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Philip Marcus

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Parental responsibilities: Reformulating the paradigm for parent–child relationships Part 1: What is wrong with the ways in which we deal with the children of separated parents and how to put them right

Philip Marcus

Jerusalem Family Court, Jerusalem, Israel

ABSTRACT

This is the first part of a two-part article, which calls for the removal of terms such as rights and custody, including joint and shared custody, and visitation from the legal discourse in relation to children and their parents. This part demonstrates how the current discourse, based on the competing rights of the parents, leads inevitably to competitiveness and litigation, which are highly damaging to the child. The proposed paradigm of parental responsibilities requires establishing the needs of the specific child when there are parental disharmony and separation, while emphasizing the joint responsibilities of both parents to ensure that those needs are adequately met. This part also addresses the question: who has parental responsibilities, when a child is born as a result of Assisted Reproductive Technology, and also the quasi-parental role of the court.

KEYWORDS

Adversarial system; children's needs; custody; parens patriae; parenthood; personality disorders; visitation

Introduction

“Children see their families as a collection of individuals who love and care for them. And children are right; in the end, their welfare in the world will ultimately be protected and assured, to the extent maximally possible, by the collection of individuals who step up to take responsibility for their care and upbringing” (McHale & Irace, 2011, p. 15).

In many (perhaps most) jurisdictions, the criterion for dealing with matters affecting children is the best interests of the child. For example, Article 3 of the Convention on the Rights of the Child (The United Nations, 1989) provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her

parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

There is widespread dissatisfaction with many aspects of the dialogue between parents and the adversarial nature of court proceedings when conflict is unresolved. It is essential to reframe the discussion of the needs of children, to shorten and simplify the resolution of disputes. 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 relationships and court proceedings, including divorce and separation cases. There is a widespread understanding that the best interests of children are not properly served by much of the current terminology, which consists of words that are inappropriate for parent–child relations and emotionally charged—rights (see Marcus, 2007, in which I discuss the development of the discourse of rights as the basis of legal relations and the distortions caused by defining legal relations in terms of rights), custody, visitation, and the like—and there is a need for a paradigm shift.

In Part 1 of this article, I review legislation, academic writings, case law, and materials from the legal and caring professions in many parts of the world to demonstrate the inappropriateness of the current terminology and the dangers of adversarial litigation that arise in part from using words such as rights, custody, visitation, and even parental responsibility. I describe the role of biological parents and their autonomy in carrying out their parental responsibilities, which arise from the fact of their ovum and sperm being the cause of the child’s existence. I demonstrate some of the added insights into their tasks that are provided by parental responsibilities discourse. I deal also with the *parens patriae* responsibility of the state, which may be exercised by the Family Court and other agencies if, and only if, the parents fall below a certain standard, set by society, in carrying out their responsibilities.

In Part 2, I show how the new paradigm deals with the persons to whom parental responsibilities apply, alongside or instead of the biological parents, and detail how the needs of each child are answered under the new understanding of child–parent relationships. I show that the use of this paradigm is also appropriate for cases where state authorities allege that the parents are abusing or neglecting their child and that some, or all, of the parental responsibilities need, temporarily or permanently, to be taken away from them and given to others.

The approach here offered is a distillation of my understanding of research and writings in many fields, seen through the prism of my experience of four decades as a family lawyer and as a Judge of the Jerusalem Family Court. Of course, each jurisdiction (I include the framers of international instruments, as well as national and state legislatures) will need to consider and revise the wording required by the move to parental responsibilities. The rights of

the child need to be replaced by describing the needs of the child and by designating the persons or agencies that are responsible for supplying those needs. For example, as I have shown elsewhere (Marcus, 2009), the word “rights” in paragraph 2 of the Convention on the Rights of the Child, and in all the other provisions of the Convention, can be replaced by “obligations” without any damage to the intention of the article, thus:

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the **obligations** and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, *shall* take all appropriate legislative and administrative measures.

But the parental responsibilities paradigm is applicable in all countries and 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.

Damage caused by the words we use: Rights, custody, and visitation

Parents’ rights/children’s rights

In the past century or more, it has become almost axiomatic that relations between parents and children are described in terms of rights. There are international conventions and national legislation that talk about the rights of children, and of late also judicial decisions based on the right to be a parent and other rights.

A “right” is defined as a claim of entitlement that can be demanded in legal proceedings. What is common to the present terminology is that it leads to the perception that on parental separation the rights of the parents need to be sorted out by judicial intervention, unless the parents can reach some compromise, which can only be achieved if one or both of them relinquishes some right they have. This approach makes the parents, at least at the start of discussions about the effects of their separation on the children, face each other in an adversarial stance, which is the opposite of what the children need. The children need their physical, developmental, psychological, and moral needs to be provided for by their parents.

