

Transferring custody from birth parents to foster parents – an ambiguous matter

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ABSTRACT

In this study, we analyse 32 district court decisions regarding custody transfers from the birth parents to the foster parents in Sweden. When a child has been in foster care for three years, in order to enhance stability for child, the local social welfare committee considers a transferral of custody to the foster parents following an application to the district court. Although all but one of the decisions in our study favoured a custody transfer, the courts acknowledge different reasons for this. Specifically, there is vagueness about whether or not functioning contact between the child and birth parents is a hindrance in custody transfer. Our findings stress the need for clarification in the law regarding the criteria for custody transfer in order to reach a more unified judgment. Furthermore, the district courts do not sufficiently acknowledge children's views, and we suggest that children and young people should be made more visible in the decision-making process.

KEYWORDS

Foster care; custody transfer; contact; children's view; court decision; social work

Introduction

A custodian is a person who is responsible for a child's personal situation and who decides on various matters relating to the child. According to the Swedish Parental Code (Föräldrabalken), the custodian must consider both the child's and the other parent or parents' views and wishes. Most birth parents in Sweden who are married have joint custody of their child, and for the most part, the joint custody continues after a divorce. Parents who are not married can decide that custody shall be joint, otherwise the mother gets sole custody. When a child is placed in foster care, the custody of the child is not transferred to the foster parents, and this is why cooperation between the birth family and the foster family is necessary for decisions that involve the child's needs, especially in cases of voluntary care. In placements by court order, the social services are more involved in decisions about matters that concern the child, for example school and health issues, as well as visitation plans with birth parents.

Swedish foster care has long been characterised by a family-oriented perspective, focusing on reunification with the birth family. Even though foster care placements are regarded as a temporary solution, many foster care placements last for several years, although the decision to continue such care is put up for consideration every six months. Hence, many children face an insecure future, not knowing if, or when, they

might have to move to another foster home or return to their biological parents. In Sweden, the adoption of foster children is not a common occurrence. In 2012, there were only five cases of adoption by foster parents in Sweden. Instead, a different approach to generating security and stability for children in long-term placement was launched in the Social Services Act in 2003. When a child has been placed in the same foster home for three years, the local social welfare committee (LSWC) considers whether the custody of the child should be transferred to the foster parents. In Sweden, custody transfers are decided by the district courts following an application made by the LSWC. The application can only be initiated by the LSWC, and an assessment from them is always obtained in the matter.

The concept of custody transfer entails a break with the birth-family-orientated perspective, because it means that the child will stay in the foster family regardless of the circumstances of the biological parents. This break can explain why social workers in Sweden have been hesitant about applying for custody transfer for children in care, and only a minority of all of the eligible cases are brought to the district courts (Mattsson, 2010a). The findings presented in this article are part of the research project 'Custody transfers for children and youth in foster care' that explores the legal, relational, and practical aspects of custody transfers in Sweden. This article will focus on various aspects of how district courts handle applications from the LSWC concerning custody transfer from the birth parents to foster parents. Our questions concern the reasons that district courts provide in their decisions on custody transfers. Furthermore, we will analyse how contact between children and their birth parents is reflected in the decisions, as well as the birth parents' standpoints regarding custody transfer. Finally, we will examine how children's views are reflected in the court decisions.

Child welfare in the Swedish context

Children's social services are integrated with other social services and are provided for under the Social Services Act (SFS, 2001:453) and the Care of Young Persons Act (Lag, 1990:52). The services are organised at the local level in 290 municipalities. Decision-making is done within a system where laypersons participate (for a comparison between Sweden, the United Kingdom and the United States, see Liljegren, Höjer, & Forkby, 2014). The members of the LSWC are politically appointed and understood to represent the 'good citizens' in their constituencies, using sound judgment based upon the social workers' assessments and their own common sense (Forkby, Höjer, & Liljegren, 2014). However, in practice, most decisions are delegated to professional social workers (Svensson & Höjer, 2016). Cohesive decisions, such as out-of-home placement without consent, have to be made by the committee, after a social worker has presented the case to the LSWC. The custodians and the child (if older than 15 years) have the right to be present at this meeting. Studies indicate that the committee seldom decide against the proposals from the social workers, but ask questions of the social workers (Höjer, Forkby, & Liljegren, 2014). After a decision at the local level, the LSWC can apply to the common administrative court, which may decide that statutory care should be ordered. The committee can also decide to apply to the district court for a change of custody for children in foster care. If the parent, or the LSWC, is dissatisfied with the final judgment, it is possible to appeal to the court of appeal.

About three in four out-of-home placements are voluntary. One reason is that Swedish legislation encourages social workers to find solutions based on voluntariness.

However, studies reveal that the parents, and perhaps also the child, might have felt 'forced' to accept a placement (Svensson & Höjer, 2016). Social workers might have explained that if they do not give their consent, the LSWC will apply for coercive care. Consequently, consent can entail an element of hidden coercion.

