

Shared Residence: Lessons from Sweden

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This article, which draws on Swedish experience, argues that the English courts are currently using the shared residence order in ways that are unlikely either to benefit children or produce the intended results. Shared residence is considerably more demanding than co-parenting within an intact family, and attempts to use this order to improve parental cooperation are likely to prove counterproductive. Using shared residence to send symbolic messages about parental status is not only contrary to the statute, but the gap between the legal label and reality is also likely to increase dissatisfaction with the law. The article ends by arguing that whilst law may have a role to play in encouraging fathers' relationships with children it is too late to do this when parents have separated.

Introduction

The shared residence order is no longer unusual.² Moreover, a new understanding of shared residence can be discerned from the case law. The Court of Appeal has held that these orders can be used not only where they reflect the practical realities,³ but also in high-conflict cases to provide a framework for co-operation;⁴ and to prevent a sole residence parent from excluding or marginalising a former partner.⁵ This article argues against this new use of the shared residence order and the assumptions that underpin it, drawing on Swedish legislation, case law and empirical research. In Sweden, shared residence arrangements were comparatively common at least a decade before the English Court of Appeal in declared there to be nothing exceptional about this order.⁶ Swedish private family law is similar to its English counterpart, but the political contexts are different. The comparison of the two jurisdictions can, consequently, inform English debate by identifying different variables and exposing factors which would otherwise be taken for granted.⁷ In the context of a rapidly developing English case law, it seems preferable to try to learn from experience that is found in other jurisdictions 'instead of guessing and risking less appropriate results'.⁸

The article begins by setting out the Swedish law on shared residence. It is then noted that shared residence is very different from parenting within an intact family. The second section shows that rather than helping parents cooperate, court-ordered residence can in fact exacerbate the situation and expose children to further harm. The next part argues that the English courts' current use of shared residence to encourage fathers is not only likely to support some unmeritorious claims, but also likely to disappoint fathers who seek the order because they want to see more of

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² *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7 per Thorpe LJ, at [7].

³ *D v D (Children) (Shared Residence Orders)* [2001] 1 FLR 495.

⁴ *Ibid.*

⁵ *Re W (A Child) (Shared Residence Order)* [2009] EWCA Civ 370 per Wilson LJ, at [15].

⁶ *D v D* [2001] 1 FLR 495, per Dame Elizabeth Butler-Sloss P, at p503.

⁷ P De Cruz, *Comparative Law in a Changing World* (2007, 3rd edn, Routledge-Cavendish) at p11; L Hantrais *International Comparative Research: Theory, Methods and Practice* (2009, Palgrave), at pp10-11.

⁸ M Bogdan, *Comparative Law*, (1994, Kluwer), at p29.

their children. The shared residence order, as currently understood by the Court of Appeal, is too little, too late. The final section draws on the Swedish experience to suggest that if policy-makers want to strengthen fathers' ties with children, and encourage post-separation co-parenting through shared residence, intervention cannot be left until the nuclear family has broken down. The article concludes that if the courts' current over-optimistic objectives are abandoned, shared residence can be reserved for the small proportion of committed parents who can work together to ensure this arrangement benefits their children.

Recent English case law

While the Court of Appeal's assertion in *D v D* [2001] that shared residence applications should be assessed according to the welfare checklist of s.1(3) of the Children Act 1989 rather than some more stringent test is welcome, subsequent developments give cause for concern.

It is troubling that the use of the order in *A v A* [2004] to contain a conflict that had been described in the Guardian's report as a 'virtual state of war'⁹ has been cited in subsequent cases as establishing that a 'harmonious relationship' between the parents is no longer a prerequisite for shared residence, but an expected result.¹⁰ Secondly, Peter Harris and Robert George have rightly criticised the way that the shared residence order has, in practice, evolved away from the practical order envisaged by the Law Commission.¹¹ In *Re T* [2009] Wall LJ described equal division as 'rare'.¹² Instead, shared residence orders are often combined with contact orders for one parent; a 'contradiction in terms' justifiably criticised by Wilson LJ in *Re W* [2009].¹³ Increasing emphasis has been placed on sending symbolic messages about equal status; it seems the order can now be made for the psychological benefits it brings to non-resident parents.¹⁴ Richard Collier and Sally Sheldon have suggested that the courts' eagerness to ensure fathers' continued attachment to a reconstituted binuclear family unit is linked to 'wider policy agendas'.¹⁵ Unmarried and separated fathers have come to be viewed as a 'problem' to be 'managed' by law; it is felt more must be done either to instil a greater sense of responsibility in men or to help them 'develop the relationships with their children that they want, deserve and are currently unfairly denied'.¹⁶

This reinterpretation of shared residence is not only contrary to Parliament's intentions as expressed in the Children Act 1989, but also harmful in practice. Children are likely to be put at risk because the law's new direction is based on fallacious assumptions: that shared residence can be used in contested cases to

⁹ *A v A* [2004] EWHC 142, at [20] & [23].

¹⁰ *Re R (Children) (Residence: Shared Care: Children's Views)* [2005] EWCA Civ 542, per Thorpe LJ at [11].

¹¹ P Harris & R George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' (2010) 22 *Child and Family Law Quarterly*, at p15.

¹² *Re T (A Child)* [2009] EWCA Civ 20, at [35].

¹³ *Re W* [2009] EWCA Civ 370, at [21]. See e.g. *Re A (A Child) (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867; *Re G (Children) (Leave to Remove)* [2007] EWCA Civ 1497; *V v V* [2006] EWHC 2546; *Re H (Agreed Joint Residence: Mediation)* [2004] EWHC 2064.

¹⁴ S Spencer, 'Benchmarks: Family Residence', (2008) 39 *Law Society Gazette*, 24, at p25; *Re W* [2009] EWCA Civ 370, at [11].

¹⁵ R Collier & S Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing, 2008), at p218.

¹⁶ *Ibid*, p176.

improve parental cooperation, to placate fathers or to increase paternal involvement in children's lives.

Shared residence in the Swedish legal context

The Swedish Legal Framework

Swedish family law and policy has been considered groundbreaking. The social engineers who founded the Swedish welfare state in the 1930's saw the bourgeois nuclear family as an outmoded, oppressive institution and had no compunction about crossing the public/private boundary.¹⁷ Successive governments have aimed to encourage female labour market participation and redistribute the economic costs of childrearing across society, motivated by concerns over falling nativity rates and the need for economic growth as well as gender and class inequalities.¹⁸ It is acknowledged, of course, that law reform cannot be guaranteed to change behaviour, particularly in the area of familial organisation where cultural norms play a significant part; the ambitious Swedish policy goals are some way from being met. Sweden has one of the narrowest gender pay gaps among the industrialised nations, but the labour market remains highly segregated along gendered lines.¹⁹ Research shows that the increase in men's contributions in the home is not commensurate with women's increased working hours.²⁰ The election of a Centre-Right government at a time of economic down-turn has led to a re-evaluation of the welfare state.²¹ At the same time, continuing inequalities and enduring traditional understandings of mothering and fathering are obfuscated by the gender neutral rhetoric of legislation and policy documents.²² Yet, Sweden's generous reconciliation policies have, according to di Torella, shown that 'legislation can, if not change, then at least challenge stereotypes and influence attitudes in society'.²³

The private law regulating parents' disputes over children is, however, very similar to the framework set out in the Children Act 1989. The statute, the Parents Code, includes a paramountcy principle almost identical to s.1(1) of the Children Act 1989; and as in s.1(3) there is a non-exhaustive and non-hierarchical list of factors to be considered.²⁴ As in most other jurisdictions, the best interests tests has been

¹⁷ A Pylkkänen, 'Liberal Family Law in the Making: Nordic and European Harmonisation', (2007) 15 *Feminist Legal Studies* 289, at p294.

