**Family Court Social Services: An Integral Part of the Israeli Court System**

**Judge Philip Marcus**

**INTRODUCTION – IAN MAXWELL**

Thank you very much to everybody for signing up to the last of our World Series of Shared Parenting Webinars in 2022.

Our international tour has reached Israel having visited England, Sweden, the Netherlands, Canada and the USA in previous sessions.

The recordings of all these webinars are all available on our website.

Next year in 2023, we hope to extend the journey to Spain, New Zealand, Australia and other countries who have implemented new ideas about settling separation disputes and supporting parents and children to share the parenting after separation.

We're very grateful to the Scottish law firm Harper MacLeod who have sponsored this series.

In Scotland, we are poised to implement the changes that were made in the 2020 Children Scotland Act, and the Family Justice modernisation strategy so now is a very good time for us to consider what's working well in other countries around the world.

From Shared Parenting Scotland's point of view, we're very keen to have far more early support for separating families. We get calls every day on our helpline from fathers and mothers who are still in dispute with their ex partner. We point them in the direction of mediators, family, lawyers and others who can help them resolve disputes and hope that this support will help most of them to avoid going to court.

Today's session looks at the family court system in Israel. Since its establishment in 1995, it has brought the judicial process and the helping professions together to resolve family relationship problems quickly and by the least damaging route.

Retired Family Court judge Philip **Marcus** is going to tell us about how this is now working to provide early assessment, advice and assistance services to potential litigants.

We are also very pleased to have a Scottish judge **Lady Wise** and family lawyer **Amanda Masson** to give responses from the Scottish context.

Judge Marcus served as a judge of the Jerusalem Family Court from its opening in 1997 until his retirement in 2012. Since then, he has served as an expert consultant on the law relating to children and family court reform to Israel's parliament, the Knesset and to many other countries.

**JUDGE PHILIP MARCUS**

I have great respect for the work that's being done by Shared Parenting Scotland as a lobbying organisation which is not shouting and screaming and hollering, but it is trying to bring about to real change in the interests of children and their parents. That's very much my ideology.

I'm going to be speaking a bit about the history of the Israeli Family Court, and the family court Social Services. I'm then going to talk about the practical day-to-day work and how social workers from the Family Court social services are involved in proceedings.

I'm going to give a few examples of cases where I was involved where the social services were highly effective in reducing the level of enmity between the parties, and in resolving certain matters which, in the normal course of a full scale adversarial trial without social service help, would have plugged up the system and would have severely damaged the children and their parents.

A bit about my history, I qualified as a solicitor in London and a couple of years later we moved to Israel. I was a lawyer in private practice for 15 years. Towards the end of that period, the Family Courts Law was passed in 1995. They were looking for lawyers with experience in family matters to sit as judges in the family court.

That's because one of the essential elements of the Family Courts Law is that people are appointed to the family court on the basis that they have experience and knowledge in the field and have been exposed also to the disciplines outside the law.

That is made even more effective because anyone who's going to be appointed to the family court has to undergo a training seminar for several days. Each year the judicial studies organisation in Israel puts on at least one seminar specifically for family judges. They are required to attend so that they get exposed to information from all the relevant disciplines such as psychology, psychiatry, child development and economic issues.

So a couple of general points which express my personal ideology and that of the family court in Israel. I don't like the idea of rights. I wrote my thesis for my master's degree about getting rid of rights from the system.

That sounds outrageous to many people, my colleagues in the United States think I'm completely mad. But I think that reframing family issues in terms of responsibilities, specifically responsibilities to children, can in and of itself reduce the temperature of any issue that comes before the court.

So I have an article on that that was published in the Journal of Child Custody in two parts[[1]](#footnote-1). Anyone who's interested in seeing my articles is cordially invited to be in contact with me.

DIVERSION FROM COURT

In cases where parents separate, the parents do not divest themselves of their responsibility to do everything necessary to help the child to thrive, and to do everything necessary to help the child get through the parental separation without harm.

Because of that it's their responsibility to solve issues with counselling and other help and only to apply to the court as a last resort. In other words, the responsibility of the parents is to try and sort things out between them, and not immediately make an application to the court to make the decisions for them.

In fact, in many cases, the application to the court is a declaration of bankruptcy by the parents - that they are incapable of parenting heir children properly without having some authoritative figure, or, in some cases, an authoritarian figure to sort things out for them. So we can describe the process as one of diversion.

We want separating couples to be diverted away from the court, so they don't get to court at all.

Under the Israeli law, any agreement regarding children has to come before the court for approval but that should be the only involvement of the court.

The state should provide accessible and inexpensive services to help parents and children through family dislocation. The courts should have the means to encourage non-adversarial resolution of issues.

And this is where the Family Court Social Services come in.

We can divide our diversion into two parts. The first area of diversion is away from the court. But the second part is diversion within the court so that as few cases as possible will actually come for determination by a judge. These are the responsibilities on parents and on the state.

JUDICIAL THERAPY

Another underlying issue is therapeutic jurisprudence, although I prefer to call it judicial therapy particularly in family cases. The classical therapeutic jurisprudence was invented for the criminal courts, the family drug and alcohol courts, for example, give a good indication of how you do therapeutic jurisprudence[[2]](#footnote-2).

**Therapeutic Jurisprudence**

**Judicial Therapy**

* **Look beyond the immediate parties.**
* **Look into the long term for each of those affected**
* **Listening**

But the issues for the family court are about looking beyond the immediate parties. This is no longer Dad versus Mum.

I have recommended that cases should be entitled, *“In the matter of the children, A, B and C and in the matter of X the father and Y the mother”* or whoever the parties are. The letter versus should not appear and the children should be at the centre of the picture.

So it's no longer a fight between the parents - it's a request for the court to help the parents to sort things out between them in the interests of the children.

But judicial therapy or therapeutic jurisprudence goes further because the grandparents are often involved, they're often affected by the dispute. According to research that's been done in Israel and other places, they can be a very important factor in relieving or attenuating the damage to children. It’s important to see what other family members can help.

The New Zealanders invented the family group conference and I've seen that in effect in ~~in~~ British Columbia where the court invites in members of the broader families in order to find where the strengths are and how they can support the child. And of course, listening.

And here is another matter from my credo: it makes economic sense to provide a comprehensive service at no cost to the citizen or at minimal cost.

My colleagues in the Ministry of Finance jump up and down and say how can we provide free services.

I'm working with a professor of economics, a health economist and a psychologist to show that every pound, every shekel, every dollar that's invested in prevention and in immediate and early identification of problems in the child and immediate intervention will save hundreds or thousands or tens of thousands down the line.

Using the medical model, we want to prevent people getting sick. And if they do get sick, we want to diagnose them and treat them at the very earliest stage.

The classical court system, of course, works in exactly the opposite way. You file your claim, the defendant has 45 days or 30 days to file a defence, he will ask for an extension because the lawyer’s dog has a runny nose. Then there'll be a pre-trial hearing maybe five or six months later. At the pre-trial hearing the lawyers will appear and they will argue among themselves and the parties won't actually see the judge until several months later on.

That is a catastrophe, particularly in cases where there are problems with contact between the child and one of the parents, which may be due to parental alienation.

The objective should be to prevent cases going on for a long time and to get them out of the system as soon as possible.

SOCIAL WORK INVOLVEMENT

The history of Social Work involvement in family cases goes back to 1955.

In fact, when the Family Courts Law was being debated in Israel, delegations went to Australia and New Zealand which had already specialist family courts. That was not the case in Israel before 1995.

Things in Australia have deteriorated since then, as I am informed by my colleagues there. And in New Zealand, also, they're having certain issues.

But this openness to change and openness to hear from what's going on, these are things which I very much welcome.

 In 1955, the Israeli legislature gave the court the power to order that a social worker should investigate any matter involving a minor and to make reports and recommendations.

