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Children's Participation in Family Law Proceedings

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ABSTRACT This chapter addresses the child's right to participate in parental disputes by presenting the legislative developments and examining trends in judgments from the Norwegian Supreme Court and the Courts of Appeal. Extending a dataset examining children's participation in courtroom proceedings, it analyses the effect of recent amendments in the Norwegian Children Act which have strengthened children's right to have a say in litigation concerning custody and contact in the wake of family break-downs. The authors find that children are heard more often than before and that their voices are increasingly emphasized in such decisions. This represents a shift in how the child is viewed in case law, from interpreting the child as vulnerable and in need of protection to seeing the child more as a competent actor. These developments give rise to the question of how to balance the child's right to protection and the right to participate in the consideration of the best interests of the child.

KEYWORDS Children Act | parental dispute | child participation | legislative changes | legal practices | children's rights

10.1 INTRODUCTION

Children's participation in residence and contact cases brought before Norwegian courts is the main theme of this chapter. Parental disputes have an immediate impact on a child's daily life and on its relationship to its parents, siblings and wider surroundings. Given the mounting focus on children's right to have a say in decisions affecting themselves, there is every reason to ask whether this right is observed in parental disputes, and if so to what degree. How is the child's right to be consulted regulated in the Norwegian Children Act (*Lov om barn og foreldre*), and are children given an opportunity to express their opinions in relation to residence and on contact arrangements in practice?

The number of divorces and family breakdowns has remained stable in Norway over the past fifteen years. The proportion of children with parents in two households is about a quarter.¹ When relations break down, parents with children under the age of sixteen are obliged to attend mediation meetings pursuant to Section 51 of the Children Act with a view to reaching an agreement on residence and contact for their children. Most parents manage to settle questions of residence and contact arrangements for their children themselves, with or without mediation. However, between 15 and 20 per cent of parents have recourse to the courts to resolve their disputes. In 2015, 2,657 cases pursuant to the Children Act were filed with the district courts (Tingrettene). These cases accounted for 16 per cent of all cases currently being dealt with by the country's district courts. Seven out of ten cases are solved by means of an in-court settlement. The other cases are dealt with by the courts in the ordinary manner (Viblemo, Tobro, Knutsen and Olsen 2016).

According to Article 12, paragraph 1 of the Convention on the Rights of the Child (hereafter the Convention or CRC),² children have the right to express their views on matters affecting them. This applies in particular, according to Article 12 (2), to any judicial and administrative proceedings affecting the child. The Committee on the Rights of the Child (hereafter the Committee) emphasizes in its general comment to Article 12 that divorce and separation are among the most important issues in which the children are required to be consulted.³

Countries that have ratified the CRC are obliged to harmonize their national laws in line with the provisions of the Convention. How the CRC is implemented varies from country to country. Some choose to transpose the whole Convention into national legislation (incorporation), while others draft their own laws and/or add provisions that are meant to accommodate the provisions of the Convention (transformation). Having incorporated the CRC via the Human Rights Act⁴ of 2003, the Convention counts as Norwegian law, and should any conflict arise between the Convention and other Norwegian laws, the Convention's provisions have priority (cf. Section 3 of the Act). This is an important part of the background to the legislative developments in Norway.

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1. Statistisk Sentralbyrå (2015a) and Statistisk Sentralbyrå (2015b).
 2. G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.
 3. Committee on the Rights of the Child, *General Comment No. 12, The right of the child to be heard*, UN. Doc CRC/C/GC/12 (2009) ('General Comment No. 12).
 4. Act of 21 May 1999 no. 30 to strengthen the position of human rights in Norwegian law (Human Rights Act).

10.2 IMPLEMENTATION OF ARTICLE 12 OF THE CRC IN THE NORWEGIAN CHILDREN ACT

10.2.1 THE CRC (ARTICLES 3 AND 12) AND THE CHILDREN ACT (SECTION 31)

A primary consideration in all matters concerning children is what serves the best interests of the child. Children's right to be heard must be seen in light of this principle (Sandberg 2016a). Article 3, para 1, of the CRC reads as follows:

In all actions concerning children, whether undertaken by public or private institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In parental disputes, a court shall undertake a comprehensive and concrete assessment of the best interests of the child on the basis of relevant facts in each case. The child's wishes are but one of several factors to include in an assessment of the child's best interests, and Article 12 of the CRC gives children the right to participate:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This provision was previously considered to be one of the more controversial rights in the Convention insofar as the right to participate represents an actor's perspective on children in recognizing children's capacity to evaluate their own needs and wishes, at least to a degree. At the same time, the relative significance of the child's views will be determined by adults in light of the child's maturity and age.

Articles 3 and 12 of the CRC have equal status, and it is frequently contended that knowledge of the child's views is important in order to make an assessment commensurate of the child's best interests.⁵ Such an assessment of the relationship

between the child's best interests and its views is clearly expressed in General Comment No. 12 by the Committee:

There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.⁶

Section 31 of the Norwegian Children Act determines children's right to be heard in matters of residence, contact and parental responsibility:

As and when the child becomes able to form its own point of view on matters that concern it, the parents shall consider the child's opinion before making a decision on the child's personal situation. Importance shall be attached to the opinion of the child according to his or her age and maturity. The same applies to other persons with custody of the child or who are involved with the child.

A child who has reached the age of seven and younger children who are able to form their own points of view must be provided with information and opportunities to express their opinions before decisions are taken concerning personal matters affecting the child, including parental responsibility, custody and access. The opinions of the child shall be given weight according to his or her age and maturity. When the child has reached the age of 12, the child's opinion shall carry significant weight.⁷

This official translation of Section 31 by the Government is closer to the wording of Article 12 of the CRC compared to the wording of the original Norwegian version of the Children Act, where Section 31 has the wording 'to state their opinion' (*'å si sin mening'*). It follows from the Convention⁸ and the Children Act that the right to be consulted should not be interpreted as an obligation on the child to express a view. The right to be heard must be a real right in the traditional sense

5. See, for instance, Zermatten (2010) and Sandberg (2016a).

6. General Comment No. 12, para. 74.

7. Official translation, see <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/>

8. See General Comment No. 12.

of the term, where the right holder has a choice to make use of the right or decline (Hart 1982). Children must be given an opportunity to express their opinion, but they should be under no compulsion to do so. Children shall also be given age-appropriate information on their rights.

10.2.2 AGE LIMITS

The current wording of the Children Act follows from the considerable strengthening of the child's right to be involved over the years. Until 2004, children enjoyed an unconditional right to express their opinions only from the age of twelve. In 2004, the age limit was lowered to seven, and as the preparatory works to the amendment indicate, it was recommended that children under seven should also be heard if they have views they want to make known in the case.⁹ The reason for introducing the seven-year rule was that it would give all children the right to be heard from this age; it was not meant, however, to be a lower age limit regarding the hearing of children. Yet, in practice, it has tended to be interpreted and applied as a lower age limit (Skjørten 2010).