¹⁸ E Ryrstedt 'Family Law and Social Law: Reciprocal Dependency in a Comparative Perspective' (2006) 20 *International Journal of Law, Policy and the Family* 44, at p48; A Ellingsæter, 'Dual Breadwinner Societies: Provider Models in the Scandinavian Welfare States', (1998) 41 *Acta Sociologica* 59, at p60; D Bradley, *Family Law and Political Culture* (Sweet & Maxwell, 1996), at pp249-250.

¹⁹ International Trade Union Confederation, *Gender (In)Equality in the Labour Market: An Overview of Global Trends and Developments* (ITUC, 2009), at pp16-17; J Lewis, 'The Changing Context for the Obligation to Care and to Earn' in M Maclean (ed) *Family Law and Family Values* (Hart Publishing, 2005), at p71; U Björnberg, 'Ideology and choice between work and care: Swedish family policy for working parents' (2002) 22 *Critical Social Policy*, at p33.

²⁰ Å Lundqvist & C Roman 'Önska, Välja och Vilja' [2003] *Sociologisk Forskning*, 12, at p26.

²¹ H Sigfridsson, 'Alliansens familjeprogram lär väcka intern debatt', *Dagens Nyheter*, 17th July 2010.

²² Björnberg, 'Ideology and choice between work and care: Swedish family policy for working parents' (2002) 22 *Critical Social Policy*, at p33.

²³ E Caracciolo di Torella, 'A Critical Assessment of the EC Legislation aimed at Reconciling Work and Family Life: Lessons from the Scandinavian Model?' in H Collins, P Davies & R Rideout (eds) *Legal Regulation of the Employment Relation*, (Kluwer, 2001), at p443.

²⁴ This list is shorter. The Parents Code, Chapter 6, Paragraph 2a: In the assessment of what is in the best interests of the child, particular attention shall be paid to the risk of the child being abused, unlawfully removed, detained, or otherwise suffering harm; the child's need of close and good contact with both parents; and the child's wishes, considered in the light of his age and maturity. As in England, each case is supposed to be assessed on its individual circumstances, but commentators have

criticised for its lack of normative content.²⁵ Although there is no equivalent of s.1(5) of the Children Act 1989, the legislation is, according to Eva Ryrstedt, written with the underpinning assumption that 'parents will be able to agree on virtually everything'.²⁶

Sweden has a civil law system; case law is, thus, less important, but the Supreme Court often interprets terms in the Parents Code in such a way as to *de facto* alter the course of the law. Government-appointed commissions of inquiry also have a unique role to play in shaping law reform; parallels can be drawn with the Law Commission's work, but inquiries are appointed *ad hoc* and their focus tends to be less exclusively legal.²⁷

There are no specialised family courts; cases are heard by a combination of lay and professional judges who have a varied caseload; they usually rely quite heavily on reports from family court social workers or other experts, although how these professionals' evidence is weighted is ultimately a matter for the court.²⁸ Delay is a problem, compromise is promoted, and an increasing number of cases are now dealt with through cooperation talks: a form of mediation provided free of charge by the local social services (who also supply the family court social workers).²⁹ Agreements reached this way have the same legal status as judgments; successive governments have encouraged this form of dispute resolution, which is now the first port of call for most separating parents.³⁰ The current government has introduced proposals which would make cooperation talks compulsory for all separating parents.³¹ The search for settlement is very much a case of bargaining in the shadow of the law;³² dominant messages contained in 'largely pedagogical' legislative provisions are transmitted by all professionals.³³

Swedish law retains the concept of legal custody, which must be distinguished from physical custody and can be exercised independently of the latter.³⁴ Although custody is now expressed in the statute predominantly as a responsibility rather than a right, it does have important legal consequences and is generally understood

complained that courts' handling of parents' disputes is mechanical, with an unwarranted narrow focus on the checklist. G Andersson & M Bangura Arvidsson, *Barnet mellan två Föräldrar – Insatsen Kontaktperson i Umgängestvister* (2006, Stiftelsen Allmänna Barnhuset); A Rejmer, *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa* (Lund Studies in the Sociology of Law, 2003), at p104.

²⁵ H Rhoades, 'Revising Australia's Parenting Laws: a plea for a relational approach to children's best interests', (2010) 22 *Child and Family Law Quarterly* 172, at p179; E Ryrstedt 'Tvistlösning mellan Separerade Föräldrar – för Barnets Bästa' (2007) *Svensk JuristTidning* 389, at p409; Rejmer, *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa* (Lund Studies in the Sociology of Law, 2003), at p124.

²⁶ Ryrstedt 'Family Law and Social Law: Reciprocal Dependency in a Comparative Perspective' (2006) 20 *International Journal of Law, Policy and the Family* 44, at p45.

²⁷ Å Lundqvist, 'Familjens Kris', [2008] *Tidning för Genusvetenskap* 79, at pp80-81.

²⁸ B Carlsson & A Rejmer 'The Swedish Way of Dealing with Custody Disputes: Juridification and Professionalisation of the Private and Social Spheres' in B Carlsson (ed) *Social Steerage and Communicative Action* (Lund Studies in Sociology of Law, 1998), at p112.

²⁹ The Social Services Act (*Socialtjänstlagen*) Chapter 5 paragraph 3(1); 'Bodström: Långsamma Domstolar Regeringens Fel', *Dagens Nyheter*, 18th July 2010.

³⁰ J Schiratzki, *Barnrättens Grunder* (Studentlitteratur, 3rd edn, 2006), at p1108; there are unfortunately no reliable statistics on whether the increasing popularity of cooperation talks has resulted in a fall in contested cases.

³¹ J Kallin, 'Alliansen vill se schysstare skilsmässor', *Dagens Nyheter*, 16th July 2010.

³² E Maccoby & H Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Harvard University Press, 1994).

³³ Schiratzki, *Barnrättens Grunder* (Studentlitteratur, 3rd edn, 2006), at p101.

