

The Rule of Law and Custody of Children in Sweden – What Would King Solomon Have Done?

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1 King Solomon and the Rule of Law ¹

In ancient times, or so we are told, two women living in the same house, each the mother of an infant child, came to King Solomon, who held a court of justice. One of the babies had been killed, and each claimed the remaining baby as her' own. Calling for a sword, King Solomon declared his judgment: the baby would be cut in two, each woman was to receive half. One of the mothers did not contest the ruling, declaring that if she could not have the baby then neither of them could, but the other begged Solomon, "Give the baby to her, just don't kill him!" The king declared the second woman the true mother, as a mother would even give up her baby if that was necessary to save the child's life, and awarded her custody.²

Over the centuries the alleged ruling of King Solomon has been looked upon as a wise judgment.³ There is, however, reason to question if it is also a judgment in accordance with the rule of law as understood in our time. A contemporary understanding of the rule of law would underline that all public powers, such as judges, should act in accordance with the values of democracy and fundamental rights, within the boundaries set out by law, and under the control of independent and impartial courts.⁴ Modern lawyers are likely to agree that the most flagrant flaw in King Solomon's approach to the rule of law is the blunt neglect of the fundamental right to life of the child, under e.g. article 6 United Nations Convention on the Rights of the Child (CRC). Other aspects of the alleged judgment of King Solomon, to be discussed in relation to the rule of law, would be what seems to be a lack of protection for due process under e.g. article 6 the European Convention of Human Rights (ECHR) and issues such as foreseeability and how to understand the best interests of the child.

1.1 Exchanges between the Legal System and Social Work

The question asked in this chapter is how far Sweden has come in ensuring children and parents protection by the rule of law in custody cases, or in other words how would a contemporary King Solomon handle a parental dispute in Sweden? This chapter takes as a starting point two parents claiming custody over a child under Swedish law, i.e. a similar situation to that allegedly ruled on by King Solomon. Issues that are looked into are: How are due process, foreseeability and access to court granted in custody cases decided under Swedish law? How are the fundamental rights of the child protected, now and in

¹ I am grateful for constructive comments by professors Pernilla Leviner and Jens M Scherpe and PhD Johanna Finnström. Errors and opinions remain mine. This chapter is partly based on Johanna Schiratzki, 'Barnrättsperspektivet i vårdnadstvister – från domstolsförhandling till föräldraförhandling. Vad händer med barnets bästa?' (2022) *Juridisk Tidskrift* 249.

² The Book of Kings 3:16–28.

³ See Jon Elster, 'Solomonic Judgments: Against the Best Interest of the Child' (1987) 54 *University of Chicago Law Review* 1; Lawrence C. George, 'King Solomon's Judgment Expressing Principles of Discretion and Feedback in Legal Rules and Reasoning' (1979) 30 *Hastings L.J.* 1549; Anna Singer, 'Active parenting or Solomon's justice? Alternating residence in Sweden for children with separated parents' (2008) 4 *Utrecht Law Review* 35.

⁴ The rule of law as enshrined in Article 2 of the Treaty on European Union.

the future? On a theoretical level, the chapter draws on queries relating to the conception of autopoiesis. According to this theory, society is seen as composed of self-referential systems of communication that constantly reproduce and evolve via the repetition of its own operations.⁵ Within child law, it has been suggested that autopoiesis implies that the legal system is not only self-referential, but also incapable of equal and constructive exchange with other systems, such as social work.⁶ This in turn creates challenges for individuals, who are to seek assistance within several systems, namely, in law as well as in social work. As a starting point, the current Swedish understanding of the child-right perspective is that legal issues on custody, residence, and contact should preferably be handled out-of-court, foremost within the framework of social work and mediation. This raises concerns on whether the rights of the child are considered and protected sufficiently.

1.2 The Legal and Social Background in Sweden

First, almost all Swedish parents – 94 per cent – have joint legal custody of their minor-aged children,⁷ notwithstanding the high level of separation and re-coupling in Sweden.⁸ Second, the dominant understanding of how conflicts between parents should be resolved, is that legal issues on custody, residence, and contact should be handled out-of-court. The court is regarded only as a last resort. The court, however, is the only authority with decision-making powers when parents disagree on how the child's best interests should be understood. Third, there is the strong emphasis placed in Sweden on two parents sharing parental rights and responsibilities within legal custody, regardless of whether the parents are living together with each other or with the child, and also regardless of their ability to cooperate. This is emphasised in the 2021 amendments to the Children and Parents Code. According to these amendments, parents should no longer be presumed to be able to cooperate in order to be assigned joint custody. All the same, a prerequisite for the court's issuance of an order for joint legal custody is that each parent can promote the child's best interests and that they jointly can make decisions regarding the child.

