



The Israel Family Court – Therapeutic jurisprudence and jurisprudential therapy from the start

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ABSTRACT

Based on the recommendations of a commission set up to review the handling of Family Law cases in Israel, the Family Courts Law 5755–1995 included a revolutionary provision – that a Social Services Unit, staffed by senior social workers, would be an integral part of each Family Court.

Their mandate includes giving assessment, advice and assistance services to litigants and to the court, and this provision has been broadly interpreted, to include mediation and referrals for therapy. The activities of the Unit are confidential and free of charge to the parties.

More recently the Units were given the task of seeing children whose future is the subject of litigation, to find out their needs and views; and also to serve as the agency which parties who want to start proceedings are required to attend, in order to receive information about the effect of proceedings on their children and advice about alternative dispute resolution to avoid litigation.

The resulting synergy between the social workers and the Judges ensures that the needs of all those involved are met in a therapeutic fashion where this is necessary and possible, alongside the judicial powers to make orders as needed. Thus unnecessary suffering can be mitigated.

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1. Introduction

The contribution of David Wexler cannot be overestimated. By bringing the theoretical foundations of therapeutic jurisprudence to the attention of court administrators and Judges around the world, he has alleviated the plight of uncounted individuals, by emphasizing that judicial systems do not function in a sterile law only environment, but affect the emotional lives of the litigants and others. The perception that the task of the court is not only to decide the specific legal issue before it, but also to solve the underlying problem that gave rise to the dispute, requires a holistic view of the parties and their relationships and situations. A judgment of the court which takes into account the environment in which the issue arose will have a much greater chance of preventing further litigation.

This applies especially to the criminal courts, where avoidance of recidivism is a central objective, for the sake of the family of the defendant, his community, and the reduction in the cost of scarce resources, especially court time and incarceration.

For regular civil courts, which deal in the most part with disputes between litigants whose relationship is limited to the specific cause of action and ends with the final judgment, there are great advantages to

Alternative Dispute Resolution, particularly in the saving of time and resources. But in the Family Law field, where the parties typically have a long history together before the dispute arose, and are likely to remain in contact after the determination of the specific issue before the court, especially where minor children are involved, a holistic approach is essential. The danger of juridogenic harm, that is, by analogy with iatrogenic harm, damage caused unintentionally by the court, simply by using traditional juridical methods which are inappropriate to the specific family, is very high (Marcus and Gottlieb, 2012).

Although the foundations of the Israeli Family Court system were laid before the concept of therapeutic jurisprudence came into the public domain, the system now serves as an example of the application of its underlying concepts in the practical, everyday contacts between courts, litigants and their families.

The Israeli Family Court system has, since its establishment in 1995, harnessed the judicial process and the helping professions together, in order to ensure that family relationship problems should, if at all possible, be resolved by conciliation and agreement, and that judicial determination of disputes should be the last resort, only if all other possibilities have failed. The system takes full account of the psychological and emotional aspects of family problems, and the damage to the parties, and especially to children, which is an inevitable result of adversarial litigation. The law, regulations and court practices are all designed to minimize short and long term damage.

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This paper presents the history and the ideology which stand behind the Israeli Family Court system in the light of therapeutic jurisprudence,¹ and in particular the role of Family Court Social Services (FCSS) and explicates the role of jurisprudential therapy – that is, therapy ordered by or carried out under the auspices of the court.

The programmes for ensuring that the child has a full opportunity to express his views, and for referral for consultation before filing claims, will be described. The examples given are from cases dealt with by courts and social workers; in some cases they are composites, and of course the names are fictitious.

2. The Scheinbaum report

In 1982, well before the idea of therapeutic jurisprudence became known, the State of Israel came to the conclusion that reform was needed in the legal system regarding families undergoing separation and divorce. There was a consensus that families coming before the courts were ill-served by the division of jurisdiction to deal with disputes arising from family breakdown between different courts, and by the time taken to prepare, try and adjudicate these cases. In particular, there was an emerging realization that litigants and their children were suffering because cases of this kind were conducted as ordinary civil disputes, in terms of rules of evidence and procedure, without sufficient regard for their welfare.

In that year, a commission was set up whose terms of reference included: “To review the ways in which family law matters were handled, and to propose ways in which the suffering of litigants could be alleviated”. Justice Elisha Scheinbaum, a Judge with wide experience in family law, was appointed chairman of the commission, and the report, published in December 1986, is known as the Scheinbaum report *Report of the Commission to Review the Application of Family Law (Hebrew), 1986*.

The report contains a comprehensive programme for reform of the methods used by courts dealing with family cases, including setting up a unified Family Courts with jurisdiction in all cases where a family dispute lies at the root of the issue. The focus was on helping not only couples whose marriages were at risk, but also any family where a legal dispute arises, by improving the functioning of the court system.

However, it is significant that before approaching the structural and legal issues, the opening section of the report (after the introductory technical description of the work of the commission) deals with the need for assistance from non-judicial and non-legal professionals.

“When a dispute arises between spouses, the husband and wife need someone who will listen to them, and who can, with wise counsel or appropriate treatment, try to rehabilitate their married life. In a large proportion of the cases, a marriage advice organization, utilizing appropriate methods of therapy for disputing couples, can prevent the breakdown of the family and guide both parties to ways to restore harmonious living and prevent the inevitable suffering of children involved in the dispute”. (p. 7).

