

Gender in Court - in the Best Interests of the Child?

A Report from a Research Project on Adjudication of Parental Responsibility in Swedish Courts¹

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Abstract

The principle question of this article is whether court assessments of the ability to look after the best interests of the child are influenced by the gender of the parent or by assumptions on motherhood and fatherhood. The study is based on all 305 court decisions on custody, residence and contact passed down by Sweden's six courts of appeal in 2004. Contrary to what is sometimes claimed, the findings of this report do not indicate that the courts of appeal take undue notice of gender when assessing the best interests of the child. It is argued, however, that court assessments reveal a view of parenting as *positional*, in that the best interests of the child are assessed differently depending on whether a parent is a primary caretaker or not. Thus, the demands on parents differ depending on whether they have or are seeking sole custody, joint custody, residence, dual residence or contact. Given that the responsibility for a child's residence after separation is not shared equally between the sexes, but mothers, typically as a result of parental agreement, to a larger extent than fathers are residence parents, the implications are different for mothers as a group than for fathers as a group in regard to, e.g., responsibility for the child's safety and contact with the other parent.

1 The Best Interests of the Child and Gender Equality in Sweden

Regardless of the global recognition of the significance of the best interests of the child, it is assumed that there is a national or cultural comprehension of which values are understood to constitute the best interests of the child.² From a legal perspective it is apparent that codified interpretations of the best interests of the child are national in the sense that they are issued by a national parliament and adjudicated by national courts. All the same there are trends, regional if not global, regarding what is presumed to constitute the best interests of the child. Swedish law is part of a Western trend of promoting respect for the child's wishes, and co-operative parenting including dual residence and consent orders.³

The norm of co-operative parenting, as well as an increased liberalization and individualization of family law expressed as an assumption that parents are equal in the sense that they are interchangeable with one another and that parenthood is gender neutral, helps explain why stereotypical notions of parenting such as the breadwinning father and caretaking mother are absent in the Swedish legal material and replaced by a concept of participating parents both acting as breadwinners and caretakers. Mothers participate in the labour market and fathers share in the care of children and take advantage of benefits

2 An-Naim A.A., *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, (in Alston P. (ed.), *The Best Interests of the Child*), Clarendon Press 1994.

3 Cf. Rhoades H., *The 'No Contact' Mother: Reconstructions of Motherhood in the Era of the 'New Father'* (2002) 16 *Int. Journal of Law, Policy & Family*, p. 71.

such as right to parental leave to a greater extent than in other Western states.⁴ In line with the Swedish tradition of realizing equal opportunity policies primarily through labour market policies and general welfare policies, the current Swedish debate on gender and parenting is focused on whether or not it should be compulsory for mothers and fathers to share parental leave.⁵ In this context, equality has been summarized thus: “Sex shall not offer any indications as to how life is organized, how decisions are made or as to what roads men and women choose to travel”.⁶ In stark contrast, it has been argued that parenthood is understood by the public to be an extremely “gender-determined position”. This would mean that “notions on gender are clearly present in the culturally established codes that are usually integrated in an individual’s psychological perceptions of what is natural and obvious”.⁷ This seems to indicate that whereas policy makers treat parenting as gender-neutral, this position is not necessarily shared or practiced by parents.

In court cases on parental responsibility these contradicting concepts meet the Swedish legal notion of what constitutes the best interest of the child. At the discretion of the court the best interests of the child should be assessed in accordance with the Parental Code (Sw. *föräldrabalken*) which states that the safety of the child as well as the child’s contact with both parents should be safeguarded (regardless of financial contributions such as child support). The child’s wishes should be respected as long as these will not endanger the overall best interests of the child. Changes in established arrangements should be avoided unless shown to be in the best interest of the child, e.g., necessary for the protection of the child, to promote contact or to meet the wishes of the child. Issues on parental responsibility are either settled by court order or, more commonly, by parental agreements which are enforceable if signed by the social authorities. In accordance with the basis of Swedish equality policies found in the Instrument of Government (Sw. *regeringsformen*), interpretations of the best interests of the child should, as a matter of course, be gender neutral.

The law’s position that the best interests of the child is to be assessed without any consideration of the gender of the parents can be traced back to the 1970’s and the introduction of joint legal custody for unmarried parents. However, one could certainly challenge this in that the best interests of the child is a legal principle concealing all kinds of value assumptions.⁸ One such

4 During 2004 fathers in Sweden used 19 % of the parental leave benefit. See further Josefsson J., “Division of parental leave - satisfied and dissatisfied parents”, Working Papers in Social Insurance 2007:2.

5 See e.g. Lorentzi U (red.), *Vems valfrihet? Debattbok för en delad föräldraförsäkring*, Agora 2004.

6 Elvin-Nowak Y., *Den som passar bäst gör mest*, SOU 2005:73 *Reformerad föräldraförsäkring*.

7 Ibid.

8 See Eekelaar J., *Beyond the welfare principle*, Child and Family Law Quarterly Vol 14, No 3, 2002 s. 237-249.

assumption, it is claimed, is gender.⁹ There have been but few analyses of the best interests of the child and gender when assessing parental responsibility in the Swedish context.¹⁰ A court can order sole or joint custody, a prerequisite for which is parental cooperation, and residence which could be either permanent with one of the parents or dual. Contact could be ordered regardless of whether custody is held jointly by the parents or by one of them. The demands on the parenting abilities of the parent depend on what legal position s/he has or seeks. The demands on a parent with sole custody and residence are different from the demands on a parent seeking only contact. The variety of possible court orders illustrates the ambition to tailor-make individual solutions. Mostly these are used to facilitate parental agreement which as a rule is obtained either by out-of-court arrangements, at pre-trial or at a main hearing. Thus it could be argued that it is an anomaly for a court to have to rule on parental responsibility.