An admittedly extreme example of the perception that the parents are possessed of paramount rights over their children led to an agreement that the father waived all his “parenting time rights” in exchange for the mother assuming sole financial responsibility. The agreement was approved by the court of first instance. The father subsequently applied for parenting time, but was refused by the trial court. The Indiana Supreme Court declared such an agreement to be repugnant and contrary to public policy, and stated,

correctly that “Attorneys should refuse to be a part of such discussion and should advise their clients that any such discussion is unacceptable” (*Perkinson v. Perkinson*, 2013). At the other end of the spectrum, there are those who try to see relationships in the family as based solely on the rights of children, and I have shown that the Convention on the Rights of the Child, promulgated by The United Nations (1989) has enabled the discourse to get out of hand, and how international instruments need to be amended (Marcus, 2009, 2013, 2016a).

Those who think that children have rights, including a right to equality, dismiss the idea that parents should guide and instruct their children—parental authority—as improperly restricting the child’s freedom to decide for himself how to behave. The results have been damaging to children and society: in his book *The New Authority*, Chaim (2008) states that

“... many studies have shown that children growing up in permissive educational frameworks are typified by especially high levels of violence, dropping out from school, use of drugs, criminal activity and sexual license” (preface).

There is a huge difference between a parent exercising his parental role in the interests of his child and tyrannical parenting that stultifies the child’s development. However, those who decry parental authority are guilty, whether by careless thinking or deliberately, of conflating authority with authoritarianism and parenthood with paternalism. Diana Baumrind and her followers use parameters of structure and warmth. Authoritative parenting, which combines structure and warmth, leads to good results. Authoritarian parenting, which has structure and no warmth, leads to poor results, as do indulgent parenting, that is, warmth (rights) without structure, as well as neglectful parenting, with neither structure nor warmth (Baumrind, 1966; Spera, 2005).

For several reasons, the terminology of children’s rights is highly problematic conceptually. For example, the Children’s Bill of Rights (n.d.), contains a list of 12 rights. Nine are negative “rights” such as the right not to be asked to choose sides and the right not to be used as a confidant in adult matters, and the others, like the right of privacy of telephone conversations, are also negative. A parent, reading this list, is liable to take these rights as entitling children to veto powers. The interests to be protected would be far more effectively safeguarded by a list of things that parents are obliged not to do, such as a duty not to ask the child or put him in a position that he feels obliged to choose sides, or a duty not to interfere with the child’s privacy. The child is put at the focus, not the periphery, and the parents are told clearly what they should or should not do.

Granting a child rights sets up an adversarial relationship between the child and his parents. Rights imply a legal, plaintiff-defendant relationship, which runs counter to the language of family life and child development. For

example, an adolescent will assert his “liberty” right to decide for himself whether to do homework or chores, and what time to come home. The legal ramifications are impossible; instead, the adolescent, alongside his parents’ duty to hear him out and take his views into account, has a duty to act as they instruct him.

An unscrupulous parent may tell the child to make demands on the other parent as the child’s right, and when that parent refuses for good reasons to do with the child’s welfare, turn the child against that parent. A child needs to feel that he can discuss things with his parents, not that he has demands of them arising from his rights. The inadequacy of the existing construct of child–parent relationships is demonstrated by Willemsen and Marcel (1996), who say that there is no alternative to manufacturing new rights.

Existing law is often written in terms of competing rights of adults and, depending on the jurisdiction, either ignores the interests and rights of children—especially those under three-years-old—or subordinates the interests of children to those of adults. Judges who are knowledgeable about young children and their relationships are thus unable to apply this knowledge in their decisions. That is, they are unable to apply it unless they identify a new right, that is, the right of a child to maintain the nurturing, care-providing relationships they have developed. The cases of contested adoption, disputes over post-divorce housing for very young children, and debates about foster care policy bring this controversy between parent’s rights and the child’s need for nurture into focus. Something like a “right to nurture” or “right to continued family relationships” must soon be identified.

Zafran (2010; see also Minow & Shanley, 1996, and Dwyer, 2006) points to three main criticisms of the rights model as applied to child–parent relations: the problems of applying the criteria of liberal rights discourse to the discussion of legal-family issues, the intrinsic wide range and complicated nature of family issues and the emotional elements that they imply, and the absence of moral voices, which are inherent in family issues, from liberal rights discourse. She proposes a mixed model of relational rights, combining the rights discourse with the doctrine of the ethic of care, which emphasizes the elements of vulnerability and dependence in interpersonal relations, as against the individualistic nature of rights discourse (Gilligan, 1982; Tronto, 1993). It is submitted that the relational rights concept enables values such as the welfare of the child to be placed at the center of the debate, as it emphasizes the relationships within a family that are so critical to a child’s healthy development.

The ethic of care is entirely consistent with the parental responsibilities paradigm being advanced here. However, it is unclear why it needs to be engrafted on to a discourse of rights. The defects of the rights discourse, especially in relation to children and their parents—their apparent

absoluteness, their positioning of the child in an adversarial position against the parents, and especially the incapacity of the child to understand and enforce his rights against the parents—are in no way addressed by the idea of relational rights.

