

Parental Responsibilities: Formulating the New Paradigm for Parent-Child Relationships

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I use the word "child" (and other words) in the masculine gender, for convenience only, and of course boys and girls are included, and the reference to a child is to all persons who have not reached the age of full legal capacity. The use of the singular demonstrates that each child, and his individual personality and needs, must be dealt with as an individual.]

Introduction

Legislatures and courts, as well as public opinion, in many countries in the world are reaching the conclusion that there is a need to change the way we frame family proceedings, so far as they affect children and their parents¹. There is a widespread understanding that the current terminology consists of words which are emotionally charged and inappropriate for parent-child relations, and there is a need for a paradigm shift.

In many pieces of legislation as well as in general legal discourse, the change is embodied in the phrase "parental responsibility". This new phrase will, I fear, not achieve the needed changes in attitudes.

In this paper I suggest that a small change in phraseology from singular to plural, from parental responsibility to parental responsibilities, will achieve the necessary paradigm shift, and bring about substantial alterations in the way lawyers and the general public view parent-child relationships. All those children who are affected by the breakup of the relationship between parents will be the beneficiaries.

After discussing the defects of the customary discourse and some unsuccessful attempts at change, I show that when parents decide to separate, there is a need to reflect the new family structure by defining

¹ At the Second Forum on Children's Issues in Hong Kong in August 2012, which was devoted in part to the paradigm shift, lectures were given by judges and academics from England, USA, Canada, Australia, New Zealand, Hong Kong, Singapore, Pakistan, Japan, and Israel (the undersigned) on the changes needed, in legislation and practice, to reflect the paradigm shift.

parental responsibilities and to decide on the sharing or division of each of the various parenting tasks. I show that the proposed new terminology can extend the range of adults who are legally responsible for the needs of the child, for example, step-parents or other partners of parents. I demonstrate that the use of the more sophisticated paradigm is no less appropriate for cases, where the state intervenes alleging that the parents are not fulfilling their parental responsibilities and that some, or all, of the parental responsibilities need, temporarily or permanently, to be reallocated. I also suggest how the new paradigm can be adopted immediately by counselors, mental health professionals, lawyers and judges, for the direct benefit of children, even where existing legislation has not been amended. I suggest that the new paradigm can reduce costs to the state, both in court expenses and in treatment for those affected by court proceedings.

The Defects of Custody and Visitation Terminology

Some words have more than one meaning: many words have emotional undertones; words have layers of meaning, and each of us brings his own attitudes and experience of past uses and contexts to the interpretation of a word.

"Custody"², can imply ownership in some senses, and imprisonment or internment in other connections. "Visitation" relates to visiting someone who is imprisoned or hospitalized, and "access arrangements" usually refer to getting into someone's property.

The difficulties arising from the varied meanings and ramifications of these words have led to attempts to redefine custody. In some jurisdictions, the concept has been broken down into "physical custody" and "legal custody"; in others, the preference is for "joint custody", sometimes called "shared parenting"; this latter term has led in turn to disputes as to whether it implies equal time with each parent³.

In any case, the framework at present causes unnecessary litigation, encouraging parents to think in adversarial and confrontational, instead of collaborative, terms regarding their children. Many separating couples still assume that parental separation must be accompanied by litigation over arrangements for the children, because the so-called rights of one

² In Texas, the terminology is even closer to ownership: "possession and custodianship" (Sec. 135 Texas Family Code).

³ See note 17 *infra* and accompanying text

parent conflict with those of the other, and that the child has rights which he asserts against his parents. This assumption is rooted in a fundamental mistake as to the relations between parents and children, and between the parents themselves regarding their continuing joint involvement with the raising of their children.

Adversarial proceedings are almost inevitably detrimental to the child and the parents. The mother and the father are propelled into conflict, and compete as to who will be the custodial parent, as if the child was a prize to be won in a competition⁴. Each parent sees himself as being required to prove that he is a perfect parent in every way, and that the other parent is so inadequate and dangerous to the child. During the litigation, the parents expend their financial resources, and more importantly for the child, their time and emotional energy, on the conflict at a time when the child is, because of the separation, most in need of his parents' time and emotional support. Each parent wants to be the victor and the other parent to be vanquished. And when one parent "wins" custody, the child is liable to relate to the parents as "the winner" and "the loser".

Doing away with rights terminology may sound revolutionary. However, my experience has been that once a parent is made aware that the focus has to be on providing the child with what he needs, the process can, with appropriate dispute resolution techniques applied, turn into a polite debate, instead of a vociferous argument. The child does not need rights for this to happen. Judges and lawyers and other practitioners need to reframe the discussion in terms of responsibilities, obligations and duties. Inherent in this change should be replacement of talk of parental rights by the understanding that parenting consists of the many and varying tasks involved in bringing up children, and that these tasks, and those responsible for carrying them out, do not undergo any fundamental change where the parents decide to live separately.

⁴ "Their experiences with the legal system may leave them focused on the "ultimate issues" and legal labeling that are often the focus of court hearings (e.g., which parent has "primary custody," whether the other parent has "visitation" or a "custodial time-share," whether the allocation of parental decisionmaking authority is labeled "joint legal custody"), rather than on the daily activities and decisions that are often much more important to children." *Poor Planning Produces (Predictably) Poor Results: Systematic Intervention Planning*, Lyn R. Greenberg, PhD; Robin M. Deutsch, PhD; Richard Gould-Saltman, JD, CFLS; and Judge David Cunningham, AFCC e-newsletter, May 2013.

Such analysis also obviates the need to use terminology of children's rights, which is highly problematic conceptually, *inter alia* because it sets up an adversarial relationship between the child and his parents⁵.

Recognition of the serious problems arising from terminology of custody, access, visitation etc. has, in many jurisdictions, led to adoption of the language of parental responsibility. However legislators, judges, law academics and lawyers, need to realise that family relationships consist of complex webs of connections on a wide variety of levels, physical, psychological, emotional, economic, and others, and that in many cases persons and agencies, who are not biological family members, have responsibilities for the welfare of a child.

