

# Children's Capacities and Role in Matters of Great Significance for Them

*An Analysis of the Norwegian County Boards' Decision-making in Cases about Adoption from Care*

*Amy McEwan-Strand*

Researcher III, Centre for Research on Discretion and Paternalism,  
University of Bergen, Department of Administration & Organization Theory,  
Norway  
[amy.mcewan.s@googlemail.com](mailto:amy.mcewan.s@googlemail.com)

*Marit Skivenes*

Professor, Centre for Research on Discretion and Paternalism, University of  
Bergen, Department of Administration & Organization Theory, Norway  
[marit.skivenes@uib.no](mailto:marit.skivenes@uib.no)

## Abstract

How do decision-makers in the judiciary approach children's capacities as set out in Article 5 of the Convention on the Rights of the Child? Children in public care who cannot be reunified with their birth parents may be adopted, but are children given agency in these cases that are highly important to the involved children? We examine *all* judgments on adoptions from care made in Norway in a six-year period (2011-2016) involving children aged 4-17 years old, a total of 169 judgments. These cases are decided after a two- to three-day hearing in the court-like County Board. The results of our analysis are discouraging because many children are absent in the decision-maker's justification and conclusion about adoption. Young children do not have their capacity assessed, and older children's capacity undergoes a shallow assessment at best, and typically only their opinion is mentioned. Age is commonly used as a proxy for competency and maturity, and the role children's opinion plays in the cases as well as in the decision-making is unclear overall. Possible explanations for this situation may be lack of guidelines for how to give children agency, that decision-makers do not have sufficient competency in assessing children's capabilities, and/or that decision-makers are not aware of their obligations or are not willing to give children agency.

## Keywords

adoption from care – CRC, Article 5 – evolving capacity – child's participation – children's agency – judiciary decision-making – Norway

### 1 Introduction

Boy (12) has expressed his views in the case, ... He wants to be adopted, and his wish will be assigned considerable weight, ... He has been preoccupied with his belonging to the foster home since he was 4–5 years old. There is no information about the boy's functioning or maturity, nor in the case otherwise, that would indicate that he doesn't understand what an adoption entails (NA44).

This excerpt illustrates a decision-maker's consideration of a boy's capacities and his opinion about being adopted from care. The cognitive functioning of the boy is emphasised, combined with his long-standing concern about belonging in the family. These factors, as well as others, are not uncommon for decision-makers to assess when considering if an opinion is rational and should be given weight (Archard and Skivenes, 2009, 2009a; Le Grand and New, 2015). However, it is difficult for decision-makers to assess when and how a child should participate in his or her own case, as much research has revealed (see for example Gal and Duramy, 2015; Magnussen and Skivenes, 2015; Porter, 2019).

The United Nations Convention on the Rights of the Child of 1989 (CRC) clarifies in Article 5 that states should ensure and protect children's right to be involved in decisions that concern them, from the earliest possible age, in recognising parents' and others' rights and responsibilities to give: '... in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.' The presumption in the CRC is that children are capable of being involved in matters of importance to them (GC 12, para. 20; Varadan, 2019). The right to express their views is accorded to all children 'capable of forming his or her own views' (CRC, Article 12). Thus, children shall have a form of agency in matters concerning them, which starts with the presumption that they have the capacity to participate and to make and to express their views, and that exceptions must be justified. It follows from the rights perspective that it is the child's capacities that should set the threshold for the child's ability to form an

opinion. Furthermore, it is an obligation to enable children to participate and be involved in matters concerning them, and in terms of giving due weight to a child's view or opinion, it is an obligation to assign increasing weight in accordance with the child's capacities and maturity.

For decision-makers in courts or public administration, the CRC provides clear directions on how to proceed. The crux is to interpret what is meant by capacities and to identify the capacity of a specific child. Developmental psychology provides us with general insight into children's abilities, although there are different schools of thought (Smith *et al.*, 2015; Miller, 2016). The typical proxy for children's competency and abilities is age. At age 18 years, an individual is by definition an adult, and by age 15 and 12 years, children in many states are defined as being capable of making certain decisions or their views should be given great weight. Although using age as a marker for competency in some areas makes sense, it is not recommended by the CRC committee (GC 12, para. 21) because it becomes a crutch and decision-makers fail to fulfil their obligation to assess each individual child's capabilities (see Magnussen and Skivenes, 2015; Hultman *et al.*, 2019).<sup>1</sup> In decisions and matters of direct concern for a child, it is clear that the *ability to form an opinion* is the criterion and the threshold that shall be met as to whether to involve a child.

In this paper, we examine decisions that are of direct concern and importance for children, namely decisions in which the judiciary must decide if a child should be adopted from care or continue their stay in public care. These decisions are made after a two- to three-day hearing involving all legal parties concerned by the decision. Typically, only children above 15 years old are present in the hearing, and younger children may have a spokesperson, and/or speak with a psychologist or social worker. It is the County Board's responsibility to ensure that all relevant information is included in the case (Section 19-6 of The Dispute Act 2005). We are curious to find out how the Norwegian system involves and includes the child when making these decisions. We have examined all judgments made by the County Social and Child Welfare Boards (County Board)<sup>2</sup> in the period 2011–2016 in Norway in which the child is four years or older (n=179 children, n=169 cases). We first identified if the County

1 This does not mean that age should never be used as a proxy for competency, as discussed by, for example, Archard (2015). Setting an age limit for when a person can apply for a driver's licence is efficient and cost effective.

2 Norway has a unitary court system, and establishment of the Social County Board in 1994 constituted an anomaly because the County Board is a "court-like" decision-making body. However, the County Boards are considered a "court" according to ECHR, Art. 6 due to its independent position and procedural guarantees. See Skivenes and Søvig (2017) and Skivenes and Tonheim (2016) for details of the County Board's working methods.

Boards considered the child's competency by assessing his or her ability to form an opinion or view about the matter at stake. If yes, what factors do the County Boards rely on? Second, we identify if the County Boards have presented the child's view and, if yes, what this view is and how it is interpreted. Third, we analyse if and how the County Boards assign weight to the child's opinion.

The structure of the paper is as follows: in the next section, CRC, Articles 5 and 12 are outlined. Thereafter, the theme of adoption from care and the Norwegian decision-making system are presented. Following that, the legal platform and theories of what promotes and hinders children's involvement are presented, including an overview of research on children's involvement in adoption proceedings. A section on methodological approach, data material and ethical approvals follows. We then present findings, followed by a discussion section and concluding remarks.

