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## Nordic Family Mediation: Towards a System of Differentiated Services?

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### 3.1 Introduction to Family Mediation and Diverse Family Needs

The Nordic welfare-state paradigm frames parental disputes during and after divorce, and the dissolution of domestic partnerships, primarily as disagreements regarding care arrangements for custody, residence, and visitation. Since both parents are expected to support themselves with (full-time) employment—and considering that education and health-care are practically free of charge for children and young people—maintenance and other economic issues are of limited importance. In accordance with the prevailing gender-equality paradigm, parents are presumed to possess roughly equal and adequate parenting capacity.<sup>1</sup>

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<sup>1</sup> See Anna Kaldal, Agnes Hellner and Titti Mattsson, 'Introduction: Matching Legal Proceedings to Problems in Custody Disputes' in Anna Kaldal, Agnes Hellner and Titti Mattsson (eds), *Children in Custody Disputes: Matching Legal Proceedings to Problems* (Palgrave 2023).

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Consequently, most parents are expected to agree on care arrangements without requiring assistance from lawyers or other professionals, and only a small percentage of families file for court proceedings.<sup>2</sup>

Despite the dominance of out-of-court services, legal scholarship has generally been disinterested in them. One likely reason is that out-of-court services belong to the realm of social (family) services and not the justice system; lawyers are generally not involved in any capacity, either as mediators or legal counsel. Although recent reforms with Nordic out-of-court mediation aim at reducing litigation, thus making out-of-court mediation in practice part of the civil justice system,<sup>3</sup> the reforms have not stimulated much interest among lawyers. Moreover, few scholars have specialized in mediation and alternative dispute resolution, and so, the dispute resolution aspects of the system are only weakly rooted in mediation theory. Lawyers could also be disinterested because parents are implicitly construed as rational persons with good parenting capacity and the ability to agree on outcomes that are in the best interests of the child. Hence, the parents mainly need help to reorient themselves to the needs and wishes of their children, and to acquire post-separation parenting and conflict resolution skills, not legal assistance. These assumptions disregard the inability of some parents to meet the standards of ideal parenting, particularly in the aftermath of divorce, and the fact that some parents abuse or neglect their children.<sup>4</sup> Legal scholarship seems oblivious to the fact that even when the outcome is voluntary, and not imposed on the parents, mediation is a decision-making process with profound legal implications.

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<sup>2</sup> There are no exact statistics available; the figure is around 10–15%, see for example, Ann-Sofie Bergman and Annika Rejmer, 'Parents in Child Custody Disputes: Why Are They Disputing?' (2017) *Journal of Child Custody* 134–150; Anna Nylund, 'A Dispute System Design Perspective on Norwegian Child Custody Mediation' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018) 15.

<sup>3</sup> For example, in Norway, Norwegian Government Official Report 2019:20 En styrket familietjeneste. En gjennomgang av familieverntjenesten [A stronger family service. A review of the family welfare service] and in Sweden, Swedish Government Official Report 2017:6 Se barnet! [See the Child!].

<sup>4</sup> Elisabeth Gording Stang, 'Når vi ikke får gehør i rettsapparatet har vi tapt på vegne av barnet' in Karl Harald Sovig, Sigrid Eskeland Schtz and Ørnulf Rasmussen (eds), *Undring og erkjennelse. Festskrift til Jan Fridthjof Bernt 70 år* (Fagbokforlaget 2013).

There is an increased awareness that some parents abuse their children or partners<sup>5</sup> and that some parents neglect their children because of their insufficient parenting capacity. Additionally, some families experience high levels of conflict—repeated, persistent, and intense conflicts.<sup>6</sup> Research indicates that high conflict levels and risk of abuse or neglect occur simultaneously in many families, which reduces the quality of parenting,<sup>7</sup> and has repercussions for the health and wellbeing of children.<sup>8</sup> Moreover, the (perceived) lack of adequate parenting capacity is often itself a source of conflict.<sup>9</sup> Research suggests that high conflict and child neglect are not evenly distributed throughout the population. These phenomena are more prevalent in multicultural families (that is, families where one or both parents or a child are born abroad), families with a low socio-economic status, and families where the child or a

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<sup>5</sup> A recent Swedish report discovered that child abuse, or allegations of it, was present in 67% of litigated child custody cases, The Swedish Gender Equality Agency, *Uppgifter om våld är inget undantag. Redovisning av kartläggning av uppgifter om våld eller andra övergrepp i mål om vårdnad, boende och umgänge*, Rapport 2022:1 [Information on Violence Is No Exception. Reporting of the Mapping of Data on Violence or Other Abuse in Custody, Residence and Contact or Visitation] 8–9.

<sup>6</sup> The term *high conflict* is widely used, but it lacks a clear definition, see for example, Shayne R Anderson, Stephen A Anderson, Kristi L Palmer, Matthew S Mutchler and Louisa K Baker, 'Defining High Conflicts' (2010) *The American Journal of Family Therapy* 11–27. For an overview of research attempting to define the term, see Maren Sand Helland and Ingrid Borren, *Foreldrekonflikt; identifi sering av konfliktnivåer, sentrale kjennetegn og risikofaktorer hos høykonfliktpar* (Nasjonalt folkehelseinstitutt 2015) 17–22.

<sup>7</sup> For example, Bergman and Rejmer (n 2); Fritz Leo Breivik and Kate Mevik, *Barnfordeling i domstolen. Når barnets beste blir barnets verste* (Universitetsforlaget 2012); Wenke Gulbrandsen, 'Foreldrekonflikter etter samlivsbrudd: En analyse av samspill og kilder til det fastslående' (2013) *Tidsskrift for norsk psykologforening* 538–551.

