

Silencing the Conflict of Interests between Parental Rights and the Rights of the Child? Legal Requirements for the Social Services to Interview Children

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The starting point for legislation concerning responsibility for children and child law is that it deals with both civil and public law. This means that conflicts can arise between the different interests that the fields of law are set to protect since the applicability of civil law can be limited by public law and vice versa.

In the Swedish legal system parental rights are stated in the Children and Parents Code [*föräldrabalken*]. A biological parent has a fundamental right to custody, residence and contact with the child. These civil rights can be claimed by the parent in court. The Children and Parents Code also gives children the right to protection from inadequate care and mistreatment and states a ban on corporal punishment towards children. Swedish legislation is based on the fact that the carer has the primary responsibility to provide for the child's well-being and the carer have the right to decide in matters concerning their child. The carer is the child's legal representative and the child do not have the authority to initiate an action in court concerning custody and safety etc.

In addition to the primary responsibility of the carer to provide for the child's needs the legal system regulates that the society has a utmost responsibility to provide children with entitled protection. This may be seen as a compensation for the child's insufficient legal competence to claim protection independently and guarantees protection for the child when this can not be provided by the parents. Social services have been given legal authority to decide concerning the child that may involve a limitation of the fundamental rights of the carer. This means that parental rights, regulated by civil law, can be restricted by the authority of the society, regulated by public law.

In accordance with the ambitions of a welfare-state some interventions are accepted in order to give children entitled care and protection. How parental rights are restricted and how far the societal responsibility and authority for children reaches is a balance between different interests. This is a political, ideological and legal question.

In some respects the Swedish legal system gives legible answers as to when the society are authorised to intervene. In other situations of big practical importance the law do not provide an answer and it is therefore uncertain where the limit goes between parental rights and the authority of the social services. Ratifying of the UN's Convention on the Rights of the Child (the Children's Convention) and the introduction of the principle of the best interest of the child has not resulted in a different interpretation of applicable law. In addition, the principle of the best interest of the child has been criticised for its open construction that might conceal arguments for different stand-points and value assumptions.¹

This matter is brought to a head concerning the possibility of social authorities to interview a child without the carer's consent and/or knowledge. In child protection investigations there is often a need for social authorities to interview children in order to consider the need of protection and to find the best possible protection. Social authorities can face a difficult balance when there are signs that a child is being mal-treated and that co-operation with the parent is not a practicable option. In some cases interviews with children must be held

1 See Eekelaar J., *Beyond the welfare principle*, Child and Family Law Quartely Vol 14, No 3 2002 p. 237-249.

without parental consent and/or knowledge in order to get the best available information of the child's situation and need of protection. Whether such interviews are authorised is not explicitly regulated in the Swedish judicial system. This means that the legislator does not give guidance how to solve the conflict of interests and leaves social authorities with uncertain mandate to act and investigate. In practice, the social services are, more often than not, faced with situations where interviews with children without the carer's consent or knowledge are necessary in order to assess the child's needs.

Questions concerning the social services exercise of public authority rarely lead to judicial adjudication. The established practice comes from supervisor authorities and the Parliamentary Ombudsman. This practice do not have precedential value since the decisions concerns specific cases and the statements are primarily to be seen as in-casu statements. In addition, the decisions from supervisal authorities and the Parliamentary Ombudsman can not be appealed. In lack of other precedent practice these decisions have big impact in the social services work especially since the statements from the Parliamentary Ombudsman often influence both national and local guidelines.

The question on how to solve the conflict of interest between parental rights and the authority of society to intervene was actualised in a matter addressed to the Parliamentary Ombudsman. In the decision that followed² the Parliamentary Ombudsman found that interviews with children without the carer's consent may only be held in "serious situations which could almost be considered emergency situations".

The decision from the Parliamentary Ombudsman does not bring clarity on how to solve this question. In lack of an explicit regulation the social services find themselves in ambiguity. Considering the large impact of a decision from the Parliamentary Ombudsman the judicial interpretation made can influence how the social services act in child protection cases. This in turn can affect a child's possibility of getting the entitled protection and care.

