THE BEST LOVE OF THE CHILD

RELIGION, MARRIAGE, AND FAMILY

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The Best Love of the Child

Being Loved and Being Taught to Love as the First Human Right

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This volume is dedicated to
Don S. Browning (1934-2010):
sage scholar, beloved friend,
and the intellectual father
of many of us concerned with
children and the family

CHAPTER 10

What's Love Got to Do with It? (Part I): Loving Children in Cases of Divorce or Death in the Jewish Tradition*

Michael J. Broyde

Introduction

Although Jewish law is replete with mandates to "love," from loving the convert[1] to loving one's wife,[2] understanding why helps frame the basic perspective of this chapter. Love as a legal response must be limited to those cases where law gives you the right to choose whom you will love. One can be forced to love one's spouse precisely because one can choose him or her, and if one does not love him or her, one should not marry that person.[3] The same is true for loving the convert — which is essentially a voluntary relationship between an individual and the Jewish people.[4] As I have noted else-

*See Wikipedia, "Tina Turner," which notes that Ms. Turner is commonly known as the Queen of Rock 'n Roll. To my dismay, this is the first citation to Tina Turner in my work or, as far as I can tell, other works of Jewish law.

1. Deuteronomy 10:18.

2. This obligation is derived rather than biblical. Yet even the obligation not to hit one's wife stems not from an obligation to love her, but from the obligation to honor and respect her; see Rabbi Joseph Karo, *Beit Yosef, Even HaEzer* 154:[3]. This only reinforces the point that the term "love" is not taken by Jewish law sources to generate obligations in action — in contrast to terms like "honor," "respect," "heed," and "obey."

3. See Babylonian Talmud, *Gittin* 89a-b, which records a three-way dispute about the exact standards for divorce. The normative view is that even the slightest fault can be grounds for divorce, as love is gone in those cases.

4. For more on this, see Michael Broyde, "Proselytism and Jewish Law: Inreach, Outreach, and the Jewish Tradition," in *Sharing the Book: Religious Perspectives on the Rights and Wrongs of*

where, the same can be claimed to be true for one's relationship with one's adopted children.[5] Since choice is a central criterion in each of these relationships, love — an emotion that one frequently cannot regulate and rarely can compel — can be required to be part of the obligation. Even the ultimate mandate — to love God — is based in the Jewish tradition on the covenantal choice made by the Jewish people to choose to be Jewish and accept the commandments at Sinai. Only because we have chosen to accept, can we be asked to love.

Such is not the case in the parent-child relationship. Children are sometimes unwanted, the unintended byproduct of love of one's spouse or inattention to the details of birth control or one (actually, two people[6]) having too much to drink. Whatever the cause, the Jewish legal tradition mandates that parents care for their children and act in their best interest, whether or not they love them. Indeed, love is essentially unmentioned in the Jewish law discussion of children and their rights, duties, and obligations. The legal duty of guardianship, and hence the way true love is manifest in the many different situations where children are born, is found in the obligation to care for one's children. Love without a duty would be perceived as a somewhat empty obligation. Law — even Jewish law[7] — cannot compel love. But it can compel manifestations of love in terms of the parents' obligation to care for and support a child.

More than twenty years ago, the late professor Robert Cover of Yale Law School noted a crucial difference between the rights-based approach of common law countries and the duties-based approach of Jewish law. He remarked:

> Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a "Rights" movement is started. Civil Rights, the right to life, wel-

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Proselytism, ed. John Witte Jr. and Richard C. Martin (Maryknoll, NY: Orbis Books, 1999), pp. 45-60.

5. See Michael Broyde, "Adoption, Personal Status, and Jewish Law," in *The Morality of Adoption: Social-Psychological, Theological, and Legal Perspectives,* ed. Timothy Jackson (Grand Rapids: Eerdmans, 2005), pp. 128-47. The present chapter is intended as a companion and complement to that one.

6. There is an ongoing dispute in Jewish law as to whether a married couple may have sexual relations if one or both of them is drunk; see *Arba'ah Turim, Even HaEzer* 25 and commentaries ad loc.

7. For more on Jewish law as a system that requires ethical duties see, e.g., J. David Bleich, "Introduction: The *A Priori* Component of Bioethics," in *Jewish Bioethics,* ed. Fred Rosner and J. David Bleich (Brooklyn, NY: Hebrew Publishing Company, 1985), pp. xi-xix.

> fare rights, etc. The premium that is to be put upon an entitlement is so coded. When we "take rights seriously" we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.[8]

This same point can be made in reflecting on a contrast between the Jewish legal tradition and many common understandings of Christian jurisprudence. Professor Saiman of Villanova University School of Law has written insightfully about the sources of these fundamental differences and how they still resonate today in a number of ways.[9] He notes:

> The Christian (particularly the contemporary Protestant) mode inhabits a very different discursive realm. Law is not the correct platform through which to analyze and decide important religious and social issues. It is thought to be overly restrictive, and unjustifiably replaces faith and love with rules and precedents. Rather, the reasoning process is directed inward, and exhibits more overtly religious, spiritual and subjective modes of reasoning and analysis.[10]

His observation echoes that of Professor Cover. Many religious movements in the United States identify love as an overarching guiding principle. When there is some urgently felt need to change a doctrine or keep it in one way or another, "love" is frequently pointed to as a way to modify law.[11] The premium that is to be put upon a religious entitlement is so coded. When Christianity takes love seriously, we often understand that to mean that love trumps other values and creates some sort of entitlement. But Jewish law[12]

8. Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion* 5 (1987): 65-74, at p. 67 (footnotes omitted).

9. Chaim N. Saiman, "Jesus' Legal Theory — A Rabbinic Interpretation," *Journal of Law and Religion* 23 (2007): 97-130. (This article argues that the polarized positions in many contemporary debates within American law — law vs. equity, procedural vs. substantive justice, rules vs. standards, formalism vs. instrumentalism, and textualism vs. contextualism — can be seen as manifestations of a fundamental disagreement between the rabbinic Jewish understanding of law and Christian jurisprudence as represented in the Gospels.)

10. Saiman, "Jesus' Legal Theory," p. 106.

11. Consider the frequent references in contemporary Christian literature to the homosexual and love, or this conference's insistence that love is a key value for dealing with children.

12. "Jewish law," or *halakha,* is used herein to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, the Torah) is the touchstone document of Jewish law and, according to Jewish

embodies an approach where "an entitlement without an obligation is a sad, almost pathetic thing."[13]

With regard to our particular issue, the Jewish tradition would rather speak about the duties of parents and children — and love cannot be a duty or an obligation; indeed, it cannot even be the predicate for other duties and obligations, lest one exempt oneself from the many technical obligations of parenthood by claiming that one does not love one's children. Who needs a heart if a heart can be broken, indeed?

This is just one manifestation of the stark contrast between the Jewish law view and the Christian approach. In the Jewish tradition, love-based

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legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next seven hundred years, and the Jewish canon was closed around the year 200 before the Common Era (BCE). The time from the close of the canon until 250 of the Common Era (CE) is referred to as the era of the *Tannaim,* the redactors of Jewish law, whose period closed with the editing of the *Mishnah* by Rabbi Judah the Patriarch. The next five centuries were the epoch in which the two Talmuds (Babylonian and Jerusalem) were written and edited by scholars called *Amoraim* ("those who recount" Jewish law) and *Savoraim* ("those who ponder" Jewish law). The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work.

