# Child Custody in Jewish Law: A Conceptual Analysis

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## I. Introduction

The revival of the *beit din* system in the United States has returned the topic of child custody from the theoretical to the practical. Jewish law courts are now hearing child custody matters and issuing rulings. This article will survey Jewish law's approach(es) to several purely halachic[1] issues

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 Halvri* 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 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*

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related to child custody determinations and will examine the theoretical halachic underpinnings of such determinations.

Specifically, this article is divided into four substantive sections:

1) the theoretical basis for child custody determinations;

2) disputes between parents as to who should have custody;

3) the status of relatives and strangers[2] in child custody disputes, and

4) certain theoretical conclusions based on the previous three sections.

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 can substantially affect how one decides many "hard" cases. One theory 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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(1980) (Hebrew).

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 responds to or complements 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.



## II. The Theoretical Basis for Parental Custody

The initial question in all child custody determinations is frequently left unstated: by what "right" do parents have custody of their children? As explained below, two very different theories, one called "parental rights" and one called "best interests 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 will often 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. 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.

In the course of discussing the obligation to support one's children, Rabbi Asher ben Yehiel (Rosh), adopts what appears to be a naturalist theory of parental rights.[3] He asserts two basic rules: First, there is an obligation (for a man)[4] to support his children and this obligation is, at least as a matter of theory, unrelated to his custodial relationship (or lack thereof) with the child, or with his wife, or with any other party. A man who has children is biblically obligated to support them. Flowing logically from this rule, R. Asher also states[5] that, *as a matter of law*, in any circumstance in which the marriage has ended and the

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

4. See infra text accompanying note for an explanation of why this is limited to a man, at least as a matter of Torah law.

5. *Responsa of Rabbenu Asher*, 82:2.

mother is incapable of raising the children, *the father is entitled to custody of his children*. 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*, presumably subject, however, to the limitation that even a natural parent cannot have custody of his children if he is factually unfit to raise them.[6] 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.[7] 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.[8]

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

7. For a longer discussion of this issue, see Rabbi Yechezkel Landau, *Nodah BeYehudah*, *Even Haezer* 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. 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.

8. See e.g. Rabbenu Yerucham ben Meshullam, *Toldat Adam veChava* 197a in the name of the *Geonim*; Rabbi Yitzchak deMolena, *Kiryat Sefer* 44:557 in the name of the *Geonim* 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*, 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, Choshen Mishpat* 290.



There is an alternative theory of parental custody in Jewish law, exemplified in the approach of Rabbi Solomon ben R. Aderet (Rashba).[9]

Rashba indicates 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 interest 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.[10] Apparently, Rashba sees all child custody determinations as devolving from a single legal standard: *the best interest of the child*. 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

9. *Responsa of Rashba (Traditionally Assigned to Nachmanides)*, 38. Throughout this article, the theory developed in this responsum is referred to as Rashba's, as most latter Jewish law authorities indicate that Rashba 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).

10. For example, see *Otzar HaGeonim*, *Ketubot* 434 where this rule is applied in the life of the father.

as to what generally is in the best interest of children.[11]

An enormous theoretical difference exists between R. Asher and Rashba. Although there is no record of any rabbinic directive to transfer custodial rights from parents in a situation where it can be shown that the children are not being raised in their best interests and another would raise them in a better manner, yet at least in theory, that would be the position of Rashba. According to R. Asher, however, parents (or at least fathers)[12] 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 and that some alternative arrangement to raise these children consistent with the parents' wishes and lifestyle (either through the use of relatives as agents or in some other manner[13]) cannot be arranged.[14]

11. See Warburg, pages 496-98, and Shochatman, pages 308-09.

12. See Katz, 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. 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 7.

13. 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.

14. 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, Even Haezer* 82:1-7) or what principles control child custody determinations once the marriage terminates. *Mishneh LeMelech, Ishut* 12:14, notes that R. Nissim's theory was not designed to be followed in practice.

15. See also section IV.

16. See *Eruvin* 82a, *Ketubot* 65b, 122b-123a.



This legal dispute is not merely theoretical: the particular responsa of Rosh (Rabbenu Asher) and Rashba, elaborating on these principles, contain a distinct contrast in result. Rashba 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; 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.[15]

## III. Determinations of Custody Between Parents

The Talmud[16] 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.[17]

3] Custody of girls over the age of six is to be given to the mother.[18]

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.[19] Jewish law, however, rules

17. *Shulchan Aruch, 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 *Shulchan Aruch'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 that parent, the other parent would cease being obligated to pay for their support; Rabbi Moshe Alshich, *Responsa* 38. As has been noted, (R. Yom Tov ben Moshe, *Marit Zalon* 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, at pages 297-303.