Interestingly, the social workers were given the powers of a commission of inquiry in the sense that they could order any person to give information about the child in order that the report should be comprehensive.

These reports are ordered in many, many cases by the Family Court. And unfortunately, because of workload and undermanning, it can take in some places two months, some places six months, some places even longer for the report to be filed.

In the meantime the child and the parents may be marking time and there can be ~~little~~ explosions along the way. The Family Court Social Services (FCSS) are seen as a way of helping the court to make interim decisions in order to prevent the deterioration.

I mention here the Youth Care and Protection, Law of 1960. This is the law that deals with child protection. The importance of that law for our purposes is that under Family Courts Law, although the juvenile courts or youth courts are in a different section of the magistrate's court, which is our first level court, cases involving child protection, where the parties are already involved in the Family Court, the family court judge has all the powers of the juvenile court judge in terms of care and protection.

The Youth (Care and Protection) Law is based on social workers who can investigate any allegation of abuse or neglect of a child and can make interim orders and then apply to the court for the interim orders to be made, temporary and permanent. The idea of social worker involvement in family cases was very much part of the system before the family courts law was passed.

The Scheinbaum Commission was appointed in the 1980s to investigate the application of family law and make recommendations.

*Scheinbaum recommendations:*

*Institute for counselling: “When a dispute breaks out between a couple, the husband and wife need an attentive ear which can, by giving sound advice and with appropriate treatment, try to rehabilitate family life”.*

*“In the absence of such counselling, the couple turn immediately to the court… which cannot usually act as counsellor or adviser, therapist and investigator… Judgments can only decide which of them is correct according to law, but cannot settle the dispute”*

One of the recommendations was for what they then called an Institute for Counselling. You'll see in the somewhat paternalistic wording here that the husband and wife need an attentive ear, and if they turn to the courts the court does not have the equipment, the power or the knowledge to act as counsellor and advisor.

Since a judgement can only decide right or wrong, or at best allocate resources, that is not the right organisation to settle a family dispute.

And therefore, when the Family Courts Law was passed in 1995, it was passed on the basis that it would be a unified specialist court of broad jurisdiction.

All the judges are specialist judges. They're appointed on the basis of prior knowledge and experience and they have in service training. There are relaxed procedural rules and rules of evidence in order that shall be tight judicial supervision of the case.

So the court is not bound by the strict procedural rules. There are specific procedural rules in the Family Court, which are separate from the Civil Procedure Rules. The court can, for example, hear evidence at the second degree, what we call hearsay evidence and give it weight. There is no ban as there is in the regular civil courts and criminal courts on hearing hearsay evidence.

ONE FAMILY, ONE JUDGE

We also have one family, one judge.

What that means is that if Mrs Bloggs comes to the court and says that Mr Bloggs has bashed me, it's allocated to Judge Marcus, to consider whether to give an exclusion order against Mr Bloggs and to decide what's going to happen.

Then Mr Bloggs says he wants the children to live with him. That comes to Judge Marcus. And then Mrs Bloggs says she wants child support maintenance - that comes to Judge Marcus. If Mrs Bloggs is running a hairdressing salon with her sister, and they're having a partnership dispute that comes to Judge Marcus.

Then if Mr Bloggs’s father needs a guardian appointed - it comes to Judge Marcus. If Mr Bloggs is running a limited company and has property with his parents and his brother and sister and there's a dispute even about the taxes that have to be paid, it comes to Judge Marcus.

What that means is that Judge Marcus gets to know the parties, gets to know the issues and gets to know about the wider family. Instead of the judge hearing the maintenance case waiting for the judge hearing the case as to where the children are going to live, the single judge can combine and direct things.

That's been found to be extremely effective.

There is one downside and that is that Judge Marcus in some cases becomes the overseeing uncle. Every time somebody sneezes or gets a scratch on the leg, they come running off to Judge Marcus. Judge Marcus had to be fairly strict in chucking out the cases which had no merit, and which were taking time from cases which needed to be dealt with.

As I said, there is civil juvenile court jurisdiction as well. Let me give you an example of that.

Mrs Bloggs comes and says that Mr Bloggs was acting cruelly to the children and wants an order that the children should live with her. Mr Bloggs says that Mrs Bloggs is too busy working to look after the children properly and he wants the children to be with him.

It turns out that there are reports to the welfare officers under the Child Protection Law that the children are indeed neglected. They had eight children and another child was born while the proceedings were going on before me.

And I was faced with a situation of finding out what was going to be the best resolution for each of these children. Three or four of them had special needs, in addition to the allegations of neglect and the allegations of violence and so forth.

So I was able to get a joint report about each of the children and what the needs were. We found out that a brother of one of the parents had some experience with children with special needs. So that person was appointed by the court to supervise the special treatments that the children were getting and the after school activities they were having.

The whole thing was dealt with as a combined decision. Family Court social services are an integral part of the of the Family Court.

Here is part of the Family Courts Law.

Family Courts Law, 1995:

Sec. 5 (a). The Minister of Justice and the Minister of Labour and Welfare shall, by Order..., establish a Support Unit [hereinafter FCSS: PM] in the Family Court, which shall give to the parties, by itself or by means of others, the following services: diagnosis, advice, treatment and mediation, including making experts available to the Court; and shall determine the methods and rules of operation for the FCSS.

(b) The Minister of Labour and Welfare shall, with the consent of the Minister of Justice, determine by Order the professional qualifications of those who work in the FCSS, and the methods of professional supervision over them.

(c) The Family Court may refer parties to the FCSS as set out in its order, and may instruct the FCSS to present a written opinion as to the matter before it, so far as there is a need to do so immediately, such that there is insufficient time to obtain a report from a social worker [under the Welfare (Procedure in Matters of Minors, Mentally Ill Persons and Absentees) Law 1955 PM]. If a party refuses to appear before the FCSS, the FCSS shall report to the court within 15 days from the referral…

Sec 5A(a) Anything said and information given to the FCSS shall, for the purposes of prohibition of publication, be regarded as things said before a court hearing in camera.

There is a provision here that the number of social workers allocated to each court is the same as the number of judges in that court, which means that the social workers are available. The Family Court Social Services Unit is usually in the court building or in an adjacent building.

So for example, Mrs Bloggs comes along and says Mr Bloggs bashed her. On a *ex parte* basis I say that: *“it looks as if you're correct and I'm going to make the following orders”.*

Now, according to the Prevention of Family Violence Law, a judge giving an exclusion order has to include in that order a clause which bans the person excluded from having a firearm.

As you know, we have security guards in our cinemas and our shopping centres and other places and there are people who are in the army and in the police who have firearms.

Mrs Bloggs says: *“how are we going to eat, he's going to lose his job”.*

Now, at that point, I was able to have my clerk call up the Social Services Unit and within 10 or 15 minutes there was a social worker sitting with Mrs Bloggs outside the courtroom in order to explain to her what her options are, what are the services available.

Perhaps she would prefer to go to a refuge rather than stay in the house with the allegedly violent husband?

And then it might come out that the incident that was being presented to me as rather less egregious than was in fact the case. So that the lady might say: *“well, you know, I'm going to withdraw the application for now and I'm going to seek counselling”* or she would say: *“look I'm sure the employer will understand and it's not going to be so bad a damage”.*

This of course would be totally impossible without an in-house readily accessible Family Court Social Services Unit.

Without the issue of the firearm, Mr Bloggs comes and says: *“Mrs Bloggs has slapped me and beat me up*". I would immediately refer that to the Family Courts Social Services”.

According to the Family Violence Prevention Law an order can be made *ex parte* for up to three months, but there has to be an inter partes hearing to which both parties are invited within seven days.

I had a standard order to the family court social services with four questions.

First of all, is this the first incident of violence or has there been a succession of incidents?

Secondly, are there children involved?