³⁴ The Parents Code, Chapter 6, paragraph 2.

to have more 'bite' than parental responsibility.³⁵ Legal custody can be either sole or joint, but unlike parental responsibility, it cannot be held by more than two adults.³⁶ It is awarded automatically to mothers and married fathers, but can be lost to the other parent.³⁷ Unmarried fathers can obtain custody through a court order, a registered agreement, or a 'simple' administrative procedure.³⁸ Approximately 97% of cohabiting unmarried parents have joint legal custody, while 94% of married and unmarried parents who separate continue to share custody.³⁹ In a typical example of the dominant discourse, a 2007 commission of inquiry stated that 'divorce brings the marriage to an end, but leaves the parent-child relationships unaffected'.⁴⁰

The Parents Code stipulates that a child has a right to contact with a non-resident parent and that both parents share a responsibility to see that the child's need for contact is met.⁴¹ This statutory formulation has been attacked as little more than window dressing; children cannot apply for contact, and can very rarely refuse where it has been deemed to be in their best interests.⁴² According to official documents 'it is not possible to exaggerate the importance of a child having regular contact with both its parents'.⁴³ The Swedish Children's Ombudsman has, however, argued that this is precisely what has occurred in practice.⁴⁴ An unquestioning belief in the abstract benefits of contact led to a 'mechanical' handling of disputes, where both children's views and risks raised by resident parents were often ignored.⁴⁵ As in England and Wales, there has been some reassessment of the pro-contact presumption as a result of increased awareness of the risks posed by violent parents, but the latter are understood as a small, exceptional category.⁴⁶ On a more positive note, contact schedules usually involve weekday contact, which is thought to give non-resident parents a better insight into their children's lives and thus enable them to play a greater part.⁴⁷ This suggests that there is, in Swedish law, a welcome recognition of caring as an indispensable component of parenting.

³⁵ Parents without custody do not, for example, get parental leave, nor can they demand information about their child from public bodies. Custody decisions also tend to determine the outcome of residence cases. L Sandström & I Wetter, *Barnet och Lagen: Lagtexter med Kommentarer Rörande Barn* (1999, Kommentus Förlag), at p74; Socialstyrelsen, *Glimtar av Barn från Vårdnads-, Boende- och Umgängedomar 1999 respektive 200* (2004, Socialstyrelsen), at p17; K Kurki-Suonio, 'Joint Custody as an Interpretation of the Best Interests of the Child in a Critical and Comparative Perspective' (2000) 14 *International Journal of Law, Policy and the Family*, 183, at p188.

³⁶ The Parents Code, Chapter 6, paragraph 3.

³⁷ The Parents Code, Chapter 6, paragraph 4.

³⁸ Socialdepartementet, *Underhållsstöd vid växelvis boende* (Socialdepartementet, 1999) at p20; The Parents Code, Chapter 6, paragraph 4.

³⁹ Data from Statistics Sweden available at http://www.scb.se/Pages/TableAndChart___255870.aspx; Barnombudsmannen, *Upp till 18* (Barnombudsmannen, 2007), at p57.

⁴⁰ Statens Offentliga Utredningar, *Beslutanderätt vid gemensam vårdnad mm*, SOU 2007:52 (Fritzes Offentliga Publikationer, 2007), at p29.

⁴¹ The Parents Code, Chapter 6, paragraph 15.

⁴² E Ryrstedt & T Mattson 'Children's Rights to Representation: A Comparison between Sweden and England' (2008) 22 *International Journal of Law, Policy and the Family* 135, at p137; M Eriksson & E Näsman, 'Participation in Family Law Proceedings for Children Whose Father is Violent to their Mother' (2008) 15 *Childhood* 259, at p261; I Ekbohm & Å Landberg *Innerst Inne var man Rädd* (Rädda Barnen & Socialstyrelsen, 2007), at p66.

⁴³ Riksförsäkringsverket, *Råd att Umgås - en Analys av Umgängesavdrag inom Underhållsstödet* (Försäkringskassan, 2005), at p8.

⁴⁴ Barnombudsmannen, *När Tryggheten står på Spel* (Barnombudsmannen, 2005), at p41.

⁴⁵ *Ibid*; Ryrstedt 'Tvistlösning mellan Separerade Föräldrar - för Barnets Bästa' (2007) *Svensk JuristTidning* 389, at p407. For an example from the case reports see NJA2003 s.372 (Swedish cases are known by reference to the pages of the main law reports rather than parties' names).

⁴⁶ Schiratzki, *Barnrättens Grunder* (Studentlitteratur, 3rd edn, 2006), at pp109-110.

⁴⁷ Sandström & Wetter, *Barnet och Lagen: Lagtexter med Kommentarer Rörande Barn* (Kommentus Förlag, 1999), at p95; Statens Offentliga Utredningar, *Vårdnad - Boende - Umgänge. Barnets bästa, föräldrars ansvar*, SOU 2005:43 (Fritzes Offentliga Publikationer, 2005), at p167; NJA1988 s.559.

Shared Residence

Residence is the most recent of the three orders, introduced as part of a 1998 family law reform which extended joint legal custody to cases where one parent opposed this, and where the parents could, consequently, not be assumed to agree on where their children should live.⁴⁸ The option of sharing residence was introduced at the same time as the residence order, though the arrangement is known to have been implemented on a voluntary basis prior to this.⁴⁹ In 1993 only 4% of children with separated parents were alternating between two homes; the corresponding figure for 2007 was 21% (the latest estimate for England and Wales is between 9% and 12%).⁵⁰ Swedish statistics, moreover, show that four out of five children move on a weekly basis, and that most spend half, or something very close to half, of their time with each parent.⁵¹ The increasing popularity of shared residence may be partly because this time-sharing arrangement allows mothers, as well as fathers, to fit their parenting around their careers, social lives and new relationships. The creation in Sweden of the specific term *barnbollning* (child juggling) suggests there is some truth to this; further anecdotal evidence can be found in parents' letters in response to a newspaper's article series on shared residence.⁵²

The statute stipulates that residence is a question of fact.⁵³ Swedish law places considerable emphasis on specificity, and it is surprising that there is no statutory definition of shared residence.⁵⁴ Nevertheless, the starting point is very much an equal division of the child's time.⁵⁵ The leading Supreme Court case, NJA1998 s.267, held that arrangements with a less than equal split must generally be regarded as contact. Where the applicant parent's allocation of time is between 30% and 50%, the order will only be made if there are 'special factors' indicating that residence is shared. However, where a child spends less than 30% of his time with one parent a shared residence order cannot be made. The Swedish appeal courts, unlike their English counterparts, still consider time to be the central and usually decisive criterion.

The National Board of Health and Welfare Report: shared residence is not just like the intact family

In response to concerns that selfish parents were using shared residence in ways that harmed children, the National Board of Health and Welfare (NBHW) was asked to review existing knowledge and report make recommendations for courts and social

⁴⁸ Government Bill, *Vårdnad, boende och umgänge*, Proposition 1997/98:7, at p57.

⁴⁹ Socialstyrelsen, *Växelvis Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at p8.

⁵⁰ Barnombudsmannen, *Upp till 18 - Fakta om Barn och Ungdom* (Barnombudsmannen, 2007), at p57; V Peacey & J Hunt, *Problematic Contact after Separation and Divorce? A National Survey of Parents* (One Parent Families/Gingerbread, 2008), at p19.