18. For a detailed discussion of the background of these rules, see Herring, at pages 180-187, where the basic texts are translated into English, and Shochatman, at pages 289-292. While there is much discussion in the literature of how precisely these rules have been interpreted, this article focuses instead on what the theoretical underpinnings of these rules are.

19. 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.



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.[20] These rules are codified in Maimonides' code[21] and *Shulchan Aruch*,[22] and are the basis of much of the discussion found among the later authorities.[23]

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,[24] never understood these rules as cast in stone;

20. Maimonides (Rambam), *Mishneh Torah, Ishut* 21:17-18; *Shulchan Aruch 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 him, he will die, Jewish law compels that parent 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 a fellow Jew's blood is shed; see *e.g.*, *Tur, Even Haezer* 82.

21. Maimonides, *Ishut* 21:17.

22. *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 Eliezer Waldenburg, *Tzitz Eliezer* 15:50.

23. Indeed, of the major review articles published in the area, all of them use these principles as the organizational framework for their discussion.

24. See Warburg, at pages 495-499; Shochatman, at pages 308-309; and Herring, at pages 207-219.

all decisors accepted that there are circumstances where the interests of the child overwhelmed the obligation to follow the rules in all categorically.

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".[25]

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 presumptively designated to 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

25. 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.



does indicate that two schools of thought exist on this issue. Many decisors rule that these presumptive rules are relatively strong ones and can 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 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 ruled 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.[26] Many, including Maharival,[27] and Rabbi Ovadia Hadayah,[28] agree with this method of

26. Rabbi David Ibn Zimra, *Radvaz* 1:263 cited in *Pitchei Teshuva, Even Haezer* 82:(6). He concludes that the mother is sufficiently unfit that even had the father not sought custody, he would have removed the child from the mother's home. See also Gulevsky, at pages 122-123, who indicates that the standard is "unfitness" rather than "best interest". Katz, 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.

27. Rabbi Joseph ben David Ibn Lev, *Responsa Maharival* 1:58.

28. Rabbi Yosef Hadayah, *Yaskil Avdi, Even Haezer* 2:2(4) (additional section).

analysis.[29]

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).[30] 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. Thus, it should no longer be enforced, and 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.[31] So, too, Maharashdam

29. See Gilat, 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, it is not the predominant approach; but see Katz, 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 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. at n. 57.

30. Rabbi Moshe ben Yosef Trani, *Mabit* 2:62 and Rabbi Shmuel ben Moshe, *Maharashdam Even Haezer* 123; For a list of similar rulings, see Shochatman, at n. 115-116.

31. 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, 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



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 he considers it not in the child's best interest.[32] This approach can also be found in the works of many additional authorities.[33] Both Shochatman and Warburg maintain that this is the predominant school of thought among judges in the Israeli Rabbinical courts,[34] 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 *beit din*.[35] (emphasis added)

and

> *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.[36] (emphasis added)

Along with the dispute as to when the talmudic rule is

the parents which one parent now seeks to void.

32. *Maharashdam, Even Haezer* 123.

33. See *e.g.*, Rabbi Meir Melamed, *Responsa Mishpat Tzedek* 1:23, Rabbi Moshe Albaz, *Responsa Halacha LeMoshe Even Haezer* 6 and Shochatman, at n.100-102 for a list of decisors and rabbinical court rulings accepting this line of reasoning.

34. Shochatman, at pages 311-312, Warburg, throughout the article. For an example of a bifurcated responsum on this topic reflecting both standards of review, each in the alternative, see *Tzitz Eleizer* 15:50.

35. *P.D.R.* 1:55-56.

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 Yaakov 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, 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.[37]

This understanding of the rules discussed above allows their use only 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.[38] So, too, one finds support for the complementary proposition that should the father be unavailable or unfit and the

36. Ibid. 3:353.

37. *Tur, Even Haezer* 82 (last lines).

38. See also 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]...").



mother desires custody, she is entitled to it.[39]

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.[40] 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.[41] Indeed, one authority states this directly: "presumptively a girl is best raised by a knowledgeable woman rather than by a man, *even her father*."[42]

Katz, at 9-16, addresses this issue in great length.

39. See *e.g. Comments of Ramo* 82:7 as interpreted by *Chelkat Mechokek* 82:10 and *Beit Shemuel* 82:9. This issue will be discussed at greater length later in the text, as it requires analysis of a number of other issues.

40. *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 which predicates this ruling on the fact that the mother is not fit to be a parent.

41. Rabbi Yosef Karo, *Bedek Habayit Even Haezer* 82, explicitly allows placing children with a guardian rather than the mother, if that is appropriate; see also *Marharashdam Choshen Mishpat* 405. See Shochatman, at 308-310, for a list of additional authorities who support this rule.

