

NATIONAL REPORT: FINLAND

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A. GENERAL

1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

The central concept is child custody. According to the Finnish legal system the custodian of the child shall provide daily care and protection for the child and moreover provide for the child's well-being in general. The custody of the child includes the child's personal relationships to other persons close to the child, especially its parents. Child protection is a concept of public law whereas child custody belongs to private law. Child protection is a task of the local social authorities, which above all, shall provide support to the custodian of the child. But if the circumstances at home seriously endanger the child's well-being or if the child seriously endangers its own well-being, the child can be taken into care by the local social authorities, to whom a considerable part of the custodial rights will be transferred. According to the Finnish legal system a guardian oversees the administration of the property of incompetent persons. However, the custodians of a minor are also its guardians unless the court appoints another person.

Approximately one hundred unaccompanied minors arrive in Finland per year. Every unaccompanied minor must have a representative appointed who will represent the child in applying for asylum. According to the Sec. 26 Finnish Act on the Integration of Immigrants and Reception of Asylum Seekers (No. 493/1999),

A representative may be assigned to a refugee child, or a child applying for a residence permit or seeking asylum, who is in Finland without a guardian or other legal representative. The representative exercises a guardian's right to be heard in matters pertaining to the child's physical care and assets, decides living arrangements and manages its assets.

Because of its rather limited application, reference will no longer be made to the concept of the representative of an unaccompanied minor. The Finnish social security system provides services for custodians, such as the right to public day care or free education. Within the concepts of Finnish child law, this may be important to take into consideration from a comparative perspective.

2. Explain whether your national concept or concepts encompass:

(a) Care and protection

The custodian shall provide daily care and protection for the child (Sec. 1 Finnish Child Custody and the Right of Access Act), but the factual care provider must not be the custodian him or herself. If the child has been taken into care, the local social authority has the right to decide about care for the child.

(b) Maintenance of personal relationships

The objects of the custody of the child are to ensure close and affectionate human relationships for the child, particularly between the child and its parents. The right of access shall ensure a child the right to meet the parent with whom it does not reside and to maintain contact with this parent. The custodian shall therefore allow the child to have access to its parent (Sec. 1 and 2 Finnish Child Custody and the Right of Access Act). The social authorities have the power to restrict the child's right to remain in contact with its parents or to other persons close to the child, if the child has been taken into care (Sec. 25 Finnish Child Protection Act).

(c) Provision of education

The custodians have the right to make decisions concerning the education of the child. However, the concept of child custody does not include providing the means for education; that is encompassed by the parental duty to support the child. The Finnish Constitution grants everyone a right to basic education free of charge (Sec. 16). Basic education in the public basic school system normally lasts nine years beginning the year the child reaches the age of seven.

(d) Legal representation

The custodian has the right to represent the child in matters relating to the child's physical care, unless otherwise provided by law (Sec. 4 Finnish Child Custody and the Right of Access Act). If a special guardian has been appointed to administer the child's property, the guardian has the right to represent the child in cases concerning this property. The right of a minor to represent itself in court or to take authority in other matters concerning parental responsibility as well as the contingency of ordering a guardian in case of a conflict of interest between the child and his or her custodian is described in Q 8f.

(e) Determination of residence

The concept of child custody encompasses the right to determine the child's place of residence. Joint custodians shall make decisions concerning the child's residence together, if not otherwise ordered by the court. A sole custodian has the power to decide the child's place of residence alone (Sec. 4 and 5 Finnish Child Custody and the Right of Access Act). A court order or an agreement approved by the local social authority, according to which the child shall reside with one of the custodians does not impact the custodians' duty to make joint the decisions concerning the child's place of residence.

A child's removal from Finland or retention abroad is considered to be wrongful if the removal or retention is not approved by the other custodian (Sec. 32 Finnish Child Custody and the Right of Access Act). Thus the return of the child according to the 1980 Hague Convention is possible if a custodian with whom the child resides according to a parental agreement or a court order abducts the child. If the child has been taken into care, the local social authority has the right to decide the child's place of residence (Sec. 19 Finnish Child Protection Act).

(f) Administration of property

A special guardian may be appointed for the administration of the child's property, although normally the custodians of a minor are also responsible for the

administration of the child's property as guardians of the child (Sec. 4 Finnish Guardianship Services Act).

3. In what circumstances (e.g. child reaching majority or marrying) do parental responsibilities automatically come to an end?

The custody of the child ends at the age of majority, which is the age of 18 or before this, if the child marries (Sec. 3 para. 2 Finnish Child Custody and the Right of Access Act).¹

4. What is the current source of law for parental responsibilities?

The main source for the Finnish law concerning parental responsibility is the Finnish Child Custody and the Right of Access Act of 1983 with amendments, especially those from 1994.² Two other important acts are the Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access, reformed in 1996, and the Finnish Child Protection Act of 1983 with amendments, especially those from 1990. The main source of law concerning the administration of property is the Finnish Guardianship Services Act of 1999.

5. Give a brief history of the main developments of the law concerning parental responsibilities

The first important legislative enactments concerning children in Finland were in the 1920s, when the Act concerning children born outside of wedlock was brought into force. In 1936 the first Finnish Child Protection Act was enacted. It followed the Scandinavian model, which was based on the original Norwegian Act concerning Child Protection. In 1930 the Finnish Marriage Act came into force and, at the same time, amendments to the old Finnish Guardianship Act stipulated the best interests of the child together with the guilt of the parent as the criteria for child custody decisions. The first Finnish Enforcement Act concerning child custody decisions was enacted in 1975. The Act included a renewal of mandatory mediation as a part of the enforcement proceedings. This system still prevails in much the same way. The child gained the right to prevent the enforcement at the 15 years of age.

The Finnish Child Custody and the Right of Access Act 1983 was the first Finnish Act defining child custody in the way it is understood today. Before this, only a few rules existed in the former Finnish Guardianship Services Act concerning the granting of custody in divorce and the upbringing of the child. Since the new Finnish Child Custody and the Right of Access Act 1983, children born in wedlock and children born outside of wedlock have been equal in the area of parental responsibility. Before 1984, only parents who were married to each other could have joint custody of their child. Since 1984, the best interests of the child have been the first and paramount consideration in deciding child custody and right of access

¹ A person who is under 18 years of age can marry if the Ministry of Justice grants him/her permission to marry on special grounds (Chapter 2 Sec. 4 Finnish Marriage Act 411/1987).

² Finnish Child Custody and the Right of Access Act, No. 361/1983 with amendments 186/1994, 620/1996, 818/2000.

cases. The importance of the child's right of access to the parent with whom the child is not living and the child's right to be heard and have its views taken into consideration in decisions concerning it are also emphasised.³

Together with the Finnish Child Custody and the Right of Access Act, a new Finnish Child Protection Act was enacted in 1983. The new Act gives the authorities the ability to consider the child's needs and situation as a whole with the best interests of the child as the leading principle. For example, taking the child into care is no longer bound to certain conditions in a child's behaviour. Furthermore, according to the new Act, the custodian does not lose all custodial rights if the child is taken into care.

The child custody law reform in 1993 was connected to the ratification of the 1980 Hague Child Abduction Convention and the 1980 European Convention concerning the recognition of custody decisions. The Enforcement Act was reformed in 1996. The reform mainly concerned proceedings that were transferred to the court. The enforcement cases had been dealt with by the administrative authorities before. The child retained the right to prevent enforcement, for which right the age limit had already, in 1983, been lowered to the age of 12 years. The guardianship legislation reform followed in 1999. Rules concerning the supervision of the children's property administration were modernised, among other improvements.

6. Are there any recent proposals for reform in this area?

The bill for the Finnish Child Protection Act reform is expected to be presented to Parliament in the autumn of 2004. The reform will primarily concern the position of children taken into care. A bill concerning assisted reproduction and the paternity of children born as a result of assisted reproduction has been in discussion, but is not expected to be presented to Parliament before 2005 due to some crucial questions on which the Governmental parties have not been able to reach a consensus. Some adjustments are needed to the Finnish Child Custody and the Right of Access Act because of the Brussels IIa Decree, which Parliament is currently considering (Government Bill 186/2004).

B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

7. Describe what the contents of parental responsibilities are according to your national law including case law.

Reference has been made directly to the relevant sections of the Finnish Child Custody and the Right of Access Act, the Finnish Child Protection Act and in the

³ K. KURKI-SUONIO, *Äidin hoivasta yhteishuoltoon - lapsen edun muuttuvat oikeudelliset tulkinnat*, Suomalainen Lakimiesyhdistys, Helsinki, 1999 p. 367-557; M. HELIN, T. LINNA and M. RINTALA, *Huolto ja tapaamisoikeuden täytäntöönpano*, Kauppakaari Oy, Helsinki, 1997, pp. 3-10. See also M. HELIN, 'Enforcement of Custody, Access and Residence Orders, Intercountry Adoptions and Registration of Same Sex Couples', in: A. BAINHAM (ed.), *International Survey of Family Law*, Kluwer Law International: The Hague 1999.

Finnish Guardianship Services Act which provide the general contents and goals of child custody, the administration of the child's property and to the child protection.

Finnish Child Custody and the Right of Access Act

Section 1: Child custody

(1) The objects of custody are to ensure the well-being and well-balanced development of a child according to the child's individual needs and wishes, and to ensure close and affectionate human relationships for the child, particularly those between the child and its parents.

(2) A child shall be ensured good care and upbringing as well as the supervision and care appropriate to its age and stage of development. A child should be brought up in a secure and stimulating environment and should receive an education that corresponds to its wishes and talents.

