Legal Ethics: Shepherding Jewish Families Through Family Law Litigation

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This session is dedicated by Jesse & Devra Kaplan in honour of the yahrzeit of their grandfather Rabbi Phillip Kaplan z"l Rav Pesach ben Chana

Professionalism Topics covered in this presentation

2.4 Recognizing and being sensitive to clients' circumstances, special needs, and intellectual capacity (e.g., multi-cultural, language, gender, socioeconomic status, demeanour)

Supporting the Emotionally Unstable Client https://www.yutorah.org/lectures/lecture.cfm/981221/

Vignettes

1> After ten tumultuous years of marriage, Abe and Sarah both wish to divorce. They have a parenting plan for their seven-year old son Jonathan, but they are having difficulty negotiating the division of property. Sarah is happy with the law. Abe, on the other hand, would prefer to work with the Jewish Law system for dividing property, which would assign him more of their assets. Abe insists that he will withhold a *get* (bill of religious divorce) until Sarah complies regarding division of property. Does Jewish law allow Abe to do this? What can Sarah do about this?

2> Abe executes a *get*, but insists that he wants to work with the halachic system for dividing property. When Sarah proposes arbitration, Abe claims that Jewish law will not permit him to accept an arbitrator's decision if it is not based on Jewish law. Is Abe right?

3> Recognizing Abe's resistance to arbitration, Sarah proposes mediation, which Abe accepts. During a mediation session, Abe warns that if he does not get his way, and Sarah accepts funds that Jewish Law would not assign to her, she will be guilty of theft in the eyes of Jewish law. Sarah argues that Judaism's respect for the law of the land means that she should be able to claim property as assigned by the law. Which of them is correct?

4> During the last years of their marriage, Sarah had pursued a lucrative career as a corporate consultant, while Abe stayed home with their young son Jonathan. Following a failed mediation process, a court orders Sarah to make regular support payments to Abe. Sarah commits to make the payment, but requests that Abe withdraw the support order from the Family Responsibility Office. Abe does so, taking Sarah at her word that she will honour the order. After six months, Sarah stops sending payments. Abe is worried that Jewish law may prevent him from requesting a hearing for enforcement of the order, due to concern for suing a Jew in civil court and for *mesirah*. Is Abe right?

5> According to their parenting plan, Abe and Sarah have joint custody, and Jonathan's primary residence will be in the family's original home, with Sarah. But two years later, when Jonathan reaches age nine, Sarah argues that Jonathan's primary residence should be with Abe. Sarah claims that this is consistent with Abe's obligation, within Jewish law, to educate Jonathan in observance of the Torah's commandments. Is Sarah right?

Vignette 1: Religious Divorce and Get Refusal

1. When giving a *get* is a mitzvah (a non-comprehensive list)
   - Physical abuse
   - Lack of financial support for food and clothing
   - Lack of conjugal relations from either partner
   - Physical revulsion
   - Where the husband already intends to divorce his wife

2. The 1992 New York *Get* Law: An Exchange
https://traditiononline.org/wp-content/uploads/2019/06/The-1992-New-York-Get.pdf

3. Rabbi Yosef Eliyahu Henkin, cited in Rabbi Michael Broyde, *The 1992 New York* Get *Law*, Tradition 29:4 (1995)
If a husband and wife separate and he no longer desires to remain married to her and she desires to be divorced from him, in such a case divorce is a mitzvah (obligation) and commanded by Jewish law. . . . One who withholds a Jewish divorce because he desires money for no just cause is a thief. Indeed, he is worse than a thief as his conduct violates a sub-prohibition (*abizrayhu*) related to taking a human life.

4. Guy Ezra, *Drama in the Rabbinical Court: A Precedent-Setting Ruling of Rabbi Lau*, Srugim Feb 7 '16
http://tiny.cc/utcmuz

בהחלטה שנתן בית הדין הרבני הגדול בראשות רבה הראשי של ישראל הרב דוד לאו, קבע בית הדין כי אין להתנות או להצמיד את חלוקת הרכוש לעניין מתן הגט וחייב את הבעל לתת את הגט לאלתר ולקיים במועד אחר דיון בבית הדין בחלוקת הרכוש.