42. See Rabbi Moshe Chanin, quoted in *Mishpetai Shemuel* 90; for a long list of authorities who agree with this legal rule, see Shochatman, at page 310, n.112. *Maharashdam* (*Choshen Mishpat* 308) states that in a situation in which the mother dies, the Jewish court looks to the best interest of the child to determine who gets custody (in harmony with the opinion of Rashba discussed above).

It is possible that two different standards are present here; to

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

## IV. Strangers and Relatives Seeking Custody

The halachic 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 terminatable only on the same grounds as the parents' claim itself?[43]

The answer to this question is disputed by the various authorities with numerous decisors supporting each position. Rabbi Moshe Isserles' (Ramo) remarks in *Shulchan Aruch* 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:

> [This rules applies] 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.[44] If the mother dies, the maternal grandmother cannot compel that her grandchildren be placed with her.[45]

Rabbi Moshe Lima, in his commentary *Chelkat Mechokek*, explains Ramo's first rulings by stating that Ramo 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.[46] 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.[47]

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.[48]

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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, at pages 111-112, for more on this. This author has found no unambiguous statement of this principle in the various responsa.

43. Or do relatives merely compete with all others under the rubric of "best interest of the child?"

44. Rabbi Eliyahu of Vilna (Gra) rules that the proper resolution of this case depends solely and completely on the wishes of the daughter; *Gra, Even Haezer* 82:11. This is the only case encountered in which the desire of the minor child is deemed by any decisor to be the sole relevant factor.

45. Ramo, commenting on *Even Haezer* 82:7.

46. *Chelkat Mechokek Even Haezer* 82:10.

47. Ibid. 82:11.

48. 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

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 had custody of his children dies, his father inherits the right-obligation-mitzvah-duty[49] to educate his grandchildren; along with that right, he is given custody. Similarly , if a woman who would have had custody were she alive dies, her mother would be entitled to custody assuming she is fit, even if others are more fit.[50]

A second theory can be found in Rabbi Mordechai ben Judah Halevi, Responsa *Darchai Noam* (*Even Haezer* 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

"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.

49. 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.

50. See *Chelkat Mechokek* 82:11, who states this principle as a matter of law, rather than as a matter of best interest of the child.

The explanation of Ramo advanced by *Chelkat Mechokek* is the one most consistent with Ramo's elaboration on this topic found in his commentary on *Tur*, *Darchai Moshe*, *Even Haezer* 82. It is also consistent with the comments of Rabbi Meir Ben Yitzchak Katzellenbogen, *Responsa Maharam Padua* 53, which Ramo 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 Tzemach Duran, *Tashbetz* 1:40.



marriage ended in the death of his 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.[51]

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,[52] but is in fact incapable of being the custodial parent, the primary legal factor used to determine which "stranger" should receive custody is, who is designated as an agent of the parent.[53] 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

51. 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 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.

52. According to the rules explained in the text .

53. 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.

someone to watch his children (in the absence of the mother).[54] 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 a matter of inheritance of rights and agency law according to Jewish law.[55]

The third theory indicates that all levels of relatives are equal to each other, but in legal advantage to complete strangers. 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 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 Ramo on *Shulchan Aruch* 82:7 and the explanation of *Chelkat Mechokek*, and draws support from *Beit Yosef* also.[56]

54. Indeed, the notion of agency is implicit in R. Asher, and can be found also in works of others .

55. *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 of a parent, custody is denied or abrogated. Thus, unlike ownership of a cow or house, there are situations which can abrogate one's "rights."

56. 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 *Geonim* in this manner, one could easily assert that in modern times where other couples might more readily take custody of the children, the *Geonim* would fall into the camp of Rashba, 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 *Darchai 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 section III. However, she is under no obligation to accept such custody. For her, Jewish law treats custody as a privilege or right without a concomitant duty. The father, however, has certain duties and obligations based upon Jewish law's requirements that he support his children. Custody for him is a right and a duty.



The final possibility, explicitly found in Rashba[57] 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 Rashba 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.[58] In the case of orphans, where

57. *Responsa of Aderet (Rashba)*, 38.

58. Rabbi Meir Abulafia, *Responsa of Ramah* 290; Rabbi Yaakov ben Moshe, *Or Zarua* 1:746; Rabbi Shimon ben Tzemach Duran,

potential custodians are strangers, it would appear that most authorities accept the opinion of Rashba.[59]

## V. Conclusion

This article has analyzed various basic disputes among the Jewish law authorities concerning the application of halachic rules in child custody determinations. Essentially three disputes have been 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 Rabbenu Asher and Rashba. According to Rabbenu Asher and those who accept his rule, parents are always entitled to custody if they are fit, even if others would be more fit.[60] 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 Rabbenu 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

*Tashbetz* 2:216. For a long list of authorities who accept this rule, see Shochatman, at n.51.

