



2020

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Recommended Citation

Zylberman, Michoel; Greenberg, Karen K.; and Pollack, Daniel (2020) "Unfit to Parent: American and Jewish Legal Perspectives," *Touro Law Review*. Vol. 36 : No. 1 , Article 14.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol36/iss1/14>

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UNFIT TO PARENT: AMERICAN AND JEWISH LEGAL PERSPECTIVES

*Michoel Zylberman, Karen K. Greenberg, & Daniel Pollack**

I. INTRODUCTION

When do parents become unfit to parent their children? Broadly speaking, parental unfitness may be determined by considering such factors as a parent's conduct and capacity to provide for their child's needs. Parents who are judicially determined to be unfit may have their parental rights terminated, may lose custody, or have visitation orders drastically modified or denied. Should a court decide that both parents are unfit, a child may be placed in foster care or be available for adoption. Unfitness to parent may arise in a variety of circumstances: allegations of child maltreatment (abandonment, abuse, and neglect), custody, incarceration of the parent, or disability or incompetence of the parent. These specific issues are discussed, from an American legal perspective in Part II. Part III addresses similar issues from a Halachic perspective—Jewish law and jurisprudence, based on the Talmud.

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II. AMERICAN LEGAL PERSPECTIVES

The first part of this article focuses on child maltreatment from the civil perspective. All states have statutes that define the abuse of a child criminally¹ as well as civilly.²

¹ See, e.g., OKLA. STAT. tit. 21 § 843.5 (2020). Child abuse means the willful or malicious harm or threatened harm or failure to protect from harm or threatened harm to the health, safety, or welfare of a child under eighteen (18) years of age by another, or the act of willfully or maliciously injuring, torturing or maiming a child under eighteen (18) years of age by another.

Id; See also, FLA. STAT. § 827.03 (2020).

² See, e.g., KAN. STAT. ANN. § 38-2271 (2020): Presumption of unfitness, when; burden of proof:

(a) It is presumed in the manner provided in K.S.A. 60-414, and amendments thereto, that a parent is unfit by reason of conduct or condition which renders the parent unable to fully care for a child, if the state establishes, by clear and convincing evidence, that:

(1) A parent has previously been found to be an unfit parent in proceedings under K.S.A. 2014 Supp. 38-2266 et seq., and amendments thereto, or comparable proceedings under the laws of another jurisdiction;

(2) a parent has twice before been convicted of a crime specified in article 34, 35, or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2014 Supp. 21-6104, 21-6325, 21-6326 or 21-6418 through 21-6421, and amendments thereto, or comparable offenses under the laws of another jurisdiction, or an attempt or attempts to commit such crimes and the victim was under the age of 18 years;

(3) on two or more prior occasions a child in the physical custody of the parent has been adjudicated a child in need of care as defined by K.S.A. 2014 Supp. 38-2202(d)(1), (d)(3), (d)(5) or (d)(11), and amendments thereto, or comparable proceedings under the laws of another jurisdiction;

(4) the parent has been convicted of causing the death of another child or stepchild of the parent;

(5) the child has been in an out-of-home placement, under court order for a cumulative total period of one year or longer and the parent has substantially neglected or willfully refused to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home;

(6) (A) the child has been in an out-of-home placement, under court order for a cumulative total period of two years or longer; (B) the parent has failed to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home; and (C) there is a substantial probability that the parent will not carry out such plan in the near future;

(7) a parent has been convicted of capital murder, K.S.A. 21-3439, prior to its repeal, or K.S.A. 2014 Supp. 21-5401, and amendments thereto, murder in the first degree, K.S.A. 21-3401, prior to its repeal, or K.S.A. 2014 Supp. 21-5402, and amendments thereto, murder in the second degree, K.S.A. 21-3402, prior to its repeal, or K.S.A. 2014 Supp. 21-5403,

A. Child Maltreatment

Child maltreatment may be present anytime, anywhere – even at the earliest stages of a child’s life in the womb or at birth.

1. *In The Womb*

Child maltreatment may begin in the womb. Notwithstanding the controversy as to whether or not or when a fetus is considered a person, the entity growing inside the mother’s womb is subjected to its mother’s actions and habits.³ According to the Guttmacher Policy

and amendments thereto, voluntary manslaughter, K.S.A. 21-3403, prior to its repeal, or K.S.A. 2014 Supp. 21-5404, and amendments thereto, human trafficking or aggravated human trafficking, K.S.A. 21-3446 or 21-3447, prior to their repeal, or K.S.A. 2014 Supp. 21-5426, and amendments thereto, or commercial sexual exploitation of a child, K.S.A. 2014 Supp. 21-6422, and amendments thereto, or comparable proceedings under the laws of another jurisdiction or, has been adjudicated a juvenile offender because of an act which if committed by an adult would be an offense as provided in this subsection, and the victim of such murder was the other parent of the child;

(8) a parent abandoned or neglected the child after having knowledge of the child’s birth or either parent has been granted immunity from prosecution for abandonment of the child under K.S.A. 21-3604(b), prior to its repeal, or K.S.A. 2014 Supp. 21-5605(d), and amendments thereto; or

(9) a parent has made no reasonable efforts to support or communicate with the child after having knowledge of the child’s birth;

(10) a father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child’s birth;

(11) a father abandoned the mother after having knowledge of the pregnancy;

(12) a parent has been convicted of rape, K.S.A. 21-3502, prior to its repeal, or K.S.A. 2014 Supp. 21-5503, and amendments thereto, or comparable proceedings under the laws of another jurisdiction resulting in the conception of the child; or

(13) a parent has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition. In making this determination the court may disregard incidental visitations, contacts, communications or contributions.