In a book I am writing, tentatively entitled *Why Rights Are Wrong, And What To Do About Them*, I point to the dangers of the process of inventing rights by courts and international institutions, which has been going on for several decades, often with no constitutional or other juridical basis.

Custody and visitation

“Custody” as a legal concept has its origins in property law and criminal law. A custodian has in his possession property belonging to another, but not his own property.

Several notions need to be dispelled that have no foundation in fact: that a child belongs to his parents like their other possessions over which they may exercise exclusive rights. At most, he is theirs only on a temporary loan, as it were. There needs to be a shift from stressing the importance of parental rights to an emphasis on parental duties; and from the child being regarded as chattel to a recognition of his right to loving care (Kellmer Pringle, 1980). I would use the word “entitlement” rather than “right.”

Thus, the idea of custody of one’s own child is untenable. The word custody also implies deprivation of liberty: imprisonment (“remanded in custody,” “escaping from lawful custody”) or internment pending deportation. In the practical sense, the word custody is taken to imply that the child’s only home is that of the custodial parent, and that the custodial parent has the power to make all decisions in relation to the child, without involving the other parent. These perceptions, even though they are inaccurate, are what make custody worth fighting for.

“Visitation” relates to going to the zoo or someone’s home, or visiting someone who is imprisoned or hospitalized, and “access arrangements” usually refer to getting into someone’s property. Experience shows that confusion can arise here also in the perceptions of the parents and the children. The concept of one of the parents being a visitor, or being “allowed” to spend time with the child, rather than doing what is natural—spending time with the child—assigns inferior status to that parent, in the eyes of the child and of the custodial parent.

The words used have the ability to distort the natural situation, which is that the child spends time with each of the parents, in that parent’s house, which is also the child’s home when he is there. This natural situation needs to be reflected in appropriate words.

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” or “equal time parenting”; and in some cases the court may order “parallel parenting” (Shaffer, 2007a, 2007b, 2014) where the parents care for their children without contact with each other). Each of these terms has been shown to cause difficulties.

For example, one of the conditions for joint custody is said to be good communication between the parents. However, as the Family Court in the Krayot, Israel, pointed out, one of the parties may try to sabotage the possibility of joint custody by refusing to be in contact with the other parent, to the children’s detriment. This is often the mother, who insists on sole custody for financial reasons, since with joint custody the father may expect to be ordered to pay less child support.

Is it conceivable that a parent who does not want joint custody should sabotage communications, offend by damaging the child’s welfare, and also be rewarded (by being granted sole custody)? (*Anon. v. Anon.*, 2010, p. 15)

The aforementioned quote shows that the idea of joint custody is of little help; the parents are still likely to fight over the question of whether there will be joint custody or sole custody, with all that the dispute entails for the children—uncertainty and confusion, loyalty conflicts, susceptibility to manipulation, and the like—and the possibility that one or other of the parents will resent the result and try to undermine it. The parents need to be convinced that their parental responsibilities include the duty to cooperate, and that this requires communication. If necessary they may need to be ordered to do so by the court, and warned that if they fail to do so and the children suffer, their parental responsibilities may be removed by the state and transferred to others.

Joint custody, joint physical custody, and like terms have led in turn to disputes as to whether they imply equal time with each parent and whether “joint legal custody” is possible when the child lives with one parent on a different continent from the other parent (*Costa v. Costa*, 2015). For this reason, some courts in Israel have preferred to state only that the child will be with the father on certain days and with the mother on others, and avoid the use of the term custody altogether, adding provisions as to other parental responsibilities. In other places, the court gives a “residence order” and a “contact order,” but these are in fact synonymous with custody and visitation orders: “a distinction without a difference” (*Lewis v. Averay*, 1972).

Parenting plans

In many jurisdictions the parents are encouraged to draw up a parenting plan, which should contain all the details necessary for providing the needs of the

child. However, it appears that alongside the welcome desire that parents discuss, rather than litigate, the arrangements for their children, the parenting plan itself may allocate legal custody, and speaks in rights language.

The phrase “parenting time,” in itself, is inadequate and misleading. 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.

Parental responsibility

In other jurisdictions, realization of the faults of rights talk, and of custody and visitation terminology, has led to the adoption of the term “parental responsibility.” In England, it appears that the grant of parental responsibility does not, in fact, impose responsibilities on the person concerned. It enables him to insist on being involved in certain decisions regarding the child, but not the duty to take part in the child’s upbringing.

However, the change does not constitute a real change in attitudes; as was pointed out in *Children’s Dispute Resolution: The Israel Experience* (Marcus, 2016b):

...the proposed change (to parental responsibility) will not benefit the child, so long as the underlying assumption is that the parents have to litigate their differences in relation to their responsibilities and they need to fight about one parent’s “right” or suitability to exercise responsibilities at the expense of the other. Paraphrasing George Orwell in *Animal Farm*: Both parents are equally responsible, but one is more responsible (or should have more responsibilities) than the other (p. 170).

