



T.M.C. ASSER INSTITUUT

Comparative study on enforcement
procedures of family rights

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1.1 PART 1 ENFORCEMENT IN DOMESTIC CASES

1.1.1 1A Procedures and practices for enforcement in domestic cases

1. Description of the general law for enforcement of:

- a. decisions on custody, including orders on the place of residence of the child**
- b. orders on contact and/or access rights**

2. Comments as to the practice of the law with respect to:

- a. decisions on custody, including orders on the place of residence of the child**
- b. orders on contact and/or access rights**

Substantive law on custody, access and the place of residence of the child

Provisions on custody, access and place of residence of the child are found in the Children and Parents Code (1949:381, Föräldrabalken). The provisions of the Children and Parents Code relating to custody and access have been amended on several occasions. The most recent amendments came into force on 1 July 2006.

The purpose with the changes of the Code in 2006 was to further emphasise the importance of the consideration being given to the best interests of the child. Previously, it was clear from the rules in the Code that the best interests of the child are to be the primary consideration. By the amendments in 2006 the importance of the best interests of the child is further underlined in that the Code stipulates explicitly that the best interests of the child must be the determining factor in all decisions concerning custody, residence and access. The risk of the child coming to harm is emphasised in the Code. When assessing the best interests of the child, the Social Welfare Committee and the court, must pay particular attention to the risk of the child or another member of the family being exposed to abuse or of the child being unlawfully abducted, retained or otherwise coming to harm (Chapter 6 Section 2 a in the Children and Parents Code).

Swedish law distinguishes between the concept of ‘custody’ and the concept of ‘guardianship’. The concept of ‘custody’ can be defined as including all those rights and obligations necessary to decide in matters concerning the child’s personal affairs, for example the upbringing and education of the child, and to provide for the child’s personal needs. According to Chapter 6 Section 1 in the Children and Parents Code children are entitled to care, security and a good upbringing. Legal custody includes the power to decide where the child should live.

The concept of ‘guardianship’ can be defined as including the rights and obligations to administer the child’s assets and to represent the child in economical matters. Often, but not always, the functions of custody and guardian are combined. Normally, the guardians are the parents or the parent who is the child’s custodian. All children under

the age of 18 shall – except if they have married – be in the custody of one or two adults. Guardianship continues until the child attains majority at the age of 18.

If the child's parents are married to each other at the time of the child's birth, both parents automatically acquire the status of custodians. If they are unmarried at the time of the child's birth, only the mother acquires automatic custodianship. If the parents subsequently marry each other, the father acquires custodianship from the time of the marriage (Chapter 6 Section 3 in the Children and Parents Code).

Unmarried parents can also obtain joint custody on a joint application to court. Provided that it is not obvious that joint custody is incompatible with the best interests of the child the court can decide on joint custody. The unmarried parents can also obtain joint custody by giving joint notice to the Social Welfare Committee in conjunction with the Social Welfare Committee's approving an acknowledgement of paternity or an acknowledgement of parenthood for a woman. The parents can also obtain joint custody by joint notification to the Swedish Tax Agency, provided that an order on custody has not previously been issued and that the parents and the child are Swedish citizens (Chapter 6 Section 4 in the Children and Parents Code).

If one or both of the parents wish to obtain a change of custody, the court shall order that the parents should have joint custody or award custody to one of the parents. In its assessment of whether or not the parents should have joint custody of the child or whether or not the custody should be awarded to only one of the parents, the court should give special attention to the parent's ability to cooperate in matters concerning the child. Joint custody usually presupposes that the parents can cooperate in matters concerning the child in a manner reasonably free of conflict. The court may *not* decide on joint custody if *both* parents are opposed to this. Nevertheless, if only *one* of the parents opposes joint custody the court may order such custody (Chapter 6 Section 5 in the Children and Parents Code).

As a rule joint custody continues to apply after a divorce without the court having to make any decision to this effect in connection with the divorce.¹ This applies provided that neither of the parents has requested that the joint custody should be dissolved and that it is not obviously incompatible with the best interests of the child. If one of the parents claims that the joint custody should cease, the court may, according to the best interests of the child, award custody to just one of the parents. However, the court may order that joint custody should continue if this is in the best interests of the child and subject to the precondition that *both* parents do not oppose to continued joint custody. Finally, the court may without any plea relating to the same, award custody to one of the parents, if it is obvious that joint custody is incompatible with the best interests of the child.²

¹ Chapter 6 Section 3 in the Children and Parents Code.

² Chapter 6 Section 5 in the Children and Parents Code.

Since 1998 parents need no longer apply to court in order to get a decision on custody. The parents may enter into an agreement on custody. Such an agreement is binding and enforceable if it is in writing, signed by both parents and approved by the Social Welfare Committee. If the parents, according to the agreement, are to have joint custody of the child, the Committee must approve of the agreement, if it is not obvious that the agreement is incompatible with the best interests of the child.¹

Legal custody includes, as mentioned earlier, the power to decide where the child should live. If only one of the parents has the legal custody it is that parent alone who has the right to decide where the child should live. Where the parents have joint custody of the child, but do not live together, for example after a divorce, the court may decide with whom of the parents the child should live (Chapter 6 Section 14a in the Children and Parents Code). The court may also decide that the child should live alternately with both parents (alternating residence). The best interests of the child shall be the decisive consideration when the court makes its decision.

If the parents are in accord, they may also enter into an agreement on the child's residence. Such an agreement is binding and enforceable if the agreement is in writing and approved by the Social Welfare Committee. The Social Welfare Committee should approve of the parent's agreement if the terms of the agreement are in the best interests of the child (cf. Chapter 6 Section 2a in the Children and Parents Code).

