Written Materials for

The Prohibition of Litigating In Secular Court

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The Prohibition Against Going to Secular Courts

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The Torah states (Exodus 21:1), "*Vé'eleh ha-mishpatim asher tasim lifneihem*," "And these are the statutes which you shall place before them." The Talmud (*Gittin* 88b), sensitive to the word "*lifneihem*", deduces "*lifneihem- velo lifnei akum*," "Before them- but not before gentiles." As such, the Talmud understands that there is a prohibition against bringing disputes to be adjudicated before gentile courts.[1] The rationale for such a prohibition is explained by Rashi who writes that one who goes to secular courts "profanes the name of God and gives honor to the name of idols."[2] Rambam writes that one who does so is considered as if he has "blasphemed and raised a hand against the Torah of Moses."[3] The unanimous conclusion among *halachic* authorities is that the prohibition extends to even those gentiles who are not technically idol worshippers.[4] Acceptance of a foreign court system, even if secular in nature, is considered a rejection of Torah law.

The *Shulchan Aruch* emphasizes the seriousness of this prohibition by describing one who violates it in unusually harsh terms. One who goes to secular court is considered "an evildoer, as if he has blasphemed, and as if he has raised a hand against the Torah of Moses." The *Shulchan Aruch* also states that the prohibition applies even in a situation where the secular court would rule according to Jewish law and in a case where both litigants agree to go to secular courts.[5]

As a result of this unequivocal prohibition, one who wishes to adjudicate a private legal dispute with a Jewish adversary generally must do so in the confines of a *beit din*. What follows is an examination of some of the exceptions to and ramifications of this rule.

A. Exceptions to the Rule

1. A Defendant Who Refuses to Appear Before a *Beit Din*

In a situation where one's adversary refuses to appear before a legitimate *beit din*, Shulchan Aruch permits one to resort to the secular courts after receiving permission from a *beit din*.[6] Typically, a plaintiff opens a file in a *beit din*, which then issues a *hazmanah* (summons) to the defendant. If a proper response is not received,[7] that *beit din hamazmin* (summoning *beit din*) would send additional hazmanot and, if the defendant has failed to properly respond to the *beit din*, *a heter arkaot* (permission to litigate in secular court). If appropriate, the *beit din* may also issue a *seruv* (document of contempt) against a recalcitrant defendant.

Sma writes that the custom of *batei din* is to only give permission after the adversary has refused to respond to three summonses by *beit din*.[8] Nevertheless, some batei din may give permission earlier if it is clear that the adversary will not appear in a *beit din*.[9]

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[1] See R. Shimon ben Tzemach Duran (1361-1444), *Sha'arei Tashbetz* II, no.290 who understands this prohibition to be biblical in nature. This is also the implication of R. David ibn Zimra (1479-1573), *Teshuvot Radvaz*, I, no. 172; *Chiddushei ha-Ran, Sanhedrin* 2b; *Chiddushei ha-Ramban, Sanhedrin* 23a; R. Chaim Benbenishti (1603-1673), *Teshuvot Ba'i Chayei, Choshen Mishpat* no. 158; R. Chaim Yosef David Azoulay (1724-1806), *Birkei Yosef, Choshen Mishpat* 26:3 and *Kli Chemdah*, beginning of *Parshat Mishpatim*. However, see R. Baruch Klai, Sefer *Mekor Baruch*, no. 32 who concludes, based on the omission of this prohibition by Rambam and Rasag from their list of mitzvot, that this prohibition is in fact rabbinic in nature. See R. Yerucham Fischel Perlow (1846-1934), Commentary on *Sefer Ha-mitzvot* of R. Saadia Gaon, II: 319, who attempts to explain the omission.

[2] See commentary of Rashi to Exodus 21:1.

[3] Rambam, *Mishneh Torah, Hilchot Sanhedrin* 26:7.

[4] See *Sha'arei Tashbetz* II, no. 290 and R. Shimon Duran (1361-1444), *Yachin U'Boaz* II, no. 9, who states this explicitly, as well as the Rif, quoted in *Beit Yosef, Choshen Mishpat* 26:3, who refers specifically to adjudicating before Muslims. This is accepted by all halachic authorities. See *Knesset Ha-Gedolah, Choshen Mishpat*, 26:1; R. Shmuel Vozner (1913-), *Teshuvot Shevet Halevi* X, no. 263 sec.1; R. Yitzchak Yaakov Weiss (1902-1989), *Teshuvot Minchat Yitzchak* IV, no.52 sec.1; R. Ezra Batzri, *Dinei Mamonot* V (Jerusalem 1990), no. 5; R. Shmuel Leib Landesman, "*Teshuva bi-Inyan Arkaot*," *Yeshurun* XI (2002), 708.

See, however, R. Meir Dan Plotzki (1867-1928), *Kli Chemdah*, beginning of *Mishpatim*, who at the end of his comments on the prohibition writes in brackets that his discussion is only theoretical since it is only relevant in areas that practice real idol worship. In light of the overwhelming majority who disagree, as well as the use of brackets, a persuasive argument can be made that *Kli Chemdah*'s comments were inserted for governmental censors who were prevalent at the time, and do not reflect his viewpoint.

[5] *Shulchan Aruch, Choshen Mishpat*, 26:1.

[6] See *Shulchan Aruch, Choshen Mishpat* 26:2. The theory underlying this exception to the prohibition of litigating in secular courts appears to be a recognition among authorities that where compliance with the prohibition would necessarily result in the forfeiture of funds to which the litigant has a legitimate claim, the prohibition should be set aside. *Kli Chemdah, Mishpatim*, questions why one should be permitted to violate a biblical prohibition in order to "save his money". R. Moses Sofer (1762-1839), *Teshuvot Chatam Sofer, Choshen Mishpat*, no. 3 and *Biur ha-Gra, Choshen Mishpat* 26:2, as explained by *Be'er Eliyahu*, imply that one is permitted to do so since the secular court merely acts as an agent of *beit din*. *Kli Chemdah* rejects this approach and suggests that the prohibition only applies in a case where one has the option of appearing before *beit din*. In a case where one has attempted to go to *beit din* but the adversary refuses, appearing before secular court does not imply a rejection of Torah law and as such there is no prohibition.

[7] See section 2 of the Rules and Procedures of the Beth Din of America for an example of acceptable responses to a *beit din*. ("Rules and Procedures of the Beth Din of America," Beth Din of America, Accessed January 27, 2012, http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf)

[8] *Sma, Choshen Mishpat* 26:8. Also see *Pitchei Teshuvah, Choshen Mishpat* 11:1 and *Netivot ha-Mishpat, Chiddushim*, 11:4 who refer to the custom of issuing three summonses.

[9] See R. Yitzchak Yaakov Weiss (1901-1989), *Sha'arei Minchat Yitzchak* IX, no. 155.

The Beth Din of America generally sends three summonses before granting permission to litigate before the secular courts. However, the Rules and Procedures of the Beth Din of America provide that it is within the discretion of the *Av Beit din* to grant permission to go to secular court if no response is forthcoming after proper notification and the passage of thirty days.[10]

2. One Who is Summoned to Secular Court

Defendants inappropriately summoned to secular court by a fellow Jew may defend themselves in secular court without violating any prohibition. There is some disagreement as to whether defendants are required to receive express permission from *beit din* to defend themselves in the action, and whether they are required to take steps to indicate their willingness to move the case to a *beit din*.[11]

3. Non-Jews

Tashbetz[12] assumes that, technically speaking, the prohibition against litigating in secular court would apply even in the context of a non-Jewish adversary. However, one may assume that a non-Jew will not willingly appear before a *beit din*, and accordingly one may bring the non-Jew before a secular court without permission from *beit din*.[13]

[10] Rules and Procedures of the Beth Din of America, Section 2(i), (accessed January 27, 2012, http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf)

[11] Although *Tumim, Choshen Mishpat*, 26:1 writes that even in such a situation the prohibition remains, this does not seem to be the accepted opinion. R. Meir Auerbach (1815–1878), *Imrei Binah, Choshen Mishpat*, no. 27 refers to those who require that the defendant protest that the case should be brought to *beit din* but argues that not even that is required. Similarly, R. Yechezkel Katzenelenbogen (1667 1749), *Knesset Yechezkel*, no. 97, also quoted in Imrei Binah and R. Shalom Mordechai Schwadron (1835 1911), *Shu"t Maharsham* I, no. 89, write that no protest is necessary and no permission from *beit din* is required. This appears to be the opinion of R. Ovadya Yosef (1920-), *Yechaveh Daat* IV, no.65 who permits a defense attorney to defend a Jew who is wrongfully brought to secular court but makes no mention of a requirement to protest or receive permission from *beit din*. However, *Kesef ha-Kodshim, Choshen Mishpat*, 26:1 writes that although one who went to secular court to defend against an injunction does not "bear much guilt" it is appropriate to first receive permission from *beit din* to do so. R. Moshe Shternbuch (1926-), *Teshuvot ve-Hanhagot* III, no. 453 writes that it is appropriate for defendants to voice their preference to appear before *beit din*. He implies that one who is brought to secular court by a religious Jew is certainly required to demand that the case be moved to *beit din*. Note that even if there is no prohibition for a defendant to participate in secular court proceedings without protest, such participation may prevent the defendant from later insisting on *beit din* adjudication. See Section C.1 for a discussion of this matter.

[12] *Shu"t Tashbetz* II, no. 290 and *Shu"t Tashbetz* IV (*Chut Hameshulash*), no. 3:6, also quoted in R. Chaim Aryeh Kahane (unknown – 1917), *Divrei Geonim*, no. 52:15. *Midrash Tanchuma, Parashat Shoftim* 1 also explicitly writes that it is forbidden to take a non-Jew to secular court.

4. Non- Observant Jews

Kesef ha-Kodshim rules that when it is extremely likely that an adversary will refuse to appear before *beit din*, one may go directly to secular court without prior permission from *beit din*.[14] The argument can be made that a non-observant Jew may be immediately summoned to secular court without permission from *beit din*, since it can be assumed that he or she would not attend a *din torah* (*beit din* proceeding). Nevertheless, some *batei din* have the practice of issuing one summons (as opposed to three) before granting permission to go to secular court in such a situation.[15] The Beth Din of America does not differentiate between observant and non-observant Jews and will issue three summonses in all cases unless the party summoned makes it clear that they will not appear before the Beth Din.

5. Insurance Companies

Generally, where a defendant maintains insurance coverage for the particular claim being pursued by a plaintiff, it is the position of the Beth Din of America that the insurance company is viewed as a necessary party in interest. Accordingly, if the insurance company is not prepared to submit to arbitration before a *beit din*, the plaintiff may pursue his or her claim in secular court.[16] This is because the insurance company

[13] *Oruch Mishpat, Choshen Mishpat* 26:1: 178 writes that it is a *mitzvah* to try to bring the non-Jew to *beit din* but upon refusal he may bring him to secular court. Based on ruling of Tashbetz, in the unusual case where a non-Jew would be willing to appear before *beit din*, one would theoretically be required to litigate the case in *beit din*. See *Kovetz Haposkim, Choshen Mishpat* 26: 178 who cites *Teshuvot Emet Me'erets* who writes that, nevertheless, one who takes a non-Jew to secular court, rather than *beit din*, would not be treated as a *mesarev* or one who refuses to recognize the authority of *beit din*. R. Michael Broyde has stated that Jews may avail themselves of the secular courts even in cases of gentile adversaries prepared to appear before a *beit din*, since the use of secular courts in such an instance would not constitute a form of rebellion or denial of the authority of the Torah.

[14] *Kesef ha-Kodshim, Choshen Mishpat*, 26:2.

[15] *Minchat Yitzchak* IX, no. 155, 2 writes that his practice is to send one summons. However, if the *beit din* determines, based on the totality of the circumstances, that the individual is noncompliant, permission may be granted to go to secular court immediately. See *Teshuvot ve-Hanhagot* III, no. 441 who reaches a similar conclusion. However, *Teshuvot ve-Hanhagot* III, no. 445, concludes that it is not necessary to burden a claimant with the requirement to send even one summons, although it would be appropriate to note in the secular court pleadings that that beit din is the preferred forum. R. Chaim Jachter, *Gray Matter Vol. II* (Teaneck, NJ: 2006), 166 quotes R. Mordechai Willig as requiring permission from *beit din* before bringing a non-observant Jew to secular court. R. J.D. Bleich, *Contemporary Halakhic Problems V* (Southfield, MI: Targum/Feldheim, 2005), 37 writes that in a day and age where "alternative dispute resolution is encouraged and in which many non-observant Jews are open to the heritage of Judaism," an offer to appear before a *beit din* is appropriate.

