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# CHILD CUSTODY IN JEWISH LAW: A PURE LAW ANALYSIS

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## I. *Introduction*

Child custody determinations are among the most difficult in any legal system as they pose many of the classical difficulties related to mixed fact and law determinations. This article will survey Jewish law's approach(es) to several purely legal[1] issues related to child custody

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This paper was first presented at the Paris Conference of the Jewish Law Association on July 16, 1992. My thanks to Maidi Katz, a student at Yale Law School, whose paper on child custody in the Rabbinical Courts of Israel (see note 1), prepared as a directed research project under my supervision for Yale Law School, first stimulated my writing in this area. One would be hard-pressed to find a more competent law student working in Jewish law than she.

[1] 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", 5 *Shenaton LeMishpat HaIvri* 285 (5738) (Hebrew).

In addition, a number of articles address various issues in the field; see Rabbi Chaim David Gulevsky, "Question on the Custody of Children", *Sefer Kavod Harav: Essays in Honor of Rabbi Joseph B. Soloveitchik* 104, (New York, 5744) (Hebrew); Ronald Warburg, "Child Custody: A Comparative Analysis" 14 *Israel Law Review* 480–503 (1978); 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*

determinations and will examine the theoretical halakhic underpinnings of such determinations. Specifically, this 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 discusses the status of relatives and strangers[2] in child custody disputes; and the fourth draws certain theoretical conclusions based on the previous three sections.

Of course, all reasonable[3] legal systems must acknowledge that certain people are unfit to be custodial parents of their children and Jewish law accepts that fact. That does not, however, minimize the importance of certain purely legal questions that are raised in all child[4] custody determinations.

It is the thesis of this article that there are two implicit basic theories used in Jewish law to analyze child custody matters and that different rabbinic decisors are inclined to accept one or the other. Indeed, which of these theories one adopts substantially affects how one decides many "hard" cases. One of these theories grants parents certain "rights" regarding their children while also considering the interests of the child, while the other theory focuses nearly exclusively on the best interests of the child.

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*Times*, II:177 (1989); Israel Tzvi Gilat, "Is the Best Interest of the Child a Major Factor when Parents Conflict on Custody of a Child" 8 *Bar Ilan Law Studies* (1980) (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.

[2] 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 *infra* section IV.

[3] 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 Einhorn, "Child Custody in Historical Perspectives" 4 Behav. Sci. & Life 119 (1986); 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).

[4] 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.

## II. *The Theoretical Basis for Parental Custody*

The initial question in all child custody determinations is frequently unstated: by what "right" do parents have custody of their children? As explained below, two very different theories, one which can be called "parental rights" and one which can be called "best interest of the child" exist in Jewish law. These two theories are somewhat in tension, but also 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.[5]

Rabbi Asher ben Yecheil (Rosh), 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)[6] 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.[7] A man who has children is biblically obligated to support them. Flowing logically from this rule, R. Asher also states[8] 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—

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[5] 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 31.

[6] See *infra* text accompanying note 26 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 Shemuel Alkalai, Mishpatai Shemuel 90, and Gilat, *supra* note 1, at pages 316–318.

[7] Rabbi R. Asher ben Yecheil, Responsa of Asher (Rosh) 17:7; See also Rabbi Judah ben Samuel Rosannes, Mishnah Lemelech, Eshut 21:17.

[8] Responsa of Rosh, 82:2.

is a legally unfit father—he would not be the custodial parent.[9] However R. Asher appears to adopt the theory that *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.[10] While this understanding of the parent's 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.[11]

There is a second theory of parental custody in Jewish law, the approach of Rabbi Solomon ben R. Aderet (Rashba).[12] R. Aderet indicates that Jewish law always accepts—as a matter of law—that child custody matters (upon termination of the marriage) be determined according to

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[9] This could reasonably be derived from Ketubot 102b which mandates terminating custodial rights in the face of life threatening misconduct by a guardian.

[10] For a longer discussion of this issue, see responsa Rabbi Yechezkail Landau, Nodah BeYehudah E.H. 2:89, and Rabbi Yitzchak Weiss, Minchat Yitzchak 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 sections III and IV in more detail.

[11] See *e.g.* Rabbenu Yerucham ben Meshullam, Toldat Adam veChava 197a in the name of the gaonim; Rabbi Yitzchak deMolena, *Kiryat Sefer* 44:557 in the name of the gaonim and Rabbi Yosef Gaon, Ginzey 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, *supra* note 1, at pages 110–112. 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 Yehuda ben R. Asher, one of Rabbi Asher's children; see Zichron Yehuda 35 quoted in Beit Yosef Tur, H.M. 290.