(3) A child shall be brought up in the spirit of understanding, security and love. The child shall not be subdued, corporally punished or otherwise humiliated. The child's growth towards independence, responsibility and adulthood shall be encouraged, supported and assisted.

Section 4: Duties of custodians

(1) Custodians shall safeguard the child's development and well-being as laid down in section 1 of this Act. For this purpose, they are empowered to make decisions on the child's care, upbringing, residence and other matters relating to the person of the child's physical care.

(2) Before a custodian makes a decision on a matter relating to the child's care, the custodian shall, where possible, discuss the matter with the child taking into account the child's age and maturity and the nature of the matter. In making the decision the custodian shall give due consideration to the child's feelings, opinions and wishes.

(3) The custodian has the power to represent the child in matters relating to it, unless otherwise provided by the law.

Child Protection Act

Section 1: The rights of the child

A child is entitled to a secure and stimulating growing environment and to a harmonious and well-balanced development. A child has a special right to protection.

Section 2: Child Protection

The purpose of child protection is to ensure a child the rights mentioned in section 1 by providing a good general growing environment, by assisting the custodians in child upbringing and by providing family-oriented and individual child welfare.

Under all circumstances a child shall be provided such care as stipulated in the Child Custody and Right of Access Act.

Section 9 para. 1: Principles

In family-oriented and individual child protection, the first and paramount consideration shall be the best interests of the child. Parents and others caring for the child shall be assisted in the child's upbringing so as to establish a favourable growing environment for it on a permanent basis.

Section 10 para. 1: Ascertainment of the best interests of the child and hearing of a child

In ascertaining the best interests of a child, the child's wishes and views shall be taken into account, its growing environment shall be studied and due consideration shall be given to the probable effects of alternative child protection measures applicable to the child.

Section 19: Custody of a child in care

When the local social authority takes a child into care, the authority will have the power to decide on care, upbringing, supervision, caretaking in other ways and residence of the child in order to carry out the purpose of the caretaking. The authority shall, however, make every effort to cooperate with the parents or other custodians of the child.

The local social authority or director of a child care institution shall decide on contacts between the child and its parents or other persons close to the child in accordance with sections 24 and 25 of this Act.

Guardianship Services Act

Section 37 para 1: Property management

The guardian shall manage the property of the ward in a manner allowing for the property and the revenue to be used for the benefit of the ward and for the satisfaction of his/her needs. In this task, the guardian shall take conscientious care of the rights of the ward and promote his/her interests.

There is no important case law completing these sections.

8. What is the position taken in your national law with respect to:

(a) Care

A child's custodian is responsible for the daily care of the child (Sec. 1 Finnish Child Custody and the Right of Access Act). The responsibility for the care of the child does not prevent the custodian from transferring the daily care to another person or body. The local social authority is responsible for the child's care and protection if the child has been taken into care, and the authority is given the power to carry out this task (Sec. 19 para. 1 Finnish Child Custody and the Right of Access Act).

(b) Education

The custodian has the right to make decisions regarding the education of the child (Sec. 1 para. 2 Finnish Child Custody and the Right of Access Act). The right to make decisions regarding the education of the child when the child has been taken into care has not been regulated by Sec. 19 Finnish Child Protection Act. In legal

literature, the local social authority is regarded as having the right to decide upon the education of the child during long-term substitute care, whereas the child's custodians would retain the power to decide upon the child's education if the care is meant to be temporary.⁴

(c) Religious upbringing

A child's religion and his or her membership of a church or other religious group have been regulated in the Finnish Religious Freedom Act, which was reformed in 2003. According to this Act, the custodians are to make decisions regarding the child's religious upbringing together. If they cannot agree, a mother with custody of the child has the sole power to decide regarding the registration of the child in a religious group within the first year after the child is born, unless the court has ordered otherwise (Sec. 3).

The Finnish Religious Freedom Act includes special provisions concerning the child's autonomy. A child aged 15 or older has the right to choose its religious affiliation if the child's custodians give their written consent. The religious affiliation of a child aged 12 or older or more cannot be changed without the child's own consent (Sec. 3). Taking the child into the care of the local social authority does not affect the custodian's right to make decisions regarding the child's religious affiliation (Sec. 19 Finnish Child Protection Act).

(d) Disciplinary measures and corporal punishment;

Corporal punishment or other behaviour that causes the humiliation of the child is not allowed (Sec. 1 para. 3 Finnish Child Custody and the Right of Access Act). The same applies to substitute care, since Sec. 2 para 2 Finnish Child Protection Act refers to the Finnish Child Custody and the Right of Access Act. Corporal punishment has been forbidden and criminalized in all circumstances since 1984. In 1993 the Supreme Court of Justice penalised the cohabiting partner of a mother because of corporal punishment. According to the court decision, the partner caused pain to the child by flipping the child and pulling its hair. The child was five years old.⁵

(e) Medical treatment

A child has the right to decide upon his or her own medical treatment if the child has reached an age and a maturity which allow him or her to understand the meaning of the treatment and its consequences (Sec. 7 Finnish Patient Act 785/1992). If this is not the case, the custodian or other legal representative of the child shall make the decisions concerning the child.⁶ However, the custodian or other legal representative has no power to deny necessary treatment when the life or health of a minor is in danger (Sec. 9 Finnish Patient Act). Another legal representative may be the local social authority, for instance, if the child has been taken into care. The Supreme Administrative Court decided on 10 March 2000 that a child whose parents were Jehovah's Witnesses could be taken into care in order to

⁴ M. MIKKOLA and J. HELMINEN, *Lastensuojelu*, Karelactio Helsinki, 1994, p. 190.

⁵ Supreme Court of Justice, 26.11.1993, KKO 1993: 151.

⁶ See M. HELIN, *Alaikäisen oikeudet potilaana* J. Kovisto Potilaan oikeudet ja potilasasiamiestoiminta. Suomen Kuntaliitto Helsinki, 1994 p. 90-103; Salla Lötjönen: *Ihmiseen kohdistuva lääketieteellinen tutkimustoiminta*, Lakimies, 1997 p. 856-879.

safeguard his or her continuing treatment for lymphoma (KHO 10.3.2000/530). The parents had denied the use of blood products in the treatment of the child.

(f) Legal representation

The custodian has the power to represent the child in matters relating to person of the child, unless otherwise provided by law (Sec. 4 Finnish Child Custody and the Right of Access Act). A custodian preserves his or her right to represent the child if the child has been taken into care (Sec. 19 Finnish Child Protection Act).

According to procedural law, a child aged 15 or older has the right to self-representation in cases relating to its person. The child and its custodian thus both have a parallel right to represent the child in these cases. This arrangement applies both to civil and criminal proceedings as well as to administrative proceedings, such as care proceedings (Chapter 12 Sec. 1 and 2 Finnish Code of Judicial Procedure; Sec. 14 para. 3 Finnish Administrative Procedure Act). In care proceedings, a child whose care is in question has exceptional procedural rights, such as the right to appeal if the child is 12 or more years old (Sec. 35 Finnish Child Protection Act).

The child has the right to independently administer assets which it has purchased with its earnings, as well as to represent itself in civil or criminal proceedings concerning these assets (Chapter 12 Sec. 1 para. 2 Finnish Code of Judicial Procedure). A special guardian can be appointed if there is a considerable conflict of the interest risk between a ward and a guardian (Sec. 11 Finnish Guardianship Act).⁷ In social welfare matters, if a conflict of interest can be assumed the local social authority shall *ex officio* take the matter of the appointment of a special guardian to the court or to the guardianship authority (Sec. 10 Finnish Act Concerning the Position and Rights of the Social Welfare Client).

According to a Supreme Court of Justice decision, a guardian for a child should not be appointed in a case that concerns the annulment of the paternity of the child. According to the court, the child should be allowed to consider the consequences of such proceedings by her or himself at an age of maturity. An appointment for this situation was not found to be in the best interests of the child (KKO 2002:13).

9. What is the position taken in respect of the child's right to be heard with regard to the issues mentioned under Q 8 ((a)-(f)). What relevance is given to the age and maturity of the child?

Section 4 para. 2 Finnish Child Custody and the Right of Access Act includes a general rule about the task of the custodian to discuss matters relating to the child with the child, giving regard to the child's age and maturity. According to this section the custodian shall give due consideration to the child's feelings, opinions and wishes. There are no specified age limits concerning the custodian's duty to listen to the child, but because the custodian is to support and assist the child's growth towards independence, responsibility and adulthood, the goal of the Act seems to be that the child's right to take part in decisions concerning its own affairs would expand step by step.

⁷ P. VÄLIMÄKI, *Holhoustoimen pääpiirteet*, WSOY Lakitieto, Helsinki, 2003 p. 54.

The principle expressed in this section covers all custodial decision making, but as it is only a goal or ideal, there are no sanctions if the custodian does not listen to the child. However, the custodian's failure to listen to the child's opinion can be taken into consideration as a relevant factor if the court has to make a decision about the custody of the child according to what is deemed to be in accordance with the best interests of the child.

Concerning the relationship between the child and authorities, there are, however, specific rules safeguarding that the child's views will be heard. Such rules concern the child's religious affiliation and the child's medical treatment. The contents of these rules are explained above in Q 8c and 8e.

There are other examples where an authority must take the will of the child into consideration. The child's consent is needed, for instance, if the child's first name or family name is petitioned to be changed and the child is at least 12 years old. A child younger than 12 can prevent the change of its name, if the child demonstrates enough maturity that its will should be taken into consideration (Sec. 33 Finnish Name Act). A child 12 or older can also prevent its own adoption if the child does not consent to the adoption. The will of a younger child can also be taken into consideration (Sec. 8 Finnish Adoption Act). An important right of the child is the right to prevent the enforcement of a decision concerning custody or right of access (Sec. 2 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access). The child's right to be heard in decisions concerning its custody will be clarified in Q 59 - 62. The rules concerning legal representation can provide a child of 15 or older not only the right to be heard, but also to act as a party with the child's custodian, as explained in Q 8f.