[16] In most cases, insurance companies are not owned by Jews. See section A: 3 of this article which established that one may initiate an action against a gentile defendant in court even without obtaining prior permission from *beit din* to do so.

acts as a surety (i.e. a guarantor with primary liability). Just as a creditor may pursue either the debtor or surety, a plaintiff may pursue the insurance company in whatever forum necessary.[17]

Where insurance coverage is common and expected, such as in cases of professional malpractice, personal injury and automobile and property casualty, a defendant has the right to insist that a plaintiff bring his or her claim directly against the insurance company, even if the plaintiff wishes to seek damages from the defendant, personally, in *beit din*. This is based on the assumption that both parties entered into their course of dealing with an implicit assumption that any liability would be covered by insurance, and that any recovery could be obtained only from the insurer.[18]

[17] R. Bleich, *Contemporary Halakhic Problems V*, 34 adds that, "since it is readily perceived that the cause of action is really against a non-Jewish insurance company that will not appear before a *beit din*, it would appear that judicial proceedings in such circumstances do not constitute either a renunciation of the Law of Moses or voluntary aggrandizement of a non *halachik* legal system and hence such suits are not forbidden." Also see R. Michael Broyde, *The Pursuit of Justice and Jewish Law* (New York: Ktav Publication House, 1996), 47. See R. Yitzchak Zilberstein, *"Teviah bi-Arkaot al Mechdal Shel Rofeh," Tesburim* XI (2002), 695-697 who also permits going to secular court in such a situation.

See, however, R. Avraham Chaim Sherman, *"Teviat Nezikin Kineged Mevutach Ezad Gimel," Shaarei Tzedek* VII (2007): 45-57 who views the insured as the primary litigant and as such requires appearance before *beit din*, which then may permit the litigants to proceed in secular court. See *Teshuvot ve-Hanhagot* III, no. 444 who discusses the case of a Jewish insurance company and requires permission from beit din before bringing them to secular court. Also see R. Yaakov Yishaya Blau, *Pitchei Choshen – Hilchot Terusha* (Jerusalem: *Beit Horaah Tevunot Aryeh*, 1996), 1:65.

[18] Where insurance is not commonly held, other factors may be relevant in determining whether a plaintiff may insist on pursuing the defendant, personally, in *beit din*, even in the face of a claim by the defendant that he or she is insured and will not be indemnified for any losses in *beit din*.

[19] This is the implication of R. Moshe Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* II, no. 11, who writes that one may not refuse to appear before *beit din* on the grounds that their adversary already filed for an injunction in secular court. This is the opinion of Ramah MiPanu 51 quoted by *Knesset Hagedolah* 73 (*Beit Yosef* 47) and R. Batzri, *Dinei Mamonot* I, no. 5:11. He writes that in a case of imminent monetary loss one is permitted to file for a preliminary injunction to freeze assets so that the case may be taken to *beit din*. R. Shternbuch, in *Teshuvot ve-Hanhagot* III, no.440, adds that no permission is required to do so but that contemporaneously with emergency court filings litigants must make it clear that they intend to bring the case before *beit din*. In *Teshuvot ve-Hanhagot* III, no. 445, he writes that it is the prevailing custom to be lenient in not requiring permission. In *Teshuvot ve-Hanhagot* V, no. 362:2 he adds that if it is possible to get permission from a *beit din* one should do so and that if that is not possible it is appropriate to ask permission from the rabbi of the area.

See, however, *Teshuvot Shevet HaLevi* X, no. 263:4 who assumes that an injunction is an action of a *beit din*. As such he does not permit one to file for an injunction in secular court before a *beit din* proceeding since no presumption of guilt has been established. This analysis would seem to be limited to Israel, where a *beit din* has the authority to issue an injunction.

6. Cases Involving the Threat of Imminent Loss

Most *halachic* authorities maintain that in a case of imminent loss when there is no time to go to *beit din* first, one is permitted to file for a preliminary injunction or temporary restraining order in secular court, even without permission from a *beit din* to do so.[19] The rationale for such a position seems to be that the prohibition of going to secular courts entails going to such a court for "judgment." Since an injunction to prevent imminent loss is not dispositive of the underlying claims, obtaining such an injunction does not violate the prohibition.[20] The position of the Beth Din of America is that it is *halachically* permissible for parties to resort to civil courts, when necessary, for injunctions restraining the other party from taking action in a matter until a *beit din* can properly adjudicate the underlying dispute.

Similarly, where a party faces an approaching deadline, pursuant to a statute of limitations, to initiate an action in court, the party may file a petition or seek to toll the statute of limitations in secular court in order to preserve his or her right to seek remedies. Also, a landlord wishing to evict a tenant for non-payment of rent who stands to lose rent from re-letting the premises if he or she is unable to first begin eviction proceedings until after a *hazmana* process has played out, may initiate an action in landlord-tenant court simultaneously with initiating the *hazmana* process in *beit din*. Since the plaintiff is merely reserving the right to seek remedies in court if he or she is unable to do so in *beit din* and he or she will not begin substantial judicial involvement prior to completion of the *hazmana* process, such an action does not represent a violation of the prohibition against litigating in secular court. In both these cases, the plaintiff should simultaneously begin the *hazmana* process or make his or her preference to litigate in *beit din* clear to the defendant in the court pleadings or otherwise, and be prepared to adjudicate the substantive dispute in *beit din* in the event the defendant indicates a willingness to do so.[21]

[20] *See Teshuvot Chatam Sofer, Choshen Mishpat*, no. 3 who permits registering the statement of a witness in secular court for use in *beit din* at a later date. Since the secular court is not asked to judge, no prohibition is violated. *Kesef ha-Kodshim, Choshen Mishpat*, 26:2 writes that the Torah only forbade *"mishpatim"* or judgments but not actions in secular court that do not require judgment.

[21] There is an additional reason for permitting such actions. Certain judicial actions cannot be performed by a *beit din*. For example, obtaining a name change or adopting a child are governmental functions that can only be accomplished by a secular court judge, and one does not violate the prohibition against litigating in secular court by bringing such an action to secular court (see R. Bleich, *Contemporary Halachic Problems* V, 26). Other actions require action by a secular court judge, but also involve the adjudication of substantive disputes among litigants. Where the dispute can be separated from the court action in a manner that allows for *beit din* adjudication, Jewish law

7. Discovery

A party who files a complaint in secular court solely to initiate discovery may technically not be in violation of the prohibition of adjudicating before a secular court, to the extent the filing is followed by discovery that proceeds among the parties without judicial involvement.[22] Litigation in secular court to enforce discovery rights may constitute a violation of the prohibition.[23] In any event, a plaintiff who files an action in secular court, even if only for the purpose of beginning the discovery process, may lose his or her right to later insist on *beit din* adjudication of that claim.[24]

8. Undisputed Claims

A plaintiff with an undisputed claim, such as where the defendant has signed a confession of judgment for the full amount being claimed by the plaintiff, may resort to secular court without attempting to litigate the matter in a *beit din*. Since the courts are not being asked to adjudicate competing claims, such an action could be characterized merely as a collection action with no resulting violation of the prohibition of litigating in secular court.[25]

Even absent a confession of judgment, in the case of a claim upon which no defense or counterclaim can reasonably be anticipated, the prohibition of litigating in secular court may not technically bar a plaintiff from initiating an action in secular court, although it may still be appropriate to first attempt to adjudicate the claim in a *beit din*.[26] Examples of such claims are nonpayment of tuition obligations, or of an unconditional promissory note, mortgage or guaranty,[27] if the parties have no other business dealings with each other that could result in the assertion of a counterclaim that may offset the obligation.

9. Confirmation and Enforcement of an Award of *Beit Din*

Based on the same logic, one who wishes to have a judgment from *beit din* confirmed or enforced in secular court is permitted to do so. Here too, the claimant is petition-

would require such separation. For example, a civil divorce can only be obtained in court, but the parties may also be disputing issues such as the allocation of their assets, spousal and child support, and custody and visitation. It is permissible to file a court action for civil divorce, so long as the plaintiff makes his or her preference to litigate in *beit din* clear to the defendant, either in the court pleadings or by simultaneously initiating the *hazmana* process. Similarly, a landlord may file a complaint in secular court for possession of leased premises in landlord-tenant court, so long as it is clear that such action is merely a predicate for the enforcement of a *beit din* decision on the merits of the case.

[22] See Roger S. Haydock and David F. Herr, *Discovery Practice* (Austin: Aspen Publishers, 2009), §31.01 ("Discovery is designed to take place primarily with satisfaction and without court involvement. Interrogatories, depositions, document production, and requests for admissions are all normally used without a judge ordering or barring them.")

[23] See R. Benzion Yaakov Vozner, *"Halicha li-Arkaot," Divrei Mishpat* III (1997): 195-197, who discusses the case of an individual who plans on adjudicating before *beit din* but goes to secular court for the purpose of putting pressure on his adversary. R. Vozner points out that *Shulchan Aruch, Choshen Mishpat*, 26:1 begins by writing, "It is forbidden to adjudicate" in secular court but ends by writing that anyone who "comes to adjudicate before them" has violated the prohibition. He argues that the additional words here as well as in other primary sources indicate that appearance before secular court alone, when a request to adjudicate has been made, is a violation of the prohibition since it honors another system of law and represents a rejection of Torah law. Similarly, see R. Asher Weiss, *Minchat Asher Devarim* (Jerusalem, 2007), 3:1 who prohibits appearing in secular court even when one's intention is merely to convince an adversary to agree to a compromise. Also see R. Yehoshua Yehuda Leib Diskin (1817-1898), *Shu"t Maharil Diskin*, in the collection of rulings based on his manuscripts in the back of his responsa, no. 20 which says that one who issues a *"pazavu"* (seemingly a summons) is not deemed to have gone to secular court since only words were spoken and no court action was taken. One may infer from here that any action taken in court beyond a summons, such as actual appearance, would be tantamount to violation of the prohibition. It follows that appearance in secular court solely for enforcement of discovery would be prohibited as well.

[24] See Section C.1.

[25] *Shu"t Maharshem* I, no. 89 quotes the position of the *Av Beit din* of Butchatch who permits going to secular court in the case of a defendant who admits his debt. He argues that with the admission of liability, the case is viewed as if a decision was already rendered, and enforcement in secular court is akin to enforcing a decision of *beit din*, which does not violate the prohibition of appearing before secular courts (see note 28). Requesting permission prior to going to court to enforce such an obligation is merely a *"middat chasidut."* See *Shu"t Maharshem* II, no. 252 and *Shu"t Maharshem* III, no. 195 where he reiterates this position. Similarly, *Teshuvot Shevet Halevi* II, no. 263:3 permits use of secular courts to collect a *"chov barur"* or clear debt provided basic *halachic* laws of debt collection (such as certain debtor protection laws enumerated in *Shulchan Aruch, Choshen Mishpat*, 97:23) are not violated. See R. Yaakov Kamenetsky (1891-1986), *Emmet le-Yaakov, Choshen Mishpat*, 26 who suggests that secular courts may be utilized when one is merely coming to take what is clearly his and requires no decision from *beit din*. R. Bleich, *Contemporary Halachic Problems* V, 26 permits probate of an uncontested will in secular court on the same grounds. R. Mordechai Eliyahu, *"Mahat Tovmi Al Chukei ha-Medina vi-Hatkanat Takanot bi-Yameinu," Techumin* III (1982), 244 similarly permits appearance before a secular court to collect a clear debt. See R. Weiss, *Minchat Asher Devarim*, 3:4 who writes that a bounced check would not qualify as a *chov barur* since the debtor may have any of several possible defenses (i.e. he could claim that the debt was already paid, the sale was voided, etc.) As such, the creditor would be required to go to *beit din*. Presumably this would be the case regarding similar unambiguous documents.

[26] Practically speaking, what might be viewed by a claimant as a *chov barur* may be met by defenses and counterclaims asserted by the defendant. Once such defenses and counterclaims are asserted the claimant would be required to continue the action in *beit din*. Even if no actual defenses or counterclaims are asserted, in a case where the debtor claims that he cannot afford to pay and/or requests an extension, it would be appropriate to go to *beit din* first, even if not absolutely required. In any event, a plaintiff who files an action in civil court, even if he or she does so on the basis of an expectation that the claim would not be substantively contested, may lose the right to later insist on *beit din* adjudication of that claim (see Section C.1.).