The Committee in its general comment on Article 12 advised against the introduction of age limits for the hearing of children:

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States Parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.¹⁰

The amended Children Act, which came into force January 2014, states that children under the age of seven *shall* be given an opportunity to be heard if they are capable of forming a view on the matter.¹¹ The reason for introducing the amendment was that it would bring the wording of Section 31 of the Children Act more in line with the Committee's concluding observations to Norway's reports and that research, which had revealed a need to specify in the law that younger children who had views of their own should also be given an opportunity to make those views known.¹²

9. Amendment of 20 June 2003 no. 40, entering into force 1 April 2004. See Ot.prp. no. 29 (2002-2003), point 10.5.

10. General Comment No. 12.

11. Amendment of 21 June 2013 no. 62, entering into force 1 January 2014.

12. Prop. 85 L (2012-2013) pp. 37–38.

10.2.3 TO MAKE THEIR VIEWS KNOWN

It is worth noting that Article 12 of the CRC uses the term 'the right to express' with reference to the child's views. The words encompass more than a mere phrase, however. In its general comment to Article 12, the Committee states that the right to be heard must be given a wider interpretation than simply the right to make one's views known verbally:

Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.¹³

As mentioned, the Norwegian wording of Section 31 of the Children Act uses a narrower specification for the right to be heard where the right is associated with stating one's opinion, that is, expressing it verbally.¹⁴ Insofar as the Convention applies today as Norwegian law, one might ask whether it would not have been better to formulate the right of children to be heard in the Norwegian Act using the formulation in the Convention's provision. We return to this question at the end of the chapter.

10.2.4 THE CHILD'S OPINION AND THE BEST INTERESTS OF THE CHILD

The right to be heard is often referred to as a procedural right, meaning that children have the right to be involved in the case, but not a right to a particular outcome. For the court, it means that children shall be offered an opportunity to express their views, and if they choose to do so, their views must be considered as part of the wider assessment of the case.¹⁵ All decisions relating to residence and contact shall have regard for the child's best interests, and it is for the judges to decide which of the arrangements will be best for the child in the individual case. This follows from Section 48, first paragraph, of the Children Act:

13. General Comment No. 12, para. 21, first bullet point.

14. The wording of the Children Act must be seen in conjunction with the original wording of Section 31 with the introduction of the new Children Act in 1981. Despite substantial amendments to this provision to accommodate Convention Article 12, the wording still indicates that it is a verbal statement children should be asked to provide.

15. Children's right to participate is explained in more detail in Section 5 below.

Decisions on parental responsibility, international relocation, custody and access, and procedure in such matters, shall first and foremost have regard for the best interests of the child.¹⁶

The preparatory works to the Act mention different factors to be included in an assessment of the child's best interests.¹⁷ In addition to the child's opinion, mention is also made of risks arising from a change of residence; the best overall parental contact arrangement; stable conditions in the home; the child's attachment to parents and the parents' personal characteristics as caregivers. In assessing the child's wishes and other factors, the child's maturity and age shall be considered, and for children aged twelve and over, their wishes shall be given particular weight. In practice, the strength and stability of the child's views, along with the reasons informing its choices, will also be considered (Sandberg 2016a). But the gravity of the arguments against following the child's wishes may have an effect as well.

The basic premise of the provisions of the Children Act regulating parental contact is that it serves the best interests of the child to maintain good contact with both parents following the breakdown of family relations.¹⁸ However, legislative changes in recent years have modified this premise to account for situations in which the child is at risk of violence and abuse. The purpose of several amendments introduced in 2006 was to strengthen children's protection against violence and abuse. Section 43 of the Children Act, which regulates contact, was therefore extended to include:

If such access is not in the best interests of the child, the court must decide that there shall be no access.¹⁹

The above-mentioned Section 48, according to which decisions on residence and contact shall be based on the best interests of the child, was expanded at the same time with the addition of a new paragraph:

When making such decisions, regard shall be paid to ensuring that the child is not subjected to violence or in any other way treated in such a manner as

16. Official translation, see <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/>.

This section is placed under the procedural rules of Chapter 7 of the Act, but also provides substantive guidelines on judicial assessments.

17. See, for instance, Ot.prp. no. 104 (2008–2009) p. 18.

18. Ot.prp. no. 103 (2004–2005) pp. 28–29.

19. Section 43, para 1, third sentence.

to impair or endanger his or her physical or mental health.²⁰

In the amendments of the Children Act of recent years, changes have been informed by the child's right to participate and to be protected from violence and abuse. This was the main theme of the 2013 amendment,²¹ according to which children should not be forced to have contact against their wishes. In order to strengthen the child's perspective in parental disputes brought before the courts, the preparatory works also urged parties to pay greater attention to the child's current situation:

The Ministry assumes that the courts will, to a greater extent, decide contact-related matters in light of current circumstances and that the child's subjective experiences will be given greater weight. It is also assumed that contact against the wishes of the child will not be prescribed, not even supervised contact, until the circumstances of the child and the family are adequately known and assessed.²²

It is further made clear that if children are not heard in a case in which they are entitled to be consulted by law, the lapse is to be considered a procedural error which could possibly lead to the nullification of the judgment.²³

Alongside this amendment the system of supervised contact was also amended, with the introduction of two forms of supervision, supported and protected. In the case of protected supervision, a supervisor shall be present at all times during a visit; this arrangement is especially intended to guard against situations in which children may be at risk of violence, sexual abuse or other forms of neglect. In the case of supported supervision, the supervisor is present only during parts of the visit for the purpose of advising the parents and supporting and preparing the child for subsequent visits without supervision. These supervisory schemes are financed by the government. A court may also require the parties to find a private supervisor to assist them for a period of time during the visits. In our review of the jurisprudence below, we will see that children's right to express their opinion does have an effect of the choices made by the courts between these different forms of supervision in cases where the court is not convinced that unaccompanied contact will be in the best interests of the child.

20. Section 30 of the Children Act dealing with parental responsibility has a similar wording. The amendment of 2010 added a sentence to this section specifying that violence is illegal also in connection with the child's upbringing.

21. Amendment of 21 June 2013 no. 62, see Prop. 85 L (2012–2013).

22. Prop. 85 L (2012–2013) p. 6.

23. Prop. 85 L (2012–2013) p. 35.

A child's right to be heard and their right to be protected from violence and abuse were constitutionally strengthened in 2014 with the incorporation of a new provision, Article 104, to the Constitution:

Children have the right to respect for their human dignity. They have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development.

For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration.

Children have the right to protection of their personal integrity. The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.²⁴

The pertinent question now is whether these legislative changes have led to an increase in children's participation in court decisions on residence and contact in the wake of family breakdowns.

