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FAMILIES
AND
FAMILY LAW
IN
MULTI-CULTURAL
AND
MULTI-RELIGIOUS
SOCIETIES

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Stockholm November 2003

Annika Rabo and Johanna Schiratzki
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Child law: Custody, Residence and Contact

In 1998, the courts were empowered to issue orders on joint legal and physical custody against the wishes of one of the parents. In order to facilitate the exercise of joint legal custody when one of the parents opposed such a custody form, "residence" (Sw. boende) was introduced as a legal term to designate which of the custodians the child should live with and to a certain extent how the responsibilities for the child should be divided between parents with joint custody who are not living together. In contemporary law parental rights and duties towards a child may thus follow from residence as well as custody and guardianship.

A person with legal custody of a child has the right and duty to make decisions concerning the child’s personal affairs. A person who has custody of a child shall ensure that the child’s need of care, security and good upbringing are met. Sweden has ratified the United Nations Convention of Rights of the Child from 1989. The custodians shall, in keeping with the increasing age and maturity of the child, take the child’s views and wishes increasingly into account.

When parents share legal custody, they are obliged to exercise their rights and duties together. All decisions regarding the custody of the child should be taken jointly regardless of whether the parents are living together or not. Only if it is manifestly important in terms of the best interests of the child that a decision is

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2 Chapter 6, Section 1, the Children and Parents Code.
3 Chapter 6, Section 11, the Children and Parents Code.
not delayed may one of the custodians take a decision on her or his own.\textsuperscript{4} All the same, the parent with whom the child lives - the residential parent - has a right to make what has been labelled as "everyday decisions". There is no definition as to what constitutes such an everyday decision. Thus it is, for example, uncertain if a residential parent has the right to move with the child within the country or take independent decisions in regard to the child's education without the consent of the other custodian.\textsuperscript{5} 

Custody of a child ceases when the child attains the age of 18 or, contrary to the regulations on guardianship, enters into marriage before that age.

Were the parents married to each other at the time of the birth of their child they both have part in the custody of the child jointly. If the parents enter into marriage with one another after the birth of their child, both of them have custody of the child from that point in time. An exception is made for the very rare cases when a court has previously entrusted custody to one or two specially appointed custodians.\textsuperscript{6} The majority of children in Sweden of today are born to unmarried parents. According to the law the mother alone has custody if the parents are not married. However, unmarried parents who wish to exercise custody together may easily obtain joint custody by means of registration. As many as 95 per cent of all unmarried cohabitant parents in Sweden obtained joint custody by registration.\textsuperscript{7}

\textsuperscript{4} Chapter 6, Section 13, the Children and Parents Code.
\textsuperscript{6} Chapter 6, Section 3, the Children and Parents Code.
\textsuperscript{7} Of all children born in Sweden, 54 per cent were born out of wedlock. 1997. The vast majority of these children were born by cohabiting, unmarried parents, only about 5 per cent of all children born in Sweden were born by unmarried mothers not cohabiting with the child's father. Of the non-cohabiting unmarried parents, 50 per cent registered for joint legal custody. Cf. Socialstyrelsens officiella statistik for socialjänsten. 1999-4.
If the parents get divorced or move a part, the custody normally continues to be held by them jointly.

**Mediation and out of court custody agreements**

A striking feature of contemporary Swedish law regarding custody issues are the efforts which have been undertaken by the legislator in order to keep disputes on custody of children away from the courts. An example is the highlighting of mediation – which in custody and residence conflicts has the form of so-called “co-operation talks” (Sw. *samarbetssamtal*) – as a means of solving custody related conflicts. Another way to keep custody and residence conflicts from the courts is to emphasise the ways open to parents of receiving assistance to enter into agreements on custody, residence and contact.\(^8\) Thirdly, a financial argument for avoiding court litigation is the significant cuts that have been made in legal aid for custody and residence litigation.\(^9\)

**Custody and residence litigation**

A recent feature of Swedish custody law is the courts’ power to grant joint custody against the wishes of one of the parents.\(^10\) As a consequence, court orders awarding sole custody to one of the parents are unusual. Litigation tends instead to regard the question of which parent the child shall live with, within the framework of joint legal custody. If either parent wishes the custody position to be changed, the court shall order that the parents are to have joint custody or entrust custody to one of them. However, the court may not order joint custody if both parents are opposed to it.\(^11\) The best interests of the child shall be decisive for the court’s decision. If the parents have joint custody the court may

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\(^8\) Chapter 6, Section 17 a, 18, the Children and Parents Code.