## 2 Evolving Capacities – Rights and Theory

### 2.1 *Evolving Capacities*

Article 5 of the Convention on the Rights of the Child is titled, "Parental guidance and the child's evolving capacities" and reads as follows:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

For our purposes, we are concerned with the concept of children's *evolving capacities*, and in one of the few discussions of the concept, UNICEF 2005, three interlinked strands are identified: (1) the developmental dimension of the convention, (2) the participatory/emancipatory dimension, (3) the protective concept of evolving capacities. These are presented as conceptual frameworks through which the concept should be understood and examined. The participatory/emancipatory dimension is especially interesting for our purposes because it imposes on states a duty to respect the rights of children to have their capacities recognised in accordance with their level of competence, and to shift the level of responsibility for the exercise of rights from parents to children accordingly (Landsdown, 2005: 15). In this respect, we cannot mention Article 5 without Article 12 of the CRC, on the child's right to be heard, which likewise establishes children as agents with autonomy, with the

right to participate in matters affecting them (see also Archard and Skivenes, 2009). Varadan (2019) suggests that the concept of evolving capacities has been treated as (1) an enabling principle, (2) an interpretive principle, and (3) a policy principle (Varadan, 2019: 11). In terms of being an enabling principle, the concept of evolving capacities serves four functions: (1) affirming children as rights holders and recognising their increased capacity and agency as they grow, (2) supporting children's agency in decision-making, (3) recognising that all – even very young – children should be engaged in the exercise and promotion of their own rights, (4) clarifying the duties of parents and legal guardians in supporting and guiding their children's enjoyment of their own rights under the CRC (Varadan, 2019: 317).

We find two main messages from the literature on Article 5 of the CRC to be of particular importance: first, the imperative to move away from age as determinant but rather focusing on capacity (Landsdown, 2005). As discussed elsewhere (for example Archard, 2005; Archard and Skivenes, 2009; Daly, 2018), age as a proxy for a linear progressive development in terms of maturity and competency to apply equally to all children is highly problematic. Following the CRC, decision-makers in adoption proceedings have an obligation to assess each child's ability to form an opinion and make sure the child is involved accordingly in the proceedings.

Second, the *rights* of children are the same, but their needs and capacities vary (Landsdown, 2005). The balance to be struck is recognising children as autonomous rights holders with respect to their relative capacity, without exposing them to responsibilities prematurely. It needs also to be said that evolving capacities is not about rights as such, rather, it concerns the *exercise* of rights, and where the responsibility to do so lies (Landsdown, 2005). While the concept recognises children as active agents with autonomy, it also recognises their need for protection, and how competency and the need for protection will vary between children and situations, and evolve as children grow both with age and life experience. A summary of how to think about children's involvement, which we concur with, is laid out in a piece by Archard and Skivenes:

... we do not seek the views of the child simply in order to demonstrate the child's possible competence to decide for himself or herself; nor only so that they might play a consultative role in helping adult decision-makers judge what is in the overall best interests of the child. We think that the expression by a child able to do so of his or her views has independent value as an essential element in the decision-making process. The value derives from the fundamental respect a child is owed as a distinct individual in that process (Archard and Skivenes, 2009: 392).

Moving forward from this platform, the question is how children may be barred from involvement and how they can be involved in decision-making.

#### 2.1.1 Barriers for involving Children

There are several reasons why decision-makers in the child welfare service and in courts do not involve children adequately. We do not have systematic research knowledge about this, but some explanations do emerge. In Skivenes (2018), five barriers for decision-makers that hinder the involvement of children are presented. The first one is about decision-makers' (and adults') desire to protect children from potential re-traumatisation and from reliving pain they have experienced. Furthermore, decision-makers do not want to place the child in a difficult conflict of loyalty, or further burden the child. They have thoughts of the child as vulnerable, and that they should not give the child additional experiences they cannot handle. Second, many decision-makers believe that children do not have sufficient ability and maturity to get involved or to have reasonable perceptions about a case or the matters at stake. Third, there may be a perception among decision-makers that it does not matter to the decision whether the child participates. If the risk to the child is considered high, the decision-makers may think that one must do what is necessary – regardless of what the child thinks. Fourth, decision-makers lack the competence and training in talking about difficult and sensitive issues with children. Finally, fifth, there are not sufficient organisational structures or bureaucratic case management rules for involving children, and the decision-makers may have high time pressure and physical surroundings designed for interacting with adults (see Skivenes, 2018 for details; cf. also Hultman *et al.*, 2019). The first three barriers are about individual features and attitudes, whereas the final two barriers are about structures for building competence through education and training, as well as in organisations.

#### 2.1.2 Involving Children in Decision-making

A child can be involved in various ways: directly if the child provides oral testimony or submits a written statement, or indirectly through the intermediary of an adult such as a specially trained legal advocate or a relevant professional. Clearly, in any interaction with children, one seeks the child's authentic voice and decision-making must be a deliberative process, in the sense that arguments and new information will influence decision-makers' opinions and considerations (Archard and Skivenes, 2009, 2009a). As much scholarship has demonstrated, children are involved in many ways, some experience real involvement, while some are on the opposite end, experiencing tokenism or simply exclusion (Hart, 1992; Shier, 2001).

Involvement of children (and any person for that matter) in decision-making aiming to withstand rational critique (see Habermas, 1981; Eriksen and Weigård, 2004; Archard and Skivenes, 2009; Magnussen and Skivenes, 2015), must ensure that all participants involved in the case must be given the opportunity to participate. There must be an appropriate location for the presentation of opinions and arguments, and important differences between the participants in their ability to articulate a point of view, advance a claim or understand the terms of the case should be compensated. The decision-making process should be transparent so that everyone participating hears everything that everyone else has to say, and the process must be accountable to avoid peculiar customs and illegitimate arguments. In the methods section, we operationalise how to identify children's involvement in a written judgment, but first, we will address the scholarship on adoptions from care and children's involvement, followed by an outline of the Norwegian system on adoptions from care and the research available on this theme.

## 2.2 *Children's Involvement in Adoption Proceedings*

There is huge variation across European countries in their legal regulation of children's involvement in adoption proceedings, and the revised European Convention on the Adoption of Children (2008)<sup>3</sup> states that *if* the child's consent is required, the age should not be set higher than 14 years (Article 5(1)b). Some countries in Europe, for example Switzerland and Ukraine, do not operate with an age limit, but solely require an assessment of the child's capacities to consent or not. In some countries, for example England, Ireland and Austria, the child's consent or lack thereof is at no point legally determinative (Fenton-Glynn, 2013).

Although the CRC does not set as an *obligation* that the child should determine to be adopted or not (Fenton-Glynn, 2013: 593), it is clear that it is an obligation that states hear the child's opinion and give it due weight according to age and competency. While states vary greatly in how they regulate this, age as a proxy for competency is widespread throughout Europe. Thirty European countries use only age to determine if consent to an adoption is necessary: age 10 years in, for example, Estonia, Lithuania, and Russia; age 11 years in Malta; age 12 years in, for example, Belgium, Portugal, and Spain; age 13 years in Poland and France; age 14 years in, for example, Germany and Italy; and age 15 years in, for example, Monaco (see Fenton-Glynn, 2013: 594-5 for a full overview). Some countries – Finland, Hungary and the Netherlands – have chosen

3 Ratified by 11 countries (in 2019): Belgium, Czech Republic, Denmark, Finland, Germany, Malta, Netherlands, Norway, Romania, Spain, Ukraine.

a combination of an age limit that can be deviated from if a younger child is found mature and competent. Other countries, Denmark, Sweden, Iceland and the Czech Republic, allow for dispensing of the requirement of consent from the child at a set age, based on a best interests' consideration (Fenton-Glynn, 2013). In Norway, the country from which we have empirical material, a child must consent to adoption if 12 years or older.

