Discretionary Decision-Making in Child Protection Care Order Cases

Exploring the Tensions between Rule of Law and Discretion

Barbara Victoria Ruiken

Thesis for the degree of Philosophiae Doctor (PhD)
University of Bergen, Norway
2024

Discretionary Decision-Making in Child Protection Care Order Cases

Exploring the Tensions between Rule of Law and Discretion

Barbara Victoria Ruiken

Thesis for the degree of Philosophiae Doctor (PhD)
at the University of Bergen

Date of defense: 16.04.2024

© Copyright Barbara Victoria Ruiken

The material in this publication is covered by the provisions of the Copyright Act.

Year: 2024

Title: Discretionary Decision-Making in Child Protection Care Order Cases

Name: Barbara Victoria Ruiken

Print: Skipnes Kommunikasjon / University of Bergen

Scientific Environment

This thesis has been completed through a Ph.D. position at the Department of Government at the Faculty of Social Sciences at the University of Bergen. I have been affiliated with the Centre for Research on Discretion and Paternalism (DIPA) and am a member of the Department's Law, Politics, and Welfare (LPW) research group. I have significantly benefited from seminars arranged with the Centre on Law and Social Transformation (LawTransform) and the Western Norway University of Applied Sciences.

The PhD project is a part of the European Research Council (ERC) Consolidator Grant project DISCRETION led by Professor Marit Skivenes, which received funding under the European Union's Horizon 2020 research and innovation program (grant agreement no. 724460). The project was, at the time of onset, the *"the most comprehensive cross-country comparison of child protection systems to date"* (Centre for Research on Discretion and Paternalism, n.d.). The project focusses on understanding discretionary child protection decisions, how they are made and justified.

Through assisting in the data analysis for the DISCRETION, ACCEPTABILITY and Barn Nemnd projects I gained important insights into the material, that were valuable when designing the methodological framework for the three articles. In addition to data from the DISCRETION project, the articles used data from the ACCEPTABILITY and Barn Nemnd projects.

Acknowledgments

It’s been five years. They have included successes, frustrations, great office spots, horrible office spots, too many office plants, horrendous amounts of coffee, and many many memorable moments. Many people have helped me in this process, and I am grateful for every helping hand and word of encouragement, large or small.

First and foremost, many heartfelt thanks to my supervisor Marit Skivenes whose unwavering guidance, expertise, and encouragement were instrumental throughout this journey. Your insightful feedback and mentorship shaped not only this thesis but also my academic growth. On a more personal level, I am grateful that you accepted my quirks and even asked about my lifting records.

Special thanks also to Tarja Pösö, my co-supervisor: you have been so kind and encouraging along the way. Any time you were joining research group meetings, I knew that it would be a fruitful and happy meeting. My work would not be what it has become without your positive spirit and constructive feedback.

The colleagues at the DIPA-centre have been my main professional environment throughout the process. You are generous, lovely, and so very smart, and I love you (in a professional and platonic manner). You have been so accepting of me and my fantastic sense of humor and not once complained about the end-of-semester entertainment you had to endure. My fellow PhDs Ida Juhasz, Hege Helland, Audun Løvlie, Mathea Loen, and Frøydis Lønborg Haarberg – thank you for your encouragement, the chances to vent and rant, for sharing and caring.

There have been many important people involved in DIPA and the Law, Democracy, and Welfare research group over the years that I have had the pleasure of working with and learning from. I’d like to especially mention Vanessa Seeligman, Katre Luhamaa, Mona Machrouh, Victor Cepoi, and Espen Stokke, thank you for being a part of this amazing group of people. Special shoutout to Jenny Krutzinna. You’re awesome and an inspiration.

My appreciation goes to the Department of Government and the University of Bergen for providing the resources, facilities, and opportunities that facilitated my research endeavors. I am grateful to PhD program coordinator Martina Vukasovic and PhD coordinator Anna Polster, who have been so very helpful and encouraging on the academic and administrative side of things, respectively.

There are some people I am privileged to call my friends. I want to express my gratitude for continued friendship and support especially during this time to Hilde, Julie, Hilde, Aslaug, and Ingvild.

I am indebted to my family for their unconditional love, understanding, and constant encouragement, not just during this roller coaster but in general. Especially when the final stretch of the thesis meant I was mainly confined to writing during Christmas 2023. My dear Jesper – thank you for supporting and being there for me, especially in the final months when my brain was fried. I'm so glad we're a team. And although they can't read this I include in my thanks home office supurrvisors Sophie and Mephisto, for reminding me of the truly important things in life: snacks and cuddles.

List of Abbreviations

CPS: child protection system

DIPA-Centre: Centre for Research on Discretion and Paternalism

ECHR: European Convention on Human Rights / The Convention for the Protection of Human Rights and Fundamental Freedoms of 1953

ECtHR: European Court of Human Rights

UNCRC: United Nations Convention on the Rights of the Child

Abstract in Norwegian

Denne avhandlingen tar for seg beslutninger som har stor innvirkning på enkeltindivider og som er nødvendige for å oppfylle statens plikt til å beskytte barn: omsorgsovertakelser av nyfødte barn. Profesjonelle beslutningstakere tar disse beslutningene på vegne av staten, som må følge lover og retningslinjer utarbeidet av demokratisk valgte politikere («policymakers»). Grunnlaget for disse beslutningene er skjønnsmessige vurderinger som gjøres av beslutningstakerne, som må følge likebehandlingsprinsippet ved å behandle like tilfeller likt og ulike tilfeller ulikt. Likebehandling («equal treatment») er avgjørende for rettferdighet og for folks tillit til og legitimiteten til både barnevernet og rettssystemet. Likebehandling er nødvendig av hensyn til disse abstrakte prinsippene, men også av et helt konkret hensyn: barn skal oppleve samme grad av beskyttelse. Hvor godt de blir ivaretatt, skal ikke variere mye eller være vilkårlig. Med tanke på delegeringen av beslutningsmyndighet og skjønnsutøvelse, og den lukkede beslutningsarenaen de fattes på, er det avgjørende at beslutningene begrunnes og rettferdiggjøres på en måte som viser at de er legitime.

Det er store kunnskapshull når det gjelder hvordan beslutningstakere vurderer og legitimerer inngrep i familier. Denne avhandlingen tar sikte på å undersøke slike skjønnsmessige beslutninger ved å analysere og kritisk vurdere skriftlige dommer av omsorgsovertakelser for nyfødte barn. Dommene er samlet inn fra Østerrike, England, Estland, Finland, Irland, Tyskland, Norge og Spania, og utgjør et unikt og verdifullt datasett. Funnene har relevans for alle beslutninger der sosialpolitikk iverksettes.

Følgende forskningsspørsmål styrer analysen:

- Er like saker begrunnet og rettferdiggjort likt?
- Er beslutningstakernes redegjørelser egnet til å holde dem ansvarlige (om beslutningene kan etterprøves), og hvilke konsekvenser kan dette ha for det demokratiske systemet?
- Hvilke konsekvenser kan funnene mine ha for forutberegneligheten i saksbehandlingen?

Hovedfokuset i avhandlingen er likebehandling, men det er også andre viktige prinsipper som må tas i betraktning når det gjelder omsorgsovertakelser for nyfødte og implementering av politikk generelt. Et av disse prinsippene er forutberegnelighet («predictability»), som betyr at borgerne i rimelig grad skal kunne forutse de rettslige konsekvensene av sine handlinger. En del av forutberegneligheten er å vite hvilke saker som vil bli behandlet likt og hvilke som vil bli behandlet ulikt. Forutberegnelighet er et avgjørende aspekt ved rettsstaten og er nødvendig for legitimiteten til statens inngrep i borgernes private sfære. I denne avhandlingen vurderes forutberegnelighet ut fra en vurdering av dommenes kvalitet.

Jeg vil også diskutere begrepet etterprøvbarhet («accountability»), som i likhet med forutberegnelighet er avledet av dommene og avhenger av deres kvalitet. Etterprøvbarhet er avgjørende på grunn av demokratiets svarte hull, der beslutninger om omsorgsovertakelser fattes. Gode redegjørelser for hvordan og hvorfor beslutningene ble tatt, er en viktig forutsetning for at beslutningstakerne skal kunne holdes ansvarlige for forskjeller i behandlingen av lignende saker. Både forutberegnelighet og etterprøvbarhet er avgjørende, ikke bare for enkeltbeslutninger, men også for systemets legitimitet som helhet.

Avhandlingen består av tre artikler, der hver av dem studerer likebehandling fra hver sin vinkel:

- Den første artikkelen ser nærmere på hvordan risiko- og beskyttelsesfaktorer vurderes.
- Den andre artikkelen sammenligner behandlingen av like saker med ulikt utfall.
- Den tredje artikkelen analyserer hvordan skjønnsmessige rettslige standarder anvendes.

I hver av disse artiklene kartlegger og viser jeg beslutningstakernes resonnementer og begrunnelser. Jeg ser etter mønstre av likheter og forskjeller gjennom dokumentanalyse av de skriftlige dommene om omsorgsovertakelse av nyfødte. På bakgrunn av denne analysen vurderer jeg om likebehandlingskravet er oppfylt slik det er dokumentert i dommene, og diskuterer mulige forklaringer på

forskjellsbehandling. I tillegg foretar jeg en kritisk vurdering av kvaliteten på dommene og diskuterer hvilke implikasjoner denne vurderingen har for etterprøvbarhet og forutberegnelighet.

Jeg har funnet at selv om skriftlige dommer til en viss grad oppfyller og legger til rette for likebehandling, forutberegnelighet og ansvarliggjøring/etterprøvbarhet av beslutningstakere, har de visse svakheter som må adresseres.

Når det gjelder likebehandling, kartlegger jeg et mønster der lignende hensyn er relevante, men vurderingen av deres innvirkning på saken er forskjellig. Jeg konkluderte med at beslutningstakernes skjønnsmessige vurderinger av sosiale forhold, som aspekter ved familiens situasjon og foreldrenes atferd, noen ganger fører til ulike utfall, selv i like saker. Dette skaper et problem, særlig når det er uklart hvordan beslutningstakerne har kommet frem til sin konklusjon. I min diskusjon undersøker jeg fordelene og ulempene ved å implementere en sjekkliste for å begrense beslutningstakerens skjønn ved å vurdere spesifikke punkter i beslutningsprosessen. Jeg konkluderer med at hvis en slik sjekkliste er riktig utformet, kan den føre til mer likebehandling og bedre beslutninger.

Vurderingen av dommenes kvalitet viser flere svakheter (selv om det også finnes noen styrker). For det første svekkes forutberegneligheten av dommenes kvalitet. Mangelen på beskrivelser av konkrete vurderinger og avveininger som er gjort er spesielt problematisk, ettersom slike beskrivelser er avgjørende for å kunne forutsi behandlingen av fremtidige saker. Det er nettopp denne skjønnsmessige begrunnelsen som kan true forutberegneligheten. I den forbindelse har jeg diskutert om det ville være en fordel for likebehandlingen å eliminere beslutningstakerens skjønn ved å gjøre skjønnsmessige standarder om til regler. Jeg har imidlertid funnet ut at selv om man kunne lage nok regler (noe som i seg selv er urealistisk), ville feilene som reglene ville føre til, og kostnadene forbundet med dem, være uakseptable i et demokratisk samfunn.

Det er en utfordring å holde beslutningstakerne ansvarlige (konseptualisert som etterprøvbarhet) på grunn av manglene i dommene. Det blir vanskelig for

offentligheten og berørte parter å forstå og reagere på avgjørelsen når det er uklart hvorfor avgjørelsen ble som den ble. Behandlingen av lignende saker kan variere, men dårlige redegjørelser gjør det vanskelig å skille mellom maktmisbruk og rimelig uenighet («reasonable disagreement»). I tillegg svekkes den demokratiske kontrollen over implementeringen av politikken, og man går glipp av læringsmuligheter. For å løse dette problemet diskuterer jeg muligheten for å stille høyere krav til beslutningstakere om å inkludere flere detaljer i vurderingene sine. Jeg mener at denne tilnærmingen vil forbedre etterprøvbarheten, men bare hvis kravene oppfylles i praksis. Jeg trekker også frem kvalitetsforbedringene i norske dommer, som har blitt mer detaljerte og begrunnede etter kritikk fra den Europeiske Menneskerettighetsdomstolen.

Avhandlingen bidrar til litteraturen om skjønn og likebehandling ved å kartlegge resonnementer og begrunnelser i skjønnsmessige avgjørelser. I tillegg gir avhandlingen verdifull kunnskap om hvordan forutberegnelighet og etterprøvbarhet ivaretas i praksis. Det metodiske bidraget er knyttet til bruk av skriftlige dommer i barnevernssaker - et svært verdifullt materiale, men som er utfordrende å arbeide med. Avhandlingen bidrar til empirisk kunnskap ved å kaste lys over et inngripende tiltak som vanligvis er skjult for offentligheten.

Abstract in English

This thesis discusses decisions that significantly impact individuals and are necessary to fulfill states' obligation to protect children from harm: care orders for newborn children. Professional decision-makers make these decisions on behalf of the state, which must comply with laws and policies created by democratically elected policymakers. The grounds for these decisions are discretionary assessments made by the decision-makers, who must follow the equal treatment principle by treating similar cases similarly and different cases differently. Equal treatment is crucial for justice and for people's trust in, and the legitimacy of both the child protection and legal system. Equal treatment is required for these abstract principles, but also for a very concrete concern: children should enjoy equal levels of protection. How well they are safeguarded should not vary a lot or be arbitrary. Given the delegation of decision-making power and discretion involved, and the closed decision-making arena they are made in, it is crucial that the decisions are justified and reasoned in a manner that demonstrates their legitimacy.

There are huge knowledge gaps regarding how decision-makers evaluate and legitimize interventions into families. This thesis aims to investigate such discretionary decisions by analyzing and critically appraising written judgments of care orders for newborn children. The judgments are collected from Austria, England, Estonia, Finland, Ireland, Germany, Norway, and Spain, and are a unique and valuable data set. The findings are applicable to all decisions through which social policy is implemented.

The following research questions guide the analysis:

- Are similar cases equally reasoned and justified?
- Are the accounts the decision-makers provide suitable to hold them accountable, and what are possible implications for the democratic system?
- What are possible implications of my findings for the predictability of case treatment

The main focus of the thesis is on equal treatment, however, there are other important principles that need to be considered while making care orders for newborns and

implementing policies in general. One of these principles is predictability, which means that citizens should reasonably be able to predict the legal consequences of their actions. Part of predictability is knowing which cases will be treated similarly and which will be treated differently. Predictability is a crucial aspect of the rule of law and is necessary for the legitimacy of the state's interventions in the private sphere of the citizens. This thesis assesses predictability based on an appraisal of the judgments' quality.

I will also discuss the concept of accountability, which, much like predictability, here is derived from judgments and depends on their quality. Accountability is crucial because of the black hole of democracy, where care order decisions are made. Good accounts of how and why decisions were made are a vital precondition for holding decision-makers accountable for differences in the treatment of similar cases. Both predictability and accountability are essential not only for individual decisions but also for the system's legitimacy as a whole.

The thesis comprises three articles, where each studies equal treatment from a different angle:

- The 1st article homes in on how risk and protective factors are assessed
- The 2nd article compares the treatment of similar cases with different outcomes
- The 3rd article analyzes how discretionary legal standards are used

In each of these articles, I map and show the reasoning and justification by the decision-makers. I look for patterns of similarities and differences through document analysis of the written newborn care order judgments. Based on this analysis, I assess the fulfillment of the equal treatment obligation as documented in the judgments and discuss possible explanations for why there were differences in treatment. In addition, I critically appraise the quality of the judgments and discuss the implications of this appraisal for accountability and predictability.

I have found that although written judgments fulfill and facilitate equal treatment, predictability, and decision-makers' accountability to some extent, they have certain weaknesses that must be addressed.

Regarding equal treatment, I map a pattern where similar concerns are relevant, but the assessment of their impact on the case differs. I concluded that the discretionary evaluations made by decision-makers regarding social facts, such as aspects of a family's situation and the parents' behavior, sometimes lead to different outcomes, even in similar cases. This creates a problem, especially when it's unclear how the decision-makers arrived at their conclusion. In my discussion, I explore the advantages and disadvantages of implementing a checklist to limit decision-maker discretion by assessing specific elements in the decision-making process. I conclude that if such a checklist is correctly designed, it can lead to more equal treatment and better decisions.

Appraising the judgment's quality highlights several weaknesses (although some strengths are also present). Firstly, predictability is compromised by the judgments' quality. The missing descriptions of concrete weighing and balancing that were done are particularly problematic as they are crucial for predicting the treatment of future cases. It is precisely this discretionary reasoning that can threaten equal treatment. In this regard, I have discussed whether eliminating the decision-maker's discretion by turning discretionary standards into rules would benefit predictability. However, I have found that even if one could create enough rules (which is unrealistic in itself), the errors that the rules would lead to, and their associated costs would be unacceptable in a democratic society.

Holding decision-makers accountable is a challenge due to the shortcomings in the judgments. It becomes difficult for the public and concerned parties to understand and react to the decision when it's unclear why they decided as they did. Treatment of similar cases can vary, but poor accounts make differentiating between abuse of power and reasonable disagreement a daunting task. Additionally, democratic control over policy implementation suffers, and learning opportunities are missed. To address

this issue, I explore imposing higher requirements on decision-makers to include more details in their judgments. I believe that this approach would improve accountability, but only if the requirements are met in practice. I also highlight the improvements in the quality of Norwegian judgments, which have become more detailed and reasoned after receiving criticism from the ECtHR.

The thesis contributes to the literature on discretion and equal treatment by mapping reasoning and justification in discretionary decisions. Additionally, the thesis provides valuable knowledge on how predictability and accountability are fulfilled in practice. The methodological contribution relates to using written judgments of child protection cases – a very valuable but challenging material. The thesis contributes to empirical knowledge by casting light on an intrusive intervention usually hidden from the public.

Table of Tables

Table 1-1 - Summary of the articles' research focus and how it ties in with the thesis' research questions 7
Table 4-1 - Decision-making bodies in eight countries 43
Table 4-2 - Key facts about child protection in eight countries.................................. 48
Table 4-3 - Out-of-home placements (omsorgstiltak) in Norway 49
Table 4-4 DISCRETION and ACCEPTABILITY project data material for newborn care orders, from which the data material for all three articles were selected............ 51
Table 4-5 – Norwegian newborn care order judgments from the Barn Nemnd project 52
Table 4-6 - Elements of justification as required by national legislation. Country ranking. (Reproduced from Centre for Research on Discretion and Paternalism, 2019) 53
Table 6-1 - Summary of findings relating to equal treatment. Numbers indicate article number.. 82
Table 6-2 - Summary of the critical appraisal... 89
Table 6-3 - Summary of findings relating to accountability. Numbers indicate article number.. 92
Table 6-4 - Summary of findings relating to predictability. Numbers indicate article number.. 97

Table of Figures

Figure 1-1 - Visualization of the thesis' focus 1
Figure 4-1 - Selection of article data material from projects data sets 56

List of Publications

1st article: Ruiken, B. (2022). Analyzing decision-maker's justifications of care orders for newborn children: Equal and individualized treatment. *Journal of Public Child Welfare*, *0*(0), 1–24. https://doi.org/10.1080/15548732.2022.2158990

2nd article: Ruiken, B. (2023). A tale of two cases – investigating reasoning in similar cases with different outcomes. *European Journal of Social Work*, 0(0), 1–18.

3rd article: Ruiken, B. (in preparation for publication). Accounting for the use of legal standards: The Good, the Poor, and the Adequate.

The 1st article is published as Open Access.

The 2nd article is published as Open Access.

Contents

Scientific Environment i

Acknowledgments iii

List of Abbreviations v

Abstract in Norwegian vii

Abstract in English xi

Table of Tables xv

Table of Figures xvii

List of Publications xix

Contents xxi

1. Introduction 1

1.1 Gap and contributions 3

1.2 The data and the three articles 5

1.3 Structure of the thesis 8

2. Literature review 9

2.1 Discretion in the street-level bureaucracy literature 10

2.2 General debates on decision variability in child protection 12

2.3 Discretionary decision-making in judicial child protection decisions 13

2.4 Decision-making tools and other standards 15

2.5 Judicial decision-making and assessment of case facts 18

2.6 Quality of judgments 21

2.7 Summary 21

3. Theoretical framework 25

3.1 The rule of law 26

3.2 The welfare state 29

3.3 Discretionary decision-making *30*

3.4 Accountability for delegated decision-making power *34*

3.5 Summary and reflections *36*

4. Empirical setting, research design, and methods 39

4.1 Context and decision-making in eight countries *39*

4.2 Care orders *47*

4.3 Judgments as data material *51*

4.4 Handling the data material and empirical contribution *54*

4.5 Methodologial contribution and reflections *60*

4.6 Ethical considerations *65*

5. Results – presenting the articles 67

5.1 1st Article: Analysing decision-makers' justifications of care orders for newborn children: equal and individualised treatment *67*

5.2 2nd Article: A Tale of Two Cases - Investigating Reasoning in Similar Cases with Different Outcomes *70*

5.3 3rd Article: Accounting for the use of legal standards: The Good, the Poor, and the Adequate *73*

6. Discussion and concluding remarks 79

6.1 Equal treatment *79*

6.2 Appraising the quality of judgments *88*

6.3 Concluding remarks *100*

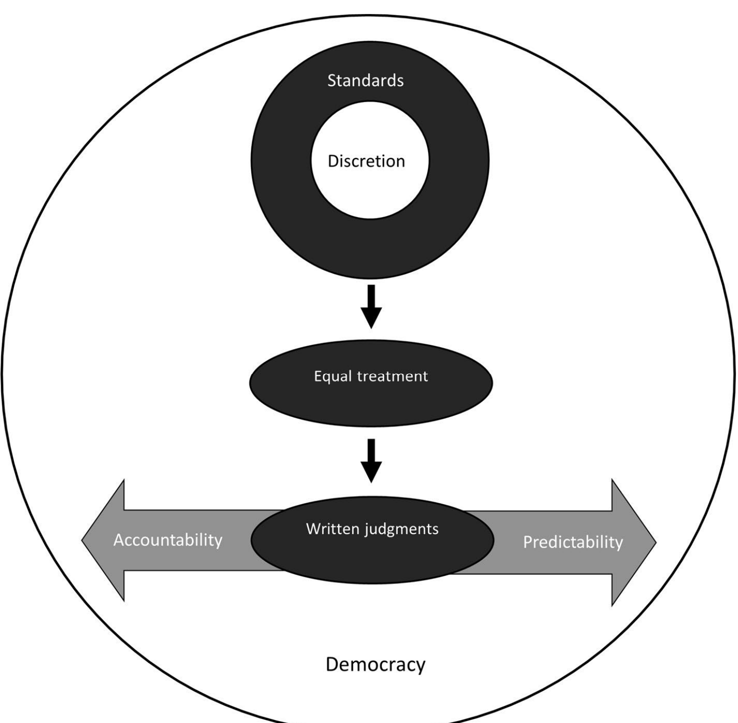
7. References 107

Appendices A – D 128

1. Introduction

This thesis explores the decision-making by judges in child protection cases concerning newborn children. It investigates whether these decision-makers are capable of ensuring that similar cases are treated equally, and if the same considerations are applied uniformly across a country. It also examines how we might consider these complicated cases similar and entitled to equal treatment. Given the significant consequences of care order decisions for newborn children, the thesis seeks to examine how these decisions can be justified in democratic societies. In Figure 1-1 the key dimensions of the thesis are outlined.

Figure 1-1 - Visualization of the thesis' focus



Description: The figure shows the central concepts of the thesis in relation to each other. Democracy is the wider context and delivers central premises for delegated and legitimate decision-making. Central in such decision-making is the interplay of discretion and standards that act as limits to discretion, as visualized in the donut-shape in the top half of the figure. Treatment and outcome of cases should fulfill the equal treatment obligation, visualized beneath the donut. The next element is

written judgments. They are the thesis' data material and analyzed to evaluate decision-makers fulfilment of the equal treatment obligation. They are also the basis on which I evaluate accountability and predictability. The direction of the arrows indicates that accountability here is conceptualized as retrospective, indicating the ability to hold decision-makers accountable for the cases they have decided in the past. Predictability is forward-looking, inferring expectations for future case treatment based on past cases.

Care order decisions must be of high quality as the state is responsible for protecting children from harm. However, the decision-makers have been delegated a certain degree of discretion when making decisions which can lead to variability in reasoning and outcome (Molander, 2016). Judicial decision-makers make these decisions on behalf of the state, according to democratically sanctioned laws and policies (legal standards visualized as surrounding discretion in Figure 1-1). The combination of the decisions' far-reaching consequences and the discretionary and delegated decision-making that is difficult to control democratically (such a situation is described as democracy's black hole (Rothstein, 1998)) highlights the need for equal, accountable, and predictable treatment of similar cases. Equal treatment is a basic principle of a legitimate child protection and legal system and is crucial for justice (D. Miller, 2017). Equal treatment is required for these arguably abstract democratic principles, but also for a very concrete concern: children should enjoy equal levels of protection. How well they are safeguarded should not be arbitrary or subject to capricious variation. In addition to treating similar cases equally, decision-makers can face dilemmas or conflicting demands, as they need to find the best solution for the child, balance this against the parents' rights, within their institutional and normative decision-making setting. The thesis investigates whether and how decision-makers uphold equal treatment under such difficult conditions.

The thesis focuses primarily on equal treatment; however, it is important to consider other principles while making care orders and implementing policies. Two principles that I include are predictability and accountability (included towards the bottom of Figure 1-1). Accountability is crucial to dem up for a potential "black hole of democracy" where discretionary care order decisions are made, so that the delegated authority given to decision-makers can be held responsible (Rothstein, 1998). Providing good accounts of how and why decisions were made is a vital prerequisite

for holding decision-makers accountable for their extraordinary use of power on behalf of the state (Bovens, 2007). Accountability in this thesis is evaluated based on the quality of written judgments and conceptualized as retrospective, as visualized through the arrow pointing backwards in Figure 1-1.

I will also be discussing predictability, which in this instance means that citizens should be able to reasonably predict the legal consequences of their actions. Seen this way, predictability is forward-looking, as the corresponding arrow Figure 1-1 indicates. Part of predictability is knowing which cases will be treated similarly and which will be treated differently, and this is essential for the rule of law and the legitimacy of the state's interventions in the private lives of citizens. As accountability, the thesis evaluates predictability by examining the quality of judgments. Both predictability and accountability are not only essential for individual decisions but also for the overall legitimacy of the system.

The overarching research questions for this thesis are:

- Are similar cases equally reasoned and justified?
- Are the accounts the decision-makers provide suitable to hold them accountable, and what are possible implications for the democratic system?
- What are possible implications of my findings for the predictability of case treatment?

This thesis investigates these questions through analyzing written judgments of care orders for newborn children from eight European countries: Austria, England, Estonia, Finland, Ireland, Germany, Norway, and Spain. How the analysis of judgments through individual articles contributes to answering the above research questions is summarized in Table 1-1.

1.1 Gap and contributions

There are significant gaps in the knowledge about the composition and functioning of child protection systems worldwide, which this thesis contributes to filling (Berrick et al., 2023a). More specifically, this thesis tackles the need to better understand the making of child protection decisions about removing children from their parents' care

in the best interests of the child (Juhasz, 2020; Skivenes, 2010). These gaps in the literature are addressed by focusing on the differences in the treatment of similar child protection cases as well as the justifications behind them (Burns et al., 2017a; Gilbert et al., 2011; Skivenes et al., 2015). Burns et al. (2019) also highlight the need for more knowledge regarding how intrusive child protection interventions are decided, particularly with regard to the rule of law mechanisms. This study contributes to this area of research as well.

Furthermore, given the criticism voiced towards how judgments containing such decisions are written (Helland, 2021a), it is important to broaden our understanding of current practices. Although the number of studies analyzing child protection judgments is increasing (see Chapter 2), there are still gaps in knowledge regarding judicial justifications (Kriz et al., 2022; Løvlie, 2022).

By applying a theoretical lens to the empirical material, my results gain relevance beyond the child protection field and can provide important insights into other discretionary decisions regarding state interventions into citizen's lives. Through this, I also add to the welfare state literature, building on the seminal works of scholars such as Molander (2016; 2012; 2014) and Rothstein (1998).

The thesis main contribution is fourfold, as the research:

1) Supplement the literature on equal treatment and discretion by adding to the understanding of how similar cases are treated when discretion is involved in this unique intersection between the public and private spheres, and how this discretionary practice can be understood in a political science context.
2) Adds to the understanding of how predictability and accountability are impacted by judgment quality.
3) Is methodologically worthwhile, showing how valuable data material consisting of written judgments can be used to answer theoretical questions and which considerations are important in the analytical process.
4) Provide new empirical knowledge on discretionary decision-making in practice, in decisions usually are inaccessible to the public, where the state interferes with private life to protect someone.

1.2 The data and the three articles

The three articles in this thesis examine written care order judgments, which are a valuable and unique source of data for answering the research questions. There are several reasons for this. Firstly, they provide reliable accounts of discretionary care order decisions, as the decision-makers are required to fulfill strict formal criteria for form and content (described in detail in section 4.3). Secondly, the judgments represent the decision-maker's reasoning, justification, and legitimization of their decisions, making them an essential site for mapping discretionary decision-making practices. Finally, few research communities have successfully met the necessary strict data protection and ethics requirements to gather full samples of such judgments.[1] Through the labor-intensive coding necessary to analyze them, their value is made available to the field.

To answer the research questions, I have mapped practice regarding reasoning and justification in three articles. I show if there are similarities, differences, and patterns in the treatment of cases. I have studied equal treatment from three angles:

- The 1st article homes in on how risk and protective factors are assessed.
- The 2nd article compares the treatment of similar cases with different outcomes.
- The 3rd article analyzes how discretionary legal standards are used and accounted for.

Chapter 6 brings together the results from these articles. There, I also appraise the mapped reasoning and justification practice and discuss implications of judgment quality for predictability and accountability.

The articles vary in their analytic aim and coding approach. Each approach has its drawbacks and benefits, and together, they form a multi-pronged approach to analyzing discretionary reasoning and justifications. The 1st and 3rd article quantify the presence of arguments and topics in the reasoning and justification, while the 2nd

[1] The judgments were made available to me through the DISCRETION, ACCEPTABILITY, and Barn Nemnd projects.

article takes a more holistic approach to understanding the reasoning in a small number of cases. To facilitate the analytic aims of comparison along different dimensions, I have selected newborn care order judgments with specific characteristics for each article. Table 1-1 summarizes key components of the three articles in the three top rows and shows how they relate to the thesis' overarching research questions in the last row.

The 1st article maps both equal and individualized treatment in 85 newborn care order cases from Austria, England, Estonia, Finland, Germany, Ireland, Norway, and Spain, where the mother is reported to have a substance misuse problem. The puzzle is whether and how seemingly contradictory demands for individual and equal treatment are upheld. The research questions ask: Are decision-makers similar or different in justifying a care order? In which ways are they similar or different? Does the type of child protection system influence similarities and differences between decision-makers? As described in the last row of Table 1, the article is relevant to the thesis' research question regarding equal treatment by analyzing how risk and protective factors are relied on and weighted when deciding for or against a care order. The article also contributes to the discussions on predictability and accountability.

Table 1-1 - Summary of the articles' research focus and how it ties in with the thesis' research questions

	1st article	2nd article	3rd article
Article research questions	Are decision-makers similar or different in their justifications for deciding a care order? Does the type of child protection system influence similarities and differences between decision-makers?	How do decision-makers reason and justify individual cases with different outcomes?	How do decision-makers describe and explain their use of legal standards in written care order decisions for newborn babies? Further, can the accounts be said to be poor, adequate, or good?
Focus	Equal and individualized treatment. Risk and protective factors.	Similarities and differences in the treatment of similar cases. Equal treatment.	Accounts of the use of legal standards.
Data and selection criteria	85 cases from eight countries. Maternal substance misuse.	8 cases (4 pairs) from 3 countries. Similar on formal aspects and risk factors, different outcomes.	36 cases from Norway. Contain assessments of a kin foster home.
Relation to the thesis' research questions	Investigates equal treatment when decision-makers evaluate risk and protective factors, central components in the treatment of care order cases.	Investigates treatment of similar cases in the light of different outcomes and points to where treatment diverges.	Investigates the use of standards and how this is accounted for. Appraisal of judgment quality, relevant for predictability and accountability.

The 2nd article takes as a starting point that sometimes, similar cases have different outcomes despite the obligation towards equal treatment. Through carefully selecting pairs of similar newborn care order cases where one ended in a care order and the

other did not (different outcomes), I analyzed the discretionary reasoning of the decision-makers. The data are eight cases (four pairs) from Norway, Estonia, and Finland (see Table 1-1). The research question asks: How do decision-makers reason and justify individual cases with different outcomes? I map concluding reasons and the pivotal elements in the reasoning. The discussion centers on the implications for equal treatment and the legitimacy of the decisions, and adds to the thesis' contribution regarding accountability and predictability.

The 3rd article is concerned with the decision-maker's interpretation and use of legal standards in the discretionary reasoning and justification regarding kinship placements. For this purpose, I selected a full sample of 36 Norwegian newborn care order cases where a child is placed in kinship foster care or where this placement option is explored in the reasoning (see Table 1-1). The research questions ask: How do decision-makers describe and explain their use of legal standards in written care order decisions for newborn babies? Further, can the accounts be said to be poor, adequate, or good? The article provides valuable knowledge on the quality of judgments, which I appraise in chapter 5, and relate to accountability and predictability.

1.3 Structure of the thesis

Following this introductory chapter, I proceed with a review of relevant literature (chapter 2). Then I outline and discuss the theoretical framework for the thesis and the scholarship it draws on and contributes to in chapter 3. The empirical setting and research design will be presented in chapter 4, followed by a presentation of each article in the thesis (chapter 5). Their results and implications will be discussed in chapter 6, together with concluding remarks, and policy recommendations and suggestions for further research.

2. Literature review

The thesis draws on literature from several disciplines: political science, law, and social work. This chapter is based on a number of systematic literature searches conducted in the course of working with the individual articles, and with this framing introduction. Through these searches I have gained a thorough understanding of the research field. As the thesis draws on literature from a range of disciplines and empirical settings, there are pragmatic reasons to describe the most central research, and not the entirety of the search results. This chapter focusses thus on the research literature that is most closely related and most valuable to the thesis and the individual articles. Research literature investigating what influences individual decision-makers decisions, both judicial decision-makers and those in child protection services, ranging from decision-making tools to heuristics to system differences, are relevant for answering the research questions of the thesis in a broader context than only related to my findings. The literature also provides important insights into the feasibility of improving equal treatment through limiting discretion in different ways, which is discussed in chapter 6. How judgments are written and how one can evaluate quality is informative to the discussion regarding accountability and predictability.

The chapter starts with literature on discretion exercised by street-level bureaucrats, which child protection decision-makers are. Next, two conceptual articles on the debates regarding decision variability (different outcomes for similar cases) in child protection are presented. They describe what drives this variability, and how it can be understood through different ethics lenses. The chapter continues with describing central literature on discretionary decision-making in judicial child protection decisions in the legal system just like the newborn care order cases analyzed in this thesis, before handling literature on decision-making tools and other standards. Such tools and standards are relevant to understand how the decision-makers in the analyzed cases relate to the limits of their discretion. Certain aspects of judicial decision-making, such as biases and heuristics as well as rationalization of decisions will be introduced before discussing a study on the quality of judgments. These

provide context to understand the written judgments I analyze. A summary rounds off the chapter.

2.1 Discretion in the street-level bureaucracy literature

Discretion is at play and issues related to its use can arise in a number of situations where professionals with a mandate from the state apply policies to citizens' lives. Both professionals who work in child protection agencies at the street-level with families and judicial decision-makers who decide on care order cases are street-level bureaucrats as they implement social policies into real-life cases (Biland & Steinmetz, 2017; Lens, 2012; Lipsky, 1980). While I do not rely on street-level-bureaucracy literature to design analytical approaches (see section 3.5 for why I made this choice), the insights from empirical studies of street-level bureaucrats in other areas than child protection are generalizable to child protection decision-makers and are of use to understand my findings.

Public administration should be fair, which can mean equal treatment or treatment adapted to the needs of the individual citizens. Literature on fairness in street-level bureaucracy can be split into two approaches: fairness through treating similar cases similarly and fairness through treating different cases differently, as described by Raaphorst (2021) in her comprehensive literature overview on fairness in street-level-bureaucracy research. I discuss the tradeoff between equal treatment and adapting treatment to specific cases in section 6.1.3.

There is variation in the literature on how discretion and treatment are studied, and the conclusions drawn based on this. I draw and build on these when discussing whether my findings challenge or support the existing body of knowledge on discretionary decision-making in the meeting between individuals and the state. Below are some examples of insightful studies which illustrate the practices of street-level bureaucrats that can lead to decision variability, and the situations where this can arise. Implications for predictability and accountability are often discussed in this literature.

Varying practices implemented by street-level bureaucrats can threaten equal treatment and transparency, as found by van den Bogaard and colleagues (2022). Their desk study of the practices of Belgian municipalities and the Immigration offices when registering mobile EU workers drew on information provided to EU citizens looking to register and interviews with those who conduct registrations. They found that the procedural practices differed based on, and did not favor, the "deservingness" of residence of the migrants, threatening procedural justice.

Some decision-makers favor discretion over rules to meet their client's needs best. Harrits and Møller (2014) studied child-oriented providers of preventive services. They conducted semi-structured interviews with 58 service providers in Denmark and asked them to react to two vignette cases. The authors highlight the providers' focus on building relationships rather than following rules and that the discretionary practices often are implicit.

Demographic variables, often connected implicitly to values and norms, are recognized as influencing decision-making. Seeking to expand the street-level bureaucracy literature that has focused on the effects of race, gender, and class on decision-making, Pfaff and colleagues (2021) investigated the impact of religion. They emailed over 45.000 public school principals in the US, pretending to be a family, asking for a meeting, and stating their religious affiliation and intensity. They found that Muslim and atheist families were substantially and statistically less likely to receive an answer to their email and concluded that discrimination against nonmainstream religious beliefs is widespread in the US public school system. To solve the issue, they suggest new policies and practices should be implemented to prevent discrimination, which can be conceptualized as structural mechanisms to steer discretionary decision-making.

In their vignette study of 90 Norwegian and Danish cardiologists, Bjorvatn et al. (2020) found that the doctor's assessments of a patient were quite similar when the case was severe and varied more when it was less severe. Applying this finding to newborn care order cases would lead to an expectation of streamlined assessment,

considering their severity. Bjorvatn et al. conclude that simpler legal regulations would be better for effectiveness while allowing more decision-making freedom would facilitate individualized treatment, acknowledging the trade-off between standards and rules as described in section 3.3.

2.2 General debates on decision variability in child protection

I now turn to literature that is more specific to child protection decision-making, starting with two overviews on debates and drivers of decision variability. In her conceptual article based on a review of selected literature, Keddell (2014) describes and outlines different drivers of decision variability in child protection and the debates in the literature connected to these phenomena while drawing on a decision ecology approach. She describes drivers of variability between and within countries, including policy aims and mechanisms, cultural understandings of risks to children and their origin, and decision-making structures. Keddell concludes that despite being complicated, reducing decision variability should be an ethical priority, especially within countries. The overview is comprehensive and includes many possible drivers of variability that should be considered when designing research frameworks intended to explain variability.

In her conceptual follow-up article, Keddell (2022) describes how ethics of care can explain and justify decision variability to a degree as the approach considers the specific case, the context, and the relations involved. She argues that while there are other influences on decision variability, ethics of care is likely to be a driver. The approach can be justified with respect for people, moral obligations, and responsive decision-making that could lead to better outcomes for the individuals involved. She acknowledges different drivers of decision variability, as those included in her 2014 article described above, but states that the individualized treatment resulting from an ethics of care is likely to be influential too. This adds to the list of potential drivers of variability in my data material. Keddell contrasts the ethics of care to an ethics of justice, based on the equal treatment principle. Through this she highlights how

decision variability in child protection can be morally acceptable. This insight is important to the discussion of limiting discretion to facilitate more equal treatment and predictability, and the costs that could come with limiting discretion (discussed in sections 6.1.3 and 6.2.1).

These two articles provide a valuable background for the discussion of equal treatment based on my findings in section 6.1. The next section describes examples of studies analyzing discretionary child protection decisions, where decision variability is common.

2.3 Discretionary decision-making in judicial child protection decisions

Studies of written judgments regarding child protection removal decisions (care orders and adoptions) are particularly pertinent to this thesis as they provide a larger context for understanding my findings and help to highlight any gaps in knowledge that my thesis contributes to filling. I am focusing specifically on studies that analyze the reasoning and justifications of decision-makers, in naturally occurring decision-making (by this I mean the day-to-day practices of decision-makers when handling real cases, as opposed to data that has been created exclusively for research purposes[2]).

Discretion in reasoning has been a subject of research and has been found to be crucial to the adjudications. Helland (2021a) conducted a study on the arguments presented in four cases about adoptions from care, which were the complete sample of such cases decided between 2007 and 2019 by the Norwegian Supreme Court. Helland found that while similar norms regarding biology, the child's vulnerability, and stability were applied, there were discretionary differences in the reasoning and balancing of arguments based on these norms. She also discovered that similar norms

[2] The value of naturally occurring versus other data is discussed in section 4.5.1.

were guiding adoption cases in England and Norway (2021b), but their application and justification varied due to discretion and system differences.

This shows a pattern of similar considerations being relevant in child protection cases, but different things being highlighted and placed weight on in the reasoning and justification. In addition, subsequent articles will demonstrate that highly interpretive facts about individuals, including their personal history and current situation, are crucial in such cases. Decision-makers must carefully interpret and evaluate these facts in order to reach a conclusion.

Scholars have examined how decision-makers reach conclusions based on the information presented to them and what type of information they consider in care order adjudications. Juhasz (2020) analyzed the reasoning behind the decision-making process in 19 Norwegian newborn care orders decided in 2016, where the parents had no prior history of having their children removed. In these cases, since there was little to no parenting history available, decision-makers relied on reports from health and education providers and professionals from the criminal justice system. They interpreted information regarding the parents' childhoods, health, and social welfare to make their discretionary decisions, predicting future behavior.

In their study of 58 Norwegian adoption proceedings decided in 2016, Helland and Nygård (2021) explore the impact of discretion on predictability and equal treatment. They focus on the concept of "attachment", which describes the relationship between the child and significant individuals in their life. The authors found that "attachment" was used in varied ways, with no obvious common denominator, leading to challenges in consistently applying discretion. They conclude that discretion can also create difficulties in ensuring fairness and consistency.