<sup>8</sup> For example, Paul R Amato, 'The Consequences of Divorce for Adults and Children' (2002) *Journal of Marriage and the Family* 5–24; Janet Johnston, Vivienne Roseby and Kathryn Kuehnle, *In the Name of the Child—A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce* (Springer 2009); Ann-Sofie Bergman and Annika Rejmer, "Det är klart att barnen blir lidande": om barns mående när föräldrar är i vårdnadstvist' (2017) *Socialmedisinsk tidskrift* 437–446.

<sup>9</sup> For example, Judy Cashmore and Patrick Parkinson, 'Reasons for Disputes in High Conflict Families' (2011) *Journal of Family Studies* 186–203; Marian Ådnanes, Gry Mette D Haugen, Heidi Jensberg, Tonje Lossius Husum and Minna Rantalaiho, 'Hva karakteriserer vanskelige saker i foreldremekling, og er meklingsordningen godt nok tilpasset?' (2011) 39 *Fokus på Familien* 86–115.

parent has a disability or serious long-term illness.<sup>10</sup> These insights challenge the assumptions in which the Nordic family mediation system—thus far—has been rooted. In this chapter, the term ‘high conflict’ encompasses all permutations of persistent, intense conflict, abuse, and child neglect.<sup>11</sup>

In this text, Nordic family mediation systems and their processes are analysed with a thorough reading of regulation and policy documents (such as preparatory works and guidelines), using the lens of family mediation and dispute-system design theory. The examination focuses on three issues:

1. A look at the organization of the Nordic systems, in terms of the processes available, their target groups, and the organizational framework of family mediation.
2. Whether and how the quality of mediation is expressed and what mechanisms are available to ensure sufficient quality of mediation, such as, ethical standards and adequate mediator training.
3. Whether adequate mediation processes have been developed to address the needs of high-conflict families.

The analysis begins by defining family mediation processes and the mechanisms for ensuring quality (Section 3.2). It then discusses whether and when family mediation is an appropriate service for high-conflict families (Sect. 3.2.1). The second step examines current Nordic family mediation systems and their processes in the light of the standards and definitions set forth in the first step. Section 3.3 presents the family mediation systems in Nordic countries by giving an overview of the processes available in each country and how these are organized. In Sect. 3.3.2, the nature and content of each mediation process are discussed, like whether all the processes fall within the scope of mediation, and describing the content and target group for each process. The important question

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<sup>10</sup> Swedish Government Official Report 2017:6 Se barnet! (n 3) 117–118.

<sup>11</sup> See also, Annika Rejmer, ‘Custody Disputes from a Socio-Legal Perspective’ in Anna Kaldal, Agnes Hellner and Titti Mattsson (eds), *Children in Custody Disputes: Matching Legal Proceedings to Problems* (Palgrave 2023).

here is, whether these systems include processes designed to help high-conflict families. Section 3.3.3 presents the Nordic countries' standards and mechanisms that focus on ensuring sufficient quality in the process and outcome. Finally, Sect. 3.4 offers some concluding observations.

## 3.2 Family Mediation as a Quality Process

### 3.2.1 Defining Family Mediation Processes

Mediation is often used as an umbrella term that encompasses a range of dispute resolution processes, 'whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute'.<sup>12</sup> This definition, which will be used in this chapter, includes diverse forms of mediation practice, often labelled facilitative, evaluative, transformative, and therapeutic mediation.<sup>13</sup>

Family mediation has dual roots: one in the legal context, the other in the family therapy or family services context. Legal family mediation emphasizes the legal and economic aspects of parenthood, and the goal is that parents resolve conflicts and cooperate in a 'business-like' manner.<sup>14</sup> Counselling family mediation focuses on the intra- and inter-personal processes in the family, and the concept that addressing these issues is the key to resolving conflicts.<sup>15</sup> Therapeutic family mediation, a subgroup

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<sup>12</sup> Singapore Convention on Mediation Art 2 nr 3. This is approximately the same definition as in, for example, Vibeke Vindeløf, *Reflexive Mediation: With a Sustainable Perspective* (Steven Harris, transl.) (DJØF Publishing 2012) 52.

<sup>13</sup> For example, Robert A Baruch Bush and Sally Ganong Pope, 'Transformative Mediation: Changing the Quality of Family Conflict Interaction' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 67–96; Randolph L Lowry, 'Evaluative Mediation'; Marsha Klein Pruett and Janet R Johnston, 'Therapeutic Mediation with High-Conflict Parents: Effective Models and Strategies'; Bernard Mayer, 'Facilitative Mediation', all in Jay Folberg, Ann L Milne and Peter Salem (eds), *Divorce and Family Mediation: Models, Techniques, and Applications* (The Guilford Press 2004).

<sup>14</sup> O J Coogler, *Structured Mediation in Divorce Settlement: A Handbook for Marital Mediators* (Lexington Books 1978).

<sup>15</sup> See, for example, John M Haynes, *Divorce Mediation: A Practical Guide for Therapists and Counselors* (Springer 1981).

of counselling mediation, is a process designed for high-conflict families.<sup>16</sup> Moreover, hybrids of the two approaches can be found, often as co-mediation in which one mediator is a lawyer and the other is a family counsellor or therapist.<sup>17</sup> One variant could be characterized as educative,<sup>18</sup> in that the mediator primarily educates the parents in post-divorce co-parenting skills, recognizing and acting upon the needs of their children, while letting the parents negotiate on their own.

