

# CHILD PARTICIPATION IN NORWAY

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## 1. INTRODUCTION

Norway has a population of 5.3 million people, of whom 1.1 million are children, i.e., under the age of 18. Almost half of marriages in the country end in divorce, the others end by the death of one of the partners. In 2018, the number of new marriages was 20,949, and there were 10,630 separations and 9,545 divorces. The number of minor children experiencing their parents' divorce was 8,900.<sup>1</sup> To file for divorce, spouses must either first file for separation and then wait 12 months or have been separated for at least two years.<sup>2</sup> The prevalence of cohabitation is also high: 29% of children living with both parents have unmarried parents.<sup>3</sup> The divorce statistics do not therefore reflect the number of children whose parents cease to cohabit.

In 2017, 12,647 families participated in mandatory post-separation mediation; almost half (47%) of the parents in these cases were cohabitants.<sup>4</sup> Cohabiting parents tend to be younger and to have younger children at the time of separation than married parents, but otherwise there are no significant demographic differences between the two groups. Parents who have cohabited need a higher number of mediation sessions than parents who have

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<sup>1</sup> Statistisk sentralbyrå, *Barn som opplevde skilsmisse*, <https://www.ssb.no/statbank/table/05703/tableViewLayout1/>.

<sup>2</sup> Statistisk sentralbyrå, *Ekteskap og skilsmisser*, <https://www.ssb.no/befolkning/statistikker/ekteskap/aar-hovudtal>

<sup>3</sup> Statistisk sentralbyrå, *Barn 0-17 år med antall foreldre i familien*, <https://www.ssb.no/statbank/table/06239/tableViewLayout1/>. A registered partnership is equivalent to marriage.

<sup>4</sup> Statistisk sentralbyrå, *Avsluttede mekling og deltakere, etter meklingsinstans*, <https://www.ssb.no/statbank/table/10936/tableViewLayout1/>.

been married, which is likely to result from their shorter experience with co-parenting.<sup>5</sup> Researchers estimate that 20-25% of separated families have high levels of conflict, including negative emotions as well as disruptive and destructive conflict and communication patterns.<sup>6</sup>

In 2018, 71 children from 39 families were registered as abducted from Norway. Additionally, 24 children from 16 families were registered as abducted to Norway.<sup>7</sup>

In Norway, both parents are usually employed outside the home, and two thirds of employed women work full-time.<sup>8</sup> Children aged 1-9 years have a right to high-quality, affordable day care and after-school care. Health services are free of charge for children under 16, and schooling, including higher education, is also free. Social benefits and services are universal and individual.<sup>9</sup> After separation, both spouses are expected to provide for themselves and for their children. Spousal maintenance is practically non-existent. Hence, economic issues are seldom subject to overt litigation. Most divorces do not require any involvement of a lawyer; rather, one or both spouses file for separation and divorce, and afterwards the spouses agree on the division of the matrimonial property.<sup>10</sup>

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<sup>5</sup> M. Ådnanes, G.M.D. Haugen, H. Jensberg, T.L. Husum and M. Rantalaiho, 'Hva karakteriserer vanskelige saker i foreldremekling, og er meklingsordningen godt nok tilpasser?' [2011] *Fokus på familien* 86, 109.

<sup>6</sup> M. S. Helland and I. Borren, *Foreldrekonflikt; identifisering av konfliktnivåer, sentrale kjennetegn og risikofaktorer hos høykonfliktpar*. Rapport 2015:3. Folkehelseinstituttet, Oslo 2015.

<sup>7</sup> Regjeringen, Statistikk for internasjonal barne bortføring, <https://www.regjeringen.no/no/sub/barnebortforing/nettsider-og-litteratur/statistikk-for-internasjonalt-barnebortforing/id733040/>.

<sup>8</sup> Statistisk sentralbyrå, 'Flere heltidsarbeidende', <https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/flere-heltidsarbeidende>.

<sup>9</sup> For more detailed information see, for example, J. H. Petersen, 'Nordic Model of Welfare States', in P. Letto-Vanamo, D. Tamm and B.O.G. Mortensen (eds), *Nordic Law in European Context*, Springer, Cham 2019, pp. 21-39.