A child shall have the right of access with the parent with whom he or she is not living (Chapter 6 Section 15 in the Children and Parents Code). This normally means that the child meets the other parent for longer or shorter periods, such as every other weekend. Under the new provisions (since 2006) the court is empowered, in exceptional cases, to decide that access is to take place in another way (e.g. by telephone, letters or text messages) than by the child meeting the parent. The contact is primarily for the sake of the child. The child's interests and needs shall be the decisive consideration. The starting point shall be that it is important for the child to have contact with both of his or her parents, even though they are not living together. The child's parents have joint responsibility to ensure that, as far as possible, the child's need of contact with a parent with whom he or she is not living is met.

The court may decide on contact. This also applies in cases where the parents have joint custody. The best interests of the child are the decisive consideration for the court in its decision. Proceedings on contact may be commenced by a parent who wishes to have contact with his or her child. The Social Welfare Committee is also entitled to initiate proceedings concerning the child's contact with a parent. The Committee may also initiate proceedings concerning the child's need of contact with people other than the parents. In its assessment whether the Committee should bring a court action, the Committee should pay particular attention to the child's need for contact with his or her maternal or paternal grandparents and other people close to the child (Chapter 6 Section 15 a in the Children and Parents Code)

¹ Chapter 6 Section 6 in the Children and Parents Code.

If the parents are in accord they can also enter into an agreement on access. For the agreement to be legally valid it must be in writing and approved by the Social Welfare Committee (Chapter 6 Section 15a in the Children and Parents Code).

Enforcement of judgments, decisions or agreements concerning custody, access or place of residence

Provisions on enforcement of judgments, decisions or agreements on custody, access rights or place of residence of the child are laid down in Chapter 21 of the Children and Parents Code. These provisions were introduced in the Code at the end of the 1960s, but it was not until in 2006 that a general review of the provisions on enforcement was made. The amendments to the rules in Chapter 21 of the Children and Parents Code entered into force on 1 July 2006.

The provisions on enforcement in the Children and Parents Code mainly concern the enforcement of Swedish court decisions. However, these provisions are also applicable in cases where a parent, that has been awarded the custody of a child according to such a court decision, lives in a foreign country and where the enforcement of the Swedish court decision implies that the child is to be handed over to the parent in a foreign country.

The enforcement of judgments, decisions or agreements concerning custody, residence or access rights was earlier dealt with by the administrative courts: the county administrative court at the first instance, the administrative court of appeals in the second instance and the Supreme Administrative Court as a final body of appeal. By the amendments of the Children and Parents Code in 2006 the processing of enforcement decisions was transferred from the administrative courts to the ordinary public courts: the district court ('tingsrätt') at the first instance, the court of appeals in the second instance and the Supreme Court as the final body of appeal. Thus, enforcement of judgments and agreements on custody, residence or access is now dealt with, at first instance, by the district court ('tingsrätt') in the area in which the child resides. If another district court deals with a case between the same parties on custody, residence or access, then an application for enforcement may also be made to that other district court. In the absence of any other court with jurisdiction, the question on enforcement shall be considered by the Stockholm District Court (Chapter 21 Section 1 in the Children and Parents Code).

For this reason, the same court that decides on the point at issue concerning custody, residence or access will also in many cases subsequently decide on enforcement. One purpose of this reform is to streamline enforcement procedures and to make it easier to coordinate the processing of contentious cases. Another purpose is to reduce the number of protracted proceedings. The purpose with the reform is to avoid repeated and lengthy proceedings about the same matter, since such proceedings typically can be bad for the child. By the changes the enforcement proceedings were brought closer to the

proceedings concerning the underlying custody case itself. The possibility to coordinate the enforcement proceedings and the proceedings concerning the custody dispute in question were considered to increase. One other reason for the transfer of the enforcement procedure to the ordinary public courts was to ensure that the judges, who work with custody, residence and access cases, also will learn about the possible problems that may arise at the enforcement stage. In this way the best possible conditions for making the fundamental decision manageable in practice is created.

An *agreement* between parents on custody, residence or access shall be enforced in the same way as a final court decision. Enforcement of such an agreement is dealt with by the district court. For such an agreement to be enforceable it is required that the agreement is in writing and that it has been approved by the Social Welfare Committee.

Mediation

The starting point is that enforcement of a judgement shall take place voluntarily if possible. Before making an order for execution, the district court may instruct a representative of the Social Welfare Committee or the social services, to use his or her good offices to facilitate voluntarily compliance with the court order (Chapter 21 Section 2 in the Children and Parents Code). As soon as an application for enforcement is made, the district court should contact the applicant, the opposite party and the social services in order to examine if a mediation assignment is likely to succeed. The district court should also examine who should perform such an assignment. It is considered of importance that all efforts should be made for the child to be handed over on a voluntary basis.¹ Still it is important that the assignment is dealt with in a speedily manner. An assignment for mediation should not be given if it is unlikely that it will result in a voluntarily return of the child or if it can be assumed that it will unnecessarily delay the enforcement of the court order. The same applies when it is of importance that the matter can be dealt with speedily, e.g. when the matter concerns the child's right to access with a parent.

The mediator shall within the time-frame set by the district court report to the district court on the measures taken and other relevant facts that can be of importance (Chapter 21 Section 2 of the Children and Parents Code). The maximum time-frame allowed for mediation is a period of two weeks. However, the district court may prolong the time-frame if it finds it likely that fulfilment can be reached voluntarily. However, it should be considered that sometimes a court decision must be enforced immediately, e.g. when a child according to a court decision is to spend the Christmas holidays with a parent with whom he or she is not living. The time-limit to reach fulfilment voluntarily may therefore be adjusted by the court to fit to the circumstances in each individual case. Special considerations should be given to the child and this means that drawn out mediation proceedings should be avoided.²

¹ Prop 1982/83:165 p 15-16.

