

# Kluwer Mediation Blog

## Are We Losing the Voice of the Child in Mandatory Family Mediation Schemes in Europe?

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Mediation has been universally praised as an effective tool in resolving family disputes and lowering the social and economic costs of separation and divorce. This is why many jurisdictions in the recent past have adopted various measures to encourage parties to a family breakdown to try mediation, including through mandating them into the procedure. A [recent study](#) has established that 20 out of the 27 EU Member States already enjoy one or several models of fostering family mediation in its mandatory form, while at least nine Member States are in the process of adopting certain forms of mandatory family mediation. Such developments indicate the gradual transition to first refer family conflicts to mediation. While such approaches may be beneficial in terms of saving time and money while improving parties' communication, they do not address the question of how children should be included or how their interests should be protected.

A [comparison](#) between the different models applied in 18 European countries shows that national legislation/regulations often treat children differently in mediation from court proceedings. While children's views and opinions are required to be heard in court proceedings that may affect them, their participation in mediation is not clarified. This indicates dichotomous standards, which effectively discriminate between children whose parents' conflict is not before a court and those whose conflict is before a court. This can jeopardize the right of children to share their insights and opinions on questions that affect their long-term future and raises the question of whether the same level of guarantee of protection of children's rights is available in judicial proceedings and mandatory mediation.

Today, academic literature recognizes two main models for hearing children in mediation – those that are child-focused, where the mediator aims to focus the attention of the parents on the best interest of their child and those that are child-inclusive, where children are directly or indirectly included in the mediation process. Both models share several pros and cons. The pros include ensuring a safe space for hearing children's views and wishes, offering them the option to choose whether particular information should be shared with their parents, and focusing parents' attention on the actual needs of their children. The cons include involving children too much in their parents' dispute, prolonging their feelings of guilt, confusion and anger, and creating false expectations that the situation or dynamics will necessarily improve because of them being included in the mediation. Within the landscape of various mandatory family mediation models in Europe, only a select few Member States have offered some additional guidelines on the manner through which children are integrated in the process of mediation. One such example is the existing

framework in Estonia where all child access cases are subject to mandatory family mediation. Family mediation, though, is not legally defined and the process is merely referred to in the Code of Organization and Civil Procedure, 2004, without providing any penalty for non-compliance. In addition, the Estonian Child Protection Act, 2014 requires to hear the child, both during litigation and mediation, while accounting for his/her age and development. To achieve the above, family mediation is carried out by a family mediator, who has completed a 160-hour family mediation training course, has experience in counseling, and has a higher education in psychology, law, or social work. No sanctions are provided for, either under the Code of Organization and Civil Procedure or the Child Protection Act, if the mediation does not take place.

Another example of the way children are integrated in mandatory family mediation comes from Norway, where all separating parents are obligated under the Norwegian Children Act, 1981 and the Norwegian Marriage Act, 1993 to participate in a one-hour mediation, while their children's participation in the procedure is not specifically regulated. A project called "Children in Mediation" was piloted from 2003 to 2006 at Grenland family counselling office (one of the country's 40 family counselling offices), to systematically include children in mandatory family mediation. No sanctions were prescribed if either or both parents declined the participation of their children in the mediation. In this model, the mediator initially had a brief conversation with both the child/children and parents to describe the procedure and intentions of the meetings. The parents were then asked to leave the room, so that the mediator could have a private discussion with the child or each child separately for approximately 20-25 minutes. The objective was that by employing such a methodology, the mediator would acquire a better understanding of the family dynamics, be able to create a safe space for children to express their own reactions and feelings and be better equipped to facilitate the exercise of the child's democratic right to participation. While the pilot project was not statutorily adopted, the methodology developed as part of the project has been adopted by other family counselling offices in Norway. The project triggered several discussions in Norway about the role of children in mandatory mediation, whether in certain situations children ought not to attend and if so, who should decide—the mediator, the parents or the child itself? Other discussion points include questions about when the mediator should talk to the child, how children should be informed of the purpose of mediation and their right to be heard, and what being heard in connection with mediation implies. None of these questions has been addressed in the existing legislation though, which further undermines the status of children in such proceedings and leaves the approach to children without unanimous interpretation.

Other Member States that provide for some form of mandatory family mediation do not stipulate any requirement or guidance for having children being heard as part of the mediation procedure. Typical examples of this are Lithuania, Greece, and Croatia, where the applicable national legislations fail to address the question and thus, leave it in the hands of the mediator to consider whether to hear the child. Even though these countries provide for mandatory mediation of family disputes, parties are only referred to a first information mediation meeting to receive more insights on the process. Thus, whether the child shall be included is left to the discretion and competencies of the mediator. Statistics from [Lithuania](#) show that from the 8,469 applications filed for mandatory mediation in family cases in 2022, mediation took place in 3,859 cases and settlement was reached in 1,972 cases. This means that in those 1,972 cases that were not filed in court, the child's voice was most probably not heard. In contrast, the national legislation of the aforementioned countries (Lithuanian Law on the Basics of the Protection of the Rights of the Child, 1996, the Greek Civil Code, 1981 and the Croatian Family Act, 2003) provide without exception that children's views and wishes should be heard during court proceedings that may impact their rights. The above raises the question of how precisely children's voices shall be

accounted for during mediation as required by Art. 12 of the Convention on the Rights of the Child and Comment No. 12 thereto if their participation in mandatory mediation proceedings is not guaranteed.

Similar problems can also be tracked in the existing legislation in Bulgaria, where amendments to the Mediation Act, 2004 and the Civil Procedure Code, 2008 were adopted in 2023, because of which Bulgaria is headed to a model of mandatory mediation as of 1 July 2024 in some cases, including for separating families that may be referred to mediation at the sole discretion of the judge. However, the amendments are silent on the way children's wishes and concerns should be heard during the mediation. Thus, whether and how children are to be included is vested fully in the discretion of the mediator. Lack of guidance on this is coupled with the absence of specific requirements for family mediators in Bulgaria.

The existing legislation in Malta (the Mediation Act, 2004, and the Civil Code, 1870), which provides for mandatory mediation in parental disputes since 2017, also deploys a similar approach where the status of children in the process of mediation is not clear. There are no specific requirements for the professionals who would be best placed to talk to the children and their qualifications. Thus, the way the mediation process is organized is left to the discretion of mediators who would choose between a child-inclusive or child-focused model, bearing in mind that the protagonists of the settlement agreements are not the parents themselves but the children. The only guidance that touches upon the need to ensure children's voices are heard in mediation is contained in "[The Process of mediation in the Family Court](#)" (2014) booklet issued by the Ministry of Justice, Culture and Local Government. It stipulates that children who are mature enough are entitled to be heard by the mediator, if the mediator feels that this is necessary. Should such a meeting take place, it will be for the mediator to conduct the interview personally and there is no protocol that governs the actual steps of such a meeting.

In conclusion, upon review of the applicable legislation(s) and the prevailing position in the above jurisdictions in Europe where mediation is mandatory in family disputes, it is established that the hearing of children during mediation is not regulated, save for in Estonia to a certain extent. Hence, the voice of children is often compromised, and not sufficiently acknowledged and integrated, which, in turn, could render the outcome of any mediation incomplete or pointless. In the author's view, specific regulations, binding requirements governing family mediators and standardized methodologies for integrating children are required to ensure that the voice of children is accounted for in mandatory mediation. It is the position of the author that this would ultimately lead to giving full effect to the rights of children as enshrined in international regulations and would ensure that children are granted the same right to be heard with respect to their parents' dispute in mediation as children whose disputing parents are before courts.

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