In note 5 to that article (p. 170), I point out that the word “responsible” has two meanings: responsible, in the sense of having a responsibility, or an obligation, to do something; and responsible, in the sense of being reliable and trustworthy to do something. As a result, one can envisage that parties will each allege that the other is an irresponsible person and bring up incidents of alleged irresponsibility in the past, many or most of which will have nothing to do with the children. However, the underlying defect is that each parent will want to be the parent who has parental responsibility, and we are no better off than when they were litigating about custody.

What about the child?

One defect shared by all of these terms—parents’ rights, children’s rights, custody, access, visitation, joint custody, parallel parenting, residence orders, contact orders, and the like—is that they tell us little or nothing about the details of the care of the child once the judgment is given or the term is agreed to be included in an agreement. The child has no need for a decision as to whether physical custody is to be joint, shared, or sole. He needs to know where he is to sleep each night, who is going to collect him from school each

day and at what time, and where he will spend holidays and weekends. The parents and their legal advisers often waste huge amounts of time and resources on arguing about the terminology. Social workers and mental health professionals have to concern themselves with the nuances of this or that type of custody. Their time would be more usefully spent on fleshing out the details: which parent has responsibility for each detail of the child's needs. I expand on this in Part 2.

Children as the victims of adversarial proceedings

One of the most damaging effects on children with the use of terms such as “custody” is that they imply that one of the parents is better than the other and, for that reason, preferred over the other. Because neither parent wants to be labeled as the inferior, less competent, less loving parent, the parents are forced, by the terminology used by the legal system, to see each other as rivals for the title of residential, or responsible, or custodial parent, with the other parent having only visitation or contact.

This framework causes litigation, encouraging parents to think in adversarial and confrontational, instead of collaborative, terms regarding their children. Frankel (1980) says:

...the route of a lawsuit is marked by a running battle all the way,...many of us trained in the learned profession of the law spend much of our time subverting the law by blocking the way to the truth ... The key point at every stage, which will bear recalling from time to time, is that the single uniformity is always adversariness. There are other goods, but the greatest is winning. There are other evils, but scarcely any worse than losing (p. 12).

Because of the language used, 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 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.

Recent research shows that mothers who are non-custodial—that is, whose children are in the custody of the father or placed with foster parents or children's homes—suffer from guilt, and the stigma of being seen as inadequate or bad mothers, and that this affects their relationship with their children. On the other hand, many men who are noncustodial gradually distance themselves from their children, portraying themselves as having “lost” the children or having been deprived of them.

Far from looking honestly at his own failings and his partner's strengths, each parent sees himself as being required to prove that he is a perfect parent in every way, and that the other parent is incompetent and bad and therefore

are dangerous to the child. In preparation for and during the litigation, the parents expend their financial resources, and more importantly for the child, their time and emotional energy, on the conflict, precisely at the time when the child is, because of the separation, most in need of both 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."

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 (Thapar, Harold, Rice, Langley, & O'Donovan, 2013).

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. They spend time and energy in seeking and equipping separate living quarters, in meeting with advisers and counselors, in hiring and meeting with lawyers, in appearing in court, and also in working, all of which require time. Parents also feel they have less money to provide for the children; even where legal fees are paid by the state, the need to take time off work for consultations and court hearings and meetings with welfare officers and experts, reduce earnings, or use up holiday allowances. Many children suffer as a result. For example, Finkelhor (2013) 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.

These difficulties continue during an extended period, from the initial breakdown until resolution, whether by agreement or by court orders and often, as we have seen, thereafter. This makes the maintenance of good relations between the child and each parent a duty of the highest importance. A deeper discussion of this, among the other duties of parents, will be found in Part 2. There is ample research to show that the children of divorced couples have higher rates of stress and illness, psychological (e.g., increased incidence of ADHD attention deficit/hyperactivity disorder) (Larsson, Dilshad, Lichtenstein, & Barker, 2009), depression (Rende, Plomin, Reiss, & Hetherington, 1993), physical (Juang, Wang, Fuh, Lu, & Chen, 2004), than their peers in intact families (Abse, 2016). The findings relate to the entire span of time, from the beginnings of family disharmony until decades after the divorce.

A study of children following parental separation and divorce showed that 52% of boys and 48% of girls had significant adjustment problems

immediately after the proceedings and a year later, 62% of boys and 32% of girls were still maladjusted (Bream & Buchanan, 2001). Wallerstein, Lewis, and Blakeslee (2000) followed, over a period of 25 years, a cohort of children whose parents divorced, and found that even after nearly three decades many of the subjects were suffering from problems that could be directly related to the circumstances of the divorce, and which affected relationships with partners and the children of the people studied. As children, the subjects exhibited fear, anger, loneliness, feelings of being abandoned, of loss of the parents or one of them, feelings of responsibility for the divorce, feelings of responsibility for their siblings, and sometimes for their parents, and confusion about parents' new relationships.