The possibility of transferring custody from the birth parents to the foster parents has been available in Sweden since 1983. According to the Parental Code 6:8§, the criteria for a custody transfer is that the child has had a stable placement in the foster home and that it is evident that it is best for the child if the existing circumstances are maintained. When the law was first established in the 1980s, the legislature argued for a restrictive usage of the prerequisite. Over the years, there has been a shift towards a stronger emphasis that custody transfers shall be assessed when a child has been placed in a foster home for three years. The National Board of Health and Welfare (2006) has developed guidelines and advice about the social welfare committee's tasks and responsibilities regarding custody transfers (National Board of Health and Welfare, 2006). Adjustments in the law have made it possible for foster parents to retain economic and practical support from the LSWC even after a custody transfer. The motive for this adjustment was that it would reduce the foster family's reluctance regarding custody transfers, and it was argued that one reason for the low numbers of court decisions was foster parents not wanting to become custodians (SOU, 2015:71).

Swedish family law, as well as child and family welfare agencies, is also required to consider the best interests of the child, and the Social Service Act [SFS, 2001:453] clearly states that this should inform all decisions concerning children and young people. In order to determine the best interests of the child, three parameters are of importance – the risk of harm and abuse, the child's need to have two parents, and the child's own view, bearing in mind the child's age and cognitive development. According to the act, considerations and decisions regarding custody transfers should only be brought when it is the best way forward for the individual child or young person, and this is why an assessment by social services is mandatory. The concept of custody transfer gives priority to principles of continuity for the child, and consequently, the birth parents' circumstances and capacities have less significance in the decision. When a child has lived in a foster home for three years, it is argued that this home has become the natural base and caring environment for the child. Even though the situation of the birth parents might change in the future, for example, by developing improved parenting skills, becoming sober, or having a more settled life, it is considered better for the child to remain in an environment where they are established.

Previous research and theoretical concepts

Custody transfer

To ensure safe, stable and long-lasting solutions for children in care, welfare professionals must balance a range of issues, including the needs of the child and the family, as well as legal requirements. Because the legislation and policy differs between countries, various ways to ensure stability are used. For example, in the United Kingdom, there are several options for children in long-term care, such as adoption, special guardianships (sought by carers), and residence orders (without consent from the birth parents) (Wade, 2011).

There is limited previous research about custody transfers in Sweden. In 2003, a Swedish study regarding long-term placement acknowledged custody transfer as one way to enhance continuity for the affected children (Nordin, 2003). Another Swedish study investigated the possibilities of methods to promote and protect good relationships between children and their foster parents (Mattsson, 2010a). Mattsson concludes that continuity in the relationships between the children and their foster parents can only be legally guaranteed by a custody transfer, but that social workers are hesitant to apply for a custody transfer. Mattsson also argues that it is difficult to reach uniformity in court decisions because the requisite standard ‘in the best interests of the child’ can be interpreted in different ways.

Family formation and parenting obligations

The post-modern family is characterised by variations in parenting patterns and family formations. Stepfamilies and extended families are not a new phenomenon, but the vocabulary and discourse surrounding family life has evolved, and now emphasises flux and fluidity over time regarding family formation (Morgan, 2011). Further, the development of assisted reproductive technologies has opened up the debate about parenting as something other than a biological tie to the child. Rights and responsibilities are intertwined with emotional ties and caring practices. However, the two-parent household with biological children is still viewed as the proper model in the post-modern society (Kitzinger, 2005; Powell, Bolzendahl, Geist, & Steelman, 2010; Singer, 2000). This is evident in recent research concerning family formation among individuals who differ from the two-parent norm, for example, LGBTQ-families, single parents, and individuals who become parents using reproductive technologies and surrogacy. In this respect, family legislation in Sweden is described as being out-of-date, meaning that the law stipulates that parenthood is shared between two heterosexual biological parents (Mägi & Zimmerman, 2015). The strong belief that the traditional nuclear family is the best environment for a child’s upbringing is also reflected in foster care, and the nuclear family in itself is seen as a suitable ‘intervention’ to care for children in adverse life situations (Butler & Charles, 1999).

Legal parenthood involves several rights and responsibilities, such as custodianship, contact, financial support, inheritance, and benefits. What a parent is supposed to do in relation to their children differs between cultures. Article 5 of the UN Convention on the Rights of the Child (CRC) recognises the ‘responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention’. In Sweden, as in several other western countries, these rights and responsibilities have to a large extent been directed to the birth parents.

When it concerns children in foster care, previous research has shown that there are uncertainties about how parenting roles and responsibilities should be divided among foster carers, birth parents, and social workers (Hollin & Larkin, 2011). When a child is placed in foster care, day-to-day responsibility for the child is transferred to the foster

parents, while the legal element of parenthood remains with the birth parents. Thus, a custody transfer differs from adoption, which implies a complete dissolution of the birth parents' rights and obligations.