To our knowledge, there is little research on children's position and views in cases about child protection adoptions or other types of adoptions (see Helland and Skivenes, 2019). Tregagle *et al.* (2019) recently published a study on the adverse childhood experiences of vulnerable children adopted from care in Australia. Palacios and a wide interdisciplinary group of researchers (2019) argue that adoption is an important and legitimate model for care of children when made within a rights-and-ethics framework that emphasises children's best interests. Two studies directly address children adopted from care, Berg (2010) interviewed 12 children adopted from care in Norway about their experiences, but this did not relate to court proceedings. Thomas *et al.* (1999) interviewed 41 children adopted from care in England, and they were also asked about the court proceedings. This study shows that half of the children were concerned about the court proceedings, both in terms of the actual court hearing and meeting a judge and being in the court-room, but also worries about the outcome of the proceeding and if the judge would, for example, say no to an adoption and what would happen then (69). The long waiting period before the court hearing was also mentioned as difficult for about half of the children (70 ff). In conclusion, questions about if and how children are involved, whether children provide their consent, whether children have views on foster home versus adoption as a placement alternative, if children have a view on their contact with the birth family, are to a large degree left unanswered (Helland and Skivenes, 2019). There is research on children's involvement in child protection cases in general and also on legal proceedings, such as the Norwegian Expert by Experience group, the Change Factory, which has collected information from 130 children (Expert by Experience Report, 2019). We return to these findings in the discussion section.

### 3 Background – Adoption from Care in the Norwegian Child Protection System

Research on Norwegian adoption cases is scarce. In Norway, around 50 children are adopted from care each year and about 8,000 children are at any given day placed out of home due to a care order. A general outline of adoption from



care in Norway is presented in Skivenes and Thoburn (2016) and in Helland and Skivenes (2019; in press).<sup>4</sup> Adoption from care is regulated by the Norwegian Child Welfare Act 1992 (section 4-20) as well as the Adoption Act 2017 (section 12, second sentence). The Child Welfare Act states in Section 4-20, Deprivation of parental responsibility. Adoption, that:

If the county social welfare board has made a care order for a child, the county social welfare board may also decide that the parents shall be deprived of all parental responsibility. If, as a result of the parents being deprived of parental responsibility, the child is left without a guardian, the county social welfare board shall as soon as possible take steps to have a new guardian appointed for the child.

When an order has been made depriving the parents of parental responsibility, the county social welfare board may give its consent for a child to be adopted by persons other than the parents.

Consent may be given if:

- a) it must be regarded as probable that the parents will be permanently unable to provide the child with proper care or the child has become so attached to persons and the environment where he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her; and
- b) adoption would be in the child's best interests and
- c) the adoption applicants have been the child's foster parents and have shown themselves fit to bring up the child as their own and
- d) the conditions for granting an adoption pursuant to the Adoption Act are fulfilled.

When the county social welfare board consents to adoption, the Ministry shall issue the adoption order (Section 4-20, Norwegian Child Welfare Act 1992).

Thus, the legislation provides for adoption of children placed in long-term public care, provided it is in the child's best interests. Post-adoption contact with birth parents may be a formalised arrangement decided by the County Board (see Section 4-20 a). The legislator has assumed this contact to be limited, stipulated in extent by the decision-maker, and can only be granted if the adoptive applicants agree and it is considered in the child's best interests.

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<sup>4</sup> An outline of the Norwegian child protection system can be found in Skivenes (2011) and Falch-Eriksen and Skivenes (2019), and details on various processes of child protection removals are specified in Skivenes and Søvig (2017).

### 3.1 *County Board Proceedings*

The child protection service prepares an application for an adoption from care, and the County Boards make the decision. The County Board typically consists of three decision-makers: a lawyer (the Board's chair), an expert member and a lay member. The main principles for the proceedings and strict due process requirements are outlined in the Child Welfare Act of 1992, Section 7-3. Typically, decision-makers in adoption proceedings will have been provided with extensive written material by the public and private parties in the case. However, children are parties to the case only when they are 15 years or older (or younger if the case is due to the child's own behaviour). There will be an *in camera* hearing of two to three days ensuring that all arguments are heard and addressed. The County Board has an obligation to ensure that, 'an independent and genuine assessment of the basis for decision-making' (Child Welfare Act of 1992, Section 7-3 e) is undertaken. The chair and the co-decision-makers meet after the last day of hearings, discuss the case, and make a decision. Typically, in adoption cases these decisions are unanimous (Helland and Skivenes, 2019). The written judgment should be ready no later than two weeks after the hearing and must include all relevant reasons and arguments on which the County Board has based its decision. The written judgment will be around 10–15 pages long.

### 3.2 *On Child Participation in Adoption Proceedings*

In adoptions from care, the Norwegian Child Welfare Act 1992 sets out the general rules of procedure. In accordance with Section 6-3 of the Act,

A child who has reached the age of 7, and younger children who are capable of forming their own opinions, shall receive information and be given an opportunity to state his or her opinion before a decision is made in a case affecting him or her (Section 6-3 first sentence, Norwegian Child Welfare Act 1992).

The law further specifies that, 'Importance shall be attached to the opinion of the child in accordance with his or her age and maturity' (section 6-3 second sentence). The Adoption Act (section 9, second paragraph) also sets out requirements on children's participation in adoption proceedings, largely echoing that of the Child Welfare Act Section 6-3. However, the Adoption Act (*ibid.*) further specifies that children aged 12 years or older can only be adopted with their consent. This does not apply, however, if the child, due to mental disability or physical or mental illness, is clearly not able to understand what consent entails. The requirement of consent from children aged 12 years or older was

also stated in the previous adoption law of 1986 (Norwegian Adoption Act 1986, section 6-2), which was repealed by the 2017 legislation.

The requirements for children's involvement are further anchored in the Norwegian Constitution §104, which states that children – regardless of age – have the right to be heard in questions relating to them and, in so doing, consideration should be had to their age and development. Moreover, the Norwegian Children Act 1981 (section 31) sets out children's right of co-determination, providing that children who are able to form their own point of view in matters that concern them shall have their opinion considered before someone makes a decision on their personal situation. This Act echoes the guiding age of seven years, stating (*ibid.*) that, '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', and 'When the child has reached the age of 12, the child's opinion shall carry significant weight.'

Thus, it is clear that children's involvement is extensively and cohesively provided for in Norwegian legislation concerning adoption from care. The Norwegian legislation does not set out a strict age limit as such, rather, a combination of age, capacity and maturity is to be considered when assessing whether the child should be involved, i.e. receive information and state their opinion. However, age is important because the ages 7 and 12 years are key in assessing the maturity of the child. While age 12 years is an absolute age limit for consent, with only limited exceptions, age 7 years is worded as a guiding age; children above this age *should* be heard, while children below this age *may* be heard, all the while assessing their capabilities. The law does not specify the issue of consent for children below the age of 12 years, rather, the law provides an obligation to involve the child, not a duty placed on the child that she or he should have to decide on the outcome.