Id.

³ Hollie Silverman & Ralph Ellis, *A Pregnant Woman Was Shot, then Indicted in her Baby’s Death. Lawyers will try to get the Charges Dismissed*, CNN (Jun. 30, 2019) www.cnn.com/2019/06/30/usalabama-pregnantwomanlawyers-motion/index.html.

Review,⁴ twenty-three states and the District of Columbia consider substance use during pregnancy to be child abuse under civil child-welfare statutes, and three consider it grounds for civil commitment.⁵ Twenty-five states and the District of Columbia require health care professionals to report suspected prenatal drug use, and eight states require them to test for prenatal drug exposure if they suspect drug use.⁶ The extent of harm inflicted by the mother on the fetus is not always known.⁷ Nevertheless, courts have ruled drug use during pregnancy to be severe child abuse, even in the absence of an injury to or long term effects on a child.⁸

Many courts have held that prenatal drug use constitutes severe child abuse for purposes of terminating parental rights.⁹ Courts have also held that a mother's drug abuse during pregnancy resulting in the child being born drug-addicted and injured, constitutes severe child abuse.¹⁰ For instance, in *In re A.L.C.M.*,¹¹ the court held that the presence of illegal drugs in the child's system at birth constitutes sufficient evidence that the child is an abused or neglected child.¹² In the A.L.C.M. case, the court found a father's alleged failure to stop the mother's illegal drug use during her pregnancy, would support a

⁴ The Guttmacher Policy Review (GPR) analyzes sexual and reproductive health policy making in Washington and state capitals across the U.S. and makes connections across a wide range of sexual and reproductive health topics, including abortion, contraception, teen pregnancy, sexually transmitted infections, and maternal and child health. *Guttmacher Policy Review*, GUTTMACHER INSTITUTE (last accessed Jan. 13, 2020) <https://www.guttmacher.org/gpr>.

⁵ *Substance Use During Pregnancy*, GUTTMACHER INSTITUTE (last accessed Mar. 31, 2020) <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>.

⁶ *Id.*

⁷ *Alcohol, Drugs, and Babies: Do You Need to Worry?*, WEBMD (last accessed Jan. 13, 2020) <https://www.webmd.com/baby/drug-use-and-pregnancy#1>.

⁸ *In re P.T.F.*, No. E2016-01077-COA-R3-PT, at 12 (Tenn. Ct. App. Jun. 12, 2017); *see also In re Shannon P.*, No. E2012-00445-C0A-R3-PT, at *5 (Tenn. Ct. App. May 13, 2013).

⁹ *In re Colton B.*, No. M2018-01053-COA-R3-PT, at *22 (Tenn. Ct. App. Oct. 29, 2018); *In re Ethin E.S.*, No. E2011-02478-COA-R3-PT, at *8 (Tenn. Ct. App. May 31, 2012) (“this Court has repeatedly held that a mother’s prenatal drug use can constitute severe child abuse in termination of parental rights cases”); *In re Joshua E.R.*, No. W2011-02127-COA-R3-PT, at *3 (Tenn. Ct. App. May 15, 2012) (“In light of our prior holdings, and the supreme court and General Assembly’s disinclination to overrule them, we continue to hold that prenatal drug abuse may constitute severe child abuse for the purpose of terminating parental rights.”).

¹⁰ *In re Benjamin M.*, 310 S.W.3d 844, 848 (Tenn. Ct. App. 2009).

¹¹ 239 W. Va. 382, 392 (2017).

¹² W. VA. CODE § 49-1-201 (2015) (Repl. Vol. 2015).

finding of abuse based upon his knowledge that another person is harming his/her child.¹³

2. *At Birth*

There is much case law addressing child maltreatment when a child is born with drugs in his or her system, which results in the termination of parental rights.¹⁴ Regrettably, if a mother has a history of drug abuse, and has failed to follow a service plan—as directed by the department of children and families—it is not unexpected that upon the birth of a subsequent child, custody will be taken from her, by the appropriate state department for child abuse.¹⁵

Of course, grounds for removing a child upon birth are multifarious and not just because of drug use, although often related. In the *Goodman* case¹⁶, the court referenced other factors: ignoring the care of a parent’s children when disappearing for periods of time while overdosing on cocaine; a consequence to fail to provide basic necessities for the children, such as food, heat, suitable housing, all of which place the children at severe risk for abandonment and harm in the future.¹⁷

Drug abuse is just one of many reasons why a child may be taken into custody at birth for suspected child abuse. The definition of child abuse¹⁸ includes a child being found neglected when among other things, “... it is being permitted to live under conditions, circumstances or associations injurious to the wellbeing of the child...”¹⁹

¹³ *Id.*; W. VA. CODE § 49-1-201.