1.1 Material and Method

The study is based on all 305 decisions on custody, residence and contact made by the Swedish appeal courts in 2004.¹¹ Verdicts from the appeal courts are quoted as persuasive.

Out of the 305 court decisions, 27 (9 percent) were found to include gender-relevant argumentation, defined as statements on:¹² a) the gender of a parent, b) mothers' responsibility, c) gender stereotypes, d) gender identification. Given that a stereotypical assessment on parenting is a perceived improbability of a father being entrusted with resident or sole custody the study further comprises e) the 70 cases where fathers were awarded residence and/or single custody.¹³

9 See e.g. Collier R., *Masculinity, Law and the Family*, Routledge 1995 p. 179. Fineman M., *The politics of custody and gender* (in Smart C., Sevenhuijsen S., *Child Custody and the Politics of Gender*) Routledge 1989, p. 28. Rhoades *ibid*.

10 SOU 2005:99 *Barnets bästa, föräldrars ansvar*. SOU 2002:71 *Nationell handlingsplan mot våld i nära relationer* p. 85. On related issues Bekkengen L., *Man får välja - om föräldraskap och föräldraledighet i arbetslivet*, Liber 2002, Bergman H., Hobson B., *Compulsory fatherhood: the coding of fatherhood in the Swedish welfare state* (in Hobson B. (ed), *Making Men into Fathers*) Cambridge University Press 2002 pp. 92-124. Jalmert L., *Vad är bäst för det yngsta barnen?* SOU 2005:73 del B p. 143. Eriksson M., *I skuggan av Pappa. Familjerätten och hanteringen av fäderns våld*, Förlags AB Gondolin, 2003, Johansson T., Kuosmanen J., *Manlighetens många ansikten*, Liber 2003, p. 13. SOU 2005:73 *Reformerad föräldraförsäkring. Kärlek, omvårdnad, trygghet, del A-B*.

11 It is a tradition in legal science to refer to cases using authentic case numbers. In this study, however, the material contains information that would violate the personal integrity of the people involved. The decisions are therefore coded.

12 The coding schedule where inspired by the research of Bekkengen L., Bergman & Hobson, Cabrera N.J., et.al. (2000) *Fatherhood in the Twenty-First Century, Child Development*, 71, (1) sp 127-136. Collier *ibid*. Eriksson p. 301, Jalmert p. 143. Johansson – Kuosmanen p. 13., Moloney L., *Do Fathers 'Win' or do Mothers 'Lose' - A Preliminary Analysis of Closely Contested Parenting Judgements in the Family Court of Australia*, *Int. Journal of Law, Policy and the Family*, 15, (2001) 363-396. Neale B, Smart C, *Family Fragments?*, Cambridge Polity 1998, Rhoades.

13 Single or joint custody was the issue in question in 187 cases, while the rest concerned residence or contact. Out of the 187 cases on custody, the decision was joint custody in 59

These cases, including the district court decisions, were then analyzed on the basis of the gendered assumptions and the general assessments of the best interests in Swedish law.¹⁴

The selected cases were analyzed in the light of the legal interpretations of the best interests. From the perspective of social sciences the study could be described as a text analysis aiming at understanding the reasoning of the courts and the internal legal approach.¹⁵ For the purpose of this study, and in accordance with legal theory, the courts' verdicts are trusted to reflect the main frame, if not the full line, of reasoning.¹⁶ All the same, it seems quite apparent that there are certain taboos in the writing of verdicts on the best interests of the child and that certain parts of the parties' reasoning may be censured. Rights-based rhetoric is likely to be avoided in the verdicts. An example is the recent Supreme Court ruling in NJA 2007 p. 382 on joint custody and dual residence against the wishes of a parent. The framing of the rhetoric of the plaintiff father during the oral hearing was the child's right to a father with rights equal to those of the mother. Not a syllable of this was reflected in the verdict. It is telling that out of the 305 court cases in this study, the only verdict in which the father was quoted to base his claims on his rights as a father regards the plaintiff whose behaviour was, arguably, the most morally condemnable. He had fathered a child with the adoptive daughter of an ex-girlfriend placed in his house as a foster child.¹⁷

2 Gender in Appeal Court Decisions on Custody, Residence and Contact

Although it is frequently claimed that dads are treated prejudiced, several of the theories on gendered assumptions on the best interests of the child are based on the presumption that the parenting of mothers is more scrutinized, and that more is demanded of mothers than of fathers and that expectations on mothers differ

cases (32 percent), while mothers were awarded single custody in 83 cases (44 percent), fathers were awarded single custody in 37 cases (20 percent) and the courts appointed a special guardian in 8 cases (4 percent). The outcome of the court proceedings does not mirror national statistics for 2004 which showed that 90 percent of Swedish children had parents who shared custody, 9 percent had mothers who were single custodians and 1 percent had fathers who were single custodians.