⁵¹ Barnombudsmannen, *Upp till 18 - Fakta om Barn och Ungdom* (Barnombudsmannen, 2007), at p57.

⁵² *Svenska Dagbladet*, 24th October 2005, 3rd November 2005, 6th November 2005.

⁵³ The Parents Code, Chapter 6 paragraph 14a.

⁵⁴ Riksförsäkringsverket, *Underhållsstöd: Ett Urval av Kamrarrättsdomar* (Riksförsäkringsverket, 2003), at p13.

⁵⁵ *Ibid*, at p11; Socialstyrelsen, *Växelvis Boende: att bo hos både pappa och mamma fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at p36.

services.⁵⁶ The resultant report (referred to here as the NBHW report) is cited in judgments and appears to have had a significant impact on practice.⁵⁷ The report concluded: 'Shared residence is neither good nor bad; it becomes what the parents make it. There are no ideal solutions'.⁵⁸

Shared residence can work well. It can help parents share the burden of raising children while maintaining an involvement in the latter's lives that gives young people good, natural access to their parents.⁵⁹ It can also limit both children's subjective sense of loss and their actual loss of material and emotional resources.⁶⁰ Shared residence mothers, in particular, have described it as empowering to have more time available to pursue their own interests.⁶¹

However, the NBHW report refuted the idea that shared residence is 'just like' or 'most like' the intact family.⁶² Instead, it was found to be an exceptionally demanding arrangement. Children have to pay a high price to have equal access to both parents.⁶³ Its benefits must be balanced against children's need for stability and a good range of relationships with other children.⁶⁴ One of the interviewed teenagers complained: 'There have been times when I've thrown myself on the bed and shouted: I can't do this again! It just feels like too much to pack everything up and re-adjust once more'.⁶⁵

Although the young people interviewed for the report were generally positive about shared residence, those who had felt locked into inflexible arrangements were significantly more critical. They reported feeling trapped in the middle of their parents' arguments, had often wished for 'a place of their own', but had not dared to broach the subject. It was evident from these accounts that the main cause of irritation or disappointment was the fact that arrangements had appeared to exist solely for their parents' benefit.⁶⁶

Flexibility and child focus are, thus, essential. Adults are required to make considerable material sacrifices, and often find the frequent changes as emotionally demanding as their children do.⁶⁷ One mother observed that shared residence required 'a lot of give and take'; the report stressed that parents must contain their own conflicts and develop new, post-separation ways to negotiate.⁶⁸ In addition, they must also be sensitive to children's changing needs and the things that the latter find difficult to say, because of fear of hurting either parent's feelings.⁶⁹ It appears

⁵⁶ Socialstyrelsen, *Växels Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at p3.

⁵⁷ See e.g. the case RH2005:38.

⁵⁸ Socialstyrelsen, *Växels Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at pp42-44.

⁵⁹ *Ibid.*, at p42.

⁶⁰ *Ibid.*, see also K Breivik & D Olweus, 'Adolescents' Adjustment in Four Post-Divorce Family Structures', (2006) 44 *Journal of Divorce and Remarriage* 99, at p103.

⁶¹ L Carlsson & M Öhrn 'Med tiden i fokus', (Luleå Tekniska Universitet, 2004).

⁶² Socialstyrelsen, *Växels Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at p8.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, at pp41-43.

⁶⁵ *Ibid.*, p32.

⁶⁶ *Ibid.*, pp29-31.

⁶⁷ *Ibid.*, p24. See also interview with Marre Ahlsén and Ulf Lindberg, shared residence parents, in M Carling, 'Flyttcirkus med barnen i fokus', *Svenska Dagbladet*, 19th October 2005.

⁶⁸ Socialstyrelsen, *Växels Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at p24.

⁶⁹ *Ibid.*, p8, p29.

that parents, too, pay a high price for maintaining this high level of involvement in their children's lives. The NBHW report recommended that shared residence must not be undertaken lightly, and courts must be slow to order it where parents have reservations.⁷⁰ As was noted in the introduction, English courts increasingly justify the making of orders in such circumstances by reference to the order's educative properties.

Can shared residence be used to teach parents to cooperate?

The English Case Law

In the 1990's English case law it was only parents who could agree on a shared residence schedule who were able to persuade a court to grant such an order.⁷¹ However, in *D v D* [2001] the idea was mooted that the order could reduce animosity and prevent further returns to court.⁷² Since *D v D* [2001], the initial suggestion that shared residence orders could be helpful in high conflict cases has solidified into a certainty as successive cases have emphasised the symbolic granting of equal status and the perceived consequent reduction of bitterness over the practical benefits to children.⁷³ The causal relationship between good parental cooperation and shared residence has been reversed; the former is now seen as a by-product of the latter rather than an essential pre-requisite. This re-interpretation finds no support in empirical research. Stephen Gilmore has rightly expressed concern over the judicial tendency to refer only to other judgments and not engage specifically with the issue of how parental conflict is known to affect children.⁷⁴ Where such concerns have been raised by instructed child welfare professionals, judges have expressly chosen to reject the advice against shared residence, interpreting instead the developing case law as laying down that shared residence is a useful tool for entrenched disputes. According to Wall LJ in *Re R* [2009] the shared residence order 'is a legal, not a psychiatric concept'; consequently decisions should be guided by the now 'substantial jurisprudence' and judges are free to reject inconsistent psychiatric opinion, 'however distinguished its source'.⁷⁵ Paradoxically, the recent emphasis on how inter-parental conflict harms children has increased the appeal of the shared residence order. 'Compromise', according to Wall LJ, 'is an art that every separated parent ought to master'.⁷⁶

More than most parents can manage?

⁷⁰ *Ibid.*

⁷¹ I Weyland, 'Judicial Attitudes to Contact and Shared Residence since the Children Act 1989' (1995) 17 *Journal of Social Welfare and Family Law* 445, at p454.

⁷² *D v D* [2001] 1 FLR 495, per Dame Elizabeth Butler-Sloss P at p504.

⁷³ *A v A (Shared Residence and Contact)* [2004] EWHC 142; *Re R* [2005] EWCA Civ 542.

⁷⁴ S Gilmore, 'Court Decision-making in Shared Residence Order Cases: A Critical Examination' (2006) 18 *Child and Family Law Quarterly* 468, at p497.

⁷⁵ *Re R (A Child) (Residence Order)* [2009] EWCA Civ 358, at [30].

⁷⁶ *Re G (A Child) (Residence: Restriction on Further Applications)* [2008] EWCA Civ 1468, at [7].