In County Board proceedings, children will not be directly involved in the proceedings unless they are a party to the case at age 15 years and older. This means the decision-makers in the County Board do not meet the children, and they are dependent on the information provided by the parties in the case. A spokesperson may also speak with the child to identify the child's view on the situation and give testimony before the County Board (in person or by video conference). A spokesperson will typically meet with the child a couple of times for a few hours. In Enroos *et al.* (2017), details on the spokesperson system are outlined, and a finding from this study is that the spokesperson arrangement is not sufficiently resourced to provide for children's involvement on their own standing (*ibid.*). The arrangement with a spokesperson is much used for children aged seven years and older, but rarely for children under seven years (Magnussen and Skivenes, 2015).

#### 4 Methodological Approach

The study reported here is part of a larger project relating to decision-making in child protection, funded by Bufdir (The Norwegian Directorate for Children, Youth and Family Affairs) and the European Research Council. Detailed information about ethical approvals and data collection procedures is available in Helland and Skivenes (2019). Permission to access the cases was given by The Norwegian Data Protection Authority and the Council for confidentiality and research, and the project is reported to Data Protection Services and the University of Bergen's Ombudsman for Personal Data and Privacy. Only select named researchers could access the cases. Our data material consists of written judgments. We have examined all judgments on adoption from care decided by the County Boards over a six-year period (2011-2016). The written decisions are statements that consist of four parts: 1) an objective (non-contested) summary of the case, then 2) and 3) the two (usually) contested parts, each with a presentation of the viewpoints and the arguments of the parties (public and private), and 4) finally the County Board's considerations and conclusion(s). The judgments are required to include all information and arguments relevant to the decision-maker's decision (see Section 19-6 of the Dispute Act 2005; cf. Skivenes & Tonheim, 2017). Thus, if children have been assessed or their views have been considered, this should be evidenced in the County Board's written justification of its decision (read more here: <https://www.discretion.uib.no/wp-content/uploads/2019/10/FORMAL-LEGAL-REQUIREMENTS-FOR-JUDGMENTS-IN-CARE-ORDER-DECISIONS-IN-8-COUNTRIES.pdf>). In the analysis of the data material we have only used the County Board's considerations and conclusion(s), each typically three to five pages, to examine if and how the child's capacities and views have been considered by the decision-makers.

In the six-year period covered, a total of 283 cases have been decided on adoption from care, involving 302 children. For our study, we have included all cases with children between 4 and 17 years ( $n=169$  cases and  $n=179$  children), and excluded children who have not yet turned 4 years ( $n=122$  children;  $n=120$  cases). We collected all the information about the children in these cases. Our research approval<sup>5</sup> only allows us to keep a limited sample of cases for a longer period, and thus we deleted all cases for the years 2012-2015 after extracting the information about children in the case. Thus, we cannot review these cases again, for example if we wish to extract new information. The reason we

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5 Please read here about storage of sensitive data material: <https://www.discretion.uib.no/wp-content/uploads/2019/11/SAFE-STORAGE-OF-CHILD-PROTECTION-JUDGMENTS-.pdf>.

excluded cases with children younger than four years is that we believed it likely that they would not be involved. To check if this assumption is true, we conducted a systematic check of all the cases with children below four years of age from the years 2011 and 2016 (the years we have full case material of all age levels). A total of 34 children were below the age of four years old, and in none of these cases was the child's opinion mentioned, nor had the child been appointed a spokesperson. In two cases (both from 2016), there had been an assessment of the child's ability in the sense that it was stated that due to the children's young age, their opinion would not be heard.

We used an analytical and conceptual strategy (Coffey and Atkinson, 1996: 26) by gaining an overall impression of the County Board's reasoning, and thereafter specifically identifying a) whether the child's views and opinions are mentioned by the Board in its assessment; b) how much weight the Board will give the child's views and opinions in its assessment (no weight, weight not mentioned, weight mentioned but unspecified how much, some, a lot); c) what the child's opinion and view towards adoption is (positive, negative, neutral). In Table 1 below, the codes and code descriptions are set out. To ensure the validity of the interpretations and categorisations, both researchers were involved in discussing and determining the codes, and one researcher was responsible for the coding. The text analysis program Nvivo 12 Pro was used for the coding process. The reliability of the coding was secured by a third person independently checking the coding. Only a few differences were detected, and these were discussed and then given a final code.

TABLE 1 Code descriptions

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**Whether the board assesses the child's capabilities:** Statements in which the County Board has assessed the child's ability to form an opinion, or the child's ability to be involved in the process. We also include here the indirect assessment of abilities, when an opinion is in fact included. We code "yes" if the child's abilities are assessed by the board, "no" if not.

**Whether the board mentions and presents the child's views and opinions in the case:** References to direct statements from the child to their spokesperson, or indirect statements where the child has expressed their opinions to other persons (parents, foster parents, child welfare services etc.). We code "yes" if the child's opinion is mentioned by the board, "no" if not.

**Whether the board considers and relies on the child's opinion in their decision:** Includes statements from the County Board on whether they will assign weight to the child's opinion in their decision. This can be direct statements from the board that they will or will not rely on the child's

TABLE 1 Code descriptions (*cont.*)

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opinion, e.g. 'the perhaps most important argument for adoption, in this case, is still the child's clear and well-reflected wish to be adopted'.

Indirect statements may express an evaluation on the board's part of the child's opinion, such as, 'the board considers that child X has not understood what adoption implies'. We interpret this as the perception that the view is rightly held, implying it will not be relied upon by the board. We register results in the following six categories:

- Yes: the board indicates that the opinion is relied upon but there is no mention of the degree
- Yes – a lot: the board indicates that the opinion is relied upon and weighed heavily
- Yes – some: the board indicates that the opinion is relied upon to some extent
- Not mentioned: the opinion is merely mentioned by the board with no indication of whether it is relied upon<sup>a</sup>
- No: the opinion is not relied upon, either by express statement or because the opinion is devalued by the board
- Not relevant: the opinion is not mentioned by the board

**The child's opinion towards adoption:** Statements that describe what the child's opinion towards adoption is, categorised according to positive, neutral, and negative.

- Positive: the child is positive towards adoption. This can be assessed either from direct statements, or indirect statements or actions.
  - Direct statement: 'the child has been heard in this case, as is stated above. He wants to be adopted and his wish will be assigned considerable weight'.
  - Indirect statement: 'the child has been preoccupied with not having the same last name as the foster parents, and she is very quick to point out specifically that she belongs to the foster family and is a part of the family'.
  - Neutral: there is no indication of whether the child is positive or negative to adoption, or there is indication that the child is unsure.
  - E.g. 'the child did not have any opinions on what adoption entails, but did express that she belongs to the foster home and the network around them'.
  - Negative: The child is negative or has doubts concerning adoption.
  - E.g., 'in her latest conversation with the spokesperson, the child expressed she did not want to be adopted if this means less contact with her father'.
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<sup>a</sup> There are nuances as, for example, reference to a repeated wish over the years could be interpreted as implicitly assigning weight. However, we do not stretch the interpretation on behalf of the County Board, and thus categorise this as not mentioned.