<sup>10</sup> For more information see, for example, I. Lund-Andersen and A. Kronborg, 'Marriage and Family Relations', in P. Letto-Vanamo, D. Tamm and B.O.G. Mortensen (eds), *Nordic Law in European Context*, Springer, Cham 2019, pp. 97-113.

Out-of-court mediation is mandatory for separating families with children under the age of 16. Participation in mediation is a prerequisite both for registration as a single parent and for court proceedings on custody, residence, contact and relocation. Mandatory out-of-court and pre-filing mediation lasts 1-7 hours depending on the needs and wishes of the family; the average duration is approximately two hours.<sup>11</sup> After the first hour, the parents receive a certificate of attendance regardless of the outcome and progress. The certificate enables the parents to file child custody proceedings in court.<sup>12</sup> The mediator has discretion to exempt families from mediation, for instance, when the mediator suspects that mediation would be inappropriate due to the presence of violence, child neglect and so forth, or it would be unsuccessful for other reasons. If one parent does not attend mediation, the mediator has the discretion to issue a certificate of attendance.<sup>13</sup>

Mediation takes place at one of the state-funded Family Counselling Offices or with a registered mediator.<sup>14</sup> Registered mediators include psychologists, social workers, lawyers, and members of the clergy. Most families (80%) choose the Family Counselling Offices, which offer mediation free of charge in child-friendly premises.<sup>15</sup>

A parent can file a case at court within six months of the first mediation session. After this time limit has passed, the parents must return for further mediation before filing for litigation (pre-filing mediation). The same mediation process as that used in post-separation mediation is applicable for pre-filing mediation.

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<sup>11</sup> Barne-, ungdoms- og familiedirektoratet, *Årsrapport 2018*, <https://www.bufdir.no/globalassets/documents/arsrapport-2018.pdf>, p. 31.

<sup>12</sup> For more details, see A. Nylund, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation', in A. Nylund, K. Ervasti and L. Adrian (eds), *Nordic Mediation Research*, Springer, Cham 2018, pp. 9-26.

<sup>13</sup> Decree on mediation in accordance with the Marriage Act and the Children Act (Forskrift om mekling etter ekteskapsloven og barneloven) FOR-2006-12-18-1478, section 7 and 8.

<sup>14</sup> Lawyers, social workers, psychologists and priests provide family mediation services. Mediators at Family Service Offices are psychologists and social workers.

<sup>15</sup> Statistisk sentralbyrå, above n. 4.

Less than 20% of separating families start court proceedings.<sup>16</sup> Courts use court-connected mediation as the main method of dispute resolution, unless the case involves child abuse or neglect. The court appoints an expert to mediate, provide advice to the parents and assess the family's situation. Sometimes the expert and the judge co-mediate.<sup>17</sup> If mediation is unsuccessful, or is considered inappropriate due to child abuse or neglect, the case proceeds to regular court proceedings. The expert continues to be involved in the case, now providing an evaluation of the family and the best interests of the child.

## 2. STATUTORY PROVISIONS

The Norwegian Constitution<sup>18</sup> section 104, protects the right to be heard for all children. The provision is a shorthand for the UN Convention of the Rights of the Child art. 12. However, participation is narrowly construed and uses the term *right to be heard* instead of the broader term *right to participate*.<sup>19</sup>

The Children Act,<sup>20</sup> section 31, regulates child participation in family law in more detail. Children have a right to express their views in matters concerning themselves when they have become mature enough to form their own opinion or, at the latest, when they turn 7 years old. Weight is given to the views of children according to their age and maturity. Particular weight must be

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<sup>16</sup> Annually, about 12,500 mandatory out-of-court mediations are held, and the number of court cases is approximately 2,600. However, some are repeat cases.

<sup>17</sup> For more details, see C. Bernt, 'Custody Mediation in Norwegian Courts: A Conglomeration of Roles and Processes', in A. Nylund, K. Ervasti and L. Adrian (eds), *Nordic Mediation Research*, Springer, Cham 2018, pp. 105-32.

<sup>18</sup> The Constitution of the Kingdom of Norway (The Constitution) Kongeriget Norges Grundlov (Grunnloven) 17 May 1814.