If so, the FCSS was asked to bring the parties to some form of agreement whereby the parent being excluded would have contact with the children under supervision, if necessary, or at least telephone contact so that the children would not immediately lose contact with one of the parents with all the terrible losses and damage that that might cause.

The third question was whether the couple are suitable for a mediation?

The fourth question was should I be ordering a full scale report from the local authority social services under the law which I referred to earlier?

By the hearing date seven days later, the parties have met with a social worker together before they meet the judge together. In probably 50% of the cases, the family court social services at the very least made arrangements for the child or children to see the excluded parent.

And they would either persuade the excluded parent that even if the allegation was false, do they want to go back to live with the other party who is going to foment issues and is going to try to get the person excluded. Whether it's better, perhaps, to take a break and get social work and psychological help in order to resolve the issue.

So as I say, in probably 50% of the cases, they reached agreement as to what was going to happen. In 90% of the cases, they had at least reached an interim arrangement.

Then at the inter partes hearing, I was able to get a better look at what was going on, aided by the report made by the Family Court Social Services. In these applications for urgent relief putting the parties before a social worker has a great part to play in reducing the temperature of the dispute.

And I have, of course, dozens, if not hundreds of stories to tell about that but time does not allow.

SOCIAL SERVICES EXPERIENCE

Who are members of the Family Court Social Services?

They are senior and experienced social workers. Many of them have previously been in local authority social services units dealing with family disputes, and many if not most of them have training in mediation.

Their experience is available to the parties. The social services unit also has access to a psychologist who can do an initial review if the social worker thinks there may be psychological issues involved. They have access to a psychiatrist so that if there are serious questions about the mental health of one of the parties, or there's an issue of addiction, then a psychiatrist can be called in.

Although this does not specifically appear in the law, most social services units also have a lawyer available. The lawyers were found to be exceptionally helpful in giving the parties an idea of what the court is likely to do even though they may have their own lawyers.

Because of ‘one family, one judge’ the lawyer could say: *“well, you know, this kind of allegation before Judge Marcus won't wash”*.

Or: *“you better be careful how you frame things, because judge so and so is sensitive to certain issues”.*

But their main use is in mediation, so that where the parties are available for mediation, the mediation can happen in the short term in the social services unit itself. The mediators are one of the social workers and the lawyer so that the agreements can be framed in a way which is going to be acceptable to the court. This is a very welcome addition to the staff of the Family Court Social Services.

So what do Family Court Social Services do? The Family Court Social Services does not act on its own volition or its own instance, unlike the juvenile protection social workers, as there has to be a referral from the court.

They then will conduct an intake and screening and they've worked out over the years a sophisticated intake tool, which is designed to disclose what is the source of the dispute, what are the problems, how the children are affected by it, and so on.

They can give advice to the parties and they can do mediation, and they will make a report and recommendations to the judge.

Anything that said before the FCSS worker is confidential.

However, the report to the judge will include the impressions of the social worker. We developed a kind of coded language, which enabled the court to understand that there were problems in specific areas, even though the parties may not have raised them in their submissions to the court. The reports and recommendations were highly important.

I can give you a more examples of the way in which family court social services were highly effective In heading off what might have been a nasty blood-soaked dispute.

A gentleman comes before me and says he wants an order that his late wife's parents should not see the children. He had been recently widowed. According to him, the maternal grandparents had alleged to his children that he had caused the sickness from which the mother of these children died. Without social services support I would have had to hold a hearing in which the grandparents would say that he did cause the death of our daughter, and the children would have to be involved in some shape or form.

I referred this family to the Social Services Unit. And the Social Services Unit appointed three social workers, one to talk to the children, one to talk to the grandparents and one to talk to the father. It came out that the grandparents really loved the grandchildren, the grandchildren loved the grandparents. But the grandparents had a terrible emotional overlay. It turned out that the daughter was their only child, they had both been in concentration camps, and being cut off from their grandchildren would be catastrophic for them, as well as for the grandchildren.

The social workers were able to bring the parties to an agreement that in the first stage, there were telephone conversation between the grandparents and the grandchildren supervised by a family member who was trusted by both parties.

The telephone conversation could be stopped If there were any things said which were detrimental to the children. All I had to do was to explain the agreement properly so they understood what was going on and give the force of a judgement to the agreement.

This prevented a full scale battle with allegations flying backwards and forwards over several months before a judgement could be made. In this way, the Social Services Unit was able to resolve the issue without recourse to an adversarial hearing.

In another case a couple who were fighting mainly about money and property matters. The adolescent children were living with their mother and they were seeing their father on alternative weekends.

The kids said: “*We don't want to go to daddy on the weekends”*.

The mother immediately jumps to the conclusion that the father had been abusive.

The father immediately jumps to the conclusion that the mother was alienating the children.

I called in the social services and it transpired that the problem was a different one.

The father was being represented by his brother who was a tax lawyer, and was handling the case in an insensitive matter. Mom had come back from court one day and said: *“Do you know what uncle so and so said about me in the court”,* and the children said: *“Because uncle lawyer is with dad every weekend, we don't want to go weekends”*.

So the social services were able to elicit this information, which might not have come out at all without their involvement, and I was able to say to the father*: “look, your kids want to come here at weekends, make sure that Uncle so and so is elsewhere on those weekends*”, and that matter was resolved without the need for an adversarial hearing.

ACCOMPANYING MINORS TO MEETINGS WITH JUDGES

Until the regulations were enacted *(see appendix 1)*, it was up to the judge whether the children were going to come to his chambers and discuss things.

The social services unit would send a social worker who knew about the case in order to brief the judge.

I was often able to obtain a lot of information from the children. One of the principal objectives I had was to persuade the children that they do not decide.

The judge is going to hear them and give proper weight to what they have to say and also hear the parents and witnesses. The judge will then decide what's going to happen.

That relieves the children tremendously from the burden because they might have been told by one or both of the parents what to say and what not to say.

That was a process that we developed together with social workers and sometimes psychologists. Every three months, we held the joint seminars with the six family judges and six social workers for lectures and case discussions.

THE VOICE OF THE CHILD

It was realised that many judges didn't want to speak to children as they didn't feel they had the ability or the experience

But under Article 12 of the International Convention on the Rights of the Child, the court is required to take account of the desires and the position of the children.

In a pilot scheme, which was held in the Jerusalem Family Court when I was the senior judge there, we developed a system whereby children were given the option of a referral to ta social worker from the Social Services Unit who was specially trained in talking to children

The social worker would conduct a meeting or meetings with the children, and would elicit from the children what their thoughts and feelings were, not their desires, not what they wanted.

Then there would be a report to the court and the child would be invited to see the judge as well. About half of the kids did want to see the judge.

In order to establish a relationship between the judge and the children you need to talk about mutual things in a process called “joining”.

One of my colleagues had a budgerigar so she was able to open the discussion about pets In order to show that she was not as fierce as the children might have expected. The cleaning staff hated this bird, and it was removed swiftly afterwards,

I would do joining in a different way, I made sure I was up to date with what the Jerusalem soccer team and basketball team were doing or I was able to talk about what subjects the children were studying or who their friends are as part of the joining.

I got amazing amounts of information and

clarifications as to what the case was really about. I was able to tell the parents afterwards: *“Look, you are messing up the children by fighting. This is what the children need.”*

Very often the parents were persuaded. This gave the child some feeling of agency, but without needing take sides.

So the judge will give weight to what the child says, in accordance the child’s age and maturity along with the whole of the evidence and the reports.

According to our rule 56, which I understand sounds similar to the recent changes in Scotland, the court shall transmit the principal parts of its decision to the child. This is done via the social services who explain to the child what the judge decided according to the child's maturity.

There was a debate as to whether the judge should call in the children into the courtroom and read out the judgement before them but that was rejected.

I know that Sheriff Principal Aisha Anwar wrote an exceptionally wonderful letter to children in a Scottish court case.