¹⁴ In re K.T., No. 11-0819, 2011, at *2-3 (W. Va. 2011) (holding that a mother’s rights terminated when second child was also born drug addicted, the court saw no reason to allow mother time to rehabilitate when she had not complied with her service plan.); In re JAIMAR WESTLY GOODMAN, TELA MARIE LARKS-GOODMAN, JEVEINA KATRICIA LARKS-GOODMAN, JERMAINE ANTONIO CHANDLER-GOODMAN, & TIA LASHONDA GRAY-GOODMAN, Minors, No. 223381, at *3-4 (Mich. Ct. App. Jan. 30, 2001) (holding that a mother gave birth to two crack addicted babies, parental rights terminated, returning the children to respondent would not be in the best interests of the children because of reasonable likelihood that conditions such as drug use and neglect of children in the home rectified within a reasonable time.)

¹⁵ In re K.T., *supra* note 14.

¹⁶ Goodman, *supra* note 14.

¹⁷ *Id.* at 8.

¹⁸ *Supra* note 2.

¹⁹ CONN. GEN. STAT. § 46b-120 (4) (C).

Often, the child is taken soon after birth because of the doctrine of predictive neglect.²⁰ In *In re Joseph W.*, the court held that:

The doctrine of predictive neglect is grounded in the state's responsibility to avoid harm to the wellbeing of a child, not to repair it after a tragedy has occurred. . . . Thus, [a] finding of neglect is not necessarily predicated on actual harm, but can exist when there is a potential risk of neglect. . . .²¹

In *In re Joseph W.*, a mother's rights had previously been terminated in 2007 with her oldest child.²² At that time, it was determined that the mother's mental problems impaired her ability to safely parent her child, although the department had worked with the mother between 2002 and 2005 to remedy the concerns.²³ The mother and father left the state prior to Joseph's birth to avoid involvement with the department.²⁴ Nevertheless, the mother continued to exhibit such disconcerting behavior that steps were taken to cause Joseph to be ordered into the department's custody and care.²⁵ Upon the birth of the parties' second child, the state stepped in again.²⁶ The court determined both children were neglected under the doctrine of predictive neglect.²⁷

All states have procedures to remove a child from a caretaker when there is a concern as to abuse or neglect and provide services to the caretaker to ameliorate the conditions of neglect and abuse.²⁸ As in the Dana S. case, parental rights are terminated because the caretaker failed to follow through with a service plan.²⁹

²⁰ *In re Joseph W.*, 305 Conn. 633, 644-645 (2012).

²¹ *Id.* at 644-645.

²² *Id.* at 637.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 638.

²⁶ *Id.* at 638-639.

²⁷ *See, In re Brianna C.*, 98 Conn. App. 797, 802, (2006) (“[a] finding of neglect is not necessarily predicated on actual harm, but can exist when there is a potential risk of neglect”).

²⁸ *See, e.g. People v. Dana S. (In re Tamesha T.)*, 384 Ill. Dec. 370, 373-374, 16 N.E.3d 763, 766-767 (2014) (Department involved after receiving hotline calls reporting neglect of minor children; Mother's rights terminated for her failure to make progress in provided services.)

²⁹ *See, e.g., In the Interest of A.L.W.*, No. 01-14-00805-CV, at *37-38 (Tex. Ct. App. July 14, 2015) (holding that inference can be made by parent's failure to take initiative to complete services required to regain custody of children, does not have the ability to motivate herself to seek out available resources needed now or in the future.).

B. Custody

Custody is probably the most divisive issue of any divorce. This is especially true when one parent alleges that the other parent is unfit. The court makes its custody award decision based on what is in the best interest of the child. This means confronting the issue of fitness-to-parent of each party.

Part and parcel to the fitness of the parent is the determination of the best interests of the child in a proceeding for exclusive custody.³⁰ One of the many factors in determining the best interests of the child is “any history of abuse by one parent against any child, or the other parent.”³¹ Courts must also consider the evidence as to the likelihood the parent will further abuse or neglect the child before making a determination as to fitness and custody.³²

Factors that a court may use to determine a person’s fitness as a parent include:

* A history of substantiated child abuse. Child maltreatment of any kind, especially physical, sexual or emotional abuse, will likely mean the parent will be allowed—if any—only infrequent visitation rights. Supervised visitation will be ordered when a caregiver’s behavior puts the child at risk. Supervised visitation may be ordered in the face of allegations of sexual abuse, substantiated by expert witnesses.³³

It is not unusual for one parent’s allegation that the other parent physically abused the children to be unfounded.³⁴ Rather, after an investigation by a guardian *ad litem*, a court can order a parent to have supervised visitation, because “unsupervised visitation would further impair the emotional development, endanger the physical health of the ... youngest

³⁰ CAL. FAM. CODE § 3021(d); *See, also*, *Montenegro v. Diaz*, 26 Cal. 4th 249, 255 (2001) (holding that the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents.).

³¹ *Montenegro supra* note 30.

³² *In re C.W.*, No. 84, at *26 (Ct. Spec. App. Jan. 3, 2019).

³³ *Ex parte Thompson*, 51 So.3d 265, 271 (Ala. 2010).