Children's rights versus parents' rights

A child's right to two parents has a strong tradition in Sweden, which is illuminated by Swedish family law and practices after parental separation. The number of children with alternating living arrangements, meaning that they live every other week with one parent at a time, is increasing. About 35 per cent of all children with separated parents have this kind of accommodation, but there are class differences regarding how children's housing after separation is handled (Fransson, Bergström, & Hjern, 2015). Alternate living is more common in families where the parents have higher education, and is less likely in low-income families. Many children in low-income families live with only one parent – usually the mother.

The CRC states that children who, for various reasons, are separated from their parents have the right to regular contact with their parents (article 9.3). Previous research has shown that birth families remain important for children in foster care, and many children request contact. This does not seem to diminish over time, even if children develop an attachment to their foster parents (Hepinstall et al 2001; Fernandez, 2007). Thus, many children in long-term care emotionally belong to multiple families. Whether this is a good or a bad thing for children in care is, however, a contested question. The practice and support of post-adoption contact has been substantially researched in the United Kingdom (Neil, Beek, & Ward, 2017). The European Parliament recommends that a complete disconnection between a child and their birth family should only be considered 'in the most severe and exceptional circumstances, which are not necessarily present in all cases where a child cannot return to their birth family' (Parliament, 2016 p. 57).

Whether it is better for a child to remain with their foster parents instead of being reunited with their birth parents also depends on the relationship between the foster parents and the child, and an important question is whether the foster parents are willing to make a long-term commitment and to take on a more definite parental role. In general, foster parents seem to enjoy the children placed within their home (Barber & Delfabbro, 2005). One explanation for such positive feelings is the formation of an attachment relationship that serves as a solid foundation for a successful placement (Sinclair & Wilson, 2003). The attachment works both ways – the child finds it easier to adapt to the environment and the foster parents feel that the child is part of their family. However, early attachment patterns with birth-parents can affect the capacity of a child to construct secure attachment relationships with a new caregiver (Andersson, 2008). Thus, pre-care experiences can make children unable to form attachment to foster carers. On the other hand, some foster parents identify themselves as strictly professional carers rather than as parental figures (Hollin & Larkin, 2011). Hence, some studies indicate a tendency towards the professionalisation of the foster parent role, which can affect the likelihood of these figures taking on parental responsibilities in the long run.

In order to acknowledge ‘the best interests of the child’, there is a moral necessity to include children as individuals in decisions regarding their future. However, previous research has shown that children are not fully recognised as legal subjects, and to a large extent children’s voices are not heard or noticed in legal processes (Singer, 2014). Even though the law clearly states that decisions on parental responsibility, including residence or contact, should always include the views of the child, this does not happen as often as intended in Sweden. Singer identifies a number of reasons for why this is the case. One is the difficulty in finding suitable ways to involve children in court proceedings. Children are not necessarily interested in being physically present in court, at least not with today’s procedures, and the present legal procedure does not function in a way that best allows children’s views to be heard and acknowledged. In matters about parents’ responsibilities, Singer also points out that the question about how parental responsibility is fulfilled is not a decision for the court. This is a matter that is assigned the parents, and they have to decide how their parental responsibilities are best carried out.

Contemporary research reveals that the Swedish Social Service still gives priority to a parents’ rights perspective, despite the aim to promote children’s participatory rights. For example, Heimer and Palme (2016) show that children’s voices are weakened in the investigation phase and the care phase. Children rarely participate in meetings for treatment whereas the parent’s voice is strengthened. Children’s rights and what is in the best interest of children are still things that are mostly defined by adults, with the focus on protecting children from harm. This implies that children are first and foremost seen as becomings, rather than as beings (Heimer & Palme, 2016). Heimer and Palme argue:

The main policy implication is the importance to invest in children’s agency. To evaluate child policy, where participatory rights are a constituent part of other dimensions of welfare, requires the elaboration of new measures of children’s participation. This includes more specific questions about children’s participation in the decision-making process, their right to a voice, and how their opinions are taken into consideration in the various arenas where their welfare is the object of decision-making. (Heimer & Palme, 2016, p. 449).

Methods

In this paper, we report the findings from a research project focusing on custody transfers. The project consisted of two parts – a document analysis of court decisions addressing custody transfers from Swedish district courts and interviews with custodians and youths who have experienced a custody transfer from a birth parent to foster parent. The focus of this paper is the court decisions. The research team consisted of three researchers with experience of social work practice, as well as research in the field of child welfare.

The empirical material on which the analysis in this paper is based consists of 32 decisions addressing custody transfers from birth parents to foster parents in four district courts in Sweden during 2012. The material includes court files and decisions, but not the assessment and application conducted by the LSWC. However, these assessments were often referred in the court decisions. The material illustrates how the decisions are reasoned and presents an overview of the cases that are subject to an application for custody transfer.