I recommend that a judge writing a letter to a child needs help from somebody who is experienced in child psychology, social work and child development, in order that the letter is framed in a way that is acceptable to the specific child and that child's needs.

PROMOTING FAMILY DISPUTE RESOLUTION

This was also piloted in our court, and is now part of the law.

You don't file a lawsuit anymore before the family court - you file an application for dispute resolution, which is referred to the social workers. The parties are invited to attend information assessment and coordination meetings which are aimed at promoting alternative dispute resolutions. They also give the court intake information which will help the court to decide how to conduct the case if in fact no agreement is reached.

If there is an application for immediate relief, an exclusion order or for an injunction about moving property and so on, then the parties may bring that before the court.

The judge will hear it but then will refer the case to the social services to carry on the process of giving information and assessment and guidance to the parties and to try and sort things out by alternative dispute resolution methods. The one does not exclude the other.

This has proven to be extraordinarily effective.

In most of these cases, the agreements were reported to be stable over time (72%) and to have contributed to further management of the dispute (59%).

Furthermore, around 40% of the clients reported that the sessions had additional contributions such as reducing the family conflict.

For all of the last three reported years, the number of cases actually filed was about half of the number filed before this scheme came into force

• 2018-2019: 15,123

• 2019-2020: 13,300

• 2020-2021: 15,149.

Prior to the passing of the Law the annual average was 29,970.

Parties are able to resolve their disputes, or at least part of them before they actually see a judge. That is a tremendous alleviation of the workload on judges.

There is another extraordinary finding, which I think was unexpected.

Since attendance at these information sessions is voluntary approximately 50% of the people coming to court don't actually show up. It was decided not to make attendance compulsory as mediation has to be voluntary. Otherwise it's not really mediation, it's arbitration or something else.

Although 50% of the people don't actually show up in these information sessions, they are taking their cases to mediation before they start the process in the court because they know that they are eventually going to be recommended to go to alternative dispute resolution anyway.

Many more people than previously are going for mediation

That also has its part in reducing the pressure on the court, and enabling them to deal properly with the issues that actually come before the court.

ENGLISH AND WELSH COURTS

I want to finish by mentioning what's going on with you guys south of the border. Although the President of the Family Division Sir Andrew McFarlane is making strenuous efforts to sort things out there, that the situation there is catastrophic.

Because, first of all, there are no guidelines about parenting. After separation, that child needs contact with both parents. This encourages disputes. There is a terrible distortion in that an application alleging violence that gets legal aid, but the respondent does not get legal aid. And that, of course, runs against everything I knew about the English legal system, from my studies at University College and as a solicitor.

That is the idea of a level playing field. And the despite the unification of the family courts, in family court centres, nevertheless, particularly among magistrates, the level of training of judicial officers, is far less than it desirable. And I'm very hopeful that Sir Andrew and his team will be able to find a better way in order to handle disputes there.

CHILD WELFARE REPORTS
Although Scotland has the long established and well-respected Children’s Hearing system, the appointment of a lawyer to give a Child Welfare Report, in my opinion, is shortchanging the system and shortchanging the parents.

The lawyer does not have the necessary training or the necessary knowledge about the tensions and the frictions and the difficulties that separating couples have and about what happens to children.

I have the impression that you are on the way to making things considerably better with the recent law change.

Let me finish with just one more vignette.

A lady came to me saying that her husband was beating her up, they had six children. And he denied it, of course.

But it turned out that the children had split into two camps, three of them supporting mum and three of them supporting dad and the children weren't talking to each other. They were living in different houses,

Court social workers got a hold on this and brought about a situation where the children, all six of them would meet together at weekends. Although each of them had lost one parent, but they would not lose their siblings.

A court that is not assisted by social workers is very unlikely to reach that partial alleviation of the needs of the children.

SUMMARY

Social services are an integral part of the court system in Israel and they are bringing about better resolutions of cases than there would be without their involvement and cooperation,

Social workers are actually very nice people to deal with because of their training and their attitude and why they went into social work in the first place.

I have to declare an interest as I have a son and a couple of nieces who are social workers and they're very charming people to work with.

The essential issue here is multidisciplinary working. Social workers and judges and lawyers and psychologists and psychiatrists need to work together as part of a team in order to find the best resolution for the couple and for the children.

That involves joint training in the seminars put up by the judicial studies organisation. There are often lectures by social workers and psychologists and psychiatrists for the judges, and judges lecture to members of the other professions.

LADY WISE

That was really illuminating lecture from Judge Marcus - I want to try and home in on a few things.

Unlike England and Wales, Scotland doesn’t have a unified family court. We have family law going on everywhere in the court system so judges at all levels are hearing family cases.

International child abduction cases are reserved to the highest court (Court of Session). The Sheriff Court deals with a lot of cases with an international element, such as relocation cases.

You get one main opportunity to appeal in Scotland if you don't agree with the decision, either from the Sheriff Court to the Sheriff Appeal Court, or from the Outer House to the Inner House of the Court of Session.

I want to just say very briefly something about the availability of individual specialist judges. Listening to Judge Marcus, I think we all wish that every judge in the land was as involved and committed to resolving family disputes as he is.

We do have a lot of specialist family judges at all levels now but we have some geographical and resource limitations, so a family case in some parts of Scotland will not be dealt with by a dedicated specialist family judge. In the Court of Session, we now have three ( two main judges and a back up judge) specialist family judges who will hear all of the family cases at first instance.

We do have some high quality judicial training. All sheriffs, and judges will have some family law training through our Judicial Institute. And of course we have great dialogue with practitioners through the Family Law Committee of the Scottish Civil Justice Council, which I chair, and there are is also a Court of Session family action users group.

So what we're here to talk about today is the approach to the sad disintegration of a family.



I often put up this slide and remark that it's not exactly a picture of a modern family, because it seems to be quite stereotypical. We've got mum and dad and granny and granddad and two little children.

I was interested to hear what Philip had to say about the importance of older relatives and grandparents in the family and in some of the family cases that he hears.

Society is now moving away from the mindset of this very stereotypical family to saying that a child's family will involve anyone who has had any active care of them.

As a generality, I think it's the mission of all courts and should be the mission of all societies to try to preserve existing relationships where possible, unless it's contrary to a child's interests.

So the aim, I think for any practitioner but certainly for the courts is to try to avoid more loss to a child than is necessary because the breakdown of a family will inevitably involve some form of loss. We all feel responsible for mitigating that loss.

Our substantive law is still contained in the Children (Scotland) Act 1995. The overarching welfare principle is that the decision maker must regard the welfare of the child concerned as a paramount consideration.

We've had an expansion, if I can call it that, of the welfare principle such that the decision maker is required to take into account a number of matters. The one that I think is most topical, that one has to be careful about, is the need to protect a child from abuse. Judge Marcus also referred to parental alienation and we're all familiar with the sorts of problems that damage children that come from a fight being about the parents rather than about the children.

In the legislation, abuse is defined as including, but not limited to, conduct giving rise or likely to give rise to physical or mental injury, fear, alarm or distress.

Now, this is so broad, that of course, the abuse can be perpetrated by anyone who's come into contact with the child, or indeed can be from a process over which the child has no control.

It may be that the welfare principle was already broad enough to require courts always to consider this. I can't imagine any judge not being live to and trying to mitigate any risk of abuse prior to this amendment to the legislation.

But the Scottish Parliament has felt it necessary to spell this out to show society's commitment to try to protect children from the kinds of abuses that family breakdown can engender.

The child's views are sometimes regarded as a subset of the welfare principle, they're an integral part of everything the court has to look at before making any decision.

So when you hear me talk about section 11 orders in a private law context, that's what we mean. These orders relate to a dispute between people who have an interest in the child about what should happen to that child.

There are many statutes now which have the best interests principle underpinning them, including the Human Rights Act of course. Judge Marcus said repeatedly and I agree, that the best interests of the child are entirely consistent with Article 8 of the ECHR and have to be promoted by states.