[27] This assumes that no interest is being charged, or that there is a valid *heter iska* in place. Where the claim involves interest charges, *beit din* involvement may be necessary.

ing the secular court to enforce a decision of *beit din* that was already rendered, rather than adjudicate a dispute between parties.[28]

10. Criminal Law

As a technical matter, criminal litigation does not violate the prohibition of litigating in secular court since it involves criminal charges brought by the government against an individual rather than a civil dispute resolution between two individuals. One should consult a competent *halachic* authority to determine whether reports of criminal activity to the secular authorities involve a separate prohibition of *mesirah*. In any event, it is important to note that in any instance of imminent danger to human health or safety, criminal activity must be reported to the police.

[28] *Urim vi-Tumin, Choshen Mishpat,* 26:5 quotes *Keneset ha-Gedolah* in the name of Maharshach who permits enforcing a decision of *beit din* in secular court without express permission of *beit din. Urim* questions why this is permitted, since he equates seeking redress in the secular courts with "taking the law into one's own hands," which is only permitted against an adversary who is an *'alam"*, a strong and non-compliant individual. Even if *Urim*'s question makes it clear that he prohibits enforcing a *beit din* award absent non-compliance, the implication is that he would permit it where there is actual non-compliance. *Kesef ha-Kodshim* 26:2 implies that a defendant's status as non-compliant can certainly be presumed based on an *umdenah* (i.e. a likelihood of non-compliance based on prior actions). *Imrei Binah, Choshen Mishpat,* no. 27, answers the *Urim*'s question by pointing out that no prohibition is violated where the secular authorities are not rendering a decision but are merely carrying out the decision of *beit din*. He quotes Maharikash who nevertheless requires receiving permission from *beit din* to do so, but writes that such an argument is not compelling. R. Vozner, *"Halicha li-Arkaot,"* 197-200, answers Urim's question by pointing out that in the case of someone who refuses to carry out the decision of *beit din*, "there is no greater alam than this." *Teshuvot Maharsham* IV, no. 105 quotes and concurs with the opinion of Maharshach that one may enforce a *beit din* decision without permission from *beit din*. R. Shlomo Kluger (1785-1869), *Teshuvot ha-Elef Lecha Shlomo, Choshen Mishpat,* no. 3 comes to a similar conclusion as Maharshach. *Teshuvot Shevet Halevi* X, no. 263:2 writes that one is permitted to enforce a decision of *beit din* when the other party refuses to comply but notes that in a case where his non-compliance is sanctioned by *beit din* because *beit din* has agreed to revisit its decision, one would certainly need permission from the *beit din* before bringing the decision to secular court for enforcement.

However, see *Teshuvot Ve-Hanhagot* III, no. 439 who writes that it is not customary to follow the opinion of Maharshach.

It would seem that confirming a *beit din* decision in secular court should be equated with enforcement of a *beit din* decision. However, see R. Chaim Kohn, *"Akipat Kiyum Psak Pashranim Al Tedei Arkaot," Divrei Mishpat* III (1997): 188-189 who questions the permissibility of confirming a *beit din* decision since making a motion to confirm an arbitration decision allows the other party to contest the award and thereby retains an element of "judgment." Accordingly confirmation would require permission from *beit din* as would any other judgment in secular court. R. Kohn concludes, however, that confirming a *beit din* decision in secular court would be permissible since first going to *beit din* and only then seeking recourse in secular court indicates that the party is not attempting to "raise a hand against the Torah of Moshe". R. Bleich, *Contemporary Halachic Problems* V, 28 writes that confirmation of a *beit din* decision does not require prior permission since the confirmation process results only in the reservation of the option to enforce the decision should it become necessary. He notes the opinion of some *halachic* authorities who require permission before enforcing a *beit din* decision. For a further discussion on confirming judgments of *beit din*, see R. Yaacov Feit and Dr. Michael A. Helfand, "Confirming Piskei Din in Secular Court," *Journal of Halacha and Contemporary Society* (Spring 2011): 5-27.

Section 33 (c) of the Rules and Procedures of the Beth Din of America as well as the standard form of binding arbitration agreement that the parties sign prior to *din torah* proceedings at the Beth Din of America, expressly provide for the enforcement of the decision in secular court. Accordingly, even if permission of a *beit din* to enforce a *beit din* award is required, such permission is presumed upon the issuance of any decision (following the final disposition of any requests for modification under section 31 of the Rules and Procedures) by the Beth Din of America.

11. Cases Where *Beit Din* Judgments Would Be Unenforceable Under Secular Law

There is no obligation to use a *beit din* to adjudicate public law matters[29] such as allegations of zoning violations, OSHA violations, bankruptcy law[30] or other areas of public law. In a case where two Jewish individuals have a private dispute that may implicate public law issues, a *beit din* should adjudicate the matter if secular law allows for arbitration of the matter.

[29] This is true for several reasons. In the United States, most public law matters cannot be adjudicated through arbitration. As such any decision rendered by *beit din* would be unenforceable. See *Medrash Tanchuma, Parashat Shoftim,* which states, "When there is no police officer, there is no judge," implying that when *beit din* has no power to enforce its judgments appearance before *beit din* is not mandated. See R. Chaim Ibn Atar (1696-1743), *Ohr Hachayim – Devarim,* 16:18 who writes that there is no requirement to appoint judges when there is no one to enforce their law. See *Teshuvot Maharsham* I, no. 89, who writes regarding enforcement of an admission of guilt that since in our day *beit din* does not have the power to enforce its rulings, receiving permission from *beit din* to go to secular court is merely a *"middat chassidut"* but not required strictly speaking. The implication of his statement is that when *beit din* has no power to enforce its decisions, no prohibition exists since it is clear that appearance in secular court does not imply a rejection of Torah law. Also see *Teshuvot Shevet Halevi* X, no.263:2 who addresses the case of one who wishes to contest a decision of a zoning board. He argues that since the government will not recognize the decision of *beit din* and as such the decision will be unenforceable, it is obvious that no prohibition of going to secular courts applies. These *halachic* authorities assume that a prohibition against going to secular court only applies when the matter can be solved in *beit din*. Bringing a matter unenforceable by *beit din* to secular court does not in any way "raise a hand against the Torah of Moses." However, see R. Landesman, *"Teshuva bi-Inyan Arkaot,"* 704-707 who argues that one may not appear before secular court without permission from *beit din* even in a case where *beit din* does not have the ability to enforce their judgment. He argues that *Medrash Tanchuma*'s statement cited above is meant to be taken as advice and not as a *halachic* ruling.

In addition, public law matters usually entail determining the rights of parties such as gentiles, public officials, and the community at large. See Section A.3. which discusses *beit din* adjudication of matters involving non-Jews.

Furthermore, *halacha* recognizes the rights of gentiles and society to regulate their own framework and they need not go to *beit din*. As such, one may litigate against a government agency even if its agents are coincidentally Jewish. See R. Broyde, *The Pursuit of Justice and Jewish Law,* Chapter 8, for a further discussion of public law.

[30] See R. Steven Resnicoff, "Bankruptcy- A Viable Halachic Option?," *The Journal of Halacha and Contemporary Society* (Fall 1992): 52-54, who offers several reasons why filing for bankruptcy does not

Generally speaking, the decisions of arbitration panels in the United States regarding child custody and visitation matters are not automatically enforceable in court, although in some jurisdictions *beit din* determinations regarding these matters may be presumptively enforceable.[31] It is the view of the Beth Din of America that custody disputes should be decided in *beit din*.[32]

B. The Scope of the Prohibition of Litigating Before Non-Jewish Courts

1. Secular Law before a Jewish Judge

The prohibition of adjudicating a dispute before a secular court applies even if the judge is Jewish. The acceptance of a foreign system of law in replacement of Torah Law is considered a repudiation of the Torah and viewed as "raising a hand against the Torah of Moses."[33]

2. Choice of Law

A choice of law clause, where two parties agreed to be judged in *beit din* but according to the laws of a specific secular set of rules or authority, is permitted by many *halachic* authorities. The Beth Din of America generally respects choice of law clauses and will apply secular law in determining the outcome of a dispute where parties have agreed to be governed by that body of law.[34]

violate the prohibition of going to secular court. First, bankruptcy is an "*in rem*" proceeding. It is not an action directed toward a particular individual and there is no adjudication between parties. Rather, the debtor merely appears before court to seek relief. In a situation where filing for bankruptcy leads to adjudication between individuals in bankruptcy court, appearance in such a court would still be permitted since bankruptcy law would usually prohibit collection actions in *beit din*. R. Resnicoff questions the permissibility of such an appearance in a case where bankruptcy court would make an exception to this rule. Still, he suggests that if most of the creditors are non-Jews the debtor would not violate the prohibition of going to secular court for taking such actions. Since the debtor is entitled to relief against non-Jewish creditors and filing for bankruptcy and following the court's procedures is the only way to do so, such actions would not be tantamount to "raising a hand against the Torah of Moses." This paragraph has only addressed the permissibility of bankruptcy vis-à-vis the prohibition of going to secular court. A more complete discussion of whether it is permissible to file for bankruptcy is beyond the scope of this article and is addressed at length in R. Resnicoff's article.

The Beth Din of America will generally hear a post-bankruptcy claim that addresses a debt that existed pre-bankruptcy upon the consent of both parties. The Beth Din would generally not issue a *seruv* in such a case since it would be in contravention of *dina demalchuta dina*, the "law of the land is law."

[31] For a collection of cases in various states dealing with this issue, see Elizabeth A. Jenkins, "Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters," 38 A.L.R.5th 69 (1996). See also Fawzy v. Fawzy, 199 N.J. 456 (2009), in which the court ruled that arbitration decisions regarding child custody and visitation matters are presumptively enforceable pursuant to the applicable arbitration statute. As a practical matter, courts will often defer to the child custody and visitation decision of an arbitration body such as a *beit din* if it is clear to the court that the arbitrators adhered to fundamental notions of due process, considered the relevant factors and acted in the best interests of the child.

[32] See R. Bleich, *Contemporary Halakhic Problems* V, 33 who takes this position as well.

[33] For a discussion regarding adjudication before the secular courts in the State of Israel see R. Avrohom Yeshaya Karelitz (1878-1953), *Chazon Ish, Sanhedrin* 15:4; R. Yitzchak HaLevi Herzog, *"Gedarim bi-Din ha-Malchut," Hatorah Vehamedinah* VII-VIII (1956): 9-12; *Teshuvot Heikhal Yitzchak Even HaEzer* IV, no. 65; R. Eliezer Waldenberg (1915-2006), *Teshuvot Tzitz Eliezer* XII, no. 82; *Teshuvot Shevet HaLevi* X, no. 263; *Teshuvot Ve-Hanhagot* III, no. 441; and R. Binyamin Zilber (1917-2008), *Teshuvot Az Nidberu* III, no. 74. Also see, *Kovetz Hapaskim, Choshen Mishpat*, 26: 206. For further explanation see R. Bleich, *Contemporary Halakhic Problems* V, 16-21.

[34] At first glance this ruling appears to contradict the opinion of *Chazon Ish* and others cited above as well as R. Shlomo ben Aderet (1235-1310), *Teshuvot ha-Rashba* VI, no. 254, cited in *Beit Yosef, Choshen Mishpat*, 26. Rashba discusses a case where a person claimed that the accepted custom in his area was to follow secular law regarding inheritance despite its clash with Jewish inheritance law, and as such argued that it was as if the parties had agreed to be bound by it. Rashba argues that to do so because it is the law of the gentiles is prohibited since he is mimicking the gentiles and this was specifically forbidden by the prohibition against going to secular courts. He writes that even though both parties agree and even though it is a monetary agreement, the Torah does not permit giving value to a gentile system of law. See R. Tzvi Gartner, *"Sheila bi-Inyan Arkaot," Teshurun* XI (2002): 699-701 who accordingly argues that such clauses are prohibited. See R. Bleich, *Contemporary Halakhic Problems* V, 21-22, and R. J. David Bleich, *Be-Netivot ha-Halachah* II (New York: Michael Sharf Publication Trust of the Yeshiva University Press, 1998): 169-170 who takes a similar position.