As adolescents (and their adolescence started earlier and extended into the years of early adulthood), they found it hard to make and maintain relationships, particularly with members of the opposite sex, they had a fear of failure of relationships, and the relationships were short and superficial, and sexual experiences and use of drugs and alcohol started earlier and were more prevalent than in other peer groups.

But it's in adulthood that the children of divorce suffer the most. The impact of divorce hits them most cruelly when they go in search of love, sexual intimacy and commitment. Their lack of inner images of a man and a woman in a stable relationship and their memories of their parents' failure to sustain the marriage badly hobbles their search ... (Wallerstein et al., 2000, p. 299).

In addition, the children of divorced couples may have difficulty raising their own children, because of fear of failure, the lack of positive role models for parenting, inability to protect their children and inability to cope with the inevitable challenges of marriage and parenthood (Wallerstein et al., 2000, p. 301). There are also indications that parents' divorce may cause the attachment of the children of divorce with their own children to be unstable and inadequate (Levi-Schiff (n.d.)).

It's true that fighting between parents, whether it takes place in the courtroom or the bedroom, is harmful to the children ... It offers a frightening model of adult behavior and it seriously erodes the quality of any parent-child relationship. (Wallerstein et al., 2000, p. 270)

The decision to separate requires that the parents seek and obtain advice together, to assess the specific child's individual needs, and the parenting strengths and weaknesses of each of them, in order better to deal with the child's needs when separated from the other parent. Instead of competing for the title of custodial or residential parent, they should be concentrating on the daily activities and decisions that are often much more important to children (Greenberg, Deutsch, Gould-Saltman, & Cunningham, 2013).

The need for the paradigm of parental responsibilities

Children's needs, parents' responsibilities

What is required is a change of viewpoint, from that of the parents to that of the child. The existing paradigms encourage fighting over custody and visitation.

“The courts ... (c)ought between the rights of parents and protecting the interests of children ... have tilted heavily towards parents” (Wallerstein et al., 2000, p. 302). Focusing on the needs of the child, instead of the status and rights of the parents, will achieve the necessary paradigm shift, and bring about substantial alterations in the way judges and lawyers, therapists and members of allied professions, and the general public—parents and children alike—view parent–child relationships.

As Mr. Justice Hayden put it so trenchantly in *J.B. v. K.S.* (2015):

I do so to return him (the child E, *P.M.*) to his proper place in this process, namely at the centre of it, but also to signal to the parents that which they have both, in their different ways and, despite their strengths, at times sadly forgotten. This case is not about them, not about their past, not about their relationship, it is all about E, his needs, his future happiness and the realization of his potential (para. 4).

There is also a moral element in the proposed paradigm. Leong Wai Kum, professor of Law at the National University of Singapore, puts it thus:

Family law regulates, among other things, two relationships that are extremely difficult to regulate due to their characteristics of being of long duration, delicate in quality and dynamic as the parties grow ... The right message at all times may well be to convey society's expectations and hopes... Of parents, the expectation is that he or she views the relationship of the child as his or her parental responsibility. By this, a parent is expected to view the other as an equal in parenting, as someone with whom he or she should always co-operate and that their joint parenting should be in pursuit of the welfare of their child. (Leong, 2016, pp. 364–365)

All those children who are affected by the breakup of the relationship between parents will benefit from the change in terminology. A paradigm of parental responsibilities, which includes expanding the definition of those having such responsibilities, requires such no judicial inventions. Shulman (2014), in *The Constitutional Parent: Rights, Responsibilities and the Enfranchisement of the Child* shows that:

“ ... historically, the authority of the parent has been treated as a sacred trust,

“that

“ ... the emergence of a rights orientation has threatened to uncouple the traditional linkage of rights and responsibilities, subordinating the best interests of the child to parental preferences”,

and that

“... a renewed reliance on the trust model of parent-child relations would better serve the developing personhood of the child and the civil society to which he or she belongs” (p. 50).

I would go further and state that the trust consists of responsibilities and duties of parents to their children, and of children, from an appropriate age, to their parents; and that the discourse of rights has no place in parent-child relations, not in the determination of the way in which parents behave towards each other or towards their children, and certainly not in the area of conception, childbirth, and upbringing. As Shulman (2014) himself admits,

“A collection of rights-bearing individuals is not the likeliest of recipes for family stability” (p. 51).

The parent has responsibilities to the child. These include the duty to consider the child’s views and to take them into account, giving them appropriate weight, but the ultimate decision is with the parents. Framing this aspect of the relationship as the parents’ responsibilities avoids any suggestion of oppression, since the direction is not focused on the parent but on the child: not authority **over** the child but responsibilities **to** the child.

The paradigm of parental responsibilities is designed to cut down to a minimum the amount of fighting. The vast majority of the suffering, of the divorcing couple, their children and their grandchildren, can be minimized if the concepts of custody and rights are replaced by a concept that requires parents to put the short and long-term interests of the children at the center of their attention.