I want to mention just very briefly, the 2011 Children's Hearings (Scotland) Act as a questioner has mentioned the Kilbrandon report, which over 50 years ago recommended the introduction of a system that's not a court system at all.

The question asked whether what Judge Marcus was describing is rather resonant of what Kilbrandon wanted and what we now have in the Children's Hearing system.

I don't mean to be remotely flippant in suggesting as an answer that it rather depends whether you think that professional judges should be replaced by lay people, which is what they've done in the Children's Hearing system.

There is a great deal of merit in cases that come before the Children's Hearing system for lay people to be making the decisions about what should happen on the ground, having input from all the sorts of people that Judge Marcus talked about, while always retaining a right to appeal on points of law to the Sheriff Court.

…. indisputably cases on child welfare are extremely fact sensitive and the first instance court must assess the evidence led and particular issues raised without reference to any checklist other than factors included as part of the statutory test. M v N [2021] CSOH 60

This little quote is one of mine,

I mention it simply because when I talk about the 2020 Children (Scotland) Act, an issue arises as to how much the court is assisted by a checklist or tick box exercise, rather than looking in a bespoke way at the particular needs of this child and this family and what is required to try to achieve minimum loss for all of them.

I've never been particularly fond of checklists as such and I mentioned earlier that no judge should have to be told that you have to avoid, if you can, any risk of abuse to a child.

However, there's an interesting new provision introduced by section 16 of the Children (Scotland) Act 2020, which is being implemented in stages in Scotland.

It introduces yet another addition to Section 11, which is going to be called Section 11ZA. It's going to require the court to take into account the effect that any order the court is deciding whether or not to make might have first, on the involvement of the child's parents in bringing the child up and secondly, on the child's important relationships with other people.

I think the second point is of interest if we were looking at the grandparents, siblings and the people in those family relationships who may not be primary carers but have a clear interest and ought to be part of the court's decision-making considerations.

So far as the involvement of the child's parents is concerned, it may be thought that this is as close as the legislature can get to reminding the court that there are two parents here and that it should never be a one-sided exercise.

So I have no criticism, of course, of what the Scottish Parliament is intending to do in introducing section 11 ZA.

What I would do is point out this very potent statement from the Inner House.

“Before refusing an application for parental contact, a careful balancing exercise must be carried out with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child……This approach is reflective of the general background of it almost always being conducive to the welfare of the child that parental contact is maintained…

….in the context of what are sometimes called intractable cases, it is not appropriate for the court, in effect, to give a veto to a parent who, for no good reason, and come what may, is simply intent on preventing contact”. J v M 2016 JC 835

This statement is in a sense more helpful than a list of factors you have to take into account.

The statement that there is a strong presumption in favour of continuing and allowing parental contact, unless the circumstances show that to do so would be adverse to the best interests of the child.

Lord Malcolm in this case says, in the context of what are sometimes called ‘intractable cases’, (which are the cases that will come before the courts) that it is not appropriate for the court in effect, to give a veto to a parent who for no good reason and come what may is simply intent on preventing content.

While I welcome any attempt by the Scottish Parliament to assist the courts in expanding the list of factors that underpin the welfare principle, to me, that sort of dictum from the courts is much more powerful in reminding us all that minimising the loss to a child through the withdrawal of either a parent or a grandparent or a sibling from their lives, is one that we should be having at the forefront of our minds.

ALTERNATIVES TO LITIGATION

Now, Judge Marcus has talked a lot about diverting cases from the court and also diverting within the court from the need to make the final determination.

It sounds as if, although our practices differ, Scotland and Israel are very much on the same page on this.

For many years, we have had a number of alternatives to litigation that I am confident practitioners inform their clients about at an early stage.

At one end of the sliding scale, we have the ultimate gold standard of an informal agreement between the parties, and nobody has to see what would otherwise have been a dispute. We should be interviewing all these people and asking them what their secret is, I think.

But coming down the line, we have, and I think it's always important for judges to acknowledge this, a huge number of agreements are facilitated by legal advisers.

The lawyers, working albeit in an adversarial situation, nudge each party along to an agreement without having to involve the raft of other professionals that one hopes would be available if they couldn't agree.

One of the differences between our jurisdiction and the position in England is illustrated by the next slide on mediation.

In the infamous abduction case of Al-Khatib v Masry in 2004 mediation at appeal level miraculously succeeded. Thorpe LJ memorably stated: "This supports our conviction that there is no case, however conflicted, which is not potentially open to successful mediation, even if mediation has not been attempted or has failed during the trial process. It also demonstrates how vital it is for there to be judicial supervision of the process of mediation"

This was a famous international abduction case involving a father removing his children from France to Saudi Arabia and the wife was in the UK. They hotly contested the case all the way to the appeal court in England and then miraculously they managed to resolve the child case through mediation.

This quote from Lord Justice Thorpe in 2004 is often used in heralding mediation and saying no matter how high-conflict a case is it can be mediated. It always tickles me that at the end, he says it demonstrates how vital it is for there to be judicial supervision of the process of mediation.

Now, as the Scots practitioners know, we take a slightly different approach here.

The Scottish courts have a very laissez faire approach to mediation. If the parties go and resolve matters at mediation, the court will completely step out. Similarly with collaborative law.

On arbitration, private judgement if you like, is quite far down towards our last resort because it's a determination but not by a full time professional judge like myself, but perhaps by a retired judge, perhaps by a practitioner.

In Scotland there is an active Family Lawyers Arbitration Group Scotland (FLAGS) that's been trying to kickstart arbitration in Scotland. Our arbitration legislation means that if you arbitrate in Scotland about your children or about your financial disputes or anything else, the court will never intervene with an arbitral award unless there is a process issue or some other clear error of law.

The English position is rather different. There was a case called Haley v Haley a couple of years ago where the English court said that if you arbitrate on financial provision and we think the decision is wrong, we can interfere with it.

And very recently, Mr. Justice Peel, in G against G, has said it’s the same for child cases. If you have an arbitration about whether a child should stay in England with dad or go to New Zealand with mum, the English will say the courts can come in and just say: *“that was a wrong decision, and we're going to change it*”.

We don't take that approach here. It's important to understand that the courts in Scotland have a very long tradition of leaving parties, with or without the assistance of other professionals. to resolve their disputes without ever coming to the court and the court does not need to rubber stamp any agreement.

But of course, those of us who have been judges for a good few years are involved in this last resort scenario of court proceedings.

I always reminded people when I was in the family court and doing a lot of case management - I did try to reiterate as often as I could that court proceedings do not mean court determination.

Many cases come to the court and with a bit of helpful case management and decent representation on both sides this results in agreement long before the court has to make an actual determination with a judgment. A court imposed determination can be damaging for all sides and, and open more wounds than it closes. So the courts are very conscious of these things.

INDEPENDENT INPUT TO THE COURT

So how in Scotland do we secure independent input to assist the court and the litigants, and as Judge Marcus reminds us, most importantly, the child.

So in this jurisdiction, we have the child welfare reporter, and traditionally we have used lawyers. The court appoints an advocate in the Court of Session or a solicitor in the Sheriff Court to visit the parties and elicit views, learn a bit about the family situation and report back to the court.

Now, I am not here as an apologist for that system, obviously, although I have been part of it for many years.

A long, long time ago, I was at a conference with some English lawyers and judges, and one of them asked me how on earth we thought the way in which we instructed members of the bar to be child welfare reporters without training, fulfilled our obligations under Article 6 of the ECHR and the procedural aspects of Article 8 as well.

And of course, that that was unanswerable and so steps were taken in this jurisdiction to try to address that by making some training essential for child welfare reporters, and having limited lists of suitably qualified reporters who all now have PVG certification to protect vulnerable groups.

Nonetheless, there is a view that those involved in social services and psychologists are better placed to assist the court with this sort of information.