<sup>19</sup> For a more detailed analysis of the constitutional protection of children's participatory rights in Norway, see A. Nylund, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy', in T. Haugli, A. Nylund, R. Sigurdson and L.R.L. Bendiksen (eds), *Children's Constitutional Rights in the Nordic Countries*, Brill, Leiden 2019, pp. 201-24.

<sup>20</sup> Act on Children and Parents (Children Act) Lov om barn og foreldre (barnelova) 8 April 1981 no 7. In force since 1 January 1982.

given to the views of children aged 12 years or older. As a rule, the parents represent children in decision-making processes, and the obligation to hear children rests on the parents. However, authorities do not control whether and how parents fulfil their obligations.

The Children Act section 51 mandates separating parents with children under the age of 16 to attend mediation. However, the Act does not explicitly direct mediators and courts to enable children to participate in decision-making, nor does it give any indication as to the forms of participation to be used.

There is no direct obligation to let children under the age of 7 participate in mediation; consequently, participation rates are significantly lower for young children. However, some mediators invite children to participate from the age of 4, especially if the children have older siblings, and invite siblings above the age of 16 and up to around 20 to participate in mediation.<sup>21</sup> While the usual minimum age of 7 suggests that children are expected to have sufficient verbal and cognitive skills to communicate, some mediators have developed models to cater to younger children and children with disabilities. Nonetheless, there are currently no official guidelines on how to involve younger children and children with cognitive or language related disabilities. Furthermore, mediation is mandatory only for families with children under the age of 16. Thus, children who are 16 or 17 years old do not participate in mediation unless they have younger siblings and are invited to participate.

According to the Children Act, section 61 no. 4, children who have expressed their opinion on custody, residence or contact during litigation have a right to be informed of the outcome and of how their views have been taken into account. According to the Norwegian Supreme Court, this rule must be interpreted in conjunction with section 31 and the Constitution, and thus it involves an obligation for the court to invite children from the age of 7 to be heard.<sup>22</sup> This entails a shift towards a recognition of the

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<sup>21</sup> R. Thørnblat and A. Strandbu, 'The Involvement of Children in the Process of Mandatory Family Mediation', in A. Nylund, K. Ervasti and L. Adrian (eds), *Nordic Mediation Research*, Springer, Cham 2018, p. 183, 191.

<sup>22</sup> E.g. HR-2017-18-U.

inherent value of child participation; previously, child participation was often considered harmful for the child. Nonetheless, the obligation to hear the child in court-connected mediation is unclear, and participation in mandatory out-of-court mediation is not regulated at all in statutory law. Mediation processes are not considered to be decision-making processes and thus are not considered processes in which the child should be allowed to participate. Even when the court hears the child, the child has limited influence on contact and residence arrangements.<sup>23</sup>

According to Norwegian law, the parents represent the child in family law court proceedings, and the child does not have legal standing. Hence, children cannot initiate mediation or litigation, nor can they make claims independently of their parents or appeal cases. Children have a right to receive information about their case, but they do not have the right to be present at court hearings or to access case documents. However, they have a right to be informed of the content of documents in an age-appropriate manner. Parentage cases are the only exception: the child has legal standing in them.

The rules regarding participation in international child abduction cases in the Child Abduction Act<sup>24</sup> and participation of children in adoption proceedings in the Adoption Act<sup>25</sup> are general and tacitly refer to the Children Act. Thus, in court proceedings the rules and practices in child custody, residence, contact and relocation apply *mutatis mutandis*.

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<sup>23</sup> G.M.D. Haugen, K. Dyrstad and M. Ådnandes, *Barns innflytelse på samværsordninger og bosted*. Rapport. SINTEF. NTNU Samfunnsforskning, Trondheim 2015.

<sup>24</sup> Act Relating to the Recognition and Enforcement of Foreign Decisions Concerning Custody of Children etc. and on the Return of Children (Child Abduction Act) Lov om anerkjennelse og fullbyrdelse av utenlandske avgjørelser om foreldreansvar m.v. og om tilbakelevering av barn (barne bortførsloven) 8 July 1988.