⁵ Niklas Luhmann, *A Sociological Theory of Law* (Routledge and Kegan Paul 1985); Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993).

⁶ Michael King and Christine Piper, *How the Law Thinks About Children* (2nd ed, Ashgate Pub. Co. 1995).

⁷ Data provided by Statistics Sweden. https://www.statistikdatabasen.scb.se/pxweb/sv/ssd/START_LE_LE0102_LE0102O/LE0102T28/table/tableViewLayout1/?loadedQueryId=121175&timeType=item. Accessed 6 February 2023

⁸ Data provided by Statistics Sweden. Skilsmässor i Sverige: 2022-04-08 /www.scb.se/hitta-statistik/sverige-i-siffror/manniskorna-i-sverige/skilsmassor-i-sverige. Accessed 6 February 2023.

2 Litigation in the Shadow of Mediation, Cooperation Talks and Information Meetings

Swedish family law is following the international, foremost Western, trend of encouraging mediation and parental agreements in child and family law matters as opposed of court decisions.⁹ While research on Swedish out-of-court mediation in family law in relation to the rule of law is scarce,¹⁰ international research indicates that out-of-court mediation may be perceived as including pressure on a party to consent to out-comes perceived to compromise a parent's understanding of the best interests of the child.¹¹ In a Swedish custody context divorcing or separating parents are being encouraged to reach an agreement regarding their children out-of-court. Parents are discouraged from turning to court with a carrot-and-stick approach. Since 2022, access to court was further complicated by requiring the parents to attend a compulsory information meeting with the social services before a petition regarding custody, residence, or contact can be made to the court (see 2.2 below).

Regarding the rule of law understood as all public powers acting within the boundaries set out by law, it is worth recalling that a custody process takes place in the intersection of the supposedly self-referential systems of law and social work.¹² It entails professionals with different professional training and different over-all objectives. Judges as well as publicly employed social workers are bound to act within the constraints set out by law. Members of the Swedish Bar

⁹ This trend includes the European Union, Regulation (EU) 2019/1111 on jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

¹⁰ See generally on collaboration talks and mediation: Annika Rejmer, Gunilla Cederström, Karin Röbeck de Souza, Maria Eriksson, 'Sammanställning av aktuell forskning och kunskap', in: *Barnets rättigheter i vårdnadstvister: slutrapport*, Stockholm: Stiftelsen Allmänna Barnhuset, 2015 40-57; Maria Eriksson and Marianne Gabrielsson, 'Supporting Children and Parents in Sweden through Collaboration Teams' (2019) 57 *Family Court Review* 362; Maria Eriksson, 'Våld i parrelationer och familjerättens arbete' in: Eveliina Sinisalo och Linn Moser Hällen (eds.), *Våld i nära relationer: Socialt arbete i forskning, teori och praktik* (Liber 2018); Ann-Sofie Bergman and Annika Rejmer, Parents in child custody disputes: Why are they disputing? (2017) 14 *Journal of Child Custody* 2-3, 134-150.

¹¹ See e.g. Miranda Kaye, Tracey Booth, Jane Wangmann, 'Compromised "consent" in Australian Family Law Proceedings' (2021) 35 *International Journal of Law, Policy and the Family* 1; Emily Schindeler, 'Unanswered Questions - Family Dispute Resolution in the Shadow of the Law' (2022) 44 *Journal of Social Welfare and Family Law* 84; Anna Nylund, 'A Dispute System Design Perspective on Norwegian Child Custody Mediation', in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds.), *Nordic Mediation Research* (Springer 2018) 15. Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016). H.L.A. Hart, 'Discretion' (2013) 127 *Harvard Law Review* 652; Carl E. Schneider, 'Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard' (1991) 89 *Michigan Law Review* 2215.