10.3 INVESTIGATION OF JURISPRUDENCE

To illustrate how the law is practised, we have chosen to examine recent judgments from the Norwegian Supreme Court and the Courts of Appeal on issues related to residence, custody and contact in cases regulated by the Children Act. All rulings by the Supreme Court and Courts of Appeal are recorded in the Norwegian Lovdata database. The judgments analysed here come from that source. Many court decisions are appealed to the Supreme Court, but there is no right in these cases for such a review. Most appeals are dismissed and only a very small minority reach the Supreme Court. The judgments handed down by the Courts of Appeal offer therefore a broader picture of the state of the law concerning the hearing of children.

Regarding the decisions of the Supreme Court, we have limited our examination to judgments dealing with the right of children to be heard in this type of case over the past decade. In this period the Supreme Court issued three judgments and one ruling in cases falling under the Children Act of relevance to the question of

24. Unofficial translation provided by the Storting (Parliament).

children's participation in parental disputes (Rt. 2007 p. 376; Rt. 2010 p. 216; Rt. 2011 p. 1572; and HR-2017-18-U).

Our analysis of the case law of the Courts of Appeal is based on 491 judgments dealing with issues of residence and contact. The judgments are divided into four periods between 1998 and 2015. The oldest decisions, comprising a total of 129 judgments mainly on residential questions, are from 1998 to 2000. The next three periods involve decisions on residence and on contact. The second period consists of judgments from 2006 to the first half of 2007, 163 decisions in all. The third period is 2012, with a total of 100 judgments on residence and contact. The fourth period is 2015: 99 judgments in all concerning matters of residence and contact. The case materials comprise every judgment delivered during the selected periods in which residence and/or contact were assessed pursuant to the Children Act. To make sure the selection included all judgments in the chosen periods, we performed searches for the relevant legal provisions, and undertook a manual examination of all judgments handed down in these periods. For our selection of judgments it is the time the judgment was handed down that is of central importance. This may differ from the year noted in the case reference, because this refers to the year when the case was filed, not when the judgment was passed. The data are part of an ongoing longitudinal study on parental disputes and children's rights at the Norwegian Centre for Violence and Traumatic Stress Studies.

Since the judgments span a period of eighteen years, it gives us a chance to identify trends in the jurisprudence regarding children's right to participate in parental disputes over residence and contact. Two relatively recent legislative changes were designed with a particular view to strengthening children's right to be heard: The 2004 amendment, which lowered the age for children's unconditional right to be heard from twelve to seven; and the 2013 amendment according to which children under the age of seven should be heard if they so desire and are able to form views. The selected periods with judgments from the Courts of Appeal are well suited to illuminating the case law before and after these amendments.

The judgments from the Courts of Appeal are coded onto a comprehensive coding table, and the data fed into the Statistical Product and Service Solution (SPSS) programme. The data are not suitable for advanced statistical analysis, but registration in SPSS allows us to keep track of the judgments, run frequency analyses and crosstabs on selected themes. It makes it possible to gain a general picture of, for example, the proportion of cases where children were heard and whether the outcome matched the child's views. In the further analyses, we apply qualitative methodology along with a *thematic analysis* of judgment texts (Braun and Clarke 2006). This analytical approach is particularly good at revealing general patterns

in larger numbers of judgments. First of all, we examined all judgments in the specified periods to identify cases where children were given an opportunity to express their opinion. These cases were then analysed more closely to ascertain the extent to which the child's voice was given weight and influenced the wider assessment of the child's best interests.

Since the Children Act distinguishes between children over and under seven years of age, we decided to apply the same distinction in our examination of cases in the following account. In our description of the implementation of Article 12 of the CRC in the Norwegian Children Act, we pointed out that the wording of Section 31 of the Act, which refers only to the right of children to express themselves verbally, is narrower than that of Article 12, which also includes other ways of expressing a view. In order to answer the question posed above – whether there is a need to amend the wording of Section 31 of the Children Act – we decided to include an analysis of the courts' use of observation in cases involving younger children. This analysis is based on new judgment data from 2015.

Parents and children mentioned in the judgments have been anonymized. Mother and father are referred to as A or B according to which of them submitted the case to the Court of Appeal. Children are referenced by C, D, etc. by age and number of siblings involved in the case. When citing judgments, we add in square brackets who the letters refer to, whenever this is necessary to understand the extract of the judgments.

In this chapter, we expand on earlier publications dealing with the right of children to be heard by including new cases from the Court of Appeal for the year 2015 and relevant cases from the Supreme Court over the last decade. The new cases from the Court of Appeal give us an opportunity to detect any changes in legal practice following the 2013 amendment, which strengthened the right to be heard of children under seven. Case materials from 2015 comprise a total of 129 children, three in five of whom were under seven.

Finally, we need to emphasize that this source material of judgments from the Courts of Appeal and the Supreme Court only provides information at these judicial levels. We know little about the case law of the courts of first instance, one major reason being the lack of databases with complete records of parental disputes handled by the district courts. Only a small number of district court judgments are recorded in Lovdata, and they are not representative of decisions at this judicial level either. In order to improve the possibility to do research in this area, including measuring the implementation of children's right to be heard, we would like to recommend that judgments from the courts of first instance should also be recorded in publicly available databases. We also need to emphasize that since this

chapter is limited to the hearing of children in parental disputes pursuant to the Children Act, our findings cannot be transferred to other areas of law, where we know that children's right to be heard is observed differently (see, for example, Strandbu, Thørnblad and Handegård 2016; Magnussen and Skivenes 2015).

10.4 THE PRACTICE OF THE NORWEGIAN SUPREME COURT – CHILDREN OLDER THAN SEVEN

We look first at how the Supreme Court addressed the views of the children in the three judgments from the past ten years in which the issue was considered. In principle, the practice of the Supreme Court is precedential for how these cases should be dealt with. However, as the best interests of the child are assessed according to the concrete situation, a judgment may not have any significant bearing beyond the particular case. However, it is interesting to look for patterns or indications of how these cases should be dealt with, in individual cases or altogether.