² Prop 1982/83:165 p 27.

The mediation assignment has a double function. The purpose of the assignment in the first place is to get the question of enforcement solved in a smooth manner and in mutual understanding between the parties. The mediator should act speedily and, if it is possible and appropriate, seek to clarify the view of the child. If the mediator finds that the child will be handed over on a voluntary basis, the mediator should immediately inform the applicant of this and also be of assistance in deciding a time and place for the child to be handed over to the applicant. The mediator shall also inform the district court when the child has been handed over to the applicant.

The other purpose of the mediation assignment is to gather information for the execution order, if after all, the child is not handed over voluntarily.¹ In the report of the mediator to the court it shall be indicated what reasons the parent has for his or her refusal to hand over the child. The mediator shall also indicate if there are any impediments for the execution of the court ruling.

Conditions for enforcement

As a rule a decision on custody, residence and access must be enforced.² There may though exist different impediments for the enforcement.

The starting point in the enforcement procedure must be that the child's best interests have been decisive for the underlying judgment, decision or agreement on custody or access that is now to be enforced. Therefore, the principal viewpoint is that a judgment, decision or agreement shall not be re-examined at the enforcement stage. However, where circumstances manifestly have changed since the making of the court order it must still be possible for the court to refuse to enforce a judgment, decision or agreement. The protection of the child demands that a court judgment, decision or agreement is not enforced unconditionally.

The court is required to refuse enforcement if it is obvious that enforcement is incompatible with the best interests of the child (Chapter 21 Section 6 in the Children and Parents Code). The provision implies that the court is always obliged to make a certain examination to ensure that the enforcement of the court decision is in compliance with the child's best interests. If the circumstances at the time of the enforcement of the court decision are such that it is obvious that the enforcement cannot be in compliance with the best interests of the child, the court is required to refuse enforcement.

When assessing this, the court is to take account of the risk of the child coming to harm.

There can be a risk that the child might be exposed to abuse or of the child being unlawfully abducted or retained. The provision may e.g. be applicable, according to the

¹ Prop 1967:138 p 55.

² Prop 1967:138 p 46.

travaux préparatoires to the Code, if there is information on the child being subject to violence from the non-custodian parent.

Enforcement proceedings should in principle only relate to circumstances and facts that have occurred after the decision underlying the application for enforcement. The court should thus only take into consideration the circumstances at the time of the enforcement. There should be no re-examination of the fundamental decision itself, which means that the court at the enforcement stage in principle only should take into account entirely new information or events that have occurred recently.¹

In addition, other circumstances that are of fundamental importance for the satisfaction of the best interests of the child can have changed. It may e.g. occur that the parent, to whom the child should move to according to a court decision on residence, in fact is homeless. In such a situation enforcement of the decision is obviously not in compliance with the best interests of the child.²

The district court may not decide on enforcement against the child's will if the child opposes to the enforcement and has attained such an age and maturity that its wishes should be taken into account. However, even if the child opposes the enforcement, the decision may be enforced if the court considers that it is necessary having regard to the best interests of the child (Chapter 21 Section 5).

Previously to the amendments of the provisions in the Code in 2006 there was a twelve-year age limit in the Code. According to the earlier wording of the provision the court could not decide on enforcement against the child's will, if the child had attained the age of twelve, or if the child had not attained the age of twelve, but had attained such a degree of maturity that its will should be taken into account. The Supreme Administrative Court has in a case concerning the enforcement of a court decision concerning custody taken into consideration an eleven-year old child's will. The Court found that, with regard to what was known of the child's level of development and the consistency he showed for his opinion, the child had shown such a maturity that his opinion had to be taken into account.³ The twelve-year age limit has now, by the amendments in 2006, been removed in order to increase the possibilities for the court to take younger children's opinion into consideration.⁴

It should be noted that this provision is also of importance for other measures such as mediation, collecting of a child or taking a child into custody. It is only the *court* that may decide if it is necessary to enforce the measure against the child's wishes. If it becomes apparent during the e.g. mediation or collecting of the child that the child opposes the measure, and the child has attained such an age and maturity that its will should be taken into account, then the measure may not continue unless there is such a standpoint from the court in the matter.

¹ Prop 2005/06:99 p 99.

² Prop 2005/06:99 p 99

³ RÅ 1977 ref 127.

⁴ Prop 2005/06:99 p 83 and 97.

Finally, the possibility for the court to adjust the conditions for access rights according to Chapter 21 Section 4 in the Children and Parents Code should be mentioned. According to this provision the court may, if it decides to enforce a judgment or decision concerning access that has gained legal force, supplement or change what has been decided on the practical arrangements for the exercise of rights of access if it is necessary for the access to take place. The purpose with the provision is to solve practical matters that may occur in relation to the decided right of access that the enforcement concerns.

3. Supporting orders

a. what supporting orders (i.e. ‘compliance orders’ or ‘measures to further the effect of the family law judgement’) are available under domestic law?

b. can you make any remarks as to legal practice (i.e. what supporting orders are practicable, what is the usual content)

1B. Specific issues relating to the enforcement of family law judgments in domestic cases

1. The organisation of organs and institutions involved in enforcement of family law

a. Regulation under substantive law (legislation that establishes the organ or institution and regulates its tasks and powers)

b. Procedural law rules relevant for the functioning of these organisations (procedural rules on the role of these organisations in the enforcement of family law decisions)

c. Practical aspects relevant for the legal position of these organisations

The court structure

It is worth noting that there are no special family law courts in Sweden. Family law cases are heard by the ordinary public courts. Also enforcement of judgments, decisions or agreements concerning custody, residence or access are now dealt with by the ordinary public courts. The district court (‘tingsrätt’) is the court of first instance, with the possibility of appeal to the court of appeal (‘hovrätt’). Appeals from courts of appeal are made by way of application for review to the Supreme Court (‘Högsta domstolen’). The Supreme Court only gives leave to appeal provided that the case is of importance for the guidance in the application of the law, or that extraordinary cause exist for a review, such as that a ground exists for relief for substantive defects or that there has

been a grave procedural error or that the outcome of the case in the court of appeals was plainly due to gross oversight or gross mistake.¹

Apart from the procedural rules under the Code of Judicial Procedure there are special procedural rules which are applied in family law cases relating, for example, to the composition of the court and trial costs. According to Chapter 21 Section 12 in the Children and Parents Code the district court should consist of one judge and three lay judges ('nämndemän').

