CHILD CUSTODY: DON’T WORRY, A BET DIN CAN GET IT RIGHT

Jeffrey Haberman

I. INTRODUCTION

Gitty Grunwald is a 23-year-old woman embattled in a custody dispute over her four-year-old daughter, Esther Miriam. Gitty was born and raised a member of the Satmar sect of Hasidic Judaism. The Satmars, following the leadership of the former Grand Rebbe Joel Titlebaum, attempt to emulate the extremely insular and pietistic lifestyle of the Jewish community that thrived centuries ago in Satu Mare (present day Romania). At 17, Gitty was forced to marry her now ex-husband, Yoely Grunwald. Dissatisfied with the restrictive and demanding lifestyle, Gitty fled the Satmar community with her daughter. Gitty moved to Brooklyn and enrolled Esther Miriam in school, from which she was later kidnapped and brought back to her father in Kiryas Yoel, a Satmar community in Monroe, New York. Gitty is now fighting custody battles in two different legal systems: one in the New York courts and the other in the Satmar Bet Din (Rabbinical court). According to Gitty, the Satmar Bet Din told her that if she helped Yoely effectuate a proper Jewish divorce, they would help her obtain custody of Esther Miriam. Gitty contends that she was deceived: she accepted Yoely’s get (a divorce document required by Jewish law), yet did not obtain custody of her daughter. The Satmar Bet Din did not issue a formal ruling. Gitty relates that the Satmar Bet Din resolved that Esther Miriam should remain with Yoely until Gitty “settled down.” Gitty believes that she has settled down, as evidenced by the fact that she has a home and a job. But the Satmar Bet Din apparently meant that Gitty “had to be religious again.” Gitty’s custody battle in the secular court is still underway.

2 Id.
3 Id.
4 Id.
5 Id.
Another side of the story paints a much less sympathetic picture of Gitty. After she left the Satmar community, Gitty resided among Hasidic ‘dropouts’ and ‘rebels,’ who also had fled their previous ultra-Orthodox Jewish lives.7 “This was the beginning of the wild times, making the rounds of pads in Monsey and the Lower East Side, hanging out with artists, people trying to make something beautiful, not ugly. When Esther Miriam was snatched, Gitty became a . . . celebrity. Everyone knew the story of Gitty and her baby.”8 While Gitty was optimistic about her prospects in secular court, her optimism soured when opposing counsel asked for an immediate hair follicle drug test.9 Gitty tested positive for drug use, although she maintained it was from smoking marijuana months before.10

As New York law currently stands, both statute11 and case law dictate that child custody disputes are to be resolved by the courts.12 Custody is awarded to the party that can serve the child’s best interest.13 The courts believe that they are in the best position to determine the best interest of the child. Many people, however, attempt to resolve their custody issues through arbitration, despite knowing that the outcome may not be enforceable in court. Though arbitration decisions awarding custody are not binding, arbitration tribunals such as a bet din (Hebrew: “house of judgment”) continue to hear and decide custody disputes.14

7 Id.
8 Id.
9 Id.
10 Id.
11 See infra note 13, N.Y. DOM. REL. § 70 (a) (Consol. 2008).
12 See, e.g., Glauber v. Glauber, 192 A.D.2d 94, 98 (2d Dep’t 1993); Agur v. Agur, 32 A.D.2d 16 (2d Dep’t 1969).
13 “In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.” N.Y. DOM. REL. § 70 (a) (Consol. 2008).
14 Beth Din of America, Services, available at http://www.bethdin.org/services.htm. In describing their services, the Beth Din of America states: “The Beth Din of America is a rabbinical court [that] adjudicates commercial, communal and matrimonial conflicts.” http://www.bethdin.org/services.asp (last visited Feb. 19, 2010). Additionally, the instructions for completing the Beth Din of America’s Prenuptual Agreement state: “If the parties choose to refer matters of child custody and visitation to the Beth Din for resolution, they may do so by signing this Section B. They must, however, understand that secular courts generally retain final jurisdiction over all matters relating to child custody and visitation.” The Beth Din of America Binding Arbitration Agreement, Instructions: Choice of Options, available at http://www.bethdin.org/docs/PDF6-Standard_Prenuptial_Agreement.pdf.
This Note aims to explore the reasoning behind the state’s reluctance to accept arbitration, including that of the bet din, as a means of resolving child custody disputes. The Note highlights the advantages of arbitration, both in general and when used to determine child custody. The Note examines the arguments proffered by the courts to justify the view that they, and not outside arbitrators, best resolve child custody battles. This Note argues that when two parties agree to arbitrate their divorce settlement before a bet din, the award should be given the same deference as a bet din’s resolution of other civil and commercial matters. This Note maintains that batei din (plural of bet din), through their application of halakhah (Jewish law), do in fact employ the “best interest of the child standard” to reach their decisions.

In drawing this conclusion, the Note first discusses the background and functions of the bet din and explains alternative dispute resolution’s favored status in New York. The Note then explicates the standard that New York courts use in determining which party is awarded custody in a child custody dispute and explores the public policy arguments underpinning the courts’ position. Lastly, the Note delves into how batei din apply Jewish law in resolving custody disputes and argues that Jewish law and secular law coincide to the point that rabbinic courts are capable of rightfully adjudicating child custody disputes.

II. BACKGROUND AND EXPLANATION OF THE BET DIN

A bet din\textsuperscript{15} is a rabbinical court or tribunal that is generally comprised of three rabbis.\textsuperscript{16} The institution of the bet din has been in existence for thousands of years;\textsuperscript{17} it may be as old as the Bible itself.\textsuperscript{18} After the destruction of the Second Temple in Jerusalem in 70 C.E., many governments permitted the exiled Jews living in the Diaspora to form their own self-governing institutions to impose

\textsuperscript{15} Also transliterated as beth din and beit din; plural: batei din.

\textsuperscript{16} Jodi M. Solovy, Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate, 45 DePaul L. Rev. 493, 500 n.54 (1996).


\textsuperscript{18} Joseph C. Kaplan, Rabbinical Courts: Modern Day Solomons, 6 Colum. J.L. & Soc. Probs. 49, 50 (1970) (citing Exodus 19:13: “The first judge of the Jews was Moses, who sat from morning till evening in judgment over the children of Israel as they wandered in the Wilderness after their flight from Egypt.”).
law and collect taxes.\textsuperscript{19} Throughout the Middle Ages, local governments gave Jews explicit power to adjudicate cases before respective \textit{batei din}.	extsuperscript{20} The \textit{bet din} was organized by the Jewish community and presided over religious, civil, and criminal cases.\textsuperscript{21} Presently in the United States, there are several different types of rabbinical courts,\textsuperscript{22} which largely resemble arbitral panels.\textsuperscript{23} Some people bring their legal disputes before a \textit{bet din} because they feel religiously obligated to use a religious forum, rather than a secular one; others simply use a \textit{bet din} for the advantages that alternative dispute resolution offers disputants: namely, speed and economy.\textsuperscript{24}

The Beth Din of America, founded by and affiliated with the Rabbinical Council of America, “has been recognized as one of the nation’s pre-eminent rabbinic courts for nearly four decades.”\textsuperscript{25} The Beth Din of America functions as a rabbinic authority for facilitating Jewish divorces and conversion to Judaism and has also expanded its reach to include the adjudication of commercial disputes.\textsuperscript{26} \textit{Batei din} that comply with the requirements set forth in New York’s arbitration statute can produce legally binding decisions that can be confirmed and enforced by a New York Court.\textsuperscript{27}


\textsuperscript{20} Kaplan, supra note 18, at 53; \textit{batei din} is the plural form of \textit{bet din}.

\textsuperscript{21} Id.