14 Although there is some ground for criticizing such a perspective, partly because Swedish laws on parenthood of homosexuals reject the idea that the best interests of the child means access to two parents of different sexes, the basis for the study is thus gender in the traditional sense, i.e. the parent's biological sex. In the cases at hand, there are no examples of litigating homosexual parents. There is, however, one example of a parent who entered a homosexual relationship after separating from the other parent.

15 See Tuori K., *Self-description and external description of the law*, No Foundations Journal of Extreme Legal Positivism, 2, 2006.

16 See, Lindroos-Hovinheimo S., *What the law says? Reflections on literal interpretation* No Foundation 2 [Nov 2006] pp. 56-65.

17 Appeal Court No. 13.

from those on fathers.¹⁸ Regardless of the transition from a rights-based to a best-interests-of-the-child-based parenting norm, as well as the weakening of gender determined parental roles, studies on a variety of aspects of parenting, such as domestic violence and parental leave indicate that mothers are expected to take responsibility for the daily care of children as well as for the safety of the child and the child's contact with the father.¹⁹ It has been suggested that men's parenting could be characterized as freedom of choice, born out of the legal powers previously entrusted in married fathers.²⁰ Collier traces the division on gendered expectations back to the legal discourse of the early twentieth century and the shaping of a "masculinity marked by the dualism of a public/private divide which legitimated his absence from childcare whilst maintaining the structural supports whence he derived his economic power."²¹ More recently, Morgan underlines the complexity of men's parental roles when identifying several current themes including a declining (or at least challenged) patriarchy including a weakening of the determining character of gender, and a growing importance of individualization as well as national and cultural differences in the shaping of fathering as opposed to, or in addition to, fatherhood.²²

Assuming a perspective of gender-determined parenthood, this could indicate that there is greater acceptance for fathers who choose a non-stereotypical form for parenting than there is for mothers.²³ In court cases concerning parental responsibility, it could be argued that a freedom to shape the parental role would be beneficial, as judgments of the ability to look after the best interests of the child may be based on a more open assessment of what good parenthood entails. Another way to see it, however, would be that fathers almost by definition are secondary in the lives of their children.²⁴

Such an assumption is challenged by the number of fathers who were awarded residence in the study. The father came out the residence parent in 23 percent of the cases. This can be compared to general statistics for 2004, which

18 Collier pp. 238, 24. Haavind H., *Liten og stor. Mødres omsorg og barns utviklingsmuligheter*, Universitetsforlaget 1987. Pettersson G., *Med hänsyn till barnets vilja? Socialtjänstlagens barnperspektiv och den nya välfärdsstatens villkor* (in Sandin B, Halldén G., *Barnets bästa. En antologi om barndomens innebörder och välfärdens organisering*) Symposium, 2003 p. 160. Sandberg K., *Tilbakeføring av barn etter omsorgsovertakelse*, Gyldendal Norsk Forlag 2003, p. 101.

19 Eriksson p. 307. Neale & Smart *ibid.* Bekkengen.

20 Collier p. 185 f.

21 *Ibid* p. 214.

22 Morgan D., *Epilogue* (in Hobson *ibid* p. 278, 280-283).

23 See Rydberg E., *Twistelösning mellan separerade föräldrar – för barnets bästa*, Svensk juristtidning 2/07 s. 414.

24 Former Minister for Gender Equality Jens Orback, e.g., has indicated that fathers are not seen as adequate parents: "Sometimes one also encounters distrust for this father-friendly position, something like: Why should fathers who fail their children gain even more rights? But I don't think there is another way than to be seen as an adequate parent, to become one." Mattson Å., *Jens Orback: 'Som pappa oroas jag över den utbredda sexismen'*, "www.salongk.se".

show 5 percent of all children aged 0 to 17 lived with their fathers, alone or in a new family, while 23 percent lived with their mothers (and 72 percent with both parents). From this can be inferred that a father who chooses to “fight” for custody, residence and contact stands a better chance to achieve this than national statistics indicate.

A study based on appeal court verdicts on parental responsibility obviously presents a selection bias in relation to national statistics. The 305 verdicts from the appeal courts should be seen in relation to the approximately 45 000 children who yearly experience parental break-ups. Little is known about what triggers parental conflicts. It has been suggested, however, that parents in disputed custody cases are socially and financially marginalized.²⁵

Among the 70 cases there were two (3 percent) where the mother was reported to have been sentenced for crimes against father. That is a distinctly lower incidence of criminal or alleged criminal behavior than in the overall study (24 percent). In one case the mother was under compulsory mental health treatment, in the other the mother was enrolled in a voluntary methadone program. In six cases, at least one child was in custody under the Compulsory Care of Young Persons Act or looked after under the Social Services Act (about 9 percent, similar to the overall result). In six cases (9 percent), one parent lived abroad (13 percent in the overall study). The number of consent orders is slightly lower than in the overall study. Eleven out of the 70 cases, or about 16 percent, were based on parental agreements. In the study as a whole, about 18 percent were based on agreements. This could be taken to indicate a higher level of conflict in families where the child, after a court procedure, lives permanently with the father. An alternative theory would be that it is considered inconsistent with our cultural definition of motherhood not to live at least part-time with ones minor children, and thus more difficult for a mother to let children live with the father.²⁶ It is debatable whether the existing Swedish material can be said to confirm that fathers are found better equipped to look after a child’s best interests only if the mother does not live up to an image of the good mother. The fact that non-residential mothers appear in a more positive light than non-residential fathers may, however, indicate that higher demands are made on mothers than fathers in terms of ability to care.²⁷

25 Rejmer A., *Vårdnadstvister*, Lunds Studies in Sociology of Law 2003 p. 79. The Swedish legal aid and insurance system makes it possible for less wealthy parents to bear the legal cost.