Risk factors and risk level assessment are central to reasoning in child protection interventions and are based on the conditions or behaviors of the involved families. Krutzinna and Skivenes (2020) studied decision-makers’ reasoning regarding maternal strengths and weaknesses in care orders from Germany, Norway, and England. Their analysis of 117 newborn care order judgments found that risks

dominate the reasoning and that risk-mitigating factors were overlooked. In their study of 94 Norwegian care order cases from 2016 and 2017 involving familial violence, Løvlie and Skivenes (2021) found that risk was often decisive in these cases. Pragmatic arguments draw on evidence of violence and pragmatic-ethical arguments on the parent’s ability to change and meet the children’s needs. The authors describe that decision-makers must interpret the parents’ arguments and based on this; judge skills central to raising children. The two studies (Krutzinna & Skivenes, 2020; Løvlie & Skivenes, 2021) show how risk dominates reasoning in care order cases and how decision-makers decide depends on parental behavior, arguments, and reports from other professional actors.

2.4 Decision-making tools and other standards

Central throughout this thesis is the interplay of decision-makers discretion and the standards that guide and limit discretion. I analyze how decision-makers use standards in kinship placement decisions and discuss different discretion-limiting tools in chapter 6. While my focus is mainly on legal standards, insights from literature regarding decision-making tools and algorithms is also valuable to understand how decision-makers deal with limits to their discretion and if these measures are suitable to facilitate equal treatment and accountability, as intended.

Gerdts-Andresen (2020) conducted a study on the decision-making process of Norwegian authorities in determining contact frequency in care order cases. The study analyzed 91 Tribunal decisions made in Norway between 2018-2019. The findings revealed that a decision-making norm is used when deciding contact arrangements in cases where the care order is deemed long-term. According to the norm, three to six contact sessions per year are scheduled. However, this approach does not take into account the needs of the child and the parents' ability to maintain positive contact. While the norm ensures consistency in decision-making, it lacks professional justifications and proper evaluation of the situation.

In his analysis, Miller (2015) sheds light on the shortcomings in Michigan's (US) kinship foster care placement system, specifically related to the implementation of laws and decision-making processes. He provides an overview of past and present laws, along with current practices, and highlights the deficiencies in complying with legal requirements and documenting decisions. Additionally, Miller criticizes the lack of documentation of an agency's refusal to place a child with a willing relative and the absence of a review process for agencies' placement decisions. To enhance accountability, he recommends policy changes that would improve documentation and make court resolutions of placement disputes available to relatives who request it.

In his recent peer-reviewed article, Norwegian Supreme Court Justice Hellerslia (2023) discusses decision variability as a phenomenon and weighs the benefits of narrowing discretion through more detailed standards against the value of discretion and individual treatment of cases. Unconscious psychological processes can influence decision-making throughout adjudications and threaten equal treatment. He concludes that conflicting considerations (individualized vs. equal treatment) can be best solved by having norms for outcomes (e.g., norms for the volume of contact arrangements in child protection cases or norms for penalties in criminal cases) combined with specific discretion to depart from the norm.

Structured decision-making and assessment tools are widespread in child protection. One such tool is the Kvello framework, an assessment framework commonly used in Norwegian child protection investigations, which includes guidelines and checklists on how to conduct and report assessments. Sletten (2022) interviewed 32 Norwegian child protection professionals from two agencies, observed them, and analyzed client documents, regarding how the Kvello framework is structuring the professionals' discretionary decision-making. The author found that the tool increased the proceduralisation of the assessment work and reinforced transparency in the collection of information. However, there was still interpretation required when filling out forms, which turned interpretations into conclusions. Sletten also points out gaps in the chain of arguments. She concludes that the tool increases

accountability and decreases discretion as it standardizes decision-making and narrows which kind of information is relied on.

In an exploratory case study study related to Sletten (2022) described above, Sletten and Ellingsen (2020) interviewed 31 Norwegian frontline child protection workers on their work with two standardized tools, the Kvello-framework and COS-P (an intervention program aimed at caregivers). The authors found that the two standardized tools contributed to the worker's experience of legitimacy. However, the guidelines in the tools still required interpretation, and at times, workers used their discretion instead of the tools when they felt that the tools were unable to account for the complexity and context of the cases.

Coming to a similar conclusion, Stokes and Schmidt (2012) studied 118 Canadian child protection social workers through a vignette study. They found that in addition to relying on a risk assessment tool, the workers' internalized subjective knowledge played a role. The authors encourage more attention to be given to the complexities of cases when they are being handled in the child protection system instead of relying solely on technocratic risk assessment.

Bartelink et al. (2014) tested the effect of ORBA, a structured risk assessment and decision-making tool, on decision consistency. In this vignette study from the Netherlands, the authors compared the decision-making of 40 child protection practitioners who had been trained in using the ORBA tool to the decision-making of 40 practitioners who had not received such training. They found that the practitioners varied considerably in their assessment of the case and what should be done. This was the case for both trained and untrained practitioners, although trained practitioners were more in agreement on the risk level in the vignettes. The authors state that while the lack of decision consistency was disappointing, it is a pattern known from other studies.

The ORBA tool was also the focus of a child protection case record study by de Kwaadsteniet and colleagues (2013). This time, the focus was on the tool's effect on the documentation of the child protection decision. They compared the content of 100

case records written after ORBA implementation to 60 case records from before implementation, focusing on content, process, and rationales. The authors found clear improvements in the records after ORBA implementation, demonstrating a more systematic and transparent decision-making process. However, rationales for decisions and conclusions were still missing in records, compromising transparency.

Algorithmic assessment and decision-making by computers have been attempted in the past. In a review of six such attempts used in social work with families, Gillingham (2019) found that the algorithms were not accurate enough to justify implementation, given the human cost of errors. He also pointed out that the effectiveness of the algorithms is limited by the quality of the data they are trained on, and that there may be issues with sample selection bias when using existing data.

The discussion in sections 6.1.3 and 6.2 suggests different ways of mending the challenges discretion poses to the rule of law and accountability through different ways of restricting or guiding discretion. The studies described above give indications on whether the suggestions are likely to achieve the aims or not.

2.5 Judicial decision-making and assessment of case facts

The literature on how judiciary decision-makers behave, make decisions and justify them identifies a range of normative and positive theories (Epstein & Lindquist, 2017; Posner, 2008) either pointing to individual traits of decision-makers, case-specific factors, or institutional factors to explain behaviour. Sociological studies of sentencing focus on the interpretative work that judicial decision-makers engage in, especially considering cues of remorse and hope (Mascini et al., 2016; van Oorschot et al., 2017). Other approaches emphasise sentencing in criminal law cases as craftwork (Tata, 2007).

This thesis does not aim to establish causal relationships between decision-makers, their surroundings, and how they decide and justify. However, empirical studies that analyze such relationships provide possible explanations for my findings. Heuristics and biases, such as availability, affect, representativeness, confirmation, anchoring,

egocentric, and hindsight biases, have been found to affect decision-making in various empirical studies (Thornburg, 2019). However, how these mechanisms affect decision-making is dependent on the decision-maker's background, characteristics, and experiences (Thornburg, 2019), and it can change over time as society evolves (Weaver & George, 2017). Other factors can also influence decisions, such as the decision-maker's goals. Weaver and George (2017) mention strategy, while Rachlinski and Wistrich (2017) describe how judges can adjust their reasoning to satisfy accountability mechanisms, such as appeal proceedings, promotions, and removals from office.

Studies have shown that biases can be overcome with the help of training that emphasizes conscious reasoning over unconscious processes. However, it has been observed that this approach is more effective when rules, instead of standards, are applied (Thornburg, 2019). The research literature on influences on decision-making is extensive, and there are many mechanisms to consider. It is crucial to take the context of these mechanisms into account before assuming that they are generalizable to other situations.

It is crucial to note within the context of this thesis that examines decision-making through analyzing written judgments, that factors outside of the law can influence not only the decisions themselves but also the summary of case facts and the justifications given by the judges. This influence can be used to justify the outcome or achieve a particular strategic objective (Gennaioli & Shleifer, 2008). One such objective can be to conceal the personal biases of the judges.

Judges are required to provide accountability and predictability by giving reasons for their decisions. In a study conducted by Liu and Li (2019) judges were biased by extralegal factors such as the defendant's moral character and then asked to give reasons for their decisions. The study found that the judges adapted their legal reasoning to fit with their decision when unduly influenced by these factors. They either strategically interpreted a standard or interpreted a legal concept and applicability of law to support their biased conclusions. However, almost none of the

judges acknowledged the factor that biased them. The authors could not conclude whether this behavior was intentional or not, but they highlighted that these practices are problematic for accountability and predictability regardless of intent.

To test the influence of legally relevant and irrelevant factors on judges' decision-making and written justifications, Spamann and Klöhn (2016) conducted an experiment, varying defendant characteristics (legally irrelevant factors) and precedents (legally relevant). 32 US federal judges were given case materials to review, and 1 hour to review and make a decision. The written reasons the judges provided were short, not exceeding 1 paragraph.[3] They were similar to real legal decisions in tone (although more informal) and content (policy and legal considerations). They found that for the outcome, precedent did not matter, but defendant characteristics did. However, in the written reasons the judges gave, they focused most on precedent, legislation and policy, and did not mention defendant characteristics.

Rubin (1987) argues that judges apply the law without being influenced by extralegal factors. However, he provides no empirical evidence to support this claim, and instead, he only describes how judges make decisions and write judgments. This indicates that the rationalization methods that Liu and Li (2019) documented may be unconscious, rather than conscious.

Niblett (2010) conducted a study to see whether judges' political beliefs influenced the precedents they chose to support their decisions. The study found no correlation between the judges' political orientation and how they justified their decisions. Niblett does acknowledge that other extralegal factors could have had an influence on their data, and that their study is limited to one jurisdiction and one law. It's possible that the discrepancy between Liu and Li's controlled experiment and Niblett's study based on naturally occurring data may be due to the complexity of actual decision-making. In real-life scenarios, it's difficult to establish causal relationships because the effect

[3] Written reasons provided in full in an appendix to the article.

of background variables on decision-making changes over time and context (Thornburg, 2019; Weaver & George, 2017).

2.6 Quality of judgments

As I appraise the quality of newborn care order judgments to discuss implications for predictability and evaluate accountability (see section 6.2), it is useful to look at how others have studied judgment quality and the conclusions they came to. One such study is by Schei and Qvigstad (2019). While they focus on the quality of justifications and not on whether the decisions are right, they state that good justifications can reveal poor decisions. They analyze in-depth a handful of pragmatically chosen judgments regarding a range of topics (e.g. publication of tape recordings of a high-profile court case, sentencing discounts after killing ones spouse, and the protection of the identity of media informants) from the highest courts of Norway, Sweden, Denmark, and the UK and look at their fulfillment of four criteria: the judgments should be 1) legal professional, 2) functional, 3) open, honest, and complete, and 4) formulated with an eye to the judgments' normative effect. They find that largely, the judgments they analyzed fulfill the four criteria.

A number of studies analyzing the substantive content of judgments have (mostly critically) remarked on the quality of judgments. Common and relevant criticism is related to the lack of weighing (e.g. Gerdts-Andresen, 2020; Krutzinna & Skivenes, 2020) and justification (de Kwaadsteniet et al., 2013; e.g. Gerdts-Andresen, 2020; Sletten, 2022).

2.7 Summary

The chapter started with literature on discretionary decision-making by street-level bureaucrats. The literature described in section 2.1 shows that street-level bureaucrats of different professions and different roles use discretion and that this use can threaten equal treatment. The need to investigate the effect of different demographic characteristics of clients or users on decisions is highlighted. The policy suggestions

by the authors differ based on variability in treatment or decisions being perceived as acceptable (e.g., based on professional expertise) or not acceptable (due to religious discrimination). This ties into the discussion about when differences due to individualized treatment can constitute fairness, through ensuring the individual needs of clients instead of insisting on treating everyone the same.

The chapter continued with two literature overviews on decision variability in child protection. There are various ways to understand the causes and consequences of decision variability and eliminating it may not be in the best interests of the involved people, parents, and children. This is further discussed in chapter 6.

The empirical studies on child protection decision-making described in 2.3 show a risk focus in the decision-maker's reasoning. The literature also describes how discretion is vital in decision-making, especially when interpretative social facts are essential in child protection cases, and discretionary assessment of such facts can lead to decision variability.

Such variability is sought to be counteracted by decision-making tools or standards. Studies analyzing the effect of such tools have varied results; the studies described in section 2.4 show that standards or tools don't solve all challenges related to reasoning and justifying decisions. Child protection practitioners still use discretion, sometimes to interpret the standards, other times to disregard standards in favor of relationships with the families they work with, or otherwise adapt their decision-making to the specific case. While standards can improve decision-making and accountability, there often is still room for improvement in terms of transparency and explicit explanations for decision rationales. This criticism ties in with section 6.2 on the quality of judgments. The chapter ends with describing literature on judicial decision-making concerned with influences on judges' decisions, and the reasons they officially give for their decisions, and touching on research on the quality of written judgments.

All in all, the literature paints a very complex picture of drivers of variability, which include factors from the country or system level down to characteristics of the individual decision-maker. It is vital to understand both general influences on

decision-making, the heuristics, and those especially relevant to my empirical focus, like the focus on risk in child protection cases and the prevalence of highly interpretative social facts of the families involved. These are important to contextualize the patterns of variability and similarity documented in my articles. The literature on how judges justify decisions and on the quality of judgments are important reference points in the discussion around accountability and predictability.

3. Theoretical framework

This chapter will describe the theoretical concepts that facilitate answering the thesis' research questions:

- Are similar cases equally reasoned and justified?
- Are the accounts the decision-makers provide suitable to hold them accountable, and what are possible implications for the democratic system?
- What are possible implications of my findings for the predictability of case treatment

I will present the components that were used directly in the coding and analysis of data, and those that are relied upon to understand and generalize the findings in a larger context. These theoretical concepts have been present and vital tools throughout the research process. They have guided the positioning of the individual articles, served as basis for development of coding strategies and operationalization of codes, and been instrumental in understanding the findings in a larger theoretical and societal context. As the research questions ask both how one can understand what happens in individual cases, and the implications of patterns for the overarching system, theory on both the individual and system level is required. The theoretical framework is summarized at the end of the chapter and visualized in Figure 1-1.

The thesis investigates intrusive state interventions where the state has delegated decision-making power to professionals. These interventions are exceptional limitations to the otherwise inviolable autonomy of individuals, on which modern states are founded (Eriksen & Weigård, 1999). The autonomy that is encroached upon is protected by the rule of law and enabled by the welfare state. For such interventions to be legitimate they must be justified by the need to protect someone and meet certain conditions. Care orders for newborn children are a prime example of such state interventions justified by the need to protect someone. The safety, welfare and rights of children are at stake, and the state-mandated decision-makers need to balance these against the rights and autonomy of the parents and the family as a unit. Given the states' capacity to order coercive interventions, there are strict requirements

to justice and procedure in the decision-making process and outcome. In the following I will present this picture in more detail, showing how I have applied the theory in the thesis.

3.1 The rule of law

The rule of law protects certain areas of life from interference by the state and guarantees fair treatment when the state does intervene. Simply stated, when the principles of the rule of law are protected, individuals can live as they wish and participate in the democratic process.

The rule of law is a set of principles that together form a way of governing a community, and while they are operationalized differently by different theorists and in different contexts there is a core component: that those in power are restrained and held accountable through law (Waldron, 2020). The rule of law has been operationalized and made concrete in the European Convention on Human Rights, which 46 European states, including those studied in this thesis, have ratified. The convention formulates important principles that protect citizens from state interference, such as equality before the law, legality, freedom of speech, the right to appeal, and procedural requirements for legal decisions (Council of Europe, 1953). The rule of law provides reasonable expectations for the interaction between citizens and the state, which is where this thesis is located.

The theoretical basis for my analysis is Molander and colleagues' (2016; 2012) understanding of the rule of law and how it comprises four principles, as they make the connection to discretion explicit. The principles they emphasize are equal treatment, predictability (being able to predict how policy/laws will be implemented), legality (decisions based on valid law), and the separation of public and private spheres.[4]

[4] Due to relevance to the thesis, I will focus on the first two of these.

Equal treatment is the formal principle of equality: the impartial and consistent application of rules; similar cases need to be treated similarly, and different cases differently (D. Miller, 2003).[5] Equal treatment is vital in child protection as children are entitled to equal levels of protection, and because the system must be fair. If cases are to be treated differently, it must be because they are different – and differences in treatment need to be proportional to differences between cases (Westerman, 2015). For example, if child protection law aims to keep children safe from harm, a child's hair color will hardly ever be a relevant difference between cases. A child's age can be a very relevant difference - but how much of a difference in treatment is warranted based on age needs to be proportionate to the aim of the decision. It is essential to point out that there is no requirement for either cases or treatment to be identical: the similarity of the cases is sufficient to warrant similar treatment (Gosepath, 2021). That child protection cases are treated equally is not a given: the complexity of cases to the point where they are considered unique as well as the requirement that decisions are in the best interests of the child (see section 4.1.1 for the principles and laws that apply to these cases) requires individualized treatment where the specifics and individual circumstances of a case need to be taken into consideration. How equal treatment can be compromised under these conditions is explained in section 3.3. All in all, equal treatment in child protection is vital to understand.

Equal treatment and its counterpart, decision variability, are often used to describe the outcomes of care order cases (whether a care order is decided for or against). However, this measure alone is unsatisfactory in the context of this thesis because the reasoning that led to the conclusion is a vital part of providing justice and accountability in the specific case. When I use the term "equal treatment," and apply it for empirical analysis, I include several elements such as the similar application of laws, consideration of similar case aspects, and similar conclusions in similar cases as they are accounted for in the reasoning and justification in written judgments.

[5] Parts of the text on equal treatment is adapted from my philosophy of science essay, submitted as course work for VITSV900 in spring 2021.

Conversely, decision variability here refers to the variability in the application of laws, consideration, and conclusions in similar cases.

The next principle is that of predictability, which means that citizens must be able to know what the laws are and how they will be implemented (Molander, 2016). These preconditions are necessary to legitimately expect citizens to adhere to laws or to penalize them when they breach them.

Legality means that citizens are to be governed by valid law (Molander, 2016). Other factors, like decision-makers' personal preferences and values, media attention, and heuristics, should not influence a decision made according to law. Additionally, laws should be publicly available and written or explained in a way ordinary people can understand.

I see legality and predictability as inseparable in several aspects. One crucial aspect is the transparency and availability of laws. Citizens should have access not only to the laws that are relevant but also to how they will be applied on a case-by-case basis (how case aspects will be evaluated in light of the laws, and which conclusions will be drawn based on this). Another critical aspect is that decisions must be based solely on valid laws. If this is achieved, and extralegal factors have not influenced the decision, then the treatment of cases becomes more predictable. This inseparability is crucial to my discussion of the implications of reasoning and justification practices. I analyze these practices in written judgments, where decision-makers need to demonstrate the legality of their decisions. The predictability of future case treatment depends on judgments containing sufficient detail and clarity. I will examine these two concepts together in the discussion, mainly in section 6.2 under the term "predictability".

The fourth principle of the rule of law that Molander (2016) concerns the line between the public and the private sphere. This signals that there are some areas in which the state will not interfere (unless to protect someone) and where individuals can be pretty sure that they can choose freely and will not be regulated. The importance of family life is encompassed in the ECHR article 8 on the Right to

respect for private and family life (Council of Europe, 1953). This principle underscores the importance of decisions interfering with family life needing to be legitimate and of high quality but will not be discussed in this thesis due to the limited relevance of the findings for the principle.

3.2 The welfare state

Another important part of the context for care order cases is the welfare state. It enables citizens to use their autonomy and take part in democratic processes through providing services guaranteed to them in social policies (Rothstein, 1998). For example, literacy, knowledge about the political system and how to influence it, critical thinking skills, and providing for basic needs such as shelter, food, and health care allow people to think less about survival and more about shaping the world around them. The child protection system is part of the welfare state, and securing children's adequate childhood conditions enables their autonomy as citizens. Children who experience maltreatment in their childhoods can face challenges later in life related to, among other things, physical and mental health, education, early pregnancy, income, and unemployment (Clausen & Kristofersen, 2008; Felitti, 2002). Such challenges can make it harder for them to choose how they want to live and lessen their capacity to participate in and influence democratic processes.

When enabled to participate in democratic processes by the welfare state, the preferences of autonomous citizens are channeled into social policies formulated by policymakers. This basis provides democratic base and legitimacy to the policies that shape society (Christman, 2020).

Different policies have different characteristics, which influence their implementation and results. A care order would be considered a "dynamic interventionist" policy by Rothstein (1998, p. 82). It is dynamic because it takes into account the specific situation of an individual family during policy implementation, and interventionist because it intervenes with the behavior of that family. This is a difficult task in which decision-makers need to interpret the demands of the policy to apply it to the specific

case in all its complexity. Both equal and individualized treatment must be provided. To fulfill this task, state-mandated decision-makers are allowed discretion (the mechanisms and results of discretion will be the topic of the next section).

The situation that arises due to the combination of delegated and discretionary decision-making is described by Rothstein (1998) as "democracy's black hole". This refers to the decision-making setting where the decision-makers are not democratically elected, and thus cannot be held democratically responsible for the result of policy implementation. Without control mechanisms, they cannot be held accountable for their exercise of power. In addition, discretion has to be used, further diminishing control over the decision. This can in turn compromise legality and predictability - within the black hole, there is a danger that the rule of law can be compromised. The analogy of the black hole of democracy illustrates which problems can arise in care order adjudications. They will be thoroughly discussed throughout the thesis.

3.3 Discretionary decision-making

Discretion is part of decision-making when someone is given a task and some guidance on fulfilling the task, but the guidance only partially determines the process or outcome. It is the power to decide what to do, present *"when someone is in general charged with making decisions subject to standards set by a particular authority."* (Dworkin, 1967, p. 32), or can be *"broadly conceived as the exercise of judgment and freedom to act within externally controlled limits"* (Evans & Hupe, 2020, p. 7). The authority to use discretion is delegated to the decision-makers based on their role and professional expertise (Molander, 2016) and they exercise the power they have been given as state-mandated professional decision-makers and not as private individuals. This basis for delegation allows one to legitimately expect a certain quality in the decision-making and the resulting written judgments. Analytically relevant expectations of this sort are operationalized in the critical appraisal of judgment quality discussed in section 6.2.1.

Discretion is at play when state-mandated decision-makers implement policy in real-life cases. When a Tribunal decides whether to commit an individual to a psychiatric ward against their will, when a police officer needs to evaluate whether a reported situation fits the criteria for further investigation, or when a social welfare professional is tasked with admitting and denying applicants for subsidized housing, and in care order adjudications, they all use discretion in the decision-making. In child protection cases, child protection professionals apply for a care order when they think a child is at too great a risk of harm and cannot be safeguarded unless she is removed from her parents' care. When the care order case is adjudicated in court, the decision-makers need to find the best solution in the specific case while adhering to the laws and regulations (standards) that apply. This requires discretion as cases are complex, and the standards that regulate the decision are not specified for all situations.

An important distinction in my use of the term discretion is in the difference between rules and standards. Not all laws that govern judicial decisions are standards that allow discretion; some are rules. What is the difference? Lovett (2011) describes rules as deterministic, restricting decision-makers' legitimate actions in a machine-like format. Rule-like laws can be seen as simple, fair, and efficient, for example, traffic speed limits. On the other hand, standards are laws that allow discretion or decision-making flexibility, giving outcomes that ensure substantive justice (the right solution for the specific case at hand (D. Miller, 2017)). Standards are not fully determined but enable the decision-makers to adapt their decisions to the specific case, taking into consideration the circumstances and characteristics that are most important in that case. I have applied this conception of standards in my articles and this thesis.

Dworkin (1967) has described the relationship between "standards" or "limits" and decision-making freedom as a donut (see also the donut shape in Figure 1-1). The standards are the dough of the donut, forming the decision, letting the decision-makers know what they need to take into consideration and what the goal of the decision is. The dough surrounds the hole in the middle where discretionary freedom

to make decisions within the dough-limits is found. Donuts differ in taste and texture, and decision-making situations will differ depending on the standards that restrict and emancipate the decision-makers. How decision-makers deal with and account for their use of standards in discretionary kinship placement decisions as part of care order adjudications, is a central focus of the 3rd article of the thesis.

The donut analogy described above parallels how Molander (2016) describes two dimensions of discretion: the structural and the epistemic. The structural dimension considers discretion as space: *"discretion refers to an area of conduct which is generally governed by rules but where the dictates of the rules are indeterminate."* (Goodin, 1986, p. 234). The space can be large, giving decision-makers much freedom when making their decisions, or small, leaving them little leeway, or anywhere along this continuum. Decisions made in a wide discretionary space can vary more than those made in a narrow space.

Within this space, discretion in the epistemic sense is located, known as discretionary reasoning: *"Discretionary reasoning is defined as the cognitive activity that may take place within the discretionary space of professional judgment"* (Wallander & Molander, 2014, p. 1). It is the result of discretionary reasoning that this thesis is concerned with, reasoning regarding what the case is about and what should be done (Molander, 2016). The reasoning process is a crucial aspect of "democracy's black hole," which needs to be examined closely due to the significant impact of the decisions made within it. This involves interpreting the facts of the case, and what is deemed important and what is not (Larsson & Jacobsson, 2013). Analyzing how this reasoning is accounted for in the written judgments provides information on equal or variable treatment of cases, and a basis on which I assess the capacity to hold decision-makers accountable (discussed in section 6.2). This focus allows in-depth analyses of the reasoning and justification of intrusive state interventions, showing how decision-makers use their discretion, and what they consider legitimate reasons to interfere with citizen's autonomy.

Discretion in decision-making can compromise equal treatment and predictability (Molander, 2016) which makes it vital to investigate these aspects of care order decisions.[6] Firstly, discretion can pose a problem for the equal treatment principle: decision-makers using discretion can end up treating two similar cases differently, as their evaluation of the facts of the case and applicable standards can vary. This can happen to the most conscientious decision-makers and need not express malice; even between reasonable people, there may be reasonable disagreement when discretion is involved (Molander, 2016).

Next, discretion can lead to law being implemented differently in similar cases, making it unpredictable for citizens (Molander, 2016). For example, decision-makers can interpret the accepted threshold for intervention in child protection cases differently, leading families to experience intervention by the child protection system as unpredictable and unfair. This can lead to great dissatisfaction and decrease trust in the system. Unpredictability can also result from poor accounts of rendered decisions – it is easier to understand how laws are implemented when their application is explained clearly and understandable to lay people. This is mapped and discussed in the 3rd article. Despite these dangers, varying degrees of discretion are allowed in many state-mandated decision-making processes. This is because discretion also has some valuable benefits related to laws, and related to the cases the decisions are made for.

Schneider (1992) explains that the flexibility discretion provides can be helpful when several laws can be applied, when there are no laws written for a novel or very complex case, or when a very strict application of law would be contrary to the aim of the law. Discretion is especially helpful in child protection cases, which tend to be complex and require prognostic decisions - and discretion allows the decision-makers to take into consideration the unique characteristics of each case (Molander, 2016). Additionally, it can be used to achieve equality, democracy, and social justice

[6] Molander describes four principles: equal treatment, predictability, legality, and the separation of private and public. As the thesis discusses the first two, discretionary threats to these will be described.

(Brodkin, 2020). Potential benefits and drawbacks of limiting discretion to achieve more equal treatment and predictability are discussed in sections 6.1.3 and 6.2.1.

3.4 Accountability for delegated decision-making power

Accountability is vital when some people are given special powers over others (like when decision-makers decide whether to remove a child from her parents' care), (D. Miller, 2003). This is an essential part of a democratic society to ensure that the people are still in control. Through accountability one can control whether the decisions meet the expectations of being legitimate, reasonable, and in line with valid law.

Bovens conceptualizes accountability as "*a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.*" (Bovens, 2007, p. 447). Bovens goes on to describe four questions to determine which kind of accountability one is looking at 1) to whom account must be given, 2) by whom, 3) about what, and 4) why. For this thesis, in care order cases:

1) Account must be given to the parties of the care order case (the families and the child protection agency), other state institutions (like politicians, the rest of the legal system, ministries, and state departments, etc.), and the public.

2) It is the decision-makers who adjudicate care orders who are obligated to give the account. I access this through their written judgments.

3) The account by the decision-makers in written care order judgments must explain why the outcome was chosen. Different countries' legal systems have different specific requirements for what judgments need to contain, described in section 4.3.2.

4) The obligation to justify the decisions is formal; justifying is part of the decision-makers' job. If they do so inadequately or not at all, they can face consequences such as appeals, reprimands, or even loss of their professional position.

Accountability can counteract some of the potential problems of delegated decision-making illustratively described as the “black hole of democracy” by establishing control mechanisms for non-elected decision-makers, facilitating that the abuse of power can be exposed, and by promoting effective governance (Bovens, 2007). Accountability makes visible the actions that happen in the black hole of democracy, as the decision-makers are obligated to explain the reasons for their decisions. This visibility facilitates democratic control, as one needs to know what is happening to decide if anything should be changed. This manner of understanding accountability is central in the 3rd article, and further discussed in section 6.2.1.

Bovens (2007) explains how the transparency provided in written accounts can expose power abuse, like when decision-makers have stepped outside their mandate. Such abuse is also more likely to be prevented when the decision-makers know they will be held accountable. They could be deterred by public embarrassment and the professional consequences if they were to abuse the special powers conferred to them by the state.

Accountability can also be seen as a tool to keep the state fulfilling its promises (Bovens, 2007). It induces the system to learn by confronting decision-makers and other agents with their actions. The possibility of sanctions can motivate them to find more effective solutions, and when they are discovered, others can learn from the corresponding accounts.

Uncontrolled power or abuse of it and ineffective governance will lead to struggles with legitimacy. Legitimacy

> *“… is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.”*
> (Suchman, 1995, p. 574)

When conceptualizing legitimacy as perception, it is the result of actions, objects, or, in the case of this thesis, decisions and their justifications, being perceived as appropriate by others (Suddaby et al., 2017). The child protection and the legal

system need to be perceived as legitimate, as the cooperation of involved parties is often required.

To be perceived as legitimate, the reasons for deciding to intervene with a family's autonomy must be “good reasons”. Molander (2016) explains that “good reasons” must be related to professional knowledge, laws, and/or generally accepted principles. In child protection adjudications, this would mean professional knowledge of children, or the law, national and international laws and guidelines related to child protection and children in general, and broadly accepted norms and principles of parenting, family life, and conceptions of a good childhood. The reasons must be able to withstand rational objections. I use this conception of "good reasons" in the 2nd article to evaluate the legitimacy of the decision-makers’ justifications and the content of accounts in the 3rd article.

3.5 Summary and reflections

The chapter has described the theoretical framework that is applied in this thesis, which is summarized in Figure 1-1. The thesis focuses on a specific decision-making situation, known as democracy's black hole, which is a closed setting where decision-makers are mandated to make decisions on intrusive interventions into the private sphere. This is an exceptional act that limits autonomy of families to protect children from harm. As state-mandated decision-makers have to deal with indeterminate legal standards and complex cases, they use discretion in their treatment of cases. However, discretion can pose a challenge to the equal treatment obligation. To ensure accountability, decision-makers have to account for their reasoning and justification in written judgments. The quality of the judgments determines how well decision-makers can be held accountable for the decision they made and how predictable the future implementation of policies is. The interplay of discretion, equal treatment, and accountability is connected to the individual case. Predictability, as seen in this thesis, has consequences on a systemic level and is derived from the treatment and outcome of a number of cases, aggregated into patterns.

It is worth noting that other theories could have been useful in understanding the phenomena studied in this thesis, such as organizational theory, theories on judges' behavior, and street-level bureaucracy. However, I have chosen to discuss the findings in the context of the rule of law and accountability, as these are currently debated among researchers (e.g., Burns et al., 2019) and in the practice field (e.g., Ministry of Children and Family Affairs, 2023). This approach maximizes the thesis' value in a societal context. Within the rule of law, I focus primarily on two principles: equal treatment and predictability, and implicitly touch on a third; legality. Although the separation of public and private are important in a child protection context, it has less relevance for the findings and the analytical framework I have employed.

Insights regarding accountability are valuable to a long-standing debate regarding the legitimacy and trust in the child protection system (Gilbert et al., 2011; Loen & Skivenes, 2023).

The theoretical concepts I have selected to gain a better understanding of my findings in a broader context often overlap and intersect. For instance, it can be difficult to distinguish analytically between predictability and accountability, as both are dependent on good accounts of how decisions are made (as illustrated in Figure 1-1). However, I am making an effort to clearly separate these concepts to highlight their distinct contributions to the literature. This is not meant to undermine their complex and interconnected aspects.

4. Empirical setting, research design, and methods

After having set the theoretical landscape, this chapter will set the thesis in the empirical context and describe the methods through which I brought the data and research questions together. I will start by briefly describing the decision-making context in the countries from which the data is collected and the characteristics of care order cases. Then I discuss judgments as data. Lastly, I will describe how this material was handled, including limitations and empirical and methodological contributions. The chapter is rounded off by describing ethical considerations that have played a role throughout the process.

4.1 Context and decision-making in eight countries

The thesis contains data from eight countries: Austria, England, Estonia, Finland, Germany, Ireland, Norway, and Spain.[7] The national contexts including characteristics of the decision-making are relevant to understanding how the judgments came to be and how they should be interpreted. The 1st article has a small comparative element across child protection systems, but this element is not built on in later articles. The 2nd article compares treatment within pairs of cases, and the 3rd article has data from one country alone. While the comparative aim across countries is limited in the individual articles, the countries are the context for the thesis as a whole. The following section will describe the overarching characteristics of the eight countries and point out national distinctions where they are considered relevant.

The eight countries are similar in some ways and different in other ways. They are all classified as high-income countries (World Bank, n.d.) and score high on indexes ranking the rights and welfare of children (Berrick et al., 2023a).

[7] In addition to the similarities and differences that are analytically relevant, there is a pragmatic reason for choosing these countries: judgments are very difficult to access, also for a researcher. Through utilizing project data material, where the legwork of getting permissions and collecting the data was done, the study was made feasible.

4.1.1 Laws regulating care orders for newborn children

Important sources for principles governing the relationship between family and state come from the UN Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR) (Council of Europe, 2022; OHCHR, 2014), which all eight countries have ratified. The international conventions deliver important premises and principles that are translated into national legislation and take precedence over national law if they conflict. Especially the child's best interests principle from the CRC (article 3) and the least intrusive intervention principle from the ECHR (article 8) are important in child protection decisions in the eight countries. The latter principle implies that a care order may only be put in place when doing so is in the best interests of the newborn child, and when a certain threshold is crossed. In addition, shared European values are likely to influence both legislation and its implementation. While there are differences, values regarding personal freedom, individual autonomy, social solidarity, ethnic tolerance, civic honesty, gender equality and liberal democracy are strongly supported and converging over time across EU countries and Norway (Akaliyski et al., 2022).

Thresholds vary across countries. The national laws that regulate care orders are included in Table 4-1. In Austria, a care order may be put in place when the wellbeing of the child is at stake (Centre for Research on Discretion and Paternalism, 2018) based on the Child and Youth Welfare Act (see Table 4-1). Central for the evaluation of the wellbeing are 12 criteria, which can be summarized to providing resources and services, protection, and participation (Kriz et al., 2023). Although Austria is a federal system where each state has their own child welfare law, the different laws are very similar (ibid).

In England, care orders are issued by the court when a child is experiencing, or is likely to experience, significant harm, which can be attributed to the care provided to them (Centre for Research on Discretion and Paternalism, 2018). This is regulated in the Children Act and Children and Families Act (see Table 4-1). The "no order principle" states that an order can only be made when that would be better than making no order (ibid). Generally, England has operated with a high threshold for

intervention into the family, although the threshold varies with changes in the sociopolitical context (Thoburn, 2023).

The Family Law Act regulates care orders in Estonia (see Table 4-1). If a child's physical, mental, or emotional well-being is endangered by the parents, the child may be taken into care (Centre for Research on Discretion and Paternalism, 2018). State support to families is mostly limited to cash benefits, and the child protection agencies' focus is risk-oriented and concerned with protecting children from abusive parents (Linno & Strömpl, 2023). Although there is work underway to strengthen parent's caregiving abilities, they are still often seen as defective and in a negative light (ibid).

In Finland, a care order is issued when the health or development of a child is at serious risk, regulated in the Child Welfare Act (see Table 4-1). Such orders are only made when in-home services are not feasible, suitable, or sufficient, and when placing the child in substitute care is deemed to be in their best interest (Centre for Research on Discretion and Paternalism, 2018). However, the threshold for providing supportive services is considerably lower, aimed at preventing the need for a care order (Höjer & Pösö, 2023).

The German Civil Code allows care orders when the physical, mental or psychological best interests of the child are in danger, and if the parents are unable or unwilling to ward off the danger, and the proportionality principle applies (Centre for Research on Discretion and Paternalism, 2018). Case law is clear that the assessment of child endangerment is prognostic, and the negative effects of intervention on the child have to be considered (Biesel & Kindler, 2023). The threshold for intervention has been lowered somewhat in the latter years, as the vulnerability of very young children has been emphasized (ibid).

Reunification and proportionality are central in Irish legislation regarding care orders (Centre for Research on Discretion and Paternalism, 2018). The threshold for care orders comprise assault, abuse, neglect and maltreatment, and includes the child's health, development and welfare both retrospectively and in the future (CCA, n.d.).

The Norwegian CWA of 1992 was replaced with a new law in 2023, but the threshold for removals remains unchanged (Bufdir, 2023). As the judgments in the thesis are decided according to the 1992 law, I will refer to that law throughout and seek to understand the judgments in light of that law. Among the eight countries in the study, only Norway specifically mentions newborns in their legislation[8] – stating that similar considerations apply to removing a child from their parents' care while still at the hospital, as when removing older children (Centre for Research on Discretion and Paternalism, 2018). Newborns who were in an emergency placement since birth can receive a care order if reunifying them with the birth parents make it likely that the threshold for a care order will be crossed. The Norwegian child protection system should be seen in context of an extensive welfare state that provides universal services from cradle to grave, seeking to prevent a range of harms for all citizens (Hestbæk et al., 2023).

The Spanish Civil Code requires care orders when children are neglected or abandoned (Centre for Research on Discretion and Paternalism, 2018). Autonomous regions create additional laws to specify the threshold for intervention further (Segado, 2023).

4.1.2 Decision-making bodies

All eight countries have a tiered legal system, where a care order decision can be appealed to the next level. In Austria, Estonia, and Ireland, care orders are decided in a district court; in England and Germany, in a family court; Finland has an administrative court; in Norway, a Child Welfare Tribunal; and in Spain, a Child Guardianship Committee (see Table 4-1). The cases are decided by a single judge in Austria, England, Estonia, Germany, and Ireland, while Finland, Norway, and Spain practice group decision-making.

[8] Status of 2018. Most of my data is from before 2018, so the legislation that was active at that moment is most relevant.

Table 4-1 - Decision-making bodies in eight countries

	Austria	England	Estonia	Finland	Germany	Ireland	Norway	Spain
Decision-making body	District Court	Family Court	District Court	Administrative Court	Family Court	District Court	Child Welfare Tribunal	Child Guardianship Committee
Specialization and type of body	Generalist court with a specialized department	Specialized court	Generalist court, some specialization[9]	Generalist administrative court	Specialized court	Court	Specialized court-like body	Court-like body
Decision-makers	1 judge	1 judge	1 judge	2 judges, 1 expert	1 judge	1 judge	1 jurist, 1 expert, 1 lay member	7 decision-makers
Laws regulating care orders[10]	Child and Youth Welfare Act 2013	Children Act 1989 and Children and Families Act 2014	Family Law Act 2009	Child Welfare Act 417/2007	German Civil Code 1900	Child Care Act 1991	Child Welfare Act 1992	Spanish Civil Code 1889
Sources	(Burns et al., 2017c, 2019; Centre for Research on Discretion and Paternalism, 2019, 2018; Segado, 2023)							

[9] The Estonian District courts are generalist courts, but some divide cases among the judges to allow for more specialization.
[10] The listed laws are those effective when the data judgments were made. There are likely to have been amendments to the laws since their first enactment.

In Finland, the administrative court only decides cases if at least one of the parents or a child over 12 years does not consent to the care order. Otherwise, the decision is made by the municipal social work authority (Höjer & Pösö, 2023).

Among the important legislative charges in Norway in the latter years is the piloting and subsequent adoption of a dialogue-based decision-making procedure (Viblemo et al., 2019). This has led to a reduction of cases decided in the Tribunal. The child protection context in Norway is also influenced by a larger number of child protection cases decided and pending decisions in the ECtHR (The Norwegian Directorate for Children, Youth and Family Affairs, n.d.). Several of these have concluded that Norway had breached the human rights of parents and children in these child protection cases.

In Spain, there are regional differences due to the country consisting of autonomous regions. However, the law emphasizes homogeneity of the child protection structures in the different communities, and the decision-making bodies are very similar in structure and function (S. Segado, personal communication, 27.11.2023). For example, in Madrid and Melilla, the decision-making bodies have 7 decision-makers, and most other regions are similar (ibid).

The role of courts, relevant legislation, and national contexts of these and other countries are described in more detail in Burns et al. (2017a) and Berrick et al. (2023a).

4.1.3 Child protection system orientations

The typology of the child-centric, family-service, and risk-oriented systems is based on characteristics of existing national systems and aims to be valuable when analyzing and comparing systems (Gilbert et al., 2011). It can be helpful to understand when and how the child protection services will offer services or even intervene into the family without consent. Child protection system orientations provide a lens to understand the national contexts, and the 1st article operates with the orientations as part of the comparative framework. I will briefly describe them here, based on Burns et al. (2017a), Gilbert (1997), and Gilbert et al. (2011).

Norway and Finland are classified as systems in the child-centric orientation (Gilbert et al., 2011). In such systems, children are seen as *"individuals with independent rights and interests"* (Burns et al., 2017a, p. 6). This gives them status separately from the family, prioritizing their rights over the parents' (Gilbert et al., 2011). Gilbert et al. go on to describe how the state will intervene not only when there is established harm but also when the child's development is at risk. The system is oriented towards children's rights, and a care order is one of the interventions designed for ensuring children's welfare. In this orientation, the approaches of social investment and individualization (seeing children as future citizens vs as current citizens) can conflict.

As the child-centric orientation was split from the family service orientation, the two share several traits. Their goals and logic are often the same, but how rights and responsibilities are weighed differs; *"In some respects the family service orientation favors parents' rights over children's rights"* (Gilbert, 1997, p. 234)

The service-oriented systems view the problem of child maltreatment as a symptom of intertwining problems, which often can be treated through therapeutic interventions. The cause of the problem is located in the family's needs. Families should receive help to treat their problems and improve their lifestyles and behavior. Systems of this orientation will intervene early to assess needs and often respond with offers of voluntary measures, as it aims to prevent removals. The state seeks to enter into partnerships with parents to assist them in strengthening family bonds. Austria, Germany, and Spain have family service-oriented systems (Gilbert et al., 2011).