<sup>25</sup> Act Relating to Adoption (Adoption Act). Lov om adopsjon (adopsjonsloven) 16 June 2017 no 48. In force since 1 July 2018. Participation in child protection cases is regulated in the Act Relating to Child Welfare (Child Welfare Act) Lov om barneverntjenester (barnevernloven) 17 July 1992 no 100. In force since 1 January 1993.

### 3. MODES OF CHILD PARTICIPATION IN NORWAY

#### 3.1. DIRECT FORMS OF PARTICIPATION

Guidelines, recommendations and other official documents contain unequivocal support for direct child participation in both court-connected and out-of-court mediation. The Ministry of Children and Families has obliged the Family Counselling Offices to include children in mediation more often.<sup>26</sup> This reflects a shift in the beliefs regarding child participation over the last few decades. Participation is important not only because it encourages a child-centric shift in the parents' attitudes and behaviour and in their eliciting of information regarding the best interests of their child, but also because it empowers the child and honours the child's human dignity.<sup>27</sup> Child participation brings the child's needs and wishes to centre stage and gives the child the opportunity to gain a better understanding of the situation.<sup>28</sup>

##### *3.1.1. Out-of-court mediation*

Despite shifts in attitudes, child participation in out-of-court mediation is still uncommon and is subject to parental consent. The parents have a duty to inform children of their right to participate in mediation and their right to be heard. However, the parents' duty to hear the child is not enforced. Moreover, for low-conflict families, the mandatory mediation session is treated as a ritual rather than a true forum for decision-making. In 2018, children's participation in out-of-court mediation was still the exception, with only 26% of children participating after they turned 7. Nonetheless, this does represent a significant increase from the early 2010s when children participated in only 4% of mediations.<sup>29</sup>

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<sup>27</sup> Nylund, above n. 19.

<sup>28</sup> Domstoladministrasjonen, Den gode barnesamtalen i foreldretvistar, <https://www.domstol.no/domstoladministrasjonen/publikasjoner/veiledere/den-gode-barnesamtalen-i-foreldretvistar/>.

<sup>29</sup> Barne-, ungdoms- og familiedirektoratet, above n. 11, p. 28.

There is significant variation among the Family Counselling Offices regarding child participation. This variation can be attributed to several factors, such as how comfortable the employees are in allowing children to participate, whether high-conflict families are given priority, and the local mediation culture.<sup>30</sup> When parents are told, and gain the impression from other parents, that children are routinely invited to participate, they are more likely to consent to child participation. Likewise, children expect to participate in mediation when they learn that their peers have done so.

Several Family Counselling Offices have implemented the child-inclusive BIM model (Barn i mekling, Children in Mediation) of mediation.<sup>31</sup> Mediation commences with a short introductory session. After the introduction, the parents exit the room and the mediator has a conversation with the children. Three questions guide the conversation: (1) What is happening/has happened? (2) How are you feeling? (3) Is there anything you would like to say to your parents? Based on these questions, the mediator encourages the child to convey a message to the parents. The role of the mediator is to document the message as literally as possible to retain authenticity. Thereafter, the mediator begins mediation by conveying the child's message to the parents. Often, the child's message regards issues beyond residence and contact, such as maintaining or establishing relationships and traditions. However, the mediator asks the parents to discuss the issues the child has raised regardless of their legal relevance. The mediation session concludes with the child entering the room. The settlement, or lack thereof, is then explained to the child. The child also receives feedback on how his or her input has influenced the outcome.

The BIM model reflects an understanding of children's participation as a way to bring the child's perspective to the mediation table. The open questions allow children to select freely which issues they wish to discuss and what message they wish to convey. It thus reorients the parents towards the children and shapes

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<sup>30</sup> Barne-, ungdoms- og familiedirektoratet, above n. 11, p. 28.

<sup>31</sup> Thørnblاند and Strandbu, above n. 21, pp. 186-187.



the agenda, as well as potentially provides new information. Children are not specifically asked to indicate their preferences regarding residence and care arrangements, although the open questions allow children to express such preferences if they wish to do so. While not asking children to state their views on care arrangements relieves children of the pressure to side with one parent it could, in some cases, amount to depriving children of the opportunity to express their views, since some children may not perceive open questions as an invitation to do so.