10. Do(es) the holder(s) of parental responsibilities has(have) the right to administer the child's property?

The custodians of a minor child also act as guardians *i.e.* taking responsibility for the administration of the child's property, unless a special guardian has been appointed by the court or other guardianship authority (Sec. 4 Finnish Guardianship Services Act).

11. If yes, explain the content of this right

The starting point in Finnish guardianship legislation is that guardianship should be as easy as possible for parents or other custodians of children who do not have any special property. Most parents are probably not even aware of the different duties which a guardian may have, but as soon as the child receives significant assets or property, or if the child becomes an heir, the actions of the parents or other custodians in the administration of the child's property become an object of supervision by guardianship authorities, the magistrate and the court. In such a situation, the guardianship of the child shall be entered into a register of guardianship affairs (Sec. 65 and 66). The supervision of the guardianship happens in practice mainly by means of accountability (Sec. 50 - 56) and the necessity of asking for permission for certain transactions, and by means of other restrictions.

12. Are there restrictions with respect to:

(a) Certain goods and/or values (inherited property, gift...)

The actions of a guardian in the administration of a minor's property are subject to a number of restrictions. Sec. 34 Finnish Guardianship Services Act includes 13 paragraphs describing different actions that the guardian is not entitled to perform without the permission of the guardianship authority. These restrictions encompass proceeds concerning housing property (para. 10 and 11), real property (para. 1, 3 and 12), inheritance and division of marital property (para. 7, 8 and 9).

(b) Salary of the child

An incompetent person, such as a minor, has the right to the proceeds of his or her own work. The guardian has, however, the right to take this property into his or her administration if the incompetent person exercises the right in a manner that is obviously contrary to his or her best interests or in order to prevent the incompetent person from coming to harm if there is an imminent danger (Sec. 25 para. 2 Finnish Guardianship Services Act).

(c) Certain transactions

The actions of a guardian in the administration of a minor's property are subject to a number of restrictions. Sec. 34 Finnish Guardianship Services Act includes 13 paragraphs describing different actions that the guardian is not entitled to perform without the permission of the guardianship authority. These restrictions encompass the incurrance of a loan (other than a student loan guaranteed by the state) or assumption of liability for a bill of exchange or the debt of another person (para. 5 and see also para. 2); business operations in the name of the ward (para. 5) and the purchase of investment targets other than those listed in para. 13a-13e. The guardian is however entitled to freely invest the ward's property in stocks.⁸

13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?

There are no special rules concerning children as wards, but the Finnish Guardianship Services Act includes general rules concerning how the guardian shall handle the expenses of the ward. The guardian shall take conscientious care of the rights of the ward and promote the ward's interests (Sec. 37-39 Finnish Guardianship Services Act, see Q 7).⁹

The most important way to protect the ward's property is through supervision of the guardianship authorities, which encompass the guardian's duty to provide authorities with an inventory of the assets and liabilities of the ward as well as the guardian's duty to keep records and provide the guardianship authority with a financial record (annual statement and final statement, Sec. 46 - 57). The guardianship authority may, however, decide that a generalised statement of the property is deemed to be sufficient in view of the nature of the property under management (Sec. 55 para. 3).

⁸ P. VÄLIMÄKI, *Holhustoimen pääpiirteet*, WSOY Lakitieto, Helsinki 2003, p. 93 - 99.

⁹ A child's own assets can be taken into consideration when the extent of the parent's responsibility to maintain the child is estimated (Sec. 2 Finnish Child Custody and the Right of Access Act).

The guardianship's duty to ask for permission for certain activities and transactions for certain activities is also supervised. The guardian's duty to ask for permission from the authority for the incurrence of any loan, other than a student loan guaranteed by the State or assumption of liability for a bill of exchange or the debt for another person, can be specially be mentioned here (see Q 12).

If the guardian has failed to safeguard the interests of the ward, the court shall appoint another guardian on the petition of the guardianship authority (Sec. 58). The guardian shall bear the responsibility for the damages he or she caused (Sec. 61-63).

14. Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, stepparents, foster parents or other persons). If so, describe in some detail how it differs.

A parent's legal position as custodian does not differ from that of any other custodian (whether the custodian is a stepparent, foster parent, a parent not living with the child *etc.*). But parents, as parents, have certain privileges as regarding the child's custody. According to the Finnish Child Custody and the Right of Access Act parents have:

- The right to make an agreement about child custody and the right of access, which after the approval of the local social authority has the same effect as a court decision (Sec. 7 and 8);
- A special right to retain custody of their own child, in which case the court can transfer custody from the parents or a parent to one or more other persons where that is deemed to be manifestly in the best interests of the child (Sec. 9 para. 2);
- The right to make an application to the court in order to obtain a decision on child custody or right of access matter as a parent, regardless of the parent's status as custodian (Sec. 14 para. 1).

There are also other special rights for parents:

- The child has a right of access to the parent with whom the child does not live and the right to maintain contact with that parent;
- The parent has a right to be heard in care proceedings regarding the child even if he or she is not the child's custodian. However, the authority is not required to hear a parent if the action not to hear the parent's wishes can be deemed as well-grounded because of the lack of contact between this parent and the child (Sec. 17 Finnish Child Protection Act); and
- The parent's consent is needed for the child's adoption regardless of the parent's status as custodian (Sec. 9 Finnish Child Adoption Act).

If the parents of a child were not married at the time of the child's birth, the father's paternity must be approved according to the Finnish Paternity Act (No. 702/1975).

C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

I. Married Parents

15. Who has parental responsibilities when the parents are:

(a) Married at the time of the child's birth

Parents who are married at the time of the child's birth become *ex lege* joint custodians by the birth of the child (Sec. 6 Finnish Child Custody and the Right of Access Act). If the child's mother is not married at the time of the birth, she will become the sole custodian of her child.

(b) Not married at that time but marry later

If one of the parents has sole custody of a child, when the parents marry they both become joint custodians of the child, presuming that the paternity of the unmarried father has been approved according to the Finnish Paternity Act, either through an approved acknowledgment or a court decision.

16. How, if at all, is the attribution of parental responsibilities affected by:

(a) Divorce

Attribution of custody or any other aspect of parental responsibility is not necessarily affected by the divorce of the parents at all. The court may render a decision about the custody of a child in connection with the divorce proceedings of the parents who have the custody of their child. The court can also deal with the question of the custody of the children *ex officio*, but it cannot render a decision concerning custody without a parental request (Sec. 31 - 32 Finnish Marriage Act No. 411/1987).

(b) Legal separation

Legal separation is not recognised by the Finnish legal system

(c) Annulment of the marriage

Annulment is not recognised by the Finnish legal system, since the reform of the related law in 1987.

(d) Factual separation

The factual separation of the parents does not affect their custodial status.

17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority.

Parents (and only parents) have the right to make agreements upon the attribution of the custody of the child, which can be approved by the local social authority (Sec. 7 Finnish Child Custody and the Right of Access Act). A condition for approval by the authority, however, is that at least one of the parents is also the custodian of the child (Sec. 8 Finnish Child Custody and the Right of Access Act). Parents then may agree,

- that they shall have joint custody of the child;

- that the child shall reside with one parent, if the parents do not live together;
- that one of the parents shall have the sole custody of the child;
- that the child has the right of access to the parent with whom the child does not reside in conformity with the parents' agreement.

The parent's written agreement shall be subject to approval by the local social authority of the child's residence. The authority shall approve the agreement if the agreement is in accordance with the best interests of the child. An approved agreement has the same validity, and is as enforceable, as a court order (Sec. 8 Finnish Child Custody and the Right of Access Act).

18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the parents? To what extent, if at all, should the competent authority take account of a parent's violent behaviour towards the other parent?

A court may order that the parents shall have joint custody if it considers this to be in accordance with the best interests of the child. The disagreement of one or both parents, as such, does not have any effect according to Sec. 10 Finnish Child Custody and the Right of Access Act. According to the *travaux préparatoires* however, the discretion of the court should be based on the fact that the parents agree on the joint custody, although exceptions to this were supposed to be possible.¹⁰ In the beginning of the 1990s nearly 20 percent of the custody cases in Courts of Appeal resulted in joint custody against one parent's will.¹¹ In any case, one must bear in mind that in Finland only the court can decide the child shall have its residence at one of the parents' residences, if the parents do not live together (Sec. 9 para. 1 point 2 Finnish Child Custody and the Right of Access Act).

However, since the beginning of the 1990s, courts have become more reluctant to order joint custody against one parent's will.¹² According to the Finnish Child Custody and the Right of Access Act the best interests of the child shall be the first and paramount consideration in settling any matter concerning custody and right of access (Sec. 10 para 1). The court shall pay special attention to the way in which the objectives of custody and the right of access can best be implemented in the future (Sec. 10 Finnish Child Custody and the Right of Access Act). Thus, domestic violence of any kind is not mentioned in the Act. The Supreme Court has also not

¹⁰ Governmental Bill (HE 224/82) p. 5; K. KURKI-SUONIO *Äidin hoivasta yhteishuoltoon*, Suomalainen Lakimiesyhdistys Helsinki 1999, p.485; K. KURKI-SUONIO, 'Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective', IJLPF, 2000, Vol. 14, p. 195.

¹¹ K. KURKI-SUONIO 'Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective', IJLPF, 2000, Vol. 14, p. 194, K. KURKI-SUONIO, *Äidin hoivasta yhteishuoltoon*, Suomalainen Lakimiesyhdistys, Helsinki, 1999, p. 501-504.