Doing away with the concept of custody and 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 the child and what he needs, the process can, with appropriate dispute resolution techniques applied, turn into a reasonable debate, instead of a vociferous argument. The child does not need rights for this to happen. Judges and lawyers and other practitioners can reframe the discussion in terms of responsibilities, obligations, and duties (Marcus, 2009, 2013). 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. Basing itself on the principles of Jewish Law, the Rabbinical Court in Ashdod put this point bluntly:

“Neither of the parents has a right to custody, this is only a duty, and the court will take no account of what is convenient for them” (*Anon. v. Anon.*, 2015, p. 8).

As we have seen, the newer terms, that is, parental responsibility, residential parents, joint custody, and the like, are also inadequate, especially if they are used together with “rights” of the parents, and the transition from custody, 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 that he, and not the other parent, should be “awarded” parental responsibility.

Getting rid of the old

In the 1970s Mia Kellmer Pringle said this:

The myth of the blood tie should be replaced by the concept of responsible and informed parenthood. The ability and willingness to undertake its responsibilities are neither dependent on, nor necessarily consequent upon, biological parenthood. Rather it is the unconditional desire to provide a caring home, together with the emotional maturity to do so, which are the hallmarks of good parenting (Kellmer Pringle, 1980, p. 157).

The move toward recognition of the need that both parents take part in the child’s future, and the concept of parental responsibility, are reflected also in the title of the Hague Convention on parental responsibility and protection of children.

However, Article 3(b) of the convention, 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” We see that the purported shift away from the rights-custody-visitation paradigm is far from complete, with all that this entails for the continuation of adversarial proceedings regarding the future of the child (Marcus, 2009, 2013).

The reason for this is a failure to understand that parenting consists of many different tasks, not only deciding where the child will live. One parent may be better able than the other, generally or at specific times, to fulfill this or that task. In many cases (for example, education and health care) the parents hand over particular tasks, in part, to persons and agencies who are not biological family members, and the parents’ role is to select who will carry out these tasks and supervise their performance.

Regardless of the circumstances of his conception and birth, 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 all the parental tasks and responsibilities. Some of these will be carried out personally, by one or both parents, and other tasks will be carried out by teachers and medical professionals and

the like (where the parents' tasks are to decide on the identity of the professional and give instructions and supervise the care given). This more sophisticated terminology fully reflects the relationship between the child and his parents.

Parental responsibilities consist not of rights, but of all the obligations and duties that 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.

Who has parental responsibilities?

Not a matter of status

Joint responsibilities for parenting are not connected with the marital status of the parents: it is irrelevant to the child if they are married or never married or divorced, living together or apart. While issues of legal parentage (and, in some jurisdictions, legitimacy) are important for some issues, such as succession to property on the death of relatives, the focus of this proposal is entirely different: establishing a framework for ensuring that a minor child is properly looked after by those who are responsible to do so. Looked at in this way, legal definitions of legitimacy and bastardy are irrelevant to the concept of parental responsibilities, since supplying the child's needs by the most appropriate adults becomes the sole matter for decision. The standard should be "good enough" (Winnicott, 1973).

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. Parents do this by caring for the child and by making informed decisions where necessary.

Biological parents

All biological 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, as long as the parents perform their parenting tasks adequately. In this connection, the Court of Appeal of New York recognized the inappropriateness of the terminology of rights:

...neither decisional rule nor statute can displace a fit parent because someone else could do a "better job" of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their "rights" by

surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance. These “rights” are not so much “rights”, but responsibilities which reflect the view, noted earlier, that, except when disqualified or displaced by extraordinary circumstances, parents are generally best qualified to care for their own children and therefore entitled to do so (*Bennett v. Jeffreys*, 1976, p. 548).

I will develop this issue in Part 2 of this article, in relation to child protection proceedings.

In fact, parental responsibilities start before conception. A couple who decide to have relations that might (despite precautions) lead to the birth of a child need to take into account the possibility that they will be responsible for a human life. Sawhill (2014) writes:

“We also need a new ethic of responsible parenthood. That means not having a child before you and your partner really want one and have thought about how you will care for that child” (p. SR1).

Once the child is conceived, the parents have responsibilities to the embryo and the fetus. These responsibilities include prevention of harm to the baby to be born. Here, also, the language of rights is doomed to absurdity: the debate regarding abortion often uses the right to life against the right to choose, where the issue is ethical and philosophical, not only legal. The paradigm of responsibilities to the fetus has the potential to resolve some of the dilemmas, but is certainly less given to emotional (and sometimes violent) excesses than a dialogue which sets the mother against her unborn child. The individuals who brought about the conception of the child need to agree as to the way in which the child will be brought up and what will be their involvement; whether they will live together or apart; how their child will be educated; and so on.

