A Critical Evaluation of Mediation in Scots Family Law Cases.

Introduction

"In my view, we are somewhat behind here in Scotland, and I fear that with the recent review of our civil court system, we may be in danger of missing an opportunity to remedy that…If we wish to survive and thrive, we all need to acknowledge that we are living in a rapidly changing world where our traditional ways of thinking and doing things are being challenged." [1]-John Sturrock QC, 2010

This dissertation will critically examine and evaluate the role that mediation plays in family law cases in Scotland today. Although there are many different types of alternative dispute resolution ("ADR") available in Scotland, this dissertation will primarily focus on mediation, as it is the type of ADR that is used most commonly.[2] Other forms of ADR include collaborative law, arbitration and negotiation, but these will not be discussed here. In addition, this dissertation will concentrate on the use of mediation in the context of heterosexual separating couples who are making decisions relating to their children, but some reference shall also be made to decisions regarding property and finance. Reference will also be made to interviews and questionnaires that were carried out specifically for the purposes of this dissertation.

Firstly, Chapter 1 will provide a brief overview of the framework of mediation services in Scotland, as well as a discussion of other contextual and legal factors. Chapter 2 will examine three of the main proposed benefits of choosing to mediate rather than litigate in family cases by comparing the two methods in depth. For the purposes of this dissertation, the definition of litigation that shall be used is the traditional use of the courts in civil/family cases whereby a judge makes the final, legally binding decision having analysed the evidence put in front of them. The benefits chosen to form the basis of this evaluation are: the proposal that mediation is more

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[1] Sturrock, J. (2010). The role of mediation in a modern civil justice system.(Scotland, United Kingdom). *Scots Law Times, 2010*(21), 111

[2] Scottish Civil Courts Review (2009) *Report of the Civil Courts Review*, https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, 296

empowering and flexible than litigation; the suggestion that mediation is better for children and lastly that mediation is more cost and time efficient. Each of these suggested benefits will be examined in turn with a comparison to litigation in order to look at both the strengths and weaknesses of both types of dispute resolution. Finally, Chapter 3 will provide an overall evaluation of the current approach towards mediation in Scots family law cases, and will argue that further reforms are needed in order to utilise mediation to it's fullest potential. In this chapter, the framework in England and Wales will also be examined as a comparative stance, along with the general European approach. It will be concluded that despite some minor issues, mediation should be used more in suitable Scots family law cases.

Chapter 1: The Background and Framework of Mediation in Scotland

The increasing use of alternative dispute resolution and mediation reflects the gradual shift from the legalisation towards a partial privatisation of the legal process over the past thirty years,[3] which has been subject to much debate and discussion both by the Scottish and UK Governments and literary commentators. The concept of mediation, within the contexts of both ADR and family law, is one that is fairly complex and difficult to succinctly define. However, the definition provided by the UK Government is a good starting point. It defines mediation as *"...a process in which an impartial third person, the mediator, assists couples considering separation or divorce to meet together to deal with the arrangements which need to be made for the future."*[4] Mediation aims to offer an alternative method of settlement that allows couples to reach their own decisions, outside of the court process, with help from an impartial third party. In other words, family mediation is a facilitated and assisted form of negotiation for divorcing or separating parties. Typically, any children of the relationship are the focus of the discussion and decisions regarding their residence, contact with the non-residence parent, health and education will be discussed, along with any financial and property matters.[5]

Mediation in family disputes was first used in 1984 to help separating or divorcing parents make arrangements for the future of their children, finances and property.[6] In 1987, Family Mediation Scotland was set up in order to provide a uniform network of local family mediation services held to professional standards.[7] In 2016, family mediation is made available through a network of thirteen local mediation services affiliated to Relationships Scotland[8], and a number of trained lawyers who are able

[3] Diduck, A. and Kaganas, F. (2012). *Family law, gender and the state*. Oxford: Hart, 706
[4] Lord Chancellor's Department (1995) *Looking to the Future: Mediation and the Ground for Divorce,* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272042/2799.pdf, 5.4
[5] Marshall, K. and Parvis, P. (2004). *Honouring children: The human rights of the child in Christian perspective*. Edinburgh: Saint Andrew Press, 56
[6] Cubitt, R., (2009) Family Mediation in: Malcolm, E. and O'Donnell, F. ed. *A Guide to Mediating in Scotland.* Dundee University Press, 97-98
[7] Matheson, S. M.G., (1994) *Family Mediation in Scotland* in: Moody, S. and Mackay, R. (1995). *Green's guide to alternative dispute resolution in Scotland*. Edinburgh: W. Green/Sweet & Maxwell, 36
[8] Relationships Scotland. (2011). *Family Mediation Services*. [online] Available at: http://www.relationships-scotland.org.uk/find-a-local-service/family-mediation-services

to work as CALM mediators (Comprehensive Affiliated Lawyer Mediators)[9] of which there is approximately sixty-five.[10] These mediators will usually provide their services through the firms that they work at and can be either privately funded or funded by legal aid.[11] The Relationships Scotland affiliated services are not for profit, charitable organisations that are funded through a variety of grants, including financial support from the Scottish Government.[12] It is worth noting at this point that the mediation conducted by Relationships Scotland will be the primary focus throughout this dissertation, rather than mediation by CALM, due to problems with access to data from the lawyer-mediators. Because of this difficulty, there were problems in obtaining statistics for the total number of people who had received, or are receiving, mediation in Scotland today. However, in the year 2014-2015 Relationships Scotland had 3,803 new and existing clients receiving mediation.[13] Despite the fact that these numbers do not include those receiving mediation from CALM providers, they do provide a rough estimation of the number of people receiving family mediation, which can reasonably be expected to be higher in reality.

There is a widely held view that disputes (especially in the context of family cases) should be kept out of the courts so far as is reasonably practicable. This means that people are encouraged to reach their own agreements when divorcing or separating instead, and mediation provides a method for this to be done. In 2009, the Scottish Government facilitated the Report of the Scottish Civil Courts Review, which was led and produced by Lord Gill ("The Gill Review"). This report examined the civil justice system in Scotland as a whole, but most relevantly it also included a discussion (in Chapter 7) as to whether or not court should be regarded as a last resort for resolving disputes after all alternative avenues have failed (namely mediation), or

[9] Cubitt, R., (2009) Family Mediation in: Malcolm, E. and O'Donnell, F. ed. *A Guide to Mediating in Scotland.* Dundee University Press, 98
[10] Calmscotland.co.uk. (2016). *Calm Scotland | Family Mediators Glasgow, Edinburgh, Aberdeen*. [online] Available at: http://www.calmscotland.co.uk
[11] Scottish Civil Courts Review (2009) *Report of the Civil Courts Review*, https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, 296
[12] Cubitt, R., (2009), Family Mediation in: Malcolm, E. and O'Donnell, F. ed. *A Guide to Mediating in Scotland.* Dundee University Press, 99
[13] Relationships Scotland (2016) *Relationships Scotland Annual Statistics Summary 2014-15* [Appendix D]

whether or not court is *"simply on of several options open to the parties."*[14] The Report concluded that *"parties should be encouraged, but not compelled to consider ADR in appropriate cases"* [15] and also that further steps should to be taken in order to raise the awareness of ADR, particularly mediation, across the board. The Gill Review also found that there appears to be a concerning lack of public awareness regarding mediation, or even that it exists, in Scotland. It was also reported that while a lot of people had heard of mediation, they did not have a clear idea of what is involved and what it can offer, but that those who had taken part in mediation viewed in a positive manner and would use it again.[16] Social Research conducted by the Scottish Government showed that only 53% of people asked had an awareness of mediation and that where they had heard of it; they were not entirely sure what it entailed.[17] This suggests that more needs to be done to boost the public's awareness of mediation in Scotland.