I propose to show that the paradigm of parental responsibility, as at present formulated, is lacking in several respects, and for this reason the transition, greatly needed for the children concerned, is incomplete and may fail to achieve its worthy objectives. In particular, there is a risk that each parent and his legal advisers will simply replace custody with parental responsibility as the objective of litigation, and each will claim the he, and not the other parent, should be "awarded" parental responsibility.

The Need to Refine the New Paradigm

The Children Act of 1989 in England and Wales purported to change the previous approach, by introducing the concept of parental responsibility, defined in s. 3(1) as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". The new legislation also replaced "custody" with "residence orders", and "visitation" with "contact orders"⁶, new terms which did not have the emotional overlay of the old words

Despite the good intentions, the Children Act failed to carry out the required changes. I would suggest that the reason is that the legal profession and the public understood that residence orders and contact orders were custody and visitation, dressed up as something else. The

⁵ See in this regard my paper, *Towards a Convention on Responsibilities and Obligations to the Child*, given at the 6th World Congress on Family Law and Children's Rights, March 2013 (available at <http://www.lawrights.asn.au/6th-world-congress/papers.html>) and the annex, which is part of my paper, *We Have Duties To Children: But Do They Need Rights*, given at the 5th World Congress in 2009.

⁶ Section 8.

parents continued to fight about who would be the winner of the "title" of residential parent, and who would be entitled "merely" to contact, as if separation of the parents brings about some need for exclusivity in performance of parenting tasks, and demotion of the other parent to the sidelines.

The change did not put an end to the adversarial nature of proceedings for another reason: the use of the word "orders" seems to require that the court be asked to make decisions.

The move towards recognition of the need that both parents take part in the child's future, and the concept of parental responsibility, is reflected also in the title of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded at The Hague in 1996 (hereinafter Hague 1996).

However, Article 3(b) of Hague 1996, in defining the measures that may be taken for the protection of the child, refers *inter alia* to "rights of custody, including rights relating to the care of the person of the child and the right to determine the child's place of residence, as well as rights of access..."

These examples, from English legislation and from the international convention, show that the shift from the custody-visitation paradigm to the parental responsibility paradigm is far from complete, with all that this entails for the continuation of adversarial proceedings about the future of the child.

The reason for this is a failure to understand that parenting consists of many different tasks, and one or other parent may be better able than the other, generally or at specific times, to fulfill this or that task. So, in cases where the parents separate (private law), it would be better to talk about parental responsibilities, in the plural. The child's need is that the end result, whether by agreement of the parents or by decree of the court, should be allocation of some of the parental tasks and responsibilities between the parents, and leaving other tasks to the joint decision and execution by the parents together. This more sophisticated terminology reflects fully the relationship between the child and his parents.

It is essential to emphasize that parental responsibilities do not include rights, in the formal sense. Parental responsibilities consist of the obligations and duties which a parent must carry out for the benefit of the child, including the power to make decisions relating to the child, and immunity from interference, by other persons or agencies, so long as the powers and duties are being performed in the best interests of the child.

In defining parental responsibilities, we should not lose sight of the objectives of parenting. The ultimate goal is to bring the child to the point where he can be an independent member of society, capable of making the most of his potential in every respect, by caring for him and making informed decisions where necessary. This requires the involvement of the child in decision making, to the extent of his developing abilities.

In making decisions, parents have to be aware that a child usually knows what he wants, but is often unable to understand that his needs, in the sense of his long-term welfare, may require the setting of limits and denial or deferral of his immediate demands. If we were to ask our pre-schooler if he would like to have a painful inoculation by injection, he would probably say no; if this were to be final, we would be exposing him to disease and possible disability or death. If we were to allow our pre-teens to decide about bedtimes, or our secondary school children if they would like to do their homework or chores, and be bound by their decisions, we would be condemning them to a life without boundaries or education. And there are some questions which we do not ask: a judge will not ask which parent the child prefers to live with, since the question places the child in a position of having to decide a matter which is beyond his competence, not to mention jurisdiction, and may cause the child to feel guilty, that he has rejected one of his parents. Thus, it is one of the parents' central responsibilities to take into account the child's expressed wants and opinions, and to give them the proper weight, according to the child's maturity, in arriving at decisions⁷.

Here in particular the realization that both parents jointly have responsibilities can avoid manipulation by the adolescent or younger child of the separation of the parents so as to extract concessions which are not to his benefit: "...but Dad said I could stay out late..."

Adoption of the proposed new paradigm should also once and for all put an end to the intrusion of claims, assumptions, and generalisations based

⁷ Expressing the child's wants and opinions in terms of his rights distorts the balance of the parent-child relationship. Sometimes the tail, especially the adolescent, will use his so called rights to try to wag the dog – his parents.

on gender into issues of the care of children. Presumptions based on the superiority of females over males or the reverse, in general, to be custodial parents, whether related to the age of the child or in general, will be irrelevant. The discussion will relate to each of the parenting tasks and the ability of each of the parents to carry out that specific task, including sharing the task, for each specific child.

Moving to terminology of allocating parental tasks would also put an end to the claim, sometimes made by one parent, that if the other is awarded custody, he will "lose" his child, or will be "separated" or "isolated" from him.

The next sections will amplify the proposal; each jurisdiction (I include in this term the framers of international instruments, as well as national and state legislatures) will need to consider the precise wording required by the move to parental responsibilities.

However, experience has shown that even without legislative changes, those involved with dealing with parental separation (including guidance counsellors, mediators, social workers, mental health professionals, parental coordinators, lawyers and, of course, judges) can often shift the situation from one of conflict and alienation to one of cooperation and collaboration. By use of the requisite language, parents can often be persuaded that the child needs them to work together.

Families: Parental Responsibilities and the Sharing or Division of Parenting Tasks

Who has Parental Responsibilities?

Biological Parents

Joint responsibility for parenting is not connected with the marital status of the parents: married or never married or divorced, living together or apart.

All parents have autonomy, that is, immunity from outside interference in allocating responsibilities between themselves according to the needs of the child and to the parents' abilities and availability. The state is under a

duty to refrain from interfering, so long as the parents perform their parenting tasks adequately. The standard should be "good enough"⁸.