26 The question of whether it is inconsistent with our cultural image of womanhood for a woman not to live with her children is discussed in Utdrag fra St.meld. (Stortingsmelding fra Barne- og familiedepartementet) nr. 29 2002-2003 om familie - forpliktende samliv og foreldreskap: “odin.dep.no/bld/norsk/dok/regpubl/stmeld/004001-040008/hov003-bu.html#hov3.noteref20”.

27 Earlier research confirms that mothers who do not live with their children see the children more than fathers do. SOU 2005:42 Ett reformerat underhållsstöd.

2.1 Gendered Arguments

In the following, the verdicts in which gendered arguments were referred are discussed with an aim to present the appeal courts assessments of the best interests of the child in cases where gendered assumptions on the parenting of mothers and fathers are introduced.

The first cases illustrate the dual roles of parents as breadwinners and caretakers, and cases concerning the consequences of establishing a new family, followed by the child's right to safety and contact with both parents. The exposé ends with a discussion on gender identification and the concept of a "good father".

2.1.1 Dual earning and dual caretaking

In Australian research it has been argued that for a mother to be judged best equipped to satisfy the best interests of a child; and thereby "win" a case of custody, residence and contact; she has to behave according to a conventional image of motherly self-sacrifice.²⁸ Contrarily, a prerequisite for a father to be given preference is that the mother is not found to fulfil stereotypical demands on motherhood. This presumption of "motherly self-sacrifice" was not applicable in the 2004 Swedish appeal court decisions. Instead, the norm of dual earning families and mothers as contributors to the family economy is at play. The child's best interests could be seen as presupposing two parents working outside the home, both with dual careers as breadwinners and caretakers.

This appears to be the case in Appeal Court No. 9, where the district court stressed it was important for the mother to start working to help support the children, instead of living off care-allowances for the sons as she had for the past three to four years. The appealed decision held that a then 11-year-old son should live with the father and the 10-year-old son with the mother in another part of the country where mother and sons had moved two years prior. The decision on residence for the older boy was appealed and reversed. The outcome in the appeal court is arguably well in line with one of the main interpretations of the child's best interests: that it is usually in the child's best interest to keep siblings together and not change existing circumstances. The district court judgment, on the contrary, may be seen as an attempt to correct what is considered a deviation from the norm: an equal family with two working parents.

2.1.2 New family

From the cases in the study, no clear line is discernible on whether new families are considered in the child's best interests. In Appeal Court No. 26, where the father demanded residence of a seven-year-old boy, the father's new relationship was considered an advantage and the appeal court switched residence to the father, primarily to let half-siblings grow up together. The reasoning of the appeal court echoes an understanding that a home with two adults have more resources for a child, or as the court held: "[the father] would be able to give [the child] the time and care he needs from his father – and two adults, also, means

²⁸ Moloney *ibid.*

extra security in the daily care, as the need for help with child minding from someone outside the immediate family is thereby diminished.”

The opposite view, however, was taken by the district court in Appeal Court nos. 19 and 6. Although the custody investigation in Appeal Court No. 19 on residence for two girls, aged eight and five, reported that both children had said they wanted to live with the father, the investigators claimed they then would have to share him with his partner and her daughter, who could be seen either as a “bonus sister” or a competitor. A new family was found problematic in Appeal Court No. 6 on residence of two children as well. This was primarily because the mother’s new husband had a criminal record (comprising aggravated drunken driving and petty assault). Her demand for permanent residence because of non-existent communication between the parents was dismissed and dual residence upheld. The decision can be seen to reflect either the presumption that existing circumstances best be left unchanged, or the fact that the husband’s crimes were held against the mother.

2.1.3 Safety of the child

In her studies of Swedish Social Services work, Eriksson concludes that a mother is expected to take special responsibility for a child’s safety, even in regard to the actions of the father. She maintains that there is a patriarchal viewpoint in family law based on respect for the power of fathers over young children. As a result, a broken nuclear family would, according to Eriksson, follow a patriarchal family pattern where fatherhood means limited responsibility for daily care, but dominance over the mother and children under 18. The mother would be expected to encourage an independent father-child relationship and to protect the child from harm. Motherhood would include a responsibility for the father’s parental responsibilities giving fathers greater freedom of action than mothers.²⁹ The theory on mothers’ special responsibility for the best interests of the child corresponds in Swedish law to gender-neutral paragraphs on a child’s right to security and care, on protection against abuse and other risks, and on the need for good and close contact with both parents.