¹² My personal experience is based in my work at the office of the Parliamentary Ombudsman and in functioning as teacher of courses for judges and other court lawyers about child custody decision-making. The courses have been organised by the Ministry of Justice for the last four years.

set any precedents for this question either. Thus the courts must make their decisions *in casu*.¹³

During the last ten years the problem of domestic violence has received attention in academic writings and studies as well as by high authorities and the gravity of the problem has been widely acknowledged. Today the Finnish Government, among others, runs several programs in order to prevent, identify, treat and organise follow-ups for parents and children who are affected by this problem. It is submitted that, unfortunately, public interest does not mean that all social workers or judges possess the necessary skills to deal with the problem of domestic violence in custody and right of access cases, as yet.

19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.

There is no official statistical information about the attribution of child custody by the courts. However, there are statistics about parental agreements that have been approved by local social authorities. When interpreting these statistics one must bear in mind that the most typical situation for drawing up a parental child custody agreement about is the birth of a child to an unmarried cohabiting couple. Most cohabiting couples draw up joint custody agreement during the same visit to the local social office where the father acknowledges his paternity of the newborn baby. Later, the unmarried parents may draw up a new agreement if they separate. So, because the statistics do not differentiate between the different social situations in which parental agreements can be made, they must be carefully interpreted.

In 2003, the local social authorities approved 39,331 agreements. One agreement always concerns one child, thus the number of agreements between parents often parallels the numbers of siblings. There were slightly more agreements in 2003 than in 2002 (38,313) and the trend has been increasing (in 1999 there were 36,254).

Of all these agreements, 91.5% concerned joint custody. Sole custody was given to the mother in 7.5 and to the father in one percent of agreements. In about 81 percent of cases (19,458) parents stipulated the child's place of residence as the home of its mother and in 19% as the home of its father.¹⁴

The latest statistics about court decisions were included in my 1999 doctoral thesis.¹⁵ According to the findings, about 64% of the contested custody cases from three Courts of Appeal (146) concerned sole custody and 36 percent joint custody.

¹³ See K. KURKI-SUONIO, 'Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective', IJLPF, 2000, Vol. 14, p. 197-198, where I suggest that the policy of promoting joint custody as a part of a 'concept of the amicable divorce' may underestimate the significance of parental conflicts in child custody decision making, both in court and in mediation.

¹⁴ Statistics of the National Research and Development Centre for Welfare and Health, Statistic Information 11/2004, 7.5.2004, (in Finnish and in Swedish).

¹⁵ About the sample see, K. KURKI-SUONIO, 'Joint Custody as an Interpretations of the Best Interests of the Child in Critical and Comparative Perspective', IJLPF, Vol. 14, 2000, p. 183-205, particularly p. 193.

The sample concerned cases from the years 1992 and 1993. The child's place of residence was assigned to the mother in 73% of all these cases and to the father in 25% of cases. In 2% of the cases the residences of the siblings were divided between the parents.¹⁶

II. Unmarried Parents

20. Who has parental responsibilities when the parents are not married?

The mother shall be sole custodian of the child if the parents are not married at the time of the child's birth (Sec. 6 Finnish Child Custody and the Right of Access Act).

21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, pacte civil de solidarité...).

In Finland a registered partnership only concerns partners of the same sex (Sec. 1 Finnish Act Concerning Registered Partnership (No. 950/2001). The rules of the Paternity Act concerning paternity based on marriage shall not be implemented to the registered partnership (Sec. 9 of the same Act). This means that a partner of a mother may not gain the legal position of a parent.

22. Under what condition, if at all, can:

(a) The unmarried mother obtain parental responsibilities

The biological mother of the child is always a custodian at the birth of the child.

(b) The unmarried father obtain parental responsibilities

An unmarried father primarily obtains the custody of the child by virtue of an agreement with the mother. A precondition to this is the confirmed paternity of the unmarried father (Sec. 7 and 8 Finnish Child Custody and the Right of Access Act). Normally an unmarried couple makes an agreement concerning joint custody soon after the birth of the child (see Q 19). After the approval of the agreement concerning the joint custody of the parents, their position does not differ in any way from that of married parents. The parents can also agree that the father has sole custody, although this seems to be extremely rare.

An unmarried father can obtain custodial rights through a court decision, if he cannot reach an agreement about custodial rights with the mother. Both parents have the right to submit an application to the court concerning custody or the child's right of access (Sec. 14 and Sec. 9 Finnish Child Custody and the Right of Access Act). The court can vest the custody on both parents jointly or on one of them alone, as it deems, in accordance with the best interests of the child.

23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parents' relationship?

¹⁶ K. KURKI-SUONIO, *Äidin hoivasta yhteishuoltoon*, Suomalainen Lakimiesyhdistys, Helsinki, 1999, p. 501 and 537.

The ending of the unmarried parents' relationship has no legal effect on the custodial rights of the parents.

24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?

The law does not differentiate between married or unmarried parents in this respect. Refer to Q 18.

25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?

The ending of the unmarried parents' relationship does not affect their right to draw up agreements about their child's custody (Sec. 7 Finnish Child Custody and the Right of Access Act, see Q 17).

26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.

As explained above, it is impossible to differentiate between married parents or unmarried parents in the statistical information (see Q 19).

III. Other Persons

27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he/she is:

(a) Married to that parent

A married partner of a parent may obtain custody of the child. This can only happen by means of a court order. A court may order that one or more persons who have consented thereto shall have the custody of a child instead of, or together with, the parent or parents (Sec. 9 para. 1 point 4 Finnish Child Custody and the Right of Access Act). The application to the court can be made by the parent(s), by the child's custodian(s) or by the local social authority (Sec. 14 para. 1).

If the court should at the same time transfer the custody from a parent, the court must consider the condition expressed in Sec. 9 para. 2 Finnish Child Custody and the Right of Access Act. According to this condition, the transfer is only possible if it is manifestly in the best interests of the child. This condition does then not apply if the custody is not to be transferred from a parent. As referred to above, the child may also have more than two custodians.

(b) Living with that parent in a formalised relationship (registered partnership, civil union, pacte civil de solidarité...)

The registered partner of a parent may obtain custody of the child under the same conditions explained above in point (a). Registered same-sex partnership is the only form of a formalised relationship known in Finnish legislation.

(c) Living with that parent in a non formalised relationship

The partner of the parent in a non - formalised relationship may obtain custody of the child under the same conditions explained above in point (a).

28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?

The sex of the partner has no significance according to the Finnish Child Custody and the Right of Access Act. Same-sex partners have also in practice been able to obtain joint custody of the other partner's biological (or adoptive) child. On 19 October 2001 the Supreme Court of Justice assigned custody of two siblings to the female partner of their mother after her death instead of to the father of the children. The mother had had the sole custody of the children, aged 12 and 14 at the time of the decision, who had been living with the mother and her female partner in Finland for several years. The father was living abroad and the children resisted moving to live with him. The father would not have been able to obtain an enforcement order against the will of the children and the court therefore found such a custody order not to be in the best interest of the children (KKO 2001:110).

29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

The ending of any of the relationships mentioned above in Q 27 and Q 28 does not, as such, have an impact on the custody of the child.

30. To what extent, if at all, is the parent holding parental responsibilities and his/her partner free to agree upon the attribution of parental responsibilities after the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

Only the child's legal parents have the right to make effective agreements concerning the custody of the child. The partner of the parent can only obtain custodial rights if the court so orders, as explained in Q 27a. Thus, the ending of the relationship between the parent and his/her partner does not affect the legal situation in any way.

31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent...)? Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

As the rules concerning another person's right to custody of the child applies to anyone, regardless of the relationship to the parent of the child, the legal rules are the same as already explained in Q 27a. The substitution of a parent or parents as custodians is only possible under the condition that the arrangement would be manifestly in the best interests of the child concerned, as pointed out.

32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

If the child has been taken into the care of the local social authority (under the conditions of Sec. 16 or Sec. 18 Finnish Child Protection Act), the local social authority obtains *ex lege* the right to decide on the care, upbringing, supervision, other welfare and place of residence of the child (Sec. 19 para. 1 Finnish Child Protection Act). Thus, once the child has been taken into care, the custodian no longer has the right to decide regarding these matters, unless the care is terminated through a decision of the local social authority or of the administrative court. The local social authority shall in any case, make efforts to cooperate with the parents or other custodians of the child (Sec. 19 para. 2 Finnish Child Protection Act). The custodian of the child remains a holder of some custodial rights despite the care order, such as the right to make decisions regarding the child's religious affiliation and name.¹⁷

Taking the child into care does not affect the custodian's or other guardian's right to administrate the child's property.

In any case, the local social authority always has the right to submit an application to the court to review the child's custody (Sec. 14 para. 1 Finnish Child Custody Act). The local social authority also has the right to bring to the court the matter concerning the appointment of a guardian for a minor, if a suspicion arises about the misuse of the right to administrate the child's property, for instance (Sec. 72 para. 2 Finnish Guardianship Services Act).

33. To whom are the parental responsibilities attributed in the case of:

(a) The death of a parent holding parental responsibilities;

The Finnish Child Custody and the Right of Access Act actually has no rules for the case of a custodian's death except Sec. 14 para. 2, according to which a relative or another person close to the child has the right to submit an application to the court concerning the custody of the child, if the child has been left without any custodian because of the death of his custodian. Consequently, if one custodian dies, the other custodian will remain as sole custodian and exercise the custodial rights alone.

(b) The death of both parents of whom at least one was holding parental responsibilities at the time of the death?

