



Hauser Global Law School Program

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Shahar Lifshitz^{•**}

I. Introduction

Scholars and teachers of family law tend to divide this field into two main subcategories: spousal law and parent and child law.¹

Spousal law regulates the legal relationship between spouses. It includes, *inter alia*, marriage law (for example, who may marry whom); the law of the ongoing marriage, *i.e.* the mutual rights and duties of the spouses; divorce law; cohabitant law; spousal support and property relations between spouses.

Parent and child law deals with the relationship between parents and children. It includes *inter alia*: the legal definition of parents; the legal rights, duties and responsibilities of parents to their children (*i.e.* the duty of the parent to support his child); the boundaries of the State's intervention in the parent-child relationship; custody and adoption law. In general, parent-child law focuses on the parent-child relationship and consequently does not directly regulate the relationship of the parents *inter se*. Nonetheless, important components of parent-child law (for example, support law, custody law and visitation law) do deal with the division of the legal rights, duties and responsibilities of the parents. In this respect, beyond regulating parent-child relationships, parent-child law also regulates the relationship between the parents themselves (called here - joint parents law).

Among modern lawmakers and scholars the prevailing trend is to distinguish between the ideologies that guide or ought to guide the regulation of the spousal relationship of the parents, on one hand, and the ideologies that guide the regulation of parenthood, including joint parenthood, on the other.

In the spousal context, liberal (individualist and private) approaches guide legal regulation. Consequently, the law is expected to respect each partner's freedom of contract and the right of

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¹ This distinction is well-known in legal literature. For example, in the famous Blackstone Commentaries on the Common Law, separate chapters are devoted to husband and wife law. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, (A Facsimile of the First Edition of 1765-1769, Chicago, 1979) Parent-child law as a distinct category can also be found in modern family law "text-books", *see, for example*, Stephen M. Cretney et al., PRINCIPLES OF FAMILY LAW (7th ed., 2002) Part V. *See also* L. J. Harris & L.E. Teitelbaum, FAMILY LAW (2nd ed, 2000) Part III. *See also* Pinhas Shiman, FAMILY LAW IN ISRAEL (Vol. 2 1989) (in Hebrew).

each partner to exit unilaterally from spousal ties and obligations. In the parenthood context, the best interest of the child is the primary consideration. The terminology of parental responsibility has gradually replaced the concept of parental rights and consequently, in many cases, the parents' needs, will and interests including their freedom of contract and their right to exit are subordinate to the best interest of the child.

This article calls for a rethinking of the modern boundaries between the regulation of spousal relations and the regulation of parenthood, including joint parenthood. My main argument is that important legal rules that are currently at the core of spousal law possess a dramatic influence on children's lives. Thus, I will critique the current legal regulation that limits the influence of the best interests of the child principle to the regime of law that is currently classified as parent law but almost completely ignores its application in regimes currently classified as spousal law.

As noted, this article supports broadening the influence of the best-interest principle beyond its traditional territory (namely, parent-child law). However, we cannot deny that there must be a substantial difference between the ordinary role of the best interest of the child in the context of parenthood law (for example, custody law) and its role in the context of spousal law (for example, divorce law). In the context of parenthood law, the best interest of the child is a primary or even a paramount consideration which overwhelms the parents' needs and will. In contrast, in the context of spousal law, the parents' rights must also be accorded significant weight. Consequently, in this article we shall try to find the proper balance between the rights of the parents and the best interests of the children in different areas of spousal law.

Apart from the theoretical discussion concerning the ideal law, we shall also discuss the current positive law (state laws and international laws, especially the Convention on the Rights of the Child). In this context we will criticize legal arrangements that limit the influence of the best interest of the child principle to the traditional territory of parenthood law. Nonetheless, in the spirit of Dworkin's aspiration to present the existing law in its best light,² I will also try to suggest interpretations of the existing law that allow us to overcome the current dichotomy between spousal law and parenthood law. In this context, a unique attention dedicates to the phrase **actions concerning children**, which define in which law's area the best interest of the child should be a primary consideration. We oppose the current rigid dichotomy between children – parent's law which considered to be **actions concerning children** in which the best interest of the child is the primary, if not the only consideration, to spousal law which is not considered **actions concerning children** and therefore the interest of the child, is almost neglected. We suggest replacing this rigid distinction with flexible formulation, which tries to identify the best interest of the child in different aspect of life and to balance this interest with the interests of other parties of the family.

In the final section, we return to a theoretical analysis of the tension that exists between parental responsibilities and spouse's rights. We conclude by proposing a possible application of the framework developed in this article to the broader tension that exists between rights and responsibilities in contemporary society.

² See Ronald Dworkin, LAW'S EMPIRE (1986) 52-53.

II. Historical Background: The Common Ethos of Traditional Family Law

Traditionally, most Western countries based the legal regulation of the family on a public approach.³ This approach originated from feudal concepts which perceived the family as a patriarchal unit.⁴

Thus, the feudal world was subject to authorities organized in a hierarchical structure. The hierarchical structure was committed to the view of the whole of human society as one unit. In feudal society the individual was not viewed as an atomic entity but as part of a whole system of community and society; a society in which everyone had a predefined role and where all the participants were mutually committed. The second component of feudal thinking held that in feudal society the group and not the individual formed the basic entity. Consequently, feudal society was subdivided into groups and subgroups, each of which was perceived as a hierarchal unit organized in such a way as to form a microcosm of the larger society.

The feudal family integrated well into the structure of society.⁵ The family formed a hierarchal unit. At the head of the family stood the father and subordinated to him were his wife and children. Family members had well defined roles and well defined obligations with respect to each other.

Historians usually tag the 11th – 13th centuries as the second feudal period in the history of Western Europe. In the early 14th century a gradual disintegration of the feudal structure began and with the collapse of the feudal configuration a general social transformation took place. This transformation is eloquently presented by Lord Main in his famous depiction of the history of social evolution: “The individual is steadily substituted for the family as the unit of which civil laws take account.”⁶

However, despite these shifts, for a long time the family continued to be perceived as a unit rather than as a collection of individuals and the individual members of the family were subjugated to the family.

In the common law these issues are clearly expressed in the doctrines of unity and merger which dominate spousal law. Thus, according to the common law, marriage causes the husband and wife to be viewed merging into one unit. As a result of the union, the legal personality of the

³ See S. Lifshitz, CONTRACTUAL REGULATION OF SPOUSAL RELATIONSHIP IN CIVIL LAW (thesis toward a Ph.D. degree, Bar Ilan, 5762) Part I Ch. 2-3.

⁴ See Mark Bloch, FEUDAL SOCIETY (London, 2nd ed., 1965); see also JANET L. DOGLIN, “The Family in Transition: From Griswold to Eisenstadt and Beyond”, 82 GEO. L. J. (1994) 1519, 1524 *et seq.*; Frances E. Olsen, “The Family and the Market: A Study of Ideology and Legal Reform”, 96 HARV. L. REV. (1983) 1497, 1513-1514.

⁵ See Doglin, *ibid*, *ibid*; Olsen, *ibid*, at 1516; Robert Fossier, “The Feudal Era (Eleventh-Thirteenth Century)” in Andre Burguiere et al. (eds.) HISTORY OF THE FAMILY, (Vol. I, Paris, 1986, Trans. Sarah H. Tenison, Cambridge, 1996) 407; Bloch, *supra* note 4 at 123-142. But *cf.* Lawrence Stone, THE FAMILY SEX AND MARRIAGE IN ENGLAND 1500-1800 (abridged edition, New York, 1979). In contrast to scholars who emphasize the family as a closed unit, Stone emphasizes the vulnerability of a family to external influences in the Middle Ages. Stone describes the family during this period as an “open lineage family”.

⁶ See Henry S. Maine, ANCIENT LAW, ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (4th America ed. from 10 London ed. New York, 1906) 1.

wife merges with that of her husband and consequently she loses her legal status, her control over her assets and most of her legal capacity. The law relates to the consolidated unit.⁷ The unitary nature of Western spousal law is manifested in the severe restrictions imposed on divorce as well as the fact that even following dissolution of marriage the link between the parties is not completely severed as the husband's obligation to pay alimony to his wife continues to apply.⁸

The family hierarchical structure has also influenced the evolution of parent-child law. Thus, parents possessed quasi-property rights in their children.⁹ These rights enabled the parents to dominate their children's lives.¹⁰ Consequently, it was clear that children could not lead their lives as autonomous beings. On the contrary, children were expected to obey their parents¹¹ and indeed the ability of the parents to shape their children's lives continued even when they matured.¹²

In the beginning of the 19th century, spousal laws were influenced by a process favoring individualism. This trend was most prominently expressed in legislation enacted in the United

⁷ This is how Blackstone describes the theory:

"By marriage the husband and wife are 'one person in law' that is the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband". See Blackstone supra note 1, at 430.

There is a large volume of literature which describes the doctrine and its ramifications for women. For a discussion of this doctrine in the context of English law, *see, for example*, Brenda Hoggett, "Ends and Means: The Utility of Marriage as a Legal Institution" in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES (Toronto, John M Elkelaar & Stanford N Kaats eds., 1980) 94, 195, and the references in note 8. For the doctrine in the United States, *see* Hendrik Hartog, MAN AND WIFE IN AMERICA - A HISTORY (Cambridge, 2000) 103-107 & 115-117.

⁸ *See* Lawrence Stone, ROAD TO DIVORCE - ENGLAND 1530-1987 (1990); John Witte, FROM SACRAMENT TO CONTRACT: MARRIAGE RELIGION AND LAW IN WESTERN TRADITION (Louisville, 1997).

⁹ *See* Mary A. Mason, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS (Cambridge 1994); John M. Elkelaar, "The Emergence of Children's Rights" 6 OXFORD JOURNAL OF LEGAL STUDIES (1986) 161; Florence Kaslow, "Children who Sue Parents" in FAMILY IN TREATMENT: THE POST LAUNCHING YEARS 351-352.

¹⁰ *See* John Demos, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY (London, 1975) 100 *et seq.*; Jean L. Flandrin, FAMILIES IN FORMER TIMES: KINSHIP HOUSEHOLD AND SEXUALITY (Cambridge, Richard Southren, Trans., 1979) 131-140; Steven Ozment, WHEN FATHER RULED FAMILY: LIFE IN REFORMATION EUROPE (Cambridge, 1983). At the same time it should be noted that concurrently with the recognition of the father's control of his children, this period saw the beginning of the development – at least in Protestant countries – of ideas concerning parents' obligations towards their children particularly to support and educate them.

¹¹ *See* BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, (4th ed. 1770) Book I Ch. 15 sec. 2.

¹² Thus, for example, there were places in which family laws in the past vested parents with the right of veto over their offspring's choice of spouse, out of the need to protect family estates. Note that the legal requirement of parental involvement in the marriage ceremony persisted in various countries in Europe through to the end of the 18th century! *See, for example*, Mary A. Glendon, THE TRANSFORMATION OF FAMILY LAW: STATE LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (Chicago, 1989) 35-36. Even the Napoleonic Code of 1804 contained a requirement of parental consent for the marriage of young persons (men under the age of 25 and women under the age of 21) and the obligation to consult with parents prior to marriage even when the couple involved was above that age. For this, *see* Dagmar Coester-Waltjen & Michael Coester, "Formation of Marriage" in "Persons and the Family", INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Mary Ann Glendon ed., 1997, Vol. IV, Chap. 3) 16-17.

States and in the United Kingdom repealing the doctrine of merger between the respective legal personalities of the husband and wife. The repeal of the doctrine meant that married women could acquire and manage their own property, sue, be sued, enter into contracts and engage in business activities.¹³

In the field of parenthood law the trend towards individualism began even earlier, towards the end of the 18th century. In this period lawmakers understood that the child was not the property of his parents. Consequently, parents' rights were interpreted as a legal device for enabling the parents to act in the best interest of their children.¹⁴

However, despite these changes, until the beginning of the 20th century the public, unitary and non-egalitarian approach continued to characterize family law.¹⁵

It seems that the common ethos of spousal law and parenthood law was the basis for the coherent regulation of the family relationship. Thus, for example, the hierarchical approach created a familial role based on gender. These legal-familial roles influenced both spousal law and parent-child law. Consequently, in the context of spousal law the husband had the duty to provide for his wife while the wife had the duty to obey her husband. In the same spirit, in the context of parent-child law the husband had the duty to provide for his children while the mother had the duty to take care of the children at home and the law also preferred mothers in custody disputes.

The unit approach also had an impact on spousal law and parenthood law.