\(^9\) The Act on Legal Aid. SFS 1996:1619.

further, on application of one or both of them, decide with which of the parents the child is to live. If the court considers it to be in the best interests of child it may, against the wishes of one of the parents, order that the child should live with the parents alternately. Joint legal custody is normally considered to be in the best interests of the child. Following the Supreme Courts’ ruling in NJA 1999 p. 451, this applies also to parents with a longstanding open conflict regarding their children.

The best interests of the child shall constitute the primary consideration in the determination of all the questions concerning custody, residence and contact. In ascertaining the best interests of the child, the court shall take into consideration the wishes of the child, having regard to the child’s age and maturity. However, the child must not be pressed to take side for one of the parents. Regarding age and maturity it may be noted that the leading case on the impact of the wishes of the child in custody litigation, NJA 1995 p. 398, regards a thirteen year old girl, who’s wishes was decisive for the outcome of the case. The wishes of an eleven year old boy have been seen as decisive by a court of appeal. In the assessment of what constitutes the best interests of the child particular attention shall be given to the child’s need of a good and close contact with both parents. The child’s needs of a good and close contact with both the parents are generally understood to be best satisfied if both parents exercise legal custody. Custody arrangements in which the child lives alternately with each parent are becoming increasingly common in court decisions as well as in parental agreements.

11 Chapter 6, Section 5, the Children and Parents Code.
12 Chapter 6, Section 14 a, the Children and Parents Code.
Right to Commence Proceedings

Parents, specially appointed custodians and in certain cases the social welfare committee have a right to commence proceedings concerning custody, residence and contact arrangements. Other persons, such as the child him- or herself, grandparents, foster parents, other members of the family and friends do not have a right to commence proceedings.

According to the law, a child has the right to contact with a parent with whom he or she is not living. The court may make a contact order within the framework of joint legal custody.\(^{17}\) Court orders concerning contact should be made in accordance with the best interests of the child. Following the emphasis placed on the child’s need of a good and close contact with both parents when assessing what is in the best interests of a child contact is granted in most cases. However, if there are strong reasons to believe that contact may endanger the well-being of the child, for example if domestic violence has occurred, the court may order that contact is to take place only in the presence of a contact person (Sw. kontaktperson) provided for by the social welfare committee. Contact orders may be withdraw it the parent granted contact is not seeing the child in accordance with the order.\(^{18}\)

Regardless of the emphasis attributed to the child’s rights and needs in the law, the only person who has the right to commence proceedings regarding contact is the parent with whom the child is not living.\(^{19}\) “Persons particularly close to the child”, for example grandparents, are dependent on the social welfare

\(^{16}\) Chapter 6, Section 2 a, the Children and Parents Code.

\(^{17}\) Chapter 6, Section 15 a, the Children and Parents Code.

\(^{18}\) Cf. RH 1997:59.

\(^{19}\) A parent with whom the child is living may commence proceedings regarding the expire of contact. Cf. NIA 1994 p. 128.
committee's taking action if they have not managed to reach an agreement with the custodian. The child does not have a standing of its own in these matters.

Maintenance of children

Parents are responsible for the maintenance of the child until the child has reached the age of majority. The parents shall together share in meeting the cost of maintaining the child, each according to his or her ability. Provided that paternity has been established the duty to maintain a child applies irrespective of custody. If the child does not live together with both its parents, the parent not living permanently with the child shall discharge his or her duty to maintain the child by making payments of maintenance to the child. If the child shares its time between the parents, living alternately with each of them, the child is – for the sake of maintenance – considered to live permanently with both of them. Neither parent is then under a duty to contribute to the maintenance of the child when the child is staying with the other parent. Two statutes are applicable to parental maintenance when the child is not living with both of its parents. The Children and Parents Code lays down the general private law principles of the parental obligation to maintain children. Maintenance under the Children and Parents Code is determined by court in a private law procedure or by agreement.\(^{20}\) The Maintenance Support Act regulates the state's responsibility to provide for children not living with both of their parents. Under certain conditions the state will advance or supplement maintenance payment for children living with a sole parent. The public social insurance office (Sw. försäkringskassan) will then determine the amount of maintenance, disburses it to the child and reclaims it from the liable parent.