In a decision given by the chief rabbinical court, headed by the (Ashkenazi) Chief Rabbi of Israel, Rabbi David Lau, the rabbinical court established that one may not condition or link the division of property to the presentation of the *get*, and obligated the husband to give the *get* immediately, and to set, at another time, a hearing in the rabbinical court regarding division of property.

5. Rabbi Shlomo Weissmann, *Ending the* Agunah *Problem As We Know It*, Aug 23 '12
https://www.ou.org/life/relationships/ending-agunah-problem-as-we-know-it-shlomo-wiessmann/

What is most remarkable about the prenup is that it actually works. It has been utilized in scores of cases before the Beth Din of America, and has consistently prevented the use of the *get* as a tool for improper leverage or extortion. It has worked dramatically to produce a *get* even in highly contentious cases, where couples have bitterly litigated all the other issues on the table. Most often where there has been a prenup in place, the Beth Din has not even needed to begin formal proceedings to award support under the arbitration provisions of the agreement. The mere existence of the prenup, and the husband's knowledge that it is an enforceable document, has convinced the husband that he has nothing to gain by delaying the delivery of the *get*.

6. Key clauses of the Rabbinical Council of America prenuptial agreement, as found in the text at theprenup.org

Arbitration: Should a dispute arise between the parties, so that they do not live together as husband and wife, they agree to submit to binding arbitration before the Beth Din of America (currently located at 305 Seventh Avenue, Suite 1201, New York, New York 10001; www.bethdin.org), which shall have exclusive jurisdiction to decide all issues relating to a *get* (Jewish divorce), the *ketubah* and *tena'im* (Jewish premarital agreements) entered into by the Husband-to-Be and the Wife-to-Be, any issues and obligations arising from or in connection with this Agreement (including under paragraphs II, III and VI hereof) and any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement…

Support Obligation. Husband-to-Be acknowledges that he recites and accepts the following: *I obligate myself to support my Wife-to-Be according to the requirements of Jewish law governing Jewish husbands. Furthermore, I hereby now* (me'achshav) *obligate myself, in a manner that I cannot exempt myself with any claim of* asmachta *(unenforceable conditional obligation) or any other claim, to support my Wife-to-Be from the date that our domestic residence together shall cease for whatever reasons at the rate of $150 per day (calculated as of the date of our marriage, adjusted annually by the Consumer Price Index… in lieu of my Jewish law obligation of support, as hereinabove cited and circumscribed, so long as the two of us remain married according to Jewish law, even if she has another source of income or earnings. Furthermore, I waive my* halakhic *rights to my wife's earnings for the period that she is entitled to the above-stipulated sum, and I recite that I shall be deemed to have repeated this waiver at the time of our wedding. I acknowledge that I have now* (me'achshav) *effected the above obligation by means of a* kinyan *(formal Jewish transaction) in an esteemed* (chashuv) *Beth Din as prescribed by Jewish law.*

However, this support obligation shall terminate if, despite Husband-to-Be's compliance with the terms of this agreement and the decision or recommendation of the Beth Din of America, Wife-to-Be refuses to appear upon due notice…

7. Rabbi Moshe Feinstein (20th century USA), Igrot Moshe Even haEzer 4:107 (1980)

בדבר שאלת כת"ה אם נכון להוסיף בשטר התנאים לשון כזה: אם אחרי הנשואין יבואו לידי פירוד, ח"ו, אז הבעל לא יעכב מליתן גט פטורין והאשה לא תסרב לקבלו, כאשר כך יצוה הב"ד פלוני ע"כ. ועל ידי הוספה זו יכריחו הערכאות שיצייתו שני הצדדים להב"ד.