³⁴ *Noland-Vance v. Vance (In re Noland-Vance)*, 321 S.W.3d 398, 420 (Mo. Ct. App. 2010).

children.”³⁵

* A history of psychiatric concerns. The court may insist on seeing a thorough psychiatric history to determine if a parent has any mental health disorder that may be considered a risk to a child. Counseling and medical records must demonstrate suitability to parent. Courts have also ordered the parent to undergo an evaluation, and participation in therapy as a means toward unsupervised visitation.³⁶

* A history of domestic violence. A thorough examination of all domestic violence claims will be investigated, especially if children were witness to those events.³⁷

* A history of substance abuse. Parents who present with previous substance abuse and dependency issues will need to demonstrate longstanding temperance and dependability to be awarded any type of custody. A track record of relapses could defeat any chance of visitation or custody.³⁸

* The parent’s ability to communicate with their child. The failure to communicate with one’s child may become an issue regardless of the circumstances.³⁹ The court will want evidence that a parent has the ability to empathize and constructively communicate with their child and that the parent is attuned to the child’s needs.⁴⁰ Courts will place particular weight upon the parent’s inability to place the needs of the child before

³⁵ *Id.*

³⁶ *Matter of Harder v. Phetteplace*, 93 A.D.3d 1199, 1200 (App. Div. 2012); see also, *Matter of Procopio v. Procopio*, 132 A.D.3d 1243, 1244 (App. Div. 2015)(supervised visitation was appropriate in order to provide the stability and consistency that the mother needed as she continued to work on her mental health issues)

³⁷ *Matter of Chilbert v. Soler*, 77 A.D.3d 1405, 1406 (App. Div. 2010) (father committed acts of domestic violence against the mother, often in the child’s presence, and that he threatened to kill the mother and leave with the child).

³⁸ See A.R.S. § 8-533(B) (2), (3), (11). “Long-lasting substance abuse “need not be constant to be considered chronic.” *Raymond F. V. Ariz. Dep’t of Econ. Sec.*, 224 Ariz. 373, 377 ¶ 16 (App. 2010).

³⁹ See discussion at Incarceration.

⁴⁰ *Hammersley v. Hammersley*, No. FA074014518, 2011 Conn. Super. LEXIS 178 (Super. Ct. Jan. 20, 2011)

her needs.⁴¹ A parent's inability to deal constructively with a child's crisis, the child's educational needs, medical needs, anger, or blaming the other parent for the child's troublesome behavior are factors which may result in the parent losing custody and the ability to make health, education and welfare decisions regarding a child.⁴²

* The child's preferences. Depending on the child's age, the court may consider a child's wishes. This usually applies to older and mature children.⁴³ Although a court may inquire into the child's preference as to custody, it is not binding upon the court.⁴⁴ Furthermore, the custody preference "must be weighed according to the age and maturity child."⁴⁵ In considering the communication between the parent and the child, the court must be mindful as to whether that parent's efforts were thwarted by the other parent or a third party.⁴⁶

⁴¹ *Id.*

⁴² *Id.* at 7-8.

⁴³ CALI. FAM. CODE §3042, subsections (a) through (d) specifically state:

(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.

(b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child.

(c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record.

(d) Nothing in this section shall be interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interests.

Id.

⁴⁴ UTAH CODE ANN. § 30-3-10(1)(e); *see also* K.P.S. v. E.J.P., 414 P.3d 933, 941 (Utah Ct. App. 2018).

⁴⁵ K.P.S. v. E.J.P., 414 P.3d 933, 941 (citing *Larson v. Larson*, 888 P.2d 719, 725 n.8 (Utah Ct. App. 1994)) (citing an earlier version of Utah Code section 30-3-10(1)).

⁴⁶ *See generally* *Graham v. Starr*, 415 N.E.2d 772 (Ind. Ct. App. 1986).

C. Incarceration

The growing jail and prison population has resulted in collateral effects on children. Unique challenges and barriers are faced by incarcerated parents.⁴⁷ While video and teleconferencing technology are available as a means for the parent to participate in the life of their child, an assessment will often be made to determine whether the incarcerated parent has maintained a meaningful role in the child's life. Evidence of past communication patterns may be persuasive. A parent's incarceration, in and of itself, is not considered a mitigating circumstance.⁴⁸ Nor is incarceration, alone, considered grounds for termination of parental rights.⁴⁹ Moreover, a parent has an obligation to maintain continuous contact with the child, not just after a Petition to Terminate Parental Rights.⁵⁰

D. Disability or Incompetence

A parent's disability or incompetence, in and of itself, is not grounds to determine fitness.⁵¹ The fact that a parent has a mental illness does not, as such, constitute a lack of fitness to parent a child.⁵² The focus is whether the parent is able to recognize the extent or gravity of the mental illness which results in putting her own needs above that of the child.⁵³

III. JEWISH LEGAL PERSPECTIVES

The Talmud (Shabbat 31a) relates the often-cited story of a prospective proselyte who approached the great Sage Hillel the Elder

⁴⁷ In re M.D. v. K.A., 921 N.W.2d 229 (Iowa 2019). The Iowa Supreme Court held that an incarcerated parent has a constitutional due process right to participate in the entire TPR hearing, and the trial court has a responsibility to ensure the parent can respond to the state's evidence.