The commission points out that in Israel such organizations have not become widely available and culturally acceptable, and that

“the parties apply immediately to judicial institutions....not for the purpose of obtaining advice and guidance, but to present their allegations and to win their case, and inevitably what they say to the courts does not represent their real feelings. In such a case, the courts usually cannot take on the role of guide and adviser, therapist and arbitrator, who is capable of bringing the parties to a peaceful resolution. A judgment can only decide which of the two is correct in the eyes of the law, but is not able to calm the dispute.

For this reason, we propose the setting up of an institute for counselling and family welfare (hereinafter: the counselling institute) to which

the parties will be obliged to apply for treatment of their problem, before filing a claim of any kind, including maintenance and divorce, arising from their marriage relationship.” (pp. 7–8).

The commission explains that the institute would be staffed by psychologists, social workers and lawyers; the parties would not be represented by lawyers at this stage; and the aim would be to reach agreements, whether by avoiding divorce or, if there is no possibility of the marriage continuing, arriving at consent on all the issues arising out of divorce.

The report describes the principles according to which the institute would operate, goes into considerable detail as to its methods of work (pp. 8–12).

3. The Family Courts Law, 1995

The Scheinbaum report generated debate among academics and lawyers, and it took until 1995 for the Knesset, Israel's legislature, to enact *Family Courts Law, 1995* embodying most of the recommendations of the commission. These included

- A single Family Court with comprehensive and exclusive jurisdiction to deal with all family disputes
- Appointment as Judges of the Family Court only lawyers who have knowledge and experience in family law
- Allocation of all cases relating to a particular family to a specific Judge (One Family – One Judge)
- Allowing Judges to diverge from the usual rules of procedure and evidence, where the interests of justice require
- Setting up a Support Unit, also called Family Court Social Services,² attached to every Family Court.

The ideology of the Israeli Family Court system is, therefore, holistic. Under this view, it is inappropriate to regard the legal and juridical aspects of a dispute within the family in isolation, without full consideration of the effects of the judicial process, in all its stages, on the parties and their families – even those who are not litigants.

This consideration requires that welfare agencies start their involvement at the earliest possible stage, even before the start of litigation. The very first document filed in court may have far-reaching effects on parents and their children, especially if it contains allegations which the other party regards as being untrue or exaggerated, and the defendant, angered by the falsity of the claims, feels the need to respond with equally or more serious allegations against the plaintiff. The severity of the mutual allegations in and of itself prevents the parties from being open to negotiations. Their preparedness to make concessions or withdraw their allegations may be made impossible by the language and severity of the allegations.

In cases involving children, litigation makes huge demands on the resources – time, emotional availability, as well as money – of the parents. The parents are fully occupied with their anger at each other, which may manifest itself as outright hatred, and with the litigation: meetings with lawyers, trying to find witnesses, considering the tactics and strategy of the proceedings, finding finance to pay the lawyer and other experts, preparing for court hearings and attending court, and worrying about loss of earnings because of their days away from work. All of these take away time and emotional availability from the children, and this at a time when the children, who are deeply disturbed by the disharmony, which sometimes deteriorates into verbal or physical violence, see their family breaking up, and are faced with uncertainty about the future, need their parents more than ever.

A holistic approach takes account of the needs, as opposed to the claims and allegations, of the parents and the children. For this reason, the Israeli system devotes considerable resources to making assessment

¹ Perhaps the time has come to reframe the concept as therapeutic court processes, or courtherapy; jurisprudence is usually understood to mean the theory and philosophy of law, rather than judicial practice in specific types of cases.

² This name was considered preferable to Institute for Counselling and Family Welfare.

and therapeutic services available to the parties before, or at least in the stages immediately after, the start of legal proceedings.

For this reason the paper will deal mainly with the FCSS: their objectives, their structure, and their methods of work vis-a-vis adults and children involved in or affected by family disputes; their relationship with the Judges; and the specific functions which have been allocated to them, in legislation and procedural rules, since their establishment.

4. The FCSS - Family Court Social Services³

4.1. Structure and operation

The FCSS Units are attached to all the courts which deal with family issues, including the Family Court and the religious courts – for Jews, Muslims, and Druze. They provide services free of charge to all who apply to the courts.⁴

The Ministry of Welfare is responsible for provision of welfare services in Israel. These services include social welfare departments in all local authorities; centres for child visitation; centres for treatment of family violence; and welfare officers and probation officers who can be required by the courts to produce reports after investigation. The FCSS are under the professional supervision of a dedicated department in the Ministry.

The Units were staffed from the start by senior social workers who were highly experienced in family therapy and allied areas, with access to psychologists and psychiatrists. Lawyers were added to the teams when it became apparent that this was needed. The Units are attached to every Court and have their offices in or near to the courthouse.

The mission statement and aims of the FCSS Units are as follows:

- To promote settlement of conflicts
- To assist both the court and families in crisis
- To act in the interest of all family members and of children in particular
- To assist families in litigation to settle their conflicts outside the court
- To help curtail the adversarial process
- To address the emotional, personal and intra-personal needs of the litigant and his family
- To improve parenting skills.