\textsuperscript{22} Id. at 56 (noting that some rabbinical courts are permanent, such as the Rabbinical Council of America based in New York, while others are convened on an \textit{ad hoc} basis). \textit{See also} Harvey Kirsh, \textit{Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court}, 9 Osgoode Hall L.J. 335, 349 (1971) (noting that \textit{ad hoc} \textit{batei din} are less formal tribunals before which disputants are not represented by counsel, but rather, each disputant selects a rabbi, and the third rabbi is selected by mutual consensus).

\textsuperscript{23} Fried, supra note 17, at 634 (noting that a \textit{bet din} is generally composed of three rabbis who sit as judges of Jewish law). \textit{See also} \textit{The Beth Din Of America Binding Arbitration Agreement, Instructions: Binding Civil Court Effect}, available at http://www.bethdin.org/docs/PDF6-Standard_Prenuptial_Agreement.pdf (providing: “When properly executed, this Agreement is enforceable as a binding arbitration agreement in the courts of the United States of America, as well as pursuant to Jewish law (\textit{halakha}).”).

\textsuperscript{24} See Kaplan, supra note 18, at 68 (noting that in religious problems such as divorce and conversion, for Conservative and Orthodox Jews, “a \textit{bet din} is the only recourse available to a Jewish person.”).

\textsuperscript{25} Beth Din of America, Our Mission, Background, Affiliations, & Principals, available at http://www.bethdin.org/organization-affiliations.asp.

\textsuperscript{26} Id. (noting that \textit{batei din} regularly serve as arbitration panels for secular business disputes).

\textsuperscript{27} Kozlowski v. Seville Syndicate, Inc., 314 N.Y.S.2d 439, 445 (N.Y. Sup. Ct. 1970). \textit{See also} Stein v. Stein, 707 N.Y.S.2d 754, 759 (N.Y. Sup. Ct. 1999) (noting that New York C.P.L.R. article 75 delineates the method by which an arbitration proceeding shall be convened and the procedural safeguards that must be employed. Adherence to all statutory procedural safeguards embod-
It is important to note that the breadth of an arbitration clause is not diminished if the arbitrator is a religious figure or body.  

III. Arbitration’s Favored Status

Resolving disputes through arbitration, as opposed to litigation, has become increasingly popular as courts continue to be congested. Some observers question whether the traditional court system is the optimal and most practical venue for addressing and resolving legal problems. In New York, arbitration is the preferred method of dispute resolution, and courts interfere “as little as possible with the freedom of consenting parties” to submit disputes to arbitration. Courts favor alternative dispute resolution because it saves the time and resources of both the court and the contracting parties. When a valid agreement to arbitrate has been made and complied with, the arbitrator has complete power...
to render a decision.\textsuperscript{34} Secular courts will not hear a case filed in court prior to a stay of proceedings.\textsuperscript{35} Courts place great emphasis on parties’ freedom to contract, and therefore judicial review of an arbitrator’s award is extremely limited.\textsuperscript{36} When parties agree to adjudicate their dispute through arbitration, it is assumed that they understand the consequences of their choice,\textsuperscript{37} and that if they do not agree with the outcome, they cannot claim that they were ignorant of the law.\textsuperscript{38} Overall, the result of arbitration will not be invalidated unless it is irrational, violates strong public policy, or exceeds a specific limitation on the arbitrator’s power.\textsuperscript{39}

IV. Arbitration: A Sensible Forum for Resolving Marital Disputes and Issues

Arbitration is one of the best methods for resolving matrimonial disputes.\textsuperscript{40} Divorcing parties may find their needs better served by the alternative dispute resolution process.\textsuperscript{41} The advantages of arbitration particularly apply to domestic disputes that in-

\textsuperscript{34} Silverman v. Benmor Coats, 61 N.Y.2d 299, 307 (1984) (noting that “[a]ny limitation upon the power of the arbitrator must be set forth as part of the arbitration clause itself, for to infer a limitation from the substantive provisions of an agreement containing an arbitration clause calling for arbitration of all disputes arising out of the contract, or for arbitration in some other broadly worded formulation, is to involve the courts in the merits of the dispute—interpretation of the contract’s provisions—in violation of the legislative mandate.”).

\textsuperscript{35} Id.

\textsuperscript{36} See Liberty Mut. Ins. Co. v. Sedgewick of N.Y., 43 A.D.3d 1062, 1063 (2d Dep’t 2007); See also Nationwide General Ins. Co. v. Investors Ins. Co. of America, 37 N.Y.2d 91, 95 (1975) (declaring that “to encourage the use of the arbitration forum . . . prevent[s] parties to such agreements from using the courts as a vehicle to protract litigation . . . . To this end the New York Legislature has assigned the courts a minimal role in supervising arbitration practice and procedures.”).

\textsuperscript{37} Meisels v. Uhr, 79 N.Y.2d 526, 538 (1992) (noting that the court places the burden on the parties to understand what they have agreed upon).

\textsuperscript{38} Id. at 534–35 (noting that arbitration is binding and ignorance of the law is not a valid excuse).

\textsuperscript{39} See generally Glauber v. Glauber, 192 A.D.2d 94 (2d Dep’t 1993); Silverman, 61 N.Y.2d at 299.

\textsuperscript{40} Albano, supra note 30, at 421. This Note argues that binding arbitration is appropriate for the determination of child custody. Albano likewise maintains that, “[w]ith the proper precautions, the child’s best interest may be met by a forum outside the traditional system such as arbitration . . . . There is no reason to assume a person with a judicial title is more qualified to determine the best interest of a child than a person considered an expert in the area of family law.” Id. at 445.

\textsuperscript{41} Id. at 420 (arguing that “[s]ome may find their needs better met by an alternative process.”).
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volve children. This is due to the very nature of the marital relationship—unlike civil or commercial disputes, in which the parties never have to deal with one another once the dispute is settled, divorcing parties that must resolve the issue of child custody are in a continuing relationship. Thus, mitigating the adversarial component of the dispute “increases the overall satisfaction between the parties by preserving, or at least limiting damage to, their future relationship.” In addition, factors such as extended court delays and legal fees are frustrating to all disputants, especially those that exacerbate the emotional toll that typically accompanies divorce. Choosing the arbitrator, usually an expert in family law, presents an opportunity for the parties to agree on at least one aspect of the dispute proceedings: “Since the parties must choose the arbitrator together, the arbitrator is viewed as credible by the parties.” Another argument favoring arbitration is that the arbitrator can better concentrate on each individual case, whereas a judge may have hundreds of matters to preside over at once. This advantage enables a more individualized and targeted approach to dispute resolution.

V. CHILD CUSTODY: DETERMINING THE BEST INTEREST OF THE CHILD

Pursuant to statute and well-established case law in New York, “contracts entered into by the parents with regard to the fate

42 Id. at 426.
43 Id.
44 Id. at 422.
45 Albano, supra note 30, at 425 (noting that “[a]lthough the arbitrator must be paid, arbitration generally costs less than traditional litigation because the less formal and quicker resolution of the dispute tends to limit the amount of attorney fees.”).
46 Id. at 426 (noting that “[p]ushing emotions to the side may be extremely difficult, if not impossible.”).
47 Id. at 427 (noting that “[t]he parties choose the decision-maker who is usually an expert in the field, rather than an appointed judge who may or may not be an expert in the particular area of dispute.”).
48 Id. at 423.
49 Id. at 425.
50 Albano, supra note 30, at 425.
51 N.Y. DOM. REL. § 70 (Consol. 2008):
(a) Where a minor child is residing within this state, either parent may apply to the Supreme Court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time,
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of their children are not binding on the courts.”52 In its 1993 decision in Glauber v. Glauber, the New York Court of Appeals closed the door on arbitration relating to custody of and visitation with children.53 The court found that, even if parents made their own custody agreements, the responsibility of the courts always supersedes whatever bargain was struck.54 The court held:

[A court] must always make its own independent review and findings, and may award custody to one parent in the face of an agreement granting custody to the other if the best interests of the child requires it. . . . A court cannot be bound by an agreement as to custody and visitation, or either custody or visitation, and simultaneously act as parens patriae on behalf of the child.55

In determining which party is granted custody of the child in the wake of divorce, the “supreme consideration . . . [is] ‘what is for the best interests of the child, and what will best promote its welfare and happiness.’”56 There is no prima facie right to custody of the child in either parent.57 Furthermore, there is no dispositive issue that ensures which parent will be awarded custody; rather, the court considers and balances the factors enumerated in the New York statute,58 which include the financial status of the re-

under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

(b) Any order under this section which applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to the provisions of part eight of article ten of such act, sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person or official having care and custody, or temporary care and custody, of such child.