This article deals with the conflict of interests between parental rights and the society's responsibility with a focus on interviews with children without the carer's consent. The aim is to closer investigate the limits of parental rights from a child perspective and interpreting the mandate of the social services in child protection matters in the light of the principle of the best interest of the child. The interpretation by the Parliamentary Ombudsman will be scrutinized and an alternative legal argumentation from a child perspective will be given.

1 Civil Law – the Right of the Child and the Right and Responsibility of the Parent

A distinguishing feature of childhood is the child's dependence on the individual adult's care. According to Children and Parents Code a child has the right to care, safety and a good up-bringing. Usually, the child's parent is the best custodian of the child's rights and the best provider of care. This is also the basis

2 Announced in October 2005 (20051010 ref. no. 1059-2003, 4857-2003).

of the law. The carer has the primary responsibility of the child and the obligation to provide for the child's well-being. In correspondence with the primary responsibility the carer has the right to decide in matters concerning the child. The carer must exercise this duty and right regarding the age and maturity of the child. According to the carers rights and responsibilities it is the carer that represents the child in both legal and personal matters. The carer also has a status as a party in several legal matters concerning the child. In most cases this is for the benefit of the child. The carer is the person who has the best capacity and knowledge to represent the child and in other ways look after the interests of the child. The civil rights of the carer are therefore motivated from the perspective of the child. For the majority of children, this serves as a guarantee of the entitled care and protection. However, when there is, or might be (and therefore needed to be investigated), a conflict of interests between what the carer wants or claims on the one hand and what the child needs on the other hand, the civil right of the carer can become an obstacle in relation to the rights and needs of the child.

2 Social Law – the Responsibility of the Society

2.1 *Protection of the Child*

Historically children's situation used to be a strict family concern. As the society has developed and become a welfare society, the interest in children's upbringing and wellbeing has increased. Nowadays it is a social concern and responsibility regulated in social welfare laws like Social Services Act [*socialtjänstlagen*], the Care of Young Persons (Special Provisions) Act [*lagen med särskilda bestämmelser om vård av unga*] (LVU) and The Education Act [*skollagen*], which includes the obligation to attend school.³ The rights of the child are also stipulated in international conventions as the Children's Convention. Children are now considered to have a right to integrity vis-à-vis their carer and a right to assistance irrespective of their carer. The principle of the best interest of the child has increasingly dominated child legislation.

2.2 *The Responsibility for Vulnerable Children*

In Sweden, we have a generally high level of child welfare and many children live and grow up in a good and friendly environment. This is however not the situation for all children. Even in a modern welfare society such as ours, there are children subjected to inadequate care, mistreatment and sexual abuse in the home. When a parent fails in their care, society assumes a responsibility, which goes beyond the general welfare commitments. If the primary responsibility for children lies with the carers, the ultimate responsibility to provide support and protection to vulnerable children lies with the municipal social services committees. This responsibility is regulated by the Social Services Act and the Care of Young Persons (Special Provisions) Act.

3 Johanna Schiratzki, *Barnrättens grunder* [The Foundations of Child Law] (Lund: Studentlitteratur, 2005), p. 13 ff.

A fundamental responsibility for Swedish municipalities and the social services committee's is to provide all persons, including children, a "reasonable standard of living" (*skälig levnadsnivå*). This also includes other than economical measures, for example different types of treatment and contact persons. The social services measures are however based, in the first instance, on voluntariness. In a child protection case this means that the ambition is to give help to the child with the consent of the child's carer. It is only when voluntary measures are not enough and when the parents' ability is so inadequate that it constitutes "a serious danger to the child" (*påtaglig risk*) that the society may intervene and take action without the carers' consent. There is a big gap between "a serious danger to the child" and "a reasonable standard of living". In practice this means that in a situation that is not "a serious danger to the child" the possibility for the child in question to obtain "a reasonable standard of living" fully depends on the willingness of the parent.

