

THE CHALLENGE OF NEW FAMILIES

EVA RYRSTEDT*

Today there are many new and different types of families—not only families with one biological parent and one step-parent, but also families with same-sex parents or with two sets of same-sex parents who together with the child form a household.

These new families pose many new challenges for society. One such challenge is how to allocate different social benefits that were traditionally designed for the nuclear family or for a single parent with sole legal custody of a child. Families with a single parent and a non-custodial or joint custodial parent who spends some time with the child and families with one biological parent and one stepparent already pose certain problems. Such families mean there may be other parental figures out there claiming that the child is part of their family. As even more complex families emerge, the potential for problems is readily apparent.

The problem is further amplified in Sweden through the existing National Registration, which can determine what social benefits are granted to the family. This means that the child's primary family is determined by the address at which the child is registered. This would not be the large problem it is today if not for the fact that the child can be registered at only one address. This fails to consider the fact that today's families are more flexible. The legislation simply has not kept up with the changes in society.

Even though the phenomenon of National Registration seems to be restricted to the Nordic countries, the problem that arises from determining to which family a certain child belongs—and thus who is entitled to the different social benefits associated with the child—is a common problem that may be solved in different ways.

This Article aims to map out the different legal perspectives of families in Sweden today and to discuss the

* Associate Professor, Faculty of Law, Lund University, Sweden.

allocation of social benefits, while considering the challenge of the new diversity of family types and the problems that are caused by benefits that cannot be divided. Gender issues are closely connected with the above-mentioned problems.

I. THE ACCEPTED FAMILY

A. The Diversity of New Families

Just a few years ago, a family normally was understood as the nuclear family, consisting of a married man and woman who are parents to their children, even though in earlier times an older generation often was part of the picture. Today the word “family” is understood in a broader way. In Sweden we use the term “rainbow families”¹ to describe these different family structures which are inconsistent with the nuclear family, such as a family with same-sex parents. A child might also alternate between living with one set of two fathers and one set of two mothers.

The most recent development in Sweden occurred in the spring of 2009 when the parliament passed an act amending the Marriage Code, which legalized gender-neutral marriages as of May 1, 2009.² This is not the first law regarding homosexuals that has taken rather a long time to gain acceptance.

The new social development of nonconventional families has thus—sometimes reluctantly—been accepted into the family legislation, at least in part. The following Section will give an overview of the different family types now recognized in the Swedish legislation.

B. Cohabitees

The first civil law on cohabitees came into force in 1974, and was an answer to the increase in cohabitation out of wedlock and the greater societal acceptance of cohabitation as a

¹ Wikipedia, *Regnbågsfamilj*, <http://sv.wikipedia.org/wiki/Regnb%C3%A5gsfamilj> (last visited May 1, 2010). This term was first used to describe families consisting of persons of different “colors”.

² Äktenskapsbalk [ÄktB] [Marriage Code] 1:1 (Swed.).

way to live together in a family.³ This first law on cohabitantes concerned the joint dwelling, consisting of a tenant-owner's flat or a tenancy flat.⁴ The regulation, however, only gave a possible right to take over the dwelling on the ending of the relationship; it did not allow for the division of the value of the dwelling.

Fourteen years later, as cohabitation became even more frequent, the law developed to include a possible division of the net-value of the goods shared by the couple.⁵ The property that the law considered was extended to nearly all types of joint dwellings, with the exception of property primarily used for the purpose of leisure.⁶ Further, to be included in a property division, the property also had to be acquired for the use of both the cohabitantes.⁷

The old legislation remained, with only small changes, in a paragraph in the new law, with seemingly the same purpose as before—to look out for a cohabitee in need of protection. This is especially important since the cohabitantes could agree that they should not apply the paragraph on division to their cohabitation.⁸

The first articulation by the parliament about the acceptance of homosexual cohabitation took place in 1973.⁹ Nevertheless, the law on homosexual cohabitantes¹⁰ did not come into force until 1988. Through this legislation, the law on heterosexual cohabitantes became applicable to homosexual cohabitantes as well. Sweden then became the first country in the

³ See, e.g., Statens Offentliga Utredningar [SOU] 1972:41 Familj och äktenskap I. [government report series], 45.