The question of how to handle parental responsibility in families where violence occurs was under scrutiny at the time of a 2006 overhaul of Swedish custody legislation. Under the current law, a parent’s violence toward another family member is a strong ground for not awarding joint custody, residence, dual residence or even contact for a violent parent.³⁰ From 1998 to 2006, i.e., at the time of the appeal court decisions in this study, it was unclear how violence within the family should affect judgments. Some of this unclarity is explained by statements in the doctrine, mirroring the stereotype of obstructive motherhood,

29 Eriksson *ibid.* Bekkengen *ibid.*

30 In recent travaux préparatoires (prop. 2005/06:99), however, it is stated that demands on evidence are lighter in custody cases than in criminal cases, and that discontinued police investigations, dismissed claims or verdicts of acquittal should not be disregarded in cases concerning custody, residence and contact. The statement should be seen in light of the uncertainty on the issue which existed before, i.e., when the decisions of this study were made. See NJA 2000 p. 345.

to the effect that not much heed should be paid to isolated cases of violence.³¹ In the appeal court decisions of 2004, the notion that the mother has a special responsibility for the safety of a child is relevant only in regard to families where there were reports of alleged violence or other crime. In 24 percent of the cases, or 73 decisions, there were reports on crimes, non-prosecuted violence or other improprieties. Out of these there were 14 cases where an issue was the residential parent's responsibility for the safety of children in relation to the father, mother or other close persons. In three of the cases, there was a connection to honor cultures and gender-segregated legal systems, and in five cases it was alleged that sexual abuse constituted a threat to the security of a child. One concerned abduction and five cases alleged violence against a partner.

In five of these decisions the alleged violence was not confirmed by conviction. In two of the cases no heed was paid to the assumed maltreatment including the mother's reports of a family characterized by a patriarchal structure, power struggle and her diminishing self-esteem or the fear the mother reported she felt based on events 12 years earlier.³² In three cases, the mother was granted sole custody.

In Appeal Court No. 2 the father, who has criminal record, including crimes against the mother, argued in line with the narratives of "selfish motherhood"³³ that the mother was unfit for custody as she had not handed over the child for contact with him. The court decision made it clear that the mother was found to have acceptable reasons for not doing so. The main justification was a concern that the child, during contact visits, would reveal the mother's protected address. The appeal court found that the mother was justified in refusing to hand over the son for contact visits and therefore should maintain single custody. Contact was denied and the court stated that, "From the conclusions of the investigation it appears, however, that his interests to a large extent are connected to a desire to continue to control [the mother] and her doings."

The subsequent verdict appears to confirm the notion that Social Services for a long time expected the mother to take special responsibility for the safety of the children with limited regard to her safety. However, the appeal court does not share this view but found that regular contact would not serve the best interests of the child and that: "a prerequisite for safe contact is that the father works on and learns to deal with his feelings toward [the mother] and that [the mother] feels secure so that she can allow the children to meet their father." From the quote it is clear that the father was handed a responsibility to deal with his emotions.³⁴

31 It has been argued that minor acts of violence committed under the emotional stress should not bar joint custody. Sjösten M., *Vårdnad, boende och umgänge*, Norstedts Juridik 1998 p. 58.

32 Appeal Court No 23 and 14.

33 See Rhoades *ibid*.

34 The court decision can be considered in light of the Supreme Court decision in NJA 2003 p. 372, according to which a "concrete risk" to the mental health and development of a three-year-old child was not grounds for refusing contact, if the risk is diminished through a contact person NJA 2003, p. 372, can be criticized for not fully considering the balance

In Appeal Court No. 16 the court confirmed the decision of the district court awarding single custody to the mother, while the father's demand for contact with an eight-year-old son and a six-year-old daughter living with the mother with address protection was rejected. The father stated that he was a boxing coach mostly coaching women, that he was currently on sick leave, and that he had always been nice to his children. According to the verdict, the father acted in a "very unbalanced and aggressive way, particularly toward [the mother] and her counsel" during the hearing. The Social Services Committee had, after the district court's decision, reported the father to the police for threatening the mother on 25 May, 2004. Since the committee did not find that the children had been threatened, plans remained for a contact visit on 29 May. On 27 May, the father issued new threats, through the Social Services director. The director felt the threats were related to the contact visit, and found the Social Services could not guarantee the safety of the children. The visit was cancelled. The father was notified of this on 28 May. The father issued threats toward Social Services, which was reported to the police. The following week, he asked for contact via telephone. The Social Services then planned for telephone contact on 7 June, but waited to get the mother's approval.

The following case illustrates the different demands on parents depending on whether they seek custody or contact. In this case a father who had been sentenced for subjecting the mother to violence and crime against liberty, in the presence of the children, was not granted custody but contact.

In Appeal Court No. 1 on joint custody and contact concerning a 15-year-old girl and a 12-year-old girl, a father had been sentenced, in 1999 and 2001. Both girls opposed contact; the mother was afraid that her protected address would be disclosed to the father. The appeal court found that the mother's fear no longer was justified, as the father had served his prison term and paid damages to her, and there no longer appeared to be any concrete risk of his relapsing into drug use and criminality. The court found it important for the younger girl to meet the father as soon as possible, and awarded three-hour contact visits a month with a contact person present. Contact was denied with the older girl, in accordance with her wishes. The mother retained single custody.

In the case, contrary to what is stated in the Parents Code, there is no discussion on the wishes of the 12-year-old girl based on information that "she, at present, does not want to see her father".

