CHILDREN'S WELFARE IN FAMILY LAW

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IN THE FIELD of family relations it is perhaps more obvious than elsewhere that it is impossible to model real life in strict accordance with abstract ideals by applying legal rules. The rôle of law must be regarded as much more modest, though law is undoubtedly by no means unimportant for the development of family life in general. Accordingly it would be wrong to take the principles and rules embodied in the family law of any country as a correct statement of the real situation regarding family relations in that country. The problem of the general influence of law upon the trends in family life requires very deep and far-reaching study, and this is true also of the more special problem concerning the effectiveness of legal rules about parents and children. What this paper will present is not the result of such a study. Its purpose is merely to deal with some ideas about the legal relations between parents and children, with special reference to Swedish family law. The sociological aspects cannot be discussed here. The restriction to "family law" means that I shall deal mainly with questions belonging to the field of private law (Swedish: *civilrätt* or *privaträtt*) or to closely related fields.[1] My intention is not to give a comprehensive review of the relations between parents and children in the field of private law but only to make certain comments and indicate certain viewpoints.

The word "children" is used here not in a specific technical sense but in its general meaning, unless otherwise stated. Accordingly in this paper, the terms "child" or "children" cover illegitimate as well as legitimate offspring irrespective of age.

I

It may perhaps be of interest to say a few words here about the historical evolution of Swedish law concerning parents and children.

The general history of Swedish family law has followed the

[1] To a great extent this paper is founded on the author's book (in Swedish) *Föräldrarätt*, Stockholm 1956.

same lines as the evolution of the corresponding rules in other legal systems originally based on North Germanic law and later influenced by the medieval Church, by the Reformation, by the successive changes in society in the following centuries and by various ethical and social ideas, economic changes and other factors in modern times.

In very early times it seems to have been possible to dissolve a marriage without any great difficulty. It seems also to have been a generally accepted custom that husbands might have concubines (*frillor,* sing. *frilla*). No sharp distinction seems to have been made between legitimate and illegitimate children as categories having clearly different legal positions. The system rather recognized a series of various grades as regards the legal situation of children. Concubinate children probably had a better position than children born of an unfree mother or children born of casual liaisons.[2] Children living as members of the family were submitted to the far-reaching paternal authority of the head of the family (the husband-father). Originally the latter seems to have been permitted to expose new-born children, although later on this was forbidden. Thus the *Gotlandslagen* (the Provincial Code of the Island of Gotland) states in Ch. 2 *principium:* "Furthermore every child born in our country shall be duly brought up, and shall not be cast out."[3]

The influence of the Church led to a modification of customs and morals in many respects and at the same time to a more rigorous conception of marriage. While this conception can from several points of view be regarded as a sign of higher moral standards, on the other hand it had severe consequences for illegitimate children, whose situation gradually deteriorated. Signs of this change can be found in Sweden as early as in the era of the so-called provincial codes (the period before 1350) and the same trend is clear in the subsequent development. The two general Swedish codes of the middle of the 14th century, the General Rural Code and the General Urban Code, gave concubinate children the right to claim very restricted sums from

[2] See Lagberedningen, *Förslag till lag om barn utom äktenskap m. m.*, Stockholm 1913, p. 57; Delin, *Om oäkta börd samt oäkta barns rättsställning enligt äldre svensk rätt*, Lund 1909, *passim;* Maurer, *Die unächte Geburt nach altnordischem Rechte,* Sitzungsber. der Ak. der Wiss., München 1883, tom. 1, pp. 1 ff.; Holmbäck, *Ätten och arvet,* Uppsala 1919, pp. 70 ff.; Holmbäck–Wessén, *Svenska landskapslagar,* I, Stockholm 1933, Östgötalagen p. 136 note 12.

[3] Holmbäck–Wessén, *op. cit.* IV, p. 205, with remarks p. 245. Concerning the old custom of exposing children see also the same work, I, Östgötalagen, pp. 23–24, and II, Dalalagen, pp. 14–15.

the estate of a deceased father or mother. The codes declared the parents responsible for the support of such children up to the age of seven years only. Children conceived in adultery or incest were excluded from all inheritance rights.

In the 16th century, after the Reformation, the institution of divorce was introduced in cases of adultery or desertion, but the situation of the children was not regulated. From the 17th century may be mentioned a statute of 1669 on guardianship. A Royal Decree of 1697 made both parents of children born out of wedlock responsible in principle for the support of such children up to the time when they were able to support themselves.