In Rt. 2007 p. 376, the District Court ruled first that the two children aged twelve and nine respectively should live with the father and not be relocated to their mother. The Court of Appeal decided that they should live with the mother. For the Supreme Court, the key question was to assess the relative importance of maintaining the status quo (staying with the father) as against the children's wishes to live with their mother. The Supreme Court had already ruled in several judgments that relocation was not in children's best interests, and in the few judgments where a change of residence was ordered anyway, the justification was that relocation would undoubtedly benefit the child (Bendiksen and Haugli 2015). In Rt. 2007 p. 376, the Supreme Court assumed the children were accustomed to living with the father and that relocation to the mother could only take place if the move benefited the children:

The benefit that may accrue to the children in this case is to live where they themselves have expressed a desire to live. In accordance with Section 31 of the Children Act, children who have reached the age of seven shall be allowed to make their views known before a decision is made regarding their personal circumstances, including with which of the parents they shall live. When the child is twelve years old, emphasis should be placed on the child's opinion. However, the child's opinion cannot in itself be the decisive factor. Children should not, regardless of age and maturity, be given responsibility for choosing between their parents. On the other hand, when a child has reached a certain age, and clearly expressed a firm opinion, it should be given considerable

weight. Otherwise, the system of hearing children, which often imposes a heavy burden on them, may seem disrespectful and offensive.²⁵

The expert appointed by the Supreme Court was instructed to investigate the father's claim that the mother had manipulated the children. The purpose of this investigation was to give the Supreme Court a better basis on which to determine the weight of the children's views. The expert concluded that the children had not been manipulated, they had not expressed any kind of ambivalence and their wishes had remained constant over time. They believed their mother understood them better and was emotionally closer to them than their father, and this conviction informed their views. Relocating to the mother would require the children to change schools. This did not affect their desire to move to their mother's. Based on the expert's report, in which the claim of manipulation was rejected, the Court decided to give significant weight to the wishes of the children, and the children were as a result permanently relocated to the home of their mother. The Supreme Court concluded by saying that the emphasis on the wishes of the children would be to the children's benefit:

Based on this, it is clear to me that the wishes of the children, as expressed here, must be given considerable weight. If one were to go against their wishes, it would have to be because the change of setting required by moving would be harmful, or at least hazardous. I have come to the conclusion that this will not be the case.²⁶

This judgment determines that the views of children of a certain age and with clearly expressed and consistent opinions shall be accorded substantial weight. To go against their wishes, the judge continues, could only be contemplated if their preferred arrangement was likely to harm them or at least present a risk to them. The arguments against listening to the preferences of the child can therefore be so strong that the court believes a different arrangement will be better for the child, but those arguments would have to be very weighty indeed in a case like this.

In Rt. 2010 p. 216, the Court addressed questions of permanent residence, contact and parental responsibility in respect of a seven-year-old girl. Her mother and father had never lived together. The girl had always lived with her mother and had expressed a clear desire to continue to do so. This arrangement should indeed continue, the Supreme Court concluded, highlighting the assessment of the court

25. Rt. 2007 p. 376 para 23.

26. Rt. 2007 s. 376 para 28.

appointed expert according to which relocating to the home of the father would place the girl under a great strain:

It is difficult to predict how C would be able to adjust and settle down to a new life with her father – in the longer run. But in the shorter term, it is clear that, as far as C is concerned, if she does have to move from her mother to her father, contact with whom she has so clearly expressed reluctance to, it will elicit strong reactions in the form of anxiety, adjustment difficulties and grief reaction.²⁷

To obtain information on which to assess contact arrangements, the expert was asked to observe interaction between father and daughter during a visit:

Although the January visit was marked by C's customary attitude to her father, and her expressed opposition to having any contact with him, the impression was nevertheless that C exhibited neither fear nor rejection, as one might have expected. She was insecure and tense, but at the same time a sense of ambivalence shone through in that she behaved with her father in a relatively interested and exploratory way.²⁸

The expert recommended contact under supervision to give the girl an opportunity to form her own impression of her father. The Supreme Court ordered daytime contact six hours a month, and the mother to appoint a person to be present during the visits. The Court in its conclusion refers to the expert's assessment while relying on the presumption that contact is in the best interests of the child:

Given the presumption that contact with both parents would be in the best interests of the child, and given the expert's opinion that such contact would serve C's best interests in the longer term, I have found that contact between C and A [father] should be authorised. Such contact must take place in the presence of a person of trust who is able to ensure C's well-being, in accordance with the recommendation of the expert.²⁹

In this case, the Supreme Court appears to have placed greater emphasis on information obtained by the expert while observing contact between father and daughter, than on the girl's stated opinions regarding contact.

27. Rt. 2010 s. 216 para 30.

28. Rt. 2010 s. 216 para 36.

29. Rt. 2010 s. 216 para 38.

The final Supreme Court judgment (Rt. 2011 p. 1572) relates to contact and parental responsibility for two boys aged four and seven respectively. While both parents agree that the father should have contact, they disagree on the extent. Both children have expressed a wish to have contact, and the elder of the two would like to see the contact with his father increase over time. The Supreme Court emphasized the elder boy's wishes:

I stress in addition what C has said about enjoying being together with his father and that he wishes to expand this contact and would like to spend the night at his father's. He will soon be eight years old, and his opinion shall be accorded weight, cf. Section 31, second paragraph, of the Children Act.³⁰

The Court in this judgment decided on different contact arrangements for the two children, with supervision during parts of the visits. The decision was explained with reference to, among other things, the observations of the expert of the interaction of the youngest boy with his father during visits. We will look at this in greater detail when we address the hearing of children under the age of seven.

In these cases before the Supreme Court, all of the children over seven were heard, and in the two cases concerning the question of residence, emphasis was indeed placed on the children's opinions. In one of the two cases dealing with the issue of contact, the Court emphasized the seven-year-old boy's desire for extended contact with his father. In the second judgment, contact was determined against the girl's wishes, on the grounds that it would be in her best interests to have contact with both parents, and based on the expert's recommendations.

We should also mention a ruling from the Supreme Court of 2017 (HR-2017-18-U). The Court of Appeal had refused to hear an appeal dealing with the permanent residence of two children aged nine and seven, without them having had the opportunity to express their opinions to the Court. The expert and a designated spokesperson for the children had talked with the children eight and four months respectively before the Court made its decision, in connection with the District Court's handling of the case. The Supreme Court annulled the decision for the following reasons:

Children's right to be heard is a basic procedural requirement in cases concerning permanent residence. The Court of Appeal should therefore have taken a clear stand as to whether the importance of this right – and thereby the impor-

30. Rt. 2011 p. 1572 para 62.

tance of a proper clarification of the case – in this instance prevented a summary decision of the appeal.³¹

Here again, the importance of children's right to be heard is emphasized insofar as it is considered a procedural error on the part of the court in failing to assess the importance of consulting the children in the context of illuminating the details of the case. This is true not least when the children are over seven, but as the law is currently worded, the same should apply when a court fails to explain clearly why a child seven years or under has not been heard. The ruling of the Supreme Court confirms the statements in the preparatory works and previous decisions of the Supreme Court in which failure to allow children an opportunity to express their wishes in cases in which they are entitled to be heard is tantamount to a procedural error.³²

10.5 COURTS OF APPEAL – CHILDREN OVER SEVEN

ARE CHILDREN HEARD?