The post-talmudic era is conventionally divided into three periods: (1) the era of the *Geonim,* scholars who lived in Babylonia until the mid-eleventh century; (2) the era of the *Rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and (3) the period of the *Aharonim* (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century up to this era. From the period of the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo, called the *Shulhan Arukh,* as the basis for modern Jewish law. The *Shulhan Arukh* (and the *Arbaʿah Turim* of Rabbi Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: *Orah Hayyim* is devoted to daily, Sabbath, and holiday laws; *Even HaEzer* addresses family law, including financial aspects; *Hoshen Mishpat* codifies financial law; and *Yoreh Deah* contains dietary laws as well as other miscellaneous legal matter. Many significant scholars — themselves as important as Rabbi Karo in status and authority — wrote annotations to his code, which made the work and its surrounding comments the modern touchstone of Jewish law. The most recent complete edition of the *Shulhan Arukh* (Vilna: Ha-Almanah veha-Ahim Rom, 1896) contains no less than 113 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Besides the law codes and commentaries, for the last twelve hundred years Jewish law authorities have addressed specific questions of Jewish law in written *responsa* (in epistolary, question-and-answer form). Collections of such *responsa* have been published, providing guidance not only to later authorities but to the community at large. Finally, since the establishment of the State of Israel in 1948, the Rabbinical Courts of Israel have published their written opinions (Piske Din) deciding cases on a variety of matters.

13. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," p. 67.

commandments are weak and obligation-less. Thus, the requirement to love the convert or even to love God seems to be magnificent in the Jewish tradition, but really is somewhat powerless — until it is actualized in terms of a duty and an obligation. Maimonides' *Book of Commandments* lists four love-based commandments: to love God,[14] to sanctify God's name (in demonstration of that love),[15] to love one's neighbor,[16] and to love a convert.[17] None of them ever directs one to a concrete action,[18] with the exception of the sanctification of God's name, which is understood by Maimonides as allowing one to be killed rather than violate specific aspects of Jewish law.[19] This stands in contrast to other code words such as "respect" or "fear" or "remember," each of which is understood to direct concrete actions in the Jewish tradition. Parents are entitled to be respected and obeyed by operation of the Jewish law duty imposed on children to respect them. Children are entitled to be fed, clothed, taught Judaism, given a profession, and generally taught to be competent adults, grounded in the obligations imposed on parents. Nowhere is love mentioned.

Why this is so in the Jewish tradition reflects an underlying sense of what Jewish law aims to accomplish. Unlike other religious systems and like other legal systems, Jewish law is focused on the practical. Love is at its core a commandment that can never be mandated. Even the biblical verses directing one to love God generate an enormous literature in the Jewish tradition about what that means and how to fulfill it.[20] Instead, the Jewish tradition,

14. Moses Maimonides, *Book of Commandments,* Positive Commandment no. 3.

15. Maimonides, *Book of Commandments,* Positive Commandment no. 9.

16. Maimonides, *Book of Commandments,* Positive Commandment no. 206.

17. Maimonides, *Book of Commandments,* Positive Commandment no. 207.

18. Consider, for example, the obligation to love one's neighbor as oneself. This certainly does not mean that when I have two dollars in my wallet and I am going into a store to buy myself a banana (which I love), and I am with my neighbor and he loves bananas too, I should buy him one as well.

19. Which is, at its core, a passive activity and not an active one.

20. Contrast, e.g., *Notes of Nahmanides to the Book of Commandments,* Positive Commandments nos. 1, 5, and 9, together with the explanatory notes of R. Hayyim Heller to Maimonides' *Sefer HaMitzvot* (Jerusalem: Mosad Harav Kuk, 1980), with the view of R. Sa'adia ben Joseph Gaon in his *Sefer HaMitzvot* and the illuminating comments of R. Jeroham Fishel Perla to that work (Jerusalem: Keset, 1973). This literature focuses on whether this and other abstract, action-less *mitzvot* are even to be enumerated as commandments. Nahmanides, for example, reinterprets a whole host of *mitzvot* to make them tangible, though in essence he distances many of these commandments from their simple understanding. To him, love of God is manifest in the particulars of regular worship, though it is far from clear whether that truly can be considered a duty of "love" in any classical sense.

when it focuses on the parent-child relationship, sets forward obligations and responsibilities so that parents should be compelled to act in a manner that is in the best interests of the child.

Continuing this rabbinic sense that love is manifest only through concrete rules that govern the conduct between individuals, this essay will explore the basics of this issue through the lens of a complex problem — namely when parents cannot jointly raise their children together, which parent (or third party) shall be given the rights, duties, and obligations of the caregiver. Conceptually, this essay is the sequel to an article I wrote explaining why the Jewish tradition has no legal category called adoption.[21] The contrast between how Jewish law views natural children and adopted children is profound, as adopted children are exactly *chosen* and natural children are not. These two essays thus constitute twin takes on the same issue, albeit studies in contrast.[22]

This article will survey Jewish law's approach(es) to several complex matters of Jewish law, each of which focuses on who bears the duty and obligation to care for children — the concrete manifestation of love.[23] Specifically, this

21. Broyde, "Adoption, Personal Status and Jewish Law."

22. This concretizing of "love" into real obligations, when coupled with the revival of the Rabbinical Court system in the United States, has returned the topic of child custody from the theoretical to the practical in Jewish America; Jewish law courts now are hearing child custody matters and issuing rulings in this area. In fact, these determinations are among the most difficult to make as they pose many of the classical difficulties related to mixed fact and law determinations.

23. A number of excellent articles address the unique mixture of law and fact found in this area and survey the applications of the various practical rules developed. The most complete of these is Professor Shochatman's excellent article; see Eliav Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," *Shenaton LeMishpat HaIvri* 5 (5738 [=1978]): 285-301 (Hebrew).

In addition, a number of articles address various issues in the field; see Rabbi Chaim David Gulevsky, "Question on the Custody of Children," in *Sefer Kavod Harav: Essays in Honor of Rabbi Joseph B. Soloveitchik,* ed. Moshe D. Sherman (New York: Student Organization of Yeshiva, 5744 [=1984]), p. 104 (Hebrew); Ronald Warburg, "Child Custody: A Comparative Analysis," *Israel Law Review* 14 (1978): 480-503; Maidi Katz, "A Reply to Ronald Warburg" (manuscript on file with the author) (1992); Basil Herring, "Child Custody," in *Jewish Ethics and Halakhah for Our Time* (New York: KTAV and Yeshiva University Press, 1989), p. 177; Israel Tzvi Gilat, "Is the 'Best Interest of the Child' a Major Factor in a Parental Conflict over Custody of a Child?" *Bar Ilan Law Studies* 8 (1990): 297-349 (Hebrew).

In particular, Professor Shochatman's article is a complete analysis of this area with in-depth collection and discussion of the many Jewish law authorities and a near complete review of the *responsa* literature. Each of the articles listed above (except perhaps Gulevsky's), as well as this article, in one way or another is responding to or complementing the analysis found in Professor Shochatman's article.

article is divided into four substantive sections: the first addresses the theoretical basis for child custody determinations, the second discusses disputes between parents as to who should have custody, the third assesses the status of relatives and strangers[24] in child custody disputes, and the fourth draws certain theoretical conclusions based on the previous three sections.

Of course, all reasonable[25] legal systems must acknowledge that certain people are unfit to be custodial parents of their children, and Jewish law accepts this fact. That does not, however, minimize the importance of certain purely legal questions that are raised in all child[26] custody determinations.

Determinations of Custody between Parents

The Babylonian Talmud[27] seems to embrace three rules that govern child custody disputes between parents:

1. Custody of all children under the age of six is to be given to the mother;
2. Custody of boys over the age of six is to be given to the father;[28]

24. The word "stranger" need not mean a person unknown to the children, but rather denotes a person having no prior legal claim to custody of the children; see the fourth section of this article.

25. Certainly Jewish law rejected Roman law's rule that parents have a "property" right or interest in their children no different than an ownership interest in any other object. For a discussion of Roman law, see Jay Einhorn, "Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law," *Behavioral Sciences and the Law* 4 (Spring 1986): 119-35. According to Roman law, ownership of the child apparently included the right to terminate the child's life; see, e.g., *The King v. Greenhill,* 111 Eng. Rep. 926 (1836).