Between 2013 and 2014 there were 9,619 divorces granted; three fifths of which used the simplified procedure.[18] These statistics indicate the downward trend of the number of divorces in Scotland, which were at their highest between 2006 and 2007 with 13,767.[19] This could perhaps reflect the ever-increasing number of couples cohabiting and choosing not to get married, meaning if they separate they will not be included in the official statistics. This notion can be reinforced when we consider the fact that almost half of all children are now born to unmarried parents[20]. In practice, the vast majority of parents who decide to live apart after they separate make their own arrangements for contact between the non-resident parent and the child and

[14] Scottish Civil Courts Review (2009) *Report of the Civil Courts Review*, https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, 165
[15] Scottish Civil Courts Review (2009) *Report of the Civil Courts Review*, https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, 172
[16] Quail, T. (2013). *Keep CALM and carry on: The Journal Online*. [online] Journalonline.co.uk. Available at: http://www.journalonline.co.uk/Magazine/58-2/1012221.aspx
[17] The Scottish Government Social Research (2007) *Public Awareness and Perceptions of Mediation in Scotland,* http://www.gov.scot/Resource/Doc/213116/0056629.pdf
[18] The Scottish Government (2015) *Civil Justice Statistics in Scotland 2013-14,* http://www.gov.scot/Resource/0048/00489564.pdf, 24
[19] 'Brodies (2014). *Divorce trends in Scotland - Brodies LLP Legal Resource Area*. [online] Available at: http://www.brodies.com/blog/family-law/divorce-trends-scotland/
[20] Office for National Statistics (2015) *Statistical Bulletin: Households and Families 2014,* http://www.ons.gov.uk/ons/rel/family-demography/families-and-households/2014/index.html

only 5% of separated parents state their arrangements were ordered by a court.[21] This again shows that in the majority of cases, families are reaching their own agreements, rather than the court ordering the arrangements instead.

All divorces have to be granted by the courts under the Divorce (Scotland) Act 1976 and section 1(1) states the two grounds for divorce. The first is that the marriage has broken down irretrievably and the second is that an interim gender recognition certificate has been issued under the Gender Recognition Act 2004. Following the reforms made by the Family Law (Scotland) Act 2006, the grounds for establishing irretrievable breakdown are now: adultery[22]; intolerable behaviour[23]; non-cohabitation for one year with the other party's consent to divorce[24] or non-cohabitation for two years without the need for consent[25]. Those with no children under the age of sixteen and no financial matters to sort out can make use of the simplified divorce procedure, which was introduced in 1982 and is known as a 'do-it-yourself divorce'.[26] This procedure allows these couples to dispense with the general requirement for evidence from someone else and it essentially means they are able to fill out an application form which is then approved by the court in order for the divorce to be granted.[27] However, those with children under 16 must use the ordinary procedure whereby they must proceed through the formal court procedure. This means that evidence must be heard to prove the grounds for divorce and this must come from a third party, regardless of whether or not the action is defended,[28] before a decree of divorce can be granted.

Mediation can be offered at any stage in a dispute, whether prior to litigation, or the court could refer a couple at any time during the proceedings. This is made clear by the Ordinary Cause Rule 33.22 which states: "*In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at*

[21] Mackay, K., (2013) *Hearing children in court disputes between parents*. CRFR, Edinburgh. http://www.research.ed.ac.uk/portal/files/14844333/K201334.pdf
[22] Section 1(2)(a) Divorce (Scotland) Act 1976
[23] Section 1(2)(b) Divorce (Scotland) Act 1976
[24] Section 1(2)(d) Divorce (Scotland) Act 1976
[25] Section 1(2)(e) Divorce (Scotland) Act 1976
[26] Rule 49.72 of the Rules of Court of Session 1994 as amended by the Act of Sederunt (Rule of the Court of Session Amendment No. 3) (Family Law (Scotland) Act 2006) 2006 (SSI 2006/206), para 1.5
[27] Griffiths, A., Fotheringham, J. and McCarthy, F. (2013). *Family law*. Edinburgh: W. Green, 517
[28] Civil Evidence (Scotland) Act 1988, ss 1(1), 8(1) and (3)

any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation."[29] It is worth noting that only a small proportion of referrals to mediation actually come from the courts, and instead referrals come from solicitors, voluntary aid agencies or the parties themselves.[30] 34% of Relationships Scotland's referrals came from the court or a solicitor, 11% came from a social worker or related agency and the majority (55%) were either a self-referral or as a result of a recommendation from a friend or relative.[31]

The main purpose of mediation is for the parties to reach a mutually acceptable agreement to benefit both of them, as well as any children involved. In order for this to be done, there are five key principles that must be adhered to. Firstly, that the process is voluntary, that the parties come to the mediation of their own free will, and also that they are free to withdraw at any time.[32] Secondly, all discussions between the mediator and the parties are confidential as the Civil Evidence (Family Mediation) (Scotland) Act 1995 ensures that the matters discussed in mediation cannot be used as evidence in court[33], but this only applies where an accredited mediator conducts the mediation session. This means that the individuals engaged with the mediation process can reasonably expect a high level of confidentiality regarding the matters they discuss, illustrating the notion that mediation is a less formal and more private method of dispute resolution than litigation. The third principle is that the mediator will remain neutral and impartial throughout the process.[34] The final two principles are that mediation is interest based in order to establish underlying concerns, and finally that the ideal outcome of the mediation is mutual gain whereby both parties are satisfied with the arrangements made.[35]

Agreements reached in the mediation session can then be made legally enforceable by registration with the Keeper of Registers in the form of a Minute of Agreement

[29] Rule 33.22 *Act of Sederunt, (Sheriff Court Ordinary Cause Rules)* 1993 No.1956 (S.223)
[30] Griffiths, A., Fotheringham, J. and McCarthy, F. (2013). *Family law*. Edinburgh: W. Green, 484
[31] Relationships Scotland (2016) *Relationships Scotland Annual Statistics Summary 2014-15* [Appendix D]
[32] Mantle, M. (2011) *Mediation: A Practical Guide for Lawyers,* Dundee, Dundee University Press, 13
[33] Section 1(1) Civil Evidence (Scotland) Act 1995
[34] Mantle, M. (2011) *Mediation: A Practical Guide for Lawyers,* Dundee, Dundee University Press, 13
[35] Mantle, M. (2011) *Mediation: A Practical Guide for Lawyers,* Dundee, Dundee University Press, 14

which is held as a public record in the Scottish Record Office, or by a Joint Minute of Agreement, which forms part of the court action.[36] However, it is also worth noting that in reality, many couples may reach their own agreements and stick to them without it being legally enforced in this way, which shall be discussed in more detail in Chapter 2. The proposed benefits of mediation will now be examined.

[36] Wasoff, F., McGuckin, A., Edwards, L., & Great Britain. Scottish Office. Central Research Unit. (1997). *Mutual consent written agreements in family law* (Legal studies Research findings (Scottish Office, Central Research Unit); no. 5). Edinburgh: Scottish Office.

Chapter 2: The Proposed Benefits of Mediation

This chapter will examine three of the main proposed benefits of mediation that are common throughout the literature and shall evaluate them in relation to litigation. At the end of this chapter, the advantages and disadvantages of mediation will be weighed up in order to reach a conclusion regarding the use of mediation in Scots family law cases.

(i) Mediation is more Flexible and Empowering

The first proposed benefit that will be discussed is the suggestion that mediation is more empowering and flexible than litigation. In this section, it shall be presumed that it is the flexible nature of mediation that makes the process more empowering than litigation and therefore the two concepts go hand in hand. As briefly mentioned above, mediation provides a mechanism for families to reach their own agreements when separating or divorcing, rather than having the court make the decisions for them. During the mediation session, where parties may be consulted together or apart, they are free to discuss any issues they desire in order to reach mutually satisfactory arrangements. The first reason why it can be suggested that mediation is more flexible and empowering, is because it allows couples to reach their own arrangements, which can be whatever suits the needs their particular set of circumstances. In other words, they are free to reach an agreement that is specifically tailored to best meet the needs of their family, thus allowing for more creative outcomes to be reached. It can be suggested that this cannot be done in litigation because the courts are only looking at the facts of the case from a quasi-subjective view and do not have the same level of understanding and insight into the families' lives that they do. Moreover, the courts will only have the information about the family's past and can only look backwards, whereas the individuals involved directly are able to make decisions looking to the future[37].