Law (1996:242) Regarding Court Procedures regulates the procedure that the district Court has to follow (Chapter 21 Section 16 of the Children and Parents Code).

2. Time limits relevant for enforcement proceedings

- a. Time limits for appeal, both against family law decisions and against decisions supporting their enforcement**
- b. Any other time limits that have an effect on enforceability**
- c. The effect of appeal on enforceability**
- d. The effect of the passing of time on the enforceability of a family law judgment**
- e. The effect of change of circumstances on the enforceability**

As a rule a court decision on enforcement is immediately enforceable, if the court does not decide otherwise. The court can make an exception from this rule and decide that the decision shall not be enforceable until it has gained legal force (chapter 21 Section 14 in the Children and Parents Code). A party can also request a stay of execution at the Court of appeal.

The time limit for appeal, both against family law decisions and against decisions supporting their enforcement is three weeks.

3. Coercive measures to ensure enforcement

- a. Measures available by law**
- b. Measures usually taken in practice**
- c. Taking of coercive measures when the child opposes enforcement**

The court may decide on certain coercive measures to ensure enforcement (Chapter 21 Sections 3 and 4 of the Children and Parents Code). The court can order the surrender of the child under a penalty of a fine or alternatively order collection of the child by the police authority. Even at this stage of the enforcement procedure an assignment for mediation may be given. The court may also order that the child should be taken into custody temporarily. When dealing with the enforcement of custody orders the child's best interests should always be in focus.

¹ Chapter 54 Sections 9-10 of the Code of Judicial Procedure.

Before the court decides to make use of coercive measures, all efforts shall have been made to achieve a voluntary solution. Even after the court has decided to use coercive measures, efforts shall be made to try and achieve a voluntary solution. The possibility to use coercive measures shall be used restrictively. Normally a penalty of a fine should be the major coercive measure against a parent who does not comply with an order to hand over the child out of free will. The penalty of a fine shall be decided according to what is known of the opposing party's financial situation and other relevant circumstances that may convince the party to comply with the enforcement order. The imposition of penalty of a fine does not always lead to the intended effect and can lead to a delay of the execution over time. In some cases the situation is already such that it already from the beginning may be seen pointless to try other measures than enforcement with the help of the police authority. In respect to these cases a court order to collect the child should not always be preceded by court order of a penalty of a fine.

The court can thus decide that the child is to be collected by the police authority (Chapter 21 Section 3 of the Children and Parents Code). Collection of the child with the support of the police authority should, according to the *travaux préparatoires* to the Code, only be resorted to in very few cases.¹ In the case of a judgment or decision concerning *custody or residence* of a child, the court may decide that the child is to be collected if enforcement cannot otherwise be implemented or if collection is necessary to avoid the child suffering serious harm. If there is a risk that the child will suffer serious harm if it remains in the environment where it stays and it therefore is necessary that the child is removed from that environment then collection may be used. In other cases the collecting of the child by the help of police should only be used as a measure of last resort. It is important that all efforts are continuously made to voluntary hand over the child even if a decision for collecting the child has been issued. If the court has decided that the child should be collected with the support of the police, then usually also an assignment for mediation shall be given.

In the case of a judgment or decision concerning *contact* between the child and a parent with whom the child is not living, the court may decide to place a penalty of fine on the parent who is retaining his or her child. The court can also, if enforcement of the contact order cannot be achieved in any other way and the child has a strong need of contact with the other parent, decide that the child is to be collected by the police (Chapter 21 Section 3 in the Children and Parents Code). According to the *travaux préparatoires* to the Code this means that collection of the child may only be decided upon in exceptional cases.² Collection of the child by the support of the police may have a negative effect on the relationship between the child and the parent with whom the child is not living. It is considered very exceptional that the need for contact is such that it can outweigh the risk of the negative effects that the collection by police may bring about. Not even the fact that a parent systematically tries to sabotage the child's right to contact with the other parent, is merely considered as a sufficient reason for a decision to collect the child.³

¹ Prop 2005/06:99 p 74.

² Prop 2005/06:99 p 75.

³ Prop 2005/06:99 p 75.

The child's own will is of great importance. Contact shall be decided upon with the child's best interests in focus. If the child has attained such an age and maturity that the child's opinion should be taken into account, the contact should not be executed against the child's will, unless the court finds an enforcement to be in the child's best interests.

If there are special reasons, the court may also decide that the child shall temporarily be taken into immediate care by the social services (Chapter 21 Section 4 in the Children and Parents Code). It can be necessary in emergency situations to take a child into immediate care in order to prevent the child to be harmed. Such a situation could be when there is a risk that the child will be abducted. The provision only allows the child to be taken into care for a short period of time, in general only a couple of days. The purpose with this measure is to create favourable circumstances for the handling over of the child. The court should usually be able to delegate to the social authorities to take the necessary actions on the execution of the immediate care. The court may also decide that the child should be taken into care with the help of the police authorities, but this possibility should be used restrictively. The main rule is that the immediate care shall be executed without the involvement of the police.