Clearly the primary responsibility to the child is upon any living person with direct biological parenthood. This is uncontroversial, and exists without any rights attaching to the child or the parents, and in any case where one of the biological parents is incapable of providing for a specific need of the child, the other parent bears the responsibility to do so.

Responsibilities for a child are not a matter for contracts or status. Still less are they a right of the adult, which the adult can waive or ignore at will. The existence of any biological connection with the child must carry parental responsibilities; in other words, any act directed to procreation imposes responsibilities for, and towards, the child to be born. This represents accurately the provisions of sections 15 and 17 of the Israeli Capacity and Guardianship Law 5722–1962, which provide 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. In *XXXXX v. XXXXXX* (2015), the Family Court in Hadera, Israel, found that a child born by *in vitro* fertilization (IVF) from sperm from a donor, who had no romantic or other relationship with the mother, was entitled to child

support despite a contract in which the mother agreed that the donor would have no parental duties. However, the provisions of s. 2(2) of the Children Act 1989 in England and Wales, which provides that where the father and mother were not married, the father has to acquire parental responsibility. I suggest that this does not properly have regard to the needs of the child, which have to be fulfilled by the parents, regardless of the parents' legal status *inter se*.

Gender

Adoption of the proposed new paradigm should also, once and for all, put an end to the intrusion of assumptions and generalizations based 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 otherwise, will be irrelevant. The discussion will relate to each specific child and each of the parenting tasks, and the ability of each of the parents to carry out that specific task, including sharing it.

"Losing" the 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.

Assisted reproductive technologies

The paradigm of parental responsibilities requires analysis of the situation where a child is born using gametes donated by a person who is not related to the child. For example, in the classical case of anonymous sperm donation, the legal situation, if founded only on rights, is unclear, to say the least. What if sperm is donated and the woman dies in childbirth? If the sperm donor is anonymous, or by contract exempts himself of responsibility, who brings up the child: the state or the inheritors of the woman's estate? What if the child is born with an inherited disease or chromosomal aberration: should not the sperm or ovum donor, or the bank, be required to inform anyone else who has received a donation from that donor about the risk? What if the child needs a tissue transplant to save his life: it is known that first degree relatives are most likely to have matching tissues, but if the donor is unknown or exempt, must the child suffer or die?

As the number of children born as a result of Assisted Reproductive Technology (ART) increases, legal systems must try to decide on the proper way to identify the legal relations between the individuals involved: the child, the donor(s) of gametes, and the adults who are bringing up the child. For example, Cahn (2012), in her article *The New Kinship*, proposes recognition

of “donor conceived family networks” as a basis to resolve these legal issues, but admits that this would require adaptation of family law and even constitutional law, at least in the United States. This requires that every state adopt an approach to families of this kind and legislate for the precise legal relationships. This may take years, and the children cannot wait for clarification by legislation. Adopting a paradigm of parental responsibilities, which includes establishing the needs of the specific child and the persons who are obligated and able to provide those needs, does not necessarily require great legislative or constitutional changes. Indeed, in those jurisdictions where the courts have wide discretion to do what is needed in the interests of the child, appropriate arrangements can be made in any given situation.

There are many 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 any claim for child support, and the donor may waive any involvement in the life of the child). However, even in this case, under the doctrine of parental responsibilities, the donor might remain responsible at least to the extent that if the child becomes ill and needs a donation of an organ; the biological father should, in this situation, be compelled to cooperate by providing a sample as first degree relatives are more likely to provide a match, and because the mother’s waiver of the father’s responsibilities is clearly against the best interests of the child. As a result, any such agreement might be declared void, as being contrary to public policy.

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 between each other regarding their liabilities arising out of the creation of the child and the cost of performing those responsibilities, for example, for reimbursement of child support payments, but each remains in a relationship of direct obligation to provide that all the child’s needs are satisfied.

The role of the court

Even when parents separate, their immunity from interference remains intact, subject only, in some jurisdictions, to submission of any agreement to approval by the court. The doctrine of parental responsibilities, including the autonomy of the parents subject to the duty of the state to ensure the welfare of the child, indicates that the approval of the court should be mandatory, 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). However, in the event of disagreement, the parents, by referring their dispute to a third party—the court—give up their autonomy, at least in regard to those issues on which they cannot agree, and relinquish their

parental responsibilities to the court. This should rightly be taken by them (or at least one of them) to be an admission of their failure to resolve matters in the interests of their children on their own.