2.1.3.1 Reports of sexual abuse

Out of the 27 cases found to include gender-relevant argumentation, five involve responsibility to protect the child from reported sexual abuse or risk for sexual abuse. In three of the cases reports of improper behavior toward the children were not supported by criminal convictions. Alleged sexual abuse is notoriously hard to assess. To allege unfounded, sexual abuse could also be seen as a threat

between the rights of the child and the rights of the non-residential parent according to the European Convention. T P and K M v the United Kingdom, appl 28945/95, § 71.

against the children.³⁵ On the other hand, a previous conviction does not rule out that contact might be considered to be in the best interests of a child.³⁶

It has been established in other contexts that men are clearly overrepresented among perpetrators of sexual abuse.³⁷ As a reasonable consequence, mothers more often claim their children were subjected to incestuous abuse, than do fathers. This, however, was not the case in the following decision where the father claimed the children's maternal grandfather had assaulted them:

In Appeal Court No. 22 regarding custody of three boys, 10, 9 and 6 years old, the father claimed that the maternal grandfather had assaulted them. For three months, the father had kept the children from returning to their mother who lived in Norway with another woman. In the appeal court, the father demanded single custody on the grounds that the mother was unable to protect the children and had maltreated them herself. The mother demanded single custody and claimed the father had manipulated the children. The court questioned the father's credibility because of his maligning of the mother's family. The mother was awarded single custody, and contact was not regulated, as unsupervised contact was deemed out of the question for the foreseeable time and a Swedish court cannot decree a contact person or similar arrangement in Norway.

In Appeal Court No. 7, regarding custody, residence and contact of a nine-year-old boy, the mother claimed the father was guilty of sexual assault and of having a sexualized relationship with the son, making him unfit for custody. Central to the decision in the case was whether four photographs constituted child pornography. The district court decision on joint custody and dual residence was upheld, with the following motivation:

“The Court of Appeal agrees in the judgment that the photographs objectively may appear to constitute child pornography, but the information [the father] has given regarding the circumstances surrounding the taking of the photographs is such that it cannot be ignored. Speaking for the conclusion that the photographs were not taken for pornographic reasons is also the fact that it was [the mother] who put them in the family photo album, apparently without further reflection on them, which, in turn, indicates it was normal in the family that [the boy] played naked. To sum up, the Court of Appeal finds the photographs in question to be improper, but, considering the circumstances, finds the father is not unfit to be legal custodian.”

35 This was the case in Appeal Court No. 12 where the children lived in Australia with their father, who had single custody. The mother had repeatedly reported him for incestuous assaults. Because of this, the children had been taken into custody under the Care of Young Persons Act. A majority found the mother's actions to constitute “abuse” and deemed her unfit to be legal custodian. Two lay judges, however, dissented; they wanted to award the mother single custody and limit the father's access to the children in accordance with what the mother had consented to.

36 Thus, in Appeal Court No 21 a father who had been sentenced for sexual crimes against the child's stepsister was awarded contact.

37 Less than 2 percent of suspects in 2005 were women according to the Swedish National Council for Crime Prevention. “www.bra.se”.

The appeal court conclusion that the child pornography photographs, taken by the father, were justified and made innocent by the mother's putting them in the family album, is well in line with Eriksson's theory that motherhood means a responsibility for the parenting of the father that includes the child's safety and protection against abuse. Such a responsibility was not, however, imposed on the mother in the following decision where the father had been sentenced for sexual crimes against the mother committed while she was a foster child at his house.

In Appeal Court No. 13 the father demanded contact, arguing he had rights as a father. He claimed he was wrongfully convicted of aggravated sexual exploitation and aggravated sexual exploitation of a minor. The mother was treated for post-traumatic stress disorder after the main hearing in the district court. The appeal court found the mother represented security for the child and that forced contact would strain the mother's mental health which could have repercussions for the child and her younger half-siblings. It was also noted that the father, in the appeal court, had expressed himself in such a way that it was clear he did not understand the effects of his abuse of the mother, nor what consequences his lack of understanding had for his relationship to her and the child.

Appeal Court No. 7, accounted for above, where it had been established that the father took child pornography photographs but that these were "neutralized" by the mother's putting them in the family album, is the only case where, in spite of reports of sexual abuse, the appeal court found joint custody and dual residence was most consistent with the best interests of the child. It is also the case that most clearly confirms the theory that a mother is expected to take responsibility for the actions of the father.

2.1.3.2 Honor cultures and gender-segregated legal systems

In sharp contrast to Swedish family law and the equality feminism dominating Swedish society, patriarchal cultures, including honor cultures, are based on the notion that the different positions of men and women in society are not social constructions, but are justified by fundamental and unbridgeable differences between the sexes. As a consequence, men typically have authority in the family and a woman's contact with men outside the family may be perceived as a big threat to the honor of the family, which in some cases can only be saved by murdering the suspected woman. The best interests of the child are assessed in accordance with a patriarchal model in which fathers as breadwinner are invested with powers as opposed to caretaking mothers.