The risk orientation (or "child protection" orientation) has a higher threshold for intervention than the other orientations. The focus is on specific acts of maltreatment or abuse. Abuse is seen as perpetrated by neglectful and abusive parents or family members, against which children must be protected. The system responds to serious risk of harm (or established harm) and intervenes in a legalistic and adversarial manner to ensure children's safety. The rights of both children and parents are to be enforced through legal means, and services are provided to facilitate reunification.

England, Ireland, and Estonia are described as having risk-oriented systems (Gilbert et al., 2011).

Recently, another typology of child protection systems has been developed, seeking to cover more significant parts of the globe and systems in more varied states of development (Berrick et al., 2023b). This shows the rapid development of scholarship in this field.

The threefold typology was unhelpful in explaining the findings in the 1st article. This may have several reasons: the scholars who developed the threefold typology highlighted the increasing complexity of national child protection systems, which may contain characteristics of several orientations at once. Additionally, the orientation typology is based on legislation and policy, while my study focusses on one specific part of practice. The typologies may still be relevant as contextual issues but not as sources of explanation. Analyzing findings along typology lines was refrained from in the 2nd and 3rd articles.

Summing up, the decision-making context in the eight countries shows some similarities, and some differences. The first similarity is that newborn children have the same needs regardless of which country they are born in. Care order decisions are made in administrative or judicial bodies, that have to adhere to the ECHR and the CRC. Principles that apply in all eight countries are the child's best interests and the principle of the least intrusive intervention. Important differences between the countries relate to the number of decision-makers that make a care order decision. The child protection system orientation classification described above is a characterization of the national system's policy and legislation, which can be helpful when formulating analytical expectations, but empirical findings may not coincide.

4.2 Care orders

Children can come to state care through a court deciding for a care order[11], voluntary placement, or abandonment (Table 4-3 shows these categories combined). In this thesis, I focus on one type of state care: care orders. By this I mean the state, through child protection agencies, formally taking over the care of a child from their parents and placing the child in foster care. The aim is to prevent (further) maltreatment and ensure an adequate upbringing for the child. The care orders included in this thesis are decided by the decision-making bodies summarized in Table 4-1. The intervention into the private life is most intrusive when a care order is made without the consent of parents and children involved, as it interferes with individual freedoms, the private sphere, and family life (Burns et al., 2017b).

The number of children placed outside the home varies from 4,3 in Spain to 16,5 per 1000 children in Finland (see Table 4-2). It is difficult to know the prevalence of care orders regarding newborn children, as the statistics usually lack this level of detail. However, they are rare compared to care orders for older children, as Table 4-3 regarding newborn care orders in Norway shows.

[11] National terms for this practice vary, but I will use "care order" for placements outside the home decided by a court or respective decision-making body.

Table 4-2 - Key facts about child protection in eight countries

	Austria	England	Estonia	Finland	Germany	Ireland	Norway	Spain
Data years	2016 2017	2015 2016 2017	2015 2016 2017	2016	2015 2016 2017	2012-18	2016 2018 2021	2016 2017
Child population	1 535 958 (2018)	11 785 311 (2016)	258 835 (2016)	1 071 905 (2016)	13 470 300 (2016)	1 190 478 (2017)	1 127 400 (2016)	8 119 000 (2015)
Out-of-home placements[12]	13 325 ^ (2018)	72 590 # (2016-17)	2 599 # (2016)	17 689 ^ (2015)	145 949 # (2016)	6 116 # (2017)	11 612 # (2016)	34 644 # (2017)
Out-of-home placements per 1000 children	8,7 ^	6,2 #	10 #	16,5 ^	10,8 #	5,1 #	10,3 #	4,3 #
	^ are stock statistics showing the number of removals at one point in the year # are flow statistics showing the number of removals throughout the year							
Sources	(Berrick et al., 2023a)							

[12] Court decided, voluntary and due to abandonment. Statistics regarding care orders only are unfortunately not available.

Table 4-3 - Out-of-home placements (omsorgstiltak) in Norway

Out-of-home placements in Norway							
Year	2015	2016	2017	2018	2019	2020	2021
Per 31. December	8924	9080	9033	8868	8600	8144	7658
Per 31. December per 1 000 children	7,9	8,0	8,0	7,9	7,7	7,3	6,9
Newborn care orders	-	76	-	84	-	-	42
Sources: Statistisk Sentralbyrå (2022) and my own selection process. “-“ indicates that the presence of case type has not been mapped for the year.							

The data material consists of care orders for newborns, decided in the first instance decision-making body. By newborn care orders I mean cases where children are removed from their parents’ care within 30 days of birth or after a longer stay in a supervised parent-child facility. Such a stay can be mandatory or voluntary, and entails living in a facility with the child, and receiving supervision, treatment, and/or training related to childcare.

4.2.1 Characteristics of newborn care order cases

The following overview is based on data mapped in the 216 care order judgments from the eight countries (Austria, England, Estonia, Finland, Ireland, Germany, Norway, and Spain) that are the data material for the ACCEPTABILITY and DISCRETION projects, published by the Centre on Research on Discretion and Paternalism (2021). These 216 judgments are the project data material from which most of the data material for the articles is selected (see Figure 4-1).

In a typical newborn care order case, the child protection services are contacted before or right after birth by people who have concerns that the parent(s) might not be able to care for the child appropriately and safely. On average 14 days after birth the child is removed from their parents’ care and taken into an emergency placement or temporary foster care. When the child is on average 8,8 months old, a care order adjudication takes place. 90% of the 216 care order judgments were approved (see Table 4-4), leading to the child being taken into foster care. It varies from country to

country how the cases started – in Germany, only 4% started with a stay in a parent-child facility, the lowest prevalence for this measure reported in the data material, the highest prevalence is in Finland with 52%. The other 48% of Finnish cases started with the child being removed straight from the hospital, which is the lowest prevalence, the same happened in 83% of the Irish judgments which has the highest prevalence of this.

Paternity is known in most cases, but this varies across countries: in the English judgments paternity is known or presumed known in all cases, but only in 35% of the Estonian cases.

Care orders are applied for when there is a conceived risk of harm to the child. Parental risk factors in the 216 care order judgments are mapped, and there are more risks reported for mothers than fathers. There are more mothers than fathers described in the sample (due to unknown paternity), and for some fathers who are known there is very little information. This may be due to their lack of engagement with the case or child.

The most prevalent maternal risk, as described in the judgments, is "deficiencies in ability to care". This consists of four themes: parenting insufficiencies, chaotic lifestyle, housing issues, and financial issues. Second is mental health issues, followed by risk of harm, having lost previous children to public care, and substance misuse. Most of the mothers are reported to have several risk factors. The same five risk factors are topping the list of most reported for fathers, but they are in total less prevalent.

Newborn care orders are very good cases through which one can study discretion and the use of power by state agents (why judgments are good data material will be discussed in section 4.3). Care orders are at the intersection of public and private (Skoglund et al., 2022), where state interferences with private life are acutely felt. Care orders for newborns have a higher likelihood of permanent separation from birth parents as newborns have a higher likelihood of being adopted, which means that even more is at stake. The discretionary element is also stronger, as the child's

individual wishes cannot be attained, and there is little to no history of child and parents together on which to base predictions about the future.

4.3 Judgments as data material

The project data material consists of written newborn care order judgments, which have been collected through three projects: DISCRETION[13], ACCEPTABILITY[14] and Barn Nemnd[15]. The data collection process for the first two projects as well as data access permissions and ethics assessment are described in appendices A and B. The data material for the individual articles was selected from this project data material (see Figure 4-1).

The first two projects gathered all decided or all publicly available adoption and newborn care order judgments from eight European countries (or large areas within them) from one or several years with 2016 as the base year (see Table 4-4). The latter collected all care order and institutional care judgments from Norway from the years 2021, 2018, 2008 and 1998. Table 4-4 and Table 4-5 show the newborn care orders collected through these projects for the years relevant for the thesis.[16]

Table 4-4 DISCRETION and ACCEPTABILITY project data material for newborn care orders, from which the data material for all three articles were selected.

	Year(s)	All judgments / publicly available	Whole country / large area	N judgments	Care orders approved
Austria	2016–2017	All judgments	Large area	24	100%
England	2015–2017	Publicly available	Whole country	14	86%
Estonia	2015–2017	All judgments	Whole country	17	88%
Finland	2016	All judgments	Whole country	25	96%
Germany	2015–2017	All judgments	Large area	27	67%
Ireland	2012–2018	Publicly available	Whole country	17	88%
Norway	2016	All judgments	Whole country	76	93%
Spain	2016–2017	All judgments	Large area	16	94%
Total				216	90%

[13] https://discretion.uib.no/projectsold/discretion-and-the-childs-best-interest-in-child-protection/
[14] https://discretion.uib.no/projectsold/the-acceptability-of-child-protection-interventions-a-cross-country-analysis/
[15] https://discretion.uib.no/projectsold/county-social-welfare-board-decisions-in-child-protection-cases/
[16] The data collection process is described in Appendix B.

Table 4-5 – Norwegian newborn care order judgments from the Barn Nemnd project

Year	N judgments	Care orders approved
2018	84	96%
2021	42	100%
Total	126	98%

4.3.1 What judgments mean and are

Judgments are documents, and Asdal and Reinertsen (2022) describe how documents can be conceptually understood as sites, tools, work, texts, issues, and movements. I understand care order judgments as sites where the decision-makers reason and justify their decision for the specific case at hand. En masse, they are sites where child protection policy is interpreted and put into action in specific cases. Judgments are also tools, documenting the decision and binding the decision legally. They are an important puzzle piece important to analyze and understand in the relation between state and individual.

In addition to what they are and mean to the state system, they are personal to the individuals involved in that they contain information about them and a vital decision about their future. This has implications for the respect they should be treated with, both practically in terms of storage and data protection, and in how the research results are presented to the public. This will be noted on in section 4.6.

4.3.2 What judgments contain

The judgments are naturally occurring data, they exist independently of the research being conducted. They are documentations of decisions in real-life cases, concerning real families and made by real decision-makers. This makes them very valuable when seeking to understand authentic decisions made in the real world.

A requirement stemming from the ECHR article 6 on fair trial is that judicial decisions need to be adequately justified – adequate meaning suitable to explain the reasoning of the court (Ministry of Children and Family Affairs, 2005). Different jurisdictions meet the ECHR obligation though national requirements to what

judgments need to contain (see Table 4-6). In England and Ireland there is no requirement that judgments need to be written down. The most comprehensive requirements are found in Norway, where judgments must contain obligatory reasoning, facts and evidence that were relevant for the decision, assessments of the central elements of the involved parties, the legal grounds that guided the decision, and an assessment of the facts in light of the legal norms. In addition to the requirements summarized in Table 4-6, formal and informal legal and administrative traditions and norms from each country will contribute to forming judgments.

Table 4-6 - Elements of justification as required by national legislation. Country ranking. (Reproduced from Centre for Research on Discretion and Paternalism, 2019)

Country	Obligatory reasoning	Facts & evidence	Requests of the parties	Legal grounds	Assessment	Rank
Norway	Yes	Yes	Yes	Yes	Yes	1
Austria	Yes	Yes	Yes		Yes	2
Spain	Yes	Yes		Yes	Yes	2
Finland	Yes	Yes			Yes	4
Germany	Yes	Yes		Yes		4
Estonia	Yes	Yes		Yes		4
England						7
Ireland						7

Judgments from each country follow the same internal logic and template, although the Irish and English judgments are somewhat more variable in form compared to the other countries (for example, using fewer and more varied headings). The predictable format of the judgments allows for a systematic coding, and for some countries (Norway, Finland, and Estonia) a delimitation of the coding to only the parts containing the decision-makers’ reasoning when this is desirable.

The decision-makers reasoning is required to include everything they find relevant in the judgments, and key informant interviews conducted at the DIPA-Centre indicate that they do so.[17] This does not mean that all information about the cases is in the judgments. There is information from reports, case files, input of social workers, and

[17] For more information, see https://discretion.uib.no/projects/supplementary-documentation/key-informant-interviews-5-countries/

parents' conduct in the proceedings are likely to influence the decision-makers. While this information would be interesting, it is not considered necessary given the analytical focus.

The main value of the judgments is that they are naturally occurring data that can provide insights into real-life decisions. They are complex and challenging to work with, but through the strict requirements placed on them they are predictable and trustworthy. They are very well suited to studying the reasoning and justification of decision-makers in care order decisions. Judgments that have been made publicly available (those from England and Ireland) were only anonymized to allow publication, they were not further amended.

Care order judgments are well-suited to answer research questions regarding how decision-makers reason and justify these consequential decisions. I have focused my analysis on questions that are central in both political science and child protection: the role of risk in interventions into the private sphere, equal treatment of similar cases, and how the decision-makers showcase (or account for) their use of the legal standards that curtail their discretion in these cases.

4.4 Handling the data material and empirical contribution

As the articles' data material is part of larger project data sets, there was coding available from project coding processes consisting of systematic coding and reliability testing (section 4.2.1 is based on this work). When possible, this coding was relied on for background information such as demographics, case outcome, and milestones in case history and in the selection processes of data material for the articles.

In the following, I describe how the data material was treated during the work with the three articles. The data material was analyzed qualitatively, using content and thematic analysis. The processes for all three articles were systematic, thorough, and iterative. They involved a careful selection process, coding and reliability testing

processes, and analysis of the coded material. All coding for the articles was done in NVivo 12 Pro.

The analyses were focused towards answering the research questions by carefully selecting relevant judgments, delimiting the coding to certain parts of and themes in the judgments, and by strictly adhering to coding descriptions. These demarcations were useful to facilitate comparability of the results and ensure validity.

The analysis is limited to the decision-makers' arguments, where such a limitation is feasible. This was done to isolate the decision-makers' reasoning and justifications, as they are presented in the judgments.

4.4.1 Selection process

For each article, care order judgments were selected along criteria that fit the research questions. The aim was to establish material comparable across child protection system orientations, pairs of cases, or case types, to map similarities and differences in the reasoning by the decision-makers.

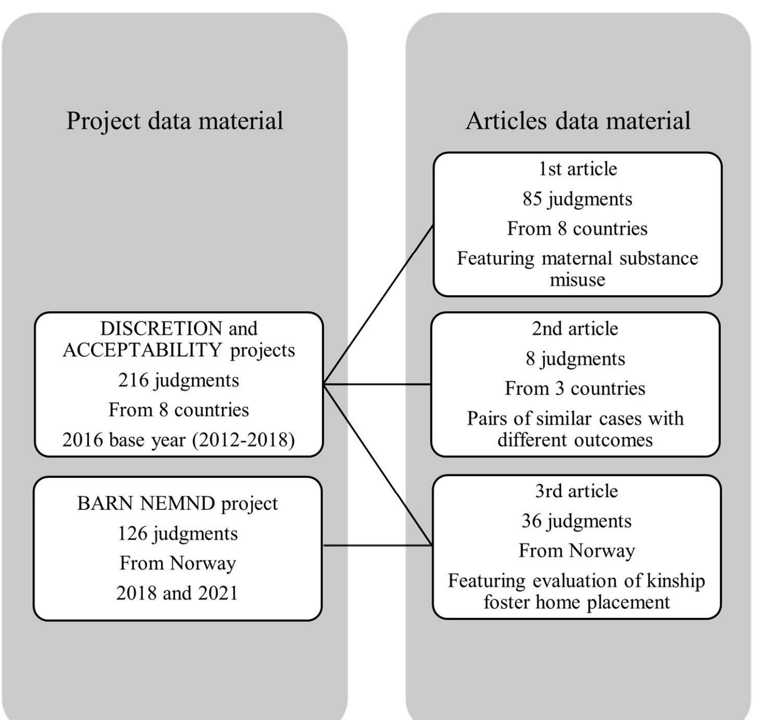
For the 1st article, 85 newborn care order cases, featuring past or current maternal substance misuse, were selected (see Figure 4-1). The research question focused on the role of risk and protective factors, and selecting cases based on a risk factor reported for the primary caregiver (the mother) provided suitable data material. While the judgments included in the article are from eight different countries, the risk and protective factors that are the focus of the analysis are empirically substantiated, they can put a child at risk or protect them regardless of the country context they are in. The article has an element of comparison across child protection system orientations, where the perception of risk and protection is a vital component. Because of this, selecting judgments from different countries can answer the research aim.

The 2nd article compares the reasoning of decision-makers within four pairs of two similar cases each, with different outcomes (removal vs. non- removal) (see Figure 4-1). The cases were selected based on formal criteria (in addition to those applicable to the project data material; country and year) and by them matching on three or four

out of six risk factors. The risk factors are empirically documented as important in child protection cases. The case selection was confirmed by a full reading of the judgments; they were the most (and highly) similar cases of the 216 cases from the ACCEPTABILITY and DISCRETION projects.

The 3rd article investigates how the use of standards is accounted for in written judgments. For this purpose, 36 cases where a kinship placement is discussed were selected, as this makes specific standards applicable to the case (see Figure 4-1). Cases from 2016 were from DISCRETION and ACCEPTABILITY projects, and from the years 2018 and 2021 from the Barn Nemnd project. In this article the country context is important, as the article analyses how decision-makers use the standards, which are the national laws that govern the discretionary decision. This is why the last article is based on only one country (Norway). Including further countries would have involved further standards, which would have made the analysis overly complicated.

Figure 4-1 - Selection of article data material from projects data sets



4.4.2 Qualitative analysis of judgments

In all three articles, different components of handling the data material from selection to finished analysis were revisited, revised, and repeated, as is common for qualitative research (Maxwell, 2013). Despite this flexibility, there was still a structure, based on the coding description, underlying the approach. Coding descriptions were kept and continuously updated when codes were amended. Systematic and detailed logs were kept and continuously updated.

The data was mapped qualitatively, and the prevalence of the codes was presented numerically in tables. This qualitative analysis and numerical presentation may seem contradictory (such contradictions are common in research methods (Silverman, 2011)). However, the approach has the benefit that I through the qualitative coding was able to understand the patterns in the judgments and through numerical summary of the findings could effectively present the comprehensive data. While some contextual meaning is lost when the judgments are coded and the codes presented numerically, the approach has the benefit of simplifying the complex and rich information available in the judgments (Silverman, 2011). To increase the contextual sensitivity of the qualitative approach, the results were illustrated by anonymized, direct quotes from the judgments.

In the 1st article, the coding description for the content analysis is based on risk and protective factors as presented by Ward et al (2014). I started with a very fine-grained coding description, mapping the presence and weighting of a larger number of risk and protective factors in the judgments. As this was too detailed to facilitate a useful analysis, I merged the codes into larger categories based on the type of risk and protective factors they referred to. This allowed for a better overview of the results, and a more valuable analysis.

In the 2nd article, I used thematic analysis to understand the data. Thematic analysis is very useful to qualitatively analyze patterns of meaning in text. Through its flexibility one can find and show both similarities and differences (Braun & Clarke, 2022). Braun and Clarke (2022) describe six steps:

(1) getting acquainted with the data material,
(2) coding,
(3) creating initial themes,
(4) reviewing the themes,
(5) defining and naming themes and
(6) producing the report.

These steps are not necessarily linear, the flexibility allows for and encourages switching between them. This creates a dynamic and iterative process well suited for working with complex data material such as care order judgments.

Through selecting the cases for the 2nd article, I got acquainted with the four pairs for this article (step 1). I coded (step 2) the data material in several iterations, as the analytic aim was clarified through working with the data material and the theory for the article. Initial themes (step 3) were created alongside the coding. Through iterations with coding, I also had several iterations of reviewing the themes (step 4), always updating the coding description accordingly. When I was satisfied that the research question could be answered by the themes, I gave them their final names (step 5) and produced the report (step 6) found in the article. A detailed log was kept and updated throughout the entire process.

In the 2nd article I also mapped the reasoning volume, operationalized by the number of words included in the reasoning of the decision-makers. This reasoning volume was split into reasoning that was positive to the removal decision, and negative to the removal decision. This manner of quantifying reasoning was a helpful addition to the in-depth qualitative analysis described above.

The approach in the 3rd article is also loosely based on thematic analysis. The analysis was restricted to the decision-makers' reasoning regarding placement alternatives. The coding emphasized the focus of accounts of the use of legal standards, and the role of standards in the accounts. The coding categories were revisited several times throughout the analysis, to find the best framing for the analytical aim. Based on the coding categories, I evaluated their quality and placed the mapped practice on a scale from poor to good.

4.4.3 Limitations related to coding

Most of the substantial coding and reliability testing for the three articles was conducted by me alone. Reliability testing by additional researchers was not pragmatically feasible. While reliability testing by another researcher would have been beneficial, I am confident in my findings. The coding descriptions were developed under the oversight of the PI of the DISCRETION project, and the coding descriptions were continually updated through the coding process. Thorough logs were kept as well. These measures ensured that the coding results were good representations of the data source and that they can answer the research questions. Additionally, for selecting cases for the three articles, I greatly relied on reliability-tested coding of the judgments that was done in an earlier process; for more information on that process, see the DIPA-Centre's report "Description of coding results" (2021).

4.4.4 Empirical contribution

The thesis contributes to empirical literature in several ways: one way is through making available more information on the contents of care order judgments. These judgments are usually unavailable to the general public and only made available in anonymized form in a small number (for example, through the Norwegian Lovdata site or the British and Irish Bailii). There has been noted a general lack of transparency in child removal proceedings (Burns et al., 2019), and the thesis provides valuable insights into decision-making in such cases. Especially the pivotal role of highly interpretative social facts is important to highlight, as discretionary interpretation of such facts can change the course of an adjudication. The potential informal standard highlighted in the 1st article shows how pervasive this pattern can be.

Further, the thesis contributes to the literature with empirical insights into the demographics of newborn care order cases. Statistics for care order cases are often reported without being split by child age (cf. Berrick et al., 2023a) or by large age categories (cf. Statistisk Sentralbyrå, 2023) that do not take into consideration the

distinct trajectory towards permanent separation from birth parents that is more likely in newborn cases (Magruder & Berrick, 2022).

Discussions regarding improving the fulfillment of the rule of law and accountability in judgments can be helpful to policymakers looking to change practice. The discussion of how to improve judgments in section 6.2.2, based on the 3rd article, is tied to ongoing changes in Norwegian child protection practice and is especially useful in that context.

The 3rd article also makes available insights regarding how a policy priority in Norwegian child protection is implemented in practice: placing more children with kin (The Norwegian Directorate for Children, Youth and Family Affairs, 2004). How the relevant legal standards are applied, and their application accounted for is something we know little about and of great value to the practice field.

4.5 Methodologial contribution and reflections

In the following I will reflect on some methodological choices and considerations that were important in my work with the articles. These constitute the methodological contributions of the thesis.

4.5.1 Studying discretion through judgments

The focus of the articles is discretionary decisions, studied through judgments. Benefits of this approach include that judgments are naturally occurring data and provide insights into how decisions are reasoned and justified in real life. This data provides snapshots of complex and dynamic situations and cases, and can be messier and more unstructured than vignette or survey data (which often are used to study discretion (Wallander & Molander, 2014)). While this makes the material challenging to work with, it also makes it immensely valuable. Vignette studies can face challenges when deployed in multiple national contexts, as context can influence the respondents' perceptions (Skivenes & Tefre, 2012). Judgments are products of their context and avoid this issue. When working with a full sample of judgments (only my 1st article contains data from publicly available samples, which do not include all

cases), one also avoids selection bias. While vignettes hold great value to the literature on discretion, this thesis provides an important addition to the literature through the insights into naturally occurring decisions.

4.5.2 Determining the level of detail

In each article, a careful balance between detail and abstraction that fit the analytical purpose of each article had to be struck throughout the coding and analysis processes. Child protection cases can be infinitely complex, and if I wanted to include all the details, I would have to include the whole case – which would obscure the analysis as patterns drown in detail. However, reducing the cases to too few variables would gloss over important differences and hold little value too. During the work with each article, I revisited the level of abstraction several times – for example, the first table I presented at a seminar for the 1st article, was 5 pages long. As the level of detail made a valuable analysis impossible, I reduced the number of variables by combining codes into larger categories. The three articles are at somewhat different levels of detail – while the 1st and 3rd are relatively abstract, having extracted between 5 to 32 variables from a medium N of cases, the 2nd article seeks to understand the reasoning of the few cases more holistically. Both abstraction and detail have their benefits and drawbacks, and the specific approach in each article was chosen depending on the analytical goal. The considerations around the level of abstraction are part of this thesis' methodological contribution.

4.5.3 Operationalisation of "treatment"[18]

The "treatment" part of equal treatment is often equaled to the outcome of a decision, like sentencing for a specific type of crime. This measure alone is unsatisfactory in child protection cases, I argue, as these are complex and dynamic cases where one-size-fits-all solutions would result in many children getting too little or too late help, while others would experience unjustified intrusions into their private sphere. Help often requires some sort of intrusion, especially when it goes against the wishes of the parents.

[18] Adapted from VITSV900 essay.

If two similar care order cases were adjudicated and both resulted in the care order being approved, it would not constitute equal treatment if one were approved because of a thorough assessment of risk factors and the applicable legal principles, while the other was approved because the decision-makers thought the child would be better off being raised in a Christian rather than a Muslim family. So "treatment" here means something else, something more, than just the order (or outcome) that is made. For "treatment" to say something about the quality of the decision being made, it needs to encompass the reasoning process leading up to the final decision. What has been assessed? What was the result of the assessment? How have the decision-makers justified the order, which considerations have been given central stage?

Analysis based on outcome is valuable when the approach is in line with the analytical aim. Studies aimed at detecting discrimination are a good example. It can also be very valuable to combine measures of outcome and treatment in the same study - as I have done in my 2nd article.

4.5.4 Establishing similar cases[19]

In the 2nd article, I invested considerable effort into matching pairs of similar cases with different outcomes. This was a thorough and systematic process in which important considerations were carefully thought through, related to the question of how can I be sure that the selected cases are similar when the cases are unique, and information is limited to what is contained in the judgments? It is important to see the answer to this question in relation to the analytical aim: comparing the treatment of the cases (the decision-makers' reasoning and justification) within a pair of two similar cases with different outcomes. In the following I will discuss the issue of limited information before I describe what kind of similarity is relevant here. Lastly, I comment on the selection process.

The first consideration is that of limited information. The case selection is made based on information provided in the judgments, which is not everything there is to

[19] This section is in part adapted from the 2nd article, the corresponding appendix, and response letters to the reviewers during the peer review process.

know about these cases. There are typically many files related to one case, reports, assessments, statements etc. that I didn't have access to. For some analytical aims this information is necessary - if my aim was to detect discrimination, for example, I would need more information on ethnicity, race, or disability. But as the analysis is aimed at the decision-makers' written reasoning, and this is contained in the judgments, the lack of demographic variables is not a hindrance.

In section 4.3.2 I have described the strict requirements regarding what the judgments must contain. Of the five categories, 1) obligatory reasoning and 2) facts and evidence are the most relevant to the analytical aim of the 2nd article. These categories reveal how the decision-makers view what happened in the case, and what their reasons for making the decisions were. Norway, Estonia, and Finland (from which the pairs selected for the 2nd article are) all require their decision-makers to include category 1) and 2) in the judgments (see Table 4-6), in fact, Norway requires all five categories to be included in the judgments. Estonia also requires 4) legal grounds. Finland requires also 5) an assessment of the facts in the light of legal norms. In sum, the judgments contain detail and a comprehensive picture of the decision-makers' reasoning, sufficient to facilitate the data selection and analysis in the 2nd article.

Having established that the judgments contain sufficient information, I move on to the next consideration: how can one match similar cases given their inherent complexity and uniqueness. The selection of similar cases is motivated by the analytical aim of investigating the puzzle of similar cases getting differing outcomes, despite the equal treatment obligation. To achieve this, one must look for similarity, not sameness. Each case is unique when going into sufficient detail, it is implausible that one will be able to find two identical cases. Each case contains a lived history, and individuals with their experiences, hopes and wishes. There is infinite complexity, each case is unique.

However, not all case aspects are equally important when looking to match similar cases. The important thing is that they have to be similar on relevant aspects to have a claim to equal treatment (Westerman, 2015). Relevance is determined by the aim of

the rule which guides the treatment (here “rule” is used in a broad sense, which I interpret to include standards). In care order cases, the aim of the rule is to safeguard children, keeping in mind a range of parental rights and procedural requirements. Relevant similarities between cases could in this instance be the needs of the child: a child with substantial additional needs demands better parenting skills than a child in robust physical and emotional health with no such needs.

Based on this understanding of relevant similarities, I arrived at a range of case aspects I consider relevant to match similar cases for comparison of their treatment. Some case aspects apply to the entire project data material, see section 4.2. Then I added selection criteria that I found relevant for the analytical purpose: maternal risk factors, year of decision, and country. The two latter establish a similar decision-making context, and maternal risk factors are relevant to the care order’s aim of preventing (further) maltreatment as they influence parents’ ability to provide adequate care (Ward et al., 2014). While the risk profile in the cases may differ slightly, the decision-makers have found the same combination of risk factors relevant within each matched pair. This means that I base my selection on the decision-makers’ perception of risk in these cases. As the same risks are present in the cases, we should expect similar treatment.

Mothers are typically the primary caregivers, especially of newborns. There is also more information available in the judgments regarding mothers than fathers (see section 4.2.1), making a selection more solid. Through this focus on mothers, I may have contributed to the trend in child protection research that focusses attention overly on mothers, while marginalizing fathers (Brandon et al., 2019). Although contributing to rectifying this skewness would have contributed to the literature, methodological considerations trumped in this instance.

To find out which cases were similar, I used the program fsQCA. This program was developed by Charles Ragin and Sean Davey to carry out fuzzy set qualitative comparative analysis, data analysis based on Boolean algebra (Kraus et al., 2018; Ragin & Davey, 2022). I did not perform a full qualitative comparative analysis but

used the program to sort the cases into groups in which the cases shared variables. Through using a computer program to sort the cases I avoided human error in this vital step. After this sorting, I started a careful stepwise process in which cases were excluded at each step. Proceeding stepwise, excluding cases based on one criterium at the time, facilitated better control and overview than excluding many types of cases at once. The process is detailed in the appendix to the article.

The resulting approach is not without limitations, mainly related to the judgments as data material. How these limitations are weighed against benefits of the data material, is described in section 4.3. The considerations relevant for analyzing judgments are described in section 4.5.1. I find that the matched pairs of cases are highly similar, and that the selection process yielded data material well suited for the analysis. The detailed and meticulous selection process, and the considerations behind it, are an important methodological contribution of this thesis.

4.5.5 Languages and contexts

The translations of the judgments were done by professionals and the quality-controlled process is described in Appendix D. Translations were only relied on for Estonian, Finnish, and Spanish judgments, the rest were analyzed in their original language.

As mentioned before, the comparative aim of the thesis is very limited. In the 3rd article the same national context applies to all included cases, and in the 2nd there is only comparison within the pairs of cases, which are from the same country. In the 1st article there is a comparative element, which I reflect on in section 4.4.1.

4.6 Ethical considerations

Care order judgments are sensitive documents for the involved families and contain private information. It is important to balance privacy concerns with the need to conduct research on child protection decisions. When done right, such research is ethical, valuable, and can improve child protection practice.

The data material was stored and coded in the University of Bergen's solution for storing sensitive research material, SAFE. Case content was only discussed with other researchers who also had permission to access the data. For more information on the process to collect the judgments, and how they were treated and kept safe, see appendices A-D.

Singular judgments have been coded several times and for multiple analytical purposes, ensuring that their value was exhausted. Child protection cases are a source of considerable stress for the private individuals involved. Having other people, such as researchers, read about this stressful period in their lives can be an additional strain. Securing that the most has been made of these judgments is to show respect for the individuals involved, as the intrusion into their privacy leads to a maximum of valuable knowledge for society that can improve services and adjudication practices. It is also important to show what these cases are about for the involved individuals, which requires and justifies in-depth descriptions of some cases and the use of anonymized quotes from the judgments.

Great care was taken to use respectful language about the individuals involved, and to always show consideration for their difficult positions and experiences. This was relevant in both the analysis of the data, and when presenting this in the articles and framing introduction.

Child protection workers face harassment due to their professional roles (Burns & Ó'Súilleabháin, 2023). While I voice criticism towards practices by child protection decision-makers, I made sure to keep it constructive and to never use information that might identify individuals to ensure that the thesis does not contribute to unhelpful negative attention.

5. Results – presenting the articles

This thesis consists of three articles. After having provided the theoretical, empirical, and methodological backgrounds for the thesis as a whole, I will now summarize the three included articles. The summaries will mainly focus on each article's distinct contributions to the thesis.

5.1 1st Article: Analysing decision-makers' justifications of care orders for newborn children: equal and individualised treatment

The 1st article investigates the reasoning by decision-makers in newborn care order judgments where the mother has a substance misuse problem, focusing on how decision-makers uphold obligations to equal and individualized treatment. I analyze this through mapping how risk and protective factors are included and given weight. The focus is motivated by the importance of these decisions for the parties involved and by the challenges that discretionary decisions pose to the formal principle of justice: similar cases must be treated similarly.

5.1.1 Research questions and how they connect to the overall thesis

The research question asks (1) if and how decision-makers are similar or different in their justifications for deciding a care order. Additionally, it is briefly investigated (2) if the type of child protection system influences similarities and differences between decision-makers.

The main research question of the article is tightly connected to the overall research question of the thesis as it investigates the reasoning and justification of discretionary decisions in complex cases. Similar cases have been selected, and comparability has been enhanced further by focusing the analysis on risk and protective factors.

The article contributes to the literature on discretion concerning equal and individual treatment, showing how these considerations are dealt with in empirical cases.

5.1.2 Theoretical and methodological approach

The theoretical approach rests on the tension between equal and individual treatment, both of which the decision-makers are obligated to provide. Equal treatment is a basic component of justice and the rule of law, and individual treatment is required to ensure the child's best interests.

Discretion can threaten equal treatment through the inherent danger of comparable treatment variability: when decision-makers have an amount of freedom they can come to different conclusions (Molander, 2016). The decision-makers adjudicating care order cases have discretion on a range of aspects or sub-questions of care order decisions. My analysis focuses on how they evaluate risk and protective factors. While the presence of factors often is objective, the consequences of this presence on the risk level and, thus, the need for intervention is subject to discretionary assessments. For example, a father having been convicted of domestic violence is an objective fact, but whether there is a continued risk of domestic violence at the time the care order case is decided is up to the decision-makers' discretion.

The individual treatment obligation stems from the CRC's child's best interest's principle, which is crucial to all decisions affecting children. Few decisions affect children more than who shall care for them. As children are individuals and each case is unique (despite sufficient similarities to warrant equal treatment), the treatment of cases should be adapted to their unique characteristics and individual treatment provided. This is necessary to find the best solution in each specific case and made possible by discretion.

The analysis focuses on how the decision-makers have balanced these, at times, conflicting obligations through discretion. They can conflict because equal treatment highlights similarities, and individual treatment highlights what is unique. They are not necessarily conflicting; preferably, the individual treatments do sum up to be similar for similar cases. However, as the aim differs, the two logics can lead to different outcomes.

The data consists of 85 written care order judgments, where the mother is reported to misuse substances, from first-instance courts in eight countries: Austria, England, Estonia, Finland, Germany, Ireland, Norway, and Spain. I performed a document analysis of the judgments, mapping risk and protective factors of empirical relevance informed by Ward et al. (2014). The mapping has two layers: if the factors are (1) relevant (mentioned) and (2) important or decisive in the decision.

In the analysis, treatment is defined as considering specific factors and evaluating their relevance and importance for the decision, and not the outcome of the case. Similar treatment is operationalized as a risk or protective factor included in less than 20% or more than 80% of the judgments, as the factor seems similarly irrelevant or relevant to the decision-makers. Reasoning variability is indicated by a factor included in 21-79% of judgments.

5.1.3 Key findings

Results show that risk and protective factors accumulate in the judgments, but the risk factors are more prevalent and assessed as more influential. This suggests that there may have evolved an informal standard for relevant case aspects to consider, which are legitimate reasons for state intervention. These are “mother,” “child’s vulnerabilities,” “removed & maltreated siblings,” and “family & social setting” nearly universally present. This finding is relevant for the discussion on the pivotal role such interpretative and complex social aspects of cases can have: they can be interpreted in several ways, leading to different outcomes in similar cases. There are similarities in the risk factors found relevant to these cases, but it varies which factors are considered decisive; protective factors are rarely important.

Most protective factors show treatment variability; such variability is also visible in the weight attributed to risk and protective factors. This indicates that equal treatment is fulfilled when decision-makers find the same things relevant to assess. However, the results of their assessments consider the unique characteristics of the case, and different things are found to be decisive. The treatment is individualized in the concrete justification for the case outcome (a pattern supported by previous research).

Few differences are found between child protection system orientations, and none that follow the established characteristics of systems. This could be due to the seriousness of newborn care orders, and other research has found that discretionary evaluations are more similar when severe cases occur. A direct weighing of risk versus protective factors is rare, and improved reasoning could improve accountability.

The article did not compare the results between removal and non-removal cases. Due to the small number of non-removals, the comparison would be of limited value. The analytic aim was not to compare removal and non-removal cases, so the small number of non-removals was no hindrance. In this article, I also remarked on the tradeoff between detail and summarization in the analysis. This trade-off has been discussed in section 4.5.2.

5.2 2nd Article: A Tale of Two Cases - Investigating Reasoning in Similar Cases with Different Outcomes

The 2nd article starts with the puzzle that sometimes, even though decision-makers are obligated to treat similar cases similarly, similar cases get different outcomes. The article seeks to identify why this happened in four pairs (eight cases) of similar newborn care order cases; in each pair, one case ended in removal, and in the other, the child was not removed from her parents' care. Through this, the article contributes to answering the overall research question regarding equal treatment. The analysis focuses on the reasons for decisions and the preceding reasoning, and discusses how this influences the legitimacy of decisions.

5.2.1 Research questions and how they connect to the overall thesis

I investigate how decision-makers reason and justify individual cases with different outcomes by analyzing care order judgments that display relevant similarities. The article contributes to the thesis' overall research question by analyzing what in the decision-makers' reasoning can explain the cases' different outcomes. This ties into the thesis' focus on the use of discretion and its consequences for equal treatment, and

the other principles of the rule of law. Low quality of reasoning can make it more challenging to evaluate whether the equal treatment obligation was upheld and be detrimental to accountability as the reasoning will be difficult to follow and understand.

5.2.2 Theoretical and methodological approach

Care order decisions are made by decision-makers using discretion to solve the difficult task of finding the right decision in a complex and uncertain case. Care order cases concern a family and their circumstances and a child with her needs, entailing considerable complexity. Additionally, decision-makers must consider what the future care situation for the child would be if she stayed with her birth parents - and the future is inherently uncertain.

Although discretion is required for this task, it can lead to unjustified decision variability when decision-makers arrive at different conclusions based on similar case facts (Molander, 2016). This would threaten the principle of equal treatment and, through this, the legitimacy of the decisions and the child protection system. Because of these potential systemic consequences and the personal ones for the involved individuals, insights gained through analyzing written justifications for the decisions are important. To be legitimate, decisions must be justified by "good" or "public" reasons – reasons accessible to the public, based on decision-makers' expert knowledge, applicable laws, and generally accepted principles (Molander, 2016).

A stringent selection process was used to select the most similar cases from the project data material of 216 newborn care order cases. Four pairs of similar cases (a total of eight cases) were selected for analysis based on selection criteria, including maternal risk factors, year of decision, and country. These were the cases that shared sufficient relevant similarities for analysis. This process is detailed in the appendix to the article and discussed more in-depth in section 4.5.4. Two of the pairs are from Norway, one pair is from Estonia, and the last pair is from Finland. The comparison is within the pairs of similar cases and not across pairs or countries.

The judgments were analyzed using thematic analysis, a flexible method suited to finding similarities and differences (Braun & Clarke, 2022). The analysis mapped the concluding reasons and summed up the decision-makers' preceding reasoning. Additionally, I quantified the reasoning volume by counting the number of words.

5.2.3 Key findings

The analysis found five concluding reasons that justified the outcome: (1) the child's best interests / welfare / rights, (2) parents not providing adequate care, (3) assistive services are sufficient/insufficient, (4) the threshold is not crossed, and (5) positive parental effort. The three first concluding reasons are most prevalent in these eight cases, and they are "good reasons" based on national laws in line with Molander's thinking (2016). Such justifications are suitable to provide accountability and legitimacy.

The outcomes seem to vary due to differing assessments of highly interpretative social aspects of the parents' lives, which require discretionary assessment: parents' cooperation, risk, and the potential efficiency of support services. The cases are similar as they share the same facts, but the outcomes differ as the decision-makers have arrived at differing conclusions through their discretionary reasoning. Theory of discretionary decision-making supports that such variation should be expected and that it can be reasonable, as there may be '*noneliminable sources of variation'* in the interpretative exercise and reasoning in complex cases (Molander 2016, p.4).

While the concluding reasons are "good reasons", the reasoning at times is unclear and lacks details. This can be detrimental to the legitimacy of the decisions. For example, despite the child being near absent in the reasoning, half of the cases conclude that the decision is in the child's best interests. Furthermore, the parents' attitude and willingness to cooperate is central in the reasoning but relatively absent among the concluding reasons. This suboptimal reasoning makes it difficult to assess how the decision-makers have fulfilled their obligations when deciding on interventions into the private sphere. This lack of transparency is problematic for accountability, and the legitimacy is difficult to evaluate.

The reasoning in cases that ended with the child being removed was shorter but contained a higher number of concluding reasons than non-removals. As non-removals are far less common than removals when the case has made it to adjudication, it is possible that the decision-makers felt the need to describe in more detail why they decided against the default, a notion supported by previous research.

The article concludes that while the outcomes are justified by "good reasons", the reasoning is suboptimal, making it difficult to see if the equal treatment obligation has been met. This lack of accountability can be detrimental to the legitimacy of individual decisions and, when aggregated, to the child protection and legal system. Interpretative social facts about the parents and their situation stand out as allowing non-removal. The variance in outcome and reasoning seems to result from discretionary evaluations of case facts, a legitimate use of the discretionary space available to the decision-makers. They are difficult decisions; in some cases, several outcomes could be legitimate based on decision-makers' assessments. These seem to be instances of reasonable disagreement, to be expected when discretion is exercised (Molander, 2016). Policy changes are suggested.

5.3 3rd Article: Accounting for the use of legal standards: The Good, the Poor, and the Adequate

The 3rd article analyses how decision-makers account for the use of standards in discretionary decisions of whether to place a newborn child in foster care with her kin (i.e., family members). The article maps the content and form of the decision-makers' accounts of how they have used legal standards when deciding on kinship placements. The mapped account types are critically appraised as poor, adequate, or good accounts using a theoretically and legally informed operationalization. The article touches on implications for the rule of law and accountability.