An earlier study of judgments handed down by the Courts of Appeal a few years before and after the 2004 amendment found that children's right to be heard from the age of seven could be observed within this court after the amendment, as regards residence (Skjørten 2013).³³ Today, most children over this age are offered an opportunity to express their views. Our new analysis of judgments shows that this increased inclination to hear children has continued. In 2015, only three out of 53 children over seven were not given an opportunity to express their views.³⁴ In most cases, the children expressed their views to an expert. In some cases, however, the judges themselves talked with the children. As children over seven are heard in almost all cases in which they are entitled to be heard, one of the reasons may be that if a child has not been given the opportunity to express its

31. HR-2017-18-U para 18.

32. See Prop. 85 L(2012–2013) p. 35 and, i.a., Rt. 1999 p. 1183 and Rt. 2006 p. 929.

33. In this study, the judicial material from 1998–2000 and 2006–2007 was used.

34. While the judgments state the children's year of birth, the judgment summaries and the decision itself tend to use the children's age. Only in one of the judgments are we uncertain of whether the child is six or seven. In this case we chose to code the child's age as six and a half. This child was not consulted. If we are wrong in our assumption and the child is in fact seven years old, the figures above will need to be corrected to give a total of 54 children over seven years of age, four of whom were not given the opportunity to express their opinion. However, this potential source of error has little effect on our general conclusions.

opinions, the losing party can demand a judicial review of the case on grounds of procedural error.

International research on consultation of children in private negotiations to resolve residential and contact arrangements shows that children want to be informed and be given a chance to express their views (Skjørten, Barlinghaug and Lidén 2007; Harold and Murch 2005; Smart 2002; Cashmore 2003). However, being offered an opportunity to express one's views in a private context is quite different than doing likewise in a legal context. This research is therefore not readily transferable to a legal context. So, do children make use of their right to be consulted in parental disputes brought before the courts? In the judgments from 2015, only two of the children who were offered an opportunity to express their views did not want to avail themselves of their right to be consulted. Children's views vary from clear, well-reasoned wishes on residence and contact, to vaguer preferences. According to the Norwegian guidelines on consulting children in cases pursuant to the Children Act, the child need not have a clear opinion on the outcome of the case. Information that is not directly related to residential and contact questions can also be valuable to an assessment of the best interests of a child:

Nor should it be the case that the child must have an opinion on the outcome of the case to express its views. The child may also have important information to share concerning, for example, how everyday life is experienced, the nature of its relationship to its parents for better and worse, and whatever happens to be important in everyday life.³⁵

This more open approach to consultations with children has doubtlessly contributed to the fact that most children who are offered the opportunity to express their opinions make use of it.

WEIGHTING OF THE WISHES OF THE CHILD

As mentioned above, the child's opinion forms part of the mandatory comprehensive assessment of the child's best interests. In this assessment, while the child's opinion may be given a certain weight, other factors counteracting the child's views may persuade the judge to conclude that, all in all, a different arrangement would be better for the child. In the following we examine court decisions where children's wishes had an impact in the sense that the court considered the child's

35. Veileder Q-15/2004, Norwegian Ministry of Children and Family Affairs. p. 41.

wishes as one of several factors speaking *in favour* of a decision in line with the child's opinion.

How large an impact does a child's wishes have on the decision? In her investigation of judgments from the Courts of Appeal a few years before and after the 2004 amendment, Skjørten (2013) found that children's influence on the outcome of the case had increased. Prior to the amendment, children's wishes were one of several factors given weight in two out of ten court decisions involving children over the age of seven.³⁶ A couple of years after the amendment, the ratio was four in ten decisions involving children in the same age category.³⁷ In the space of a short period of time, children had thereby acquired a much stronger voice in parental disputes.

If we compare age and weight of the children's wishes in cases before and after this amendment, the views of younger children are increasingly likely to be included as a factor in the decision. In the pre-amendment cases involving children under nine years the child's views were not included in the court's reasoning. A few years after the amendment, the views of children aged seven and eight were one of several factors affecting the outcome in almost two in five cases (Skjørten 2013). While the decision went against the views of a quarter of the children, judgments in the remaining cases complied with their wishes, although the decisions were justified by other factors. Our new analysis of judgments from 2015 shows that this increased weight of children's views has remained constant over time.

In cases where the court does include the wishes of children as an important factor in a decision in line with the children's preferences, the children often present a clear, well-reasoned opinion they have retained over time. It is often discussed in judgments of this type how far a decision against the children's wishes might be detrimental to the well-being of the children. In the following case (LB-2015-109494), the court summarized the expert's assessment of the two children aged twelve and ten:

In the opinion of the expert the children's statements are relevant in this case and may and should be accorded significance. The two [children] appear today to have found their voices to a greater extent than before, or have at least realized that if they do not present their views with sufficient clarity, they will not be heard. The children appear normally mature and autonomous for their age, and in their statements appear thoughtful and reasonable reflected. They give a clear impression that what they are saying is their own opinion irrespective

36. Judgments from 1998, 1999 and 2000.

37. Judgments from 2006 and 2007.

of any thoughts we might have of the influence exerted in their home environment. If the children are not consulted or their statements taken into account, this would clearly result in a not inconsiderable conflict for the children, and would unavoidably pose significant challenges for them and their carers, at least for a period.

Against this background, the Court of Appeal is of the opinion that the wishes of D and E should be given not insignificant weight in determining where they should live on a permanent basis, and that were the Court to order them to move to the mother of X against their expressed wishes, it would be a cause of friction, at least in the short term.

This increased emphasis on the child's wishes is particularly evident in questions about denial of contact. As explained earlier, the legal premise underlying assessments concerning contact is that maintaining good contact with both parents after a family breakdown is in the best interests of the child. When the law was amended in 2006, however, a specification was incorporated in Section 43 which said that if such contact is not in the best interests of the child, the court must decide that no such contact shall occur. The same amendment introduces a further specification of Section 48 on the best interests of the child, to ensure that the child is not subjected to violence and abuse.

Skjørten's (2016) study of decisions by the Courts of Appeal on residence and contact questions for the year 2012 found that contact was denied one of the parents in nine out of the hundred judgments in all. The grounds for refusing contact were the *risk of violence*, *parental conflicts* and the *child's wishes*. A clear distinction was drawn in the argumentation between cases with a risk of violence and all the others. In the two cases where the Court dealt with the risk of violence, the parent denied contact was unfit, in the opinion of the Court, to provide the necessary care. The child's wishes not to have contact were decisive in five other judgments. The children in these cases were aged from eleven to fourteen. In four of these judgments, it was the opinion of the Court that the parent denied contact was indeed able to care for the child. In these four cases, denial of contact was not grounded in the parent's inability to care for the child, but in the risk of inflicting harm on the child by forcing it to have contact with the parent and thereby violating the child's integrity. It is worth noting that courts may follow the wishes of older children not to have contact with a parent, even in cases where the court does not believe the parent is unfit to care for the child. In the last two cases, where contact was denied because the parents' mutual hostility was believed to be detrimen-

tal to the children, two dissenting opinions stood out in the judges' consideration of the fitness of the parents to care for the children. In the first case, the minority believed the father should gradually be granted contact up to 50 per cent, and in the second, the minority believed the child should live with its father on a permanent basis.