הוספת דבר זה מותר והגט לא יהיה גט מעושה. גם יש תועלת להצילה מכבלי העיגון. אבל טוב שיראה את החתן והכלה ויכירם היטב אם יש לחוש מצד טבעם שתנאי כזה יגרום למחלוקת ומריבות ביניהם ח"ו.

Regarding his honour's question of whether to add to the *tenaim* document the following language: "Should they separate after marriage, Gd forbid, the husband would not delay giving a *get*, and the wife would not refuse to accept it, when so instructed by rabbinical court X." Because of this addition, the secular courts would compel them to listen to the rabbinical court.

One may add this, and the *get* would not be considered "coerced". It would also help save her from the chains of *iggun*. But it would be good to see the groom and bride and know them well, [to know] if there is concern, due to their nature, that such a condition could cause strife and quarrels between them, Gd forbid.

8. Province of Ontario: Family Arbitration https://www.ontario.ca/page/family-arbitration
Faith-based family arbitration
Ontario law allows you to talk to a religious official or someone knowledgeable in your religion to help resolve a family dispute.
However, if an award is made based on religious principles, the award would not be a valid family arbitration award under the law. Both spouses could comply with the award voluntarily, but the award would not be enforceable if one of the people involved took it to court. The court can only enforce arbitration following Canadian law.
A religious official can conduct a family arbitration under Ontario law if they completed the required training and follow the law on arbitration. The arbitration would be enforceable like any other arbitration.

9. Rabbi Michael Whitman, Halachic Prenuptial Agreement for Canada
https://www.adath.ca/pdf_doc/HalachicPrenupforCanada1-25-16.pdf

10. Rabbi Shlomo ibn Aderet (13th-14th century Spain), Shu"t Rashba 4:40
ראובן בעל לאה וקרובי לאה היו בהסכמה שיגרש ראובן זה את לאה אשתו. ונאותו זה לזה בקנס אלף דינרים ושיגרש זה לזמן ידוע. ואחר כך נתחרט ראובן ומיאן בדבר. והללו מתרין בו מצד הקנס עד שזה הולך אצל הגזבר ומחלה פניו שיתפשר עמו. ולא רצה בתחבולות שעשו קרובי האשה. אדרבא אימו שאם יעבור אפי' שעה אחת מן הזמן יניחהו במשמר עד שיפרע. ומחמת יראה זו הוא מגרש אלא שלא היה בקי למסור מודעא. אם נדון גט זה כדין גט מעושה אם לאו...
Reuven, Leah's husband, agreed with Leah's relatives for Reuven to divorce his wife Leah. They agreed upon a fine of 1000 dinar [for non-compliance], and that he would divorce her by a pre-set time. Later, Reuven recanted and refused. They are warning him of the fine, such that [Reuven] has gone to the custodian, pleading with him to compromise. He doesn't accept the plan of his wife's relatives. Just the opposite – they have [now] threatened that if even an hour passes after the deadline, they will jail him until he pays. Due to this fear, he is divorcing, but he is not expert such that he would know to give a declaration [that this is being done against his will]. Is this a "coerced *get*", or not?

11. For more on prenuptial agreements
- A more thorough look https://www.yutorah.org/lectures/lecture.cfm/914865/
- The Agreement for Mutual Respect https://www.yutorah.org/lectures/lecture.cfm/913304/
- The Tripartite Agreement https://www.yutorah.org/lectures/lecture.cfm/918245/

12. Divorce Act, RSC 1985, c 3 (2nd Supp), <https://canlii.ca/t/551f9> retrieved on 2021-12-09
(3) Where a spouse who has been served with an affidavit under subsection (2) does not
(a) within fifteen days after that affidavit is filed with the court or within such longer period as the court allows, serve on the deponent and file with the court an affidavit indicating that all of the barriers referred to in paragraph (2)(e) have been removed, and
(b) satisfy the court, in any additional manner that the court may require, that all of the barriers referred to in paragraph (2)(e) have been removed,
the court may, subject to any terms that the court considers appropriate,
(c) dismiss any application filed by that spouse under this Act, and
(d) strike out any other pleadings and affidavits filed by that spouse under this Act.