⁴ Lag om ogifta sambors gemensamma bostad (Svensk författningssamling [SFS] 1973:651).

⁵ Lag om sambors gemensamma hem (SFS 1987:232).

⁶ 7 § Sambolag [Cohabitees Act] (SFS 2003:376).

⁷ 3 § Sambolag (SFS 2003:376).

⁸ 22 § Sambolag (SFS 2003:376).

⁹ Lagutskottet [LU] 1973:20 [parliament standing committee report], 116.

¹⁰ Lag om homosexuella samboende (SFS 1987:813).

world to include same-sex couples in regulation regarding family law.¹¹

In the middle of 2003, a new Cohabitees Act came into force, applying to both heterosexual and homosexual cohabitees. The new Cohabitees Act contains certain amendments to the original, but the main principles in the law are the same.

C. Registered Partners

A discussion regarding same-sex partnerships started even before the law on homosexual cohabitees was passed, but the law still met quite a bit of resistance.¹² After a suggestion had been put forward by the Law Committee,¹³ a law on registered partnerships finally came into force in 1995.¹⁴ However, this time Sweden was not first but instead lagged behind both Denmark and Norway. The law to a large effect referred to the Marriage Code. An important difference, however, was that the legislature did not equalize married couples and registered partnerships in relation to children. This meant, amongst other things, that registered partners could not adopt.

D. Rights to Adoption, Insemination, and IVF

Through a change in the Registered Partnership Act, which came into force February 1, 2003, same-sex couples were given the right to adopt. This was an important development in many ways, since Swedish law requires a couple to be married or registered partners in order to be able to adopt together. On the other hand, married couples or registered partners normally

¹¹ Bo Widergren & Hans Ytterberg, *Homosexuella sambor—innebörd och mottagande av en ny rättsfigur*, 7 SVENSK JURISTTIDNING [SVJT] 491 (1990).

¹² See, e.g., SOU 1984:63 *Homosexuella och samhället. Bctänkande av utredningen om homosexuellas situation i samhället*, 97-101.

¹³ 1993/94:LU28 *Registrerat Partnerskap m.m.* See also SOU 1993:98 *Partnerskap*.

¹⁴ Lagen om registrerat partnerskap (SFS 1994:1117) (Swed.).

cannot adopt individually; they have to adopt together.¹⁵ The proposed change of the law was incentivized in a peculiar way. It was articulated that the proposal would give an important signal, to the child and others, that the homosexual family was an accepted family.¹⁶ This suggests that the state could be prioritizing the adults' right to a certain family form over the child's right to grow up under the best conditions.

That said, it is important to stress that there do not seem to be any grounds for believing that a child would be better off with heterosexual parents than with homosexual ones.¹⁷ That is, however, not the point. The best interest of the child should always be our prime consideration; with that kind of argument, the legislature seems instead to have used children to legally recognize the homosexual family.

Today, neither homosexual nor heterosexual cohabitants can adopt jointly under Swedish law.¹⁸ On the other hand, legally there is a possibility for an individual to adopt.¹⁹ However, there is now a report that explores, amongst other things, the right for cohabitants to adopt jointly.²⁰

At the time of these changes to the Registered Partnership Act, Sweden was not yet ready to accept in-vitro fertilization (IVF) treatment for homosexual couples. It took another two years before a change in the law would allow that. This change came into force on July 1, 2005, via legislation applicable to spouses, registered partners, and cohabitants, regardless of whether they are homosexual or heterosexual. In reality, of course, it is only lesbians who may undergo the treatment; male homosexual couples cannot. Furthermore, the law requires that there be a genetic connection to one of the

¹⁵ Föräldrabalk [FB] [Code Relating to Parents, Guardians, and Children] 4:3.

¹⁶ SOU 2001:10 Barn i homosexuella familjer, 17, 329.

¹⁷ See, e.g., *id.* at 211–53.