The FCSS help the families by providing essential information about treatment alternatives and dispute resolution services. Anything said by the parties is confidential and the Unit social workers and those working with them may not be called as witnesses. They also provide short term treatment, counselling and mediation; they conduct workshops for divorcing and separating couples free of charge; and they have been given other tasks as will be described shortly.

The FCSS social workers give assistance to the Court by reporting on the results of their interventions (but not the things told them by the parties), and by taking an active part in conversations between children and the Judge; they can also suggest that the Court deal with issues which need attention, even though the parties may not have referred to them in their submissions to the court in the normal processes of litigation. In this way, they provide invaluable help to the court, by ensuring that matters which do not need adjudication are kept out of the court list, but at the same time making sure that all the issues arising from the breakup of the family are resolved, by agreement or by judicial decision, thereby leaving no loose ends that might lead to future litigation.

4.2. Initial interaction of citizens with the court: therapeutic, not judicial

When the parties to a family dispute want to start proceedings before the Family Court, it is important that the first neutral person they meet is a social worker, who is by definition not judgmental in orientation. The social workers are trained to see the complexities of the problems facing families and to try to help, and not a judicial figure whom they want to impress with the rightness of their allegations against the other party so that they can claim victory.

4.3. Coming to terms with marital breakdown

In those cases where one of the spouses has decided on separation and the other was unaware of the impending end of the relationship, his or her reaction may be to deny the existence of the problem, or to become stuck in an attitude of rage and hatred toward the other spouse. A social worker from the FCSS can help to move the party who did not initiate the process along the track of coming to terms with the end of the marriage, and help the spouse who initiated the proceedings to understand that the wife or husband needs time to come to accept the new situation. This often avoids the necessity for the Judge to spend time dealing with applications which are based only on the emotional state of one of the parties, rather than a need for specific relief.

In a majority of cases the involvement of the FCSS de-escalates the dispute, by reducing the emotional overload on the parties, and the need to focus on the needs of the children.⁵

4.4. The needs of the children

In a case where the parents cannot agree on the division of parental responsibilities after separation – issues described in terms of custody – and are making allegations against each other relating to parenting capacity, the social worker can, in many cases, ask the court to consider to what extent these allegations emanate less from genuine concern for the best interests of the children and more from personality issues of the parents. In addition, the social worker makes the parents aware of the effect the dispute is having on the children. This often reduces the dispute to manageable dimensions, and may obviate the need for the court to appoint an expert to prepare an opinion, and may bring about an agreement, making an evidentiary hearing and a judgment unnecessary.

4.5. Violence in the family

A husband or wife who applies to the court for an order excluding the other spouse from the family home under the [Law for the Prevention of Family Violence, 1991](#), is often in a highly emotional state, as well as suffering from the trauma of the act committed against him or her. The applicant is often unaware of the ramifications of the application, or of the order sought, and in such cases the immediate availability of the social worker is of great assistance to the applicant and to the Judge.

Mrs. A comes to the court asking for an order against her husband, alleging that he pushed her in the course of an argument. The Judge asks her questions about the incident and the atmosphere at home. He is convinced that at this stage there are grounds for making an exclusion order, banning the husband from the family home and from a 100 m radius, and starts to compose the order. When the Judge reaches the part

³ Parts of this section are taken from my article: [Marcus P. \(2015\)](#).

⁴ It was clear from the outset that providing services free of charge would encourage widespread use of the FCSS, and remove the possibility that a recalcitrant party would reject therapeutic intervention with the excuse that he could not afford it. In addition, the provision of social services at the outset of proceedings and, where necessary during the life of the family's involvement with the court, would result in savings of court time.

⁵ One of the interviewees in the study described in para. 4.7 *infra* said: "I have no doubt that N. (the FCSS social worker) succeeded in bringing us to the situation of discussion and the understanding that if love died we had to follow the correct path for the sake of the children...I understood that the things I said damaged the children... My desire for revenge caused me to belittle the mother... in the FCSS unit I understood that the things I said injured my daughter and not only her mother".

of the order banning the husband from having a firearm, and ordering him to surrender the firearm to the police,⁶ Mrs. A is shocked; she tells the Judge that Mr. A works as a security guard and that without a firearm he will be dismissed from his work, and that the family's only source of income will be cut off.

Faced with this situation, of Mrs. A's apparent ambivalence, the Judge asks his clerk to telephone the Support Unit, and to ask that the duty social worker should come to speak to Mrs. A. Within ten minutes Mrs. A is speaking to the social worker outside the courtroom, and within a short time the social worker has heard whether the incident described is a one-off event or is the last in a series of violent incidents, and whether there are children at home. If so, the social worker will advise Mrs. A as to the effects an exclusion order against their father might have on them; and will advise her on a variety of alternatives. On the basis of the consultation with the social worker, who has extensive experience in dealing with such situations, Mrs. A can consider whether to retract her application, or go ahead with it, and whether she needs to go with the children to a shelter for victims of violence, for protection.

Mrs. A returns to the courtroom and tells the Judge what she has decided.

In any case where a Judge makes an exclusion order *ex parte*, a hearing to be attended by both parties is fixed to take place within 7 days, as prescribed by the law. The Judge may then refer the parties to the FCSS, which is asked to

- Help the parents make suitable arrangements for the children to see the excluded parent, if necessary at a visitation centre, so that the children are not deprived of that parent (unless in the interests of the children it would be inappropriate to arrange contact without a comprehensive assessment) .
- Help the parties to reach agreement as to whether the banning order should remain in force or be cancelled or amended.