13. John Syrtash, *Celebrating the Success of Canada's "Get" Legislation and its Possible Impact on Israel*
The 1986 provincial Ontario and 1990 federal Canadian legislation has substantially reduced the problem of the aguna and dramatically facilitated the obtaining of a Get for both men and women in a very timely manner, often in less than 30 days. According to Rabbi Mordechai Ochs of the Toronto Beit Din for Divorce, the official responsible for administering more than half the Gitten in Canada, there has been an 85% drop in the incidence of Get abuse and

manipulation of the Get as a tool of blackmail by recalcitrant spouses since the legislation came into force. Within one week of the coming into force of the Ontario legislation in 1986, two men who had been withholding the Get from their wives for years immediately surrendered the Get. According to the Director of the Va'ad Ha'ir in Montreal, Rabbi Saul Emmanuel, over the past 15 years since the Canadian Divorce Act was amended, thousands of spouses have remarried indirectly as a result of the Get law. Moreover, he told me that his Court has been able to use the law in innumerable creative ways to ensure that a spouse would obtain a Get.

14. Letter by Rabbi Gedalia Dov Schwartz and Rabbi Shmuel Fuerst in support of ORA, Fall 2011
https://www.getora.org/rabbinic-endorsements
The Organization for the Resolution of Agunot – ORA – is an outstanding nonprofit organization which resolves *agunah* cases within the confines of Halacha and civil law. ORA is the only nonprofit organization addressing the *agunah* crisis around the world on a case-by-case basis. They have assisted the resolution of over 165 *agunah* cases, including a number of cases from our own community. We have worked with them and fully support their efforts to bring these women מאפילה לאורה ומשעבוד לגאולה, from darkness to light and from captivity to freedom.

Vignette 2: Alternative Dispute Resolution

15. Legal Ethics: Sue or Settle? (2019) https://www.yutorah.org/lectures/lecture.cfm/920041/

16. Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37
Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.J.):... "the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system." [p. 230]
More: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/cost.asp

17. Rules of Civil Procedure, Rule 50
50.01 The purpose of this Rule is to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner.
More: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/management.asp

18. Rules of Civil Procedure, Rule 24.1 (and see Rule 75.1)
24.1.01 This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.
More: http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp

19. LSO, Rules of Professional Conduct (2014), Rule 3.2-4
A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

20. Ontario Regulation 114/99 Family Law Rules, Rule 8.1 Mandatory Information Program
(3) The program referred to in this rule shall provide parties to cases referred to in subrule (1) with information about separation and the legal process, and may include information on topics such as,
(a) the options available for resolving differences, including alternatives to going to court;
(b) the impact the separation of parents has on children; and
(c) resources available to deal with problems arising from separation. O. Reg. 89/04, s. 3.

21. Talmud, Sanhedrin 6b

רבי אליעזר בנו של רבי יוסי הגלילי אומר: אסור לבצוע, וכל הבוצע הרי זה חוטא... אלא יקוב הדין את ההר, שנאמר "כי המשפט לאלקים הוא", וכן משה היה אומר "יקוב הדין את ההר", אבל אהרן אוהב שלום ורודף שלום, ומשים שלום בין אדם לחבירו, שנאמר "תורת אמת היתה בפיהו ועולה לא נמצא בשפתיו בשלום ובמישור הלך אתי ורבים השיב מעון."...

רבי יהושע בן קרחה אומר: מצוה לבצוע, שנאמר, "אמת ומשפט שלום שפטו בשעריכם." והלא במקום שיש משפט אין שלום, ובמקום שיש שלום אין משפט! אלא איזהו משפט שיש בו שלום? הוי אומר זה ביצוע. וכן בדוד הוא אומר "ויהי דוד עושה משפט וצדקה". והלא כל מקום שיש משפט אין צדקה, וצדקה אין משפט! אלא איזהו משפט שיש בו צדקה? הוי אומר: זה ביצוע...