However, see R. Zalman Nechemya Goldberg, *"Teshuva vi-Hatzaah bi-Inyan," Teshurun* XI (2002): 702-703, who takes issue with R. Gartner and argues that the Rashba's principle applies when the accepted conditions contradict Torah law, as in the case of inheritance, as opposed to when one assumes added obligations that are not in violation of any Torah principle. See R. Tzvi Spitz (20th century), *Sefer Minchat Tzvi - Shechenim*, no. 16:10 who argues that a choice of law clause is permissible when specific laws are mentioned and no reference of a foreign system of law is made. See R. Gartner who takes issue with this opinion. See R. Yonah Reiss, *"Matneh Al Mah Shekatuv ba Torah," Shaarei Tzedek IV* (2003), 288-296 who offers another distinction. The Rashba objected to blind acceptance of another system of law because such acceptance implies that the system is viewed as superior to Torah law. However, acceptance of a certain system of law because it reflects customary business practices of the location does not reject Torah law and is like any other monetary condition which is binding according to halacha. As such, the practice of the Beth Din of America is to allow choice of law clauses which accept a system of law as it is the day of the agreement because it is like any other binding monetary agreement. However, acceptance of a system of law even if the law may change in the future reflects blind adherence to secular law and represents a rejection of the Torah (unless such changes are a reflection of change in customary practice).

R. Bleich, *Contemporary Halakhic Problems* V, 30, does maintain that common trade practices or *minhag ha-socherim* can become implied conditions of a specific contract. It seems that he would differentiate between acceptance of specific practices as opposed to acceptance of an entire system of law. One could argue that a choice of law clause, since limited to a specific situation or contract, is similar to *minhag ha-socherim* and different than acceptance of an entire system of law.

See the Rules and Procedures of the Beth Din of America, subsections 3(d) and (e), which state:

> In situations where the parties to a dispute explicitly adopt a "choice of law" clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent

3. Arbitration

Many poskim assume that one is permitted to present a case for binding arbitration to an arbitrator who is a non-Jew. Since arbitrators are not bound by a specific set of laws,[33] adjudication before them is not considered a rejection of Torah law and as such is not a violation of the prohibition.[34] Still, arbitration conducted under the auspices of a gentile judicial body is prohibited since it acknowledges the authority of a foreign judicial system.[35]

permitted by Jewish Law. In situations where the parties to a dispute explicitly or implicitly accept the common commercial practices of any particular trade, profession, or community – whether it be by explicit incorporation of such standards into the initial contract or arbitration agreement or through the implicit adoption of such common commercial practices in this transaction – the Beth Din will accept such common commercial practices as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.

[33] See Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308 (1984) ("[A]n arbitrator is not bound by principles of substantive law or by rules of evidence. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement . . . .") Also see Rule 43 of the commercial rules of the American Arbitration Association (http://www.adr.org/sp.asp?id=22440, accessed February 7, 2012) which states, "(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties..." Similarly, Rule 24(c) of the JAMS Comprehensive Arbitration Rules & Procedures (http://www.jamsadr.com/rules-comprehensive-arbitration, accessed February 7, 2012) states, "[I]n determining the merits of the dispute the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including but not limited to specific performance of a contract or any other equitable or legal remedy."

[34] *Shulchan Aruch, Choshen Mishpat*, 22:2 states that even if one accepts a non-Jew as a judge, the acceptance is not binding and it is forbidden to appear before that judge. Rama comments, however, that if one was already judged in such a situation the judgment is binding. Shach 22:16 takes issue with Rama and suggests that there is a difference between acceptance of non-Jewish law which is forbidden and acceptance of a specific non-Jewish judge which is permitted. *Netivot ha-Mishpat, Chiddushim* 22:14 rejects Shach's opinion and writes that even acceptance of a specific gentile judge is prohibited. *Aruch Hashulchan, Choshen Mishpat*, 22:8 explains that Shach permitted acceptance of a specific gentile judge who will judge according to his own logic as opposed to a judge who is bound by a secular body of law. *Aruch Hashulchan* seems to understand that the nature of the prohibition is one of rejecting Torah law by replacing it with a foreign system of law. Acceptance of a gentile judge to rule according to his own judgment is not acceptance of another system of law. *Aruch Hashulchan* rules according to Shach and against *Netivot ha-Mishpat*. In effect, *Aruch Hashulchan* and Shach permit arbitration since an arbitrator is not bound by a body of law. However, *Halacha Pesukah, Choshen Mishpat*, 22:13 views the question of arbitration as a disagreement between Shach and *Netivot ha-Mishpat* and rules according to *Netivot ha-Mishpat* who forbids arbitration before a non-Jew. See, however, R. Bleich, *Contemporary Halakhic Problems* V, 21-23 (and R. Bleich, *Be-Netivot ha-Halachah* II, 171), who understands that *Netivot ha-Mishpat* never argued with Shach about a case of arbitration. Rather, *Netivot ha-Mishpat* understood that Shach permitted acceptance of a single non-Jewish judge even if bound by secular law and as such rejected Shach's view. However, even

C. Ramifications of Violation of the Prohibition

1. Appearance in *Beit din* after Secular Court

Rama rules that one who brings a case to secular court and does not prevail may not later insist on *beit din* adjudication.[36] Some authorities have expanded Rama's ruling to include instances in which secular court activities have taken place, but no final judicial decision has been rendered.[37] This means that in some cases a *beit din* may

Netivot ha-Mishpat would agree that acceptance of an arbitrator who is not bound by secular law would be permitted.

Many *poskim* seem to take the view of Shach as understood by *Aruch Hashulchan*. *Teshuvot Tzitz Eliezer* XI, no. 93 permits settlement of cooperative housing disputes by an official appointed by the government since the official is not bound by a set of laws and judges based on the official's view of fairness and equity. R. Waldenberg's ruling carries added significance, since, in effect, he even permits arbitration that is mandated by law.

See *Piskei Din Rabaniim shel Batei Din Ha-Eizoriim Be-Yisrael* XIII: 330-334 (Ashdod 1982) who permit adjudication by the Israeli Union of Engineers and Architects. They base their opinion on R. Karelitz, *Chazon Ish – Sanhedrin*, 15:4 who also differentiates between judges bound by a secular set of laws and judges who decide based on logic and fairness. See a similar conclusion in *Piskei Din Rabaniim* VII: 231 reached by the High Rabbinic Court of Jerusalem headed by R. Yitzchak Nissim, R. Yosef Shalom Elyashiv, and R. Eliezer Goldschmidt. See R. Avraham Chaim Sherman, *"Maamad Beit din Shel Tenuah Al Pi Halacha," Techumin* XIV (1994): 159-164 who similarly permits arbitration before a political union as well as settlement of a dispute by an expert in a certain area since the expert is judging based on expertise and not based on a specific set of laws. See *Kovetz ha-Poskim, Choshen Mishpat*, 26: 207 who quotes *Teshuvot Pri Eliyahu* III, no. 84 and *Teshuvot Kisei Shlomo*, no. 1 who permit "courts of merchants" on the same grounds. See R. Broyde, *The Pursuit of Justice and Jewish Law*, 127 who follows the view of *Aruch Hashulchan*.

R. Sherman adds based on a careful reading of Mei'ri, *Beit ha-Bechirah, Sanhedrin* 23a, that arbitrators are allowed to rule according to secular law if they deem it fair and equitable, as long as they are not bound by secular law. R. Yonah Reiss adds that it may even be permissible for two parties to appear before an arbitrator and stipulate that the arbitrator should judge based on secular law. If one assumes that one may make such a stipulation in front of *beit din* (see note 34), one can similarly argue that it would be permissible to do so before an arbitrator as well.

An interesting case that may arise with regard to arbitration is that of an adversary who refuses to appear before *beit din* but would be willing to go to a non-Jewish arbitrator. Is one required to follow suit since arbitration by a non-Jew is also permitted or may one consider such an individual non-compliant and proceed to secular court? R. Broyde, *The Pursuit of Justice and Jewish Law*, 128 argues that one is not required to go to arbitration since even according to Jewish law one is not required to accept a hearing of *"pesharu"* or compromise. Rather, the litigant can appear before secular court after receiving permission from *beit din*. R. Bleich, *Contemporary Halakhic Problems V*, 37 writes that accepting arbitration in such a situation would be "praiseworthy but is not mandatory if the plaintiff believes that a court is more likely to grant an award in, or closer to, the amount he is entitled to recover according to Jewish Law."

[36] See R. Bleich, *Contemporary Halakhic Problems* V, 22-23 and *Teshuvot Az Nidberu* III, no. 74. Perhaps this is explicit in *Shulchan Aruch, Choshen Mishpat*, 26:1 who writes that it is forbidden to adjudicate "in front of non-Jewish judges and in their courts." The addition of the words "and in their courts" may indicate that adjudicating in their courts even when not in front of their "judges" is forbidden as well. Appearance before arbitrators in such a setting would not be considered appearance before their "judges" but would be considered appearance "in their courts."

decline to issue a summons to appear in *beit din* on behalf of a party that has already participated to some degree in secular court litigation. In some cases, the *beit din* may issue a summons, but will not issue a *seruv* if the recipient of the summons fails, ultimately, to appear before *beit din*.

Where a party to ongoing litigation in secular court requests that the Beth Din of America invite the other party to move the case to *beit din*, the Beth Din will generally do so. However, if the other party declines to submit the matter to *beit din*, the Beth

[39] *Shulchan Aruch, Choshen Mishpat*, 26:1

[40] There are at least two explanations to Rama's ruling. Some explain that appearance before a secular court is tantamount to acceptance of its decision and ipso facto the decision is binding. Others explain that Rama's ruling represents a penalty *(kenas)* imposed by *halacha* against Jews who utilize the secular courts. *Netivot ha-Mishpat, Beurim*, 26:2 quotes both explanations as offered by the *Tumim*. See R. Pinchas Horowitz (1731-1805), *Chiddushei Hafla'ah, Choshen Mishpat*, 26:1 who adopts the first explanation. *Netivot ha-Mishpat* writes that a difference between the two reasons would arise in a case where the judge in secular court was bribed. In such a case the ruling might not be binding under Jewish law but a penalty would still be in order. *Netivot ha-Mishpat* concludes that since no *halachic* authorities raise this distinction, the penalty theory must be the more accurate explanation. See *Biur ha-Gra, Choshen Mishpat*, 26:4 who also adopts this explanation.

If one accepts the penalty theory, a penalty may be appropriate even if a ruling has not yet been issued in secular court. Whereas acceptance of a ruling of a non-Jewish judge is only binding once a decision is made (see Rama, *Choshen Mishpat*, 22:2) penalization for appearing before a secular court may be appropriate once the prohibition of appearing before a secular court has been violated. This suggestion is made by R. Meir Arik (1855-1926), *Teshuvot Imrei Yosher*, no. 36 and R. Aryeh Leib Grosnas (1912-1996), *Teshuvot Lev Aryeh*, no. 51. However, both reject this distinction. *Lev Aryeh* points out that if this distinction is correct, it should have been mentioned by *Netivot ha-Mishpat* who instead quotes the much less likely scenario of bribery. *Imrei Yosher* and R. Shlomo Yehuda Tabak (1832-1907), *Erech Shai, Choshen Mishpat*, 26, argue that penalization of an individual before the conclusion of a civil court proceeding would "lock the doors before those who wish to repent." *Imrei Yosher* as well as *Teshuvot Ve-Hanhagot* III, no.441 also add that not allowing someone to return to *beit din* if he is already in the middle of a civil court proceeding would cause him to violate the prohibition of appearing before secular courts every second that he is there. R. Shternbuch *(Teshuvot Ve-Hanhagot)* also points out that the phrascology of Rama implies that he refers specifically to an attempt to resort to *beit din* after an unfavorable opinion has already been rendered in secular court. One could respond that Rama was merely referring to the most common case, since most will only take the case to *beit din* after actually losing in court. Those who reject this distinction would argue that penalization of the individual is only appropriate when he violated the prohibition to such a degree that he allowed it to come to a final decision.