4.6. Referral by the Judge

At any time after the start of proceedings in the court, the Judge may refer the parties to the FCSS Unit. The Unit will be asked to

- Assist the parties determine whether they can agree on their future plans, divorce or reconciliation
- Find out if there are other issues between the parties, which they have not regarded as important, and if so, help them to reach agreement on the specific issues or as to how to resolve them, and in particular, whether the parties are ready for mediation.
- Advise whether there should be a comprehensive report on the family by a welfare officer.

The value of such referrals is not restricted to the answers to the specific instructions given.

4.7. Evaluation of the FCSS

In a broad study carried out in 2014–2015, the outcomes of interventions by FCSS with 3980 clients from 1950 families, who were referred to the FCSS over an 8 month period, were analysed. The clients were asked, in a telephone survey conducted approximately six months after the conclusion of the Support Unit involvement, to answer questions about the intervention of the Support Unit, and to comment on their perceptions of the mediation process, and the stability of the agreements reached (Bayer-Topilsky et al., 2015).

⁶ The law requires the court to include in an order excluding a violent family member from his home a provision banning possession of a firearm, even if the person against whom the order is made is a police officer or a member of the military) (sec. 2B of the *Law for the Prevention of Family Violence, 1991*).

While the social workers estimated on intake that the level of conflict was high in 63% of the cases, and 78% of the clients reported some form of violence from the partner, almost 48% of the clients reported agreements through the support unit on at least one area of conflict. In cases where parenting matters (custody, visitation arrangements or child support) 55% reached agreement on at least one of the issues, although in the case of visitation arrangements, 57% of the clients reported stability and satisfaction with the arrangements. In general, 70%–80% of clients reported that the arrangements were stable.

This represents a substantial reduction in the level of conflict, due to the involvement of a social worker; in the absence of such involvement the disputed issue would have been dealt with by an adversarial process before a judge, which would increase the level of conflict and adversely affect the children of the parties, as well as the parties themselves.

73% of the clients reported a good therapeutic alliance (with no substantial differences between men and women), including positive answers to the questions: to what extent did the social worker:

- Listen to you
- Allow you to express yourself
- Show impartiality
- Understand you

and a majority (80% of women and 68% of men) believed that the social worker was neutral to a great or very great extent.

4.8. Information, assessment and coordination

The understanding that it is essential that families in dispute receive social service support and assistance at the earliest possible stage, and that the FCSS had proven their competence and expertise, lay behind *Law for the Regulation of Litigation in Family Disputes (Temporary Provision), 2014* to require a spouse who wishes to file a claim against the other to apply to the court, not by filing a full statement of allegations and requests for specific relief and orders, but by an application for dispute resolution to the parties. This is done in a short form, which includes only the details of the parties, without any specific allegations or claims. The parties are then referred to the Support Unit and are summoned to meet with a social worker for a meeting or series of meetings for “information, assessment and coordination”.

This legislation, which has been in force for about a year and a half at the time of writing, has seen considerable success in several areas.

- The parties receive an explanation of the court process and of the roles of the court and the FCSS, from a person who is perceived to be professional, competent, sympathetic and neutral. The parties are made aware of the effects of family disharmony, divorce, and high conflict litigation on children, and ways in which parents can and should endeavour to mitigate the children's distress and avoid damage to their children.
- The meetings often enable the parties to put forward, in a non-judgmental setting, their feelings and their needs, and as a result many realize that there are alternative, non-confrontational ways in which they can resolve their disagreements.
- Also, the FCSS social worker will guide the parties to dispute resolution techniques about which many of them are unaware, including, for example, mediation and collaborative divorce.
- Where the FCSS social worker sees that there is a need for consultations or therapy, be it for improvement of communication between the parties, or for coping with a child with special needs or with financial difficulties, or for a possible mental illness or addictions, it can provide details of agencies and others to whom the parties may be referred.
- It is brought home to parents that it is their responsibility, and not that of the Court, to make proper arrangements for their future and that of their children; and that the court will step in only after they have

failed to do so, despite all the types of assistance available to them from state and private agencies.

4.9. The voice of the child

Israel is signatory to the [UN Convention on the Rights of the Child](#), Article 12 of which provides that the child should be given an opportunity to express his opinion on any matter concerning him which comes before the court for determination, and the court is required to give the child's feelings, opinions and desires appropriate weight in its decision, according to the child's age and level of maturity.

Pursuant to Israel's adoption of the CRC a Legislative committee was set up by the Minister of Justice with a view *inter alia* to applying Article 12. In order to test the recommendations as to the method by which the child's voice would be heard in proceedings concerning him, a pilot scheme was set up in the Family Courts in Jerusalem (the undersigned was at the time Deputy President for Family Matters for the Jerusalem district, and chief judge of the Family Court) and in Haifa.

The FCSS Unit is an integral part of the arrangements for the child to express his opinion. In any matter concerning a child the parents are asked if they agree that the child may speak confidentially with a social worker, designated and specially trained for the purpose of speaking to the child, from the FCSS.

If the parents agree, the meeting with the child is held in their absence, and the child is told that what he says will remain confidential; but that a summary of the discussion will be given in a confidential report to the Judge, which is not disclosed to the parents or their counsel; only if the child agrees will the parents be told what he has said.