During the collection of the child or when the child is taken into temporary care there shall be one person present who can be a support for the child (Chapter 21 Section 11). This person can be a civil servant from the social authorities, a relative or any other suitable person. In emergency situations the measures that are necessary to protect the child can be taken without the presence of such a support person. If it is possible then a paediatrician, child psychiatrist or child psychologist shall be of assistance when the child is being collected or taken into care.

The will of the child shall also be taken into consideration when the court decides on mediation or coercive measures. If it e.g. during the collection of a child is shown that the child opposes to such a measure, and the child has reached such an age and maturity that its will should be taken into consideration, then the measure may not continue, unless the court has taken a position in the case.

According to a report by the Committee on Custody published in 2005 the provisions on coercive measures are applied in accordance with the intentions of the legislator. This means that normally the court will order the child to be handed over under a penalty of fine and only in exceptional cases order the child to be collected by the police.¹

4. The impact of other legal or practical conditions relevant during the enforcement, e.g. the hearing of the child

¹ See SOU 2005:43 p 834.

As already mentioned, the opinion of the child is of relevance with regard to the enforcement of court decisions. In the Children and Parents Code it is prescribed that the district court may not decide on enforcement if the child opposes to the enforcement and has attained such an age and maturity that its wishes should be taken into consideration. However, if the child opposes the enforcement, a decision on enforcement may be made if the court considers that it is necessary having regard to the best interests of the child (Chapter 21 Section 5). The age and maturity of the child are thus decisive for the amount of weight that shall be contributed to the child's opinion.

It is possible to hear the child before the court in the enforcement proceeding, if there are special reasons for doing so and it is obvious that it will not harm the child to be heard (Chapter 21 Section 12). It is important that the child is not forced to take a side in the parental conflict. The court has to be aware of the risk that parents may try affect the child in terms of putting pressure on the child. If the interrogation is made in a correct way and with sufficient discretion, the child will have an opportunity to express its own views and will be free from feelings of responsibility and sense of guilt. In the *travaux préparatoires* to the Code it has been emphasised that the court has to be aware of the risk that a parent may try to use the child as a spokesperson for his or her own point of views and wishes. This provision should therefore be applied with a certain restraint.¹

1.2 PART 2 ENFORCEMENT IN CROSS-BORDER CASES

2A Enforcement of return orders issued under the 1980 Hague Convention, and after 1 March 2005, Regulation 2201/2003

Sweden has responded to the Hague Conference's questionnaire (see Annex I). Therefore the answer in this part is limited to update and, where necessary, adds lacking information.

1. Legal bases for enforcement

1. Please give details of any specific legislative provisions which exist in your State concerning the enforcement of return orders. Please specify the title of the instrument, its legal nature (law, decree, administrative regulation or rules of court etc.) and short description of content.

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction was ratified by Sweden in 1989. The Convention has been incorporated into Swedish law by the Act (1989:14) on Recognition and Enforcement of Foreign Deci-

¹ Prop 1982/83:165 p 35.

sions Concerning Custody of Children etc. and on the Return of Children (hereinafter, the 1989 Act). In addition to the Hague Convention also the Council of Europe Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children etc. and on the Restoration of Custody of Children has been incorporated by the mentioned Act of 1989.

The 1989 Act is applicable in relation to the states parties to the 1980 Hague and Council of Europe Conventions and is written explicitly to implement the relevant provisions of the two conventions in Swedish law. The Act prescribes that a child that has been taken to or retained in Sweden should upon application be returned immediately to the state of its habitual residence. The Act also regulates the procedure and defines wrongful removal and detention and grounds for refusing a return in accordance with the Hague Convention. The Act also lays out the basis for enforcement of return decisions.

In cases where there is a risk that a child will be taken out of the country, or when the enforcement of the decision is presumed to be obstructed, the Stockholm District Court has the right to order that the child should immediately be taken into care by the authorities in any way the Court finds it suitable (Section 19 in the 1989 Act). If there is no time to await such a court order, the police may bring the child under immediate care or take any urgent measures that can be made without harming the child. In these situations, a medical doctor and a social worker must assist the police. The action should be instantly reported to the court, which then has to decide, without a delay, if the child should remain in custody (Section 20 in the 1989 Act).

To encourage a voluntary return, the Court has the possibility to request that a representative of the social services, or another person deemed suitable, act as a mediator to try to reach a voluntary solution. However, this provides that such a measure can be presumed to result in the voluntary return of the child, without undue delay of the proceedings in court. The maximum time-frame allowed for mediation is a period of two weeks, which can only be prolonged under exceptional circumstances (Section 16 in the 1989 Act). This time-frame ensures that the mediation procedure do not delay the proceedings for the return of the child.

Before the Court decides on the return of the child, the child should have an opportunity to express his or her views. This shall be done unless the Court decides that it would be improper in respect to the child's age and maturity (Section 17 in the 1989 Act). This exception shall be interpreted strictly. The child shall be asked in a way that takes into consideration the child's age and maturity. The assessment of younger children's statement shall be made by people with certain knowledge in this area. In Sweden the hearing of the child is usually conducted by social workers. The social worker later on reports the child's wishes and feelings to the court.

As mentioned in the Swedish answer to the questionnaire of the Hague Conference the court can, if it decides that the child shall be returned to the state of habitual residence, order the surrender of the child under penalty of a fine or alternatively collection by police (Section 18 in the 1989 Act). By amendments in the Act in 2006 the court can, *even without a request*, place a penalty of fine on the abducting parent or order the po-

lice to collect the child. The change in the law implies increasing possibilities to decide on coercive measures. However, the court may, as previously, only decide on penalty of fine if it can be assumed that the child through this will be returned without undue delay. In cross-border cases this means that normally the court would decide that the child should be returned through the assistance of the police.