52 E.g., Glauber v. Glauber, 192 A.D.2d 94, 97 (2d Dep’t 1993) (holding that “contracts entered into by the parents with regard to the fate of their children are not binding on the courts.”) (citing Nahra v. Uhlar, 43 N.Y.2d 242 (1977)).
53 Id. at 98.
54 Id. at 97–98.
55 Id. (citations omitted).
56 People ex rel. Glendening v. Glendening, 259 A.D. 384, 388 (1st Dep’t 1940), aff’d, 284 N.Y. 598 (1940) (citation omitted).
57 N.Y. DOM. REL. § 70 (a) (Consol. 2008). It is important to note that this position is not unique to New York; every state resolves custody disputes by balancing factors that determine the child’s best interest. See LINDA HENRY ELROD, FAMILY LAW AND PRACTICE § 32.06 Standards Used to Determine Custody Between Parents (Matthew Bender, 2008).
58 N.Y. DOM. REL. § 236(B)(6) (Consol. 2008) provides:
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spective parties, their age, health, necessities and obligations, the nature and duration of the marriage, the present and future capacity of each of the parties to be self-supporting, the tax consequences to the parties, and the income which the parties are capable of earning by honest efforts.59 The court considers the

a. [I]n any matrimonial action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties . . . In determining the amount and duration of maintenance the court shall consider:

(1) the income and property of the respective parties including marital property;
(2) the duration of the marriage and the age and health of both parties;
(3) the present and future earning capacity of both parties;
(4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefore;
(5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
(6) the presence of children of the marriage in the respective homes of the parties;
(7) the tax consequences to each party;
(8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
(9) the wasteful dissipation of marital property by either spouse;
(10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
(11) the loss of health insurance benefits upon dissolution of the marriage; and
(12) any other factor which the court shall expressly find to be just and proper.

59 Id. Glendening illustrates this point well. In that case, the mother sought to modify a previous court ruling that granted custody of her son to the father. The Appellate Division reversed the decision of the lower court, thus denying the mother’s motion, and granted custody in favor of the father. Although the boy expressed his preference to live with his mother, and although the mother alleged that “the father had offered the boy limited social contacts; that the father led a gloomy and isolated life; that on a number of occasions he had referred to the mother in the boy’s presence in scurrilous terms,” the court nonetheless found for the father. The court held: “[T]he father has had the custody of his son for nearly eleven years from the time Alan was less than six until now when he is over sixteen years old. The record establishes that the father is an upright, honorable, highly intelligent, exceptionally well-educated man of culture and refinement, faithful to his parental duties and possessing sound judgment in the type of care and training most conducive to the boy’s true welfare. The father is a member of the bar in this State in good standing. He is by no means wealthy, depending for his livelihood on his practice, but his income has always been sufficient to maintain a fit and suitable home for the boy and himself and provide the boy with every necessary, reasonable and desirable opportunity for education and proper training, intellectual and otherwise. The outstanding success of the father’s care during the crucial years of the boy’s life in which he had his sole custody is so clearly established that it cannot be successfully questioned.” Glendening, 259 A.D. at 388–89.
standard of living established during the marriage, as well as “the ability of each parent to guide and provide for the child’s needs, including his or her intellectual and emotional development, [and] the type and stability of home environment . . . .”

VI. PARENS PATRIAE

The underlying theory for enforcing arbitration clauses is rooted in the freedom to contract. Yet, this freedom is not absolute. As Professor Stewart Sterk points out, “[w]hen a rule of law transcends an agreement of the parties, that is, when the parties are not free to resolve a particular question as they see fit, the freedom of contract argument alone does not provide a sufficient basis for enforcing a forum selection clause.” As previously stated, as a matter of public policy, New York courts are responsible for determining the best interests of the child. “Under the parens patriae doctrine, the court has ultimate responsibility to care for the best

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60 N.Y. DOM. REL. § 236(B)(6), supra note 58.
61 Elcock v. Elcock, 241 A.D.2d 711, 712 (3d Dep’t 1997) (noting that “[f]undamentally, the primary consideration in a child custody dispute is the best interest of the child—an inquiry that requires an assessment of many relevant factors. These factors include the ability of each parent to guide and provide for the child’s needs, including his or her intellectual and emotional development, the type and stability of the home environment and the past performance and relative fitness of each parent. This inquiry is best undertaken by Family Court, since that court is in the best position to evaluate the testimony, character and sincerity of the parties.”). Id. at 712–13.

This Note takes issue with that last sentence; it is a statement that begs the question: what makes the family court the best forum? It is well known that judges’ dockets are over-crowded; judges are not familiar with the parties; and decisions can rest on an attorney’s power of persuasion. The bet din handles these cases differently. First, the rabbis are members of the same community as the parties, which gives the rabbis firsthand knowledge of the concerns and values that the parties have and seek to maintain. Second, while having a lawyer present is permitted, even encouraged, the rabbis arbitrating the case will question the parents directly to gauge which party is better suited to care for the child(ren). If, through the litigation process, a decision awarding custody is made on the basis of who had the better attorney, then the family court may not be the best forum to address custody disputes.

62 “The doctrine that all orphans, dependent children, and incompetent persons, are within the special protection, and under the control, of the state.” BALLENTINE’S LAW DICTIONARY 911 (3d ed. 1969)
63 Stewart E. Sterk, Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense, 2 CARDOZO L. REV. 481, 489 (1980–81) (noting that “[t]o the extent that an arbitration clause or other forum selection clause is the product of arm’s-length negotiation between informed parties, there is generally no reason not to enforce the agreement between parties.”).
64 Id. at 489.
65 Id.
interests of the child and therefore must sign off on any arbitration agreement before it is considered legally binding.\textsuperscript{67} The courts will not allow a private agreement concerning child custody to exist beyond the reach of its reviewing power.\textsuperscript{68} The core reason for this rule is that “[t]he children involved are not parties to the agreement; hence, they may not be bound by it, and may bring suit for child support notwithstanding its terms.”\textsuperscript{69} Since the child has his own interests that are “at stake” in his parents’ divorce proceeding, the child has never “relinquished” his rights in an arbitration agreement.\textsuperscript{70} According to Professor Sterk, “[t]he child is not a party to the arbitration agreement, and can no more be bound by the agreement or a subsequent arbitration award than any third party can be bound by an agreement between two others.”\textsuperscript{71}

A. Resolving Custody Disputes is a Matter Entrenched in Public Policy

As discussed above, an arbitration award is enforced unless it is totally irrational, violates strong public policy, or exceeds a specific limitation on the arbitrator’s power.\textsuperscript{72} Since there is no presumption in favor of either parent, the losing party in a custody dispute would be hard-pressed to prove the award “totally irrational.”\textsuperscript{73} Additionally, given the expansive reading of arbitration clauses, the arbitrator has relatively broad power—thus, the losing party would struggle to show that the arbitrator or arbitration

\textsuperscript{67} Albano, supra note 30, at 428.

\textsuperscript{68} Sterk, supra note 63, at 494 (noting that “[p]arents cannot by private agreement place the level of a minor child’s support beyond the reviewing power of courts. The rule regarding parents’ custody agreements is even stronger. Such agreements are not binding on the courts. Instead, the court as parens patriae must make support and custody decisions in the best interest of the children involved, despite any contrary agreement of the parents.”) (citing People ex rel. Wasserberger v. Wasserberger, 42 A.D.2d 93, 94 (1st Dep’t 1973) (holding that “[n]o agreement as to custody can bind the court so as to render inoperable its supervisory power.”)).