The Finnish Child Custody and the Right of Access Act actually has no rules for the case of a custodian's death except Sec. 14 para. 2, according to which a relative or another person close to the child has the right to submit an application to the court concerning the custody of the child, if the child has been left without any custodian

¹⁷ It has been argued that the purpose for which the child has been taken into care has an influence on the division of the custodial rights between the custodian and the local social authority. The authority would not have the right to exercise custodial rights to a larger extent than what is necessary to avoid the risks to the child's well-being that were the reasons for the caretaking procedure. The interpretation is based on the wording of the section. The translation into English is unfortunately not quite precise in this respect. M. MIKKOLA and J. HELMINEN: *Lastensuojelun pääpiirteet*, Karelactio, Helsinki, 1994 p. 189-192.

because of the death of his custodian. Consequently, if both parents die and the child is left without a custodian, the procedural rules explained above enable the relatives of the child, for instance, or other close persons, to submit an application to the court to have a custodian appointed for the child. In such a situation the local social authority shall contact persons close to the child in order to examine whether it should make the application to the court and, in case an application is needed, do so (Sec. 10 Finnish Child Custody Decree).

34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his/her/their death? If such an appointment is permitted, must it take place in a special form, e.g. will?

Before the present Finnish Child Custody and the Right of Access Act came into force in 1984, it was possible for the custodian to determine in a will who was to take custody of his or her child in case of death. However, according to the present Finnish Child Custody and the Right of Access Act such a determination has no legal effect, because child custody and the right of contact shall be decided solely on the basis of what is considered to be in the best interests of the child (Sec. 10).

D. THE EXERCISE OF PARENTAL RESPONSIBILITIES

I. Interests of the Child

35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?

The Child Custody Act includes general principles that define certain goals or ideals for the factual contents of the custody, *i.e.* for exercising the rights and the duties of a custodian. The Act does not call these principles a definition of the best interest of the child, but they can be interpreted as such.¹⁸ Sec. 1 Finnish Child Custody and the Right of Access Act concerns principles relating to the custody of the child and Sec. 2 to the right of access. (Sec. 4 concerns principles relating to the custodian's duty to listen to the child's opinions, which has already been illuminated in Q 9). I refer again to this Section although it has already been cited in Q 7.

(1) The objects of custody are to ensure the well-being and well-balanced development of a child according to the child's individual needs and wishes, and to ensure close and affectionate human relationships for the child, particularly those between the child and its parents.

(2) A child shall be ensured good care and upbringing as well as the supervision and protection appropriate to his or her age and stage of development. A child should be brought up in a secure and stimulating environment and should receive an education that corresponds to his/her wishes, inclinations and talents.

¹⁸ As M. HELIN, 'Lapsen huolto', in: H. MATTILA, *Lapsioikeuden pääpiirteet 1984*, Juridica, Helsinki, 1984.

(3) A child shall be brought up in a spirit of understanding, security and love. He shall not be subdued, corporally punished or otherwise humiliated. His or her growth towards independence, responsibility and adulthood shall be encouraged, supported and assisted.

According to Sec. 2 the child shall be ensured the right to meet the parent with whom the child is not living. It also stipulates that the parents of the child shall aim to ensure the implementation of this right in mutual understanding and while taking the best interests of the child into consideration. The Finnish Child Protection Act values the 'best interests' principle.

II. Joint Parental Responsibilities

36. If parental responsibilities are held jointly by two or more persons, are they held equally?

Legally joint custodians, no matter how many, are equal when not otherwise ordered by the court.

The custodians shall be jointly responsible for the exercise of custody and shall jointly make all decisions relating to the child unless otherwise provided by the law (Sec. 5 para 1)

The court has the power to modify the custodial rights of two or more custodians. The court may attribute to one of the joint custodians the sole power to decide about a custodial issue. This can be the right to decide alone about the child's residence or religious affiliation, for instance.

Where necessary, a court may issue directions on the attribution of duties rights and responsibilities of a person or persons assigned custody of a child and if there are more persons, may decide on the distribution of responsibilities between them. (Sec. 9 para. 3 Finnish Child Custody and the Right of Access Act).¹⁹

The court shall make the decision according to what it finds to be in accordance with the best interests of the child (Sec 10 para. 1 Finnish Child Custody and the Right of Access Act).

Judges sometimes try to seek settlements in custody disputes by modifying the joint custody. The court may thus, for example, grant both of the parents the position as a legal custodian, although one parent may be given somewhat reduced

¹⁹ The Supreme Court has granted a *non-custodial* parent the right to obtain information concerning the child from the authorities. The court did not find it necessary to attribute the custody of the child to both parents jointly, when the only reason for that would have been to make it possible to the other parent to get the right to obtain information from authorities (KKO 2003:7).

powers, if both of the parties find this solution acceptable. The court may also give such an order against the will of the parties.²⁰

If the child has been taken into care, the custodial powers are divided between the local social authority and the custodian or custodians. The division of powers has been explained above in Q 32.

37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?

As it is not possible in practice for legally equal custodians who do not live together to act jointly in every single matter, it has been argued that the custodian with whom the child resides should have the sole power to make decisions of minor importance in the everyday life of the child. In any case, decisions which have a major importance to the child's future should be made jointly whenever possible.²¹

If one of the custodians is unable to take part in the making of a decision owing to absence, illness or some other reason and if a delay in deciding the matter would be detrimental, his or her consent on the matter shall not be necessary. A matter of great importance for the future of the child, however, may only be decided jointly by the custodians unless it is manifest that the best interests of the child otherwise require (Sec. 5 para. 2).

Thus, the Finnish Child Custody and the Right of Access Act allows the custodians to mutually arrange the way they wish to jointly exercise their custodial rights. If they fail to find this understanding, however, the Act gives few guidelines.²² In the legal literature, and in *travaux préparatoires* decisions concerning the child's residence, education, health care or religious affiliation are considered to require a joint decision by both parents. Special legislation, such as the Finnish Name Act, for instance, may include prescriptions concerning requirements of participation for both custodians in decision-making.²³

²⁰ On the role of judges in promoting settlements in family matters in Finland, see, A-K. AALTONEN, 'Tuomari sovinnontekijänä perheoikeusasioissa', in: S. POHJONEN, *Sovittelu*, WSLT, Helsinki, 2001, p. 353-369.

²¹ M. SAVOLAINEN, *Lapsen huolto ja tapaamisoikeus*, Suomen Lakimiesliiton Kustannus Oy, Helsinki, 1984 p. 30-31; M. HELIN, 'Lapsen huolto', in: H. MATTILA, *Lapsioikeuden pääpiirteet 1984*, Juridica, Helsinki 1984, p. 133; E. GOTTBORG, 'Lapsen huolto, huoltoriidat ja pakkotäytäntöönpano', Turun yliopiston oikeustieteellisen tiedekunnan julkaisu, Yksityisoikeuden julkaisusarja A:93, Turku 1997, p. 30-31; K. KURKI-SUONIO, 'Kotimaiset ja kansainväliset riidat lapsen huollosta', *Defensor Legis*, 2000 Vol. 5, p. 753.

²² See, for instance, Norwegian Child Law. DANIELSEN, *Nordisk borneret II, Forældresvar* Nord 2003:14, Nordisk Ministerråd, Copenhagen 2003, p. 108-110.

²³ Government Bill HE 224/1982; M. HELIN, 'Lapsen huolto', in: H. MATTILA, *Lapsioikeuden pääpiirteet 1984*, Juridica, Helsinki, 1984, p. 134; E. GOTTBORG, 'Lapsen huolto, huoltoriidat ja pakkotäytäntöönpano', Turun yliopiston oikeustieteellisen tiedekunnan julkaisu,

Neither a disagreement between joint custodians nor any other reason permits one custodian to exercise custodial powers alone, with the exception of urgent matters where delay would be detrimental, as stipulated in Sec. 5 para. 2.²⁴ The only possibility for joint custodians to obtain an authoritative resolution for their mutual dispute is to ask the court to render a decision concerning the division of powers according to Sec. 9 para. 3, as illuminated above in Q 36. Consequently, the court may issue an order regarding the division of powers, according to which one of the custodians obtains the sole power to act for that particular issue. The court may also in this connection vest the entire custodial powers in one of the custodians alone. The court may not, however, decide on the substance of the issue in question (except in cases where the dispute concerns the child's right of access to the other parent).

38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.

The possibility of obtaining a court order about the division of custodial powers has been explained above in Q 36 and 37.

Concerning the child's right of access to his or her parent, the court can give detailed orders (Sec. 9 Finnish Child Custody and the Right of Access Act). Whether the parent to whom the child has the right of access is a custodian or not does not have a legal effect on the detailed orders concerning this issue.

39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?

The custodian has the right to make a decision alone concerning the child in case of emergency (see Sec. 5 para. 2, described in Q 37). If the matter is of great importance for the future of the child, the power to act alone because of the other parent's absence or illness is sanctioned only in those situations where the child's best interests manifestly so require. About the residential custodian's right to act in daily matters, see above Q 37.

40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of parental responsibilities?

If the child has two (or more) joint custodians the child's residence should always be a matter for all custodians to decide, unless the court has given (according to

Yksityisoikeuden julkaisusarja A:93, Turku 1997, p.31-32; K. KURKI-SUONIO, 'Kotimaiset ja kansainväliset riidat lapsen huollosta', *Defensor Legis*, 2000 Vol. 5, p. 753-754; Finnish Name Act 694/1985 Sec. 4, 4a and 5.

²⁴ There is however a special regulation in the Passport Act for cases concerning custodial dispute, Sec. 5 Finnish Passport Act 642/1986, with the amendments of 14/1998. Sec. 3 Finnish Religious Freedom Act provides that the mother may decide upon the child's religious affiliation if parents cannot agree. See above Q 8c).