3 The Tools to Realize Demand of Protection

3.1 *Discovery and Identification*

Discovering and identifying the situation and needs of vulnerable children is difficult. Usually it is someone close to the child who fails in their care, neglects or assaults the child. In many cases, there are no witnesses or visible evidence. More often than not, aside from the suspected perpetrator, it is only the child who knows what has happened. When the social services committee becomes aware that a child is at risk, an important investigative measure is to interview the child. The risk of a perpetrator close to the child trying to conceal their actions and influencing the child to not reveal anything should not be underestimated. Apart from their own involvement, there are other factors which may cause a carer to be reluctant to cooperate with the social services. Such factors can be bad experiences with the social services or concern that the child may suffer distress from such contact. It may, therefore in cases where there are indicators of the child being at risk, be extremely important that the child is interviewed without first obtaining the consent of the parent.

3.2 *Investigative Tools*

If information has come to the social services attention that a child might be at risk causing it to take action it is their duty to start an investigation. It is through these so-called child protection investigations that vulnerable children can be identified, and the need for support and protection investigated. The child protection investigation can also determine whether a family should be offered support on a voluntary basis or whether compulsory measures are required to ensure the child's right to support and protection. In order to carry out its duty to investigate cases involving children, the social services is able to make contact with expert and others in the child's environment without the carer's consent.

The question of whether a child can be interviewed during a child protection investigation without the carer's consent or knowledge is currently unclear. Swedish law does not provide any explicit regulation. Applying the provision of immediate custody by virtue of the Care of Young Persons (Special Provisions)

Act solely for the purpose of interviewing a child is not possible. There must be a likelihood that the child needs to be provided with care by virtue of the same Act. Interviewing a child during a child protection investigation without the carer's consent is a far-reaching measure and must have good justification in each case. Where there is reason to believe that a carer is not acting in the child's interest, interviewing the child without the carer's consent or knowledge may, however, be crucial for the social services obtaining information on the child's situation and needs. Interviewing the child in question may be a prerequisite for a satisfactory investigation and, therefore, a correct decision.

When a crime is suspected and this has been reported to the police, the investigative tools of the criminal procedure are brought into play. The social services can in this way obtain information in order to assess the protection and care needs of the child. In many cases, however, the criminal procedural process is not always a practicable way. For example, situations in which a child may need care or protection cannot always be defined as crimes.

4 The Conflict is Exposed – Child Interviews Without the Carer's Consent and/or Knowledge

4.1 *The Parliamentary Ombudsman Decision*

In a decision announced in October 2005 (20051010 ref. no. 1059-2003, 4857-2003), the Parliamentary Ombudsman looked at the legal requirements for social services to interview a child without the carer's consent during an investigation. In the decision, the Parliamentary Ombudsman found that interviews with children without the carer's consent may only be held in 'serious situations which could almost be considered emergency situations'. The decision concerned the difficult balance a social services committee can face when there are signs that a child is being ill-treated and that working together with the parent is not a practicable option.

4.2 *The Circumstances in the Specific Case and the Parliamentary Ombudsman's Assessment*

In an application to the Parliamentary Ombudsman, a complaint was lodged from a carer about the handling of the applicant's child by a social services committee. Information had come to the social services attention that the girl was unhappy and had suicidal thoughts. Within the framework of a child protection investigation the person in charge interviewed the applicant's then 10-year-old daughter at her school 'without the mother's consent and even against the mother's wishes'. The person in charge of the investigation was of the opinion that an interview with the girl would not take place with the mother's cooperation as the mother had declined all contact. The child protection investigation was concluded after the interview with the child with a recommendation of voluntary measures.

The Parliamentary Ombudsman agrees with the social services assessment that there was a need to talk to the 10-year-old girl, but contends that explicit legislation is required in order to go against the will of a carer. The

Parliamentary Ombudsman refers to the European Convention for the Protection of Human Rights and the Fundamental Freedoms (the European Convention), Article 8 on the right to respect for one's private and family life and the carer's right to make decisions concerning their child in accordance with the Children and Parents Code.

