Children's Dispute Resolution: The Israeli Experience

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Introduction

The starting point for this paper is the understanding, which is the result of over 15 years of experience as a Judge of the Jerusalem Family Court, that adversarial proceedings are, except in the most extreme cases, unnecessary for creating arrangements for a child when his parents have separated or are about to do so.

Many separating couples assume that parental separation has to be accompanied by litigation over arrangements for the children; and this understanding may be rooted in a fundamental mistake as to the relations between parents and children, and between the parents regarding their mutual involvement with the raising of their children. This misunderstanding is, if not the product of, at least the reason for disputes which lead to adversarial proceedings, to the almost inevitable detriment of the child and the parents.

Rights and Responsibilities and Adversarial Proceedings

For the last 250 years, almost all legal and societal discourse in most of the western hemisphere has been based on Rights, and international instruments, such as the Universal Declaration on Human Rights and the Convention on the Rights of the Child, among numerous others, have been adopted by most of the countries of the world. The historical origins of this discourse are a subject for further study[1], but the result is that in many, if not most cases, each parent asserts against the other the right to have custody of the child, and often the debate is framed also in terms of the rights of the child[2].

But parents, simply because they are parents, have joint and equal responsibilities for the upbringing of the child in all its aspects, and there is no need for rights in order to organize the upbringing of the child, whether the parents are living together or separately.

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[1] In my thesis for the LL.M Degree at Haifa University, *Hohfeld Without Rights*, I sketched the history of the development of the Rights discourse, and I am hoping to continue my research on this issue.

[2] In a presentation to be given at the 6th World Congress on Family Law and Children's Rights, in Sydney Australia in March 2013, Towards a Convention on Responsibilities and Obligations to the Child, I shall try to show that a child's best interests are adequately served by putting the emphasis on the duties and responsibilities of adults and society as a whole to the child, and that framing these as the rights of the child detracts from these interests.

As early as 1951, only three years after Independence, The Knesset, Israel's Parliament, emphasised the equality between parents in regard to responsibilities to children: according to Section 3(a) the Equal Rights of Women Law 5711-1951

> **The mother and the father jointly are the natural guardians of their children; at the death of one of the parents, the survivor is the natural guardian.**

However, the division of parental duties to children is still framed in terms of custody: the provisions of the Legal Capacity and Guardianship Law 5722-1962 (hereinafter – the Guardianship Law) explain the scope of guardianship: according to Sections 14 and 15:

> **14. The parents are the natural guardians of the child.**
>
> **15. Parental guardianship includes the duty and the right[3] to care for the needs of the child**, **including his education and studies, qualification for work and a profession and his work, and also preservation of his property, including management and development; allied with it are the entitlement to have custody of the child and to determine his place of residence, and the power to represent him.**

Further provisions of the Guardianship Law speak about division of custody and guardianship when parents separate, and visitation when custody is awarded to one of them.

Despite this, in all pre-trial hearings I emphasized to the parents that for most children the determination of custody was irrelevant, and that each child needs to know that he has two parents who love him and want what is best for him, and will cooperate with each other. Where agreements were presented for my approval, I would suggest that the term custody would only refer to the formal custody necessary for obtaining social security benefits and other grants for children living mainly with one parent only[4], and in hundreds of decisions and judgments I wrote that the child would spend certain amounts of time with the mother and other times with the father, avoiding the use of the words custody care or control.

<u>Changing Terminology is not Enough</u>

I submit that the welcome move from terminology of Custody, (including Joint Custody, Legal Custody, Physical Custody), Care and Control, and

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[3] The word "right" in this section has been defined by the Israel Supreme Court as denoting, not a freestanding right, but only the right of the parents to carry out their duties, in the sense of their immunity from actions by the State to restrict or remove their guardianship except where it is proved that they are incapable of carrying out their responsibilities. Civil Appeal 212/85 **X. v. Y**. L.R. 39 (4) 312

[4] I object strongly to use of the term "single parent family", where both parents are alive and well but separated, to describe a situation where the children live most of the time with one of them.