The influence of unit ideology on both areas of family law may be exemplified by the “non-intervention in the family” doctrine. Until recently, this doctrine dominated family law and reflected the perception of the family as an autonomous entity.¹⁶ The doctrine prevented individuals who made up the family unit (namely, spouses and children) from realizing their legal rights during the marriage even when these legal rights were violated by a stronger family member (as usually happened in cases of domestic violence). It is clear, therefore, that this doctrine reflected the preference accorded to the family unit over the rights of the individuals who constitute that unit.

¹³ For this development in the United States, *see*; Lawrence M. Friedman, A HISTORY OF AMERICAN LAW (New York, 2nd ed, 1985) 208-211; Carl N. Degler, AT ODDS - WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT (Oxford, 1980) 332 *et seq.* For similar developments in England *see* R. H. Graveson, “The Background of the Century” in A CENTURY OF FAMILY LAW 1857-1957 (London, R.H. Graveson & F. R. Crane eds., 1957) 1, 15-17.

¹⁴ John M. Eekelaar, “From ‘Privacy’ to the Leviathan State; The Case of the Child”, THE EUROPEAN FAMILY - THE FAMILY QUESTION IN THE EUROPEAN COMMUNITY, (Jacques Commaille & Francois de Singly eds., 1997) 205 (hereafter: Eekelaar - Leviathan); *see also* Kaslow, *supra* note 9, at 352-354; as well as John M. Eekelaar, “Families and Children: From Welfarism to Rights” in INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN (ed. McCrudden & Chambers)301, 323-332(hereafter: Eekelaar Welfarism).

¹⁵ *See* Witte, *supra* note 7 at 203-204; Harry Willekens, “Long Term Development in Family Law in Western Europe: An Explanation” in THE CHANGING FAMILY: FAMILY FORMS & FAMILY LAW (Oxford, John Eekelaar & Thandabantu Nhlapo eds., 1998) 47, 50-51; Lifshitz, *supra* note 3, chapter 3 section 7, all of whom emphasize the similarities between family laws in the beginning of the 20th century and family laws in the 16th century.

¹⁶ For this doctrine and its influence on spousal law and parenthood law, *see* Frances E. Olsen, “The Myth of State Intervention in The Family”, 18 U. MICH. J. L. REFORM 835 (1985); Frances E. Olsen, “The Family and the Market: A Study of Ideology and Legal Reform”, 96 HARV. L. REV. 1497 (1983); *see also* Eekelaar (Leviathan), *supra* note 14; Eekelaar (Welfarism), *supra* note 14 at 311-312 and Kaslow, *supra* note 9 at 353.

The unit approach also impacted both areas of family law in the context of the limitations imposed on individual rights to exit from family ties. Thus, divorce law dramatically limited the ability of the spouses to dissolve the marriage¹⁷ and in any event no divorce was absolute due to the economic obligation of the ex-husband to support his children¹⁸ and his ex-wife¹⁹ after the divorce.

The public aspect of family regulation also reflected the similarities between the regulation of the spousal relationship and the regulation of parenthood. Thus, both spousal law and parent-child law formed part of the public “agenda” aimed at channelling people into the framework of marriage.²⁰ In this context traditional spousal law denied any legal rights to unmarried cohabitants.²¹ Parent-child law also participated in the struggle to channel people into marriage and children born out of wedlock were considered to be illegitimate.²² It is clear, therefore, that according to traditional family law, beyond the influence exerted by the spousal relationship of the parents on their own mutual rights and obligations, the spousal relationship also exerted an influence on their definition as parents! The spousal relationship influenced the definition of a person as a parent in other respects as well: According to traditional law a legal presumption existed to the effect that the husband was the father of children born to his wife during the marriage. This presumption remained valid even when it was clear in the circumstance that the husband was not the biological father.²³

The “public attitude” to family issues contributed to the blurring of the boundaries between the regulation of the spousal relationship and the regulation of parenthood in yet another respect. One of the outstanding implications of the “public approach” lay in making the concept of “fault” relevant to family issues. According to traditional law, public evaluation of spousal behavior had legal implications.²⁴ Consequently, the ability to get divorced and the economic consequences of the divorce were based on the fault model. Moreover, the classification of a spouse as the guilty party affected his chances of becoming the custodian parent.²⁵ This meant

¹⁷ See R. Phillips, “Putting Asunder: A History of Divorce in Western Society” (Cambridge, 1998) 403-478; and S.M. Cretney, J.M. Masson & R. Bailey-Harris, *PRINCIPLES OF FAMILY LAW* (London, 7th ed. 2002) 269-271.

¹⁸ See Cretney, Masson & Bailey-Harris, *ibid* at *et seq.*

¹⁹ Margaret F. Brining & June R. Carbone, “The Reliance Interest in Marriage and Divorce”, 62 *TUL. L. REV.* (1988) 855; Cretney, Masson & Bailey-Harris, *ibid*, at 341-342; Glendon, *supra* note 12, at 197-207; I.M. Ellman, “The Theory of Alimony”, 77 *CAL. L. REV.* (1989).

²⁰ For the channeling function of family law, see Carl E. Schneider, “The Channeling Function in Family Law”, 20 *HOFSTRA L. REV.* 495 (1992).

²¹ See Glendon, *supra* note 12, at 252-254.

²² See Willekens, *supra* note 15, 48-50; M. Grossberg, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (Chapel Hill, G. E. White ed., 1985) Ch. 7.

²³ See Traci Dallas, “Rebutting the Marital Presumption: A Developed Relationship Test”, 88 *COLUM. L. REV.* 369, at 370-371. (The marital presumption was known as ‘Lord Mansfield’s Rule’ and provided that a woman’s husband was the father of all children born during the marriage. This presumption was based on notions of morality and decency). See also S.M. Cretney, J.M. Masson & R. Bailey-Harris, *supra* note 17, 524 and the famous case of *Michael H. v. Gerald D.* 491 U.S. 110 (1989).

²⁴ Traditional divorce law enabled only the innocent spouse to sue for divorce and to obtain alimony, see R. Phillips, *supra* note 17. 403-478;

²⁵ See Altman Scott, “Should Child Custody Rules be Fair?” 35. *U. OF LOUISVILLE OF FAM. L.* 325 (1996) 333.

that spousal behavior legally classified as “faulty conduct” had crucial implications not only in the context of spousal law but also in the context of parenthood law.

To summarize, despite the general recognition of the division of family law into spousal law and parenthood law, traditional law integrated the regulation of the two fields. Consequently, spousal relations and conduct had dramatic implications for the regulation of the relationships between parents and spouses and even on the legal definition of a person as a parent.

III. From Partner to Parents: The Modern Distinction Between Parenthood and Spousal Law

A. *The Individualization of Modern Family Law*

Western family law was dramatically transformed during the second half of the 20th century.²⁶ In this period the conservative, unit, non egalitarian ethos was replaced by a liberal, individualistic, egalitarian ethos. The trend that evolved was one which deprived the family unit of its legal significance.²⁷ Accordingly, the law treated the individual not as a member of a family but as an autonomous entity,²⁸ who had the capacity and the right to create ties, determine their substance and ultimately rescind them.

This liberal-individualistic trend is today reflected in almost all aspects of modern **spousal laws**.²⁹

Entry into marriage is based upon decisions of individuals³⁰ and is not subjugated (as it was in the past) to the limitations and needs of the original family unit; the “independent” status of the partners is preserved even after the marriage. In this framework, rules which established special

²⁶ For the dramatic changes which took place to spousal laws in the second half of the 20th century, see Glendon 1989, *supra* note 12; Lifshitz, *supra* note 3, Ch. 4;

²⁷ See Glendon, *ibid*, at 102-103. In summary, we have noted the emergence of new legal images of the family which to varying degrees stress the **separate personalities of the family members** rather than the **unitary aspect** of the family. See also Frances E. Olsen, “The Politics of Family Law”, 2 LAW & INEQ. J. (1984) 1, 8. According to Olsen the change is “from the family as a **corporate unit** to the family as a voluntary association of individuals”. See also Elizabeth S. Scott, “Rehabilitation Liberalism and Modern Divorce”, UTAH L. REV. (1994) 687.

²⁸ See Salvatore Patti, “Intra-Family Torts”, PERSONS AND THE FAMILY - INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 7 (Mary Ann Glendon ed., Vol. IV, Ch.9, 1998) at 437,

²⁹ A description of the changes in modern spousal laws in the terminology of individualization is well accepted in Western literature, see, for example, Stephen J. Morse, “Family Law in Transition: From Traditional Families to Individual Liberty” in CHANGING IMAGES OF THE FAMILY (New Haven, Virginia Tuft & Barbara G., eds., 1979) 319, 320-322; Marjone M. Shultz, “Contractual Ordering of Marriage: A New Model for State Policy”, 70 CAL. L. REV. (1982) 204, 275-280; Martha Minow, “Forming Underneath Everything that Grows’ Toward History of Family Law”, 1985 WIS. LAW REV. 819, 833; Jana B. Singer, “The Privatization of Family Law”, 1992 WIS. L. REV. 1443, 1462-1465; Doglin, *supra* note 4, at 1553; Anne C. Dailey, “Constitutional Privacy and the Just Family”, 67 TUL. L. REV. (1993) 955, 972-978; Martha A. Fineman, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (Chicago, 1991) 18.

³⁰ For these trends in the United States, see Singer, *ibid*, at 1465-1470. For a review of the trends in central Western countries in this connection, see Glendon, *supra* note 12, at 33-75, as well as Lynn D. Wardle, “International Marriage and Divorce Regulation and Recognition: A Survey”, 29 FAM. L. Q. (1996) 497, 500-502.

consequences for marriages have been cancelled, so that in many cases the legal status of the partners with respect to one another is one of two independent individuals having no special bond.³¹

This “individualistic” arrangement is manifest, in particular, in modern divorce laws: the ease of divorce and especially the transition to *divorce on demand*. The significance of this is that individuals now have the right to sever themselves from the family framework.³² In the United States a number of decisions of the Supreme Court are interpreted as conferring constitutional status upon this right.³³ The commitment to individualistic principles is also reflected in the “clean-break principle”³⁴ which states that upon divorce there is an obligation to completely sever the partners’ mutual economic obligations.

The individualistic trend also influences parent-child law. Consequently, during the 20th century the traditional approaches that perceived the father as the owner of the children or as an autonomous leader were abandoned.³⁵ The modern alternative is to prohibit an instrumental attitude toward children with the result that the best interest of the child, which emphasizes the status of the child as autonomous individual, has become the primary consideration in the regulation of parenthood.³⁶ Furthermore, while the unit approach inspired the non-intervention

³¹ Singer, *ibid*, at 1465 and Lifshitz, *supra* note 3 at chapter 4 section 3.3 c).

In the words of Justice Brennan in *Eisenstadt v. Baird* 405 U.S. 438 (1972) at 453:

“It is true that in *Griswold* the right of privacy in question inhered in marital relationship. **Yet the marital couple is not an independent** entity with a mind and heart of its own, **but an association of two** individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything it is the **right of the individual**, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.”

³² See Wardle *supra* note 30 at 51, “clearly the contract terminated at will by either spouse model of marriage (defined by no fault divorce laws) is the dominant model of marriage in the world today”. See also Valerio Pocar & Palona Ronfani, “From Institution to Self-Regulation” in *THE EUROPEAN FAMILY: THE FAMILY QUESTION IN THE EUROPEAN COMMUNITY* (Dordrecht, Jacques Commaile & Francois de Singly eds., 1997) 195, 196 (these authors identify the same trends in Europe). The trend towards easing divorce laws is also identified by Glendon 1989, *supra* note 39 at 148-197.

³³ See Cathy J. Jones, “The Rights to Marry and Divorce: A New Look at Some Unanswered Questions”, 63 *WASH. U.L. Q* (1985) 577.

³⁴ For the establishment of the clean-break principle as a supra-principle, to which the no-fault divorce process must aspire, see Herma H. Kay, “An Appraisal of California’s No-Fault Divorce Law”, 75 *CAL. L. REV.* (1987) 291, 313. This principle is also recognized by the case law in various Western countries, *see, for example*, *Turner v. Turner* 385 A.2d 1280, 1281. (N.J., 1978) “The law should provide both parties with the opportunity to make a new life...”; *see also* the comments of the Canadian Judge Wilson in the well-known case *Pelech v. Pelech* 7 Rfl (3d) 225, 271 (Scc), “To burden the respondent with her care ... for no other reason than that they were once husband and wife seems to me to create a fiction of marital responsibility at the expense of individual responsibility. I believe that the courts must recognize the right of the individual to end a relationship as well as begin one and should not, when all other aspects of the relationship have long since ceased, treat the financial responsibility as continuing indefinitely into the future.” *See further* the remarks of Lord Scarman in the case of *Minton v. Minton* [1979] AC 593, 608, who described the clean break principle and the couple’s desire to turn their back on the past and start a new life, as fundamental elements of modern alimony laws.