¹² Roger Cotterrell, *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (London: Routledge 2018). See also Mauro Zamboni. 'Thoughts on Sociological Jurisprudence: Juristic Thought and Social Inquiry (Roger Cotterrell)' (2019) 32(4) *Ratio Juris*. 487-497.

Association have undertaken to follow a stringent Code of Conduct.¹³ However, for involvement in custody procedures as a mediation, no such requirements exist.¹⁴

2.1 To Reduce an Unknown Number of Court Cases

Court orders on custody issues entail, apart from legal custody, the child's residence and parent-child contact. Parental agreements may also be negotiated and confirmed by the social services. Court orders as well as agreements confirmed by social services are enforceable with fines or by police. The push towards mediation and resulting in a delayed access to court is motivated by the belief that parental negotiated agreements are generally better for children than prolonged disputes and court decisions.¹⁵ A motivation for the promotion of mediation and other out-of-court measures is therefore to reduce the number of court cases regarding custody, residence and contact.¹⁶ While, the exact number of custody cases per year that involve disagreeing parents and which end up being adjudicated by Swedish courts is unknown,¹⁷ the strategy to dissuade parents from bringing custody issues to court appears successful. According to statistics from the Swedish National Courts Administration (*Domstolsverket*), the number of custody cases brought to court by one parent against the other have been decreasing since 2018:

Year	2016	2017	2018	2019	2020	2021	2022
Custody, residence and contact decisions –including social services petitioning for custody-holders for children in foster care	6,096	7,359	7,338	6,316	5,990	6,068	6,115
Custody, residence and contact decisions – only natural applicants	4,379	4,606	4,872	4,838	3,479	2,467	2,123

Swedish National Courts Administration, Case no 1216, 21003. In addition, an unknown number of custody, residence and contact petitions are heard in divorce cases.

¹³ The Bar Association, Rules and regulations regarding lawyers, <https://www.advokatsamfundet.se/Advokatsamfundet-engelska/Rules-and-regulations/> Accessed 7 January 2023.

¹⁴ Swedish National Courts Administration, 'Medlare i mål om vårdnad, boende eller umgänge' <https://www.domstol.se/om-sveriges-domstolar/for-dig-som-aktor-i-domstol/for-dig-som-medlare/medlare-i-mal-om-vardnad-boende-eller-umgange/> Accessed 7 January 2023. Parents may request certain protection under the Public Access to Information and Secrecy Act.

¹⁵ Legislative Bill 2020/21:150 55.

¹⁶ Legislative Bill 2020/21:150.

¹⁷ Government inquiry 2017:6 *Se barnet!* 172.

In 2022, 2,123 custody cases between parents were reported; this number includes recurring cases but excludes an unknown number of custody issues heard in connection with divorce.¹⁸ To put the numbers in perspective, in 2020, just under 66,000 children younger than 18 years experienced parental separation.¹⁹

Why the number of custody cases brought to court have decreased after 2018 is unclear. No relevant amendments were made, before July 2021 (when the amendment on joint legal custody against the wishes of both parents entered into force) and March 2022 (when the enactment on mandatory information meeting entered into force). Possible explanations might be found in the general demography, economy, cut-downs in support for families or in the communications from the courts. What is known is that to a large extent court orders on custody consist of agreements mediated and negotiated by the parents and merely confirmed by the judge. According to one study these amount to 61 per cent of all custody, residence and contact cases, even for court cases where there was information on domestic violence or abuse.²⁰

Joint legal custody is a common out-come. A Government inquiry found that 46 per cent of all court cases and 26 per cent of the court cases where there was information on violence resulted in joint legal custody.²¹ A possible explanation to the decrease in number of cases might be that contemporary Swedish courts, as opposed to that of the ancient King Solomon, sends a message that they quite seldomly decide to transfer a child's legal custody or residence from one parent to the other.²²

Indeed, the first suggestion of a contemporary King Solomon, in the disguise of a Swedish judge, would very likely be to send away the disagreeing parents and ask them to find ways through mediation or otherwise to cooperate in the best interests of the child, instead of adding to the case load of his court.