We use quotes to illustrate typical statements and findings from the material. The quotes are de-identified, and we sometimes also alter gender to ensure anonymity. Cases are referred to by numbers, and we have ordered the cases in alphabetical and chronological order, starting at number 1 for the first case in 2011 (by alphabetical order) and number 169 for the last case in 2016. All translations from Norwegian to English were done by the authors and have been independently checked by a third person. In an online appendix, we have included additional findings for readers who have an interest in the details of the material: <https://www.discretion.uib.no/wp-content/uploads/2019/11/McEwan-Strand-Skivenes.-Childrens-Capacities.pdf>.

There are limitations to our study. We do not learn if the children themselves feel they have been involved. Although our data material is comprehensive, we have only examined the written judgments and do not have access to the full case files submitted to the County Boards. We do not know if the County Boards have included children or met with the children without this being mentioned in the judgments. However, our enquiries about this to the County Boards indicate that this rarely happens. Our data collection procedure, extracting information for a specific part of the judgments, hinders us checking other parts of the judgment for 2012–2015. We experience this to be a limitation in regard to the consent issue of the findings because the County Board may have mentioned this in the facts section, although we do not have reason to believe this has happened on a general basis.

## 5 Findings

The 179 children in our sample were on average 7 years old at the time of the adoption and included 88 boys and 91 girls. A total of 171 (95 per cent) of the children were adopted. Most of the County Board decisions (163 out of 169) were unanimous. The questions we address in the findings section are threefold. First, we examine if the County Boards have considered the child's abilities to form an opinion or view about the matter at stake and, if so, what factors do the County Board rely on. Second, when the County Boards present the child's opinion, what is the content of the child's opinion, and how does the County Board interpret the opinion. Third, we examine if and how the County Board gives weight to the child's opinion.

### 5.1 *Ability to Form an Opinion?*

The County Board undertook some form of assessment for half of the children (n=90), leaving 89 children excluded (see Table 2). Most of these children had

their opinion mentioned (n=73), and thus the County Board did not make an explicit assessment of their capacity to form an opinion. For only 17 children, the County Board undertook an assessment of the capacity of the children. Of these, none were deemed to have the ability to be involved or to have their opinion heard. Sixteen children were too young, according to the County Board, without any additional reason. These children were on average 4.3 years old (median age 4 years). For one of these children, the Board expresses what seems to be a direct misrepresentation of the law: 'Child x is only four years old, meaning there is no requirement for her to be given the opportunity to provide her opinion in this case' (NA153). However, the law requires an assessment of a child's abilities to form an opinion, regardless of age, as we have set out above. For one child (out of the 17 children) the County Board provides a reason for its assessment of the child's capacity that is directly related to the specific child in the case: 'It has been shown that Child x at this time is not able independently to form an opinion on whether or not he wants his foster parents to adopt him' (NA81).

TABLE 2 Children's ability assessed or view included. N=179 children.

Child's age	Number of children	Ability assessed or child's opinion included			
		Yes (N=)	Yes (%)	No (N=)	No (%)
All ages	179	90	50%	89	50%
4	50	13	26%	37	74%
5	33	9	27%	24	73%
6	29	7	24%	22	76%
7	7	6	86%	1	14%
8	15	15	100%	0	0%
9	12	10	83%	2	17%
10	7	7	100%	0	0%
11	3	2	67%	1	33%
12	8	7	88%	1	12%
13	4	4	100%	0	0%
14	2	2	100%	0	0%
15	6	5	83%	1	17%
16	1	1	100%	0	0%
17	2	2	100%	0	0%



For those 89 children who were absent from the County Boards' considerations, without a justification for this exclusion, most of the children ( $n=83$ ) were between four and six years old, indicating that the County Board does not consider it a legal obligation to assess the abilities or listen to children below the age of seven years. Six of the excluded children ranged in age from 7 to 15 years old. The 15-year-old did have legal representation in his/her case, but nevertheless his/her opinion was not mentioned by the County Board in its assessment. Furthermore, while children above the age of 12 years must consent to adoption, we see that for one of the 12-year-olds in this sample, the child's opinion, views or consent are absent from the County Board's reasoning. We return to the issue of consent below.

For seven children, the County Boards seem to consider the right to be involved as negative for the child, as illustrated in these two quotes, both concerning children aged four years old:

The boy has been too young to be involved in the process so far. In not too long, the boy will reach the age where the law requires that he has the right to be heard in any future proceedings. In the County Board's opinion, this right on behalf of the boy seems more like a disadvantage, rather than a benefit (NA135).

The mother has also stated that it might become natural with more contact in future if the child wants to. It might, therefore, be important to consent to adoption before the child is at an age where she will need to be involved in the proceedings before the County Boards or courts (NA119).

According to the County Board in these cases, reaching an adoption decision before the child is old enough to be heard is positive, because it would protect the child against the insecurity of having to be involved in future processes.

### 5.2 *Opinion included in the Judgments?*

Around 40 per cent ( $n=73$ ) of the children in the adoption judgments were considered to have the ability to form an opinion, whereas, for 59 per cent ( $n=106$ ) of the children, there is no mention of the child's view or opinion by the County Board. This is correlated with the age of the child because younger children's views are mentioned to a lesser degree, see Table 3.

As can be seen from the table, most children aged seven years and above did have their opinion mentioned by the Board, with the exception of six children.

TABLE 3 Overview of children's view reflected in judgment in adoption cases. N=179 children

Child's age	Number of children	The opinion is included. N/%	The opinion is excluded. N/%	View is mentioned and given weight N=number of children
All children	179	73 41%	106 59%	53
4	50	1 2%	49 98%	1
5	33	4 12%	29 88%	3
6	29	7 24%	22 76%	3
7	7	6 86%	1 14%	1
8	15	15 100%	0 0%	9
9	12	10 83%	2 17%	8
10	7	7 100%	0 0%	7
11	3	2 67%	1 33%	2
12	8	7 88%	1 13%	5
13	4	4 100%	0 0%	4
14	2	2 100%	0 0%	2
15	6	5 83%	1 17%	5
16	1	1 100%	0 0%	1
17	2	2 100%	0 0%	2

Of these, three judgments made no reference to the views or opinions of the child at all (children aged 9, 11, and 12 years), and it would be difficult to point to any reason as to why their opinion would not be mentioned. In the case concerning a child aged 15 years, the child did have legal representation, thus the view of the child was present in the judgment, but was not part of the Board's assessment of the case. In the two remaining cases, there was mention of the child's spokesperson, but no mention of the child's opinion. In one case (child aged nine years), the child had been offered a spokesperson but refused. In the second case (child aged seven years), the child did have a spokesperson, and the Board concluded that nothing the child had told the spokesperson would indicate that adoption would not be in the child's best interest, without making any further mention of what the child's views might have been. Thus, it would seem that this particular Board holds the view that the spokesperson's task is to assess whether adoption would be in the child's best interest, and not necessarily to ascertain the child's views or opinions.

### 5.3 *Consent to Adoption*

Children must by law consent to adoption when 12 years and older,<sup>6</sup> and for the judgments in our sample, consent could have been provided by the child orally or in written form and we expect it to be mentioned by the County Board in the judgment. A total of 23 children in our sample should give consent, but for only three children was this mentioned in the County Board's reasoning for its conclusion and in one case it was mentioned in the facts section of the case. For 21 children, their views on adoption were presented (20 expressed a positive view on adoption), one had legal representation and one was absent from the County Board's reasoning.