Although mediation is both a broad term and a flexible process, it must still be delimited from other processes. If mediation is to serve families with various needs, each procedure under the umbrella of family mediation must be defined to help families find the procedure that matches their needs, that is, to 'fit the forum to the family fuss'.<sup>19</sup> If families are unable to understand the contents of the various mediation procedures or find a process that is appealing to them, they might reject mediation based on a misguided perception.<sup>20</sup>

Without a clear definition, setting quality standards for mediation and making mediators accountable for their services is difficult, or even impossible. Research on the Finnish family mediation system revealed that the professionals working as family mediators lacked a clear conception regarding the main rationale of the system and their role as mediators.<sup>21</sup> Mediators cannot receive adequate training unless the role is

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<sup>16</sup> Pruett and Johnston (n 13).

<sup>17</sup> Erin R Archer, 'Evaluating Mediation's Future' (2020) *Journal of Dispute Resolution* 31–60.

<sup>18</sup> Ellen A Waldman, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' (1996) *Hastings Law Journal* 703–769.

<sup>19</sup> John Lande and Gregg Herman, 'Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases' (2004) *Family Court Review* 280–291.

<sup>20</sup> Vaula Haavisto, 'Developing Family Mediation in Finland: The Change Process and Practical Outcomes' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018) 44; Norwegian Government Official Report 2019:20 En styrket familietjeneste [A stronger family service] (n 3) 114–116; Swedish Government Bill 2020/21:150 Ett stärkt barnrättsperspektiv i vårdnadsvister [A Strengthened Child Rights Perspective in Custody Disputes] 55–56.

<sup>21</sup> Haavisto (n 20) 43–46; Vaula Haavisto, Marina Bergman-Pyykkönen and Synnöve Karvinen-Niinikoski, *Perheasioiden sovittelun uudet tuulet* (Suomen sovittelufoorumi ry 2014).

clearly defined, and inadequate training is believed to decrease the quality of family mediation.<sup>22</sup>

A coherent family mediation system requires a clear definition of each process in the system.<sup>23</sup> Otherwise, the system is neither comprehensive nor coherent, creating a risk that families will not find a process that matches their needs; indeed, as a society, we risk devoting resources to redundant or inadequate services while, in some families, conflicts escalate due to lack of access to appropriate services.

When mediation is regarded as a process connected to skills required in certain professions, rather than a separate process, it is likely to be guided by the standards of that profession.<sup>24</sup> Mediators are likely to prefer and practice, consciously or unconsciously, a model that reflects their respective profession and training: lawyers practise legal mediation, social workers favour counselling mediation, and family therapists opt for therapeutic mediation. Although some skills overlap, each process requires adequate training in addition to the professional training and skills that lawyers, family therapists, and social workers have acquired during their studies and work. In social services, parents are often referred to as 'clients', which implies that the parents are unable to identify their needs and the alternatives available to them.<sup>25</sup> Hence, the professional is the expert who designs the process and is in the position to determine what will be the best outcome. This view conflicts with the basic tenets of mediation. Similarly, therapists serving as mediators risk over-emphasizing the therapeutic dimensions of the dispute.<sup>26</sup> Moreover, mediation is an independent area of expertise that requires

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<sup>22</sup> Swedish Government Official Report 2017:6 *Se barnet!* (n 3) 257–259; Haavisto (n 20) 44–45.

<sup>23</sup> Lisa Blomgren Amsler, Janet K Martinez and Stephanie E Smith, *Dispute System Design. Preventing, Managing, and Resolving Conflict* (Stanford University Press 2020) 22–38.

<sup>24</sup> Cf. Marian Roberts, *Mediation in Family Disputes. Principles of Practice* (3rd edn, Ashgate 2008) 12–27; Lisa Parkinson, *Family Mediation: Appropriate Dispute Resolution in a New Family Justice System* (2nd edn, Family Law 2012) 23–34 and 119–140.

<sup>25</sup> Roberts (n 24) 15.

<sup>26</sup> Inger Kristin Heggdalsvik, 'Fastlåste foreldrekonflikter: En analyse av familierapeuters skjønnsutøvelse i saker med høy konflikt' (2020) *Fokus på familien* 74–95.

specific training and skills.<sup>27</sup> If mediators do not receive specific mediation training, they risk falling back on their original professional role and delivering a less-than-optimal process, with potentially detrimental effects.

Self-determination is a hallmark of mediation<sup>28</sup>: the process is intended to ensure that parents make informed, rational decisions regarding their children, while the mediator's role is to put the parents in a position to make these decisions and refrain from making decisions directly or indirectly on behalf of the parents. A common problem with mediation is that the mediator becomes the de facto decision-maker, that is, the mediator directly or indirectly pressures the parents to adopt a specific outcome. Research suggests that many parents feel that the mediator or the other parent pressures them to agree to care arrangements that are not in the best interests of the child or to which the parent cannot commit.<sup>29</sup> The risk of coercion increases when mediation is made mandatory, mediators are directly or indirectly rewarded for producing settlements, and the mediator has multiple roles in the process.<sup>30</sup>

Poorly defined services are particularly problematic when the mediator has multiple roles, as in family mediation.<sup>31</sup> Both the best interests

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<sup>27</sup> For example, Nancy Welsh, 'Do You Believe in Magic? Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation' (2017) *Southern Methodist University Law Review* 721–762; Karoline Angvik Ipsen, 'Meklere som lekmenn eller meklere som profesjonelle aktører?' (2008) *Kart og plan* 240, 246; Roberts (n 24) 12–27; Alison Taylor, *The Handbook of Family Dispute Resolution: Mediation Theory and Practice* (San Francisco 2002) 104–179.

<sup>28</sup> For example, Jacqueline Nolan-Haley, 'Does ADR's Access to Justice Come at the Expense of Meaningful Consent?' (2018) *Ohio State Journal on Dispute Resolution* 373–383.