5.3.1 Research questions and how they connect to the overall thesis

The research questions is: how do decision-makers describe and explain their use of legal standards in written care order decisions for newborn babies? Further, I examine

the content of the accounts, and determine whether they can be said to be poor, adequate, or good. The article focuses on whether and how the standards that regulate the decision are included in the account for the reasoning and justification of whether the child should be placed with kin or in a non-kin foster home (which is a sub-question of the care order). By standards I mean the laws and regulations that require interpretation and discretion when applied in complex cases.

How decision-makers relate to standards plays a vital role in the accountability of decision-makers exercising delegated decision-making power when making intrusive decisions that affect citizens' private sphere. The discussion widens the scope of contribution to the literature by critically appraising the mapped accounts as poor, adequate, or good accounts. The study also briefly comments on implications for the rule of law and accountability. The article is well-connected to the thesis' overall research questions and theme by focusing on discretionary decisions, justifications, and the rule of law.

5.3.2 Theoretical and methodological approach

In care order decisions, the state has given special powers to the decision-makers to make decisions based on their professional knowledge and according to legal standards. This power comes with a responsibility: to give an account of what the decision is based on, enabling others to check the decision-maker's work and ensure accountability. Discretion and poor accounts can threaten the rule of law and compromise accountability (Molander, 2016).

To investigate how the decision-makers have fulfilled their obligation to accountability, I map how they have described their use of standards in the decision of placing a newborn child with kin or with a non-kin foster family. The data comprises 36 newborn care order judgments discussing kinship placement. These are all the judgments of this type decided in the Norwegian Tribunal in 2016, 2018, and 2021. The document analysis is inspired by the thematic analysis approach (Braun & Clarke, 2022).

The article presents an analytical tool developed to appraise the accounts, based on theory and legislation. Good accounts have to contain "good" reasons related to law, generally accepted principles or the decision-makers professional knowledge (Molander, 2016). Their form has to be functional and complete, suited to explain and justify the decision (Bovens, 2007; Schei & Qvigstad, 2019). Adequate accounts are operationalized based on the Dispute Act (Tvisteloven, 2005), the legal source for requirements to accounts in judgments. Each jurisdiction can decide what they require of acceptable accounts; the Norwegian requirements are found here. Accounts are adequate when they mention the standards that have been applied. Poor accounts contain poor reasons; such as personal beliefs of the decision-makers that are controversial or not accepted in society. They are incomplete or completely missing, and lack functionality that allows one to understand the inference from reasoning to outcome (Schei & Qvigstad, 2019).

The practice found in the judgments is critically appraised against these operationalizations. I argue that due to the nature of the care order decisions (uncertain, consequential, and discretionary), the decision-maker's account of how they used standards should meet the requirements for good accounts.

5.3.3 Key findings

I found three types of accounts: (1) considering legality, (2) framing the decision, and (3) assessing the suitability of the kin home. The first relates to considering the legal option of placing the child with kin – standards are referenced and applied to the specific case in this question. Secondly, accounts of standards that frame the decision provide standards in a generalized manner, stating that these apply to the decision but not how they have been used. The last account type, assessing the suitability of kin homes, has three subcategories: (3a) accounts of suitability assessments based on criteria from the law referencing standards, (3b) accounts of the same but not mentioning standards, and lastly, (3c) added criteria, which are not based on criteria from the law, but added according to the decision-makers' discretion.

Accounts of suitability assessments are found in all the analyzed judgments, but they are mainly assessments of criteria from the law without referencing standards. I have appraised these as poor accounts as they do not meet the adequacy requirement of stating which law is applied. The suitability assessments that do reference standards are appraised as good accounts, the best in the material – but they are rare. Added criteria are found in over half of the cases, but as they do not include criteria from the law, they are not appraised on the scale from poor to good accounts.

Accounts of standards used to consider the legality of placing the child with kin are found in a third of the cases, and these are appraised as adequate as they reference the standards. They explicitly reference standards and show that they have been applied to the specific case. The accounts of standards framing the decision are also appraised as adequate. Such accounts are found in a quarter of the cases.

Overall, there is room for improvement in how the use of standards is accounted for in Norwegian kinship placement decisions. Poor accounts compromise the predictability of the rule of law, and they fail to provide enough information to evaluate equal treatment. The inclusion of added criteria threatens legality. They also compromise accountability by not providing enough information to expose power abuse and hinder the learning effect. Democratic control is also lacking. However, there are indications in the literature that accounts of Norwegian child protection decisions are improving. Policy changes are increasing the demands on decision-makers' accounts.

The analysis in this article is limited to reasoning regarding where the child should be placed after the care order has been decided. This means that accounts of standards applied to other parts of the care order decision (e.g., contact frequency or whether to remove the child) are not analyzed. The sample only includes cases where the child is removed; non-removals do not contain a placement decision. This means that the findings are limited to a subset of the decision for cases with one type of outcome. More research is required to investigate the documented patterns in a larger material.

The implications of the findings, however, are relevant to all decisions where state agents interfere with the private lives of citizens.

6. Discussion and concluding remarks

In this chapter, I bring together the theoretical framework and the main findings from the three articles to answer the overarching research questions about discretionary decisions and equal treatment, how this practice adheres to requirements for accountability, and implications for predictability and the democratic system. The chapter ends with summing up the contributions, and some remarks on policy implications and further research.

6.1 Equal treatment[20]

The equal treatment principle states that similar cases should be treated in the same way, while different cases should be treated differently.[21] Having established a data set consisting of cases that along various dimensions are similar on key features, the question is whether these newborn care order cases in those dimensions have been treated in an equal manner.[22] Equal treatment is measured by the reasoning and justification provided in the written judgments, and it is the essential aspects of a judgment that are appraised. The discussion is based on the following dimensions that indicate equal treatment if:

1. The same case aspects have been considered, and the decision-makers' evaluations of these aspects gave similar conclusions and weight to the case aspects.
   E.g., is the supportive role of friends and family considered, and if yes, is it given equal weight in all cases?
2. Relevant law has been applied similarly.
   E.g., have the same laws been referred to and applied in decisions regarding similar legal questions?

[20] I have operationalized "treatment" to include the reasoning in a case. The reasoning is explained in section 4.5.3, based on the VITSV900 essay.
[21] In this study, I prioritize analyzing if similar cases have been treated similarly while omitting different cases getting different treatment. Although that is also an important part of the equal treatment principle, it is not practically feasible to implement it in this study.
[22] I will explore possible explanations from the research literature, but do not aim to demonstrate causal relations.

The three articles approach equal treatment from different but complementing angles. As the treatment of cases adheres to national legislation and standards, differences between national contexts need to be addressed for the findings from the 1st article (in the 2nd and 3rd articles, I compare treatment or cases from the same country, meaning that the same legislation applies). The 1st article maps the treatment of cases from eight European countries. These have differing national legislation, but I still find equal treatment regarding which risk and protective factors will be considered, and how, can be expected based on three aspects combined: the legislative and cultural value context shared among the countries, the needs of newborn children that are the same across countries, and the relatively large coding categories used in that article.

First, the context: section 4.1.1 describes the legislative and value context applicable to all eight countries in the study. Not only the context, but also the children share important similarities: newborn children have the same needs regardless of which country they are in, and what poses a risk or acts in a protective capacity to them is stable across borders. This is especially relevant as the 1st article maps the featuring of risk and protective factors in the decision-maker's reasoning. Lastly, these factors are mapped in relatively broad coding categories which focus the analysis on larger patterns of risk and protective factors where national differences in legislation are understood as being less relevant. Based on these considerations, I find it valid to expect similar inclusion of risk and protective factors in the reasoning of cases mapped in the 1st article even though they are from different European nations.

6.1.1 Evaluating the first dimension: Equality in the consideration and evaluation of case aspects

Here, I answer the first research question: Are similar cases equally reasoned and justified? The 1st and 2nd articles shed light on an important pattern in terms of which factors were considered in the cases and how, showing that the answer has two components: similar facts were evaluated, but it differed how the decision-makers assessed the impact of these on the case. This indicates that equal treatment was fulfilled in one aspect, but not the other. I will provide more details on this pattern below.

In the 1st article, analyzing a larger sample of cases (n=85), it is shown that four risk factors, namely “mother”, “child’s vulnerabilities”, “removed & maltreated siblings”, and “family & social setting” were consistently considered in almost all cases (see Table 6-1). This indicates that judges operate with an informal standard for what are regarded as relevant considerations. Through this, it is shown that the decision-makers largely fulfill their equal treatment obligation as the cases are treated based on the same characteristics, the same things mattered to the decision-makers. However, interestingly and important for the understanding of how the obligations of equal and individual treatment are fulfilled, is that the assessed decisiveness or weight of these risk factors varied (in the right column in Table 6-1). For example, risk factors that were associated with the mother were found relevant in 92% of the cases, indicating that most cases are treated similarly in this aspect. However, the same maternal risk factors were evaluated as decisive in only 62% of cases without any indication in the judgments for this differences between cases. This gap indicates variability in the treatment of these cases.

The findings in the 2nd article, comparing similar cases with different outcomes, support this pattern: similar case aspects were central in the reasoning but were evaluated to carry different weights in the case (see Table 6-1). For instance, in one of the pairs of similar cases, unfavorable reports about the mother's parenting abilities from a parent-child center were central in both cases. However, in one of the cases, the decision-makers evaluated the report to be an accurate representation of the mother's parenting abilities, while in the other case, they did not – despite the cases being similar on relevant aspects, which is ensured through the comprehensive procedure described in section 4.5.4. These evaluations played an essential role in determining the outcome of the cases, with the former ending in a care order and the latter not, which justifies a deep-dive into the reasoning. In the non-removal, the mother had absconded with the child and when they were found, the child was fine, indicating that the mother with the support she had in that situation, provided adequate care. This situation invites some complex discretionary reasoning - is the absconding a sign of an irresponsible mother withholding necessary foster care from her child, or is she seen as engaged and motivated to fight for her child? Such moral

considerations are likely to have had an impact on the decision-makers (Liu & Li, 2019), but as my analysis shows these types of reasoning are not acknowledged in the reasoning or concluding reasons. This is the only case in the article with a split decision (the three decision-makers in the Tribunal disagreed whether the child should be removed from their mother's care). The case is especially illustrative to the finding of similar case aspects being relevant, but evaluated as having different weight, because the same case, information, and behavior in the adjudication are evaluated by the decision-makers, and they still landed on different conclusions. I will return to discussing this case in section 6.2.1 as an example of reasonable disagreement. After Table 6-1 I will discuss possible explanations for decision variability based on the research literature.

Table 6-1 - Summary of findings relating to equal treatment. Numbers indicate article number.

Equal treatment	
Similar cases are equally reasoned and justified	Similar cases are **not** equally reasoned and justified
① Four risk factors are near-universally relevant. ② Similar case aspects were relevant. ③ Suitability assessments of kin homes always include criteria from the law.	① There is variation in which factors are decisive. ② Different outcomes from differing discretionary evaluations of social facts. ③Variance in the accounts of used standards.

Description: The table summarizes the three articles' key findings as they relate to the thesis' research questions related to equal treatment. In the left column it is indicated if the finding answers the research question with a yes. In the right column it is indicated if equal treatment is compromised. The circled numbers in the table show which article the finding is from.

The literature attributes different types of "drivers" for why there are differences between decision-makers, of which I will discuss some as potential explanations for my findings.[23] The drivers relevance rests on two premises: the first being that variability is a result of legitimate use of the available discretionary freedom, and not due to power abuse. While it is a possibility that the decision-makers stepped outside their mandate and fully disregarding the applicable standards, I find it unlikely as this is not reported as a widespread problem in the literature, nor do I see signs of power

[23] The examples are not intended to be a complete list of possible influences but demonstrate the complexity of these decision-making situations.

abuse in the judgments. The second premise is that the written judgments contain the complete reasoning by the decision-makers and include all case facts that were relevant in the decision-making. Based on these premises being true, the variability documented in the written judgments can be the result of a range of factors influencing the decision-makers discretionary reasoning. I group them into individual and institutional factors.

The first potential explanation related to individual decision-makers is the influence of biases and heuristics, described in section 2.5. For example, there is availability bias: the human tendency to overestimate the likelihood of recent or dramatic events reoccurring has been documented (Kahneman, 2011). In child protection, this can lead to more risk-adverse decision-making in the wake of a decision-making error, underestimating the risk of harm, where a child was harmed or even killed. This could lead decision-makers in subsequent cases to overestimate the likelihood of the fatal event to reoccur, leading them to remove children in unrelated cases more frequently. However, the causal effects of heuristics and biases are complex, and decision-making structures like group decision-making may counteract individual heuristics (Keddell, 2014).

It is also possible that the decision-makers were influenced by their age, gender, education, experiences and attitudes. For example, decision-makers with very young children could be more paternalistic and favor state intervention as they are acutely aware of newborn children's needs, while decision-makers without or with older children could overestimate the children's robustness based on the children in their lives. While such factors can have an influence in all cases, it is more likely that characteristics salient to the case influenced the decision-makers (Weaver & George, 2017). The effect could be beneficial if commonalities between decision-maker and involved parties allow the decision-maker to see cases from otherwise unavailable angles and empathize effectively. This could lead to more individualized and adapted treatment of cases, a benefit for the individuals involved. However, it could also lead to unfavorable bias. Regardless of the direction of the influence, it is problematic and threatens equal treatment as decision-makers in lower courts are not, to my

knowledge, systematically assigned to cases based on their personal background (for example, assigning only decision-makers with immigrant background to cases featuring immigrant families). Doing so might not even be possible given the complexity of causal effects of the influences (Thornburg, 2019; Weaver & George, 2017).

In addition to individual characteristics, the institutional setting around decision-makers can influence decision variability by individual decision-makers, including the reasons they give for their decisions. One possibility is that decision-makers react to accountability mechanisms, such as promotions, appeal mechanisms, or removals from office (Rachlinski & Wistrich, 2017). Some decision-makers may be more aware than others of the appeal mechanisms in place, and make sure that their reasoning is conscientious, complete, and fair, or strategically geared towards meeting policy aims.

Another institutional mechanism that may have an influence is the use of decision-making tools. In her comparison of child's best interests consideration between English and Norwegian judges, where the former are bound by a legislative checklist and the latter not, Helland (2021b) found that the reasoning in English judgments was more deliberative and explicit than in the Norwegian ones. Tools can also influence decision-making within countries: in Norway about half of the child protection services use the Kvello-tool (Vis et al., 2021). Although this refers to the child protection agencies and not the Tribunal deciding care orders, the way discretion is limited and guided through the tool may lead to differences in the case files that Tribunal decision-makers rely on to make care order decisions.

6.1.2 Evaluating the second dimension: Equality in the application of law

The last dimension measuring equal treatment through the reasoning and justification of newborn care order cases is if the application of law (or legal standards) is similar. The findings from the 3rd article, which analyzes decision-makers use of legal standards and accounting thereof, are relevant here: while suitability assessments of kin homes always include criteria from the law, I found variation in the use of

standards in the written reasoning and how this use was accounted for in kinship placement decisions (see Table 6-1). This adds to the answer to the first research question: although law is always applied, there is variability regarding how standards are used and feature in the reasoning and justification of the decision-makers in the Tribunal.

As all cases in this article are from Norway, the same legal standards are applicable. Mapping legal considerations in judgments is according to Klein (2017, p. 241) *"Our best chances to see the full extent of law's influence on judges"*. The article found that some decision-makers used standards to frame the reasoning, others to determine the legality of kinship placements, and a few of them accounted for their application of the standards on the suitability assessment of the kin home.

In the article I point to a range of possible explanations for this variation. First, it may be due to a low prioritization of the task of deciding on kinship placements due to resource constraints or an expression of a coping mechanism. Another possible explanation can be that the decision-makers are rationalizing their decisions through stating that they have used law (Liu & Li, 2019). Contrary to what Liu and Li (2019) found, in my study the decision-makers frequently acknowledged the use of added criteria (Liu and Li use the term "extralegal factors") through including them in the written judgments. There may have been even more added criteria in the cases I analyzed, that were not acknowledged. It is possible that the acknowledged added criteria were considered reasonable by the decision-makers, and useful to support their argument, rather than a consideration they needed to hide. Still, the reliance on added criteria can threaten equal treatment, as there is no structure for or guidance regarding which extralegal factors are included across cases.

6.1.3 Ensuring equal treatment through a childs best interests-checklist

The three articles have documented variability in the discretionary treatment of newborn care order cases. The tension between discretion and equal treatment has been discussed in the context of street-level bureaucracy generally (Raaphorst, 2021) and child protection specifically (Keddell, 2022). In these debates, the ideals of

justice through equal treatment and individualized treatment through discretion are posited against each other. The problem of discretion leading to decision variability can arguably be solved by limiting the decision-makers' discretion. One way of doing so is to provide a checklist of elements they must consider when deciding, although there are some challenges with this approach. This should ensure that the same case aspects are considered in all cases. In the following, I will discuss whether a checklist regarding the child's best interests would help fulfill equal treatment.

The principle of the child's best interests is a crucial aspect of child protection. As stated in the CRC, it must be given primary consideration in all actions that affect children. This principle is highly interpretive (Skivenes & Sørsdal, 2018). When decision-makers have wide discretion in interpreting this principle, they can understand it differently, causing similar cases to be treated differently (Ministry of Children and Family Affairs, 2023).

Several countries have regulations on how to determine a child's best interests. Luhamaa et al.'s (2022) study mapped how many criteria related to the child's best interests are included in the legislation of 44 (mainly Western) countries. The research revealed that 18 of these countries, including Norway and Estonia, contain three or fewer criteria, indicating that they have wide discretion in making decisions about the child's best interests (Skivenes & Sørsdal, 2018). On the other hand, the relevant legislation of Austria, Finland, Ireland, Germany, England, and Spain includes four or more criteria, indicating that decision-makers' discretion in these countries is more narrow. The 2023 Norwegian Official Report (Ministry of Children and Family Affairs, 2023) proposes the inclusion of a child's best interests checklist in Norwegian legislation. This checklist would support decision-makers in comprehensively evaluating all relevant aspects of a case, ensuring equal treatment by considering the same factors in all cases.

Empirical results of the effectiveness of checklists and other decision-making tools on equal treatment vary. Helland (2021b, also mentioned in section 6.1.1) found that English decision-makers, having to relate to a checklist of child's best interests-

considerations, include more considerations and that their reasoning is more thorough, including explicit assessments and weighing of arguments in their judgments, compared to Norwegian decision-makers who had no such checklist guiding them. This finding indicates that restricting discretion in this manner can improve reasoning and decision-making. On the other hand, the decision-making tool ORBA has been implemented in the Netherlands and in Norway, the Kvello-framework. These tools guide decision-makers and promote consistency in their assessments. However, the results are mixed: while the tools have increased consistency and accountability, there are still challenges related to outcome consistency, documentation, and transparency (Bartelink et al., 2014; de Kwaadsteniet et al., 2013; Sletten, 2022). Sletten and Ellingsen (2020) found that social workers actively disregarded the Kvello-framework and the COS-P intervention program. Instead, they used their discretion when they found that individualized treatment better served the families. Harrits and Møller (2014), documented a similar tendency: service providers disregard rules while prioritizing building client relationships.

Disregarding the tools or restrictions of discretion (as observed in the studies above) could be an expression of an ethics of care – which emphasizes the contextual and relational aspect of child protection decision-making, taking into consideration the particularities and uniqueness of each case to make the right decision for each individual case (Keddell, 2022). Acting in this manner, prioritizing people's welfare or rights over following decision-making guidance or restriction can be seen as promoting justice – as following the rule would lead to an outcome contrary to the aim of the rule (Etcheverry, 2018). In child protection, if disregarding the standard to adapt the treatment to the individual case safeguards the child better than following the standard slavishly, then that is in line with the aim of child protection policy of protecting children. Although this compromises equal treatment, it facilitates justice in the sense that the child receives protection as they are entitled to.

There may thus be good reasons to not overemphasize equal treatment, but instead ensure that the discretion permitted to the decision-makers comes to the benefit of the

families involved in the cases, through providing best possible, individualized treatment. However, when there is a considerable discretionary element, the quality of the judgments becomes ever more vital for accountability and predictability: this will be the topic of the following discussion.

6.2 Appraising the quality of judgments

Equal treatment is closely connected to predictability and accountability: similar cases being treated similarly gives predictable policy implementation, and accountability needs to be in place to course-correct decision-makers who potentially fail to fulfil the equal treatment obligation. It is vital for citizens that the implementation of policies is predictable so that they can form reasonable expectations of how their own case would be treated in the judicial system. This, in turn, is important for trust in the system and its legitimacy.

The fulfillment of accountability and predictability requires judgments with certain qualities; both depend on knowing how past decisions were made. The difference is that while accountability is concerned with holding the decision-maker responsible for decisions made in the past, predictability makes predictions about the future based on knowledge of past decisions. In other words, accountability is retrospective while predictability is future-oriented, as Figure 1-1 indicates. This discussion aims to appraise the degree to which the judgment's quality is suited to hold the decision-makers accountable and furthermore, to discuss implications for predictability and the democratic system. This will be achieved by critically comparing the reasoning and account-giving practice outlined in my findings and comparing them to an operationalization of predictability and accountability that is adapted to qualitative analysis of judgments. These insights are generalizable to all decisions made by state-mandated decision-makers.

While operationalizations like the Venice Commission checklist for the rule of law (Venice Commission, 2016) are highly specified, and much work lies behind it, it is mainly relevant for evaluating whether the states have fulfilled their obligations to the

rule of law in their laws and regulations. My research, however, is concerned with how the rule of law is fulfilled in real-life cases and how it naturally occurs in state-mandated interventions into the private sphere.

To answer the research questions regarding accountability and predictability based on the written judgments, it is necessary to operationalize criteria for appraising judgment quality adapted to this purpose. These criteria and the result of the appraisal are summarized in Table 6-2. This way of conceptualizing predictability and accountability in the context of child protection and delegated decision-making is part of my contribution to the literature.

Table 6-2 - Summary of the critical appraisal

Criteria for accountability and predictability	Appraisal
It is mentioned which standard are applied, why, and why other standards were not applied	Moderately fulfilled
The evaluation of case facts is clearly explained	Moderately fulfilled
The application of standards on case facts is clearly explained	Seldomly fulfilled
The level of detail is sufficient to explain the outcome justifications	Moderately fulfilled

For the operationalization I formulated questions and established criteria to determine whether they were met through my study's findings. The analytical questions that guide the discussion, the operationalization, and the result of the appraisal are summarized in Table 6-2. I will appraise the fulfillment of these criteria together, as the same criteria for judgment quality must be met for both accountability and predictability. I will delve deeper into their separate implications in the following sections. I find that, in my study, the treatment of care order cases is predictable for individuals and professionals involved in care order adjudications, and accountability of the decision-makers can be facilitated when the following criteria are fulfilled in the judgments:

- It is mentioned which standards are applied, why, and why other standards were not applied.
- The evaluation of case facts is clearly explained.

- The application of standards on case facts is clearly explained.
- The level of detail is sufficient to explain the outcome justifications.

The practice mapped in the judgments fulfills these criteria only in part (see Table 6-2). The 3rd article shows that it is often not mentioned which legal standards are applied in kinship placement decisions (although the reasoning implies their application). However, when mentioned, they provide an adequate basis for predicting which standards are likely to be applied in similar decisions. There is a complete absence of reasoning regarding why the standards are used, and no discussion if others could be used instead, as Table 6-2 indicates. This first criterion is found only to be moderately fulfilled.

The next criterion is also only moderately fulfilled (see Table 6-2) as decision-makers often leave out explanations of how they evaluated case facts. While the results of evaluations are provided, it can be difficult to follow when the explanation is missing of why the decision-maker landed on the result. This pattern of a gap between case fact and evaluation outcome is documented in the 2nd and 3rd articles. For example, the matched pair of Estonian cases in the 2nd article are described with identical risks, but one was decided for a care order, the other not. There are no explanations of why the risks were evaluated differently. Further, the 3rd article also shows that the explicit application of the law, the inference from case fact to evaluation in light of the law to case outcome is seldom made explicit, meaning this criterion is only seldomly only fulfilled (see Table 6-2). This is illustrated by the low number of cases containing suitability assessments referencing the law.

Generally, the analyzed cases are justified in moderate detail (last criterion, see Table 6-2). While some are detailed and thorough, others are sparsely detailed, and one has difficulties understanding the inferences from case facts to outcome. I find this last criterion to be moderately fulfilled. Based on this appraisal, I will now discuss the implications of judgment quality for predictability and accountability separately, and through that answer the second and third research questions.

6.2.1 Facilitating accountability

The research question I aim to answer here is: are the judgments suited to hold the decision-makers accountable? To ensure accountability among decision-makers, it is necessary to have a clear understanding of their actions. Those who make care order decisions are obligated to provide a detailed explanation of their decisions (Chambers, 2010). Good accounts are required to evaluate whether the treatment of similar cases was similar, and to hold decision-makers accountable.

Based on the appraisal of the judgments' quality above, I found that the criteria measuring the facilitation of accountability are only moderately fulfilled - the judgments are only partly suited to hold the decision-makers accountable. This compromises democratic control, the exposure and prevention of power abuse, and learning effects. I will shortly touch on how these are affected by the judgment quality.

Starting with democratic control: care orders decisions are made by decision-makers who act on behalf of the state. These individuals exercise discretionary powers in a setting that is largely inaccessible to those not directly involved. Rothstein (1998) refers to this situation as "democracy's black hole". To increase transparency and accountability, written judgments are needed to understand how these individuals exercise their delegated decision-making power. However, my findings indicate that the decisions made in "democracy's black hole" are only partially accounted for, as there are deficiencies mapped in the judgments, see the right column of Table 6-3. Unfortunately, this lack of transparency and accountability is a recurring theme in child protection decision-making. For example, Burns et al. (2019) found significant deficiencies in the accountability of adoption proceedings in the eight countries included in their study.

I see democracy's black hole as a threefold problem. Firstly, discretion can pose a problem. It is part of the decision-maker's delegated mandate to apply general laws to specific, complex cases (Galligan, 1986). When doing so, they implement policy in real cases, "making" politics as they go. But due to the freedom discretion entails,

one cannot be sure that the democratically constituted laws will be adhered to. Or, at the least, not adhered to in the manner the democratically elected decision-maker intended (Wagenaar, 2020). Research has shown that the implementation of policies can differ from the policy aims intended by the policymakers (Križ & Skivenes, 2014; Lipsky, 1980). The outcome of policies can be different than intended as extralegal factors (e.g., characteristics of the clients or decision-makers, external influences, institutional factors) can influence how discretion is used, legal factors can be weighted differently than intended, or standards can be interpreted to yield different results. For example, Møller (2016) found extralegal factors to be influential in her vignette study of Danish caseworkers evaluating clients' ability to work – if the clients were stereotypically deserving, they received more positive responses despite displaying the same needs. While this seems harmless in isolated incidents, it can have wide-ranging consequences when aggregated to a systemic level. In my data (3rd article), discretionary interpretation may have changed the policy output of the Norwegian policy to increase kinship placements (The Norwegian Directorate for Children, Youth and Family Affairs, 2004) – but as the accounts for the reasoning behind kinship placements are found to largely be poor, it is difficult to describe the patterns in the reasoning in detail and evaluate how policy has been implemented (see Table 6-3) .

Table 6-3 - Summary of findings relating to accountability. Numbers indicate article number.

Accountability	
The accounts the decision-makers provide are suitable to hold them accountable	The accounts the decision-makers provide are **not** suitable to hold them accountable
② Outcomes are justified by reasons relevant to domestic law. ③ Criteria from the law are assessed.	③ Added criteria present in many cases. ① ② ③ Poor reasoning and accounts are prevalent.

Description: The table summarizes the three articles' key findings as they relate to the thesis' research questions related to accountability. In the left column it is indicated if the finding answers the research question with a yes. In the right column it is indicated if accountability is compromised. The circled numbers in the table show which article the finding is from.

This leads to the second problem related to democracy's black hole: not knowing what's happening, stemming from unpredictable and variable policy implementation. Decision-makers are delegated discretionary power on the premise that they will

exercise it according to their mandate and that they have the professional knowledge required to do so. When policy implementation varies, doubts can arise whether decision-makers are misusing their power, disregarding the standards they are required to follow, or if they are incompetent or fail to apply their professional knowledge (Molander, 2016). Trust also decreases when decisions lack justifications (Eriksen, 2001). A lack of trust can ultimately deteriorate the system's perceived legitimacy (Suddaby et al., 2017). However, good accounts of the decision-maker's actions and decisions, made widely available and accessible to citizens, could increase decision-makers' accountability. For example, had the decision-makers in the 2nd article supported their concluding reasons (which are related to relevant law, see Table 6-3) with more detail on how they arrived at that conclusion, the judgments would be better suited to hold the decision-makers accountable.

Lastly, democratic control is lacking as the decision-makers operating in democracy's black hole cannot be held accountable through democratic channels or mechanisms: as they are not elected, they cannot be removed from office in the next election. There is some democratic control embedded in their mandate, as they are delegated power on the premise that they will fulfill democratically sanctioned policies (Molander, 2016). However, as described above, discretion facilitates uncertainty in how these will be implemented, decreasing control. The result is a system with technocratic traits, as professional knowledge and not democratic control steers the policy implementation (Eriksen, 2001). Care order adjudications are not completely technocratic, as the affected parties are encouraged to bring their viewpoints across, which constitutes a certain democratic involvement. Although not election-based, there are some mechanisms in place to hold decision-makers accountable.[24] Care order decision-makers can have their decisions appealed and overturned, and in severe cases, they might even lose their appointed role. The quality of judgments is vital to evaluate the decision-maker's exercise of their delegated power. Despite difficulties, working for *"Accountability under conditions where it is difficult to*

[24] In the Norwegian Tribunal, a layperson is among the three decision-makers, which constitutes a democratic element.

enforce" (Molander, 2016, p. 58) is important in all public decision-making, including in newborn care order cases. Good accounts aid this aim.

The next benefit of accountability I discuss is that good accounts of discretionary decisions can promote learning through, in practical detail, modelling how a policy aim can be achieved and through that contribute to effective governance. The learning effect is compromised when the accounts are poor as the judgments then are poor models for emulation. A decision that is well accounted for can be a model for the next decision-maker facing a similar case. For examples of intentional model judgments, the cases Re B-S (2013) and Re B (A child) (2013) from the UK serve as models for the "balance sheet approach" of documenting the assessments of different placement alternatives when deciding care orders and adoptions from care (Jones, n.d.).[25] These judgments demonstrated how the policy aim could be achieved in that specific case: the decision-maker described a holistic evaluation of all outcome options, providing detail and balance in reasoning (Gupta & Lloyd-Jones, 2016). Through this, they laid the ground for subsequent decision-makers to emulate them and provide similarly thorough balancing exercises.

The modeling effect can be especially useful when cases involve a policy priority, like kinship placements in Norway. The Norwegian authorities aim to increase the number of kinship placements and have instructed decision-makers to use their available discretion to ensure that as many children as possible are placed with kin (Skoglund et al., 2022; The Norwegian Directorate for Children, Youth and Family Affairs, 2004). If the accounts of how decision-makers have applied standards were considerably better than the practice mapped in the 3rd article, they could guide future decision-makers and contribute to the policy goal - further supporting the delegated implementation of democratic policies. However, the findings imply that this is not the case (see Table 6-3).

The third benefit of accountability that I will touch upon is that it can expose the abuse of power. Accounts of the whole decision can expose subpar treatment of

[25] These judgments are not part of my data material.

cases, decision-makers' stepping outside their mandate to abuse their power or include extralegal factors, the latter I found they did in the 3rd article (see Table 6-3). The increased likelihood of exposure can also prevent power abuse from happening. Blatant power abuse is plausibly easy to detect, but it can be difficult to differentiate between inconspicuous power abuse and reasonable disagreement. Power abuse entails decision-makers stepping outside of their mandate and using their position for personal gain or promoting their personal values. They can hamper the legal procedure, act contrary to policy, or commit even more outrageous acts.[26]

Reasonable disagreement, however, is to be expected in discretionary reasoning *"... because the form of reasoning contains some noneliminable sources of variation."* (Molander, 2016, p. 4). Reasonable disagreement arises when there are several legitimate outcomes for the case, and which outcome is chosen depends on the discretionary evaluations (Etcheverry, 2018).

Reasonable disagreement can arise in cases where there are two or more legitimately justifiable outcomes. Parties of the case, members of the public, or one of multiple decision-makers in systems that practice group decision-making (such as Spain or Norway, see Table 4-1) may disagree with the chosen outcome. Power abuse is grounds for penalizing decision-makers and correct their decision, reasonable disagreement is not - so it is absolutely vital that accounts are good enough so that one can differentiate between the two. One example of reasonable disagreement is included in my 2nd article: case B_NOR_nonrem was decided through a split decision (also discussed in section 6.1.1). The three decision-makers differed in their evaluation of risk mitigation strategies, leading one to vote for a care order and two for no care order. As the account of the reasoning is sufficient to shed light on the assessments and grounds for the decision, we learn that two decision-makers assessed the case facts and available reports and found that the mother, together with her network and suggested protective measures, would be able to negate the present risks. The remaining decision-maker had assessed the same facts and reports and concluded

[26] There are no indications in my data that something like this has happened, nor is it frequently reported in the literature.

that the risk would not be sufficiently managed. Both interpretations of the same case facts are valid within the given discretionary space and are justified by "good reasons" related to domestic law (see Table 6-3) ("good reasons" are explained in section 3.4). However, if the decision-makers do not account for their evaluations, one would not know whether the decision to remove the child was an example of power abuse – like the decision-maker believing that misusing substances is immoral and that the mother, therefore, does not deserve to raise children. According to Norwegian law, this would abuse the decision-makers' state-mandated power as this is not a valid reason. Through looking at the treatment of the case, one can establish whether the treatment was within the mandate - the decision-makers can be held accountable in this instance.

Accountability could be improved through improved judgment quality. This could be achieved through requiring decision-makers to write better judgments, providing more requirements for what judgments need to contain. Table 4-6 summarizes the requirements for judgments in the eight countries in this study, as they were in 2019. There is considerable variation and room for further requirements.[27] Requiring more of the written judgments would not limit the decision-makers' discretion regarding the decision itself. One could thus improve the accounts and the decision-makers' accountability while retaining their ability to adapt treatment to the specific case. It is possible that the added requirements indirectly would improve the decisions themselves as the decision-makers would know that their reasoning is on greater display. The act of writing could also direct their attention to otherwise overlooked parts of the reasoning.

The positive effects of stricter requirements on the accounts depend on decision-makers fulfilling them. Of the eight countries included, Norway requires the most of their judgments - and still, I found poor accounts to be highly prevalent in the 3rd article. Although that analysis is based on only 36 cases and restricted to a part of a care order decision, namely where to place the child, it is an indication that formal

[27] The table shows the requirements contained in legislation. Practice is likely to be influenced by other factors too, like guidelines, organizational culture, and professional norms.

requirements may be insufficient to form practice as intended. The situation in Norway is currently changing. As mentioned in chapter 4, Norway has been found to have violated the ECHR in a number of child protection cases. Part of the criticism delivered in the judgments from the ECtHR concerns the reasoning and justification for intrusive measures (Aamodt & Sommerfeldt, 2022). Especially evaluations of the child's vulnerability and family ties have been highlighted as needing more thorough accounts (Ministry of Children and Family Affairs, 2023). These are highly interpretative case aspects, susceptible to discretionary evaluations which can determine the outcome of a case. The state has reacted to this criticism: courses provided to Norwegian child protection agencies include urgent requests to improve the documentation and thoroughness of evaluations (Riedl, 2020). In my 3rd article, I remarked upon the improvements in Norwegian judgment-writing practice that have been documented by researchers. The changes are still ongoing, and the long-term results are still unclear.

6.2.2 Implications for predictability

Next, I discuss possible implications for predictability of the appraised judgment quality, answering the third research question: what are possible implications of my findings for the predictability of case treatment? Implications for the democratic system were discussed in the previous section. The appraisal of predictability is based on the usefulness of the written judgments in predicting the treatment and outcome of future child protection cases. When the treatment of cases is poorly accounted for, or when similar cases are treated differently, predictability suffers.

Table 6-4 - Summary of findings relating to predictability. Numbers indicate article number.

Predictability	
The findings indicate that predictability is facilitated	The findings indicate that predictability is **compromised**
① Four risk factors are near-universally relevant.	① Weight attributed to risks varied. ② Different outcomes come from discretionary evaluation of social facts. ③Poor accounts dominate.

Description: The table summarizes the three articles' key findings as they relate to the thesis' research questions related to predictability. In the left

column are the findings that indicate that predictability is facilitated. In the right column it is indicated if predictability is compromised. The circled numbers in the table show which article the finding is from.

As it stands, the judgments provide moderate predictability - especially for laypersons, who are unlikely to have extensive knowledge regarding child protection policy implementation. As a consequence, people could base their actions on incorrect predictions, which could be to their own and others' detriment. For example, parents preparing for adjudication in court could try to predict the treatment of their case based on the four risks found near universally relevant to assess in the 1st article, but find the evaluations of these risk unpredictable as the decision-makers weighting varied (see Table 6-4). This unpredictable pattern of evaluation of case facts is also found in the 2nd article. The treatment of the case would suffer, and with it, the chances of finding the best solution for the child. As a result, the population's trust in the child protection and legal system may decrease, which in turn is detrimental to the system's legitimacy (Marien & Hooghe, 2011). These evaluations could be easier to predict if their accounts were good - unfortunately, most of the time only poor accounts were mapped (see Table 6-4).

One measure that could improve predictability would entail turning discretionary standards into rules (see 3.3 on the difference between rules and standards). Rules can be difficult to make but simple to use (Lovett, 2011). Rules have few permitted outcomes, and work along an if - then logic that is simple and easy to follow and makes the use of rules transparent. Predictability is here derived from the absence of discretion in the decision-making. Such an algorithmic decision-making procedure would be fast and could be performed by unskilled decision-makers - perhaps even by computers. I understand this to fall under Dworkin's term "mechanical jurisprudence" (Dworkin, 1963).

Such rule-based, schematic, mechanistic or algorithmic decision-making practices are at play in some parts of child protection: Gerdts-Andresen (2020) found that contact arrangements in a number of Norwegian care order cases were schematically decided. When a care order placement was assessed to be long-term, the decision-making norm perceived as binding to the decision-makers were three to six contact sessions

per year, regardless of the child's needs and the birth parents' parenting abilities and not accompanied by weighing of alternatives and justifications. Based on this schematic decision-making it is easy to predict future contact frequency decisions.

Despite the benefits of efficiency and simplicity, there are reasons why this mode of deciding has not caught on generally: one is that rules may lead to unintended consequences or errors (Kahneman et al., 2021), and another is that it might be impossible to write rules when the situations are too complex (Schneider, 1992). Writing rules for all possible care order cases could prove impossible as they are infinitely complex - each child, each family, and their histories are different. Even if one managed to do so, the rulebook would be huge and too detailed to be of any practical use.

Even if one could write sufficiently many rules for care orders, there could be problems in the form of unintended consequences or errors. Goodin describes the tradeoff between rules and discretion in this manner:

> *We can, of course, reduce the unpredictability of the verdicts rendered by rule-abiding officials by restricting the range of considerations that the rules direct them to take into account. But if those considerations were ones that really needed to be taken into account in rendering the 'right' decision, then predictability of this sort is gained at the cost of rendering objectively 'worse' decisions."* (Goodin, 1986, p. 251)

It is unlikely that one can eliminate all errors, but the acceptability of errors will depend on their frequency, their consequences, and if they can be justified. The frequency of errors would depend on the rules and how many situations they apply to. Gillingham (2019), in his review of fully algorithmic decision support systems used in social work with families, including child protection, found the highest reported accuracy of predictions based on risk assessments to be around 75%. While that is theoretically impressive (ibid), a rate of one in four wrong child protection decisions would likely be unacceptable when a single error has high costs. For example, in England the highly publicized death of a young child with considerable child protection involvement led to massive changes in practice (Butler, 2012), demonstrating that this type of error was not acceptable.

Not all errors are equally dramatic but can still lead to changes in practice. The ECtHR took issue with the schematic contact frequency decision-making documented by Gerdts-Andresen (2020) as it lacks individualized treatment (Sørensen, 2020). Without such treatment, the frequency of errors, which could deprive children who would benefit from frequent contact with their birth parents of such contact, could increase. Over time, reunification prospects would decrease as attachment between child and birth parents could suffer from the low contact frequency. As a result of these concerns that indicate the unacceptability of errors, the frequency of contact sessions for children in Norwegian child protection has increased significantly in the latter year, with greater variation in the frequency and length of individual contact sessions (Ruiken, 2022). This increase in variation can indicate that there is an increase in the individualized, discretionary assessments of contact frequency that would benefit the child in the individual case.

While algorithmic decision-making is theoretically interesting and brings forward central dilemmas of child protection decision-making, more reality-oriented actors claim that discretion will always be a part of legal decision-making generally (Etcheverry, 2018). This applies also to care order decisions specifically, as the decisions are prognostic (made about the future), and taken under conditions of uncertainty (Ministry of Children and Family Affairs, 2023). In addition, the best interests of the child-principle is inherently discretionary (Skivenes & Sørsdal, 2018) and must be a primary consideration in all decisions affecting children (CRC, 1989).

6.3 Concluding remarks

In this thesis I have analyzed the reasoning and justification used in newborn care order judgments to assess whether the decision-makers fulfilled their equal treatment obligation. My findings confirm existing literature that suggests a conflict between equal treatment and the discretionary evaluation of highly interpretative social facts. In addition, the judgments often lack sufficient explanation of how and why case facts were evaluated and weighed, and how discretionary standards were applied. This lack of transparency has negative implications for predictability and

accountability. I have explored different solutions to address these issues, through restricting discretion in various ways.

The findings show that while there may be an informal standard of similar considerations in newborn care order cases, there is variability in how decision-makers evaluate the weight or effect of case aspects on the individual case. Furthermore, while legal standards have been applied in the analyzed cases, there is variability in how they are used from case to case, and how this use is accounted for.

Findings regarding accountability have both positive and negative aspects: the care order decisions are mostly justified based on laws that are established democratically, as is evident from the justifications provided and the in-depth analysis of the reasoning. However, all three articles point out deficiencies in the reasoning and justification presented in the written judgments, which makes it more challenging to hold the decision-makers accountable for their use of delegated power. These deficiencies are most noticeable in the gap between the case facts and the evaluation of these facts' results. This gap creates difficulties in following the decision-makers' use of discretion, which ultimately challenges their accountability. By improving the practice of writing judgments, the potential for the judgments to enable democratic control over policy implementation, facilitate learning for effective governance, and expose and prevent power abuse can be fully realized.

I have evaluated the ability to predict future case treatment based on the quality of written judgments. The inadequacies in judgments that are relevant to accountability are also relevant to predictability. However, for predictability, the implications look towards the future, while accountability focuses on the past (as shown in Figure 1-1). The variability in treatment caused by discretion, combined with deficiencies in account-giving practices resulting in poor written judgments, makes it hard to predict future policy implementation. Although there is some predictability based on the informal standard regarding relevant risk factors, it is questionable whether laypeople can easily access this information.