As stated in the Swedish answer to the questionnaire of the Hague Conference there was, at the time of the response, an ongoing legislative procedure to change the forum for cases that fall under the Hague Convention. The Swedish Parliament has since then adopted the new law. From the 1 of July 2006 all Hague Convention cases are dealt with by the Stockholm District Court and not as earlier by the county administrative courts. The Stockholm District Court is now the only competent court to hear return cases (Section 13 in the 1989 Act). The appellate court is the Court of Appeal in Stockholm, whose judgment can be appealed to the Supreme Court, if the Supreme Court gives leave to appeal.

2. Please give details of any general legislative provisions which exist in your State concerning the enforcement of court orders in the area of family law and govern the enforcement of return orders (either in the absence of specific provisions under question I.1 or in addition to any such specific provisions). Please specify the title of the instrument, its legal nature (law, decree, administrative regulation or rules of court etc.) and the content of the relevant provisions.

Specific legislative provisions for the handling of return cases are to be found in the above mentioned 1989 Act. These provisions are in general in compliance with the provisions of Chapter 21 of the Children and Parents Code, but are specially adopted for the purposes of the Hague Convention. In addition, the provisions in Chapter 21 Sections 9 and 11-16 of the Children and Parents Code provides the basis for enforcement of court orders regarding children in all cases relevant to custodial issues, including but not limited to, return cases (see Section 21 of the 1989 Act that refers to these provisions). The Children and Parents Code establishes that the enforcement of court orders should be executed as carefully as possible in regard to the child concerned (Chapter 21 Section 9). Further, a person that can be a support for the child shall always be present when the child is being collected or taken into immediate care (Chapter 21 Section 11). In addition, the Code includes provisions regarding the procedure and legal costs.

The entry into force of the Brussels II-Regulation has not changed the basic handling of the return cases. However, Articles 11.2 - 11.5 in the Brussels II Regulation states that a court cannot refuse to return a child on the basis of Article 13b of the Hague Convention if it is established that the adequate arrangements have been made to secure the protection of the child after its return. This means that the court must order the return of the child even if the return would put the child at risk provided it is satisfied by the arrangements.

According to Article 47 in the Brussels II Regulation the enforcement procedure is governed by the law of the Member State of enforcement. Any judgment delivered by a court of another Member State and declared to be enforceable or certified (in accordance with Art 41.1 or 42.1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State. The Swedish provisions concerning enforcement laid down in Chapter 21 of the Children and Parents Code shall thus be used for enforcement in Sweden, which seems to imply that the provisions in Section 5-6 on the possibilities to refuse enforcement may be applicable.

II. Enforceability and legal remedies of return orders

1. a) Is a return order subject to appeal or other forms of challenge? Please give details (number and character of legal remedies, possible time-limit for them, possible time-limit for appellate court or court of appeals to decide etc.).

Following the amendments of the Children and Parents Code in 2006 a court decision for the return of the child shall be enforced immediately, if the court does not decide otherwise (Section 21 in the 1989 Act that refers to chapter 21 Section 14 in the Children and Parents Code).

2B. Law and practice with regard to enforcement of family law judgments other than return orders

1. Instruments and national legislation relevant for the enforcement of family judgments in cross-border cases

According to Swedish case law, foreign judgments on custody and access are not recognized in Sweden and cannot be enforced here unless the Swedish law supports this. Such statutory support is generally based on international conventions. Apart from the Brussels II-Regulation, Sweden is a party of the following international instruments that may be relevant to the enforcement of family law judgments, in particular judgments on custody and access.

In relation to the Nordic countries the Convention of 6 February 1931 on Marriage, Adoption and Guardianship applies. This Convention is in force between Denmark, Finland, Iceland, Norway and Sweden. The Convention has been implemented into Swedish law by the Act (1931:429) on Certain International Legal Relations Concerning Marriage, Adoption and Guardianship. The Convention is still in force even if some amendments have been made, most recently in 2006.¹ Issues on custody, residence and access are covered by this convention. The Convention contains rules on recognition,

¹ The amendments of 2006 are expected to enter into force shortly. The earlier amendments have been made 1953, 1969, 1973 and 2001.

but it does not include any rules on enforcement of judgments. However, rules on enforcement of judgments on custody or access are laid down in the Act (1977:595) on Recognition and Enforcement of Nordic Judgments in the Field of Private Law. The law is based on the Convention of 11 October 1977 on Recognition and Enforcement of Foreign Judgments in the Field of Private Law. According to the Act a judgment on custody or right to access with a child which has been delivered by a court or administrative authority in Denmark, Finland or Norway shall on request be enforced in Sweden, provided that the judgment may be enforced in the Nordic country in which it originate. Swedish court decisions are under the same conditions enforceable in the other Nordic States.¹

Sweden has also ratified the Council of Europe Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children. As mentioned earlier, it has been incorporated into Swedish law by the Act (1989:14) on Recognition and Enforcement of Foreign Decisions Concerning Custody of Children etc. and on the Return of Children and entered into force on 1 July 1989.

In relation to Switzerland, the Act (1936:79) on Recognition and Enforcement of Judgment issued in Switzerland applies. The Act is based on the Convention of 15 January 1936 between Switzerland and Sweden on Recognition and Enforcement on Judgments and Arbitration Awards. The Convention covers issues on custody.

The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children is yet not in force in Sweden. However, Sweden has signed the 1996 Hague Convention in 2003 together with the other EU Member States and is ready to proceed with ratification of the Convention as soon as the necessary decisions within the EU have been made.

It can be added that Sweden has *not* ratified the Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors.

The provisions on enforcement in Chapter 21 in the Children and Parents Code provide the basis for the enforcement of foreign court orders relating to children in all cases relevant to custodial issues.