In the Bill (Prop. 85 L (2012–2013)) the Ministry of Children and Equality said, 'proposals and comments in the Bill should together help lower the threshold at which the courts shall/should determine that contact should not take place'.³⁸ According to earlier jurisprudence, there had to be weighty reasons to deny contact. The best interests of the child shall be the decisive criterion, the Bill pointed out, and weighty reasons should not be understood as an additional criterion.³⁹ The Supreme Court confirmed in Rt. 2013 p. 1329 that weighty reasons are not an additional requirement for denying contact over and above the assumption that contact would not be in the best interests of the child.⁴⁰

The extent to which a child's wishes are emphasized in cases where the child does not want contact does vary, nevertheless, with age. We have previously seen how the Supreme Court in Rt. 2010 p. 216 prescribed contact against the wishes of the seven-year-old girl. There are also examples of the Courts of Appeal deciding in favour of contact in cases where younger children said they did not want contact. An example is LB-2015-33008, where the Court found that the father should have contact with his boys aged eight and five, gradually increasing to almost one third of the time (which is deemed to be 'ordinary contact' under the Children Act). Both boys said they wanted to live with their mother and were averse to visiting their father. The Court gave weight to their residential wishes, but not to their statements about avoiding contact with their father:

Both C and D have repeatedly said they want to live with their mother. They have also repeatedly said they do not want to visit their father. According to Section 31, second paragraph, final sentence of the Children Act, the children's point of view shall be given weight in accordance with age and maturity. As will be shown below, the children are very loyal to their mother, and they say what they think mother wants them to say. This means that the children's views are given less importance than they would otherwise have been. It is nevertheless difficult to ignore the fact that they themselves mean what they say about where they want to live. A certain weight must therefore be given to the children's views.

38. Prop. 85 L (2012-2013) p. 6.

39. Prop. 85 L (2012-2013) section 7.2.4.1.

40. Rt. 2013 p. 1329 para 39.

In this case, the parents agreed that the father should have contact with the children, although the mother wanted the visits limited to daylight hours. In support of the conclusion to permit ordinary contact, the Court of Appeal referred to the statement in Rt. 2010 p. 216 that contact with both parents is good for the children.

However, increasing emphasis is being placed on what the child itself believes would be the best arrangement. This has implications for how decisions that go *against* the wishes of the child are justified. As an example, the main question discussed in the following judgment concerned where two boys of fifteen and twelve would reside on a permanent basis. The Court of Appeal judge had talked with the boys, and they were clear about wanting to live with their mother. The issue at the forefront of this case then was achieving the right balance between the best interests of the children and their stated wishes. In the opinion of the Court of Appeal it would be best for the boys to live with their father. Neglect was the prominent feature of the home of their mother. The father was considered sufficiently fit to care for the children. In addition to explaining the reason for its decision, the Court apologized to the boys for ruling against their wishes on the question of residence:

The Court of Appeal has a good impression of [...] the two boys whom the legal question concerns. There is therefore reason to apologize to C and D [the boys] in that the Court of Appeal found it impossible to comply with their wishes, with regard to what the Court of Appeal considers both in the short and, not least, somewhat longer term, as the best outcome for both boys.⁴¹

An apology like this can be interpreted as implying that the judges considered the decision – which in their view represented the best outcome for the boys – to entail at the same time a violation of their integrity since they themselves were of a different opinion.

10.6 CHILDREN UNDER SEVEN YEARS OF AGE: CONSULTATION OR OBSERVATION?

The Committee on the Rights of the Child has been critical of setting age limits to children's right to be consulted. In its general comment on Article 12 of the CRC, the Committee explicitly states that children have the right to be consulted from the age at which they are capable of forming views on the matter in question. Children shall also be given information on the situation adapted to their age and matu-

41. LG-2006-62064.

riety. Children who cannot express themselves verbally, the Committee also states, may express their preferences by non-verbal means of communication.⁴²

The Norwegian seven-year limit introduced in 2004 was not intended to establish a minimum age limit on children's right to be heard. As stated in the preparatory works, the aim of the law was rather to give children a right to be heard from the age of seven. But should the need arise, judges should also hear younger children. However, as Skjørten (2010) found in her study of judgments from 2006 and 2007, only 10 per cent of the children under seven had been heard.

Following the latest amendment of the Children Act in 2013, which entered into force 1 January 2014, Section 31 explicitly states that children under the age of seven shall also be given an opportunity to express themselves if they are able to form views on the circumstances of the case. Our perusal of judgments from 2015 showed a clear increase in the consultation of younger children. Here, 20 per cent of children under seven were heard. It appears that the 2013 amendment has indeed encouraged the courts to talk with the younger children. Nevertheless, all these children were five or six years old. Thus, while noting the positive trend, the following recommendation from the Committee to Norway in 2018 may still be relevant to the courts: 'Increase its efforts to strengthen compliance in practice with the child's right to be heard, particularly with regard to [...] children of a younger age [...].'⁴³

As noted above, the phrase used in Article 12 of the Convention is children's 'right to express' their views, while Section 31 of the Children Act has the wording 'to state their opinion' ('å si sin mening'). Today, however, were conflict to arise between the Convention and Norwegian law, the Convention shall have priority. Observation of contact between parents and children could perhaps be seen as an indirect way of sounding out the opinions of the children. Observation also means collecting information of a non-verbal nature. Whether it is correct to equate this latter, indirect procedure with a situation in which the child can express its own views directly, is questionable, however.

In Rt. 2011 p. 1572, the youngest child was four and the eldest seven. In this case, different degrees of contact were ordered for the two brothers. In the reasons given for ordering less contact for the youngest boy, the Court emphasized in particular the expert's observation of the interaction between father and child:

42. See Section 2.3 above.

43. Committee on the Rights of the Child, *Concluding observations on the combined 5th and 6th periodic reports of Norway*, UN doc. CRC/C/NOR/CO/5-6, 1 June 2018 (advance unedited version), para. 14 (a). See also Sandberg (2016a) p. 122.