I gave evidence to the Scottish Parliament Justice Committee in the run up to the 2020 Children (Scotland) Act urging a flexible approach to this issue for the following reason.

Every family deserves a bespoke decision and a judge who tapers every single stage of the case to that family, that child, that problem, that dilemma. There are cases where a family judge might say*: “I want to appoint a lawyer here in a case such as an international child abduction case, where the legal test for an objection to a return to the other jurisdiction really needs to be understood by whoever is going to elicit the views of this child.”*

In another case, where there are allegations that the house is not well kept, where mum might be manipulating the children against dad or vice versa, you might be looking at a psychologist to go and interview people, you might be wanting a social worker to see whether that family setup is such that you should be referring matters to the children's reporter. So I think different cases have different solutions.

JUSTICE DELAYED IS JUSTICE DENIED

I want to pick up on something that was alluded to in Judge Marcus's talk - delays for children inevitably lead to justice being denied to children.

Delays are a perennial problem in the court system at all levels. One of the arguments in support of specialist family judges and specialist family courts is to try to reduce these delays.

What I have found in my experience as a family judge is that if I ask for a report from a member of the bar in 48 hours I will get it in 48 hours. I'll get it in a week if I ask for it in a week,

Because of resource issues with local authorities I've never managed to get that from a social worker. We have an insufficient number of child psychologists with an interest and sufficient experience and the appropriate skill set to help us in the family court and it’s difficult to get reports from psychologists quickly as well.

I was absolutely cheering Judge Marcus on when he told us that there are as many social workers as judges in the Israel family court. I think that's something that we really need to look at in this jurisdiction.

We have a relatively short list of child welfare reporters, we have local authorities who are under-resourced and have so much to do, helping families in other ways. And we have too few psychologists available to us. So that's a big takeaway from today's seminar for our system.

Curators ad litem, a little hobby horse of mine, mustn't be confused with child welfare reporters. This is a different function and a curator ad litem can advocate on behalf of a child.

As a judge, whichever of these types of people you have giving you independent input, they need to be careful to understand their role in not usurping the decision-making function of the court.

A considerable amount of training is required, regardless of the particular professional background of any of these people, to ensure that they understand that they're not there to tell the judge what to do.

They are there to assist the judge by increasing his or her knowledge about the family and to point to things that might be going on with this child in order for the judge to make a fully informed decision. There's a real skill to that and that's why training of any child welfare reporter is critical.

A change introduced in the 2020 Children (Scotland) Act is the establishment of a register of child welfare reporters which I think will assist with some of the shortfalls we've had in the past.

I'd like to see the register of child welfare reporters having a list that allows judges to pool all of that knowledge and experience and secure in a flexible way, the best possible input for the individual case. And I think that's what it's all about.

VOICE OF THE CHILD



This slide shows a gorgeous child anxious to be heard. We are all familiar with article 12 of the United Nations Convention on the Rights of the Child (UNCRC), possibly about to be incorporated in Scotland, but not in England as domestic legislation.

However, the legislation prior to the 2020 Children (Scotland) Act already went a long way in this direction and arguably did implement our obligations under Article 12 of UNCRC. What we had was the presumption that a child is sufficiently mature and old enough at age 12 to express a view in a case concerning them.

Arguments raged on about what does it mean if they're presumed to be mature enough at 12?

Does it mean that you don't listen to eight, nine and ten year olds?

I think all of the practitioners here from Scotland will agree that the courts have been listening to eight year olds, nine year olds, ten year olds and sometimes younger for many, many years.

The presumption was unhelpful and had to go but you have to replace it with something because you can't ask babies if they can't speak.

So the provision now is that unless a child is incapable of expressing a view or cannot be found, his or her view will be elicited.

You have to read into the requirement to elicit the views of children a practicability restriction, and you must always be looking at the need to avoid harm to the child.

You don't take the views of a child if you have really good evidence that it's going to be irreparably damaging for that child. In a very extreme example, to be spoken to yet again, if they've already been spoken to several times.

The legislation states that a child’s views are to be expressed in the manner that the child prefers, unless it's an unreasonable way. If no preference is stated it should be in a manner that is suitable to the child.

We might see a move away from the child welfare reporter going out to see the child and we might get children sending in little video recordings and voice recordings as kids have mobile phones from the age of nine or ten at least. When COVID was with us we all had to find new ways of eliciting views and seeing litigants.

So I think this is quite a welcome introduction, not just because it gives flexibility but because it reminds people that it's important to give the child some agency in the way in which they want to express the view.

EXPLAINING COURT DECISIONS TO CHILDREN

Judge Marcus touched on explaining court decisions to children. This is something that we did not have legislation about until now, in measures that have not been enacted yet, in section 20 of the 2020 Children (Scotland) Act.

This inserts section 11F into the 1995 Act. It says that when making, varying or discharging an order under Section 11 (one of our parental responsibilities orders) the court must ensure that the decision is explained to the child in a way that the child can understand.

This is a new and arguably very onerous duty on the courts that has resource implications that are being worked through. The court can delegate this function and it will be for individual judges to decide how they do it.

I anticipate that it is likely to be delegated to the child welfare reporter who has been involved at an earlier stage. That seems to be the current thinking.

Judge Marcus mentioned writing letters to children. I think from a resources perspective that this will be the exception rather than the rule.

I don't think I see judges sitting and writing letters to children when they've already written a judgment. I also agree with Judge Marcus, that this is not something that judges necessarily have the skill set to do. Some may and some may not. So it's going to be really interesting to see how this provision 11F works out.

My feeling is that judges will probably still hold off from communicating directly with children and will use child welfare reporters.

Please don't ignore the parental responsibility to try to explain to the child what's happened and to try to reassure the child that whatever happened in court, everyone's know working together for them.

Perhaps that's wishful thinking, but I hope not. And again, practitioners have a big role in this.

CONFIDENTIALITY

Now I just want to mention confidentiality in the context of both views of children and explaining court decisions to children. This is another addition to Section 11 by the 2020 Act. Section 18 of the 2020 Act introduces section 11E into the 1995 Act, imposing a duty on the court to apply the best interest test, but as a primary consideration not as the paramount consideration.

So that's a difference from the section 11 welfare test, in deciding whether to allow access to information in these cases.

Now, there is access to information, access to a person that can be the litigants can be the child can be anybody. But it will include, of course, the very fraught issue of withholding information from a parent, which is a particular issue in the children's hearing system.

This can be an issue in a redacted Child Welfare report where Child Welfare Reporter says the child told me this, and I don't want this parent or that parent to see it arise appear. So these are very difficult issues.

The law is not quite implemented yet. I should say the common law test for withholding information is that of a risk of serious harm, taken initially from an English case and adopted in Scotland.

I anticipate a fair number of arguments about this one, because of the introduction of applying best interest as a primary but not paramount consideration, because of course, the interests of the parties in seeing the information also have to be taken into account.

So whether this introduction of this section will assist the court or will create more fodder for litigation. I'm not sure but that's perhaps to be revisited.

COMPLYING WITH COURT ORDERS

I want to talk briefly about failure to comply with court orders because we all commend approaches taken by court to help families reach a resolution that they can all live with.

But what if the court reaches a resolution that one side or another really feels they can’t thole?



I put up this slide because I think all the practitioners present will have encountered a client like this if they have practised for long enough. Intractable child disputes can end with a court determination that is not in fact the end of the dispute, as you will all have experienced.

As an independent arbiter what approach should a judge take when his or her carefully considered decision is either ignored, or at the very least, and to put it more neutrally, if the outcome ordered does not ensue.

The courts quite properly are very careful to use contempt for court penalties in child cases very sparingly because contempt of court is a blunt instrument. it's a unique offence but more akin to a criminal offence and it can lead to imprisonment.

M against C[[3]](#footnote-3) is a well publicised case which went to the Inner House, where a sheriff's decision to impose three months imprisonment for repeated failure to comply with a contact order was overturned over although much of it turned on miscommunications between the client and solicitor and court.