Again, as mentioned above, people are able to legally enforce the arrangements made during mediation through the registration of a Minute of Agreement or lodging

[37] Salem, P., (2009). The emergence of triage in Family Court Services: the beginning of the end for mandatory mediation? *Family court review*, 47 (3), 377

a Joint Minute of Agreement with the court. Mair, Wasoff and Mackay conducted research into the use of Minutes of Agreements ("MoAs") in Scotland by selecting a random sample of six hundred agreements registered in 2010. They found that the use of MoAs had "*become twice as frequent, with an estimated 3,000 minutes of agreement in 1992, when there were about 12,000 divorces, or a rate of one agreement for every four divorces, compared to a rate in 2010 of one agreement for every two divorces (an estimated 5000 agreements and 10,000 divorces).*"[38] This indicates that MoAs are becoming more and more common if indeed they are used in approximately half of all divorces. This again reiterates the shift towards private ordering or the 'contractualisation' as a way of reaching agreements in family disputes[39] in Scotland. In only 46% of the sample they examined the arrangements mentioned children, [40] indicating that these minutes of agreements are also being used to reach mutually acceptable decisions regarding property and finance, and how they are divided.

Section 9 of the Family Law (Scotland) Act 1985 provides clear guidance on the issue of how finances and property should be divided following a divorce. The underlying principle is that all matrimonial property should be shared fairly between the parties[41] and the court has substantial discretion in doing so.[42] Section 10(1) defines "fair sharing" as an equal division of property, unless there are "special circumstances" to justify an alternative division.[43] Any economic advantages or disadvantages sustained by either party will be balanced.[44] Such advantages and disadvantages under section 9(1) include the economic burden of childcare, any substantial dependence and severe economic hardship. This leaves scope for a wide range of circumstances, such as where one party has been unable to work because they have been looking after the children for example. As these principles

[38] Mair, J., Wasoff, F., and Mackay, K., "Family Justice Without Courts: Property Settlement on Separation Using Contracts in Scotland." Ed. Maclean, M., Eekelaar, J., Bastard, B.Mavis (2015) *Delivering Family Justice in the 21st Century*. London: Hart Publishing, 175
[39] Mair, J., Wasoff, F., and Mackay, K., "Family Justice Without Courts: Property Settlement on Separation Using Contracts in Scotland." Ed. Maclean, M., Eekelaar, J., Bastard, B.Mavis (2015) *Delivering Family Justice in the 21st Century*. London: Hart Publishing, 175
[40] Mair, J., Wasoff, F. and Mackay, K., (2013), *All Settled? Legally binding separation agreements and private ordering in family law in Scotland*, CRFR, Edinburgh. 29
[41] Section 9(1)(a) Family Law (Scotland) Act 1985
[42] Section 8(2) Family Law (Scotland) Act 1985
[43] Griffiths, A., Fotheringham, J. and McCarthy, F. (2013). *Family law*. Edinburgh: W. Green, 452
[44] Section 11(2)(a) Family Law (Scotland) Act 1985

are so comprehensive, it means that it is more straightforward for fair arrangements to be made in relation to property and finance out of court where they are followed, which may help explain why mediation is better suited to disputes centring around children instead.

Although mediation regarding arrangements for couples with children is the focus here, it is interesting to note that this research found that the majority of cases did not mention any children. This could in part be due to the ever-changing circumstances in a child's life, so to have things such as exact contact timings included would be difficult to implement in practice. Once a Minute of Agreement is registered or Joint Minute is lodged, they cannot be varied or reduced unless they meet one of the following criteria. The first reason why a MoA or JM could be altered is it if it does not represent the best interests of the child. Under section 12 of the Children (Scotland) Act 1995 the court must consider whether any order under section 11 should be granted,[45] and in doing so the child's welfare must be the paramount concern[46], so where the order does not reflect this it could be varied or reduced. A MoA or JM could also be challenged under section 16(1)(b) of the Family Law (Scotland) Act 1985 where any term relating to financial provision was not "fair and reasonable at the time entered into." So for example where a couple were to reach an agreement stating that the wife would not receive anything, this could be challenged here. Furthermore, a MoA or a JM could be challenged on ordinary contract grounds, such as where there is evidence to suggest that consent was obtained as a result of force or fear, fraud or misrepresentation, undue influence or facility and circumvention.[47] This might help explain why in practice many people do not always take the additional step of making their agreements legally binding, as to alter anything would involve considerable time and effort. In an interview specifically conducted for the purposes of this dissertation with Rosanne Cubitt, (the Joint Head of Professional Practice at Relationships Scotland), she stated: "*Most people who are coming to mediation are reaching their own agreements that they've decided on between themselves and they are choosing to stick to it…Minutes of agreements and joint minutes are rarely lodged in practice. People tend to have written down*

[45] Griffiths, A., Fotheringham, J. and McCarthy, F. (2013). *Family law*. Edinburgh: W. Green, 525
[46] Section 11(7)(a) Children (Scotland) Act 1995
[47] Griffiths, A., Fotheringham, J. and McCarthy, F. (2013). *Family law*. Edinburgh: W. Green, 525

their plans and they go away with this in mind. This allows them to take ownership for their decisions and also this is a more flexible approach."[48] This further demonstrates the flexibility and empowering nature of mediation, as it means people are not bound by the decision of the court and are able to vary their arrangements depending on the needs and desires of the family at any relevant time.

However, the problem with not registering decisions reached in the form of a MoA or JM means that they cannot be legally enforced and there is no real act of recourse if arrangements are not abided by. For example, if one parent were to ignore an arrangement regarding contact hours, then the other parent may not have any real way to give affect to what they had agreed. Moreover, Wasoff found in 2005 that those who reached their own agreements *"reported that high emotion, conflict, antagonism and compromise were the norm in reaching such agreements. The term 'agreement' is, in itself, misleading, since almost all of those interviewed said that they has not willingly agreed but had felt pressured into signing because they thought that the alternatives were worse. They did not feel in control of the process or the outcome. No one felt empowered."*[49] This research has some worrying implications that could undermine the whole suggestion that mediation is indeed more flexible and empowering than the litigation process.

Nevertheless, in a later study conducted by Mair, Wasoff and Mackay there were far more positive results. Parties were asked to rate their level of satisfaction with their minute of agreement from one to ten and 43% rated the experience as a nine or ten, and a further 33% said it was a seven or eight.[50] Moreover, research conducted by Relationships Scotland asked individuals who had received mediation how they would rate their experience and they found that 79% of clients thought that mediation had helped improve their family situation and 96% of clients would recommend the mediation services to others.[51] This strongly demonstrates that those who use mediation perceive it to be an overall positive experience, rebutting the view that

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[48] Interview with Rosanne Cubitt, Joint Head of Professional Practice at Relationships Scotland, Conducted on 4 Feb. 2016 [Appendix A]
[49] Wasoff, F. (2005). Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce1. *Journal of Social Welfare and Family Law*, 27(3-4), 238
[50] Griffiths, A., Fotheringham, J. and McCarthy, F. (2013). *Family law*. Edinburgh: W. Green. 470
[51] Relationships Scotland (2016) Relationships Scotland Annual Statistics Summary 2014-15 [Appendix D]

reaching private agreements is not empowering. It can further be suggested that Wasoff's findings from 2005 indicate that the reason why people were so discouraged is because they felt that the other options were worse. When a dispute is settled in court, it can be argued that neither party is a "winner", whereas the whole point of mediation is that people reach their own compromises for themselves, rather than have them forced upon them.[52] Thus it can be suggested that despite mediation's flaws, the alternative of litigating may be a worse (and even less empowering) option.