[12] Responsa of Aderet Traditionally Assigned to Nachmanides, 38. Throughout this work, the theory developed in this responsa is referred to as Aderet's, as most latter Jewish law authorities indicate that Aderet wrote these responsa and not Nachmanides; see Rabbi David Halevy, Turai Zahav Y.D. 228:50 and Rabbi Chaim Chezkeyahu Medina, Sedai Chemed, Klalai Haposkim 10:9 (typically found in volume nine of that work).

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 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.[13] R. Aderet accepts that all child custody determinations involve a single legal standard: *the best interest of the child*, regardless of the specific facts involved.[14] 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.[15]

An enormous theoretical difference exists between R. Asher and R. Aderet. According to R. 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.[16] According to R. Asher, parents (or at least fathers)[17] 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 children consistent with the parent's

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[13] For example, see Otzar HaGaonim, Ketubot 434 where this rule is applied in the life of the father.

[14] Perhaps allow one to claim that this rule—custody is granted in the best interest of the child—is the rationale why, according to R. Aderet, Jewish law would not allow one to remove children from the home of their parents to be raised in the house of another who is better capable of raising the children. For a brief examination of this rule, see Sylvan Schaeffer, "Child Custody: Halacha and the Secular Approach", *J. Halacha & Contem. Society* 6:33, 36–39 (1983).

[15] See Warburg, *supra* note 1, at pages 496–98 and Shochatman, *supra* note 1 at pages 308–09.

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

[17] See Katz, *supra* note 1, at pages 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 *supra* note 6. 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 10.

wishes and lifestyle (either through the use of relatives as agents or in some other manner[18]) cannot be arranged.[19]

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. R. 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 proto-typical 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.[20]

## III. *Determinations of Custody Between Parents*

The Talmud[21] 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;

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[18] For example, sending a child to a boarding school of the parent's choosing; see e.g., P.D.R. (*Piskai Din Rabbani*) 4:66 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) which will directly supervise the child's day to day life.

[19] It is possible that there is a third theory also. Rabbenu Nissim (RaN commenting on 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 Shulchan Aruch, E.H. 82:1–7) or what principles control child custody determinations once the marriage terminates. Mishnah LeMelech, Ishut 12:14 notes that R. Nissim's theory was not designed to be followed in practice.

[20] See also section IV.

[21] See Eruvin 82a, Ketubot 65b, 122b–123a.

2] Custody of boys over the age of six is to be given to the father;[22]

3] Custody of girls over the age of six is to be given to the mother.[23]

Thus, the mother presumptively is given custody 72% of the time when the rules are strictly applied.[24]

The 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 both are financially capable of custody.[25] 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.[26] These rules are codified in Maimonides' code[27] and Shulhan

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[22] 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 forgo the father's financial support. Thus, according to Shulchan 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 Moshe Alsheich, Responsa 38. As has been noted, (R. Yom Tov ben Moshe, Marit Zahalon 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, *supra* note 1, at pages 297–303 and Schaeffer, *supra* note 14, at page 39.

[23] For a detailed discussion of the background of these rules, see Herring, *supra* note 1, at pages 180–187 where the basic texts are translated into English, and Shochatman, *supra* note 1, at pages 289–292. While there is much discussion in the literature (see articles cited in note 1) of how precisely these rules have been interpreted, this article focuses instead on what the theoretical underpinnings of these rules are.

[24] For a boy, the mother is the presumptive custodial parent six of his 13 years of childhood. For a girl the mother is the presumptive parent all 12 years of her childhood. Thus, the mother is the presumptive parent 18 years out of 25, or 72% 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).

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

[26] Maimonides, Ishut 21:17–18; 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

Arukh,[28] and are the basis of much of the discussion found among the later authorities.[29]

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, Jewish law, as has been demonstrated by others,[30] 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 .

It is apparent, however, 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 interest of the child" or must custody be granted to the other parent as a matter of law, assuming that the parent is "fit".[31]

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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.*, Tur, Even Haezer 82.

[27] Maimonides, Ishut 21:17.

[28] Even Haezer 82:7. It is worth noting that the Ravad, who explicitly takes issue with rule one above (see Comments of Ravad, Ishut 21:17) is not quoted as normative by any authority; but see Rabbi Eleizer Waldenburg, Tzitz Eleizer 15:50.