רבי שמעון בן מנסיא אומר: שנים שבאו לפניך לדין, עד שלא תשמע דבריהן, או משתשמע דבריהן ואי אתה יודע להיכן דין נוטה, אתה רשאי לומר להן "צאו ובצעו." משתשמע דבריהן ואתה יודע להיכן הדין נוטה, אי אתה רשאי לומר להן "צאו ובצעו." שנאמר, "פוטר מים ראשית מדון ולפני התגלע הריב נטוש"...

Rabbi Eliezer, son of Rabbi Yosi of Galil, said: Splitting is prohibited, and one who splits is a sinner… Rather, let the law pierce the mountain, as Deuteronomy 1:17 says, "For justice is for Gd." And so Moses would say, "Let the law pierce the mountain," but Aaron loved peace and pursued peace, and made peace between people, as Malachi 2:6 says, "The Torah of truth was in his mouth, and corruption was not found on his lips. He walked with Me in peace and integrity, and he brought many back from sin."…

Rabbi Yehoshua son of Karchah said: It is a mitzvah to split, as Zecharyah 8:16 says, "Truth, and justice of peace, you shall judge in your gates." Where there is justice there is no peace, and where there is peace there is no justice! What is justice that includes peace? This is splitting. And so regarding [King] David, Samuel II 8:15 says, "And David performed justice and *tzedakah*." But where there is justice there is no *tzedakah*, and where there is *tzedakah* there is no justice! What is justice that includes *tzedakah*? This is splitting…

Rabbi Shimon son of Menasya said: When two parties come before you for judgment, then before you hear their words, or after hearing but before you know where the verdict leans, you may tell them, "Go split." Once you have heard their words and you know where the verdict leans, you may not tell them, "Go split." Proverbs 17:14 says, "Like freeing water is the start of litigation; before the quarrel is exposed, abandon it."

22. Why does Jewish law favour settlement?
- Social peace
- Concern for injustice of law is misapplied
- Concern that justice may be too harsh for the needs of the parties involved
- Concern that controversy will continue
- Settlement achieves Justice's true goals: peace and righteousness

23. Rabbi Hershel Schachter citing Rabbi Yosef Dov Soloveitchik (20th century USA), Nefesh haRav pp. 267-268

ענין הפשרה היה רגיל רבינו לבאר שהוא ג"כ פסק דין... אלא שהוא פסק של לפנים משורת הדין המיוסד ע"פ יושר... והעולם רגילים לומר [וכך היא באחרונים] שיש ב' סוגי פשרה, שיש פשרה הקרובה לדין, ויש פשרה סתם. ורבינו אמר שאינו מבין הבדל זה, דהלא כל הענין של פשרה יסודו בקרא ד"ועשית הישר והטוב" – שמחוייבים תמיד לנהוג כפי היושר (ולפנים משורת הדין), ואם כן זה הענין גופא הוי דין התורה.

Our master would explain that "balancing" is also a legal verdict… but it is a verdict of transcending the line of the law, based on justice… People are accustomed to say [and so is found in latter-day authorities] that there are two kinds of balancing, there is balancing that is close to law and there is general balancing. Our master said that he did not understand this distinction; the entire matter of balancing is established by the verse, "You shall do that which is just and good" – we are always obligated to act according to justice (and transcending the line of the law), and if so, this itself is the Torah's law.