As highlighted above, mediation does encourage people to take ownership of their own decisions, facilitates communication with their partner and is therapeutic in its' nature,[53] and therefore extends their autonomy because it enables them to participate in the decision-making process[54]. For this reason it can be argued that this process is more empowering than litigation which is much more authoritarian in its' approach. In addition, it can be argued that settling a dispute by use of mediation is less adversarial, less intimidating and less formal than normal court proceedings. It can be suggested that mediation additionally encourages people to maintain self-respect and dignity, enables individuals a much higher degree of control in the decisions affecting them and enables direct communication, allowing for the maintenance of healthier relationships in the long term[55]. For these reasons it can be suggested that a greater use of mediation should be encouraged.

It can however be suggested that mediation will not be applicable in all cases. For example, direct communication between parties in mediation may not be suitable in cases where there have been allegations of domestic abuse or violence, which CALM and Relationships Scotland's mediators endeavour to be aware of from the outset at one-on-one first contact meeting.[56] This is because there will be a clear

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[52] Shepherd and Wedderburn. (2013). *Should Mediation be Mandatory?*. [online] Available at: http://www.shepwedd.co.uk/knowledge/should-mediation-be-mandatory
[53] Roberts, S. (1993). Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship. *The Modern Law Review*, 56(3), 456
[54] Myers, F., Wasoff, F., and Scotland. Scottish Executive. Central Research Unit. (2000). *Meeting in the middle : A study of solicitors' and mediators' divorce practice* (Central Research Unit papers). Edinburgh: Central Research Unit, 142
[55] About Families (2011) *Together and Apart: Supporting families through change,* http://www.capability-scotland.org.uk/media/101061/about_families_report_2_change.pdf
[56] Myers, F., Wasoff, F., and Scotland. Scottish Executive. Central Research Unit. (2000). *Meeting in the middle : A study of solicitors' and mediators' divorce practice* (Central Research Unit papers). Edinburgh: Central Research Unit, 141

power imbalance and the 'weaker' party may be subject to manipulation and be unable to openly and freely express their views, thus it is highly unlikely that a fair outcome will ever be reached.[57] In 2014-2015 Relationships Scotland reported that 25% of all cases seen by them were considered to be on the domestic abuse spectrum[58] which is quite concerning and has larger implications for the decisions being made. On the other hand, it can also be noted that just because there have been allegations of domestic abuse in the past, it does not rule out mediation altogether. Some have argued that mediation provides a safe place for the abused party to talk in the presence of an impartial and professionally trained third person[59], which is actually more empowering.[60] Nevertheless, these cases should be approached with caution and should be assessed on an individual basis in order to best meet the needs of the parties. In these cases it can be suggested that compelling people to mediate is not desirable, and settling the dispute in court should be the preferable option, as these parties are therefore able to communicate through their solicitors, creating more of an 'even playing field',[61]in order to help counteract any power imbalances.

It can be argued that the benefit of mediation so far as it is empowering and flexible must be balanced against the difficulties raised, namely the inapplicability in cases where there is domestic abuse. On balance, it can be suggested that there is clear value to expanding the use of mediation in Scots family law cases, but only where there are not claims of domestic abuse or child protection issues.

[57] Scoular, J. (2001). *Family dynamics*. Edinburgh: Butterworths, 90
[58] Relationships Scotland, Relationships Scotland Annual Statistics Summary 2014-2015 [Appendix D]
[59] Relationships Scotland. (2014). *How would mandatory mediation protect survivors of domestic abuse?*. [online] Available at: http://www.relationships-scotland.org.uk/blog/mandatory-mediation-protect-survivors-domestic-abuse
[60] Myers, F., Wasoff, F., and Scotland. Scottish Executive. Central Research Unit. (2000). *Meeting in the middle : A study of solicitors' and mediators' divorce practice* (Central Research Unit papers). Edinburgh: Central Research Unit, 141
[61] Lewis, J., and Great Britain. Scottish Office. Central Research Unit. (1999). *The role of mediation in family disputes in Scotland : Report of a research study ; final report* (Central Research Unit papers). Edinburgh: Scottish Office Central Research Unit, 52

"Anything that may alleviate the distress of marriage and relationship breakdown is welcomed; if the process can help solve some of the problems, especially as they reflect on the children, it will be a great step forward."[62]

[62] Terry, F. (2003). Working together; collaborative family law.(in separation and family breakdown)(United Kingdom). *Solicitors Journal, 147*(48), 1445.

(ii) Mediation is better for children

The second proposed benefit that will be examined in order to critically evaluate mediation is the suggestion that it is better for the children whose parents are separating:

"Unlike the division of property, the future care of children and the payment for that future care is an on-going commitment for parental couples when they separate. Child contact arrangements are susceptible to change due to the changing activities and wishes of both parents and children."[63]

There were 3,521 children supported by the fact that their parents were making use of Relationships Scotland's family mediation.[64] On a larger scale, it is estimated that there are around 2.5 million separated families with dependent children (including 16-20 year olds in education) in Britain and that around a quarter of the 12 million children in the UK have experienced parental separation during childhood.[65] There is evidence to suggest that separation clearly has negative effects on children. For example, almost two thirds of young people said their parents' marriage breakdown had affected their performance in exams; one in eight turned to drugs or alcohol to ease the stress; and one in three children claimed to have experienced an eating disorder.[66] These findings are quite concerning, thus the stress and trauma must be limited for these children as much as possible and it can be suggested that mediation is the best way to do this. This is because it reduces parents' levels of conflict and hostility by encouraging a better level of communication and as discussed above, it allows for more specifically tailored and flexible outcomes reflecting the longevity of the family relationship.

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[63] Mair, J., Wasoff, F. and Mackay, K., (2013), *All Settled? Legally binding separation agreements and private ordering in family law in Scotland*, CRFR, Edinburgh 78

[64] Relationships Scotland (2016) Relationships Scotland Annual Statistics Summary 2014-15 [Appendix D]

[65] Ministry of Justice (2014) *Report of the Family Mediation Task Force,* http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf 7

[66] Gardner, B. (2014). *Divorce: the devastating cost for children*. [online] Telegraph.co.uk. Available at: http://www.telegraph.co.uk/women/sex/divorce/11249446/Divorce-the-devastating-cost-for-children.html

When a couple separates, it will obviously have an impact upon their children, along with their parental rights and responsibilities in relation to said children. Part 1 of the Children (Scotland) Act 1995 lists the corresponding parental rights and responsibilities held by the parents of a child. These include the responsibility to safeguard and promote the child's health, development and welfare (s1(1)(a)), provide the appropriate direction and guidance to the child depending on their stage of development, (s1(1)(b)) and most importantly for the purposes of this discussion, the responsibility to maintain personal relations and direct contact on a regular basis where the parent does not live with the child (s1(1)(c)). The parental rights mirror these responsibilities as they allow the framework for parents to fulfill these duties.

