Custody Mediation in Norwegian Courts: A Conglomeration of Roles and Processes

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Contents

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Abstract In this article, I critically examine the judicial settlement scheme in custody and contact cases in Norway. The scheme is called mediation by the legislator, but it takes place as an integrated part of preparatory hearings in district courts. In most cases, an expert, typically a psychologist, is appointed to assist the judge. The role of these third parties varies but often they co-mediate. However, the expert can also be appointed as a mentor to the parents if they enter into interim settlements. If the case is not settled in the preparatory phase, the expert may provide the court with an evaluation of the quality of care each parent has to offer and the best interests of the children. The judge, on the other hand, is meant to preside over the main hearing should the settlement efforts not succeed and must, therefore, not say or do anything that is liable to impair his or her impartiality. The judge and the expert often use fairly evaluative techniques when promoting settlement. This so-called mediation scheme and the procedural rules and practices connected with it have been criticised, in particular, for the use of a single expert in several roles and for the unpredictable process that ensues from preparatory hearings with multiple purposes. A main concern is that there is an undue settlement pressure. At the end of this article, I propose amendments of regulation and practice.

1 Introduction

It is an undisputed fact that escalated conflict between parents is stressful and potentially harmful for the health and wellbeing of children. Therefore, it is paramount that there are systems in place to ensure that disputes concerning custody and contact are handled in a manner that provides sound and durable arrangements that are in line with the best interests of the children. Disputes need to be handled at an early stage and in a manner that does not escalate the conflict between the parents.

In Norway, all separating spouses and co-habitants with children under the age of 16, and parents intending to instigate legal proceedings concerning custody or contact are required to attend a one-hour mediation session. Additionally, they may be offered up to six hours of voluntary mediation in addition to this (The Children Act section 54).[1] This mediation scheme is further described by Anna Nylund in another article in this volume (Nylund 2018). However, although most parents manage to reach a custody arrangement out of court, a considerable number of custody disputes are brought to court. In 2014 and 2015, cases concerning custody

[1]Mediation for separating spouses and cohabitants is prescribed in The Marriage Act of 4 July 1991 no 47 Section 26, cf. Act relating to Children and Parents [The Children Act] of 8 April 1981 no 7 section 51 and the Family Allowance Act of 8 March 2002 no 4 Section 9, fifth paragraph. As regards the requirement for mediation before the commencement of legal proceedings, see The Children Act Sections 51 and 56 second paragraph.

and contact amounted to 16 per cent of all civil disputes in the district courts (The Norwegian Courts Administration 2014, 2015).

In 2004, amendments were made to The Children Act with particular focus on the preparatory stages of the trial in parental disputes concerning custody and contact rights. A main goal was to facilitate settlement, and a specific dispute resolution scheme was introduced where the presiding judge mediates, most often together with a psychologist (The Children Act sections 59 and 61 and Ot. prp. no. 29 2002–2003).

This judicial settlement scheme is much debated. On the one hand, the benefits of amicable settlement compared to a distressing trial are widely recognised. In a trial, the parents inevitably escalate the conflict by emphasising their own qualities as parents, while highlighting the other's shortcomings.

On the other hand, several concerns are raised: Firstly, some are worried that the settlement efforts lead to settlements that are not in the best interests of the children and that settlement is reached in cases that should not be mediated, due to specific concerns regarding substance abuse, physical and psychological abuse, or the mental health or capabilities of one or both parents (Breivik and Mevik 2012; Nylund 2012; Haugli and Nordhelle 2014). Secondly, the structure, regulation, and practice of the judicial settlement scheme is criticised, with particular regard to the fact that the so-called mediation is an integral part of the preparatory hearings of the trial, which are led by the presiding judge.

The use of the term 'mediation' is debatable where the third party is also the presiding judge. In Norway, the term mediation is used for this process in all sources and is also used for judicial settlement efforts, in general, in The Dispute act section 8-2. This use of terminology is not discussed in the preparatory works or official guidelines. From a mediation-theory point of view, is important to distinguish between mediation, where the third party does not have the power to adjudicate, and settlement efforts where the third party will determine the outcome should the parties not reach a full settlement. This lack of distinction between the adjudicator and mediator is one of the reasons why there have been some concerns regarding the settlement efforts in preparatory hearings. The fact that the third party is also the presiding judge may place substantial pressure on the parties to settle in these cases.

This issue is amplified by the fact that the expert who aids the judge in the preparatory hearings—and who is often given an active role as a co-mediator, or sometimes even as the sole mediator—frequently has other roles in the same case. Most importantly, if the case is not settled, the expert may serve as a court appointed expert for the purposes of the main hearing (expert evaluator), providing the court with an expert opinion on the quality of care each parent has to offer and the best interests of the children. It is argued that this combination of roles on part of the judge and the expert places too much pressure on the parties to settle (Nordhelle 2011; Nylund 2011, 2012; Breivik and Mevik 2012).

In terms of terminology, choosing another term than mediation to describe the settlement efforts of the presiding judge and the expert is a two-edged sword. For those who are well versed in dispute resolution terminology and theory, it clarifies the type of dispute resolution process.

On the other hand, using another term other than mediation to describe the process can serve as a wild-card to allow processes and techniques that are at odds with important mediation principles. In my experience, it is sometimes argued by experts or judges that it is appropriate for the experts to evaluate extensively during the judicial settlement efforts because they are *not mediating*.

Although judicial settlement efforts are not mediation in the pure sense, the process bears more resemblances to mediation than adjudication. Both are assisted negotiation processes, and in both processes the decision of whether to settle lies with the parties. In both processes there is typically a lack of the legal safeguards that govern adjudication, such as formal presentation of evidence, the adversarial principle, the right of appeal and so forth. This is particularly the case when the settlement efforts occur at the preparatory stages of the trial, which is the case in custody disputes in Norway. Therefore, when discussing the contents of the dispute resolution process, I find it useful and appropriate to use the term 'mediation', and the judge and expert will sometimes be referred to as 'mediators'. When referring to the institute as such, I will, however, use the term 'judicial settlement efforts' or settlement efforts.

In my PhD thesis I analysed and critically reviewed the legal framework for the role of the mediator in the mediation schemes currently in place in Norwegian courts (Bernt 2011). One of these is the mediation scheme for custody cases. I particularly focused on the judge as a mediator. I have explored the roles of the *expert* further in the extensive article *Sakkyndige i barnelovssaker for domstolene: roller og rettssikkerhet* (Experts in Court Disputes Concerning Custody and Contact Rights: Roles and The Rule of Law) (Bernt 2014). In this article, I will present some of my main points and conclusions regarding the judicial settlement scheme in the two mentioned publications with some updates.

The article combines legal analysis with a critical evaluation of the rules and practices based on a rule of law perspective, and conflict and mediation theory. I have not conducted systematic empirical studies of mediation practices. However, I have obtained experience and increased knowledge of the practices and issues of the mediation scheme through observations of mediations, combined with informal conversations with judges and experts as well as plenary discussions in workshops and working groups where both professions have been represented.