⁴⁸ See e.g., J.B.D. v. J.M.D., 151 S.W.3d 885, 889 (Mo. Ct. App. 2004) (father communication with child began only after the filing of the petition to terminate parental rights).

⁴⁹ § 211.447 R.S.Mo.7 (6).

⁵⁰ J.B.D. v. J.M.D., 151 S.W.3d 885, 890 (Mo. Ct. App. 2004); cf. In re J.M.S. v. A.S., 83 S.W.3d 76, 84 (Mo. Ct. App. 2002) (While incarcerated, father's continuous contact through letters with his child did not support a finding of abandonment).

⁵¹ See generally, In re D.R.M., 198 A.3d. 756 (2018).

⁵² *Id.* at 764, (citing In re D.S. 88 A3d.678,694(2014)) (quoting In re J.G., 831 A.2d 992, 1000-01(D.C. 2003)).

⁵³ *Id.* at 764.

and demanded that Hillel convert him “on the condition that you teach me the entire Torah while I stand on one leg.” Hillel famously responded, “That which is hateful to you do not do to your friend. The rest is commentary - go and learn.”

In analyzing Jewish law’s perspective on child custody, most authorities could encapsulate the subject in a single phrase: the best interests of the child. The source material that we analyze – both in the Codes and early commentaries and in published rulings of the Israeli Rabbinic Courts over the last 70 years – largely fleshes out the details of what constitutes best interests and how to arrive at such determinations. While most of the literature addresses situations where one parent is deceased, or the parents are divorced, the principles are relevant as well to other situations in which a parent or parents may be incapable of properly caring for their children.

In addressing the appropriate custodial arrangement for a child whose mother remarries, the Talmud (Ketubot 102b) writes that a daughter belongs with her mother regardless of the child’s age.⁵⁴ The Talmud does not explicitly address parallel custodial arrangements for sons. Still, the implication of the Talmud (Ketubot 65b) as understood by Maimonides (Mishneh Torah Ishut 5:17) and most medieval authorities is that the default scenario has sons living with the mother until the age of six and with the father after the age of six.⁵⁵

Many medieval authorities view these guidelines as simply reflective of what would typically be deemed in the best interests of the child. R. Yosef ibn Migash (1077-1141; Responsum 71) was asked

⁵⁴ See decision of the rabbinic court of Haifa (Case 1238603 - 2003) that analyzes the reasoning behind this rule. There is a minority opinion cited by R. Asher ben Yechiel (1250-1327) that the Talmudic position that a daughter belongs with the mother applies only when the mother is widowed (and the question is whether the daughter should stay with the father’s relatives) but not when the parents are divorced.

⁵⁵ The Talmud there indicates that a father must financially support his son until the age of six even if the son is living with his mother. Once a son reaches the age of six the father may insist that he will only provide financial support if the son moves in with him. See Maimonides (Mishneh Torah, Ishut 5:17). This is codified by R. Yosef Caro (Shulchan Aruch Even HaEzer 82:7). There is a debate as to whether Maimonides allows a father to remove a six-year-old son from his mother’s custody or merely to withhold child support so long as the son remains in his mother’s custody. See also Ra’abad (R. Avraham ben David, 1125-1198, glosses to Maimonides *ibid.*), who rules that a father may assume custody of a son from the point that he is obligated to teach him Torah, which corresponds to the age of four or five. R. Vidal of Tolosa (Magid Mishneh, fourteenth century, *ibid.*) questions Ra’abad’s assumption that the obligation to educate one’s sons begins before the age of six, and notes that even if that were to be the case, the mother’s custody should not be an impediment to the father having visitation rights that would allow him to oversee his son’s education.

about a six-year-old girl whose parents divorced when she was four, at which point her father left for another city and did not leave any financial support for his ex-wife or daughter. The mother cared for the daughter and supported her single-handedly until the father returned two years hence and demanded custody of the daughter. R. ibn Migash rules that typically a daughter is better off in the care of her mother, who is better positioned to teach her “the ways of women” including spinning and taking care of the house.⁵⁶

Similarly, R. Shlomo ben Aderet (1235-1310; Responsum 7:38) writes that although typically daughters belong with the mother because the mother will teach “the ways of the woman” and sons belong with the father who will teach them Torah, the rabbinic courts must always determine what is in the best interests of every child in every case.⁵⁷ In the words of R. Samuel de Medina (1505-1589, Shu”t

⁵⁶ He also adds that in the case at hand, there was an additional concern that the father had a track record of frequently traveling to foreign countries which would not be in the best interests of the child.