³⁵ See John M. Eekelaar, “The Emergence of Children’s Rights”, 6 *OXFORD JOURNAL OF LEGAL STUDIES* (1986) 161; Eekelaar (Leviathan), *supra* note 14; Mason, *supra* note 9.

³⁶ See Philip Alston (ed.), *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* (Oxford 1994); Joseph Goldstein, Anna Freud & Albert. J. Solnit, *BEYOND THE BEST INTERESTS OF THE CHILD* (New-York, 1979). *See also* Joseph Goldstein, Albert J. Solnit & Anna Freud, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (New York, 1996).

doctrine which prevented children from suing their parents and even denied them the protection of criminal law, modern family law has shown a much greater readiness to intervene in family matters when such intervention is needed to protect children.³⁷

The modern discourse on children rights³⁸ is a discrete example of the individualistic nature of parent-child law. This discourse is based on a perception of the child as an autonomous entity who is entitled to general human rights and to unique rights which are connected to his needs as a child.³⁹ Furthermore, in contrast to the paternalistic nature of the best interest of the child principle which enables adults to manage the child's life, the rights discourse emphasizes the importance of the participation of the child in decisions connected to his life-style and direction.⁴⁰ It is clear, therefore, that this is an individualistic discourse which emphasizes that the parents and their child are separate entities.⁴¹ Against this background even the right to exit which dominates modern spousal law influences parent-child law and consequently some western cases deal with children who want to divorce themselves from their parents.⁴²

B. The opposite direction of Parent-Child Law and Spousal Law

There can be no doubt that a basic resemblance exists between the process of liberalization and individualization which affected parent-child law and spousal law respectively in the 20th century. Nonetheless, in this section I shall consider these issues from a different perspective which exposes the tension between the processes occurring in these two spheres. I shall refer to a number of ways in which the process of liberalization and individualization of spousal law has taken a divergent course to developments in parent-child laws.

³⁷ For example, Anita L. Allen, "And - Privacy isn't everything: Accountability as a personal and social good", 54 ALA. L. REV. 1375, 2003 (the author discusses the beating of children and the State). However, even the modern law is influenced by the traditional hesitation regarding harmful intervention in the family. *See, for example*, the English Children Act of 1989. *See*, Glendon (1989), *supra* note 12, at 102-103.

³⁸ *See* Michael Freeman, THE MORAL STATUS OF CHILDREN: ESSAYS ON THE RIGHTS OF THE CHILD (Dordrecht,1997); Michael Freeman & Philip Veerman (eds.), THE IDEOLOGIES OF CHILDREN'S RIGHTS (Dordrecht,1992); Michael Freeman (ed.) CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE (Aldershot, 1996); Philip Alston et al, (eds.) CHILDRENS RIGHTS AND THE LAW (Oxford, 1992); Bob Franklin (ed.), THE RIGHTS OF CHILDREN (Oxford,1986); Geraldine V. Bueren, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD (Dordrecht, 1995) 118; Jane Fortin, CHILDREN'S RIGHTS AND THE DEVELOPING LAW (London, 1998); Andrew Bainham, CHILDREN - THE MODERN LAW (Bristol ,2nd ed., 1998) 78 *et seq.*

³⁹ *See supra* note 38. For the classification of different kinds of children's rights, *see also* Eekelaar – welfarism, *supra* note 14, at 326-332.

⁴⁰ Thus, in some respects, there is a tension between children's right and the best interests of the child, *see* Purdy, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS OF CHILDREN (Ithaca, 1992). *See also* in this context, Y. Kaplan, "The right of a minor in Israel to participate in the decision-making process concerning his or her medical treatment" 25 FORDHAM INTERNATIONAL LAW JOURNAL (2002) 1085.

⁴¹ On the individualistic nature of children's rights, *see* Katharine T. Bartlett, "Re-expressing Parenthood" 98 YALE LAW JOURNAL (1988) 293. For suggestions for redefining children's rights in relational terms, *see* Martha Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights" 9 HARVARD WOMEN'S L. J. (1986) 1 and Y. Ronen, "Redefining the Child's Rights to Identity", 18 INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY (2004) 147.

⁴² For a critical discussion of these cases, *see* M. Freeman, "Can Children Divorce their Parents" in Michael D. A. Freeman (ed.), DIVORCE – WHERE NEXT? (1996) 159.

i) Independence Versus Responsibility

In the area of spousal relations, the significance of individualization and the approach which regards each partner as an autonomous individual has been to lessen the mutual commitments and responsibilities of the spouses both during marriage and following its dissolution.⁴³ In contrast, the modern attitude towards the child as an autonomous being has not had the result of diminishing parental responsibilities and commitments towards the child. On the contrary, the attitude of modern law regarding the best interest of the child as the fundamental principle of parent-child law and recognition of the rights of the child has imposed extremely important obligations on parents towards their children.⁴⁴ Moreover, whereas in the area of spousal law, modern law emphasizes the separateness of the partners, modern scholar, like Minow⁴⁵, Haften⁴⁶ and Ronenn,⁴⁷ claim that one of the basic rights of the child is the right to a relationship, with his parents and to the sense of belonging to a family. Beyond the writing of scholar, I should add that Articles 8-9 of the International Convention on the Rights of the Child, can be interpreted in that direction. This right falls outside the narrow individualistic approach and requires the adoption of a relational attitude in the context of parent-child relations. The difference in individualistic trends between parent-child law and spousal law has been expressed in the use of the rights dialogue. Whereas in the context of spousal relations, the rights dialogue characterizes the symmetric relations of the couple, there is a lack of symmetry in the use of this dialogue in the context of parent-child relations. On one hand, in so far as concerns child-parent relations in many cases modern law equips the children with legal rights against their parents, on the other hand, in so far as concerns parent-child relations, many western systems of law have adopted the term “parental responsibilities” as the term suitable for the legal connection between parents and their children.⁴⁸ Even though in some countries⁴⁹ the term “parental responsibilities” also

⁴³ See *supra* notes 31-34.

⁴⁴ In the 1990s the need to fulfil the economic obligation of parents (especially fathers) toward their children lead to legislation aimed at defining and enforcing the father’s duties. See, for example, in England, the Child Support Act 1991 (England); John M. Eekelaar, “Third Thoughts on Child Support”, 24 FAM. L. 99 (1994); in Canada, see, Laura W. Morgan, “Child Support and the Anomalous Cases of the High-Income and Low-Income Parent: The Need to Reconsider What Constitutes ‘Support’ in the American and Canadian Child Support Guideline Models”, 13 CAN. J. FAM. L. 161 (1996); in Australia, Stephen Parker, “The Australian Child Support Scheme”, 20 FAM. L. 210 (1990) and in the United States, see Family Support Act 1988, Pub L. No 100-485 102 Stat. 2343 42 U.S.C. s 667 (b); Marsha Garrison, “Child Support Policy: Guidelines and Goals”, 33 FAM L. Q. 157 (1999) and Grace G. Blumberg, “Balancing the Interests: The American Law Institute’s Treatment of Child Support”, 33 FAM. L. Q. 39 (1999).

⁴⁵ See Martha Minow, “Rights for the Next Generation: A Feminist Approach to Children’s Rights” 9 HARVARD WOMEN’S L. J. (1986) 1

⁴⁶ See Bruce C. Haften, “Individualism and Autonomy in Family Law: The Waning of Belonging”, 1991 BYU. L. REV. 1.

⁴⁷ See Ronen, *supra* note 41,

⁴⁸ The term “parental responsibility” was adopted in many jurisdictions, see, for example, the Children Act 1989 (England); and the Children Act 1981. The transition from parent’s rights to parent’s responsibilities is prominent in the Scottish law of 1995, see Children (Scotland) Act 1995, Ch.36. In Israel, this is one of the central recommendations of the committee examining basic principles in the area of children and the law, and their implementation in legislation. See the report of the sub-committee of the Committee on the Child and His Family (Ministry of Justice Press, 2003).

includes certain parental rights⁵⁰ (principally vis-à-vis the State), as a rule the term in fact emphasizes the *commitments* of the parents towards their children and their best interest.⁵¹

ii) Public Regulation Versus Freedom of Contract

Another difference between the modern trends in spousal law and parent-child law is connected to the tension between private ordering and public regulation.

Until recently, the family relationship was dominated by massive public regulation. The State rather than the parties decided the legal content of the relationship and freedom of contract was not recognized.⁵² In contrast to traditional regulation, prominent researchers in the field of family law have now identified processes of deregulation and privatization⁵³ occurring in modern western spousal law. The modern law has extended the freedom of contract of the spouse to regulate his spousal relationship and, in general, the law now prefers private ordering to public regulation.⁵⁴ Indeed, according to some opinions, modern legislators should shape spousal law in the light of contractual values⁵⁵ (e.g. fulfilment of the explicit and implicit will of the parties) so that in the long run contract law will replace family law.⁵⁶

In contrast to trends favouring privatization and freedom of contract characterizing spousal law, it is very difficult to characterize parent-child laws in a similar way. On the contrary, whereas entry into a spousal relationship is based on the consent of the parties and their free will, a person may have to undertake the commitments of a parent even when he did not desire the child.⁵⁷ Accordingly, contrary to the trend seeking to structure spousal law on the basis of the assumed intentions of the parties, in the area of parent-child relations, the commitment of the parents to act in the best interest of the child is of a coercive character, and is not intended to reflect the

⁴⁹ The terminology of parents' rights has not yet been completely negated. *See, for example*, Articles 5 and 18 of the International Convention on the Rights of the Child. Indeed, the definition of responsibility in English law also includes the rights of the parents.

⁵⁰ For a critical discussion of the concept of parental rights, *see* Phillip Montague, "The Myth of Parental Rights" 26 SOCIAL THEORY AND PRACTICE (2000) 47, for support of this concept, *see* P. Shifam, FAMILY LAW (1989) 217 (Hebrew).

⁵¹ *See, for example*, Article 30 of the Norwegian Child Law. *See also* M. Mavis and J. Eekelaar, THE PARENTAL OBLIGATION (1997). *See also* Freeman, *supra* note 38.

⁵² *See* Part II.

⁵³ J.B. Singer, *supra* note 29; V. Pocar & P. Ronfani, "From Institution to Self-Regulation", THE EUROPEAN FAMILY (Dordrecht, J. Commaille & F. de Singly eds., 1997) 195, 196; Garrison, "Marriage: The Status of Contract" 131 U. PA. L. REV. (1983) 1039, 1049.

⁵⁴ *See principally*, L. Alexander & P. Horton, "Freedom of Contract and the Family: A Skeptical Appraisal", THE AMERICAN FAMILY AND THE STATE (San Francisco, J.R. Peden & F.R. Glahe eds., 1986) 229, 230–236; M.A. Glendon, "The Withering Away of Marriage" 62 VA. L. REV. (1976) 663; Singer, *ibid*; V. Pocar & P. Ronfani, *ibid*, at 196; Garrison, "Marriage: The Status of Contract" 131 U. PA. L. REV. (1983) 1039, 1049. For criticism on this move, *see* Marica Neave, "Private Ordering in Family Law: Will Women Benefit? in PUBLIC AND PRIVATE FEMINIST LEGAL DEBATES (Oxford, ed. Margaret Thornton, 1995) 145, 146.

⁵⁵ *See* David L. Chambers, "The 'Legalization' of the Family: Toward a Policy of Supportive Neutrality", 18 U. MICH. J. L. REFORM 805 (1985).

⁵⁶ *See* Martha L. Fineman, "Contract Marriage and Background Rules", ANALYZING LAW - NEW ESSAYS IN LEGAL THEORY 183 (Brian Bix ed., 1998).

⁵⁷ *See* Pinhas Shifman, "Involuntary Parenthood: Misrepresentation as to the Use of Contraceptives" 4 INT. J. OF LAW AND FAMILY (1990) 279.

desire or the assumed consent of the parents.⁵⁸ Likewise, contrary to freedom of contract which is at the core of the modern model of spousal law, the minority of the children, the interest in ensuring their welfare, and the character of parent-child relations generally,⁵⁹ make it very difficult to contractually regulate the relations between parents and their children, without public oversight.

iii) The Right to Exit

The discrepancy between the trends in spousal law and parent-child law becomes dramatic in the context of ending the relationship.