¹⁸ FB 4:4.

¹⁹ FB 4:1.

²⁰ SOU 2009:61 Modernare adoptionsregler.

parents in the couple: either the egg or the sperm has to originate from one of them.²¹

E. A Gender Neutral Marriage

Although the question of same-sex or gender-neutral marriages stirred quite a debate in Sweden, on May 1, 2009 the Marriage Code was amended to allow for same sex marriages. Even though an earlier governmental report²² recommended such a change in the law, the subsequent legislative bills did not.²³ However, the Civil Committee decided to assign the secretariat the task of drafting an amended marriage legislation.²⁴ This was the same path that was taken when the Registered Partnership Act was suggested by the Law Committee some fifteen years earlier.

When the legislation on gender-neutral marriages was formally adopted, the Registered Partnership Act was simultaneously abolished. Partnerships that have been previously registered will continue to be valid, but registered partners may also jointly report to the Tax Authorities that they want their partnership to be regarded as a marriage. Furthermore, registered partners can choose to be wed according to chapter four of the Marriage Code.²⁵

II. BENEFITS AND FAMILY TYPES

A. Families with Children: A Vulnerable Group

The development of new family types has not been met by parallel changes in social law. Here it is obvious that the law

²¹ 7 ch. 3 § Lag om genetisk integritet m.m. [Act on Genetic Integrity] (SFS 2006:351).

²² SOU 2007:17 Vigsclfrågor.

²³ Proposition [Prop.] 2008/09:80 Äktenskapsfrågor [government bill].

²⁴ Civilutskottet [CU] 2008/09:CU 19 Betänkande [parliament standing committee report].

²⁵ Lag om upphävande av lagen (1994:1117) om registrerat partnerskap (SFS 2009:260).

still presupposes the old nuclear family or the remainders of a shattered nuclear family. The regulation is construed more for the convenience of the administrator of benefits than to serve the intended purpose of the benefit.

The economic family policy has many different goals. Nativity is often one of them. However, the overall goal for the Swedish family policy is often said to be lessening the differences in economic conditions between families with and without children and helping families in particular need of support, such as single parents or parents of disabled children. However, these benefits are not meant to replace earnings but instead are intended to be a supplement. A goal of the policy is to safeguard the economic level of families with children by making sure that parents are able to combine paid work with parenthood. The portion of the total income of the family that the benefits constitute depends mainly on how many children there are in the family, but also on the family type.²⁶

The problem seems to be that the benefits are constructed to apply either to the nuclear family or to a single parent with whom the child primarily resides. As we now have a greater diversity of family types and ways to organize children's living situations, the allocation of benefits becomes a real problem. In Sweden, the benefits normally are not divisible, which means that the family considered the child's primary family is the recipient of the benefits. The problem is amplified through the system of National Registration. This is a technical system with its origin in the sixteenth century. Even though it is a system of registering individuals at a specific address to satisfy, amongst other things, a need for statistics, it also impacts family and social law,²⁷ and it can be said in some cases to

²⁶ Regeringens skrivelse 1999/2000:137 Barn—här och nu, 92-94 [government letter].

²⁷ For further description of the system, see Eva Ryrstedt, *Familjerätt och folkbokföring: kalla fakta som ställföreträdare för verkligheten*, JURIDISK TIDSKRIFT [JT] 2009-09, nr 3, pp. 564-75.

determine to which family the child belongs,²⁸ since a child can be registered at only one address.

One example is the care allowance provided by the Handicap Compensation and Care Allowance Act²⁹ to help disabled children. This is a benefit that can only be paid to one of the parents unless both parents agree otherwise. Although the law stipulates only that the allowance is to be paid to the parent who supplies the primary supervision and care of the child,³⁰ a fairly recent case by the Supreme Administrative Court held that if the parents supply equal supervision and care, the address where the child is registered according to the National Registration Act determines which of the parents gets the allowance.³¹

However, the National Registration is not always decisive for the allocation of benefits. One of the most common benefits is the child benefit, because it is paid to all children regardless of the parents' income.³² When the parents have joint legal custody of the child, the child benefit is paid to the mother—both when the parents live together and when the child permanently lives alternately with its parents—unless the parents agree to divide the benefit or for it to be paid to the father.³³

This is the only benefit in Sweden that is explicitly directed towards the mother as a primary recipient.³⁴ It means that the mother still has a favored position even though the

²⁸ See Eva Ryrstedt, *To Define Family Belonging—Starting Points For Family Benefits in a Comparative Perspective*, in *FAMILY LAW: BALANCING INTERESTS AND PURSUING PRIORITIES* 472 (Lynn Wardle & Camille Williams eds., 2007).

