

## CHAPTER 1

# Children, Family, and State: Changing Relationships and Responsibilities

**Halvor Fauske** Inland Norway University of Applied Sciences and Norwegian University of Science and Technology

**Camilla Bennin** Inland Norway University of Applied Sciences

**Bjørn Arne Buer** Inland Norway University of Applied Sciences

**Abstract:** The chapter examines the changing relationships between children, families and the state, and their impact on the Norwegian child welfare services authority. It discusses the evolution of concepts of family and parental rights, providing a historical backdrop of state-family interactions with a focus on children. The importance of the parent-child relationship's quality and caregiver duties are emphasized, alongside human rights considerations, referencing European Court of Human Rights cases and the Norwegian Child Welfare Act. The chapter underscores the necessity for child welfare services to evaluate the family network, parental competence, relationship quality and child development critically.

**Keywords:** child welfare, child welfare services, family, attachment

## Introduction

We will elucidate different conceptions of what a family is, and how the right to family life for children and parents is interpreted, based on fundamental beliefs about the relationship between children, family, and state. We take a closer look at the interaction between the state and the family, with the child as the focal point, how this has changed over time, and how this is now enshrined in legislation. A main feature of this development is that the state increasingly recognises a diversity of family forms as a framework for children's upbringing, at the same time as the specifications for caregivers' duties towards children have been expanded and concretised. Increasingly, the quality of the relationship between children and parents is given importance when assessing how parents safeguard their children's need for protection and care. At the same time, in this chapter, we wish to see this development in the context of the Child Welfare Services' special responsibility for vulnerable children and the family's fundamental right to family life. The question that is therefore also discussed here is challenges the Child Welfare Services now face when the best interests of the child are to be assessed and safeguarded, considering the tension between the parent's right and duty to give children an upbringing that satisfies the state's requirements for parenthood, and what is in the best interests of the child.

## The Norwegian Child Welfare Services – family-oriented and child-centred

The Norwegian Child Welfare Services is a family-oriented and child-centred welfare service (Skivenes, 2021, p. 140). The Child Welfare Service's mandate is to provide vulnerable children with necessary assistance (Child Welfare Act 2021, section 1-1) by cooperating with the child and parents, and involving family and networks when care fails (2021, § 1-9). The goal is to help children have a safe and good childhood. In 2014, the 200th anniversary of the Norwegian Constitution, a new clause on children's rights was adopted. This section states that the state shall ensure that children have a secure upbringing, 'preferably in their own family' (Constitution, 1814, section 104, third paragraph). The Child Welfare Act that came into force on 1 January 2023 has a similar wording on the right to care and protection, and the right to family life (2021, section 1-5). Section 102 of the

Constitution otherwise gives everyone in Norway a fundamental right to respect for their family life, and the state has imposed a special responsibility to protect personal integrity.

These sections establish a practice that has far-reaching historical roots. For most children, the family has been the framework for life until adulthood. Over the years, the state has imposed tasks and duties on parents in different ways and by different means. In line with societal development, parents have been assigned responsibilities for children's upbringing and education, which have also regulated relationships between parents and between parents and children. Accomplishing these tasks occurs in cooperation between the state and the family, through various forms of facilitation and support. Most often, families have a high degree of autonomy, but when parents no longer fulfil their duties towards the child, the state intervenes more directly (Kamerman, 2010; McGowan, 2010; Wyness, 2014). A turning point in the support process occurs when Child Welfare Services concludes that the problems are too great to be solved within the family. When things take such a turn, the focus shifts from assessments of the child's and the family's need for help and support in the home, to assessments of the degree to which the family is a risk to the child. This raises several questions about the child's relationship to his or her own family. Firstly, it is a question of whether staying in the family is in the child's best interests in relation to other alternatives. Secondly, it is a question of what contact the child should have with the parents if there is a care order. Formally, this is a question of how the child's rights should be weighed against parental rights. These rights may pull in the same direction, but not infrequently they may conflict (Berrick, 2018; Eide, 2020). These issues have come to the fore in recent years, because Norway has repeatedly been convicted in the European Court of Human Rights for violations of the right to family life, in Article 8 of the European Convention on Human Rights. Specifically, these are most often cases relating to the basis for assessments of care orders, visitation rights, return to family, and adoption (Søvig & Vindenes, 2020).

One of the most prominent judgments is *Strand Lobben et al. v. Norway* 2019, where the case was considered by the European Court of Human Rights in the Grand Chamber (for a more detailed analysis of the case, see the chapter 'Norwegian Child Welfare Cases in the European Court of Human Rights – an Ethical Perspective on the Judgements'). The case involves the deprivation of parental responsibility and the adoption of a

boy born in 2008, and the question of whether this was a violation of the right to respect for family life under Article 8 of the European Convention on Human Rights. The verdict of 13 judges found a violation of Article 8, while four judges voted against this. The majority was particularly critical of the fact that so little access was granted that this made a reversal impossible, and they also found various procedural errors in the case. The dissenting judges were from Denmark, Finland, Norway, and Slovakia. This partly Nordic faction refers to how the European Court of Human Rights struggles to resolve the trade-off between the rights of the family, which are particularly emphasised in the European Court of Human Rights, and the individual rights of the child, which we find in the Convention on the Rights of the Child. The four-judge minority argued that when the majority relies on procedural errors, this position conceals the fact that it was more concerned that Norway focused on the child's interests and not on the child being reunited with his biological family. In the minority's opinion, this reveals the tension that can be found in the European Human Rights Court (Helgesen, 2019).