[29] 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, *supra* note 1; Gilat, *supra* note 1; Herring, *supra* note 1.

[30] See Warburg, *supra* note 1, at pages 495–499; Shochatman, *supra* note 1, at pages 308–309; and Herring, *supra* note 1, at pages 207–219.

[31] 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, *Nachalat Tzvi* 2:282–287 (2nd ed.) where he discusses the process which should be used by beit 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 Beit Din should interview the parents, consult with a child psychologist and conduct a complete investigation.

The circumstances in which the talmudic presumption can be rejected are often not explicitly stated; thus it may be unclear whether, in any particular case, the parent designated to presumptively receive custody but denied 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 rule that these presumptive rules are relatively strong ones and can only be reversed 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 Ibn Zimra, (Radvaz) discusses a case where a couple was divorced and the mother had 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.[32] Many, including Maharival,[33] and Rabbi Ovadia Hadayah,[34] agree with this method of analysis.[35]

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[32] Rabbi David Ibn Zimra, Radvaz 1:263 cited in Pitchei Teshuva 82:(6). He concludes that the mother is sufficiently unfit that even had the father not sought custody, he would remove the child from the mother's home. See also Gulevsky, *supra* note 1, at pages 122–123, who indicates that the standard is "unfitness" rather than "best interest". Katz, *supra* note 1, at pages 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 71 for a discussion of this.

[33] Rabbi Joseph ben David Ibn Lev, Responsa Maharival 1:58.

[34] Rabbi Yosef Hadayah, Yaskeil Avdi Even Haezer 2:2(4) (additional section).

[35] See Gilat, *supra* note 1, at pages 328–335. It can occasionally be found in judgments of the Rabbinical Courts of Israel, see *e.g.* P.D.R. 4:332, although as noted in Warburg, *supra* note 1, it is not the predominant approach; but see Katz, supra note 1, at pages 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

The contrary approach, based on the best interest of the child, can be found in the responsa of Rabbi Moshe ben Yosef Trani (Mabit) and Rabbi Shmuel ben Moshe (Maharashdam).[36] Mabit describes a mutually agreed upon child custody arrangement between divorced parents which 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 ought no longer 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.[37] 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.[38] This approach can also be found in the works of many additional authorities.[39] Both Shochatman and Warburg maintain that this is the predominant school of thought among judges in the Israeli Rabbinical courts[40] who often issue statements supporting this approach. For example, one rabbinical court noted:

> The principle in *all* child custody decision is the best interest of the child as determined by the Beit Din.[41] (emphasis added)

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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, *supra* note 1 at n. 57.

[36] Rabbi Moshe ben Yosef Trani, Mabit 2:62 and Rabbi Shmuel ben Moshe, Maharashdam E.H. 123; For a list of similar rulings, see Shochatman, *supra* note 1, at n. 115–116.

[37] 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, *supra* note 1, at n.115; but see Rabbi Gedalia Felder, Nachlat 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 Beit Din disagrees, and an agreement between the parents which one parent now seeks to void.

[38] Maharashdam E.H. 123.

[39] See *e.g.*, Rabbi Meir Melamed, Responsa Mishpat Tzedek 1:23, Rabbi Moshe Abaz, Responsa Halacha LeMoshe E.H. 6 and Shochatman, *supra* note 1, at n.100–102 for a list of decisors and rabbinical court rulings accepting this line of reasoning.

[40] Shochatman, *supra* note 1, at pages 311–312, Warburg, *supra* note 1, throughout the article. For an example of a bifurcated responsa on this topic reflecting both standards of review, each in the alterative, see Tzitz Eleizer 15:50.

[41] P.D.R. 1:55–56.

or

> *Child custody is not a matter of paternal or maternal rights, but is determined according to the best interest of the child* .... Beit Din is authorized to determine what is in the best interest of the child ... according to the particular conditions of each case.[42] (emphasis added)

Along with the dispute as to when the talmudic rule is to be put aside, there is the second 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 Yakov ben Asher, writing in the 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[43] she is free to decline custody of both boys and girl. These children are then given to the father to raise *or be raised by the community if they do not have a father.*[44]

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.[45] So too, one finds support for the complementary proposition

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[42] P.D.R. 3:353. I am indebted to Maidi Katz of Yale Law School for this citation.

[43] See note 26 for a discussion of this issue.

[44] Tur, Even Haezer 82 (last lines).

