

## Active parenting or Solomon's justice? Alternating residence in Sweden for children with separated parents

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### 1. Alternating residence – actual occurrence

Alternating residence for children with separated parents has become increasingly popular in Sweden over the course of the last few decades. The first reported statistics on children with alternate living stem from the public child support system. In 1992/1993 an estimated 4% of all children with separated parents were living alternating with both parents. In 2001/2002 the corresponding number was 18%.<sup>1</sup> In 2005 it was estimated that 21% of the approximately 500,000 children living in Sweden with separated parents were living alternately with both.<sup>2</sup> Closely related to alternating residence in practical terms is when the child is formally living with one parent, but has extended visits with the other parent. It is estimated that approximately 10% of children with separated parents live permanently with one of the parents, but stay with the non-residential parent for periods of time exceeding what could be labelled as traditional visitation, *i.e.* more than every other weekend and every other holiday.

Alternating residence is in most cases the result of an agreement between the parents. However, according to Swedish law, the courts have the possibility to order alternating residence, even against the will of one parent. This indicates that alternating residence is a solution generally considered to be in the best interests of the child.

In the article, a brief background will be presented to the use of alternating residence in Sweden. Relevant legislation will be described and some of the problems noticed in connection to this kind of living arrangement will also be discussed.

### 2. Joint custody for separated parents – a background

#### 2.1. Introduction

A brief summary of the developments of the Swedish legislation on custody for separated parents is useful in order to understand the rather widespread use of alternating residence for children. An explicit objective in Swedish family law has, for a long time, been to ensure that children have good contact with both parents after the parents' separation. This can also be described as making it easier for both parents to have access to their child, even when not living together. Regardless of how one looks at the matter, it is easy to establish that one way of facilitating

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1 Government Report SOU 2005:43, *Vårdnad – Boende – Umgänge. Barnets bästa, föräldrars ansvar* (Custody – Residence – Access. Best Interest of the Child, Parents' Responsibility) Part A, p. 158.

2 SCB (Statistics Sweden), *Barn och deras familjer* (Children and their families), 2006, p. 270.

fulfilment of the goal of active parents has been to adjust the rules on custody, allowing for parents to have joint responsibility also after separation. This development has most likely promoted the use of alternating residence.

The first modern regulation on custody of children was introduced in the beginning of the 1900s. According to the 1917 Act on Children Born Outside of Wedlock, the unmarried mother had sole custody of her child. This was motivated by practical considerations; since she was unmarried it could be assumed that she lived alone and took care of the child on her own. Hence, she was given sole right to decide in matters concerning the child's personal affairs. Married parents, on the other hand, were thought to live together and consequently presumed to take joint responsibility for the care and upbringing of the child. The 1920 Act on Children Born during a Marriage consequently gave both parents joint custody. This, at the time rather radical, solution of putting both parents on equal footing as custodians was mainly motivated by egalitarian goals and not primarily justified with reference to the child's interests. If the married parents divorced, on the other hand, it was thought that both parents could not suitably exercise custody together; legal responsibility for the care of the child had to be vested in one of them. Decisive for the allocation of custody was in this situation the actual care of the child. Since the mother in most cases took care of the child she also became sole custodian. The non-custodian parent, in most cases the father, had an explicit right to have access to the child. The law stated that a father or a mother, who was not the custodian, should not be deprived of the right to access to the child, unless there were certain special circumstances.

## ***2.2. Joint custody if both parents consented***

The 1920 Act remained in force for many years. Towards the beginning of the 1960s, the law on custody and access began to appear outdated, in part due to the fact that divorce had become more common. Most children with separated parents lived with the mother. Since custodial responsibility as a general rule was given to the parent who had the actual care of the child, the mother in most cases became the sole custodian. Many fathers as a result lost contact with their children after separating from the child's mother. It appeared that access rights were not enough to rectify this. The fact that only one of the parents was entitled to be vested with custody after the divorce also generated many disputes in court concerning custody, even if the mother in most cases was eventually vested with sole custody.

The solution to the problem of the 'disappearing' father was the introduction in 1976 of a possibility for divorced parents to retain joint responsibility after divorce.<sup>3</sup> At the same time it also became possible for unmarried parents to be vested with joint custody. Joint custodial responsibility entailed a joint right and obligation to decide in all matters concerning the child. A prerequisite for joint custody was that the parents agreed. Joint custody after separation could in other words be decided only at the request of both parents. All matters concerning the child required a joint decision by the parents with one exception: If an agreement was not reached, the parent not living with the child could be obliged by the court to pay child maintenance.