2.2 Delayed Access to Court Through Mandatory Information Meetings

Since March 2022, a parent seeking a court judgment on custody must participate in a mandatory information meeting before the case can be admitted to court (Ch. 6, Sec. 17 Children and Parents Code). The aim of the mandatory information meetings is to give parents who are considering initiating a court dispute concerning custody, residence or contact information aimed at finding the solution that is in the best interests of the child. The social services should also, if it is not unsuitable, offer parents cooperation talks and, if necessary, guide and support them in another form.²³ Given that information meetings are

¹⁸ Government inquiry 2017:6 122.

¹⁹ Children and their Families (scb.se). Accessed 7 January 2023. This corresponds to 3.7 percent of children who were living with two parents.

²⁰ Government inquiry 2017:6 172; Swedish Gender Equality Agency (*Jämställdhetsmyndigheten*) 2022:1.

²¹ Government inquiry 2017:6 165; Swedish Gender Equality Agency 2022:1 55.

²² Swedish Gender Equality Agency 2022:1.

²³ Legislative Bill 2020/21:150 53.

mandatory they could be seen as limiting or delaying access to court, since legal custody of a child concerns the fundamental right of parents and child to respect to family life according to e.g. article 8 ECHR, articles 8–9 CRC. Access to effective remedies to protect i.e. the right to family life is protected by article 13 ECHR. Several consultative bodies had rejected the proposal for mandatory information meetings, e.g., because the method was so far untested, and the likely result therefore difficult to predict.²⁴

The Swedish Government argues that the limitation of immediate access to court is in accordance with the European Convention on Human Rights given that the *timespan* for the mandatory information meetings is relatively short. A meeting should take place within four weeks after a request from a parent. The Government also refers to the court's possibility to make exceptions and to grant a hearing without the parents having attended a mandatory meeting, in *exceptional cases*, e.g., if the court considers that family members have been victimized by domestic violence (on which see 2.3, below). Finally, the Government argues that the mandatory meetings have a *legitimate aim* to spare the child from being subjected to prolonged parental court disputes.²⁵

The Government's position on the mandatory information meetings in relation to access to court, is problematic. Regarding the argument that access to court is only prolonged a few weeks, it is worth noting that the *timespan* of a Swedish custody dispute was lengthy even before the introduction of mandatory information meetings. According to a Government inquiry, 72 per cent of the custody cases took up to 18 months to proceed, 24 per cent took up to 30 months and 4 per cent took even longer.²⁶ Although a month is rather short, in that perspective, it is nevertheless questionable to what extent prolonging the procedure is helpful, especially, because long procedures generally are considered as detrimental to the best interest of the child.²⁷ Interim judgments are possible, but should be made only rarely.²⁸

As far as *exceptional* situations are concerned it could be argued that it is hard to predict which circumstances would lead to an exception from attending mandatory information meeting (see 2.3 below). If the intention is that custody cases including information on violence should be excepted, according to the Swedish Gender Equality Agency this would affect the majority of cases.²⁹

Finally, the legitimate aim *to spare the child* from being subjected to a parental dispute, could be seen in light of the fact that court proceedings actually are framed as a reconciliation process, carried out repeatedly at any stage during the court procedure by the judge and/or through a mediator (Ch. 6, Sec. 18a the

²⁴ Legislative Bill 2020/21:150 54.

²⁵ Legislative Bill 2020/21:150 63, 64 with reference to *Ashingdane v. United Kingdom*, *König v. Germany*, *Erkner and Hofauer v. Austria*.

²⁶ Government inquiry 2017:6, 146. See also e.g. Stephan Milan, *Children's perception and understanding of time*. January 2012. Accessed 7 January 2023. <https://search.ebscohost.com/login.aspx?direct=true&db=edsble&AN=edsble.561120&site=eds-live&scope=site>

²⁷ E.g. Government inquiry 2017:6 122, 428.

²⁸ Legislative Bill 2005/06:99 65.

²⁹ Swedish Gender Equality Agency 2022:1.

Children and Parents Code; Ch. 42, Sec. 17 the Procedural Code). Another concern is, whether the child actually is more likely to become a victim of parental disagreements outside of court by ‘being spared’ from a court dispute. (See part 3.)