\textsuperscript{69} Id. at 499 (citing Boden v. Boden, 42 N.Y.2d 210, 212 (1977)).

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Glauber v. Glauber, 192 A.D.2d 94, 96 (2d Dep’t 1993) (noting that “[o]nce it is clear that a valid agreement to arbitrate has been made and complied with and that the claim sought to be arbitrated is not barred by limitations, the authority of the arbitrator is plenary . . . [and the arbitrator] may do justice as [the arbitrator] sees it.” An award thus will not be invalidated unless it is totally irrational, violates strong public policy, or exceeds a specific limitation on the arbitrator’s power.”) (citations omitted).

\textsuperscript{73} Id.
panel abused its power.\textsuperscript{74} The arbitrator has the power to reach all of the substantive issues covered by an agreement unless a specific exception is provided in the arbitration clause itself.\textsuperscript{75} Therefore, child custody disputes are to be resolved by the courts, and not through arbitration, because the disputes are “[s]o interlaced with strong public policy considerations that they have been placed beyond the reach of the arbitrators’ discretion.”\textsuperscript{76}  

Child custody in New York was not always considered “on its face”\textsuperscript{77} to be inappropriate for resolution by arbitration.\textsuperscript{78} In \textit{Sheets v. Sheets},\textsuperscript{79} the First Department of the Appellate Division held that “[c]ourts will, as a general rule, enforce an agreement between a husband and wife regarding custody of children so long as the agreement is in the best interests and welfare of the children.”\textsuperscript{80} The court in \textit{Sheets} noted that the court’s inherent power “[t]o safeguard the welfare of children would not, however, be dissipated by a separation agreement that provided for settlement of

\textsuperscript{74} Id.  
\textsuperscript{76} Associated Teachers v. Bd. of Educ., 33 N.Y.2d 229, 235 (1973). This case involved a challenge to an arbitrator’s decision finding that the school board should not have discontinued sabbatical leave, and ordering it to grant the requested sabbatical in the exercise of a good faith judgment. Id. at 231–32. The New York Court of Appeals reiterated that arbitration is the favored means of resolving disputes between boards of education and teachers, and that public policy is not contravened in this instance where the arbitrator had to deal with New York State’s Sabbatical Leave Moratorium Act, N.Y. CIV. SERV. LAW § 82. Id. at 236. Examples of issues that are suitable for arbitration are: the right to inspect teacher personnel files (see, e.g., Bd. of Educ. v. Areman, 41 N.Y.2d 527 (1977)); enforcement of state antitrust laws (see, e.g., Matter of Aimcée Wholesale Corp., 21 N.Y.2d 621 (1968)); disqualification of an attorney from representing a particular party (see, e.g., Bidermann Indus. Licensing v. Avmar N. Y., 173 A.D.2d 401 (1st Dep’t 1991)); usury claims asserted by borrowers (see, e.g., Durst v. Abrash, 22 A.D.2d 39 (1st Dep’t 1964), aff’d, 17 N.Y.2d 445 (1965)).  
\textsuperscript{77} Sprinzen v. Nomberg, 46 N.Y.2d 623, 631 (1979). The New York Court of Appeals held in \textit{Sprinzen} that “[c]ourts must be able to examine an arbitration agreement or an award on its face, without engaging in extended factfinding or legal analysis, and conclude that public policy precludes its enforcement.” Id.  
\textsuperscript{78} Glauber v. Glauber, 192 A.D.2d 94, 97 (2d Dep’t 1993).  
\textsuperscript{79} 22 A.D.2d 176 (1st Dep’t 1964).  
\textsuperscript{80} Id. at 178. In \textit{Sheets}, the husband and wife entered into a separation agreement in which they agreed to arbitrate disputes concerning the beneficial interests of the children. Id. at 177. The agreement provided that the wife had custody of the children and control and supervision of their upbringing, subject to specified visitation rights of the husband. Id. The agreement also stipulated that disputes would be settled by arbitration in accordance with the Rules of the American Arbitration Association. Id. “The husband served a demand for arbitration seeking, among other things, damages for violation of the agreement with respect to visitation, with respect to the secular and religious education of the children, and as to a claimed alienation of the children’s affection for their father.” Id. The wife then moved the court for a stay of arbitration. Id.
custody disputes and related matters by some arbitration tribunal.”81 *Sheets* stands for the proposition that arbitral tribunals can effectively apply the best interest of the child standard without diminishing a court’s asserted role as *parens patriae*. As the court explicitly stated:

> [I]t has been held that there may be no arbitration of a dispute between parents as to rights of visitation or as to custody and visitation. Yet, there seems to be no clear and valid reason why the arbitration process should not be made available in the area of custody and the incidents thereto, i.e., choice of schools, summer camps, medical and surgical expenses, trips and vacations. In fact, the American Arbitration Association is now equipped to arbitrate marital disputes arising out of separation agreements.82

This view, though not explicitly overruled, is no longer espoused.83 The New York Court of Appeals has held that the court must make its own independent findings to determine the child’s best interest.84 The Appellate Division in *Glauber* expressly disagreed with the dicta in *Sheets*, stating, “[w]e strongly reaffirm our disapproval of arbitration in this area.”85

One reason supporting the view that child custody can only be resolved by the courts is that arbitrating custody is not distinguishable from an agreement to give custody.86 A parent does not merely decide to “give custody;” rather, the court acts as *parens*
patriae to determine custody. This notion was described by Justice Cardozo in Finlay v. Finlay:

[The Chancellor puts] himself in the position of a ‘wise, affectionate and careful parent,’ and make provision for the child accordingly. He may act at the intervention or on the motion of a kinsman, if so the petition comes before him, but equally he may act at the instance of any one else. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights as between a parent and a child or as between one parent and another. He interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as parens patriae [sic]. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

In Sheets, the Appellate Division, First Department recommended a two-step process “in which an arbitration award concerning custody and visitation would first be made and then reviewed by the court under best interest analysis.” If disputants agreed that child custody would be determined through arbitration, their decision would first be subject to arbitration, and then, if challenged, the courts would affirm or invalidate the arbitrator’s decision. Both Agur and Glauber questioned the practicality and desirability of the Sheets approach. In Agur, the court criticized Sheets, arguing that arbitrating custody disputes would largely be a waste of time, expense, and effort, because courts would be doing the same work as the arbitration tribunal. This argument, however, does not necessarily prevail. In challenged custody disputes, courts would be performing the same type of review that they perform when reviewing commercial disputes that had been decided by an arbitral tribunal. Courts would be checking the record to see whether there had been a clear abuse of the arbitrator’s power, or

87 Finlay v. Finlay, 240 N.Y. 429 (1925).
88 Id.
89 Id. at 433–34.
90 See Glauber, 192 A.D.2d at 98 (discussing the practical application of Sheets).
91 See Agur, 32 A.D.2d at 21 (discussing the practical application of Sheets).
92 Glauber, 192 A.D.2d at 98 (“We have expressly disagreed with this approach . . . .”); Agur, 32 A.D.2d at 21 (“We harbor grave doubt whether such a two-stage procedure could have wide application.”).
93 Agur, 32 A.D.2d at 21 (“Of necessity, the second stage of the suggested course of action takes precedence over the first—to such an extent that duplication of time, expense and effort seems inevitable. Nor does it seem advantageous to the best interests of the child that the question of custody be postponed while a rehearsal of the decisive inquiry is held.”).
whether a party was coerced into arbitration.\textsuperscript{94} In actuality, courts would have the same, if not less, responsibility in the area of child custody disputes.\textsuperscript{95} Parties would either bring their custody disputes directly to Family Court or they would first arbitrate, and if challenged, would then petition the courts. This chain of events would remove cases from the dockets of Family Courts.\textsuperscript{96}

Another reason supporting the public policy argument of putting custody disputes beyond the realm of arbitration concerns the general weight given to arbitration.\textsuperscript{97} The present state of the law makes arbitration awards extremely difficult to overturn.\textsuperscript{98} Part of providing for the best interest of the child is resolving the custody issue quickly and competently.\textsuperscript{99} In \textit{Agur}, the court held that “[t]he nature . . . of the process of arbitration conveys a sense of inexpedience for the determination of such an intricate problem. There is no assurance of the qualifications of the arbitrators, no necessity that the parties nominate persons whose background or competence would certify a provident decision.”\textsuperscript{100} Thus, it seems courts lack confidence in an arbitration tribunal’s ability to make a timely and competent determination about child custody.