The Parliamentary Ombudsman states that the carer's right to make decisions must be the starting point in the social services' cases concerning children and draws a comparison with the Act on Special Representatives for Children [*lagen om särskild företrädare för barn*]. With the passing of this law, explicit regulation in criminal investigations was created. This means that the special representative assumes the carer's authority to make decisions in matters concerning the criminal investigation, for instance interviewing the child. The Parliamentary Ombudsman stated that in absence of an equivalent regulation in child protection investigations, the Children and Parents Code's provisions governing the carer's right must be given precedence over the Social Services Act. The Parliamentary Ombudsman also discusses the opportunity to appoint a public counsel and representative for the child in a child protection investigation when compulsory care can be actualised. It is pointed out that such a representative can give consent for the investigator to interview the child.

The Parliamentary Ombudsman's conclusion is that, in a child protection investigation, an interview with a child who is not old enough to make decisions may only be held without the carer's consent in a serious situation 'which could almost be considered an emergency situation'. A more specific definition of what such an emergency situation might be is not evident in the decision. According to the Parliamentary Ombudsman's interpretation of applicable law, the possibility of interviewing a child is, therefore, dependent on the child's decision-making competence and, for younger children, dependent on whether an 'emergency situation' exists.

5 Interpretation from a Child's Perspective

5.1 "A Serious Situation"

The Parliamentary Ombudsman only permits interviews with children without the carer's consent in serious situations. In the case in point, the Parliamentary Ombudsman agrees with the social services' that there was a need to interview the 10-year-old girl, but was of the opinion that her suicidal thoughts did not constitute a serious situation. According to the Parliamentary Ombudsman, it is, therefore, not sufficient that there exists a need to hold an interview. In interpreting what constitutes a serious situation, there is an obvious risk of the carer's right to integrity being set against the child's need to have their situation investigated. If the situation is serious, such balancing is excluded. In our opinion, a serious situation must always be assessed independently. The social services assessment must have its starting point in the Social Services Act's intentions, the child's best interests or at least the least detrimental for the child.

5.2 *Applicable Law*

5.2.1 **The European Convention and the Children's Convention**

In interpreting applicable law from a child's perspective, the starting point is the European Convention, which covers the rights of children and adults.⁴ All states party to the Convention are also party to the Children's Convention. According to Swedish law, the European Convention takes precedence over the Children's Convention, but is to be interpreted in the spirit of the Children's Convention. The European Convention imposes, *inter alia*, the prohibition of torture and inhuman or degrading treatment or punishment (Article 3) and the right to liberty and security of the person (Article 5). The European Court of Human Rights has declared that states party to the Convention have by doing so undertaken to 'provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.⁵ In other words, the Court verifies that society has a special duty to investigate and provide protection to vulnerable children. Thus society has a greater responsibility regarding measures aimed at children than those aimed at adults.

The European Convention also prescribes that everyone has a right to respect for one's private and family life (Article 8). The parent's right may only be restricted by law and must be necessary, for example, to prevent crime or to protect other people's liberties and rights. In Swedish law, the Care of Young Persons (Special Provisions) Act constitutes a legal opportunity for society to restrict the right of the carer. What the child's rights, according to Article 8, mean in cases where the family life constitutes a risk to the child's health and development is in some respects unclear. In a number of cases the matter has been reviewed by the European Court of Human Rights. What is clear is that a parent's right to family life with the child is not inviolable and that the child's right to private and family life is not considered to be violated if the family life is in the best interests of the child.⁶ When the interests of the child and the parent diverge, a balance between both sets of interests must be sought, according to the European Court of Human Rights. Special importance must be given to the child's best interests, and the child's best interests must be given precedence over the parents' right to family life with the child.⁷

5.2.2 **The carer's authority to make decisions in a criminal investigation**

As mentioned above, the Parliamentary Ombudsman draws a comparison with the Act on Special Representatives for Children. According to this Act, the special representative assumes the carer's authority to make decisions in matters

4 Johanna Schiratzki, *Barnrättens grunder* [The Foundations of Child Law] (Lund: Studentlitteratur, 2005), p. 20.

5 *E and others v United Kingdom*, appl. 33218/96, 26 Nov. 2002, § 88.