Out of the 39 verdicts with references to foreign legal systems or religious traditions there are three decisions in the study with a bearing on honor cultures and gender-segregated legal systems. One regards a child taken to a patriarchal jurisdiction after a prolonged custody dispute,³⁸ the second a father in a

38 In Appeal Court No. 24, a father had taken his son to Iran after having been awarded single custody in 1998, the appeal court argued that the mother had been as poor in facilitating contact as the father and did not comment on the fact that the mother, because of her sex, and the sex and age of her child, was barred from custody in Iran.

patriarchal legal system asking for contact³⁹ and the third, Appeal Court No. 8, threats against a mother for having violated an honor culture. The decision in Appeal Court No. 8 concerned custody, etc., of a six-year-old girl. She and her mother had a protected address after receiving threats from the mother's brother who accused her of violating an honor culture through divorce. The verdict touches on a mother's responsibility for the child's contact with the father and the issue of what a "good father" is, as well as how affiliation to patriarchal honor cultures should be regarded in a custody dispute. The district court had found that:

"The fact that so-called honors-related violence exists in the culture the parties stem from cannot, in itself, lead to the conclusion that [the father] is a threat to [the mother] or [the child]. Reports of violence or threats [from other family members] cannot, then, be held against the father in judging a dispute."

2.1.4 Responsibility for the child's contact

In accordance with the Western "pro-contact culture," the Swedish Parental Code (Ch. 6, Sec. 2 a) provides that a court, in judging the best interests of the child, shall give special consideration to the child's need for close and good contact with both parents. In practice, this means that a residential parent who opposes contact runs a risk of losing residence. This rule was applied in one of the 2004 verdicts from an appeal court on custody of a 22-month-old girl who had lived with her mother and half-siblings since birth.

In Appeal Court No. 25 the girl had not had any contact with her father since she was six months old, and a district court decision on joint custody and access for the father had not been adhered to in terms of the access. The mother had not cooperated with the custody investigation, and her other children had no contact with their fathers. The mother was found not to have acceptable reasons to oppose contact. A transfer was initiated by placing the child and both parents in a children's home.

It has been argued that mothers are expected to take special responsibility for a child's contact with the father and other family members.⁴⁰ In Swedish law the theory corresponds to the gender-neutral section of the Parental Code stipulating that the legal guardian has a special responsibility to fulfill a child's need for contact with anyone it is close to, such as grandparents. In Appeal Court No. 18

39 In Appeal Court No. 5, contact was denied for a father who lived in Pakistan and was not a legal resident in Sweden. The father argued that, for him to get a residence permit, it was important to have contact settled. The appeal court did not comment on the security of the mother who argued that "according to Pakistani tradition, a woman who has asked for divorce risks being killed" but based its assessment on the fact that, as the father was not in Sweden, it was difficult to investigate whether contact was consistent with the best interests of the child.

40 Rhoades *ibid* p. 84, Neale & Smart, Eriksson. Collier p. 182, Bäck-Wiklund & Johansson, Larsson Sjöberg. Regarding contact in cases of alleged risks for the child, see previous sections.

concerning residence, a father argued that the mother had a special responsibility for the child's contact with its paternal grandmother. The appeal court clearly rejected this position stating that:

“...it must primarily be up to [the father] and [grandmother] themselves to, when appropriate, take initiatives to achieve this. Nothing has emerged in the case that speaks against the expressed positive attitude of [the mother] to such initiatives.”

In Appeal Court No. 11, however, the fact that the father who was the residential parent had initiated contact between the children and their maternal grandparents was quoted as an argument for not granting the mother extended contact.

2.1.5 Gender identification

There appears to be some agreement on the importance of gender identification for a child's development.⁴¹ If parents do not reside together, or are of the same sex, a child's need for gender identification can be satisfied in different ways. The child can live with the parent of the same sex, have contact with that parent, or have its need for gender identification satisfied by someone other than the parent of the same sex. Living together is in other words not a prerequisite. This may be why the Swedish Supreme Court rejected the notion of an intrinsic value in a child's living with a parent of the same sex, in NJA 1989 p. 395. The precedential value of the decision, however, is limited to establishing that a child's need for a parent of the same sex does not compensate for that parent's inability to look after recognized aspects of the child's best interests, such as good and close contact with both parents. NJA 1989 p. 395 does not answer the question of how a child's possible need for a parent of the same sex shall be judged if that parent does fulfill the prevalent notions of the child's best interests, and the parents are “equal” in this sense.

In this study, gender identification was brought up as an aspect of the best interests of the child in three cases.

In Appeal Court No. 18, discussed in the previous section, on residence of a five-year-old boy, the father's argument that the boy needed him because he was a particularly “boyish” child was not decisive for the outcome. Instead, a deciding factor was the greater flexibility of the mother regarding contact, in line with prevalent presumptions.

In the other two verdicts in which gender identification was at stake, daughters' need for their mothers was given importance. In Appeal Court No. 19 the daughters' need for their mother, combined with their need for stability, was emphasized.⁴² In Appeal Court No. 15 on residence for two girls, aged 10 and 12, the girls initially had dual residence based on a parental agreement, *but* the

41 For example: Cullberg J., *Kris och utveckling*, Natur och kultur 2006, 5 uppl. p. 47, Broberg A., Granqvist P., Ivarsson T., Risholm Motander P., *Anknytningsteori*, Natur och kultur, 2006, s. 207 f., Cabrera *ibid* pp. 127-136.

42 See above regarding new family.

appeal court decreed that both children should live permanently with the mother with the argument that the 12-year-old girl “will soon reach puberty and her needs for close contact with the mother will likely increase then”.