2.3 Violence and Other Exceptions – How Should These Be Defined?

The Swedish legislator obviously and rightly takes a very different view of violence than King Solomon, who allegedly threatened an infant child with a sword. According to Swedish law, if a parent presents evidence that the other parent has used violence against the child or another family member, a number of exceptions from the main presumptions are contained in the legislation. In that case, the non-violent parent may turn to court without having attended the otherwise mandatory information meeting and sole legal custody and restricted contact, is to be considered.³⁰ However, how ‘violence’ should be understood in the context of custody cases is not discussed in the Legislative Bill. Identifying situations in which mediation in or out-of-court is not appropriate due to domestic violence are therefore at the discretion of the individual judge.

It is unclear how alleged violence or abuse is to be evidenced by the court, or for that matter the social services. Should only cases involving criminal court orders regarding assault be defined as violence and lead to exceptions from the requirement relating to information meetings, mediation, joint legal custody, etc? Or should the *travaux préparatoires* on how to identify domestic violence in relation to previous amendments to the law be considered? Those statements emphasize the fact that the standard of proof is lower for custody cases than for criminal cases, and that information on violence or abuse must be taken into account in a custody case, even when a preliminary criminal investigation by the police has been closed.³¹

The ambiguity in the understanding of violence and other exceptions in custody disputes are difficult to reconcile with the rule of law understood as access to justice and foreseeability, as well as the fundamental rights and best interests of the child.

3 Dividing Children the Swedish Way

A likely outcome of a Swedish custody case, unless a parent and/or a child are considered victimized by domestic violence, is not as King Solomon threatened to do, that is, to divide the body of the child in half, but to divide the legal custody between the parents. This often entails that the child shares residence with both parents and spends more or less the same amount of time at the home of each parent.

The emphasis on joint legal and physical custody goes hand in hand with a family policy aiming to promote gender equality in the labour market as well as in the family. Many positive consequences have resulted from these family

³⁰ Swedish Gender Equality Agency 2022:1.

³¹ Legislative Bill 2005/06:99 42, 43.

policy developments for parents. However, the positive effects, in particular for the child, are greatest when both parents agree to share the responsibilities over children – which, sadly, is not always the case, neither in Sweden nor in other countries.³² It is well established that parental conflicts, rather than parental separation, explains the poorer outcomes for children of separated parents.³³

When parents do not live together, the child might live with both parents permanently, or with one of them and see the other parent more or less regularly. Regardless of which, parents with joint custody should according to the law work jointly in taking important decisions regarding the child. The strong trend in the past 40 years towards joint legal custody, and shared residence, in post-separation families has not been matched by advances in how to understand joint legal custody.

Swedish law divides rights and duties between parents not living together as an ‘either or’. For the 94 per cent of parents with joint legal custody, all major decisions regarding the child should be taken together, according to the Swedish Children and Parents Code, irrespective of whether the parents live together, and irrespective of whether a custody-holder sees the child. In the minority of families in which one parent has sole legal custody, the other parent has no say in major decisions regarding the child, and no access to information such as the child’s health records, without the consent of the custody-holder.

3.1 Joint Legal Custody Without Cooperation

How parents should exercise joint legal custody was a key issue when the concept was introduced in Sweden in 1920. The result was Sec. 7 of the 1920 Act on children born in wedlock. In 1950 this rule was transferred into the Children and Parents Code (now Ch. 6, Sec. 13). Although society and family life have changed profoundly since 1920, the principles for shared decisions in Ch. 6, Sec. 13 have not been altered.³⁴ The legislation states that parents with joint custody should jointly take all decisions regarding the child. Ch. 6, Sec. 13 the Children and Parents Code reads:

If one of the custody-holders, due to absence, illness or any other reason is prevented from taking part in decisions regarding custody – and the decisions cannot be postponed without inconvenience – the other custody-holder decides alone. All the same, that custodian may not make decisions alone which are of preponderant

³² Anna Singer, ‘Active parenting or Solomon’s justice? Alternating residence in Sweden for children with separated parents’ (2008) 4 *Utrecht Law Review* 35; Mia Hakovirta and Guðný Björk Eydal, ‘Shared Care and Child Maintenance Policies in Nordic Countries’ (2020) 34 *International Journal of Law, Policy and the Family* 43.

³³ Eva-lisa Palmtag, (2022). ‘Like ripples on a pond: The long-term consequences of parental separation and conflicts in childhood on adult children’s self-rated health’ (2022) *SSM - Population Health* <https://www.sciencedirect.com/science/article/pii/S2352827322000799?via%3Dihub>. Accessed 7 January 2023.