The 1976 reform of the custody rules, making it possible for separated parents to have joint custody, and thereby a joint right to decide, was from a principal point of view a significant step in the development of custody as a legal concept in Swedish law. It was no longer necessary to have the actual care of the child in order to have the right to decide in all matters concerning the child. The fact that legal responsibility and actual care in a formal sense were separated from one

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3 Government Bill (*Proposition*) 1975/76:170, *Faderskap och vårdnad* (Paternity and custody).

another and thereby perceived, at least to some extent, as independent aspects of parenthood, indicates that the relationship between the child's right to care and the obligation to provide that care was weakened. Legal custody of a child became a right to decide in all matters concerning the child, without a responsibility to actually care for the child. In this way legal custody appeared more as a right for the parents than an obligation towards the child. This thought can be illustrated by a comment in the *travaux préparatoires* where it is stated that in many cases the circumstances are such that a parent can relatively easily accept that the other parent takes care of the child, if he [*sic*] can remain legal custodian.<sup>4</sup> This statement also illustrates one of the other main goals of the reform, *i.e.* to minimise the number of custody disputes in court.

In 1982 joint custody for separated parents became the main rule and the parents were required to renounce joint responsibility if they did not want it. In other words, consensus between the parents remained a precondition for joint responsibility, but now demonstrated by both parents refraining from asking for sole custody.

### **2.3. Joint custody if tolerated by a reluctant parent**

Joint custody seemed to promote children's contact with a parent they did not live with.<sup>5</sup> For that reason the law was changed again in 1992, stating that if it was considered to be in the best interests of the child that the parents had joint custody, this could be decided even if one of the parents preferred sole custody.<sup>6</sup> It was now enough that the reluctant parent would tolerate joint responsibility. Only in those cases where one of the parents was explicitly against joint responsibility could sole custody be vested with one of them. This reform can be seen as another landmark in the development of the custody rules in that it was no longer required that the parents agreed on joint responsibility and the resulting joint right to decide on matters concerning the child. Since it was foreseen that the parents in this situation might not be able to solve questions concerning visitation rights, a possibility for the court to decide on this matter was introduced, despite the fact that joint custody presupposed joint decision making in all matters concerning the child.

The 1992 reform resulted in joint custody becoming the most frequently chosen solution also for separated parents who could not reach an agreement on custody. One reason for this could have been that many parents were afraid to explicitly oppose joint custody since that entailed a risk of losing custodial responsibility altogether. The courts also deemed joint custody to be in the best interests of the child and often chose this solution. Maybe not surprisingly, most children with separated parents still stayed with the mother who remained the primary care-provider.<sup>7</sup> Since one of the key reasons for changing the law to make joint custody the main rule was the assumption that this form of custody encouraged the child's contact with the parent not living with the child – in particular the father. It is interesting to note that no real follow up was conducted after this reform regarding contact frequency. Available data, however, indicate that contact between children and the parent they were not living with did not increase, rather the

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4 Government Bill 1975/76:170, p. 143. This statement is repeated in the following reforms in support for expanding the possibilities to decide on joint custody for separated parents. See Government Bill 1990/91:8, *om vårdnad och umgänge* (about custody and access), p. 32 and Government Bill 1997/98:7, *Vårdnad, boende och umgänge* (Custody, residence and access), p. 51.

5 Follow up studies showed that children with parents with joint custody had better and more frequent contact with the non-residential parent than when one parent had sole custody, Government ministry report, Ds 1989:52, pp. 48-49.

6 Government Bill 1990/91:8.

7 Statistics from 1992 showed that after separation the parents had joint custody for 82% of the children. The mother had sole custody for 17% of the children and the father for 1%. According to the estimates 91% of the children lived with the mother. SCB (Statistics Sweden), *Demografiska rapporter* (Demographic reports) 1994:2, p. 39.

opposite.<sup>8</sup> The reasons behind this were never investigated. The general opinion seems to have been that joint custody for separated parents is in the best interest of the child and this did not need evaluation.