### 5.4 *The Views of the Children*

Out of the 73 children who had their views represented in the Board's assessment, almost all (n=70) expressed that they wished to be adopted. Two opinions were neutral and one did not express a wish to be adopted if this meant reduced contact with the biological father. An example of the County Board's characteristics of an opinion of a 15-year-old girl is the following:

She wants to be a full member of a family she is happy with, and who cares a lot for her. The security of living in a predictable home, and a future with the people she appreciates, weighs heavily (NA42).

Another girl's opinion, age nine years, was reiterated in the following way:

The child calls her foster parents mum and dad. I tell her that if they become her adoptive parents, she will be their child forever. She says she is aware of this, and this is what she wants (NA75).

A boy's view, age 15 years, was referred to like this:

The perhaps most important argument in favour of adoption, in this case, is still the boy's clear and well-reflected wish to be adopted. He wants to be fully integrated into the family, take their name, and be like "other children" (NA145).

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6 With the new law of 2017, it is specified that consent must be provided in writing, whereas the previous legislation of 1986 did not specify this requirement.

Quote from the child, age nine years, who did not wish to be adopted:

In his last conversation with the spokesperson, Child x expressed that he did not want to be adopted if this means a reduction in contact with his father. The County Board interprets this statement as an indication that continued contact with father is more important to Child x than adoption (NA43).

### 5.5 *Assigning Weight to the Child's Opinion*

The County Board has an obligation to give the child's opinion due weight according to the age and maturity of the child. We have found that a total of 73 children's views (41 per cent of the total sample) are included in the County Board's reasoning, see Table 4 below, and of these the County Board states that they rely on the child's view for 53 children (73 per cent) in their decision-making. For 11 out of 73 children (15 per cent), the County Board does not mention any weighing of the child's view, and for 9 children out of 73 (12 per cent), the County Board states expressly that it will not assign the child's opinion any weight.

Focusing on the 53 children for which the County Board relies on the child's view, the County Board in most instances (n=34) just states that it will assign the child's view weight, without specifying *how much*, as this quote about a nine-year-old child illustrates: 'The child is nine years old, and the County Board has assigned his opinion weight'. The County Board can also express its reliance on the child's opinion in a general way, as this quote about an eight-year-old child illustrates: 'The County Board relies on the fact that the child has spoken about adoption, both with the social worker and with the foster parents.' For 13 children, the County Board states that the child's opinion is assigned a lot of weight, as these two illustrative examples about a 12-year-old and a 10-year-old, respectively, show:

Child x has stated his opinion in this case, as stated above. He wants to be adopted, and his wish will be assigned considerable weight (NA44).

According to the spokesperson, the Child has expressed that, 'she would very much like to be adopted because then it will be for real, she is eager and repeats this several times'. The child sticks to this, even though this means stopping contact with the biological mother. The statement relates naturally to the impression the child gives of her attachment to the foster family and her consciousness of her own situation there. In light of

this, the Board considers that her opinion should be assigned considerable weight, even though she is only ten years old (NA102).

For five children, their opinion is assigned some weight by the County Board, as this statement about an 8-year-old child illustrates:

The child has stated to the spokesperson that he wants to live with the foster parents until he is grown up. He wants someone to say that this is where he will stay. The board will assign this opinion some weight, due to the child's age (NA106).

For 11 children, there is no mention by the County Board if the opinion is relied upon, as illustrated by the following quotes from a case about a six-year-old boy and an eight-year-old girl:

The boy has been appointed a spokesperson. In conversation with the spokesperson, the boy explained that he wants to continue to live in the foster home until he is an adult (NA16).

In conversation with the County Board members, the girl has stated that she wants to live with mum forever. She knows she is a foster child, but does not remember meeting her biological parents (NA101).

For nine children their opinion is not assigned weight by the County Board, either by explicit statement or because the opinion is devalued.

TABLE 4 Overview of the weight the County Board has given the opinion of the child. N=73 children

Code	Result	Number of children	% of N
<b>The boards' weighing of the child's opinion or views in their decision</b>	<b>Yes</b>	<b>53</b>	<b>73%</b>
	<i>Yes</i>	34	47%
	<i>– unspecified</i>		
	<i>Yes – a lot</i>	14	19%
	<i>Yes – some</i>	5	7%
<b>Not mentioned</b>		<b>11</b>	<b>15%</b>
<b>No</b>		<b>9</b>	<b>12%</b>

We have already seen that age is an important marker for involvement, and there is a distinct difference in age groups as to the degree to which the Board will rely on the opinions of the children, see Table A in the Appendix. For the children that are aged four up to seven years old and the very few that had their views mentioned, just over half ( $n=7$ ) of these were relied upon by the Board in their decision, whereas for the remaining ( $n=5$ ), the assigned weight was not mentioned. None of these opinions were discarded by the Board.

In 23 per cent ( $n=9$ ) of the decisions concerning children aged 7 up to 12 years old, the County Board discarded the child's view. The County Board justified discarding all of these with the child's lack of understanding of what adoption entails, even though the child indicated a positive attitude towards adoption. This is illustrated by the following quotes:

The child's opinion will be taken into account in view of the child's age and maturity, cf. CWA Section 6-3. ... The expert, Psychologist 1, has spoken to Boy (8) about his views towards this case. Boy was very clear in that he wants to live in his current home, and he does not want to move to either of his biological parents. Psychologist 1 tried to explain to the boy the difference between adoption and a foster placement, but the Board finds that Boy did not understand the implications of this and that he did not express any clear views in relation to this. Boy expressed that contact with both parents is okay, and the amount of contact is fine (NA17).

Girl's (seven) wish to stay in the foster home and to have the same last name as the foster family, will not be decisive. She stated where she wanted to live, not that she wanted to be adopted (NA21).

For the children aged 12 years or older, no opinions were disregarded by the Board, whereas for 2 (10 per cent), the County Board does not mention weighing the opinion, as the following quotes illustrate:

Girl (12) has told the spokesperson that she does not actually think she will have to move, but she is still afraid of this. She has repeatedly expressed a wish to be adopted by her foster parents in the last years (NA59).

Girl (12) has become more aware and has expressed a wish to be adopted by her foster parents. As the situation is today, she does not want contact with her grandmother. She does not want to be confronted by her grandmother with questions on why she wants adoption. She wants to see her biological brother (NA23).

In sum, the County Board states that it assigns weight to the children's opinion for the majority of the children that have their view included, and in some judgments, the County Board also qualifies the weight given to the views of the child.