Other models for child participation are also applied. All models include an introduction in which the children receive information about the mediation process and their role in it and a conclusion in which the children receive information and feedback on their participation. Some mediators utilise a one-way mirror to enable the children to see how the parents react to their messages.<sup>32</sup>

In the last few years, a programme designed for high-conflict families has been launched. It is called process mediation (prosessmekling), and consists of a mini-course, individual sessions with each parent, conversations with children and mediation. Currently, standardised methods for the conversations with children are being developed. The new model enables children to participate in decision-making through a conversation with the mediator and through a more child-centred subsequent mediation session.<sup>33</sup> Usually, two mediators are assigned to each case. One or both of them hear the children at the Family Counselling Office. After the mediation, children are given feedback on why a specific outcome was chosen.

Registered private mediators apply the mediation method they find most suitable. In 2018, 15% of children aged 7 or above participated in mediation with private mediators, which is significantly less than at the Family Counselling Offices.<sup>34</sup>

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<sup>32</sup> *Barn i familievernet*. Familievernets skriftserie nr 1/2011, [https://www.bufdir.no/globalassets/global/Barn\\_i\\_familievernet\\_1\\_2011\\_Skriftserie.pdf](https://www.bufdir.no/globalassets/global/Barn_i_familievernet_1_2011_Skriftserie.pdf) p. 22-23 and 28-29.

<sup>33</sup> Barne-, ungdoms- og familiedirektoratet, above n. 11, p. 26.

<sup>34</sup> Barne-, ungdoms- og familiedirektoratet, above n. 11, p. 33.

### 3.1.2 Participation in court proceedings in family law cases

In most cases, the court proceedings start with the judge having an audio-conference with the legal counsels. The aim is to ensure the case is suitable for mediation, to plan the first court hearing and to discuss who should be appointed as an expert.<sup>35</sup> The court-appointed expert has multiple roles: to assist the court in mediating the case, to provide advice to the parents and, if the parents do not settle, to make an evaluation of the best interests of the child. Alternatively, the court can oblige the parents to attend out-of-court mediation. However, only 1-2% are returned to the Family Counselling Offices each year.<sup>36</sup>

At a preparatory hearing, the parents, the expert and the judge discuss the proceedings and the role of the expert in them. Usually, the expert holds individual meetings with each parent, discusses the situation with the child or children and finally mediates with the parents. The role of the judge varies: some judges are involved in both hearing the child and mediation sessions, while others only co-mediate or are not involved at all.<sup>37</sup> Experts are often appointed from a list of registered experts and include psychologists and psychiatrists with specific training and experience.<sup>38</sup> However, the use of non-registered experts is widespread.

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<sup>35</sup> The Norwegian Courts Administration has issued guidelines for handling the cases; see Domstoladministrasjonen, *Nasjonal veileder for behandling av foreldretvister*, Versjon 2.0, <https://www.domstol.no/contentassets/2af0ab33bb6146ffa161a41154de85f7/nasjonal-veileder-for-foreldretvister-2019-1.pdf>.

<sup>36</sup> Statistisk sentralbyrå, above n. 4.

<sup>37</sup> Oxford Research, *Kartlegging av foreldretvister etter barneloven*, [https://evalueringsportalen.no/evaluering/domstolsbehandlingen-av-foreldretvister-kartlegging-av-foreldretvister-etter-barneloven/kartlegging\\_domstolsbehandlingen\\_av\\_foreldretvister\\_oxford\\_research\\_2016\\_.pdf/@@inline](https://evalueringsportalen.no/evaluering/domstolsbehandlingen-av-foreldretvister-kartlegging-av-foreldretvister-etter-barneloven/kartlegging_domstolsbehandlingen_av_foreldretvister_oxford_research_2016_.pdf/@@inline), 2016, p. 23 ff.