Firstly, the concerns and considerations motivating the amendments to The Children Act in 2004 will be presented (Sect. 2), followed by an overview of the procedural rules for custody cases, with particular focus on those rules affecting the judicial settlement efforts (Sect. 3). Then, the different roles of the expert in such cases will be described (Sect. 4). I will then proceed to take a closer look at the role of the judge and the expert in the settlement efforts in cases concerning custody and contact. I start by discussing why evaluation is so common in such cases (Sect. 5), and some concerns regarding an evaluative mediator role in these cases will be highlighted (Sect. 6), followed by a question raised by some lawyers and psychologists when argued for a facilitative mediator role: What is the point of having judges, psychologists and other experts as mediators if they are not supposed to offer their opinions and advice (Sect. 7)? Secondly, how can a good mediation process

that provides durable outcomes that are in the best interests of the children be achieved without evaluation (Sect. 8)? I will then proceed to look at the interaction and cooperation between the judge and the expert in the mediation process and highlight some potentially problematic aspects (Sect. 9). I will conclude on the issue of legislative amendment (Sect. 10).

2 Legislative Considerations: The Main Objectives Behind the Current Regulation

In 2004, a number of amendments to the procedural rules for parental court disputes regarding custody and contact entered into force. The main purpose was to design the court proceedings in a manner that would enable processes and outcomes that would serve the best interests of the children better. The amendments included an increased focus on amicable settlement where appropriate, *inter alia* a duty for the court to consider and, if appropriate, facilitate settlement efforts, and the introduction of a specific dispute resolution scheme in preparatory hearings, called 'mediation'. Furthermore, the Ministry wished to enable an increased and more varied use of experts (such as psychologists) in these cases (Ot. prp. no. 29 2002–2003). Traditionally experts were appointed in certain cases to conduct investigations and provide the court with an evaluation of the quality of care each parent had to offer and the best interests of the children, but such evaluation is costly and often leads to delay (Ot. prp. no. 29 2002–2003). The Ministry proposed that experts should also be assigned other tasks, such as aiding the judge in the preparatory stages of the trial, for instance, in settlement efforts. The purpose of the changes was to achieve good quality and durable settlements where appropriate, and to strive for a quick and effective process in the best interests of the children (Ot. prp. no. 29 2002–2003).

3 Overview of the Procedural Rules for Custody and Contact Cases

After the amendments in 2004, the Children Act section 59 states that the judge must handle the case as efficiently as possible. In the preparatory works it is however emphasised that a quick handling of the case must not hinder the use of more time where needed. For instance, the parents may agree to an interim settlement after the first preparatory hearing, to be renegotiated by the parents in another preparatory hearing, sometimes even followed by another interim settlement, with a subsequent preparatory hearing thereafter. Furthermore, in some cases, there is a need to appoint an expert to conduct investigations of the quality of care each parents have to offer, and the needs of the child (See: The Children Act section 61, first subsection, no. 3) (Ot. prp. no. 29 2002–2003). When the interest of a speedy process is in conflict with

the best interests of the children, the best interests of the children must always prevail (Holgersen 2008).

In section 59, subsection 2, the judge is instructed, on every stage of the process to "consider, whether an amicable settlement between the parties is possible, and to facilitate this". This is primarily a duty to *consider* whether amicable settlement is possible, but if this seems to be the case, a duty to *facilitate* settlement follows (Backer 2008). Although it is not stated in section 59, the judge must not only consider the possibility of the parties reaching an amicable settlement, but also whether settlement efforts are appropriate, considering the circumstances of the case and the characteristics of the parties. If one of the parties is unable to take care of his or her interests in such a process, for instance, because of his or her mental capabilities or a history of physical and psychological abuse from the other party, settlement should not be attempted. The same applies where there is a considerable risk that the settlement efforts will result in a settlement that is not in the best interests of the children, for instance, where there is information in the case suggesting considerable concerns regarding the quality of care one of the parents has to offer and which have not yet been investigated.[2] To increase the awareness that amicable settlement is not appropriate in all cases, section 61 no. 1 was amended in 2013, adding that the case must be suitable for 'mediation' (Prop. 85 L 2012–2013 and Act 21 June 2013 no. 62 (in force 1 January 2014)). However, even before this amendment, a restrictive interpretation of section 59 subsection two was necessitated by the fundamental rights of access to justice and fair trial and the overriding principle of the best interests of the children (The Children Act section 48, c.f. the Dispute Act 17 June 2005 no. 90 section 1-1, The European Convention of Human Rights article 6 no. 1 and The International Covenant on Civil and Political Rights article 14 no. 1).

In The Children Act 61, procedural rules for custody and contact cases are given, supplementing the general rules of procedure in the Courts of Justice Act and the Dispute Act. Section 61 no. 1 states that the court, as a main rule, shall summon the parties to one or several preparatory hearings to, among other things, clarify the issues of dispute between the parties, discuss the further handling of the case, and possibly mediate. Furthermore, different possible tasks for court appointed experts are described: The court may appoint an expert to partake in the preparatory hearings, and may also ask the expert to talk to the parents and/or the children before or in-between preparatory hearings, as well as conduct certain investigations to clarify the facts of the case, unless the parents object to it. The parties must be consulted on which tasks should be assigned to the expert.

No. 3 states that, when needed, the court should appoint an expert to conduct a traditional *evaluation* on one or several of the issues of the case. The expert's report will be, in most cases, given considerable weight as evidence and will typically be

[2]This does not mean that mediation or similar processes cannot be used in cases where there are concerns regarding the quality of care one of the parents has to offer. The point is that settlement must not be reached where the parents do not take these concerns seriously or where there is such power imbalance between the parties that the parent whose quality of care is questioned may become the custodial parent.

the most important piece of evidence in the case (The Ministry of Children and Equality 2015; Koch 2000).

Such reports may be prepared and presented prior to a preparatory hearing and used as a basis for settlement efforts in the case—or for deciding that such a process will not be appropriate. However, to my knowledge, investigations pursuant to section 61 no. 3 at such an early stage are rare, since they are time consuming and very costly. Unless settlement is considered out of the question or unsuitable, or there is considerable doubt about the suitability of settlement, investigations pursuant to section 61 no. 3 will typically not be conducted before the settlement avenue has been explored. Instead, more limited and less formal investigations will sometimes be conducted, pursuant to section 61 no. 1.

Section 61 no. 4 states that the court may talk to (hear) the children, c.f. The Children Act section 31, and may appoint an expert or another suitable person to assist, or to complete this task alone. In practice, it varies how this is done. Some judges prefer to delegate the hearing of the children to the court appointed expert, cf. 61 nos. 1 and 3. Others prefer to talk to the children together with the expert. Some judges talk to the children alone. The new national guidelines for custody cases have no recommendations or discussion about the different alternatives (The Norwegian Courts' Administration 2016).

The option of entering into interim settlements is a core element of the current procedure in custody and contact cases. The Children Act section 61 no. 7 states that the court may give the parties the opportunity to enter into interim settlements for a set period of time. The court may appoint an expert or another suitable person to serve as a mentor to the parties in the interim period.

The purpose of this option is to enable amicable settlements in cases with a high level of conflict and insecurity on part of the parents as to how the arrangement will work. It is based on the assumption that agreeing to an interim settlement will be considered less drastic by the parents than a traditional settlement, which makes settlement more likely. Furthermore, a trial period may be useful to evaluate what arrangement works best for children and parents.

The option of interim settlements was tested during pilot schemes in some courts, with good results. The option of having a mentor is seen as an incentive to reach interim settlements, and may improve the likelihood of a permanent settlement (NOU 1998: 17 with endorsement in Ot. prp. no. 29 2002–2003). A party is not bound by the agreed trial period and may, at any time, demand that the interim settlement ceases, with the consequence that the court proceedings continue towards a main hearing (Backer 2008; Ot. prp. no. 29 2002–2003).