In the year 1734 a new General Code was introduced in Sweden —which at that time included Finland. This code, covering the fields of private law, criminal law and procedure, had still no general rules about the relations between parents and children. The law of parents and children therefore remained for the most part unwritten. Concerning illegitimate children the code said that they could take property by way of inheritance only through their own descendants; they were however entitled to get a bare minimum from the father and the mother up to the time when they could maintain themselves. This provision was later construed in the courts as meaning that, when the father or the mother died before that time, the child was entitled to claim the capitalized sum of the remaining maintenance.

The rules of 1734 were very often criticized in later times. Until 1917, however, they were changed only in a few respects. By a Royal Decree of 1866 illegitimate children became entitled to a restricted right of inheritance from their mothers, and a statute of 1905 gave them the same rights of succession as legitimate children in respect of their mothers and maternal relatives. It must also be pointed out that the real situation of illegitimate children had gradually improved. It may furthermore be noted that in 1902 a statute was passed dealing with the care of foster-children and of demoralized children. This statute was the first step towards modern social welfare legislation in this field.

It must also be remembered, when judging the legal system before 1917, that many children who are now regarded as illegitimate were at that time classified as legitimate. This was the case when the parents were or afterwards became betrothed or when the child was conceived after promise of marriage; in certain circumstances the child was even regarded as legitimated through a subsequent promise of marriage. These special rules were rem-

nants of an old system in which the parents in such situations were regarded as united in a so-called uncompleted marriage.

The radical change through which modern humanitarian ideas were introduced in the Swedish law concerning parents and children took place in the years 1917 and 1920 as the result of a series of new statutes dealing with illegitimate children, adoption, the status of legitimacy and the parents' duty of maintenance, personal guardianship and education. In 1924 a detailed statute was passed concerning guardianship in respect of property belonging to minors or to persons declared incapable of managing their own affairs. In the field of social welfare this reform of family law was complemented by the Childrens' Welfare Act of 1924.

As a result of continued work on a formal revision and codification of Swedish family law, the main statutes of 1917 and 1920 and the first-mentioned statute of 1924 were later amalgamated in the so-called *Föräldrabalk* (Parents and Children Code) promulgated on June 10, 1949. This fundamental enactment will hereinafter be referred to as FB.[4]

II

Even a cursory study of the legal literature of different modern countries will show that the welfare and adequate education of the nation's children is commonly affirmed as the basic principle of the laws concerning parents and children. The welfare of the children is the basis of what we may call the official legal ideology. This principle is also obviously in perfect harmony with the spirit of the Universal Declaration of Human Rights, adopted and proclaimed by the United Nations. The general idea that all human beings are born free and equal in dignity and rights (article 1) is completed, *inter alia,* by the principles that all children, whether born in or out of wedlock, shall enjoy the same social protection (article 25, paragraph 2) and that everyone has the right to education (article 26, paragraph 1); the education shall be directed to the full development of the human personality (article 26, paragraph 2). It is true that these principles concern public law more than private law, but their spirit has consequences in the latter field also.

[4] The most important preparatory documents are: (1) *Ärvdabalkssakkunnigas förslag till föräldrabalk* (Draft Parents and Children Code), Stockholm 1946 (Statens offentliga utredningar 1946: 49); (2) *Kungl. proposition* (Government Bill) no. 93/1949; (3) *Första lagutskottets utlåtande* (Report of the 1st Parliamentary Committee on Legal Matters) no. 34/1949.

It will be enough here to give only a few quotations showing how the principle of the welfare of children in its general form is affirmed as the basic principle. I shall start with Planiol, *Traité élémentaire de droit civil,* vol. I, 5th ed. 1950, who at the very beginning of the chapter on paternal power *(puissance paternelle)* declares (p. 655):

> Ces droits et ces pouvoirs ne sont accordés aux parents que comme conséquence des devoirs qu'ils ont à remplir: il n'y a de puissance paternelle que parce qu'il y a des *obligations* nombreuses à la charge des père et mère, obligations qui se résument toutes dans un seul mot, l'éducation de l'enfant.

From Germany I quote Beitzke, *Familienrecht,* 4th ed. 1955, p. 101:

> Zur Durchführung der elterlichen Erziehung gewährt das BGB [das Bürgerliche Gesetzbuch] den Eltern an dem Kind ein absolutes Recht in Form der elterlichen Gewalt. Diese ist aber nicht ein freies, eigennütziges Herrschaftsrecht, vielmehr ein im Interesse der Entwicklung des Kindes zu einer selbständigen Persönlichkeit geregelter Komplex von Rechten und Pflichten.