<sup>38</sup> Norsk psykologforbund, *Studieplan for barnefaglig sakyndigutdanning*, <file:///C:/Users/any003/Downloads/Studieplan+for+barnefaglig+sakyndigutdanning.pdf>

According to the current recommendation issued in February 2019,<sup>39</sup> the judge shall ensure as early as possible that children are informed of their right to be heard and the methods of involving children. Children who wish to speak directly with the judge should be given an opportunity to do so unless the best interests of the child require otherwise. In the latter case, the expert will hear the child. In 2015, an expert conducted the conversations in 70% of the cases surveyed, the judge and the expert in 32% and only the judge in 16% of the cases with children aged 7 and above.<sup>40</sup> Judges seldom participated in conversations with younger children.<sup>41</sup> The judge must evaluate the time and place for hearing the child and whether information should be obtained prior to this occurring. Sometimes children should be given several opportunities to be heard, such as when the family trials care arrangements for a certain period of time. The timing of the appointment should respect children's needs (e.g., not coincide with school work, hobbies, etc.).<sup>42</sup>

However, if the parents resist the expert, judge or both having a conversation with the child, the judge must consider how to proceed. The judge must attempt to convince the parents of the benefits of child participation and, if necessary, give the parents time to reconsider. If one or both parents still resist the conversation, the judge can decide to proceed anyway, since pursuing a conversation against the outspoken wishes of a parent could be detrimental for the child.<sup>43</sup> The decision to give parents a *de facto* right to veto participation is likely to result from unclear rules on

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<sup>39</sup> Domstoladministrasjonen, *Praktiske anbefalinger for domstolsbehandling til barnet beste i foreldretvistsaker, og saker om tvangsfullbyrdelse jr. barneloven § 65*. 1. februar 2019, <https://www.domstol.no/contentassets/2af0ab33bb6146ffa161a41154de85f7/praktiske-anbefalinger-foreldretvister.pdf>

<sup>40</sup> Oxford Research, above n. 37, p. 78. The respondents could select more than one option, thus the total exceeds 100%.

<sup>41</sup> Oxford Research, above n. 37, p. 78.

<sup>42</sup> Domstoladministrasjonen, above n. 35.

<sup>43</sup> Domstoladministrasjonen, *Den gode barnesamtalen i foreldretvistar*, <https://www.domstol.no/domstoladministrasjonen/publikasjoner/veiledere/den-gode-barnesamtalen-i-foreldretvistar/>.

child participation and the tendency to treat mediation as a private process.

Conversations with children are scheduled at court in the judge's chambers, in a meeting room or in a special room for hearing children. When the judge is not involved, the expert has discretion to choose a suitable place for hearing the child. The parents are not present at the hearing, and siblings have the opportunity to talk with the judge or expert without their other siblings being present. At the beginning of the conversation, the expert or the judge informs the child about the court case, the child's right to participate, and the right to refrain from speaking with the judge and/or answering questions. The child is also told they do not decide the outcome although their views will inform the outcome. As well, the child is informed about how the judge or expert will document the hearing and how the account from the discussion will be used. Since the parents will have access to this account, it is imperative that children are given appropriate information and the opportunity to review the account and to correct any misunderstandings or provide additional information.<sup>44</sup> A recent study revealed that written accounts are not drafted in all cases,<sup>45</sup> in which case neither the child nor the parents can access information from the conversation. There are no statistics available regarding whether and when children are heard in court-connected mediation and litigation proceedings.

According to the national guidelines for hearing children in cases on parental responsibility, the aim is to discuss the child's views in a broad sense by asking the child how they feel about, and perceive, the current situation to elicit information on their needs and wishes. Direct questions on residence and contact should not be used, since these could cause the child to perceive a conflict of loyalty vis-à-vis the parents.<sup>46</sup>

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<sup>44</sup> Domstoladministrasjonen, above n. 35 and Domstoladministrasjonen, above n. 39.

<sup>45</sup> Oxford Research, above n. 37, p. 79.

<sup>46</sup> Domstoladministrasjonen, *Den gode barnesamtalen i foreldretvistar*, <https://www.domstol.no/domstoladministrasjonen/publikasjoner/veiledere/den-gode-barnesamtalen-i-foreldretvistar/>.