Visitation to terminology of Parental Responsibility, which is the subject of Panel 1 at this Forum, reflects the perception that the new terminology better indicates how parents ought to behave. However, the proposed change will not benefit the child, so long as the underlying assumption is that parents have to litigate their differences in relation to their responsibilities, and they feel they need to fight about one parent's "right" or suitability to exercise responsibilities at the expense of the other. The child's interests will not be better served. Paraphrasing George Orwell in *Animal Farm*: Both parents are equally responsible, but one is more responsible[5] (or should have more responsibilities) than the other.

Traditional proceedings arising out of separation of parents, contemplated or actual, start with the presentation of a claim by one of the parties against the other with a request that the Court determine the dispute. The framing of such a document is usually done by a lawyer, and contains the reasons why the plaintiff should succeed in the claim and why the defendant should be defeated. The scene is set for confrontation; allegations are made by the plaintiff, and the defendant has to answer, often by making allegations against the plaintiff; the descriptions are often lurid, and events may be exaggerated or taken out of context, and inevitably antagonize the other party.

The battle is inevitable, and the stakes are high, because each party wants "Custody"; and the battles over "Visitation" or about division of Responsibilities may be drawn out and painful, even if "Custody" or the child's primary place of residence, is agreed or has been determined by the Court – see Case No. 1 below.

In adversarial proceedings, the parents focus their attention negatively one upon the other. Instead of talking to each about the needs of the child, they talk at each other in formal legal terminology – custody, visitation, child support or maintenance, residence, or argue about who is more responsible[6]. Each sees himself, not as a parent, but as plaintiff or defendant, engaged in a contest which he must win. The expectation is that the Court will give judgment, justifying the allegations of one of the parties and rejecting the arguments of the other, and that the relations between the parties relating to the child will be decided, in a final decision, by the Court.

Parents considering separation should be concentrating on the child and the provision of his needs – a roof over his head; adequate time with each parent and other relatives who are important to him; care for his health, physical, mental and emotional; treatment for injury or illness; education; clothing; and most of all, good relations between the child and each parent and his extended family, and a respectful relationship between the parents in order to enable fulfillment of all the other needs.

[5] Note that the word "responsible" has two meanings: responsible, in the sense of having a responsibility, an obligation, to do something; and responsible, in the sense of being reliable and trustworthy to do something.

[6] See note 5 above.

In order to enable them to do so, most parents need help, and Alternative Dispute Resolution aims to provide such help and avoid the necessity for litigation.

Mediation in Israel

Since the 1990's, mediation has become more and more widespread in Israel, and is offered by a number of institutions and individuals, licensed and supervised by the Ministry of Justice.

Where parents agree to mediation, the child's interests are protected in the following ways:

- Rule 8(b)(6) of the Courts (Mediation) Rules 5753-1993 provide that a mediator may refuse to continue with the mediation if he is of the opinion that

  "The mediation arrangement which the parties are proposing does not take account of the interests of any child or incompetent person who is connected with the dispute".

- In order for an agreement relating to children to be binding on the parents, it must be approved by the Court.

- There is a general provision in the Civil Procedure Rules that the Court shall summon the parties and explain the provisions of the agreement to the parties and satisfy himself that they understand the agreement and entered into it of their free will (Rule 258Z).

- Section 24 of the Guardianship Law provides that where parents bring an agreement relating to guardianship and custody and contact regarding a child, the Court shall approve it only after being satisfied that the agreement is for the good of the child.

- Where the agreement is arrived at after mediation, Rule 258X(b) provides that the mediator shall inform the Support Unit that any provision of the agreement relating to a child is not against the child's welfare.

Support Units

One of the important innovations of the Family Courts Law 5755-1995 was the creation of Support Units, staffed by experienced social workers, with access to psychologists and psychiatrists. These units are attached to every Family Court and have their offices in or near to the courthouse, and their task is to assist the litigants, by providing advice and short-term treatment alternatives and dispute resolution services, free of charge, and to give assistance to the Court on matters which need attention alongside the normal processes of litigation.

Request for Dispute Resolution

Another innovation was a new type of procedure – a Request for Dispute Resolution (RDR) instead of a regular Claim by way of Statement of Claim.

Under Rule 258(T) of the Civil Procedure Rules:

(a) A spouse may make an application to the Court for the resolution of a dispute with his/her spouse, and a referral to the Support Unit (hereinafter – a Request for Dispute resolution).