As mentioned, the attempts to facilitate amicable settlement take place as an integrated part of the preparatory hearings of the trial, which are led by the presiding judge. It is stated in the preparatory works that as a main rule, the judge should conduct settlement efforts in a manner that is not liable to impair his or her impartiality as a presiding judge. Thus, the judge who facilitates settlement is, as a main rule, supposed to adjudicate the dispute in case of none or only partial settlement (Ot. prp. no. 29 2002–2003). It is emphasised that the issue of the judge's impartiality must be determined in each case and that in some cases the judge may

have to recuse himself or herself from the case after the settlement efforts (Ot. prp. no. 29 2002–2003).

The question of whether the role of 'mediator' and/or mentor can or should be combined with the role of expert evaluator pursuant to The Children Act section 61 no. 3 is debated. The Dispute Act section 25-3, subsection three states that the same rules of impartiality and recusal apply for experts as for judges. However, it is debated whether the roles of 'mediator' and mentor constitute—or should constitute—grounds for recusal as such. Some courts and judges normally use the same expert in all roles, some determine this on a case-by-case basis, with regard to whether one or both parties have raised the issue of appointing a new expert, and some always change experts. Some experts say that they find the combination of roles problematic, and some even have a conveniently fully booked schedule when the court asks them to do the expert evaluation.

The issue of whether there should be a new presiding judge for the purposes of the main hearing is also debated. Some judges preside over the main hearing as a main rule, unless there are special circumstances that require a new judge, others recuse themselves in some cases, whereas others do so in every case they have mediated in. There has been a shift in opinions, where an increasing number of judges believe that another judge should preside over the main hearing (The Norwegian Courts' Administration 2016).

The question of whether to change judges, of course, also depends on the process. If the judge has taken part in caucuses (separate meetings) with the parties, he or she cannot preside over the main hearing (The Dispute Act section 8-2 (1) and The Children Act section 59). If the judge has proposed settlements, given the parties advice or in other ways voiced opinions that are liable to impair his or her impartiality, he or she must also recuse himself or herself (The Dispute Act section 8-2 (1)). Another issue to consider is the nature of the communication between the expert and the judge out of the earshot of the parties in course of the process. This will be described and discussed further towards the end of the article (Sect. 9).

The threshold for proposals, other statements and conduct that are grounds for recusal are, however, not very clear (The Norwegian Courts' Administration 2016). There are no precedents on this threshold in custody and contact cases. In practice this issue seems to be viewed as more than a pure legal matter: The matter of trust—or lack thereof—in the judge from one or both parties is an important factor, even where the conduct and statements of the mediating judge may not constitute grounds for recusal. An important concern is that a lack of trust in the judge may lead to a loss of trust in the process as such, perhaps leading to a higher likelihood of a new court dispute in the future (Ot. prp. no. 29 2002–2003; Norwegian Courts' Administration 2016).

4 The Different Roles of the Expert in Custody and Contact Cases: An Overview

4.1 Which Qualifications Are Required for Experts?

As described above, (Sect. 3) The Children Act section 61 defines at least three main roles for the expert: *mediator*, *mentor* and *expert evaluator*. These roles are fundamentally different. Before an overview of the different roles can be given, it is necessary to know what qualifications are required for an expert in custody and contact cases.

The nature of the tasks assigned to the experts in custody and contact cases entails that the person appointed typically needs to have mediation skills as well as sound knowledge of the psychological issues relevant to such cases. Depending on which role(s) the expert is given in a case, he or she must have sound understanding of the particular issues and challenges of the relationship between parents and their children, as well as the needs of children and developmental psychology. Consequently, psychologists are often seen as suitable and are frequently used. However, other professions may serve as experts as well, for instance, social workers or child welfare officers. There is no legislation specifying which qualifications are required, and this is a deliberate choice by the legislator. In the preparatory works the Ministry of Children and Equality stated that the different roles of the experts call for using experts with different professions and fields of expertise. Furthermore, the supply of experts is better when required qualifications are not defined by law (Ot. prp. no. 29 2002–2003). The issue of the limited supply of experts is a recurring theme when different aspects of regulation of the use of experts are debated.

4.2 The Role of Expert Evaluator

The Dispute Act section 25-1 defines expert evidence as "an expert assessment of factual issues in the case". Traditional expert evaluations typically include talking to parents and children, home visits, and, depending on the case and terms of reference, other investigations such as talking to teachers, health care professionals and sometimes friends or family, as well as studying relevant documentation. The purpose is to contribute to the factual base for the court's decision, in other words, to serve as evidence. The expert gives his or her opinion on the questions raised by the court to him or her in the terms of reference (The Dispute Act section 25-4), based on the findings of his or her investigations. The report and oral testimony of the expert is called "expert evidence".

4.3 The Mentor Role

The role of *mentor* in an interim settlement period (The Children Act section 61 no. 7) has some similarities to the role as expert evaluator in the sense that the expert is meant to use his or her expertise to guide the parents. However, there is a fundamental difference between contributing to the factual base of the court's decision—evidence—and being a mentor. A mentor is meant to help the parents cooperate, and the parent's´ view of the mentor as a helper may affect what information they share with him or her, and their general conduct. It can be assumed that if a parent considers the expert as a mentor and does not consider the possibility that he or she might have the role of expert evaluator at a later stage, the parent may communicate more uncensored and less guarded than he or she would with the knowledge—or fear—that what is said or done may be used against him or her at a later stage.

4.4 The Mediator Role

4.4.1 Definition and Distinguishing Characteristics

The role of *mediator* is in principle fundamentally different than the roles of expert evaluator and mentor. A simple definition is that mediation is a dispute resolution process where two or more parties attempt to solve a conflict with the help of a third party. The third party does not have the power to determine the outcome of the dispute but help with the process, where *the parties themselves* identify issues of dispute, develop and consider different possible solutions and attempt to reach an amicable settlement. This definition is very inclusive and does not address the contentious issues of a *facilitative* versus *evaluative* mediator role. In the settlement efforts of judges and experts in custody and contact cases in Norway, evaluation seems to be rather common (See: for instance, Breivik and Mevik 2012).

4.4.2 Evaluation from Judges and Experts in Judicial Settlement Efforts

The issue of an *evaluative* versus *facilitative* mediator role is typically discussed with a focus on statements about legal issues made by judges or other jurists in the role of mediator. In custody court disputes, where the judge and the expert mediate, evaluation includes psychological as well as legal matters. The best interests of the children is an overarching principle in these cases, which means that psychological knowledge plays a very important part in the legal reasoning.

Evaluative statements on legal matters may vary in scope and strength. The most extreme form of evaluation is to give a prognosis on the probable outcome should the dispute be adjudicated. For example: "It is unlikely that you will get custody of

the children, should the case be adjudicated." A milder variety of evaluation is when the mediator gives an opinion on a particular issue, for instance, on whether a certain rule is applicable or whether there is sufficient evidence to support a particular assertion, for instance: "I have not seen any evidence so far suggesting that William is upset after his overnight visits with his father." The mildest variety of evaluation on legal matters is to express what may be deduced from a particular source of law. For example, a precedent a party has quoted to support his or her case. "I am not convinced that this precedent is applicable here. The child in question was two years old and had mild autism, whereas your son is four and has no cognitive issues." The strength of evaluative statements also varies with regard to whether or not the mediator has given the statement with reservations or expressed uncertainty. For instance, the mediator may express qualifications regarding the extent of his or her knowledge on the legal issues in question or underline that formal presentation of evidence has not yet taken place.