²⁹ Lag om handikappersättning och vårdbidrag (SFS 1998:703).

³⁰ *Id.* at 18 §.

³¹ Regeringsrättens årsbok [RÅ] [Supreme Administrative Court] 2008-05-09 ref. 34 9 (citing Folkbokföringslag (SFS 1991:481)).

³² Lag om allmänna barnbidrag [General Child Benefit Act] (SFS 1947:529).

³³ *Id.* at 4 §.

³⁴ The father will be the recipient if the child lives solely with him, even if the parents have joint custody. *Id.*

benefit is designed to improve living conditions for the children. Designating the mother as a recipient has a historical background³⁵ that may well have been logical at the time when the rule was first enacted. Today it serves a pragmatic objective, as the child benefit must be paid to someone, and it is vital that the cost of administration is kept as low as possible. A few years ago, an official report was drafted suggesting that the child benefit should be divided.³⁶ The report, however, did not lead to any real change.

The challenges of administration become more obvious in light of how the child benefit is allocated in the case of same-sex legal parents. In that fairly recent possibility, the legislation has simply decided that in the case of same-sex parents, the benefit is to be received by the oldest parent.³⁷ This clearly shows that it is important to the contributor to keep it simple when it comes to the administration. Here the gender problem, at least, has vanished.

B. Does Gender Matter?

A mother is a mother is a mother—is that what the regulation on child benefit says? Or is the mother as the primary recipient just an historic remnant that has prevailed to make sure that the administration is kept simple? It might be both. Also, benefits which, from the outside, seem gender-neutral may not be so, due to the surrounding context.

Put in context, child benefits are paid more frequently to women than to men, due to the fact that women are more frequently single parents,³⁸ or, rather, women are more frequently the parents with whom young children primarily live. This of course would mean that children are more often registered at the same address as their mother. The system,

³⁵ Prop. 1947:220, 91.

³⁶ See Återrapportering av regeringsuppdrag avseende könsneutralt barnbidrag; Prop. 2005/06:20 Delat barnbidrag vid växelvis boende, m.m.

³⁷ 4 § SFS 1947:529.

³⁸ Another important reason why women tend to more often be the recipients of different benefits is of course that they continue to have lower incomes than men.

however, is admittedly also susceptible to arbitrary decisions, since the child has to be registered somewhere, but cannot be registered at more than one address. In the case where a child lives equally with both its parents, the child still cannot be registered at more than one address.

However, this has no significance in same-sex families as such, but it matters in other ways. The Swedish practice of making child benefits indivisible, and classifying children as belonging to only one family, has created significant problems in all types of families except for strictly nuclear ones. Thus Swedish society does not display any regard for new family types, nor even for the fact that children might alternately be living with both of their parents. This shortcoming is even worse in instances where a child alternately lives with two families both consisting of two adults. In these cases, it does not seem to matter whether the adults in each family unit are of the same sex or not. What is significant here is with which of the families the child is registered, or in which family his or her legal mother is to be found.

Even though this superficially suggests that homosexual and heterosexual couples are treated in the same way, this view alters when you study the situation more closely. It has to be taken into consideration that where two heterosexual couples are concerned, it is a question of stepfamilies having been created—often after a break-up of the original family. Where homosexual couples are concerned, instead the issue presented is the primary and most basic means of *creating* a family. Through the differences in the formation of families, this means that the homosexual families will, by default, be the families where the problem of a child only legally belonging to one family most frequently applies.