#### **2.4. Joint custody against the will of one parent**

Considering the development of the custody rules in the 1980s and 1990s it is maybe not surprising that the law was amended once more in 1998 in order to promote the use of joint custody, a form of custody that was considered to be ‘an important part in the development taking place towards a stronger emphasis on the child’s interests’.<sup>9</sup> Consequently it was made possible for the courts to decide that custody should be shared between the parents even if one of them was explicitly opposed to this.<sup>10</sup> An important limitation, however, was that joint custody should be decided only if it was in the best interests of the child. Furthermore, it could not be ordered if both parents were against it. The Supreme Court stated in a leading case the following year that the law should be interpreted as meaning that sole custody should be given to one of the parents only when there were particular circumstances contradicting joint custody.<sup>11</sup> In practice the new rule was used as a presumption for joint custody, a presumption that had to be counter proven if sole custody was to be decided. The result was that parents, as long as one of them was in favour, even when they had such a deep disagreement on custody that they actually had turned to the court for a decision, were given joint custody, and thereby a joint right and obligation, to decide in all matters concerning the child.

In order to facilitate out-of-court agreements between parents a possibility to have their agreement on questions concerning custody, access or residence confirmed by the Social Welfare Committee was introduced with the 1998 reform. The confirmation of the agreement makes it valid as a court decision. The agreement can be confirmed only if what is agreed is not obviously detrimental to the best interests of the child.<sup>12</sup> The most remarkable feature of the 1998 reform was, however, the introduction of a possibility for the courts to decide on alternating residence for the child, even against the will of one parent. This will be further explored below in the following sections.

#### **2.5. Restricting the use of joint custody**

Joint custody against the will of one parent was put into extensive use by the courts following the Supreme Court decision in 1999. This practise was soon criticised by many, among them the Swedish Children’s Ombudsman. Investigations of court practice after the 1998 reform indicated that the possibility to decide on joint custody was used in cases where there were good reasons to question if it was in the best interests of the child.<sup>13</sup> Parents that could not reasonably be expected to co-operate in a way that would give the child good living conditions were still given joint custody. The law concerning joint custody was consequently changed again in 2006. The Parental Code now states that when assessing the best interests of the child, the social authorities and the court must take into account, in particular, the risk of the child or any other member of the family being abused, or of the child being unlawfully abducted, retained or otherwise being

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8 A comparison between the statistics on contact between children and the non-residential parent shows a decrease in contact frequency between the years 1984-85 and 1992-93. SCB (Statistics Sweden), *Barn och deras familjer* (Children and their families) 1992–93, p. 25.

9 Government Bill 1997/98:7, p. 49.

10 The Parental Code, Chapter 6, Section 5.

11 Supreme Court decision NJA 1999, p. 451.

12 The Parental Code, Chapter 6, Section 6.

13 Barnombudsmannen (The Children’s Ombudsman), *När tryggheten står på spel* (When Security is at Stake), BO2005:02.

harmful. A provision stating that the courts should pay particular attention to the parents' ability to co-operate before deciding on joint custody has also been introduced in order to prevent, or at least limit, the use of joint custody where this would not be appropriate. There are reasons to believe that this provision will limit the use of joint custody against the will of one parent.<sup>14</sup> Limiting the use of joint custody against the will of one parent will also limit the possibilities to decide on alternating residence in cases when the parents do not consent.

However, alternating residence has become a widely accepted form of living arrangement for children with separated parents. The efforts of the Swedish legislature underlining the importance of parents taking joint responsibility for their children after separation has no doubt contributed to this. Many parents have also found this way of organising life after separation very satisfying and it is not likely that this will change as a result of the legislative emphasis that this option should only be used when the parents are able to co-operate. Alternating residence is certainly here to stay.

### **3. Alternating residence**

#### ***3.1. Legal background***

As was mentioned above, the possibility for the court to decide on alternating residence was introduced in 1998, together with the possibility to decide on joint custody against the explicit will of one of the parents. However, joint custody against the will of one parent meant that parents with great difficulties would be forced to reach joint decisions in matters concerning the child. This could prove to be problematic in certain cases. There was an obvious risk that some parents would not be able to reach an agreement even on the most basic questions concerning the child, such as where the child was to live. It was therefore necessary to create a method to resolve disagreements between the parents concerning the child's residence. Such an option was also seen as a way to facilitate the use of joint custody since it, again, was assumed that it could be easier for a parent to accept the child living with the other parent than sole custody being given to that parent.<sup>15</sup> Since most children with separated parents live with their mother, the parent referred to was in most cases the father. The lawmaker in other words assumed that fathers would settle for joint right to decide, but would not demand to have the actual care of the child. However, there were already indications that some fathers also wanted to exercise actual care of the child. As was indicated earlier, even in 1992/1993 it had been estimated that approximately 4% of children with separated parents were alternating living with both of them.<sup>16</sup> It was, in other words, apparent that there were fathers who would not settle for only having part of the legal responsibility. This insight might partly explain that the courts were given the option to decide on alternating residence even when the parents had joint custody against the will of one of them.<sup>17</sup>