³⁴ Legislative Bill 1949:93. Government inquiry 2007:52 *Beslutanderätt vid gemensam vårdnad m.m.* A third subsection has been added which states that an absent custody-holder can lose custody.

significance for the child's future, unless it is imperative for the best interests of the child, and the decision cannot await the approval of the other custody-holder.

Although, the wording of the section is open for interpretation, e.g., on what constitutes a decision that cannot be “postponed without inconvenience” or “imperative for the best interests of the child” some issues have been defined as being of “preponderant significance” demanding consent by both custody-holders.³⁵ A parent with joint legal custody who is responsible for the child's everyday care is therefore dependent on the other custody-holder's active or passive approval, to take decisions relating to the child's fundamental rights to e.g., education, health care, and a passport.

In order to a) ensure that a child is not refused psychiatric or psychological care on account of the custody-holders' disagreement, b) allow parents to keep joint legal custody, even when they disagree, and c) avoid court disputes on custody a new section on social services powers was included in 2012.³⁶ Social services may – if there is a lack of consent of both custody-holders–determine that a child should be entitled to psychiatric or psychological examination or treatment or certain support pursuant to e.g. the Social Services Act (Ch. 6 Sec. 13 a Children and Parents Code). However, following a decision by the Swedish Parliamentary Ombudsmen stringent requirements are placed on the investigation by social services.³⁷ In any case, neither decisions on the child's fundamental right to somatic health treatment, nor the fundamental right to education are covered but (still) left to the custody-holders to negotiate between themselves.

3.2 Neither Legal Rules, Nor Court Judgments

Swedish law does neither provide legal rules to guide separated parents on how to exercise joint legal custody, nor – somewhat surprisingly– allow for courts to take decisions on how joint legal custody should be exercised, apart from orders on contact and residence. The lack of legal rules guiding (disagreeing) parents with joint legal custody is explained by the fact that during the 1910's when the scope and content of joint custody was formulated, disagreeing parents could always seek sole custody which one of them would be granted by court. Although the expectations on parents to agree on joint legal custody has been increasing since the 1980's, parental cooperation was a prerequisite for joint legal custody up until 2021. Now, however, the situation has changed. Parents' ability to cooperate in decision-making is no longer a requirement for a court order on joint legal custody as long as each parent, by him or herself is considered to be able to take decisions in the best interests of the child. Swedish

³⁵ Anita Wickström, 'Utövande av gemensam vårdnad' (2002) *Juridisk Tidskrift* 328.

³⁶ Legislative Bill 2011/12:53.

³⁷ The Parliamentary Ombudsman 3153–2016, 23 Nov 2018, See also Supreme Administrative Court (HFD) 2015 ref 5; Pernilla Leviner, ““Who has the last say?”” in: Imogen Goold, Cressida Auckland and Jonathan Herring (eds), *Medical decision-making on behalf of young children: a comparative perspective* (Hart Publishing 2020); Kavot Zillén, 'Barn och paternalism – obligatorisk vaccinering för barn som exempel' (2021) 22 *Juridisk tidskrift* 351.

preparatory works simply advise custody-holders in disagreement to take decisions in the best interests of the child, with a minimum of verbal or written contact.

It is thus possible to have joint responsibility despite a very limited collaboration in practice. [---] If contacts between the parents lead to disputes, it is good if the contacts are kept to a minimum.³⁸

Regardless of the suggestion in the Preparatory works, for the child to enjoy fundamental right to somatic health care and education as well as issues such as passport, the approval of both custody-holders is necessary.

A contemporary King Solomon, acting as an advisory to a custody-holder trying to uphold the child's fundamental rights, without the cooperation of the other custody-holder, therefore is left with few choices. One choice is to turn to the courts to petition for sole custody. Access to court, however, is prolonged by the requirements of mandatory information meetings with social services, and if a custody case is admitted by the court, the requirements of the legal procedure is for the judge to help the parents to negotiate an agreement, preferably on joint legal custody. Interim judgments could be considered if it is necessary to protect the child's interests. Regarding some of the child's rights, foremost the right to education, a headmaster may admit a child to a school based on the approval of only one of the custody-holders, to avoid infringing the child's right to education. However, the school, as well as other institutions charged with promoting children's rights, then may be reported to e.g., the Parliamentary Ombudsmen or the Swedish Schools Inspectorate.³⁹ Thus the legitimate aim of the recent amendment to the Children and Parents Code – i.e. introducing joint legal custody against the wishes of parents, joint legal custody without cooperation and prolonged access to court – *to spare the child* from being subject to a parental court dispute, may result in a childhood marked by parental out-of-court disputes, and even lead to prolonged violation of the fundamental rights of the child.