(b) A Request for Dispute Resolution shall be filed according to form 26B[7]…

(b1) Where a Request for Dispute Resolution has been filed, the Court may refer the spouses to the Support Unit…

This procedure is intended to allow the parties to try to resolve their differences without resort to the full adversarial process, but at this stage it is voluntary, and the vast majority of cases are still opened by a Statement of Claim. However, following a series of reports by Commissions which were set up to consider reforms in the Family Court system, a Bill is being prepared which will include compulsory referral to Dispute Resolution, before the filing of a Statement of Claim, except in exceptional circumstances.[8]

In almost all new cases which came before me, whether because a person applied for a banning order against the alleged perpetrator, excluding him from the applicant's home under the Prevention of Violence in the Family Law 5751-1991, or a claim for custody or child or spousal support, or even a property claim, I made a referral to the Support Unit. The referral included *inter alia* the following instructions to the Unit:

- To determine whether the parties and the disputes are amenable to mediation
- To determine if it is possible to reach agreement, partial or complete, in the matters before the Court and any other matters requiring resolution.

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

Although participation of the parties in the meetings in the Support Unit is voluntary, almost all litigants referred take part in the meetings, where 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[9]. Where

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[7] This is a short form including only the details of the parties and their children and the nature of the dispute, without any specific allegations or claims.

[8] However, the Guardianship Law was amended in July 2012 to provide that where grandparents are interested in contact with grandchildren, they shall apply to the Court only by way of RDR (Section 28B(b)); in respect of relations between grandparents and grandchildren, see Case No. 2.

[9] Even where the parents are in agreement, they may have ignored the children. In one case the parents came for help in organizing contact arrangements for their son with the father, who agreed that the mother and the child could emigrate to a country many hours of flight time away. However the social worker in the Support Unit discovered that the child, who was very attached to the father, had not been told about the emigration plans, and the parents had not

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 marriage therapy and avoiding separation altogether.

The Unit social workers are also 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.

Mediation in the Jerusalem Family Court Support Unit

The Unit offers mediation services to litigants, whether or not the initial application to the Court was an RDR. In the early days of the Unit mediations were carried out by a social worker. However, it became clear that in many cases it would be useful to have a lawyer, qualified in mediation, to mediate together with a social worker. Although the legislation setting up the Support Units does not specifically provide for a lawyer to be part of the Unit's team, soon after the establishment of the Family Court in Jerusalem it was decided to attach a lawyer, who was a Legal Assistant to a Judge, to the Unit part-time. The advantages include the legal knowledge and drafting skills of the lawyer which can make the process more efficient, although the parties are encouraged to consult with their own lawyers at any stage, and particularly in the final framing of an agreement to be presented to the Court for approval.

In addition, the Unit includes facilities for the child to express his opinion, whereby, under the Civil Procedure Rules, the child is, if the parents agree, invited to speak confidentially with a social worker, in the context of the Children's Partnership Programme [10]. In this way, the child can also be involved in the mediation process. It is, of course, for the parties with the mediator to determine the extent of the child's involvement; but very often the child will raise issues and interests of which the parents and mediators were unaware, and which may cause them to reconsider arrangements which they thought were right for the child.

At the opening of the Family Court in 1997, many lawyers, who were used to a system without mediation services and without involvement of social workers, treated the Support Unit with suspicion, and some of them told their clients not to cooperate. However, with a certain amount of gentle pressure fron the Judges, and after the social workers in the Unit had shown their professionalism and good results, it is rare for a lawyer to interfere in the cases being dealt with by the Unit.

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even considered the possible damage to the child - that he would, in effect, be cut off from all he knew, be exposed to a totally different culture and would have to learn a new language etc.

[10] This programme was initiated in the Family Courts in Jerusalem and Haifa as a pilot, so as to explore the possibility of formalizing the involvement of children in Court proceedings involving them, in accordance with Article 12 of the Convention on the Rights of the Child, to which Israel is signatory.

Proposals for the Future

In the last few years a number of Committees have held hearings with a view to improving Court procedures and treatment methods for children whose parents are separating or separated. These proposals are at this time being prepared as a consultative document prior to preparation of a Bill for Parliament to debate.