It is obvious that if the parents agree on joint custody and alternating residence, court decisions regarding the alternating residence can be a useful option in order to confirm the parents' agreement, thus thereby provide a binding way to regulate some practical questions. The legal regulation acknowledges this. However, with respect to the child, the court can only confirm the parents' agreement if what agreed on is considered to be in the best interests of the child. An agreement between the parents is usually seen as a guarantee of this.

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<sup>14</sup> Supreme Court decision NJA 2007, p. 382.

<sup>15</sup> Government Bill 1997/98:7, pp. 51, 57.

<sup>16</sup> SCB (Statistics Sweden), *Barn och deras familjer 1992–93* (Children and their families 1992–93), p. 24.

<sup>17</sup> The Parental Code, Chapter 6 Section 5. In the Government Report preceding the change of the law, nothing is mentioned about this particular consequence of the possibility to decide on living, Government Report SOU 1995:79, pp. 88-90.

However, making it possible to decide on alternating residence against the will of the one parent would appear to make alternating residence a goal in and of itself. It is remarkable that this option was given in addition to the possibility to decide on joint custody against the will of one parent. Even more remarkable is the fact that this was done without any discussion whatsoever. In the *travaux préparatoires* there is no advice concerning under what circumstances the option of deciding on alternating residence is to be used and no clarification of what factors to consider. All that is said is that the courts' decision can entail the child living with one of the parents or alternating with both.<sup>18</sup> The impression is that alternating residence without closer analysis became an automatic step in the development of the rules concerning custody of children. If the legal responsibility is shared between the parents, so should the actual care. In addition, dividing the child's time equally between the parents when they cannot reach an agreement is an easy way of reaching an equitable solution.

### **3.2. Defining alternating residence**

In legal terms there are some difference between alternating residence and extended visitation. A court decision on residence can only be given when both parents are custodians.<sup>19</sup> A decision on residence states that the child shall live with one of the parents. The term alternating residence is not used in the Parental Code. A decision on alternating residence thus states that the child is to live with both parents.

Visitation, on the other hand, can be determined regardless of the custodial status of the persons involved, *i.e.* when both parents have custody, but also if one of them has sole custody.<sup>20</sup> In reality the difference between alternating residence and extended visitation might not be visible, since it is possible to decide that the child shall reside with one parent and visit the other parent up to 50% of the time.

In practice, it has been determined that when both parents have custody and the child spends more than 40% of the time with one parent and slightly less than 60% of the time with the other it is alternating residence.<sup>21</sup> It is also required that this arrangement has some permanency or is intended to become more permanent. Consequently, if the child spends less than 40% of his or her time with one parent, it is regarded as involving extended visits. If only one of the parents has custody of the child, it is never regarded as alternating residence, even if the child spends half of the time with each parent.

## **4. Follow-up on alternating residence**

### **4.1. Alternating residence in practise**

There has been some, albeit limited, follow-up on alternating residence for children in Sweden in recent years. In 2000, the National Board of Health and Welfare conducted a study. The purpose was to find out how alternating residence was put into practice, its advantages and disadvantages and how children were influenced by alternating residence.<sup>22</sup> The results of the study indicated that parents who had opted for alternating residence were positive to this way of organising life after separation. Children who had experienced alternating residence emphasised

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18 Government Bill 1997/98:7, p. 56.

19 The Parental Code, Chapter 6, Section 14 a.

20 The Parental Code, Chapter 6, Section 15 a.

21 See *e.g.* Supreme Court decision NJA 1998, p. 267 and Court of Appeal decision RH 1993:64.

22 Socialstyrelsen (The National Board of Health and Welfare), *Växelvis boende. Att bo hos pappa och mamma fast de inte bor tillsammans* (Alternating residence. To live with dad and mum even when they are not living together), 2004, p. 7.

as positive that they were given the opportunity to develop close and good contact with both parents. However, they also pointed out that it sometimes was stressful not to have a stable place of their own. Some of the children expressed a wish that their living arrangements could change from time to time, but stated that they were afraid to take this up with their parents.<sup>23</sup>