Even when parents separate, their immunity from interference remains intact, subject only to submission of any agreement to approval by the court. The approval of the court should be mandatory, so as to ensure that all of the child's needs are catered to, and that these are not sacrificed to the other pressures in the course of negotiations, e.g. for the divorce or for financial considerations. In the event of disagreement, the court should allocate responsibilities, after hearing the relevant evidence, including the opinions of experts where necessary, and ensuring that the views of the child are, where appropriate, given proper consideration.

This means that responsibility for a child is not a matter for contracts or status. Still less is it a right of the adult, which can be waived or ignored at will. The existence of any biological connection with the child must carry parental responsibilities⁹— in other words, any act directed to procreation imposes responsibilities for, and towards, the child to be born¹⁰.

⁸ Adopting the standard suggested by the British writer Donald Winnicott.

⁹ It is important to repeat here that the subject under discussion is parental responsibilities, not rights. A biological parent who has had no contact with the child and has not seen to any of the needs of the child has to understand that any application made by him, even for contact with the child, requires an admission and acceptance of all his parental responsibilities, beyond the mere biological fact of parenthood. This should restrict applications of this kind to those where the parent, usually the father, was not aware of the existence of the child (such as a child born to an unmarried mother and given up or taken for adoption or fostering, without reasonable efforts being made to locate the father and ascertain his views), or where the other parent abducted and concealed the child. The U.S. Supreme Court recently held, in *Adoptive Couple v. Baby Girl* No. 12-399, 570 U.S. ___, 2013 U.S. LEXIS 4916, 2013 WL 3184627 (2013), that the father, who knew about the birth of the child, but had no contact with him and paid no child support, could not rely on the Indian Child Welfare Act 1978 (which was enacted because in some tribes, 25% or more of the children were taken away to be fostered or adopted without the consent of the parents), to have the child transferred to him by the couple with whom the child lived and who had applied to adopt him. The majority in the Supreme Court decided to refuse the father's petition, and remitted the case to the court of first instance for determination of the application for adoption. On the other hand, in Israel, the High Court of Justice ordered the return of an adopted child to her biological parents abroad, when it was shown that the agreement of the parents to adoption had been forged or obtained under false pretenses *HCJ 243/88 Rosilda Conselos v. Simha Turgeman*, 45 (2) LR 626.

¹⁰ This represents accurately the provisions of s. 15 of the Israeli Capacity and Guardianship Law 5722-1962, which provides that the child's biological parents are his natural guardians regardless of the legal status of their relationship – married, or unmarried – or the permanence or lack of it. However, s. 2(2) of the Children Act 1989 in England and Wales provides that where the father and mother were not married, the father has to acquire parental responsibility; it is submitted that this does not properly have regard to the needs of the child, which have to be fulfilled regardless of the parents' legal status *inter se*.

There are instances where the biological parents decide between themselves that one of them will be exempt from all responsibility for their offspring (as in the case of IVF by an anonymous donor, where the mother may contractually waive maintenance and the donor may waive any involvement in the life of the child). But even in this case, the donor will remain responsible at least to the extent that if the child becomes ill and needs a donation of an organ; the biological father will be compelled to cooperate by providing a sample – because first degree relatives are more likely to provide a match.

Even in a situation where it is proven that the sperm or ovum was obtained against the will of the person who thereby became a parent, his parental responsibilities to the child arise as a biological-legal fact. The parents may litigate about their liabilities one to the other arising out of the creation of the child, but each remains in a relationship of direct responsibility for the child's needs.

In any case where one of the parents is incapable of doing what is necessary, the other parent bears the responsibility.

Broadening the Definition

The proposed paradigm includes another element: a broad definition of parenting, enabling persons who are not biologically connected to the child, but with whom the child has a beneficial relationship, to be included in the category of those having parental responsibilities.

For this reason, questions of gender are irrelevant. Parental responsibilities may arise, for this purpose, in any person who has had a stable relationship with a parent, even for a short time, and not only a formally recognized step-parent married to a parent, if the parent's partner has conducted himself in such a way that the child depends on him for fulfillment of one or more of his needs¹¹. As soon as the child starts to

¹¹ A child growing up with two male or two female adults was not envisioned as a family when the International Convention on the Rights of the Child was drafted, even in those cases where the child is the biological offspring of one of them. Homosexual partnerships are becoming more common, as are the jurisdictions recognizing homosexual marriages. The proposed terminology of parental responsibility, coupled with the broadening of the definition of those having parental responsibility, removes, from the point of view of the welfare of the child, any legal barriers. Without expressing any opinion as to whether growing up in any kind of family is good for the child or not, the proposed terminology is functional, and reflects the reality of the child as is.

develop an emotional or dependency relationship with the partner, the partner becomes responsible, regardless of his wishes. The extent and division or sharing of the responsibilities will vary with a number of factors, including the extent of the involvement of others who bear responsibilities, including parents living apart from the child.

But it needs to be emphasized again that such persons have responsibilities and duties, not rights or powers.

Any family relationship with one of the parents may impose responsibilities towards the child. If the parents who bear the primary responsibilities are unable or unwilling to carry out their duties adequately, members of the extended families will often be required to take on the tasks of parenting.

There are others who bear responsibilities for children. At the simplest level, a teacher or health care worker who comes into contact with the child is responsible to protect the child from harm, and in many jurisdictions is required to report suspicions of abuse or neglect. But these are not parental responsibilities; at most persons such as these are acting for the parents (or in some cases the state) in fulfilling responsibilities to the child.

The mere existence of a relationship with a parent will not in and of itself entitle a partner to demand powers to make decisions for the child; allocation of these powers can be done only by those who already have parental responsibility, all of whom must be involved in making the decision. For example, the mere fact of a relationship, or even marriage, to a divorced or separated mother, even if the new partner has a good and loving mutual relationship with the child, will not give the new partner the power to make decisions as to which school the child will attend, or about medical treatment. Only the biological parents, and others who may previously have taken on themselves parental responsibility in this area, may permit such involvement by the new partner; but any such arrangement should be brought for approval to the court, so as to avoid arrangements which are contrary to the interests of the child.