Other forms of evaluation are presenting settlement proposals or evaluating the parties' proposals. In some cases, the mediator's suggestions and evaluations of the parties' proposals are expressions of the mediator's view of the legal and evidentiary matters of the case, but this is not always the case. Settlement proposals or evaluation of the parties' settlement proposals are sometimes primarily based on what the mediator sees as realistic, given the positions of the parties, or what seems to meet the interests and needs of the parties.

It is important to consider that in custody and contact cases it is likely to be more common than in most other types of civil disputes that settlement proposals and the evaluation of such are in accordance with the mediator's view of the legal and evidentiary matters of the case. The reason for this is that the court has a duty to safeguard the best interests of the children, both in terms of process and outcomes (The Children Act section 48). The child is not a party in the court dispute nor is the child a party in mediation, which means that the court must ensure that the child's interests and needs are not overlooked. Evaluative statements regarding settlement options are affected by this concern.

For *experts*, probably the most prevalent type of evaluation is statements about the needs of the children and the quality of care each of the parents have to offer, and evaluation of settlement proposals in light of these factors. There are different varieties of evaluation, similar to those varieties of evaluation of legal matters presented. The strongest form of evaluation would be to state what custody and contact arrangement he or she believes is the most optimal for the child. This is close to being a prognosis of the outcome should the case be adjudicated, since expert evaluations are such an important piece of evidence.

Regardless of the actual evidentiary impact of the expert evaluation in a case, the parties are likely to consider such evaluation in mediation from an expert as a prognosis on the probable outcome in adjudication. A more careful variety of evaluation is to express some doubts concerning a proposal that has been presented, but without divulging what custody and contact arrangement *would* be in the best interests of the children. On the lower end of the evaluative spectrum is expressing points of view on particular elements of the custody or contact arrangements

proposed by a party, but which cannot be seen as support or rejection of the arrangement as such. An example of such evaluation may be expressing points of view based on experiences from other cases regarding routines and logistical arrangements for contact.

As described above, evaluation from experts and judges alike may be interpreted as a hint—or more—as to how the case would be viewed in a judgement. Evaluation may therefore affect the mediation and settlement significantly and, in some circumstances, may also entail considerable pressure to settle. This issue will be revisited later in the article.

4.4.3 A Facilitative Role in Judicial Settlement Efforts in Custody Disputes?

Since a purely *facilitative* mediator does not express such views as described above, some experts and judges express concern that a facilitative mediator role is merely the role of a moderator and not suitable for custody and contact cases, where the best interests of the children must be safeguarded. This is, in my opinion, a grave underestimation of the potential of a facilitative mediation process. Skilled facilitative mediators enable the parties to critically evaluate their own assumptions, points of view and settlement options, simply by asking good questions that require reflection and well-reasoned replies. Instead of stating opinions, the mediator facilitates the parties' reflections and enables them to draw the conclusions themselves.

The mediator can pose reflexive questions that require that the party assess his or her own points of view. For example, if a mother is determined that the father must have only limited contact with the children due to animosity between the children and the father, the mediator may ask the mother to reflect on what would happen if she became ill and had to be hospitalized for a long period of time (Example inspired by Tomm 1987). Such questions are a facilitative mediation technique, as long as the form of question rather than statement is not merely a matter of rhetoric. Leading questions may cross the line from facilitation to evaluation.

It is an important part of every mediator's role to enable the parties to evaluate their own and the other party's positions and points of view in light of the information that is given in the mediation. The mediator should, through asking questions, help the parties identify the interests and needs behind their positions, and possible and probable consequences of different outcomes. A mediator who does not ask questions that enable the parties to reflect and critically evaluate their own assumptions and positions is scarcely more than a microphone boom in the negotiations of the parties. In family cases, where the best interests of the children should be the main focus, it is normally essential that the mediators take an active role, since the conflict has been brought to court because of the parties' inability to settle out of court. However, as described above, being an active mediator does not in itself require evaluation. In (Sects. 7 and 8) the conditions, tools and possibilities of a facilitative mediator role in custody cases will be explored.

5 Why Is Evaluation so Common in the Judicial Settlement Efforts of Custody and Contact Cases?

One important contributing factor to the widespread use of an evaluative approach in judicial settlement efforts is the use of experts that are appointed not merely as mediators, but combining mediation with expert evaluations and the role of mentor. The lines between the different roles may become blurred.

When parents meet in court in need of a solution to their conflict, they meet two experts: The judge—with legal training, expertise and experience—and the expert—who most commonly is a psychologist. As mentioned, the two often conduct settlement efforts as a team. Parents, who for the most part have little experience with mediation, judicial settlement efforts and adjudication, may expect that the judge and the expert will give advice and in other ways state their opinions. Furthermore, many will expect the judge or the expert to tell the *other party* why he or she is in the wrong. This is a wish that is probably shared by many lawyers: They have failed to convince the other party of the errors of his or her ways in negotiations, and now they hope for the court's help.

Judges, psychologists and other experts typically do not primarily identify themselves as mediators. Given the expectations of the parties and the professional identities of the judges and the experts, it is not surprising that the settlement efforts can be fairly evaluative (Similar points of view are expressed by Nylund 2011).

Furthermore, judges and experts focus on ensuring that both process and outcomes are in the best interests of the children (The Children Act section 48). In my experience, evaluation is seen by many judges and experts as the most effective means to ensure this fundamental principle.

This is, however an underestimation of the potential of mediation as a conflict resolution method. Widespread use of evaluation also threatens the uniqueness of mediation and judicial settlement efforts as alternatives to adjudication.

Furthermore, it underestimates the importance of a fair and thorough process in accordance with the rule of law to ensure that the result is in the best interests of the children. As will be discussed in Sect. 6 below, evaluative mediator behaviour in a dispute resolution process, which is so closely connected to the adjudicative proceedings as the judicial settlement scheme, may be problematic in a rule of law perspective. It may put undue pressure on the parties to settle and may blur the line between mediation and adjudication in the eyes of the parties. Breivik and Mevik (2012) have examples of informants being pressured through evaluation. (For critical views of evaluation in mediation, see Kovach and Love 1998; Kjelland-Mørdre et al. 2008; Nylund 2012; Vindeløv 2007a, b, 2013).

6 Concerns Regarding an Evaluative Mediator Role in Contact and Custody Cases

For mediation that is integrated in the court proceedings, i.e. judicial settlement efforts, an evaluative mediator role raises particular concerns. Firstly, it may be in conflict with procedural safeguards—the principles of fair trial. In adjudication there are a number of procedural safeguards and rules to ensure that there is a sound basis for the court's decision. The purpose is to achieve the right outcome. For custody cases the procedural safeguards should then essentially ensure an outcome in line with the best interests of the children.

Since the outcome of judicial settlement efforts and mediation is decided by the parties themselves, the process is not subject to the same principles and rules as a trial and judgement. When settlement efforts take place at an early stage of a custody dispute, there has been no formal presentation of evidence.

If the expert gives evaluative statements in the role of mediator, such statements may be based on information and observations that have not been submitted to the court and parties in the form of a report the parties have been given the opportunity to critically examine. For this reason, it may be difficult for the parents to assess the soundness and weight of the expert's statements. This poses a risk that the parents accept arrangements that they neither view as right nor good, because of what the expert has said with the judge present. They fear that the judge and the expert have already made up their minds, meaning that they will lose if the case were to be adjudicated (Breivik and Mevik 2012).