[45] See also Rabbi Menashe Klein, Mishnah Halachot 9:296 and Rabbi Yitzchak Weiss, Minchat Yitzchak 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. 13:17,20 ("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, *supra* note 1, at 9–16 addresses this issue in great length, and the quotations to Rabbinical court material found in text accompanying notes 42 and this note are taken from her work.

that should the father be unavailable or unfit and the mother desires custody, she is entitled to it.[46]

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 it is in the best interest of the child.[47] According to this rule, in a situation of death of one parent, once it is determined 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.[48] Indeed, one authority states this directly: "presumptively a girl is best raised by a knowledgeable woman rather than by a man, *even her father.*"[49]

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

## IV. *Strangers and Relatives Seeking Custody*

The halakhic 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

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[46] See *e.g.* Comments of Rama 82:7 as interpreted by Chelkat Mechokak 82:10 and Rabbi Shemuel Padua, Beit Shemuel 82:9. This issue will be discussed at greater length in text accompanying notes 51 to 57, as it requires analysis of a number of other issues.

[47] Maharashdam E.H. 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.

[48] Rabbi Yosef Karo, Bedek Habayit E.H. 82 explicitly allows placing children with a guardian rather than the mother, if that is appropriate; see also Marharashdam H.M. 308 and 405; see Shochatman, *supra* note 1, at 308–310 for a list of additional authorities who support this rule.

[49] See Rabbi Moshe Chanin, quoted in Mishpatai Shemuel 90; for a long list of authorities who agree with this legal rule, see Shochatman, *supra* note 1, at page 310, n.112. Maharashdam (H.M. 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 R. 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, *supra* note 1, at pages 111–112 for more on this. This author has found no unambiguous statement of this principle in the various responsa.

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' claim itself?[50]

The answer to this question is disputed by the various authorities with numerous decisors supporting each position. Rabbi Moshe Isserless' (Rama) remarks 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 Isserless adds:

> Only if it appears to the Beit Din 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.[51] If the mother dies, the maternal grandmother cannot compel that her grandchildren be placed with her.[52]

Rabbi Moshe Lima in his commentary, Helkat Mehokak, 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 Beit Din should contemplate whether it is appropriate to uproot the talmudic rule that daughters reside with their mother.[53] 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.[54]

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-a-vis the parents) as their now-deceased children.[55]

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[50] Or do relatives merely compete with all others under the rubric of "best interest of the child."

[51] Rabbi Eliyahu M'Villna (Gra) rules that the proper resolution of this case depends solely and completely on the wishes of the daughter; Gra E.H. 82:11. This is the only ruling encountered in which the desires of the minor child is deemed to be the sole relevant factor by any decisor.

[52] Rabbi Moshe Isserless, Rama, commenting on Even Haezer 82:7.

[53] Rabbi Moshe Lima, Helkat Mehokak E.H. 82:10.

[54] Helkat Mehokak 82:11.

[55] 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

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 asserts that the basic rights and duties of parents are obligations and privileges that are similar to inheritable rights and duties. Thus, in a case where a man who would have custody of his children were he alive dies, his father inherits the right-obligation-mitzvah-duty[56] 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.[57]

A second theory can be found in Rabbi Mordechai ben Judah Halevi, Responsa *Darchai Noam* (E.H. 26), in relation to a situation common in our society. 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 *Darchai 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.[58]

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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.

[56] This author is uncertain which term to use, as none of these privileges are classically inheritable. 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 are best used to denote roles of different people seeking custody; see note 63.

[57] See Chelkat Mechokak 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, *supra* note 1, at page 205, who surprisingly indicates that this is a rule based on best interest rather than law.

The explanation of Rama advanced by Chelkat Mechokak is the one most consistent with Rama's elaboration on this topic found in his commentary on Tur, Darchai Moshe, E.H 82. It is also consistent with the comments of Rabbi Meir Ben Yitzchak Katzellenbogen, Responsa Maharam Padva 53, which Rama indicates is the source for his ruling. It is possible that this same result is reached by others based on a best interest analysis; see Radvaz 1:123 and Rabbi Shimon ben Tzedek Duran, Tashbetz 1:40.