Additionally, courts buttress their argument on the basis that a court may not vacate an arbitration tribunal’s award because of a mistake of fact\textsuperscript{101} or even a “perverse misconstruction” of law.\textsuperscript{102} Moreover, it is extremely important to note that the private component of arbitration necessitates that either the father or the mother be awarded custody of the child. Under judicial standards, however, the court is not constrained to grant custody to either parent, but may decide that neither be granted custody if it is in the best interest of the child to award custody to a third party.\textsuperscript{103}

\textsuperscript{95} See generally Glauber, 192 A.D.2d 94; Albano, supra note 30; Wilson, infra note 111. This is one of the reasons that arbitration is favored—courts are overcrowded. If more parties arbitrate, fewer will litigate, thus leaving openings in court dockets.
\textsuperscript{96} See generally Albano, supra note 30; Wilson, infra note 111.
\textsuperscript{97} See generally Glauber, 192 A.D.2d 94.
\textsuperscript{98} Id. at 98 (holding that “[i]f an issue is to be arbitrated, the expectation is that an award will not be disturbed.”) (citing Silverman, 61 N.Y.2d 299).
\textsuperscript{100} Id. at 20 (citations omitted). This Note takes issue with this argument. Arbitration is favored because it is a quicker process than litigation. In litigation, determinations concerning child custody could be delayed for long periods due to the time it takes to make motions and hold hearings. See generally Albano, supra note 30. This argument is exemplified in Gitty’s case.
\textsuperscript{101} In re Martib Weiner Co., 2 A.D.2d 341, 343 aff’d, 3 N.Y.2d 806 (N.Y. 1957).
\textsuperscript{103} Agur, 32 A.D.2d at 20.
B. So What? Arbitrate Anyway

Given the state of the law in New York, and given the argument espoused by Professor Sterk, parties continue to choose arbitration over litigation in spite of the uncertainty of the agreement’s enforcement. Christine Albano, in her article, *Binding Arbitration: A Proper Forum For Child Custody?*, notes that Chief Justice Burger acknowledged that the court system does not necessarily offer the best forum for certain types of disputes. “Specifically, he stated, ‘serious study should be given to whether divorce and child-custody matters should be in the courts.’ He believed there was a better way to resolve such disputes than in an adversarial system, and he particularly favored the use of arbitration.” The simple question to ask is: what makes a judge the best person to determine the best interests of the child?

The judge does not know the parties involved. Instead, the judge learns about the parties through the careful advocacy of the attorneys. The judge absorbs the information amidst an overloaded docket and often amongst other unrelated types of cases. There is no requirement that the judge be an expert in family law. In addition, if there is any complexity to the case, chances are good the case will be divided over months for just a few days at a time. At each hearing, the parties must waste valuable time backtracking over their case and reminding the judge of significant details. Meanwhile, during their breaks from

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104 Professor Sterk’s argument is logically sound: The children involved are not parties to an arbitration agreement; hence, they may not be bound by it, and may bring suit for child support notwithstanding the terms. See *Boden v. Boden*, 42 N.Y.2d 210 (1977). However, it is this Note’s position that while Professor Sterk’s argument is valid, it is impractical. Parents or legal guardians persistently make decisions that affect the “rights” of their children on a daily basis. These decisions are not necessarily made with the permission of their children; nor do children bring their own matters to court to ask a judge whether their parent or guardian may make such a decision that affects their rights. Children do not consent to their parents’ divorce; nonetheless, their rights are affected. A prime example is a parent’s decision to circumcise their son. In this case, the circumcision is at least a battery, and arguably a deprivation of liberty and property without due process of the law. When the child is in the hospital, or when he is eight days old as the Jewish religion warrants, no one asks the child whether he wants the procedure. No motions are filed on his behalf. No judge sanctions the circumcision. This is obviously an extreme example. Yet it conveys the point that parents constantly act in ways that affect the “rights” of the child where the child has no opportunity to enjoin his or her parents’ actions or seek redress in response. This issue illustrates why legal scholars and courts continue to push for arbitrated custody disputes to have a real and binding effect, despite Professor Sterk’s argument.

105 Albano, *supra* note 30, at 439.
106 *Id.* at 429.
107 *Id.*
108 *Id.* at 431.
The struggle over whether to embrace arbitration in all phases of matrimonial disputes versus maintaining the status quo is discussed in depth in a 1984 New Jersey Supreme Court case, *Faherty v. Faherty*. In *Faherty*, the New Jersey Supreme Court recognized the traditional arguments that support *parens patriae*, but countered by declaring, “[w]e do not agree with those who fear that by allowing parents to agree to arbitrate child support, we are interfering with the judicial protection of the best interests of the child. We see no valid reason why the arbitration process should not be available in the area of child support . . . .” In fact, in resolving child support disputes, the New Jersey Supreme Court follows the same two step analysis outlined in *Sheets*. While

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109 Id.

110 Sterk, supra note 63.

111 Id.


113 Faherty v. Faherty, 97 N.J. 99, 109 (1984). The court stated: “We recognize that in many cases arbitration of matrimonial disputes may offer an effective alternative method of dispute resolution.” *Id.* at 107. The court then stated, “[o]ur inclination to embrace arbitration in all phases of matrimonial disputes is tempered, however, by our knowledge that in such cases competing public policy considerations abound. Accordingly, the principle issue involved here is whether public policy prohibits arbitration from resolving child support and custody disputes.” *Id.* at 108.

114 *Id.* at 108 (“Traditionally, courts under the doctrine of *parens patriae* have been entrusted to protect the best interests of children. Children’s maintenance, custody-visitation, and overall best interests have always been subject to the close scrutiny and supervision of the courts despite any agreements to the contrary.”).

115 *Id.* at 109. “First . . . [New Jersey] courts should review child support awards as provided by N.J.S.A. 2A:24-8. Second, the courts should conduct a *de novo* review unless it is clear on the face of the award that the award could not adversely affect the substantial best interests of the child.” *Id.* at 109–10. The New Jersey Supreme Court explained that “[a]n arbitrator’s award that grants all the requested child support would generally satisfy this second test because it is always in the child’s best interest to have as much support as possible. Clearly such an award does not adversely affect the best interest of the child. In such cases, the spouse challenging the award would be limited to the statutory grounds for vacation or modification provided in
child support differs from child custody, the court in *Faherty* suggested that “[a]s we gain experience in the arbitration of child support and custody disputes, it may become evident that a child’s best interests are as well protected by an arbitrator as by a judge. If so, there would be no necessity for our *de novo* review.”\(^{116}\)

The Michigan Court of Appeals held in 1995 in *Dick v. Dick*\(^{117}\) that there was “no clear prohibition in case law, court rule, or statute against the use of binding arbitration in the resolution of custody disputes . . . . Binding arbitration is an acceptable and appropriate method of dispute resolution cases where the parties agree to it.”\(^{118}\) Barbara E. Wilson, in her article, *Who’s Watching Out for the Children? Making Child Custody Determinable*, argues that the *Dick* decision was not ground-breaking; rather, it is “the court’s plea for help from the legislature of Michigan . . . .”\(^{119}\) The Michigan Court of Appeals’ ruling was grounded on three issues. First, the Uniform Arbitration Act (UAA)\(^{120}\) of 1963 intended ar-

\(^{116}\) *Id.* at 111.