The father finds it very difficult indeed to interact with D [the youngest boy]. The expert's statement describes a situation in which the father had bought toys that were too advanced for D [to play with]. The father lay the responsibility for D's negative behaviour on the boy, and did not reflect over whether he had done enough to facilitate the situation. The report remarks: 'Interaction during this sequence was destructive for D. He was desperate, tried to get closer to [the expert] and finally focused on the television set.'⁴⁴

In the judgments handed down by the Courts of Appeal in 2015, we found that observation of visits was relatively widespread in cases involving small children. In a quarter of the cases, observations of contact between children and parents were a source of information to the courts. In addition, children were consulted in one of five cases. In other words, just under half of the children were either heard verbally or observed in interaction with parents. The proportion of children under the age of seven who were heard or observed, was somewhat higher in cases where contact rather than permanent residence was the main issue. Contact cases are more likely to involve problems and uncertainties regarding the fitness of one of the parents to have contact, such as aggressive behaviour, substance misuse or psychological problems. In many of these cases it makes sense to consider supervision.

The 2013 amendment came with a new criterion regarding the 'child's needs' in Section 43a of the Children Act, for requiring a publicly appointed supervisor to be present during visits, in addition to the already existing criteria of the child's best interests and special circumstances. The Bill states that 'where the child has previously had contact, the child's feelings with regard to the contact must be given considerable weight'.⁴⁵ The 'child's needs' criterion opens up for other ways of obtaining information about the child's responses to parental contact than simply by talking to the child. However, this criterion is linked to assessments of whether there should be a publicly appointed supervisor in a contact case. A closer analysis of cases involving observation of child-parent interaction has shown that supervision pursuant to Section 43a was considered only in just under half of those cases. This means that observation of interaction between children and parents takes place at about the same frequency in cases where a publicly appointed supervisor is considered, as in cases where this is not an issue.

Observations of interaction between children and parents can be a source of important information about the child's relations with its parents. Observations of

44. Rt. 2011 p. 1572 para 48.

45. Prop. 85 L (2012–2013), p. 49.

contact are usually undertaken by an expert appointed by the court. The following case offers an insight into how the observation of children and parents proceeds. In this case, LF-2013-211489, there were four children aged sixteen, fifteen, thirteen and four. The three eldest had been consulted and expressed no desire to have contact with their father, partly because he had physically abused both them and their mother. Significant weight was attached to their wishes, and their father was denied contact with them. In the view of the Court, the four-year-old boy was too young to be heard, so the Court instead let the expert observe contact between father and son:

F's age has made it impossible to ask his point of view concerning contact with his father. The expert for the Court of Appeal arranged a meeting between F [the boy] and A [the father] in the son's child care facility in May 2015 to observe their mutual interaction. The following is from the expert's report of this observation:

The general impression was that the meeting went very well indeed for F. Although he was hardly able to remember his father from the two meetings he had had with him after returning to Norway, he clearly understood that it was 'daddy' he was meeting and spending time with. The two soon hit it off and F showed great interest in getting to know his father better. The father was good-natured in his behaviour with the boy and they soon found a friendly, intimate tone. F was clearly at ease with his father and felt safe in his company. At the end of the visit, after one and a half hours of contact, I asked F if he thought it would be nice to see his father again sometime soon, and he said it would be. He said he would like his father to come back – and more often. He would also like to visit his father at home, he replied.

The expert recommended contact. The quoted passage also shows the expert based the recommendation on speaking with the boy, not on observation alone. The Court of Appeal, like the District Court, supported contact with supervision provided by the family counselling services six times a year for two and a half hours.

Based on information obtained by observation, the Court found in LH-2015-66418 that it would be best for the boy of five to have contact with his father, sixteen hours a year at most under constant surveillance. This is the strictest form of supervision and is used in cases where there is a risk of violence or abuse, and where the court believes contact of such a very limited extent would still be bene-

ficial for the child. In this case, according to the mother, the boy risked being sexually abused by the father. Based on extensive evidence, including the testimony of the father's daughter from a previous relationship of suffering sexual abuse at the father's hands, there was indeed, the Court believed, a risk of abuse:

In the opinion of the Court of Appeal, D's [father's daughter from an earlier relationship] testimony – seen in conjunction with other information in the case – implies that the risk of sexual abuse is sufficiently grave that contact between C and father may only take place within the framework of protected supervision, cf. the Children Act Section 43a, cf. regulation on access under supervision pursuant to the Children Act.

The Court of Appeal had tasked the expert with assessing the possible risk of sexual abuse and to observe contact between the father and son, while also considering whether it might not be warranted to have a talk with the boy. The expert carried out a series of observations of contact between father and son:

There are notes from a number of visits conducted before and after the District Court's judgment. [...] In essence, they bear witness to interaction between father and son of a satisfactory nature. [...] The expert [...] is of the opinion that C appears to have benefited from the visits and there have been no negative reactions either before or after his visits to his father.

The observations indicate that the boy enjoyed visiting his father. In spite of the risk of abuse, the Court prescribes contact, albeit under constant supervision to protect the boy from abuse. The protected contact was limited to 16 hours a year divided by 8 visits. It is not mentioned in the judgment whether the expert, in addition to observing the visit, spoke with the boy about his wishes. In this case, the Court also considered concluding with no contact at all, but positive reports from observations of contact between father and son led to the conclusion of protected contact.

In the next case (LB-2014-205741) there was also a risk of child abuse during visits. The Court was persuaded that the father had probably abused the mother physically on a couple of occasions but was not persuaded that the three-year-old daughter was at risk of being harmed by the father during visits. In referring to, among other things, reports of several observations of contact submitted by the publicly appointed expert for the District Court, the Court of Appeal prescribed limited contact between father and daughter without supervision:

The Court of Appeal further notes that the District Court's expert [...] was, as mentioned, present during five meetings between B [the father] and daughter. Psychologist [...] has stated that contact with her biological father had given the child a great deal of enjoyment, while the father in turn demonstrated a considerable capacity to care for the child – by approaching it in a careful and sensitive way.

In cases where children were seen to react positively during visits, observations have reinforced the decision of the court to prescribe contact, also in cases when there is initial doubt as to whether contact is in the child's best interest. It is also worth noting that in Rt. 2010 p. 216, in which a seven-year-old girl was both heard and observed in interaction with her father, observation-based information was given more weight than the views of the child itself about contact. This may indicate that non-verbal expressions are perceived to be more authentic than verbal statements. Perhaps judges believe that verbal statements are more easily influenced than what is expressed non-verbally.