As we have seen the liberal-individualistic “right to exit” dominates spousal law. Consequently, not only does spousal law enable both parents to agree on ending the relationship but it also enables unilateral divorce.⁶⁰ In contrast, in spite of the fact that in some circumstance the law enables children to obtain a “divorce” from their parents it is clear that parents cannot obtain a divorce from their children.⁶¹ Furthermore, despite the fact that the can't enforce parents to love their children or to be a good parents by specific performance order, In the modern law there are sever legal result to extremely bad parenthood⁶².

A similar distinction between spousal law and parent-child law arises in connection with the regulation of the economic relations between members of the family following divorce. In the context of spousal law we have seen that whereas in the past the obligation to pay alimony prevented the absolute severance of the mutual economic responsibilities of the parties even in the case of divorce, modern divorce laws have weakened this obligation. We have explained that this aspect of divorce laws is connected to the ideology of a “clean break” at the core of which lies the desire to enable an absolute severing of the economic bond so as to allow the couple to begin a new life.⁶³ The situation is different in as far as concerns the economic commitment of parents towards their children. Indeed, in the past, as part of the ideology supporting a clean break and the need of divorced parents to begin a fresh life, an express or implicit trend

⁵⁸ For a philosophical discussion clarifying why the duties of parents toward their children cannot be justified by conventional contractual justifications, see John Eekelaar, “Parental Responsibility: State of Nature or Nature of the State? 1991 J. SOCIAL WELFARE & FAMILY LAW 37; see also Will Kymlicka, “Rethinking the Family” 20 PHILOSOPHY AND PUBLIC AFFAIRS (1991) 77; Pinhas Shifman, “Involuntary Parenthood: Misrepresentation as to the Use of Contraceptives” 4 INT. J. OF LAW AND FAMILY (1990) 279.

⁵⁹ With regard to the issue of contractual regulation, certain tensions may arise between approaches focusing on the best interests of the child, which may even be willing to protect paternalistically what is perceived to be the best interest of the child, and some of the approaches dealing with the rights of children which emphasize the autonomy of children and the need to enable them to participate and actively decide on matters that impact their lives, see, for example, Gerison Landsdown, TAKING PART – CHILDREN’S PARTICIPATION IN DECISION MAKING (London, 1995). At the same time, I believe that even those approaches which focus on the rights of children will not support the establishment of parent-child relations completely on contractual relations.

⁶⁰ See *supra* notes 31-33.

⁶¹ For the legal implications of the abandonment of children, see, for example, Ana. L. Partida, “The case for the ‘safe haven’ laws: choosing the lesser of two evils in a disposable society”, 28. N.E.J. ON CRIM & CIV. CON. (2002) 61, (the author discusses State enactments regarding the abandonment of children).

⁶² See *ibid*, See also in Israel, Civil Appeal 2034/98 *Amin v. Amin*, 53(5) P.D. 69.

⁶³ See *supra* note 34.

developed supporting the weakening of the duty of maintenance of parents (in particular fathers towards their children).⁶⁴ However, this trend has been reversed, and today as part of the commitment towards the dual principles of the best interest and the rights of the child, many countries invest considerable effort in expanding and enforcing the duty of maintenance of parents towards their children.⁶⁵ In this sense, parent-child law is an exception to the regular liberal commitment to freedom to sever relations and obligations and the desire of modern family law to create convenient conditions for a new start in life.

C. From Partners to Parents

From the analysis of the developments which took place in the second half of the 20th century it clearly follows that a fundamental shift has taken place in family law from regulation focusing on the spousal relationship to regulation focusing on parental relationships.

In the spousal area, it is possible to discern a weakening of the legal commitment imposed on a person by reason of his spousal relations, to the extent that the law enables partners to initiate and achieve unilateral severance. In a similar context, the law prefers private ordering over public regulation. On a more general level, the legal importance of the spousal pattern in which a person lives has been weakened, as many rights and many rights granted in the past solely to married persons, are today also granted to cohabitants and even to families which are not based on spousal relations (for example one-parent families).⁶⁶ In contrast, while parent-child relations have also undergone an individualistic process which emphasizes the autonomy of children, this process has not led to the weakening of parental responsibilities towards children and/or to a lessening of the public legal regulation of parent-child relations. On the contrary, in this area it is possible to discern an expansion of parental responsibility to realize the rights of their children, the freedom of parents to engage in contractual arrangements is still limited and certainly the law does not recognize the possibility of a parent unilaterally severing his connection to his child. Moreover, contrary to the past, modern law defines the parental connection, including responsibility, rights and the ensuing obligations, on the basis of the connection between the parent and child without reference to the spousal pattern in which the parents lived.⁶⁷

Thus, contrary to the weakening of the importance of the spousal relationship, modern law attaches huge importance to the connection between a parent and his child. Accordingly, there is massive legal regulation of parent-child relations. At the heart of this regulation lie the best interest of the child and the realization of his rights. Against this background there are those who see the shift from partners to parents as a process characterizing modern family law.⁶⁸

⁶⁴ See David L. Chambers, "The Coming Curtailment of Compulsory Child Support", 80 MICH. L. REV. 1614 (1982).

⁶⁵ See *supra* note 44.

⁶⁶ See Nancy E. Dowd, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997).

⁶⁷ See Martha A. Fineman, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

This is the main thesis of June Carbone, FROM PARTNERS TO PARENTS - THE SECOND REVOLUTION IN FAMILY LAW (2000).

D. The Need to Distinguish Between Spousal Law and Joint Parent's Law

Some radical feminists attack the traditional stance that describes both parents and children as the basic unit of the family. They think that the law must focus on what they call the dyad relationship between children and their primary caretakers (in most cases mothers).⁶⁹ However, most law makers still think that even in cases in which the parents live separately the non-custodian parent has an important role, authority and responsibility towards his child. Consequently, in cases in which there are problems in the relationship of the parents, for example, when they are not living together, parent-child law – beyond regulating children-parent relationships – will deal also with the mutual relationship between the parents themselves (called here - joint parents law)⁷⁰.

These aspects of parenthood law challenge the current direction of spousal law. On one hand, the aspiration of spousal law is to afford the spouses the opportunity to manage their life and their separation, by private ordering, and consequently the courts are expected to respect the freedom of contract of the spouses. On the other hand, the public character of parenthood law means that the court must supervise the parents' agreement in the light of their responsibilities towards their child and in accordance with the "best interest" principle. The exit question also raises another tension. On one hand, it is the aspiration of spousal law to enable each spouse to end completely his legal relationship and obligations upon divorce (the clean break principle). On the other hand, the continued responsibility of both parents toward their children means that the economic and personal ties between the parents cannot be severed on divorce.

What is the solution for the tension between the desire of spousal law to deregulate spousal relations and enable them to sever their ties completely following divorce and the need of parent-child law to supervise the joint parenthood of ex-spouses, including restricting their ability to perform such a clean break? It would seem that the answer may be found in the question itself.

Modern law must draw a clear and unequivocal distinction between the parental and spousal dimensions of the parties' relations. In so far as concerns the spousal dimension of the relations, it is necessary to continue pursuing the individualistic contractual trends. In contrast, in so far as concerns the parental dimension of the parties' relations it would be right to restrict these trends in accordance with considerations relating to the best interests of the child. Thus, whereas the common ethos which characterized the traditional regulation of parent-child law and spousal law enabled a coherent regulation of the relations of spouses who were parents, the tension between the trends in the two spheres of modern law require a sharp distinction to be drawn between regulation of the spousal dimension of parent relations and regulation of their joint parenthood. According to this view, in contrast to the past where the spousal conduct and the spousal pattern of the parents influenced the regulation of their parenthood, today regulation of parenthood, including regulation of joint parenthood, is an independent matter which is not contingent upon the conduct of the spouses or the spousal pattern in which they lived.⁷¹

⁶⁹ See Fineman, *supra* note 67.

⁷⁰ See Part I below.

⁷¹ For a similar process of thought, see Carbone, *supra* note 68 and June Carbone, "Income Sharing: Redefining the Family in Terms of Community", 31 HOUS. L. REV. 359 (1994). See also C.J. Frantz & H. Dagan, "Properties of Marriage" 104 COLUM. L. REV.(2004) 75, where the authors seek to present a theory of spousal

IV. Spousal Law and Parenthood Law: Rethinking the Distinction

A. Background

From the point of view of the best interest of the child, great importance attaches to the modern distinction between parenthood law and spousal law and the derivative distinction between the spousal aspect of the parties' relationship and the regulation of their joint parenthood.

First, the traditional approach which defined legal parenthood according to the spousal pattern of the parents was shaped in a sociological context in which, in the vast majority of cases, children were born and raised within wedlock. In contrast, today, many children are born and raised outside marriage and occasionally even without the parents being in a firm relationship.⁷² Accordingly, in the modern world, the significance of a legal rule which defines parenthood in accordance with the nature of the relationship between the spouses may lead to the rescission of legal recognition of the relationship between many fathers and their children.⁷³ Such a move would mean absence of recognition of these fathers' parental responsibility towards their children. Releasing fathers from their duties towards their children may harm the children financially and emotionally.⁷⁴ In this context there is a clear rationale for the modern approach which defines the parental bond, including responsibilities, rights and duties derived from it, on the basis of the connection between the parent and child without regard for the spousal pattern of the parents.⁷⁵

Second, the division between regulation of parenthood and regulation of partnerships protects children in that it clarifies to the lawmakers that the individualistic – private attitude to spousal relations is not applicable to joint parenthood. Hence, arrangements between parents on parental matters continue to be subject to public oversight which focuses on the best interest of the child.⁷⁶ Similarly, the division between regulation of partnerships and regulation of parenthood promotes the best interest of children in that it clarifies that the modern aspiration to sever the

relations which are detached from joint parental relations. Note, however, that Frantz & Dagan's theory regarding partnership has clear joint communitarian aspects which differ from individualistic contractual trends characteristic of modern spousal laws.

⁷² See, for example, Harry Willekens, "supra note 15, 53 ; Colin Gibson, "Contemporary Divorce and Changing Family Patterns", *DIVORCE - WHERE NEXT?*, 9 (Michael D. A. Freeman ed., 1996); Arland Thornton, "Comparative and Historical Perspectives on Marriage, Divorce, and Family Life", 1994 *UTAH L. REV.* 587.

⁷³ For the status of the father outside marriage, see *Eekelaar - Welfarism*, supra note 14, 319. See also the famous case of *Michael H. et al. v. Gerald D.*, Supreme Court of the United States 491 U.S. 110.

⁷⁴ Indeed this was the legal situation in legal systems or religions where children born outside marriage were not regarded as the legal children of their father, see, for example, the decision of the Sharia court which formed the basis of the of the famous judgment of the Supreme Court in Israel in *C.A. 3077/90 Plati v. Plati*, 49(2) P.D. 578 (in that case, the Sharia court denied the right of a girl born outside wedlock to maintenance payments from her father, as she was not regarded as his child according to Muslim law).

⁷⁵ See the judgment of the Supreme Court in that case. The court held that even if there was no right to maintenance by virtue of Muslim law, an obligation to pay 'civil' maintenance existed by virtue of the civil perception of a biological father as a father irrespective of the spousal pattern of the parents.

⁷⁶ For the validity of separation agreements which deal with custody issues, see *recently*, the articles contained in *Family law Quarterly* (2006).

relations between divorced spouses is inapplicable on the parental level. Moreover, legal rules in general, and family law rules in particular, influence social norms and consequently the behavior and even the preferences of people.⁷⁷ Consequently, I believe that the distinction between partnerships and parenthood contributes to the spouses' understanding that spousal crises and divorce cannot terminate their continued joint parental responsibilities.⁷⁸

Nonetheless, notwithstanding that the modern changes in family law support the importance of the distinction between the regulation of partnerships and regulation of parenthood, in this chapter I wish to argue that this distinction and its ramifications ought to be reconsidered. My fundamental contention is that occasionally the distinction between spousal behavior and parental behavior is artificial as in many cases spousal behavior has dramatic repercussions for the lives of children. I shall also argue that even in the legal context there is great difficulty in defining the boundaries between spousal laws and parental laws, as laws which are usually classified as spousal laws may have an influence on the interests and rights of children. Accordingly, confining the influence of the principle of the best interest of the child to what is classified today as parent-child law may cause great hardship from the point of view of the best interest of the child. In view of this approach, I shall propose the adoption of a normative regime which sees the best interest of the child as the guiding principle not only of parent-child laws but also of what is classified as spousal laws. I shall consider the need to identify new balancing formulae between the best interest of the child and the needs of the parents in areas dealt with by this study. I shall illustrate the possible application of the proposed approach in a number of important issues dealt with by family law.