[58] It is apparent that Darchai Noam invokes the additional concept of "the best interest of the child"; however, the repeated focus of the responsum is on rights of

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,[59] 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.[60] Thus, this responsum adopts a theory of agency rather than guardianship as it relates to parental rights. While the author of the responsum 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).[61] 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 Moshe Trani who primarily analyzes custody of children as matter of inheritance of rights and agency law according to Jewish law.[62]

The third theory indicates that all levels of relatives are equal to each other, but in legal advantage to complete stranger. The earliest source for

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the father who is the surviving parent. While there is language used in this responsum that could be interpreted as favoring a pure best interest analysis, a reading of the whole responsum indicates that Darchai Noam is not using a pure best interest analysis. In this writer's opinion, Darchai 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 of the parents, 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 halachic jurisprudence to accept that notwithstanding the precepts found in the codes, one can ignore the rules found in the codes and responsa when the parents are alive simply based on a showing that "more likely than not" the rule is not beneficial to this particular child. Rather, based on Ketubot 102b, it seems reasonable that some higher standard must be used; see note 71 for a possible way to resolve this difficulty.

59 According to the rules explained in text accompanying notes 21 to 24.

60 See also Ginzai 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.

61 Indeed, the notion of agency is implicit in R. Asher, and can be found also in works of others; see note 11.

62 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 Maharit Zahalon 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 which can abrogate one's "rights."

this appears to be *Otzar Hagaonim* (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 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 found within the words of the Rama on Shulchan Aruch 82:7 and the explanation of Chelkat Mechokak and draws support from Beit Yosef also.[63]

The final possibility, explicitly found in R. Aderet[64] 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 R. Aderet explicitly states the best interest of the child rule. He writes:

> As a general rule, Beit Din must closely inspect each case [of child custody] very closely, since Beit Din 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.[65]

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[63] Commenting on Tur, Even Haezer 82; see also Rabbi Shimon ben Tzemach Duran, quoted in Beit Yosef, E. H 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 the Gaonim in this matter, one could easily assert that in modern times where other couples might more readily take custody of the children, the Gaonim would fall into the camp of R. Aderet, and rule that child custody determination 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 Darchei Noam'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 section III. 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 26. 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 56.

[64] Responsa of Aderet (Rashba) traditionally Assigned to Nachmanides, 38.

[65] Rabbi Meir Abulafia, Responsa of Ramah 290; Rabbi Yakov ben Moshe, Or Zaruha 1:746; Rabbi Shimon ben Tzedek Duran, Tashbetz 2:216. For a long list of

In the case of orphans, where potential custodians are strangers, it would appear that most authorities accept the opinion of R. Aderet.[66]

## V. *Conclusion*

This article has analyzed various basic disputes among the Jewish law authorities 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 R. Aderet discussed in Section II (although the responsa rarely explicitly acknowledge the dichotomy). According to R. Asher and those who accept his rule, parents always are entitled to custody if they are fit, even if others would be more fit.[67] 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.[68] R. Asher's analysis accepts that basically the talmudic rules

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authorities who accept this rule, see Shochatman, *supra* note 1, at n.51. As explained in note 58 one could read such an approach into Darchai Noam also. In this author's opinion, Darchai Noam only uses a pure best interest analysis 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 R. Aderet would not disagree with that claim; however, R. Aderet is commonly interpreted as advancing a general rule, and is not limited to orphans; see Shochatman, *supra* note 1, at pages 307–311 and Herring, *supra* note 1, at pages 207–219; see also Otzar Hagaonim Ketubot 434.

[66] See *e.g.*, Shulhan Arukh H.M. 290 and Herring *supra* note 1, at pages 194–195. 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.

[67] 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, *supra* note 1, at pages 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.

[68] The crucial issue might be why the baraita, quoted in 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, *supra* note 1, at page 296, *this rule is not categorically followed*

are to be followed unless they lead to custody being given to one who is not fit or incapable.

According to R. Aderet, the presumed rule is not one of rights but of best interest of the child. In this approach, Beit Din accepts the talmudic rules as presumptively correct and then seeks to determine what actually is the best interest of the child by determining whether the general talmudic presumptions are applicable to any particular child. It is not a system of rights, but a system which 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 person, 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.

Which of these two schools of thought is normative within Jewish law has yet to be conclusively established.[69] However, it seems that the

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*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 may children 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 R. Aderet must state that this talmudic precedent allows for the transfer of children according to their own best interest.

[69] Compare Shochatman, *supra* note 1 (best interest of the child normative law), Warburg, *supra* note 1, (same), and Herring , *supra* note 1, (same) with Gilat , *supra* note 1, (parental rights a factor), Katz , *supra* note 1, (paternal rights a factor) and Gulevsky, *supra* note 1, (paternal rights a factor).