24. Basic varieties of ADR — Negotiation, Mediation, Conciliation, Arbitration

25. Legal Ethics: Litigating in Civil Court — https://www.yutorah.org/lectures/lecture.cfm/888657/

26. Why Judaism insists on litigating in a rabbinical court
- Divine Honour
- Following other systems will undermine our system
- Law is a religious responsibility

27. Arbitration Act, 1991, SO 1991, c 17, <https://canlii.ca/t/52wr5> retrieved on 2021-12-09
58 The Lieutenant Governor in Council may make regulations,
(b) requiring that every arbitrator who conducts a family arbitration be a member of a specified dispute resolution organization or of a specified class of members of the organization;…
(d) requiring any arbitrator who conducts a family arbitration to have received training, approved by the Attorney General, that includes training in screening parties for power imbalances and domestic violence;

28. Rabbi Avraham Yeshayah Karelitz (Chazon Ish, 20th century Israel), Sanhedrin 15:4
שהשופט כל דין שלפניו הנראה אליו זהו בכלל פשרה, ואין ניכר הדבר שעזבו מקור מים חיים לחצוב בורות נשברים אבל אם יסכימו על חקים הרי הם מחללים את התורה ועל זה נאמר אשר תשים לפניהם ולא לפני הדיוטות.
One who judges every case that comes before him as it appears to him is carrying out what is recognized as compromise. It does not appear that they have left the source of living water to excavate broken cisterns. But if they settle on laws, they desecrate Torah. For this it is said, "Which you will place before them" – and not before laypeople.

Vignette 3: Financial resolutions established by civil law
29. The Ketubah https://www.yutorah.org/lectures/lecture.cfm/928265/

30. Rabbi Yosef Karo (16th century Israel), Shulchan Aruch Even haEzer 92:1
הכותב או האומר לאשתו בעודה ארוסה: "דין ודברים אין לי בנכסיך," אם מכרה או נתנה, קיים...
If one writes or says to his wife, while they are in *eirusin*, "I have no claim upon your property," then if she sells or gives away the property, that is valid…

31. Rabbi Yosef Karo (16th century Israel), Shulchan Aruch Even haEzer 90:7
האשה שכתבה כל נכסיה לאחר, בין קרוב בין רחוק, קודם שתנשא, אף על פי שאם נתאלמנה או נתגרשה תבטל המתנה, אין הבעל אוכל פירותיהם, ואם מתה בחייו, אינו יורשה, שהרי נתנה אותם קודם שתנשא...
If a woman writes all of her property to another – whether a relative or not – before she marries, then even though the gift would be cancelled if she were to be widowed or divorced, still, the husband may not eat the fruits of that property, and he does not inherit it from her if she predeceases him. She gave it away before they married.

32. Equitable Distribution as a Halachic Principle Rabbi Shlomo Dichovsky, Rabbi Avraham Shirman, Techumin 18-19

33. Rabbi Akiva Eiger (18th-19th century Poland), Chiddushim to Choshen Mishpat 26:1
ואם הוציא ממון ע"י דין ערכאות אם אין כן בדיני ישראל הממון גוזל בידו.
And if one transfers money via secular court, if the Jewish law would be different, this money is theft in his possession.

34. Rabbi Moshe Sofer (18th-19th century Pressburg), Chatam Sofer Choshen Mishpat 142
יקח המלך חלקו ומאי איכפת לי' אי היתר לבעל או לשאר יורשי'
The king will take his share, and why will he care if the rest goes to the husband or to other heirs?

35. Rabbi Joseph Colon Trabotto (15th century Italy), Maharik 187
שייך למימר דינא דמלכותא דינא דמלכא אומר שיהא קרקע שלו קנוי באותו שטר... ואפי' לאותן דיעות שהביא המרדכי דאפי' בשאר ענייני ממון אומר דינא דמלכותא דינא פשיטא דוקא לענין ארנוניות ומנהגות של משפטי המלכים... אבל דין שבין אדם לחבירו פשיטא ופשיטא דלא דא"כ בטלת כל דיני תורה ח"ו
It is possible to say that government law is the law, for the king says that his land may be acquired with their designated document… But even according to those views cited by the Mordechai that government law is the law in other monetary matters, that is specifically for head-taxes and other practices of the kings, obviously… In civil law it is most obvious that this is not so, for with this you would cancel all of the Torah's laws, Gd-forbid!