### 5.6 *Characteristics of the Child and/or the Opinion and Correlated with the Weight given by the County Board*

Examining if and what features and characteristics the County Board mentions when considering the weight to assign to the views of the included children, we find three main areas of consideration (see Table 5): characteristics of the child, such as understanding, age, maturity, and the constitution of the child (if sick, disabled etc.); features of the opinion-formation process, including if sufficient clarity around the opinion is displayed, no exercise of pressure, and sufficient information; finally, there is an emphasis on the opinion itself, if the opinion is rational and the opinion is in line with the best interest of the child. Although we cannot make a direct link between the impact of these various characteristics and the decisions made, our findings show us that the characteristics of the child are the most important factor (age, understanding, maturity), and the other factors are mentioned much less.<sup>7</sup> For the few decisions in which the County Board has explicitly assigned a great deal of weight to the child's opinion (see Table 4 above), the County Board seems to focus on the quality of the opinion and the formation process, and less on various proxy terms such as age and maturity. From an example of an opinion that was assigned 'considerable weight' by the Board (in our coding scheme, this would equal 'a lot of weight'), we see that the opinion is valued as well reasoned, strong, and held over time:

The girl (17) will turn 18 this year. She has a strong wish to be adopted by the foster parents. She has held this wish over a long period of time, and she has elaborated and accounted for this in meetings before the board. The board has assigned the girl's wish considerable weight (NA134).

For the children where the Board simply states that it has assigned weight to their opinion, but not specified how much, we see a high emphasis on the child's understanding. For these children, the Board points to their lack of understanding, or their limited understanding of the adoption question (n=10), and only two of the children are deemed to understand:

<sup>7</sup> A detailed overview of all factors mentioned, by weight can be found in Table B in the Appendix.

It may be doubtful whether she understands the full implications of what adoption entails, but the County Board's assessment is nonetheless that she sees it as something positive, and a declaration of trust towards the foster parents (NA123).

In those cases where the opinion has only been assigned some weight, the emphasis is almost exclusively on age, more precisely that the child's (young) age implies the opinion should be assigned less weight:

The child's opinion should be assigned weight. The girl (8) has told the spokesperson that she wants to be adopted. Considering her age, the majority will not assign the child's opinion decisive weight (NA80).

This is true for all five children whose opinion is assigned 'some weight'. Four of these children were eight years old, and one was ten years old. While this is a very small sample, it is still interesting how the Board finds that these children are of such a young age that their opinion should only be assigned some weight, especially because age alone is the conclusive factor.

In an example of an opinion in which the County Board does not mention whether it has assigned the opinion any weight, the emphasis is on whether the child has understood, with the conclusion that this has not been clarified – thus the Board finds no conclusive indicator of capacity:

In conversations with the spokesperson, the boy (seven) is clear that he wants to live in the foster home, without there being any further indication of whether he has understood the difference between adoption and a continued foster placement (NA122).

As in the example above, for the 11 children for whom it is not possible to determine if the County Board assigns weight to their views, only a few characteristics are mentioned by the County Board. This includes the child's understanding (in one case, that the child does not appear to understand the difference between adoption and foster placement, in one case, that the child has shown consciousness around adoption); and that the opinion is consistently held over time. An example of the latter is a child aged 12 years: "The boy has expressed his wish to be adopted by his foster parents repeatedly over the years' (NA59).

When the County Board disregarded nine children's views, this was justified by their lack of understanding (eight out of nine children). In addition, age, the child's maturity, clarity of opinion, or opinion formed under pressure, were mentioned by the County Board. By way of example:



TABLE 5 Factors of importance when considering the child's opinion and its weight. N=73 children

Weight assigned to the child's opinion N=number of children	Factors the Board relies upon to assess the capacity of the child (in parentheses number of children in which a factor is mentioned at least once)
Yes N=53 (73%)	Child's age (21) Child's understanding (19) Clarity of opinion/reflection (13) Opinion held over time (10) Child's maturity (6) Opinion is coherent/well thought out (6) Sufficient information (4) Whether opinion formed under pressure (3) Features of the child/child's constitution (2) Opinion is consistent with what is in the child's best interests (1)
Not mentioned 11 (15%)	Child's understanding (2) Opinion held over time (1)
No 9 (12%)	Child's understanding (8) Child's age (3) Child's maturity (1) Clarity of opinion/reflection (1) Whether the opinion is formed under pressure (1)

The board relies on the fact that the boy (seven) is immature for his age, and that he does not understand what adoption is in the actual and legal sense (NA79).

The girl (eight) had no clear perception of what adoption entails but clearly expressed that she belongs in the foster home and the network around them and that this is where she wants to grow up and belong (NA76).

### 5.7 *The Sample of Cases not Resulting in Adoption*

Five per cent of the cases did not result in an adoption, involving eight children ranging in age from four to nine years old. Five of these children did not have their views mentioned by the Board, of which two were four years old, one was

five, and one was six, and only for one of them did the County Board give a reason for excluding them: the child (aged four years) was too young. Three children aged six, seven and nine years, had their view mentioned by the Board. Two were positive towards adoption. The Board emphasised the child's wish to have contact with the biological mother in one case (six years old), and the child's lack of understanding of the adoption question in the second case (seven years old). The nine-year-old child was negative towards adoption, mainly due to concern that adoption would entail less contact with the biological father.<sup>8</sup> The Board interpreted this as an expressed view that contact with the biological father was more important to the child than adoption, and concluded further that the child had not been sufficiently informed of the consequences of adoption. The adoptive applicants, in this case, had, in fact, agreed to post-adoption contact.

## 6 Discussion

We are examining decisions that are of direct importance to the concerned children, namely, if they should be adopted or if they should continue to remain in public care. Findings from an English study reveal that many children are worried and highly concerned about these types of court proceedings (Thomas *et al.*, 1999), and the importance for the children is clear as this statement from one of the children shows: 'I was worried whether I would be allowed to get adopted or not. And if I was not, what would I do and where would I go?' (Thomas *et al.*, 1999: 69). Our analysis of all adoption cases concerning children four years and older over a six-year period reveals some interesting and intriguing findings.

First, young children do not have any type of agency in their own case. An overwhelming number of children have not had their capacity assessed and these children are more or less absent from the decision-makers' considerations and justification for the decision. Although it can be argued that on average, four-, perhaps five- and six-year-olds, often may not have the necessary capacity, this cannot be *ex ante* taken for granted. In our view, this finding shows a clear violation of the legal requirement that children's capabilities to form an opinion should be the determinant of involvement. Similar findings have been shown in studies of care order decisions in the Norwegian County Boards (Magnussen and Skivenes, 2015), child protection frontline (Vis *et al.*, 2010), Swedish child protection (Heimer *et al.*, 2017; Hultman *et al.*, 2019),

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<sup>8</sup> This was the only child found in our sample expressing a negative view towards adoption.

as well as in other countries (Berrick *et al.*, 2019; Porter, 2019). The judicial decision-makers have overall used the seven-year age limit to determine inclusion of children and are thus behaving in the way the CRC committee warned against. The discretionary authority delegated to the judiciary decision-makers to assess children's capabilities has not been applied and, as a result, only a handful of the youngest children have had their capacity to form an opinion and to have agency in their case considered. Even though the CRC is implemented in Norwegian law, it is clearly not followed in practice. This also indicates a lack of awareness that Article 5 of the CRC is, in fact, relevant to decision-makers and other authorities, and is not a duty placed on parents alone, despite the article's wording. States, and by extension state authorities, have a duty to ensure that children are being supported in exercising their rights under the CRC in accordance with their evolving capacities.