6 *Sommerfeldt v Germany*, appl. 31871/96, 7 July 2003, § 64, *Elsholz v Germany* (GC), appl. 25735/94, § 50 and *T P and K M v the United Kingdom*, appl. 28945/95, § 71.

7 Johanna Schiratzki, *Högsta domstolen meddelar dom om umgänge med barn – kränks Europakonventionen* [The Swedish Supreme Court Passes Judgement on Relations with Children – The European Convention is Violated], *Juridisk Tidskrift*, 2003-04, pp. 642–652.

concerning the child in criminal investigations where regard is not being given to the child's interests by the carer. The Parliamentary Ombudsman assumes that the carer, in accordance with the Children and Parents Code, has the authority to make decisions concerning the child and, thus, also concerning the question as to whether an interview with the child may be held during a preliminary investigation. The fact that the carer's right in this way is given precedence over the Code of Judicial Procedure's [*rättegångsbalken*] provisions on interviews has been questioned. It has been claimed that the question of interviewing a child during a preliminary investigation is not covered by the carer's authority to make decisions, especially when the child's carer is the person suspected of the crime.⁸ Nor is it claimed in the preparatory work for the Act on Special Representatives that the carer's right to make decisions concerning the child as evidence in a preliminary investigation is unconditional.⁹ Against this background, the Parliamentary Ombudsman's comparison can be discussed.

It can also be said that the social services' task differs considerably from the purpose of the criminal investigation, to take legal proceedings against and investigate crime. The social services have the ultimate responsibility of providing support and protection to vulnerable children, and the child protection investigation is the tool and the requirement for fulfilling this responsibility. Against this background, the provisions of the Children and Parents Code regarding the carer's right cannot, according to the Social Services Act, be given clear precedence over the child's right and the social services' responsibility and duty to investigate.

5.2.3 The Social Services Act's intentions in child cases

The social services has been given main social responsibility to investigate a child's needs and, if so required, provide support and protection. To initiate a child protection investigation is under certain conditions a duty, irrespective of the carer's consent. In all measures concerning children, regard must be given to the child's best interests. The child's right to be heard is now also stated explicitly in the Social Services Act. The preliminary work to the provision concerning a child's right to be heard shows that, in the event of a conflict of interests between the child and the adult, the child's interests must be given precedence.¹⁰

Despite its role of supporting and protecting children, the social services shall respect parental rights as carer. For example a carer has the right to access all information and documents pertaining to a case concerning a child. It must, however, be pointed out that the social services primary task is to protect vulnerable children, not to protect parental rights. The Parliamentary

8 Helena Sutorius & Anna Kaldal, *Bevisprövning vid sexualbrott* [The Testing of Evidence in Connection with Sexual Offences] (Stockholm: Norstedts juridik, 2003), p. 229 and Christian Diesen & Helena Sutorius, *Expertrapport – sexuella övergrepp mot barn – den rättsliga hanteringen* [Expert Report – Sexual Assaults on Children – The Legal Approach], The National Board of Health and Welfare, 1999, p. 28ff.

9 Government bill 1998/99:133, p. 9f.

10 Government bill 1996/97:124, p. 100.

Ombudsman's comparison with criminal proceedings and the institution of special representatives for children thus falls short.

The Parliamentary Ombudsman also discusses the opportunity in a child protection investigation to appoint a public counsel and representative for the child who can give consent for the investigator to interview the child. However it must be pointed out that such a representative, in most of the cases, is provided at a much later stage.¹¹ Furthermore, it is unclear if a decision by such a representative to interview a child is executable.