The cases from Norway that have come up in the European Court of Human Rights are based on decisions made by the Child Welfare and Health Board (formerly the County Welfare Board), which is an independent administrative body making decisions independently of the municipal Child Welfare Services. Although the decision-making process is organised to safeguard the legal protection of the child and the parents, questions are nevertheless raised about violations of the human rights of the child and the parents. As Bendiksen and Haugli point out, it is thought provoking that a country like Norway, regarded as having a high degree of legal certainty, is subject to so many cases in the European Court of Human Rights (Bendiksen & Haugli, 2021, p. 202). In connection with the implementation of the new Child Welfare Act, a committee was therefore appointed to review how Child Welfare Services can better ensure legal protection at all stages of the decision-making process. In the Official Norwegian Report (2023: 7), the Child Welfare Service Commission presents 118 proposals to strengthen children's and parents' legal protection in Child Welfare Services.

There is room for discretion within the legal and professional framework on which the Child Welfare Services make their assessments and decisions. The boundaries between good and poor care and when one's own family is inferior to other alternatives will always be subject to discussion.

The assessment of the child's best interests has legal, professional, and value-related aspects. The best interest of the child is a principle rooted in a fundamental understanding and perception of what a family is and the importance of the family to the child.

## What is a family?

The importance of the family for children is usually indisputable. It is taken for granted that children should grow up with their parents and that it is the family's responsibility to provide for, protect, and raise the children. As sociologist Göran Therborn argues in his book *Between Sex and Power* (2004), the family is the oldest and most widespread social institution there is. Although there are wide variations in family patterns, the family is the basic unit of all societies (Bjorklund et al., 2020). Regardless of whether conditions differ materially, financially, and culturally, the family is assigned similar tasks in providing for the upbringing of children. One definition broad enough to embrace an understanding of the family as a universal social institution is David Archard's definition of family as '... a multigenerational group, normally stably cohabiting, whose adults take primary custodial responsibility for the dependent children' (Archard, 2010, pp. 9–10). This definition is inspired by Margaret Mead, who argued that the concept of family could not be linked only to biological family, if it were to make sense to claim that family exists in all societies (Archard, 2010, p. 7). Admittedly, it is precisely the rearing of children that Mead believes is the only function that is universal (Mead, 1932, p. 27). Nor does a sociological concept of the family as an institution cover how family life is practised. The family is no longer a social institution with clearly defined roles and functions. Instead, the family has become a social community with individual responsibility and solidarity (Schneider & Kreyenfeld, 2021, p. 3). Relations between the state and the family have also changed significantly during the latter half of the 20th century. In Norway and many other countries, there has been greater acceptance of a broader diversity of family forms, both formally and in practice and different ways of living together as a family have become more equal legally. At the same time, the distinction between public and private has changed. Relationships between family members have increasingly been framed by rights and responsibilities, and the intimate sphere of the family has become a public concern in

terms of sexuality, gender identity, and forms of cohabitation (Plummer, 2003; Roseneil et al., 2020).

## **The right to family life – a human right**

When the Universal Declaration of Human Rights was adopted in the aftermath of World War II in 1948, it stated that the family ‘... is the natural and fundamental group unit of society and is entitled to protection by society and the State’ (United Nations General Assembly (1948), Article 16(3)). Thus, Article 1 states that all adults have the right to marry and start a family, and that they have equal rights at the consummation of marriage, during marriage, and at the dissolution of marriage. Article 8 of the European Convention on Human Rights provides for an individual right to privacy and family life, as well as the right to marry in accordance with national law. Experiences from the two world wars contributed to an assessment of the biological family, and of the significance for children to grow up in their own families. Farida Banda and John Eekelaar note that the understanding of what a family is has changed significantly since 1948, when the Universal Declaration of Human Rights was adopted (Banda & Eekelaar, 2017). Therefore, there will not necessarily be a consensus on what a family is in terms of assessing the child’s right to family life. Since the question of the state’s rights in relation to families and violations of family members’ rights have become central issues in several child welfare cases, it is important to explore the meaning attached to concepts of family and family life.

The preparatory work for the Norwegian Child Welfare Act states that ‘legal definitions of the concepts “home”, “parent” and “family” are avoided ... as the meaning of these varies and evolves as time passes’ (Official Norwegian Report, 2016: 16, p. 13). The European Court of Human Rights also adopts a similar perspective on family life and refers to practice. In the Guide on Article 8 of the European Convention on Human Rights from 2022, European Court of Human Rights assumes that ‘... whether or not “family life” exists is essentially a question of fact depending upon the real existence in practice of close personal ties’ (European Court of Human Rights, 2022, p. 77). An assessment of any violations of Article 8 is therefore based on a broad concept of family. The right to family life may include both kinship and other relationships between the child and persons without biological ties to the child. But the assumption then is

that there is a *de facto* family life over a certain period. (Sørensen, 2016, p. 337). The more distant the kinship, the greater the requirement that there is an important bond between the child and the person in question (Bendiksen, 2008, p. 119). This illustrates well the importance of the Child Welfare Services having up-to-date information about the child's actual life situation and attachments. Also, foster parents can be an important part of the child's family life. In a judgment from 2016, the Norwegian Supreme Court noted that the European Court of Human Rights has recognised that the relationship between foster parents and foster children can constitute family life pursuant to Article 8 in the European Convention on Human Rights (HR-2016-1111, paragraph 51). One example of this is *Moretti and Bennedetti v. Italy* from 2010, where the court ruled that the foster parents and the foster child had a conventionally protected family life. The case concerned a child who was adopted into a family other than the foster family. A study of how the European Court of Human Rights interprets family in cases concerning adoption from foster homes shows that the family unit is understood in terms of biological relationships, but in more recent cases the relationships between foster parents and siblings are also included. This understanding is in line with recent research on how the bonds between children and parents are created through personal and caring relationships and activities (Breen et al., 2020, p. 741).