26. According to Jewish law, minors are emancipated at the age of 12 for girls and 13 for boys if these ages are also accompanied by signs of physical maturity. "Child" custody issues thus only discuss arrangements prior to legal emancipation. The question of the theoretical basis for custody of adolescence in Jewish law is a complex one and will be addressed in a forthcoming piece.

27. See Babylonian Talmud, *Eruvin* 82a, *Ketubot* 65b and 122b-123a.

28. *Shulhan Arukh, Even HaEzer* 82:7 seems to indicate that the mother may keep custody of the children in all circumstances if she is willing to forgo the father's financial support. Thus, according to *Shulhan Arukh*'s way of understanding the rule, children are placed according to these presumptive rules and parents are obligated to support them in these circumstances. Should one parent wish to keep custody beyond the time in which it is in the children's own best interest to stay with the parents, the other parent would cease being obligated to pay for their support; Rabbi Moses Alsheikh, *Responsa* 38. As has been noted (see R. Yom Tov ben Mo-

3. Custody of girls over the age of six is to be given to the mother.[29]

Thus, the mother presumptively is given custody 72 percent of the time when the rules are strictly applied.[30]

The Babylonian Talmud (*Ketubot* 59b) also indicates that these ideal rules of child custody presuppose that both the mother and the father desire custody of the children and that both are financially capable of custody.[31] Jewish law, however, rules as a matter of law that mothers (at least upon termination of the marriage) are under no legal obligation to financially support and maintain their children, whereas fathers are under such an obligation.[32] These rules are codified in Maimonides' code[33] and in *Shulhan*

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ses Tzahalon, *Responsa Maharitatz* 1:16, 2:232 and others), most authorities reject this rule and state that the mother may not keep custody of the children beyond the time in which it would be in the children's own best interest, even if she were willing to do so without child support payments from the father. This appears to be the majority opinion; for a long discussion of this topic see Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," pp. 297-303, and Sylvan Schaeffer, "Child Custody: Halacha and the Secular Approach," *Journal of Halacha and Contemporary Society* 6 (1983): 33, 36-39, at page 39.

29. For a detailed discussion of the background of these rules, see Herring, "Child Custody," pp. 180-87, where the basic texts are translated into English, and Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," pp. 289-92. While there is much discussion in the literature (see articles cited in note 23 above) of how precisely these rules have been interpreted, this article focuses instead on what the theoretical underpinnings of these rules are.

30. For a boy, the mother is the presumptive custodial parent for six of his thirteen years of childhood. For a girl, the mother is the presumptive parent all twelve years of her childhood. Thus, the mother is the presumptive parent eighteen years out of twenty-five, or 72 percent of the time (assuming boys and girls are born in equal numbers and that the sequence of children born or their sex has no correlation with the likelihood of divorce).

31. In classical Jewish law a father provided child support payments, but not alimony. Instead, the wife was paid a lump sum upon divorce or the death of her husband.

32. Maimonides, *Mishneh Torah, Sefer Nashim, Hilkhot Ishut* (Laws of Marriage), 21:17-18; *Shulhan Arukh, Even HaEzer* 82:6, 8. This presupposes that others can and will raise and support the children if the mother does not. However, in a situation in which a child is so attached to a particular parent that if this parent does not care for the child, the child will die, Jewish law compels one to take care of the child, not because of a special legal obligation between a parent and a child, but because of the general obligation to rescue Jews in life-threatening situations. This situation arises when a woman has been nursing her child and does not wish to continue nursing the child; if the child will not nurse from another and thus will die absent the mother's nursing, Jewish law compels the mother to care for the child and nurse it as part of the general obligation of not standing by while one's neighbor's blood is shed; see, e.g., R. Jacob ben Asher, *Tur, Even HaEzer* 82.

33. Maimonides, *Mishneh Torah, Sefer Nashim, Hilkhot Ishut* 21:17.

Arukh,[34] and are the basis of much of the discussion found among the later authorities.[35]

The above talmudic rules, read in a vacuum, appear to provide no measure of flexibility at all and mandate the mechanical placement of children into the appropriate category. However, as has been demonstrated by others,[36] Jewish law never understood these rules as cast in stone; all decisors accepted that there are circumstances where the interest of the child overwhelmed the obligation to follow the rules in all circumstances.

It is apparent that this interpretation of the talmudic precepts, which turns these rules into mere presumptions — and allows custody to be given contrary to the talmudic rules — is understood by the various authorities in different ways. Two different issues need to be addressed. First, in what circumstances may one reject the talmudic presumption? Need the presumptive custodial parent be "unfit," or is it enough that others are "more fit"? Second, in cases where the talmudic presumption has been rejected, who should then be assigned custody? Is that determination based purely on the "best interests of the child," or must custody be granted to the other parent as a matter of law, assuming that the parent is "fit"?[37]

The circumstances in which the talmudic presumptions can be rejected are often not explicitly stated; thus it may be unclear in any particular case whether the parent designated to presumptively receive custody but denied

34. *Shulhan Arukh, Even HaEzer* 82:7. It is worth noting that the view of Rabbi Abraham ben David of Posquières (Ravad), who explicitly takes issue with the first rule above (see *Commentary of Ravad, Hilkhot Ishut* 21:17) is not quoted as normative by any authority; but see Rabbi Eleizer Waldenburg, *Tzitz Eleizer* 15:50.

35. Indeed, of the major review articles published in the area, all of them use these principles as the organizational framework for their discussion; see Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law"; Gilat, "Is the 'Best Interest of the Child' a Major Factor in a Parental Conflict over Custody of a Child?"; Herring, "Child Custody."

36. See Warburg, "Child Custody: A Comparative Analysis," pp. 495-99; Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," pp. 308-9; and Herring, "Child Custody," pp. 207-19.

37. This article will not address the extremely important question of *how* Jewish law determines parental fitness; for an excellent discussion of that topic, see Rabbi Gedalia Felder, *Nahalat Tzvi* 2:282-87 (2nd ed.), where he discusses the process that should be used by a rabbinical court (beth din) to make child custody determinations. Rabbi Felder discusses the practical matters involved in child custody determinations, and he adopts a format and procedure surprisingly similar to that used by secular tribunals in making these determinations. He indicates that a beth din should interview the parents, consult with a child psychologist, and conduct a complete investigation.

that right is "unfit," or merely that the other parent is "more fit." However, an examination of the *responsa* literature and decisions of the Rabbinical Courts in Israel does indicate that two schools of thought exist on this issue. Many decisors maintain that these presumptive rules are relatively strong ones and may be reversed only when it is obvious that the parent who would be granted custody (or already has custody) is unfit. Other decisors adopt a lower standard and permit granting custody contrary to the talmudic rules when these presumptions are not in the best interest of the specific child whose case is being adjudicated.

For example, Rabbi David ben Solomon ibn Avi Zimra (Radvaz) discusses a case where a couple was divorced and the mother assumed custody of the seven-year-old daughter (in accordance with the rules discussed above). After a short time the mother became pregnant out of wedlock and the father sought to regain custody of his child based on the moral delinquency of the mother. Radvaz rules in his favor; however, an examination of his language indicates that it is based on the *unfitness of the mother* to have custody of the children and not merely on the fact that the father could do a better job raising the children.[38] Many, including Maharival[39] and Rabbi Ovadia Hadaya,[40] agree with this method of analysis.[41]

The contrary approach, based on the best interests of the child, can be found in the *responsa* of Rabbi Moses ben Joseph di Trani (Mabit) and Rabbi

38. Rabbi David ben Solomon ibn Avi Zimra, *Radvaz* 1:263, cited by R. Abraham Zvi Hirsch Eisenstadt, *Pithei Teshuva* 82:(6). He concludes that if the mother is sufficiently unfit, even had the father not sought custody he would remove the child from the mother's home. See also Gulevsky, "Question on the Custody of Children," pp. 122-23, who indicates that the standard is "unfitness" rather than "best interest." Katz, "A Reply to Ronald Warburg," pp. 9-16, claims that this school of thought is represented in the Israeli Rabbinical Courts.