If parties feel pressured to enter into certain settlements because there have been statements that reveal that the expert and/or the judge have already made up their minds, this may constitute a breach of the right to access to court and a fair trial before an impartial court of law (The Dispute Act section 1-1 and the ECHR article 6 no. 1). In Deweer vs. Belgium (Series A No. 35) ECJ established that pressure, which causes a party to settle rather than utilising his or her right to adjudication, may constitute an infringement of the ECHR art. 6 no.1 (NOU 2001: 32 and Møse 1999).

However, as mentioned, it is nevertheless not unusual for the expert who has mediated to be appointed as expert evaluator, c.f. section 61 no. 3. And even if there is a different expert in the latter role or if no traditional evaluation pursuant to section 61 no. 3 is done, the parties may fear that the judge is influenced by the views expressed by the expert who aided the court pursuant to section 61 no. 1.

Another issue with evaluative statements is that the settlement efforts take place as an integrated part of the court proceedings and that evaluation then may blur the line between settlement and adjudication for some parties. A survey done by *Katrin Koch* revealed that some parties were uncertain whether the expert had been appointed to conduct an expert evaluation pursuant to section 61 no. 3 or not, and some were uncertain whether the outcome of their case was a settlement or a judgement (Koch 2008).

Some might argue—and this is an actual point made by an expert when I mentioned Koch's findings—that some parents do not have the cognitive capacity to understand the difference between a settlement and a judgement, and that Koch's findings might stem from such cases. However, if the judge and expert find themselves unable to explain the difference between a judgement and a settlement to a party, it is clearly not in accordance the principle of fair trial, and also a breach of judicial ethics to mediate the case. It is an absolute requirement for mediation that both parties are mentally capable to understand what mediation is and that entering into a settlement is voluntary.

When an expert or judge takes an evaluative role in their settlement efforts, this also raises other concerns. It is a fundamental principle of adjudication that judgements should have reasons (The Dispute Act section 1-1). The written reasons guarantee clarity and certainty about the court's reasoning and also helps ensure that the conclusions are sound. If parties settle based on oral statements from the expert or the judge, there is no documentation on what has been said.

An in-court settlement cannot be appealed. Consequently, the only option for a parent that regrets the settlement and believes that it is based on wrong premises, but is unable to convince the other party to enter into a new custody and contact arrangement, is to file another lawsuit (The Children Act section 64).

Summing up, the judicial settlement process lacks some fundamental legal safeguards that are in place in adjudication, in other words, the formal presentation of *evidence, the adversarial principle, reasoned judgements, and the right of appeal.* These principles are not in place in mediation or judicial settlement efforts because settlements are based on party autonomy. If the judge or the expert expresses points of view or prognoses, and thus affects the settlement of the parties, elements from adjudication are introduced to the process of judicial settlement efforts, without the legal safeguards in place for adjudication.

Evaluation is particularly problematic when it indicates that the judge and the expert have already decided what the outcome of the dispute should be. In such instances, the judge and the expert must be recused from the further handling of the case.[3]

However, statements that will not constitute grounds for recusal—for example, because of reservations made or because they only relate to single issues—may also be problematic. Such statements are probably common in custody cases,

[3]The threshold for recusal for Norwegian judges has developed significantly the last 20 to 25 years. A statement from the Supreme Court judgment in Rt. 2008 p. 1466 is describes the current norm: *[my translation]* "the decisive factor is how it all appears – from the point of view of the accused and the observing member of the general public. If there are, from an objective point of view, sound reasons to question the judge's impartiality, the judge shall not partake in adjudication." It is then stated that "the issue of impartiality based on the judge's prior dealings with the case, go further, and altogether includes the judge [. . .] expressing himself or herself in a manner that is liable to impair the confidence in the ability of the judge to meet the case, the defendant or the evidence with such an open mind as presupposed by our procedural rules – including ECHR article 6 no. 1 and the Courts of Justice Act section 108".

particularly in light of the roles of the experts in these cases. There is no doubt that even such statements have the purpose of affecting the parents' willingness to settle and the terms of such a settlement, and that they may have a fundamental impact on the terms of the settlement. Therefore, they are problematic in a rule of law perspective, because of the lack of some of the fundamental legal safeguards of adjudication.

When arguing that evaluation may lead to an improper pressure to settle, I have been met on several occasions with statements that settlement in custody disputes in many cases is in the best interests of the children. I have been asked whether it is my opinion that the procedural rights of the parties should prevail at the cost of the best interests of the children.

Ultimately, this line of reasoning entails that concerns regarding the lack of procedural safeguards and the rule of law must recede when a judge or expert believes that a settlement should be reached. In my opinion, this is a grave fallacy. Procedural safeguards and the rule of law are first and foremost in place to lay the foundation for reaching the right decision in a case—the decision that the correct application of the law on the facts of the case entails. If parents feel pressured to reaching a settlement that they believe not to be in the best interests of the children, the reason for this may be an unrealistic view of their own parental capabilities or a lack of understanding of the child's needs. However, as long as the main hearing has not taken place, with thorough presentation of evidence, there is no basis to justify settlement pressure in the form of evaluative statements with the assertion that this would be in the best interests of the children. A similar point of view is expressed by Nordhelle (2011):

> In the fervour to resolve custody disputes in a simple and flexible manner, it seems as the rule of law has been lost in some cases – and the major losing party is the children. [My translation].

Summing up, neither judicial settlement efforts at the preparatory stages of the trial nor the mediation process is designed to present evidence and law in a manner that enables a third party to make informed evaluations. This is especially acute in custody and contact cases, which involve complex decisions that affect the future life and welfare of a child.

It has been argued by several authors from different disciplines that the conclusions to be drawn from an expert evaluation must not be overestimated and that other evidence must be presented to lay a sound foundation for the court's decision (Lundeberg 2009; Nordhelle 2010, 2011; Haugli og Nordhelle 2014; Schøitz 2006). This makes a strong point for exercising considerable caution and restraint with evaluative statements and refraining from exerting settlement pressure in mediation in preparatory hearings. In addition to the risk of a settlement entailing a custody and contact arrangement that is not in the best interests of the children, a settlement reached as a result of pressure from the mediator(s) may be problematic and counter-productive for another important reason as well. There is reason to believe that when a parent is dissatisfied with the way a settlement has been reached, the settlement may be less durable than it would have been if the parents perceived

the process as sound and just. This is underlined by the Ministry of Children And Equality in the guidelines for the handling of custody and contact cases (Veileder Q-15/2004, see also Nylund 2011; Breivik and Mevik 2012).

It is common knowledge that persons who feel wronged by the legal system can become repeat litigators, because they feel the need to correct the injustice they believe they have suffered. In other words, if a parent has accepted a settlement that is significantly different than he or she envisioned at the outset of the trial, it is crucial for the robustness of the settlement that the process has been good. In a best-case scenario, the process has caused the party to change his or her mind. A more probable scenario is that the party has concluded that the settlement, in spite of his or her position, is a result he or she is willing to live with, based on his or her own and the legal counsel's assessment of the process risks and the strains and costs of a continued legal dispute. In the opposite scenario, the settlement is the result of mediator pressure, without such careful considerations as described above. It can then be said that the party has formally accepted the settlement without really accepting it (Nylund 2011).

There is sound empirical basis for the assertion that satisfaction with the process has significant impact on how a party assesses the outcome (Adrian 2013). Furthermore, it is stated in the preparatory works of The Children Act that the parties should not be pressurized to settle, and that the settlement should be experienced as a result of the parents' own choice (Nylund 2011 with references to Ot. prp. no. 29 2002–2003 and NOU 1998: 17).