The empirical contribution is related to two aspects of the thesis: the nature of the empirical case, and the Norwegian policy context. Newborn care order cases are highly consequential and decided in a closed decision-making setting to protect the privacy of the individuals involved. Due to this, gaining knowledge about these cases is important yet difficult. The thesis systematizes and makes available knowledge on decision-making practices and demographics. Through the theoretical angle in this thesis, the knowledge becomes more applicable in the Norwegian policy context, where the need for thorough justifications and a focus on kinship placements are important. Although practice and policy changes are underway, the thesis shows that these changes, like increasing kinship placements, should be monitored closely by policymakers and researchers to ensure positive consequences.

The methodological contribution is related to the extensive work and analysis required to access and map the content of the judgments, in order to meet the analytical objectives. To explore equal treatment in the naturally occurring data, three approaches were used. One of these approaches, the matching of similar cases with different outcomes, is a novel way to study equal treatment. Deciding on the level of detail, how to define "treatment", and particularly how to match pairs of similar cases, are all important considerations that can hopefully be useful in future research. The close connection between the data analysis strategy and research question was essential at every step of the way, given the amount of work required for data analysis. This should not discourage future research, as the judgments contain valuable insights into what are considered legitimate justifications for severe state interventions into the private sphere.

6.3.1 Policy implications

A number of policy implications can be drawn from the thesis. One measure discussed as potentially improving equal treatment is the implementation of a child's best interests-checklist. Such a checklist has already been suggested to policymakers in the Norwegian system (Ministry of Children and Family Affairs, 2023).

All three articles highlight weaknesses in the reasoning and justifications of decision-makers. While the observed weaknesses in reasoning do not necessarily mean that the wrong decision was made, there is certainly room for improvement in the documentation of these decisions. This could be achieved through clearer reasoning and justification, explicit listing of reasons for intervention or non-intervention, and how they are anchored in the case history, as well as how the decisions are based on relevant legal standards. One suggested measure for improvement is to increase the requirements towards the quality of judgments, as suggested in section 6.2.1, seems like a low-hanging fruit. There should also be increased attention to the documentation of evaluations made by child protection agencies, as these provide important information to the decision-makers deciding care orders.

To support the Norwegian policy goal of increased kinship placements, one could create a fictive or real model judgment to act as a guide for which considerations to include, how to apply standards, and how to account for the decision. This could improve the predictability of such decisions. If judgments would become more predictable because of such a model judgment, policymakers would have a better basis on which to decide on changes to policy.

Improving accountability and upholding the rule of law would have numerous benefits. In addition to its positive impact on democratic control, effective governance through learning from good judgments, and prevention of power abuse, accountability has inherent value and could improve trust in the legal and child protection system. Having better records of these decisions could also enhance the knowledge base necessary to evaluate decision-making practices. This could be an initial step in a longer process of improving child protection decision-making. Regardless of the changes made, policymakers need to consider the need for additional resources to ensure that other aspects of the decision-makers' mandates are not neglected.

6.3.2 Further research

There are several promising avenues for future research. Comparison across countries seems promising regarding the role of risk and protective factors in care order reasoning. Here one could focus on the effect of attitudes and values, especially when studied in parallel with studies on population's attitude toward child protection interventions (e.g., Berrick et al., 2022; Loen & Skivenes, 2023).

As stated in the introduction, the data available does not provide insights into the reasons behind the variations in the treatment of similar cases. Conducting further research in this area would be highly beneficial to the field. A challenging yet promising design would be to match a large number of similar cases, similar to my 2nd article, and analyze the similarities and differences in their treatment. This could be done by combining demographic background information of the families and decision-makers, and preferably using a full sample of judgments from several years. By doing so, one could document some important causal relations about the factors that influence justice.

Studying larger, full samples of split decisions, focusing on the parts of the reasoning where the opinions of the decision-makers vary, could yield valuable insights into discretionary evaluations and their effect on equal treatment. Different decision-makers' take on the same case is often studied through vignettes, however, studying split decisions would add to the field as they are naturally occurring data and can highlight patterns in written reasoning.

In addition, it would be valuable to investigate further the mechanisms that influence judgment-writing practices. Combining the decision-makers' perspectives on their own practices, such as the approach used by Rubin (1987), and conducting experiments to test various influences, such as Liu and Li (2019), would be an excellent addition to the literature.

Comparative studies could provide more insights into mechanisms of variability. To follow up on the 3rd articles' findings regarding the use and accounting for use of standards, it would be beneficial to expand the analysis to the entire care order

judgment and to compare to judgments over other intrusive, paternalistic state interventions, like involuntary commitment to psychiatric treatment. This could highlight if some patterns are specific to kinship placements or child protection cases, or if they apply to a wide range of state interventions.

As society changes over time, the welfare state and child protection system are likely to change too. Developments in the policy and research fields should not be seen and planned in isolation, but in relation to each other, to best serve the democratic society.

7. References

Aamodt, H. A., & Sommerfeldt, M. B. (2022). Hvordan besluttes samvær mellom foreldre og barn under offentlig omsorg? [How is contact decided between parents and children in public care?]. *Tidsskriftet Norges Barnevern*, *99*(2–3), 80–97. https://doi.org/10.18261/tnb.99.2-3.2

Akaliyski, P., Welzel, C., & Hien, J. (2022). A community of shared values? Dimensions and dynamics of cultural integration in the European Union. *Journal of European Integration*, *44*(4), 569–590. https://doi.org/10.1080/07036337.2021.1956915

Asdal, K., & Reinertsen, H. (2022). *Doing document analysis: A practice-oriented method*. SAGE.

Bartelink, C., van Yperen, T. A., Ten Berge, I. J., de Kwaadsteniet, L., Witteman, C. L., & M. (2014). Agreement on Child Maltreatment Decisions: A Nonrandomized Study on the Effects of Structured Decision-Making. *Child & Youth Care Forum; New York*, *43*(5), 639–654. http://dx.doi.org/10.1007/s10566-014-9259-9

Berrick, J. D., Gilbert, N., & Skivenes, M. (2023a). Child Protection Systems Across the World. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford Handbook of Child Protection Systems*. Oxford University Press.

Berrick, J. D., Gilbert, N., & Skivenes, M. (Eds.). (2023b). *Oxford Handbook of Child Protection Systems*. Oxford University Press. https://academic.oup.com/edited-volume/45764?login=false

Berrick, J. D., Skivenes, M., & Roscoe, J. N. (2022). Children's rights and parents' rights: Popular attitudes about when we privilege one over the other. *International Journal of Social Welfare*. https://doi.org/10.1111/ijsw.12523

Biesel, K., & Kindler, H. (2023). Child Protection and Welfare in Germany. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford Handbook of Child Protection Systems*. Oxford University Press. https://academic.oup.com/edited-volume/45764?login=false

Biland, É., & Steinmetz, H. (2017). Are Judges Street-Level Bureaucrats? Evidence from French and Canadian Family Courts. *Law & Social Inquiry*, *42*(2), 298–324. https://doi.org/10.1111/lsi.12251

Bjorvatn, A., Magnussen, A.-M., & Wallander, L. (2020). Law and medical practice: A comparative vignette survey of cardiologists in Norway and Denmark. *SAGE Open Medicine*, *8*, 2050312120946215. https://doi.org/10.1177/2050312120946215

Bovens, M. (2007). Analysing and Assessing Accountability: A Conceptual Framework. *European Law Journal*, *13*(4), 447–468. https://doi.org/10.1111/j.1468-0386.2007.00378.x

Brandon, M., Philip, G., & Clifton, J. (2019). Men as Fathers in Child Protection. *Australian Social Work*, *72*(4), Article 4. https://doi.org/10.1080/0312407X.2019.1627469

Braun, V., & Clarke, V. (2022). *Thematic analysis: A practical guide*. SAGE.

Brodkin, E. Z. (2020). Discretion in the Welfare State. In T. Evans & P. L. Hupe (Eds.), *Discretion and the Quest for Controlled Freedom* (pp. 63–78). Palgrave Macmillan.

Bufdir. (2023). *Ny barnevernslov [New child protection law]*. Bufdir. https://www.bufdir.no/fagstotte/barnevern-oppvekst/ny-barnevernslov/

Burns, K., Križ, K., Krutzinna, J., Luhamaa, K., Meysen, T., Pösö, T., Sánchez-Cabezudo, S. S., Skivenes, M., & Thoburn, J. (2019). The Hidden Proceedings – An Analysis of Accountability of Child Protection Adoption Proceedings in Eight European Jurisdictions. *European Journal of Comparative Law and Governance*, *6*(1), 339–371. https://doi.org/10.1163/22134514-00604002

Burns, K., & Ó'Súilleabháin, F. (2023, January 27). *Online Hate Towards Child Care Workers: Findings from a national study in Ireland*. https://discretion.uib.no/online-hate-towards-child-care-workers-findings-from-a-national-study-in-ireland/

Burns, K., Pösö, T., & Skivenes, M. (Eds.). (2017a). *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780190459567.001.0001

Burns, K., Pösö, T., & Skivenes, M. (2017b). Child Welfare Removals by the State—Complex and Controversial Decisions. In K. Burns, T. Pösö, & M. Skivenes (Eds.), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780190459567.001.0001

Burns, K., Pösö, T., & Skivenes, M. (2017c). Removals of Children by the Child Welfare System—Variations and Differences Across Countries. In K. Burns, T. Pösö, & M. Skivenes (Eds.), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780190459567.001.0001

Butler, P. (2012, May 25). Thousands more children taken into care in wake of Baby Peter case. *The Guardian*. https://www.theguardian.com/society/2012/may/25/children-in-care-baby-peter

Centre for Research on Discretion and Paternalism. (n.d.). *Discretion and the Child's Best Interests in Child Protection*. Centre for Research on Discretion and Paternalism. Retrieved November 2, 2023, from https://discretion.uib.no/projectsold/discretion-and-the-childs-best-interest-in-child-protection/

Centre for Research on Discretion and Paternalism. (2019). *Requirements for Judgments in Care Order Decisions in 8 Countries*. Centre for Research on Discretion and Paternalism. https://www.discretion.uib.no/formal-legal-requirements-for-judgments-in-care-order-decisions-in-8-countries/

Centre for Research on Discretion and Paternalism. (2021). *Description of coding results—216 care order cases concerning newborn children*. Centre for Research on Discretion and Paternalism. https://discretion.uib.no/wp-content/uploads/2022/03/Newborn-Description-of-coding-results.pdf

Centre for Research on Discretion and Paternalism. (2018). *Legal Frame for Care Order Processes of Newborn Babies in 8 European Countries*. Centre for Research on Discretion and Paternalism. https://discretion.uib.no/resources/legal-frame-newborn/

Chambers, S. (2010). Theories of Political Justification: Theories of Political Justification. *Philosophy Compass*, *5*(11), 893–903. https://doi.org/10.1111/j.1747-9991.2010.00344.x

Child Care Act 1991, S.I. No. 17 of 1991. Retrieved September 5, 2019, from http://revisedacts.lawreform.ie/eli/1991/act/17/revised/en/html

Christman, J. (2020). Autonomy in Moral and Political Philosophy. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2020). Metaphysics Research Lab, Stanford University. https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/

Clausen, S.-E., & Kristofersen, L. B. (2008). *Barnevernsklienter i Norge 1990 - 2005.: En longitudinell studie [Child protection clients in Norway 1990 - 2005.: A longitudinal study]* (NOVA Rapport NOVA Rapport 3/08; p. NOVA Rapport 3/08). Norsk institutt for forskning om oppvekst, velferd og aldring (NOVA). https://doi.org/10.7577/nova/rapporter/2008/3

Council of Europe. (1953). *Convention for the Protection of Human Rights and Fundamental Freedoms*. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005

Council of Europe. (2022, May 26). *Chart of signatures and ratifications of Treaty 005*. Treaty Office. https://www.coe.int/en/web/conventions/full-list

Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, U.N. General Assembly, UNCRC (1989).

de Kwaadsteniet, L., Bartelink, C., Witteman, C., ten Berge, I., & van Yperen, T. (2013). Improved decision making about suspected child maltreatment: Results of structuring the decision process. *Children and Youth Services Review*, *35*(2), 347–352. https://doi.org/10.1016/j.childyouth.2012.11.015

Dispute Act (Tvisteloven), (2005). https://lovdata.no/dokument/NL/lov/2005-06-17-90?q=tvisteloven

Dworkin, R. (1963). Judicial Discretion. *The Journal of Philosophy*, *60*(21), 624–638.

Dworkin, R. (1967). The Model of Rules. *The University of Chicago Law Review*, *35*(1), 14–46.

Epstein, L., & Lindquist, S. A. (2017). *The Oxford Handbook of U.S. Judicial Behavior*. University Press.

Eriksen, E. O. (2001). *Demokratiets sorte hull: Om spenningen mellom fag og politikk i velferdsstaten [The black hole of democracy: On the tension between proffesionalism and politics in the welfare state]*. Abstrakt Forlag AS.

Eriksen, E. O., & Weigård, J. (1999). *Kommunikativ handling og deliberativt demokrati [Communicative action and deliberative democracy]* (1st ed.). Fagbokforlaget.

Etcheverry, J. B. (2018). Rule of Law and Judicial Discretion: Their Compatibility and Reciprocal Limitation. *Archiv Für Rechts- Und Sozialphilosophie*, *104*(1), 121–134. https://doi.org/10.25162/ARSP-2018-0007

Evans, T., & Hupe, P. (2020). Conceptualizing Discretion. In T. Evans & P. L. Hupe (Eds.), *Discretion and the Quest for Controlled Freedom* (pp. 1–13). Palgrave Macmillan.

Felitti, V. J. (2002). The Relation Between Adverse Childhood Experiences and Adult Health: Turning Gold into Lead. *The Permanente Journal*, *6*(1), 44–47.

Galligan, D. J. (1986). *Discretionary powers: A legal study of official discretion*. Clarendon Press.

Gennaioli, N., & Shleifer, A. (2008). Judicial Fact Discretion. *The Journal of Legal Studies*, *37*(1), 1–35. https://doi.org/10.1086/588266

Gerdts-Andresen, T. (2020). Fastsettelse av samvær ved omsorgsovertakelse. *Kritisk Juss*, *46*(2), 125–153. https://doi.org/10.18261/issn.2387-4546-2020-02-05

Gilbert, N. (1997). *Combatting child abuse: International perspectives and trends*. Oxford University Press.

Gilbert, N., Parton, N., & Skivenes, M. (Eds.). (2011). *Child Protection Systems: International Trends and Orientations*. Oxford University Press. https://www.akademika.no/child-protection-systems/9780199793358

Gillingham, P. (2019). Can Predictive Algorithms Assist Decision-Making in Social Work with Children and Families? *Child Abuse Review*, *28*(2), 114–126. https://doi.org/10.1002/car.2547

Goodin, R. E. (1986). Welfare, rights and discretion. *Oxford Journal of Legal Studies*, *6*(2), 232–261. https://doi.org/10.1093/ojls/6.2.232

Gosepath, S. (2021). Equality. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2021). Metaphysics Research Lab, Stanford University. https://plato.stanford.edu/archives/sum2021/entries/equality/

Gupta, A., & Lloyd-Jones, E. (2016). Re B-S: A glass half full? An exploration of the implications of the Re B-S judgment on practice in the family courts. *Child & Family Social Work*, *21*(4), 539–547. https://doi.org/10.1111/cfs.12176

Harrits, G. S., & Møller, M. Ø. (2014). Prevention at the Front Line: How home nurses, pedagogues, and teachers transform public worry into decisions on special efforts. *Public Management Review*, *16*(4), 447–480. https://doi.org/10.1080/14719037.2013.841980

Helland, H. S. (2021a). In the Best Interest of the Child? Justifying Decisions on Adoption from Care in the Norwegian Supreme Court. *The International Journal of Children's Rights*, *29*(3), 609–639. https://doi.org/10.1163/15718182-29030004

Helland, H. S. (2021b). Reasoning between Rules and Discretion: A Comparative Study of the Normative Platform for Best Interest Decision-Making on Adoption in England and Norway. *International Journal of Law, Policy and the Family*, *35*(1), ebab036. https://doi.org/10.1093/lawfam/ebab036

Helland, H. S., & Nygård, S. H. (2021). Understanding attachment in decisions on adoption from care in Norway. In T. Pösö, M. Skivenes, & J. Thoburn (Eds.), *Adoption from Care: International Perspectives on Children's Rights, Family Preservation and State Intervention* (pp. 215–231). Policy Press. https://library.oapen.org/handle/20.500.12657/47833

Hestbæk, A.-D., Skivenes, M., Falch-Eriksen, A., Svendsen, I., & Backe-Hansen, E. (2023). The Child Protection Systems in Denmark and Norway. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford Handbook of Child Protection Systems*. Oxford University Press.

Höjer, I., & Pösö, T. (2023). Child Protection in Finland and Sweden. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford Handbook of Child Protection Systems*. Oxford University Press.

Jones, M. (n.d.). *The balance-sheet approach*. CommunityCare inform. Retrieved September 20, 2023, from https://fostercareresources.files.wordpress.com/2015/12/cc-inform_download_balance_sheet_evidence.pdf

Juhasz, I. B. (2020). Child welfare and future assessments – An analysis of discretionary decision-making in newborn removals in Norway. *Children and Youth Services Review*, *116*. https://doi.org/10.1016/j.childyouth.2020.105137

Kahneman, D. (2011). *Thinking, fast and slow*. Farrar, Straus and Giroux.

Kahneman, D., Sibony, O., & Sunstein, C. R. (2021). *Noise: A Flaw in Human Judgment* (1st ed.). Hachette UK.

Keddell, E. (2014). Current Debates on Variability in Child Welfare Decision-Making: A Selected Literature Review. *Social Sciences*, *3*(4), 916–940. https://doi.org/10.3390/socsci3040916

Keddell, E. (2022). On Decision-Variability in Child Protection: Respect, Interactive Universalism and Ethics of Care. *Ethics and Social Welfare*, *0*(0), 1–16. https://doi.org/10.1080/17496535.2022.2073381

Klein, D. (2017). Law in Judicial Decision-Making. In L. Epstein & S. A. Lindquist, *The Oxford Handbook of U.S. Judicial Behavior*. University Press.

Kraus, S., Ribeiro-Soriano, D., & Schüssler, M. (2018). Fuzzy-set qualitative comparative analysis (fsQCA) in entrepreneurship and innovation research – the rise of a method. *International Entrepreneurship and Management Journal*, *14*(1), 15–33. https://doi.org/10.1007/s11365-017-0461-8

Kriz, K., Krutzinna, J., & Pantuček-Eisenbacher, P. (2023). The Austrian Child Welfare System: Moving Towards Professionalization and Participation. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford Handbook of Child Protection Systems*. Oxford University Press. https://academic.oup.com/edited-volume/45764?login=false

Kriz, K., Krutzinna, J., Pösö, T., & Skivenes, M. (2022). The Invisible Child: A Comparative Study of Newborn Removal Judgments from a Child Equality Perspective (CEP). *International Journal of Children's Rights*.

Križ, K., & Skivenes, M. (2014). Street-level policy aims of child welfare workers in England, Norway and the United States: An exploratory study. *Children and Youth Services Review*, *40*, 71–78. https://doi.org/10.1016/j.childyouth.2014.02.014

Krutzinna, J., & Skivenes, M. (2020). Judging parental competence: A cross-country analysis of judicial decision makers' written assessment of mothers' parenting capacities in newborn removal cases. *Child & Family Social Work*, *1*(11), 50–60. https://doi.org/10.1111/cfs.12788

Larsson, B., & Jacobsson, B. (2013). Discretion in the “Backyard of Law”: Case Handling of Debt Relief in Sweden. *Professions and Professionalism*, *3*(1), Article 1. https://doi.org/10.7577/pp.438

Lens, V. (2012). Judge or Bureaucrat? How Administrative Law Judges Exercise Discretion in Welfare Bureaucracies. *Social Service Review*, *86*(2), 269–293. https://doi.org/10.1086/666375

Linno, M., & Strömpl, J. (2023). Child Protection Systems in Estonia and Latvia. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford Handbook of Child Protection Systems*. Oxford University Press.

Lipsky, M. (1980). *Street-level bureaucracy: Dilemmas of the individual in public services* (p. XVIII, 244). Russell Sage Foundation.

Liu, J. Z., & Li, X. (2019). Legal Techniques for Rationalizing Biased Judicial Decisions: Evidence from Experiments with Real Judges. *Journal of Empirical Legal Studies*, *16*(3), 630–670.

Loen, M., & Skivenes, M. (2023). Legitimate child protection interventions and the dimension of confidence: A comparative analysis of populations views in six European countries. *Journal of Social Policy*. https://doi.org/10.1017/S004727942300003X

Lovett, J. A. (2011). Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction. *Louisiana Law Review*, *72*(4), 923–998.

Løvlie, A. G. (2022). Evidence in Norwegian Child Protection Interventions – Analysing cases of familial violence. *Child & Family Social Work*, *28*(1), 236–247. https://doi.org/10.1111/cfs.12956

Løvlie, A. G., & Skivenes, M. (2021). Justifying interventions in Norwegian child protection: An analysis of violence in migrant and non-migrant families. *Nordic Journal on Law and Society*, *4*(02). https://doi.org/10.36368/njolas.v4i02.178

Luhamaa, K., Krutzinna, J., & Skivenes, M. (2022). *Child's best interest in child protection legislation of 44 jurisdictions* (p. 80). Centre for Research on Discretion and Paternalism. https://discretion.uib.no/wp-content/uploads/2022/03/CBI-Report.pdf

Magruder, J., & Berrick, J. D. (2022). A longitudinal investigation of infants and out-of-home care. *Journal of Public Child Welfare*, *0*(0), 1–18. https://doi.org/10.1080/15548732.2022.2036294

Marien, S., & Hooghe, M. (2011). Does political trust matter? An empirical investigation into the relation between political trust and support for law compliance. *European Journal of Political Research*, *50*(2), 267–291. https://doi.org/10.1111/j.1475-6765.2010.01930.x

Mascini, P., van Oorschot, I., Weenink, D., & Schippers, G. (2016). Understanding Judges' Choices of Sentence Types As Interpretative Work: An Explorative Study in a Dutch Police Court. *Recht Der Werkelijkheid*, *37*(1), 32–49. https://doi.org/10.2139/ssrn.2792327

Maxwell, J. A. (2013). *Qualitative research design: An interactive approach* (3rd ed., Vol. 41). Sage.

Miller, D. (2003). Political Philosophy: A Very Short Introduction. In *Political Philosophy: A Very Short Introduction*. Oxford University Press. https://www.veryshortintroductions.com/view/10.1093/actrade/9780192803955.001.0001/actrade-9780192803955

Miller, D. (2017). Justice. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2017). Metaphysics Research Lab, Stanford University. https://plato.stanford.edu/archives/fall2017/entries/justice/

Miller, T. (2015). Improving Relative Foster Care Placement Decisions in Michigan. *Western Michigan University Thomas M. Cooley Law Review*, *32*(3), 243–264.

Ministry of Children and Family Affairs. (2005). *NOU 2005:9 Ressursbruk og rettssikkerhet i fylkesnemndene for sosiale saker [Norwegian Official Report 2005:9 Use of resources and the rule of law in the County Social Welfare Board]* [Norwegian Official Report]. regjeringen.no. https://www.regjeringen.no/no/dokumenter/nou-2005-09/id390824/

Ministry of Children and Family Affairs. (2023). *NOU 2023:7 Trygg barndom, sikker fremtid—Gjennomgang av rettsikkerheten for barn og foreldre i barnevernet [Norwegian Official Report 2023:7 Safe childhood, safe future—Review of rule of law for children and parents in the child protection system]* [Norwegian Official Report]. Norwegian Government Security and Service Organisation.

https://www.regjeringen.no/contentassets/a1eb3f73d3d94fa6b146dbd08f8a4253/no/pdfs/nou202320230007000dddpdfs.pdf

Molander, A. (2016). *Discretion in the welfare state: Social rights and professional judgment*. Routledge.

Molander, A., Grimen, H., & Eriksen, E. O. (2012). Professional Discretion and Accountability in the Welfare State. *Journal of Applied Philosophy*, *29*(3), 214–230. https://doi.org/10.1111/j.1468-5930.2012.00564.x

Møller, M. Ø. (2016). “She isn’t Someone I Associate with Pension”—A Vignette Study of Professional Reasoning. *Professions and Professionalism*, *6*(1), Article 1. https://doi.org/10.7577/pp.1353

Niblett, A. (2010). Do Judges Cherry Pick Precedents to Justify Extra- Legal Decisions?: A Statistical Examination. *Maryland Law Review*, *70*(1), 234.

OHCHR. (2014). *Status of ratification Interactive Dashboard*. United Nations Human Rights Office of the High Commissioner. https://indicators.ohchr.org/

Pfaff, S., Crabtree, C., Kern, H. L., & Holbein, J. B. (2021). Do Street-Level Bureaucrats Discriminate Based on Religion? A Large-Scale Correspondence Experiment among American Public School Principals. *Public Administration Review*, *81*(2), 244–259. https://doi.org/10.1111/puar.13235

Posner, R. A. (2008). *How Judges Think.* Harvard University Press. http://uk.practicallaw.thomsonreuters.com/Document/ID5E9D65071B311DEB4DBB46D618C8CB2/View/FullText.html?skipAnonymous=true&transitionType=Default&contextData=(sc.Default)&firstPage=true

Raaphorst, N. J. (2021). Administrative justice in street-level decision making: Equal treatment and responsiveness. In J. Tomlinson, R. Thomas, M. Hertogh, & R. Kirkham (Eds.), *The Oxford Handbook of Administrative Justice* (pp. 1–30). Oxford University Press. https://hdl.handle.net/1887/139073

Rachlinski, J. J., & Wistrich, A. J. (2017). Judging the Judiciary by the Numbers: Empirical Research on Judges. *Annual Review of Law and Social Science*, *13*(1), 203–229. https://doi.org/10.1146/annurev-lawsocsci-110615-085032

Ragin, C. C., & Davey, C. (2022). *Fuzzy-Set/Qualitative Comparative Analysis 4.0* [Computer software]. Department of Sociology, University of California. https://sites.socsci.uci.edu/~cragin/fsQCA/citing.shtml

Riedl, T. R. (2020). *JUSSKURS FOR KOMMUNALT BARNEVERN EMD og HR – Hva betyr signalene? Grunnleggende forvaltningsforståelse [Law course for municipal child protection ECHR and HR - What do the signals mean? Fundamental understanding of administration]*. https://www.bufdir.no/siteassets/fagstotte-barnevern-og-oppvekst/jusskurs-for-kommunalt-barnevern-tore-r.-riedl-presentasjon-tilhorende-nettkurs.pdf

Rothstein, B. (1998). *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State*. Cambridge University Press. https://doi.org/10.1017/CBO9780511598449

Rubin, A. B. (1987). Doctrine in Decision-Making: Rationale or Rationalization. *Utah Law Review*, *1987*(2), 357–372.

Ruiken, B. (2022). *Fylkesnemndenes avgjørelser om omsorgsovertakelser av barn og unge: Kartlegging fra årene 2021, 2018, og 2008 [The Child Protection*

Tribunal's decisions on care orders of children and young people. Mapping from the years 2021, 2018, and 2008]. Centre for Research on Discretion and Paternalism, Bergen. https://discretion.uib.no/wp-content/uploads/2022/07/Ruiken-2022-FYLKESNEMNDENES-AVGJORELSER-OM-OMSORGSOVERTAGELSER-AV-BARN-OG-UNGE.pdf

Ruiken, B. (in preparation for publication). *Accounting for the use of legal standards: The good, the poor, and the adequate*.

Schei, T., & Qvigstad, J. F. (2019). Kriterier for en godt begrunnet høyesterettsdom [Criteria for a well justified Supreme Court Judgment]. *Lov Og Rett*, *58*(8), 480–504. https://doi.org/10.18261/issn.1504-3061-2019-08-03

Schneider, C. E. (1992). Discretion and rules: A lawyer's view. In K. Hawkins (Ed.), *The uses of discretion*. Clarendon Press.

Segado, S. (2023). Child Protection Systems in Spain. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford Handbook of Child Protection Systems*. Oxford University Press.

Silverman, D. (2011). *Interpreting qualitative data: A guide to the principles of qualitative research* (4th ed.). SAGE.

Skivenes, M. (2010). Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions? *Acta Sociologica*, *53*(4), 339–353. https://doi.org/10.1177/0001699310379142

Skivenes, M., Barn, R., Križ, K., & Pösö, T. (Eds.). (2015). *Child Welfare Systems and Migrant Children: A Cross Country Study of Policies and Practice*. Oxford University Press.

Skivenes, M., & Sørsdal, L. M. (2018). The child's best interest principle across child protection jurisdictions. In A. Falch-Eriksen & E. Backe-Hansen (Eds.), *Human Rights in Child Protection—Implications for Professional Practice and Policy* (pp. 59–88). Palgrave Macmillan. https://doi.org/10.1007/978-3-319-94800-3_4

Skivenes, M., & Tefre, Ø. S. (2012). Adoption in the child welfare system—A cross-country analysis of child welfare workers' recommendations for or against adoption. *Children and Youth Services Review*, *34*(11), 2220–2228. https://doi.org/10.1016/j.childyouth.2012.07.013

Skoglund, J., Thørnblad, R., & Holtan, A. (2022). *Childhood in Kinship Care: A Longitudinal Investigation*. Taylor & Francis. https://directory.doabooks.org/handle/20.500.12854/79474

Sletten, M. S. (2022). Proceduralisation of decision-making processes: A case study of child welfare practice. *Nordic Social Work Research*, *0*(0), 1–13. https://doi.org/10.1080/2156857X.2022.2088606

Sletten, M. S., & Ellingsen, I. T. (2020). When standardization becomes the lens of professional practice in child welfare services. *Child & Family Social Work*, *25*(3), 714–722. https://doi.org/10.1111/cfs.12748

Sørensen, C. B. (2020). Langvarige fosterhjemsplasseringer og forholdsmessighetskravet i EMK art. 8 [Long-term foster home placements

and the principle of proportionality in ECHR art. 8]. *Lov Og Rett*, *59*(2), 103–122. https://doi.org/10.18261/issn.1504-3061-2020-02-04

Spamann, H., & Klöhn, L. (2016). Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges. *The Journal of Legal Studies*, *45*(2), 255–280.

Statistics Norway. (2022, June 7). *09050: Barn 0-24 år med barnevernstiltak, etter statistikkvariabel, region, omsorgs-/hjelpetiltak, kjønn, alder og år. Statistikkbanken [09050: Children 0-24 years with child protection measures by statistical variable, region, care order/assistive services, gender, age and year. Statistics bank]*. SSB. https://www.ssb.no/statbank/table/09050/tableviewlayout1/

Statistisk Sentralbyrå. (2023). *Barnevern* [dataset]. https://www.ssb.no/sosiale-forhold-og-kriminalitet/barne-og-familievern/statistikk/barnevern

Stokes, J., & Schmidt, G. (2012). Child protection decision making: A factorial analysis using case vignettes. *Social Work*, *57*(1), 83–90. https://doi.org/10.1093/sw/swr007

Suchman, M. C. (1995). Managing Legitimacy: Strategic and Institutional Approaches. *The Academy of Management Review*, *20*(3), 571–610. https://doi.org/10.2307/258788

Suddaby, R., Bitektine, A., & Haack, P. (2017). Legitimacy. *Academy of Management Annals*, *11*(1), 451–478. https://doi.org/10.5465/annals.2015.0101

Tata, C. (2007). Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process. *Social & Legal Studies*, *16*(3), 425–447. https://doi.org/10.1177/0964663907079767

The Norwegian Directorate for Children, Youth and Family Affairs. (n.d.). *Den europeiske menneskerettighetsdomstolen [The European Court of Human Rights]*. bufdir.no | Barne-, ungdoms- og familiedirektoratet. Retrieved September 14, 2021, from https://bufdir.no/fagstotte/barnevern-oppvekst/emd/#21192

The Norwegian Directorate for Children, Youth and Family Affairs. (2004, July 15). *Rettsdata—2004-07-15. Q-1072 B. Retningslinjer for fosterhjem [Guidelines on foster homes]*. bufdir.no | Barne-, ungdoms- og familiedirektoratet. https://bufdir.no/bibliotek/RettsdataStartPage/Rettsdata/?grid=gRSz20Qz2D1072z20B

Thoburn, J. (2023). Child Welfare and Child Protection Services in England. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford Handbook of Child Protection Systems*. Oxford University Press.

Thornburg, E. (2019). (Un)Conscious Judging. *Washington and Lee Law Review*, *76*(4), 1567–1665.

van den Bogaard, R.-M., Horta, A. C., Van Doren, W., Desmet, E., & Valcke, A. (2022). Procedural (in)justice for EU citizens moving to Belgium: An inquiry into municipal registration practices. *Citizenship Studies*, *0*(0), 1–16. https://doi.org/10.1080/13621025.2022.2137944

van Oorschot, I., Mascini, P., & Weenink, D. (2017). Remorse in Context(s): A Qualitative Exploration of the Negotiation of Remorse and Its Consequences. *Social & Legal Studies*, *26*(3), 359–377. https://doi.org/10.1177/0964663916679039

Venice Commission. (2016). *EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) RULE OF LAW CHECKLIST*. Council of Europe. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e

Viblemo, T. E., Tobro, M., Weigel, B., Ellingsen, D., Siljeholm, W., & Bernt, C. (2019). *Kompetanse og dialog: Evaluering av utprøving av samtaleprosss i fylkesnemndene for barnevern og sosiale saker [Competency and dialogue: Evaluation of trial of dialogue procecss in the County Social Welfare Board]*. Barne-, likestillings og inkluderingsdepartementet.

Vis, S. A., Lauritzen, C., & Fossum, S. (2021). Systematic approaches to assessment in child protection investigations: A literature review. *International Social Work*, *64*(3), 325–340. https://doi.org/10.1177/0020872819828333

Wagenaar, H. (2020). Discretion and Street-Level Practice. In T. Evans & P. L. Hupe (Eds.), *Discretion and the Quest for Controlled Freedom* (pp. 259–277). Palgrave Macmillan.

Waldron, J. (2020). The Rule of Law. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2020). Metaphysics Research Lab,

Stanford University. https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/

Wallander, L., & Molander, A. (2014). Disentangling professional discretion: A conceptual and methodological approach. *Professions & Professionalism*, *4*(3), 1–19. https://doi.org/10.7577/pp.808

Ward, H., Brown, R., & Hyde-Dryden, G. (2014). *Assessing parental capacity to change when children are on the edge of care: An overview of current research evidence* [Report]. Loughborough University. https://repository.lboro.ac.uk/articles/Assessing_parental_capacity_to_change_when_children_are_on_the_edge_of_care_an_overview_of_current_research_evidence/9580151

Weaver, T. G., & George, T. E. (2017). The Role of Personal Attributes and Social Backgrounds on Judging. In L. Epstein & S. A. Lindquist, *The Oxford Handbook of U.S. Judicial Behavior*. University Press.

Westerman, P. C. (2015). The uneasy marriage between Law and Equality. *Laws*, *4*(1), 82–90. https://doi.org/10.3390/laws4010082

World Bank. (n.d.). *World Bank Country and Lending Groups – World Bank Data Help Desk*. Retrieved October 28, 2019, from https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups

Appendices A – D

Appendix A: Data Protection and Ethics Assessment & Data Access Permission

Appendix B: Newborn Data Collection

Appendix C: Safe Storage of Child Protection Judgements

Appendix D: Translation Process

DATA PROTECTION AND ETHICS ASSESSMENT & DATA ACCESS PERMISSIONS

The ACCEPTABILITY project (funded by the Norwegian Research Council, Grant no. 262773) and DISCRETION project (funded by the European Research Council, Grant no. 724460) are situated in Norway, at the Centre for Research on Discretion and Paternalism, University of Bergen.

Processing of personal data in relation to the projects is in accordance with the Norwegian Personal Data Act [2000, 2018] and Regulation (EU) 2016/679 (General Data Protection Regulation). Information is handled as confidential material in accordance with regulations set by the Norwegian Authorities, and with the obligations set by the Norwegian and European Research Councils. All procedures for storage, anonymization, and deletion of data follow national and EU regulations, and all data handling use SAFE storage systems, which is the University of Bergen's data solution for secure storage of sensitive data material.

All actions in relation to these projects are carried out in compliance with ethical principles (including the highest standards of research integrity) and applicable international, EU and national law (cf. Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31). More information about the European Code of Conduct for Research Integrity is available here: http://ec.europa.eu/research/participants/data/ref/h2020/other/hi/h2020-ethics_code-of-conduct_en.pdf.

Overall Data Protection and Ethics Assessment

As the University of Bergen, Norway, is the host institution for both projects, the projects have been reported to the Data Protection Official for Research at the NSD – Norwegian Centre for Research Data. NSD is the National competency center for data protection in research in Norway, and was the Data Protection Official for Research for all Norwegian universities until 2018. NSD assessed the appropriateness and legality of collecting and handling personal data in the projects, and an affirmation that the projects' processing of personal data is in accordance with the Norwegian Personal Data Act was received in relation to both projects on 01.09.2017 (ACCEPTABILITY: Ref. 54904/3/BGH, DISCRETION: Ref. 54362/3/AMS). After the implementation of the new Norwegian Personal Data Act and the EU General Data Protection Regulation, the projects has been assessed by the Data Protection Officer at the University of Bergen, re-affirming that the projects' processing of personal data is in accordance with current regulations.

Data access permissions from each country

When requesting permission to access documentation from countries included in the project, all relevant authorities received the following documentation: a) a copy of the project description, b) the approval letters from the Norwegian Data Protection official, and c) a specification of the requested material. Approval documentation for access to data has been received from all research countries. Please see the description for each country for further specification.

Austria

The Ministry of Justice provided access permission to non-published judgments on care orders and adoptions from care for the whole of Austria for the year 2016 on 07.12.2017. Extension of access to cases from 2017 was granted by the Ministry on 13.08.2018, due to a small number of cases each year. The Ministry provided a list of the relevant case material for the newborn removal judgements. For adoptions from care judgements, the regional child protection offices were contacted to identify the relevant case material. The de-identified judgements were provided by the district courts directly.

England

For England, we have access to judgments from the publicly available database BAILII, as well as non-public cases collected directly from the courts of two large court districts. Access to publicly available judgments is not restricted. Permission to access non-published judgements has been received from the President of the Family Division of the High Court of Justice, the presiding judge of each court studied, and from the Children and Family Court Advisory and Support Service (Cafcass) Research Governance Committee.

Overall access permission to non-published judgments was first received from President of the Family Division of the High Court of Justice, and reaffirmed by the most recent President of the Family Division on 12.11.2018. Permission to access cases from the presiding judge of the relevant courts was received in August 2018. Approval from the Children and Family Court Advisory and Support Service (Cafcass) Research Governance Committee, who assisted us in identifying the relevant cases, was received on 24.10.2018. Case material was collected directly from each court, and de-identified by the researcher before removing the material from the court premises.

Estonia

For Estonia, we have access to non-published judgments from the district court on care order removals and adoptions from care. The Ministry of Justice of Estonia provided lists of cases. Access to the cases was provided by the courts concerned. Each court provided approval to access specified cases from their court. Permission to access care order removal cases of newborns was sought first, and permission to access adoption cases were sought at a later stage. The four relevant courts handling care order cases gave their permission to access cases in April 2018. Access to adoption cases was granted by one court only on 19.12.2018 and 24.06.2019 (updated permission).

Finland

For Finland, we have access non-published judgments from the administrative courts on care orders and from the district courts on adoption. Care order cases are decided by the Administrative Courts of Finland, and permission to access care order removal cases concerning newborns was provided by all six administrative courts in Finland, during the period of February - June 2018. Adoption cases in Finland are heard by the District Courts, and permission to access adoption cases from the District Courts were granted by each court respectively between September 2018 and January 2019. The material was de-identified by the courts before it was provided to the research team. The Legal Register of Finland provided advice on the access permission process.

Germany

For Germany, we have access to non-published judgments on care orders and adoptions from care from one large federal state. Access permission was granted by the Ministry of Justice of this state on 04.07.2018. The family court of one large city was then contacted to request the case files. A researcher travelled to the court and signed a non-disclosure agreement prior to obtaining access to the court files. In line with this agreement, the researcher ensured that only de-identified information was shared with other members of the project team. Since it was not possible to identify adoptions from care in the court's database, so only newborn removal cases were obtained from the family court. For adoptions from care, the state's County Association and the Association of Cities and Towns, who oversee the youth welfare offices provided official support for the research project. Approval was received on 16.01.2019. De-identified adoption from care decisions were provided by the youth welfare offices in the federal state.

Ireland

For Ireland, the projects only use publicly available judgments accessed via a public database (www.courts.ie). Access to non-published judgments is generally not allowed by the Courts Service. Our application was denied 20.12.2017.

The application process for access to adoption judgments is currently ongoing.

Norway

Permission to process the personal data in the Norwegian cases was given by The Norwegian Data Protection Authority. The project is also reported to NSD – Norwegian Centre for Research Data, and the University of Bergen's Data Protection Officer.

Permission to access confidential material was provided for selected, named staff by The Norwegian Directorate for Children, Youth and Family Affairs, after assessment by the Council for confidentiality and research. The permission was given separately for the adoption cases and the newborn cases. The initial permission was given to the PI in conjunction with other projects, and extended to include the Discretion and Acceptability projects on 20.02.2018 (adoption) and 08.05.2018 (newborn), with later updates.

Decisions on care order removals and adoptions from care are decided by the Norwegian County Social Welfare Boards. The county board provided a list of relevant cases, and the case material was collected from the county boards directly.

Spain

For Spain, we have access to non-published decisions concerning care order removals and adoptions from care in one of the country's regions. Access permission is provided the head of the Child Protection Area and member of the Child Custody Commission of the relevant region. The Child Custody Commission is the body in charge of deciding on the removal of parental rights and tutelage of minors. Permission was granted December 2017, and with formal letter of 25.11.19.

[Blinded version of a publicly available web page for reviewers]

Newborn judgements

To study the thresholds for intervention, the rationale and justification for a decision about removal of a newborn baby, we have collected all the first instance court judgements from eight countries for one year, and sometimes several years. Below a brief overview of the data material collection from each country is presented.

AUSTRIA

In Austria, the empirical data used in the analysis consist of all (n=24) newborn removal cases decided in 2016 and 2017 in the district courts in a big City in Austria. The Child Protective Services of the City searched their case files, which contains the file numbers of the judgments, and provided us with a list of 51 judgment numbers for the City in total for their cases related to child removals of newborns for 2016 and 2017. Among these, we have identified 24 cases that meet our selection criteria.