4 The Rule of Law in the Intersection of the Self-referential Systems in Custody Cases

To sum up, a contemporary King Solomon acting as a Swedish judge under the rule of law, has to interact with several professions. He must also try to make the parents reach an agreement, through the court's own initiatives, e.g. by negotiations led by the judge, a mediator or through cooperation-talks. Were King Solomon to work within the social service, a task would be to draw up and

³⁸ Legislative Bill 2020/21:150 133-134.

³⁹ Parliamentary Ombudsmen JO 6434-2018, 12 July 2019; The Swedish National Agency for Education, www.skolverket.se/regler-och-ansvar/ansvar-i-skolfragor/valja-forskoleklass-och-grundskola-eller-grundsarskola, Accessed 7 January 2022; Johanna Schiratzki, *Barnrättens grunder* (Studentlitteratur 7th ed 2019) 92, 100. See also Maria Heimer, Elisabeth Näsman and Joakim Palme, 'Vulnerable children's rights to participation, protection, and provision: The process of defining the problem in Swedish child and family welfare' (2018) 23 *Child & Family Social Work* 2.

control parental agreements, to hold mandatory information meetings as well as cooperation talks. In addition, social services may receive assignments from the court, relating to custody investigations and to organise supported (supervised) contact. In both missions, as a judge or as a social worker, King Solomon, should be observant as to protect the child from violence. In most Swedish court cases on custody, residence and contact, the judgment consists of the parents' agreement, confirmed and mediated by the judge. The social services are charged with making recommendations for judgments as well as assessing the parents' contract on custody, residence and contact for enforceability. The opinions of the child are transmitted to the judge by a social worker. The judge's decision is to be explained to the child by social services staff, although they have not been involved in hearing the case or making the decision.

A Solomonic advice might be to improve the matching of resources, training and tasks between the court and social service. For example, the judge responsible for a judgment would seem to be in a better position to explain it to the child whose everyday life depends on it, as compared to a social worker who has not taken part in the decision. A lawyer might also be in a better position to deal with legally enforceable parental contracts as well as evaluate evidences regarding the risk for victimization of the child.

Were King Solomon instead to take an eagle-eye view of the system for solving custody, residence and contact issues, he would likely to take notice of the inconsistency between adjudication, mediation, and social work. He might then – slightly pessimistic, reflect that law as well as social work, at least according to theory of autopoiesis, are regarded as self-referential in their communication, and eventually also incapable of equal and constructive dialog.⁴⁰ On a more optimistic note, Solomon may recall that out-of-court mediation has been hailed as a promising aspect of a child-responsive system – on the one condition, however, that “unrestricted” power is not given to child welfare experts.⁴¹ Such powers should remain restrain by the rule of law in foreseeable court-proceedings. Swedish law on parental conflicts could be summarised as “justice delayed but not denied”; it is possible for a parent to turn to court with a petition regarding custody, residence and contact. All the same, mediation and cooperation talks with “child welfare experts“ are encouraged while the court is seen as a very last resort that parents are discouraged from turning to.

In relation to the rule of law, it is a concern that not all professionals involved in custody cases are distinctly bound to act within the constraints set out by law. Public employees such a judges and social workers employed by the municipalities are, and a Code of Conduct applies for members of the Bar Association, but no enactments are available to constrain the mediators' powers in leading negotiations. Another concern is that as a consequence of the ambition

⁴⁰ Note 6 supra.

⁴¹ Note 6 supra 164.

to spare the child from parental court disputes, and to promote joint legal custody, the child's fundamental rights are to be negotiated out-of-court by parents, that might have been assigned joint legal custody, against their wishes and regardless of their cooperation ability. This is a scenario that brings to mind the ancient tale of the two adults before King Solomon, both claiming the child. Only, we essentially lack knowledge of how the current parental negotiations on custody are carried out in practice. Which parent prevails, which parent gives in?