\(^{20}\) Chapter 7, Section 2, the Children and Parents Code.
Divorce

Under Swedish law a marriage is dissolved either by the death of one of the spouses or by divorce. During the 1990s between 20,000 and 23,000 divorces have been granted yearly. The number of divorces have been slightly declining during the last years.\textsuperscript{21} However, the rate of divorces per 1000 people have fluctuated between 2.3 to 2.6 during the 1990 and is thus among the highest within the European Union.\textsuperscript{22} Contemporary Swedish law does not embrace the legal institutes of annulment of marriage or legal separation. Divorce is constructed as a non-fault divorce, thus no grounds are necessary for obtaining a divorce. The non-fault divorce was introduced 1973. According to Swedish law each spouse is entitled to a divorce if he or she wishes the marriage to be dissolved.\textsuperscript{23} The court may order a divorce without a court hearing.\textsuperscript{24} The marriage is dissolved when the time limit for appealing has run out.\textsuperscript{25} Although spouses are entitled to divorces without introducing any grounds, a divorce may in certain cases be granted only after a six-months’ long reconsideration period. The rationale behind the rulings on reconsideration period is to avoid to hasty divorces and give the spouses a chance for reconciliation.

Swedish Marital Property Law

The provisions on matrimonial property law in the Marriage Code\textsuperscript{26} apply to spouses and registered partners of the same sex.\textsuperscript{27} They do not apply for unmarried cohabitants. The provisions of the Marriage Code aim to combine

\textsuperscript{21} Sveriges Officiella Statistik, Statistiska Meddelanden. \url{www.scb.se}.
\textsuperscript{22} Eurostat Yearbook 2000. \url{www.scb.se}.
\textsuperscript{23} Chapter 5, Section 1, the Marriage Code.
\textsuperscript{24} Chapter 14, Section 6, the Marriage Code.
\textsuperscript{25} Chapter 5, Section 6, the Marriage Code.
\textsuperscript{27} Chapter 3, Section 1, the Act on Registered Partners, SFS 1994:117.
goals which may be construed as conflicting to some extent. Certain provisions of the Marriage Code promote financial independence of the spouses, whereas other provisions stress co-operation for the benefit of the family during marriage. Another goal is to provide protection for the economically more vulnerable spouse as well as for the children raised by the spouses. Special rules therefore apply to the transfer of the matrimonial home. The risk of fraudulent transactions on the part of the spouses to the detriment of their creditors has given rise to special provisions concerning, for example, gifts between spouses. Regarding the dissolution of a marriage that has broken down, the aim of the law is to facilitate a “clean break” with regard to the financial issues.

**Marital and Separate Property**

Property in a marriage estate is according to Swedish law either marital property or separate property. The legal nature of the property is decisive for whether or not certain restrictions shall apply in regard to the transfer of real estate and the family home. It is of further essential importance upon the dissolution of marriage by divorce or by the death of one of the spouses.

A spouse’s property is marital property in so far as it is not separate property. Separate property is defined by the law and consists of: 1) property which is separate in consequence of a marital property agreement, 2) property which a spouse has received as a gift from someone other than the other spouse on condition that it be the separate property of the recipient, 3) property which a spouse has received as a bequest on condition that it be the separate property of the recipient, 4) property which a spouse has taken as a heir and which under the will of the deceased is to be the separate property of the recipient, 5) property which a spouse has received under a beneficiary clause of a life insurance policy.
or personal accident or permanent health insurance policy or a pension savings scheme as provided for in the Individual Pension Savings Act, 29 entered into by someone other than the other spouse on condition that the property be the separate property of the recipient, 6) property which has taken the place of property referred to in points 1-5, unless otherwise provided by the deed on the basis of which the property is separate. 30 Any property belonging to a spouse not covered by these provisions is marital property. Income deriving from separate property is marital property unless otherwise is stated by the legal act on the basis of which the property is separate.

By means of a marital property agreement, spouses and prospective spouses may determine that property belonging or accruing to either of them is to be that spouse’s separate property. By means of a new agreement, spouses may determine that such property is to be marital property. 31 A marital property agreement does not affect a spouse’s rights as the owner of the property, neither does an agreement affect a spouse’s liabilities for his or her debts. A marital property agreement shall be drawn up in writing, signed by the spouses or prospective spouses and registered with the court.

The Financial Relations of Spouses
The main principle regarding the financial relationship of spouses’ emphasises their financial independence. The law thus states that each of the spouses owns his or her property and is liable for his or her own debts. 32 According to the main principle a spouse possess full rights of ownership to his or her property. Significant exceptions apply, however, in regard to the family home.