When the child is at risk of abuse or neglect, court-connected mediation is not attempted. Instead, the expert is assigned the role of an evaluator and, as part of the evaluation, the expert, the judge or both hear the child. The expert can also observe the child. As a rule, the child is not invited to participate in the main hearing. The child's views are presented by way of the expert evaluation report or as a written account from a conversation with the child. The same applies when the parents do not settle in a preparatory hearing or in court-connected mediation. In these cases, the judge has discretion to decide whether a new conversation with the child should be scheduled.

Depending on the outcome of mediation and the level of conflict between the parents, either the parents, the expert or the judge informs the child of the outcome. During the court proceedings, the parents often make interim arrangements, through either agreement or court order. The child must be informed of the interim arrangement, its duration and the process that will be followed after the interim period. For permanent outcomes, whether based on a settlement or on a judgment, the child has a right to feedback on whether, and how, their views have been taken into account. The information must be tailored to the age and development of each child. The court has a duty to document when, how and by whom the feedback was given to the child.<sup>47</sup> Usually, the expert or the parents inform the child.<sup>48</sup>

Framing participation as a conversation with the child presupposes fairly developed verbal skills on the part of the child. Thus, other methods of communication, such as play, are often overlooked, and many young children or children with cognitive disorders are consequently deprived of the right to participate even when their participation could be beneficial.

Court-connected mediation has been criticised due to the mediator having multiple roles that in some cases may be incompatible.<sup>49</sup> Hence, children may not wish to disclose information to

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<sup>47</sup> Domstoladministrasjonen, above n. 35 and Domstoladministrasjonen, above n. 39.

<sup>48</sup> Oxford Research, above n. 37, p. 80.

<sup>49</sup> See Bernt, above n. 17.

the expert and the judge. The expert has no right to confidentiality vis-à-vis the judge; thus, any information the child shares with the expert could be used either indirectly or directly in the expert evaluation or in the judgment or interim order.

According to the Child Abduction Act section 17, the court has a duty to hear children aged 7 or above and younger children who are capable of forming their own opinion. Moreover, the child has a right to receive relevant information, and the child's opinion is given weight according to the age and maturity of the child. The court proceeds in the same manner as in cases involving parental responsibility; that is, the court, an expert or both hear the child.<sup>50</sup>

### **3.2. REPRESENTATION FORMS OF PARTICIPATION**

During litigation, the court has the power to appoint a (legal) representative to the child if there is a particular need to do so, such as when there is reason to suspect child abuse or neglect.<sup>51</sup> The role of the representative is to ensure that the court process is conducted in a manner that is compatible with the best interests of the child, that all necessary steps are taken, that the child is given sufficient opportunity to state their views, that their views are taken into account and that the proceedings are not overly burdensome for the child. The representative is not the legal counsel of the child and only advocates the procedural rights of the child. The government pays for these representatives.

Legal representatives are appointed in less than 1% of all cases, with most courts never having appointed a representative.<sup>52</sup> The role of the representative is unclear and limited. Therefore, most judges believe that appointing a representative provides little or no added value and may only serve to make the process more complicated.

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<sup>50</sup> Rundskriv om internasjonal barne bortføring G-2015-6, part 6.4.3.

<sup>51</sup> Children Act, section 62 no. 5.

<sup>52</sup> Birte Sundsdal, 'Barnets representant i foreldretvister – en innholdsløs styrking av barns rettssikkerhet?' *Tidsskrift for familierett, arverett og barnevern-rettslige spørsmål* [2015] 177.

### 3.3. CHILD LITIGATING ON OWN BEHALF

Children have legal standing in parentage cases. The child has the right to initiate proceedings to establish and revoke parentage. If the child is under 15 years of age, the child must first receive a *guardian ad litem* who acts on the behalf of the child. Children who are 15 years or older can commence litigation on their own behalf, and a guardian can only commence litigation with the permission of the child.

The rules of procedure are flexible in parentage cases and are tailored to the specific case. Hence, the forms of child participation vary. The government pays for the proceedings. Legal aid is awarded to the child.