For the purposes of this paper, the salient reform proposed consists of three linked elements, the first terminological, the second procedural and the third directed to mediation.

The terminological reform proposes doing away with the language of Custody and Visitation, while preserving and strengthening the concept of guardianship and using the language of parental responsibility.

The procedural reform is in accordance with my comments on the undesirability of starting the court proceedings with a statement of claim with allegations and demands. Thus it is proposed to amend the Civil Procedure Rules so that a parent who requests the Court's involvement will first file an RDR "in the Matter of Parental Responsibility". The Request will be filed with the basic details of the family, and the applicant will present a proposed Parenting Agreement; the proposed Rule sets out in an appendix a form of parenting agreement to be completed by the applicant.[11] The form is very detailed as to living arrangements, time spent with each parent[12], responsibility for making health, medical, educational and free-time arrangements, holidays, relocation etc. The objective is clear – to get the parties to think first in terms of their joint responsibilities, and not about ways of "winning" or "defeating" the other parent.

This leads to the mediation-directed reform proposal: upon filing such a Request, the Court will send a summons to both parties to attend an initial Acquaintance, Information and Coordination (AIC) meeting at the Support Unit. The parties are required to attend the AIC meeting, and may bring lawyers; but if either party refuses to attend, the applicant shall be ordered by the Court to file a Statement of Claim.

The AIC meeting shall include the following:

- Providing information about legal proceedings relating to parental responsibilities, including hearing the child, in the Court;
- Providing information about agreed, peaceable, resolution methods, for the dispute and its ramifications;
- Acquaintance with the parties, so as to identify their needs and desires, and

[11] It is my intention to propose that the respondent should be ordered to file his version of the proposed agreement, before the next stage; this will cause him properly to consider the applicant's proposals one by one, and will help the parties and those advising them, and mediators or other professionals, and the Court, to get an idea of what (if any) are the issues that need to be addressed.

[12] The term used is "Parenting Time"; this is an unfortunate choice, since parenthood is a continual responsibility, and the father is no less a parent when the child is with the mother, or *vice versa*.

providing assistance in considering dispute resolution methods, and also preparing a programme for continuing the process, including referrals to third parties for assistance of all kinds, those within the court, those in public institutions, and private providers of services, including mediators;

- Preparation of a parenting agreement or referral to a person who will asist in preparation.

Within ten days of the AIC meeting, the parties are required to notify the Support Unit if they wish to continue to a|dispute resolution process, or if they or one of them wants to litigate; in such a case the Unit shall report to the Court, which shall order the parties to file their Statements of Claim or Defence accordingly[13].

Case Studies – Successful and Unsuccessful Mediation

Case No.1: G. v. G

In this case, the parties came before me under the provisions of the Guardianship Law and the Civil Procedure Rules 5744-1984, with an agreement for approval and grant of a judgment. The agreement had been reached with the help of an experienced mediator, and, in addition to property division and child support, contained detailed provisions for the custody of their only son with the mother and arrangements for the boy to spend time with the father.

After I read the agreement to the parties, and offered my comments and amendments where the terms were unclear, I was convinced, as required by the Law and the Rules, that the parties, who had not previously been before the Court, understood the agreement and agreed to all its terms, and I approved it.

However, about a year later, the mother filed a claim to change the visitation arrangements, and asked for an injunction against the father restraining him from being near her house; the father, who alleged that the mother had not allowed him to see the child, had picketed the mother's home together with members of his family with placards to the effect that his child was being held hostage.

The father also demanded a change in the visitation arrangements; and each party made serious allegations about the other's parenting abilities.

It was clear that the mediation had failed; although on the face of it the parties had reached agreement, the mediator had failed to bring about transformation in the attitudes of the parties. The father felt himself to have "lost" and that the mother had "defeated" him in the battle over "custody", and the mother regarded the father as having been relegated to an unimportant, secondary role in the bringing up of the child.

[13] I would propose that before filing, the Court should hold a hearing so as to hear the parties' reservations and objections to dispute resolution procedures; to record agreements on those issues which are not in dispute; and examine the issues in dispute and try to resolve them. In this way it should be possible to prevent escalation of the conflict.