Sec. 9 para. 3) one custodian the sole power to make the decision concerning the child's residence (See above Q 36).

However, if the residential custodian changes the child's place of residence within the country of Finland without the consent of the other custodian, the non-consenting custodian cannot require the enforcement of a move back to the child's past residence. She or he can only apply for the sole custody of the child or a residential order in a normal custody court dispute in order to get the child's place of residence changed to that of his or her place of residence.

If the residential custodian takes the child abroad without the consent of the other custodian, (and there is no order about the residential custodian's sole power to decide the child's country of residence,) the non-consenting custodian can ask for the return of the child according to the Hague Child Abduction Convention of 1980 (see Sec. 32 Finnish Child Custody and Right of Access Act, amendment 186/1994).

41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?

An order concerning the child's residence can only concern one of the parents, if the parents do not live together (Sec. 7 and 9 Finnish Child Custody and Right of Access Act).²⁵ However, it is possible that although a child resides with one parent, his/her right of contact is so great that the child practically resides with both custodians (such as a division of two weeks and two weeks). This arrangement can be settled by means of a parental agreement or a court order. Such arrangements are not to my knowledge very common in Finland. No statistical information exists about their frequency.

III. Sole Parental Responsibilities

42. Does a parent with sole parental responsibilities have full authority to act alone, or does he/she have a duty to consult:

(a) The other parent

The sole custodian has the power to use his or her custodial rights without consulting the other parent. However, the sole custodian's consent for the adoption of the child is not sufficient, because the Act concerning adoption requires the consent of both parents (Sec. 9).

Additionally, courts often give practical guidelines to the parents concerning the exercise of the child's right of access. The parents may be obliged to consult each other about certain conditions, such as work shifts, summer holidays or other practical arrangements, regardless of the attribution of the custodial rights to one or both parents (Sec. 9 para. 3 Finnish Child Custody and the Right of Access Act).

²⁵ This is not so in Sweden, for instance, according to DANIELSEN, *Nordisk Borneret II, Foreldreansvar*, Nord 2003:14, Nordisk ministerråd, Kobenhavn 2003, p. 189.

(b) Other persons, bodies or competent authorities

Before the 1974 reform concerning the position of children born out-of-wedlock, there were restrictions on an unmarried mother's right to exercise her custodial rights. All restrictions on an unmarried mother's position were removed when the present Finnish Paternity Act came into force in 1976.

The restrictions concerning the power of the guardian in the administration of the child's property also concern the sole custodian if he or she is functioning as the guardian of the child, if no special guardian has been appointed. About these restrictions, see above (Q 12). The custodian shall consult the child in the way explained in Q 9.

E. CONTACT

43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system.

There are two concepts that can be taken into account. The first, and arguably more important concept is the child's right of access to its parents according to the Finnish Child Custody and the Right of Access Act (private law). The second concept, provided by the Finnish Child Protection Act (public law), is the child's right to maintain contact with persons close to the child. This concept concerns a child who has been taken into the care of the local social authority.

The child has a right of access, which encompasses the right to meet and keep contact with the parent with whom the child does not live with (Sec. 2 Finnish Child Custody and the Right of Access Act). The Enforcement Act gives the non-residential parent the ability to ask for the child's right of access to be enforced if the child's custodian does not allow the non-residential parent to meet with the child. The enforcement is given because the right of access determined in a parental agreement has been approved by the social local authority or in a court decision.

A child who has been voluntarily placed in substitute care or has been taken into care of the authority has the right to meet and keep in touch with its parents and other persons close to it (Sec. 24 Finnish Child Protection Act). The local social authority can for, safety or security reasons, decide upon restrictions concerning this right of a child who has been taken into care of the authority (Sec. 25 Finnish Child Protection Act).²⁶ The decision of the local social authority is subject to appeal in the administrative court.

44. To what extent, if at all, does the child have a right of contact with:

(a) A parent holding parental responsibilities but not living with the child

In legal terms the custodial position of the non-residential parent makes no difference regarding the child's right of access. In practice, non-residential parents who have joint custody seem to meet with their children more than parents without custodial rights.

²⁶ A director of a childcare institution can make a decision with effects for a maximum length of one month (Sec. 9 para. 2 Finnish Child Protection Decree).

(b) A parent not holding parental responsibilities

The child has an equal right to meet its non-residential parent who does not have custody as with a parent who is its custodian, as explained above.

(c) Persons other than parents (e.g. grandparents, stepparents, siblings etc...)

The objectives of custody are, among others, to ensure close and affectionate human relationships for a child, in particular those between a child and its parents (Sec. 1 para. 1 Finnish Child Custody and the Right of Access Act). Thus, the Act principally encourages the custodian to allow the child to meet and have contact with other persons close to the child, such as siblings, grandparents and other relatives. However, only the right of access between the child and its parent can be subject to an approved agreement, court decision or enforcement.

If the child has been taken into care, the right of the child to maintain contact with any person close to the child can be subject to scrutiny and a decision by the administrative court (see above Q 43).

45. Is the right to have contact referred to in Q 43 also a right and/or a duty of the parent or the other persons concerned?

A child's right of access also means that the residential custodian has a duty to allow the child to use its right of access as agreed or ordered by the court, or the Enforcement Act authorises use of enforcement measures against the custodian.

The parent with whom the child has a right to meet has, however, no enforceable duty to meet with the child. This was confirmed by the Supreme Court of Justice in 1991 (KKO 1991: 36). It is questionable whether an enforced contact between the child and its parent would serve the best interests of the child.

If the local social authority and the persons close to a child who has been taken into care cannot agree on how the child should maintain contact, the authority has, according to the Deputy Parliamentary Ombudsman, an obligation to decide how contact should be maintained. This decision can be an object of scrutiny of the administrative court.²⁷

46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?

A child's parents shall, by mutual understanding and having the best interests of the child as the first and paramount consideration, make every effort to ensure the implementation of the purpose of access in conformity with the principles stated in Sec. 1 Finnish Child Custody and the Right of Access Act. (Sec. 2 para. 2 Finnish Child Custody and the Right of Access Act)

²⁷ See the attitude of the Deputy Parliamentary Ombudsman (since 2002 Parliamentary Ombudsman) RIITTA-LEENA PAUNIO in the Annual Report from 1998 p. 180.

Thus, the wording of the Child Custody Act seems to place parental cooperation and unofficial mutual agreements as ideals, especially concerning the exercise of access. If enforcement is needed, however, a parental agreement must be approved by the social local authority (Sec. 7 Finnish Child Custody and the Right of Access Act). The local social authority shall give due weight to the best interests of the child when considering the approval of the agreement. The condition of the approval is that at least one of the parents has custody of the child.

47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?

According to the Finnish Child Custody and the Right of Access Act the court may order that a child shall have the right of access to the non-residential parent (Sec. 9 para. 1 point 5). The court shall issue directions on the conditions for access when deciding on the right of access (Sec. 9 para. 3).

These provisions of the Act have also been interpreted by the court to mean that the child does not have a right of access with the parent in question, if the contact is considered not to be in the best interest of the child. The exclusion of the right of access has, however, been regarded as very exceptional. A close and affectionate relationship between the child and its parent is an ideal that is generally considered to be in the best interests of the child (See Q 35).²⁸

In cases where there is a risk that contact could harm the child, the courts often order that the child shall meet the parent under a third person's supervision, if this can be realised in practice. Although such an arrangement is not regulated in legislation, most communities and some private organisations provide opportunities for children to meet with their parents in controlled circumstances under supervision.

If the child has been taken into care, the child's right to maintain contact with any person close to it may be restricted on the following conditions:

- 1) If such contact clearly endangers the development or safety of the child; or
- 2) if such restriction is necessary for the safety or security of the parents, or of the family where the child is cared for or for the children or personnel at the institution, where the child is cared for. (Sec. 25 Finnish Child Protection Act).

48. What if any, are the consequences on parental responsibilities, if a holder of parental responsibilities with whom the child is living, disregards the child's right to contact with:

(a) A parent

The court may order the enforcement of a court decision or approved parental agreement concerning a child's right of access with the other parent. The order may concern a threat of a fine under which the custodian shall allow the child to meet

²⁸ M. SAVOLAINEN, *Lapsen huolto ja tapaamisoikeus*, Suomen Lakimiesliiton Kustannus Oy, Helsinki, 1984, p. 127-130.

with its parent. Since 1996 it has also been possible for the court to issue a fetching order. The child may then be brought to meet with its parent by the executor (in the presence of a social worker) for a special occasion.²⁹ If the child has been taken into care, the parents and other persons close to the child who have been subject to a restriction of contact with the child can appeal to the administrative court. The child may appeal if it is 15 years old (Sec. 10 para. 2 Finnish Child Protection Act).

(b) Other persons

There are no coercive measures to be taken in the case the custodian is not providing the child with the possibility of keeping contact with persons the child is close to other than the parents. If the child has been taken into care, the parents and other persons close to the child who have been subject to a restriction of contact with the child can appeal to the administrative court. The child may appeal if it is 15 years old (Sec. 10 para. 2 Finnish Child Protection Act).

F. DELEGATION OF PARENTAL RESPONSIBILITIES

49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?

The custodian of the child may transfer the daily care of the child to a third person or body. Those situations other than normal day care are considered below.³⁰ Holidays taken, or time spent as a guest with grandparents, or with other relatives or close persons are excluded.

Empowering the non-residential parent, particularly in an intact family, to make certain decisions alone, for instance, can be regarded as a normal way to exercise custodial rights. The reason for the delegation can also be the placement of the child into foster care. The length of time a custodian may delegate his/her rights and responsibilities as well as the question in which form this should be done (written or oral etc.) has to be decided *in casu*.³¹ Following is an explanation of the regulation of private foster care or a substitute care as a voluntary child protection measure.