The same general idea can be found in many typical statements of, for instance, Swedish legislative committees and jurists, and this idea is undoubtedly the guiding principle of the Swedish legislation of 1917–1920 and of the new FB of 1949.

The principle is stated also in countries whose government is based on social ideas differing from those held in countries of "western" type. As an example may be quoted *Sowjetisches Zivilrecht,* vol. II, Berlin 1953 (edited by Prof. S. N. Bratus and published by the Federal Institute of Legal Sciences at the Ministry of Justice of the USSR, translated and published in German by the "Deutsches Institut für Rechtswissenschaft" in East Germany). According to the communist doctrine of law, as reproduced in this semi-official treatise, the family law of capitalist countries is characterized by emphasis on the powers of the parents, especially of the father, and not on their duties. Children born out of wedlock are said to be without any rights *("völlig rechtlos")* under capitalist laws (*op. cit.,* pp. 454–455). On the other hand, it is claimed to be a characteristic of the Soviet law that the rights of the parents are at the same time duties of the parents. The parental rights are to be used exclusively in the interests of the children (p. 436).

If at first sight the basic principle seems to be the same every-

where, it is on the other hand well known that the legal rules about parents and children in force in the various countries differ widely, and this seems to indicate that the principle itself is in fact only a general phrase and as such is very vague. This vagueness makes it necessary to be very cautious when dealing, in comparative legal studies, with the phrase about the welfare of children. It is necessary to examine, for every country concerned, the real meaning of the words.

Another fact must also be stressed here. Even if the welfare of the children is said to be the basic principle in a given country, this does not exclude that the legislator takes some other points of view into consideration, too. The welfare of the children is always, consciously or unconsciously, balanced against other important interests or principles, such as the interest, in cases about paternity, of arriving as nearly as possible at the biological truth, or the interest in many types of cases of protecting marriage and family as social and legal institutions, etc. Below I will try to give a few examples of various ideas about the welfare of children and of various methods of balancing this concept against other interests regarded as relevant.

III

Should the welfare of children govern not only the rules about parental power, education, the normal amount of maintenance etc., but also the principles about the establishing of paternity and of the duty of the putative father to contribute to the maintenance of the child?

As far as children born out of wedlock are concerned, the answer has been different in different countries. In any case the balance between the conflicting interests has been found in different ways. *Mater semper certa est,* and it is but natural that the law has made the mother of an illegitimate child responsible for the support and the education of the child. But what about the father? If it is supposed to be possible to establish the paternity, why should not the father also be responsible at least for the economic needs of the child? This seems to be a clear consequence of the idea of the welfare of the child, provided that the community itself is not willing to pay for the full support of the child and in this way to make any contribution from the parents unnecessary. The responsibility of the father seems also to be an inevitable consequence of the idea of equal treatment for both sexes. If the legislator regards the welfare of the children as a

preponderant interest, it is possible that he is of the opinion that this interest requires that an economic responsibility should be established not only if a certain person is proved to be the real father but also if a person is proved to have had sexual intercourse with the mother in such circumstances that the possibility of his being the father may be said to exist. On the other hand, the legislator can hold the opinion that the biological truth is more important than the aim to find someone to pay for the child in cases where the real paternity seems to be doubtful. Whether the legislator in such cases is ready to find other ways of giving the child effective support, e.g. from public funds, is another matter. Finally, the legislator may find that some other interests which in his opinion are very important require restrictions of the legal possibilities of establishing the paternity and making the possible or real father legally responsible for the child. These interests may in given circumstances perhaps be regarded as so important from the point of view of the legislator that he excludes every responsibility on the part of the father. But it seems on the other hand quite clear that in this case the idea of the welfare of the children as the governing principle has been disregarded, even if this idea is officially proclaimed by the same legislator as the general justification of the rules concerning parents and children.

As is well-known the original provision of the French *Code Civil* was: *La recherche de la paternité est interdite* (art. 340). This rule was subsequently modified to a very great extent, but traces of the original principle still exist in French law, and the same is true of the law in Belgium. These systems of compromise between conflicting interests have obviously drawn up narrow limits for the idea of the welfare of the children in the special field now discussed, even if nowadays the rules are more favourable to the children than before. The less favourable treatment of children born in adultery or incest that still exists e.g. in France (*Code Civil* art. 342) seems from a modern standpoint to be a very conservative system in evident conflict with the principle of children's welfare.