The European Court of Human Rights case law thus shows that the Court has a nuanced understanding, where the concept of family includes three important components: the judicial, the biological, and the social/emotional. Of these family ties, biological and social conditions seem to be of the greatest importance (Bendiksen, 2008, pp. 114–115). However, when we look at recent developments in European Court of Human Rights convictions and the criticism Norway receives, European Court of Human Rights places considerable emphasis on the biological connection and value. At the same time, this can also be seen by the fact that European Court of Human Rights uses biological arguments to highlight the importance of the child's environment of origin in child welfare cases, which includes the legal, biological and social family. The biological principle expresses the fundamental value on which we have historically built, and which remains a very important foundation of our society. The fact that Child Welfare Services takes an open and nuanced view of the concept of family when dealing with child welfare cases is an important safeguard of the biological principle. In this way, modern family forms gain the space necessary

to fulfil the right to family life. The assumption is that this family life is in the child's best interests. The Child Welfare Services and the courts are therefore always responsible for seeing the unique child, and getting an overview of who are the important caregivers for the child. This will also better safeguard the child's right to care and protection.

## **Tensions between different conceptions of the family**

Another path to understanding the concept of the family than the European Court of Human Rights is the Convention on the Rights of the Child. The UN Committee on the Rights of the Child also has a broad understanding of family, and in General Comment No. 14 on the best interests of the child, the committee considers that the concept of family in Article 16 of the Convention on the Rights of the Child shall be broadly interpreted (paragraph 59): 'The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom' (Article 5).

The Convention on the Rights of the Child is the only convention that distinguishes between parents and other family members in the text. Like the conventions, section 102 of the Constitution has no clear definition of what family is, and within the Norwegian understanding of law, it is more uncertain as to whether the constitution's concept of family is as broad as the concept of family following from human rights conventions (Sørensen, 2016, p. 335).

In the Official Norwegian Report (2020: 14), the committee has based its proposal for a new Children's Act on the fact that the understanding of family is changing, and that this understanding also varies between states and different cultures (Official Norwegian Report, 2020: 14, p. 35). They assume that family encompasses much more than biological ties. A family is a group of people who may be connected by kinship, adoption, or a foster home. It could be a traditional nuclear family or a shared household with your, mine, and our children. Some parents are married, others cohabit with and without children, and others are single parents. The parents may be same-sex or fall under what are referred to as rainbow families, where, for example, two women have children with a friend. Legally, only two parents are allowed, but in these cases, the family is expanded to three parents (Norwegian Directorate for Children, Youth and Family Affairs, 2021).

Family can also include non-resident parents, grandparents, and former relationship partners.

In the preparatory work for the Child Welfare Act of 2021, it has also been assumed that family patterns and forms of cohabitation in society have changed considerably over the years (Official Norwegian Report, 2016: 16, p. 29). The Child Welfare Act of 1992 did not define the concept of family, although the term was used in the wording, for example section 4-4, where assistance measures were intended to lead to 'positive change in the child or in the family' (Ot.prp. no 44 (1991–1992)). The Child Welfare Act of 2021 also has no such definition, but section 1-5 highlighted children's right to family in a more explicit way (Prop. 133 L (2020–2021)). The Child Welfare Act is based on an understanding of the family that otherwise follows from the constitution and from human rights conventions. The fact that, for example, grandparents are an important part of our understanding of the family is emphasised in a Supreme Court decision in which a grandmother was granted visitation rights to her grandchild living in foster care (H.R. 2021-1437-A). Here, the grandmother was granted party status because the parents had very limited contact with the child. With reference to the preparatory work for the Child Welfare Act of 1992, the Supreme Court emphasised the importance of close family relations. When the parents have so little contact with the child, as in this case, the consequence will be that the child's contact with other family members and significant persons in the child's environment of origin is virtually cut off. Persons other than relatives may also be granted access rights after a care order, but in such cases, they must have a close connection to the child (Child Welfare Act 2021, section 7-3, second paragraph). The Child Welfare Act of 2021 also clarifies that following a care order, Child Welfare Services has a responsibility to 'strengthen ties with siblings and others who have an established family life and close personal ties to the child' (2021, section 7-5). As these examples show, such expansions of the concept of the family may also guide practice in both the Child Welfare Services and the judicial system.