<sup>29</sup> For example, Nancy A Welsh, 'You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation' (2009) *American Bankruptcy Institute Law Review* 427, 454–458; Sandra J Perry, Tanya M Marcum and Charles R Stoner, 'Stumbling Down the Courthouse Steps: Mediator' Perceptions of the Stumbling Blocks to Successful Mandated Mediation in Child Custody and Visitation' (2010) *Pepperdine Dispute Resolution Law Journal* 441–465.

<sup>30</sup> Forrest S Mosten, 'Institutionalization of Mediation' (2004) 42(2) *Family and Conciliation Court Review* 297–298; Marian Roberts, 'Family Mediation: The Development of the Regulatory Framework in the United Kingdom' (2005) 22(4) *Conflict Resolution Quarterly* 509–526, observing how the law defines success even in out-of-court mediation; Welsh (n 29) 438–441; Camilla Bernt, 'Custody Mediation in Norwegian Courts: A Conglomeration of Roles and Processes' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018) 105–132, 127–128.

<sup>31</sup> Bernt (n 30).



of the child and the aim of settlement promote role conflicts in family mediation. When and how must the mediator intervene if there is reason to believe that the interests of the child are endangered? What information do the families need regarding this aspect? Although settlement is the goal, mediator performance should be measured using other indicators. At best, however, family mediation is a process where parents receive help to adjust from the role of ex-partners to co-parents and adapt care arrangements to the changing needs of their family.<sup>32</sup>

### 3.2.2 (When) Is Mediation an Appropriate Service for All Families?

Mediation is not a panacea. When a parent lacks adequate parenting capacity or is abusive, the mediated agreement could be contrary to the interests of the child. Spousal abuse in all its forms—physical, emotional, psychological, economic, and sexual—can also diminish the ability of a parent to make rational, child-centred decisions. In these cases, too, mediation is not likely to be an appropriate method for dispute resolution. If the mediator believes that the parents are not capable of making an agreement that is in the best interests of their child, the mediator should end the process—not decide on behalf of the parents or pressure the parties to accept an agreement. The mediation process lacks a system for gathering information and enabling the parties to argue their cases. Thus, the outcome that a mediator imposes or suggests can be based on erroneous assumptions. Incorporating elements that would enable the mediator to act as an ‘adjudicator’ runs counter to the nature of the

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<sup>32</sup> For example, Renee Thørnblad, Astrid Strandbu and Anita Salamonsen, ‘Hvordan påvirker barns deltakelse foreldremekling? Barns deltakelse som mål og middel’ (2019) *Barn* 67–80; Lovise Grape, Renee Thørnblad and Bjørn Helge Handegård, ‘Children Sharing Preferences on Contact and Residence Arrangements in Child-Inclusive Family Mediation in Norway’ (2021) 29(1) *The International Journal of Children’s Rights* 31–53.

mediation process and would thus diminish or even eradicate the qualities that make mediation a process that enhances self-determination and creative, collaborative problem-solving.<sup>33</sup>

Since mediation can be detrimental for high-conflict families, many countries have implemented screening tools to identify families with intimate partner violence, severe mental health issues, and so forth, as well as to determine distinct dispute resolution processes to fit the needs of these families.<sup>34</sup> The broad spectrum of needs in high-conflict families adds to the complexity of creating appropriate services for them.<sup>35</sup> Moreover, many countries have also introduced auxiliary services such as courses and support groups specifically for certain types of families, such as multicultural families or families with a child that has health-related problems.<sup>36</sup> Some families might benefit from therapeutic interventions; families who grapple with poverty and unemployment could find interventions that encompass social services to be helpful, while other families would be better aided with a combination of child-welfare services and services for divorcing families. Ideally, services for high-conflict families would be multi-professional and customized to the needs of each family.

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<sup>33</sup> For example, Anna Nylund, 'Alternative Dispute Resolution, Justice and Accountability in Norwegian Civil Justice' in Xandra Kramer, Betül Kas and Erlis Themeli (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 81–100.

<sup>34</sup> For example, Pruett and Johnston (n 13) 92–111; Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge University Press 2011) 184–185 and 190; Amy G Applegate, Connie J Beck, Jeannie M Adams, Fernanda S Rossi, and Amy Holtzworth-Munroe, 'Preparing Mediators to Mediate Cases Reporting High IPV in a Randomized Controlled Trial: The Importance of a Mediation Manual, Training, and Consultation' (2021) 59(4) *Family Court Review* 725–740.

<sup>35</sup> For example, Grethe Nordhelle, *Høykonflikt. Utvidet forståelse og håndtering via mekling* (Universitetsforlaget 2016) 23–39.

<sup>36</sup> For example, Thomas D Barton, 'Challenges When Family Conflicts Meet the Law—A Proactive Approach' in Anna Kaldal, Agnes Hellner and Titi Mattsson (eds), *Children in Custody Disputes: Matching Legal Proceedings to Problems* (Palgrave 2023); Marsha Kline Pruett, Jonathan Alschech and Talia Feldscher, 'The Family Resolutions Specialty Court (FRSC): An Evidence-Informed Court-Based Innovation' (2021) 59(4) *Family Court Review* 656–672.

## 3.3 Nordic Family Mediation

### 3.3.1 Nordic Family Mediation Systems

Although the boundaries between the services are not clear, all of the Nordic countries have specific, divorce-related services that can be conceptualized as a three-tier system: services for all families during the early stages of divorce, services for families needing (or desiring) assistance to resolve their disputes, and mandatory pre-filing services—that is, taking part in ‘mediation’ is a prerequisite for filing a court case. As Table 3.1 shows, there is no uniform Nordic system.

The Danish system has services for each tier, the Norwegian system has services for early divorce families and pre-filing; Sweden has services for families seeking help and a new pre-trial service, while Finland only has services for families who actively seek help. Denmark has the most diversified system, featuring multiple processes for families with various needs and preferences.