In other words, the test should be functional rather than formal, and be driven by the extent of that person's involvement in the life of the child¹². A child may thus be in the position that more than two persons have parental responsibilities, and in such a case, all of the adults having such responsibilities must make the necessary arrangements as are necessary for carrying out all the tasks of parenting¹³.

Looked at in this way, legal definitions of legitimacy and bastardy cease to have importance, since supplying the child's needs becomes the sole matter for decision¹⁴.

Parenting tasks

Parenting in an intact family, in which the parents live together harmoniously, consists of a variety of tasks, some of which parents share, some of which are performed mainly by one of the parents, and some of which are assigned to other persons or organisations.

Without attempting to construct a comprehensive list, these tasks include caring for the child's health, housing, clothing, nutrition, education, social and emotional needs (which include involvement of all such relatives who can contribute positively to the child's development).

The extent of involvement of each parent in the performance of a given task changes over time, in accordance with the changing needs of the child and changes in the capacity and availability of the parents. Some of

¹² To avoid semantic arguments, such persons might be called "persons having parental responsibilities". The words "parent", "father", "mother" imply a biological relationship; the term "quasi-parent" may diminish the sense of responsibility; the emphasis here is on the legal relationship.

¹³ In a case recently before the courts in Israel, two men, the former husband of the mother and a friend with whom she lived, claimed paternity and custody of the child. The mother was not able to give a clear account of who was the biological father, and for various reasons it was not possible to carry out medical tests to determine scientifically who was the father. Despite the strong and beneficial relationship of the child with both men, both of whom she called Daddy, the courts saw it as being essential to make a determination who was the biological father. Such a determination would be certain to damage the child, who would lose the relationship with someone who had fulfilled some of the parenting tasks. In my view, the child would benefit from recognition of both of the men as having parental responsibilities, including to have continuing contact with the child and allow her to have contact with the other, regardless of any biological connection, and the model proposed in this paper would enable this, reflecting the *de facto* situation.. See my paper (in Hebrew) "*Three claim possession of a child*", published in Nevo Literature, 2012

¹⁴ In *Mason & Mason and Anor* [2013] FamCA 424, the Family Court of Australia recognized the possibility of denying parentage, that is, legal recognition of the status of parent, to one of the parties and at the same time allocating to him "equal shared parental responsibility".

the tasks are delegated to others, all according to legal, social and cultural norms.

For example, in a particular society, a newborn child may be looked after physically by the mother most of the time, while the father looks after the financing of the child's needs by working; at a later stage, the task of physical care may be delegated, for increasing parts of the day, to a babysitter or child minder or a relative, and the mother shares the task of funding by going out to work, while the father may be more involved in play or reading to the child at bedtime. As he grows up, the child will carry out an increasing number of the physical tasks - dressing, toilet, washing, eating, and so on - by himself. Later on, the child will be at school for part of the day, and may stay overnight with relatives or friends.

A child may have special needs, and one of the parents may be better able than the other, physically or emotionally, to look after those special needs; another child may be especially talented in some field, and one parent may be less capable than the other of encouraging and advancing the child in that area.

As the child gets older, the parents are divested of most of their parental responsibilities; and finally, when the child reaches legal majority, there are no longer matters in which the parents have legal (as opposed to moral) responsibilities.

In such an intact family, in which there is rarely a need to discuss who does what; each parent recognizes the talents (and limitations) of the other, and together they provide, almost instinctively, all the child's needs.

Only in the case of disharmony is there a need to talk about divisions of activities. The division may be in different ways – by allocation of time spent with the child according to the child's needs and the ability of each parent to devote time to the child, balancing the other demands on the parent's time (work, studies etc.), or by allocating decision-making in certain areas, or responsibility for carrying out specific tasks, to one parent or the other, or to those who are not parents. Of course, both parents bear the ultimate responsibility for the child's welfare.

A child will almost inevitably have new or greater needs because the parents separate, but the categories of parental tasks do not change. There

is however a need to reallocate some of them in the light of the new circumstances, including changes in living arrangements.

An efficient and lasting division can only be effected if consideration is given to each task separately, to the needs of the specific child, including his temperament and his reaction to the separation, and the ability of each parent to meet that need.

The following does not purport to list or describe all the different responsibilities of parents. Each child has his specific needs, and some have special needs arising from physical, developmental, emotional, or other disabilities. Siblings may differ widely from each other in temperament and educational achievements. Responsible and loving parents will take these factors into account, whether they are living together or apart.

What follows is, therefore, a consideration of some of the main categories of parental tasks, in the light of the new paradigm of parental responsibilities.

Love, Attention, and Time with Each Parent

It may seem trite or obvious to set out a basic, almost instinctive, emotion as one of the tasks of parents, but experience shows that when parents are in conflict, the task of providing a loving environment is sometimes neglected or even forgotten.

In the heat and the turmoil of the breakdown of a relationship, "children exposed to everyday conflicts between their parents - conflicts that are non-violent, but frequent, intense and poorly resolved - are at elevated risk for mental health problems, even when we consider poor parenting practices or genetic susceptibility factors passed on from parents to children, in explaining the effects of hostile relationships on children"¹⁵. This is exacerbated when the conflict is accompanied by adversarial court proceedings. The parents may be so overwhelmed emotionally that they have little capacity to answer the child's need to feel loved. This becomes even more damaging when there is a need to spend time and energy in seeking and equipping separate living quarters, in meeting with advisers

¹⁵ Anita Thapar, Gordon Harold, Frances Rice, Kate Langley, Michael O'Donovan. *The contribution of gene-environment interaction to psychopathology*. Development and Psychopathology, 2007; 19 (04) DOI: [10.1017/S0954579407000491](https://doi.org/10.1017/S0954579407000491) reported in Science News 8 May 2013.

and counselors, in hiring and meeting with lawyers, in appearing in court, and also in working, all of which require time. Many children suffer as a result¹⁶.