Many of the demographic changes that have occurred are global. A greater diversity of family types also affects the understanding of what a family is. Ingeborg Schwenzer (2007) notes that family and the relationship between children and parents are no longer understood solely in terms of whether the parents are married or not. At the same time, there was also legal regulation of forms of cohabitation other than marriage. Family and

parenthood are partly constituted by marriage, but also socially by who shares the household as a family. A main point of Schwenser is that there is no unambiguous development of family forms and parenthood. While biological family and biological ties seem to have become less important, there are also cases where precisely this type of bond has been strengthened (Schwenser, 2007). This is also reflected in Norwegian legislation. According to the Children Act, children who have reached the age of 18 have the right to know who their biological father is. Schwenser mentions Norway specifically in this context, but points out that this is also a tendency in other countries. She therefore argues that there is tension between different conceptions of family and parenthood, in that biological ties can challenge both social and legal parenthood (Schwenser, 2007, pp. 6, 24). Legal rules often keep pace with developments. Whether parents are married or not has less relevance than before, thus gradually reducing the traditional *pater est* rule that the mother's spouse is the child's father. While the understanding of who the child's social parents are is gradually gaining traction, it seems that the biological origin of the child is also given greater emphasis. The right to family life and privacy is based on the freedom to arrange our lives as we see fit. As the principle of legality expresses, the state cannot override this freedom without a legal basis. This principle of law is one of the foundations on which our legal society is founded, and which is also enshrined in section 113 of the constitution. This freedom of action to decide for oneself and one's family clearly underscores that the law should be somewhat reticent in its role as a driving force here, especially given how the diversity of family life and childcare is still being shaped in ever new ways.

## **Understanding of family: Developments in Child Welfare Services**

When Norway's first child welfare law was passed at the end of the 1800s, it was based on a growing understanding of the influence parents could have on their children. The relationship between state and family underwent extensive changes. The family was given more tasks and duties, and it was to an even greater extent than before subject to government regulations regarding marriage, fathers' duties, and the parents' upbringing of their children. The introduction of general schooling also imposed an additional task on parents in that they had to ensure that children received the

education they should have (Kvam & Tveiten, 2018). However, the state's control of the family was based mainly on an understanding that family life was private. Therefore, control consisted mainly of ensuring that the family could provide a stable and lasting framework for children's upbringing. One legislative amendment to contribute to this was the prohibition against living together without being married, which Norway enacted in the Penal Code of 1842, and which was continued in the Penal Code of 1902. This ban was lifted in 1972, but in the debate in parliament, there were several who argued for keeping the ban because marriage was best for both parents and children.

The first Child Welfare Act in Norway, the Act on the Treatment of Neglected Children, marked a change in the state's control of parents. A family with married parents was not necessarily enough to ensure a good upbringing of children. In the preparatory work to the law, it is stated that 'unworthy parents' shall be deprived of the right to raise children, while 'honourable parents' who are not quite able to take care of their children shall be helped (Oth. Prp. No 6, 1896, p. 3). A distinction is thus made between parents whom it is possible to help and parents who will not be able to take care of their children. Therefore, in some cases parents can be justifiably deprived of responsibility for the child. As the wording shows, this decision depends on an assessment of the moral quality of the parents. Therefore, one of the options for placement outside the biological family is to put the child away into a 'reliable and honourable family'. One consequence of the fact that the importance of the family for children is seen as more critical than earlier seems to be that control vis-à-vis the parents is tightened by direct intervention in the relationships between children and parents in the family. First, the use of corporal punishment in upbringing is limited. The law relating to the Limitation of the Application of Corporal Punishment, adopted in 1891, states that this form of punishment must be only 'temperate'. Second, it was argued that the state had the right to intervene in the family if the child was neglected. In the Child Welfare Act debate, Prime Minister Hagerup argued that the state must have the opportunity to intervene in the family if the child was not taken care of, without it being employed as a form of German state socialism. He argued that

when, by exercising his right to care for the child, in particular by abuse of the right to upbringing, or by neglecting the child, the holder of parental responsibility endangers his mental or bodily well-being, ... (Parliamentary Proceedings, 1896, p. 47; Kvam & Tveiten, 2018, p. 47)

He emphasised that the state's overall role as guardianship authority also included controlling authority over the parents' exercise of parental authority. The state's task was twofold. Based on the thinking of the time, the protection of the child went hand in hand with the protection of society, in that the state made sure to counteract unfortunate influences of the social environment (Dahl, 1985; Rose, 1999). The social order of society became the goal, and education became the means. To the extent that family and school were inadequate educators, the state had to step in by intervening in the family. The Child Welfare Services was given this task, and residential care and institutions emphasising harsh discipline became practical tools, since the idea was to compensate for the parents' neglect in the upbringing of their children. Legislative changes gave the state the right to intervene in families, and the scientific knowledge of psychiatry and psychology provided tools that Child Welfare Services could use with children and families.

However, psychology and pedagogy contributed to a greater extent than psychiatry in influencing the content of the Child Welfare Services' practical parenting work. Psychology not only influenced the classification and treatment of problems, but also contributed greatly to changing the dominant view of maladaptation and behavioural difficulties. First, the child's problems were linked to relationships with close caregivers, the immediate milieu in general, and the child's 'natural' development and needs at specific ages. Second, the 'morbidity stamp' was removed from those who needed treatment through emphasis on how the interaction between the child and the environment gave rise to problems. And third, psychology contributed to a more optimistic view of the efficacy of prevention and treatment. This psychological understanding also contributed to a reassessment of the family and the child's relationship with the parents (Ericsson, 1996; Hernes, 1996; Buer & Fauske, 2009).