See R. Chaim Halberstam (1793-1876), *Divrei Chaim, Choshen Mishpat* II, no. 1, who discusses a case where a plaintiff left a secular court before the final decision and returned to *beit din*. He rules that the defendant must return to *beit din* as long as he is reimbursed for any expenses he was forced to pay in order to defend himself in secular court. See R. Aharon Volkin (1865-1942), *Teshuvot Zekan Aharon, Choshen Mishpat* II, no. 125 who rules that one can compel his adversary to return to *beit din*, even after a decision is rendered in secular court, as long as the reward was not yet collected. Also see R. Batzri, *Dinei Mamonot* I, no. 5:4 who rules that *beit din* should accept a case previously brought to secular court as long as no decision is rendered in secular court. He argues that since Rama's ruling is not accepted by everyone, and Rama's reasoning may not be due to the reason of penalization, and Rama's phraseology implies that penalization is appropriate only after a decision is rendered, *beit din*

Din will generally not issue a *seruv* if (i) the plaintiff in civil court is the party requesting *beit din* adjudication and he or she did not obtain prior permission to adjudicate the matter in secular court or (ii) the defendant in civil court is the party requesting *beit din* adjudication and the civil court action has already reached a stage of "substantial judicial involvement,"[40] as determined by the Beth Din based on a review of submissions by the parties.[41] As a practical matter, this means that a party risks losing the ability to compel an adversary to appear before *beit din* as a result of initiation of or participation in secular court proceedings. It is therefore advisable that any action in secular court, other than for emergency injunctive relief, only be taken after first attempting *beit din* adjudication.

should accept a case that was not completed in secular court. However, Maharil Diskin, in the collection of rulings based on his manuscripts in the back of his responsa, no. 20 writes that one who issues a *"pazeva"* (seemingly a summons) is not deemed to have gone to secular court since only words were spoken and no court action was taken. One may infer from here that any action taken in court beyond a summons, such as actual appearance, would be tantamount to violation of the prohibition and subject to penalization. See R. Avraham Dov Berkowitz, *"Teviah bi-Beit din Liachar Teviah bi-Arkaot,"* *Techumin* XV (1995): 228-244 and R. Mordechai Willig, *"He'arot Birtiv Perek Zeh Borer," Beit Yitzchak* 36 (2004), 24-25 who conclude that penalization of one who went to secular court is in order even before a decision was rendered. See *Teshuvot Ve-Hanhagot* III, no.443 who writes that some *batei din*, including the *beit din* of the Eidah Hacharedis of Jerusalem, have the practice of not hearing any case previously brought to secular court. Even though strictly speaking the ruling of Rama may not apply, such a practice is customary to properly enforce compliance with the prohibition of going to secular court.

The foregoing analysis pertains to the ability of a litigant to insist on *beit din* adjudication following resort to the secular courts, and to the appropriateness of the imposition of a *seruv* against a litigant who declines to submit to *beit din* after secular court proceedings have already begun. In contrast, *Teshuvot Lev Aryeh* 52 writes that in a case where both the plaintiff and the defendant wish to return to *beit din*, everyone would agree that *beit din* would not be required to penalize the plaintiff for bringing the case to secular court and the case should be heard by *beit din*. However, see R. Berkowitz, *"Teviah bi-Beit din Liachar Teviah bi-Arkaot,"* 228-244, who suggests that if the reason for Rama's ruling is penalization, *beit din* should be required to penalize the plaintiff by not hearing the case even in a situation where the defendant is willing to go to *beit din*. He points out that this would depend on whether the nature of the penalty is for the purpose of protecting the honor of *beit din* or for the purpose of protecting the defendant.

[41] *Shu"t Maharsham* I, no. 89 writes that even though a defendant who is summoned to secular court inappropriately is allowed to defend himself or herself without permission from *beit din*, in a case where the defendant makes certain investments and demands an oath from the plaintiff, the defendant thereby demonstrates an intention to bring the case before secular court and an acceptance of the jurisdiction of the secular court. See R. Shlomo Zalman Braun, *She'arim Metzuyanim be-Halacha - Kitzur Shulchan Aruch*, no. 181 who quotes Maharsham as ruling this way in any case where a defendant appears before secular court without requesting that the case be brought to *beit din*, regardless of the degree of involvement of the defendant in court. It follows, that a defendant who participates to some degree in secular court proceedings is subject to Rama's ruling to the same degree as the plaintiff who initiated secular court proceedings.

It should be noted that Maharsham's logic seems to be based on the assumption that the ruling of Rama under discussion is based on the reasoning that appearance in court implies acceptance of

2. Award Not in Accordance with Jewish Law

Someone who appears before secular court when not permitted to do so according to Jewish law and is granted an award that is more than he or she would be entitled to according to Jewish law may not accept such an award and is guilty of theft if he or she does so.[41]

The centrality of the prohibition against litigating in secular courts cannot be overstated. The comparison of one who violates the prohibition to "one who worships idols" and one who "raises a hand against the Torah of Moses" highlights the fact that with adherence to this commandment we are recognizing the Torah's legal system and none other as the guiding principle in our lives. On the flipside, violation of the

the secular court decision. As such, Maharsham's ruling should only apply if we accept that reason and should only apply if the secular court proceeding reached the point of a final decision. *Netivot ha-Mishpat* and *Biurei ha-Gra*, who preferred the other explanation of Rama's ruling set forth above, would not necessarily apply Rama's ruling to a defendant. However, see *Teshuvot ve-Hanhagot* III, no. 443 who writes that while someone who is summoned by a non-observant Jew to secular court cannot be held accountable for not attempting to bring the case to *beit din* since he may have justly assumed his attempt would be futile, someone summoned by an observant Jew who does not protest may be subject to penalization as well since he should have tried to bring the case to *beit din*. Also see *Teshuvot ve-Hanhagot* III, no. 441 sec.3. See *Imrei Binah, Choshen Mishpat*, no. 27, who cites those who ruled that a defendant who did not voice his opposition to being brought before a secular court loses his right in *beit din* to demand repayment for legal expenses spent in secular court. *Imrei Binah* himself rejects such a view.

[41] In cases involving a party requesting a *get* (Jewish divorce) the Beth Din may determine that a *seruv* is appropriate notwithstanding prior secular court proceedings, since the issue of the *get* is only justiciable in *beit din*.

[42] *Shu"t Tashbetz* II, no. 290 writes that where a secular court issues an award in excess of what a *beit din* would award, a litigant who collects on such an award violates the prohibition of theft (in addition to any violation of the prohibition of litigating in secular court, to the extent the prohibition applies in the given case). Such an individual would be labeled a "thief" and disqualified from serving as a witness, and title to any property collected on such a judgment would not vest under Jewish law. He writes that "this point is so obvious that it does not need to be written." *Chidushei R. Akiva Eiger, Choshen Mishpat* 26:1 quotes Tashbetz and *Chidushei Haflaah, Choshen Mishpat*, 26:2 makes a similar point. Also see R. Batzri, *Dinei Mamonot* I, no. 5:6.

Many authorities assume that this is the case even if one or both of the litigants had received prior permission from *beit din* to go to secular court. It is for this reason that *Netivot ha-Mishpat* 26:3 does not allow a *beit din* to give permission to a plaintiff to go to secular court unless the plaintiff has demonstrated to the *beit din* that the case is compelling (lest such permission result in an improper award by the secular court to the plaintiff). Although normative *halacha* does not follow this practice, the concern nevertheless remains. See R. Avrohom Borenstein (1838-1910), *Teshuvot Avnei Nezer, Yoreh Deah*, no. 133:2 who writes that an adversary's refusal to follow the laws of the Torah does not make it permissible to steal from the adversary. *Teshuvot ve-Hanhagot* III, no. 445 warns that one should consult a halachic authority before going to secular court. However, he adds that one who knows they are owed a certain sum but lacks the witnesses to receive the award according to Jewish law, is not in violation of theft if the amount is received through an award from secular court. See *Teshuvot ve-Hanhagot*

prohibition serves as a rejection of the Torah itself. It is the hope of this author that a greater understanding of the issues at hand and a clearer perspective on the rules and exceptions will aid the reader in properly observing this vital commandment, ultimately leading to the fulfillment of our daily prayer for "restoration of our judges as in earlier times, and our counselors as it was at first."

Rabbi Yaacov Feit is a member of the Norman Lamm Yadin Yadin Kollel of the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University. He also serves as the inaugural intern of the joint program of the Rabbi Norman Lamm Yadin Yadin Kollel and the Beth Din of America. Rabbi Feit is also a rebbe at the Joseph Kushner Hebrew Academy in Livingston, New Jersey.

III, no. 444 where he permits accepting an insurance award for injury that is not in accordance with Jewish law, since the parties bound themselves to such a monetary agreement. R. Yosef Shalom Elyashiv is quoted by R. Mordechai Ralbag, "*Hitdayanut bi-Arkaot bi-Heter Beit din*," *Techumin* XXV (2005): 250-251, as saying that one must speak to a *halachic* authority before accepting an award and suggests that *beit din* mention this point when granting permission to go to secular court. R. Weiss, *Minchat Asher Devarim*, 3:4 also writes that one must go to a *beit din* after going to secular court in order to ensure that the reward is appropriate according to Torah law. Also see R. Landesman, "*Teshuva bi-Inyan Arkaot*," 706, who also assumes that permission granted by *beit din* to appear before secular court is on condition that one will not collect more than the amount deserved according to Torah law. Also see, R. Bleich, *Contemporary Halakhic Problems* V, 26-27, 35 who makes this point as well.

See, however, R. Willig, "*He'arot Bireish Perek Zeh Borer*," 23 who suggests based on a view of *Or Zarua* that the prohibition of theft only applies when one is not allowed to be in secular court. When one has permission to appear before secular court the prohibition is lifted and the principle of "*dina demalchuta dina*" applies. Also see *Teshuvot ve-Hanhagot* III, no. 441, who deals with the question of why one may go to secular court when an adversary refuses to go to *beit din*, despite the fact that appearance in secular court is biblically prohibited. He suggests that *beit din*'s approval of appearance in secular court is really a way for *beit din* to punish a non-compliant individual by subjecting that individual to whatever the secular court decides. The implication of such an argument is that it would be permitted in such a case to accept an award granted by secular court even though it is in excess of the award that would be granted by Torah law. R. Kohn, "*Akipat Kiyum Psak Pashrunim Al Yedei Arkaot*," 191, uses a similar argument to explain the practice to not follow the view of the *Netivot ha-Mishpat* cited above. Since permission to go to secular court is viewed as a way for *beit din* to punish a non-compliant individual, it is irrelevant if the individual is guilty or not since that individual is responsible for the loss he or she will incur. The implication again, is that in such a situation one may accept an award greater than the amount that would have been awarded in *beit din*. This would not be viewed as theft but as a punishment that the non-compliant individual brought upon himself or herself.

199 N.J. 456

Christine Saba PAWZY, Plaintiff-Appellant and Cross-Respondent,

v.

Samih M. PAWZY, Defendant-Respondent and Cross-Appellant.

Supreme Court of New Jersey.

Argued Feb. 3, 2009.
Decided July 1, 2009.

Background: Father appealed judgment of the Superior Court, Chancery Division, Family Part, Middlesex County, confirming and enforcing arbitration award in matrimonial action as to child-custody and parenting-time issues. The Superior Court, Appellate Division, 400 N.J.Super. 557, 948 A.2d 709, Simonelli, J.S.C., temporarily assigned, reversed and remanded for plenary hearing. The Supreme Court granted certification.

Holdings: The Supreme Court, Long, J., held that:

(1) right to parental autonomy subsumes the right to submit issues of child custody and parenting time to arbitrator;

(2) review of child-custody arbitration award is to take place within confines of Arbitration Act absent a claim of adverse impact or harm to child;

(3) if there is a finding of harm from child-custody arbitration decision, it will fall to court to decide what is in child's best interests;

(4) in arbitration of child custody and parenting time, record of all documentary evidence shall be kept, all testimony shall be recorded verbatim, and arbitrator shall record findings of fact and conclusions of law with focus on child's best interests;

(5) colloquy on the record, without written agreement, was inadequate to assure that parties fully understood consequences of removing child custody dispute from judicial arena; and

(6) guardian ad litem should not serve as arbitrator regarding child-custody issues.

Affirmed.

1. Alternative Dispute Resolution ⇐112

Although arbitration is traditionally described as a favored remedy, it is, at its heart, a creature of contract.

2. Alternative Dispute Resolution ⇐112

In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute, and subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be.

3. Alternative Dispute Resolution ⇐134(1)

Contractual clause depriving a citizen of access to the courts should clearly state its purpose, with the point being to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.

4. Estoppel ⇐52.10(2)

A party's waiver of statutory rights must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.