In a different *responsum,* Radvaz reaches a different result and uses language closer to the best interest of the child; see *Radvaz* 1:126. See note 83 for a discussion of this.

39. Rabbi Joseph ben David ibn Lev, *Responsa Maharival* 1:58.

40. Rabbi Ovadia Hadaya, *Yaskil Avdi, Even HaEzer* 2:2(4) (additional section).

41. See Gilat, "Is the 'Best Interest of the Child' a Major Factor in a Parental Conflict over Custody of a Child?" pp. 328-35. It can occasionally be found in judgments of the Rabbinical Courts of Israel, see e.g., P.D.R. *(Piskei Din Rabbani'im)* 4:332, although as noted in Warburg, "Child Custody: A Comparative Analysis," it is not the predominant approach; but see Katz, "A Reply to Ronald Warburg," pp. 1-6.

Excluded from this analysis are those cases where the father denies paternity. The standard of review for those cases involves completely different issues in that Jewish law hesitates to assign custody (and even visitation rights) to a person who denies paternity, even if as a matter of law that person is the presumptive father. For precisely such a case, see P.D.R. 1:145 and Katz, "A Reply to Ronald Warburg," n. 57.

Samuel ben Moses de Medina (Maharashdam).[42] Mabit describes a mutually agreed-upon child custody arrangement between divorced parents that one parent now seeks to breach. Mabit states that it appears to him that the agreement is not in the best interest of the children and thus no longer ought to be enforced, and that custody is to be granted contrary to the agreement. He understands the "standard of review" to be the best interest of the child and not unfitness of the parent.[43] So too, Maharashdam evaluates the correctness of a (widowed) mother's decision to move a child to another city away from the family of the father based on the best interest of the child. He concludes by prohibiting such a move, as it is not in the child's best interest.[44] This approach can also be found in the works of many additional authorities.[45] Both Shochatman and Warburg maintain that this is the predominant school of thought among judges in the Israeli Rabbinical Courts[46] who often issue statements supporting this approach. For example, one Rabbinical Court noted:

> The principle in *all* child custody decisions is the best interest of the child as determined by the beth din [Rabbinic Court].[47]

42. Rabbi Moses ben Joseph di Trani, *Responsa of Mabit* 2:62, and Rabbi Samuel ben Moses de Medina, *Responsa of Maharashdam, Even HaEzer* 123; For a list of similar rulings, see Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," nn. 115-16.

43. This issue becomes a little perplexing, since it is not the practice of Jewish courts to second-guess decisions of parents as they relate to their children; as noted by the Supreme Rabbinical Court of Israel, "As a general rule the court will not decide against the judgment of the parents merely based on a disagreement of judgment," P.D.R. 2:300 quoted in Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," n. 115; but see Rabbi Gedalia Felder, *Nahalat Tzvi* 2:282-87, who justifies this practice. He notes that there is no *res judicata* or law of the case in child custody matters. In addition, a conceptual difference is present between a mutually agreed upon arrangement between parents which they both seek to honor, but with which the Beit Din disagrees, and an agreement between the parents which one parent now seeks to void.

44. Rabbi Samuel ben Moses de Medina, *Responsa of Maharashdam.*

45. See e.g., Rabbi Meir Melamed, *Responsa Mishpat Tzedek* 1:23, Rabbi Moses Albaz, *Responsa Halakhah LeMoshe, Even HaEzer* 6, and Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," nn. 100-102, for a list of decisors and Rabbinical Court rulings accepting this line of reasoning.

46. Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," pp. 311-12; Warburg, "Child Custody: A Comparative Analysis," throughout the article. For an example of a bifurcated *responsa* on this topic reflecting both standards of review, each in the alterative, see R. Eliezer Waldenburg, *Tzitz Eleizer* 15:50.

47. P.D.R. 1:55-56 (emphasis added).

Another stated that

> *Child custody is not a matter of paternal or maternal rights, but is determined according to the best interest of the child.* . . . the beth din is authorized to determine what is in the best interest of the child . . . according to the particular conditions of each case.[48]

Along with the dispute as to when the talmudic rules are to be put aside is the second, related question of who should be considered eligible for custody once the presumptive rules are deemed inapplicable. Most authorities understand the presumptive rules as requiring that in cases where the mother does not wish to have custody (or is unfit or incapable), the children must be given to the father if he is willing and able. Rabbi Jacob ben Asher, writing in the *Arbaʿah Turim (Tur)*, states this quite clearly when he rules:

> And if the mother does not wish to have the children in her custody after they are weaned[49] she is free to decline custody of both boys and girls. These children are then given to the father to raise *or are to be raised by the community if they do not have a father.*[50]

This understanding of the rules discussed above only allows their use in situations where *both* parents seek custody; it assumes that in cases where only the father seeks custody, he always will be given such custody.[51] So too, one finds support for the corollary proposition that should the father be unavailable or unfit and the mother desires custody, she is entitled to it.[52]

48. P.D.R. 3:353 (emphasis added).

49. See note 32 for a discussion of this issue.

50. *Tur, Even HaEzer* 82 (last lines) (emphasis added).

51. See also Rabbi Menashe Klein, *Mishneh Halakhot* 9:296, and Rabbi Yitzhak Weiss, *Minhat Yitzhak* 7:113. It is possible that this rule is based on the insight that the mother's custodial claim is based on a decree of the Sages and that, as a matter of biblical law, the father is always entitled to custody. Therefore, when the mother is deceased or unavailable and the father desires custody, since the rabbinical decree is inapplicable, the father's claim triumphs as a matter of law, assuming minimal fitness.

This type of analysis can be found in a number of Israeli Rabbinical Court decisions; see P.D.R. 13:17, at 20 ("The father is obligated in his children's support and upbringing. Accordingly the father has full rights to demand that the children live with him . . . however, the Sages were concerned about the best interest of the children and therefore found it appropriate to transfer custody [to the mother"). Katz, "A Reply to Ronald Warburg," pp. 9-16, addresses this issue at great length; my quotations of Rabbinical Court material found in text accompanying notes 47-48 and this note are taken from her work.

52. See, e.g., Comments of Rama, *Even HaEzer* 82:7, as interpreted by Rabbi Moses ben

Other authorities strongly disagree with this understanding of the law and allow (after the termination of the marriage) *placing a child with a non-parent rather than a parent,* once the original talmudic presumption is removed and if doing so is in the best interest of the child.[53] According to this rule, in a situation of the death of one parent, once the determination is made that placement in harmony with the talmudic rules is ill advised, it is possible to place the child with someone other than a parent if that is in the child's best interest.[54] Indeed, one authority states this directly: "presumptively a girl is best raised by a knowledgeable woman rather than by a man, *even her father.*"[55]

The theoretical underlying basis for these disputes will be discussed in the fifth section.

The Theoretical Basis for Parental Custody[56]

The initial question in all child custody determinations is frequently unstated: By what "right" do parents have custody of their children? As ex-

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Isaac Lima, *Helkat Mehokek* 82:10, and Rabbi Samuel ben Uri Shraga Feibusch, *Beit Shmuel* 82:9. This issue will be discussed at greater length in text accompanying notes 76 to 83, as it requires analysis of a number of other issues.