These difficulties continue during an extended period, from the initial breakdown until resolution, whether by agreement or by court orders; but when one parent seeks to deprive the child of a loving and caring relationship with the other parent, the result can be severe distress, including contact refusal¹⁷.

So parents must formulate the relations between them in a manner which minimizes these effects, and preserves the opportunities of each to give the child the love and affection he needs.

Sibling relationships are often protective against the worst effects of parental breakup and separation, so it is incumbent on the parents to make arrangements which take account of the relationships of each child with each of his siblings. In some cases it will be important for the children to stay together when they are with one or other of the parents; but there are other cases where it is preferable for them to meet from time to time, for example on weekends and holidays, and for the rest of the time to be separately with one parent or the other. Making an informed decision in this area also is one of the tasks of parenting.

In many families, the ties of children with their grandparents and other members of the extended family are strong, and may be invaluable in cases where the relations between the parents are disharmonious. Grandparents can provide a refuge from a chaotic home. On the other hand, when the parental relationship breaks down, some grandparents align themselves with their son or daughter, and may even fan the flames of the dispute. The same is true of uncles, aunts and cousins.

¹⁶ In his lecture, *The Challenge of Sexual Abuse Prevention*, David Finkelhor reviewed the current research on sexual abuse of children, and pointed to family disharmony and breakup as a risk factor; children in this situation are vulnerable, since the parents have less time and are less available to instruct and protect their children from harm. Seminar at Hebrew University, Jerusalem: *Who Cares About Sexual Abuse of Young Children*, May, 2013.

¹⁷ For a review of the literature about the prognosis and long-term consequences of alienation, see Chapter 5 of *Children Who Resist Postseparation Parental Contact*, Barbara Jo Fidler, Nicholas Bala, Michael A. Saini: Oxford University Press, 2013.

The parents have a responsibility in this area, too. Where a child who has grown up with good and beneficial relationships with members of the extended family, and these relationships remain beneficial despite the breakup of the parental ties, each parent should do all possible to foster good ties with members of the extended family on both sides, on condition that those persons refraining from words or conduct which may damage parent-child relationships.

Responsible parents need carefully to assess the need of each child to spend time with each parent and the extended family, and this is one of the vital tasks of parenthood. It is for this reason that the concepts of custody, residence, primary residence, visitation, access, shared parenting, equal time and the like are so unhelpful.

As the Australian experiment has shown, an attempt artificially to divide the child's time equally between the parents is seldom effective¹⁸.

The proposal in the American Law Institute's Principles of the Law of Family Dissolution, that the time spent by each parent with the child after separation should be based on the time spent pre-separation – the approximation rule – has been roundly criticized by experts as being inappropriate, unworkable and inviting manipulation prior to separation. It would also almost inevitably lead to litigation over the question what in fact happened for several months or years prior to breakup, exhausting

¹⁸ In the Final Report of the Family Justice Review by the Norgrove Committee, issued in November 2011, reference was made to the expression "shared parenting" in the Australian 2006, the Family Law Amendment (Shared Parental Responsibility) Act, 2006, thus: "The evidence showed that people place different interpretations on this term, and that it is interpreted in practice by counting the hours spent with each parent, disregarding the quality of the time. The thorough and detailed evidence from Australia showed the damaging consequences for many children"(para. 4.23). The term "meaningful relationship", which also featured in the Australian 2006 reforms, caused increased litigation, again based on quantity of time (para. 4.35). Both of these provisions were substantially amended by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011.

The evidence from Australia was, it appears, unknown to the legislature in Florida, where a Senate Bill No. 0618 (2013), which was devoted almost entirely to issues of alimony and child support, contained a provision which stated that with certain narrow exceptions, "Equal time-sharing with a minor child by both parents is in the best interest of the child" (s. 61.13 (2)(c)). The Bill was vetoed by the Governor.

The Norgrove Committee's final recommendations in this area (at para. 4.40) are that: "Government should find means of strengthening the importance of a good understanding of parental responsibility in information it gives to parents. No legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents".

the parents emotionally and financially, and taking inadequate account of the great changes in the needs of the child and the availability and resources of the parents arising from the separation¹⁹.

It will be clear from the above that the responsibilities for the welfare of the child are continual, from birth (and even before birth, since the development of the unborn child may be affected by stress on the mother²⁰) until majority. For this reason the phrase "parenting time" is entirely inappropriate. A parent does not slip in and out of his responsibilities as a parent according to a timetable of days and hours set by agreement or by the court. One does not cease to be a parent, with all the responsibilities that this entails, when the child leaves to go to school or summer camp, or goes to visit his grandparents, or when he is with the other parent. So agreements and court orders should be framed in terms which reflect this reality, such as "time with mother" and "time with father".

Home and Contact

Every child needs a home. It should be obvious that when the parents no longer live together, each has to provide a place where the child can feel comfortable and regard as a home.

However, some parents get bogged down in fighting about the division of their property, or disputing which should be the "principal" residence.

As is the case in regard to the child's other needs, so in this area the parents' duty is to decide on appropriate places for the child to live, at such times and under such conditions as are necessary for the child, without interference from considerations of who is the custodial parent. In other words, the child needs two homes, "home with mother" and "home with father". Unless there is a pressing psychological need, neither home needs to be called the "main" or "principal" home of the child, even if mathematically the child spends more hours per week in one house than in the other.

¹⁹ See: Richard A. Warshak, *Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids* [2007] 45(4) Family Court Review, p. 600-619.

²⁰ *Fetal Exposure to Excessive Stress Hormones in the Womb Linked to Adult Mood Disorders* British Neuroscience Association (2013, April 6). *Science Daily*. Retrieved April 10, 2013, from <http://www.sciencedaily.com/releases/2013/04/130407090835.htm>. See also other epigenetic and psychoneurological research.

It is the joint responsibility of the parents to decide on any change in the child's homes. Furthermore, a parent who is considering moving his home to a new location is under an obligation to consider the ramifications, for the child, of the move.

This obligation manifests itself in different forms.