5. Alternative Dispute Resolution ⇐143

A court may not rewrite a contract to broaden the scope of arbitration.

6. Alternative Dispute Resolution ⇐377(1)

The scope of review of an arbitration award is narrow; otherwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined. N.J.S.A. 2A:23B-22, 2A:23B-23(a), 2A:23B-24(a).

7. Child Custody ⇐22
Parent and Child ⇐2.5

The right of parents to the care and custody of their children is not absolute.

8. Infants ⇐154.1

The state has an obligation, under the parens patriae doctrine, to intervene in matters involving care and custody of children where it is necessary to prevent harm to a child.

9. Infants ⇐154.1

Potential harm to the child is the constitutional imperative that allows the state to intervene into the otherwise private and protected realm of parent-child relations.

10. Child Custody ⇐419
Infants ⇐154.1

The right to parental autonomy subsumes the right to submit issues of child custody and parenting time to an arbitrator for disposition.

11. Parent and Child ⇐2.5

The entitlement to autonomous family privacy includes the fundamental right of parents to make decisions regarding custody, parenting time, health, education, and other child-welfare issues between themselves, without state interference, and that right does not evaporate when an intact marriage breaks down.

12. Child Custody ⇐419

When matrimonial litigants reach a settlement on issues regarding child custody, support, and parenting time, as a practical matter the court does not inquire into the merits of the agreement; it is only when the parents cannot agree that the court becomes the default decision maker.

13. Child Custody ⇐314

Review of a child-custody arbitration award is to take place within the confines of the Arbitration Act unless there is a claim of adverse impact or harm to the child. N.J.S.A. 2A:23B-22, 2A:23B-23(a), 2A:23B-24(a).

14. Child Custody ⇐419, 460

Where harm to the child as a result of a child-custody arbitration decision is claimed and a prima facie case advanced, the court must determine the harm issue, and if there is a finding of harm, the presumption in favor of the parents' choice of arbitration will be overcome and it will fall to the court to decide what is in the child's best interests.

15. Child Custody ⇐314

Mere disagreement with arbitrator's child-custody decision will not satisfy the harm standard for applying a best-interests analysis, as opposed to narrow standard of review under Arbitration Act, in reviewing the decision. N.J.S.A. 2A:23B-22, 2A:23B-23(a), 2A:23B-24(a).

16. Child Custody ⇐419, 421

When parties in a dissolution proceeding agree to arbitrate their dispute, the general rules governing the conduct of arbitration shall apply, except that, with respect to child-custody and parenting-time issues only, record of all documentary evidence shall be kept, all testimony shall be recorded verbatim, and arbitrator shall state in writing or otherwise record findings of fact and conclusions of law with a focus on child's best interests. N.J.S.A. 2A:23B-1 et seq.

17. Child Custody ⇐924

Any arbitration award regarding child-custody and parenting-time issues that results from procedures other than those mandated by the Supreme Court will

be subject to vacation upon motion. N.J.S.A. 2A:23B–23.

18. Alternative Dispute Resolution ⇐132

An agreement to arbitrate must state in clear and unmistakable language: (1) that the parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right; (2) that the parties are aware of the limited circumstances under which a challenge to the arbitration award may be advanced and agree to those limitations; (3) that the parties have had sufficient time to consider the implications of their decision to arbitrate; and (4) that the parties have entered into the arbitration agreement freely and voluntarily, after due consideration of the consequences of doing so. N.J.S.A. 2A:23B–1 et seq.

19. Alternative Dispute Resolution ⇐143

Parties are not bound under Arbitration Act to arbitrate on an all-or-nothing basis, but may choose to submit discrete issues to the arbitrator. N.J.S.A. 2A:23B–1 et seq.

20. Alternative Dispute Resolution ⇐143

Arbitration agreement should reflect, with specificity, which issues are to be subject to an arbitrator's decision. N.J.S.A. 2A:23B–1 et seq.

21. Child Custody ⇐419, 924

Colloquy on the record, conducted in absence of written arbitration agreement, was inadequate to assure that parties to matrimonial action fully understood consequences of removing child custody dispute from judicial arena, and therefore child-custody arbitration award could not stand; trial judge did not fully explain parties' statutorily limited ability to challenge award without changed circumstances, did not allude to particular standards under which modification or vacation of award would be allowed or what other standards would warrant judicial intervention, and erroneously suggested that bias on part of arbitrator would not be a basis for challenging award. N.J.S.A. 2A:23B–1 et seq., 2A:23B–23(a)(2).

22. Child Custody ⇐419

A guardian ad litem who is appointed in a dispute regarding child custody and parenting time should not, either simultaneously or sequentially, serve as an arbitrator regarding child-custody issues, in view of possibility of being be privy to facts about which parties have no knowledge and which thus have not been tested by cross-examination, potential claims of partiality, potential conflicts in the event guardian ad litem must testify if case for some reason goes back to court, and prohibitions against an arbitrator's becoming a witness except in the narrow circumstance of a challenge based on corruption, fraud, or undue means. N.J.S.A. 2A:23B–14, 2A:23B–23(a); R. 5:8B(a).

Brian G. Paul, Lawrenceville, argued the cause for appellant and cross-respondent (Szaferman, Lakind, Blumstein & Blader, attorneys).

Dale E. Console, Kingston, argued the cause for respondent and cross-appellant.

Peggy Sheahan Knee, submitted a brief on behalf of amicus curiae New Jersey State Bar Association (Ms. Knee, President, and Einhorn, Harris, Ascher, Barbarito & Frost, attorneys; Ms. Knee and Bonnie C. Frost, Denville, on the brief).

Justice LONG delivered the opinion of the Court.

At issue in this appeal is whether parties to a matrimonial action may agree to submit questions regarding child custody and parenting time to binding arbitration, and if so, what standard of review will apply. More particularly, we have been asked by a matrimonial litigant to declare arbitration of issues involving children an affront to the exercise of our *parens patriae* jurisdiction. Alternatively, we have been requested to establish a best-interests standard as the basis for judicial intervention into an otherwise binding arbitration award.

We hold that within the constitutionally protected sphere of parental autonomy is the right of parents to choose the forum in which their disputes over child custody and rearing will be resolved, including arbitration. Deference to the parties' choice of forum requires certainty regarding that choice; an agreement to arbitrate must be in writing or otherwise recorded and must clearly establish that the parties are aware of their rights to a judicial determination and have knowingly and voluntarily waived them. Once arbitrated, the matter is subject to review under the narrow provisions of New Jersey's version of the Uniform Arbitration Act ("Arbitration Act"), *N.J.S.A.* 2A:23B–1 to –32. The only exception is the case in which a party establishes that the arbitrator's award threatens harm to the child. Best interests is not the standard for judicial review of an arbitration award. Only a threat of harm will justify judicial infringement on the fundamental right of parents to decide how to resolve disputes over their children's upbringing.

A child-custody or parenting-time arbitration should be conducted in accordance with the principles established in the Arbitration Act. However, because the Arbitration Act does not require the recording of testimony or a statement of findings and conclusions by the arbitrator, we depart from it by mandating that a record of all documentary evidence adduced during the arbitration proceedings be kept; that testimony be recorded; and that the arbitrator issue findings of fact and conclusions of law in respect of the award of custody and parenting time. Without that, courts will be in no position to evaluate a challenge to the award.

I.

Plaintiff, Christine Saba Fawzy, and defendant, Samih M. Fawzy, were married on September 28, 1991, and have two children born in 1996 and 1997, respectively. On September 13, 2005, Mrs. Fawzy filed a complaint for divorce. Leonard R. Busch, Esq., was appointed as guardian ad litem for the children.

On January 22, 2007, the day on which the trial on all issues was to take place, the parties apparently notified the judge that they had agreed to arbitrate in place of proceeding to trial. The judge informed Busch, who appeared by telephone, that "the lawyers have agreed to this: that they're really going to convert or actually double your hat [in] that they're asking you to also serve as the binding arbitrator in this case on all issues" and that "the bottom line is that you should be aware that the parties have agreed to let you arbitrate all issues." The judge stated that he would delay issuing the judgment of divorce until March 5, 2007, which would give the parties six weeks to complete the arbitration proceedings.

During the same proceeding, after dealing with issues of fees and payments, the attorney for Mr. Fawzy asked that the parties be sworn and place on the record their agreement to submit the case to arbitration. The following colloquy ensued:

[THE COURT:] Both of you need and want closure as do your children. Arbitration is unappealable. If I make a decision and either of you decides to

take it to a higher court, arbitration is unappealable. You can never—neither you nor she can ever return to court, except in one or two circumstances. And here's how you can return.

If there's a change of circumstances, you can return. Now, a change of circumstances is a legal term of art. What that means is—let me give you a hypothetical. You've got two children. Issues regarding [ ] children are always open.

Let me give you an example as to children as to money. If down the road, you or your wife believe that—that circumstances have changed and that the best interests of your children will be served by a modification of Mr. Busch's order, which again as the arbitrator he's—he'll be deciding parenting time, not recommending it. He'll be deciding it. If down the road, either of you think that his—his order should be modified, you can make an application to [the] court.

Let's assume there's a child support obligation, and I assume there will be. If someone's financial circumstances change, you can return to court. Child support can always be revisited. Alimony, too, theoretically, but I'm addressing child support since that's my primary concern.

I think the incomes are, again, about $80,000.00 and $40,000.00. If, hypothetically, someone's income doubles and this are not—these are no magic barometers. If someone's income doubles or if someone loses their job, someone can say we need a modification of the financial obligations.

Here's what you can't do. You can't come back to me and say I don't like the award or I think Mr. Busch was partial or I think he was unbalanced. Neither side could do that.

But either side could come back and say since Mr. Busch decided this matter or—or—or gave a decision, things have changed. For example, Mrs. Fawzy could [s]ay—let's assume Mrs. Fawzy has the children. She can say Mr. Fawzy won the lottery, so, therefore, I want more money for our children for them to go to, say, better camps.

And Mr. Fawzy vice versa. If Mrs. Fawzy hypothetically wins the lottery—this suggests, obviously, a very extreme example—you could say well, my God, she should be paying more of the children's—because she's got all this extra money—because when it comes to the issue of child support, all sources of income are available.

If either of you, say, got an inheritance, that is your property, not subject to distribution. Inheritances belong to the person inheriting it, period, except for this. If either of you inherited money, I could look at that as to a child support obligation, but I can't give the other side a part of it. That's the difference between what I call equitable distribution and support.

If either of you—if either of you inherits a — a — a building that pays off rents, neither side will ever get a piece of the building because that remains theirs. But I could look at the rents to say well, out of those rents, child support should be changed.

So, there's a difference between giving someone a piece of property and considering it income flow from an inheritance. There's a difference. But I only—oh.

There's one other instance in which you can return to court. To enforce the award. If Mr. Busch's award says X dollars in child support and someone's not paying it, you can come back to court to enforce that. But you can't come back to court because you've said I don't like Mr. Busch's decision.

Okay. Now, before either side is questioned by their attorney, Mrs. Fawzy, do you understand and agree to everything I just said?

MRS. FAWZY: Yes, I do.

THE COURT: Sir, do you?

MR. FAWZY: Yes, I do.

THE COURT: Okay. Thank you.

Now, Mr. Burns, do you want to ask your client any questions?

MR. BURNS: No, Judge. I think she's testified that she understands and is willing to be bound by it.

Mr. Goldstein, Mr. Fawzy's attorney, then questioned his client:

[MR. GOLDSTEIN]: Mr. Fawzy, Judge Berman said it, and I said it to you. It's now about 5 after 12:00 and we've been here virtually since 9:00 a.m. discussing after Mr. Burns and I came out of chambers the prospect of this arbitration, and I've been talking to you on and off about it. Is that correct?

[MR. FAWZY]: Yes.

[MR. GOLDSTEIN]: Do you understand that nobody's forcing you or coercing you, that this is, in fact, a voluntary course of action that you're pursuing?

[MR. FAWZY]: Yes.

[MR. GOLDSTEIN]: And if—if you chose not to do it, the Judge could not and would not frown upon you and Judge Berman would do his job and hear your case in the future. Do you understand that?

[MR. FAWZY]: Yes.

[MR. GOLDSTEIN]: In fact, Judge Berman was ready to try your case today, but for a host of reasons the case isn't ready because of issues with Mr. Busch and—and not his doing but we need Mr. Busch and also Dr. Rosenbaum. Do you understand that?

[MR. FAWZY]: Yes.