53. *Responsa of Maharashdam, Even HaEzer* 123, where he grants guardianship over a child to a brother-in-law even where the mother is present and fit; *Radvaz* 1:360 (same); but see *Radvaz* 1:263, who predicates this ruling on the fact that the mother is not fit to be a parent.

54. Rabbi Joseph Karo, *Bedek Habayit, Even HaEzer* 82, explicitly allows placing children with a guardian rather than the mother, if that is appropriate; see also *Responsa of Marharashdam, Hoshen Mishpat* 308 and 405. See Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," pp. 308-10 for a list of additional authorities who support this rule.

55. See Rabbi Moshe Chanin, quoted in *Mishpetei Shmuel* 90; for a long list of authorities who agree with this legal rule, see Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," p. 310, n. 112. Maharashdam (*Hoshen Mishpat* 308) states that in a situation in which the mother passes on, the Jewish court looks to the best interest of the child to determine who gets custody (in harmony with the opinion of Aderet discussed above).

It is possible that two different standards are present here; to remove a child from one parent and place that child with another parent requires a lesser showing of "unfitness" than to remove a child from one parent and place that child with a stranger. See also Gulevsky, "Question on the Custody of Children," pp. 111-12, for more on this. This author has found no unambiguous statement of this principle in the various *responsa.*

56. This short analysis is essentially a duplication of the material presented in my chapter on adoption, "Adoption, Personal Status, and Jewish Law," cited in note 5 above.

plained below, two very different theories, one called "parental rights" and one called "best interest of the child," exist in Jewish law. These two theories are somewhat in tension, but they lead to similar results in many cases, as the best interests of the child often will coincide with granting parents rights.

There is a basic dispute within Jewish law as to why and through what legal claim parents have custody of their children. Indeed this dispute is crucial to understanding why Jewish law accepts that a "fit" parent is entitled to child custody — even if it can be shown that others can raise the child in a better manner.[57]

Rabbi Asher ben Yehiel (R. Asher),[58] in the course of discussing the obligation to support one's children, adopts what appears to be a naturalist theory of parental rights. R. Asher asserts two basic rules. First, there is an obligation (for a man)[59] to support one's children and this obligation is, at least as a matter of theory, unrelated to one's custodial relationship (or lack thereof) with the child or with one's wife or with any other party.[60] A man who has children is biblically obligated to support them. Flowing logically from this rule, R. Asher also states[61] that, *as a matter of law,* in any circumstance in which the marriage has ended and the mother is incapable of raising the children, *the father is entitled to custody of his children.* Of course, R. Asher would agree that in circumstances in which the father is factually incapable of raising the children — is a legally unfit father — he would not be the custodial parent.[62] However, R. Asher appears to adopt the theory that

57. This article will not address the crucial question of how a legal system determines who is "fit" and who is not and which environment would be in the best interest of a particular child. These determinations are essentially "fact" determinations, and beyond the scope of this article; see also note 37.

58. Known by the Hebrew acronym "Rosh," R. Asher (1250-1327) was a late Tosaphist who emigrated from Franco-Germany to Barcelona, then Toledo, Spain.

59. See text accompanying note 90 for an explanation of why this is limited to a man, at least as a matter of Torah law. R. Asher might claim that the talmudic rule, which transferred custody of children (of certain ages) from the husband to the wife, did so based on a rabbinic decree and that this rabbinic decree gave the custodial mother the same rights (but not duties) as a custodial father; for a clear explication of this, see Rabbi Samuel Alkalai, *Mishpetei Shmuel* 90, and Gilat, "Is the 'Best Interest of the Child' a Major Factor in a Parental Conflict over Custody of a Child?" pp. 316-18.

60. Rabbi Asher ben Yehiel, *Responsa of Asher* (Rosh) 17:7; see also Rabbi Judah ben Samuel Rosannes, *Mishneh LeMelekh, Hilkhot Ishut* 21:17.

61. *Responsa of R. Asher* 82:2.

62. This could reasonably be derived from the Babylonian Talmud, *Ketubot* 102b, which mandates terminating custodial rights in the face of life-threatening misconduct by a guardian.

the father is the presumptive custodial parent of his children based on his obligations and rights as a natural parent, subject to the limitation that even a natural parent cannot have custody of his children if he is factually unfit to raise them. For the same reason, in situations where the Sages assigned custody to the mother rather than the father, that custody is based on a rabbinically ordered transfer of rights.[63] While this understanding of the parents' rights is not quite the same as a property right, it is far more a right (and duty) related to possession than a rule about the "best interest" of the child. The position of R. Asher seems to have a substantial basis in the works of a number of authorities.[64]

There is a second theory of parental custody in Jewish law, the approach of Rabbi Solomon ben Abraham Aderet (Aderet).[65] Aderet indicates[66] that Jewish law always accepts — as a matter of law — that child custody matters (upon termination of the marriage) be determined according to the "best interests of the child." Thus, he rules that in a case where the father is deceased, the mother does not have an indisputable legal claim to

63. For a longer discussion of this issue, see *responsa* of Rabbi Ezekiel Landau, *Noda BeYehudah, Even HaEzer* 2:89, and Rabbi Yitzhak Weiss, *Minhat Yitzhak* 7:113, where these decisors explicitly state that, even in cases where the mother was assigned custodial rights, the father has a basic right to see and educate his male children, and if this right is incompatible with the mother's presumptive custody claim, his rights and obligations supersede hers and custody by the mother will be terminated. This issue is addressed in more detail in the third and fourth sections of this article.

64. See, e.g., Rabbenu Yeruham ben Meshullam, *Toldot Adam veHavah* 197a, in the name of the *Geonim;* Rabbi Isaac de Molena, *Kiryat Sefer* 44:557, in the name of the *Geonim;* and Rabbi Joseph Gaon, *Ginzei Kedem* 3:62, where the theory of custodial parenthood seems to be based on an agency theory derived from the father's rights; see also Gulevsky, "Question on the Custody of Children," pp. 110-12. R. Asher, in his theory of parenthood, seems to state that typically the mother of the children is precisely that agent. When the marriage ends, the mother may — by rabbinic decree — continue if she wishes to be the agent of the father, because Jewish law perceives being raised by the mother (for all children except boys over six) as typically more appropriate than being raised by the father.

Interestingly, a claim could be made that this position was not accepted by Rabbi Judah ben R. Asher, one of Rabbi Asher's children; see *Zichron Yehudah* 35, quoted in *Beit Yosef, Hoshen Mishpat* 290.

65. Known by the Hebrew acronym "Rashba," Aderet (1235-1310) of Barcelona, Spain, was an eminent and prolific decisor.

66. *Responsa of Rashba Traditionally Assigned to Nahmanides,* 38. Throughout this work, the theory developed in this *responsa* is referred to as Rashba's, as most later Jewish law authorities indicate that Aderet wrote these *responsa* and not Nahmanides; see Rabbi David Halevy, *Turei Zahav, Yoreh Deah* 228:50, and Rabbi Hayyim Hezekiah Medina, *Sedei Hemed, Klalei HaPoskim* 10:9 (typically found in volume 9 of that work).

custody of the children. Equitable factors, such as the best interest of the child, are the *sole* determinant of the custody. In fact, this *responsum* could well be read as a general theory for all child custody determinations.[67] Aderet accepts that all child custody determinations involve a single legal standard: *the best interest of the child,* regardless of the specific facts involved.[68] According to this approach, the "rules" that one encounters in the field of child custody are not really "rules of law" at all, but rather the presumptive assessment by the talmudic Sages as to what generally is in the best interest of children.[69]

An enormous theoretical difference exists between R. Asher and Aderet. According to Aderet, the law allows transfer of custodial rights (even from their parents) in any situation where it can be shown that the children are not being raised in their best interests and another would raise them in a manner more in their best interest.[70] According to R. Asher, parents (or at least fathers)[71] have an intrinsic right to raise their progeny. In order to remove children from parental custody, it must be shown that these parents are unfit to be parents and that some alternative arrangement to raise these

67. For example, see *Otzar HaGeonim, Ketubot* 434, where this rule is applied even when the father is alive.

68. One might suggest that the deeply searing psychological trauma involved in being removed from one's parental home makes it never in the best interest of the child to be taken from one's parent, so long as that parent is fit. Consequently, even according to Aderet, this seemingly broad rule — that custody is granted in the best interest of the child — is properly interpreted to mean that Jewish law would not allow the removal of children from the home of their parents to be raised in the house of another who apparently is better capable of raising them. For a brief examination of this rule, see Schaeffer, "Child Custody: Halacha and the Secular Approach."