The fact that children benefit from growing up with their own parents became a guideline for Child Welfare Services with the Child Welfare Act passed in 1953. The ideological basis for the law is clearly expressed in the preparatory work, and is a clear break with the Act on the Treatment of Neglected Children and previous practice. The Child Welfare Committee, which prepared the law, emphasised that children should grow up in 'a natural family environment with their own parents and siblings'. The strong emotional attachment that children had to their parents was an

argument that children would be better off with their parents even if there were ‘certain deficiencies’ in the home. The committee pointed out that not all parents were equally good providers and caregivers, but – it was argued – ‘replanting the child in a materially and socially better environment’ could be a greater strain than staying with one’s parents (Ministry of Social Affairs, 1951, pp. 37–38). In these assessments of children’s attachment to their parents and of the family’s importance to children, the Child Welfare Committee was influenced by a psychological understanding of children’s development and attachment to their parents. In Norway, as in many other countries, children’s emotional development and what the Child Welfare Committee called ‘problems of a mental hygiene nature’ received greater attention than before (Ministry of Social Affairs, 1951, p. 46).

The Child Welfare Committee aligned with contemporary ideological currents. The same year that the committee submitted its recommendation, John Bowlby published his report about homeless children in post-war Europe and USA that the World Health Organization had commissioned. His conclusions, after reviewing research from Europe and the United States on children who had been separated from their parents, contrasted with a good deal of what had been written about childrearing from the early 1900s. Bowlby argued that except for the worst cases, parents who neglect their children also mean a lot to their children. These parents – despite all their shortcomings – provide their children with care, security, and the knowledge that they are valued for what they are. This, according to Bowlby, is why poor homes provide better developmental opportunities for children than even good institutions (Bowlby, 1952, p. 68). This report quickly gained widespread circulation.

Bowlby’s ideas and the development of attachment theory on the importance of the emotional bonds between caregivers and the child have gradually become fundamentally recognised in the work of the Child Welfare Services. Interventions were to be implemented where there was an ‘urgent need’, and in choosing between alternative measures, the mildest was to be chosen. However, according to the intervention criteria, Child Welfare Services would assess the parent’s treatment of the child in terms of whether the child’s health or development was exposed to danger or harm. As Knut Sveri points out, the wording of the law provides little guidance on where to draw the line for danger or harm. In practice, it was difficult for child welfare boards, which consist of laypeople, to draw the line between normal

and abnormal conditions (Sveri, 1957, p. 125). Although the importance of the family was well established with the Child Welfare Act of 1953, in practice, care orders rather than preventive measures persisted. The intervention criteria concentrating on the risk to the child contributed to such practice. Where to draw the line meant finding a level of acceptable risk. Nevertheless, preventive measures were also increasingly used. In 1982, for the first time, more preventive measures than care measures were implemented, and by the beginning of the 1990s the proportion of preventive measures had increased further.

The 1992 Child Welfare Act distinguished between the two main types of measures: voluntary assistance measures and coercive measures. The reason for separating the conditions for these measures was that the threshold for intervening in the family should be low enough to prevent more serious problems at an early stage (see Ot. Proposition 44, 1991, 1992, p. 32). Support measures were to be implemented to prevent neglect and behavioural problems, and to safeguard the living conditions and welfare of the family and the child. In other words, it was expected that support measures would counteract the family's deficiencies. With this amendment, there is a shift towards a stronger emphasis on meeting children's needs, and ensuring good and safe conditions for growth in the family with their own parents. The reasoning was as in the preparatory work for the previous law, namely that attachment to parents was crucial for children's development and mental health.

Gradually, understanding of the attachment between the child and the parents was both expanded and deepened. The professional approach that also gradually characterised the work of the Child Welfare Services was an expanded understanding of the relationship between children and parents. Greater emphasis was placed on the emotional relationship and the parents' interpretation of the child's signals and needs in accordance with key parts of attachment theory. Thus, it also became a question of how these professional insights could have an impact on the assessment of the child's biological family. The question of whether attachment may be more important than growing up with one's biological parents was raised in the Official Norwegian Report (2012: 5) *Better Protection of Children's Development*. The biological principle is thoroughly considered in the report, and it concludes that children generally benefit from growing up with their own parents. However, the committee supports the position that the best interests of the child must be an overriding principle and a new

principle called developmental care is proposed. Regarding the importance of the biological principle in the future, it is pointed out that it will depend on societal developments (Official Norwegian Report, 2012: 5, p. 15). In the comments and discussions that followed the committee's report, several interpreted the committee's proposal as a contribution to weakening the biological principle (see Kjørstad, 2013, part 5).

Criticism of Norway for the interpretation of the child's right to privacy and family life changed the discussion of the biological principle, which is reflected in the preparatory work for the Child Welfare Act that was adopted in 2021.

## **The right to family life in the Child Welfare Act 2021**

The road towards a new Child Welfare Act reveals varying views on the part of the authorities as to whether the fundamental principles of children's rights should be formulated in the text of the law. The Child Welfare Act of 1992 had no explicit rule on the child's right to a family, but it was nevertheless clear that the law was based on the biological principle.