Parents who had had alternating residence imposed by a court decision were, maybe not surprising, not as positive. Many of them pointed out that they had not been able to co-operate prior to the decision and were also not able to do so afterwards. It was also noted that in many cases the arrangement with alternating residence was not implemented; one year after the court decision, alternating residence was practiced in only one out of every two cases.<sup>24</sup>

One conclusion from the study was that alternating residence is in itself neither good nor bad. It depends on how the arrangements are handled by the parents. A prerequisite for a workable solution is that the parents manage to avoid conflict. It is also important that they live close to one another in order to facilitate that the child can attend school and retain the same friends even when the residence is changing. The parents also have to be very flexible and sensitive to the wishes of the child. Alternating residence can without doubt burden the child. As it is said in the report from the National Board of Health and Welfare, the child pays a price in order to have equal access to both parents.<sup>25</sup>

#### **4.2. Re-evaluating alternating residence as a legal option**

Following the study by the National Board of Health and Welfare, in 2002 a governmental committee was given the task to evaluate the 1998 custody reform. This involved studying the consequences of the new regulation for joint custody and residence. The committee studied 249 district court cases from the first half of 2002. In 125 of these cases the parents were engaged in conflict regarding the child's residence. In 51% of the cases it was decided that the child should live with the mother, in 34% of the cases with the father and the remaining 15% of the cases it was decided that the child should alternately live with both parents. In 66 out of the 125 cases there was a claim by one of the parents for alternating residence. The courts rejected three out of four of these claims and decided on alternating residence only in 19 cases. However, in 15 out of these 19 cases the decision on alternating residence was against the will of one parent.<sup>26</sup> The reasons for deciding on alternating residence was in one out of every two cases that such an arrangement was justified with regard to the child's need for close and good contact with both parents. The child's own desire to live alternately with the parents was given as a reason in almost every other case. In many cases it was also stated that the parents did not have severe difficulties co-operating and that the parents lived close to one another. In two cases it was also stated that alternating residence had been the previous arrangement and that the child's need for continuity spoke in favour of continuation of the arrangement.<sup>27</sup>

The evaluating committee organised several hearings on the subjects of its investigation, among them alternating residence. The committee found that in general the possibility for the court to decide on alternating residence against the will of one parent was seen as positive, even if a restrictive use was recommended by many. The committee declared that it considered alternating residence as a living arrangement that under the right conditions could function quite well and could provide the child a natural and unstrained contact with both parents in the

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23 *Ibid.*, p. 8.

24 *Ibid.*, p. 8.

25 *Ibid.*, pp. 8-9.

26 Government Report SOU 2005:43 Part B, pp. 757-761.

27 *Ibid.*, p. 761.

different events of everyday life that is not possible when the child lives with one parent. In its final report the committee took the opportunity to elaborate on the preconditions for deciding on alternating residence since this form of living arrangement demands that certain requirements are met.<sup>28</sup>

The child's own opinion is of great importance. The committee stated that the child's own opinion on how the living arrangements should be organised must, with increasing age and maturity, be respected and, for the oldest children, even decisive. It was also pointed out that for many children it is more self-evident to have an opinion on where to live, than on the question of custody, thus underlining the importance of consulting the child.<sup>29</sup> Another factor to consider before deciding on alternating residence for a child is, according to the committee, if one of the parents is against such an arrangement. A basic requirement that needs to be met prior to considering alternating residence, is whether the parents have the ability to co-operate with regard to the issue of the custody of the child and that they do not let their own conflict influence the child's situation. Experience indicated that joint custody and alternating residence against the will of a parent does not work as a means to force the parents to co-operate in matters concerning the child. Studies and experiences from child psychiatry has also shown that if the parents cannot co-operate or if there are serious conflicts between them, there is a risk that this affects the conditions for alternating residence. This form of living then becomes a source for continuous conflict that negatively affects the child. If one of the parents is guilty of violence or other degrading treatment of family members, the committee was of the opinion that neither joint custody nor alternating residence should be considered.<sup>30</sup>

Moreover, the commission found that the ability of the parents to be flexible is vital for the success of alternating residence. The needs of the child must always be paramount. Few grown-ups would accept to have their lives strictly and irrevocably planned for a long time in advance. Depending on the child's activities the parents must be able to adjust their schedules to fit the child's needs. Alternating residence cannot be a question of absolute fairness between the parents and should not be seen as a way of equally dividing the child's time between the parents or as a tool to achieve equality in the relationship between parent and child. On the contrary, it is necessary for the conditions of the child to develop continuously to accommodate for the child's needs and wishes. The child's time with each respective parent must be allowed to vary from one time to another.<sup>31</sup>