⁵⁷ See also R. Meir Katzenellenbogen (Maharam of Padua, 1482 -1564, Responsum 53), who articulates the best interests principle and is the source for the authoritative ruling of R. Moshe Isserles (1530-1572) in his glosses to Shulchan Aruch (Even Haezer 82:7). See R. Mordechai HaLevi (Darchei Noam 26, published 1667). Chelkat Mechokek (R. Moshe Meisels, 1605-1668) (Even Haezer 82:10) and Beit Shmuel (R’ Shmuel of Szydlów, 1650-1706) (Even Haezer 82:9) both note that the default arrangement must still reflect the Talmudic guidelines unless there is sufficient evidence to convince a beit din that the best interests of the child are served by a different arrangement. R. Moshe Shturbuch, a leading contemporary authority (Teshuvot V’hanhagot 1:783), notes that while in earlier times the father’s responsibility to educate his sons over the age of six made him the default custodial parent for such children, since nowadays most communities have access to appropriate educational institutions that a mother could send her children to just as well, the child’s best interests should be evaluated without that default presumption.

R. Michael Broyde, *Child Custody in Jewish Law: A Conceptual Analysis*, 36 RABBI JACOB JOSEPH SCHOOL JOURNAL OF HALACHA AND CONTEMPORARY SOCIETY 22, 21-46 (1999) presents as a matter of dispute among rabbinic authorities whether parental rights carry more weight in custodial determinations than best interests. It seems more compelling that the broad consensus of rabbinic authorities throughout the ages view best interests as the primary determining factor and the authorities differ as to the relative weight of other factors when the best interests are not otherwise obvious. See 5 ELIAV SHOCHATMAN, THE ESSENCE OF THE PRINCIPLES GOVERNING THE CUSTODY OF CHILDREN IN JEWISH LAW” (HEBREW), *SHENATON L’MISHPAT HAIVRI* 285 ET. SEQ. (1978) who presents a similar analysis. Yechiel Kaplan, *Child Custody in Jewish Law: From Authority of the Father to the Best Interest of the Child in 24* JOURNAL OF LAW AND RELIGION 1, 89 et. seq. (2008)) unconvincingly argues that there was a shift in Jewish law between the ancient and Talmudic period and the medieval period, with best interests only becoming significant later in history.

The following printed decisions of the rabbinical courts in Israel reflect principles of the best interests of children: Piskei Din Rabbanim (henceforth PDR) Vol. 1 pp.55 et. seq., pp.65 et. seq., pp. 145 et. seq., pp. 161 et. seq., pp. 173 et. seq.; Vol. 3, pp. 353 et. seq.; Vol. 4 pp. 93 et. seq. (reprinted in Kovetz Teshuvot 2: 115), pp. 332 et. seq.; Vol. 7 pp 3 et. seq.; Vol. 11

Maharshdam Even Haezer 123), there are no parental rights to child custody; the only rights at play are those of the children.⁵⁸

A. Awarding Custody to a Third Party

Rabbinic authorities apply the best interest principle even in situations where there is only one living or competent parent, and the rabbinic court deems it in the best interest of the child to live with a relative other than the surviving parent. R. David ben Solomon ibn Abi Zimra (1479-1573; *Teshuvot Radvaz* 1:123) addressed a widower with a sickly young son who wanted his child removed from the maternal grandmother's custody. The widower had not remarried, was poor, and would have to leave his son with neighbors when going to

pp. 366 et seq.; Vol. 13 pp. 335 et seq.; Osef Piskei Din (henceforth OPD) Vol. 2 pp. 6 et seq. [In this 1946 decision, the Court of Appeals under the leadership of then Chief Rabbi Isaac Herzog overturned a lower court ruling that had split custody of two daughters between their father and their mother. The lower court's rationale was that since both parents were blind and needed assistance, it served the needs of the parents to award each parent one child. The Court of Appeals found that since custody determinations should consider the best interests of the children and not the needs of the parents, the lower court's decision was misguided.] An incomplete list of more recent published decisions that affirm these principles (most of which are posted at https://www.gov.il/he/Departments/DynamicCollectors/verdict_the_rabbinical_courts) include Case 1117210 (Jerusalem 2019), Case 1084672 (Tel Aviv 2019); Case 1130804 (Tel Aviv 2018), Case 1142916 (Court of Appeals undated) Case 1238384 (Court of Appeals 2004), Case 1294927 (Court of Appeals 2005) Case 1230849 (Haifa 2004), Case 1238603 (Haifa 2003).

We should note that the Israeli rabbinic courts strongly rely on the recommendations of mental health professionals and social workers in determining the best interests of the children. In a recent case, the Court of Appeals (1149751 2018) overturned a lower court ruling because the lower court had not given sufficient weight to the recommendation of the social worker.

⁵⁸ Maharshdam rules that the default position that a daughter belongs with her mother does not necessarily give unconditional license to the mother to move far away such that the father (in a case of divorce) or the father's relatives who have financial responsibilities to the daughter (in a case of a widowed mother) would have little or no visitation privileges. See also R. Moses ben Joseph di Trani (1505-1585, *Mabit* 1:165), who ruled that the paternal grandfather of a deceased father had the right to prevent the widowed mother from moving away with her sons so that he could be better positioned to provide for their educational needs. R. Ovadia Yosef (in a brief addendum appended to *Tzitz Eliezer* 16:44; originally printed in *PDR* Vol. 13 pp. 26-27) notes that while Maharshdam's position is not universally accepted, many later authorities do embrace it. R. Yosef Shalom Elyashiv (*Kovetz Teshuvot* 2:115), who served for many years on the Israeli Rabbinic Court of Appeals, notes that the Maharshdam's ruling addressed a case where the mother wanted to move to a location that was a two or three day trip away on dangerous roads. However, if a mother wishes to move to a place that is a two hour drive away from the father's residence, there is no reason to prevent her from doing so, as reasonable visitation could be arranged in such a situation. See also a ruling of current Chief Rabbi David Lau's panel of the Court of Appeals, reprinted in *Maskil L'David: Piskei Maran HaRav Elyashiv* (Jerusalem 2019), pp. 56-63.