Article 9(3) of the United Nation's Convention on the Rights of the Child ("UNCRC") states that there is the general presumption that children should have a continuing relationship with both parents, unless to do so would be harmful and go against the child's best interests[67] (for example if there's allegations of child protection issues). Research has shown that distress suffered by children and long-term damage can be reduced where the children continue to have a good relationship with both parents after separation and divorce.[68] Thus, the aim of mediation should be to promote a continuing relationship with both parents and work out an acceptable system for this to happen. In addition, Article 12 states that *"state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law."*[69] This is encompassed in Scots family law by the Children (Scotland) Act 1995. Section 11(7)(a) states that the court "*shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made*

[67] Children & Young People's Commissioner Scotland (2016). *UNCRC Articles - CYPCS*. [online] Available at: http://www.cypcs.org.uk/rights/uncrcarticles, Article 9
[68] Matheson, S. M.G., (1994) *Family Mediation in Scotland* in: Moody, S. and Mackay, R. (1995). *Green's guide to alternative dispute resolution in Scotland*. Edinburgh: W. Green/Sweet & Maxwell, 38
[69] Unicef.org. (2016). *FACT SHEET: A summary of the rights under the Convention on the Rights of the Child*. [online] Available at: http://www.unicef.org/crc/files/Rights_overview.pdf Article 12

than that none should be made at all." Section 11(7)(b) also says that the court should *"take account of the child's age and maturity, shall so far as practicable give him an opportunity to indicate whether he wishes to express his views; if he does so wish, give him an opportunity to express them; and have regard to such views as he may express".* These two theories help form the foundational basis for decisions made in Scots family law cases. A child's welfare must be at the heart of all decisions made and the court or mediators must give effect to the minimum intervention principle in order to try and maintain the status quo of family life so far as is possible.

When making decisions regarding a child's future, the court also must take the child's views into account, provided they have sufficient understanding of the situation. This is presumed at the age of twelve[70], but can be lower if the child is deemed competent. In court proceedings, a child is able to express their opinions in a variety of ways. Firstly, Section 2(4A) of the Age of Legal Capacity (Scotland) Act 1991 states that a child under the age of 16 has the legal capacity to instruct their own solicitor in a civil matter as long as they have a "general understanding of what it means to do so." Where a child does not meet this requirement then they could be appointed a curator *ad litem* or court reporter to represent their best interests[71] or alternatively the child could talk the sheriff directly in their chambers.[72] The sheriff must take all reasonable steps to allow the child to express their views[73] and make them feel at ease, such as by removing their gown or wig to make the circumstances less intimidating and reduce any associated trauma. The final way in which a child's views may be taken in court proceedings is by filling out an F9 Form, which is a legal document that is supposed to be written in simple terms so that it can be filled out by the child with or without assistance from their solicitor. This method has been subject to high levels of criticism as it is a legal document that is arguably too complex to be used by a child. The child may need help when filling out an F9 form and ask one of their parents for assistance, which would clearly have an affect on what is said and therefore it would not be an accurate representation of their thoughts or feelings. The

[70] Section 11(10) Children (Scotland) Act 1995
[71] Section 1(3)(f)(iii) Age of Legal Capacity (Scotland) Act 1991
[72] Mackay, K., (2013) *Hearing children in court disputes between parents*. CRFR, Edinburgh. http://www.research.ed.ac.uk/portal/files/14844333/K201334.pdf
[73] Rule 33.19 Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223)

Scottish Faculty of Advocates argued that they are *"not fit for purpose… off-putting and difficult to comprehend"* and that *"they do not encourage a response…It is unsurprising that courts and professionals involved with children are on occasion reluctant to seek children's views when doing so is perceived as associated with these forms."*[74] Thus, it is clear that F9 forms are clearly an unsatisfactory method to obtain children's views in the matters that affect them. Moreover, research conducted by the Centre for Research on Families and Relationships found that the views of only 42% of the children they studied (just under 300 children) were put before the court,[75] which is less than half. This shows that in court proceedings, the views of children are not always taken, and where they are, they are not always given regard to, as well as the fact the means for obtaining such views are inadequate.

It can be suggested that a greater use of mediation may help solve this problem. In mediation, the children are at the centre of the whole process as they are the common ground between parents. It has been argued that the principles and philosophy of mediation are very similar to those set out in the Children (Scotland) Act 1995, if not the same,[76] as promoting a child's best interests is the most important priority. It can be suggested that where courts focus on the actions of the parents, mediation will look to what is best for the children above anything else and it has been stated that *"the importance of mediation…cannot be underestimated in helping often damaged adults to co-operate in fulfilling parental responsibilities and rights.*"[77] This is because it allows them to put aside their issues and focus on the future of their children and family relationships. The framework of mediation in Scotland has a process in place called Direct Consultation that allows children to speak directly with the mediator in person. Specialist training is required here, and mediators have to attend courses to teach them how to effectively communicate with

[74] Journalonline.co.uk. (2016). *Advocates call for children's input into family court forms: The Journal Online*. [online] Available at: http://www.journalonline.co.uk/News/1021261.aspx#.Vu7SA8fQuFI
[75] Mackay, K., (2013) *Hearing children in court disputes between parents*. CRFR, Edinburgh. http://www.research.ed.ac.uk/portal/files/14844333/K201334.pdf
[76] Myers, F., Wasoff, F., and Scotland. Scottish Executive. Central Research Unit. (2000). *Meeting in the middle : A study of solicitors' and mediators' divorce practice* (Central Research Unit papers). Edinburgh: Central Research Unit, 101
[77] Cleland, A. and Sutherland, E. (1996). *Children's rights in Scotland*. Edinburgh: W. Green/Sweet & Maxwell, 82

children.[78] Between 2014 and 2015, 143 children were directly involved in Relationships Scotland's mediation process.[79] It is made clear to the children from the outset that they are not in the position to be making the final decision, as this would put a large amount of pressure on them, but instead the purpose is to obtain their feelings in order to make things easier for them and help reach an arrangement that best suits them.[80] Evidence shows that where children are consulted during the mediation process, there are a number of advantages, thus it can be argued that mediation is better for children than litigation. For example, 61% of parents saw an improvement in their child's ability to cope after they had attended mediation and 73% reported an improvement in their family situation since starting mediation.[81] This indicates that mediation provides a better framework to hear the voices of children which is less intimidating and more productive, as it allows them to speak to someone who is specifically trained and express their views in a safe environment. Additionally, where these views are taken, they will almost certainly be given due weight when deciding the outcomes and arrangements because of the flexibility of the process.

In Australia, direct consultation in mediation is widely used, and their use of mediation more generally will be examined in order to further the critical evaluation of mediation in Scots family law cases. The Family Law Amendment (Shared Parental Responsibility) Act 2006 amended the Australian Family Law Act 1975 section 60I. Now, parents who are in conflict over the arrangements for their children are required to make a *"genuine effort to resolve their dispute through a family dispute resolution"*[82] ("FDR") process. They must then receive a certificate from an accredited Family Dispute Resolution Practitioner before they can apply to the court for a parenting order[83] meaning that it mediation compulsory to an extent as it means parents have to try FDR before they can go to court. The purpose of this is to

[78] Interview with Rosanne Cubitt, Joint Head of Professional Practice at Relationships Scotland, Conducted on 4 Feb. 2016 [Appendix A]
[79] Relationships Scotland (2016) Relationships Scotland Annual Statistics Summary 2014-15 [Appendix D]
[80] Interview with Kate Shirres, Acting Director of Family Mediation Lothian, Conducted on 04/02/16 [Appendix B]
[81] Relationships Scotland (2016) Relationships Scotland Annual Statistics Summary 2014-15 [Appendix D]
[82] Section 60I(1) (Australian) Family Law Act 1975
[83] Familyrelationships.gov.au. (2016). *Family Dispute Resolution*. [online] Available at: http://www.familyrelationships.gov.au/services/familylawservices/fdr/pages/default.aspx

encourage families to settle their disputes by avoiding court altogether when making arrangements and this has worked to a certain extent as Australia have seen a 32% reduction in the number of family cases going to court since these reforms came into force in 2007.[84] However, this is still subject to some exceptions such as if a party has contravened and has shown serious disregard for a court order made in the past 12 months; if party is unable to participate effectively (such as if they are incapacitated or geographically too far away); or if there's domestic violence or child abuse.[85] This suggests that there are still arguments that due to prevalence of claims of domestic violence and child protection issues, mediation may not suitable or better for the children in all circumstances, and once again arrangements would be best made by court here.[86]

Nevertheless, it can be argued that this legislative framework in Australia could be translated across to Scotland, as it has led to a decrease in the number of family dispute cases before the courts. Moreover, this greater use of ADR has been shown to be better for the children, especially where they are included in the mediation process itself. A study conducted by the Australian Government involving 275 parents and 364 children looked at the value of child-inclusive dispute resolution. Overall benefits included greater contentment by children with care and contact arrangements and less inclination to want to change them, less impact on the child's mental health and a greater stability of care and contact patterns over the year.[87] These findings are strongly indicative that where a child is directly consulted or included in the mediation process, the greater the likelihood that the arrangements made are to be satisfactory in the long term.