ENGLAND

For England, the empirical data used in the project consists of all publicly available (n=14) newborn removal cases decided in 2015-2017 (published in BAILII, British and Irish Legal Information Institute, database). This does not include care and placement orders, as placement order cases are in effect adoption cases and the court reasoning follows this line. For 2015, 2016 and 2017, there were 455 publicly available cases decided by the Family Courts (first instance). We manually reviewed these cases, and identified 14 cases concerning care order removals of newborns in England that meet our inclusion criteria. We also consulted non-published judgments, but this data collection did not yield any written judgments fitting our criteria for newborn removal cases.

ESTONIA

In Estonia, the empirical data used in the analysis consists of all (n=17) newborn removal cases decided in 2015, 2016 and 2017 by the district courts. The Ministry of Justice in Estonia compiled a list of relevant cases for newborn removal based on the 1) reference to section 135 of the Family Law Act of 2009 (removal provision); 2) the DOB of the child being a of one calendar year before the date of the decision. The number of care order cases from all district courts for one year is low: 24 cases decided in 2015, 18 in 2016 and 9 in 2017. Based on this list, access to the decisions was requested from the four district courts. We received 51 judgments, which we manually reviewed, and 17 newborn removal cases fitted our inclusion criteria.

FINLAND

For Finland, the empirical data used in the research consists of all judgements (n=25) of newborn removals decided by the Administrative Courts in 2016. For Finland, we requested and received access to all the court decisions from 2016 and 2017 of care orders made under paragraph 40 of the Child Welfare Act (*Huostaanotto ja sijaishuoltoon sijoittaminen*), aged 2 years or younger at the time

of the decision by the administrative courts. We received 129 such cases; from these we have manually identified 53 cases that fit our selection criteria of newborn removals; 25 from 2016 and 28 from 2017. The full sample from 2016 was then selected as the material for analysis.

GERMANY

In Germany, the empirical data used in the research consist of all (n=27) newborn removal cases decided between 2015-2017 in one large city. We have access to all judgments from the district court in that city, family division (*Amtsgericht*), concerning removals of newborns. These were identified by a search for care order judgments based on § 1666 BGB (German Civil Code, *Kindeswohlgefährdung*) where an interim order was made when the child was up to 100 days old and where the main proceedings (*Hauptsacheverfahren*) were decided between 2015-17 (including decisions made in 2018 where the child concerned was born in the previous year). This yielded a total of 74 cases. From these, we have manually identified the cases that concern newborn removals.

IRELAND

For Ireland, the empirical data used in the project consist of all judgments (n=17) concerning removals of newborns published in the public Irish Courts Service database from 2012-2018. Our search has included all care proceedings under the Child Care Act 1991 published in the database, which includes cases from 2008-2018 (as of September 2018). A total of 146 judgments decided by the District Court have been published on the Courts.ie website (as per 20.09.2018). Out of these, 139 judgments are child care proceedings (though not all cases concern care orders) and 7 cases are Public Prosecutions that concern a minor. Out of these 139 judgments, 21 cases concern newborn removals. None of these were decided before 2012.

NORWAY

For Norway, we have access to all judgements (n=76) decided by the County Social Welfare Boards concerning removals of newborns in 2016, i.e based on the child welfare act § 4-9, (1), cf. § 4-8 (2) (temporary) followed by § 4-8 (2), cf. § 4-12 (care order) in 2016. To make sure we have the full sample, it was also a manual review of all cases filed under § 4-8 and § 4-12 where the child is 1 years or younger. We have ordered them chronologically after decision date, and selected every second judgements, and the randomized sample consist of 38 judgements.

SPAIN

For Spain, we have access to all judgements in one of the autonomous regions. In this region, we have been granted access to case files relating to care order removals of newborns in 2016 and 2017 (n=16) . Decisions are made by the Child Custody Commission and the decisions are of a different format than in other countries included in the project. Rather than a full length written decision, the Commission ratifies or refuses to ratify the case made before it by social workers. In our analysis, we have therefore included the Child Protection Commission proposal.

SAFE STORAGE OF CHILD PROTECTION JUDGEMENTS

Receiving files and de-identification

In the research projects we analyse written judgements from eight jurisdictions: Austria, Ireland, England, Estonia, Finland, Germany, Norway and Spain. The permissions to access judgements were given by The Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) and by the Norwegian Data Protection Authority (Datatilsynet), and in some cases the courts of the individual countries as well as other authorities. We have strictly followed the procedures and regulations we have been given for collecting and storing confidential material. For each jurisdiction there were different access- and user agreements and thus there are differences between jurisdictions in terms of how we have collected and de-identified the judgements. All written judgements are stored in SAFE, which is the University of Bergen´s secure solution for storage of sensitive material (described in detail below). All electronic correspondence containing de-identified information has been deleted, and all paper versions are kept in a lock safe in a locked office. In the following we present a brief description of the process and status for each jurisdiction.

Austria

All Austrian judgements were received by email, and they were all de-identified. The cases were checked and a further level of de-identification added by a Centre team member.

England

The English cases were downloaded from the publicly accessible database Bailii, and all judgements in this database are fully de-identified. We have also collected cases from two counties in England, and all these judgments were de-identified in court before they were copied and removed from the premises of the courts. This was done by the Centre's researchers on the court's premises, and some were brought to Norway in person, and some were sent via post.

Estonia

Judgments were received via e-mail encrypted so that they were accessible only by the Estonian researcher of the Centre with an Estonian ID card. The cases were kept encrypted in the private drive of the researcher until judgments had been de-identified by the Estonian researcher, and thereafter deleted. By requirements from the Estonian courts, the year the adoption judgement was decided and the case number were deleted from the documents before we received them.

Finland

Judgments were received via post and email. The judgements were sent to the Centre either directly from the courts or via a Finnish researcher who was explicitly asked by the courts to forward the judgments to the Centre researchers. All judgments had been de-identified before they were sent to us.

Germany

German judgments were received via e-mail and a few judgements were received via regular mail (de-identified). Only the researcher who signed the non-disclosure agreement with the court the judgements came from has had access to non-de-identified material, and they were de-identified before stored in SAFE.

Ireland

Irish newborn judgments were collected from the *Courts Service of Ireland*-website. Only publicly available judgments were used, which had been de-identified before publication. Judgments were downloaded directly from the Court Service's website. Irish adoption judgments are yet to be received (17.10.2019).

Norway

Newborn and adoption judgments were collected at the County Board in paper form and transported to the UiB in sealed envelopes by a researcher. The judgments were then scanned on an offline scanner and UiB's IT department transferred them to SAFE. They were stored in their full form, without any de-identification, and only a limited number of named researchers with permission from the *Norwegian Council for Personal Data Protection and Research* have access to them.

Spain

Judgments were sent to us via email, de-identified. A de-identification check was done by a Center member and all judgements were stored in SAFE.

Detail on the safe storage of sensitive information

Some files containing child protection judgements were at first stored for a period in the Centre's Dropbox (except for Norwegian judgements which were only stored in SAFE). The Centre has a Business Dropbox subscription, which has high levels of security (read more here). Only team members with the required permissions had access to the files. In June and July 2019 the files were copied to SAFE ("Sikker Adgang til Forskningsdata og E-infrastruktur", secure solution for sensitive data). SAFE is UiB's solution for storing sensitive data used in research, for more information please see here. This was a carefully managed process ensuring that all files were transferred correctly and to the correct locations. A detailed description and logs for the process is in the Centre archive.

Within SAFE there are different servers, and within a server there are folders where one can restrict access. Only team members with the required permissions were given access. All adoption and newborn judgements were stored on one server, the adoption judgements from Norway were stored in an access-restricted folder on this same server. Newborn judgements from Norway were stored on a separate server from the rest of the judgements. All judgments are still stored on their respective servers as of today.

After the transfer to SAFE, all judgments and NVivo files containing judgments were deleted from the Centre's Dropbox and permanently deleted from Dropbox' backup system. A detailed log of this is kept in the Centre archive.

UiB has two backup systems for SAFE where backups of all files are stored. When running into issues with transferring files into SAFE, UiB's IT department was contacted.

NVivo is a data analysis program for qualitative and mixed-methods data, and we use it for analysing the judgements. The judgment files are uploaded into NVivo-projects, which are stored in SAFE together with the judgement files.

The company QDAtraining Ltd. is the Centre's support service when running into problems with NVivo, and when consulting them only NVivo files with publicly available judgement files were used (such as the English and Irish newborn cases, which were collected from the public databases).

All project members and associates have confirmed that they have deleted all documents that they may have received containing sensitive information. This included documents received via email, stored in Dropbox or otherwise electronically, and physical documents.

Renaming the judgements

New file names were assigned to judgement files to assure conformity when coding and also for further de-identification.

Newborn/adoption	Country	Nr	Separator	Year the case was decided*
N	AUT	XX	-	XX
A	ENG			
	EST			
	FIN			
	GER			
	IRL			
	NOR			
	SPA**			

* Year the case was decided (except for Estonian adoptions).

** SPA is not the official country abbreviation – but we use it regardless to have the files in the same alphabetical order as the tables later will be in.

Example:

- NAUT05-15
- AFIN13-17

Key

A password-protected name key was created, linking case numbers, old file names and new file names. This is stored in SAFE.

This document was last updated: 20.12.2019

TRANSLATION PROCESS OF WRITTEN JUDGEMENTS – SHORT DESCRIPTION

In our research, we have used original written judgments from 8 countries - Austria, England, Estonia, Finland, Germany, Ireland, Norway and Spain - as basis for the analysis. Judgments not originally written in English have been translated by professional translators, i.e. for countries Austria, Estonia, Finland, Germany, Norway and Spain. The translation process was carried out in parallel with data collection, and took place during the period between February 2018 and October 2019.

Full sample or selected documents

For languages where there were several native speakers on the research team to read and code, analyse and reliability-test, only a selection of judgments has been translated. This was to minimise costs, as each translated case is costly (est. 300-700 € per document, depending on length and language). In the team, there were several native speakers of German and Norwegian, whereas only one native speaker for Estonian, Finnish and Spanish. The purpose of translating a sample of those cases where several native speakers were available was to provide all team members with an impression of the various judgment styles and content from each country.

For Norway, only judgments published in *Lovdata* have been translated, as non-published judgments can only be examined by named and pre-approved researchers. *Lovdata* is a publicly available database of primary legal sources, including a selection of anonymised decisions by the County Social Welfare Boards, accessible subject to subscription.

Table 1: Overview of cases translated per country as per 22.10.2019

Country/language	Type of case	Number of documents translated
Austria (German)	Adoption	None translated
Austria (German)	Newborn	Selection of cases (8)
Estonia	Adoption	Full sample
Estonia	Newborn	Full sample
Finland	Adoption	Full sample
Finland	Newborn	Selection of cases (13)
Germany (German)	Adoption	None translated
Germany (German)	Newborn	Selection of cases (8)
Norway	Adoption	Selection of cases (3)
Norway	Newborn	Selection of cases (9)
Spain	Adoption	Full sample
Spain	Newborn	Full sample

Each translation was conducted by a professional translator. As the cases are sensitive, only the translator was allowed to examine the cases for the assigned purposes. Each involved translator has provided written agreement to keep the material confidential, and has provided written confirmation that all case material was deleted after completion of the translation.

All translators were instructed to stay as close to the original text as possible. After receiving each translated text, a native speaker from the research team also familiar with the terminology required, conducted a quality assurance check by comparing the translated text with the original judgment.

Journal of Public Child Welfare

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/wpcw20

Analyzing decision-maker's justifications of care orders for newborn children: equal and individualized treatment

Barbara Ruiken

To cite this article: Barbara Ruiken (2022): Analyzing decision-maker's justifications of care orders for newborn children: equal and individualized treatment, Journal of Public Child Welfare, DOI: 10.1080/15548732.2022.2158990

To link to this article: https://doi.org/10.1080/15548732.2022.2158990

© 2022 The Author(s). Published with license by Taylor & Francis Group, LLC.

Published online: 28 Dec 2022.

Submit your article to this journal

View related articles

View Crossmark data

Full Terms & Conditions of access and use can be found at
https://www.tandfonline.com/action/journalInformation?journalCode=wpcw20

JOURNAL OF PUBLIC CHILD WELFARE
https://doi.org/10.1080/15548732.2022.2158990

Analyzing decision-maker's justifications of care orders for newborn children: equal and individualized treatment

Barbara Ruiken

Department of Government, Centre for Research on Discretion and Paternalism, University of Bergen, Bergen, Norway

ABSTRACT
Seeking insights into how decision-makers uphold obligations to equal and individualized treatment in decisions about state intervention, this study examines justifications by decision-makers in care orders for newborn children. Eighty-five care order judgments from eight European countries concerning children of mothers who misuse substances are analyzed to determine how decision-makers justify removing a newborn child from their mother's care. I find that the results display similarities in what risk factors they find relevant to these cases, but it differs which are deemed decisive. Protective factors are rarely important. Implications for the US context are commented on.

ARTICLE HISTORY
Received 14 February 2022
Revised 15 November 2022
Accepted 28 November 2022

KEYWORDS
Equal treatment; justification; discretionary reasoning; child protection; care order

Introduction

The aim of this paper is to seek insights into the treatment of cases similar to each other by judiciary decision-makers, specifically, how they reason and justify intrusive child protection interventions in cases about removing a child from their parent(s) care. In addition, I investigate if the decision-makers provide individualized treatment adapted to the specific case. Child protection interventions are the implementation of a government's responsibility to protect children from maltreatment, decided by decision-making bodies vested with such authority (Berrick, Gilbert, & Skivenes, in press; Burns, Pösö, & Skivenes, 2017). The decision-makers are obligated to provide similar treatment for similar cases to uphold the formal principle of justice, and to avoid unnecessary removals which can result in trauma to the child and family. Given the high stakes in care order cases, it is important to examine if and how decision-makers exercise discretion and if similar cases are being treated equally (Burns et al., 2017; cf. Rothstein, 1998, 2011), as well as how the decision-makers provide individualized treatment of the cases.

The research question for this paper is: are decision-makers similar or different in their justifications for deciding a care order? In which ways are

CONTACT Barbara Ruiken barbara.ruiken@uib.no Department of Government, Centre for Research on Discretion and Paternalism, University of Bergen, Christies Gate 17, Bergen, 5007 Norway

© 2022 The Author(s). Published with license by Taylor & Francis Group, LLC.
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial License (http://creativecommons.org/licenses/by-nc/4.0/), which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

they similar or different? I also briefly investigate if similarities and differences between decision-makers are influenced by the type of child protection system. The eight jurisdictions included can be categorized into three types of child protection systems (Gilbert, Parton, & Skivenes, California2011b): child centric: Norway and Finland, family-service oriented: Austria, Germany, and Spain, and risk oriented: England, Ireland, and Estonia. The data material includes 85 judgments, which are all judgments for one or several years, or all publicly available judgments for several years.[1] To ensure the cases have similar case characteristics, I have selected judgments regarding a newborn baby,[2] in which the mother is characterized as misusing substances.[3] To establish comparable material further, I focus the analysis on risk and protective factors that the decision-makers emphasize in the judgments.

Child maltreatment

Maltreatment of children is a widespread problem (Stoltenborgh, Bakermans-Kranenburg, Alink, & Van. Ijzendoorn, 2015), and the consequences of maltreatment can include "*long-term, negative impact on children's physical, cognitive, social, emotional and behavioural development that can last throughout the life course*" (Ward, Brown, & Hyde-Dryden, 2014, p. 36). Infants have an even higher chance of being exposed to maltreatment than older children (Braarud, 2012; Ward et al., 2014), and children of parents who misuse substances have a higher likelihood of experiencing maltreatment (Austin, Berkoff, & Shanahan, 2020; Kroll & Taylor, 2003; Taber-Thomas & Knutson, 2020; Ward, Brown, & Westlake, 2012).

Generally in newborn removal cases, child protection agencies are notified during pregnancy or right after birth that there is a concern for the parents' capacity to parent the child safely. Often, the child protection agency takes the newborn into care in an emergency placement. Some weeks or months after this (depending on the local process), care order proceedings take place in a court or court-like body where it is decided whether to reunite the parents and child or if the child should remain in state care (usually with a foster family).

Decision-making in child protection

There has been an upswing in research on empirical analyses of judicial child protection decisions in severe child protection cases (Helland, 2021a, 2021b; Helland & Nygård, 2021; Helland, Pedersen, & Skivenes, 2020; Juhasz, 2018, 2020; Krutzinna & Skivenes, 2020; Løvlie & Skivenes, 2021; Luhamaa, McEwan-Strand, Ruiken, Skivenes, & Wingens, 2021). Although these give important insights into child protection decision-making, few of these have focused on the important aspect of equal treatment.

Discretion as a theoretical framework

Decisions on whether the state should intervene in the private sphere of citizens are often complex and the relevant laws are ambiguous, which requires the decision-makers to apply discretion (Freeman, 2009; Titmuss, 1971). Discretion is the power to decide what to do; it is present "*when someone is in general charged with making decisions subject to standards set by a particular authority*" (Dworkin, 1967, p. 32).

The state intervention into the private sphere that I am concerned with in this study is a care order, the removal of a child from their biological parents and placement in a state-mandated care setting. When a newborn child is being or is at risk of being maltreated, state-mandated decision-makers need to decide whether to take them into state care. Such a decision requires the application of general standards to a complex case; discretion is unavoidable. At the core of the discretionary considerations that the decision-makers take are risk and protective factors. Risk factors are aspects of the parenting or circumstances of the case that increase the risk of harm to the child, whereas protective factors decrease the risk of harm. The decision-makers need to determine which factors are relevant and crucial to their decisions, and these factors feature in the justification of whether a care order is required. So the interpretation of risk and protective factors is discretionary (Mascini, 2020), as well as how these feature in the decision-makers' justifications.

Equal treatment and tailormade decisions

The equal treatment principle is fundamental to the justice system but may be threatened by discretion (Molander, Grimen, & Eriksen, 2012). That cases or treatments are similar means that they share some relevant traits, not that they are identical (Gosepath, 2021). The "treatment" part of the equal treatment principle is often equated to the outcome of a process, but I find this unsatisfactory for child protection cases. These are complex and dynamic cases where one-size-fits-all solutions would lead to many children getting too little or too late help, whereas others would experience unjustified intrusions into their private sphere. "Treatment" must encompass the reasoning and justification, and not only the outcome, to provide information on the quality of the decision being made.

A second demand placed on the treatment of care order cases is for individualized treatment, based on the child's best interests principle. To take decisions in the best interests of a child one needs to assess the specific aspects of the case carefully, for which discretion provides the necessary flexibility.

Applicable standards for decision-making

The discretionary decisions to be made in these cases are restricted and formed by standards. Among these standards are international and national law, guidelines for judicial and administrative proceedings, templates, checklists, and others. In addition to international laws, the eight countries have their respective national legislation and judicial systems.[4] These laws, in addition to guidelines and structured aids for decision-making as well as norms that decision-makers have internalized, will structure and form the assessments and decisions that are taken in care order adjudications. This means that the decision-makers are influenced by some of the same and some differing standards.

Child protection system orientations

A child protection system must find the desired balance between the rights and obligations of the state, families, and children, and what this looks like may differ from system to system (Gilbert, Parton, & Skivenes, 2011a). Gilbert et al. have developed a three-part classification of the theoretical underpinnings of child welfare systems, namely, child-centric, family-service, and risk-oriented.

In the child-centric systems, children are seen as "*individuals with independent rights and interests*" (Burns et al., 2017, p. 6). Gilbert et al. (2011a) describe this system as giving children status separately from the family, prioritizing their rights. Preventive services and early intervention are hallmarks of such a system, moving beyond the goal of protecting children from risk toward promoting children's wellbeing, Norway and Finland are here. The family-service-oriented systems have a therapeutic outlook, seeking to provide services to families so that they can be rehabilitated. The rights of parents to family life are sought to be protected (Gilbert et al., 2011a). Germany, Austria, and Spain are in this category (Gilbert et al., 2011b; Skivenes, Barn, Križ, & Pösö, 2015). Gilbert et al. (2011a) describe the risk-oriented systems as having a higher threshold for intervention than the other orientations. The rights of children and parents are to be enforced through legal means, and it is the state's responsibility to ensure that this is happening. Here, we find England, Ireland, and Estonia (Burns et al., 2017; Parton & Berridge, 2011; Strömpl, 2015).

Data and methods

The data material consists of 85 written care order judgments from first instance courts in eight countries; Austria (N = 8), England (N = 4), Estonia (N = 12), Finland (N = 12), Germany (N = 10), Ireland (N = 13), Norway (N = 19), and Spain (N = 7). Of these, 91% (N = 77) resulted in a care order

Table 1. The sample.

	Year(s)	Judgments N	Care order made N	Care order made %
Total		85	77	91%
Austria	2016–17	8	8	100%
England	2015–17	4	2	50%
Estonia	2015–17	12	11	92%
Finland	2016	12	12	100%
Germany	2015–17	10	7	70%
Ireland	2012–18	13	13	100%
Norway	2016	19	17	89%
Spain	2016–17	7	7	100%

(see Table 1). For England and Ireland, the sample consists of all publicly available judgments, for the other countries the sample consists of all the cases decided in one large city or region, or the whole country within the timeframe specified in Table 1. To be included, the judgment needs to concern a care order only, from the first instance decision-making body, for a child removed within 30 days after birth or after a stay in a parent–child facility and feature prior or ongoing maternal substance misuse. The analysis includes both cases that ended in a care order and those that did not.

The study reported here is part of the DISCRETION project funded by the European Research Council, a comprehensive comparative study of discretionary decisions in child protection cases. The included judgments have been collected through the DISCRETION and ACCEPTABILITY projects.[5] Illustrative quotes provided from Spanish, Finnish, and Estonian judgments are translated by professional translators, whereas quotes from German, Austrian, and Norwegian judgments are translated by the author, a native speaker of these languages.

Coding risk and protective factors

To gain insights into empirical decision-making and justification, the data material for this study is written judgments. Within these texts the decision-makers must justify the decision, showcasing the relevant facts of the case as well as the specific reasons for the decision. Risk and protective factors are essential components of this discretionary reasoning and are mapped.

Based on two systematic reviews, Ward et al. list a range of risk and protective factors that are influential in situations of recurring harm (Ward et al., 2014, pp. 42–43). My coding description takes this list as a starting point. A preliminary reading of the judgments identified what could be excluded from the coding description (factors related to children that had longer lived experience with their birth parents), and some things relevant to maternal substance misuse were added (like the newborn exhibiting withdrawal symptoms at birth). The resulting coding description, available in full in Appendix A, is thus theoretically and empirically informed.

I focus on the mother and factors that relate to her context because of her central role as the primary caregiver of the newborn. This is not to discount the importance of fathers; however, information is scarce because many fathers in this data material are unknown or not participating in taking part in the upbringing of the child (44%, N = 36). Although not a main focus, the influence of the father, both risk and protective aspects, is encompassed in several codes.

The judgments were coded systematically using NVivo 12, focusing on background information and the court's justification while excluding parties' statements when these were clearly distinguishable. Most of the risk factors were coded and the reliability tested by nine coders; the reliability test showed extensive convergence between coding, meaning that only small differences in code interpretation were revealed. The protective factors and how all factors were weighted were coded and tested by the author, a reliability test was performed, and only very few discrepancies were found. The reliability tests were conducted by reading through the judgments and comparing the understanding of the reliability tester with how the judgment was understood by the first coder.

Coding for equal and individualized treatment

All relevant facts, and only relevant ones, are to be included in judgments (Luhamaa et al., 2021), so when a factor from the coding description is mentioned in a judgment, it is reported as "present" in this study. At this level ("present") I map the equal treatment – because the cases are reasonably similar in relevant aspects, the decision-makers can find that the same things are relevant to assess in the cases.

I also map how the decision-makers have assessed the risk and protective factors they have found relevant. Protective factors that are influential on the decision are reported as "important" and risk factors that determine the case are reported as "decisive." During coding, the context was consulted for guidance to identify whether a passage described a decisive risk factor or important protective factor.

Operationalizing reasoning similarities and differences

Equal treatment is operationalized in the following way: if a risk or protective factor is mentioned in 20% or less of judgments, it is similarly not relevant to the decision-makers. If a factor is mentioned in 80% or more of judgments, it is similarly relevant to them. The rest, between 21% and 79%, indicates reasoning variability.

Findings

The data material consists of 85 judgments concerning 86 newborn children. Seven of the judgments did not end in a care order.

Risk and protective factors present in the judgments – the equal treatment mapping

The decision-makers have found risk factors in all cases (see Figure 1). The most influential risk factor is "mother," including aspects of the mother's background, mental makeup, and behavior that can pose a risk to the child. Such risks are present in 92% of all judgments (N = 78). This Spanish judgment illustrates mental health problems:

> *The mother reports alcohol and mental problems, limit personality disorder, and psycho-social problems. NSPA05-17*

Fifty-eight families in the sample have one or several sibling(s) in addition to the newborn. In 91% of these judgments (N = 53, see Figure 1) the decision-makers mention that siblings have been maltreated or removed from the family through state intervention.

The risk factor "family and social setting" is present in 88% of judgments (N = 75, see Figure 1). This includes both the presence of people with a negative influence (such as an abusive and violent partner) and the absence of people with a positive influence. A range of stressful elements in the

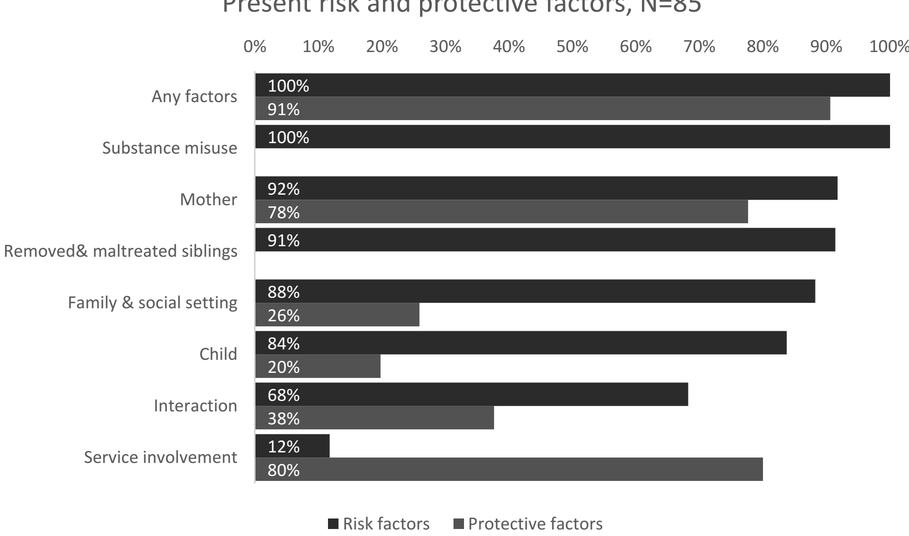


Figure 1. Present risk and protective factors, N = 85. For numbers see tables B.4-5 in appendix B.

mother's life like incarceration, chaotic lifestyle, homelessness, and financial difficulties are also included, illustrated in this Austrian judgment:

At a consecutive home visit at the parent's home, it became apparent that the apartment was destroyed, full of trash and dirty and the furniture was taken apart or broken. Also living in the apartment was a dog, who did his business in it, which led to a massive odour problem. NAUT02-16

Many of the children in the sample are born with vulnerabilities that place greater demands on their caregivers, like withdrawal symptoms, low birth weight, or premature birth. The decision-makers mention the child's young age and other vulnerabilities for 84% of the children in the judgments (N = 72, see Figure 1).

The risk factor "interaction" concerns the interaction between mother and child, if the mother is "in tune" with them, attachment, the mother's parenting skills, and if she prioritizes the child's needs over her own. Risks related to this are present in 68% of judgments (N = 58, see Figure 1). A German judgment includes this description:

She doesn't acknowledge the pregnancy and will because of her condition neither be able to establish an emotional connection to the newborn, nor take care of it. NGER24-18

The least prominent risk is "service involvement." Risks such as the inability of professionals to provide services because of resource constraints or ineptitude are rarely mentioned by decision-makers (in 12% of judgments, N = 10, see Figure 1).

Most judgments also contain protective factors (91%, N = 77, see Figure 1). Most frequently mentioned are protective aspects of "service involvement," in 80% of judgments (N = 68, see Figure 1). This encompasses the service provider's outreach to the family, forming helpful partnerships, and the involvement of legal and medical services. This is an Irish example of a partnership with parents:

The HSE entered into a 'Contract' with the Applicant mother and the Child's father after the making of the Interim Care Order. This involved agreements regarding access and participation in a parental capacity assessment. NIRL07-13

Protective aspects of "mother" are present in 78% of judgments (N = 66, see Figure 1), including the mother recognizing her problems, taking responsibility, engaging with services, and co-operating productively. This Estonian judgment describes:

The mother explained that she participated in group work conducted by a psychologist and saw a psychologist individually. The mother noted that she changed jobs because of the working hours, should the children live at home; she changed flats because the previous one was not fit for living. NEST14-16

Protective aspects of the interaction between mother and child, such as a present and adequate parent–child bond, having parenting competence in some areas, and empathy for the child are mentioned in 38% of judgments (N = 32, see Figure 1). The protective factor of "family and social setting" is present in 26% of the judgments (N = 22, see Figure 1). This includes the absence of intimate-partner violence and having a supportive (nonprofessional) network. In this Estonian judgment a supportive friend is described:

> She also has a support person to whom she can turn for help. NEST14-16

Some decision-makers mention that the child is healthy (20%, N = 17, see Figure 1). This Estonian judgment illustrates:

> *When visiting the shelter, the child's representative observed that, at that moment, the child was a nice three-month-old baby who had developed normally, sought a lot of attention and had gained weight owing to the efforts of the shelter employees. No deviations could be noticed in the child at the time. NEST13-16*

How risk and protective factors are assessed – for individualized treatment

To show what the decision-makers find to weigh heavily in the cases, I calculate the percentage of the number of cases where the factor has been found relevant by the decision-makers – for example, how often do the decision-makers evaluate a mother's interaction problems to be decisive for the case, calculated by the number of mothers reported with poor parent–child interaction skills.

85% of judgments (N = 72, see Figure 2) have risk factors that the decision-makers have assessed as decisive.[6] Risks relating to the mother are most often reported; the decision-makers have found them to be decisive to the outcome in 62% of cases (see Figure 2). Interaction is the second most commonly

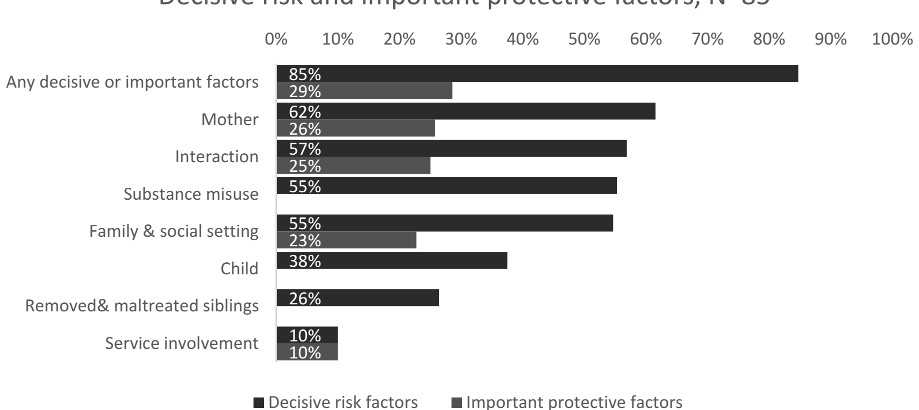


Figure 2. Decisive risk and important protective factors, N = 85. For numbers see tables B6-7 in appendix B.

assessed decisive risk, in 57% of cases where it is reported as present (N = 33, see Figure 2).

Although substance misuse is present in all judgments, the decision-makers find it decisive in only 55% of judgments (N = 47, see Figure 2). Decisive substance misuse is illustrated in this Estonian judgment:

> *Because of their alcohol and drug abuse and addiction, the parents are unable to raise the child or to take care of the child and to provide the child with the required special assistance and care. Because of such facts, leaving the child with the parents would be life-threatening to the child. NEST07-15*

Risks related to “family & social setting” are found to be decisive by the decision-makers in 55% of judgments where they are noted (N = 41). Vulnerabilities of the child, removed and maltreated siblings, and service involvement as a risk are decisive in less than half of the cases (see Figure 2).

Contrasted to the high prevalence of decisive risk factors, the protective factors are found to carry less weight. In 29% of judgments where the decision-makers have found them to be relevant, they have assessed that they are important (N = 22, see Figure 2). Protective aspects of the mother are important in 26% of instances where they are noted (N = 17), and the interaction between mother and child is close at 25% (N = 8). When aspects of the family and social setting have been found relevant to the case, the decision-makers have assessed them as holding an important protective role in the case in 23% of judgments (N = 5). Protective aspects of service involvement are important in only 10% of judgments (N = 7).

Similarities and differences in the child protection system orientations

Overall, the reasoning in the three child protection system orientations is similar, although a few differences are worth pointing out (see Tables B.1 and B.2 in Appendix B). The decision-makers from the risk-oriented systems show similar reasoning in that the vulnerabilities of the child are a relevant consideration, but in contrast to the decision-makers from the other systems, they show agreement among each other that this is rarely decisive for the outcome of the case.

There is more variation between child protection system orientations when it comes to the protective factors. Whereas the decision-makers from risk- and child-centric orientations are similar among themselves in that they find protective factors from the categories “mother” and “service involvement” relevant in most cases, the family-service decision-makers sometimes find these to be relevant, sometimes not. When they have found them relevant, they are more likely to find them important than the decision-makers from the other orientations. Despite some differences, the results of the orientations are surprisingly similar.

Summary of results

The empirical analysis has shown an accumulation of both risk and protective factors in the judgments. Acknowledging the accumulation of risk factors is vital because substance misuse alone does not automatically lead to child maltreatment or a high risk of harm (Kroll & Taylor, 2003; Murphy-Oikonen, 2020), and risk increases when the number of risk factors increases (Braarud, 2012; Glaun & Brown, 1999; McGoron, Riley, & Scaramella, 2020; Sigurjónsdóttir & Traustadóttir, 2010; Cleaver 2011 in Ward et al., 2014). They are often intertwined and interact, and it is difficult to isolate the effect of substance misuse on parenting and the possible effects on the child (Forrester, 2000; Klee, 1998).

The decision-makers mention more risk factors than protective, and the risk factors are assessed as more influential by the decision-makers. For the risk factors, there is substantial convergence in what the decision-makers have found relevant and especially crucial for the case (decisive). For “mother,” “substance misuse,” “interaction,” and “family & social setting,” the risks have been found to be decisive in over half of the cases where they have been mentioned (see Figure 2).

Discussion

How individual decision-makers are similar or different in their assessment of child protection cases

To answer the research question, the decision-makers are similar in some aspects of their reasoning and different in others. I have operationalized equal treatment to be provided when most of the decision-makers have found the same risk and protective factors relevant to the cases, or if very few of them did. They would show variance as a group if some of them found a factor relevant, and others did not.[7] The decision-makers in this sample have, despite differences in personal background and decision-making context, shown substantial convergence in that four risk factors are consistently included in the judgments; “mother,” “child’s vulnerabilities,” “removed & maltreated siblings,” and “family & social setting.” These are all present in 80% or more of the judgments indicating that they are relevant to the reasoning of the decision-makers and that the decision-makers reason (treat the cases) similarly on these aspects.

The convergence in reasoning on the four risks leads me to suggest that this similarity of assessments constitutes a standard for what decision-makers consider relevant in care order adjudications and legitimate reasons for state interventions. Informal standards can emerge despite the presence of comprehensive formal standards (Galligan, 1987), such as international conventions like the CRC (1989), or national/regional guidelines for judicial decision-

making. This standard of relevant risk considerations may emerge due to broad norms regarding family, good enough parenting, and childhood, that may be shared across Europe and child protection systems.

The notion of an informal standard can be supported by the small differences between child protection system orientations found in my data. The same four risks are relevant, regardless of child protection system orientation. This similarity in decision-makers' reasoning may be because in severe cases, decision-makers can show less variance in their discretionary reasoning than in less serious cases (Bjorvatn, Magnussen, & Wallander, 2020). The removal of a newborn from their birth parents to state care is certainly a severe intervention, emphasized by the state's strong obligation to provide services to avoid this happening (Luhamaa et al., 2021).

The similarity between countries with different norms and cultures can seem counterintuitive. Culture will influence how children and parenting are perceived, as well as what children are expected to endure. An argument can be made, however, that the importance of culture is negated by the vulnerability of newborn children, making cultural differences less important in newborn care order cases. Small differences in parenting newborns can have great consequences, whereas the consequences would be smaller for older children.

Moving on from the four relevant risks, one risk factor is dismissed as not relevant by most decision-makers (service involvement), and the mapping of the last (interaction), as well as most protective factors, display treatment variability. Overall then, the decision-makers' reasoning is similar for some and different for other aspects of this sample of cases.

Although protective factors are present, they are heavily outnumbered by risk factors – this should not be a surprise. Care order proceedings are not initiated unless a social worker has serious concerns about the risk level in a case, indicating that a removal could be required (Brophy, 2006; Masson, 2012; McConnell, Llewellyn, & Ferronato, 2006). The focus on risk may also be influenced by the case preparations, social workers and care order applications are often dispositioned to disclose risks or already occurred harm (Berrick, Dickens, Pösö, & Skivenes, 2018; Wilkins, 2015). This focus is also in line with Krutzinna and Skivenes (2020) study of a partially overlapping sample of judgments analyzing the decision-maker's assessment of parenting capacity, where they found few protective factors.[8]

Is individualized treatment ensured? How decision-makers justify interventions

Of interest to the research question is also how the decision-makers justify their decisions. Tailormade justifications for specific decisions show what decision-makers focus on when giving individualized treatment. The data indicate that some things are very rarely attributed weight (for example risk

and protective aspects of public service provision). Apart from this, the decision-makers' reasonings are varied and do not follow the logic of the established child protection system orientations.

The variance in decision justification suggests that the decision-makers not only look toward the presence of a risk or protective factor in a case but that they assess how this specific factor influences and interacts with other factors, creating a unique situation in each case that the decision-makers take into consideration. For example, although the risk of parental substance misuse to a child is widely acknowledged in the literature (Austin et al., 2020; Kroll & Taylor, 2003; Taber-Thomas & Knutson, 2020; Ward et al., 2012), the risk level stemming from this varies based on other circumstances of the case and if relevant, these also need to be considered by the decision-makers. It may seem counterintuitive that substance misuse is not decisive in all of these cases, despite the case material being similar. However, the cases are similar, yes, but they are not identical – so the treatment does not need to be identical to be legitimate. Individualized treatment means that the decision-makers have taken into consideration the facts of the particular case, not taken a schematic decision. Seen like this, it may be a strength that the decision-makers differ in what they have emphasized in their justifications.

The data material is from eight European countries, and the resulting insights are most valuable in that context. However, they can yield some hypotheses for other contexts. Considering the US, where a lot of child protection research is conducted, three aspects of the national context seem relevant to consider. First, the opioid epidemic and children born with withdrawal symptoms have become a major public health concern (Pryor et al., 2017). It is possible that in this context, where the prevalence of substance misuse is far higher than in Europe (United Nations: Office on Drugs and Crime, n.d.), decision-makers would argue that substance misuse is decisive in a larger portion of care order cases than the 55% found in this study. However, substance misuse is not the only risk that is more prevalent in the US – the poverty gap and poverty rate are higher than in the eight countries included in this study (OECD, 2022a, 2022b). Together with a welfare state with fewer preventive services on offer, the context for families and decision-makers is quite different than in Europe (Burns et al., 2017; Gilbert et al., 2011b). Second, the US child protection system is described as risk oriented, like England, Ireland, and Estonia (Burns et al., 2017; Parton & Berridge, 2011; Strömpl, 2015). A focus on the vulnerabilities of the child as well as on protective aspects of the service system was prominent in the reasoning of decision-makers from risk-oriented systems in this study, and future research could investigate if this is the case in the US as well. Third, although the US has federal child protection policies, there are large variations in how these are implemented (Burns et al., 2017). This could be consequential for the equal treatment provided to care order cases.

Limitations

Stemming from a highly formalized and controlled process, the judgments are a high-quality data source.[9] Some reservations are tied to the material; they are written post hoc and relevant elements may have been omitted. However, key informant interviews conducted at the Center for Research on Discretion and Paternalism indicate that decision-makers include all relevant components when writing up the judgments.[10]

Many things influence the decision-maker's discretion and final, written judgments; the case preparations, case files, input of social workers, laws and regulations restricting the decision-maker's discretion, the proceedings, etc. A limitation regarding my approach to the data material is that I do not directly consider the role of these in shaping the discretion of the decision-makers.

The eight countries have different requirements as to what judgments need to contain and how they should be written.[11] The samples from England and Ireland are not representative because only publicly available judgments are analyzed. It is unclear why these cases were made public and others not, and if they differ from each other. Burns et al. (2019) detail the lack of transparency in child protection adjudications and the subsequent challenges to accountability and researchers. Samples from Germany, Austria, and Spain are from one regional area each, and therefore I cannot claim representativeness for the whole country. Despite the small N, the cases are all the decided or available ones from one or several years as described earlier.

Because of the nature of this study, a comparison with nonremoval situations is not conducted, because of the small number of cases that ended in a nonremoval would lead to results of limited value. Comparison of removal and nonremoval situations would, in general, not be brought to the attention of the court.

Any sort of systematization will have to balance concerns of detail vs summarization. Being too detailed in what information is recorded from each case can make finding patterns difficult and reducing variables too much can make one lose out on important insights because differences are averaged out. In my approach, detail has to some extent been sacrificed for overview in two areas: a holistic approach to assessing the cases and the aggregation of individual risks to risk factors. Choosing to not aggregate narrow conceptions of risk into broad categories such as "mother" and "child" could have yielded very useful and detailed results. However, this would have required a narrower focus on one area of risk or protection (for a skillful example of such an analysis see Krutzinna and Skivenes (2020)) and I was aiming for a holistic view of the decision-maker's reasoning in these cases.

Concluding remarks

I have found that although the main emphasis is on risk factors, protective factors are also relevant in the discretionary reasoning process. The prevalent inclusion of protective factors, as well as a thorough assessment of several risk and protective factors also in cases where siblings of the newborn have been removed or maltreated, indicates a comprehensive assessment process for the specific case at hand.

Typically, several risk and protective factors are referred to in a judgment, and there seems incrementally to have emerged a standard for which factors are relevant for reasoning across the board. If this has effects on future decisions as well as whether this standard is present in other types of interventions or cases would be an interesting point of departure for future research. At the moment, it can seem like the seriousness of a newborn removal overrides theoretical differences between child protection system orientations, a finding that supports previous indications (Bjorvatn et al., 2020) that a decision-maker's discretion is more streamlined when the case is severe.