36. Rabbi Moshe Isserles (16th century Poland), Choshen Mishpat 369:11
לא אמרינן דינא דמלכותא אלא בדבר שיש בו הנאה למלך או שהוא לתקנת בני המדינה, אבל לא שידונו בדיני עובדי כוכבים, דאם כן בטלו כל דיני ישראל

We do not recognize government law other than in matters that benefit the king, or that benefit the citizenry, but not to judge by the laws of idolaters; that would cancel all of the laws of Israel.

37. Rabbi Mordechai Willig, *Retaining the Proceeds of Secular Court Judgments*, Journal of the BDA #2 (2014)
The Talmud derives from the word "lifneihem" ("before them") that disputes are to be brought before Jewish courts, and may not be litigated before heathen courts. The *Ohr Zarua* explains that were it not for this derivation, it would be permitted to force a defendant to adjudicate in secular court, since Noachides are commanded to establish and abide by laws. Moreover, if both parties agreed to be judged in secular court, and the court decided in accordance with Jewish law, the decision is binding. Even though the parties violated the prohibition of "*lifneihem*", post facto the decision stands, since the law of the land is law (*dina demalchuta dina*). This ruling of the *Ohr Zarua* establishes an important principle: the judgment of a secular court can, in limited respects, achieve halachic legitimacy. To be sure, Jews are ordinarily prohibited from litigating in secular courts. But those same courts play a Torah-mandated role in society, and halacha does not necessarily disregard the outcomes of secular court proceedings. According to the *Ohr Zarua*, secular courts would have jurisdiction even over a case between two Jews, were it not for "lifneihem".

38. Rabbi Michael Broyde, *The 1992* Get *Law: An Exchange*, Tradition 31:3 (1997)
The scope of the halakhic duty to follow the law of the land, or the abilty of the Jewish community to incorporate the law of the land into Jewish financial dealings through common commercial custom (*minhag ha-soherim*), remains one of the fundamental issues in the whole discussion of the *Get* Law. I believe that the custom of the Orthodox Jewish community – or vast portions of it – is to accept as part of our customary financial law the concept of alimony, post-divorce payments, and very likely equitable distribution.
Indeed, for the last number of years, at every wedding where I am invited to sit at the groom's table (*hatan's tisch*) while the *ketuba* is signed, I ask the husband whether, if the marriage were to end by divorce, does he expect to pay his wife the value of the *ketuba* and return to her the assets that she brought to the marriage, or does the couple expect some other form of asset division in cases of divorce?
I am almost always told by the husband and wife that they do not intend for the *ketuba* to control the division of assets. That really is the intent of many couples. This fact is reflected in the American custom of not negotiating the dollar amounts in the *ketuba*, either in terms of how much money the woman actually brings into the marriage or how much the husband shall pay her upon divorce or his death, as is done in Israel, or was the custom in Europe centuries ago…

<u>Vignette 4: Enforcing a Settlement Agreement</u>
39. Legal Ethics: Reporting Child Abuse https://www.yutorah.org/lectures/lecture.cfm/863352/

40. Business Halacha Institute, *Civil Litigation, Insurance Claims, and Halacha*
Some Poskim maintain that using civil courts to collect an undisputed debt would not violate Arkaos[64]. They explain that the prohibition of Arkaos does not apply since this is not true litigation; it is simply the process necessary to foreclose on the assets to which the creditor is clearly entitled to. As Bais Din today does not have the ability to do so, there is no viable alternative to the civil courts, and therefore one would not violate Arkaos if one is simply collecting an undisputed debt. Even according to these authorities, it would be a Middas Chassidus to first approach Bais Din before initiating legal action.
Other Poskim[65] point out that there are many Halachos regarding collecting debts. For example, the amount of time a debtor is given to raise funds, the type of assets he is obligated to sell, and how assets should be sold, are all issues that require Halachic determination… Thus, even what appears to be a simple case of collecting a debt is subject to many halachos that requires the supervision of a Bais Din. Furthermore, civil courts may impose additional fees such as interest charges, court costs, or other fees that may not be Halachically appropriate. As such, a Bais Din is necessary to determine the lender's rights and a Din Torah is needed before initiating a foreclosure process. If, however, the debtor refuses to appear before a Bais Din, the Bais Din will issue a Heter Arkaos, as previously explained.