28 Chapter 7, Section 1, the Marriage Code.
29 SPS 1993:931.
30 Chapter 7, Section 2, the Marriage Code.
31 Chapter 7, Section 3, the Marriage Code. Between 10 200 and 11 500 marital property agreements were registered yearly during the 1990’s.
Regardless of the fact that each spouse owns his or her own property and is liable for his or her debts spouses may just as well as any other group of people possess property jointly. Joint ownership arises, according to the main principle, when the spouses jointly acquire property, each of them contributing with his or her means to the purchase. Joint ownership may further arise if the spouses receive a gift jointly.\textsuperscript{33} Joint ownership may also arise when only one of the spouses has bought and paid for an item or an estate. This may be the case when both the spouses have incomes and have taken turns in purchasing movables. The purpose of this exception from the main rule is to prevent an unfair division of property as would be the case if one of the spouses has been providing for the purchase of capital goods and the other for the running expenses, spending his or her income buying consumer goods, such as food, household articles, etc.\textsuperscript{34} Swedish law further recognises, so-called "covert joint ownership" (Sw. dold samäganderätt). Covert joint ownership may according to case law arise if one of the spouses purchases property in his or her own name but with an intention that the other spouse should have a right of ownership in the property.

During marriage the spouses shall, each according to his or her ability, contribute to the maintenance needed to meet their joint and personal needs.\textsuperscript{35} If the contribution which one spouse is to make is not sufficient for that spouse’s personal needs or for the payments, which that spouse otherwise attends to, or for the maintenance of the family, the other spouse shall contribute the means that are needed.\textsuperscript{36} Property received by one of the spouses from the other spouse for his or her personal needs under these provisions shall be the property

\textsuperscript{32} Chapter 1, Section 3, the Marriage Code.
\textsuperscript{33} Cf. The Act (1904:48, p. 1) on Co-ownership, which applies on spouses, partners and unmarried cohabitants.
\textsuperscript{34} Cf. SOU 1981:85, p. 104.
\textsuperscript{35} Chapter 6, Section 1, the Marriage Code.
\textsuperscript{36} Chapter 6, Section 2, the Marriage Code.
of the receiving spouse. If the spouses are not living together on a permanent basis, a spouse may be forced to discharge his or her duty to maintain by making maintenance payments to the other spouse.

**Protection of the Family Home**

In order to protect the family home certain restrictions apply to a married person’s right to dispose of the joint dwelling and household goods. A spouse may not, without the written consent of the other spouse do any of the following: 1) alienate, mortgage, let or in any other way grant the use of real property or property held under an indefinite period lease constituting the spouses’ joint dwelling, 2) alienate, pledge as security, let or in any other way grant the use of other property constituting the spouses’ joint dwelling, or 3) alienate or pledge as security the spouses’ joint household goods. These provisions do not apply to a dwelling or household goods which are the separate property of a spouse under the conditions of a will. Special restrictions apply to real estates even if it does not constitute the spouses joint dwelling, if the property is marital property. A spouse may not without the written consent of the other spouse, dispose of his or her real property regardless of whether or not it is the spouses’ joint dwelling. The provisions regarding the consent of one spouse to the action by the other spouse further apply when action is taken on behalf of a deceased spouse.

The family home is thus quite strongly protected against unilateral actions by the spouse owning it. All the same, the owner may under certain conditions take action without the consent of the other spouse. Thus, in consistency with various

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37 Chapter 6, Section 2, the Marriage Code.
38 Chapter 6, Section 6, the Marriage Code.
39 Chapter 7, Section 5, the Marriage Code.
40 Chapter 7, Section 5(2), the Marriage Code.
41 Chapter 7, Section 6, the Marriage Code.
other provisions concerning matrimonial property, no restrictions apply if a
divorce case is in progress and the spouse acquired the property after the
proceedings for divorce were commenced.\textsuperscript{42} Neither is consent as provided for
in Section 5 and Section 6 necessary if the spouse cannot give valid consent or if
the spouse's consent cannot be obtained within a reasonable period of time. Nor
is consent necessary when division of property occasioned by divorce has taken
place.\textsuperscript{43} If the required consent cannot be obtained the court may permit the
action on application of the person wishing to undertake it.\textsuperscript{44}
If, without the necessary consent or permission a spouse or the personal
representative of a deceased spouse has alienated or, to the detriment of the
other spouse, granted the use of property, the court shall on the application of
the latter declare that the transaction is void and that the title or use is to be
restored. The same shall apply if the spouses’ joint household goods has been
pledged as security. The transfer or the pledging as security of household goods
shall not be declared void if the new possessor gained possession of the property
in good faith.