The child is also asked if he wants to meet with the Judge.

If he does, the child is invited to the Judge's chambers, with a Unit social worker participating; however the parents and their lawyers are not permitted to be present. The Judge will however give the parties, in writing or at a hearing, his impressions from the meeting, without disclosing the child's words or feelings, unless the child expressly agrees that the parents should be told.

The Judge has the power to require that the child meet him in chambers, even if the aforementioned procedure has not been followed.

In any case, the child has an opportunity to tell the Judge, directly or indirectly, what is on his mind, without the parents being told. The opportunity to speak directly to the Judge is welcomed by many children, and ensure that the decision is made after consideration of his views, but no less important, the Judge is able to assure the child that the court decides the case, so that the child should not feel that he has to take sides, or that been disloyal to either parent in saying what he feels. The Judge, with the social worker, are also able to assess to what extent is any the child has been told by a parent what to say, and the court can draw the necessary conclusions.

The pilot operated from June 2006 until March 2009, and the findings of the research, conducted by the Engleberg Center for Children and Youth at the Myers-JDC-Brookdale Institute.⁷

The research was highly encouraging. 448 children were invited to participate; 99 children who had participated were interviewed, as were 73 parents of such children. Interviews were also conducted with judges and lawyers, and with the designated social workers.

According to the designated social workers, 70% of the children expressed themselves easily; 69% were relaxed; but 25% were tense and 26% expressed concern about the reaction of one of the parents. The social workers also said that the process helped bring the child's views before the judge, but also to bring these views to the attention of the parents, who in many cases were unaware of the wishes, emotional state, distress and needs of their children.

77% of the parents expressed satisfaction with the process (31% extremely satisfied and 36% satisfied).

The children's reactions were highly satisfactory. 93% said it was a good idea to offer children the chance to express themselves. 92% said they would recommend a friend to participate. 62% of the children said participation had helped them, by being shown respect and consideration for their opinions and feelings, by being helped to decide what they really wanted, and that involvement with the social worker had contributed to an improved relationship with one of the parents.

The role of the social workers of the FCSS was found to be central to the success of the project. They provided emotional support for the children at a time of stress, being perceived by the child and the parents as being neutral, professional and caring.

The pilot project was deemed to be a success, and a follow up report confirmed the findings ([Morag and Sorek \(2013\)](#)), and chapter XX(2), which provides for the procedure utilized in the pilot, with certain changes, was added in 2011 to the [Civil Procedure Rules, 1984](#), and is now in force.

Very often the child will raise, at the meeting with the social worker, issues and interests of which the parents and mediators were unaware. If the child agrees, these concerns will be placed before the parents, who may reconsider arrangements which they previously thought were right for the child.

Mr. and Mrs. B reached an agreement, whereby Mrs. B would have custody of their child, and would be able to emigrate to a country several flying hours away from Israel. They also agreed that Mr. B would be able to see his son in the new country, and the child would come to Israel three times a year. The agreement was submitted to the Court for approval, as required by law.

However, when the social worker spoke to the child, who was then 11 years old, it became clear that neither of the parents had told him about the plans for emigration, and he was most upset that he would have to leave his friends, his school and his grandparents, and that he would have to learn a completely new language in a country about he knew nothing.

This was reported to the court, which refused to approve the agreement.

Mr. and Mrs. C were divorced, and by consent the children, girls aged 14 and 10, lived with the mother, and visited the father with overnights twice a week and on alternate weekends.

After a short time, the older girl told the parents that she no longer wanted to see the father. Both parents filed claims in the court; the father alleged that the mother had alienated the girl against him and the mother alleged that the father had abused the child.

The children were referred to the social worker, who spoke to the children. The older girl was an surly and uncooperative adolescent, and his sister was the opposite, a charming child in every respect. The 14 year-old complained that the father spent most of the time with the younger sister, and she felt neglected, and she decided that he did not want to see her father.

As a result of the involvement of the Support Unit, the social worker was able to reassure the parents and the court that there had been neither abuse nor alienation. Instead of an adversarial hearing, in which each parent would try to prove that the other parent was unfit, the parents agreed with the recommendation of the social worker that the older girl would see her father without her sister one of the mid-week visits, and the younger sister would go to father on her own on the other midweek day, and they would both be with the father on alternate weekends.

4.10. Collaboration between the Judges and the Support Unit

Another of the welcome results of the provision of FCSS Units attached to each court is the level of cooperation between Judges and social workers of the Support Unit.

Under section 68 of the [Capacity and Guardianship Law, 1962](#), Judges of the Family Court have very wide powers to take all such

⁷ The research is described and the findings discussed in [Morag et al. \(n.d.\)](#)

steps as may be necessary for the welfare of a child, even without a specific application having been filed by one of the parents.

As an example of the collaboration between the Unit social workers and the Judges, there are cases in which a social worker is able to detect the possibility that there are psychological or psychiatric issues that need to be addressed, and each Unit has a psychologist and psychiatrist available for consultation. In such a case, the social worker can recommend assessment and/or treatment for the child and/or the parents. After hearing the parties, the court is empowered to order assessment or treatment, even if neither parent has asked for this, and even if they object.