The care of a child by someone other than its custodian over a certain period of time can be arranged as a voluntary child protection measure, if the child is 12 years old. The child can be taken into an institution or into a family for a maximal period of 6 months (Sec. 14 Finnish Child Protection Act, amendment 139/1990).³²

²⁹ See M. HELIN, 'Enforcement of Custody, Access and Residence Orders, Intercountry Adoptions and Registration of Same Sex Couples', in: A. BAINHAM (ed.), *International Survey of Family Law 1997*, The Hague: Kluwer, 1999, p. 156.

³⁰ Parents have a subjective right to communal day care for their child (Sec. 11a, Finnish Day Care Act).

³¹ M. HELIN, 'Lapsen huolto', in: H. MATTILA, *Lapsioikeuden pääpiirteet*, Juridica, Helsinki 1984, p. 133 - 134, M. SAVOLAINEN, *Lapsen huolto ja tapaamisoikeus*, Vammala: Suomalainen Lakimiesyhdistys, Helsinki, 1984, p. 31 - 37.

³² A child who is younger than 12 years old can be taken into substitute care only with his/her parents, in the case the child has not been taken into care (Sec. 14 Finnish Child Protection Act, amendment 139/1990).

There can also be a private arrangement for a child to be cared for by a third person. The local social authority shall oversee the functioning of private foster families. Both the custodian and the foster parent shall notify this authority about the child's placement in the foster family. The local social authority shall clarify whether the circumstances of the child are properly qualified and in accordance with the best interests of that child. The authority has the power to prohibit a particular foster family from the care of the child (Sec. 41 Finnish Child Protection Act).

A permanent arrangement for the care of the child by a person other than the custodian is supposed to be exceptional, although it may in some cases prove to be in the best interests of the child. If the arrangement is permanent and if another arrangement for the custody of the child is considered to be reasonable regarding the best interests of that child, local social authorities shall take measures to arrange for the custody of a child through a parental agreement or court decision (Sec. 11 Finnish Child Custody and Right of Access Decree, No. 556/1990).

50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?

The child's parents, regardless of their custodial status, are always entitled to submit an application to the court concerning child custody or the right of access. The local social authority also has the right to submit an application to the court in child custody matters (Sec. 14 para. 1 Finnish Child Custody and the Right of Access Act). Consequently, the court may use all the alternatives given in Sec. 9 Finnish Child Custody and the Right of Access Act, including the possibility of transferring the custodial rights to the applicant. The court can also decide to distribute the rights and responsibilities between custodians. Certain custodial rights such as the right to obtain information may even be given to the non-custodial parent (see above Q 36).

If the child has remained without a custodian because of the death of custodian(s), the relatives or other persons near to the child are empowered to make an application to the court concerning the custody (see above Q 33).

G. DISCHARGE OF PARENTAL RESPONSIBILITIES

51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his/her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc.? To what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?

Maltreatment, negligence or abuse of the child may constitute legal reasons for child protection measures. If the child's health or development is seriously endangered by a lack of care or other conditions at home, the local social authority shall take the child into care and provide it with substitute care. According to the Child Protection:

The local social authority shall take a child into care and provide substitute care for it, if the child's health or development is seriously endangered by lack of care or other conditions at home, or if the child seriously endangers its health or development by abuse of intoxicants, by committing an illegal act other than a minor offence, or by other comparable behaviour, if the measures stated in Chapter 4 (*i.e.* assistance in open care) are not appropriate or have proved to be inadequate, and if substitute care is considered to be in the best interest of the child. (Sec. 16)

If a child has been taken into care, the local social authority has the power to decide on the child's care, upbringing, supervision, residence and other welfare of the child (Sec. 19 para. 1 Finnish Child Protection Act). Thus, the custodian will be discharged of exercising the rights mentioned above as a consequence of the care procedure.

There is no special civil court procedure for discharging a custodian because of his/her behaviour or lack of parental competence. A custody decision or approved agreement can be reviewed if the circumstances have changed after the decision or agreement has been made or if the change in custody is deemed appropriate (Sec. 12 Finnish Child Custody and the Right of Access Act).

The violent behaviour of one parent towards the other parent is not mentioned, as such, in the Finnish Child Protection Act or in the Finnish Child Custody and the Right of Access Act, as a reason to be taken into consideration in decision-making. However, if it is proved that the parent's violent behaviour is referred to in Sec. 16 Finnish Child Protection Act as a serious danger for the child's health or development, the violent behaviour should be taken into consideration. Not being in accordance with the best interest of the child, such behaviour can impact the decision-making concerning the custody in the same way, according to Sec. 10 Finnish Child Custody and the Right of Access Act.

52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of parental responsibilities?

The care order can be initiated by the competent local social authority, which is, in practice, the communal social worker or social workers. The child's parents and custodians may submit an application to the court concerning child custody. The local social authority has the same power (Sec. 14 para. 1 Finnish Child Custody and the Right of Access Act, see above Q 50).

53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his/her parental responsibilities?

Whether a parent is a previous custodian or not does not have an impact on the child's right of access. The interests of the child shall be the first and paramount consideration in making a decision about the child's right of access (Sec. 2 and 9 Finnish Child Custody and the Right of Access Act). See Q 47, above, about the conditions for restricting a child's right of access or maintaining contact.

54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his/her parental responsibilities, regain them?

The local social authority shall discharge a child from care when the need for care and substitute placement no longer applies, unless the discharge is clearly contrary to the best interests of the child (Sec. 20 Finnish Child Protection Act). If a decision is made that the child shall be released from care of the authorities, the custodian automatically regains his or her previous custodial rights.³³

A former custodian may, of course, regain his or her rights if the court reviews the child custody decision or the parents draw up a new agreement according to which a prior sole custody decision is now decided to be joint custody, or the sole custody is vested on the former custodian. (Sec. 12 Finnish Child Custody and the Right of Access Act).

H. PROCEDURAL ISSUES

55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?

Child custody disputes and the right of access are dealt with by the district court of the child's residence (Sec. 13 Finnish Child Custody and the Right of Access Act). The issues can also be handled together in the divorce case of the child's parents (Sec. 32 § Finnish Marriage Act; Sec. 10 Chapter 10 Finnish Procedural Code). The decisions are open to appeal. The court shall request the local social authority to make a report to the court unless it is evident that a report is not necessary (Sec. 16 Finnish Child Custody and the Right of Access Act). In practice, a report most often will be requested in disputed cases.

Parental agreements concerning child custody and/or the right of access shall be presented for approval at the local social authority in the commune or municipality where the child has residence (Sec. 8 Finnish Child Custody Act).³⁴

The care proceedings in cases where the caretaking is opposed by the custodian, or by the child who is at least twelve years old, are subject to submission to the administrative court. Thus, the administrative court deals with the issue of this

³² The European Court of Human Rights has, in its decisions *K & T v. Finland* and *K. A. v. Finland*, pointed out that the social authorities should periodically examine whether the reasons for the caretaking decision still prevail. The present Child Protection Act does not include a direct obligation to the authorities to carry out such examination as, periodically, the Art. 25 of the Convention of the Rights of the Child requires.

³⁴ From 1st March 2005 the implementation of the Brussels IIa decree will impact the regulation of the competent authority. According to the proposal the competent authority is the local social authority in the municipality of Helsinki, if neither the parents nor the child is habitually resident in Finland (HE 186/2004).

question (Sec. 17 para. 2 Finnish Child Protection Act). Besides the custodians, the parents and the person(s) providing caregiving immediately before the caretaking procedure are entitled to appeal the caretaking decision of the local social authority to the administrative court, and then to the Supreme Administrative Court (Sec. 35 para. 2 and Sec. 37 Finnish Child Protection Act). The local social authority is responsible for the investigation in the care proceedings.

The proceedings concerning the administration of the property of the child are handled by the district court of the child's residence (Sec. 70 Finnish Guardianship Services Act). The guardianship authority shall be given the opportunity to be heard in the proceedings.

56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g., required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has passed since the decision or agreement?

A court decision or an approved parental agreement can be reviewed by the court if there has been a change of circumstances or where it is otherwise deemed appropriate (Sec. 12 Finnish Child Custody and the Right of Access Act). The Act gives no special conditions for making a new parental agreement. Thus, it is a question of parental agreement. The conditions for reviewing a care order are explained above in Q 54.

57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?

The primary manner for solving family disputes should be a negotiation between the family members that leads to a mutually favourable agreement. This is an important principle in Finnish family law, explicitly articulated in Chapter 5, Sec. 20 Finnish Marriage Act (amendment 411/1987). Communal family counselling and mediation services are available for all families regardless of the marital status of the parents. Private organisations, communities and foundations may also serve as family mediators under the supervision of County Governments (Sec. 22 Finnish Marriage Act).

In 1996 an amendment was made to the Finnish Marriage Act in order to assure that family mediators' and counsellors' services may also be available to solve problems arising from the implementation of an approved agreement or court decision on child custody or right of access (Sec. 20 para. 3 Finnish Marriage Act).

A custody dispute can result in the local social authority approving a parental agreement if it becomes apparent during the preparation of the report that the parents are able to reach a settlement (Sec. 16 para. 2 Finnish Child Custody and the Right of Access Act). It has been argued that social workers may actually function as mediators in preparing the report or instead of preparing a report,

because the court may ask the local social authority to clarify whether the case could be solved with a settlement.³⁵

The local social authority has an obligation to provide parents with assistance and counselling in drafting agreements regarding child custody and the right of access. In fact, social workers in many communes also offer counselling or even mediation in cases in which parents settling on an agreement difficult. (Sec. 17 Finnish Social Welfare Decree).