69. See Warburg, "Child Custody: A Comparative Analysis," pp. 496-98, and Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," pp. 308-9.

70. As a matter of practice, this would not happen frequently. Indeed, this author has found no *responsa* that actually permit the removal of children from the custody of parents who are married to each other.

71. See Katz, "A Reply to Ronald Warburg," pp. 16-19, for a discussion of whether this analysis is genuinely limited to fathers or includes all parents. It is this author's opinion that later authorities disagree as to the legal basis of the mother's claim. Most authorities indicate that the mother's claim to custody of the daughter is based on a transfer of rights from the father to the mother based on a specific rabbinic decree found in the Talmud; see note 59 above. On the other hand, many later authorities understand the mother's claim to custody of boys under six to be much less clear as a matter of law and are inclined to view that claim based on an agency theory of some type, with the father's rights supreme should they conflict with the mother's; see also sources cited in note 64.

children consistent with the parents' wishes and lifestyle (either through the use of relatives as agents or in some other manner[72]) cannot be arranged.[73]

This legal dispute is not merely theoretical: the particular *responsa* of Rabbis Asher and Aderet, elaborating on these principles, contain a distinct contrast in result. Aderet rules that when the father is deceased, typically *it is in the best interest of the child to be placed with male relatives of the father rather than with the mother;* R. Asher rules, that as a matter of law, when the mother is deceased, *custody is always to be granted to the father (unless the father is unfit)*. To one authority, the legal rule provides the answer, and to another equitable principles relating to best interest do.

These two competing theories, and how they are interpreted by the later authorities, provide the relevant framework to analyze many of the theoretical disputes present in prototypical cases of child custody disputes. Indeed, it is precisely the balance between these two theories that determines how Jewish law awards child custody in many cases.[74]

Strangers and Relatives Seeking Custody

The Jewish law rules for situations where those competing for custody are not the mother and father but legal strangers to the children raise a very interesting issue as a matter of law: Are relatives considered strangers? Do family members other than parents (siblings, siblings-in-law, or grandparents) have a presumptive claim of custody to the children (based on their relationship with the parents), which is terminable only on the same grounds as the parents' claims?[75]

72. For example, sending a child to a boarding school of the parent's choosing; see e.g., P.D.R. 4:66 (1959), where the Rabbinical Court appears to sanction granting custody to the father, who wishes to send his child to a particular educational institution (a boarding school) that will directly supervise the child's day-to-day life.

73. It is possible that there is a third theory also. Rabbenu Nissim (Hebrew acronym "RaN," commenting on Babylonian Talmud, *Ketubot* 65b) seems to accept a contractual framework for custodial arrangements. R. Nissim appears to understand that it is intrinsic in the marital contract *(ketubah)* that just as one is obligated to support one's wife, so too one is obligated to support one's children. This position does not explain why one supports children out of wedlock (as Jewish law certainly requires, see *Shulhan Arukh, Even HaEzer* 82:1-7) or what principles control child custody determinations once the marriage terminates. *Mishneh LeMelech, Hilkhot Ishut* 12:14 notes that R. Nissim's theory was not designed to be followed in practice.

74. See also the fourth section of this article.

75. Alternatively, relatives merely compete with all others under the rubric of "best interest of the child."

The answer to this question is disputed by the various authorities, with numerous decisors supporting each position. The remarks of Rabbi Moses Isserles (Rama) in *Shulhan Arukh* provide the framework for this discussion. After Rabbi Karo states that a daughter resides with her mother even after the mother remarries and the father dies, Rabbi Isserles adds:

> Only if it appears to the court that it is good for the daughter to remain with her mother; however, if it appears to them that it is better for her to reside in the house of her father, the mother cannot compel the daughter to remain with her.[76] If the mother dies, the maternal grandmother cannot compel that her grandchildren be placed with her.[77]

Rabbi Moses ben Isaac Lima in his commentary *Helkat Mehokek* explains Rama's first rulings by stating that Rama does not rule that the daughter *cannot* reside with her mother, but merely that *it is not obvious* that she must. He adds that if the daughter wishes to be with her paternal grandparent, she is entitled to do so; if she has no opinion, the court should contemplate whether it is appropriate to uproot the talmudic rule that daughters reside with their mother.[78] He explains the second rule as limited to a case where the father is alive; however, if both parents are dead, the maternal grandmother has a stronger claim to custody of the girls throughout childhood and of the boys until they are six.[79]

Thus, these rules do appear to grant relatives some greater claim than strangers. It would seem reasonable that these rules implicitly are based on the notion that grandparents have the same rights (except vis-à-vis the parents) as their now-deceased children.[80]

The legal basis for these preferences is addressed in the *responsa* literature in some detail. Four basic legal theories have been set forth. The first as-

76. Rabbi Elijah of Vilna (Gra) rules that the proper resolution of this case depends solely and completely on the wishes of the daughter; *Biur HaGra Even HaEzer* 82:11. This is the only case encountered in which the desires of the minor child are deemed to be the sole relevant factor by any decisor.

77. Rabbi Moses Isserles, Comments of *Rama, Even HaEzer* 82:7.

78. Rabbi Moses ben Isaac Lima, *Helkat Mehokek, Even HaEzer* 82:10.

79. Lima, *Helkat Mehokek, Even HaEzer* 82:11.

80. Thus, the maternal grandmother does not usurp the father's claim, as he is a parent. However, the maternal grandmother has a stronger claim than a paternal grandmother to children that would normally go to the mother, since the maternal grandmother "inherits" (in some form) her daughter's claim. For the same reason, it would seem likely that the paternal grandfather has a greater claim than the maternal grandfather to boys over the age of six.

serts that the basic rights and duties of parents are obligations and privileges that are similar to rights and duties that transfer to heirs of the estate (other than one's spouse[81]). Thus, in a case where a man dies who would have custody of his children if he were alive, his father inherits the right-obligation-*mitzvah*-duty[82] to educate the grandchildren; along with that obligation-right-duty-*mitzvah* he is given custody. Similarly too, if a woman who would have custody were she alive dies, her mother would be entitled to custody assuming she is fit, even if others are more fit.[83]

A second theory can be found in the *responsa* of Rabbi Mordecai ben Judah Halevi addressing a situation common in our society.[84] The *responsum* concerns a man who had just ended his second marriage; his first marriage ended in divorce, and his second marriage ended in the death of his second wife, with whom he had had a number of children. Being unable to take care of these children himself, he arranged for them to be raised by his first wife, *whose marriage with him had ended in divorce.* The children's maternal grandparents, from whom the husband was estranged, sought custody. The author of *Darkhei Noam* ruled that since the father was alive, his rights to the children still existed and so long as his custodial arrangements were satisfactory, others (perhaps even others capable of providing a better home) could not seek to subrogate his rights.[85]

81. In Jewish law, spousal inheritance laws differ from those of blood relatives in significant ways, in that they are fundamentally grounded in contract rather than classical biblical notions of inheritance. This complex matter is well beyond our topic but deserving of treatment in a future article.