The committee did not find a specific age when alternating residence could be said to benefit the child. There had been discussions of a three-year age limit, indicating that younger children should not be subject to alternating residence. Even if such an age limit was based on well-founded reasons, according to the Committee, it could not be said to be absolute. The conditions for the individual child could differ greatly. If the child had lived with one parent for a long time, even maybe his or her whole life, a change to alternating residence could be dramatic also for an older child. The same could be true for a child who had lived with both parents but having had one of them as the primary care giver. On the other hand, in many families today, both parents take an active part in the child's life and care and the preconditions for alternating residence could in such cases be good.<sup>32</sup>

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28 Government Report SOU 2005:43 Part A, pp. 157-163.

29 *Ibid.*, p. 159.

30 *Ibid.*, p. 160.

31 *Ibid.*, pp. 160-161.

32 *Ibid.*, pp. 161-162.



The committee also emphasised that the parents must live reasonably close to another if alternating residence is to be considered in the best interest of the child. Cases had been reported where children had alternating residence also when the parents lived far away from one another, in some cases more than 1000km. Even if the parents are in agreement on such arrangements, and co-operating parents in general can be assumed to provide good care of the child, it was difficult, according to the committee, to get away from the impression that these arrangements had more to do with the parents desire to have equal share in the child's life, than a genuine desire to see to what was best for the child.<sup>33</sup>

In summary it can be said that the committee underlined the importance of carefully judging the circumstances in the individual case before deciding on alternating residence, whether this was decided by the parents themselves or by the court. As a reminder to the courts it was emphasised that alternating residence should not to be decided when the parents had difficulties co-operating and should not be used as a way to create something adjacent to equal sharing of a child between the parents. Alternating residence was not discussed extensively in the subsequent government bill. The government stressed that alternating residence should not be used when the parents had problems co-operating, but saw no reason to abolish the possibility for the court to decide on alternating residence for the child against the will of one of the parents altogether.<sup>34</sup>

## **5. Emerging problems with alternating residence**

### ***5.1. Child support and alternating residence***

The practical implication of whether the child has alternating residence or is just visiting with one parent becomes apparent when determining child support. According to the Parental Code parents are to provide maintenance for the child according to what is reasonable having regard to the needs of the child and their collected resources.<sup>35</sup> This means that each parent should have a share in the costs for the child proportional to his or her economic ability. If one parent has 80% of the total earnings of the parents, that parent should pay 80% of the costs for the child's support. Parents living with the child fulfil their maintenance obligation by taking care of the child and catering to the child's needs in day to day life. A parent not permanently living with the child should pay maintenance allowances, regardless of whether he or she has custody.<sup>36</sup> The obligation to pay maintenance allowances can be determined by means of an agreement between the parents or by the court. A parent who lives permanently with the child may only be compelled by the court to provide special maintenance payments if he or she neglects the duty to maintain the child. This option, however, is never used in practice, seemingly because it is assumed that a parent living with the child automatically fulfils his or her maintenance duty.

Due to the wording of the law there are no legal grounds for obliging a parent to provide special maintenance payments when the child is living alternating with both parents. The reason is that the child is considered to live permanently with both parents. In this situation both parents are thought to fulfil their duty by virtue of their actual care of the child. Grounds for such an assumption may be present when both parents share a similar economic level, when they share the child's costs equally and when they co-operate. As is well known separated parents do not

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33 *Ibid.*, pp. 162-163.

34 Government Bill 2005/06:99, *Nya vårdnadsregler* (New custody rules), pp. 52-53.

35 The Parental Code, Chapter 7, Section 1.

36 The Parental Code, Chapter 7, Section 2.

always manage to collaborate in the best possible way. In these instances, and when one of the parents has a greater economic ability – which means that he or she according to the main rule should cover a greater part of the child’s economic needs – there is limited support for the assumption that the costs of the child is naturally divided between the parents according to the main rule of the law. For instance, the parent that is supposed to cover 80% of the child’s economic needs cannot automatically be expected to do this in 40% of the time, thus compensating for the costs that are to be covered when the child is with the other parent. The parent who is supposed to cover 20% of the child’s economic needs might find it difficult to manage when having the child in some cases more than half of the time.