The Judges and social workers also take steps to enhance their ability to work together. This takes several forms, including

- meetings attended by all the Judges and social workers in the court, addressed by a social worker or Judge or an invited outside speaker on a topic of current mutual interest.
- Involvement of Judges in lecturing and conducting workshops at pre-appointment and in-service training seminars for social workers.
- Involvement of social workers and psychologists of the FCSS as lecturers at in-service training seminars for Family Court Judges.
- Participation of a social worker at all meetings between a Judge and a child, including preparation before and debriefing after the meeting.
- Consultation on judicial and therapeutic actions in specific cases

4.11. Prevention of litigation

The following case is an example of the value of the benefits of synchronicity of the therapeutic work of the Support Unit with the judicial authority of the Judge.

Mr. D. came before the court with an application for an immediate *ex parte* order banning his parents-in-law, the parents of his lately deceased wife, from having any contact with his children. His wife, the children's mother, had recently died after an illness, and Mr. D stated that the respondents, the grandparents, blamed him for the death of their only daughter and had told the children, or at least implied, that he was responsible. The grandparents would talk to the children on their cellphones in school hours and while they were at meetings of their youth movements; the grandfather would wait outside the children's schools or outside their house to meet the children, without consulting with their father; their conversations would also include inappropriate references to the suffering of the grandparents in concentration camps at the time of the Nazi persecutions. These conversations were very troublesome for the children.

The court made an order *ex parte* that the grandparents could not speak to the children by telephone, and that meetings could be arranged, but only in the presence of an adult, acceptable to the father and the grandparents, until further order of the Court. The order was to be in force for three months. At the same time, the Judge referred the parties to the FCSS Unit.

As provided by the law and rules of procedure, the application and the order were served on the grandparents by the police. Their reaction was severe, emotionally and physically; the meeting with the police revived memories of the Nazi persecutors and the grandfather had to be hospitalized.

The FCSS Unit decided to hold separate meetings, each with a separate social worker; one with the father, one with the grandparents and one with the children. This method was chosen to allow each of those involved to express his feelings fully, in a therapeutic atmosphere and away from any possibility of friction.

The social workers held a total of ten meetings and many telephone conversations. They applied to the Court for clarification to the parties of the legal situation; that the father as surviving natural guardian had all the necessary powers to make decisions relating to the children, that he had to act in the best interests of the children, that the interests of children usually include positive contacts with the extended family,

including grandparents, and that bereaved grandparents are allowed, under Section 28A of the [Capacity and Guardianship Law, 1962](#), to apply to the Court so as to provide for contact with the children of their deceased child.⁸

The meetings with the children were held with each one separately and all together; it was clear that they were deeply troubled by the content of the grandparents' conversations, but at the same time loved them and sympathized with them, and wanted to remain in contact.

The Social workers then held two meetings of the children with the grandparents; these meetings were held in the neutral surroundings of the FCSS Unit, after each of those involved, the grandparents, the father (who was not present at the meetings) and the children, had been briefed as to the purpose of the meetings and as to permitted and forbidden subjects for discussion.

These meetings were highly charged, but it was clear that the grandparents understood their position *vis-à-vis* the father and the grandchildren. Following these meetings, the father was told about the meetings, emphasizing his sole responsibility for the upbringing of the children, but that he must consider the needs of the children for contact with their late mother's parents, and to allow the children to work out the difficulties which might arise, with professional help where necessary, and at the same time to refrain from over-protectiveness.

It was then possible to work out an agreement, including details of the frequency of meetings, times and places, and the presence of an agreed third party, and also telephone calls and letters; in particular, there was agreement that the content of communications should be suited to the emotional maturity of each child.

The agreement was brought before the court for approval and was given the force of a Judgment.

This case represents an impressive success.

If the Court had not been assisted by the FCSS, in all probability all of those involved would have suffered damage and loss. If the father's allegations had proceeded to trial, he would have been compelled to prove by witnesses that the grandparents had in fact said and done the things attributed to them. The grandparents would have tried to prove that the father was a liar, that they had not said the things alleged; or that their allegations against him were true - the death of their daughter was in fact caused by the acts or omissions of their son-in-law, who in turn would have tried to disprove their claims. The children, because of their age, would not have been permitted to give evidence and their views and needs would not have become known.

The trial would have been long and expensive, and the result, one way or the other, would have caused irreparable damage to the fabric of the family. If the court had adjudged the father a liar, or upheld the grandparents' allegations against him, he would lose the respect of his children, and any order for contact between the children and the grandparents would have been complied with, if at all, unwillingly. If the court had upheld the father's case, the children would have been deprived of contact with people they loved and who loved them.

Instead, the court held only two short hearings, the first to hear the father's application and the second to approve the agreement; and the result was to the complete satisfaction of all concerned, particularly of the children, who were allowed to have a part in the process which was age-appropriate and respectful of their feelings.

If, on the other hand, the father had approached a social worker of the local authority or other professionals, they would not have been able to ensure the involvement of the grandparents; and even if the grandparents had cooperated, and the children had been involved, the social worker would have been limited to making suggestions. Without

⁸ This provision was added after the Yom Kippur War of 1973, in which many reserve and regular soldiers, fathers of children, fell. It was seen as necessary to give the bereaved parents standing, by statute to apply to the court. The provision was more recently extended, to allow any grandparent to apply to the court for an order allowing contact with a grandchild; however, the approach to the court is made by an application for dispute resolution, which is referred to the FCSS, and not by a regular claim (section 28B).

the authority of the Court, and the parties' awareness that the Court had a wide discretion to make orders and enforce them, it is unlikely that the parties would have reached agreement.