Our material only involves decisions made during 2012. In order to get a picture of the target population, as of November 2012, a total of 9,181 children were in foster homes. From the national statistics of children in care, it is not possible to determine for how long a child has been in the same foster home, only the total time in care and the child's age at placement. However, we know that more than 2,000 of the 9,000 children had been placed in foster care for more than five years. Yet in 2012, only 246 custody transfers were made in the whole of Sweden (SOU, 2015:71).

Sample

Court decisions

There are 48 district courts in Sweden, and our sample of decisions addressing custody transfers from birth parents to foster parents consists of material from four of these courts. The decision to limit the sample to four district courts, and not all district courts in Sweden, is a result of the massive volume of decisions we had to deal with. Due to the organisation of file records in the district courts, we received documentation of all decisions regarding custody transfers, not only those decisions that concerned transfers to foster carers. This meant reading more than 1,000 decisions in order to find the decisions that met our criteria, and this is why we decided to restrict the number of district courts included in the study. The four district courts in the sample are responsible for applications of custody transfers from 35 of Sweden's 290 municipalities. Our sample concerns all decisions on custody transfer from birth parents to foster parents in 2012 in our selected courts. The main reason for choosing the 1-year time range is an adjustment made in 2012 in the Social Services Act regarding decisions addressing custody transfers. The change in the law made it possible for former foster parents to access continuing financial and social support from the social service, even after custody transfer, based on the assumption that foster carers might be more willing to become custodians if they were allowed to keep this support.

There are similarities between our sample and a previous survey of custody transfers to foster carers. The mean age of the children in our cases was 10 years, and the median length in the foster care placement in the same foster home was 6 years (ranging from 1 to 15 years). The mean age for children who experienced custody transfer during 2000–2005 was 11 years, and the average time for foster home placement in the same foster home at the time of the custody transfer was 7.5 years (Socialstyrelsen, 2006).

Half of the children in our sample were placed in foster care as infants, while the other half were characterised by more variation in their backgrounds. The oldest child was 13 years old when placed in foster care. However, the decisions do not make it clear whether the placement in foster care was voluntary or not.

Data collection and analysis

The court decisions were analysed both quantitatively and qualitatively using content analysis, following Hall and Wright (2008). The amount of text in each decision varies from one to 10 pages. The decisions are written in Swedish, and the quotations presented in this paper have been translated into English. As a first step in the analysis,

all decisions were numbered, and when quotations are used in this paper we only refer to this number. Even though district court decisions are public documents, we have decided to delete all names in the quotations due to ethical considerations.

The analysis of the material was mainly driven by the research questions and focused on the courts' arguments for why custody should be transferred to the foster parents, and if so, how, as well as whether children's views were represented in the decision. The arguments were categorised into themes, and the coding was crosschecked among the research team.

All of the interviews were conducted by one member of the research team. However, there was close collaboration throughout the research process, not least in the analysis, by crosschecking and agreeing on the coding that led to the findings we discuss in this paper. Ethical approval was given by the Regional Ethical Review Board in Gothenburg, Sweden (Dnr 751-14)). The findings reported here have been appropriately anonymised.

A limitation of this study is the small number of cases. Because the sample involves all cases in the studied region over the course of one year, the findings reported are relevant for this area and time. However, previous research indicates that there are national variations in how social welfare offices deal with assessments regarding custody transfers; thus, it not possible to generalise the findings to all district courts in Sweden. Nor can our findings be generalised to all custodians and children who have experienced custody transfer. However, the findings point at themes and questions that are relevant on a more general level to the discussion about custody transfers specifically and foster care more generally.

Findings

Factors associated with custody transfer in court orders

Of the 32 cases, all but one application from the LSWC was approved by the district courts. At first glance, this result could be taken as a sign of uniformity in the courts' decision making. However, our analysis reveals that there are variations in how district courts argue and report on decisions about custody transfers to foster parents. These variations are not only between different district courts or variations seen over time; even within the same district court, we find variations regarding the volume and content in the decision.

We have analysed factors that are mentioned in the written decisions of judgment from the district courts as reasons for why a custody transfer is in question.

The fact that the child has been placed in the same foster home for several years is the most commonly mentioned factor in the court orders. One could argue that several of the reasons found in [Table 1](#) above are dependent on duration; for example, attachment and family belonging. In our material, a number of decisions present more detailed information about the relational factors with regard to time. Still, some decisions only acknowledge that significant time has passed and that this is a reason to approve the application for custody transfer.

The second most common factor is the argument that the child has a sense of belonging in the foster family. It is mentioned that the child has developed an

Table 1. Most commonly mentioned factors for custody transfer in the court orders.

Duration of placement	17
Family belonging	13
Birth parent's deficiency	12
Attachment to foster parents	11
Birth parents approve	10
Child approves	9
Avoid disruption in the care environment	7
Foster parents provide good care	7

attachment to the foster parents. Ideas about attachment are central in contemporary understandings of relationships between parents and their children, and consistent, reliable, and close relationships with primary caregivers who provide security and well-being are viewed as significant for children's positive development. This is also reflected in children in care and their caregivers, and a secure attachment is seen as a cornerstone of successful foster care (Hollin & Larkin, 2011).