The courts are used to dealing with relocation cases, but only where the parent with whom the child lives wants to move to a new residence, at a substantial distance from the home of the other parent. Where the move would necessitate changes (usually a reduction) in the physical meetings between the child and the other parent, the court has to balance the various interests, and often the case is decided, not on the basis of the parents' obligations to the child, but on the basis of the interests (sometimes called rights) of the parents – on the part of the parent who wants to move, the "rights" to autonomy and to create a new family, or to improve themselves economically, and on the part of the other parent, the "right" to have frequent meetings with the child.

It should be clear that the needs of the child often get lost in the debate over the rights of the parents; the principal need of the child is for good relationships and contact with all members of his family, and any change in arrangements needs to be considered fully.

It is, however, rare for a parent with whom the child does not live most of the time to consult with the other parent before moving far away from the child. There are very few decided cases in this area, since the existing custody paradigm is perceived as absolving the non-custodial parent from any responsibility for good contact with the child. On the basis of the parental responsibilities, as set out above, it should be inconceivable that a parent should be able unilaterally to reduce the level of his involvement with the child, by moving to a remote place.

In other words, the parents retain, after separation, the obligation to maintain good and frequent contact with the child, and relocation of the child or of a parent need to be given the proper consideration. Thus, either parent wishing to move to a place where the distance between the child and either parent is greater than that previously agreed or decreed, such as to diminish the extent of contact between the child and either parent, should be required to negotiate an agreement to be presented to the court for approval.

The parental responsibilities paradigm requires a review of the international instruments relating to abduction. Article 5(a) of the Hague Convention on the Civil Aspects of International Child Abduction of 1980 defines custody rights as including "rights relating to the person of the child and in particular the right to determine the child's place of residence". From the above it is clear that unless a parent expressly waives his authority over the child's whereabouts (and courts should be wary of approving such a waiver, which amounts to a statement by the parent that he absolves himself of responsibility for the child), both parents are proper applicants for return of a child to his state of habitual residence, regardless of any agreement or award of custody²¹.

Education, Play and Health

The supply of these needs, defined in the widest possible sense, is the responsibility of parents. They may, and in some aspects must, for example, according to compulsory education statutes or laws relating to inoculations, be assisted by other persons or organizations in the performance of these tasks.

At the most basic level, parents must protect their children from harm. Again, this may seem so obvious as not to need saying, but children are exposed to dangers of varying kinds. We have already mentioned the adverse effects of separation and conflict between parents, arising from reduced emotional availability and reduced time with the child. This itself can place a child at risk, in the sense of reduced supervision; of particular concern recently is exposure to harmful material in the electronic media – pornography, bullying, sexting and the like.

Responsible parents have to be aware of the dangers from the different spheres in which the child lives, and the vulnerabilities of each child, which may arise from the child's personality or from the effects of family stress and breakup; and they must act in concert to prevent harm. In particular, where the child wants to engage in activity which may put him in harm's way, separated parents must adopt a consistent attitude, lest the

²¹ I am in the process of preparing a paper, to be presented at the conference of the International Society of Family Law in Israel in January 2104, *Adapting the Hague Conventions to the Paradigm of Parental Responsibilities* which will examine changes needed in this and other international conventions and instruments if the paradigm shift, replacing rights and custody etc. with parental responsibilities, is adopted.

child exploit the differences between the parents and thereby endanger himself. However, parents should not deprive the child of his developmental needs, including the need to experiment and make mistakes. They are obliged carefully to consider all relevant factors, including, where the child is sufficiently mature, the child's views, and to refrain afterwards from undermining decisions jointly made.

Another of the essential tasks of parenthood is education, in all areas. While formal education may be required at certain ages, and the law may require the child to attend kindergarten or school during certain hours on certain days, educating the child is the joint responsibility of the parents starting at birth and ending no earlier than when the child reaches majority. This includes bringing the child up to be a responsible member of society (and a responsible parent when the time comes), and this itself requires identification and development of the child's talents and inclinations.

While parents may differ in their belief systems, this does not exempt them from their joint responsibilities to provide structure, consistency and boundaries, which lead to feelings of safety and security. By setting limits, and consequences when they are overstepped, the child learns about self-discipline. Parents must also together choose the type of formal and informal education for each child; this includes daycare, preschool, youth movements, religious or moral education, and even the books a child reads or the programmes he views on television.

In these areas, the parents should make decisions together, after taking into account the views of the child so far as it is appropriate to do so. While there may be differences of parenting style, and different rules may apply in different settings (mom's house, dad's house, granny's house, preschool, etc.) children are usually capable of adjusting to different contexts. Such differences must not be made an excuse for one parent to criticize or express contempt for what happens in any of the contexts in which he agreed that the child should spend time, or to undermine jointly made decisions about educational issues. In an appropriate case, he should discuss these matters with the other parent, and if necessary apply to the agreed decisor or to the court for a determination based on the welfare, including consideration, so far as appropriate, of the wishes, of the child. Here again, neither parent may undermine a decision, whether arrived at by agreement or by judicial order.

A child needs to play: in other words, he needs to be free to behave as a child.

Once again, it seems that this is to state the obvious, but in the chaotic world of adversarial proceedings between the parents, the childlike aspect of childhood is ignored. A child needs time to play, by himself and with other children, but there are parents who emphasize the formal aspects of education and regard playing as a waste of time. Parents locked in a dispute over the child may criticize one another if the child's grades are suffering, and blame one another for allowing time for play at the expense of homework, when the child's lack of success at school is because of the tension and friction between the parents.

But parents also disregard the needs of the child to be a child, where one or both of the parents impose, intentionally or unwittingly, adult, and sometimes parental, roles on the child.

For example, when a parent asks the child to choose between the parents - with whom he wants to live, or with whom he wants to spend the weekend or the holidays - this is adultifying the child by putting him in the position of having to make a decision for which he is ill-equipped. In addition, the child is in an impossible bind, since any decision is bad. If he says he prefers the parent asking, he may feel that he has betrayed the other parent, and if he says he prefers the other parent, he may fear that the parent who asked him may reject him.