If the parties are aware that the mediators may preside over the main hearing or conduct the expert evaluation pursuant to section 61 no. 3 should the case not be settled, this may in itself affect the mediation process negatively. It may cause the parents to act strategically when communicating with the judge and the expert during the mediation process, rather than contributing to a productive mediation process with open communication, in the best interests of the children (Nylund 2011). The risk that parties may act strategically rather than contributing to a constructive mediation process was an important reason for the main rule for court-connected mediation that a judge who has mediated should not preside over the main hearing (The Dispute Act s. 8-7 (2)) (NOU 2001: 32).

In my view, there is no doubt that the level of awareness and critical reflection among the population of judges, experts and lawyers on the role of the mediators in custody disputes must be increased. This requires more extensive mediation training than currently in place (See also Nordhelle 2011; Breivik and Mevik 2012; Haugli and Nordhelle 2014). The judges and experts must also be thorough in their communication to the parties of what judicial settlement efforts entail and of their respective roles in this process.

7 What Is the Point of Judge and Expert Mediators Who Do Not Evaluate?

When confronted with critical views on evaluation in mediation, some argue that it seems pointless to use judges and experts, such as psychologists as mediators, if they are not supposed to evaluate. I will address this issue in the next few paragraphs.

In my opinion, there is no doubt that the expertise of judges and experts is an important factor in mediation and judicial settlement efforts even where a strictly facilitative mediator role is observed. In the role of mediator the ability to listen and ask good questions that capture the issues that are important to the parties and thereby enabling better communication is essential. In order to ask good questions, it is very useful to have sound knowledge and understanding of the legal, psychological as well as practical and financial issues custody and contact arrangements give rise to.

The judge's legal professional expertise and experience can help him or her determine what might be relevant and important to focus on when structuring the process through questions etc., helping the parents to have a sound basis for their negotiations and enabling them to critically evaluate the strength and weaknesses of their own positions and assertions.

The expert has sound knowledge about the important factors for a child's wellbeing and development and also about common feelings and reactions connected to the breakup of relationships and custody disputes. The judge and expert can use their professional knowledge and experience to ask the right questions and fashion the process to the needs of the parties, thereby achieving a better and more reflective dialogue with the parties, and first and foremost *between* the parties.

Furthermore, the expert and the judge may use their expertise to give *general information* that the parties may, in turn, use to assess their own situation, the case and different settlement options. General information in this sense may include descriptions of relevant statutes and other sources of law without expressing points of view regarding how they may or may not be applied to the facts of this particular case. Experts may, in general terms, describe what factors must be taken into account when determining what types of arrangements are workable for children of different ages (Similar Nordhelle 2007). An example, which is adapted from a statement made by an expert in the courtroom at a preparatory hearing, could be:

> When determining which custody and contact arrangements will work for a child, the age of the child must be considered. For smaller children up to the ages of two to three, if is often important that the timespan *between* contact with each of the parents is not too long, but the timespan of each visit does not necessarily have to be very long. For older children, duration and continuity is generally more important. For smaller children, it may in some cases be wise to have mid-week contact without the child sleeping over, to keep the frequency of contact at a sufficiently high level.

It must, however, be underlined that in some cases it may be debatable whether what is said could be considered general information without evaluation. Some psychological and legal issues are debated. Nevertheless, there is undoubtedly some legal and psychological information that can be given by judges and experts

without entailing a problematic evaluative mediator role. It is, however, crucial that judges and experts alike are conscious about the nature of the information they share and do not inadvertently present their own opinions under the guise of general information. It is also crucial that they make it absolutely clear for the parties that the information given is of a general nature and that it does not include the application of this information to the particular circumstances of the case at hand.

In the Ministry of Children and Equality's guide for the handling of custody cases, it is clear that the ability to ask good questions and to give general information is considered the most important tasks of the expert in the preparatory hearings (Veileder Q-15/2004).

8 How Do We Achieve Mediation That Provides Good Quality Outcomes Without Evaluation?

8.1 The Power of Feeling Heard, Understood and Empowered

In my opinion the most important asset of mediation compared to adjudication in cases concerning custody and contact is the opportunity to facilitate better communication between the parties and, thereby, de-escalate the conflict. This, in turn, lays the foundation for amicable settlement with arrangements that are more robust than those forced on the parties through adjudication. There is little doubt that reduced conflict and more robust arrangements often will be in the best interests of the children. Prolonged disputes between parents may cause health issues and social problems for the children (see e.g. Rød et al. 2008; Paradis et al. 2009).

In order to utilise this potential of the mediation process, it is essential that the parties feel ownership of the solutions, as opposed to feeling pressured by the mediators, see section 6 above in this article. This means that the mediation process should focus on enabling the parties to reach a mutually acceptable agreement that is in the best interests of the children.

I therefore firmly believe that mediators should prioritise spending time on breaking through the barrier of the parents' positions and enabling them to speak openly about their interests and needs. Especially, there should be a good dialogue concerning the needs of the children. In a good mediation process each of the parents should be enabled to tell his or her side of the story without interruptions from the other parent, and this may be the first opportunity they have to do so.

In the preparatory hearings of custody cases, there is a lot going on besides settlement efforts, and, as a consequence, basic and well-known mediation techniques are perhaps not utilised to their full potential: The mediators can help each of the parents to feel heard and understood by *summing up* what has been said. Such summing up from the neutral may make it easier for each of the parents to hear the message delivered than when presented by the other parent. Mediators may also improve communication by *rephrasing* provocative statements phrased as personal

attacks on the other party, to more concrete statements that address the actual problem, and thereby *reframes* the issues to be dealt with in the mediation (See for instance Vindeløv 2007a, b; Moore 2003). An example could be:

> *Father*: "She is incredibly irresponsible!" *Mediator:* "Could you elaborate on that with an example?" *Father:* "A few weeks ago our eight year old son came home from his mother's and told me that he had been to the emergency room after a rough tackling at soccer practice a few days ago! I have to be told these things immediately! It is so typical of her!" *Mediator*: "So you feel that mother does not always give you important information about the children?"

This simple example shows that the mediator can change the focus from a general characteristic of the mother as an irresponsible person to the actual problem: That the mother has not given the father essential information about the health and wellbeing of one of the children. While inflammatory general characteristic hardly sets the foundation for constructive dialogue between the parties, problems with the information exchange between the parents is a concrete issue that can be somewhat easier to address.

Another important approach in custody mediation is for the mediator to show each of the parties' *empathy*. This may show both parents that it is entirely possible to have an understanding of how the other party views and experiences the situation without having to agree with the other party (Vindeløv 2007a, b). Parents who are not able to agree on custody and contact arrangements for their children out of court may feel that they are perceived as problematic people and even bad parents, which may lead to defensive behaviour. Empathy may help.

In custody cases, it is sometimes difficult for parties to separate the feelings of hurt and betrayal from the breakup from the issues at hand, which is a settlement arrangement in the best interests of the children. Some mediators try to steer the parties away from expressing feelings and discussing issues concerning the breakup and might even explicitly instruct the parents to focus on the children rather than their own hurt feelings. However, this may be counterproductive, since parents may not be cognitively capable to negotiate constructively without having been able to vent and be met with empathy—at least from the mediator. On the other hand, there are limits to the resources that can reasonably be used for handling a dispute within a court setting. The parents may need a break from settlement efforts to work on the hurt from the break-up in therapy (Nordhelle 2016). By spending time on the parties' stories and dialogue, important information about facts, feelings, interests and needs come to the surface, and the parties feel heard and understood. This may make the parties more ready to talk constructively and openly about possible solutions than trying to convince them through evaluative statements.