One example in our material is a 4-year-old girl who has been in foster care since she was 9-months-old. Her birth father is deceased, and contact with her birth mother, who has a drug abuse problem, was described as sporadic.

(The child) is seen as part of the family and relates to (the foster parents) as its obvious (?) carers and is securely attached to them. (The child) has a natural and given place in the family and is an appreciated little sister for the other children. The spouses have agreed to be appointed as specially designated custodians (verdict 17).

The case above concerns a child with no, or very limited, contact with their birth parents. Attachment with foster parents depends on several factors, and previous research has suggested that contact with birth parents during placement is not a hindrance for attachment. It is also possible for children to develop multiple attachment patterns and affiliations with more than one family (Andersson, 2008; Goodyear, 2011). However, social workers tend to stress the importance of securing an attachment between the child and the foster parents, sometimes at the expense of the birth parents. The studied court decisions do not give an answer to this sort of question, but attachment to foster parents is mentioned in the material as a factor in cases where there is very limited contact with birth parents, as well as in cases where the child regularly meets the birth parents. It is important to acknowledge that not all information is viewed as relevant to the courts' decisions, and some information from the written assessments or oral proceedings are not presented in the written decisions of judgment (Röbäck, 2012). For example, more detailed information about attachment patterns is not found in the decisions, nor do the courts' decisions describe or analyse conflicts for the children who might be torn between loyalty to their birth family and affiliation with their foster family.

An interesting finding is that many decisions describe the birth parents' inability to care for the child. This factor should not have any significance for the decision because the principles of continuity are given priority over reunification with birth family. Some district courts recognise that the birth parents' ability is not the focal point for a custody transfer.

The child is said to have become rooted in the foster home and to feel such stability and connection that it sees the home as its own. It is therefore important to assess the child's attachment to the foster home as well as its contact with the biological parents. *Transfer is not demanded because the parents are unsuitable as custodians.* It shall be obviously best for the child that the present arrangements can continue (verdict 4).

However, our findings show that the birth parent's incapacities are discussed in several cases. One example is a 3-year-old girl who had been placed in the same foster home since she was born.

The mother of the child does not have the capability to take care of the child because she has an intellectual disability and a drug abuse problem. The father of the child is marginalised in society and has a drug abuse problem. It is not considered a possibility to make arrangements for the child to return home to the biological parents, partly because of their life situation, partly considering that the child has been placed in the same foster home since birth (verdict 25).

Other factors that are mentioned in about one third of the court orders are that the child wants to stay with the foster family, that the birth parents give their consent to a custody transfer, and that a custody transfer will prevent the child from being removed from a secure environment where they have settled. Later in this paper we will return to and specifically discuss the view of the child and children's participation in custody transfers.

Less common in the court orders are factors related to the children's positive development and environmental factors, such as enjoying friends, school, and leisure activities. Four of the court orders say that the child does not want any contact with the birth parents.

Birth parents' standpoint in regard to custody transfer

Table 2 below illustrates who had custody of the children before the LSWC applied for a custody transfer. Table 2 also illustrates whether the birth parents approved the application. Table 3 shows whether children's and foster parents' opinions of custody transfers are reflected in the written court orders.

Table 2. Custodian standpoint before decision of custody transfer.

	Approve	Disapprove
Birth mother sole custodian (16)	9	4
Birth father sole custodian (7)	1	1
Joint custody by birth father and birth mother (8)	6	
Information of custody prior to decision is missing in court order (1)		
Total number: 32	16	5

Table 3. Are children's and foster parents' opinions of custody transfer reflected in the written court orders?

	Yes
Child's view presented	15
Foster parents' view presented	25

In half (16) of the cases in our sample, the birth mother had sole custody of the child before the LSWC applied for a custody transfer to the foster parents. This finding is not surprising since statistics show that lone mothers are over-represented in cases where children are placed in foster care (Lundström & Sallnäs, 2003). In most of the court decisions where the mother had sole custody, not much is written about the child's birth father. In some cases, the birth father is not mentioned at all. Other cases describe how the child has never had contact with the birth father or that 'the father has never been a part of the child's life'. However, in two cases where the birth father was the sole custodian, the birth mother had been killed by the father, and this was the reason for the child being placed in foster care. In this paper, children's experiences of violence within the family and how this affects decisions about custody and contact on a general level will not be discussed further, but this has been the focus of other studies (Eriksson & Hester, 2001; Eriksson, Hester, Keskinen, & Pringle, 2005; Sundhall, 2012).

An official report from the Swedish Government regarding children in long-term out-of-home care states that one important aspect for social services to consider in order for a custody transfer to take place is whether the foster parents are willing to become custodians (SOU, 2015:71). In half of the court decisions (16), it is explicitly stated that the foster parents give their consent to the decision of custody transfer. The rationale for this statement is not presented in most of the decisions, but some decisions say that the foster carers want to be custodians because it means that they will not lose a child who has become part of their family.