Since March 2022, when Sweden introduced mandatory pre-filing information talks (*informationssamtal*),<sup>37</sup> the systems of all Nordic countries (except Finland) follow a model with mandatory pre-filing

**Table 3.1** Nordic family mediation/dispute resolution systems, m = mandatory, v = voluntary

	Early divorce families	Dispute resolution	Pre-filing
Denmark	Counselling (v)	Mediation (v) Expert counselling (v)	Family mediation (m) Expert assessment (m)
Finland	–	Child welfare supervision (v) Family mediation (v)	–
Norway	Family mediation (m)	–	Family mediation (m)
Sweden	–	Cooperation talks (v)	Information talks (m)

<sup>37</sup> Swedish Children and Parent Code [Föräldrabalk] (1949:381) Chapter 6 Section 17c and Social Services Act [Socialtjänstlag] (2001:453) Chapter 5 Sections 3 and 3a.

services.<sup>38</sup> The rationale for mandatory information sessions in Sweden is the low usage of the voluntary cooperation talks process (*samarbetssamtal*) and an increasing number of court cases.<sup>39</sup> Norway and Finland are outliers: Norway requires all divorcing families with children under the age of 16 to attend mediation, and Finland offers only voluntary services.

Denmark and Finland have two parallel services for families. Parents can select the service that they believe will best serve their preferences and perceived needs. In Danish pre-filing cases, the parents are assigned either to family mediation or to an expert assessment, according to the results of a screening conducted at intake.<sup>40</sup>

Denmark and Norway have implemented screening processes at intake to identify families experiencing violence, substance abuse, and parental mental disorders, and thus the risk of child neglect and abuse.<sup>41</sup> Unlike Denmark, the Norwegian screening process is not reflected in statutory law or official guidelines; nor is it described on the Family Counselling Services website. The need for screening is also recognized in Sweden, but screening is not regulated.<sup>42</sup>

Ostensibly, it appears that no Nordic country has implemented a mediation process specifically designed for high-conflict families; however, in practice, the Norwegian system operates with three forms

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<sup>38</sup> Danish Parental Responsibility Act [Forældreansvarslov] Section 31 and Norwegian Children Act [Lov om barn og foreldre] 8 April 1981 no 7 Section 51.

<sup>39</sup> Swedish Government Official Report 2017:6 *Se barnet!* (n 3) 138–139. For a discussion on cooperation talks, see Anna Singer ‘Out-of-Court Custody Dispute Resolution in Sweden—A Journey Without Destination’ in Anna Kaldal, Agnes Hellner and Titti Mattsson (eds), *Children in Custody Disputes: Matching Legal Proceedings to Problems* (Palgrave 2023).

<sup>40</sup> Danish Family Law House Act [Lov om familieretshuset] Sections 5 to 9. Family Law House Instruction Sections 3.2 and 3.3. An example of the questionnaire can be found at: <https://familieretshuset.dk/media/1320/foraeldremyndighed.pdf> accessed 10 May 2023.

<sup>41</sup> For example, Norwegian Directorate for Children, Youth and Family Affairs (Barne-, ungdoms- og familiedirektoratet), *Årsrapport 2020 Barne-, ungdoms- og familiedirektoratet* [Yearbook 2020 Directorate for Children, Youth and Family Affairs] 40; Thomas Hugaas Molden, Gro Ulset and Melina Røe, *Kvalitet i familievernet Ansattes vurderinger av betingelser for et faglig godt tjenestetilbud* [Quality in Family Care Employees’ Assessments of Conditions for a Professionally Good Service Offer] (NTNU Samfunnsforskning 2019) 18–20.

<sup>42</sup> Swedish Government Bill 2020/21:150 *Ett stärkt barnrättsperspektiv i vårdnadstvister* (n 20) 62–63; Swedish Government Official Report 2017:6 *Se barnet!* (n 3) 327 ff.

of mediation—so-called A, B, and C mediations.<sup>43</sup> Based on the intake screening, families who need limited assistance are directed to A mediation; families with low to medium levels of conflict are directed to B mediation; and high-conflict families are encouraged to attend C mediation, which consists of a mixture of interventions including family and group therapy.

In Denmark and Norway, auxiliary services such as conversation groups for children and young people experiencing divorce, informational videos, information booklets, and courses for families with specific needs (for example, family members with disabilities or serious illnesses, or who require anger-management training), are offered as a complement to mediation.<sup>44</sup> Families can also use these services independently of mediation.

The organization of Nordic family mediation is as diverse as the range of processes. Denmark and Norway have centralized services located within entities that partly specialize in family mediation. In Denmark, the Agency of Family Law (*familieretshuset*), a specialized administrative body, is the apex body of the family justice system. In addition to providing family dispute resolution service, it hears cases involving (among other things) adoption, paternity, and guardianship. Norway also has a centralized service in the Family Mediation Service (*familievernnet*, literally family protection), which offers family counselling and therapy in addition to mediation services, and is part of social services. The Finnish and Swedish systems are organized by municipalities or counties. In Sweden, the local social service (*socialtjänsten*) delivers the services. In Finland, Child-Welfare Supervisors (*lastenvalvoja/barnatillsyningsman*), whose main task is to assist parents with agreeing on maintenance, and family counselling services (*perheneuvola/familjerådgivning*) are municipal services. In addition to the public services, alternatives are also offered by private providers and churches.

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<sup>43</sup> Norwegian Government Official Report 2019:20 En styrket familietjeneste (n 3) 113.