\textit{Division of Matrimonial Property}

At dissolution of marriage. Division of the marital property may, but must not
necessarily, result in property being transferred from one spouse to the other.

If the spouses agree, they may, after notifying a district court in writing,
distribute their property by means of property division during their marriage
without a divorce case being in progress. Such notification shall be recorded by
the district court.\textsuperscript{45} The court shall, in order to give the spouses’ creditors a
possibility to keep track of the financial transactions between the spouses, cause

\begin{itemize}
\item \textsuperscript{42} Chapter 7, Section 5(3), the Marriage Code.
\item \textsuperscript{43} Chapter 7, Section 7, the Marriage Code.
\item \textsuperscript{44} Chapter 7, Section 8, the Marriage Code.
\end{itemize}
notice thereof to be published in the Official Swedish Gazette and in the local press.46 A division of property during marriage may be performed either to clarify who owns what of the spouses’ property or to redistribute the property.47 A division of property is thus an alternative to making gifts between the spouses. It is a more favourable solution from the point of view of taxation, since what a spouse receives by means of property division normally is not taxed as a gift or income.

**Distribution after Divorce**

When a marriage is dissolved by divorce, the spouses’ property is normally to be distributed between them by means of a division of marital property. Property division is not necessary, however, if the spouses only have separate property and neither of them requests the right to take over the family home or household goods from the other spouse.48 The property division shall, according to the main rule, be performed when the marriage has been dissolved. But if either of the spouses requests a property division while a divorce case is in progress, property division shall be performed immediately.49 The division of property is to be performed by the spouses together. A document concerning the division of property shall be drawn up in writing and signed by both of them.50 Each spouse is for the period until the division of property is carried out required to give an account of his or her own property, and of property which he or she has managed but which belongs to the other spouse. Each spouse is further required to supply any other particulars that may be of importance when property division takes place.

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45 Chapter 9, Section 1, the Marriage Code.
46 Chapter 16, Section 3, the Marriage Code.
47 Proposition 1986/87:1, p. 53.
48 Chapter 9, Section 1, the Marriage Code.
49 Chapter 9, Section 1, the Marriage Code.
When a spouse has passed away, property division is to be performed by the surviving spouse and the heirs and residuary testamentary beneficiaries of the deceased spouse. An important objective of the division of property is to establish what property belongs to each of the spouses. Provisions concerning the deceased spouse shall, unless otherwise provided, apply to the heirs and residuary testamentary beneficiaries.\(^{51}\) If a spouse dies while a divorce case is in progress, the provisions on property division occasioned by divorce shall apply.\(^{52}\)

The spouse most in need of the spouses’ joint dwelling or household goods is entitled to receive it, with a corresponding deduction from his or her portion or, if it is of little value, without such a deduction.\(^{53}\) However, this entitlement does not apply if the joint dwelling is the separate property of the other spouse according to the conditions concerning inheritance or gifts in Chapter 7, Section 2(1), points 2-4 of the Marriage Code. Further a spouse may only take over a dwelling or household goods belonging to the other spouse if it can be considered reasonable, having regard to the overall circumstances. Of importance for a spouse’s chances to take over the family home is whether or not he or she will be permanently living with spouses’ children. In the case of the death of one spouses, the right to take over the family home and household goods applies only in favour of the surviving spouse.\(^{54}\) If the property is security for a claim which carries a preferential right, a further condition for it to be taken over is that the other spouse shall be relieved of responsibility for the claim or that funds to pay it shall have been placed in safe custody. If one of the spouses takes over the spouses’ joint dwelling or household goods with a

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\(^{50}\) Chapter 9, Section 5, the Marriage Code.
\(^{51}\) Chapter 9, Section 5, the Marriage Code.
\(^{52}\) Chapter 9, Section 11, the Marriage Code.
\(^{53}\) Chapter 11, Section 8, the Marriage Code.
\(^{54}\) Chapter 11, Section 8, the Marriage Code.
corresponding deduction and does not provide the other spouse with property forming part of their marital property, the first mentioned spouse shall pay a corresponding sum of money.55

55 Chapter 11, Section 10, the Marriage Code.