In the court decisions, there is more information about the birth parents' attitudes and motivation compared to the foster parents' views, especially when the birth parents do not give their consent to a custody transfer. A previous study of custody transfer cases in district courts reveals that only in one of every 10 cases did the custodians disagree on a change of custody (Mattsson, 2010b). This study concluded that the LSWCs did not seem to take the case to court when the custodian disagreed on the measure in general. In our study, there are five cases in the material where the court says that birth parents disapprove of a custody transfer. According to the court's decision, these parents declared that they did not object to the child being placed in foster care but stressed that contact with the child was important, and were afraid that contact might be obstructed if custody was transferred to foster parents. One example was a birth father who had sole custody of his daughter, who had been in foster care for four years. He telephoned the foster home once a week and met his daughter three or four times a year. The father's view was presented in the verdict:

He is afraid that (the foster parents) will not let him meet his daughter if they have custody of her. He also thinks that (the daughter) will be very disappointed in him if he gives custody to them (verdict 9).

A similar statement is given in another case, this time by a mother with mental illness whose son had been in foster care since he was an infant. She argued that she never wanted to abandon her son or her role as his mother, but became ill and needed treatment and care. Further, she stated that a new treatment method had improved her health and that she 'wishes to be a mother for her son in a way that fits the present situation' (verdict 8).

The fact that birth parents can be hesitant about and sometimes disapprove of a custody transfer can be interpreted as a fear of being excluded from the child's life, and the worry that it will be possible for the custodians to prohibit contact between child and the birth family.

She wishes that (her son) be continuously placed in foster care with the (foster parents), but feels that she has been discouraged by the foster parents when it comes to contact with her son (verdict 8).

Contact between children and birth parents

How the district courts handle the question of contact between the child and the birth parents varies significantly in our material. In some decisions of judgment, the district court states that it is important that the new custodians safeguard contact between the child and the birth family.

X and Y have contact with their birth parents, and the foster parents believe that it is important that they have contact with their origins (verdict 15).

In this case, the foster parents seem to agree with the court that contact is important and that a custody transfer is a preferable solution. On the other hand, some district courts explain that custody transfer is favourable when there is *no* contact between the child and birth family, or if the contact is characterised by uncertainty or turmoil. One example is a district court that approved of a custody transfer despite the fact that the birth mother's trustee disapproved in court. The birth mother herself was not present at the court proceeding, and according to the LSWC they had not heard from her for some time, so her view of the custody transfer was unknown. However, the birth mother had a trustee who was present in court, and the trustee argued that a decision on custody transfer should not be made before the birth mother's standpoint was confirmed. However, the district court approved the application and stated:

If the parents have not shown the child any interest during its time in foster care and the contacts have been sporadic or characterised by harm, a transfer of custody can be recommended (verdict 4).

Another example reads:

The child's contact with its biological parents has been very limited. The child has only seen the father twice since birth. At one contact in April 2011 (the child's mother) was also present. The mother could not relate to the child and sat in the car during the visit (verdict 25).

Some of the decisions of judgment state that the contact and relationship between child and birth parent was functioning well, yet the court argued that a custody transfer was still in the best interests of the child. One example concerned a 9-year-old boy who had been in foster care since birth. He had regular contact with his birth mother, and the verdict stated:

The parents of (the child) are welcome to the foster home when they want to meet (the child), and when it is suitable the foster home (sic) goes to (the mother) with (the child) (verdict 8).

The fact that the court's arguments concerning if and why a custody transfer should take place varies is also reflected in the one application that was dismissed by the district court. The verdict states:

According to 2 § 2a Parental Code, what is best for the child shall be decisive for all decisions concerning the custody of a child. If a child has steadily been cared for and educated in another home than the parental home, the district court, according to ch 6 § 8 [of] the same code, shall appoint those who have taken care of the child as Specially Appointed Custodians to care for the child. One prerequisite for this is that it is in the obvious best interests of the child. (The child) has since a very early age lived with (the foster parents). The parties agree that the child has connected to them and that he has a good life in their home. There is nothing opposing that he sees it as his own family. XX (the child) will also live there for a long time in the future. This speaks in itself for transferring custody. However, the biological mother says that she now is free from drug abuse, that she wants (the child) to remain with the foster parents as she believes the child is doing well, and that she wants regular contact with her son. The preparatory work in the code reads that a transfer from parents who keep contact with their child during the time in foster home should not be considered. From what has emerged in this case, (the biological mother) has made efforts to keep contact with her son and has a desire to have regular contact with him in the future. Considering this, and that (the biological mother) has stated that she wants her son to stay with the foster parents, the district court states that it cannot be considered as in the best interests of the child to transfer custody. The application from the Social Welfare Committee shall be turned down (verdict 14).