work. Radvaz ruled that the child should stay with his grandmother, who was better able to provide the medical care that the child needed, and there was a concern that he might die under the father's watch. The non-suitability of the father's care was heightened in this case by his having no suitable daycare option, but Radvaz writes that he would have ruled the same way even had the father been able to stay home all day, as the best interests of the son were served by staying with his grandmother.⁵⁹

In a 1954 ruling of the rabbinical court of Jerusalem (*Piskei Din Rabbanim* (henceforth P.D.R.) Vol. 1 pp.65 et. seq.), a panel that included R. Yosef Shalom Elyashiv addressed a custody dispute between a divorced mother and the father of the mentally unstable father. Everyone agreed that the father was unable to care for his children. However, the father's father requested custody, claiming that he would be better positioned to provide for the educational needs of the children. The mother argued that were custody to be awarded to the paternal grandfather; the father would inevitably have more contact with the children than would be healthy. After clearly articulating the best interest principle, the panel concluded that the best interests of the children involved remaining in the mother's care provided that she would continue to send the children to the schools that they were previously attending. However, the rabbinical court notes as a hypothetical that had the paternal grandfather lived far away from the father such that there would be no concern about the father's involvement, the paternal grandfather would have a much stronger claim of custody over his grandson (although not granddaughter).⁶⁰

⁵⁹ See also R. Asher ben Yechiel (*Shu"t HaRosh* 82:2) who writes that the decision about whether a daughter of a deceased mother should live with her father or maternal grandfather should be made by someone who knows both candidates and can presumably best judge what arrangement better suits the girl. His starting assumption is that absent other considerations, a daughter would presumably be more comfortable living with her own father.

⁶⁰ In Case 1238603 (Haifa 2003), the court dealt with the children of a divorced couple in which neither parent was deemed fit to care for the children. The court had to decide between awarding custody to the mother's sister or the father's mother. It chose the former primarily because the mother's sister worked part time and had no children of her own, whereas the father's mother worked full time (by Israeli standards) and had five children of her own at home.

B. Religious Shortcomings as an Impediment to Parenting

Rabbinic authorities address whether religious shortcomings on the part of one parent may allow for the removal of a child from that parent's custody. Radvaz (1:263) addresses a seven-year-old girl who was living with her mother after her parents divorced. The father discovered that his ex-spouse gave birth to a child out of wedlock and petitioned that he be awarded sole custody so that the daughter would not be negatively influenced by her mother's iniquities. Radvaz ruled in favor of the father, writing that the default presumption that a daughter belongs with her mother did not apply in this case, even if the daughter herself would profess to prefer staying with her mother. He goes even further in writing that even if there were no father in the picture, the rabbinic court would be authorized to remove the child to the custody of the father's relatives or even to an appropriate foster family.⁶¹

In more recent times, R. Eliezer Waldenberg (1915-2006), a senior judge on the Israeli Rabbinical High Court of Appeals, responded to a request that four and seven-year-old children should be removed from the mother's custody and placed in the father's care in a case in which the parents divorced because the mother was having an affair, and had abandoned her previous religious lifestyle, no longer keeping Shabbat and kosher. In a 1977 decision, R. Waldenberg's panel (Tzitz Eliezer 15:50), relying on the advice of social workers as well, determined that awarding custody to the father was the only way to facilitate the proper religious education and lifestyle that the children were used to and was thus in their best interest.⁶² As a panel

⁶¹ Elsewhere Radvaz (1:360) even allowed the father's relatives to remove a daughter from the mother's custody when the mother conducted herself in an indecent way or allowed indecent men into her house. These rulings are cited as normative by R. Eliezer Waldenberg (1915-2006, Tzitz Eliezer 17:50). *See also* Radvaz (1:429). In a recent case (Case 860851 Haifa 2018), a rabbinic court took away custody from a mother who was living with another man out of wedlock (and denied doing so) in violation of a divorce agreement. *See, however*, a 1953 ruling of the rabbinical court in Tel Aviv (PDR Vol. I p. 55 et. seq.), in which the court was reluctant to remove a thirteen-year-old boy from the custody of his mother who was living with another man out of wedlock.

⁶² *See* R. Yitzchak Yaakov Weiss (1902-1989 Minchat Yitzchak 7:113) who ruled that in a case where both parents were observant of Jewish law, but the mother moved to Los Angeles and the father lived in Brooklyn, the father was entitled to custody of his one-and-a-half-year-old son (who was no longer nursing). R. Weiss observes that the father was better positioned to ensure the proper education of the son. Had the parents been living in relative proximity to each other, the default position would have been to award custody to the mother and visitation

that included R. Elyashiv noted in a 1960 ruling of the Court of Appeals (P.D.R. Vol 4 pp. 332 et. seq.), the best interests of children do not only include their physical wellbeing but their spiritual wellbeing as well.