In the Official Norwegian Report (2016: 16), the Child Welfare Law Commission proposed an overarching provision in the Child Welfare Act in line with human rights as expressed in the Constitution and in conventions: consideration for the best interests of the child, the child's right to care and protection, and the child's right to family life. The committee also proposed that consideration of the best interests of the child should be 'decisive' in all actions and decisions affecting a child so that this condition should not only be linked to implementing measures under the law. In the Consultation document from 2019, the Ministry did not wish to follow up on the commission's proposal to legislate the right to family life, and the right to care and protection in separate provisions (Ministry of Children and Equality, 2019). Several consultative bodies had argued that legislating the right to family life in the Child Welfare Act entailed a risk of strengthening the biological principle at the expense of children's need for attachment and relationship quality. The Ministry stated here that a statutory enactment could create ambiguity as to what legal content such an overarching provision on the right to family life should have in individual cases, but that the child's need to preserve the family environment and close relationships would be important factors

in an assessment of the child's best interests (Ministry of Children and Equality, 2019, p. 45).

In the proposal for a new Child Welfare Act (Prop. 133 L (2020–2021)), the Ministry has changed its stance and now proposed an overarching provision in section 1-5 of the Child Welfare Act concerning children's right to care and right to family life. The majority of the consultative bodies were still critical of regulating the right to family life. At the same time, the legal picture of Norway has been nuanced somewhat through new practices from the European Court of Human Rights and from the Supreme Court. In many cases against Norway, the European Court of Human Rights has found violations of Article 8 of the European Convention on Human Rights and the right to family life. In particular *Strand Lobben et al. v. Norway* from 2019 was thoroughly dealt with in the European Court of Human Rights Grand Chamber. Considering these legal developments, the Supreme Court chose to hear three child welfare cases in the Grand Chamber in 2020, and here, the first respondent in HR-2020-661-S stated in paragraph 85:

In Norwegian decisions, consideration of family ties is sometimes more of an implied, and partly unstated assumption, but consideration for the best interests of the child emerges most clearly, even though the Supreme Court in its decisions as mentioned has stressed the importance of family ties.

The Ministry also stressed that the purpose of legislating the right to family life in the Child Welfare Act 'is not to strengthen the biological principle beyond what already follows from sources of law of higher rank' (Ministry of Children and Family Affairs, 2021, p. 93), and has therefore chosen to legislate children's right to care and protection in the same section.

## **The 'mandate' of parents: Children and Parents Act**

It is the parents who are responsible for their children. What the parental responsibility entails is set out in Section 30 of the Children Act. The Act gives parents a right that entails a duty to safeguard the child's interests and needs in the exercise of parenthood. As such, it is not a right granted to parents 'for their own sake' (Smith & Lødrup, 1993, p. 64). This right includes responsibility for the day-to-day care, upbringing, and care of children, as

well as ensuring that children develop in a safe environment and under sound conditions. Furthermore, the parents have the right and duty to make decisions for the child in personal matters within the framework set by the Act (the Children Act, 1981, section 30). The Children Act of 1981 also signals a different view of the family by replacing what were previously two laws, one for children born out of wedlock and one for children born in wedlock, by a common law. Children whose parents were single mothers or fathers, cohabiting or married couples, were incorporated into the same law, marking the equality of children with parents with different family forms. One important reason why there was no longer a difference between the law for unmarried and married couples probably had to do with the fact that an increasing proportion of children also had cohabiting parents, which meant that these children were formally born out of wedlock. Admittedly, children born out of wedlock had already in 1915 been given the same legal rights as children born in wedlock through what was called the Castbergian Child Laws. Johan Castberg, the politician who pushed the law through, argued that mothers should be recognised for assuming the social responsibility of caring for children. Nevertheless, in the 1956 revision of the law, two laws were retained, marking a difference between married and unmarried parents.

The Child Welfare Act is aimed at children living in conditions that may harm their health and development. In the Official Norwegian Report for a new law relating to children and parents, the Children Act (2020: 14), the most important rights for all children in Norway are gathered in the first chapter of the Act. This emphasizes with renewed vigour the importance of the child as an independent legal entity today, and how the best interests of the child as the fundamental consideration should permeate all decisions and actions that affect children. It follows from this that children must be allowed to form their own opinions and then be allowed to participate freely in decisions that affect them. Other fundamental rights for the child include the child's right to care and protection from violence and the child's independent right to family life.

In the years following 1981, the Act has been amended to place a stronger emphasis on children's participation. In the proposal for a new Children's Act, the rights of the child and the duties of the parents are clarified. Chapter 1 states that parents shall, like public services and institutions, allow the best interests of the child to be a fundamental consideration in all decisions and actions involving the child. The child shall be met with love and respect and shall have a secure childhood. The parents must ensure

that the child is allowed to participate and safeguard the child's right to care, development and protection against violence and abuse, as well as the right to family life. The right to family life means that if the parents consider it to be best for the child, the child must be ensured contact with both parents.

As stated in the current Children Act of 1981 and the proposal for a new Children Act, the duties assigned to parental responsibility are formulated quite similarly to those for professionals working with children. The Act applies to all parents, but it is only when the Child Welfare Services receives a concern that the child is not receiving adequate care, or that the Child Welfare Services itself considers the care to be of concern, that parents and children are subject to the Child Welfare Services' assessment. In the Child Welfare Services' assessment, emphasis is no longer placed on the parental cohabitation arrangements, but on whether the parents exercise their parenthood in a satisfactory manner. While a greater diversity of family forms has been legalised through changes in family law, there is also increased emphasis in the child welfare mandate and practice on the quality of the relationships between parents and children. In the proposal for the Child Welfare Act of 2021, this is expressed in the fact that the overriding principle of the best interests of the child shall be professional assessments of 'attachment and relationship quality, biological ties, mildest effective interventions and the child's participation' (Prop. 133 L (2020–2021), p. 77). This overarching principle was established in 'Prop. 106 L (2012–2013) Amendments to the Child Welfare Act' and confirmed in the proposal for the current Child Welfare Act.