The most powerful impact of mediation has been seen at the stage of the *enforcement* of custody or right of access agreements or decisions. The relevant court shall first appoint a mediator for the case. There are only a few exceptions to this: cases with a recent decision or approved agreement (of less than 3 months), urgent cases, and cases where enforcement mediation has already failed (Chapter 2, Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access). According to the empirical results of a research carried out by RISTO JAAKKOLA, in more than half (52%) of the cases where a mediator was appointed, a case was settled, recalled or otherwise laid down. A solution was found in only 39% of cases with no mediator.³⁶ The results suggest that parties benefit from the help of a mediator.

58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?

The enforcement of an approved agreement and a court decision concerning child custody, residence or right of access is possible. The enforcement application shall be addressed to the court of first instance, primarily in the area where the child is staying (Sec. 4 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access). In most cases the mediation explained above (Q 57) constitutes the first stage of the enforcement proceedings. If the efforts of the mediator do not result in a settlement, the mediator delivers his or her report to the court.

The court may decide to accept or reject the application concerning the enforcement, and it may hear witnesses. The court may then order that the defendant shall let the child meet with the applicant, or leave the child to his or her care under a threat of a fine. The court may also issue a fetching order, although these kinds of orders seem to be exceptional in practice, especially if the enforcement concerns the child's right of access, where a fetching order is possible only under special conditions.

³⁵ M. SAVOLAINEN, *Lapsen huolto ja tapaamisoikeus*, Suomen Lakimiesliiton Kustannus Oy, Helsinki, 1984, p. 219-220. Critically, with justice, to the social workers' mediation function in connection of making the report: M. AALTONEN, 'Sosiaalitoimen roolit selvitystyössä', in: M. LITMALA, *Lapsen asema erossa*, WSOY Lakitieto, Helsinki, 2002, p. 122-123.

³⁶ The sample concerned the years 1997-2001. R. JAAKKOLA, 'Lapsen huolto- ja tapaamisoikeuspäätösten täytäntöönpano vuosina 1998-2001', *Lakimies*, 2002, p. 879-901.

A custody or residence order made no longer than three months ago can be executed directly by the executor as a fetching order. The executor may however transfer the case to the court, if he or she finds it reasonable on the grounds of a change of circumstances or for another reason (Sec. 22 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access).

The court shall reject the application in cases where a child of 12 years of age resists the enforcement. The same effect may be given to the resistance of a younger child if the child has reached such maturity that the child's will can be taken into consideration. The application can also be rejected if the enforcement would be contrary to the best interests of the child because of a change in circumstances or for another reason (Sec. 2 and 14 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access).

Enforcement measures concerning the child shall be conducted carefully and without upsetting the child. The removal of the child can be postponed, for instance, if the situation upsets the child too much. (Sec. 3 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access). The mediator or a social worker shall be present when the fetching order is realised, and a doctor or other expert may be present as well, if needed (Sec. 24 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access).³⁷

59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinizing an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?

The way and extent children are heard depends on the case. One can differentiate four situations:

1. Parents are in agreement about custody and/or right of access.
2. Parents are not in agreement about custody, residence or right of access, or the child does not live with its parents.
3. Enforcement proceedings.
4. Care proceedings.

In cases concerning child custody or right of access (situation 1), the wishes and opinions of the child shall only be sought if the parents are not in agreement, if the child has actually been cared for by someone who is not a parent, or if the child's clarification is deemed to be well-founded in considering the best interests of the child (Sec. 11 Finnish Child Custody and Right of Access Act). Thus, if the parents bring a mutual agreement to the court, the child's views or wishes are normally not sought. The same applies to the local social authority when it approves the parental agreement (Sec. 8 Finnish Child Custody and Right of Access Act). However, parents are supposed to take the views and wishes of their child into consideration when they make decisions on his/her custody (Sec. 4 para. 2 Finnish Child Custody and Right of Access Act, see Q 9 above).

³⁷ See M. HELIN, 'Enforcement of Custody, Access and Residence Orders, Intercountry Adoptions and Registration of Same Sex Couples', in: A. BAINHAM, *International Survey of Family Law 1997*, The Hague: Kluwer Law International, 1999, p. 153.

The views and wishes of the child shall be sought if the court is dealing with a child custody or right of access dispute (situation 2). The child's opinion shall be carefully clarified in a way that does not harm the child's and parents' mutual relationship (Sec. 11 para. 2 Finnish Child Custody and the Right of Access Act). Normally the child's views are clarified by social workers or a psychologist in connection with the preparation of the social report.

The child's views have a special importance in enforcement proceedings (situation 3), as the enforcement may not happen against the child's will if the child is 12 years of age or has reached such a maturity that its will can be taken into consideration (Sec. 2 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access).³⁸

In care proceedings a child of 12 years of age has a sort of party position (situation 4). If a child of that age has not been heard or opposes being taken into care, the decision of the local social authority shall be submitted to the administrative court (Sec. 17). A child of 12 also has the right to appeal against certain decisions, such as against a care order (Sec. 35 para. 2 Finnish Child Protection Act). According to the general principles of the Finnish Child Protection Act the child's views and wishes shall be taken in consideration in connection with all child protection measures (Sec. 9 and 10 Finnish Child Protection Act).

60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?

If a child custody or right of access dispute is dealt with by the court, the child can only be heard by the court in special circumstances. The hearing of the child must be necessary for the resolution of the case, and the child must agree to be heard by the court. Moreover it must be evident that the hearing cannot harm the child in question (Sec. 15 para. 2 Finnish Child Custody and the Right of Access Act).

Normally the child is heard by the social worker connected with the preparation with the report for the court. Many communities and municipalities also use psychologists, and in difficult cases child psychiatrists, to clarify the child's wishes and views as well as to discover the child's inner bonds with parents and siblings.³⁹

In an enforcement procedure the child is heard by the mediator who has been appointed for the enforcement dispute (Sec. 7 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access). If a mediator is to be appointed for the case, the hearing of the child must be resolved *in casu*. In the care procedure,

³⁸ The Supreme Court of Justice decided in 2001 to vest the custody of two siblings to the female partner of their deceased mother instead of their biological father who lived abroad. The children, who were 12 years old and above, had repeatedly expressed their will not to leave Finland, where they had been staying with their mother for several years (KKO 2001:110). The court found that it was according to the best interests of these children not to give the custody to the father because this kind of decision could not have been enforced against the children's will anyway.

³⁹ S. TASKINEN, *Lapsen etu erotilanteessa*, Oppaita 24, STAKES Sosiaali- ja terveystieteiden tutkimus- ja kehittämiskeskus, Helsinki, 2001, p. 71-75.

a child of 12 years of age or more is heard by a social worker. The hearing shall be officially documented (Sec. 17 para. 1 Finnish Child Protection Act).

61. How, if at all, is the child legally represented in disputes concerning:

(a) Parental responsibilities

In custody and right of access disputes the child is not positioned as a party and is therefore not represented in the dispute. In care proceedings the child is a party and may act as a party from the age of 15. The child may have its own attorney, if necessary. The social worker who is responsible in the case shall help the child, to obtain an attorney (Sec. 10 para. 3 Finnish Child Protection Act). The custodian is also the legal representative of the child, and in cases in which the child has gained the parallel right to represent itself at the age of 15, the custodian and the child may act independently. A child aged 12 or more has a right to be heard and a right to appeal against a care order. The care order shall be submitted to the administrative court if the child (12 or older), or the custodian of the child resists taking the child into care (Sec. 17 Finnish Child Protection Act).

In connection to care proceedings it is worth noting that the local social authority may make an application for a special appointed guardian for the child. The authority has a duty to take such measures if the custodian of the child does not seem to be able to represent the child because of an assumed conflict of interest between the custodian and the child (Sec. 10 Finnish Act concerning the Position and Rights of the Social Welfare Client). In enforcement proceedings the child is not considered a party and is thus not represented. In proceedings concerning the appointment of a guardian for a child, a child aged 15 or older must be given a possibility to be heard (Sec. 73 Finnish Guardianship Services Act).

(b) The child's residence

The rules concerning a custody dispute also apply to a dispute over a child's place of residence, as it is understood to be part of the concept of the custody of the child (see above). The same applies to the enforcement of the child's residence.

(c) Contact

The rules concerning the custody dispute of the child (see above point (a)) are also applicable to the private law dispute concerning contact or right of access. If the child has been taken into care and restrictions concerning its right to maintain contact are made, the general rules concerning the taking of the child's views into consideration according to the Finnish Child Protection Act (Sec. 10) and to the Finnish Administrative Procedure Act (Sec. 14 para. 3) shall be applied.

62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q 59-61?

The age limits of 12 and 15 in care proceedings have been explained above, as well as the age limit of twelve concerning enforcement proceedings (Q 59). In disputes concerning custody (including residence) and right of access there are no age limits. The wishes and views of the child shall be taken into consideration with regard to the maturity that the child has reached. In practice, social workers tend to talk with

the children of school age alone. The younger children are met accompanied by each parent separately.⁴⁰

The child has the power to prevent the enforcement of custody or a right of access decision/agreement from the age of 12. The opinion of a younger child can have the same effect if the child has reached such a maturity that its will can be taken into consideration (Sec. 2 Finnish Act of the Enforcement of a Decision on Child Custody and Right of Access).

⁴⁰ S. TASKINEN, *Lapsen etu erotilanteessa* Oppaita 46, STAKES Sosiaali- ja terveysalan tutkimus- ja kehittämiskeskus, Helsinki 2001, p. 71-75.