So when the Scottish Government was consulting on the Bill that became the 2020 Act, they asked us to express views on imposing on the courts a duty to investigate an alleged failure to comply with an order of this type.

Now, I like to think all judges would never pronounce a contempt of court order on any party without an investigation because you have to make findings in fact.

What the legislation that's coming in is geared towards is an earlier stage, when somebody alleges: “you made a contact order, I didn't get contact, I want this person to held in contempt of court”.

The judge will at an earlier stage, first have a duty to elicit the child's view, because the child may be old enough that you can't just see the court order in a vacuum, as if it's in tablets of stone, and if it's not implemented you're going to drag the child away and make it be implemented.

And secondly, there is to be scope for a child welfare reporter to investigate and report back to the court on what's behind this allegation of contempt of court.

I finish in a sense with carrots and sticks because we all have ambitions and aims for a family court system that results in a court determination or agreement that everyone can live with.

Where it's not being complied with insofar as the new legislation is designed to make sure that the court does not use a blunt instrument in a situation where it may cause more harm than it is intended to rectify few of us could quibble with it.

I think the slight challenge that will require to be worked through is the use of an investigation to delay further the determination of what is causing the log jam.

Because, to come back to one of my favourite themes, the delay for the child will cause harm to the child.

If we have a clear-cut case where the court has recently made a decision and it's not being complied with, that's a very different situation from a case where you've got a stale order and child's life has moved on and the child is now much older and it no longer fits with the child's welfare and interests.

As you all know, you can come back to court because children's lives are not static or better still, you can go to mediation or negotiation and agree a change to the order, either informally or asking the court to do so.

So my slight concern about how this will work through is that society mustn't let people regard complying with court orders as some sort of optional lifestyle choice, a court order is there to be complied with, and that must be the starting point.

So I'm sorry to start I'm sorry to finish with what may sound like a slightly old fashioned and harsh view. But having taken you on the journey from ‘let's all mediate and collaborate and use judges and courts only as a last resort’ it has to be emphasised that if you have that court determination, the whole system will fall into disrespect if you don't ensure that your orders are complied with.

IAN MAXWELL

Thank you very much for these comments Lady Wise. I will pass swiftly over to Amanda Masson of Harper Macleod for bring in her viewpoint as a Scottish family lawyer,

AMANDA MASSON

I want to comment from a practitioner’s perspective on a few of the themes that have been raised today.

What struck me when I was listening to the talks today was that, in terms of the World Series, there are common themes which gives me a lot of heart as a family lawyer.

We were really delighted to be able to sponsor the World Series. Because the family team here do really believe and share in the proposition that children need both parents. What really did occur to me today was that we are all very much trying to pursue the same thing.

We are trying to minimise loss for children, when families and relationships or structures break down.

I had a lovely flashback listening to Lady Wise. I attended a consultation probably about 15 years ago, if not more where she gave a beautiful summary of the spectrum of dispute resolution methods.

The thing that I have come back to in each one of these talks during the World Series is mediation.

Collaborative Practice seems to come and go in terms of popularity. It's still very active in Aberdeen, but mediation seems to be having a bit of a resurgence, which is great. And one of the things which is being mooted by CALM the organisation for solicitor mediators is child inclusive mediation, which I'm particularly interested in because I think in Scotland, it could be hugely useful.

As a child welfare reporter I dealt with a case recently where a 12 year old girl asked if it would be possible to go to mediation with her mum and dad. And for various reasons, the court took the view that it wouldn't really be appropriate to involve her to that extent although some mediators were willing to give it a go.

But her voice really did need to be heard, because, as is common in these cases, her view bore very little resemblance to the accounts given to me by each parent of what they thought her view might be or could be.

So all I'm trying to say really, is that I think as agents, there is a huge role for mediation. And it's just another tool in our kit, I suppose that that we need to keep in mind.

The other thing that struck me listening to Judge Marcus was that one of the most effective tools we have as family lawyers is the ability to listen. And I think that's particularly true for those of us who do reports.

Often when you really actively listen to parents, you realise that the cause of the dispute isn't necessarily just around a decision having to be made about contact or residence. Other issues come into play: financial issues, issues around domestic abuse, issues around addiction.

So the more holistic approach that seems to be adopted in Israel is laudable.

But I think in Scotland, we do have the tools, we just need to be very mindful in everything we do about drawing on the appropriate tools. A mediation skill that we use often is the ability to reframe, and it occurred to me as well that we have the ability to reframe these conflicts or disputes with our clients in a way that might be really, really helpful.

I love Judge Marcus's idea of abolishing the concept of rights in children's cases I agree that it's maybe a bit controversial, but it occurred to me that in Scotland parental rights really exist only to allow parents to fulfil their parental responsibilities.

So I think in Scotland we have the conceptual framework. But maybe as lawyers we need to try to be more mindful about just using a slightly different lexicon.

Bearing in mind that shared aim of trying to avoid or minimise loss for children, there must be things that we can all do to make things a bit easier. But it really struck me from listening to many practitioners from across the world and trying to draw things together, we are all very much trying to do the same thing.

And it's really, really useful, I think, to be able to hear from our colleagues and other jurisdictions about what other courts and other practitioners are doing. So I would just like to thank you very much for putting together this really great series of talks and for giving us the opportunity to be involved.

**Question to Judge Marcus about how the timescales work in Israel compared with Scotland.**

JUDGE MARCUS

I can try and answer that. The first thing that's happened fairly recently is that there is now a practice direction issued by the President of the Supreme Court.

Where there's an allegation of abuse or neglect of a child, including interference with contact, there has to be a first hearing before a judge within 14 days of filing and both parties have to show up.

At that first hearing the court has very wide powers, including to appoint a guardian ad litem, that will be a lawyer who, free of charge for everybody, appointed from the legal aid panel of lawyers who are specially qualified to deal with children's cases and to represent the child and make applications on behalf of the child.

The court can conduct a preliminary investigation. One of my colleagues, Judge Shani in Tel Aviv says there should only be two questions: *“Is little Johnny seeing daddy or mummy?”* and *“If not why?”*

If there is a convincing sounding reason why, then he will refer the case for investigation and assessment by the Family Court Social Services Unit in the first instance.

If the answer is unconvincing then he will make orders for establishment of contact supported by a psychologist who has experience in this field.

Obviously, the longer time there has not been contact, then there'll be more investment of time in re-establishing contact.

The court will then fix a review hearing within another 14 days in order to find out what's actually been going on and will make corrective orders if necessary.

But it will also, and this goes to the last point Lady Wise made about enforcement, make it perfectly clear that non-compliance is not an option and will set out the sanctions which are available to the court, including a fine payable to the court or a payment of court costs to the other party, including imprisonment or a suspended sentence of imprisonment and a variety of other sanctions.

And I agree entirely with Lady Wise that if a court does not enforce a judgments, and I've heard this from judges from many, many different jurisdictions and from lawyers, and from people affected, that if there is no threat of effective sanctions for non-compliance, then the court is simply wasting its time and bringing the whole system into disrepute, particularly in the eyes of the child.

So there has to be muscle there and in my experience the threat of prison, even for three days, will convince even the most recalcitrant and personality-disordered parent that it's really not worthwhile.

As far as the other cases are concerned, I'd mentioned that where a full Social Inquiry Report is required, that can take six months or more, that is unacceptable.

But there are manning issues outside of the court. That's why the courts rely so much on Family Court social services.

I've been reading some correspondence from the United States saying that were a child custody, evaluation is required, that's what they call it there, you can take up to a year,

That in my view is catastrophic because there's all kinds of stuff going on with the child and the child is getting older.

And if the child isn't seeing the parent also in England, until there's a fact finding hearing, it can take a year or more. If there's no contact that is catastrophic,

Very much in Israel, the idea is that the judge has his foot on the neck of the lawyers and the parties, and wants to make sure that things are moving according to the pace that he wants it to happen.