4.12. High conflict and alienation

As we have pointed out, one of the great achievements of the existence of the FCSS is that in all cases where the parties meet a social worker from the Unit, they are exposed, many of them for the first time, to an impartial professional with wide experience in the field.

These professionals show them that litigation is not the only way to resolve their disputes, and emphasise that the interests of the children must be taken into account – which may not be obvious to the parents who are expecting a litigious battle. Where necessary they are warned of the danger of allowing or making the children take sides in the dispute, and of the possibility of rejection of the other parent, including contact refusal, if this is allowed to happen.

In addition, even though the case before the Court may be restricted to one issue – allegations of abuse, or child support, or property division, or custody – the social worker will present the advantages of reaching a comprehensive agreement on all matters arising from the matrimonial problems, including the possibility of resolving their differences by marital therapy and avoiding separation altogether.

But the FCSS are helpful even in cases of high conflict, where the spouses are unable to reach agreement, despite persuasion and therapy, on many or all of the issues arising from the failure of their marriage and relationship. It may seem paradoxical that a Unit devoted to helping the parties to reach a settlement of their dispute should be able to assist the court and the family despite the level of enmity and even hatred between the parties.

However, the Unit can and does help the court, and the parties, at least their children in a number of ways, provided that the parties come before the Support Unit early enough.

It is well documented that in many high conflict cases, one or both of the parties suffer from personality problems, including personality disorders, which may make them unwilling or incapable of seeing beyond their own feelings and wants.⁹

Early identification of these problems, by means of the intake instruments used by the FCSS, will usually result in a recommendation to the court to refrain from referrals to mediation, since personality disordered litigants may take advantage of such referrals to manipulate the proceedings and delay the eventual decisions.

Those who have personality disorders are likely to engage in maladaptive gatekeeping and alienating behaviours which drive a wedge between their children and the other parent. Early identification in such cases may lead to recommendations which have a profound effect on the children. As I have pointed out in my lectures and writings (Marcus, 2017; Marcus, 2018a; Marcus, 2018b), it is of paramount importance that such parenting behaviours, and the distress they cause to children, should be identified and handled at the earliest possible stage, before the child ceases to have any contact with one of the parents.

For this reason, where the FCSS social worker comes to the conclusion that there is a serious risk of contact failure, the court can be recommended to act in two ways:

- to make clear and unequivocal orders about contact between the child and the parent concerned, with strong sanctions for non-compliance (including the threat of imprisonment or fines for contempt of court);
- to order that the parents have appropriate advice so that they realize the short- and long-term damage caused by parental alienation, and how to deal with the needs of the child; and therapy for the child, to help him cope with the new situation and the pressures he faces. Failure by a parent to comply with treatment orders should also be

sanctioned, with a clear warning that failure to comply could lead to a temporary suspension of decision making authority.

The FCSS Unit can also monitor compliance by both parents, and ask that the case be brought back to the court in the event of non-compliance.

4.13. Client satisfaction

The services provided by the FCSS were assessed in terms of client satisfaction in the report (Bayer-Topilsky et al., 2015) mentioned above, which was published in August 2015, nearly twenty years after the Family Courts Law was passed. The results were positive in all respects.

Among the findings:

- Most of the clients (73%) were highly satisfied with the service, even though 63% of the cases were described as high conflict, and 78% of clients reported that they had experienced some form of violence from the other party to the dispute
- 73% of the clients reported a good therapeutic alliance with the social worker
- Almost half (45%) of the clients reported that they had reached agreement in at least one area of conflict through the intervention of the Unit
- 70%–80% of the clients who reached an agreement about custody, divorce and child support reported that the arrangements were stable.

5. Conclusions

The beginnings of the doctrines of therapeutic jurisprudence as a concept are traced to the work of Professor David B. Wexler in the mid- 1980's; he first used the term in a paper delivered to the National Institute of Mental Health in 1987. The underlying idea, that courts of law constitute a social agent which can unwittingly cause beneficial (therapeutic) or detrimental (anti-therapeutic) results, which affect the immediate litigants and others, was well understood in Israel, and led to reconsideration of the adequacy of the response of the court system in family cases.

As we have shown, this appreciation gave rise to a new approach, particularly in the area of law where individuals are faced with conflict, precisely in the social institution which is intended to give them a stable and loving basis for their existence – the family. It was clear that the existing structure of the court system, and the techniques of adjudication within the courts, were adding to distress and suffering, and needed reform. But the commission set up to recommend changes also saw that the judicial process was incapable of taking proper account of the personal needs of parents and their children without access to professionals from outside the legal system. Furthermore, assistance from the caring professions, in order to be effective, would have to be immediately accessible for the parties, and that this could only be achieved by incorporating social services within the court itself.

The Family Courts Law set up the FCSS, and defined their role in broad terms in order that help could be offered in a variety of forms. Essential to the achievement of these objectives was the appointment of Judges with proven experience in family law and acquaintance with the potential contribution of associated disciplines, in particular social work, psychology (including child development), mental health and pathology. The Family Court judges and FCSS workers have annual in-service training seminars, in order to be updated as to new legislation, social work practices, psychological insights, etc.