<sup>44</sup> The Agency of Family Law Familjeretshuset, Cooperation course [Samarbejdskursus] <https://familieretshuset.dk/forloeb-og-tilbud/forloeb-og-tilbud/samarbejdskursus> and Norwegian Directorate for Children, Youth and Family Affairs, Courses and group guidance at the family welfare office [Kurs og gruppeveiledning hos familievernnet] [https://www.buudir.no/Familie/Familievernnet/Kurs\\_og\\_gruppeveiledning\\_hos\\_familievernnet](https://www.buudir.no/Familie/Familievernnet/Kurs_og_gruppeveiledning_hos_familievernnet) accessed 25 February 2022; Norwegian Government Official Report 2019:20 En styrket familietjeneste 95–98.

The centralized organization of family mediation services in Denmark and Norway coincides with tiered services and systematic use of intake screening to identify families where there is a risk of child abuse or neglect, and high conflict levels. Denmark uses processes with well-defined target groups, and the systems are clearly tiered according to the severity of the conflict level in the family, whereas in the other Nordic countries, the relationship of the various services is less clear.

### 3.3.2 Nordic Family Mediation Processes

Danish, Finnish, Norwegian, and Swedish legislation provide concordant definitions of family mediation: it is a process that assists parents with agreeing on care arrangements,<sup>45</sup> which is concordant with mediation theory. The only exception is Finnish child-welfare supervision, for which no unequivocal purpose is stated. The organizations that are responsible for providing family mediation divide their processes into five groups, presented on their websites and promotional literature.

The first group can be characterized as counselling family mediation—that is, the main intervention informs and educates the parents on applicable rules and regulations, children’s needs during and after divorce, and teaching co-parenting and conflict-resolution skills. These processes include the Danish counselling session (*rådgivnings- og afklaringsamtale*), which is for newly separated families,<sup>46</sup> and expert counselling (*børnesagkyndig rådgivning*).<sup>47</sup> The Norwegian A and B mediations also

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<sup>45</sup> Danish Family Law House Act of 27 December 2018 no 1702 Section 21, Finnish Marriage Act [Avoliittolaki/Äktenskapslag] no 411 of 16 April 1987 Sections 20–23a, Norwegian Children Act Section 52, and the Swedish Children and Parent Code Chapter 6 Sections 17c and 17a, Social Service Act Chapter 5 Section 3, and Information Talks Act [Lag om informationssamtal] (2021:530) Section 7.

<sup>46</sup> The Agency of Family Law, ‘Tilbud til brudteamiliarr’ <https://familieretshuset.dk/forloeb-og-tilbud/forloeb-og-tilbud/tilbud-til-brudte-familier> accessed 25 February 2022; The Agency of Family Law, ‘Når vi behandler din sag’ <https://familieretshuset.dk/forloeb-og-tilbud/forloeb-og-tilbud/naar-vi-behandler-din-sag> accessed 25 February 2022.

<sup>47</sup> The Agency of Family Law, ‘Børnesagkyndig rådgivning’ <https://familieretshuset.dk/forloeb-og-tilbud/forloeb-og-tilbud/boernesagkyndig-raadgivning> accessed 25 February 2022.

fall into this category.<sup>48</sup> These services are suitable as universal services for all families who want guidance during or after separation.

The second group focuses on dispute resolution and decision-making, that is, legal family mediation. Danish conflict mediation (*konfliktmægling*)<sup>49</sup> and the mandatory Danish pre-filing family mediation (*familjemægling*)<sup>50</sup> belong in this group. Finnish family mediation can also be placed in this category.<sup>51</sup> These processes are suitable when the parents have adequate parenting capacity but might need a structured process to be able to make good decisions.

The third group could be labelled therapeutic family mediation. Norwegian C mediation (which is also called procedure mediation, *prossmekling*) falls into this category because therapeutic interventions are a primary feature. This type of mediation is suitable for those high-conflict families who need assistance to deal with underlying emotional and relational issues before they proceed to decision-making.

The fourth group uses procedures with an undefined approach. The Finnish child-welfare supervision process and Swedish cooperation talks belong to this category because the techniques and approaches used are not described.<sup>52</sup> It is unclear what the process entails, and the intensity of disputes for which it is designed, is not defined.

Finally, the fifth group includes processes that do not involve decision-making. Danish expert assessment (*familieretlig udredning*) is for families where the child is at risk of abuse or serious neglect. It is designed to

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<sup>48</sup> Norwegian Directorate for Children, Youth and Family Affairs, 'Mekling ved samlivsbrudd' [https://bufdir.no/Familie/Samlivsbrudd/mekling\\_og\\_avtale/Mekling/](https://bufdir.no/Familie/Samlivsbrudd/mekling_og_avtale/Mekling/) accessed 25 February 2022. See also, Rundskriv Q-02/2008 Mekling etter ekteskapsloven og barneloven, comment to Section 1, and Ådnes and others (n 9).

<sup>49</sup> The Agency of Family Law, 'Konfliktmægling' <https://familieretshuset.dk/forloeb-og-tilbud/forloeb-og-tilbud/konfliktmaegling> accessed 25 February 2022.

<sup>50</sup> The Agency of Family Law, 'Familjemægling' <https://familieretshuset.dk/forloeb-og-tilbud/forloeb-og-tilbud/familjemaegling> accessed 25 February 2022.

<sup>51</sup> Terveiden ja Hyvinvoinnin Laitos, 'Perheasioiden sovittelu' <https://thl.fi/fi/web/lapset-nuoret-ja-perheet/sote-palvelut/perheoikeudellis-et-palvelut/perheasioiden-sovittelu> accessed 25 February 2022.