That does not mean that there are not a difficult cases which take a long time. But the child's perception of time, is one of the principal things that the judge has to take into account.

**Question to Judge Marcus - is there competition between the court social workers and the other social workers?**

JUDGE MARCUS

No, I've not found any problem like that. The reason is that, from a professional point of view, the social workers in the entire system, including local authorities are all responsible professionally to the Ministry of Welfare.

The Ministry of Welfare has a chief social worker of the family courts and the chief social worker of the juvenile cases and the chief social worker for presenting these reports.

They all sit together and they have worked out a comprehensive scheme as to how to do things. We do not have, except in very few cases, independent social workers, but here is a list of experts who can be brought in by the court.

That is a list that's put together by the family court social services. There is a cap on how much they can charge. Sometimes the parties will pay but in many cases Legal Aid will pay for the lion's share of the expert’s report.

They are reporters who are known not to be a mum-ologist, or a dad-ologist and they're not the kind of people that you put the coin in, and you get the result that you want. These people have been specially weeded out.

But the report can take a long time. However, there is a tremendous potential for a therapeutic element even when the court asks for a report from an expert psychologist in a heavily disputed case, because often in preparing the report, the psychologist or the psychiatrist or the social worker can bring the parties to an understanding what their needs are.

The lawyers appointed for the child has a very important role in bringing the parties together and seeing the needs of the child.

**Question about the necessary training for social workers in connection with court cases**

LADY WISE

I've presided over a lot more state intervention cases than private law cases where this comes up and I found that social workers have been asked all sorts of questions about the law. As a judge one tries to stop social workers being put on the spot about matters such as the difference between this type of order and that type of order and the minimum intervention principle.

I think if social workers are going to become more involved along the lines of the system in the Jerusalem family court, that's fantastic. But they would need more training especially if there are going to have more child welfare reporters who are social workers, because the idea is to say more to the local authority.

**The final question was about outcomes – judges are making very important and life-changing decisions about family life - do they find out what happens as a result of what they have been doing?**

LADY WISE

My answer relates to something that Judge Marcus and I discussed the other day, and that's about the size of one's jurisdiction.

Scotland is a small country and Edinburgh is certainly a village and in the court where I work, I will come across the practitioners either walking the corridor, or in the street.

Occasionally somebody will say to me: *“I think you'd be really interested to know that in that particular case, the couple reconciled, and they're all living with the child again”* or “*in that case, it was terribly sad, the child has run away from home”.*

Practitioners, if they really care about their work, get very involved, and they'll sometimes share with me something that happened after the event, if they knew I'm not going to be involved again.

I think it'd be difficult to introduce a system where judges could formally be told about that. And remember, judges have to remain dispassionate. I love to hear a word or two if something nice, as happened after a decision I've made, but my job isn't to follow that family to the future. I think that is more a social workers’ remit.

JUDGE MARCUS

My take is slightly different. Particularly when you have one family, one judge, then a lawyer will be unlikely to speak to the judge who heard the case and say you messed up this case or that things are disastrous, because there may be another application on the way.

I enjoyed the judging tremendously, but my only frustration was that we really don't know what happens down the line.

I've had maybe four or five occasions after dealing with hundreds, maybe thousands of families where people have come up to me and said: *“you know, you made the right decision, I wanted to go with dad but you sent me to live with mum and dad and now I'm on good terms with both of them”.*

In any other professional or industry you want to know down the line whether you have made a decent decision, the quality control requires that.

But the idea that you could sign parents up and say will you be willing in one year, two years, four years time to answer questions about what happened with your family - most of them will say that's an invasion of privacy.

The ones who agree are probably the people who don't need the court to intervene at all, because they're probably going to be ok.

Those families where are seriously messed up are not going to be particularly amenable to answering questions. That is an issue which I've addressed with academics and practitioners in many fields.

I want to go back to the matter of training. The training has to be joint training, so that each profession understands the limits of that profession’s remit and understands what the other professionals can do and find out what support services are available.

One of the things I didn't mention about family court social services is that in each area they will do a proper mapping of what services are available.

So that if in the course of an intake, they discover that one of the parents has a drinking problem, or an addiction to drugs or pornography, they will be able to refer that parent to get the appropriate help. Or they make a recommendation to the court that the case is not going to proceed until somebody has really made a good try at resolving their addiction problem or psychiatric issue that's been unaddressed or a child who has been diagnosed with ADHD but it turns out the child has a hearing problem.

One of the things Family Court social services can do is get a better idea of where the problem actually lies, and refer the parties out to get help. So that's another aspect of the interdisciplinary work. I have done this type of interdisciplinary training recently in Malta along these lines.

**IAN MAXWELL**

I would like to thank Judge Marcus, Lady Wise and Amanda Masson for the very interesting material that's been presented this afternoon.

The view from Israel and the view from Scotland are both very important. This World Series has brought in examples of good practice from many countries which we can consider for implementation in Scotland.

APPENDIX ONE

Israel Family Court (Procedure) Rules 2020

R. 49. A court dealing with a claim in family matters ... relating to a child, shall give the child an opportunity to express his feelings, opinions, and desires on the matter before it (hereinafter –hearing the child) and give them appropriate weight in its decision, according to the child’s age and level of maturity, unless the court decides, for special reasons which shall be recorded, that the child shall not be heard, if it is persuaded that implementing the child’s right to be heard would cause the child greater harm than that which would be caused by the denial of this right.

R.50.(a) At a pre-trial review, the court shall order that the child shall be heard, ands hall refer the parents to the FCSS according to Form9 in the First Appendix, unless it has decided, under Rule 49 above, that the child shall not be heard; explanatory notes for the parents and for the child, about the process of hearing the child, shall be attached to the Form.

R. 52. At the meeting with the FCSS worker, the worker shall explain to the child, in a way suited to the child’s age and level of maturity, his right to be heard by the judge who is dealing with the case or by the Support Unit worker, as he chooses, the purpose of the meeting, its course, and the rules of confidentiality and disclosure that will apply to the meeting and the hearing, including the provisions of rule 56; the worker shall also explain to the child that he is allowed to waive his right to be heard, or to choose that his views be transmitted to the judge, in writing or by any other means, by the FCSS worker.

R. 53. Should the child choose to be heard before a judge, the judge may decide that the child shall be heard in the presence of a FCSS worker or another employee of the court. The court shall make a record of the main points of the child's statements.

R. 54. Should the child choose to be heard by a FCSS worker, the worker will give the court a record of what the child asked to transmit to the court, together with the worker’s professional impression of the behavior and the condition of the child at the time of the hearing.

R. 55. The record made by the court or by the FCSS worker, and the child's statements, shall be kept in the court safe and shall be confidential vis-a-vis all persons, except for the appeal court; the court which heard a child shall not report the child’s statements in its decisions, unless the child agreed that all or part of his words be disclosed, and the court determines that disclosure would advance the child’s best interests.

R 56. The court transmit the principal parts of its decision relating to the child to the FCSS, which shall report them to the child, in a way which is adapted to the child's age and maturity, including by inviting the child and the parents to the FCSS.

1. Philip Marcus (2017): Parental responsibilities: Reformulating the paradigm
for parent–child relationships Part 1: What is wrong with the ways in which we deal with the
children of separated parents and how to put them right, Part 2:
Who has responsibilities to children and what are
these responsibilities? Journal of Child Custody, [↑](#footnote-ref-1)
2. Philip Marcus, The Israel Family Court –Therapeutic Jurisprudence and Judicial Therapy from the Start *International Journal of Law and Psychiatry* 63 (2019) 68–75 [↑](#footnote-ref-2)
3. https://scotcourts.gov.uk/search-judgments/judgment?id=434c27a7-8980-69d2-b500-ff0000d74aa7 [↑](#footnote-ref-3)