Second, and related to the first, our findings support previous research showing how the Norwegian justice system strongly relies on age as a proxy for maturity and competency in child protection cases (Magnussen and Skivenes, 2015). Age is the main explanation for why children's opinions are given weight, or the reason given in the few cases that children's capacities are assessed and children are excluded. The use of an age limit in the law, although a guide, is probably the explanation for why most children aged seven years have their opinion mentioned in the judgments, while most children below this age do not. Other systems, as in the UK, do not set an age limit for children's involvement, and we recommend that Norway do the same.

Third, a deficit in regard to the consent criteria is revealed. Consent is a statutory requirement for children aged 12 years and older, and consent should be mentioned in all the decisions that concern children in that age group. When only very few decisions mention consent – this is a concern. As to why consent is not a focus, we can only speculate. One possible explanation is that adoption is regulated both by the Child Welfare Act as well as the Adoption Act. While the Child Welfare Act and the Adoption Act have relatively similar provisions in relation to the child's opinion and involvement, only the Adoption Act mentions and requires the child's consent after age 12 years. As cases under the Child Welfare Act make up most of the Boards' caseload, they may not be as familiar with the requirements of the Adoption Act. It is possible that decision-makers assume that the adoption application is in accordance with the child's wishes. However, they still have a duty to ensure that proper procedure is followed, and everyone's rights are protected. While one can also assume that any foster parent seeking to adopt *wants* to do so, adoption decisions will nonetheless include a statement of the foster parents' suitability and wish, and the biological parents consent or objection (Helland and

Skivenes, 2019). This would indicate that nonetheless, adults' rights, for example to consent or object, are still taken more seriously than those of the child. Recently, a template has been introduced for decisions in adoptions from care that explicitly requires a check of consent from children aged 12 years or older, and we hope that this development can lead to greater awareness on this issue.

Fourth, the assessment of capabilities and the County Boards' approach to children seem simplistic. This is evident when decision-makers are assessing children because either age or the child's ability to understand is used as a proxy for maturity and competency. Only a few times do we find the County Board's assessment of consistency and strength (see Archard and Skivenes, 2009), and almost never is the child's meaning formation process an issue. This may be a result of the limited information offered to the County Board to assess the ability of the child; information on whether the child was subject to pressure, or whether the child had sufficient information. Because the Board rarely meets the child, decision-makers will have limited opportunity to seek additional information on the capacity of the child should they need it. However, it may also be due to a lack of focus and interest from the decision-makers because children's involvement does not seem high on the agenda in child protection cases (Vis *et al.*, 2010; Hultman *et al.*, 2019; Porter, 2019). A lack of guidelines and clear political aims to follow the CRC are two likely explanations of why the system is like this. Furthermore, decision-makers may feel they lack competency to assess children's capacity, and that lack of training on children's development explains why there is a relatively low focus on children in these cases. However, we wish to point out that in the County Boards one of the decision-makers is an expert on children and their development, but we do not see this expertise reflected in the judgments. Possibly this is related to the working form of the County Boards, where the legal chair is responsible for organising and writing the judgments. However, the expert members have opportunities to bring in their viewpoints during the hearing process as well as into the written judgments, so possibly they also have a low focus on children in the cases. As we will return to below, the County Boards' interaction with children has so far been indirect via a spokesperson and the written material, and this is about to change from 2019 and onward.

Closely related, fifth, is the issue of what the child's capacity is measured against. Although there are only a few children in our material in which the decision-makers provide information about how they have weighted a child's opinion, it is sometimes clear that an opinion is disregarded because the issue of adoption and its legal implications is not understood (and possibly the

decision-makers also believe this cannot be understood by children overall). In some other situations, it is the child's opinion about his/her life situation and their wish to belong in the family that is considered. Thus, the County Boards vary in their perceptions of what the child should be providing their view about: some focus on the legal implications of adoption, others on the child's view on their present living situation. Some decision-makers even indicate that it is a burden for children to be involved and that young children should be shielded from involvement without a further assessment of the child's capacity and their right to have agency in their own case. This seems to be a disabling form of paternalism in the sense that it is not given a specific justification for the paternalistic act. Possibly, the reason for this is the County Boards' lack of information about the child. They rarely meet with the child directly, and the findings from our analysis show that the child's views often are only briefly presented. However, the County Board has a choice to ask for more information, and they may extract it from the case files as well as from the spokesperson (see Enroos *et al.*, 2017). While the County Board has a duty to ensure the child can participate and have their views heard, it is also a duty to consider the child's best interest (see Archard and Skivenes, 2010 for a discussion of this, cf. also Hultman *et al.*, 2019), and they likewise have a duty to protect the child from undue duties and burdens. This requires a type of paternalism towards the child that is enabling, for example in the format that *explicit and elaborate justifications* are provided in terms of why an opinion is disregarded or why a child is not involved in the case.

Sixth, our analysis shows that in very few cases due weight to the child's opinion is explained and elaborated on, and in the majority of the cases it is not specified. This is also detected elsewhere, as Daly (2018) points out a lack of common ground amongst decision-makers in terms of giving weight to children's opinion. In her view, the concept of 'giving due weight' has been an obstacle to children's participation, and has promoted decision-makers to give weight to opinions that concur with their opinion, and neglecting those that disagree. Training in providing reasons, and increased awareness on why and how an argument is important for a decision-making outcome, may be two solutions that the County Board may pursue (see Porter (2019)).

Our findings coincide with a notion of disabling paternalism towards younger children, and a more enabling paternalism towards the older. Although only indicative findings, younger children's (below age 12 years) ability to form an opinion seems to be assessed by their age and their ability to understand, while older children's (12 years and older) ability seems to be judged by their capacity to form a well-reasoned and consistent opinion – i.e. qualities of the decision-formation process, rather than simply features of the child.

A study of a representative sample of the populations in England and Norway reveals a significantly higher portion of the Norwegians being willing to act paternalistically towards children compared with the English population (Cappelen *et al.*, in preparation).

## 7 Concluding Remarks

Our results are discouraging because overall children's role and place in cases about adoption from care are minimal. These children are not given agency and they are not the main person in these cases. In itself, this raises a question about legitimacy, and we doubt this would happen with an adult person's case. We can conclude that the law is not followed and children's rights as laid out in the CRC are not respected, which is surprising and disappointing, bearing in mind that the County Board is led by a lawyer and is a decision-making body operating as a court. However, new guidelines are in place for the County Boards, and involvement of children is not impossible nor difficult to realise, as there are very good examples of in our analysis and a point clearly made by Experts by Experience (2019). We end this paper with an excerpt from the judgment about a 15-year-old child that we believe had agency in her case:

Something which in this case speaks especially in favour for adoption is Girl's own strong wish to be adopted, as well as research indicating it is better for children to grow up as adoptive children rather than foster children. Girl will soon turn 16 years old, and her opinion must weigh heavily. She has stuck by this wish over time. She is familiar with what adoption entails and has provided good reasons for her wish.

She wants to be a full member of a family she is happy with, and who cares a lot for her. The security of living in a predictable home, and a future with the people she appreciates, weighs heavily (NA42).

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