59. See e.g., *Shulchan Aruch Choshen Mishpat* 290. 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.

60. Indeed Rabbenu Asher states this clearly in *Responsa of R. Asher* 82:2. In this writer's opinion, Rabbenu 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, 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.



to an agent or heir according to the wishes of the parent.[61] Rabbenu Asher's analysis accepts that basically the talmudic rules are to be followed unless they lead to custody being given to one who is not fit or capable.

According to Rashba, 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

61. The crucial issue might be why the *beraita*, 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, at page 296, nearly all codifiers do not follow this rule. 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 children may be transferred contrary to the technical requirements of unchanged Torah law. Rosh would claim that we reject the talmudic law of placing children with their parents only in cases of unfitness, whereas Rashba must state that this talmudic precedent allows for the transfer of children according to their own best interest.

within Jewish law has yet to be conclusively established. Indeed, in the real world of adjudicating child custody matters there is a vast area of gray in the middle, where the halachic theory one adheres to hardly matters, as there is frequently a great deal of overlap between the best interest of the child and the rights of the parents. There are many *batai din* (outside of the Israeli Rabbinical Court system) which are more inclined to accept Rosh's approach as reasonable and worthy of consideration,[62] at least in cases where the children are not orphans and both parents are moderately fit;[63] the Rabbinical Courts of Israel, as well as the Beth Din of America, appear more inclined[64] to accept Rashba's approach and engage solely in determining what

62. See e.g. R. Y. Landau, *Nodah Biyehudah Even Haezer* 2:89; R. Eliyahu Kook, *Ezrat Cohain* 57; R. Shmuel Wozner, *Shevat Levi* 5:208; R. Yitzchak Weiss, *Minchat Yitzchak* 7:113; R. Nathan Goshtanter, *LeHorot Natan Even Haezer* 3:87-89 (cited in Gilat, at n.139); R. Shalom Masas, *Tevuot Shamash* 96; R. Eleizer Waldenburg, *Tzitz Eliezer* 16:44.

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

64. See *P.D.R.* 4:4 and 6:6 cited by Shochatman, 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, 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.



is in the best interest of the child, at least when the dispute is between parents.

This article does not discuss in depth the relationship between secular law's child custody rules, and halacha's rules. This topic is vitally relevant, however, as on a practical level, it is very common that *batai din* can enforce their decisions concerning child custody in the United States only when secular courts permit them to be enforced. While in most areas of commercial law secular courts will honor the ruling of a *beth din* when there is a binding arbitration agreement–even if the result is different from that which would be reached under secular law–such is not the case in child custody rulings, as secular courts review *de novo* all child custody determinations.[65] Thus, it is very common for the losing party in a child-custody determination to appeal to the secular courts to overturn the ruling of the *beth din*.

It is critical to understand secular law's public policy concerns as to why courts are less willing to allow child custody disputes to be subject to binding arbitration, and how *batai din* have to respond to that reality. The classic public policy ground is the state's interest in protecting the welfare and best interests of the child, which closely corresponds to the halachic notion of the Jewish court being the "father" of orphans. As Jenkins states, "arbitration awards which adversely affect the best interests of the child will be disregarded by the courts, whose paternal jurisdiction is paramount." The courts traditionally have had the role of *parens patriae*, or super parent, in protecting

65. See Elizabeth A. Jenkins, "Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters" 38 A.L.R.5th 69 (1996; 1998 Supplements).

the best interests of the child in marital disputes. Thus, courts either have rejected the use of arbitration for child custody disputes or will often only uphold child custody awards if they are in the best interests of the child.

The child custody award of a *beth din* will be reviewed completely, if one parent or gaurdian so requests, but the award from the *beth din* is accepted as evidence by the court. While *de novo* review does not necessarily mean that an arbitration award will be vacated by the court, the *beth din's* award is subject to a great deal of scrutiny by the court. [66]

Essentially, courts will show some deference to the original arbitration award, but use their independent judgment to determine whether to uphold the award. As a practical matter not only must an arbitration agreement and award be written and adhered to according to the procedural rules of the jurisdiction, an award concerning child support also needs to explain clearly the facts behind and reasons for the award. This is important because a court is likely to give more deference to an arbitration award that is explicit in its reasoning.

It is worth noting that a ruling of a *beth din* not grounded in the "best interest of the child" standard will most likely not even be accepted as enforceable in the United States.

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66. Ibid.