The outcome of most of the cases is the same – 91% end in a care order (see Table 1). Some of the reasoning of the decision-makers is the same – most of them find four risk categories relevant to assess. Despite these similarities, there is variance in the reasoning of the decision-makers – they come to differing conclusions when diving deep into individual cases, and they provide the individual treatment they are obliged to provide, paying attention to the peculiarities and specifics of the case. A similar pattern was found by Mosteiro, Beloki, Sobremonte, and Rodríguez (2018) in their vignette study of Spanish child protection professionals; similar arguments were included, but the professionals differed in their assessment. My findings suggest that both equal treatment (similarity in what is relevant) and individual treatment (assessing case factors specific to the case) are upheld in the treatment of these similar, but not identical, cases.

What stands out is that although the decision-maker's reasoning regarding relevant risks is similar, there is variability concerning protective factors. These could give indications as to the strengths of the family that the child protection services can work with to facilitate reunification or prevent subsequent removals.

How risk and protective factors are entangled and how the decision-makers view and balance them against each other would be a fascinating follow-up to this study. It might be challenging with this data material because the direct weighing of risk and protective factors is rare, as found by Krutzinna and Skivenes (2020) in their study of a partially overlapping sample of judgments.

Notes

1. I will refer to them as "judgments" although the Norwegian, and Spanish judgments are from an administrative decision-making body.
2. I consider newborns here as children removed within 30 days of birth, which includes those who were removed while still at the hospital. Children who after birth only stayed in a highly supervised facility with their parent(s) are also included.
3. Past and present substance misuse. Includes misuse of legal drugs, alcohol, and use of illegal drugs. The term "substance misuse/misusing" will be used to refer to both past and current misuse. See table B.3 in appendix B for distribution of substances reported.
4. For a full description please see Burns et al. (2017) and this overview: https://discretion.uib.no/resources/child-welfare-facts/#1503574564970-738f5923-706a.
5. A description of data collection, translation, and ethics approvals is available here: https://www.discretion.uib.no/projects/supplementary-documentation/#1552297109931-cf15569f-4fb9.
6. The remaining 15% cases are the seven cases that did not end in a care order, and a few cases where the decision-makers did not point out specifically what they found decisive.
7. Similarity is indicated when less than 20% or more than 80% of decision-makers assessed a factor as relevant to the case, and reasoning variance if 21–79% of decision-makers assessed a factor as relevant.
8. The data material is part of the DISCRETION and ACCEPTABILITY projects.
9. For more information, see https://discretion.uib.no/resources/requirements-for-judgments-in-care-order-decisions-in-8-countries/#1588242680256-00a159db-e96f.
10. For more information, see https://discretion.uib.no/projects/supplementary-documentation/key-informant-interviews-5-countries/.
11. For more information, see https://discretion.uib.no/resources/requirements-for-judgments-in-care-order-decisions-in-8-countries/#1588242680256-00a159db-e96f.

Acknowledgments

The reviewers' comments have been most helpful, and I thank them for their time and commitment. An early draft of this paper was presented at the EUSARF 2021 conference, and I thank the audience for comments and questions. I am grateful for insightful and constructive feedback and comments from supervisors. The paper has been presented at seminars at the University of Bergen, and I am thankful for fruitful discussions with participants.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Disclaimer

Publications from the project reflects only the authors' views and the funding agency is not responsible for any use that may be made of the information contained therein.

Funding

This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation program (grant agreement no. 724460).

Notes on contributor

Barbara Ruiken is a PhD fellow at the Centre for Research on Discretion and Paternalism, department of Administration and Organisation Theory at the University of Bergen, Norway. She previously worked as a research assistant, and holds an M.Phil. in Administration and Organization theory from the University of Bergen. Her PhD project "Understanding risk and protective factors in child's best interest decision" focusses on discretion by decision-makers in high-stake child protection cases, and employs a comparative lense. Her research interests include discretionary decision-making, child protection policy implementation and the role of risk and protective factors in care order proceedings concerning newborn children.

ORCID

Barbara Ruiken http://orcid.org/0000-0002-1485-6681

References

Austin, A. E., Berkoff, M. C., & Shanahan, M. E. (2020). Incidence of injury, maltreatment, and developmental disorders among substance exposed infants. *Child Maltreatment*, 1077559520930818. doi:10.1177/1077559520930818

Berrick, J. D., Dickens, J., Pösö, T., & Skivenes, M. (2018). Care order templates as institutional scripts in child protection: A cross-system analysis. *Children and Youth Services Review*, 84, 40–47. doi:10.1016/j.childyouth.2017.11.017

Berrick, J. D., Gilbert, N., & Skivenes, M. (Eds.). (inpress). *International handbook of child protection systems*. New York: Oxford University Press.

Bjorvatn, A., Magnussen, A.-M., & Wallander, L. (2020). Law and medical practice: A comparative vignette survey of cardiologists in Norway and Denmark. *SAGE Open Medicine*, 8, 2050312120946215. doi:10.1177/2050312120946215

Braarud, H. C. (2012). Kunnskap om små barns utvikling med tanke på kompenserende tiltak iverksatt av barnevernet. *Tidsskriftet Norges Barnevern*, 89(3), 152–167. doi:10.18261/1891-1838-2012-03-04

Brophy, J. (2006). Research review: Child care proceedings under the children act 1989. *Department for Constitutional Affairs*. https://www.scie-socialcareonline.org.uk/research-review-child-care-proceedings-under-the-children-act-1989/r/a11G0000001803xIAA

Burns, K., Križ, K., Krutzinna, J., Luhamaa, K., Meysen, T., Pösö, T., . . . Thoburn, J. (2019). The hidden proceedings – An analysis of accountability of child protection adoption proceedings in eight European jurisdictions. *European Journal of Comparative Law and Governance*, 6 (1), 339–371. doi:10.1163/22134514-00604002

Burns, K., Pösö, T., & Skivenes, M., Eds. 2017. *Child welfare removals by the state: A cross-country analysis of decision-making systems*. New York: Oxford University Press. doi:10.1093/acprof:oso/9780190459567.001.0001

Cleaver, H., Unell, I., & Aldgate, J. (2011). *Children's Needs – Parenting Capacity: The impact of parental mental illness, learning disability, problem alcohol and drug use, and domestic violence on children's safety and development* (2nd ed.). The Department for Education. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/182095/DFE-00108-2011-Childrens_Needs_Parenting_Capacity.pdf

Convention on the Rights of the Child, United Nations, *Treaty Series*, Vol. 1577, p. 3, U.N. General Assembly, UNCRC (1989).

Dworkin, R. (1967). The model of rules. *The University of Chicago Law Review*, 35(1), 14–46. doi:10.2307/1598947

Forrester, D. (2000). Parental substance misuse and child protection in a British sample. A survey of children on the child protection register in an inner *London* district office. *Child Abuse Review*, 9(4), 235–246. doi:10.1002/1099-0852(200007/08)9:4<235::AID-CAR626>3.0.CO;2-4

Freeman, M. (2009). Children's rights as human rights: Reading the UNCRC. In J. Qvortrup (Ed.), *The Palgrave handbook of childhood studies* (pp. 377–393). Palgrave-Macmillan, London.

Galligan, D. J. (1987). *Discretionary powers: A legal study of official discretion*. New York: Clarendon Press.

Gilbert, N., Parton, N., & Skivenes, M. (2011a). Changing patterns of response and emerging orientations. In N. Gilbert, N. Parton, & M. Skivenes (Eds.), *Child protection systems: International trends and orientations* (1st ed., pp. 243–257). New York: Oxford University Press.

Gilbert, N., Parton, N., & Skivenes, M. (Eds.). (2011b). *Child protection systems: International trends and orientations*. New York: Oxford University Press. https://www.akademika.no/child-protection-systems/9780199793358

Glaun, D. E., & Brown, P. F. (1999). Motherhood, intellectual disability and child protection: Characteristics of a court sample. *Journal of Intellectual & Developmental Disability*, 24(1), 95–105. doi:10.1080/13668259900033901

Gosepath, S. (2021). Equality. In E. N. Zalta Ed., *The Stanford encyclopedia of philosophy (Summer, 2021)* (pp. 1-55). California: Metaphysics Research Lab, Stanford University https://plato.stanford.edu/archives/sum2021/entries/equality/

Helland, H. S. (2021a). Reasoning between rules and discretion: A comparative study of the normative platform for best interest decision-making on adoption in England and Norway. *International Journal of Law, Policy, and the Family*, 35(1), ebab036. doi:10.1093/lawfam/ebab036

Helland, H. S. (2021b). In the best interest of the child? Justifying decisions on adoption from care in the Norwegian supreme court. *The International Journal of Children's Rights*, 29(3), 609–639. doi:10.1163/15718182-29030004

Helland, H. S., & Nygård, S. H. (2021). Understanding attachment in decisions on adoption from care in Norway. In Tarja P., Marit S., & June T. (Eds.), *Adoption from care: International perspectives on children's rights* (pp. 215-231). Bristol: Family Preservation and State Intervention.

Helland, H. S., Pedersen, S. H., & Skivenes, M. (2020). Adopsjon eller offentlig omsorg? En studie av befolkningens syn på adopsjon som tiltak i barnevernet. *Tidsskrift for samfunnsforskning*, 61(2), 124–139. doi:10.18261/.1504-291X-2020-02-02

Juhasz, I. B. (2018). Defending parenthood: A look at parents' legal argumentation in Norwegian care order appeal proceedings. *Child & Family Social Work*, 23(3), 530–538. doi:10.1111/cfs.12445

Juhasz, I. B. (2020). Child welfare and future assessments – An analysis of discretionary decision-making in newborn removals in Norway. *Children and Youth Services Review*, 116. doi:10.1016/j.childyouth.2020.105137

Klee, H. (1998). Drug-using parents: Analysing the stereotypes. *International Journal of Drug Policy*, 9(6), 437–448. doi:10.1016/S0955-3959(98)00060-7

Kroll, B., & Taylor, A. (2003). *Parental substance misuse and child welfare*. London: Philadelphia: Jessica Kingsley Publishers.

Krutzinna, J., & Skivenes, M. (2020). Judging parental competence: A cross-country analysis of judicial decision makers' written assessment of mothers' parenting capacities in newborn removal cases. *Child & Family Social Work*, 1(11), 50–60. doi:10.1111/cfs.12788

Løvlie, A., & Skivenes, M. (2021). Justifying interventions in Norwegian child protection: An analysis of violence in migrant and non-migrant families. *Nordic Journal on Law and Society*, 4(2), Article 02. doi:10.36368/njolas.v4i02.178

Luhamaa, K., McEwan-Strand, A., Ruiken, B., Skivenes, M., & Wingens, F. (2021). Services and support for mothers and newborn babies in vulnerable situations A study of eight European jurisdictions. *Children and Youth Services Review*, 120(1), 105762. doi:10.1016/j.childyouth.2020.105762

Mascini, P. (2020). Discretion from a Legal Perspective. In T. Evans & P. L. Hupe (Eds.), *Discretion and the quest for controlled freedom* (pp. 121–141). Basingstoke: Palgrave Macmillan.

Masson, J. (2012). "I think I do have strategies": Lawyers' approaches to parent engagement in care proceedings. *Child & Family Social Work*, 17(2), 202–211. doi:10.1111/j.1365-2206.2012.00829.x

McConnell, D., Llewellyn, G., & Ferronato, L. (2006). Context-contingent decision-making in child protection practice. *International Journal of Social Welfare*, 15(3), 230–239. doi:10.1111/j.1468-2397.2006.00409.x

McGoron, L., Riley, M. R., & Scaramella, L. V. (2020). Cumulative socio-contextual risk and child abuse potential in parents of young children: Can social support buffer the impact? *Child & Family Social Work*, 25(4), 865–874. doi:10.1111/cfs.12771

Molander, A., Grimen, H., & Eriksen, E. O. (2012). Professional discretion and accountability in the Welfare State. *Journal of Applied Philosophy*, 29(3), 214–230. doi:10.1111/j.1468-5930.2012.00564.x

Mosteiro, A., Beloki, U., Sobremonte, E., & Rodríguez, A. (2018). Dimensions for argument and variability in child protection decision-making. *Journal of Social Work Practice*, 32(2), 169–187. doi:10.1080/02650533.2018.1439459

Murphy-Oikonen, J. (2020). Neonatal abstinence syndrome: Decisions concerning infant safety. *Journal of Public Child Welfare*, 15, 384–411. doi:10.1080/15548732.2020.1733731

OECD. (2022a). *Poverty gap (indicator)*. 10.1787/349eb41b-en

OECD. (2022b). *Poverty rate (indicator)*. 10.1787/0fe1315d-en

Parton, N., & Berridge, D. (2011). Child protection in England. In N. Gilbert, N. Parton, & M. Skivenes Eds., *Child protection systems: International trends and orientations* (1st, 60–87). New York: Oxford University Press. 10.1093/acprof:oso/9780199793358.003.0004

Pryor, J. R., Maalouf, F. I., Krans, E. E., Schumacher, R. E., Cooper, W. O., & Patrick, S. W. (2017). The opioid epidemic and neonatal abstinence syndrome in the USA: A review of the continuum of care. *Archives of Disease in Childhood. Fetal and Neonatal Edition*, 102(2), F183. doi:10.1136/archdischild-2015-310045

Rothstein, B. (1998). *Just institutions matter: The moral and political logic of the universal Welfare State*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511598449

Rothstein, B. (2011). *The quality of government: Corruption, social trust, and inequality in international perspective*. Chicago: University of Chicago Press.

Sigurjónsdóttir, H. B., & Traustadóttir, R. (2010). Family Within a Family. In G. Llewellyn, R. Traustadóttir, D. McConnell, & H. B. Sigurjónsdóttir (Eds.), *Parents with intellectual disabilities. past, present and futures* (pp. 49-62). Chichester: Wiley-Blackwell.

Skivenes, M., Barn, R., Križ, K., & Pösö, T. (Eds.). (2015). *Child welfare systems and migrant children: A cross country study of policies and practice*. New York: Oxford University Press.

Stoltenborgh, M., Bakermans-Kranenburg, M. J., Alink, L. R. A., & Van. Ijzendoorn, M. H. (2015). The prevalence of child maltreatment across the globe: Review of a series of meta-analyses. *Child Abuse Review*, 24(1), 37–50. doi:10.1002/car.2353

Strömpl, J. (2015). Immigrant children and families in estonian child protection system. In M. Skivenes, R. Barn, K. Križ, & T. Pösö (Eds.), *Child welfare systems and migrant children: A cross country study of policies and practice* (pp. 241-262). New York: Oxford University Press.

Taber-Thomas, S. M., & Knutson, J. F. (2020). Association between mothers' alcohol use histories and deficient parenting in an economically disadvantaged sample. *Child Maltreatment*, 1(10). doi:10.1177/1077559520925550

Titmuss, R. M. (1971). Welfare "Rights," law and discretion. *The Political Quarterly*, 42(2), 113–132. doi:10.1111/j.1467-923X.1971.tb00061.x

United Nations: Office on Drugs and Crime. (n.d.). *Statistical Annex—1.1_Prevalence_of_drug_use_in_the_general_population_-_regional_and_global_estimates*. Retrieved May 30, 2022, from //www.unodc.org/unodc/en/data-and-analysis/wdr2021_annex.html

Ward, H., Brown, R., & Hyde-Dryden, G. (2014). *Assessing parental capacity to change when children are on the edge of care: An overview of current research evidence [Report]*. Loughborough: Loughborough University. https://repository.lboro.ac.uk/articles/Assessing_parental_capacity_to_change_when_children_are_on_the_edge_of_care_an_overview_of_current_research_evidence/9580151

Ward, H., Brown, R., & Westlake, D. (2012). *Safeguarding babies and very young children from abuse and neglect*. London: Jessica Kingsley Publishers.

Wilkins, D. (2015). Balancing risk and protective factors: How do social workers and social work managers analyse referrals that may indicate children are at risk of significant harm. *The British Journal of Social Work*, 45(1), 395–411. doi:10.1093/bjsw/bct114

Appendix A – coding description

Table A1. Coding description.

Risk factors	Protective factors
Substance misuse Current or previous misuse of illegal drugs, alcohol and/or legal drugs. Does not have to result in addiction. Moderate alcohol use is not included unless stated as a risk. Alcohol use resulting in aggression/loss of control is included.	
Mother Abuse in childhood (unacknowledged): Mother has own history of abuse, neglect or maltreatment in childhood. May have a history with child welfare services. This is not recognized as a problem/ or something that needs treatment. Lack of insight and compliance: Describes the unwillingness of the mother to cooperate and see her own faults. Includes lack of compliance: failure to comply with recommended treatment or therapy programs, either by failing to enroll or later dropping out. Includes refusal to move into a parent-child unit, or to accept in-home services, where this has been recommended. Includes denial of problems: not agreeing that one has certain features that can affect a child negatively (such as substance misuse problem or learning difficulty). Or agreeing that one has these features but disagreeing that they or actions or choices one has made affect the child negatively, or lack of insight into problems. Mental health: the mother has significant mental health problems that are not alleviated by medicine or treatment. Psychiatric disorders like anxiety, depression, PTSD and others. Includes also self-harm and suicidality. Some diagnoses are more temporary and other more permanent. Includes when Court/ Board expresses concern regarding mothers mental health. Violence: mother has a history of violence or sexual assault toward others, adults, children or animals. Domestic violence is only coded here as well as in inter-partner conflict and violence if it is clear that the mother is violent as well as the partner. Learning difficulties + mental health issues: presence of both maternal learning difficulties and mental health issues.	**Mother** MH + treatment: mother has a mental disorder or mental health issue which responds positively to medicine and/or therapy. Insight and cooperation: describes the mother's willingness to see her own faults, work on them and allow the help of services. Includes engagement with services: mother shows willingness to follow recommendations by professionals and engage with services, both in health-related or child welfare-related settings. Attending/keeping appointments with services/professionals. Completing requested tasks. Does NOT include asking for additional services that professional have not recommended or suggested or consent to care order. Does NOT include attending access with the child. This is not a service. Includes responsibility taken: mother actively tries to change/improve. Is seeking appropriate help with problems. Includes overcoming SA or trying to do so, or cutting ties with people that have negative influence, cleaning up the house and preparing it for the newborn. Includes recognition of problem: mother is aware of her problems, whether health-related or other problems. Is aware of the choices or actions that can have negative effects on the child. Adaption to childhood abuse: Mother's history of childhood abuse, neglect or maltreatment is recognized by her as a problem and has been addressed (through adaptive behavior, therapeutic interventions, etc.). Supportive partner: Presence of a supportive and protective partner. Who can intervene in risky situations or protect the child in such, alleviate stress or encourage positive change. Partner does not have to be biological father of the child.
Family & social setting Inter-partner conflict and violence: frequent arguing, one partner controlling the other, domestic violence. High stress: stress on the family such as lack of or unstable housing (NOT when hygiene is bad due to insufficient cleaning), no/low income, unemployment, crimes and incarceration, inability to work (disability). Isolation: lack of social and family support, father of the child unwilling to help and lone parenthood. Statements of unknown paternity do not automatically lead to inclusion, as other partner(s) may be available. No existing family, or no contact with family or family is unable to support with child-rearing or life in general due to lack of capacity or geographic location. No support in the area from friends or acquaintances. Neighborhood: The neighborhood where the family lives is violent, unsupportive and/or has a lot of crime.	**Family & social setting** Absence of intimate partner violence: clear statements that the partner is NOT violent. Does not include when it is just not mentioned that he is violent. Supportive network: presence of a supportive and protective family member, friend or members of the community. Who can intervene in risky situations, alleviate stress or encourage positive change. Describes if the mother has nonprofessional support.

(*Continued*)

Table A1. (Continued).

Risk factors	Protective factors
Interaction Concerns only the newborn, not other siblings. Attachment: disorganized, severely insecure patterns of attachment. Lack of empathy and prioritization: describes the mother not seeing the child and their needs, and placing own needs over the child's. Includes lack of empathy for child: inability to recognize the child's emotional needs. Not showing interest in the child in general is NOT lack of empathy for child. Not being interested in what the child does when meeting with the child is included. Includes own needs before child's: the parent's own needs prevail, either due to selfishness or own childhood trauma, meaning that the parent's own needs will outweigh the child's needs. Includes poor parenting competency: general deficiencies in parenting, including a failure to recognize the child's physical needs for stimulation. May require intensive assistance in basic parenting tasks.	**Interaction** Normal attachment: parent-child bond is present and adequate. Empathy for child: parent is responsive to the child's needs, especially emotionally. Competence in some areas: parenting competency is only partially limited. Mother is capable of some aspects of parenting, such as basic care or emotional stimulation etc.
Child's vulnerabilities Concerns only the newborn, not other siblings. Child development: child has developmental delay with special needs or is born prematurely, has low birth weight or other deficits at birth.". Child age: statements referring to the child's (young) age. References to the child as minor are not included as this is more of a legal classification. Does not need to be in relation with vulnerability. Withdrawal symptoms: child is born with withdrawal symptoms.	**Child's strengths** Child is physically and mentally healthy and well adapted, meeting developmental milestones during placement w. biological parents or in foster care. Does not need to have all these points, it just needs to be clear that the child is well and healthy. The code is an indication that the child is robust and thus less likely to experience harm.
Removed & maltreated siblings Previous siblings have been maltreated or neglected, or been taken into state care. Does not include when siblings are raised by family members without the involvement of the state.	
Service involvement Lack of resources: social workers, medical personnel or others too understaffed to follow up on the family. Services denied because they have no capacity. No available services in that area. Ineptitude: professionals involved in the family/case are lacking the professional or personal skills to handle the case well, or have made mistakes that should have been avoided.	**Service involvement** Outreach and partnership: describes the efforts of professionals and services to connect and cooperate with parents. Includes outreach to family: professionals actively approaching family and offering services. Includes services offered after a note of concern has been made. Key is that it is the professionals that offer services and not the family that asks for them. Includes partnerships with parents: professionals have established partnerships with the parents. Involvement of legal or medical services: parents have medical or legal professionals aiding them. Legal or medical services are involved with the family. Services regarding the child only count when child is still with the parents. Lawyers for the care order proceedings for parents and/or child are not included.

Appendix B – additional tables

Child protection systems

The Tables B.1 and B.2 show what risk and protective factors have been mapped in the judgments. The percentages for present factors have been calculated by the N for the child protection system orientation, the percentage for decisive and important factors has been calculated by the N of cases that have that factor present in their judgments.

Findings – tables for figures

Tables B.4 – B.7 show the findings presented in Figures 1 and 2 in the paper.

Table B1. Risk factors, by child protection system.

Risk factors		Child centric N = 31		Family service N = 25		Risk oriented N = 29	
		N	%	N	%	N	%
Any risk factors	Present	31	100%	25	100%	29	100%
	- Of which decisive	*28*	*90%*	*21*	*84%*	*23*	*79%*
Mother	Present	29	100%	23	92%	27	93%
	- Of which decisive	*19*	*66%*	*13*	*57%*	*18*	*67%*
Substance misuse	Present	31	100%	25	100%	29	100%
	- Of which decisive	*13*	*42%*	*17*	*68%*	*17*	*59%*
Interaction	Present	23	79%	15	60%	21	72%
	- Of which decisive	*16*	*70%*	*10*	*67%*	*7*	*33%*
Family & social setting	Present	27	87%	21	84%	28	97%
	- Of which decisive	*13*	*48%*	*14*	*67%*	*14*	*50%*
Child[a]	Present	28	88%	21	84%	24	83%
	- Of which decisive	*14*	*50%*	*10*	*48%*	*3*	*13%*
Removed& maltreated siblings[b]	Present	12	86%	18	90%	23	96%
	- Of which decisive	*3*	*25%*	*4*	*22%*	*7*	*30%*
Service involvement	Present	1	3%	3	12%	6	21%
	- Of which decisive	*0*	*0%*	*1*	*33%*	*0*	*0%*

[a]Calculated by number of children, N = Child centric N = 31, Family service N = 25, Risk oriented N = 29.
[b]Calculated by number of families with siblings, N = Child centric N = 14, Family service N = 20, Risk oriented N = 24.

Table B2. Protective factors, by child protection systems.

Protective factors		Child centric N = 31		Family service N = 25		Risk oriented N = 29	
		N	%	N	%	N	%
Any protective factors	Present	30	97%	20	80%	27	93%
	– Of which important	*7*	*23%*	6	30%	9	33%
Mother	Present	26	84%	16	64%	25	86%
	– Of which important	*6*	*23%*	6	38%	5	20%
Family & social setting	Present	7	23%	6	24%	10	34%
	– Of which important	*1*	*14%*	2	33%	2	20%
Interaction	Present	13	42%	5	20%	15	52%
	– Of which important	*2*	*15%*	2	40%	7	47%
Child[a]	Present	6	19%	6	24%	5	17%
	– Of which important	*0*	*0%*	0	0%	0	0%
Service involvement	Present	25	81%	17	68%	27	93%
	– Of which important	*2*	*8%*	4	24%	1	4%

[a]Calculated by number of children, Child centric N = 31, Family service N = 25, Risk oriented N = 29.

Table B3. Maternal substance misuse.

	Total N = 85		Child centric N = 31		Family service N = 25		Risk oriented N = 29	
Only alcohol	12	14%	1	3%	6	24%	5	17%
Only drugs	39	46%	16	52%	12	48%	11	38%
Unspecified or combination misuse	34	40%	14	45%	7	28%	13	45%

Table B4. Present risk factors.

Present risk factors	N	%
Any risk factors	85	100%
Substance misuse	85	100%
Mother	78	92%
Removed & maltreated siblings[b]	53	91%
Family & social setting	75	88%
Child's vulnerabilities[a]	72	84%
Interaction	58	68%
Service involvement	10	12%

[a]Calculated by number of children, N = 86.
[b]Calculated by number of families with siblings, N = 58

Table B5. Present protective factors.

Present protective factors	N	%
Any protective factors	77	91%
Service involvement	68	80%
Mother	66	78%
Interaction	32	38%
Family & social setting	22	26%
Child's strengths[a]	17	20%

[a]Calculated by number of children, N = 86.

Table B6. Share of decisive risk factors, calculated by N of present risk factors.

Share of decisive risk factors, calculated by N of present risk factors	N decisive	%	N "present"
Any risk factors	72	85%	85
Mother	48	62%	78
Interaction	33	57%	58
Substance misuse	47	55%	85
Family & social setting	41	55%	75
Child's vulnerabilities	27	38%	72
Removed & maltreated siblings	14	26%	53
Service involvement	1	10%	10

Table B7. Share of important protective factors, calculated by N of present protective factors.

Share of important protective factors, calculated by N of present protective factors	N important	%	N "present"
Any protective factors	22	29%	77
Mother	17	26%	66
Interaction	8	25%	32
Family & social setting	5	23%	22
Service involvement	7	10%	68
Child's strengths	0	0%	17

European Journal of Social Work

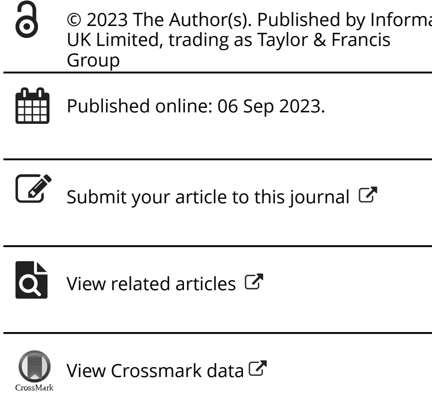
ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/cesw20

A tale of two cases – investigating reasoning in similar cases with different outcomes

Barbara Ruiken

To cite this article: Barbara Ruiken (2023): A tale of two cases – investigating reasoning in similar cases with different outcomes, European Journal of Social Work, DOI: 10.1080/13691457.2023.2250927

To link to this article: https://doi.org/10.1080/13691457.2023.2250927



© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

Published online: 06 Sep 2023.

Submit your article to this journal

View related articles

View Crossmark data

Full Terms & Conditions of access and use can be found at
https://www.tandfonline.com/action/journalInformation?journalCode=cesw20

EUROPEAN JOURNAL OF SOCIAL WORK
https://doi.org/10.1080/13691457.2023.2250927

A tale of two cases – investigating reasoning in similar cases with different outcomes

En beretning om to saker – Undersøke begrunnelser i like saker med ulike utfall

Barbara Ruiken

Department of Government, University of Bergen, Bergen, Norway

ABSTRACT
Why is it that some care order cases result in the child being removed from parental care, while in others she is not, despite the cases being similar? This paper investigates how decision-makers reason and justify different outcomes for similar cases, by an analysis of four pairs of judgments (from Norway, Estonia, and Finland) about care orders, using thematic analysis. The comparison is within the pairs and not across countries. I find that the variance in outcome and reasoning seems to be a result of discretionary evaluations: risk, cooperation of the parents, and the potential of services to alleviate the situation are interpreted differently in the cases and lead to different outcomes. This appears to be a legitimate use of the discretionary space available to the decision-makers. The decisions are justified with 'good reasons' mostly related to threshold, the least intrusive intervention principle, and the best interests of the child. Such justifications are suitable to provide accountability and legitimacy, but the reasoning is at times lacking transparency and thoroughness. The reasoning is longer in the non-removal cases, suggesting that more thorough reasoning is required when the decision-makers depart from the most common outcome.

KEYWORDS
Child protection; care order; discretion; accountability; legitimacy

NOKKELORD
Barnevern; omsorgsovertakelse; skjønn; ansvarlighet; legitimitet

SAMMENDRAG
The reasoning is longer in the non-removal cases, indicating that more thorough reasoning is required when the decision-makers depart from the most common outcome.

Hvorfor er det slik at noen omsorgsovertakelser ender med at barnet blir fjernet fra foreldrenes omsorg, mens i andre blir hun ikke det, til tross for at sakene er like? Denne artikkelen undersøker hvordan beslutningstakere resonnerer og begrunner ulike utfall for like saker, gjennom en analyse av fire par av dommer (fra Norge, Estland, og Finland) i omsorgsovertakelser, gjennom å bruke tematisk analyse. Sammenligningen er innad i parene, og ikke på tvers av land. Jeg finner at variasjonen i utfall og resonnering virker å være et resultat av skjønnsmessige vurderinger: risiko, foreldrenes samarbeid, og hjelpetjenesters potensiale til å forbedre situasjonen blir vurdert ulikt i

CONTACT Barbara Ruiken barbara.ruiken@uib.no Department of Government, University of Bergen, Bergen, Norway; Department of Administration & Organization Theory, Centre for Research on Discretion and Paternalism, University of Bergen, Christies gate 17, 5007 Bergen, Norway

© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (http://creativecommons.org/licenses/by-nc-nd/4.0/), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way. The terms on which this article has been published allow the posting of the Accepted Manuscript in a repository by the author(s) or with their consent.

sakene og leder til forskjellige utfall. Dette virker å være legitim bruk av beslutningstakernes skjønnsrom. Beslutningene er begrunnet med «gode grunner», for det meste relatert til terskel for inngripen, det minste inngreps prinsipp, og barnets beste. Slike begrunnelser er godt egnet til å gi ansvarlighet og legitimitet, men resonneringen mangler tidvis transparens og grundighet. Resonneringen er lengre i saker der barnet ikke blir fjernet, som indikerer at mer grundig resonnering er nødvendig når beslutningstakerne avviker fra det mest vanlige utfallet.

Introduction

Why is it that some care order cases result in the child being removed from parental care, while in others she is not, despite the cases being similar on relevant and visible factors? In this paper, I investigate how decision-makers reason and justify individual cases with different outcomes through analysing judgments in care orders cases that display relevant similarities. In such decisions, decision-makers are given discretion to find the best possible solution, but discretion can lead to unjustified decision variability and threaten the legitimacy of the decisions as well as the decision-making system.

State mandated decision-makers implement child protection policy and wield power over individual citizens' lives – equal treatment in their decisions are vital for the rule of law. Differences in treatment must be based on differences between the cases. Child protection systems are established to safeguard the rights and welfare of children. Among the interventions available are care orders, placing a child in state care. The right decisions must be made regarding severe interventions into family life, especially in the case of newborns where a separation from their birth parents can be permanent (Magruder & Berrick, 2023). The wrong decision can leave a child in a dangerous situation, or unnecessarily interfere into a family, both can be traumatic.

Care order decisions are important to study given the consequences for the involved parties, the legitimacy of the child protection system and the rule of law. As care order cases are complex and laws can be ambiguous, the decision-makers need to use discretion which '*has come to connote … autonomy in judgement and decision*' (Galligan, 1987, p. 8). Discretion poses an inherent threat to equal treatment as it involves freedom in making decisions according to set standards (Molander, 2016). Decision-makers must justify their decisions using 'good reasons' to facilitate accountability and show that the decisions are legitimate (Molander, 2016). Care orders are useful study objects as they are 'discretion in practice', and their justifications are accessible in written judgments.

While discretion in child protection is an established research area, this paper adds a novel dimension by investigating how different outcomes in similar cases are reasoned, through comparing four case pairs consisting of eight individual care order cases concerning newborns. From a large project data material in which characteristics of 216 cases are registered, a rigorous selection process detailed in the methods section determined the selection of cases that share formal aspects like country of origin and decision year, and central aspects of the involved parties. Two of the pairs are from Norway, one from Finland and one from Estonia. As the aim is comparison within the pairs and not across countries, the same discretionary context applies to the cases within each pair. Norway and Finland practice group-decision-making, in Estonia a single judge decides.

To situate my approach, I begin with an overview over relevant literature, theory, and the empirical context. Next, the methods used are presented, before then findings are described and discussed. Finally, I provide some concluding remarks.

Equal treatment and discretion

The equal treatment principle is a core component of the rule of law, and according to Aristotle, '*alike cases should be treated alike and unalike cases should be treated unalike.*' (as cited by Westerman,

2015, p. 83). The inclusive starting point of the principle is that all cases should be treated similarly, all exceptions have to be founded in relevant differences, and the difference in treatment has to be proportionate to the aim of the rule (Westerman, 2015).

Decision-makers are given discretion when making decisions governed by general laws. Discretion gives limited freedom and *'ensures proper examination and treatment of individual cases because it permits professionals to consider what is particular and unique'* (Molander, 2016, p. 51). The aim is justifiable outcome variation – that different outcomes are based on relevant differences in the cases or in the evaluation of facts. There is an inherent danger that discretion can lead to arbitrary decisions and threaten equal treatment, if cases without relevant differences are treated differently, or if relevant differences in cases are overlooked.

Discretionary reasoning takes place within space surrounded by the laws and guidelines that must be followed. Wallander & Molander explain that *'To reason means to attempt to find justifiable answers to questions.'* (Wall Ander & Molander, 2014, p. 3), reasoning regarding what the case is about and what should be done (Molander, 2016). To facilitate accountability, the result of reasoning is documented in written care order judgments. To be legitimate, the decisions need to be justified by what Molander (2016) calls 'good' or 'public reasons': they need to be generally accessible, related to the decision-makers' expert knowledge, applicable laws and generally accepted principles. If the reasoning or the reasons justifying the decision are absent, incomprehensible or not in line with what policymakers authorised, the trust in the delegated decision-making power and the legitimacy of the decisions can be questioned (Molander, 2016).

Discretionary decision-making

There is a growing literature on discretionary decision-making, focussing on for example handling of debt relief (Larsson & Jacobsson, 2013), bureaucratic treatment of migrants (van den Bogaard et al., 2022), and medical assessments (Bjorvatn et al., 2020). Raaphorst (2021) summarises administrative justice research on treatment of similar and different cases, highlighting the tension between equal treatment and discretion.

Some research has focused on decision variability in child protection (Keddell, 2023), and research on empirical child protection decision-making has been productive in recent years (Helland, 2021b, 2021a; Juhasz, 2020; Krutzinna & Skivenes, 2021; Løvlie, 2023; Løvlie & Skivenes, 2021; Luhamaa et al., 2021). Different approaches to understand and predict child protection decision-making have been developed, like Dalgleish's (2003) work on the role of values related to decision thresholds in child protection, or the decision-making ecology (Fluke et al., 2020) which aims to explain why child protection decisions are made as they are. Comparisons of treatment has been researched through vignette studies (e.g. Bartelink et al., 2014; Falconer & Shardlow, 2018). However, these have not compared the treatment of empirical cases in regards to *equal treatment* specifically, despite being recognised as an important topic (Burns et al., 2016; Rothstein, 1998).

Legal systems and child protection

The eight analysed cases were decided in Estonia, Norway and Finland in 2016. In the same year between 10 and 16.5 per 1.000 children were placed in out-of-home care in these countries (see Table 1). In Finland, only care orders where a party objects are decided in court, and the number reported in Table 1 are for the whole year. Estonia and Norway report all out-of-home placements, at one point of the year. Interpretation of the table should take this into consideration.

The Norwegian and Finnish child protection systems are classified as child centric orientations, where the rights of children, preventive services and early intervention are emphasised, aiming at promoting wellbeing and equal opportunities (Gilbert et al., 2011). Cooperation with parents is sought after, to facilitate a therapeutic effect, actively working to uphold the right to respect for family life. The Estonian child protection system can be classified as a risk-oriented system

Table 1. Key facts for Estonian, Finnish and Norwegian child protection systems.

	Estonia	Finland	Norway
Children in out-of-home care, per 1.000 children (2016)	10#	16,5^	10,3#
Newborn care order cases (2016) (% approved)	4(75%)	25(96%)	76(93,4%)
Relevant law	Family Law Act, §134 (1)	Child Welfare Act, Chapter 9 Section 40(1)	Child Protection Law §§4–12 (a) and (d)

= stock data; from one point in the year, ^ = flow data; total number throughout the year.
Sources: (Berrick et al., 2023; Centre for Research on Discretion and Paternalism, 2021; Statistics Estonia, 2022).

(Luhamaa et al., 2021), meaning that the threshold for intervention is high, and focus is on keeping children safe from harm (Gilbert et al., 2011).

Norwegian care orders are usually decided in the Child Welfare Tribunal, by a jurist, a child expert and a layperson. The child protection agency and private parties are represented by lawyers, and evidence is mainly given orally (Lov Om Barnevern (Barnevernsloven), 2021). In 2022, there were submitted applications to the Tribunal averaging 50 applications per jurist (Fylkesnemnda for barnevern og sosiale saker, 2023). The Finnish care orders are decided in a generalist administrative court, by two judges and one expert (Höjer & Pösö, In press). The court is obliged to hear the child's parents and the child protection agency, but while proceedings are mainly based on written statements the proportion of oral hearings is increasing (was around 1/3 cases in 2017) (Pösö & Huhtanen, 2016). The courts are generally considered to be under-resourced (ibid). In Estonia, single generalist judges who tend to specialize into family law matters decide care orders. They are required to hear parents and older children.

Deliberative theory through which group decision-making can be understood finds that the quality of the decision is based on the process, not the outcome (Skivenes & Tonheim, 2017). Care orders are decided by one decision-maker in Estonia and three in Norway and Finland. While it can give valuable insights into care order decision-making, it is outside the scope of this paper to discuss the deliberative process as well as the outcome.

Legislation in all three countries contains a threshold, and removals are only permitted as the last resort (Luhamaa et al., 2021). All three are civil law countries where decision-makers are bound by a codified collection of laws (Danner & Bernal, 1994). When considering care orders for newborn children, decision-makers make individual decisions in specific cases and their discretion is not bound by precedent in the same way as in common law systems. All three have an appeal system for care orders in place (Burns et al., 2016; Eesti Kohtud, n.d.). In all three countries, the written judgments are legally required to include the reasons for the decision, and the relevant facts and evidence for the decision (Centre for Research on Discretion and Paternalism, 2019). Norway and Finland require an assessment of the facts in light of legal norms, and Norway and Estonia require specification of which legal norms guide the decision and assessment. Norwegian judgments also need to include an assessment of the central claims of the parties.

Methods

Data material

The data material was selected from a project data material of 216 judgments from Austria, England, Estonia, Finland, Germany, Ireland, Norway, and Spain as specified in Appendix 1. All judgments concern a newborn and her birth parents, decided in the first instance decision-making body. The child was removed from their parent's care within 30 days of birth or after a stay in a supervised parent–child facility. The material was collected between February 2018 and October 2019, for details on data collection, coding and ethical approvals, see Appendix 1.

From the 216 judgments, I have selected the paper data material – the eight cases that are pairwise similar (see Table 2). In each pair, one case ends in a care order, while the other does not. I have

Table 2. Pair characteristics.

Pair A	Pair B
2 Norwegian cases:	2 Norwegian cases:
A_NOR_rem	B_NOR_rem
A_NOR_nonrem	B_NOR_nonrem (split decision)
Maternal substance misuse and cognitive issues	Maternal substance misuse and mental health issues
Father is no help	Previous children removed
Stay in parent-child center	Removed straight from hospital
Pair C	**Pair D**
2 Finnish cases:	2 Estonian cases:
C_FIN_rem	D_EST_rem
C_FIN_nonrem Maternal mental health and cognitive issues	D_EST_nonrem
	Maternal substance misuse
Domestic violence	Previous children removed
Stay in supervised setting	Removed straight from hospital
Inadequate care	Lack of interest in child

selected cases that share the maximum number of central risk factors but differed in outcome to ensure that the most similar cases in the project material were analysed for this paper. They share a range of formal, legal and case-internal aspects, and are highly similar. Despite different outcomes the cases are classified as similar, as the outcome depends on the decision-makers' discretion, which carries an inherent potential for decision variability.

To identify which cases shared the highest number of attributes, the program fsQCA sorted the 216 cases into groups that share three or four of six maternal risk factors, in addition to the formal and case-related characteristics that are applicable to the whole project data material. fsQCA allows sorting a number of cases by their attributes and shows mutually exclusive groups where cases are sorted according to the highest number of shared attributes. It is positive that the cases are from countries where a full sample was available for the same year as it ensures that the selection was from a complete material. See Appendix 1 for details on the selection process.

Finnish judgments are around 7–9 pages per judgment. Estonian judgments are around 6–10 pages. Norwegian judgments can range from 8 to 23 pages, but around 12 pages is typical. The judgements are required to include the decision-makers' reasoning, and the facts and evidence they found to be relevant (Centre for Research on Discretion and Paternalism, 2019).

Risk factors are well suited for finding similar care order cases as applications are made to prevent harm. Parental problems can significantly put the child at risk and influence parents' ability to provide adequate care (Ward et al., 2014). The maternal risk factors I used to sort and select are perpetration of domestic violence, mental health issues, removal of previous children, parenting insufficiencies, substance misuse, and learning difficulties (see Appendix 1 for full description). Domestic violence, mental health issues and substance misuse all are documented to potentially greatly influence parenting capabilities (Ward et al., 2014). Having previous children taken into care signals that previous parenting has been found to be inadequate. No pairs in the project data material shared more than four of these risk factors. As mothers are typically the primary caregiver for newborns, I focus on risks related to the mother.