82. This author is uncertain which term to use, as none of these privileges are classically heritable. Rather, it is assumed that those authorities who treat the matter in this way understand this to be part of the decree of the Sages. Indeed, different terms might best be used to denote roles of different people seeking custody; see also note 90.

83. See *Helkat Mehokek* 82:11, who states this principle as a matter of law rather than as a matter of best interest of the child; but see Herring, "Child Custody," p. 205, who indicates that this is a rule based on best interest rather than law.

The explanation of Rama advanced by *Helkat Mehokek* is the one most consistent with Rama's elaboration on this topic found in his commentary on *Tur, Darkhei Moshe, Even HaEzer* 82. It is also consistent with the comments of Rabbi Meir ben Isaac Katzenellenbogen, *Responsa Maharam Padua* 53, who is the source for Rama's ruling. It is possible that this same result is reached by others based on a best-interest analysis; see *Radvaz* 1:123, and Rabbi Simeon ben Tzemah Duran, *Tashbetz* 1:40.

84. Rabbi Mordecai ben Judah Halevi, *Responsa Darkhei Noam, Even HaEzer* 26.

85. It is apparent that *Darkhei Noam* invokes the additional concept of "the best interest of the child"; however, the repeated focus of the *responsum* is on the rights of the father who is the surviving parent. While there is language used in this *responsum* that could be interpreted

According to this approach, relatives have greater rights solely because they are most likely to be appointed agents of the parents. Thus, when a particular parent is alive and entitled to presumptive custody of a child,[86] but is in fact incapable of being the custodial parent, the primary legal factor used to determine which stranger shall receive custody is who is designated as an agent of the parent.[87] Thus, this *responsa* adopts a theory of agency rather than guardianship as it relates to parental rights. While the author of the *responsa* does not phrase the discussion precisely this way, it is manifest that his analysis is predicated on the ability of the father to appoint someone to watch his children (in the absence of the mother).[88] This approach accepts the ruling of R. Asher discussed above, as it addresses these issues from the perspective of parental rights. Such a position is explicitly adopted by Rabbi Moses ben Joseph di Trani (Mabit) who primarily analyzes custody of children as a matter of inheritance of rights and agency law according to Jewish law.[89]

The third theory indicates that all levels of relatives are equal to each other, but in legal advantage to the complete stranger. The earliest source for this appears to be *Otzar HaGeonim* (Ketubot 59b), which states that when both parents are unavailable (either unfit for custody, unwilling to take custody, or dead) the court should decide between the maternal and paternal grandparents who desire custody based on the "best-interests-of-the-child"

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as favoring a pure best-interest analysis, a reading of the whole *responsum* indicates that *Darkhei Noam* is not using a pure best-interest analysis. In this writer's opinion, *Darkhei Noam*'s oft-repeated insight that all custody arrangements are subject to review by Beit Din for the best interest of the child must be limited to cases of unfitness or other disqualification, rather than pure value judgments as to where a child would be best off.

Indeed, more generally, this author finds it difficult as a matter of halakhic jurisprudence to accept that, notwithstanding the precepts found in the codes, one can ignore the rules simply based on a showing that "more likely than not" the rule is not beneficial to this particular child. Rather, based on Babylonian Talmud *Ketubot* 102b, it seems reasonable that some higher standard must be used; see note 95 for a possible way to resolve this difficulty.

86. According to the rules explained in text accompanying notes 27 to 30 above.

87. See also *Ginzei Kedem* 3:62, where the right of the father to appoint a relative is explicitly mentioned as an option in a case where the father is not capable of raising the child.

88. Indeed, the notion of agency is implicit in R. Asher, and can be found also in works of others; see note 64.

89. Rabbi Moses ben Joseph di Trani, *Mabit* 1:165. There are reasons why one would not adopt a pure inheritance approach. One might accept that, for example, a paternal grandfather is entitled presumptively to custody of a male child above six even as against the mother. Such a result is found in *Mabit* 1:165 and *Maharitatz* 1:16, 2:232. As explained above, all agree that in a case of unfitness to be a parent, custody is denied or abrogated. Thus, unlike ownership of a cow or house, there are situations that can abrogate one's "rights."

rationale. There is no acknowledgment of the legal possibility that the children can be placed with complete strangers. This approach seems to be the one most easily consonant with the wording of Rama on *Shulhan Arukh* 82:7 and the explanation of *Helkat Mehokek,* and it also draws support from *Beit Yosef.*[90]

The final possibility, explicitly found in Aderet,[91] is that in the case of orphans, based on the principle "the court is the guardian of orphans," a pure best-interest-of-the-child analysis is made. Indeed, it is precisely in this category of case that Aderet explicitly states the best-interest-of-the-child rule. He writes:

> As a general rule, the beth din (court) must closely inspect each case [of child custody] very closely; since the court is the guardian of orphans, it is to find out what is in their best interest.

Similar observations can be found in the words of many authorities who discuss the status of relatives or strangers in child custody matters.[92] In the case

90. Commenting on *Tur, Even HaEzer* 82; see also Rabbi Simeon ben Tzemah Duran, quoted in *Beit Yosef, Even HaEzer* 82. This theory is a little difficult to harmonize with the lack of legal obligation imposed upon the mother according to Jewish law. One could read this position as simply being the best interest of the child, with a presumption that when parents are incapable of retaining custody, grandparents are those adults most likely (as a matter of fact) to function in the best interest of the child. If one understood this to be the view of the *Geonim,* one could easily assert that in modern times, when other couples might more readily take custody of the children, the *Geonim* would fall into the camp of Aderet and rule that child custody determinations are made purely in the best interests of the child.

Alternatively one could posit that grandparents are merely presumed agents or heirs and thus this position is identical as a matter of theory with *Darkhei Moshe*'s rule, with the psychological insight that grandparents are very likely to be appointed.

It is possible to distinguish between the obligation of the mother and the obligation of the father. The mother, if she desires custody, is entitled by rabbinic decree to custody in those cases explained in the third section of this article. However, she is under no obligation to accept such custody. To her, Jewish law treats custody as a privilege or right without a concomitant duty; see note 32 above. The father, however, has certain duties and obligations based upon Jewish law's requirements that he support his children. Custody to him is a right and a duty; see also note 82.

91. *Responsa of Aderet (Rashba) Traditionally Assigned to Nahmanides* 38.

92. Rabbi Meir Abulafia, *Responsa of Ramah* 290; Rabbi Isaac ben Moses of Vienna, *Or Zarua* 1:746; Rabbi Simeon ben Tzemah Duran, *Tashbetz* 2:216. For a long list of authorities who accept this rule, see Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," n. 51. As explained in note 85, one could read such an approach into *Darkhei Noam* as well. In this author's opinion, *Darkhei Noam* uses a pure best-interest analysis only once parents are deceased, but in the presence of both parents, the rule "*beit din* is the guardian of orphans" is simply completely inapplicable and not used by him. Indeed, one could go further and claim that even Aderet would not disagree with that claim; however, Aderet is commonly

of orphans, where potential custodians are strangers, it would appear that most authorities accept the opinion of Aderet.[93]

Conclusion

This article has analyzed various basic disagreements among the Jewish law authorities regarding the application of halakhic rules in child custody determinations. Essentially three disputes were discussed: by what standard may one remove a child from the custodial parent; who then is entitled to custody; and what is the status of relatives in custody determinations. All of these disagreements can be regarded as manifestations of the theoretical dispute between R. Asher and Aderet discussed in the third section of this article (although the *responsa* rarely acknowledge the dichotomy explicitly).

According to R. Asher and those who accept his rule, parents are always entitled to custody if they are fit, even if others would be more fit.[94] So too, when one parent is incapacitated, dead, or otherwise unfit, the other parent may assert rights against strangers. Some would go even further with R. Asher's theory by incorporating some sort of concept of transferable rights to children; upon the death or incapacity of the parents, the children can be transferred to an agent or heir according to the wishes of the parent.[95] R.