If we look at the proportion of children under the age of seven who have either been heard or observed, almost half fall into these categories. In the group of children aged five and six, nearly two-thirds were either heard or observed in interaction with their parents. In the group of three- to four-year olds, a third was observed. Of a total of five two-year-olds, one of the children was observed during parental contact. The term 'express' embraces both verbal and non-verbal forms of communication. If we include observations in the interpretation of the child's right to be consulted, the courts are generally more inclined to let smaller children express their opinions too. However, in the judgments we have examined, the courts still distinguish between consulting and observing children. There may be good reasons for this. One may ask whether the observation of young children as practised in Norwegian courts meets the Convention's criterion whereby the right to express oneself should not be interpreted as a duty and that children should be informed about how the information they provide is to be used. In the case of observation, it is highly doubtful whether the children were given an opportunity to say no, and refuse to participate. Nor is it stated whether they were informed about what the information obtained by observation would be used for. Observation can otherwise be seen as a way of sounding out other aspects of the best interests of the child than eliciting the child's own view. Tisdall and Morrison (2012: 164) refer to a similar distinction between observation and consultation in the Scottish courts:

When the stated *views* of children are not considered sufficient for giving much weight, whatever a child's age, then recourse is made to *observed behaviour* of children. Of frequent note is whether the child seems loved, happy, and/or settled. Reactions at school are given high prominence. Such observations are not discussed as non-verbal expressions of children's views, but rather as indications of their welfare.

The Convention is complex. On the one hand, children's right to protection and care is emphasized, i.e., rights based on a perception of children as vulnerable and not fully capable of making decisions concerning their own lives. On the other hand, however, there is also an emphasis on children's right to participate, turning the spotlight on the competent child. In the charged field between protection and self-determination, observation of child–parent interaction lies closer to protection, while the hearing of children is closer to self-determination.

10.7 CONCLUDING REMARKS

A main finding of the analysis of children's participation in judicialised parental disputes is that children are increasingly being consulted and their voices increasingly being emphasized in decisions by the courts. There is also a significant movement towards accentuating the opinions of younger children in these decisions.

Our analysis is limited to parental disputes falling under the Children Act. There are wide variations in Norway in the way children's right to participate is practised in different areas of the law. For example, children are less likely to be consulted in connection with mediation proceedings to settle issues of residence and contact following a family breakdown and in child welfare cases. In recent years, one has witnessed an increase in the tendency to consult children in these areas too (Strandbu, Thørnblad and Handegård 2016; Magnussen and Skivenes 2015). However, in their recent concluding observations on Norway, the Committee on the Rights of the Child recommends that the government 'ensure that children are informed about the possibility of participating in mediation processes in the context of their parents' separation',⁴⁶ indicating that there is room for improvement.

Returning to parental disputes in court, there has been a similar development in court practices in Scotland regarding child consultation (Tisdall and Morrison

46. Committee on the Rights of the Child, *Concluding observations on the combined 5th and 6th periodic reports of Norway*, UN doc. CRC/C/NOR/CO/5-6, 4 July 2018, para. 14 (d).

2012). There too, the tendency to seek the opinions of the children has advanced rapidly over the past few years. As we noted above, failure to consult children may be considered a procedural error under Norwegian law, and on this point, we find a clear parallel to Scottish practice where failure to hear children is 'a recognized ground of appeal and, in some cases, has been the *sole* ground' (Tisdall and Morrison 2012, p. 160). The link between the right of children to be heard and the consequences for the courts of having decisions revoked if this right is not effectively respected seems therefore to have led to an increase in child consultations. There is another interesting parallel between the legal systems of Norway and Scotland. According to the Norwegian guidelines on child consultation, hearings also involve, as noted above, the views of the child on the issues addressed in the case as well as other information likely to shed light on pertinent questions. We find a similar conception of what children have a right to express their opinions on in Scottish case law, where other aspects of the children's situation than the precise issues being considered in the case can be included in the hearing of children:

This shows some move to recognizing that the only issues at stake are not children 'choosing' between their parents but other aspects of children's lives affected by decisions on parental responsibilities and rights. (Tisdall and Morrison 2012, pp. 160–161)

Other aspects than the child's relations with its parents can include, for example, its relations with its friends, leisure activities and school. This more open approach to children's right to express their opinion can affect both the children's desire to express themselves and the inclination of the experts and judges to talk with the children. When the conversation does not require the expression of clear preferences and choices, it can help explain why most children offered the opportunity to express themselves choose to avail themselves of their right.

As mentioned earlier, the right of children to be consulted is defined in the Norwegian wording of Section 31 of the Children Act as the right to state an opinion. Article 12, first paragraph, of the Convention uses the phrase 'right to express those views freely', implying both verbal and non-verbal ways of making one's views known. An important question, therefore, is whether the Norwegian Children Act should not be amended in conformity with the wording of the Convention. It is possible that this should be done for the general right to be consulted pursuant to Section 31, first paragraph, of the Children Act. However, the second paragraph, which deals with decisions concerning, among other things, parental responsibility, residence and contact, is closer to the second paragraph of Article

12. The latter speaks of the child's right to 'be heard' and in order to meet the requirement in the Convention it is probably sufficient that the child is given an opportunity to state its opinion ('*seie meininga si*'), as the second paragraph of Section 31 of the Children Act puts it.

The changes in jurisprudence reflect the legislative changes of recent years. In turn they reflect wider changes in society concerning perceptions of children's competence and capacity. In childhood sociology, Corradi and Desmet describe this paradigm shift as follows:

Regarding the conceptualisation of children, the theoretical framework most recurrently, albeit often implicitly, adopted, is that of the '(new) sociology of childhood'. This means that childhood is socially constructed, and children are considered competent social agents (see e.g. James and Prout 1997) – in reaction against the previously prevalent childhood image of the incompetent child. (Corradi and Desmet 2015: 238)

The child is increasingly perceived as sufficiently competent to participate in decisions concerning its own life, even though this does not mean decisions can be left to the child completely. In international research, concern has been expressed in case this increased focus on children's opinions encourages judges to follow the child's view as an easy way out in a difficult case (Parkinson and Cashmore 2008). The responsibility imposed on the children in such decisions could prove detrimental. For the time being, this does not appear to be happening in Norwegian courts. The main impression gained from our analysis of the judgments is that the child's wishes are considered and weighed in a conscientious manner together with other factors in the case, based on the best interests of the child and in line with the legislator's premises and the formulation of the legislative text. As long as this remains the case, the increased weight of the child's opinions should be considered a positive development. It satisfies Article 12 of the Convention without compromising Article 3 requiring a comprehensive assessment of the best interests of the child.⁴⁷

It is, however, important to keep an eye on the further development regarding children's right to be heard. As discussed in another article, we have seen a shift in how the child is viewed in case law on residence and contact from interpreting the child as vulnerable and in need of protection to seeing the child more as a competent actor (Skjørten 2016b). To comply with Article 3 in the Convention, the

47. On the relationship between the best interests of the child and the right of the child to be heard, see Sandberg (2016b), p. 67.

decision-maker must keep both perspectives in mind when making decisions on residence and contact arrangements for children and be aware that in some instances the child's wish may be in conflict with the best interests of the child. As described earlier, we found that the decisions went against the views of the children in a quarter of the cases. If in the future the outcome in almost all cases turns out to be in accordance with the views of the child, it should set alarm bells ringing.

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