B. The Challenge: The Need of Modern Individual Spousal law to Consider the Best Interest of the Child

Article 3 of the Convention on the Rights of the Child provides as follows:

- “1. 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**.”
(My emphasis – S.L.)

As mentioned earlier, spousal laws deal with the regulation of partnerships and therefore they focus on spousal behaviour. In contrast, parent-child law deals with the regulation of relations between parents and children and therefore it focuses on parental conduct. Conceivably, it is because of this that the principle of the best interest of the child is perceived as the guiding principle of parent-child law even though its influence on spousal law is minimal.

⁷⁷ See, for example, Cass R. Sunstein, “On the Expressive Function of Law”, 144 U. PA. L. REV. 2021 (1996); Carol Weisbrod, “On the Expressive Function of Family Law”, 22 U. C. DAVIS L. REV. 991 (1989).

⁷⁸ But see Milton C. Regan, “The Boundaries of Care: Constructing Community after Divorce”, 31 HOUS. L. REV. 425 (1994). Regan thinks that, in the long run, if one exposes the family to private-individualistic values, it will not be possible to identify community feelings in relation to the parent-child relationship.

Nonetheless, as will be explained in more detail below, in real life situations, in contrast to legal theory, the distinction between spousal behaviour and parental behaviour is not an easy one to make as “spousal” conduct has an apparent impact on the lives of children. Accordingly, legal regulation of spousal relations which focuses on the spouses and their conduct but which fails to take into account the best interest of their children may ultimately harm the children.

Despite this, in legal discourse, it is customary to deal with the principle of the best interest of the child and its significance primarily in the traditional contexts of parent-child laws such as issues of custody, medical treatment, adoption, education, fostering and the like, albeit this restriction does not arise from the language of the convention or from its rationale.⁷⁹ On the contrary, the article emphasizes that in “all actions concerning children” the best interests of the child shall be a primary consideration. Under the convention, the best interest of the child is a primary consideration in the legal regulation of these matters.

At the same time, while in relation to decisions which patently deal with children such as custody or education, it is possible to justify an approach making the best interest of the child a primary consideration and in certain circumstances even a paramount consideration which overrides other considerations including the interests and desires of the parents, it seems to me that even the most fervent supporters of the principle of the best interest of the child would find it difficult to justify the complete discounting of the desires and rights of the parents in relation to manifestly spousal matters such as the continuation of the partnership or division of property accumulated during the marriage. Thus, in relation to the latter issues, I do not believe that it is possible to attribute to the principle of the best interest of the child a status similar to that given to this principle in relation to issues dealing directly with children. At the same time, in view of the analysis which refers to the ramifications of spousal behaviour on the lives of children, the regulation of spousal relations which has an impact on children’s lives must take into account considerations of the best interest of the child concurrently with other customary considerations. At least in some cases, considerations of the best interest of the child and the obligations to children deriving from these considerations may clash with the contractual, private individualistic approach which currently characterizes spousal laws.

Thus, the recognition of the far-reaching influence which spousal behaviour has for the legal regulation of the best interests of the child creates a difficult challenge for jurists committed to liberal-contractual-individualistic trends of spousal law, on one hand, and for the status of the best interest of the child as a supra-principle, on the other hand. I am not convinced that in this study I can propose a general comprehensive formula for the integration of considerations relating to the best interest of the child within the framework of spousal laws. Nonetheless, below, I shall still propose a number of ways in which such considerations may be integrated in spousal laws in relation to a number of specific issues usually dealt with by these laws (divorce laws, property relations, accommodation laws and attitudes towards spousal agreements). As we shall see, a cautious analysis of considerations relating to the best interest of the child on one hand and the interests and desires of the parents on the other hand, shows that at least in some of the cases it is possible to propose acceptable balancing mechanisms between the interests and

⁷⁹ See also Yair Ronen, THE BEST INTEREST OF THE CHILD TOWARD CROSS CULTURAL CONCEPTION (PhD thesis 1999).

desires of the parents and the needs and welfare of the children. Applying the balancing formula proposed here, we shall examine some of the regulations used in the legal systems of various countries and in some of the cases we shall propose interpretations of these regulations combined with the principle of the best interest of the child. In other cases we shall conclude that it is necessary to amend the existing law.

C. The Normative Implication

i Divorce on Demand and Child Considerations

Divorce laws expressively illustrate the modern trend towards distinguishing between spousal laws and parental laws and the decreasing importance of child considerations in the modern understanding of partnership and its laws.

In the past, the legal and moral expectations of society were that spouses would overcome differences of opinions and refrain from divorce ‘for the sake of the children’.

This expectation faltered in the second half of the 20th century when the legal attitude towards divorce was primarily spousal. It was argued that while the divorce of parents indeed severed a considerable portion of the bond and the legal responsibilities between the parents it did not sever the legal bond and responsibilities between the parents and their children⁸⁰. Thus, in the spirit of the general distinction between spousal laws and parental laws, a distinction developed between the divorce itself – which concerned the relations between the parents – and some of the consequences of the divorce, for example, custody of children and maintenance of children, which were concerned with the continued responsibility of parents for their children. This spirit of individualism which guided the spousal laws shaped the divorce laws; the resulting trend was the dramatic facilitation of the spouses or even one of them to initiate a divorce to the extent that some observers described the model of divorce on demand as the dominant model in the modern approach towards divorce laws. In view of the primacy given to the desire of the couple (or one of them) to divorce, almost no weight at all was given to considerations relating to the best interest of the child. In practice, even the most fervent supporters of the principle of the best interest of the child explained that this principle was not to be given primacy when divorce laws, in their narrow sense, were being deliberated.⁸¹

In recent times the status of children affected by divorce disputes has become the subject of renewed discussion.⁸² This fresh interest is linked to a series of studies which exposed the long

⁸⁰ See, *supra* note 9 “Although divorce legally ends a marriage, it cannot dissolve the bond uniting father – or mother – and child”.

⁸¹ See Van Bern, *ibid*, at p. 48 et seq. . See also Ronen, *supra* note 41 at 274.

⁸² See, for example, E. M. Hetherington & M. Stanley-Hagan (1999), “The Adjustment of Children with Divorced Parents: A Risk and Resilience Perspective”, *JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY AND ALLIED DISCIPLINES*, 40 (1), 129-140; P. R. Amato (2000), “The Consequences of Divorce for Adults and Children”, *JOURNAL OF MARRIAGE AND THE FAMILY*, 62 (4) 1269-1288; E. M. Hetherington & J. Kelly (2002), *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED*, New York: Norton; A. Booth, & P. R. Amato (2001), “Parental Divorce Relations and Offspring - Post Divorce Well-Being”, *JOURNAL OF MARRIAGE AND THE FAMILY*, 63, 197-212; J. S. Wallerstein, S. Blakeslee & J. Lewis, (2002)

term damage caused to children of divorced parents⁸³ and to children in one-parent families in general.⁸⁴ The studies showed that children raised under the shadow of divorce are more likely to suffer from emotional distress, learning difficulties, premature departure from school, early pregnancy, juvenile crime and future unemployment and relationship problems. In view of these findings, new opponent of the modern model of divorce on demand claim that divorce law must be shaped in such a way as to enable the prevention or at least significant postponement of divorce in order to protect the interests of minor children.⁸⁵

Prima facie, the analysis exposing the serious problems encountered by children of divorced parents presents an irreconcilable contradiction between considerations of the welfare of the child which support making divorce laws more strict and the liberal-individualist ideology which supports a sharp and clean break. Yet, in my view, a deeper examination of this issue reveals that the contradiction is not as acute as might seem at first glance and that even considerations of the welfare of the child do not necessarily support a policy of strict divorce laws.

First, the argument that it is necessary to make divorce laws more stringent because of the suffering of children of divorced parents, tacitly assumes that stringent divorce laws are likely to prevent divorces. However, such an argument itself is a matter of intense controversy as many studies doubt the capacity of divorce laws to reduce the rate of divorces.⁸⁶

THE UNEXPECTED LEGACY OF DIVORCE: THE 25 YEAR LANDMARK STUDY. New York: Hyperion.; C. P. Martinez & M. S. Forgatch (2002), "Adjusting to Change: Linking Family Structure Transitions with Parenting and Boys Adjustment", *JOURNAL OF FAMILY PSYCHOLOGY*, 16 (2) 107-117; M. F. Whiteside & B. S. Becker (2000), "Parental Factors and the Young Child's Post Divorce Adjustment: A Meta-Analysis with Implications for Parenting Arrangements", *JOURNAL OF FAMILY PSYCHOLOGY* 14 (1), 5-26; L. Laumann-Billings & , R.E. Emery (2000), "Distress Among Young Adults from Divorced Families", *JOURNAL OF FAMILY PSYCHOLOGY*, 14 (4), 671-687.

⁸³ See J. S. Wallerstein & J. B. Kelly, *SURVIVING THE BREAKUP - HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (New York, 1980); J. S. Wallerstein & S. Blakeslee, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE*, (New-York, 1989); R. E. Emery, *MARRIAGE DIVORCE AND CHILDREN'S AJUSTMENT* (Newbury Park, Cali. 1988); P. R. Amato, "Children's Adjustment to Divorce: Theories, Hypotheses and Empirical Support", 55 *J. MARRIAGE & FAM.* (1993) 23; P.R. Amato & A. Booth, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (Cambridge, 1997).

⁸⁴ See S. McLanahan & G. Sandefur, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS WHAT HELPS* (Harvard, 1994); see also L. J. Waite & M. Gallagher, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OF FINANCIALLY* (New-York, 2000).

⁸⁵ For attacks on divorce laws because of their influence on children and the demand that divorce laws be made more stringent as a result, see, for example, D.S. Vivaz, "Balancing Children's Rights into the Divorce Decision", 13 *VT. L. REV.* (1989) 531; J.T. Younger, "Marital Regimes: A Story of Compromise and Demoralization Together with Criticism and Suggestions for Reform", 67 *CORNELL L. REV.* (1981) 45, 90 *et seq.*; Waite & Gallagher, *ibid*, at Ch. 9-10, 14; Wardle, *supra* note 30 at 134; W. Galston, *LIBERAL PURPOSE: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (Cambridge, 1991) 286-287; K.S. Spaht, "For the Sake of the Children: Recapturing the Meaning of Marriage", 73 *NOTRE DAME L. REV.* (1998) 1547.

⁸⁶ In recent years, numerous studies have examined this question, see, for example, Martin Zelder, "The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate", 16 *HARV. J. L. & PUB. POL'Y* (1993) 241; Ira M. Ellman & Sharon Lohr, "Marriage as Contract, Opportunistic Violence and Other Bad Arguments for Fault Divorce", 1997 *U. Ill. L. Rev.* 719; T. B. Marvell, "Divorce Rates and the Fault Requirement", 23 *L. & SOC. REV.* (1989) 543. See also P. A. Nakonezny *et al.*, "The Effect of No-Fault Divorce Law on Divorce Rate Across the 50 States and its Relation to Income, Education, and Religiosity", 57 *J. MARRIAGE & FAM.* (1995) 477; D. W. Allen, "Marriage and Divorce: Comment", 82 *AM. ECON. REV.* (1992) 679; L. Friedberg, "Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data", 88 *AMERICAN ECONOMIC REVIEW*

Second, even if divorce laws are capable of reducing the legal divorce rate, it is not clear that strict divorce laws can contend with the sociological phenomenon of divorce, *i.e.*, the separation of the couple. Many of the problems faced by the children of divorced couples are connected to the sociological aspect of the divorce and not necessarily to the legal aspect. Accordingly, it is not clear that a change to the legal regulation would contribute to the welfare of the children.

Third, the harsh findings regarding the special problems of children in families which have undergone divorce do not necessarily prove that it was the divorce (in its legal and/or sociological sense) *per se* which harmed the children. An alternative possibility is certainly conceivable, namely, that it is the processes which generally accompany a dispute between parents, and in particular life in homes characterized by harsh disputes⁸⁷ between the parents, which cause the difficulties.⁸⁸ If this is the case, the proposal to make divorce laws more stringent will not help these children, but on the contrary, will harm them. Lengthening the divorce process may increase the exposure of the children to tensions between their parents in the period when these tensions are in fact at their most acute. Accordingly, making divorce laws more stringent may worsen the problems faced by the children of parents desiring to divorce.⁸⁹

It should also be emphasized that at least some of those criticizing modern divorce laws attempt to deal with the assumption that the cause of the distress to children in cases of divorce is not the divorce itself but the conflict between the couple prior to divorce. For this purpose, new psychological studies are presented that use complex statistical tools which isolate the influences of different factors.⁹⁰ These studies prove that at least in certain cases (for example, homes characterized by low levels of tension) some of the problems faced by children of divorced parents are attributable to the divorce itself and not ancillary processes.⁹¹ On the face of it, therefore, an approach focusing on the welfare of the child would support negating the

(1998) 608. Notwithstanding the intensive research, the studies have found it difficult to reach a consensus on this issue.