\(^{118}\) *Wilson*, *supra* note 111, at 231 (citing *Dick*, 534 N.W.2d 185). The *Dick* court used a three-prong analysis to determine arbitrability of child custody. Case law “that has led to the widely held belief that custody decisions are the exclusive province of the circuit court” was balanced with the provisions of the Child Custody Act and the effect of the [Uniform Arbitration Act]. “The court ultimately found ‘no clear prohibition in case law, court rule, or statute against the use of binding arbitration in the resolution of custody disputes.’ The court went further to say ‘binding arbitration is an acceptable and appropriate method of dispute resolution in cases where the parties agree to it.’” *Id.* at 230–33 (citing *Dick*, 534 N.W.2d at 190).

\(^{119}\) *Id.* at 234 “The *Dick* court was careful to enunciate that ‘the language of the arbitration statute is broad and seemingly all inclusive. It permits all persons to submit any controversy to arbitration upon their agreement. It does not specifically exempt any civil action from binding arbitration.’” *Id.* (quoting *Dick*, 534 N.W.2d at 190).

\(^{120}\) Albano, *supra* note 30, at 438 n.76. The court in *Dick* noted that the Uniform Arbitration Act of 1963, which became Section 600.5001 of the Michigan Compiled Laws, provides that:

(1) All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission. *Dick*, 534 N.W.2d at 189 (quoting Mich. Comp. Laws § 600.5001). The court went on to hold: [W]e find no clear prohibition in case law, court rule, or statute against the use of binding arbitration in the resolution of custody disputes. Binding arbitration is an acceptable and appropriate method of dispute resolution in cases where the parties agree to it. Furthermore, the decision of an arbitrator does not prevent a party from seeking to change custody or modify
abitration to reach all types of civil disputes.\textsuperscript{121} Second, custody disputes are not expressly exempted from the UAA.\textsuperscript{122} Lastly, there are no specific exemptions of child custody disputes from alternative methods in Michigan’s statute.\textsuperscript{123} Overall, the court in \textit{Dick} reached the conclusion that arbitration may actually further the public interest.\textsuperscript{124}

C. \textit{Batei Din} and Child Custody Resolutions

Where two parties agree to arbitrate their divorce settlement before a \textit{bet din}, including the distribution of assets, custody of the children, visitation, alimony, and child support, then the award should be upheld by secular courts, as are the awards from commercial based arbitrations, provided that the \textit{bet din} can apply both the best interest of the child standard along with \textit{halakha} (Jewish law). The question is whether secular and religious standards can function together. According to Rabbi Jonathan Reiss, the Director of the Beth Din of America and the newly appointed Dean of Yeshiva University’s Rabbi Isaac Elchanan Theological Seminary,\textsuperscript{125} the Beth Din of America does apply New York’s standard for determining the child’s best interest.\textsuperscript{126} Mirroring the language in \textit{Sheets}, Reiss asserts that “the reality is that, provided that a \textit{beit din} demonstrates that its decision is based on the ‘best interests of the children,’ courts are likely to enforce a decision of the \textit{beit din} even in child custody matters.”\textsuperscript{127} The Beth Din of America is not reluctant to arbitrate child custody disputes. Quite the opposite, “[t]he Beth Din of America has decided a number of cases involv—

\begin{thebibliography}{99}
\bibitem{121} Albano, \textit{supra} note 30, at 438.
\bibitem{122} \textit{Id.}
\bibitem{123} \textit{Id.}
\bibitem{124} \textit{Id.} at 439.
\bibitem{127} \textit{Id.} (discussing the functions of a \textit{bet din} in securing a religiously correct divorce. Reiss also addresses people’s concerns that secular courts may not uphold a \textit{bet din’s} award.).
\end{thebibliography}
Carasco and blaming child custody issues . . . .” 128 The Beth Din regularly utilizes “child therapists and professional experts to assist in the Beth Din’s determination.” 129 Most importantly, “[n]o child custody matter resolved by the Beth Din of America has been overturned in secular court.” 130 Rabbi Reiss’ article clearly illustrates that New York law and Jewish law are compatible in the sphere of determining child custody.

D. Jewish Law and Child Custody

It is necessary to understand the halakhic approach to child custody to see whether bet din custody decisions should be given the same weight the court gives to commercial matters. Whereas New York law resolves custody disputes by determining what is in the child’s best interest, Jewish law resolves the issue by taking one of two methods. 131 The first asks which parent has the right to the child, while the second awards custody to the party most capable of providing for the child’s best interest, which is evaluated in a manner similar to the secular method. 132 Professor Israel Z. Gilat points out that there is a difference between civil law and rabbinic law, because the former is based exclusively on the best interest of the child, while in the latter, such is not always the case. 133 It is important to note that these two approaches do not necessarily clash; rather, it can be argued that the best interest of the child will fit together with conferring rights upon the parents. 134

The first view stems from the teachings of Rabbi Asher ben Yehiel (known as “Rabbenu Asher,” 1250–1328), 135 who adopts a

128 Id.
129 Id.
130 Id.
132 Id.
133 Israel Z. Gilat, Is the ‘Benefit of the Child’ a Major Criterion according to Jewish Law in a Parental Conflict of the Child? 8 BAR ILAN L. STUDIES 297–349 (1990). Note that this article is written and printed in Hebrew. Professor Gilat teaches law at the Bar Ilan University and at Netanya Academic College, both in Israel. The civil law referred to here is Israeli civil law.
134 Id. (“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.”).
naturalist theory of parental rights. Rabbenu Asher opines that “there is an obligation (for a man) 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.” According to Rabbi Moshe ben Maimon’s (known as “Maimonides”; 1135–1204) code, a father must support his children just as he supports his wife. As a man is Biblically obligated to support his wife, so too he is Biblically obligated to support his children. Based on the father’s obligations and rights as a natural parent, Rabbenu Asher holds that the father is the presumptive custodial parent of his children. Thus, as a matter of law, when a marriage ends, and the mother is incapable of raising the children, the father is entitled to custody of his children, unless he is unfit to raise the children.

Rabbenu Asher derives this view from the Talmud, which classifies child custody into three categories. First, custody of all children under the age of six is to be given to the mother; second, custody of boys over the age of six is to be given to the father; and third, custody of girls over the age of six is to be given to the mother. The primary reason for this breakdown is that the Talmud articulates actual duties that a father must fulfill with respect to his son. These duties include making sure the son is circumcised, redeemed (from a priest, or kohen), educated, taught a craft, and eventually married. The mother, however, is “under no legal obligation to financially support and maintain [her] children.” It is important to note that these laws were codified over 1500 years ago, when mainstream Jewish society conceived of distinct roles for each gender. Standing alone, these rules seem inflexible and man-

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136 Broyde, supra note 130, at 23.
137 Id.
139 Rav Binyamin Tabory, Shiur # 18: Wife and Family Support, Yeshivat Har Etzion, www.vbm-torah.org/archive/mitzva/Tmishpatim.doc (last visited Feb. 25, 2009) (discussing a man’s obligations to his family, the obligation for a father to support his young children, and “just as he must support his wife.”) (citing Maimonides, Mishneh Torah, Hilkhot Ishut 12:14).
140 Id. This comparison drawn by Maimonides between supporting children and supporting a wife suggests that in his view, feeding children likewise constitutes a Biblical obligation.
141 Broyde, supra note 130, at 24.
142 Ketubot 65b, 122b–123a.
143 Id. at 27–28 (citing Talmud, Ketubot 65b, 122b–123a).
145 Broyde, supra note 130, at 29.
date the placement of children into the appropriate category. Such a rigid categorical system is clearly at odds with secular law, which places no presumption in favor of either parent and rewards custody solely on the best interest of the child. Thus, if this were the only approach to solving custody disputes, batei din would be ill-equipped to arbitrate such disputes. Rabbinic courts, however, have made decisions that run contrary to these Talmudic guidelines, such as when the presumptive parent is unfit to retain custody.