<sup>52</sup> For example, Soite, [https://www.soite.fi/sv?page\\_id=lastenvalvoja](https://www.soite.fi/sv?page_id=lastenvalvoja) accessed 25 February 2022; Family Law and Parental Support Authority, 'Vad är ett samarbetsamtal?' <https://www.mfof.se/vardnad-boende-och-umgange/information-for-foraldrar/vad-ar-samarbetsamtal.html> accessed 25 February 2022; Singer (n 39).

provide an expert report on the care situation of the child.<sup>53</sup> The Swedish information talks aim to educate parents regarding the potential repercussions of court proceedings and the available alternatives.<sup>54</sup> Hence, these processes cannot be called mediation, although they might have important functions in the family mediation or family justice system.

Denmark has the broadest range of mediation services for low- to medium-conflict families. They can choose between counselling and dispute resolution approaches to mediation, and between early pre-emptive services and services once conflicts have happened. It should be noted that the Danish system has only a single process for high-conflict families, known as expert assessment, which serves to identify abuse and neglect and funnel those families to court proceedings. Although there are courses designed for specific groups of (high-conflict) families, there are no therapeutic processes available; this is an outspoken policy choice,<sup>55</sup> and probably reflects the fact that the Agency of Family Law is embedded within the justice system, not the welfare systems.

Although Norwegian Family Counselling Services formally have only a single process, in practice it has three processes as explained above, all of which follow a counselling or therapeutic approach. This is not surprising, considering that the Family Counselling Services provide couples and family therapy services to the general population,<sup>56</sup> and the methods are drawn from psychological research.<sup>57</sup> Family mediation belongs in the realm of family services, which is reflected in the mediation process, in that the mediators emphasize maintaining the therapist-client relationship in high-conflict cases.<sup>58</sup> The screening at intake serves to funnel some families to court, while C mediation and courses

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<sup>53</sup> The Agency of Family Law, 'Familieretlig udredning' <https://familieretshuset.dk/forloeb-og-tilbud/forloeb-og-tilbud/familieretlig-udredning> accessed 25 February 2022.

<sup>54</sup> Swedish Government Bill 2020/21:150 Ett stärkt barnrättsperspektiv i vårdnadstvister (n 20) 55.

<sup>55</sup> The Agency of Family Law Instruction VEJ no 9404 of 26 June 2020 pt 8.1.

<sup>56</sup> Norwegian Directorate for Children, Youth and Family Affairs, *Barn i familievernet*. Familievernets skriftserie 1/2011 8–10.

<sup>57</sup> For example, Peder Kjøs, *Obliatorisk foreldremekling i høykonfliktsaker. En kvalitativ studie* (Department of Psychology, University of Oslo 2016) 52–56.

<sup>58</sup> This fact is not manifested in policy documents, but it is latently present as an assumption that the mediators apply a therapeutic lens to the mediation process, see for example,



for specific populations, are attempts to provide for the needs of high-conflict families. As in Denmark, the mediation services also offer courses designed to meet the needs of high-conflict families.

The Finnish and Swedish systems are less diversified or well-defined. The decentralized organization of mediation services probably contributes to this situation. There are no services specifically for high-conflict families. From a dispute-system design perspective, these systems are unsatisfactory because the content of the processes and their target groups are not adequately defined and the relationship between the processes is unclear. To some extent this applies to the Norwegian system also, because the three-tiered mediation system is not formalized and is opaque to those who do not know the system well.

The family mediation systems in Nordic countries mainly consist of processes that can be characterized as mediation but also include some processes that do not fulfil the criteria of mediation; in addition, some processes are ill-defined, which renders them incomprehensible. Only the Danish system has services that are openly intended for high-conflict families, while similar services in the Norwegian system are available, but somewhat perplexing. Interestingly, the Danish and Norwegian systems are situated in different organizations—the former in the justice system, and the latter in the family therapy system—which also affects the type of services available. The Danish system does not explicitly offer therapeutic services, while the Norwegian system is embedded in a family-therapy approach.

### 3.3.3 Quality Standards in Nordic Family Mediation

We have limited information regarding the quality of Nordic family mediation. One reason is that although the outspoken goal of family mediation is to help parents agree on care arrangements, the rationale is to reduce the workload of the courts. The mediation process, the role of the mediation, and the criteria for success vary depending on the

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Heggdalsvik (n 26); Kjøs (n 57); Hilde Kåstad, Kjersti Halvorsen and Vibeke Samsonsen, 'Standardisering og profesjonelt skjønn i høykonfliktmekling: En kvalitativ undersøkelse av mekleres erfaringer med prosessmekling i høykonfliktsaker' (2021) *Fokus på familien* 285–302.

mediation model used. Still, reading Nordic regulation and policy documents through the lens of family mediation theory, reveals the striking absence of references to the extensive international body of research regarding both the mediation process and mediator interventions, as well as ethical and regulatory challenges. These circumstances are likely to have repercussions on the quality of the process and outcome, mediation process development, training of mediators, accountability of mediators and the organizations that provide mediation services, the perception of mediation among potential users, and so forth.

As discussed above,<sup>59</sup> Finnish family mediators believe that the lack of clear definitions for family mediation goals, the nature of the mediation process, and the role of the mediator, reduces the quality of mediation and hinders development of mediation methods and mediator training. Additionally, it renders adequate management of mediation quality impossible. Two Norwegian government-appointed committees have recommended a clearer demarcation between therapeutic and counselling services on the one hand, and services for separated families on the other, to enhance the quality of services.<sup>60</sup> They also proposed that the system of three types of mediation should be formalized.<sup>61</sup> This approach resonates with the idea of a system that consists of distinct processes that are designed for different target groups and stages of separation.

Mediation still seems to be considered primarily as an auxiliary to other professions and to family services, not a discrete service that requires specific skills. This is reflected in requirements for mediation training; only in Norway are mediators required to have some training,<sup>62</sup> and even there, the length and scope of the training is not regulated.