As was noted above, shared residence is in many respects more demanding than parenting within an intact family. Swedish parents have spoken of the need for constant communication about homework, sports, music lessons, friendship problems, and 'the difficult task of getting a teenage son out of bed in the morning'.⁷⁷ Even committed parents with excellent post-separation relationships admit that there have been times when their patience and cooperation skills have been stretched to the limit.⁷⁸

There is Swedish research on custody, contact and residence which strongly suggests that the parents involved in contested cases differ markedly from the model cooperative parent. Annika Rejmer's research on courts' handling of custody disputes revealed the parents in her sample to be economically and socially disadvantaged, often 'subject to at least two parallel crises'.⁷⁹ However, courts remained unaware of this; 'the right questions' were 'never asked' because the family court social workers had narrowed their information-gathering to suit the courts' purposes.⁸⁰ Even where one parent raised these types of problems in order to query the other's parenting abilities, the issues were lost because, consistent with the received wisdom about avoiding the adversarial approach, parents' deep seated disputes were re-interpreted as superficial disagreements over the precise allocation of children's time. This occurred even where the parties presented diametrically opposed accounts of past events, current arrangements or the child's future needs, so that a meeting in the middle was impossible both in principle and practice.⁸¹

Rejmer's findings were confirmed in a study of supervised contact by Inger Ekbohm and Åsa Landberg.⁸² Case reports would more often than not mention interlinked problems such as violence, addiction, mental illness or long-term unemployment.⁸³ Yet, both the judges and the social workers they interviewed felt the current law was working well, relying on generalised assertions about the development of long-term unsupervised contact (a goal met in only 15% of the cases in the sample).⁸⁴ Ekbohm and Landberg were extremely critical of the way '[c]hildren were expected to react as though they were living in law's ideal family, rather than their own'.⁸⁵ A comparison can be made here with the often over-optimistic application of a *de facto* pro-contact presumption in England and Wales in the 1990's. Drug or alcohol addictions, psychiatric illness, domestic violence and allegations of child abuse were often trivialised or summarily held to be outweighed, and an unwavering belief in the natural benefits of contact led to a judicial optimism which frequently failed to address the potential problems posed by inexperienced, incompetent or

⁷⁷ Interview with Marre Ahlsén and Ulf Lindberg, shared residence parents, in Carling, M, 'Flyttcirкус med barnen i fokus', *Svenska Dagbladet*, 19th October 2005.

⁷⁸ *Ibid.*

⁷⁹ Parents with problems in terms of physical or mental illness, unemployment, poverty, addiction or crime were all over-represented in Rejmer's sample, as were adults with previous traumatic events in their life history, Rejmer, *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa* (Lund Studies in the Sociology of Law, 2003), at p206, pp73-76.

⁸⁰ *Ibid.*, at p187.

⁸¹ *Ibid.*, at p175.

⁸² Ekbohm & Landberg *Innerst Inne var man Rädd* (Rädda Barnen & Socialstyrelsen, 2007), at p79.

⁸³ *Ibid.*, at p29.

⁸⁴ *Ibid.*, at pp34-35.

⁸⁵ *Ibid.*, at p58.

untrustworthy applicants.⁸⁶ The Swedish research detailed here provides further strong evidence why a similar presumption in favour of shared residence would undoubtedly expose children to serious and unwarranted risks.

Furthermore, Eva Ryrstedt's recent research on cooperation talks suggested that parents caught up in distressing separations or serious conflicts are much less able to consider adequately whether this arrangement is, in fact, the best for their child.⁸⁷ It can be expected that they have similar difficulties in sharing residence in the required flexible and child focused way.

There is nothing to say that parents in this jurisdiction would be markedly different from the parents in the Swedish studies; and as demonstrated by the contact case law referred to briefly above, the general legal tendency to dismiss as unsubstantiated any allegations that cannot be proved to law's stringent standards currently combines with the strong emphasis on settlement to discourage detailed enquiry into parents' circumstances.⁸⁸

The Swedish research indicates that parents who fail to share residence are not necessarily being selfish, obstinate or implacably hostile. This demanding arrangement may simply prove too much for adults, and children, who are already under considerable stress. One Swedish mother argued, based on her own experiences, that it must be better for children 'to have one well-adjusted everyday parent and one contented weekend parent' than to be 'caught in a dysfunctional alternating arrangement where neither adult is able to parent properly'.⁸⁹

Shared residence does not improve parental cooperation

In the NBHW sample of parents with court-ordered shared residence most reported that the order had not improved their poor cooperation.⁹⁰ Half of the families in this sample had abandoned shared residence within its first year, with parents commonly stating that the order had failed to remedy their previous inability to communicate.⁹¹ Where the arrangement did last, conditions did not improve. One mother commented on her court case: 'The way it is now, this has dragged on and cost us money, but things are the same as they were before, we can't talk to each other'.⁹²

It was concluded in the NBHW report that for shared residence to benefit children, parents must be able to contain their conflicts; otherwise it is likely that the potential benefits of shared residence are outweighed or eliminated by rigid schedules,

⁸⁶ A Barnett, 'The Welfare of the Child Re-Visited: In Whose Best Interests? Part II', [2009] *Family Law* 135; S Hathaway, 'Committal for no Contact' [1997] *Family Law* 355; C Piper, 'In Re O: Comment' (1995) 17 *Journal of Social Welfare and Family Law* 355, at p358.

⁸⁷ E Ryrstedt, 'Samarbetssamtal' [2009] *Svensk JuristTidning* 821, at p831.

⁸⁸ *Re B* [2008] UKHL 35 per Lord Hoffman, at [2]; B Hale & R Hunter, 'A Conversation with Baroness Hale', (2008) 16 *Feminist Legal Studies* 237, at p243.

⁸⁹ Letters page, *Svenska Dagbladet*, 6th November 2005. Support for this statement is provided by the research by Smart and Neale, who found that parents in more traditional arrangements reported less conflicts and higher levels of satisfaction, C Smart & B Neale, *Family Fragments?* (Polity Press, 1999) at p59, p63.

⁹⁰ Socialstyrelsen, *Växelvis Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at p8.

⁹¹ *Ibid*, at p32.

⁹² *Ibid*, at p33.

exposure to parents conflicts, or repeated returns to court.⁹³ Similar findings have been made by others who have focused on shared parenting in high conflict families.⁹⁴ The Norwegian legislation was amended to restrict shared residence to cases where both parents agree after a commission of inquiry had reviewed existing research and concluded that forcing shared residence on reluctant parents did nothing except expose children to harmful conflict.⁹⁵ In Sweden, there has been no such re-writing of the legislation, but there is evidence of a significant shift in practice.

In 1998, amendments were made to the Parents Code to promote co-parenting. This led to concern that the father-child link was being over-emphasised at the expense of other factors to be considered as part of the welfare enquiry.⁹⁶ Indeed, there are some reported shared residence cases from the late 1990's and early 2000's where resident parents' objections were routinely dismissed, often with general normative pronouncements along the lines that children need two parents, that all parents ought to be able to get on, and that the conflict in the particular case was not intractable.⁹⁷

Academic commentators' critique of the 1998 reforms combined with an increased awareness of the different ways in which domestic violence can be harmful to children, and in 2002 a commission of inquiry was appointed to evaluate current practice as a whole (rather than just courts' handling of domestic violence issues). One of the inquiry's central findings was that parents must be both willing and able to react to changes in their child's situation and therefore 'cannot be stuck in an arrangement that - for the sake of minimising conflicts between the parents - is based on everything being determined in detail in advance and impossible to change'.⁹⁸ The empirical research carried out for the inquiry found some evidence that fathers, in particular, formulated their claims for shared residence using rights rhetoric, and that courts were often reluctant to deny such applications outright, for fear of alienating the applicants.⁹⁹ The inquiry called for a more critical appraisal of applications for shared residence, particularly when objected to by resident parents. Furthermore, the inquiry's report contained a clear statement that parents cannot be forced into cooperation, and that hopes that shared residence can teach parents to collaborate are not only misplaced but contrary to the statutory requirement to focus on the child.¹⁰⁰

The inquiry's report was followed by law reform; changes were made to the Parents Code to convey the message that decision-makers had to be alert to any relevant

⁹³ *Ibid*, at p36.