At first, involvement of the parties in the services provided by the FCSS was voluntary. However, it took a relatively short time for lawyers and litigants to realize that there was a lot to be gained by attendance at the Units, so that it became rare for parties to fail to comply with a

⁹ See, for example, Eddy (2012).

recommendation by a Judge to go to the Unit, if only to hear what was being offered.

With time, all concerned with policy discovered that the professionalism of the social workers of the FCSS would enable them to take on several tasks, beyond those originally designated. These included workshops for divorcing parents, mediation, and sophisticated processes for allowing the child to be heard. It became clear that the system which required that proceedings in the court could be initiated only by filing lists of allegations and claims led to contention and escalation of disputes, and the courts needed further reform. This would require that a spouse who felt that there were serious difficulties in the family relationships would have to approach the court, not by making demands, but by asking for a referral for consultation. The organization needed for such a reform was readily available - the FCSS with their experienced staff and established intake and therapeutic approach were ideally suited to take on the task of holding information, assessment and coordination meetings, and they are now doing so with positive results, in terms of reduction in the severity of conflict and the use of alternative methods of dispute resolution.

The results reported, that in almost half of the cases dealt with by the FCSS the parties reached agreement on at least part of the issues between them, represent a substantial saving of court time; in these cases, which would otherwise have required hearings and possibly evidentiary trials before the court, the Judge had only to review the agreement and give it the force of a judicial decision or judgment.

But as we have shown, there are cases which are not appropriate for such primary therapeutic intervention, such as applications for immediate relief where violence is alleged, or where for reasons connected with the personality or mental state of one of the parties, it is not possible to help the family without the exertion of judicial authority. In such cases, the FCSS social workers play an essential role in assessing the needs, especially of children involved in such situations, and making recommendations to the court as to the orders which need to be given. Such orders, which often include a requirement that a parent and children obtain assistance, including assessment and treatment, from a mental health professional, may be called jurisprudential therapy.

The FCSS are invaluable to the courts and to the public in reducing the level of severity of disputes in the family. This is the objective of therapeutic jurisprudence.

The Israeli Family Court provides a fine example of the effectiveness of placing social work support services at the disposal of the court and of the litigants. FCSS supply inputs from the fields of social work, psychology and child development, and psychiatry, for preliminary assessment, advice to the parties, involvement of children and other roles.

As we have seen, collaboration between the judges and the FCSS is built into the system. When a judge refers a case to the FCSS with instructions as to the matters which need evaluation, consultation, and initial treatment, the FCSS can draw matters to the attention of the judge which may not appear on the surface of the court documents, but arise during the work of the social workers with the family, and need judicial intervention.

The court remains in control of the procedures, and the rules relating to confidentiality ensure that the activities of FCSS do not impair the impartiality of the court and its role as guardian of due process, but enhance the likelihood of a speedy and lasting resolution of disputes: restoration of proper relationships in the family, and terminating the litigation, while minimizing harm to the adults and children involved.

The goals of Therapeutic Jurisprudence are thus addressed in the Israeli Family Court system.

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References

- Bayer-Topilsky, T., Manor, A., & Szabo-Lael, R. (2015). *Family Court Social Services – National Evaluation Study*. Jerusalem: Myers-JDC-Brookdale Institute, Engelberg Center for Children and Youth.
- Capacity and Guardianship Law, 5722-1962 (Israel).
- Civil Procedure Rules, 5744-1984 (Israel).
- Eddy, B. (2012). *The Future of Family Court*. Scottsdale AZ: High Conflict Institute Press.
- Family Courts Law, 5755-1995 (Israel).
- Law for the Prevention of Family Violence, 5751-1991 (Israel).
- Law for the Regulation of Litigation in Family Disputes (Temporary Provision) 5774-2014 (Israel).
- Marcus, P. (2015). In K. Lynch, & A. Scully-Hill (Eds.), *Children's dispute resolution: the Israeli experience, in international perspectives on disputes about children and child protection*. Vol. 1. (pp. 167-183). The Chinese University of Hong Kong.
- Marcus P. (2017) Parental alienation, contact refusal and maladaptive gatekeeping: how to prevent contact failure, lecture at ISFL International Conference, Amsterdam, 2017.
- Marcus, P. (2018a). *Parental alienation and contact refusal: how to prevent failure of contact between parent and child submitted to Journal of the Society of Medicine and Law, Israel 2018 (Hebrew)*.
- Marcus, P. (2018b). *Preventing contact failure and alienation: a multidisciplinary approach workshop at afcc annual conference, Washington DC*.
- Marcus, P., & Gottlieb, D. (2012). *Juridogenic Damage to Children and Ways to Limit It: Presentation at AFCC annual conference, Chicago Ill*.
- Morag T. and Sorek Y. (2013) Children's participation in Israeli Family Court an account of an ongoing learning process.
- Morag T., Rivkin D. and Sorek Y. Child participation in the family courts – lessons from the Israeli pilot project, International Journal of Law, Policy and the Family Page 1 of 30, doi:<https://doi.org/10.1093/lawfam/eb023>
- Report of the Commission to Review the Application of Family Law (Hebrew)(1986).. Jerusalem: Ministry of Justice.
- UN Convention on the Rights of the Child (d). <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

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