It can be suggested that the evidence is clearly in favour of mediation being used more and that it is better for the children. When asked '*Do you believe that alternative dispute resolution benefits the children and their overall wellbeing more*

[84] Ministry of Justice (2014) *Report of the Family Mediation Task Force,* http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf 10

[85] Familyrelationships.gov.au. (2016). *Family Dispute Resolution*. [online] Available at: http://www.familyrelationships.gov.au/services/familylawservices/fdr/pages/default.aspx

[86] Mackay, K., (2013) *Hearing children in court disputes between parents*. CRFR, Edinburgh. http://www.research.ed.ac.uk/portal/files/14844333/K201334.pdf

[87] Australian Government and Child and Family Community Australia (2007) *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors,* https://aifs.gov.au/cfca/publications/child-inclusion-principle-and-evidence-based-practic/section-3-empirical-support-child

than the litigation process?' in the questionnaire conducted for this dissertation, here are some of the answers:

> *"Undoubtedly. There is research to show that children respond much better to solutions agreed between their parents*"[88]

> *"Yes. Court proceedings are costly and lengthy and there are limited options available to Sheriffs. Clients are less empowered where a third party is making decisions about children."*[89]

> "*OF COURSE. This is stating the obvious – one of the primary outcomes family mediation works towards is the improved well being of the children involved. It is NOT an outcome that the litigation process is addressing."*[90]

These answers overwhelmingly show the support for the use of mediation, and once again when evaluating the use of mediation in Scots family law cases, it can be suggested that on balance, the benefits clearly outweigh the negative points. Thus, it can be suggested that mediation is indeed better for children that the formal court proceedings in suitable cases.

[88] Partner at MTM Family Law, Glasgow in Returned Questionnaire [Appendix F]
[89] Partner at Harper Macleod, Glasgow in Returned Questionnaire [Appendix F]
[90] Anonymous Contact at Family Mediation Tayside and Fife in Returned Questionnaire [Appendix F]

(iii) Mediation is more Cost and Time Effective

The final proposed benefit that will now be critically evaluated is the submission that mediation is both more cost and time effective for participants, rather than taking a family dispute to court. As already mentioned, there are approximately 10,000 divorces a year in Scotland.[91] Following the Scottish Government's Strategic Spending Review 2014/15, the legal aid fund is facing a cut of 7.2% over the years 2012/13 to 2014/15.[92] With ever-increasing cuts to public funding like this and due to economic hardships as a result of the recession, it is arguably in everyone's interests to keep the costs of divorces and separations as low as possible. Research conducted by Aviva found that UK couples are (on average) spending more than £44,000 when they divorce or separate, which adds up to about £5.7 billion a year, when costs such as buying a new house, furniture and overall legal fees are included.[93] These costs are clearly substantive and show the financial implications involved following the breakdown of a marriage. Although it is difficult to provide an up to date and precise portrait of the cost of a divorce or separation in Scotland, in 2012 it was estimated that the average cost per client who went to court was £2,823 in the UK.[94] On the other hand, the average cost per client for mediation was only £675 compared which is a huge average cost saving of £2,148 per person,[95] clearly showing that mediation is a much cheaper alternative to litigation.

The main reason it can be said that litigation is more expensive than mediation is because solicitors are usually paid by the hour, and those whose arrangements are decided by a court take much longer. It is not a new suggestion that resolving a dispute through court is an extremely lengthy process. In contrast, cases that make use of mediation take much less time to resolve, as they take on average 110 days, whereas for those whose cases are non-mediated it takes 435 days, therefore the

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[91] 'Brodies (2014). *Divorce trends in Scotland - Brodies LLP Legal Resource Area*. [online] Available at: http://www.brodies.com/blog/family-law/divorce-trends-scotland/

[92] Lawscot.org.uk. (2015). *Civil legal aid | Law Scotland*. [online] Available at: http://www.lawscot.org.uk/members/legal-aid-and-access-to-justice/civil-legal-aid/

[93] Aviva.com. (2014). *UK: Cost of divorce reaches £44,000 for UK Couples - Aviva plc*. [online] Available at: http://www.aviva.com/media/news/item/uk-cost-of-divorce-reaches-44000-for-uk-couples-17337/

[94] National Family Mediation (2016). *How much does Mediation cost?*. [online] Available at: http://www.nfm.org.uk/index.php/family-mediation/cost-of-mediation

[95] National Family Mediation (2016). *How much does Mediation cost?*. [online] Available at: http://www.nfm.org.uk/index.php/family-mediation/cost-of-mediation

average time saving is 325 days which is the same as ten and a half months.[96] Thus it can also be shown that where people use mediation, it is both more time and cost effective: *"Family mediation helps resolve issues between separating couples more quickly and more cost effectively than those cases that go through the courts. It is estimated that around 70 per cent of mediations result in an agreement being reached."*[97] The evidence here is encouraging and is indicative of positive outcomes which both cost less money, and take less time.

There have however been concerns raised in relation to access to justice, with some commentators suggesting that if we introduce and encourage a greater use of mandatory mediation, as well as other forms of ADR, then we may be denying people's access to justice, which may even amount to an infringement of their right to a fair trial under Article 6 of the European Convention on Human Rights.[98] To counter this point, it could be argued that in Scotland, because the vast majority of mediation is provided through the Relationships Scotland network, it actually has the opposite affect by increasing access to justice. This is because the local affiliated mediators provide their services on a donation basis. In the interview conducted with Kate Shirres (the Acting Director at Family Mediation Lothian) funding for mediation was discussed at length. She stated that funding is *"quite complex in the sense that it's quite marginal at the moment. We're waiting to hear about funding from the Scottish Government and the Council. We've been funded by them in the past for many, many years, but obviously in the present climate things have been getting tighter and tighter. We also raise money from trust funds, charities and we raise a small proportion of the money directly from our clients… We have a recommended rate based on income. But we would never turn someone away because they couldn't afford it. It's kind of means tested but we don't check them out."*[99] Here, it is made clear that someone's income will not be assessed and for this reason it can be

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[96] National Family Mediation (2016). *How much does Mediation cost?*. [online] Available at: http://www.nfm.org.uk/index.php/family-mediation/cost-of-mediation
[97] Valentine, S, (2014, February 12) Should mediation be mandatory for separating couples? *The Scotsman* http://www.relationships-scotland.org.uk/blog/mediation-mandatory-separating-couples
[98] Scottish Civil Justice Council (2014) *Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdictions*, http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/literature-review-on-adr-methods.pdf?sfvrsn=2 , 37
[99] Interview with Kate Shirres, Acting Director of Family Mediation Lothian, Conducted on 04/02/16 [Appendix B]

suggested that it actually means that there is the opportunity for anyone to receive mediation, regardless of their income or financial circumstances. CALM mediators are more likely to charge clients for their services and they typically charge about £100 an hour and most couples have three or four sessions,[100] yet it can still be argued that mediation would still be cheaper than litigation even where sessions were privately funded.