Framing the asking of such a question as respecting the rights of the child exposes the defects of the use of children's rights to describe the parent-child relationship. The definition of a right, as a claim that can be enforced by legal action, shows how inappropriate rights discourse is in this regard. From infancy until pre-adolescence, the vast majority of children are unable to say what their so-called rights are, or at least to frame them in a legally persuasive fashion. An adolescent claiming his rights against a parent is placed in an adversarial position, in which he is at loggerheads with those who love him and want his best interests.

There are pathological situations where a parent is so involved with the battle that a child takes over parenting tasks, looking after the needs of siblings, or has to parent his inadequate mother or father. Here also, the child takes on an adult role, and is deprived of his childhood.

Parents also have, in the nature of things, the primary responsibility for their children's health, and must take decisions relating to maintaining health – inoculations and so forth – and for treatment when the child becomes unwell, together.

Here again, giving one parent the status of being "custodial" may mislead both parents into believing that that parent alone is to make the decisions, and that he need not report to the other parent; the non-custodial parent may think he is relieved of involvement precisely at the time that the child needs him to look after him. In both of these situations, the child is doubly endangered; two heads are better than one in coming to medical decisions, and division of the task of looking after a sick child gives each parent the opportunity to rest and refresh his strength.

Economic Responsibilities

No less obvious than the parents' obligations in regard to love and affection, welfare, health, education and play is their duty to provide the child's physical day-to-day needs. The child needs a roof over his head, food, clothing, footwear, toys, and equipment.

When the parents live separately, they have to make sure that the child is in suitable accommodation and has suitable nutrition, clothing etc. These needs, like those mentioned above, impose an economic obligation on each parent, according to the laws of the child's place of residence, to provide for the child.

I would submit that the economic responsibilities arising out of the separation of the parents do not have to be regarded as separate from the other parental responsibilities.

In the same way that parents who live together make their arrangements for the financial upkeep of the household together, by express agreement as to budget and what use shall be made of the parents' resources, capital and income, or by tacit adoption of whatever arrangements seem necessary, so they are obliged to come to such arrangements when they separate. They need to sit together and honestly assess the children's needs, and no less honestly disclose their resources.

It is taken, wrongly in my view, to be axiomatic that child support or maintenance are in a different legal category from the other parental responsibilities; a claim for child support is usually filed separately from custody or residence claims, and different procedures apply. In Israel, for example, maintenance claims are dealt with in a separate part of the Civil Procedure Rules and are not integrated into the part dealing with other Family Proceedings. Separate commissions were set up, to "Review the Legal Aspects of Parental Responsibility on Divorce" (chaired by Professor Dan Schnitt) and to "Investigate the Issue of Child Maintenance in the State of Israel" (chaired by Professor Pinchas Schiffman).

This is most unfortunate, since the performance of each of the parenting tasks has a cost. But it is a truism that assessing the economic cost of time spent with a child is fraught with difficulty. There can be no doubt that there is an economic cost, where the parent concerned could be spending the time earning money, and there are expenses associated with travelling to see the child. Other costs are, on the face of it, easier to assess; it is possible to create a formula for the child's use of electricity and water in the home of each parent, and to assess the nutritional needs and costs of clothing, laundry, etc.

Each jurisdiction has its own laws regulating the different parameters for assessing the costs of parental tasks and the criteria for division of these costs between the parents, and this is not the place to discuss them. In Israel, attempts were made to create a computerised tool for assessment²², with little success.

Parents living together arrange the family finances, by mutual agreement or by silent consent. This includes budgeting the use to be made of their resources - income and property – and these matters need to be arranged also when they separate.

Discussion of financial arrangements needs to be carried out as part of the discussion of all the other parental tasks and not as a separate exercise. Each task has, as stated, an economic cost, at least in terms of time devoted and marginal costs.

The separation of financial responsibilities from the other responsibilities of parents is unsupportable in principle, and for this reason an agreement relating only to some of the responsibilities, such as the time spent with

²² *Ketanei Ketanim*

each parent, without regard for the economic ramifications, is equally unsupportable. This is clearly the case where one parent wishes to relocate the children to a place far from the residence of the other parent, where travel expenses and travel time need to be part of the arrangement; but even where the parents live in close proximity, there is a need for clear arrangements as to who is responsible for paying, for example, school fees, school trips, bus fares, school books, and the like, and how much can be recovered from the other parent as his contribution.

Where the court has to be involved, because there is no agreement, at the very least the same judge should hear all the issues relating to parental responsibilities together, so as to factor in the economic aspects of any proposed arrangement. Needless to say, this is one of the reasons for the Israeli system, where one experienced and expert judge hears all matters connected with the separation of the parents, including the division of their property and the arrangements, including financial arrangements, for their children. But there are places where judges rotate through different areas of law, and a period of a year or two is insufficient time to amass sufficient experience in the family law field; there are jurisdictions in which one judge tries property issues and another judge, sometimes of a different court or division, tries matters of custody; in others, a single judge tries many different matters – criminal, civil, property, small claims, bankruptcy, torts, commercial etc. and cannot establish the knowledge base for dealing holistically with family matters in all their complexity.

Changing Circumstances

The needs of children change over time, and the capacity of the parents to comply with their responsibilities may also change. For this reason any arrangement, by agreement or judicial decision, must be open to adjustment in the event of a substantial change of circumstances (with the power to impose financial sanctions against a parent who files unnecessary applications). It may be appropriate to provide for a mandatory review every three years, granting the parents the power to agree from time to time that a review is unnecessary and to defer the mandatory review.

Care and Protection: Allocating Parental Responsibilities

Where welfare agencies of the state are of the opinion that neither parent has the capacity to carry out the parenting tasks, and that as a result the child is being abused or neglected, they have a duty to intervene. However, the intervention should be limited to supplying those of the child's needs which the parents are not at a given time capable of supplying: the autonomy of the parents to carry out their parental responsibilities must be preserved to the extent possible.