5.2.4 Presumed consent

Professionals who come into contact with children often talk to them presuming the carer's consent has been given. Support for such a presumption can be found in the provisions of the Children and Parents Code concerning the carer's responsibility for the child's best interests. In light of the carer's responsibility and duties to the child, the carer is expected to be in favour of an interview being held with the child. Such interviews take place, for example, in care situations and in the social services' visiting work. It is open to discussion whether the same presumption can be made during a child protection investigation, as long as the carer has not clearly stated that the child must not be interviewed.

6 Concluding Remarks

It can be established that the conflict of interests which can arise between the demand to investigate the needs of a child and a parent's right does not have a clear outcome. As already stated above the question whether the social services can interview a child without the carer's consent is not explicitly regulated. The conflict of interests between parental rights and the society's responsibility to investigate and protect children remains.

In the light of the difficult balances which the social services often face and the impact of the Parliamentary Ombudsman's decisions, the present decision of the Parliamentary Ombudsman can have serious consequences for the rights of children. In practice, the question remains: how does the social services assess if there is a serious situation? Irrespective of whether it involves assessing if there exists a suicide risk or whether sexual assault is suspected, the child can be the central – if not the only – source of information. How can a decision be made on whether an emergency situation exists, if interviewing the child is the only way of getting information? With the Parliamentary Ombudsman's interpretation, many children risk not having their life situation investigated, as required.

To begin with it is vitally important that it be made clear that the assessment of whether an emergency situation exists should always be made independently. It is only when a serious situation can be excluded, but the need to interview still

¹¹ A problem is that the National Board of Health and Welfare in its general advice on the application of the Care of Young Persons (Special Provisions) Act (SOFS 1997:15) states that the question of providing public counsel can only be considered if the committee deems that care outside the home may be a consideration, which excludes cases where the form of the care measures is still unclear.

exists, that a balance between the carer's right and the child's need can come into play.

The Parliamentary Ombudsman states that the basis of the Social Services Act must be the parent's authority to make decisions concerning the child. In this way, a parent's perspective is emphasised without consideration being given to the Social Services Act's intention to provide help and protection to vulnerable children. The Parliamentary Ombudsman's view seems to suggest that the primary interest when interpreting applicable law lies with the rights of the parent. Such a presumption involves restricting the social services investigation options and, thus, jeopardising the intentions of the Social Services Act.

The Parliamentary Ombudsman's decision can, however, also be seen as a request for legislation in this matter. A clear regulation which gives the social services the opportunity to interview a child even without the carer's consent is essential and would, in our opinion, safeguard the responsibility of the society and the legal rights of both the child and the parent.¹² Another option is to expand the legal possibility to appoint a public counsel and representative with the authority to give consent to an interview with the child at an earlier stage of the child protection investigation.

It is our opinion that even today – without an explicit regulation - applicable law must be interpreted from a child's perspective and with the child's best interests as the starting point. In a conflict of interests, the child's interests shall be given precedence and be the guiding principle for the social services' investigative measures. This means that, in the absence of an explicit regulation of the right to interview a child, such an investigative measure must still be possible in order for the social services to be able to fulfil their commitments in accordance with the law.

In conclusion, it can be noted that based on a child's right, in accordance with the European Convention on Human Rights and the Children's Convention and the intentions of the Social Services Act, a child's interests in being given support and protection cannot be considered subordinate to the adult's interest in integrity. The parent's right, according to the Children and Parents Code, must be set against the child's right to care, security and good upbringing. To safeguard children's rights requires an identical view of children and adults, otherwise a child's rights risk becoming simply symbolic.

12 Such an amendment of the law are requested by the investigator in a official report written after the present decision by the Parliamentary Ombudsman. The investigator concludes that the social services are in need of legal prerequisites to interview children even without the carer's consent and knowledge. SOU 2007:52 *Beslutanderätt vid gemensam vårdnad m.m.* p. 131 ff.