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<sup>59</sup> See text accompanying footnotes 20 and 21.

<sup>60</sup> Norwegian Government Official Report 2019:20 *En styrket familietjeneste* (n 3) 87; Norwegian Government Official Report 2020:14 *Ny barnelov – Til barnets beste [A new Children's Act—In the Best Interest of the Child]* 288.

<sup>61</sup> Norwegian Government Official Report 2019:20 *En styrket familietjeneste* (n 3) 119–121; Norwegian Government Official Report 2020:14 *Ny barnelov—Til barnets beste* (n 60) 238.

<sup>62</sup> Norwegian Decree on Mediation in Matters Related to the Marriage Act and Children Act of 18 December 2006 no 1478 [Forskrift om mekling etter ekteskapsloven og barneloven] Section 4.

Danish and Swedish regulations imply that mediation training is important, but it is not unequivocally required.<sup>63</sup> The Finnish rules require no mediation training; it is sufficient that the child-welfare supervisor is a social worker or has other suitable training.<sup>64</sup> Nordic countries would probably benefit from training and professional standards. At present, the Danish system appears to be in the best position to develop such rules and programmes because it has five distinct processes, and the services are centralized. The Association of Family and Conciliation Courts' Model Standards of Practice for Family and Divorce Mediation<sup>65</sup> could serve as a model for the other Nordic countries to ensure appropriate mediator skills for promoting child-friendly mediation processes and outcomes, distinct definitions of processes, and identification and management of ethical and professional challenges.

Pressure to settle is seldom discussed in policy documents on family mediation in Scandinavia; nor is this aspect addressed in family mediation regulation. As discussed above,<sup>66</sup> institutional constraints—for example, mediators not having adequate time in each mediation or mediators being (indirectly) rewarded for settlement, as well as personal and professional biases, such as therapist-mediators over-emphasizing the value of maintaining the client-therapist relationship—could obscure the mediation process. While mediation is usually considered superior to litigation, an excessive belief in the advantages of mediation could lead a mediator to be overconfident regarding the capacity of the parents to act according to the best interests of the child, and thus to overlook signs of an insufficient parenting capacity. Currently, no mechanisms are in place in Nordic countries to monitor whether families feel pressured to settle. Nor have mechanisms been implemented for addressing mediator pressure, such as cooling-off periods or complaint systems.

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<sup>63</sup> Danish Family Law House Act Section 1 para. 4; Swedish Government Bill 2020/21:150 Ett stärkt barnrättsperspektiv i vårdnadstvister (n 20) 78–79.

<sup>64</sup> Finnish Social Services Act [Sosiaalihuoltolaki/Socialvårdslag] 30.12.2014/1301 Section 27a.

<sup>65</sup> Association of Family and Conciliation Courts, 'Model Standards of Practice for Family and Divorce Mediation' <https://www.afccnet.org/Portals/0/PDF/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf?ver=ykuc9AnD6m4jF9IZs4PhkQ%3D%3D> accessed 11 January 2023.

<sup>66</sup> See text accompanying footnotes 24–30.

The lack of clarity in these processes could also reduce their appeal in the eyes of potential users. Although mediation is mandatory in Norway, many families have not used the services beyond the first mandatory hour-long session.<sup>67</sup> However, the introduction of the C-track for high-conflict families has made mediation more attractive for this group.<sup>68</sup> This illustrates the importance of clear designation of processes.

Considering the complexity of problems that high-conflict families face, these families would probably benefit from a system consisting of multi-professional services that can be combined to fit the needs of each family. While the Nordic mediation systems have become more diversified, services intended for high-conflict families are still fragmented and underdeveloped. Progress has been made, notably in Denmark and Norway, where the centralized organization of family mediation services appears to facilitate the process, and in Norway, where the devising of better services for high-conflict families has been a priority for several years.<sup>69</sup> These efforts have been fruitful, yet there is still significant need for further improvement.

### 3.4 Conclusions

Nordic family mediation systems have taken a leap forward during the past decade. Danish family mediation and dispute resolution have undergone transformational shifts towards differentiation, more accurately defined services, and increased child participation. With Norway and (to some extent) Sweden following suit. Differentiation could make the services more attractive to parents and more compatible with the needs of each family, and thus also more likely to provide processes and outcomes that are in the best interests of the child. Services targeted at the diverse group of high-conflict families have also emerged: screening for abuse and other challenges, the development of a specific mediation

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<sup>67</sup> Norwegian Government Official Report 2019:20 En styrket familietjeneste (n 3) 114.

<sup>68</sup> Norwegian Directorate for Children, Youth and Family Affairs *Årsrapport 2020* 40; Norwegian Government Official Report 2019:20 En styrket familietjeneste (n 3) 114.

<sup>69</sup> Norwegian Directorate for Children, Youth and Family Affairs, for example (n 56) (n 41).

process, and auxiliary services that can be combined with mediation or used separately.

Despite the developments, the Nordic systems are still incomplete; indeed, they are far from comprehensive and well-designed. To improve the system, Nordic family mediation needs solid theoretical foundations and should be firmly based on dispute-system design theory. Additionally, rigorous empirical studies are required to test whether the new models help families manage their conflicts, make better care arrangements, and give voice and choice to children—or whether the outcomes will largely be the same. Research on user satisfaction, compliance with mediated agreements, the impact of mediation on conflict levels and conflict resolution, and other related aspects is sorely needed. Measures to monitor and (when needed) reduce pressure to settle must also be implemented. More research is required to understand how the institutional design of mediation (that is, centralized vs. decentralized services, mediation as part of the social services or justice system) influences the mediation process and its long-term outcomes, and how best to coordinate—and when appropriate, combine—family, therapeutic, and dispute resolution services.

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