In such a case, the court will stand in the shoes of the parents and 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. The family court acts as *parens patriae*, literally the parent of the fatherland. This doctrine was well established by the seventeenth century (Curtis 1976), to describe the monarchs of England as having the power and duty to see to the welfare of those who could not look after themselves in a situation of conflict or in everyday life, and was applied first to people of unsound mind and the handicapped. In its current manifestation it is frequently used by courts to protect children in a situation where their interests are not being safeguarded by those whose responsibility it is to do so. A similar idea underlies the role of the Rabbinical courts to intervene on behalf of those who are in a weak position vis-à-vis others, based on the verse in Psalms (LXVIII 6): “A father of the fatherless and a judge of the widows, is G-d in His holy habitation.” According to Jewish tradition, the name for G-d, Elokim, also applies to judges; the Sovereign is represented in many aspects by the judicial function, in as much as the *parens patriae* power belongs to the state and is administered by the courts. A child whose parents are so immersed in their own suffering and fighting is neglected and may be effectively orphaned by the litigation; this is the point at which the court, representing the state, has to step in.

There are two aspects to the *parens patriae* power, which parallel the responsibilities of the parents. On the one hand, parents have to protect their children from harm. Thus, the court is duty-bound to make sure that the children are affected as minimally as possible by litigation between their parents. On the other, parents have to act in the best interests of their children. As a result, the court must ensure that it has at its disposal all the information necessary, including input from the children who are mature enough to express an opinion and may be affected by the conduct of the proceedings and not only by any orders to be made. Court procedural rules can reduce the exposure of children to the adversarial process.

For example, the statement of claim, especially in child support proceedings, used to be framed in such a way that the child, represented by the mother, was the plaintiff against the father as defendant. As long as child support was seen as a right of the child, this was reasonable. However, many fathers saw the child, in his role as a plaintiff against him, encouraged by the mother, as becoming his enemy. Any defense the father might raise, as to the unreasonableness of the amount demanded by the mother for child support, might be seen by the child as an expression of the father's callousness toward the child. To prevent this, the Civil Procedure Rules (CPR) in Israel were amended (Rule 258 E (a), Form

26A1, Civil Procedure Rules 1984, (Amendment No. 3) 2014), such that the plaintiff is now the mother alone, the father is the defendant, and the children appear in a separate line: “And in the matter of the children.” In fact, this represents the paradigm of parental responsibilities. As I show in Part 2, both parents have to provide the child’s needs, wherever he may be at any given time. The laws of the state in which he lives determine what proportion is paid by the mother and what by the father, but the child is not possessed of a right, that is, his entitlement is that the parents fulfill their obligations toward him.

The court may be empowered to prevent the parents from subjecting the children to examination by experts until the court is satisfied that there is no alternative (Section 8, Family Courts Law 1995 (Israel)).

There is nothing paternalistic, in its negative sense, in these examples of the use of the *parens patriae* powers. On the contrary, the procedures and the judicial discretion are directed to treating the children, not as parties to the litigation but as persons in their own right whose interests are liable to be affected by the behavior of the parents (and their lawyers) in the proceedings, and not only by the outcome. For this reason, the court may appoint counsel for the child, or a special (nonlawyer) advocate. The court may, after hearing submissions from the parties, be empowered to refuse to hear frivolous proceedings whose only object is to continue the battle between the parents, with no perceptible benefit to the children. For example, the court struck out the application of a father to change visitation arrangements where the father in his pleadings failed to show that the existing arrangements were harming the children, and where allowing the proceedings to go forward would subject the children to an investigation by a welfare officer which would unnecessarily disrupt their regular routine and infringe on their privacy (*A. E. v. N. E.*, 2016). The court must make arrangements for the child to be invited to express his needs and views about the situation, before trained and experienced workers, and to have the opportunity to speak to the judge, without being subjected to giving testimony in court.

The professionals involved, social workers, experts, and judges, need to be trained how to speak to the child and to assign the appropriate reliance on what the child says. The *parens patriae* power is also the basis for child protection statutes and jurisdiction. The state is required to apply to the court in relation to exercise of its power and duty to protect children from abuse and neglect; however, here the state has a parallel duty not to interfere with the autonomy of the parents to bring up their children as they see fit, except when their acts or omissions are deemed to be causing suffering to the children.

Conclusions: The proposal

In this part, a new paradigm has been presented, which can reduce the damage caused to children by adversarial proceedings between their parents.

The widespread traditional discourse, which is based on the rights of the parents and on trying to resolve the inevitable conflicts on the basis of imprecise concepts, such as the best interests of the child or children's rights, is discussed and criticized, on the basis of psychological research and underlying legal principles. The damage to children is described. Under the new paradigm of parental responsibilities, the focus is shifted to the needs of the specific child and deciding who has the responsibility for answering those needs: the parents together, one of the parents, some other person or agency. In Part 2, I amplify the proposal by relating the new paradigm to the biological parents and to others, as well as to specific responsibilities.

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Ethical standards and informed consent

The article does not include any reference to work done on individuals or groups.

Author note

Philip Marcus served as a Judge of the Jerusalem Family Court from its opening in 1997 until his retirement in 2012. Since then he has lectured on Family Law, including Child Law, Elder Law, and on the law relating to people with disabilities and gives courses on Professional Ethics. He is a consultant to the Knesset Constitution, Legislation and Law Committee, and on the team of lecturers for Mashav – Israel's Agency for International Cooperation.

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