For example, Rabbi David Ibn Zimra [known as “Radvaz,” 1479–1589] 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. Here, Radvaz awarded custody to the father based on the fact that the mother was deemed unfit to provide for her daughter, which comports more with a best interest of the child standard.

Since the Talmudic categories are not flexible, batei din may apply the best interest of the child standard. In Jewish law, this standard was espoused by Rabbi Solomon ben Aderet (known as “Rashba,” 1235–1310). Rashba held that, as a matter of law, Jewish law accepts that child custody be determined according to the best interest of the child. Like New York law, Rashba did not strictly adhere to the presumptions of custody stated in the Talmud. For example, in a case where the father died, Rashba stated that the mother does not have an indisputable right to the child;
rather, the rabbinic court must consider equitable factors before making a determination.\textsuperscript{154}

This standard is also found in the decisions of Rabbi Moses ben Joseph of di Trani (known as “Mabit,” 1505–1585),\textsuperscript{155} and Rabbi Samuel ben Moses de Medina (known as “Maharashdam,” 1505–1589).\textsuperscript{156} Mabit, when reviewing a child custody arrangement between divorced parents, said that the agreement was not in the best interest of the children, and that custody should be awarded to the other parent.\textsuperscript{157} Likewise, Maharashdam opined that a widowed mother’s decision to move her child away from her family was not in the child’s best interest, thus prohibiting the move.\textsuperscript{158}

Professor Gilat argues that throughout its history, the bet din’s approach to resolving child custody disputes has developed into determining which party was responsible for the break-up of the marriage, and then awarding custody to the other party.\textsuperscript{159} This is more or less a test of “guilt,” where the “guilty” party was considered the party responsible for the break-up of the marriage.\textsuperscript{160} Batei din eventually began to incorporate general religious infrac-
tions into the meaning of guilt.\textsuperscript{161} Thus, if one parent was known to break Jewish law habitually,\textsuperscript{162} the other parent would be favored. For example, in a case where the father observed Jewish law and the mother did not, the rabbis would emphasize this fundamental right of the father to guard his children.\textsuperscript{163} But in the case where

\begin{itemize}
\item \textsuperscript{154} Id. (noting that “[a]ccording to [Rashba], 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.”).
\item \textsuperscript{155} Marcus Jastrow et al., \textit{Trani, in The Jewish Encyclopedia} 219 (1906), \textit{available at} http://www.jewishencyclopedia.com/view.jsp?artid=294&letter=.
\item \textsuperscript{156} Gotthard Deutsch & Henry Malter, \textit{Medina, in The Jewish Encyclopedia} 424 (1906), \textit{available at} http://www.jewishencyclopedia.com/view.jsp?artid=327&letter=
\item \textsuperscript{157} Broyde, \textit{supra} note 130, at 32 (“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 that custody is to be granted contrary to the agreement.”).
\item \textsuperscript{158} Id. at 33. \textit{See also} Gilat, \textit{supra} note 132, at 321. Gilat elaborates that it is known that this woman renounced her religious beliefs, and it was presumed that she would not raise her children religiously. With this, the rabbinical court deemed it in the best interest of the children to prohibit the mother from moving. \textit{Id.} at 321–24.
\item \textsuperscript{159} Gilat, \textit{supra} note 132, at 348.
\item \textsuperscript{160} Id. (noting that the prevailing thought was that the “guilty party should lose the right to custody of the child.”).
\item \textsuperscript{161} Id.
\item \textsuperscript{162} For example, if it was known that one parent did not keep Jewish dietary laws or the laws regarding the Sabbath.
\item \textsuperscript{163} Gilat, \textit{supra} note 132, at 348. This view is exemplified in the case where the mother wanted to move away from the community. Assuming that she would no longer observe Jewish law, she would be presumed unfit. \textit{Id.}
the father was the one who “disregarded Torah [i.e., Jewish law]” and the mother was more observant, batei din recognized their authority to award custody to the mother.\textsuperscript{164}

Nowadays, the view of ensuring the best interest of the child is widely popular in Israeli Rabbinical courts, as well as the Beth Din of America.\textsuperscript{165} One Israeli case speaks directly to this issue. In \textit{Nagar v. Nagar},\textsuperscript{166} a Special Tribunal of two Supreme Court justices and a judge from the Rabbinical Court of Appeals unanimously held that the presumption of the father’s right to custody of his son is rooted in the father’s obligation to educate his son. Yet due to “changing social and educational conditions, Jewish law has obligated both men and women to study Torah and halakhah, and therefore both . . . have the right and duty to educate their children . . . .”\textsuperscript{167} The Special Tribunal traced the history of the father’s obligation to teach his son Jewish law from Biblical times to the present day. The tribunal reached its decision by noting the change in approach to education throughout history and the advancements that women have made over time.\textsuperscript{168} The tribunal held that, “it is not merely permitted but desirable and [even] necessary to provide girls with an intensive education . . . .”\textsuperscript{169} Thus, it seems that since both parents are on equal footing with regard to their child’s education, both would be on equal footing with regard to custodial rights. With this, the best interest standard “could be read as a general theory for all child custody determinations,” and the pre-

\begin{itemize}
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} Broyde, \textit{supra} note 130, at 33 (noting that the best interest of the child standard is “the predominant school of thought among judges in the Israeli Rabbinical Court . . . .”).
\item \textsuperscript{166} \textit{Nagar v. Nagar}, [1984] IsrSC 38(i) 365.
\item \textsuperscript{167} MENACHEM E LON, 4 JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1667 (Bernard Auerbach and Melvin J. Sykes, trans.) (1994). In \textit{Nagar}, the dispute between a divorced couple was whether the children should attend a religious school or a secular school. At marriage, neither party was observant, but the father became more religious over time. The \textit{bet din} ruled in favor of the father, and decided that the children should transfer from the secular school they attended to a religious school. This matter then was considered by the Special Tribunal, which expressed its view that the rule that the father alone determines the nature of his children’s education does not accord with current Jewish law. \textit{See id.} at 1795.
\item \textsuperscript{168} \textit{Id.} at 1800 (“[T]he fact is that the woman teacher has taken the place of the male teacher. The woman teaches Torah to both boys and girls in the elementary schools. . . . [Thus] the performance of the religious precepts by boys [as well as girls] is dependent on her knowledge.”).
\item \textsuperscript{169} \textit{Id.} at 1801.
\end{itemize}
sumptions of the Talmud are treated as presumptions that the *bet din* considers when assessing the child’s best interest.\textsuperscript{170}

E. Where the *Bet Din* Fails

A *bet din*’s ruling that refuses to apply the best interest standard and only applies Jewish law in custody disputes cannot sustain a challenge if a petition is brought in secular court. The Appellate Division, Second Department properly rejected the arbitration award in *Agur v. Agur* that only applied Jewish law. In *Agur*, the disputants signed a separation agreement providing that any controversies arising between the parties would be arbitrated under Jewish religious law.\textsuperscript{171} The separation agreement stipulated that the mother was to have custody of the child until he reached the age of six, and thereafter, the father would have custody.\textsuperscript{172} Shortly before the child turned six, the mother petitioned the court, alleging that the best interests and welfare of the child required that she retain his custody.\textsuperscript{173} She pointed out that the arbitration clause compelled the exclusive use of religious tenets and was therefore unenforceable.\textsuperscript{174} After considering whether custody is included in separation agreements and concluding that it is, the court vacated the arbitration award, and ruled in favor of the mother, and demanded a hearing to determine who should have custody.\textsuperscript{175}

In *Agur*, the court was correct in ordering a custody hearing, because the *bet din* only applied Jewish law, and did not apply any standard that resembled the New York law for determining the best interest of the child. The court in *Agur* and decisions following went too far in pronouncing that custody disputes are beyond the competency of arbitral panels.