⁸⁷ For the impact of conflicts between parents (prior and post divorce) on children's adjustment, see K. A. Camara & G. Resnick, "Interpersonal Conflict and Cooperation: Factors Moderating Children's Post-Divorce Adjustment", in *IMPACT OF DIVORCE, SINGLE PARENTING AND STEPPARENTING ON CHILDREN*, (Hillsdale, E. M. Hetherington & J. D. Arasteh eds., 1988) 169. See also the review set out in J. H. Grych & F. D. Fincham, "Marital Conflict and Children's Adjustment: A Cognitive-Contextual Framework", 108 *PSYCHOLOGICAL – BULLETIN* (1990) 267.

⁸⁸ In this context see Amato, *supra* note 83, at 30-31. See also Lawrence A. Kurdek, "Issues in Proposing a General Model of the Effects of Divorce on Children", 55 *J. MARRIAGE & FAM.* (1993) 39, 40-41. For arguments in this spirit, see Robert W. Gordon, "The Limits of Limits on Divorce", 107 *Yale L. J.* 1435 (1998). 1448-1449.

⁹⁰ In recent years a whole branch of psychological research has developed, at the centre of which is an attempt to identify which components in the divorce process have the greatest impact on children. See, for example, Cherlin *et al.*, "Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States", 252 *SCIENCE* 1386 (1991). See also McLanahan & Sandefur, *supra* note 84 (who try to develop a model which will define when divorce is the best option for children and when it is a harmful option). See further P. R. Amato & A. Booth, "A Prospective Study of Divorce and Parent-Child Relationships", 58 *J. MARRIAGE & FAM.* (1996) 356; Amato *supra* note 82; and recently Amato & Booth, *supra* note 83. See also the review of research appearing in Gordon, *id.*

⁹¹ For this, see the sources cited in the previous note (principally Amato & Booth, *id.*, at 196-197, 204-205, and the studies discussed there). See also the sources cited in Spaht, *supra* note 85, at 1556-1558; Waite & Gallagher, *supra* note 84, at 145-147.

possibility of divorce in such cases. At the same time, in my view, legal rules which would define certain family situations (for example, low levels of tension between parents) as ones which negate the possibility of divorce, may encourage partners interested in divorce to act manipulatively and heighten the family conflict. Accordingly, such rules may ultimately harm children. Moreover, as mentioned earlier, legal rules will obstruct, or at the most delay, formal divorce; the ability of divorce laws to prevent substantive divorce, *i.e.* to prevent the possibility of separation and severance is much weaker. It seems that even the studies which conclude that divorces harm children, are addressing divorces in their sociological sense and not the legal definition of the relations between the parties. Accordingly, I do not believe that a comprehensive rescission of the right to legal divorce would be an efficient measure even from a perspective focusing on the welfare of the child.

Earlier I explained why comprehensive denial of divorce is not an appropriate policy from a point of view focusing on the welfare of the child. At the same time, notwithstanding my reservations concerning comprehensive denial of the unilateral right to no-fault divorce, it would seem that the demand to take into account the welfare of children when shaping divorce laws is certainly valid. I believe that the studies which deal with the influence of divorces on children clearly show that even if divorces do not invariably harm children,⁹² the process is a complex one which has a significant impact on their lives. Accordingly, the manner in which divorces are conducted in specific cases may have far reaching effect on the lives of the couple's children. It seems, therefore, that the best interest of the children must be one of the factors influencing the shape of divorce laws. Thus, even those who do not believe that a strict and all-embracing policy regarding achieving a divorce will inure to the benefit of the child, would agree that the divorce procedure ought to be shaped in a manner which takes into account the impact of the divorce on the children in the concrete case. Consequently, different treatment ought to be accorded to divorces which involve children and divorces which do not involve children. Where the divorces do not involve children, the divorces must focus on the parents, their desires and needs. In contrast, when the process involves a couple with children, a divorce procedure must be established which also takes into account the best interest of those children. This may have a number of practical legal ramifications which go beyond the prevailing legal order in most western countries:

First, conceivably it is necessary to establish default options which distinguish between the length of a divorce process which does not involve children and the length of a divorce process which involves children. At least as a starting premise, it would seem that the existence of children is a consideration for establishing a lengthier divorce process both in order to exhaust the possibility of compromise between the parents and in order to enable the family to properly prepare and plan their divorce.

Second, I believe that in the case of divorce which involves minors, it is right to enable the courts to make the divorce contingent upon a referral to professionals or to special Unit which

⁹² On the contrary, a close consideration of the studies dealing with the impact of divorce on children reveals a complex picture, where alongside cases where divorce harms children, primarily in families where the level of conflict is low, other cases arise (primarily where family relations are very tense) where the divorce facilitates the adjustment of children in problematic families. This is admitted even by those who support making divorce law more stringent. *See, for example*, Amato & Booth, *id.*, at 196-197, 204-205; and Gordon, *supra* note 89.

operates within the Family Court, which will enable the couple and the family as a whole to prepare and plan their future actions. **Moreover**, against the background of the significant ramifications of divorce upon children, we may ask the court dealing with children to obtain a report from a professional regarding the expected impact of the divorce process upon the children and even demand that the children or their independent representative be heard prior to the divorce.

Finally, beyond the ordinary rules dealing with the divorce process, the court must be vested with the power to delay or propel forward the divorce process in a specific case, while taking into account the opinions of professionals and its evaluation of the needs of the couple's children.

In this context, I wish to re-emphasize that according to our analysis considerations relating to children cannot entirely prevent divorce or even defer them for a prolonged period of time. At the same time, considerations of the best interest of the child may make the concrete divorce process compatible with the needs of the children of the family. It seems to me that even if the price of such compatibility is certain harm to the right to exit of the person seeking the divorce, the modern ethos which is committed to the best interest of the child may justify such harm, provided always that such harm is temporary.

Against the backdrop of my recommendations regarding the situation which ought to prevail, an examination of the actual legal situation is largely disappointing:

On one hand, in many western countries, such as the countries of Scandinavia,⁹³ Australia⁹⁴ and some of the states in the United States,⁹⁵ there is a clear tendency towards expressly or impliedly

⁹³ In most of the countries of Scandinavia, there is a pure 'official' system of 'no-fault' divorce on demand. At least in some of those countries agreed divorce is not a legal issue at all. For this, see Glendon, *supra* note 13 at 182-188; Pocar & Ronfani, *supra* note 32 at 196-197; T.S. Schmidt, "The Scandinavian Law of Procedure in Matrimonial Causes", THE RESOLUTION OF FAMILY CONFLICT (Toronto, J.M. Eekelaar & S.N. Katz eds., 1984) 77.

⁹⁴ Divorce on demand is also available in Australia. There, one year of separation allows a party to obtain a divorce unilaterally. See Family Law Act 1975 (Cth) (Australia) Section 48.

⁹⁵ The American approach is manifest in the Uniform Code - see Uniform Marriage and Divorce Act 9A U.L.A. 147 (1987) - and the California code, which reflected the revolution. Both codes repealed the usual grounds of divorce, and divorce is available only upon irreversible breakdown of marriage. *Prima facie*, the legislative changes need not necessarily have led to divorce on demand, and even not to divorce by consent. Indeed, certain courts have emphasized the obligation of the court to carry out independent examination, and not confine themselves to the testimony of the parties. See, for example, the judgment in *Ryan v. Ryan* 277 So.2d 266 (Fla. 1973). In practice, the formal notes to the Code grant the courts power to deny a divorce when one party objects and argues that the marriage has not broken down. See H.H. Clark, "The Role of Court and Legislature in the Growth of Family Law" 22 U.C. DAVIS L. REV. (1989) 699, 702; see also R. Levy, "A Reminiscence About the Uniform Marriage and Divorce Act - and Some Reflections About Its Critics and Its Policies", BYU L. REV. (1991) 43, 45-46. At the same time, review of the vast legal literature which describes the divorce law, clarifies that despite the above theoretical possibility, in these countries an interested party may divorce even without the consent of his partner. Clark - H.H. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (Vol 2, St. Paul, 2nd ed., 1987) 42 - stated this eloquently: "It is virtually impossible to imagine a case in which if one spouse wishes divorce the divorce would be denied". However, it is important to note that contrary to the commonly held view whereby every state in the United States enables divorce on demand, a closer consideration of the divorce laws in New York, Mississippi and Tennessee shows that in these states, at least according to the 'official' law, it is not possible to

adopting a special divorce model based on demand. As I have shown this model is not sufficiently sensitive to the needs of children. On the other hand, a large proportion of the proposals for reform of family law seek to make divorce laws in their entirety more stringent or even return to fault based models of divorce. First, a large proportion of these proposals ensue from moral and/or religious motivation regarding the institution of marriage and they do not focus on the best interest of the children. Second, even when the motivation of the persons making the proposals is the best interest of the children, I do not believe that making the divorce laws more stringent is the right solution. Indeed, as I fully explained previously, the best interest of children does not necessarily require the prevention of divorce and certainly it does not justify the discourse of fault.

Against the background of my criticism both against the modern trend towards the model of divorce on demand and against the approaches which seek to make the divorce process as a whole more stringent for the sake of the welfare of the children, I wish to note favourably the Family Law Act which was adopted in England at the end of the last century.⁹⁶ In certain aspects the new Act integrates with the previous trends towards easing the laws of divorce: the new Act completely repeals the grounds of fault, and the sole ground for divorce is a declaration by one or both parties that the marital connection has broken down.⁹⁷ In other words, the system is one of “no fault” which enables “official” unilateral divorces.

At the same time, the Act illustrates the legal possibility of taking into account the best interest of children:

First, in the spirit of our recommendation, the Act distinguishes between a divorce in which minor children are involved and one in which children are not involved.⁹⁸

Second, the Act determines that all matters connected with the custody of children must be resolved prior to a divorce order being given.⁹⁹

divorce at all without the consent of the innocent party, and accordingly it is not possible to characterize these states as states which supply divorce on demand or even as states which enable unilateral divorce.

⁹⁶ Family Law Act 1996 (hereinafter: “the English Family Law Act”). For a detailed description of the provisions of the Act and the way in which they integrate with other statutes, see R.C. Bird & S. Cretney, *DIVORCE: THE NEW LAW* (Bristol, 1996); G. Douglas, “Family Values’ to the Fore?” *THE INTERNATIONAL SURVEY OF FAMILY LAW 1996* (Hague, A. Bainham ed., 1998) 157; Cretney, Masson & Bailey-Harris, *supra* note 17 at 297 *et seq.*;

⁹⁷ Section 5 of the English Family Law Act.

⁹⁸ According to the Act, the divorce process begins with an information meeting in which the parties are given explanations regarding the divorce process. About three months after the meeting, the interested party submits the application to divorce. The final divorce order is given about nine months after the application if no minors are involved, and fifteen months after the application if minors are involved (see Sections 2-8 of the English Family Law Act as well as the sources describing the Act, *supra* note 30). The Act anticipates that the parties will utilize the waiting period to reflect about the possibility of reconciliation or settle property issues if reconciliation is impossible. For a sceptical approach to this anticipation, see S. Cretney, “The Divorce White Paper - Some Reflections”, 25 *FAM. L.* (1995) 302.. At least during the running in period of the Act, in which it was being examined in relation to a small number of couples, the sceptical approach was found to be realistic, as in most cases the couples came to meetings at a stage when it was already impossible to rehabilitate their relations.

⁹⁹ According to the Act, in the absence of an agreement or judgment relating to property or children, an order of divorce will not be given. See Sections 2 and 9 of the English Family Law Act,

Third, the Act empowers the court to prevent a divorce in the event that it would result in serious hardship to the children of the couple.¹⁰⁰

As noted, the premise of the Act is that a divorce process in which children are involved will last longer. At the same time, the Act is aware of cases where this is contra-indicated and therefore provides that when the best interest of the child compels a swift divorce process, it is possible to bring forward the time of divorce.