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interpreted as advancing a general rule, one that is not limited to orphans; see Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," pp. 307-11, and Herring, "Child Custody," pp. 207-19; see also *Otzar HaGeonim, Ketubot* 434.

93. See, e.g., *Shulhan Arukh,* Hoshen Mishpat 290, and Herring, "Child Custody," pp. 194-95. Thus, the more distant one is from the parents, the more likely one is to have to prove that one's custody actually is in the child's best interest.

94. Indeed R. Asher states this clearly in *Responsa of Asher* 82:2. In this writer's opinion, R. Asher makes no distinction between mother and father for the purposes of this rule when they are both alive. While it is true that a strong claim can be made that as a matter of Torah law this is only true for the father (see Gulevsky, "Question on the Custody of Children," p. 106, and notes accompanying that section), one could easily claim that the nature of the rabbinic decree giving the mother custody transfers to her those rights.

95. The crucial issue might be why the Baraita quoted in Babylonian Talmud *Ketubot* 102b, which indicates that children whose father is deceased do not get placed with paternal relatives lest these children be killed to produce an inheritance, is not normative in Jewish law. As noted by Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," p. 296, this rule is not followed by nearly all codifiers. The rejection of this rule must indicate that some sort of additional analysis is taking place. It could be that, absent this talmudic source, children would have had to be transferred according to inheritance laws. Once the Talmud indicated that this need not be done, the crucial question is in what circumstances chil-

Asher's analysis accepts that the talmudic rules are generally to be followed unless they lead to custody being given to one who is not fit or capable.

According to Aderet, the presumed rule is not one of rights but of best interest of the child. In this approach, the beth din accepts the talmudic rules as presumptively correct and then seeks to ascertain what actually is the best interest of the child by determining whether the general talmudic presumptions are applicable to the particular child. It is not a system of rights, but a system that seeks to do the best for children — and not for their parents. It thus actually rejects "rule-based" determinations and insists that custody will be given to the most fit caretaker, rather than the one designated by the father (or mother). Thus, fewer default rules and no absolutely concrete ones are found in this system, at least once the parents are divorced, separated, or incapacitated.

Absent from the entire discussion of the relationship between caregivers and children as portrayed in Jewish law is the notion of love — perfect, complete, or otherwise. As we have seen throughout this chapter, no authority discusses who can love the children more or better. Jewish law never addresses the question of who is obligated to love a child and what the nature of that love is. Indeed, it even imposes no requirement upon parents to love their children or for children to love their parents. Rather, Jewish law places an obligation upon parents to take care of their children and upon children to honor and respect their parents. Love is too fleeting an emotion for the Jewish tradition to put its faith in when discussing children, the most important asset any society and any family might have.[96]

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dren may be transferred contrary to the technical requirements of unchanged Torah law. R. Asher would claim that we reject the talmudic law of placing children with their parents only in cases of unfitness, whereas Aderet must state that this talmudic precedent allows for the transfer of children according to their own best interest.

96. Marriage, too, in the Jewish tradition is not based on an unbreakable, unyielding bond of love but on mutual agreement between the husband and wife. Marital roles and duties are thus established contractually at the outset of a marriage with the *ketubah* document and are subject to negotiation between the parties. Most significantly, marriages in the Jewish tradition are ultimately dissolvable by divorce; see Michael Broyde, "The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law," in *Covenant Marriage in Comparative Perspective,* ed. John Witte Jr. and Eliza Ellison (Grand Rapids: Eerdmans, 2005), pp. 53-69.

Even the covenantal relationship between God and the Jewish people has been presented as requiring reaffirmation following the destruction of Solomon's Temple. According to the Babylonian Talmud, *Shabbat 88a,* even though the Jews accepted the Torah at Sinai, the Sages understood exegetically from the Book of Esther that the Jews reaffirmed and reaccepted it again in the time of the Persian king Ahasuerus (Artaxerxes), several generations into the exile.

Though there certainly is a deep connection between love and care, the Jewish tradition generally and Jewish law specifically — given its deep, nitty-gritty concern that abstract principles be made concrete — choose to concentrate their energies in the parent-child arena, not on the inchoate and intangible manifestations of the word "love" or even to contemplate who will love a child more. These are impossible to measure, the Jewish tradition avers. What we can measure is who will best care for the child, and that is the approach of Jewish law. This is consistent with the general worldview of the Jewish tradition, a religion that focuses on deed as the central manifestation of the godly in this world.[97]

Indeed, the inclination toward care as the measure of parental fitness underlies the classic biblical story in which King Solomon wisely suggests to "split the baby." This incident, recounted in 1 Kings 3:16-28, involves the custody determination of an infant contested by two women, each of whom claims to be the biological mother. The Jewish tradition, I think, does not deny that both of these women "love" this baby, but it sees that one of them is prepared to love the baby to life and the other to love the baby to death. The one who loves the baby to life is entitled to custody, whereas the one prepared to love the baby to death should not have custody in fact. In other words, King Solomon was not seeking to determine who is the true mother, but who is the true and proper caregiver.

I opened the chapter by making reference in the title to the refrain of a Tina Turner hit — what's love got to do with it — that summarizes one half of the Jewish law view on parents and children, namely what the relationship is *not* based upon. I will now end with the signature song/lyric of the Queen of Soul, Aretha Franklin, one that I think better encapsulates the Jewish tradition's understanding of what the basis of the relationship *is*. Ultimately, it is not love that matters, but R-E-S-P-E-C-T.[98]

97. Secular law has chosen to adopt the Jewish law view here and also focus on the best interest of the child exactly because love — particularly as it is used in the Christian tradition — remains difficult to quantify, easy to fake, hard to mandate, and prone to manipulation in front of a judge. Thus, one never sees courts adjudicating matters of child custody asking who will love the child more or better; instead, courts focus on the best interest of the child as manifest through indicia of care. No other structure can actually provide for the best interests of the child.

98. See Wikipedia, "Aretha Franklin." To my dismay, this is also the first citation to Aretha Franklin in my work or, as far as I can tell, other works of Jewish law. It should be noted that although "Respect" was first written and recorded by Otis Redding in 1965, Ms. Franklin's cover recording of the song, recasting it as a feminist ballad, lent it enduring popularity; see Wikipedia, "Respect (song)."

CHAPTER 11

What's Love Got to Do with It? (Part II): The Best Interests of the Child in International and Comparative Law

Rana Lehr-Lehnardt and T. Jeremy Gunn

[A]lthough a pragmatic approach was needed for children's problems, an important point was being missed in the general human rights debate: the substantive provisions of the Convention [on the Rights of the Child] made no reference to the emotion of love. . . . Disabled children needed love more than anything else, yet the Convention dealt only with rights and was addressed to Governments.[1]

Introduction

With the ratification of the United Nations Convention on the Rights of the Child, the best-interests-of-the-child standard has been elevated from being a widely accepted legal norm in the domestic law of a significant number of countries around the world to becoming the prevailing international legal norm as well.[2] Although the best-interests standard has been increasingly ac-

1. Committee on the Rights of the Child, General Discussion on the Rights of Children with Disabilities, Oct. 7, 1997. CRC/C/SR.419, ¶19.

2. The best-interests-of-the-child doctrine is used in courts and administrative agencies to determine various issues relating to child welfare, especially upon the dissolution of marriage or the termination of parental rights. In deciding the best interests of the child, often, multiple factors are weighed against each other to determine which combination works to the greatest advantage of the child and her development. Countries using the best-interests-of-the-child doctrine (to varying degrees and with varying terminology) in their laws include countries from every continent, including countries of the European Union, countries with a foun-