It is worth noting that two recent rulings in the Israeli rabbinic courts affirmed that a father's personal religious prerogatives should have no bearing on visitation determinations. The rabbinical court in Petach Tikva (1171061/3 2019) was approached by a father with the request to modify visitation arrangements to facilitate his ability to pray with a quorum (a *minyan*). The status quo agreement had the father picking up his four small children from their mother on alternate Friday afternoons and returning them to their schools the following Sunday morning. The father petitioned to be allowed to return the children to the mother on Saturday night after the conclusion of Shabbat so that he would be able to attend synagogue services on Sunday morning. His request was rejected, as returning the children late on a Saturday night would be disruptive both to the children and to their mother, and these considerations outweighed the father's interest in his personal religious observances.

In a similar case brought in front of the Jerusalem court (1161709/2) a father who was awarded visitation on alternate Jewish holidays requested that he always receive the children for the first day of Passover, to allow him to properly perform the commandment of recalling the miracles of the Exodus to his children. The ruling rejected his claim for many reasons, including the fact that the father's potentially enhanced religious experience is not more valuable than the mother's interest in having her children with her for a holiday.

to the father, which would allow the father to have a role in the son's education. Since significant visitation was impractical given the distance between the two, giving custody to the father became the optimal choice. In a 1984 case of the Court of Appeals (PDR Vol. 13 pp. 335 et. seq.), a panel of R. Shlomo Dichovsky, R. Ezra Bar Shalom (son-in-law of R. Ovadia Yosef), and R. Avraham removed children from the custody of a mother who had a live-in boyfriend and who had stopped observing Shabbat and awarded custody to the religious father. In a 1944 decision of the same court (PDR Vol. 1 pp. 28 et. seq.), a panel that included R. Yitzchak Herzog and Rabbi Benzion Uziel, the two Chief Rabbis at the time, upheld a lower court decision that awarded custody of a nine-year-old son to the mother because the father was a public desecrator of Shabbat who did not live a religious lifestyle. See PDR Vol. 13 pp. 3 et. seq. in which a panel of the rabbinic court in Haifa disagreed internally about whether a non-observant father should have a role in the education of his children regarding ethical matters.

C. Consideration of Children's Preferences

There is little explicit discussion in earlier sources as to how the stated preferences of children, both underage and of age, impact on determinations of their best interests. R. Meir Katzenellenbogen (Maharam of Padua, 1482 -1564, Responsum 53) writes that if a girl who is old enough to indicate a preference reasonably does so, that request will trump other default considerations.⁶³ In a 1954 ruling of the Tel Aviv rabbinical court (P.D.R. Vol. 1 p. 158), the panel ruled that even visitation with a non-custodial parent cannot be considered in the child's best interests if the child (who, in the case at hand, was a nine-year-old girl) protests such visits.⁶⁴

⁶³ He was addressing an eleven-year-old girl who was orphaned from her father who expressed her interest to live with her older brothers, who were deemed capable of supporting and caring for her, and not her mother. Even though the girl was not yet "of age" according to Jewish law (i.e. under twelve), she was old enough to have a reasonable understanding of where she wanted to live. Had the girl not expressed any preference, custody would have by default been assigned to her mother. There may also be an implication in Radvaz (1:429) that a son's preference to remain with his mother may override other objective considerations in determining custody of a son orphaned from his father. See a recent ruling of the Court of Appeals (1149751 2018) which noted that the courts should strongly take into consideration the preference of children who are twelve to fourteen but not those who are four or five.

⁶⁴ However, rabbinic courts may sometimes be skeptical about the stated preferences of children, when the court suspects that one parent is turning the child against the other parent in an attempt to limit or eliminate the other parent's custody or visitation privileges. In Case 1230849 (Haifa 2004) the court found that a father's claim that the mother was acting irresponsibly because she cut her daughter's hair too short, extinguished a cigarette on her daughter, and hit her daughter was unconvincing because the mother claimed that she had cut the hair to prevent getting lice, the cigarette incident was an accident when her daughter ran into her, and the hitting was only on rare occasion for acceptable disciplinary reasons. For other recent cases in which the rabbinic courts addressed unfounded claims to reconsider custodial arrangements see Case 992673 (Jerusalem 2019), Case 860851 (Haifa 2018), Case 1097696 (Tiberias 2018), Case 120850 (Beer Sheva 2017), Case 882974 (Haifa 2017), Case 1022685 (Tel Aviv 2016), Case 653935 (Ashkelon 2015). See a recent ruling of the rabbinical court in Jerusalem (964046-21, 2019) in a case where a mother represented that her daughter refused to visit with her father. The judges wrote that they were convinced that the mother was perpetuating false accusations of the father being abusive in order to limit his visitation rights. The decision observes that one of the responsibilities of a custodial parent is to encourage and ensure that the noncustodial parent fulfills the appropriate visitation arrangements. See also ruling of Netanya (292687/2) which fined a mother for unjustly turning her children against their father. In case 910711 (Tel Aviv 2017), the court removed a child from his father's custody (and fined the father) because the father was brainwashing the child against the mother.