Increasingly, the Child Welfare Services are tasked with making demanding and difficult assessments of the parents' competence, of the child's development and of the relationships between parents and children. In the Child Welfare Services' own reports and in expert assessments, attachment theory concepts and reasoning are often used. Such arguments are also used in Supreme Court decisions (e.g., HR-2020-00662-S.). Although attachment theory can be applicable and useful, a high level of knowledge and understanding is required to make it applicable in child welfare and legal contexts. In a pressured work situation, both misunderstandings and misuse of the theory can occur (for a more in-depth discussion, see e.g. White & Gibson, 2020, p. 105; Duschinsky, 2020, p. 549; Forslund et al., 2022; Duschinsky et al., 2023). It is also important to emphasize that relational quality encompasses a number of different relationships between parents and children

and that all relationships are not synonymous with the attachment theory's concept of attachment.

## **Balancing the parents' right to family life and the best interests of the child**

When there is doubt in the Child Welfare Services about the principle of the child's own family and the child's need for care, the central question is what is in the child's best interests. Even though everyone agrees that the best interests of the child shall be a fundamental consideration in all actions and decisions affecting children (Convention on the Rights of the Child Article 3 no. 1, Article 104 of the Constitution and Child Welfare Act section 1-3), it is in the discretionary formulation of the concept that the very content of the child's best interests is difficult to obtain.

### **What is in the best interests of the child?**

In general, we have a great deal of knowledge about what is in the best interests of the child and what is not, but what is in the best interests of the individual child in a concrete trade-off between the child's needs and the parent's wishes is often a demanding assessment. Nor is consideration for the child's best interests merely a standard of striking a balance between the child's right to care and protection and the right to family life. The principle primarily means that all children, as an independent legal entity, have a fundamental right to have their needs and interests specifically safeguarded. As the UN Committee on the Rights of the Child emphasises, children are completely dependent on adults and have a weak legal status with less opportunity to bring a case on their own behalf. This suggests that great emphasis should be placed on what is considered to be best for the child (Committee on the Rights of the Child, paragraph 37). The European Court of Human Rights also attaches importance to the considerations expressed in the Convention on the Rights of the Child in matters concerning children. Here, it is emphasized that the child's best interests should not be the only consideration, but it should be «a primary consideration» (Strand Lobben, 2019, paragraph 207). Consideration for other children in the case and for parents will also be factors that must be taken into account, but not in such a way that the best interests of the child become only one of several considerations:

If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best. (Committee on the Rights of the Child, paragraph 39)

The Committee on the Rights of the Child also highlights several factors that may be appropriate to emphasise in the assessment of a child's best interests: participation, identity, the child's particular vulnerability, health and education, care and protection, and preservation of the family environment and maintenance of relationships. Several of these factors have also been incorporated into Chapter 1 of the new Child Welfare Act and may be used as arguments in the specific assessments that the Child Welfare Services face when the child's need for care must be weighed against the child's right to family life and the parent's right to live with their own children. These factors mentioned by the Committee on the Rights of the Child must also be assessed against each other, depending on the specific situation the individual child is in. In this discretionary assessment one must not only look at the present situation but also emphasise the child's capacity to develop. The Child Welfare Services must therefore be reluctant to implement measures that are irreversible and definitive but be open to possible scenarios for how the child and the family can develop in the short and long term (Committee on the Rights of the Child, paragraph 84).

This highlights how demanding it is for the Child Welfare Services to weigh up such considerations. As the Court puts it in the Strand Lobben judgment: The authorities must strike a fair balance between these interests, but that particular weight should be given to the child's best interests (2019, paragraph 206). This is also emphasized by the Supreme Court in H.R. 2020-661-S, paragraph 95. Here, the Supreme Court refers to the Strand Lobben judgment's statement that family ties should be maintained unless the parents are particularly unfit and that the parents cannot demand measures that will harm the child's health or development. Regarding visitation following a care order, according to the European Court of Human Rights judgment K.O. and V.M (paragraph 69), the parents cannot demand visitation that would be an unreasonable burden on the child ('undue hardship'). In subsequent judgments, the Supreme Court has held that 'undue hardship' does not mean that the scope of visitation

should be close to the child's tolerance limit (HR-2020-1967-A, Section 61 and HR-2020-2081, Section 74). Nevertheless, it will still be a major challenge for the Child Welfare Services to find a reasonable limit for what the child should tolerate in terms of stress, whether in their everyday life or when they have access rights after a care order.

## **Balancing the child's right to care and protection, and the objective of reunification after care orders**

After the many convictions against Norway in the European Court of Human Rights, the Norwegian Child Welfare Services now have a strong focus on children's connection to biological families and the goal of reunification of children placed in foster homes and reunification of children and parents. A common feature of the judgments against Norway is that the Norwegian authorities have placed too little emphasis on family ties (HR-2020-661-S, paragraph 84), and have placed too much emphasis on the care orders being long-term (Søvig & Vindenes, 2020, p. 196). In this context, the best interests of the child are often understood as the child's need for care and protection outside his or her family in a neutral foster home. However, the Supreme Court emphasises that all care orders are generally regarded as temporary and that family ties are an important part of the principle of the best interests of the child (Ministry of Children and Family Affairs, 2020). The state has a duty to actively work to maintain the relationship between children and parents so that they can be reunited. The Child Welfare Services clarifies its responsibility for identifying measures that enable children to stay at home in their families and measures that entail that children can be returned to their families after placement in foster homes. The measures must therefore be designed in such a way that they create the prerequisite for reunification if possible. Among other things, the criticism of Norway in the Strand Lobben judgment was that the Child Welfare Services could not argue with a lack of affiliation where this was initially caused by the access that was severely restricted by decision-making authorities.