It is worth noticing that in this case the court does not agree to a custody transfer, even though they declare that the child has an attachment to the foster parents. Our interpretation of this decision is that the court gives priority to the birth parent's rights when the best interest of the child is determined. In this case, the birth mother is permitted to keep custody of her child, which can be seen as a gesture from the court that they acknowledge her struggle and good intentions. However, there have been a few cases where the LSWC has appealed when the district court has disapproved of a custody transfer from birth parents to foster parents. The appeal court has also changed the decision in favour of a custody transfer, emphasising the principle of continuity for the child, which is in line with the legislators' intentions (Decision of Judgment, 2017–09–28 Case nr T 1257–17).

Children's views in court decisions

The SSA stresses that the best interests of the child should guide decisions that concern children and that it is important to talk to children and listen to their views. In our sample, 15 of the court decisions in some sense reflect the view of the child in relation to the custody transfer, but in 17 of the decisions the child's view was not reflected. Among those whose standpoint is mentioned, the youngest child was 8 years old, and the oldest was 15. In some cases, the child's view is explicitly stated, and the following extract from a court order concerns an 8-year-old girl who has placed in foster care since she was an infant.

In conversations and when observed at the Social Welfare Office, together with (the foster parents), the (child) gave a “thumbs up” when asked about her opinion on whether the foster parents should be custodians and answered that it would be “great” (verdict 24).

This extract is unusual in our sample because it is one of few examples where the court acknowledges the voice of the child and also makes a comment about the child’s cognitive and developmental state. The most common way the cases reproduce the child’s view is to formulate it from an adult perspective, such as:

The child is considered one of the family and the child sees the foster parents as mother and father and their children as his siblings/.../He is determined to grow up in the foster home (verdict 21).

In our sample, we were surprised to find that the child’s age did not seem to influence whether their own words were represented or not, even though legal policies stipulate that more significance should be given to children’s wishes in relation to their age and development. However, previous research has shown that social workers seldom describe children’s voices explicitly in their assessments. Instead, social workers rephrase and incorporate children’s voices in their professional judging (Röbäck, 2012).

The absence of children’s views can also be noticed regarding contact with their birth parents. In most of the judgements, there is no information on what the child thinks about the contact with the birth family. Only seven of the 32 decisions present some information about the child’s view in this respect. In six of the decisions there is a clear declaration that the child does not want to have contact with his or her birth parents. The child’s original wording is not represented in the court decisions, and their views are summarised in one sentence, such as: ‘In the last few years (the child) has only had very sporadic contact with his mother and he has not wished to see her because he is disappointed in her. Currently, he has no contact with her’ (verdict 2). This can be interpreted as the court finding it more important to report on cases where the child has a clear view that they do not wish to have any contact with their birth parents, and that it is not as important to report when they do want to keep contact. Furthermore, the written judgments of the courts are public, which means that the judge has to be careful and not mention more private circumstances than are necessary (Svensson & Höjer, 2016).

Discussion

One motive for this study was the need for more knowledge about custody transfers, especially because the limited body of research on this topic has caused uncertainty among professional social workers. This unease is related to questions about when and why a custody transfer is an appropriate outcome for children in foster care. Apparently, current legal prerequisites – that the social services shall evaluate a custody transfer when the child has been in foster care for three years and that it is obvious that it is in the best interests for the child that existing circumstances continue – do not provide sufficient guidance for practitioners. Previous studies have shown that in spite of legislation that stipulates that the social welfare agency shall assess the question of custody transfer, only a minority of all relevant cases are brought to court. This is also

reflected in our findings, as only 32 decisions were found in four district courts over a one-year period. Thus, these cases that reach the courts are a minority of all the cases that meet the criteria for custody transfer, and one interpretation of the small number of cases is that social workers only apply for a custody transfer in 'strong cases'.

The findings presented in this paper are based on an analysis of decisions from district courts, specifically an analysis of which factors are acknowledged as reasons for a custody transfer. The question we sought to answer was whether these decisions present a more nuanced and substantial answer as to why and when a custody transfer is in the best interests of the child. We conclude that one thing in common in all decisions that are in favour of a custody transfer is the argument that a custody transfer is in the best interests of the child. However, our findings also show that what this means is not always easily determined. The courts' diverse arguments regarding contact between children in foster care and their birth parents are one of the most visible examples of this ambiguity. In some decisions, the court argues that a custody transfer is preferable because there is no contact with the birth parents, while in other decisions of judgment the argument is the reverse, that a functioning contact between child and birth parent certifies that a custody transfer is an appropriate decision. This finding indicates vagueness, and we agree with the authors of SOU (2015):71 that there is confusion about whether or not functioning contact between the child and birth parents is a hindrance for custody transfer. The authors of SOU (2015):71 argue for clarifications in the law regarding the criteria for custody transfer in order to ensure uniformity in social service assessments, and guidance over in which cases they should apply for a custody transfer. Our analysis shows that this is also important for the district courts in order to reach more unified decision-making. In our sample, some decisions of judgment claim that there should be no contact between the child and the birth parents for a custody transfer to be in question, while other decisions contend that contact between the child and birth parents is a positive factor even after a custody transfer. It is clear that contact between the birth parents and their children has to be assessed with regard to the special circumstances and the context of the individual case, and there is no simple or standardised solution to these questions. However, social workers and court decisions of judgment need to be more transparent, and to present all of the circumstances and facts on which the decisions are based.