A further problem worth highlighting at this stage is that people also usually require independent legal advice and/or representation at the same time as receiving mediation whilst going through the divorce proceedings as mentioned above. Moreover, where mediation is used but it does not result in the parties reaching a satisfactory agreement, then in reality this can increase both the cost and time of the proceedings because it has added an additional step.[101] This could hopefully be avoided by an increasing people's awareness and understanding of the mediation process and how it can specifically help their family. Also, by allowing any special concerns to be raised at the intake meeting, it will enable mediators to appropriately advise clients as to whether or not mediation is applicable to their dispute. Evidence has also shown that following mediation, those using a solicitor or seeking a court order to make arrangements for the children is reduced.[102] Thus, it can be suggested that although implementing a greater use of mediation would require considerable sums at the start, mediation does save both time and money, which is in the interests of the Scottish Government and the general public, especially during times of financial instability.

[100] Moneyadviceservice.org.uk. (2016). *How much does divorce or dissolution cost?*. [online] Available at: https://www.moneyadviceservice.org.uk/en/articles/how-much-does-divorce-or-dissolution-cost

[101] Scottish Civil Courts Review (2009) *Report of the Civil Courts Review*, https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, 166

[102] Relationships Scotland (2016) *Relationships Scotland Annual Statistics Summary 2014-15* [Appendix D]

Chapter 3: An Overall Assessment of Mediation in Scotland

In this final chapter, the overall framework and practice of mediation in Scots family law disputes will be evaluated and recommendations for the future will be suggested. From examining the proposed benefits in the previous chapter, it can be suggested that there is clear evidence in favour of a greater use of mediation in suitable family disputes in Scotland. In order to facilitate further discussion, a comparison will now be made to the legislative approach to mediation in England and Wales, as well as the general approach under the European Legislative framework.

The Directive of the European Parliament and of the European Council of 21 May 2008 on Certain Aspects Of Mediation In Civil And Commercial Matters (2008/52) has been adopted by the UK government.[103] Article 1(1) states: *"The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."*[104] This piece of legislation clearly creates the expectation that member states will encourage mediation wherever possible[105] but does not impose a requirement for mandatory mediation, thus does not compromise human rights under Article 6 of the ECHR. A Report conducted by the European Parliament in 2014 on this Mediation Directive generally indicated that a favourable approach to ADR and mediation was held. However, it also reported that mediation was only being used in less that 1% of all cases in the EU and that the Mediation Directive clearly did not have as big an impact as they had hoped.[106] They suggested two ways in which the Mediation Directive could be "rebooted": they could amend the current wording of Article 1, or, based on the existing wording, request that each Member State commit to, and reach, a simple *"balanced relationship target number"* between civil litigation and

[103] Hodson, D. (2008) *The EU Mediation Directive: The European encouragement to family law ADR,* http://www.davidhodson.com/userFiles/eu_mediation_directive.pdf
[104] Article 1(1) The Directive of the European Parliament and of the European Council of 21 May 2008 on Certain Aspects Of Mediation In Civil And Commercial Matters (2008/52)
[105] Hodson, D. (2008) *The EU Mediation Directive: The European encouragement to family law ADR* http://www.davidhodson.com/userFiles/eu_mediation_directive.pdf
[106] European Parliament Policy Department on Citizens' Rights and Constitutional Affairs (2014) *'Rebooting' the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU,* http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf

mediation.[107] In other words, the EU could set a standard quota for how many cases should be settled by ADR or mediation, rather than going to court and thus imposing stricter rules on Member States. It can be suggested that the European Parliament views mediation and ADR quite favourably, and that in the future, mediation could be promoted more across all member states.

Mediation has been introduced on a more wide scale basis in England and Wales. There is now a legal requirement for people who wish to take a dispute regarding children or private financial matters to court to consider mediation before doing so. The Family Procedure Rules 2010 (SI 2010/2955) came into force on 6th April 2011 and were implemented by Section 10 of the Children and Families Act 2014.[108] Section 10(1) of this Act states: "*Before making a relevant family application, a person must attend a family mediation information and assessment meeting.*" In addition, the Family Law Protocol 2010 states that: "*Increasingly there is an expectation on the part of the family justice system that mediation will have been tried unless there is good reasons to the contrary.*"[109] Therefore, in England and Wales there has been a clear shift towards the greater use of mediation as a result of the introduction of Mediation Information and Assessment Meetings ("MIAMs") in family cases, which must be attended. Where families do not attend a MIAM, there must be evidence to show that mediation is not applicable and cannot be used to settle their dispute. In other words, there is the assumption that people will at least attend a MIAM to find out about how the mediation process can be applied to their family dispute, and the mediation would not start unless the family agreed that this would be the best course of action for them. The onus is on the individuals or their legal representatives to contact a family mediator then arrange the MIAM. Their attendance will either be confirmed or reasons will be given as to why they have not attended in an FM1 Form, which must be completed and signed in all cases[110]. Reasons for not attending an information session may include allegations of

[107] European Parliament Policy Department on Citizens' Rights and Constitutional Affairs (2014) *'Rebooting' the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU,* http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf
[108] Black, J. (2012). *A practical approach to family law* (Ninth ed., Practical approach series). Oxford: Oxford University Press. 53
[109] Paragraph 2.2.29(8) Family Procedure Rules 2010 (SI 2010/2955)
[110] Black, J. (2012). *A practical approach to family law* (Ninth ed., Practical approach series). Oxford: Oxford University Press. 53

domestic violence, child abuse or that a party is bankrupt or that the parties are in agreement that there is no dispute to resolve.[111]

Moreover, Rule 3.2 of the Family Procedure Rules 2010 states that the court is obliged to consider whether or not an alternative form if dispute resolution is appropriate in any family case and can refer parties to mediation at any stage of the proceedings. These rules also state that that mediation must involve the agreement of both parties[112] meaning that both parties must willingly accept the use of mediation in their case and use the process voluntarily. There is a further procedure in place to encourage couples to settle their disputes as early as possible and, where possible, avoid the court procedure altogether. Practice Direction 3A Pre-Application Protocol for Mediation Information and Assessment sets out a procedure to encourage parties to participate in mediation before court proceedings.[113] This Protocol also expects people to have attended a Mediation Information and Assessment Meeting, and the court will account for any failure to comply and may refer parties to meet a mediator before proceedings in court can continue.[114] This shows the importance placed upon MIAMs in England and Wales and that parties could in theory be unable to litigate unless they have received information about mediation. Where it is agreed in a MIAM that mediation is the best course of action for a particular family's dispute, they will then proceed to sessions and make their own arrangements. Despite the fact that MIAMs are compulsory under this legislation, it can be suggested that because of the wording, the court in reality is limited to 'encouraging' the use of mediation,[115] rather than compelling it in all cases in England and Wales.

[111] Black, J. (2012). *A practical approach to family law* (Ninth ed., Practical approach series). Oxford: Oxford University Press. 54

[112] Rule 3.3(1)(b) Family Procedure Rules 2010 (SI 2010/2955)

[113] Justice.gov.uk. (2016). *PRACTICE DIRECTION 3A – FAMILY MEDIATION INFORMATION AND ASSESSMENT MEETINGS (MIAMS)*. [online] Available at: https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a

[114] Black, J. (2012). *A practical approach to family law* (Ninth ed., Practical approach series). Oxford: Oxford University Press. 53

[115] Black, J. (2012). *A practical approach to family law* (Ninth ed., Practical approach series). Oxford: Oxford University Press. 52

Research into the effectiveness of the introduction of MIAMs in England and Wales found that there had actually been an unintentional decrease of about a third in the number of cases being settled through mediation, and instead found that there had been an increase in the number of cases being heard before the family courts.[116] There have been suggestions that the fall in numbers for mediation is actually as a result of confusion in relation legal aid, which was subject to reform following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This led to the belief that legal aid was no longer available for families attending mediation and that parties would have to privately fund mediation sessions, which is actually not the case.[117] The Task Force recommended that a campaign addressing this issue should be provided in order to clarify any confusion and that the first mediation session following a MIAM should be publicly funded for the first 12 months.[118]