<u>Vignette 5: Custody</u>
41. Legal Ethics: Child Custody https://www.yutorah.org/lectures/lecture.cfm/866999/

42. Rabbi Yosef ibn Migash (11th-12th century Spain), Responsum 71

והראוי שלא יניחו ראובן זה להוציא הבת מאמה אבל תשאר אצלה כאשר היתה בתחלה בפרט מה שנראה מהתועלת וההנאה בזה לקטנה

It would be appropriate not to allow this Reuven to take the daughter from her mother; she should remain with her mother, as she has been from the start, unless we would see profit and benefit for the daughter in switching.

43. Rabbi Moshe Isserless (16th century Poland), Shulchan Aruch Even haEzer 82:7

ודוקא שנראה לב"ד שטוב לבת להיות עם אמה, אבל אם נראה להם שטוב לה יותר לישב עם בית אביה, אין האם יכולה לכוף שתהי' עמה

[The daughter only goes with her mother if] it appears to the court that being with her mother is good for her, but if it appears better to them for her to be with her father, the mother cannot force the daughter to live with her.

44. Rabbi Shemuel di Medina (16th century Greece), Responsa of Maharashdam Even haEzer 123

כללא דמלתא כי כל זכות שאז"ל בדבורם הבת אצל האם לעולם לא אמרו כן לחוב לאחרים... ובזכותה דברו לא בזכות האם כמו שכתב הר"ן הלשון הנז"ל וכן בבן בזכות הבן דברו...

The general rule is that all of the rights the Sages presented in saying "the daughter is with the mother" are not about taking away from others… They spoke to help the daughter, not the mother, as Rabbeinu Nisim wrote. And regarding the son, they spoke to help the son…

45. Rabbi Moshe Alshich (16th century Israel), Responsa of Maharam Alshich 38

אני אומר שאם הקטן אחר היותו בן ו' ומעלה אומר דניחא ליה בצוותא דאימיה לאו כל כמיניה דאפטרופוס לעכב בידו...

I say that if a minor, who is already six and up, says he prefers his mother's company, the guardian is not empowered to prevent this…

46. Rabbi Gedaliah Felder (20th century Toronto), Nachlat Zvi II pg. 285

והאב דורש שימסרו לו בנו שיהא ברשותו והרופא הפסיכולוגי אומר שטובת הילד מחייבת להשאירו אצל אמו שהוא קשור אליה והוא לא התפתח כראוי, ומוכר שזהו רצונו האמיתי של הילד ולא רק פרי הסתה מצד האם...

The father asks for his son to be given into his custody, and the psychologist says the good of the child requires that he stay with his mother, to whom he is attached, and he has not yet developed properly. It can be seen that this is the true desire of the child, and not only the fruit of his mother's persuasion…

47. Rabbi Yechezkel Landau (18th century Poland, Prague), Noda b'Yehudah II Even haEzer 2:89

אם אחר הגירושין אין המגרש והמתגרשת בעיר אחת אז הדין שישאר הבן אצל האב אפי' פחות מבן שש כדי לחנכו וללמדו כי בזה לא שייך דברי הרב המגיד...

If the former husband and wife will not live in the same city after the divorce, the law is that the son should stay with the father even when younger than six, to train him and teach him. Here, [the visitation possibilities] noted by Maggid Mishneh are irrelevant…