8.2 Scope and Need for Evaluation?

It can be argued that under some circumstances the judge or expert can or should evaluate to some extent in course of the mediation. The mediation concerns the wellbeing of the children, and the children are not parties to the custody dispute.

There may be a need for some evaluation to lower obviously unrealistic expectations or unfounded perceptions of one or both parents, or to prevent them from settling on terms that are clearly contrary to the best interests of the children. The court's responsibility to ensure that both the process and the outcome safeguard the best interests of the children may under certain circumstances entail that the judge or expert expresses some points of view or assessments.

The fundamental issue is, however, that in light of the problematic aspects of an evaluative mediation process, the mediator should, as an overriding main rule, stay within the boundaries of a purely facilitative role. If evaluative techniques are to be used at all, this should be the result of careful consideration and only when the mediator considers that the settlement process cannot proceed in a manner that would be in the best interests of the children without some evaluation.

If evaluation occurs regularly, the process will fail to achieve its potential, and there is a risk that the judicial settlement institute resembles a form of simplified non-binding arbitration (Nylund 2011). This does not serve the best interests of children, because the level of conflict between parents will typically not be reduced significantly and the settlements may be less durable.

Furthermore, evaluation may lead to the parties positioning themselves, rather than communicating openly. Problems, interests and settlement options may remain under the surface, and important factors to determine the best interests of the children may be concealed (Nylund 2011).

If the parties are unable to reach an agreement in mediation without being subjected to considerable evaluation from the judge or expert, the court should abandon the settlement efforts and handle the case through means of adjudication with a main hearing and subsequent judgment. It is crucial that there is a clear line between settlement and judgment, section 6 above in this article.

The court must be conscious of the difficulty for some parties to understand the difference between a settlement and a judgment, and not least between evaluative statements from the expert in the role of mediator/helper/mentor (The Children Act section 61) and as part of an expert evaluation for the purposes of the main hearing (section 61. no 3). This difficulty is quite understandable considering the fact that the judicial settlement efforts take place in a court room, as part of preparatory hearings, with the courtroom scenography and symbolism, and where the expert in many cases has conducted some investigations prior to the meeting, i.e. talked to the children, parents and perhaps also others.

When discussing whether some evaluation is acceptable or not, it must be considered which stage of the process the mediation takes place. At an early stage, it is particularly problematic to evaluate, for two reasons: Any evaluation requires sound knowledge of all relevant aspects of the case. Secondly, there has been considerable criticism regarding the soundness of expert evaluation in general, and in custody cases in particular, highlighting that there is a considerable risk of erroneous conclusions (Nordhelle 2010, 2011; Haugli and Nordhelle 2014; Schiøtz 2006; Lundeberg 2009; Breivik and Mevik 2012).

Furthermore, it is valuable that the parties feel heard and has had ample opportunity to express their own points of view before any evaluation. Evaluation often affects the focus of the dispute resolution process, and the parties may become

defensive rather than creative. This may be a missed opportunity for the parties to work out arrangements that they feel ownership to, and which are nonetheless sound, seen from a perspective of the best interests of the children. In a worst case scenario, the evaluation may lead to one or both parties losing faith in the mediators' neutrality and impartiality, thus halting the mediation process.

At a later stage in the settlement efforts, when the parties have had ample opportunity to present information, points of view and suggestions, some evaluation may be justifiable depending on the circumstances, but nevertheless with a considerable caution that the reality of custody cases is complex and requires thorough evidence before any conclusions should be drawn.

Particularly in a preparatory hearing that takes place after the trial of one or more interim custody arrangements, with the expert as a mentor, some evaluation from the expert in particular may be reasonable. The expert has had the opportunity to observe how the arrangements have worked during the interim period. It makes sense for the expert to report on what he or she has observed, including what has worked well and what seems to have been more problematic. Such a report should, however, stay within the boundaries of the expert's terms of reference as a mentor. This role does not include assessing the parents' personality, their abilities and qualities as caregivers or what arrangement is in the best interests of the children.[4]

Regardless of whether one believes the parents should be given evaluative feedback or not, it is a reality that the judge, when facilitating settlement needs feedback from the expert on his or her observations during the interim settlement period. Otherwise, it would be difficult to co-mediate. And the parties must be given the same information as the judge to ensure that the adversarial principle is observed. If the information is not shared with the parties, the judge will have to recuse himself or herself from presiding over the main hearing. However, the problem with information flow is in itself a reason to consider changing the current system where mediation efforts are integrated in preparatory hearings to a system where mediation is a separate process led by mediators (judge and expert) who will not partake in further proceedings. Such a model, with a separate court-connected mediation scheme for custody disputes, is in place in Finland (Salminen 2018). If the expert sums up the experiences from the interim settlement period and evaluates how the settlement has worked, this may constitute such extensive evaluation that the expert has stepped outside the boundaries of the role of mediator and should leave further mediation efforts to the judge. Unless the expert's feedback on the interim settlement is limited to pointing out details of the arrangement that may or may not have worked, the confidence in his neutrality and impartiality as a mediator can reasonably be weakened in the eyes of the parties.

This may or may not in itself infringe the legal requirements for impartiality, but equally important: the loss of trust in the mediator's neutrality may be detrimental to the mediation process, and to the parents' perception of procedural justice. It can be, therefore, argued that after evaluative feedback from the expert, the judge should be

[4]The role of the mentor is described in the preparatory works, see Ot.prp. no. 29 (2002–2003) and NOU 1998: 17.

the sole mediator and stay within a purely facilitative role. Any evaluation from the expert should also be documented in writing, to ensure clarity about what has been said, if the case is adjudicated.[5]

9 The Interaction and Cooperation Between the Judge and the Expert in the Mediation Process: Potential Problems

9.1 The Problem at Hand: The Expert Has Ex Parte Communication with Parties, Whereas the Presiding Judge Cannot

As described in (Sect. 3) above, settlement efforts in custody court disputes normally takes place in preparatory hearings, and the judge is assumed by the legislator to preside over the main hearing as a main rule should the case not be settled (Ot. prp. no. 29 2002–2003). The judge must therefore observe the boundaries of judicial impartiality, which means that the adversarial principle must be observed. Consequently, caucuses (separate meetings) between the judge and the parties, and receiving information from a party which cannot be divulged to the other, is not allowed. In The Dispute Act section 8-2, which applies in custody cases, c.f. The Children Act section 59, caucuses and confidential information is explicitly forbidden.

For the expert, these rules do not apply. The Children Act 61 no. 1 gives a wide and flexible description of possible tasks for the expert, and *ex parte* communication can be a part of this. It is stated that the court may ask the expert to talk to parents and children and conduct enquiries to clarify the facts of the case, unless the parents object to this. It is common for the expert to talk to the parents separately before mediation.

The expert's duty of professional secrecy does not prohibit communication with the court (The Children Act section 50). If caucuses are to take place between the parties and the expert, it is, however, essential that any information relevant to the case given to the court by the expert is also given to the other party. Otherwise, the adversarial principle will be breached. Although it could be argued that confidentiality is important in caucuses, the preparatory works leave no doubt that The Children Act section 50 must be interpreted literally in this regard – also including caucuses in mediation (Ot. prp. no. 29 2002–2003; NOU 1998: 17. See Dalseide 2004 and Nylund 2011).

It is therefore essential that the expert informs the parties that all relevant information will be shared with the court and the opposing party. Furthermore, it is crucial that the expert is very thorough in telling the judge when information stems

[5]The latter is recommended in the national guidelines for the handling of parental disputes (Norwegian Courts' Administration 2016, pp. 13–14).

from ex parte communication, ensuring that the judge is aware of the need for the information to be presented to the other party.