⁹⁴ J McIntosh, 'Legislating for Shared Parenting: Exploring some Underlying Assumptions' (2009) 47 *Family Court Review* 389; J Johnston, 'High Conflict Divorce' (1994) 4 *The Future of Children* 165; Smart & Neale, *Family Fragments?* (Polity Press, 1999).

⁹⁵ Norges Offentlige Utredninger, *Barnefordelingssaker - avgjørelsesorgan, saksbehandlingsregler og delt bosted*, NOU 1998:17 (Barne- og familiedepartementet, 1998) at [12.4.1].

⁹⁶ Barnombudsmannen, *När Tryggheten står på Spel* (Barnombudsmannen, 2005).

⁹⁷ Statens Offentliga Utredningar, *Vårdnad - Boende - Umgänge. Barnets bästa, föräldrars ansvar*, SOU 2005:43 (Fritzes Offentliga Publikationer, 2005), at pp760-761; Norra Norrland Appeal Court, Case No T87-98, 27th November 2003; Svea Appeal Court, Case No T5912-02, 13th April 2003.

⁹⁸ Statens Offentliga Utredningar, *Vårdnad - Boende - Umgänge. Barnets bästa, föräldrars ansvar*, SOU 2005:43 (Fritzes Offentliga Publikationer, 2005), at p43.

⁹⁹ *Ibid*, at p725.

¹⁰⁰ *Ibid*, at p160.

risks, including adults who are frightened of or deeply mistrust each other, and parental intransigence. Parents must be able to renegotiate arrangements with flexibility rather than insist on what is rather aptly referred to in the government bill as 'millimetre justice'.¹⁰¹ The bill repeated the inquiry's view that since shared residence places particular burdens on the adults, parents' post-separation relationships must be 'particularly good'.¹⁰²

The Swedish case law

The 2005 reforms have been praised for bringing about a new, pragmatic approach and a realisation that formal orders can no longer be used to teach parents to cooperate.¹⁰³ The phrase 'particularly good cooperation' from the government bill has often been repeated in judgments, and appears to have had a significant effect on practice. Fathers who are inflexible, obstinate or controlling are denied both legal custody and shared residence even where law's emphasis on the promotion of father-child links leads to generous contact orders. In one case, the shared residence application was dismissed on the grounds that the parents had in the recent past been unable to manage face-to-face conversation without this descending into ugly confrontations or even physical fights.¹⁰⁴ In another case, the court refused to make the shared residence order since the parties could not envisage communicating other than through text messages.¹⁰⁵

The West of Sweden Appeal Court not only dismissed the shared residence application in RH 2005:38, a case where the applicant father had a history of threatening and abusive behaviour, but also refused to make a consent order to approve the parents' compromise on contact. The appeal court said this was *de facto* shared residence (with handovers taking place at school to avoid confrontations, a familiar strategy in English high-conflict cases). Thus, because the required good cooperation was found to be lacking, the contact was reduced to one long weekend per fortnight. Implicit in the judgment is that the children would benefit not only through lessened exposure to conflict, but also by having a primary carer who was able focus on meeting their needs. It also suggests a different understanding of parenthood; joint decision-making is neither seen as an indispensable component of parenting, nor necessary for relationships to develop in ways that can benefit children.

Comparing the two jurisdictions

This approach stands in stark contrast to one of the latest reported cases from this jurisdiction. In *A v A* [2010] a fact-finding hearing had been held in relation to 89 incidents (some trivial, but some of domestic violence sufficiently serious to constitute criminal offences). A little later, an interim residence order had been

¹⁰¹ Government bill, *Nya vårdnadsregler*, Proposition 2005/06:99, at p53.

¹⁰² *Ibid.*

¹⁰³ Ryrstedt, 'Samarbetssamtal' [2009] *Svensk JuristTidning* 821, at p822.

¹⁰⁴ The Court instead extended the father's fortnightly contact from two to four days. Hovrätten för Övre Norrland, Case No T146-00 of 1st June 2001.

¹⁰⁵ Svea Appeal Court, Case No T483-08, 28th October 2008, at p5.

made, 'effectively by consent', providing for an equal sharing of the children's time. On appeal, the order was described as 'sensible' and 'modern', and the most likely outcome whatever the decision regarding the 89 allegations and counter-allegations.¹⁰⁶ There was no consideration of how the frequent moves between two hostile households would impact on the three children aged between six and three.

The Swedish approach is much to be preferred; it accords with current empirical research emphasising the need to protect children from parents' conflicts and avoids subjecting children to considerable practical and emotional stresses in the present in the hope that this may lead to some unproven future improvement. Courts are not concerned with sending symbolic messages or preventing primary carer mothers from excluding fathers. This may be because independent motherhood is more acceptable in a jurisdiction where marriage is no longer viewed as 'better' than other forms of family formation and the traditional breadwinner model has deliberately been discarded.¹⁰⁷ It is also likely that joint legal custody is perceived to be an adequate safeguard against such marginalisation.¹⁰⁸

In England and Wales, legal custody was replaced by parental responsibility, and the intention was that the latter should be used to signify parity in terms of rights as well as responsibilities. However, the courts' subsequent downgrading of this order from a signifier of practical involvement to a mere symbolic gesture has led to a kind of inflation in orders. Since parental responsibility is often awarded on the assumption that it does not have any real effect, shared residence is now perceived necessary to mark continued practical involvement and stress both parties' equal status.¹⁰⁹ It can be argued that shared residence is now being used to perform the function that is, in Sweden, ascribed to the joint custody order. The next section will, therefore, look at the use of joint legal custody to emphasise parity of status.

Symbolic messages, joint decision-making and the Swedish joint custody order

Legal custody has greater legal and practical implications than parental responsibility; whereas the law in England takes independent decision making as the implicit norm, excepting only important issues, the Swedish law has joint decision making as the default position and permits derogation only in relation to trivial questions such as bedtimes.¹¹⁰

The expansion of joint legal custody

¹⁰⁶ A v A [2010] EWHC 1282 (Fam) *per* Mostyn J at [30].

¹⁰⁷ A 1999 government inquiry noted, quite correctly, that 'the factual realities of family life are not determined by marital status' noted, quite correctly, that 'the factual realities of family life are not determined by marital status', Justitiedepartementet, *Gemensam Vårdnad för Ogifta Föräldrar*, Ds 1999:57 (Fritzes Offentliga Publikationer, 1999), at p60.