The situation is further complicated by the fact that it is possible to receive maintenance support from the Swedish Social Insurance Agency. According to the Maintenance support law,<sup>37</sup> maintenance support can be paid to the parent with whom the child is living permanently, if the parent liable to pay maintenance fails to do so or simply as an advance payment of maintenance. The maintenance support is not means tested and is a fixed sum paid monthly. The Social Insurance Agency then endeavours to obtain reimbursement from the person liable to provide maintenance. If the full sum paid as maintenance support cannot be retrieved from the parent liable to pay maintenance, the difference is paid as a supplementary payment in order to guarantee the child a certain economic level. Since it is not possible to determine maintenance payments when the child has alternating residence, it is always possible to apply for maintenance support in these cases. When the child has alternating residence, however, the parent applying for maintenance support will receive half of the amount that would normally be paid. This sum is reduced in consideration of that parent’s own capability to pay maintenance.

Without going into the rather complicated methods for calculating maintenance support, one can conclude that this system makes it possible to give public support to families that have alternating residence, which could not be paid to children in cohabiting families or to children who are living permanently with one of the parents.

## **5.2. The registration of child’s residence**

The registration of the child’s residence in the national population register is another question that has been discussed in relation to children with separated parents with an alternating residence regime.<sup>38</sup>

The National Tax Board registers the child’s residence independently of the custody of the child.<sup>39</sup> A parent with sole custody has the exclusive right to decide in all matters concerning the child and the child will consequently be registered with that parent. If the parents have joint custody, but are not living together the situation becomes more complicated. As a general rule a child should be registered at the address where he or she spends most nights. This is also the case when the child has alternating residence. If one of the parents remains in the previous family home this will be the registered address of the child. If both parents have moved, an independent assessment will be carried out. The parents’ opinion, even if they are in agreement at which address the child should be registered, is of no relevance for the decision of the National Tax Board.<sup>40</sup> The result is that when the child has alternating residence it becomes very difficult to

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37 *Lag om underhållsstöd* (1996:1030).

38 The questions concerning problems with social benefits in connection with alternating residence is discussed *i.a.* in A. Wickström, ‘Barn som bor hos var och en av föräldrarna – skärningspunkt civilrätt/offentlig rätt (Children who live with each one of the parents – intersection of private/public law)’, 2004 *Förvaltningsrättslig tidskrift*, pp. 329-356.

39 Government Bill 2005/06:99, p. 53.

40 Supreme Administrative Court decision RÅ 1997 ref. 8.

determine where the child is to be registered and from the parents perspective the decision can be perceived as arbitrary.

The question of where or with whom the child is registered is of importance for the child when it comes to, *inter alia*, access to health care. For any other treatment than emergency treatment, the child has to turn to a hospital in the area where the child is registered. If the child has alternating residence in two different areas, this could cause problems. Another practical question for both child and parents that has been discussed is the right to enrol in a school and free school rides. A child has a right to go to school in the municipality where the child is registered. The decision in which school the child is to be enrolled has to be taken by the parents together. This has caused problems when parents are not in agreement in which school should be chosen and there are cases where the child has been enrolled in different schools. This problem is accentuated when the child has alternating residence and both parents would like for the child to be in a school close to his or her home. Parents with joint custody have to register the child in the school. When the parents are not in agreement the question of which school the child is to attend is decided by the registered address. Since the child with alternating residence can have to travel a long way to school half of the time, the cost for school rides can also cause problems. The municipalities will only pay for rides within the municipality. For the single parent it therefore can be of great importance to have the child registered at his or her address.

### **5.3. Social benefits and alternating residence**

The question of registration is not only of importance to the child. For a parent the registration of the child on his or her address can have great economic consequences since many forms of social benefits to children are paid to the parent living with the child. Social benefits are of great importance for single parents. Estimates show that around 30% of a single parent's disposable income consists of social benefits. For single mothers this percentage is almost 37%.<sup>41</sup> The system of paying social benefits to single parents has been reformed in recent years in order to decrease the importance of the child's registered residence. All children in Sweden are entitled to a state child allowance. When the child has alternating residence the parents can notify the Social Insurance Agency that half of the child allowance should be paid to each one of them. However, this requires consensus and the possibility is used infrequently. If no notification is made the child allowance is automatically paid to the mother.<sup>42</sup> Other social benefits, such as housing allowance, as well as families with children and childcare allowance paid to a parent taking care of a sick or disabled child at home, are paid to the parent registered as living with the child.