However, the expert is not obliged to report all information received by a party to the judge. Brainstorming of settlement options and strategic discussions are examples of pieces of information that do not necessarily have to be shared with the judge—and in turn the other party—because it is not relevant as a basis for the adjudication of the dispute. However, if the judge and the expert are to function effectively as co-mediators, having different information is impractical.

How information from *ex parte* communication with parties is presented to the judge varies. Sometimes all information is shared with the judge and sometimes only parts of the information are shared. Some judges are very conscious to ensure that all information they have received and that may be relevant should be divulged to both parties to ensure that the adversarial principle is observed, whereas others take a less strict view of this matter.[6] However, as stated above, the judge must ensure that all information that may be relevant to the case is given to both parties (The Dispute Act section 1-1, c.f. ECHR art. 6 no.1).

9.2 Problems with the Current Regulation and Practice Regarding Ex Parte Communication in These Cases

The current system requires considerable vigilance and accuracy on part of the expert and judge. In my view, it seems rather difficult to guarantee that the adversarial principle is sufficiently observed. When the judge and the expert discuss the handling of the case, in general, and mediation strategy, in particular, it is nearly unavoidable that the expert sometimes expresses assessments based on conversations with the parents, and that have not been presented to the parties. Even if the expert does not give specific information to the judge, it may be problematic that the judge hears assessments that are based on information that has not been presented to the parties. Although there will be ample opportunity to present evidence in the main hearing should the case not be settled, there is no guarantee that all factors on which the expert based his oral and informal assessments will be presented then. In fact, expressing assessments may be more problematic than presenting specific facts. It is probably easier to see the need for formal presentation of specific facts than vague assessments.

It can be argued that there is a difference between information and assessments that are relevant to the court's assessment of the facts of the case—in other words, information that may serve as evidence—and information and assessments that is shared with the purpose of planning the mediation process.

[6]The information is gathered through informal conversations with judges and experts in different district courts and cannot be viewed as a representative selection. However, the material point in this context is to show that there are different approaches and views of this issue.

An example of the latter may be that a parent has told the expert that he quarrels with his ex-spouse when they have to meet whenever the children move from one home to another. This is useful information for the judge to have when facilitating the mediation process, as it means that the judge should make sure that the parents consider this factor when deciding the logistical arrangements for contact.

Another example may be that the expert has experienced that the father needs more encouragement and more questions to be able to communicate openly about his points of view, interests and needs than the mother does, and that his stern looks and short brusque replies are a facade. This type of information helps the judge as a mediator to achieve a good dialogue with and a correct image of the father. None of these examples imply that the judge receives information that needs to be shared with both parties in open court.

However, the line between such information as shown in the examples and information that is relevant to the court's assessment of the facts of the case in a judgement is not clear. An example could be that the expert tells the judge that she has experienced that mother behaves aggressively and escalates conflict, and is easily provoked by questions, and that the judge should be aware of this when mediating. There is no doubt that such information is highly relevant to the judicial settlement process, but, at the same time, such information characterises the mother in a way that is relevant in a court decision on custody and contact.

Another example could be that the expert says that mother seems more yielding and weak than father. Such information is undoubtedly relevant for facilitating the settlement process. However, such personal traits may also affect the court's perception of the mother as a parent.

As shown, the current system where judicial settlement efforts are integrated in the preparatory stages of the trial has some problematic aspects. In the last few paragraphs of this article, I will discuss the need for statutory amendments and amendments of practice in this field.

10 Amendments of Regulation and Practice?

There is little doubt that there was a need for amendment of the process in custody disputes in 2004 to enable processes that were better tailored to the needs of the families.

Introducing the possibility of interim settlements with an expert mentor was a positive step that is likely to increase the chances of settlement. The parents who come to court have not managed to settle at the family counselling offices, which means that the level of conflict is normally fairly high, and that there is likely to be difficulties with communication and cooperation between the parents (Nylund 2018). The parents may also have well-founded concerns about the possible consequences for the child of certain custody and contact arrangements. The fact that the level of conflict is high does not necessarily mean the reason for a parent's unwillingness to settle is the desire to harm the other party. The option of an interim settlement and the opportunity to seek advice from a mentor, therefore, makes a lot

of sense. A reduced level of conflict and an improvement of communication between the parents will be beneficial to the children. It can also be assumed that having tested a certain arrangement for a period of time will be conducive for reaching a settlement on an arrangement that serves the interests and needs of the children well.

As shown above, the regulation and practice in these cases has shortcomings. The fact that the settlement efforts are integrated in the preparatory hearings and that both the judge and the expert have other roles in addition to mediating, may create considerable settlement pressure and blur the line between settlement and adjudication, which is problematic in a rule of law perspective. This is amplified by the common view among experts and judges that evaluation is a necessary part of the settlement efforts. These factors, in turn, may lead to settlements of lesser quality and durability.

In my opinion, the overriding principle stated in The Children Act section 48 that both process and outcome should be in the best interests of the children would be better served by having a separate mediation process led by a judge and expert with no other roles than mediating, similar to the court-connected mediation scheme in Finland (Salminen 2018). This would enable the judge mediator and the expert mediator to communicate openly with one another and also to lead all parts of the mediation process as a team—including caucuses (separate meetings).

The latter can be an important tool in custody cases, where the level of conflict is often high, and where there may be a need to explore issues and ask questions that each of the parents are uncomfortable with in a joint meeting. To ensure that the mediators are able to assess whether there are circumstances that makes a proposed arrangement contrary to the best interests of the children, it is essential that the mediators have all the facts (Nordhelle 2011).

Caucuses also enable mediation in cases where there is considerable difference in negotiating strength between the parties. In my experience, there are some cases where settlement would be in the best interests of the children, in order to end a conflict that has taken its toll on both parents and children, but where joint meetings do not work. One of the parents may not be strong enough emotionally to communicate and negotiate constructively while in the same room as the other.

Some fear that a separate mediation process may lead to delay and increase the strain on the children involved should the case not be settled. However, settlement rates are fairly high in custody disputes,[7] and there is no reason to believe that they would be lower if a separate mediation process is introduced, as long as the positive features of the current process are kept: the combination of a judge and an expert as mediators, and the possibility of interim settlements under the mentorship of an expert.

[7] In the period of 2010–2014, 2700 custody cases were handled by Norwegian courts, and 1670 of these were settled, amounting to a settlement percentage of 61.9. See The Ministry of Children and Equality, *Evaluering av Barnesakkyndig kommisjon og vurdering av utvidet ansvarsområde* [Evaluation of the Commission on Child Welfare Experts and Assessment of Expanding Their Field of Responsibility] 14 October 2015 p. 69 (data acquired from the Norwegian Court's Administration). However, the total of 2700 also includes cases where mediation was not attempted and where it would not have been suitable because of the circumstances of the case and/or the personal characteristics of the parties. This means that the settlement percentage in cases where mediation was actually attempted is considerably higher.

Legislative amendment in itself is, however, not enough. It is equally important that judges and experts who act as mediators have sufficient training, ensuring that they have the tools to mediate in a manner that enables settlements in the best interests of the children—with the use of facilitative mediator techniques. In March 2017, an expert committee appointed by the Ministries of Justice and Children and Equality recommended that custody, contact and child protection cases should be assigned to specific district courts of general jurisdiction with designated judges with special further training (NOU 2017: 8). This would, in my opinion, be a wise reform.

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