It cannot be denied that part of the motivation for enacting the Act was connected to a fundamental trend towards strengthening the institution of marriage.¹⁰¹ In addition, in England doubt has been expressed regarding the ability to implement the Act in practice and indeed the implementation of the Act has been deferred for the time being, and according to a government announcement it is possible that it will be amended prior to being implemented.¹⁰² Nonetheless, I believe that this Act and the processes preceding it make it clear that western law has not yet said the last word on the laws of divorce and at least from the perspective of the best interest of the child it seems that this is a correct process.

ii Property Relationship: the Rights of Children in the Family Property

The economic relations between couples also illustrates the modern trend towards distinguishing between spousal relations and parenthood and joint parenthood and the difficulties posed by this distinction from a point of view which focuses on the best interest of the child.

In the prevailing legal discourse, children's maintenance is perceived as a child's right, notwithstanding that in practice payment of maintenance is made to the parent and not directly to the child, it is perceived to be part of the laws of parenthood. In contrast, the duty to maintain a spouse and property rules are perceived to be part of spousal law.

However, in the real world the distinction is less sharp:

First, the non-custodial parent does not pay the financial support directly to the child but to the custodial parent and in practice besides the needs of the child the financial means of both parents are an important factor in the calculation of the precise sum that the non custodial parent has to pay. This means that the economic connection and even dependency between the spouses continue. The continuing ties and dependency dramatically weaken the clean break aspirations of spousal law.¹⁰³

More important is the fact that the economic relations between the couple are not entirely spousal in nature, as the economic state of the custodial parent has a dramatic influence on the

¹⁰⁰ See Section 10 of the English Family Law Act,

¹⁰¹ See, for example, the statement in Section 1 of the Act.

¹⁰² See Cretney, Masson & Bailey-Harris, *supra* note 17 at 308-309;

¹⁰³ Thus, in some circumstances, the clean-break ideology does influence the regulation of the responsibility of a parent toward his child. See, for example, *Delany v. Delaney* [1990] 2 FIR 457 (Ca).

interests of children and the quality of their lives.¹⁰⁴ Thus, for example, studies show that notwithstanding the tendency of property law in the western world to share the joint property of the couple equally, in many cases female custodians encounter economic problems in the aftermath of divorce.¹⁰⁵ In view of the fact that in the majority of divorce disputes it is the women who struggle as the custodians of the children, it is no wonder that studies show that the economic situation of the parent who holds the child following divorce, is one of the factors which has the greatest influence on the negative phenomena experienced by children of divorced families.¹⁰⁶

Naturally, the economic condition of the custodial parent derives not only from the sum he receives for child maintenance but also and perhaps primarily from the economic spousal regulation between the parties, *i.e.*, the property relations and the obligation to pay maintenance to the other spouse. Consequently, the property arrangements and the economic support of the spouse which are customarily regarded in legal thinking as spousal issues, have clear influence on the welfare of children. Accordingly, I believe that expansion of the obligatory duty of the father to maintain his children cannot suffice, it would be right to consider a reform of the property laws aimed at safeguarding the economic and psychological state of the children of divorced families.

Reforms of this type are likely to justify departing from an equal distribution of the property of the parties, in favour of the spouse holding the children in order to ensure the welfare of the children of the family. It is also possible to think of a more radical change which would allow some of the family property to be transferred into the names of the children or at least for a short period of time to charge some of the family property in favour of the children of the family.

Contrary to the position I have espoused here, it seems that in recent years many western countries, including most of the states of the United States, have developed a different trend. Following this trend, even common law countries have tended to adopt the tradition of the countries of the civil law in which family property is perceived as a product of partnership between spouses. This perception tends to prefer a stringent partnership rule which divides the products of the partners between the partners, *i.e.*, between the spouses. This rule makes it much more difficult to depart from equal distribution generally and accordingly makes it more difficult to vest extra portions of the property in the custodial parent.¹⁰⁷ Certainly, the attitude to a

¹⁰⁴ See K. A. Clarke-Stewart, K. McCatney, D. L. Vandell, M. T. Owen, & C. Booth, (2000) Effects of Parental Separation and Divorce on Very Young Children”, *JOURNAL OF FAMILY PSYCHOLOGY*, 14 (2), 304-326; J. M. Hilton & S. Desrochers, “Children’s Behavior Problems in Single-Parent and Married-Parent Families: Development of a Predictive Model”, *JOURNAL OF DIVORCE AND REMARRIAGE* (2002) 37 (1/2) 13-36. See for example Lenore J. Weitzman, *The Divorce Revolution - The Unexpected Social and Economic Consequences for Women and Children in America* (1985).

¹⁰⁶ See, for example, McLanahan & Sandefur, *supra* note 83, Chapter 5. For a similar, albeit more reserved, view, see Amato, *supra* note 82 at 32-33.

¹⁰⁷ Thus, for example, in the United States, where in the past the majority of states supported equitable law, there is a clear trend in the direction of partnership. This trend is reflected in legislation which guides or even requires judges to prefer equal distribution and on occasion even in an independent policy of courts preferring equal distribution over other forms of distribution, see C. J. Frantz & H. Dagan, “Properties of Marriage” 104 *COLUMBIA L. REV* (2004) 101, 126. Against this background, it is not surprising that the American Law Institution *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND*

partnership in which the sole partners are the parents makes it difficult to directly vest property rights in the children of the family.

Against the background of my criticism of legal systems which are committed to strict equal distribution, there is a clear advantage to equitable legal systems which enable the courts to depart from equal distribution for various reasons. Particularly noteworthy are legal systems which like the English Property law refer to the best interest of children as a specific factor which dictates the economic consequences of the divorce.¹⁰⁸

In this regard I wish to emphasize that the legal literature reflects an intense dispute concerning the advantages and disadvantages of equitable legal systems versus legal systems favouring strict equal distribution.¹⁰⁹ Indeed, in many cases equitable legal systems undermine legal stability.¹¹⁰ Moreover, empirical studies show that in many cases, equitable legal systems have led to the diminution of the share of women in spousal property and not the opposite.¹¹¹ Naturally, an inequitable distribution in which custodial women receive less than half of the spousal property harms children. In practice, even in England in which, as we have seen, the welfare of the child, is a formal criterion in terms of the division of property, a practice has developed in which women receive only a third of the spousal property. However, even if in the prevailing situation, equitable distribution harms women, in my opinion, it is possible to conceive of an additional reform which will relate to equal distribution as a stringent default option and which will enable a deviation from this type of division in favour of the custodial parent only, and only when this deviation is required for the benefit of the couple's children.

The possibility of vesting children with direct rights in the family property is even more problematic from the property point of view. Nonetheless, at least in some western states there are statutory provisions and judgments which vest this power. I believe that from the vantage point of the benefit of the child extensive use of these provisions should be encouraged.¹¹²

So far I have referred to the need to integrate children related considerations into property law in those situations in which divorcing couples have minor children. Now I wish to argue that the

RECOMMENDATIONS (2002) (hereinafter: the ALI) which recently completed an ambitious project restating family law, provides for equal distribution as the default option in Section 4.09 of the chapter dealing with property relations between spouses. For similar examples in Australia, see Rebecca Bailey-Harris, "Equality or Inequality within the Family? Ideology, Reality and the Law's Responses" in *THE CHANGING FAMILY: FAMILY FORMS & FAMILY LAW* (Oxford, John Eekelaar & Thandabantu Nhlapo eds, 1998) 251, 256-261.

¹⁰⁸ See Matrimonial Causes Act 1973, Section 25(1) of which refers to the welfare of the child as the central criterion for determining the property relations between the spouses. According to the English Act as amended in 1984 "In exercising the powers conferring by this section the court shall have regard to all the circumstance of the case first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen . . .".

¹⁰⁹ See Marsha Garrison, "How do Judges decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making", 74 N.C.L. REV. (1996) 401, 411-419.

¹¹⁰ , for example, a lot of lawyers in England, referring to the difficulty in identifying a unified legal policy.

¹¹¹ See Marsha Garrison, "How do Judges decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making", 74 N.C.L. REV. (1996) 401.

¹¹² See, for example, *Dougherty v. Dougherty* (1987) 163 CLR 278, in Australia which interprets Section 79(1) of the Family Law Act in a way that enables the court to consider the child's interests in altering the property settlement between the parents.

original design of the property laws must also take into account the ramifications these laws have for the willingness of the couple to make decisions for the benefit of their children even when these decisions *prima facie* harm them personally. Thus, for example, property laws which do not take into account the loss of career of the domestic spouse may prevent couples from reducing their work hours in order to devote time to being with their children even when such a decision is needed for the benefit of the children. Against this background I believe that the considerations of the best interest of the child support establishing property arrangements which will enable the parties to live lifestyles which take into account the good and benefit of their children.¹¹³ Accordingly, I believe that considerations of the benefit of the child require the establishment of mechanisms which will compensate the spouse who took care of the children for his loss of career during the marriage and/or even vest him with a portion of the human capital which his spouse accumulated during the marriage. More precisely, in recent years there have been those who justified the establishment of such mechanisms and at least some have been adopted in various countries. Nonetheless, in the present discourse, the justification for these mechanisms is based on the relationship between the couple and on their interests. In contrast, in my opinion, beyond the regular spousal justifications it is also possible to justify these mechanisms from a broader public point of view which seeks to enable and encourage comfortable conditions for children to grow. Accordingly, it should be noted that ironically these type of child related considerations should be implemented even if, at the time of divorce, the children of the couple have already become adults, as property laws which do not care for a spouse who sacrificed his personal interests for his children is likely to cause hardship in the future to the children of other couples.

Thus, in my opinion, a proper regulation of property law must distinguish between three separate situations:

1. Couples without children – in such a case, the legal regulation will be based solely on the interests of the couple and accordingly in most cases the private individual ideology currently guiding spousal law will continue to be compatible.
2. Couples with small children at the time of divorce – in this case, regulating the property relations must take into account the needs of the minor children. A matter which may justify both deviation from equal distribution in favour of the custodial parent and direct registration of the property in the names of the children.
3. Couples who together raised children who have since become adult – in this case the legal regulation will focus on the couple. At the same time, the regulation must take into account the public interest in encouraging or at least in enabling parents to devote time to their children. Accordingly, beyond the regular considerations raised by the laws of property there is room to compensate the spouse who devoted most of his time to raising the children as their primary care-taker.

¹¹³ Indeed, in recent years, modern spousal laws have begun to recognize the need to compensate the domestic spouse for loss of career during marriage, *see* Ellman *supra* note 17. At the same time, according to current thought, such recognition is perceived as primarily a spousal matter. In my opinion, however, this recognition does not deal exclusively with the spousal aspect of the parties' relationship but also with the joint parental aspect.

In this connection it is important to admit that the recognition of property rights of children in family property is contrary to customary property thinking and in many senses it impairs the individual rights of the parents. At the same time, I believe that modern law recognizes, in numerous contexts, the economic and non-economic limitations which parental relations impose on the parent. Thus, for example, Article 27(2) of the Convention provides that:

“The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.”

Accordingly, I am of the opinion that in certain cases it is also right to protect the rights of children using property or quasi-property measures and that the accepted distinction between the obligatory right of children to maintenance and property relations which deal with property issues, is not sacred. In any event, it is clear to me that the issue of property relations again illustrates the need to find new balancing formulae between the needs of children and the rights of parents, an issue which will be discussed in the last paragraph of this section.

iii Accommodation

The difficulty alluded to in the previous section, concerning the division of the economic relations between those attributable to the spousal relations and those relating to the interests of the children, manifest itself in the context of the family living accommodation. On one hand, on the property level, in the vast majority of cases the residential home is the property of both spouses or a single spouse. Accordingly, this is apparently a spousal issue. However, the definition of ownership of the residential home, and even more so decisions regarding severing the partnership in the apartment by selling it, may have dramatic ramifications for the lives of their children, who concurrently with the divorce will also be forced to relinquish a familiar place of residence. Indeed, psychological studies of divorce show that one of the ramifications of divorce is the harm to the sense of stability of the children of the couple. Part of the impairment to stability is connected to the family change within the framework of which daily contact with the two parents is terminated. An additional aspect of instability is connected to the fact that in many cases, one of the ramifications of divorce is a change in the place of residence as a result of the sale of the residence pursuant to the distribution of assets between the parents.¹¹⁴ Accordingly, notwithstanding the natural classification of the issue as a spousal matter, one cannot ignore its ramifications for the quality of life of the children.

Does the existing legal situation enable the prevention of the sale and distribution of the residential home in order to ensure stability in the lives of the children?