2.1.6 “Good Father”

In two verdicts contact was awarded fathers with reference to them being “fond of the child” and a “good father”. In neither of the two cases did the mother forward evidence of a concrete risk that the child would fare badly from contact.

Appeal Court No. 20 concerned a father’s contact with a two-and-a-half-year old boy. The parents had joint custody and the child lived with the mother. The mother agreed to contact but contested overnight stays. The father had admitted to an earlier drug problem. The custody investigation advised against increased contact. The appeal court found the father to be very fond of the child, and determined there was no evidence of current drug use, nor any indication that normal contact would be bad for the child. Contact was established according to the father’s demands.

Appeal Court No. 8 concerned custody and contact of a six-year-old girl.⁴³ She and her mother had a protected address after receiving threats from the mother’s brother, because the mother was accused of violating an honor culture through divorce. The appeal court stated the father was “a good father” and granted visitation.

It is not clarified on what grounds the appeal court found the father to be a “good” one. It was hardly based on actual care, as father and child had not been in contact for a number of years and the father expected them to communicate through an interpreter. The statement could be seen in the light of the notion that the parenting of fathers is less scrutinized than that of mothers, and that fathers who fight for custody, residence and contact automatically are considered to look after their children’s interests.⁴⁴ Another way of seeing it is to say that it confirms the fact that the demands on contact parents are low, a general assessment - that would not meet the demands on investigation for a primary caretaker - suffices.

3 Conclusions – Positional Parenting

The study confirms the complexity of court cases on parental responsibility. Several cases reveal childhood experiences not explicitly covered by the legal sources, demanding discretionary assessments by the court. All the same some patterns are distinguishable. The courts are hesitant to change established living arrangements. Promoting the child’s contact with the non-residential parent is considered of great legal importance, compared to other aspects of a child’s best

43 See above.

44 Petterson *ibid.*

interests.⁴⁵ The decisions on contact are examples of the difficulties that arise when a “norm of normality”, such as that contact usually is in the best interests of the child, is applied to children whose living conditions are not entirely “normal” because, e.g., they have a parent who is a drug addict or has been sentenced for sexual abuse of children.⁴⁶ In the cases at hand the wishes of the child have been given limited importance.⁴⁷

A conclusion to be drawn from the study is that courts do not appear to unduly consider the gender of parents or assumptions on mothering and fathering in cases on parental responsibility, at least not from what is spelled out in the verdicts.⁴⁸ The assessment of legal interpretations of the child’s best interests, however, produces different results depending on whether a parent lives with the child or not. A distinctly larger responsibility for a child’s welfare is imposed on a parent who lives with the child than on the parent who does not live permanently with the child.⁴⁹ Given that the responsibility for a child’s residence after separation is not shared equally between the sexes, but that mothers, typically as a result of parental agreement, to a larger extent are residence parents, the implications are different for mothers as a group than for fathers. Given that a mother is more likely to be a primary caretaker she is, because of this position, bound to be more scrutinized.

3.1 Value Statements and Gender Identification

A perceived weaknesses of this study is that it trusts the verdicts to reflect the main tracks, if not the full line, of reasoning of the court. The written court opinions usually only give limited grounds for judging what other stereotypes may affect the outcome of custody cases. It seems to confirm the Swedish parental ideal of combining breadwinning with caretaking.⁵⁰ Mothers who do not live with their children have criminal records or are subjected to compulsory care to a lesser extent than fathers and are less apt to neglect contact.

One exception from the courts’ hesitance to use gendered concepts is the use of value statements such as “good father” or “is fond of the child.”⁵¹ Such statements are not made about mothers. On the other hand, both decisions where a child’s need for gender identification was given importance concerned mother-daughter relations.⁵²

45 Appeal Court No. 25 and No. 2.

46 Appeal Court No. 20 and No. 21.

47 E.g. Appeal Court No.1.

48 Some decisions still invite misgivings. One such decision is Appeal Court No. 7. The appeal court decision that photographs taken by the father of the child, which the court found to constitute child pornography, were made innocent by the mother’s putting them in the family photo album is in line with the theory of motherhood including a responsibility for the parenting of fathers.

49 For example Appeal Court No. 16, No. 20 and No. 4.

50 Appeal Court No. 9.

51 Appeal Court No. 20 and No. 8.

52 Appeal Court No. 15 and No. 19.

3.2 *Exchange “Mother” for “Residence Parent”*

All in all, the verdicts of the appeal courts conform with the official Swedish view on gender-neutral parenthood and thus contradicts theories forwarded on special responsibilities imposed on mothers to safeguard the welfare of the child. These theories do, however, in a general sense, agree with the findings of this study – if the concept “mother” is replaced by “residence parent” and thereby includes the fathers who live with their children after a separation. This gives reason to discuss parental roles as positional as understood in postmodern feminism. Or as Bartlett explains:

“Like the postmodernist position ...the positional knower conceives of truth as situated and partial. Truth is situated in that it emerges from particular involvements and relationships. These relationships, not some essential or innate characteristics of the individual, define the individual’s perspective and provide the location for meaning, identity and political commitment.”⁵³

53 Bartlett K.T., *Feminist Legal Methods* (1990) 103 Harvard Law Review 829.