The question about custody transfers also needs to be addressed from a wider perspective and needs to include the principles that guide child and family welfare legislation in general. The basis of the SSA is defined as client participation and self-determination. Further, the best interest of the child is central, and is summarised in three guiding parameters. One parameter is the child's own view, bearing in mind the child's cognitive development. However, previous research has shown that child and family welfare legislation in Sweden still prioritises parents' rights at the expense of children's rights. Our findings also indicate that decisions from district courts pay more attention to the birth parents' views and their circumstances than to the children's voices. This can be interpreted as showing that the parents are seen as clients, and it is their rights that need to be addressed rather than the children's rights. However, our analysis points out an apparent tendency that the district courts follow the social services' recommendation, even when a birth parent does not give consent. Within

our sample, the district courts only dismissed one of the 32 applications from the LSWC. The same tendency has been observed in research about decision-making in the LSWC, showing that the actual decisions seldom differ from the proposals of the professional social workers (Höjer et al., 2014). Consequently, the system has been criticised, while others argue that the system contributes to the legitimacy of social workers' decisions. The district courts tend to rely on social workers' competences to assess and decide what is in the best interest of the child and to make their decisions according to the social workers' recommendation.

It has been argued that birth parents' rights are given too much attention within the Swedish child and family welfare legislation and that social workers do not sufficiently acknowledge children's views (Cocozza & Hort, 2011; Singer, 2014). It is important that children and young people feel that they are involved in the decision and are sufficiently informed about its legal and practical consequences. It is also important that social workers are available for questions and reflections about what a custody transfer might bring for the child, the foster parents, and the birth parents. For foster parents, the ambivalence can also be connected to whether they identify primarily as parents or as professional carers, because a custody transfer involves a long-term commitment.

Because the LSWC has the exclusive right to initiate an application for custody transfer to the district court, social workers have the responsibility of informing those affected by the decision. Furthermore, it is important that social workers themselves are informed about the legislation and its consequences and have had the opportunity to reflect on their own views about custody transfer. As noted at the beginning of this paper, a custody transfer means that the ideal for child and family welfare in Sweden, to reunite children and birth parents, is set aside. This can underpin feelings of insecurity and ambiguity within organisations in matters concerning custody transfers. Previous research has implied that there is ambivalence among social workers, as well as foster parents, on how to handle contact and the question of reunification with the birth family. According to the SSA, the LSWC has the utmost responsibility for securing the well-being of children in their geographical area. In assessments regarding custody transfers, social workers take on a parental role if one considers what the UN Convention on the Rights of the Child says about parental rights and responsibilities. Hence, social workers are positioned as stable adults and caregivers who put the children's needs first. In contrast, in the court decisions, the birth parents are not positioned as caregivers. Instead, the parenting role has a more symbolic meaning that can be interpreted as if the courts are influenced by presumptions that biological ties are important, especially for the parents, even if they are not physically present in the children's everyday lives. In the Swedish debate about custody transfers, there is a need to discuss the symbolic as well as legal aspects of custody, and what custody implies in relation to reunification with birth parents.

There is also a need to discuss the role of foster parents – both now and in the future. A custody transfer requires that foster parents take on a parental and familial role rather than being professional carers. In our sample, many foster carers are portrayed as the 'natural parent' for the child, meaning that they have an emotional bond with the child and want the child to be part of their family. It could be argued that if custody transfers are to be more routinely used by social services, presumptive foster carers might be unwilling to accept the assignment if they view their obligation as strictly

professional. On the other hand, since Swedish legislation stresses that a custody transfer cannot be decided if the foster parents do not consent, a new routine might be counterproductive, not resulting in an increase of custody transfers. Hence, the context surrounding custody transfers needs to be discussed from various perspectives. It is also important to acknowledge varying family formations and parenting practices, and that today there is still no obvious way to organise and share parenting and caring responsibilities. There are still uncertainties as to how to divide parenting and caring responsibilities to serve ‘the best interests of the children’ yet make them manageable for foster parents, birth parents, and social workers. As long as the two-parent household with biological children is viewed as the standard solution, the dialogue about shared parenting is somewhat hindered.

Conclusion

The findings of this study have important implications for the development of district court practices regarding children’s right to a voice and how their opinions are taken into consideration in various areas where their well-being is the object of decision making. Our findings also stress the need for clarification in the law regarding the criteria for custody transfer in order to reach more unified decision-making. We also suggest that more research should be directed towards social workers’ values about custody transfers in relation to parenting practices and norms about family life. Because post-modern family life is characterised by flux and fluidity, it is important to acknowledge that children in foster care are participating in various family settings where the two-parent norm and the nuclear family do not serve as a role model.

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