Child custody rules can be used to determine many of the practical aspects of recent cases where who is the mother is the subject of legal dispute. For example, Jewish law still has not reached a consensus as to who is the mother in a situation of classical surrogate motherhood—is it the egg donor or the one who carries the child to term; see *e.g.*, Rabbi J. David Bleich, "In Vitro Fertilization: Questions of Maternal Identity and Conversion," *Tradition* 25(4) p.82 (1991) and Michael Broyde, "The Establishment of Maternity and Paternity in Jewish and American Law", *National Jewish Law Review* 3:110 (1988). From the perspective of the ritual law, it is quite probable that Jewish law will be strict in this matter with regard to both sets of possible relatives. Thus, even those authorities who maintain that the one who carries the child to term is the true mother according to Jewish law, nonetheless would be inclined to prohibit a marriage between such a child and a genetic brother or sister (a "sibling" from the egg donor).

However, these ritual issues tend not to be the crucial ones to the couple seeking such children; the crucial one is who has custody of the children. It would appear reasonable to argue that in cases where maternity is legally in doubt or of dispute,

consensus of modern halakhic authorities *who are not members of the Israeli Rabbinical Court system in Israel* are inclined to accept R. Asher's approach as normative,[70] at least in cases where the children are not orphans;[71] the Rabbinical Courts of Israel, however, appear more inclined to accept R. Aderet's approach and engage solely in determining what is in the best interest of the child.[72]

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and paternity is established, maternal custody should be granted to the wife of the father who might (as a matter of law) be the mother and paternal custody should, of course, be granted to the father. Three rationales can be marshalled to support that result. First, those authorities discussed in note 10 would certainly rule this way; second, there appears to be a strong Jewish law presumption in favor of raising children in their parents' home and the house of the father and "egg donor-mother" has a stronger claim to that title than the house of the "parturition-mother" married to the non-father; finally (assuming that that result is in fact in the best interest of the child) the best interest of the child rule, which might be the right standard to apply in all cases, favors that result.

[70] See *e.g.* R. Y. Landau, Nodah Beyehudah E.H. 2:89; R. Eliyahu Kook, Ezrat Cohain 57; R. Shemuel Wozner, Shevat Levi 5:208; R. Menashe Klein, Mishnah Halachot 9:296; R. Yitzchak Weiss, Minchat Yitzchak 7:113; R. Nathan Goshtanter, LeHorot Natan Even Haezer 3:87–89 (cited in Gilat, *supra* note 1, at n.139); R. Shalom Masas, Tevuot Shamash 96; R. Eleizer Waldenburg, Tzitz Eliezer 16:44. In fact, outside of the pronouncements of the Rabbinical courts of Israel or those who have served on them, one is hard-pressed to find a statement in the last one hundred years asserting that the sole test is the best interest of the child; see also text accompanying note 66.

[71] It is crucial to distinguish between cases where both parents are seeking custody and cases of an orphan. For example Radvaz 1:263 uses R. Asher's standard to discuss the case of parental misconduct and transfers custody to another parent. On the other hand, Radvaz 1:126 uses R. Aderet' standard in the case of an orphan when custody is disputed. Situations of dispute between parents are almost always judged by Asher's standards, whereas in cases of orphans the role of court greatly increases and one will find R. Aderet's standard accepted. Indeed decisors will use these different standards without even noting the change in criterion.

[72] P.D.R. 4:4 and 6:6 cited by Shochatman, *supra* note 1, at pages 308–09; see also notes 100–103 of Shochatman for a list of such cases and authorities. See also P.D.R. 1:55; 1:145; 2:298; 7:3 cited by Warburg, *supra* note 1, at n. 73. See also notes 74, 75, 78, and 84 of Warburg for a further list. More than thirty cases are cited in various places throughout the Shochatman and Warburg articles to support this understanding of the rabbinical courts; even Katz, *supra* note 1, acknowledges that this position can be found in the rabbinical court, but notes that the position expressed in note 71 of this article can also be found.

Warburg appears to be aware of the difference in normative outcome between Israeli Rabbinical courts and other Jewish law authorities. He states:

> To prevent an otherwise likely misunderstanding, let me note from the onset that the model of decision-making process which is offered in this

article is to be understood as an attempt to reflect the custody decisions of the Israeli Rabbinical courts. Whether this model is applicable to custody cases adjudicated by other post-Talmudic authorities or reflects the normative structure of other branches of Jewish law where the *dayyan* [judge] acts in legislative capacity is beyond the scope of this essay.

Warburg, *supra* note 1, at n.77.
Why such a difference in Jewish law rules should exist is beyond the scope of this article.