## **6. Discussion – concluding remarks**

All available information indicates that the most important prerequisites for alternating residence to function well is that the parents are not in conflict with one another and that they can cooperate. The question is whether this rather mundane requirement is addressed by the legal system. To solve conflicts between the parents, thus protecting the interests of the child, can be said to be one of the main purposes of the law concerning matters of custody and residence. A possibility to decide on joint custody and alternating residence against the will of one parent clearly contravenes such an ambition. There are no convincing arguments for introducing such

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41 SCB (Statistics Sweden), *Income distribution survey 2005*.

42 There are suggestions that the child allowance always should be paid to both parents, but no legislation has been passed.

an option or to retain it. The fact that it exists in Swedish legislation is difficult to understand, let alone justify. Mechanically dividing the time with the child equally between unwilling parents has nothing to do with justice or the best interests of the child.

Alternating residence when the parents are in agreement can, on the other hand, be encouraged, but only if the parents are co-operating the whole time that alternating residence continues. The aim for the legal system must therefore be to help parents to co-operate. In this respect improvements can be, and to some extent have been, made.

One factor to consider is the court process itself. There are indications that court proceedings concerning questions of custody and residence spur conflicts and efforts should, for that reason, be made to shorten the length of the process. It can be questioned if conflicts concerning custody and residence should be handled at all by the regular courts, as is the case in Sweden. If the goal is to improve co-operation between parents, a less formal way of handling conflicts would probably be more efficient. One way of doing this could be to develop the existing possibility for parents in conflict to turn to the Social Welfare Committee in their community to get help to reach an agreement. In their present form these talks are not sufficient.

Questions related to the economy for separated parents with alternating residence also need to be addressed. The lack of a possibility to have maintenance payments determined when the child has alternating residence is remarkable considering the general rule that each parent should take part in the costs for the child proportional to his or her economic ability. It is well known that economic questions are often at the core of conflicts between separated parents. The regulation of the division of costs for a child with separated parents must for that reason be perceived as just and the results as predictable. Consensus agreement should be encouraged and the rules should also be simple to put into practice. This can not be said about the Swedish system today. The result is that in some cases economical considerations are behind the decision to choose alternating residence for the child. Many parents have a – sometimes justified – impression that alternating residence for the child will improve the parent's economy. The parent with the higher income is provided an incentive to ask for alternating residence in order to avoid paying maintenance and the parent with the lower income has reasons to refuse alternating residence in order not to lose different kinds of social benefits or special maintenance payments.<sup>43</sup>

Furthermore the regulation concerning social benefits should to be amended in order to function well with alternating residence. It is apparent that the administrative system has not been able to adjust to the rapid increase of the use of alternating residence for children with separated parents. As it is today, the system is constructed for children living permanently with one parent, and the inadequacy of the regulation can cause conflicts between the parents when the child has alternating residence. A possibility to make equal, but divided, payments of different social benefits to both parents would probably alleviate some of the problems that are present today. Split child benefits would also indicate that both parents are equally important as parents. On the other hand, there is a risk that a division of social benefits could serve as an even stronger incitement for alternating residence for economical reasons than today, and possibly to an increase in court proceedings. This would not be in the best interests of the child. The ambition must be to create a system that does not prevent or hinder the parents to reach an agreement on alternating residence. But the system should not encourage alternating residence for economic reasons. A good starting point would be to look at who is actually paying the different costs of

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43 The National Board of Health and Welfare (*Socialstyrelsen*), *Växelvís boende. Att bo hos pappa och mamma fast de inte bor tillsammans* (Alternating residence. To live with dad and mum even when they are not living together), 2004, p. 26.

the child. Maybe it is reasonable that one parent has the main responsibility for paying, for example, the child's clothes or leisure activities, even when the child's residence is alternating. Splitting the benefits does not necessarily mean that each parent take equal part in all costs.

Last but not least, further research is needed to clarify children's experiences of alternating residence. The main argument in favour of alternating residence is that it is in the best interests of the child. It is being underlined that this is an arrangement that provides the child natural and unstrained contact with both parents in the different events of everyday life that is not possible when the child lives with one parent. But are there disadvantages seen from the child's perspective? Of this, very little is known. Before further encouraging the use of alternating residence a follow up should be done. It is quite noteworthy that this has not been done considering that it is a solution being promoted as a way to protect the best interests of the child.