Despite this, it can be argued that a similar approach should be taken in Scotland, whereby families should at least receive information about mediation and how it could help resolve their dispute outwith the traditional court process: *"Relationships Scotland would like to see the introduction of mandatory information meetings with a mediator, to find out more about the mediation process and how it might help, prior to hearing a family case in court. There would be no compulsion to mediate, only to find out more about the options available for resolving disputes. We believe this would deliver a step change in the use of family mediation, resulting in better outcomes for children and families. This would also deliver a significant saving to the Scottish Court system and the Scottish legal aid bill."*[119] This approach can be strongly advocated as it makes sense based on the clear benefits of mediation discussed above, that it should be used more in Scotland. There would (of course) be difficulties in doing so, as it would require changing peoples' opinions on how the

[116] Ministry of Justice (2014) *Report of the Family Mediation Task Force,* http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf, 8
[117] Department for Education and Ministry of Justice, Hughes, S. and Timpson, E., (2014) *A Brighter Future for Family Justice: A round up of what's happened since the Family Justice Review,* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346005/family-justice-review-update.pdf
[118] Ministry of Justice (2014) *Report of the Family Mediation Task Force,* http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf, 3
[119] Justice Committee (2014) *Courts Reform (Scotland) Bill: Written Submission from Relationships Scotland* http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CR16._Relationships_Scotland.pdf

whole civil justice system works. At the moment, people assume that their first port of call should always be a solicitor when they are considering a divorce or separation: *"I think people naturally go a solicitor when they're splitting up, like you'd go to the GP if you were unwell".*[120] Therefore, to introduce mediation as the norm would require changing society's attitudes as to how a family dispute should, and will, be settled and do so would be to refocus opinions on the civil justice system as a whole.

It can also be suggested that legal professionals could be creating a barrier to ADR, as they act as the gatekeeper in many cases and they have not uniformly accepted mediation and collaboration as worthwhile dispute resolution options.[121] So not only can it be suggested that we need to change the public's opinions, but we would also have to change the views of the whole legal profession. There have been suggestions that a greater use of mediation would create a deflection away from solicitors, meaning they would lose business. However, it can be suggested that mediation should not be seen as an alternative to court, but instead it should be seen as an additional support network that runs in parallel to litigation and legal advice, and this how mediation currently exists in Scotland. This raises some interesting points in relation to the concept of mediation and so on as forms of alternative dispute resolution. It can be suggested that it is not necessarily correct to presume that mediation should be used instead of court, and rather it should be seen to compliment the court proceedings in order to resolve disputes in a manner that is specifically tailored to the needs of each family. This reflects the wider scope of disputes in society, and it makes sense that there should be a variety of options available. Therefore it can also be recommended that mediation could be used in co-ordination with court, with more referrals from sheriffs under Rule 33.22.[122]

It can further be suggested that the lines of the legal system are being blurred and that a greater use of mediation would be to build upon the skills already held by lawyers: *"Any applicant to the court in respect of children or money will now be deflected to one of a variety of negotiating opportunities. These may or not be on the court premises, and the mediation label may or may not be attached… Customers of*

[120] Interview with Rosanne Cubitt, Joint Head of Professional Practice at Relationships Scotland, Conducted on 4 Feb. 2016 [Appendix A]
[121] Clark, B., (2009). Mediation and Scottish Lawyers, The Past, the present and the future, *Edinburgh Law Review*. 13(2), 254
[122] Rule 33.22 *Act of Sederunt, (Sheriff Court Ordinary Cause Rules)* 1993 No.1956 (S.223)

mediation services may find that their mediator is in fact a lawyer… so we have mediation in the law, and we have law in mediation; or to put this another way, we have deflection from the formal an the formalisation to the informal. This is either an impressive convergence of practice and principle, or it is a very fine mess, depending on how one looks at it."[123] This indicates that the guidelines for the use of mediation would need to be very carefully framed, in order to provide clarity and use solicitors' skills to the fullest potential.

The Gill Review acknowledged that mediation and other forms of ADR could, and should be used more in Scotland, but it did not provide any conclusive suggestions for reform. They did suggest awareness needs to be increased and perceptions need to be changed, but mediation and other types of ADR should not be mandatory in Scotland.[124] Although it can suggested that mandatory mediation is not desirable, there is a clear case for introducing the concept of Mediation Information and Assessment Meetings to Scots family law cases, and that there needs to be more campaigning to raise awareness and inform the public. There is already evidence proving that mediation is applicable in Scots family law cases in the forms of pilot schemes in Edinburgh, Glasgow and Aberdeen Sheriff courts. Despite having low numbers (again probably due to a lack of awareness) the overall outcomes were positive,[125] thus indicating that there is a market for a greater use of mediation in Scots family law cases.

Thus, it can be recommended that mediation should become an integral part of Scotland's civil justice system, particularly in family disputes. The Scottish Government should consider introducing MIAMs to give people the option of settling their disputes outside of court by encouraging them to at least receive information about how mediation could help them reach their own arrangements. There should be no requirement to mediate and reach all agreements following a divorce or separation in this way, but it should at least be an option that is encouraged more so that mediation will become much more mainstream in Scots family law cases. It can

[123] Diduck, A. and Kaganas, F. (2012). *Family law, gender and the state*. Oxford: Hart, 718
[124] Scottish Civil Courts Review (2009) *Report of the Civil Courts Review*, https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, 167
[125] The Scottish Government Social Research, Bain, D. and Ross, M., (2010) *In Court Mediation Pilot Projects: Report on Evaluation of in Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts,* http://www.gov.scot/Resource/Doc/310104/0097858.pdf

also be recommended that there needs to be campaigns to boost the general public's awareness of mediation, and that the courts should be using mediation to compliment the existing framework. Thus it can be suggested that mediation should be used along side the litigation process, and wherever possible, families should reach their own arrangements, rather than the courts.

Conclusion

Overall, it can be argued that it has been effectively demonstrated that mediation is not being utilised to it's fullest potential in family cases in Scotland. Firstly, it was shown that mediation is more empowering as it allows individuals to reach their own decisions by facilitating communication, rather than have them ordered by court. It was also show (for the same reason) that mediation allows for more flexibility of outcomes that are specific to the individual needs of the family. Secondly, it was illustrated that mediation is a much better process for children than litigation because it reduces the trauma of their parents' separation by allowing them to communicate directly with the mediator in order to express their feelings. Thirdly, it was demonstrated that mediation, when used either as an alternative, or in addition to litigation, is less expensive and less time consuming. It has also been highlighted throughout that mediation may not be suitable for all family disputes, namely where there has been allegations of domestic or child abuse, and in these cases settling the dispute in court will probably be the best option.

It can be proposed that compelling people to mediate in all cases is not desirable, yet on the whole there are clear benefits to encourage a greater use of this type of dispute resolution in suitable family cases in Scotland. It can be argued that by following a similar model as in England, and by raising public awareness and changing perceptions, that Mediation Information and Assessment Meetings would be a step in the right direction. As shown by research, where mediation is used, it is successful, has high levels of satisfaction and agreements were made to maximise the benefit to the parties and their children. Mediation should not be seen as a complete alternative to the court process, but instead should be seen to compliment litigation by allowing families to reach their own agreements wherever possible. It can be concluded that any problems are outweighed by the benefits here. More needs to be done by the Scottish Government in order to take steps to allow mediation to flourish and become the norm, rather than the exception, in Scots family law cases.

"We need to work together to build the case for mediation…so that it is adopted by the many and not just the few. It is true that the court is still often viewed as the place

to resolve conflict but I think we are beginning to see a shift…Awareness of mediation is growing, albeit slowly, and with the financial situation forcing us all to tighten our belts, the benefits of avoiding costly, distressing court actions cannot be overplayed."[126]

Jonathon Djanogly, Parliamentary Under-Secretary of State for the Ministry of Justice, 2010

[126] Diduck, A. and Kaganas, F. (2012). *Family law, gender and the state*. Oxford: Hart, 708