Attempts to resolve the dispute by reference to social workers and Welfare Officers failed, and the Court had to determine the dispute, which was about the father's demand for an additional hour or two on alternate weekends.

After extended negotiations in which I took a leading role, the parties agreed to a new arrangement which was given the force of a Judgment, two or three years after the original mediated agreement was approved.

Four or five years later the father claimed custody; he alleged that the mother, who had remarried and had another child and was working in a demanding job, was no longer capable of looking after the boy. There was no alternative, despite my efforts to resolve the dispute by agreement, to hearing evidence from the parties and their witnesses; I also met the boy in my chambers, and formed the impression that he was satisfied with the existing arrangements, but was very disturbed by the continuing arguments over what time the father should collect him and return him to the mother's home.

I dismissed the father's claim, finding that the mother was caring adequately for the son, and made some adjustments to the visitation schedule; but the father appealed, and the District Court allowed the appeal and sent the case back to the Family Court. On my retirement the case was referred to another Judge and the matter is still proceeding, ten years after the original agreement was filed. The child should be in treatment for the disorders he is exhibiting as a result of the ongoing conflict, but the parents cannot agree as to the identity of the therapist.

Case No. 2: H. v.J.

Mr. H. came before me 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. H stated that the respondents, the grandparents, blamed him for the death of their only daughter and 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.

I made an order 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, I referred the parties to the Court Support Unit.

As provided by the law and 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 Support 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, in the context of the Children's Partnership Programme. 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 Guardianship Law, to apply to the Court so as to provide for contact with the children of their deceased child[14].

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 Support 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 me for approval and given the force of a Judgment.

Comments

[14] 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.

From the cases given above we can gain insights into dispute resolution processes; in both cases, mediation was carried out by experienced professionals, but in Case No. 1 the process failed, and in Case No. 2 it succeeded.

In Case No.1 failure may have been inevitable. The father, a highly intelligent professional in his field, was, and still is, convinced that he was bullied into the original agreement, and the child represents the only implement at his disposal to try and wipe out what he sees as his loss or failure. The child, as a result, has been suffering for years as a pawn in the father's chess game against the mother. The father identifies his own interests as being identical with those of the child, and cannot differentiate between them; it is likely that the father suffers from a personality disorder, which was not diagnosed or taken into account in the mediation process. The child was at the time of the original agreement too young to be consulted.

The proceedings, which are still ongoing, have used dozens of Court hours, and the lawyers' fees paid by both parents and the hours and days spent in the proceedings are valuable resources which could have been utilized for the child's benefit.

Case No. 2 represents an impressive success.

Without 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 approached social workers or other professionals, and even if they had done so, these professionals would have been limited to making suggestions, and not a binding agreement to be backed by a Court decision.

If the Court had not been assisted by the Support Unit, 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, and they in turn would have ventilated their conviction that the death of their daughter was because of the acts or omissions of their son-in-law, and he 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 would not have become known. The trial would have been long and expensive, and the result, one way or the other, would have left all the parties dissatisfied.

Instead, I 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.

Other forms of Alternative Dispute Resolution

Collaborative Law as a method of dispute resolution is in its infancy in Israel, but it is hoped that a sufficient number of experienced lawyers will start to make use of its methods. The Support Unit in Jerusalem supports this method, and social workers from the Unit may be used as advisors to the parties on matters involving children.

Arbitration is not permitted as a method of determining disputes relating to children; the assumption of Israeli law is that these disputes should, in the absence of agreement by the parents, be decided only by a professional Judge.

Conclusion

The Israeli system is using methods of dispute resolution, combining proceedings before the Court and social work contributions, and refining and adjusting them in the light of experience. However, it is vital to find methods of preventing matters from proceeding to a dispute; this requires an educational effort, starting in schools, so as to make it clear that it is the duty of parents, in the interests of their children, to make arrangements arising from their separation without bitterness and legal proceedings. Stereotypes, including the perception that marriage breakdown has to be accompanied by allegations and counter-allegations, need to be destroyed.

But if a matter has to come to Court, the starting point should be with social workers and not with the judge; only if there is some serious issue that cannot be resolved by the parties, even after they have received suitable advice from professionals, should the matter be brought for judicial determination.

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