In addition to the above mentioned instruments it should be mentioned that Sweden also has ratified the following instruments concerning maintenance for children:

-The New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance.

¹ In relation to Island the Convention of 1932 on Recognition and Enforcement of Foreign Judgments applies. See also the Act (1932:540) on Recognition and Enforcement of Judgments delivered in Denmark, Finland, Island or Norway.

- The Hague Convention of 2 October 1973 on Recognition and Enforcement of Decisions Relating to Maintenance Obligations, and

- The Lugano Convention of 1988.

2. National law relevant for cross-border enforcement of family law judgments under Brussels 2A

According to Article 47 in the Brussels II Regulation the enforcement procedure is governed by the law of the Member State of enforcement. Any judgment delivered by a court of another Member State and declared to be enforceable or certified (in accordance with Art 41.1 or 42.1) shall be enforced in the Member State of enforcement *in the same conditions* as if it had been delivered in that Member State. The Swedish provisions concerning enforcement laid down in Chapter 21 of the Children and Parents Code shall thus be used for enforcement in Sweden, which seems to imply that the provisions in Section 5-6 on the possibilities to refuse enforcement may be applicable.

3. National practice with regard to the enforcement of family law decision of your own courts in another member state

In case the courts in your member state take a decision that is to be enforced in another member state, will the courts take the 'cross-border' factor into account. E.g. will the court consider:

- whether orders that support enforcement are practicable (or not) in the member state where enforcement is to take place (e.g. involvement of police authorities, which may not be practicable in all member states in case of enforcement of, e.g., visiting rights)
- any other practical factors regarding the enforcement that ensue from the fact that the enforcement takes place in a cross-border situation, such as the involvement of foreign child protection agencies, the taking into account of different society customs and practices in the other member state, or the practical difficulties encountered by the child and interested persons (mostly parents) when family rights such as custody or visiting rights are to be respected in a cross-border situation.

4. National practice with regard to the enforcement of family law decisions of another member state in your own member state.

When a family law judgment from another member state is to be enforced in another member state, will the courts be inclined to amend the modalities of such a decision, e.g. with regard to the measures supporting enforcement (involvement of the police) or the practicality of the arrangements laid down by the foreign court.

5. Setting aside or amending of foreign judgments

Is it possible to indicate what conditions must be fulfilled before a decision of another member state, which is to be recognised and enforced in your member state, may be set aside by a 'new' decision of your own courts? E.g. a divorce court in another member state has taken measures with respect to parental responsibility and visiting rights. The child then comes to live in your member state. After a certain period an interested party

challenges the arrangements made by the divorce court, whereas another interested party pleads for enforcement of these arrangements.

2C. Specific issues relating to the cross-border enforcement of family law judgments

1. The role of organs and institutions

What national organs and institutions are involved in the cross-border enforcement of family law judgements (both when enforcement takes place in your member state or ‘abroad’ (in another member state or in a third state). We assume that to an extent such organs have already been discussed above under B.1 a-c, above, but it may be necessary to include particular details.

Reference may be made to paragraph B.1a-c above.

In the absence of any other court with jurisdiction, the question of enforcement of a foreign court order shall be considered by the Stockholm District Court (See Chapter 21 Section 1 the Children and Parents Code).

It can be added that under article 68 of the Brussels II-Regulation 2201/2003 the court that decides upon the enforceability of foreign court orders is the Svea Court of Appeal in Stockholm (‘Svea hovrätt’).

2. Time limits relevant for enforcement proceedings and the effect of time

To an extent these issues will have been discussed under B. 2 a-c above and there may not be any specific different rule or practice. We are inclined to assume that in cross-border cases certain time limits (e.g. for appeal) are similar to those in internal cases, as discussed in under B. above, or are subject to foreign law (if the decision emanates from another state. However, in cross-border cases, possibly certain time limits may influence enforcement, whether it is the enforcement of a ‘foreign’ decision or the enforcement abroad of a decision from your Member State. Finally the passing of time may have a different effect on enforceability in cross-border cases.

Reference may be made to paragraph B.2 a-c above.

3. Coercive measures to ensure enforcement

Again reference may probably be made to paragraph B. 3. a-c above. Please include any issue relevant to a cross-border case.

As mentioned above, the provisions on enforcement in Chapter 21 in the Children and Parents Code provides *the basis* for the enforcement of foreign court orders relating to children in all cases relevant to custodial issues. Reference may therefore *in general* be made to paragraph B.3.a-c above.

The Council of Europe Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children etc. and on the Restoration of Custody of Children has been incorporated by the above mentioned *Act of 1989*. The 1989 Act is applicable in relation to the states parties to the 1980 Hague and Council of Europe Conventions and is written explicitly to implement the relevant provisions of the two conventions into Swedish law.

If a foreign judgement is to be enforced according to the 1989 Act the following rules in this Act applies (in addition to Chapter 21 Sections 9 and 11-16 the Children and Parents Code):

In cases where there is a risk that a child will be taken out of the country, or when the enforcement of the decision is presumed to be obstructed, the District Court has the right to order that the child should immediately be taken into care by the authorities in any way the Court finds it suitable (Section 19 in the 1989 Act). If there is no time to await such a court order, the police may bring the child under immediate care or take any urgent measures that can be made without harming the child. In these situations, a medical doctor and a social worker must assist the police. The action should be instantly reported to the court, which then has to decide, without a delay, if the child should remain in custody (Section 20 in the 1989 Act).

Before the Court decides on the enforcement of a judgment, the Court has the possibility to request that a representative of the social services, or another person deemed suitable, act as a mediator to try to reach a voluntary solution. However, *this provides that such a measure can be presumed to result in the voluntary return of the child*, without undue delay of the proceedings in court. The maximum time-frame allowed for mediation is a period of two weeks, which can only be prolonged under exceptional circumstances (Section 16 in the 1989 Act). This time-frame ensures that the mediation procedure do not delay the proceedings for the return of the child.