When asked if he had any questions, Mr. Fawzy only inquired about the implications of a statement that the judge had made about the family income.

On March 6, 2007, judgment of divorce was entered, including reference to the agreement to arbitrate. The attorneys signed an interim arbitration order on March 14, 2007 which stated that "[t]he parties agreed to enter into Binding Arbitration pursuant to *N.J.S.A.* 2A:24–1, et seq."[1]

Subsequently, Busch heard testimony regarding custody and parenting time. On March 28, 2007, while the arbitration process was in progress, Mr. Fawzy filed an order to show cause seeking to restrain Busch from issuing a custody or parenting-time award, on the grounds that those issues could not, as a matter of law, be arbitrated, and that, in any event, he was rushed and pressured into agreeing to the arbitration.

At a hearing on March 29, 2007, Mr. Fawzy's attorney argued, among other things, that his client felt he would be seen in a "bad light" and as uncooperative if he did not agree to arbitration. The judge denied the application, noting that Mr. Fawzy's characterization of the arbitration as unreviewable was inaccurate because the award could be modified based on

1. Although the interim order indicated that the parties were submitting their dispute to "Binding Arbitration pursuant to *N.J.S.A.* 2A:24–1, et seq.," in 2003 that statute was partially superseded by *N.J.S.A.* 2A:23B–1 to –32, *L.* 2003, *c.* 95. All agreements to arbitrate made on or after January 1, 2005, are governed by *N.J.S.A.* 2A:23B–1 to –32, except for collective bargaining agreements. *N.J.S.A.* 2A:23B–3(c). *N.J.S.A.* 2A:24–1 to –11 now governs only the arbitration of collective bargaining agreements.

changed circumstances, and [1]the award could be vacated under *N.J.S.A.* 2A:24-8(d) if the arbitrator exceeded his powers or if he executed them imperfectly.

Busch issued a custody and parenting-time award on April 4, 2007, which granted the parties joint legal custody with primary physical custody to Mrs. Fawzy; designated Mrs. Fawzy as the parent of primary residence; and granted Mr. Fawzy weekday, weekend, vacation, and holiday parenting time. Arbitration continued on the remaining financial issues.

On May 14, 2007, Mr. Fawzy filed a second order to show cause, that time to vacate the arbitration award and to disqualify Busch from any further participation in the case. In the alternative, he requested that the court review the award de novo or stay the award pending appeal. Mr. Fawzy certified that he did not understand the rights he was waiving when he agreed to arbitration, and that he had not been involved in the process that led to the interim order. The trial judge denied that application after a hearing and entered an amended judgment of divorce on May 14, 2007, which confirmed the award; he also ordered both Mr. and Mrs. Fawzy to comply with its terms.[2]

Mr. Fawzy appealed, contending that parties cannot submit custody issues to binding arbitration because doing so deprives the court of its *parens patriae* obligation to assure the best interests of the child. In reversing, the Appellate Division noted that it was "troubled by [Mr. Fawzy]'s failure" to establish that the award would harm the children, *Fawzy v. Fawzy*, 400 *N.J.Super.* 567, 570, 948 *A.2d* 709 (App.Div.2008), but ultimately held that matrimonial litigants cannot submit custody issues to final, binding, non-appealable arbitration, *id.* at 572, 948 *A.2d* 709. Thus, the Appellate Division reversed the trial judge's decision and remanded for a plenary hearing on the custody and parenting-time issues. *Id.* at 572, 948 *A.2d* 709.

[1]Mrs. Fawzy filed a petition for certification, and Mr. Fawzy filed a cross-petition on the issue of whether an arbitrator in a child-custody proceeding may also serve as a guardian ad litem in that proceeding. We granted both the petition and cross-petition, 196 *N.J.* 595, 960 *A.2d* 391 (2008), and now affirm the judgment of the Appellate Division, but not for the reasons it expressed.

II.

Mrs. Fawzy argues: that arbitration of custody and parenting-time issues is authorized under the Arbitration Act; that this Court should provide a procedure that would permit parents to engage in binding arbitration for custody and parenting time; that any holding that grants litigants an automatic de novo review of an arbitrator's custody determination would result in two custody trials in virtually every arbitrated custody case, directly conflicting with the public policy rationale underlying arbitration; and that the court's *parens patriae* power should be limited to instances where there is a showing that the child has been placed at serious risk of harm.

Mr. Fawzy counters: that the interim order signed by both parties incorrectly indicated the arbitration would be held pursuant to *N.J.S.A.* 2A:24-1 to -11, a provision governing collective bargaining; that the best interests of the child cannot be protected within the confines of the statutory framework of *N.J.S.A.* 2A:23B-1 to -32; that the public policy underlying the Court's *parens patriae* obligations precludes binding arbitration of custody issues; that parties must have a written agreement defining the scope of binding arbitration, including a requirement that the arbitration process be on record with full findings of fact and conclusions of law; that parties must be given adequate time to agree on the terms of arbitration with full knowledge of the rights they are waiving; that this Court should not impose an affirmative obligation to demonstrate a risk of harm to the children in order to submit arbitrated custody issues to appellate review; and that parties should be afforded automatic review unless it is clear on [1]the face of the award that it will not harm the child's best interests. Finally, he argues that a person who has been appointed guardian ad litem cannot serve as the arbitrator because there is an inherent conflict between the responsibilities of those two roles.

Amicus curiae New Jersey State Bar Association argues that "arbitration of custody/parenting time should be encouraged" and suggests the adoption of the following procedural safeguards: a written arbitration agreement that outlines the structure of the proceeding and the method for review; a record including both the transcript of testimony and the arbitrator's findings of fact and conclusions of law; the application of the *Court Rules* and the *Rules of Evidence*; the application of case law and the best-interests-of-the-child standard; and de novo review of the arbitrator's decision by a trial court.

III.

We begin with some brief observations regarding arbitration, which is "'a method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.'" *Wash. Auto. Co. v. 1828 L St. Assocs.*, 906 *A.2d* 863, 873 (D.C.2006) (alteration in original) (quoting *Black's Law Dictionary* 112 (8th ed. 2004)). "Our courts have long noted our public policy that encourages the 'use of arbitration proceedings as an alternative forum.'" *Weiss v. Morris*, 194 *N.J.* 364, 375-76, 944 *A.2d* 642 (2008) (quoting *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 129 *N.J.* 479, 489, 610 *A.2d* 364 (1992)).

> [Arbitration's] object is the final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between the parties. Arbitration can attain its goal of providing final, speedy and inexpensive settlement of disputes only if judicial interference with the process is minimized; it is, after all, meant to be a substitute for and not a springboard for litigation.
>
> [*Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, 86 *N.J.* 179, 187, 430 *A.2d* 214 (1981) (quotation marks and citations omitted).]

[1][1] "Although arbitration is traditionally described as a favored remedy, it is, at its heart, a creature of contract." *Kimm v. Bisset, LLC*, 388 *N.J.Super.* 14, 25, 905 *A.2d* 887 (App.Div.2006) (citations omitted), *certif. denied*, 189 *N.J.* 428, 915 *A.2d* 1051 (2007); *see also McKeeby v. Arthur*, 7 *N.J.* 174, 181, 81 *A.2d* 1 (1951) ("An arbitration agreement is a contract and is subject, in general, to the legal rules governing the construction of contracts." (citation omitted)). It is for that reason that binding arbitration cannot be imposed by judicial fiat.

[2-5] "In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be."

2. A second amended judgment of divorce was filed on August 3, 2007, which incorporated the final arbitration award on the remaining issues.

In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 *N.J.* 221, 228-29, 403 *A.*2d 443 (1979). As we stated in *Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A.*, 168 *N.J.* 124, 132, 773 *A.*2d 665 (2001):

> In respect of specific contractual language, "[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." *Marchak [v. Claridge Commons, Inc.*, 134 *N.J.* 275, 282, 633 *A.*2d 531 (1993)]. As we have stressed in other contexts, a party's waiver of statutory rights "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." *Red Bank Reg'l Educ. Ass'n [v. Red Bank Reg'l High Sch. Bd. of Educ.*, 78 *N.J.* 122, 140, 393 *A.*2d 267 (1978)]. In the same vein, a "court may not rewrite a contract to broaden the scope of arbitration[.]" *Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc.*, 240 *N.J.Super.* 370, 374, 573 *A.*2d 484 (App.Div.1990).
>
> [(First and fourth alterations in original).]

In 2003, the Legislature adopted the Arbitration Act, which in most respects mirrors the Uniform Arbitration Act. *L.* 2003, c. 95. The Act, which exempts arbitration between employers and employees under collective bargaining agreements, *N.J.S.A.* 2A:23B-3(a), recognizes the contractual nature of the arbitration remedy and sets forth the details of the arbitration procedure that will apply unless varied or waived by contract, *N.J.S.A.* 2A:23B-4. Within the Act are specific provisions governing the arbitration process, including those detailing the method for initiation of the proceedings, *N.J.S.A.* 2A:23B-9; the conduct of the arbitration process itself, *N.J.S.A.* 2A:23B-15; and the issuance of the award, *N.J.S.A.* 2A:23B-19. The Act prescribes standards for confirmation, *N.J.S.A.* 2A:23B-22; vacation, *N.J.S.A.* 2A:23B-23; and modification of an award, *N.J.S.A.* 2A:23B-24. Under the Act, a court will vacate an arbitration award only if:

> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
>
> (4) an arbitrator exceeded the arbitrator's powers;
>
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
>
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.
>
> [*N.J.S.A.* 2A:23B-23(a) (footnotes omitted).]

[6] A modification of the award may be ordered by the court if:

> (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
>
> (2) the arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or
>
> (3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.
>
> [*N.J.S.A.* 2A:23B-24(a).]

As can be seen from those provisions and, as might be expected, the scope of review of an arbitration award is narrow. Otherwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined. *Barcon Assocs., supra*, 83 *N.J.* at 187, 430 *A.*2d 214.

[7] We note that there is no express bar to the arbitration of family law matters in the Arbitration Act. Further, in *Faherty v. Faherty*, we long ago approved the arbitration of some family law issues, alimony and child support in particular. 97 *N.J.* 99, 108-09, 477 *A.*2d 1257 (1984). There we reserved decision on the issue of arbitration of child-custody questions:

> While several states have enforced agreements to arbitrate child support disputes, arbitration of custody and visitation issues has been deemed to be an unacceptable infringement of the court's *parens patriae* role. We do not reach the question of whether arbitration of child custody and visitation rights is enforceable since that issue is not before us. However, we note that the development of a fair and workable mediation or arbitration process to resolve these issues may be more beneficial to the children of this state than the present system of courtroom confrontation. *See* Schepard, Philbrick & Rabino, *Ground Rules for Custody Mediation and Modification*, 48 *Alb. L.Rev.* 616 (1984). Accordingly, the policy reasons for our holding today with respect to child support may be equally applicable to child custody and visitation cases.
>
> [*Id.* at 100, 477 *A.*2d 1257.]

Today, the issue left open in *Faherty*—whether child-custody and parenting-time issues can be resolved by arbitration—is before us.

The legal landscape across the country has changed in the quarter century since *Faherty*, which was decided at a time when few, if any, jurisdictions allowed arbitration of child-custody disputes. Indeed, the majority of our sister states that have addressed the issue have concluded that parents are empowered to submit child-custody and parenting-time issues to arbitration in the exercise of their parental autonomy. *See, e.g., In re Marriage of Popack*, 998 *P.*2d 464, 469 (Colo.Ct.App. 2000); *Dick v. Dick*, 210 *Mich.App.* 576, 584 *N.W.*2d 185, 190-91 (1995); *Miller v. Miller*, 423 *Pa.Super.* 162, 620 *A.*2d 1161, 1163-64 (1993).

We note as well that that conclusion has been urged by the bulk of scholarly writing on the subject. *See, e.g.*, Christine Albano, Comment, *Binding Arbitration: A Proper Forum for Child Custody?*, 14 *J. Am. Acad. Matrimonial Law.* 419 (1997); Joan F. Kessler et al., *Why Arbitrate Family Law Matters?*, 14 *J. Am. Acad. Matrimonial Law.* 333 (1997); Janet Maleson Spencer & Joseph P. Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 *Duke L.J.* 911 (1976); E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 *Wash. & Lee L.Rev.* 1189 (2000); Aaron E. Zurek, Note, *All the King's Horses and All the King's Men: The American Family after*

Troxel, the Parens Patriae Power of the State, A Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes, 27 *Hamline J. Pub.L. & Pol'y* 357 (2006).