The term attachment, as used by the Supreme Court, addresses the child's relationship to people and the environment in which it is, that is, the child's current care base (HR-2020-1788-A). It will normally be the foster parents, but the criterion may also be relevant for other care bases. The term also includes school, friends, local community, etc. In cases where the child has

lived in the same foster home for a long time, the attachment will be strong. A safe and good connection to the foster home is not a sufficient reason why a return to biological parents should not take place. A care order should be a temporary intervention, and the reunification objective is central. It is therefore only where relocation can cause serious problems for the child that a care order should not be revoked. The attachment exception concerns the real risk of long-term adverse effects. If it is essentially a transitional problem, the connection will not be an obstacle to reunification. Far more long-term problems of a serious nature may mean that reunification cannot take place.

Some of the criticism from both the European Court of Human Rights and the Supreme Court that is particularly important in these types of cases is that the assessments that have been made have not been thorough and good enough. The quality of the decision-making basis, weighing up and justification are particularly important when the question of reversal comes up. The discussion must be based on an adequate and up-to-date basis for decision-making and have a balanced and sufficiently broad assessment and have a satisfactory justification (ref. HR-2020-661-S). A decision to deny reunification must show how the reunification goal is intended to be met in the future if possible or explain why the goal may need to be abandoned. As long as the provision is practised accordingly, it is not, in the opinion of the Supreme Court, contrary to the human rights obligations.

## Conclusion

The importance of the family for children's upbringing is still given great importance today. The decisive factor is the relationship between parents and children and, more generally, between adults and children. These relationships are partly rights-based, while what is otherwise qualitatively good relations is academically and theoretically justified. In terms of the relationship between the state and the family, the family has a high degree of autonomy in how they want to live their lives, but is limited by general requirements for parental responsibility, school obligations and basic requirements for care. Child Welfare Services intervene in the family based on the assumption that parents do not fulfil the duties that parental responsibility entails and are no longer suitable or able to

provide children with the care required. Children's rights have become an important basis for assessments of parenting and the relationship between children and parents. In the wake of the European Court of Human Rights rulings, attachment to one's own family has become an even more important issue for Child Welfare Services than before. In addition, Child Welfare Services must assess attachment and relationship quality, where these concepts are rooted in theory and research, and form the basis for assessments.

The result of the European Court of Human Rights' rulings and decisions of the Supreme Court is that the Norwegian Child Welfare Services have taken a new turn in their professional trade-offs between various considerations in child welfare cases. The complexity of the cases has become more apparent, and this complexity also seems to be reflected in the professional assessments. The Child Welfare Services are required to achieve a high degree of both adequate care and protection for the child, while choosing solutions entailing that the child also maintains a relationship with family and networks when possible. Child Welfare Services must therefore be aware of which relationships and conditions are important to the child. The focus is more on solving problems where the child lives, in the child's local environment. However, when the child does have to move out of the home, these important relationships must be safeguarded as far as possible. The new pivot also implies that an increased recognition of how important the local environment is, also shows respect for the child and the child's real life. Most children in child welfare already have a daily life that can consist of many significant people, such as extended family, friends and their family, teachers, and neighbours. This complex network and its significance for the child's care situation requires time and interest to understand. The responsibility of the Child Welfare Services is also to strengthen these important relationships, but this responsibility, for obvious reasons, cannot rest with Child Welfare Services alone. All agencies that are part of a child's life have a similar responsibility. The responsible authorities must cooperate closely in order for children to be able to retain and increase the good care they receive from people they are associated with. Therefore, the new and broader understanding of what a family is, who is important in the child's network, as well as insight into the concrete quality of these relationships will be decisive.

## Author biographies

**Halvor Fauske** is Professor of Social Work at Inland Norway University of Applied Sciences, Department of Social Work and Guidance, and Norwegian University of Science and Technology, Department of Social Work. He has experience in teaching and research, and has also worked in municipal health and social services. Fauske has been head of the Children and Youth Participation and Competence Development (BUK) Ph.D. programme. His research interests and publications are within child welfare, children, youth and families, professions, professional development and professional knowledge.

**Camilla Bennin** is a lawyer and associate professor at Inland Norway University of Applied Sciences, Department of Social Work and Guidance, where she teaches at, and heads the section for the bachelor's programme in child welfare. She also teaches at the master's programme in child welfare. Her publications include a book that examines the weight given to the child's interests in judicial decisions in child care hearings, a book on ethics in child welfare and a book chapter on cooperation and coordination in the child welfare service.

**Bjørn Arne Buer** is a university college teacher at Inland Norway University of Applied Sciences, Department of Social Work and Guidance, where he teaches at the bachelor's and master's programmes in child welfare. He has a background as a child welfare worker and holds a master's degree in politics. Buer's publications include a book chapter on neglect and social capital, a book on ethics in child welfare work and a book chapter on cooperation and coordination in the child welfare service.

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