As has been described above, a court process arising from a family crisis must be framed, not as a fight or dispute but as a request for allocation of parental responsibilities between parents so as to avoid or at least minimize contention. Likewise, an application by the state in a matter of the care of a child should be framed, not as a hostile demand to take the child away from the parents, but as an application to allocate to others - to a member of the extended family of the children, a foster family, a children's home, etc., - only those parental tasks which the parents are, at a particular time, incapable of performing. An application sensitively so framed will be far less threatening than an application to remove the child into the care of the anonymous local authority, thereby depriving the parents of any involvement in decision making. Such a course as suggested will not preclude planning for a permanent solution for the child; on the contrary, it has better prospects of encouraging the parents to cooperate with the welfare agencies, and to work for their own rehabilitation and the return of the child, rather than abandoning hope and relying on the authorities to look after him.

Assessing Capacity to Carry Out Parental Responsibilities

It will be clear from the above that in cases of all kinds, both those between parents and those between welfare agencies and the parents, the investigation needed is not to show whether one parent or the other has perfect general parenting capacity. In cases where there is no alternative to requesting a report from a welfare officer or expert, the report should concentrate not on parenting capacity in general, but on the abilities and limitations of each parent in respect of each of the parental responsibilities, including his ability to cooperate with the other parent, and the welfare agencies where necessary, despite the changes in the arrangements for the child.

What can be done

Reframing parent-child relations in terms of responsibilities will not achieve the goal of changing the way parents see their status vis-a-vis the child and each other, unless an effort is made to educate the general public and lawyers, mental health professionals and others professionally involved. In addition, reform is required in the way proceedings in court are commenced.

Every effort should be devoted to encouraging the parents to settle the matter without recourse to court proceedings. The Australian model, of Family Relationship Centres, from whom a certificate of attendance is a prerequisite for filing proceedings²³, has had remarkably positive results²⁴. The mission statement of these FRCs is:

- strengthening family relationships
- helping families stay together
- assisting families through separation.

The development of Collaborative Divorce techniques holds out similar hopes for reduction of litigation with its accompanying tensions and damage to children.

The state is under a duty to balance its budget, and in particular to allocate resources in a way that will save expenditure in the future. Investment of adequate resources in education for the new paradigm, and in provision of services for handling parental separation arrangements before they arrive at court will save far more in terms of court resources.

However, it is not to be assumed that all cases can be resolved without litigation; the personalities of the parents or one of them, or other factors, may make litigation inevitable²⁵.

But especially in these cases, there is great importance to the way in which documents presented to the court are framed²⁶.

²³ Family Law Act 1975 s 60 I.

²⁴ Patrick Parkinson, *The Idea of Family Relationship Centres in Australia*, [2013]52(2) Family Courts Review, and other articles in that issue.

²⁵ Bill Eddy, in his book *The Future of Family Court* (Scottsdale Az., High Conflict Institute Press, 2012) points out that parents with personality disorders constitute a very high proportion of those for whom litigation is inevitable. My judicial experience shows that this is a true representation of the situation.

The parties should be described, not in terms of their roles before the court: Plaintiff, Applicant, Petitioner, Defendant, Respondent, but in terms of their relationship to the child, whose name should appear at the head of the document instituting proceedings. The word "against" or "v.", should not appear.

Thus the originating document filed in court will be headed thus:

"In the matter of
A. B., C.B., D.B... all minors

And in the matter of
X.B., parent
And
Y.B., parent."

The originating document will consist of an application for Dispute Resolution, and will not contain allegations of any kind. It will contain the details of how the parties came to be bearers of parental responsibilities for each child, and the fact that they are living separately or that one of them intends to live separately. The parent presenting the application shall attach a draft of his plan for sharing parental responsibilities for each child. This part of the document shall also be devoid of allegations.

The other parent will be required to respond, again without allegations, with his draft of the parental responsibilities sharing plan.

The parties will then be referred to the court social worker, who shall discuss matters with them and shall also be empowered to speak to the children about the situation, and shall report to the court, within a specified time, as to the prospects of reaching agreement; and if there is a full agreement, or even an agreement as to some of the aspects of parental responsibilities, the matter will be referred to a judge for approval. If

²⁶ The following adopts some of the changes recommended by the committee headed by Professor Dan Schnitt, which are at present awaiting approval as draft amendments to the Civil Procedure Rules in Israel. However, the draft amendment does not go as far as is suggested in the present paper; in particular, there is no reference to child support, nor are there provisions for contact with siblings, grandparents and the extended family. A Consultative Document, containing the draft of a Bill relating to parent-child relationships, which would radically change the statutory framework, is under consideration. The conceptual and procedural changes proposed here should suffice to bring about important improvements for the children of separating parents.

there is no agreement, the judge will conduct a preliminary hearing, and only if he concludes that it is necessary, will the parties be permitted to present their allegations and evidence, restricted to those issues which are ordered by the court.

This procedure is designed to avoid the present situation, which requires the raising of every possible allegation at the very outset of proceedings – in the Statement of Claim and the Defence – and the situation, which is already stressful, is exacerbated by the raising of matters which may be irrelevant to the determination of the allocation of parental responsibilities.

The changes in terminology and procedures suggested here should make it possible for court systems to establish, very soon after the institution of proceedings, which are the really difficult issues, and to allocate proper resources for prompt adjudication.

So the role of parents, and other adults authorised to do so, is to guide the child, while listening to his views, allowing him to experiment within the bounds of reasonable care for his safety, and to continuously assess his maturity and ability to make sensible decisions. This contributes to developing the child's own sense of responsibility, for his own welfare and to others.

Conclusions

The thrust of this paper is to show that adoption of the paradigm of parental responsibilities, which includes more careful use of language, and changes in the processes for dispute resolution and procedural changes, it is possible to bring about wide-ranging improvements for the benefit of children. By way of educating for changes in accepted attitudes, and by placing appropriate services at the disposal of families undergoing breakdown, it is possible to prevent, or at least reduce, the suffering of their children. This will apply also when welfare services seek to change a child's lifestyle where neglect or abuse are alleged.

The proposed paradigm emphasizes the needs of children, and the responsibilities of parents and other adults and of the welfare services to act in the best interests of the child, and shifts the method of reaching decisions from that of confrontation to that of discussion and agreement.

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