Before the Court decides on the enforcement of a judgment, the child should have an opportunity to express his or her views. This shall be done unless the Court decides that it would be improper in respect to the child's age and maturity (Section 17 in the 1989 Act). This exception shall be interpreted strictly. The child shall be asked in a way that takes into consideration the child's age and maturity. The assessment of younger children's statement shall be made by people with certain knowledge in this area. In Sweden the hearing of the child is usually conducted by social workers. The social worker later on reports the child's wishes and feelings to the court.

If the Court decides on enforcement of the judgment it may order the surrender of the child under a penalty of a fine or alternatively collection by police (Section 18 in the 1989 Act). By amendments in the Act in 2006 the court can, even without a request, decide on a penalty of fine or order the police to collect the child. The change in the law implies increasing possibilities to decide on coercive measures. However, *the court may, as previously, only decide on penalty of fine if it can be assumed that the child through this will be surrendered without undue delay*. In cross-border cases this means

that normally the court would decide that the child should be returned through the assistance of the police.

4. Other legal or practical conditions that may form obstacles to enforcement

Again reference may probably be made to paragraph B. 4 above. Please include any issue relevant to a cross-border case.

No further comment.

5. Issues of specific concern in cross-border cases

The issues of specific concern may vary from Member State to Member State and may very well be specific for you jurisdiction. Possible issues that may (or may not be discussed are, e.g.:

- Are rights granted under certain family law judgments (decisions on parental responsibility or on access/contact rights) limited in a geographical sense (e.g. the territory on one member state) or are they absolute (e.g. the right may be exercised world-wide)

- Is it necessary to obtain permission of a court to move to another member state without the consent of another holder of parental responsibility? Under what do the courts give permission to relocate?

Legal custody includes the right to decide where the child should live. The starting point is that both parents have joint custody of a child also after a divorce, and thus also have the right to decide where the child should live. If the parents can agree on the matter then it is possible for one of the parents to move with the child to another country. However, it is not possible for one of the parents to move with the child to another country without the consent of the other parent. The only remedy for a parent, in that situation, who wants to move to another country with the child, is to apply for the sole custody of the child. It is though not likely that such an application will be successful since joint custody is considered to be in the best interests of the child.

If only one of the parents have the legal custody, it is that parent alone who has the right to decide where the child should live. If the custodial parent decides to move to another country, the non-custodial parent with a right of access has the right to be informed of any move, but has no right to prevent the custodial parent from moving with the child. If the non-custodial parent is not willing to accept the relocation of the child, the only remedy is to make an application to the court for transfer of custody. 'Relocation', as it is known e.g. in England, is not known in Sweden.

- Are there specific issues that arise when enforcing foreign family judgements?

No comments.

- Are there specific conditions with respect to foreign family judgements that may form obstacles to enforcement?

Specific conditions can be found in the conventions and legislation listed in paragraph 2B.1.

According to provisions in the Act (1989:14) on Recognition and Enforcement of Foreign Decisions Concerning Custody of Children etc. a foreign judgment may not be recognized or enforced in Sweden:

- 1) if this would be manifestly incompatible with the fundamental principles of Swedish law relating to family and children,
- 2) if the judgement due to changes in the circumstances is manifestly no longer in accordance with the welfare of the child,
- 3) if at the time when the proceedings were initiated in the State of origin the child was a Swedish citizen or had its habitual residence in Sweden and no such connection existed in the State of origin, or the child was a citizen both of the State of origin and of Sweden and had its habitual residence in Sweden,
- 4) if the judgment is incompatible with a judgement given in Sweden pursuant to proceedings begun before the submission of the request for recognition or enforcement, and if the refusal is in accordance with the welfare of the child.

According to provisions in the Act (1977:495) on Recognition and Enforcement of Nordic Judgements in the Field of private Law and the Act (1936:79) on Recognition and Enforcement of judgement issued in Switzerland a foreign judgment shall not be enforced *inter alia* if such recognition or enforcement is manifestly incompatible with fundamental principles of Swedish law.

- The influence of any bilateral or regional convention that is relevant for enforcement

There are no other conventions that are relevant for enforcement than those listed under paragraph 2B.1.

6. Mediation/Alternative dispute resolution

Please discuss to what extent mediation (or alternative dispute resolution) plays a role in the enforcement of other family law decisions. What would or could be the legal base of such a solution and to what extent does it play a role in the practice of the courts. If mediation plays a role, is its use limited to ‘internal’ cases or is there also a use in cross-border cases.

For a discussion of the role of mediation in the procedure of enforcement of family judgements reference can be made to part 1 (pp. 6-7) and paragraph 2A.I.1.

It can also be added that conciliation is encouraged to avoid custody and access disputes. The object of conciliation is to allow parents, under expert guidance, to resolve their disputes and reach agreements on issues relating to their children. It is required in the Swedish legislation that municipalities provide parents with the opportunity to at-

tend conciliation (Chapter 5 section 3 Social Services Act (2001:453). Courts may take the initiative and order parents to attend conciliation discussions (Chapter 6 section 18 Children and Parents Code).

When the provisions relating to custody and access in the Children and Parents Code were amended on 1 July 2006 a new obligation was introduced for the court to encourage, when appropriate, amicable solutions in cases that are not amenable to out-of-court settlement. In cases concerning custody, residence and access this means that the court is required to encourage parents to reach an amicable solution that is compatible with the best interests of the child. The court is also empowered to instruct a mediator to try to get the parents to reach an amicable solution in the best interests of the child (Chapter 6 section 18 theChildren and Parents Code).