¹⁰⁸ K Kurki-Suoni, 'Gemensam Vårdnad – Vad Döljer Man med Barnets Bästa?' in G Nordborg (ed) *Tretton Kvinnoperspektiv på Rätten* (Iustus Förlag, 1995), at p171.

¹⁰⁹ H Reece, 'The Degradation of Parental Responsibility' in R Probert, S Gilmore & J Herring (eds) *Responsible Parents and Parental Responsibility* (Hart Publishing, 2009), at p95; Harris & George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' (2010) 22 *Child and Family Law Quarterly*, at p168.

¹¹⁰ The Parents Code, Chapter 6 paragraph 13; Schiratzki, *Barnrättens Grunder* (Studentlitteratur, 3rd edn, 2006), at p93.

In 1998 the Parents Code was amended with the aim of further facilitating co-parenting; most importantly, courts were given the option to continue joint legal custody even where one parent opposed this.¹¹¹ These changes were understood by the courts as creating a presumption in favour of joint legal custody.¹¹² The order underwent a process of re-conceptualisation from a voluntary mechanism for co-operation and practical involvement to a near universal right and abstract badge of legal status.¹¹³ A parallel can be drawn with what is currently happening to the English shared residence order. Indeed, Swedish judges expressed similar hopes that the making of the order would bolster parental co-operation by either appeasing non-resident parents, or persuading resident parents not to ignore their former partners.¹¹⁴

Johanna Schiratzki has asserted that the post-1998 extension of joint custody is likely to have transferred, rather than resolved, conflicts; this appears to be confirmed by court statistics that show increases in applications for contact and residence.¹¹⁵ As has been the case with some proponents of shared residence, those who linked joint custody with good intra-familial relationships had confused correlation with cause. Parents did not learn to get on with each other. Instead, the assumption of collaboration, which had validly underpinned voluntary joint legal custody, became unsustainable.¹¹⁶

The increased use of joint legal custody appears to have created more problems than it solved. It is perhaps trite to observe that not all non-resident parents want increased influence in order to further their children's interests. There is ample evidence from both England and Sweden of abusive fathers using court orders to harass and undermine their former partners, and concern was expressed that the Swedish extension of joint custody exposed greater numbers of parents and children to such harmful behaviour.¹¹⁷

Secondly, the requirement of joint decision-making did in some cases lead to stressful and even dangerous stalemates. Most controversially, a few non-resident fathers relied on joint legal custody to block treatment recommended to help their children recover from abuse which the former were alleged to have perpetrated.¹¹⁸ The media attention generated by such cases contributed to debate; when the 2005 commission of inquiry was appointed to review practice, there was widespread consensus that further reform was necessary to curb the over-optimistic use of joint custody, and this view was echoed in the inquiry's report.¹¹⁹

¹¹¹ Government Bill, *Vårdnad, boende och umgänge*, Proposition 1997/98:7.

¹¹² Government Bill, *Umgängesstöd och socialtjänstens förutsättningar att tala med barn*, Proposition 2009/10:192 (Justitiedepartementet, 2010, p22; NJA 1999 s.451.

¹¹³ J Schiratzki, 'Vad Betyder det att ha Gemensam Vårdnad?' (1999) 10 *Juridisk Tidskrift*, at p1055.

¹¹⁴ Svea Hovrätt, case T455-98, 3rd November 1998.

¹¹⁵ Schiratzki, *Barnrättens Grunder* (Studentlitteratur, 3rd edn, 2006), at p111; Domstolsverket (2007) *Domstolsstatistik 2007*, Jönköping, Domstolsverket. http://www.domstol.se/templates/DV_InfoPage___868.aspx

¹¹⁶ Schiratzki, 'Vad Betyder det att ha Gemensam Vårdnad?' (1999) 10 *Juridisk Tidskrift*, at p1051.

¹¹⁷ M Eriksson & M Hester 'Violent Men as Good Enough Fathers?: A Look at England and Sweden' (2001) 7 *Violence Against Women* 779, at p792.

¹¹⁸ Barnombudsmannen, *När Tryggheten står på Spel* (Barnombudsmannen, 2005), at p58.

¹¹⁹ Statens Offentliga Utredningar, *Vårdnad - Boende - Umgänge. Barnets bästa, föräldrars ansvar*, SOU 2005:43 (Fritzes Offentliga Publikationer, 2005).

Thus, in 2006 the Parents Code was amended again. The Supreme Court has explained this change as stipulating a more careful and realistic evaluation of the prospects for child-focused co-parenting prior to the making of a joint custody order.¹²⁰ In that case, the parents had been embroiled in legal disputes almost continuously since the birth of their three-year-old daughter. This, and the father's inflexible attitude, were held to be decisive indicators against joint custody.¹²¹ This more balanced, pragmatic approach has been praised by Ryrstedt and followed in subsequent cases.¹²² Sole custody orders are now made more frequently, and although many of the cases have a background of domestic violence, the change in practice is understood in wider terms as also affecting other cases where the parents are finding it so difficult to make decisions together that this is likely to impact negatively on their children.¹²³

Lessons to be drawn from the Swedish experience

This suggests that English courts should be very careful when assuming that the symbolic benefits of shared residence justify the making of the order. Furthermore, such orders can also prove counterproductive in cases where fathers' motivations are unassailable. Rejmer concluded from her empirical work that the concept of custody had been divorced from the task of caring for the child and reduced to a purely judicial concept.¹²⁴ The same observation can be made about the English courts' current understanding of shared residence; it no longer means what a layman would understand it to mean. In Sweden, the reconceptualisation of joint legal custody has been shown to be a source of paternal irritation. One father in Mikael Gustafsson's study described custody as 'a smokescreen' which creates an illusion of co-parenting and hides 'the reality of most cases'.¹²⁵ It is understandable that where the formal order fails to achieve the expected results fathers are bitterly disappointed.

In England and Wales, evidence suggests that despite continuing gendered inequalities in both public and private spheres, men are investing more in fatherhood, both in terms of time and emotion;¹²⁶ many would expect that investment to continue after a separation. Fathers who seek shared residence to avoid becoming occasional visitors in their children's lives are unlikely to be satisfied with seeing their children once a fortnight (or even less in some cases), simply because their formal order is recorded as shared residence rather than contact. It is difficult to see how such orders can be in children's best interests, particularly since the gap between legal rhetoric and practical reality is just as likely

¹²⁰ NJA2007 s.382, at p390.

¹²¹ *Ibid*, at p394.

¹²² Ryrstedt, 'Samarbetssamtal' [2009] *Svensk JuristTidning* 821, at p822; Cases reported in *Dagens Juridik*, 15th November 2007 & 1st May 2007.

¹²³ Government bill, *Umgängesstöd och socialtjänstens förutsättningar att tala med barn*, Proposition 2009/10:192, (Justitiedepartementet, 2010), at p23.

¹²⁴ Rejmer, *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa* (Lund Studies in the Sociology of Law, 2003), at p153.