## 4. RESEARCH

In recent years, models for child participation in mediation have been developed. Research on the BIM model indicates that children appreciate the opportunity to participate in mediation.<sup>53</sup> A survey of children in 217 mediations found that around 90% of the children felt they were able to say what they wanted to the mediator, that the mediator understood them and that they enjoyed talking to the mediator. The vast majority, 88%, agreed that children in general should be able to take part in mediation. A higher level of conflict slightly reduced children's level of satisfaction; however, the effect was small.

The researchers also analysed the messages children wished to convey to their parents based on the notes with the children's message to the parents made during mediation.<sup>54</sup> These messages were related to four analytical categories. 'Breakdown' messages included statements related to the process of change from one family constellation to another. 'Preservation and improvement' messages related to the child wanting the parents to reunite or expressing a desire to preserve family relations and traditions or

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<sup>53</sup> Thørnbland and Strandbu, above n. 21, pp. 199-204.

<sup>54</sup> Thørnbland and Strandbu, above n. 21, pp. 194-99.

improve communication within the family. ‘Reorientation’ messages referred to establishing new relationships with the parents’ new partners. Finally, ‘security’ messages related to the child’s care situation. These were not directly related to the marital breakdown, although the breakdown could intensify security issues. Only the final category, ‘security’, had direct implications for residence and contact, however information related to all four categories was relevant for improving the level of co-parenting.

Interviews with 12 mediators at Family Counselling Offices using the BIM model found that including children changes the function and focus of mediation from an adult-centred information session dominated by details related to parental responsibility to a child-centred discussion on co-parenting.<sup>55</sup> Discussions on economic aspects and other ‘adult’ issues yielded to issues pertaining to daily life, such as toys, activities, and holidays. Children’s messages could also make mediation more complex, since these shaped the agenda and the information available, and parents could not define the agenda alone. Moreover, the mediation addressed issues and perspectives that were important to the specific child or children concerned, not just children in general.

## **5. POLICY AND PRACTICE DEVELOPMENTS**

In March 2019, the Norwegian government appointed a commission to modernise the Children Act to include developments in children’s rights. The commission is expected to file its report in September 2020. In 2019, the commission on Family Counselling Offices recommended that the Children Act should explicitly state that children have a right to participate in out-of-court mediation.<sup>56</sup>

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<sup>55</sup> R. Thørnblad, A. Strandbu and A. Salamonsen, ‘Hvordan påvirker barns deltakelse foreldremekling? Barns deltakelse som mål og middel’ [2019] *Barn*, 67.

<sup>56</sup> NOU 2019: 20. En styrket familietjeneste. En gjennomgang av familieverntjenesten. Norges offentlige utredninger 2019, p. 233.



## 6. CONCLUSION

The requirements of Article 12 of the UNCRC are being met formally in Norway: the Children Act, Child Abduction Act and Adoption Act give children above the age of 7 the right to participation and to information on the issues to be decided and the final decision. Since the specific sections regulating decision-making processes do not explicitly iterate the right to participation, nor state what participation entails, the obligations under Article 12 are not always met in practice.

Flexible rules enable mediators and judges to tailor the proceedings to each case. However, flexibility also results in considerable differences in practice. The level of knowledge and training in using child-inclusive practices varies among judges and court-appointed experts: at larger courts, only some judges hear cases concerning children (i.e., custody, contact, parentage, and welfare cases), in most small courts, all judges hear these cases, which in turn might reduce the level of child participation.<sup>57</sup> A government report has recommended limiting cases concerning children to selected courts to ensure that the judges and experts have the necessary training and experience.<sup>58</sup> Similar problems apply to Family Counselling Offices. However, the development and spread of new models for child participation have resulted in increased child participation.

Although Norway has made significant progress in recognising the intrinsic value of child participation, lack of specific rules and procedures still reduce the level and quality of participation.

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<sup>57</sup> Oxford Research, above n. 37, pp. 24-26 and pp. 85-88.

<sup>58</sup> NOU 2017: 8. *Særdomstoler på nye områder? – Vurdering av nye domstolsordninger for foreldretvister, barnevernsaker og utlendingssaker*. Departementenes sikkerhets- og serviceorganisasjon. Oslo 2017, <https://www.regjeringen.no/contentassets/57139c34d05943b4829ad0839a4f5116/no/pdfs/nou201720170008000dddpdfs.pdf>