In Germany the action for paternity is generally admitted (*Bürgerliches Gesetzbuch* § 1717). The father is regarded as being the man who has had sexual intercourse with the mother within the period of possible conception; the *exceptio plurium concumbentium* is however permitted and leads, if proved, to the consequence that no paternity will be stated. The paternity founded

on this provision is not regarded as a proved real (biological) fatherhood but only as a *"Zahlvaterschaft"*, and an action concerning real fatherhood, *"blutmässige Abstammungsklage"*, is regarded as another, independent form of action.[5] But through § 1717 it is usually possible to find a "legal father", responsible together with the mother for the maintenance of the child.

In Denmark and Norway another type of system prevails, which is still more favourable for the children. In these countries it is not correct to speak only of admissibility of actions for paternity. The purpose of the legal rules is to promote through public assistance either a recognition by the father or an action against him. If a man has had sexual intercourse with the mother within the critical period, he is presumed to be the father and can be declared the father by the court. The *exceptio plurium concumbentium* is admitted. The consequence, however, of this exception is not the acquittal of the defendant but only that he and other possible fathers may all be declared responsible for the maintenance of the child (the details of this joint responsibility of the possible fathers differ somewhat in the two countries). In this situation no formal "fatherhood" is declared but only a so-called "duty of contribution". This distinction is of great importance, as the legal consequences of a declared fatherhood *stricto sensu* according to Danish and Norwegian law are in principle the same for illegitimate as for legitimate children. Accordingly Danish and Norwegian law recognise two forms of "paternal responsibility" for children born out of wedlock: the normal form of full "fatherhood", and the lower form of mere economic responsibility, "duty of contribution" without declared fatherhood, a form which can be used against several possible fathers at the same time.

The Swedish system is not the same. Swedish law does not know the distinction between "fatherhood" and "duty of contribution" but has only one form of action for paternal responsibility. This action is in principle regarded as concerning biological fatherhood, although the result of the action, i.e. declared legal paternity, is founded to a great extent upon legal presumptions, which means that the paternity must be supposed to be fictitious in some cases. On the other hand, the consequences of declared paternity are not in general so far-reaching as in Denmark or Norway. The main general consequence is a duty of maintenance; as regards so-called "betrothal children" the consequences go further (a "be-

[5] Cf. Palandt's edition of *Bürgerliches Gesetzbuch*, remarks to §§ 1589, 1593, 1717; Beitzke, *Familienrecht*, 4th ed., München and Berlin 1955, pp. 142 ff.

trothal child" is entitled to the name of the father and is his heir-at-law). The maintenance given by the father shall in principle be of the same amount as if the child were legitimate.

Paternity may according to Swedish law be declared with binding effect either through voluntary recognition (in the form prescribed by FB) or by judgement of the court. The rule about the declaration of paternity through judgement was, according to the statute of 1917, that the man who was proved to have had sexual intercourse with the mother during the period of possible conception should be declared the father, unless he could prove that his paternity was *impossible* (e.g. by producing evidence of impotence). *Exceptio plurium concumbentium* was not allowed. This very severe system, through which the judicially declared paternity was very often a fictitious one, was to a great extent justified by the wish of the legislator to guarantee the welfare of the child by assigning to it a person who would pay for it as a father. But undoubtedly the system in some cases gave the mother the possibility of choosing between several possible fathers. Gradually the courts accepted more and more the results of blood tests as evidence of the impossibility of the defendant's paternity, if the conclusions of the medical experts concerning the blood tests were formulated in a sufficiently absolute manner; but still the system was hard on the putative father. By FB, 1949, the rule has been made a little less absolute. The law now says that the man proved to have had sexual intercourse with the mother within the period of conception shall be declared the father, if it is not *improbable* that he is the father (FB 3: 2). But still there must be a very high degree of improbability. As a striking example may be quoted the decision of the Supreme Court in a fresh case, *Ytterman* v. *Högström*, 1956 N.J.A. 329.

> In this case a boy was born out of wedlock on March 25, 1952. His weight was 2450 grammes and his length was 48 centimetres. The question was whether the pregnancy could have been caused by a coition which had taken place only 227 days before the birth. Blood tests and other anthropological investigations did not exclude the defendant's fatherhood, nor could they be said to render his fatherhood improbable. The official medical experts said that it was improbable, but not impossible, that the boy could be the result of a coition 227 days before the birth. The medical experts generally mean by "improbable" a probability less than 10 per cent, and in the actual case the statistical probability was said to be 9.4 per cent in respect of the weight and only 2.8 per cent as regards the length. The Su-

preme Court found that this degree of improbability was not enough to satisfy the word "improbable" in FB 3: 2. No facts indicated that the mother had had a liaison with another man in the period of possible conception. Consequently, the defendant was declared to be the father of the boy.