According to standard legal thinking, the parent’s obligation to provide economic support for his children naturally includes the need to ensure their accommodation. This obligation is commonly perceived as a general obligation which does not require the parents to continue enabling their children to live in the residential home to which they are accustomed. Nonetheless, in a wide

¹¹⁴ For the transfer of accommodation as a derivative of the divorce process, *see, for example*, Wallerstein & Kelly, *supra* note 82 at 25-26. For the psychological price involved here, *see* McLanahan & Sandefur, *supra* note 84, Chapter 7.

variety of contexts sale of a residence ultimately also leads to an overall change of place of residence, as often, with only half the money received from the sale of the original flat, the custodial parent will find it difficult to finance a flat in the same area and consequently will be forced to seek a more modest flat or, alternatively, a similar size flat in a cheaper area. The change in accommodation and in the area of residence aggravates the psychological difficulty involved in divorce. Accordingly, I believe, that an approach focusing on the welfare of the child is likely to support conferring discretion on the court to draw a division between the ownership of property and occupation of the flat and enable the custodial parent to continue living in the residential home. Notwithstanding that such an arrangement undermines the property rights of the non-custodial parent it seems to me that this is one of the cases where considerations of the welfare of the child supersede the private, individual nature of existing spousal laws. At the same time, in order to limit the harm to the non-custodial spouse, I propose that the right of residence in the family home be granted unconditionally to the custodial parent only for the duration of an acclimatization period, and longer periods will only be granted in special cases in which patent harm would be caused to the children by requiring them to transfer. Further, I believe that consideration should be given to the economic harm caused to the non-custodial spouse when calculating maintenance payments for the children or when arranging the overall property relations between the parents.

Like other issues considered above, there is a divergence between our proposals and the prevailing legal situation, and in many western countries severing the partnership in the residential home is perceived to be part of the property arrangements between the parents. Thus, for example, in Israel up to 1995, it was possible to obtain a speedy court order requiring the partnership in the residential home to be dissolved, without examining alternative accommodation options for the children of the family. In 1995 the law was amended and now a court ordering the dissolution of the partnership must examine whether alternative accommodation arrangements are available for the children. At the same time, as I mentioned, even the amending law is satisfied with the existence of temporary alternative accommodation and only very few judges are sensitive to children's need to continue living in the family home to which they are accustomed.

Against this criticism, it is important to point to a number of countries which have developed legal arrangements in the proper direction: in this spirit it was decided in England, and even in a number of states in the United States, that the custodial parent must be vested with accommodation rights in the residential home of the couple, even after the divorce, such rights to be unconnected to property rights.¹¹⁵ The case law in England is not uniform in implementing this provision or setting the balance between the needs of the children and the rights of the parents.¹¹⁶ At the same time, it seems to me that despite the disputes, the section and the case law

¹¹⁵ L. J. Weitzman, "Marital Property: Its Transformation and Division in the United States", in *THE ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE* (Oxford, L. J. Weitzman & M. Maclean, eds., 1992) 85, 101-105; for similar reform in California, *see* Kay, 21-22. For a similar provision in Australia, *see* FAMILY LAW ACT 1975 s. 79

¹¹⁶ *Cf.*, for example, the different judgments which dealt with the case of *Richards v. Richards*: the lower court held that the husband had to leave the matrimonial home as the mother, who had been left with the children, could not continue living with him under the same roof. The House of Lords held that raising the child, in this case, was not the central issue. *See also* the differing opinions in *K v. K*: the lower court judge, relying on the principle of the welfare of the child, ordered the father to transfer the matrimonial home to the mother, who had been left with the

dealing with it provide a good example of a legal arrangement which seeks to overcome the formal classifications and also consider the interests of children in the context of spousal laws. A similar arrangement which seeks to enable children to continue residing in the family home exists also in Canada. Thus, the Family Law Act – 24, provides that the court is entitled to grant the sole right of occupation to one of the spouses even if he is not the owner of the property. Section 24.3 provides parameters which the court must weigh before granting exclusive occupation. The primary criterion is:

- (a) the best interests of the children affected;

Section 24.4 provides criteria for examining the best interest of the child:

[What is best for the children is a major consideration in determining whether to grant a spouse exclusive possession of the matrimonial home.]

- (a) the possible disruptive effects on the child of a move to other accommodation; and
- (b) the child's views and preferences, if they can reasonably be ascertained.

iv. Agreements and Representations

Another ramification of the modern division between regulating parenthood and regulating the spousal connection is connected to the legal attitude to agreements between the spouses / parents. According to modern thinking, where reference is to issues classified as spousal, *i.e.*, the property relations between spouses and their economic responsibilities, it is necessary to aspire to apply liberal principles of freedom of contract. In contrast, in so far as reference is to agreements dealing with children, such as support of children and custody of children, more stringent public oversight must be exercised over the agreements. In this spirit, it is stated even in modern laws which reveal a clear trend towards broadening legal enforcement of premarital agreements and divorce settlements, that agreements dealing with the custody of children or agreements that impair children's rights to support, will not be enforced according to regular criteria.¹¹⁷

Nonetheless, the analysis made in the previous sections makes it clear that even issues classified as spousal, such as the property relations between the spouses, may have an impact of the welfare of children. Accordingly, I am of the opinion that the logic justifying subordinating the parents' freedom of contract to the principle of the welfare of the child may also justify intervention in agreements between parents which *prima facie* deal with spousal issues. Against this background, I believe that the qualifications to freedom of contract in the family context must be drafted broadly in such a way as to clarify that every arrangement which might harm

children. The order prevented the father from taking his share in the home which was his sole property. The Appeals Court overturned the decision and held that in this case the principle of the welfare of the child was not the overriding principle.

¹¹⁷ See, for example, American Law Institution, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002), Section 7.09 (5) "terms of separation agreement concerning child support or custodial or decision making responsibility for children are not enforceable ...".

children is subject to review by the court even if formally the agreement deals with spousal laws, such as the ownership of property and methods of realizing it.

Therefore I prefer the provisions drafted in Australian¹¹⁸ and Canadian¹¹⁹ statutes which enables the court to intervene in every matter relating to children, over more focused formulations which relate to issues of maintenance and custody.¹²⁰

Yet, even the broader formulation will not help if the courts will not acknowledge that property relations, accommodation and occasionally even the divorce itself are matters which concern children and allow them to intervene in the content of these agreements on grounds of children's welfare.

A similar implementation of my approach relates to the issue of the representation of children. In recent years an approach has developed holding that when a dispute arises between the parents, the interests and the needs of the children may be forgotten and accordingly the court dealing with the interests of children must ensure that the children obtain independent representation during litigation or, alternatively, when processes get underway to achieve an agreed settlement. According to customary legal thinking, independent representation of minors is obtained in the context of parent-child relations. In contrast, under our analysis, it would also be right to enable independent representation in much wider contexts such as in the contexts of divorce, property and accommodation.

So far I have dealt with situations in which recognition of the lack of a clear distinction between spousal law and parent-child law supports strengthening public oversight of family agreements and the litigation between spouses. I now wish to present the contrary situation where it is actually recognition of the interconnection between these fields which may broaden freedom of contract in the family context. I am referring here to the often seen situation in which, during family negotiations, the spousal issues and the parental issues are not perceived as independent issues by the negotiators. Accordingly, the divorce settlement is discussed as a whole concept where interests conceded in the spousal arena are weighed against interests conceded in the parental arena and *vice versa*.¹²¹

In many senses, this state of affairs is problematic from a perspective which focuses on the welfare of the child as there is a fear that parents will "sacrifice" the interests of their children for personal gain.¹²² Particular fear arises in situations where there is a significant discrepancy in the

¹¹⁸ See the sec 55A to the family law act as well as the new sec 90 of that Act.

¹¹⁹ See sec 56 to the Canadian Family law act

¹²⁰ See ALI, *supra* note 41, but *it should be admitted* that even the ALI enables courts to consider the welfare of a children as a criterion which determines the substantive justice of the agreement.

¹²¹ Moreover, in many cases, even custodial and contact rights between parents and children are perceived by the parents as negotiable and therefore, in consideration for a concession regarding claims and rights to custody, the parent who concedes his rights expects a return concession in the economic field. See Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce", 88 YALE L. J. 950 (1979).

¹²² In economic language, this is a manifest case of externalizing costs, which is one of the cases in which judicial intervention in freedom of contract is justified. See Michael J. Trebilcock & Rosemin Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective", 41 U. Toronto L. J. 533 (1991).

level of power of the respective spouses. In this situation the spouse with greater economic power might exploit the weakness of the other spouse in order to evade his obligations not only towards that other spouse but also towards the children. Against this background, it would seem that it is actually the point of view focusing on the welfare of the child which should favor a strict separation between the regulation of spousal relations and consensual relations, where the concession of children's interests by their parents will be invalid.

However, in my opinion, there are situations in which arrangements which integrate spousal issues with parenting issues *are* in the interest of children. The property concession of a home is also of great value from a perspective focusing on the welfare of the child. Think, for example, of a spouse willing to give up his share in the matrimonial home registered in the name of the custodial parent in consideration for a reduction in the amount of the maintenance payments which he is required to pay to his child. A strict division between the regulation of parenthood and the regulation of spousal relations may lead to the outcome whereby the reduction in the amount of the maintenance payments to the children will not be valid notwithstanding the property concession. Accordingly, spouses may be deterred from making agreements of this type. On the other hand, the analysis made in the previous chapters teaches that this type of arrangement will provide the children with stability and security and therefore it integrates well with the interest in the welfare of the children. Accordingly, I am of the opinion, that it is reasonable to engage in an overall examination of the arrangement without completely, and in my opinion artificially, severing the spousal components and the parental components. In cases where the court is persuaded that the agreement as a whole is a fair agreement which answers the needs of the children, it must confirm the agreement as a whole and not look at each component individually.

In view of this stance, I believe that the trend existing in some western states to distinguish, in an extreme manner, between the obligation to pay maintenance to children which is calculated independently by administrative authorities¹²³ and the other economic matters which the court considers, makes it more arduous to achieve comprehensive agreements and consequently is a problematic trend. Accordingly, I recommend that even when technical formulae exist for calculating the minimum amount of child maintenance, ways must be found to enable a deviation from these formulae, where in consideration for the reduction of maintenance payments to the child, the child or even the custodial parent receives a more generous share of the matrimonial property.

V. Conclusion: Toward new Balance between spousal rights and parental responsibility

In this study I have tried to examine the complex relations between the regulation of spousal relations and the regulation of parenthood. In the first stage I analysed the differences in the development of the two areas and the manner in which this development led the drafters of the law to try and distinguish between them in a stringent manner. I explained why different aspects of this distinction are important from a perspective which focuses on the welfare of the child.

¹²³ See, for example, the Child Support Act 1991 in England .

Against this line of thought, I pointed to cases in which the distinction is incompatible with the way in which families live and operate and how it may even undermine the welfare of the child.

There are two levels at which this study may be read:

At one level the study does not refute the actual distinction between spousal regulation and parental regulation but only indicates the cases where various issues classified today as spousal law possess a parental aspect. According to this line of thought, the importance of the study lies in the renewed delineation of the boundary between the spousal laws and parenthood laws while clarifying that different issues of accommodation, property and even divorce have an impact on parent-child relations and therefore are subject to the best interest of the child.

At the same time, in my opinion, the study has an additional broader significance related to the actual ability to sever spousal relations and parental relations: in the prevailing legal discourse, there is a dichotomy between matters concerning children, in which the best interest of the child is the primary consideration or even the exclusive consideration and other matters in which the welfare of the child is not expressed in legal terms. Nonetheless, this analysis - which shows that even manifestly spousal matters, such as divorce laws, property relations between spouses and accommodation in the matrimonial home have an impact on the welfare of children - proves the problematic nature of the dichotomy. On one hand, the classification of these issues as matters connected to children and their complete subordination to the principle of the welfare of the child is unreasonable as it disregards the rights and needs of the parents on these issues. On the other hand, refusal to regard them as issues concerning children leads to the complete and inappropriate removal of child related considerations from the treatment of these issues. Against this background I believe that the great challenge facing the drafters of family law is to chart intermediate categories of family law which will deal both with spousal relations and with parental aspects and to try to propose appropriate balancing formulae which integrate the interests, wishes and rights of all those concerned in these issues.

This leads me to a final insight: While western culture predominantly focuses on individualistic rights, there are certain areas of law, such as children-parents law in which responsibilities, duties and obligation remain central notions. One possible strategy employed by lawmakers is to isolate these animalist areas of law, distinguishing them from the primary legal focus on individuals. This Article suggests a different approach, by integrating conceptions of responsibility into the liberal-Individual areas of law. The example of children and spousal law demonstrates the significant advantages of the latter approach.