\textsuperscript{170} Broyde, supra note 130, at 25–26 ("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.").

\textsuperscript{171} Agur v. Agur, 32 A.D.2d 16, 18 (2d Dep’t 1969) (noting that “[t]he parties agree that any controversies arising between them shall be arbitrated under Jewish religious law.”).

\textsuperscript{172} Id. The second term indicated that “[t]he Wife shall have custody of The Child until The Child’s sixth birthday. After The Child’s sixth birthday, The Husband shall have custody of The Child. The intention of this custody provision is to conform with Jewish religious law.” *Id.*

\textsuperscript{173} Id. at 16.

\textsuperscript{174} Id. The tenet of Jewish law to which the court refers, found in the Talmud, tractate *Kidushin* 29a, provides that the father is responsible for educating his son.

\textsuperscript{175} Id. at 16.
F. Harken Back to the Root of Arbitration and its Favored Status

As discussed above, courts emphasize that arbitration is the preferred means for dispute resolution. Arbitration is less formal, quicker, and cheaper than litigation. Arbitration allows parties to bring their disputes before a person or tribunal whom they deem qualified.176 The emphasis on upholding arbitration resolutions comports with honoring parties’ freedom to contract.177 It is in this light that courts should give weight to custody disputes resolved through arbitration. This approach should especially hold true where disputants bring their case before a religious tribunal. For those parties who seek a bet din’s ruling, there are underlying needs of the parties that must be met; namely, there is great concern that the case will be resolved according to Jewish law. In Agur, the court recognized this concern and suggested that, in a child custody hearing, the court:

\textit{can accept evidence of Jewish religious law from both parties as part of the relevant data upon which it will render its decision of custody. In assessing the total evidence and pondering the welfare of the child it can properly put into focus the expression of intent by the parties that Jewish religious law shall be given high place in the factors governing the custody of the child. It can appraise as well the claim of the petitioner that her need for the respondent’s consent to a religious divorce dictated her acquiescence to a transfer of custody to the respondent when their son would become six years old.}^{178}

While courts should emphasize the original intentions of the parties, there are numerous problems with having secular courts incorporate Jewish law into their decision-making process. The most obvious problem is that secular courts would encounter the issue of separation of church and state. Accordingly, the New York Court of Appeals held in \textit{Avitzur v. Avitzur} that judicial involvement in matters touching upon religious concerns has been constitutionally limited and courts should not resolve such controversies in a manner requiring consideration of religious doctrine.179 This approach

\begin{itemize}
\item 177 Id.
\item 178 Agur, 32 A.D.2d at 21–22.
\item 179 See Avitzur v. Avitzur, 58 N.Y.2d 108 (N.Y. 1983). In Avitzur, the Court of Appeals answered whether the terms of a ketubah (Jewish marriage contract), which was entered into as part of the religious marriage ceremony, are enforceable. The contract stipulated that both spouses agreed to recognize the bet din as having authority to counsel the couple in matters\
\end{itemize}
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contemplates the application of objective, well-established principles of secular law to the dispute, permitting judicial involvement to the extent that it can be accomplished in purely secular terms. 180

VII. WHERE DO WE GO FROM HERE?

As discussed above, many Jews bring their disputes before batei din because they want their dispute to be resolved according to halakha. 181 Although secular courts are deemed the sole arbiter of child custody disputes, parties continue to bring their cases before batei din with the knowledge that the decision might not be upheld in court. Furthermore, batei din willingly hear custody disputes. The Beth Din of America has a provision in its prenuptial agreement contract that offers disputants the option of having a beit din hear the custody dispute. 182 The Beth Din of America is mindful of New York’s best interest of the child standard, and as Rabbi Reiss maintains, “[n]o child custody matter resolved by the Beth Din of America has been overturned in secular court.” 183 This is because if “[a] beit din demonstrates that its decision is based on the ‘best interests of the children,’ courts are likely to enforce a decision of the beit din even in child custody matters.” 184 The Beth Din of America regularly utilizes child therapists and professional experts to assist in the Beth Din’s determination. 185

180 Id. (citing Jones v. Wolf, 443 U.S. 595, 601 (1979)).

181 See Kaplan, supra note 18, at 68 (noting that in religious problems such as divorce and conversion, for Conservative and Orthodox Jews, “a bet din is the only recourse available to a Jewish person”).

182 See The Beth Din of America Binding Arbitration Agreement, available at http://www.bethdin.org/docs/PDF6-Standard_Prenuptial_Agreement.pdf (stating that “[t]he parties agree that the Beth Din of America is authorized to decide all disputes, including child custody, child support, and visitation matters, as well as any other disputes that may arise between them.”).

183 Reiss, supra note 125.

184 Id. Reiss’ article discusses the functions of a bet din in securing a religiously valid divorce. Reiss also addresses people’s concerns that secular courts may not uphold a bet din’s award.

185 Id.
Ultimately, Rabbi Reiss believes that New York law and Jewish law are compatible in the sphere of determining child custody. Additionally, as exemplified by modern Israeli case law, halakha is not rigid; rather, it adapts to the necessities of the times. Thus, case law has shown that rabbinic courts are mindful of the trends of the secular world, and are willing to expand the law to be more inclusive of the best interest of the child standard. Secular courts can therefore rest easy in giving due weight to the decisions of the Beth Din of America and other batei din that use the same standards in determining child custody. State legislatures should set requirements for the batei din and for all arbitrators resolving child custody disputes. For example, the rabbis on the bet din and the arbitrators should be experts in the field, and they must record and justify their decisions. These requirements give the courts the chance to understand the reasoning behind the ruling, in case of appellate review. Parties seeking arbitration should also sign affidavits declaring that they are arbitrating of their own free will and that they understand the consequences of their choice to arbitrate. For parties seeking redress from the bet din, the affidavit will show explicit proof that they want the application of Jewish law in resolving their dispute.

VIII. Conclusion

Gitty Grunwald’s popular and emotional story raises important issues and questions concerning child custody in the Jewish and secular systems of law. As New York law currently stands, both statute and case law provide that child custody disputes are to be resolved by the courts. Custody is awarded to the party that can serve the child’s best interest. The courts believe that they alone are in a position to determine the best interest of the child. Setting this reality aside, and combined with the increasing popularity of resolving disputes through arbitration, arbitration

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186 See N.Y. Dom. Rel. § 70(a) (Consol. 2008).
188 N.Y. Dom. Rel. § 70(a) (Consol. 2008). “In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.” Id.  
189 Glauber, 192 A.D.2d at 96 (noting that “[t]here is little doubt that as courts have become more and more congested there has been a concomitant rise in resort to arbitration. Over the last 25 years it has become a preferred method for the settlement of many controversies.”).
has become the preferred method of dispute resolution in New York, and courts are becoming hard-pressed to justify their current stance on custody disputes and arbitration.

Overall, the advantages of evaluating arbitration in custody disputes in the same manner as arbitration in commercial disputes are far too great to ignore. Not only is arbitration more expeditious and less expensive, it is a better forum for dealing with the emotional and life-altering elements that stem from divorce. Parties have to agree to arbitrate and must collectively choose an arbitrator. Moreover, they feel more secure knowing that the outcome was not based on crafty lawyering techniques. This is especially true for those seeking to resolve their dispute before a bet din. There, the parties are comforted knowing that their dispute is being settled with the application of Jewish law. The rabbis who serve as arbitrators have a good understanding of the disputants’ needs. Thus, so long as batei din apply a combination of halakha with the best interest of the child standard, the decision should be given the full weight of any other valid arbitration decision.