¹²⁵ Adam, one of the separated fathers interviewed in M Gustafsson, *Vad som kan Dölja sig bakom Gemensam Vårdnad och Barnets Bästa* (Mälardalens Högskola, (2002), at p44.

¹²⁶ Collier & Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study*, (Hart Publishing, 2008), at p141.

to be a source of resentment for resident mothers who continue their primary carer roles without the recognition of a sole residence order.

English family law has already justifiably been criticised for its failure to acknowledge the distress, pain and frustration experienced by parents making applications under s.8 of the Children Act 1989.¹²⁷ The current use of shared residence, if continued, will exacerbate this problem. It seems an unhappy compromise that pleases no-one, except perhaps the legal system, which is pre-occupied with finding new solutions to the perceived problem of discouraged or disengaged post-separation fatherhood.¹²⁸ The final section argues that the courts' efforts in this regard are too little, too late.

Encouraging engaged fathering

Although the research examined above demonstrates that the shared residence order is not a solution for high-conflict cases, the arrangement seems to work well enough to last for increasing numbers of Swedish families. The NBHW study showed that where families choose, and remain committed to, such shared parenting, it impacts positively on children by maintaining strong relationships with both parents.¹²⁹ It may be that governments concerned about paternal disengagement should do more to facilitate genuine shared residence by consent.¹³⁰

Despite the insistence on a near-equal sharing and involvement in children's daily lives, which also makes geographical proximity a necessity, Swedish parents are increasingly choosing to share residence. It is likely that this demanding arrangement works better in Sweden because it is a continuation of already established patterns of shared care. Moreover, it may be that separated Swedish parents find it easier to share residence because they are given a helping hand by the state.

It is noted above that the dual-earner model is firmly established in Sweden, that successive political reforms have eroded the public/private boundary with reforms explicitly aimed to encourage the re-allocation of domestic duties in more equitable ways. Swedish fathers have good opportunities to develop the parenting skills necessary for what is known to be a very difficult transition from an intact to a dual household post-separation family.¹³¹ The 'daddy month' (which has now become two months of parental leave reserved exclusively for fathers) was introduced to bolster fathers' confidence and skills by giving them extended periods

¹²⁷ *Ibid*, p159.

¹²⁸ *Ibid*, p141.

¹²⁹ Socialstyrelsen, *Växelvís Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at pp31-33.

¹³⁰ It is not suggested here that it should become the norm – the NBHW research shows quite clearly that shared residence is an extraordinarily demanding arrangement, which should be reserved for extraordinary families

¹³¹ Socialstyrelsen, *Växelvís Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at p24; Smart & Neale, *Family Fragments?* (Polity Press, 1999) at p66; B Simpson, J Jessop & P McCarthy, 'Fathers after Divorce' in A Bainham, B Lindley, M Richards & L Trinder (eds) *Children and their Families: Contact, Rights and Welfare*, (Hart Publishing, 2003), at p210.

of sole responsibility.¹³² Fathers can also share the remaining 16 months of parental leave, and have the right to flexible working as well as leave to stay at home when a young child is sick.¹³³ Although difficult to assess empirically, Swedish fathers appear increasingly committed and capable; it is likely that many mothers recognise this even at the difficult time of separation.¹³⁴

In this jurisdiction, the financial and practical obstacles may seem insurmountable for many fathers who would otherwise like to share residence. In Sweden, child support and child benefit have been reformed to accommodate shared residence.¹³⁵ The generous parental leave provisions mentioned above are also likely to assist shared residence fathers. Furthermore, nearly every Swedish child is at some point enrolled in the subsidised public childcare system; in 2008, 90% of two-year-olds attended a state-run nursery, while 80% of nine-year-olds were enrolled in after school clubs.¹³⁶ The Swedish state's continued commitment to supporting parents is likely to make it considerably easier for separated Swedish parents to organise shared residence around their other commitments.

Thus, if it is this government's policy to encourage fathers' permanent attachment to children, resources should be targeted at facilitating all parents' practical involvement in this way,¹³⁷ rather than directed at the small proportion of separated couples who cannot settle their disputes without repeated returns to court. Current Swedish legislation should be praised for its recognition that the law cannot be used to teach these parents to respect or include each other.

Conclusion

A consideration of the Swedish research has cast considerable doubt on the assertion that shared residence orders can help parents 'go away and make contact work'.¹³⁸ Instead, children pay a high price 'in order to have equal access to both parents' and while those who grew up in flexible child-focused shared residence arrangements have generally described this as a price worth paying, those whose parents were preoccupied their own conflicts often reported that the price had been too high.¹³⁹ Where parents have to be coerced into sharing residence, as many as half abandon the arrangement and where it does last there is 'a very real risk that the children end

¹³² The Universal Insurance Act (*Lag (1962:381) om allmän försäkring*) Chapter 3, paragraph 3(6); H Bergman & B Hobson, 'Compulsory Fatherhood' in B Hobson (ed) *Making Men into Fathers* (Cambridge University Press, 2002), at p110.

¹³³ The Parental Leave Act (*Föräldraledighetslag (1995:584)*) paragraph 3.

¹³⁴ Another interpretation is that the majority of mothers work, and therefore prefer not to take on the practical burdens of sole residence. This, still, requires them to have a certain level of confidence in fathers' parenting abilities.

¹³⁵ The Child Maintenance Act (*Lag (1996:1030) om underhållsstöd*) paragraph 3; The Child Benefit Act (*Lag (1947:529) om allmänna barnbidrag*) paragraph 4.

¹³⁶ Statistics Sweden, http://www.scb.se/Pages/TableAndChart___282474.aspx accessed on 27th July 2010.

¹³⁷ There are some signs that change is occurring, albeit slowly. Current policy initiatives to aid the combination of paid work and responsible active parenting for both sexes echo the policies of Sweden and other northern European countries and contribute to a changing understanding of fatherhood both at a policy level and among the men who are actively engaged in fathering practices, Collier and Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing, 2008), pp127-128.

¹³⁸ *D v D* [2001] 1 FLR 495 per Dame Elizabeth Butler-Sloss, at p503.

¹³⁹ A Singer, 'Active Parenting or Solomon's Justice? Alternating Residence in Sweden for Children with Separated Parents' (2008) 4 *Utrecht Law Review* 35, at p41; Socialstyrelsen, *Växelvis Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2nd edn, 2004), at p42.

up living with a balance of terror: cold war rather than peace'.¹⁴⁰ The reforms to joint legal custody show that the law's concern with parents' equal status and involvement in decisions can create problematic stalemates, or frustrate non-resident fathers who are not seeking symbolic status but time for hands-on parenting. Thus, it is argued that the shared residence order under s.8 of the Children Act 1989 should be restored to its intended function of regulating practical arrangements for the minority of parents who are both willing and able to make these kinds of efforts for their children's sakes.

¹⁴⁰ L Ångström (Green Party), Motion till Riksdagen 2002/03:mp833, accessed online, http://www.mp.se/files/39200-39299/file_39293.pdf