Thematic analysis

Thematic analysis was used to analyse the data, a method suitable to qualitatively analyse patterns of meaning, a flexible approach suitable to finding and showing both similarities and differences (Braun & Clarke, 2022). Braun and Clarke (2022) describe six steps, (1) getting acquainted with the data material, (2) coding, (3) creating initial themes, (4) reviewing them, (5) defining and naming themes and (6) producing the report. These are not linear steps but can be switched between in a dynamic and iterative process. In my case, especially steps 2 and 4 were revisited several times.

I mapped the conclusion of the decision-makers' reasoning, and found the following five concluding reasons (full coding description in Appendix 2):

(1) Child's best interests/welfare/rights
(2) Parents providing inadequate care
(3) Assistive services are sufficient/insufficient
(4) Threshold not crossed
(5) Positive parental effort

Reasoning volume

To determine the reasoning volume, I counted the number of words in the decision-makers' reasoning, when it concerns the specific case.

Limitations

While being a valuable and trustworthy data source, the data material has some limitations. It does not show the quality of the evidence presented in the adjudication, which is likely to influence the reasoning of the decision-makers, as presentation will influence interpretation. The adjudication and my selection can only be as good as the presented evidence. Additionally, inferences between decision-maker or setting characteristics and outcome cannot be established, and it cannot identify discrimination in the child protection system as full case files are not available.

Findings

Pair A

Pair A consists of two Norwegian cases with striking similarities. Both mothers have cognitive difficulties and mental health problems. The fathers are no help – in the removal case he is unknown, and in the non-removal he leaves the family. Both mothers stay at a parent–child centre with their child.

Central in both cases are negative reports from the parent–child centre, and the decision-makers' evaluation of these. In A_NOR_nonrem, the mother's inability to provide adequate care in the centre is attributed to the stress of the situation. In A_NOR_rem, however, the decision-makers state that the reports give a realistic picture of the mother's caring abilities, which allows them to conclude that no assistive services are sufficient to alleviate the situation, adding that removal is in the best interests of the child:

> It seems both necessary and in CHILD's best interests that a care order is decided for and that she is placed in a foster home.

In A_NOR_nonrem, the decision-makers conclude that support services will be sufficient for providing an adequate care situation. The mother absconded from the centre when she was informed, she would lose custody of her child, and moved (secretly) in with friends. Due to this, the decision-makers are able to compare the situation in the centre with a situation where the mother felt safe and supported. The child was examined after the family was found and assessed to be adequately developed. The decision-makers mention this, in addition to pointing out that the mother was not provided with systematic guidance at the centre:

> Assistive services have previously not been tried in this case, and the Tribunal has under doubt come to the conclusion that assistive services will give a satisfactory care situation for CHILD.

The reasoning highlights that service implementation is possible through support from the friend family where mother and child will stay.

Pair B

Pair B contains two Norwegian cases where the mothers lost care of older children, both have mental health issues and misuse substances, and the newborns are taken into care from the hospital.

Central in both cases are reports by mental health and substance misuse treatment professionals. In B_NOR_rem, the reports focus on mother's mental health issues and difficulties in treatment. The decision-makers conclude that she is unable to provide adequate care due to her mental health and that a care order is in the child's best interests. The absence of a father is not discussed by the decision-makers.

In B_NOR_nonrem, the reports are conflicting, and the decision-makers side with those favourable to the parents, supported by their impressions of the parents in the adjudication. Although the mother has lost care for a sibling of the newborn and the father has been violent towards a previous child (and partner), the decision-makers find previous parenting experience advantageous. The decision-makers conclude their reasoning by stating that assistive services can be sufficient:

> The majority has concluded that the requirements for a care order not are fulfilled as they find that a care order is not required as satisfactory conditions for the child can be created through assistive services.

The favourable evaluation of reports should be seen in context of the parents' motivation for change and their assurance that they would not tolerate substance misuse or violence from the other. The support from professionals and the attitude of the parents come together and allow the majority of the decision-makers to decide against a care order (the case is a split decision).

Pair C

Two Finnish cases make up pair C. The parents have violent relationships, and both mothers' cognitive deficits, mental health problems and insufficient parenting abilities as well as uncooperativeness (C_FIN_rem) and varying cooperation (C_FIN_nonrem) are described. After birth of the child, both families moved to a supervised setting, in the removal case to the mothers' former foster carers.

In both cases, reports from the supervised setting are central. In C_FIN_rem, the court accepts the reports, concluding that the mother is providing inadequate care and that assistive services will be insufficient:

> … the Administrative Court considers that the upbringing-related conditions of the infant child with her parents pose a serious threat to her health and development within the meaning of section 40 of the Child Welfare Act. The child welfare support measures in open care have proven to be insufficient to implement care in the best interests of the child. This being the case, grounds for taking the child into custody exist.

They add the child's best interests to the concluding reasons.

In C_FIN_nonrem the court concludes that it is not sufficiently clarified whether the mother can care for the child with assistance – and thus rejects the care order. While this is the singular concluding reason in this case, the reasoning reveals that the mother's family network and her (varying) cooperativeness are important. The reports from the parent–child centre and medical professionals are discounted in favour of the parents, stating that the episodes were not so serious or not the parents' fault. The reasoning in C_FIN_nonrem is far longer (see Figure 1) and provides more substantial information than the removal case.

Pair D

In pair D it is the most difficult to pinpoint why the cases got different outcomes. It contains two Estonian cases where both mothers have lost care of previous children. Both have misused substances for several years and continued doing so during and after pregnancy. In both cases the child was taken into care from the hospital. Only summaries of the mother's risks are provided (in the non-removal always in the context of how she mitigated these), and almost no information on the children and their needs.

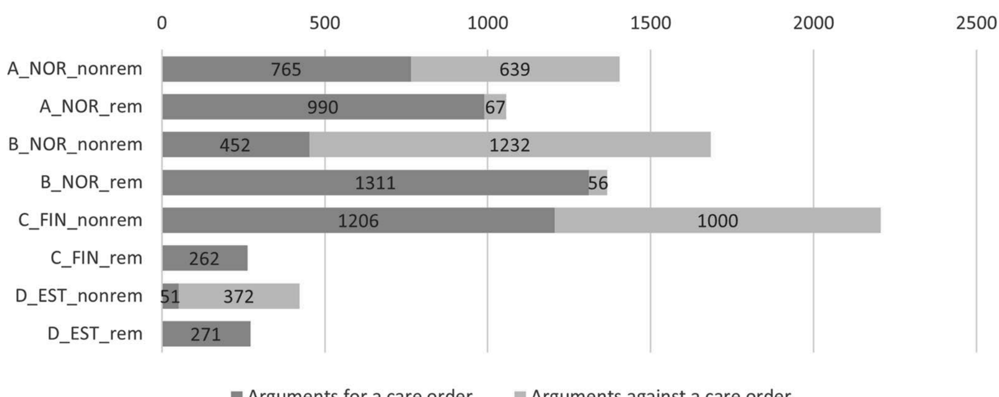


Figure 1. Reasoning volume in number of words.

In both cases, the decision-maker states that the mother has failed to provide adequate care for her child. In neither case is it detailed by the decision-maker how she has failed to provide care, but in D_EST_nonrem it is concluded that the threshold is not crossed:

> … that the mother, in various periods of her life, has had problems with herself as well as with raising the children, but the circumstances pointed out by the petitioner's representative at the court session held on xx.xx.2016 (the absence of a doctor's certificate, the change of jobs and place of residence) are not so serious that would justify the application of the most extreme family law measure

The decision-maker also concludes that to the mother's positive parental effort makes removal unnecessary, and non-removal is in the child's best interests.

The court's reasoning in the removal case contains only a concise summary of the mothers' risks, and concludes that she cannot provide adequate care:

> It emerges from the explanations of the parties to the proceedings and the case file (…) that the mother is a person with subsistence difficulties who consumes narcotic substances and alcohol. The mother does not have the desire or social skills to raise the child on her own.

In both cases the wish of the mother to raise her child is central. In D_EST_nonrem, the decision-maker describes the mother's actions to organise her life, and concludes that the mother wishes to care for her children. It is worth pointing out that the final decision in the non-removal was suspended several times, to give the mother a chance to complete her substance misuse treatment. In D_EST_rem, the mother made similar efforts to organise her life, but this is not acknowledged in the decision-makers' reasoning.

Concluding reasons

The decision-makers use more concluding reasons in removal cases (see Table 3). The most frequent concluding reasons are the child's best interests/welfare/rights, parents providing inadequate care, and the sufficiency/insufficiency of assistive services.

Reasoning volume

The decision-makers differ greatly in how much reasoning they include before concluding. Generally, the reasoning of non-removal cases consists of more words, and of arguments both in favour and

Table 3. Concluding reasons.

Concluding reasons	Present in
Child's best interests/welfare/rights	A_NOR_rem B_NOR_rem C_FIN_rem D_EST_nonrem
Parents providing inadequate care	A_NOR_rem B_NOR_rem C_FIN_rem D_EST_rem
Assistive services are sufficient/insufficient	A_NOR_nonrem B_NOR_nonresm C_FIN_rem C_FIN_nonrem
Threshold not crossed	D_EST_nonrem
Positive parental effort	D_EST_nonrem

against a care order (see Figure 1). The removal cases are far more one-sided, most of their reasoning concerns negative aspects of the case.

Discussion

The analysis of the data material shows that discretionary interpretation of the parents and their situation (e.g. risk or their potential to benefit from assistive services) led to different outcomes in these similar cases. The decision-makers in the cases conclude with five reasons, of which three are stated across most of the cases: child's best interests/welfare/rights, parents providing inadequate care, and assistive services are sufficient/insufficient. These are '*good reasons*', in line with Molander (2016), based on international and domestic law and in line with generally accepted values – making the decisions acceptable to the public (Langvatn, 2016). They are in line with the legal requirements for care orders, which for all three countries require crossing of a threshold, that the decision is in the best interests of the child, and that a care order is the last resort, not permitted when in-home services can be sufficient (Luhamaa et al., 2021). Helland found that over time, Norwegian Supreme court judgments concerning child welfare adoption cases developed towards more '*rational, well-reasoned and thorough judgments*' (Helland, 2021a, p. 633), indicating that the fulfilment of the obligation towards '*good reasons*' is under development.

In addition to the concluding reasons, I found that the reasoning preceding the concluding reasons is longer in non-removal cases, and typically contains both positive and negative aspects of the case, while removal cases focus more (singularly) on the negatives.

Connecting reasoning and reasons

Concluding reasons are preceded and should be supported by reasoning – the decision-makers' process of determining what should be done in the specific case (Molander, 2016). In the judgments they discuss, weigh, and lay out what they find to be relevant aspects, and account for their impact on the conclusion. Here I discuss the prevalence of concluding reasons and how the reasoning supports them.

The effectiveness of services is central in many of the cases, also mirrored in the concluding reasons. The content of services is discussed somewhat, but more important is the prospect of the parents benefiting from them. Ruiken (2022) found that the involvement of assistive and health services is the most prevalent protective factor that decision-makers found relevant in newborn care order cases involving maternal substance misuse. Concluding that services will be sufficient is discretionary – supporting this conclusion with reference to positive testimony from

professionals and support from private network, done in several of the analysed cases, increases the accountability as it makes the reasoning more transparent. For example, in case A_NOR_nonrem, the mother found a supportive network while absconding with the child. The decision-makers concluded that while the threshold for removal was crossed, the network that now supported her would facilitate the implementation of services to the point where it would create satisfactory conditions for the child.

Although rare among the concluding reasons, the attitude of the parents is often discussed in the reasoning. Attitude can magnify risk or risk mitigation, and willingness and capacity to change have been found to be important considerations for decision-makers (Juhasz, 2020; Løvlie & Skivenes, 2021). A positive and cooperative attitude can increase the likelihood of services being effective or mitigate risk directly, like in B_NOR_nonrem, where parents are adamant, they will not allow risky behavior in the other. If the attitude is negative, the risk can increase – like in C_FIN_rem, where the mother refuses to separate from the violent father.

While the parents' attitudes are prevalent in reasoning but not among concluding reasons, the child's best interests is the opposite: the most prevalent concluding reason but rarely substantiated by specific case aspects discussed in the reasoning. Lack of specificity can be problematic for the accountability and legitimacy of the decision, which depends on the quality and availability of reasons (Molander, 2016). In several of the analyzed cases, the child is barely mentioned, but still the decision-makers conclude that the decision is in the child's best interests. Newborns are nonverbal, but even in decisions regarding older children their view is often not included (Helland, 2021a; McEwan-Strand & Skivenes, 2020). At best, blanket statements, as quoted from A_NOR_rem in the findings section, are suboptimal reasoning; at worst they can be seen as endangering accountability.

The concluding reasons discussed above are relevant regarding risk. Risk and risk mitigation have been found to be central considerations in care order cases, often dominating the reasoning (Krutzinna & Skivenes, 2021; Ruiken, 2022). Risk assessments are difficult, highly discretionary (Berrick et al., 2017) and can vary across decision-makers and contexts (Križ & Skivenes, 2013). Two concluding reasons are directly tied to risk assessments: parents providing inadequate care (given in all four removal cases), and that the threshold is not crossed. Risk is dealt with in different ways, acknowledged but assessed as not justifying a removal like in D_EST_nonrem, or attributed to something outside of the parents' control, like in C_FIN_nonrem. In B_NOR_nonrem, the decision-makers adjudicating the case had dissenting opinions, disagreeing about the viability of risk mitigation in the case and the mother's potential to benefit from assistive services. This shows how difficult it can be to evaluate such cases, and that several outcomes can be appropriate.

There are indications that the decision-makers consider it more important to clearly show the thoroughness of their reasoning when their decisions depart from the common or obvious outcome. Few newborn care orders are decided each year, most are approved, and non-removals are the exception (see Table 1). I find that the reasoning of removals is much shorter than of non-removals (in some instances the brevity makes it difficult to follow the decision-makers reasoning, especially C_EST_rem and D_FIN_rem) while non-removals are longer and more balanced in content. This confirms a reasoning pattern where challenges to the position of the child protection agency and related services are more thoroughly argued for: Helland (2021b) in her analysis of adoption cases from England and Norway, found that the adoption petition was confirmed without much balancing or challenge of the states' arguments. Løvlie (2023) found that moderating the implications of reports from a parent–child center (like in A_NOR-nonrem and C_FIN_nonrem) may be an expression of discretion that requires further justification to be legitimate.

Implications

What stands out in the reasoning and justifications of non-removals vs. removals in the analysed pairs? The same things are evaluated, parents' attitude, the feasibility of service implementation and support from professionals and private networks, but the inferences drawn from these case

aspects differ due to discretionary judgment. Empirical research has shown the relevance of these case elements on the safety of children (Ward et al., 2014) – this is an empirical fact. How the decision-makers evaluate the presence of these case facts will mitigate risk in the specific case is subject to discretionary considerations**.** The facts of the cases are interpreted differently, and the cases have different outcomes as a result of the discretionary reasoning by the decision-makers. There may be '*noneliminable sources of variation'* in the interpretative exercise and reasoning, that this variation leads to different outcomes may be expected – and reasonable (Molander, 2016, p. 4).

Different outcomes for similar cases can lead one to question the legitimacy of the decisions – good reasoning quality can assure trust in the decision and system. There are some parts in the reasoning of the analysed cases that are not substantiated very well – for example, B_NOR_nonrem, where it is stated as a positive that the parents are experienced caregivers, but the father's history of domestic violence as well as the mother's loss of the right to care for a previous child are not problematised. It is also difficult to understand post-hoc why the decision-maker in D_EST_rem omits the positive changes that the case mother has achieved, when they are acknowledged in the non-removal. Another is the general lack of specific substantiation of child's best interests arguments. This suboptimal reasoning, also found by Dickens et al. (2019) in child protection files, makes it difficult to assess whether the process has been thorough, and the question of legitimacy is also difficult to evaluate, threatening accountability (Molander, 2016).

Despite shortcomings in the reasoning, the cases are concluded with '*good reasons*'. Previous studies have found that the need for intervention in the same case can be evaluated differently by different decision-makers (Berrick et al., 2020). Thus, it seems understandable that discretionary evaluations of complex and interpretative case facts lead to different outcomes in similar cases. Several outcomes can be appropriate, and this highlights the difficult nature of discretionary decisions. It also indicates that the cases can be similar and receive different but legitimate outcomes. The question remains if it is enough to conclude with '*good reasons*' if the reasoning is suboptimal.

Concluding remarks

The cases are justified with '*good reasons'* related to relevant accepted empirical knowledge on children and safe childhoods, applicable laws and generally accepted social principles. The decision-makers are complying with accountability demands by using publicly accessible reasons to conclude.

While the justifications are good, the reasoning has room for improvement. It is difficult to assess the equal treatment obligation in these cases when the removals are sparsely reasoned and explanations of the basis for concluding reasons are lacking. Decision-makers are given discretion based on trust that they'll make good decisions, this trust is maintained by accountability: '*individuals should be able to "account" for their judgment and decisions'* (Molander, 2016, p. 60). When the account for the reasoning is suboptimal, this may harm the legitimacy of the individual decision, and the system as a whole. It may very well be that the decision-making process was sound and fair and the decision the best one, but when critique is voiced towards a decision process, there can be reason to ask whether the decision or process was fully legitimate.

Interpretative social facts about the parents and their situation stand out as allowing non-removal. The variance in outcome and reasoning seems to be a result of discretionary evaluations of case facts, a legitimate use of the discretionary space available to the decision-makers. They are difficult decisions; in some cases several outcomes could be legitimate based on the assessments by decision-makers. These seem to be instances of reasonable disagreement, to be expected when discretion is exercised (Molander, 2016).

Further research involving a greater number of matched cases would be very beneficial for generalisability.

Structural accountability mechanisms like specifying applicable rights and standards could compel decision-makers to further justify their decisions (Molander, 2016). Molander also mentions epistemic accountability mechanisms aimed at improving the quality of decision-making. Such policy changes, stretching across countries, could increase the accountability of decision-makers, but would require considerable political will.

Acknowledgements

I am grateful for constructive feedback and comments from both my supervisors Dr Marit Skivenes and Dr Tarja Pösö. Furthermore, thanks to anonymous reviewers, and Dr Jenny Krutzinna and Dr Audun Løvlie. The paper has been presented at seminars at the University of Bergen.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation program (grant agreement no. 724460). Disclaimer: Publications from the project reflects only the authors' views and the funding agency is not responsible for any use that may be made of the information contained therein.

Notes on contributor

Barbara Ruiken is a PhD fellow at the Centre for Research on Discretion and Paternalism, department of Government at the University of Bergen, Norway. She previously worked as a research assistant, and holds an M.Phil. in Administration and Organization theory from the University of Bergen. Her PhD project 'Understanding risk and protective factors in child's best interest decision' focusses on discretion by decision-makers in high-stake child protection cases, and employs a comparative lens. Her research interests include discretionary decision-making, child protection policy implementation and the role of risk and protective factors in care order proceedings concerning newborn children.

ORCID

Barbara Ruiken http://orcid.org/0000-0002-1485-6681

References

Bartelink, C., van Yperen, T. A., Ten Berge, I. J., de Kwaadsteniet, L., & Witteman, C. L. M. (2014). Agreement on child maltreatment decisions: A nonrandomized study on the effects of structured decision-making. *Child & Youth Care Forum*, *43*(5), 639–654. https://doi.org/10.1007/s10566-014-9259-9

Berrick, J. D., Dickens, J., Pösö, T., & Skivenes, M. (2017). A cross-country comparison of child welfare systems and workers' responses to children appearing to be at risk or in need of help. *Child Abuse Review*, *26*(4), 305–319. https://doi.org/10.1002/car.2485

Berrick, J. D., Dickens, J., Pösö, T., & Skivenes, M. (2020). Are child protection workers and judges in alignment with citizens when considering interventions into a family? A cross-country study of four jurisdictions. *Children and Youth Services Review*, *108*. https://doi.org/10.1016/j.childyouth.2019.104562

Berrick, J. D., Gilbert, N., & Skivenes, M. (2023). Child protection systems across the world. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *Oxford handbook of child protection systems*. Oxford University Press.

Bjorvatn, A., Magnussen, A.-M., & Wallander, L. (2020). Law and medical practice: A comparative vignette survey of cardiologists in Norway and Denmark. *SAGE Open Medicine*, *8*, 205031212094621. https://doi.org/10.1177/2050312120946215

Braun, V., & Clarke, V. (2022). *Thematic analysis: A practical guide*. SAGE.

Burns, K., Pösö, T., & Skivenes, M. (2016). *Child welfare removals by the state: A cross-country analysis of decision-making systems*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780190459567.001.0001

Centre for Research on Discretion and Paternalism. (2019). Requirements for judgments in care order decisions in 8 countries. Centre for Research on Discretion and Paternalism. https://www.discretion.uib.no/formal-legal-requirements-for-judgments-in-care-order-decisions-in-8-countries/.

Centre for Research on Discretion and Paternalism. (2021). Description of coding results—216 care order cases concerning newborn children. Centre for Research on Discretion and Paternalism. https://discretion.uib.no/wp-content/uploads/2022/03/Newborn-Description-of-coding-results.pdf.

Dalgleish, L. I. (2003). Risks, needs and consequences. In M. C. Calder, & S. Hackett (Eds.), *Assessment in child care: Using and developing frameworks for practice* (pp. 86–99). Russel House Pub.

Danner, R. A., Bernal, M.-L. H., & American Association of Law Libraries. (1994). *Introduction to foreign legal systems*. Oceana Publications.

Dickens, J., Masson, J., Garside, L., Young, J., & Bader, K. (2019). Courts, care proceedings and outcomes uncertainty: The challenges of achieving and assessing "good outcomes" for children after child protection proceedings. *Child & Family Social Work*, *24*(4), 574–581. https://doi.org/10.1111/cfs.12638

Falconer, R., & Shardlow, S. M. (2018). Comparing child protection decision-making in England and Finland: Supervised or supported judgement? *Journal of Social Work Practice*, *32*(2), 111–124. https://doi.org/10.1080/02650533.2018.1438996

Fluke, J. D., López, M. L., Benbenishty, R., Knorth, E. J., & Baumann, D. J. (eds.). (2020). Decision-Making and judgment in child welfare and protection: Theory. In *Research, and practice* (1st ed.). Oxford University Press. https://doi.org/10.1093/oso/9780190059538.001.0001

Fylkesnemnda for barnevern og sosiale saker. (2023). Årsrapport Årsregnskap 2022. Barneverns- og helsenemnda. https://www.bvhn.no/aarsrapporter.6485272-568824.html.

Galligan, D. J. (1987). *Discretionary powers: A legal study of official discretion*. Clarendon Press.

Gilbert, N., Parton, N., & Skivenes, M. (2011). Changing patterns of response and emerging orientations. In N. Gilbert, N. Parton, & M. Skivenes (Eds.), *Child protection systems: International trends and orientations* (1st ed., pp. 243–257). Oxford University Press.

Helland, H. S. (2021). In the best interest of the child? Justifying decisions on adoption from care in the Norwegian supreme court. *The International Journal of Children's Rights*, *29*(3), 609–639. https://doi.org/10.1163/15718182-29030004

Helland, H. S. (2021). Reasoning between rules and discretion: A comparative study of the normative platform for best interest decision-making on adoption in England and Norway. *International Journal of Law, Policy and the Family*, *35*(1), ebab036. https://doi.org/10.1093/lawfam/ebab036

Höjer, I., & Pösö, T. (In press). Child protection in Finland and Sweden. In J. D. Berrick, N. Gilbert, & M. Skivenes (Eds.), *International Handbook of Child Protection Systems*. Oxford University Press.

Juhasz, I. B. (2020). Child welfare and future assessments – An analysis of discretionary decision-making in newborn removals in Norway. *Children and Youth Services Review*, *116*), https://doi.org/10.1016/j.childyouth.2020.105137

Keddell, E. (2023). On decision variability in child protection: Respect, interactive universalism and ethics of care. *Ethics and Social Welfare*, *17*(0), 4–19. https://doi.org/10.1080/17496535.2022.2073381

Eesti Kohtud. (n.d.). The Estonian court system | Eesti Kohtud. Retrieved May 5, 2023, from https://www.kohus.ee/en/estonian-courts/estonian-court-system.

Križ, K., & Skivenes, M. (2013). Systemic differences in views on risk: A comparative case vignette study of risk assessment in England, Norway and the United States (California). *Children and Youth Services Review*, *35*(11), 1862–1870. https://doi.org/10.1016/j.childyouth.2013.09.001

Krutzinna, J., & Skivenes, M. (2021). Judging parental competence: A cross-country analysis of judicial decision makers' written assessment of mothers' parenting capacities in newborn removal cases. *Child & Family Social Work*, *26*(11), 50–60. https://doi.org/10.1111/cfs.12788

Langvatn, S. A. (2016). Should international courts Use public reason? *Ethics & International Affairs*, *30*(3), 355–377. https://doi.org/10.1017/S0892679416000265

Larsson, B., & Jacobsson, B. (2013). Discretion in the "backyard of Law": case handling of debt relief in Sweden. *Professions and Professionalism*, *3*(1), Article 1. https://doi.org/10.7577/pp.438

Lov om barnevern (Barnevernsloven). (2021). https://lovdata.no/dokument/NL/lov/1992-07-17-100.

Løvlie, A. G. (2023). Evidence in Norwegian child protection interventions – analysing cases of familial violence. *Child & Family Social Work*, *28*(1), 236–247. https://doi.org/10.1111/cfs.12956

Løvlie, A. G., & Skivenes, M. (2021). Justifying interventions in Norwegian child protection. *Nordic Journal on Law and Society*, *4*), https://doi.org/10.36368/njolas.v4i02.178

Luhamaa, K., McEwan-Strand, A., Ruiken, B., Skivenes, M., & Wingens, F. (2021). Services and support for mothers and newborn babies in vulnerable situations: A study of eight European jurisdictions. *Children and Youth Services Review*, *120*(1), 105762. https://doi.org/10.1016/j.childyouth.2020.105762

Magruder, J., & Berrick, J. D. (2023). A longitudinal investigation of infants and out-of-home care. *Journal of Public Child Welfare*, *17*(0), 390–407. https://doi.org/10.1080/15548732.2022.2036294

McEwan-Strand, A., & Skivenes, M. (2020). Children's capacities and role in matters of great significance for them. *International Journal of Children's Rights*, *28*(3), 632–665. https://doi.org/10.1163/15718182-02803006

Molander, A. (2016). *Discretion in the welfare state: Social rights and professional judgment*. Routledge.

Pösö, T., & Huhtanen, R. (2016). Removals of children in Finland: A mix of voluntary and involuntary decisions. In K. Burns, T. Pösö, & M. Skivenes (Eds.), *Child welfare removals by the state: A cross-country analysis of decision-making systems*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780190459567.003.0002

Raaphorst, N. J. (2021). Administrative justice in street-level decision making: Equal treatment and responsiveness. In J. Tomlinson, R. Thomas, M. Hertogh, & R. Kirkham (Eds.), *The Oxford handbook of administrative justice* (pp. 1–30). Oxford University Press. https://hdl.handle.net/1887/139073.

Rothstein, B. (1998). *Just institutions matter: The moral and political logic of the universal welfare state*. Cambridge University Press. https://doi.org/10.1017/CBO9780511598449

Ruiken, B. (2022). Analyzing decision-maker's justifications of care orders for newborn children: Equal and individualized treatment. *Journal of Public Child Welfare*, *0*(0), 1–24. https://doi.org/10.1080/15548732.2022.2158990

Skivenes, M., & Tonheim, M. (2017). Deliberative decision-making on the Norwegian county social welfare board: The experiences of expert and Lay members. *Journal of Public Child Welfare*, *11*(1), 108–132. https://doi.org/10.1080/15548732.2016.1242447

Statistics Estonia. (2022, December 5). RV021: POPULATION, 1 JANUARY by Sex, Year and Age group. Statistical Database. Statistics Estonia. https://andmed.stat.ee/en/stat/rahvastik__rahvastikunaitajad-ja-koosseis__rahvaarv-ja-rahvastiku-koosseis/RV021/table/tableViewLayout2.

van den Bogaard, R.-M., Horta, A. C., Van Doren, W., Desmet, E., & Valcke, A. (2022). Procedural (in)justice for EU citizens moving to Belgium: An inquiry into municipal registration practices. *Citizenship Studies*, *26*, 995–1010. https://doi.org/10.1080/13621025.2022.2137944

Wallander, L., & Molander, A. (2014). Disentangling professional discretion: A conceptual and methodological approach. *Professions and Professionalism*, *4*(3), 1–19. https://doi.org/10.7577/pp.808

Ward, H., Brown, R., & Hyde-Dryden, G. (2014). *Assessing parental capacity to change when children are on the edge of care: An overview of current research evidence* (p. 193). Department for Education.

Westerman, P. C. (2015). The uneasy marriage between Law and Equality. *Laws*, *4*(1), 82–90. https://doi.org/10.3390/laws4010082

Appendix 1

This appendix consists of two parts. The first part describes the project data material of 216 cases, and the coding process of the risk factors that were used to select the cases for the paper data material. The paper data material was selected from the project data material, this process is described in the second part of the appendix.

Part 1: The project data material

The data material is part of the DISCRETION and ACCEPTABILITY projects.

A description of data collection, translation, and ethics approvals is available here: https://www.discretion.uib.no/projects/supplementary-documentation/#1552297109931-cf15569f-4fb9

Table A1. Overview over the data material the pairs were selected from.

	Year(s)	All judgments or publicly available	Whole country / large area
Austria	2016–2017	All judgments	Large area
England	2015–2017	Publicly available	Whole country
Estonia	2015–2017	All judgments	Whole country
Finland	2016	All judgments	Whole country
Germany	2015–2017	All judgments	Large area
Ireland	2012–2018	Publicly available	Whole country
Norway	2016	All judgments	Whole country
Spain	2016–2017	All judgments	Large area

Estonian care order judgments are around 6–10 pages.

Finnish care order judgments are around 7–9 pages per judgment.

Norwegian care order judgments can range from 8 to 23 pages, but around 12 pages is typical.

Mapping of risk factors in the project data material

The selection criteria were coded for the whole project material in a separate process prior to the coding for the paper. For an overview over the results of this process, please see https://www.discretion.uib.no/projects/supplementary-documentation/#1552297109931-cf15569f-4fb9. The judgments were coded and reliability tested by a team of 9 researchers and research assistants in a collaborative process led by the PI of the projects, between September 2018 and July 2019. In general, the coding process consisted of 1 person reading the judgement and mapping the

content with values according to the pre-set coding description. A second coder then read the same judgements and made amendments to the coding where they deemed fit.

At least one person coded, and at least one person (other than the first coder) reliability tested the coding. Due to additional codes and large quantities of codes the workload of coding and reliability testing was split between several people. No one coded and reliability tested the same codes for the same cases.

When coders discovered confusions over the coding description or discrepancies in the coding, discussions were had in the team and the coding description updated. When necessary, the coded material was then revisited and amended. Logs were kept.

The entire judgments from Estonia and Finland were included for coding of these codes, for Norway it was the parts called 'Saken gjelder/Sakens bakgrunn' and 'Fylkesnemndas merknader/vurderinger'.

Part 2: The paper data material.

Table A2 shows the codes from the project data material coding, which were used as selection criteria for the paper data material.

Table A2. Overview over codes used for selection of paper data material.

Name	Description
Country	The country the case comes from.
Year	The year in which the case was decided.
Substance misuse	The mother is described as currently or previously misusing illegal drugs, alcohol and/or legal drugs. This does not have to result in addiction. Moderate alcohol use is not included unless stated as a risk. Alcohol use resulting in aggression/loss of control is included.
Perpetrator of domestic violence	The mother is reported to commit domestic violence towards the child, siblings or other parent. Includes suspicious injuries to other children in the home, and sexual abuse allegations.
Mental health issues	Cases where mother has clear cognitive limitations. This can range from severe learning difficulties to reduced cognitive function. It is often referred to WAIS tests, other IQ and ability tests when these limitations are to be investigated and the score is below normal range.
Having previous children taken into care	Previous children of the mother were placed in care, or mother has a clear history of previous child welfare interventions regarding her children.
Parenting insufficiencies	Includes general parenting insufficiencies: this is used as description of the overall assessment of the mothers ability to provide care which can include an unstable lifestyle, lack of capacity to interpret situations, poor interaction, poor daily functions in general, poor emotional connection, immaturity, anxiety and conflict, lack of willingness to change, lacking ability to see the child's needs, lack of ability to shield the child from adult issues, irrational decision making, personality traits etc. Can also include immature parents. Includes chaotic lifestyle: Family household lacks stability, mother has frequently changing partners, mother cannot hold down a job, unstable relationship between parents, mother struggles with bureaucratic tasks or ensure regular school attendance / doctor's appointments of children. Includes housing issues: Overcrowded housing, homelessness, messy housing, and housing unsuitable for children. Includes financial issues: Poverty, financial hardship situation. Does not include if the mother has a financial guardian (Norwegian: økonomisk verge).
Learning difficulties	Cases where mother has a clearly defined mental health issue. Includes psychiatric disorders like anxiety, depression, schizophrenia and other personality disorders. Includes also self-harm and suicidality. Some diagnoses are more temporary and others more permanent. The key is that mental health problems are included as a risk factor in the decision-makers assessment. This means also that decision-makers express concern regarding mother's mental health.

Case sorting and selection process for paper data material.

Step 1

The selection and sorting process started with the project data material of 216 cases from eight European countries. All of these cases shared the following characteristics: decided between 2012 and 2018, concern a newborn and their birth parents, decided in the first instance decision-making body, and the child was removed from their parent's care within 30 days of birth or after a stay in a supervised parent-child facility.

An excel sheet with these 216 cases and six relevant maternal risk factors as variables (perpetration of domestic violence, mental health issues, removal of previous children, parenting insufficiencies, substance misuse, and learning difficulties) were added to the program fsQCA. The risk factors were mapped in a thorough and documented coding process, and are established in the literature to be associated with future harm.

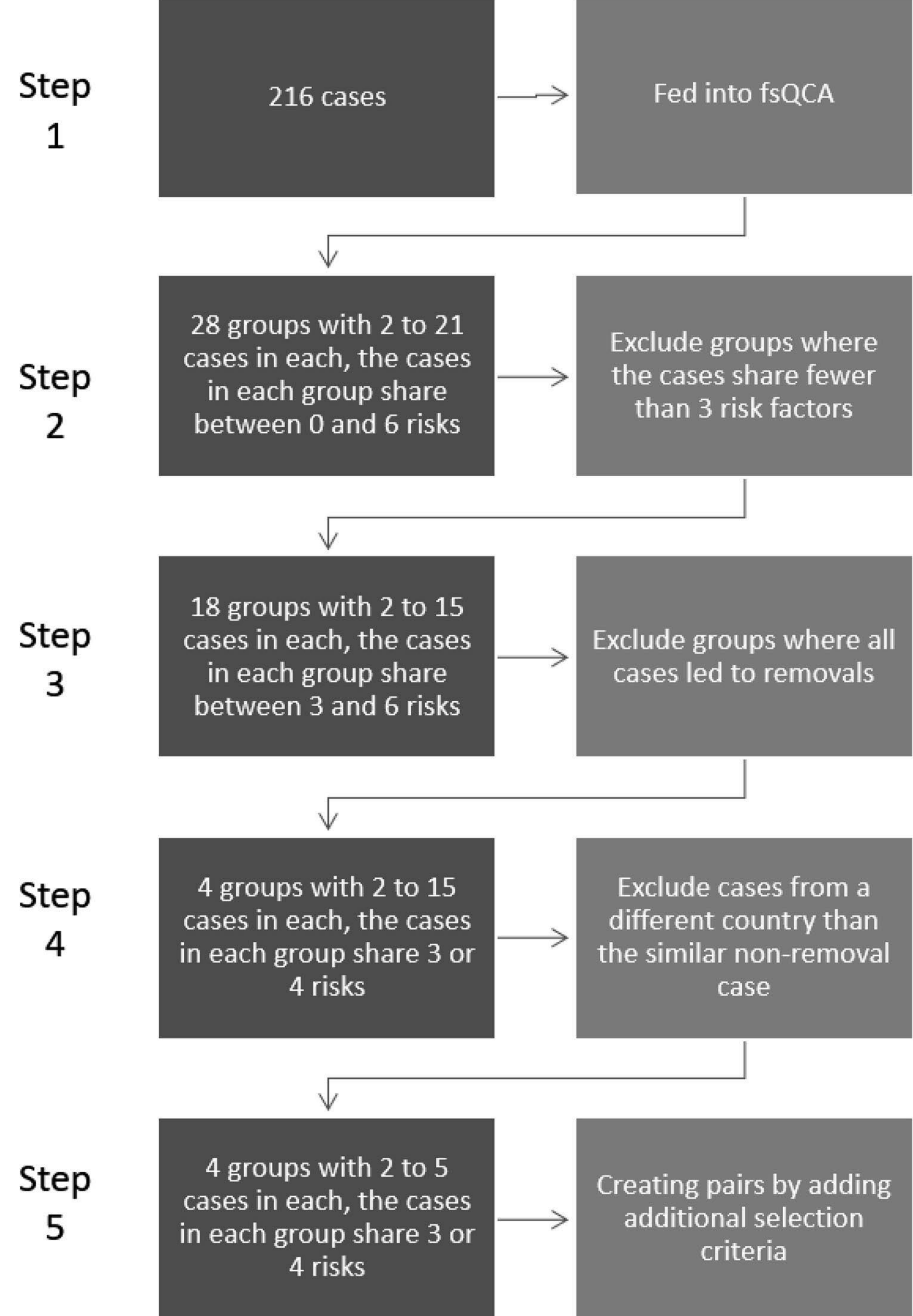


Figure A1. Case selection process. Blue boxes are steps, green boxes are actions.

The program sorted the cases into groups based on which of the variables (maternal risk factors) they shared. The groups were mutually exclusive, meaning that any case was sorted into only one group. The groups were determined by the maximum number of shared variables.

Step 2

Step 2 started with the result of step 1: 28 groups with two to 21 cases in each, that shared between zero and six risk factors. I then excluded from the selection all groups where the cases shared fewer than three risk factors, as these were considered not similar enough for a valuable analysis.

Excluded in this step: 10 groups where cases shared less than three risk factors.

Step 3

Step 3 started with the result of step 2: 18 groups, which contained between two and 15 cases each. The cases in each group shared between three and six risks. I then excluded the groups where all cases led to removals, as the aim of the analysis was to compare cases with different outcomes.

Excluded in this step: 14 groups where all cases led to removals.

Step 4

Step 4 started with the four groups that were the result of step 3. They contained between two and 15, which shared three or four maternal risk factors. So far, the groups contained cases from different countries. Three of the groups contained only one case that ended in a non-removal. All cases from a different country than the non-removal were excluded from the groups.

One group contained two non-removals (one from Finland and one from Germany). There were no removals from Germany in this group, so the German non-removal was excluded.

Excluded in this step: 29 removal cases from a different country than the non-removal, one non-removal case from a different country than the removals.

Step 5

Step 5 started with the result of step 4: four groups with two to five cases in each.

The groups respectively called pair A and pair B in the paper consisted of only one removal case and one non-removal, and were thus established as pairs. All of these cases were from 2016.

The group called pair C contained one non-removal and two removal cases, all from Finland from 2016. One of the removal cases contained additional important risk factors that the non-removal did not share, and this removal case was thus excluded. Thus, pair C was established.

The group called pair D in the paper contained one non-removal and four removal cases from Estonia. The non-removal and one of the removals were decided in 2016 and chosen to establish pair D. The three remaining cases were decided in 2015, and thus excluded.

Excluded in this step: one Finnish removal case that contained additional risk factors, and three Estonian cases from 2015.

Comment on the excluded countries

The included pairs consist of cases from Estonia, Norway, and Finland. There is nothing to my knowledge that suggests that the other five countries are better at avoiding situations in which similar cases get different treatment. All cases in the Austrian sample ended in removals, so there were no cases to match. Among the non-removals from Ireland, England, and Spain, none reported three or more of the maternal risk factors selected for sorting and selection of the paper data material. The remaining two German non-removals reported three of the risks, but one did not find a match and for the last the data material was incomplete, excluding it from analysis.

Appendix 2 – coding description

This appendix describes the coding for the paper 'A Tale of Two Cases – Investigating Reasoning in Similar Cases with Different Outcomes'

Substantive coding

What is coded

The following parts of the judgments were coded:

- Estonia: 'Reasons for the order'
- Finland: 'Reasoning of the court'
- Norway: 'Fylkesnemndas merknader/vurderinger' (The County Social Welfare Boards' comments/considerations) – in the case where the decision-makers' split into a majority and minority, only the majority's part was coded.

The limitation was done to only include the arguments of the decision-makers, and not the arguments of biological parents or child protection services/social workers. The length of the reasoning of the court described in the paper refers to these parts, and includes the parts of the reasoning where applicable law is referenced, and the conclusion of the decision-makers. It has to be noted that the Finnish judgments are formatted with a substantial indent that leaves less space on the page for text than in the other judgments.

Concluding reasons in the justifications

Coding the justifications – the direct justification for why the outcome (care order or no care order) is required. This means that the decision-makers' summary of the situation is not included, only the reasons they mention in direct relation to the need or non-need for a care order. A lot of the contextual risks or protective aspects will be missing here. After mapping these, I have sorted them into the following intuitive/inductive descriptive categories:

- Assistive services sufficient/insufficient: here the argument is that assistive services have not been tried in the case yet, and/or the assessment is that services will be sufficient to create a satisfactory care situation for the child with her birth parents. Or, the argument centers around the services that have been tried or are available, and the assessment of the decision-makers is that these were or would be insufficient to create a satisfactory care situation for the child with her biological parents.
- Not providing adequate care: this argument includes statements that the parent(s) are unable or unwilling to provide adequate care for the child, that they de facto not are providing care, or that the home conditions are unsatisfactory.
- Child's best interests / welfare / rights: the outcome is required to ensure the child's best interests, or well-being, or rights. The argument is used to justify both removals, and a non-removal.
- Threshold not crossed: the decision-makers argue that the risk of harm is not so high as to justify a removal of the child.
- Positive parental effort: arguments centering on the parent trying to be a good parent and wishing to care for the child.

Reasoning volume

The aim of this coding is to find out how much case-specific reasoning is included in the decision-makers' parts. Anything related to what has happened in the case, or what can happen, will be included. Legal references not directly tied to the case will be excluded (meaning that when they present law and case law, without specifying how this relates to the case at hand, it will be excluded).

(1) First, I coded the reasoning as described above
(2) Then, from what I coded I coded arguments for a care order (negative events, aspects of the case), and what should count against (positive events and aspects of the case). Only focusing on case history/future, not including legal references, or the decision to go for a care order or not or instructions for what happens after the decision. Not coded is reasoning around where the child should be placed, or if there should be contact arrangements.
(3) Then I exported the nodes, and let Word count the content of the categories.

Graphic design: Communication Division, UiB / Print: Skipnes Kommunikasjon AS

uib.no

ISBN: 9788230841341 (print)
9788230848135 (PDF)