The improbability can be proved in several ways; nowadays, owing to the steady scientific progress in this field of anthropology, the most important practical method is naturally the evidence derived from blood tests. The period of gestation is normally now estimated to be 240–300 days before the birth, but the court has to take regard to the concrete circumstances of every case. In normal cases *exceptio plurium* is in principle not admitted, but may be used in cases where the difference in time between the coition of the defendant and the coition of the alleged third person would in itself prove a sufficiently high degree of improbability of the defendant's fatherhood.

This slightly modified new Swedish system may possibly be a little less favourable to children born out of wedlock, but on the other hand the social welfare system nowadays gives the children better support than before, and it may therefore be said that the final outcome of the rules now in force is probably at least as satisfactory as that of the system in force in the 1920's, when the Act of 1917 was fresh.

The reform brought about through FB naturally indicates a higher valuation than before of the interest of stating the real biological fatherhood and reducing the rôle of fictions. It may well be possible to advance further in this direction without real danger to the welfare of the children, by relying still more on the social security system. This is the leading idea of a draft presented in 1954 by a special committee on inheritance law and related questions.[6] The committee wishes in general to give a child born out of wedlock the same rights of inheritance as a legitimate child, and is of the opinion that for this purpose it is necessary to amend the legal system of establishing paternity. The committee would therefore admit *exceptio plurium* and in principle bring all the possible fathers as defendants before the court, in order that the court shall have the opportunity to declare as the father the defendant who is most probably the biological father. The aim of the procedure would still be to establish the fatherhood, and therefore only one man could be declared re-

[6] *Ärvdabalk. Förslag av ärvdabalkssakkunniga* (Draft Inheritance Code). Stockholm 1954. (Statens offentliga utredningar 1954: 6.)

sponsible for the child. The proposal has been criticized and has not yet been brought before the Swedish Parliament. What I here wish to underline is that this proposal tries to find a new point of balance between the leading principle about the childrens' welfare and other important interests. It aims at promoting a system of legal paternity corresponding more closely to the biological fatherhood. Amendments on this point are considered necessary before giving illegitimate children in general a better position as heirs-at-law. At the same time, however, the proposal involves a disadvantage or a deterioration for those children who through the new system would perhaps lose a now existing possibility of finding a paying legal father. This probably very small group would be compensated through social welfare assistance. The example is interesting as showing the complicated balance system of legislative aims and the difficulty of pointing to a particular solution as the right one having regard to the welfare of the children.

A few words may be added here about the solution embodied in the Soviet law. I have already indicated that the welfare of the children is proclaimed as the leading principle of Soviet law concerning parents and children, contrary to what is said to be the case according to capitalist laws. It is difficult to judge of the final effect of the Soviet rules, as this would require a detailed analysis of the social welfare measures in the Soviet society. But it is in any case very interesting to find a quite different "point of balance" in modern Soviet family law from that in the legal systems of, for example, the Scandinavian countries. After the change in Soviet family law through the decree of July 8, 1944, and other legislative measures connected with this reform, the natural relationship between the father and the child born out of wedlock does not give effect to any parental rights or duties. The father has accordingly no duty of maintenance, and the child is not his heir-at-law. The paternal rights and duties presuppose the existence of a registered marriage between the father and the mother.[7] On the other hand the principle of Soviet law is that

[7] The Code of Laws on Marriage, Family, and Guardianship, of the RSFSR of November 19, 1929, art. 29 (as amended April 16, 1945) runs as follows (English version by Gsovski, *Soviet Civil Law*, vol. 2, 1949):

"The mother shall have no right to sue in court a person with whom she has not contracted a registered marriage for establishment of fatherhood and payment of alimony for support and maintenance of a child by such person."

Corresponding rules are in force in other Republics of the USSR. See further *Sowjetisches Zivilrecht*, vol. 2, pp. 479–480, 487, 528 ff.

illegitimate and legitimate children have equal rights as citizens of the USSR. Motherhood is honoured even if the mother is not married. An unmarried mother is entitled to the same public assistance as other mothers. She may get the special help given to mothers with many children, and she may as a mother be decorated with orders and medals. An unmarried mother is entitled to grants from the State for the support of the children, according to a scale laid down by law. She is also entitled to place her child in a public childrens' home, where it will be supported and educated at the expense of the State. What these public advantages mean in practice as a counter-balance to the missing responsibility of the father cannot be estimated without special investigations.