Such scholarly support for child-custody arbitration recognizes that it has the potential to minimize the harmful effects of divorce litigation on both children and parents. As Professor Linda Elrod explained:

> Unlike a tort action where the issue is liability and the litigants may never cross paths again, a divorce legally ends a relationship between people who may not have separated emotionally and who must continue to interact as long as there are minor children.... The win/lose framework [of child-custody litigation] encourages parents to find fault with each other rather than to cooperate....
>
> In addition, unlike tort cases that end with a money judgment, issues regarding children remain modifiable throughout a child's minority, giving parents more opportunities to carry on a dispute.... The entire process becomes negative and expensive.
>
> [Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 *Wm. Mitchell L.Rev.* 495, 501-02 (2001).]

On the other hand, "arbitration conducted in a less formal atmosphere, often in a shorter time span than a trial, and always with a fact-finder of the parties' own choosing, is often far less antagonistic and nasty than typical courthouse litigation." Kessler et al., *supra*, 14 *J. Am. Acad. Matrimonial Law.* at 343. In sum, the benefits of arbitration in the family law setting appear to be well established.

That is the backdrop for our inquiry.

IV.

As the arguments of the parties make clear, although the stated issue before us is whether we should permit arbitration of child-custody issues, the case is really about the intersection between parents' fundamental liberty interest in the care, custody, and control of their children, and the state's interest in the protection of those children.

The right to rear one's children is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Wisconsin v. Yoder*, 406 *U.S.* 205, 232-33, 92 *S.Ct.* 1526, 1541-42, 32 *L.Ed.2d* 15, 35 (1972) (explaining "primary role" of parents in raising their children as "an enduring American tradition" and the Court's historical recognition of that right as fundamental). Although often expressed as a liberty interest, childrearing autonomy is rooted in the right to privacy. *See Prince v. Massachusetts*, 321 *U.S.* 158, 166, 64 *S.Ct.* 438, 442, 88 *L.Ed.* 645, 652 (1944) (observing existence of "private realm of family life which the state cannot enter"); *V.C. v. M.J.B.*, 163 *N.J.* 200, 218, 748 *A.2d* 539 (2000) (remarking that "the right of a legal parent to the care and custody of his or her child derives from the notion of privacy"), *cert. denied*, *M.J.B. v. V.C.*, 531 *U.S.* 926, 121 *S.Ct.* 302, 148 *L.Ed.2d* 243 (2000). Eighty years ago in *Meyer v. Nebraska*, the United States Supreme Court characterized the right of parents to bring up their children "as essential to the orderly pursuit of happiness by free men." 262 *U.S.* 390, 399, 43 *S.Ct.* 625, 626, 67 *L.Ed.* 1042, 1045 (1923) (citations omitted).

[*Moriarty v. Bradt*, 177 *N.J.* 84, 101, 827 *A.2d* 203 (2003), *cert. denied*, 540 *U.S.* 1177, 124 *S.Ct.* 1403, 158 *L.Ed.2d* 78 (2004).]

Indeed, the primary role of parents in the upbringing of their children is now established beyond debate as an enduring tradition to which we have unflinchingly given voice. *See, e.g., Yoder*, *supra*, 406 *U.S.* at 232-34, 92 *S.Ct.* at 1541-43, 32 *L.Ed.2d* at 35-36 (holding state could not force Amish child to remain in formal high school until age sixteen); *Pierce v. Soc'y of Sisters*, 268 *U.S.* 510, 534-35, 45 *S.Ct.* 571, 573, 69 *L.Ed.* 1070, 1078 (1925) (holding state could not require children to attend public school); *Meyer*, *supra*, 262 *U.S.* at 400-03, 43 *S.Ct.* at 626-28, 67 *L.Ed.* at 1045-47 (holding state could not criminalize teaching of German language to pupils who had not yet passed eighth grade); *Watkins v. Nelson*, 163 *N.J.* 235, 256, 748 *A.2d* 558 (2000) (holding in custody dispute between non-custodial father and parents of deceased custodial mother, non-custodial parent awarded custody unless harm shown).

Deference to parental autonomy means that the State does not second-guess parental decision making or interfere with the shared opinion of parents regarding how a child should be raised. Nor does it impose its own notion of a child's best interests on a[1] family. Rather, the State permits to stand unchallenged parental judgments that it might not have made or that could be characterized as unwise. That is because parental autonomy includes the "freedom to decide wrongly." Spencer & Zammit, *supra*, 1976 *Duke L.J.* at 918.

[7] Nevertheless, "[t]he right of parents to the care and custody of their children is not absolute." *V.C.*, *supra*, 163 *N.J.* at 218, 748 *A.2d* 539; *Prince*, *supra*, 321 *U.S.* at 166-67, 64 *S.Ct.* at 442, 88 *L.Ed.* at 652-53.

> Thus, for example, our courts have overridden the desires of parents who refused to consent to medical treatment and ordered such treatment to save a child's life. *See Parham v. J.R.*, 442 *U.S.* 584, 603, 99 *S.Ct.* 2493, 2504, 61 *L.Ed.2d* 101, 119 (1979) ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." (citations omitted)); *Prince*, *supra*, 321 *U.S.* at 166-67, 64 *S.Ct.* at 442, 88 *L.Ed.* at 652-53 (noting that state, as *parens patriae*, can intrude on parental autonomy to protect child from ill health or death); *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278 *F.Supp.* 488, 498-99, 504-05 (W.D.Wash.1967) (holding Washington State statute that declared children to be dependents of state for purpose of authorizing blood transfusions against expressed wishes of parents was constitutional), *aff'd*, 390 *U.S.* 598, 88 *S.Ct.* 1260, 20 *L.Ed.2d* 158 (1968) (per curiam); *State v. Perricone*, 37 *N.J.* 463, 474, 181 *A.2d* 751 (finding state may act under its *parens patriae* authority to protect child's welfare by declaring him or her neglected to obtain necessary medical treatment), *cert. denied*, 371 *U.S.* 890, 83 *S.Ct.* 189, 9 *L.Ed.2d* 124 (1962); *Muhlenberg Hosp. v. Patterson*, 128 *N.J.Super.* 498, 503, 320 *A.2d* 518 (Law Div.1974) (ordering blood transfusion to infant over parents' wishes).
>
> [*Moriarty*, *supra*, 177 *N.J.* at 102-03, 827 *A.2d* 203.]

[8] Indeed, the state has an obligation, under the *parens patriae* doctrine,[2] to in-

1. "*Parens patriae*" means "parent of his or her country," and refers to "the state in its

tervene where it is necessary to prevent harm to a child. *Ibid.* (citations omitted); *Prince, supra*, 321 *U.S.* at 169–70, 64 *S.Ct.* at 444, 88 *L.Ed.* at 654; *In re Guardianship of K.H.O.*, 161 *N.J.* 337, 352, 736 *A.2d* 1246 (1999) ("The harm shown under the first prong [of the test for termination of parental rights] must be one that threatens the child's health and will likely have continuing deleterious effects on the child."); *see also N.J.S.A.* 30:4C–11 (stating that for child to be placed in care and custody of Division of Youth and Family Services, it must be shown "that the welfare of such child will be endangered unless proper care or custody is provided").

[9] The harm standard is clear. Indeed, in *Moriarty, supra*, we stated unequivocally that "interference with parental autonomy will be tolerated only to avoid harm to the health or welfare of a child." 177 *N.J.* at 115, 827 *A.2d* 203. There, a father had denied visitation to the parents of his deceased wife. *Id.* at 90–95, 827 *A.2d* 203. In ruling, we were called upon to consider the New Jersey Grandparent Visitation Statute, *N.J.S.A.* 9:2–7.1, which applied a best-interests standard in assessing a grandparent's application for visitation. We declared that:

> Our prior jurisprudence establishes clearly that the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child. When no harm threatens a child's welfare, the State lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit. However, when harm is proved and the presumption in favor of a fit parent's decision making is overcome, the court must decide the issue of an appropriate visitation schedule based on the child's best interests.
>
> [*Moriarty, supra*, 177 *N.J.* at 114–15, 827 *A.2d* 203.]

Thus, we held that when a grandparent challenges a parent's decision regarding visitation, he or she must demonstrate, by a preponderance of the evidence, that the visitation "is necessary to avoid harm to the child." *Id.* at 117, 827 *A.2d* 203. That harm standard "is a constitutional necessity because a parent's right to family privacy and autonomy are at issue." *Id.* at 118, 827 *A.2d* 203. In short, potential harm to

capacity as provider of protection to those unable to care for themselves," such as children. *Black's Law Dictionary* 1144 (8th ed. 2004). The doctrine has deep roots. Scholars trace it back to the Book of Genesis where God said to Cain of his brother Abel "[h]is desires shall be subject unto thee, and thou shalt rule over him." Zurek, *supra*, 27 *Hamline J. Pub.L. & Pol'y* at 377 (citing Robert Filmer, *Patriarcha: or the Natural Power of Kings* 19 (1680); *Genesis* 4:4–5). "The Roman Senate had the power to award the honorary title of *pater patriae* ('father of the fatherland') to the emperor in recognition of his great leadership." *Ibid.* (citing Stefan Weinstock, *Divus Julius* 200 (1971)). King James I utilized the term when he told Parliament in the seventeenth century that the king is "truly *parens patriae*, the politic father of his people." *Id.* at 378 (quoting James I (James VI of Scotland), Speech to Parliament (March 21, 1610)). The obligation of the king to protect the lords of the manors and those under them was viewed as part of the father's responsibility. *See id.* at 378–79. Eventually, that power devolved upon the chancery court, which acted as a guardian of the mentally ill "and children who could not help themselves." *Id.* at 379. The doctrine was legislatively established in the early American colonies; in pre-Revolutionary America and the Plymouth Colony, the community was authorized to act when a parent neglected his or her child. *Id.* at 380 n. 88 (citing John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* 105 (1970)).

the child is the constitutional imperative that allows the State to intervene into the otherwise private and protected realm of parent-child relations.

V.

[10–12] The question then becomes whether the right to parental autonomy subsumes the right to submit issues of child custody and parenting time to an arbitrator for disposition. We think it does. As we have said, the entitlement to autonomous family privacy includes the fundamental right of parents to make decisions regarding custody, parenting time, health, education, and other child-welfare issues between themselves, without state interference. That right does not evaporate when an intact marriage breaks down. It is for that reason, as the parties conceded, that when matrimonial litigants reach a settlement on issues regarding child custody, support, and parenting time, as a practical matter the court does not inquire into the merits of the agreement. It is only when the parents cannot agree that the court becomes the default decision maker.

Indeed, Mr. Fawzy does not suggest otherwise. He recognizes that parental autonomy subsumes all child-custody and parenting-time questions and that so long as the parties agree, they can make decisions on those subjects between themselves without state interference. The only decision that he appears to carve out of that right to parental autonomy is the decision to submit child-custody and parenting-time matters to arbitration.

We see no basis for that exception. For us, the bundle of rights that the notion of parental autonomy sweeps in includes the right to decide how issues of custody and parenting time will be resolved. Indeed, we have no hesitation in concluding that, just as parents "choose" to decide issues of custody and parenting time among themselves without court intervention, they may opt to sidestep the judicial process and submit their dispute to an arbitrator whom they have chosen. We agree with legal commentators who have concluded that the right to arbitrate child custody and parenting time serves an important family value in that it:

> allows the parents the opportunity to choose an arbitrator for their custody dispute on the basis of her familiarity with the family or her understanding of the values that the parents hold dear and have tried to follow in raising their child. In such cases, one might reasonably anticipate that the arbitrator will reach a decision that is more in accord with the family's true needs, wants, and values than would a judge deciding the case in public custody litigation.
>
> [Spitko, *supra*, 57 *Wash. & Lee L.Rev.* at 1210.]

Likewise:

> To the extent that parents, even after a good faith effort, cannot agree between themselves on what is best for their children, they should at least have the right to choose the decision-maker and should not be compelled to accept an individual or committee chosen by the state whose values may significantly differ from their own.
>
> [Spencer & Zammit, *supra*, 1976 *Duke L.J.* at 918–19.]

In short, the constitutionally protected right to parental autonomy includes the right to submit any family controversy, including one regarding child custody and parenting time, to a decision maker chosen by the parents. To the extent that the Appellate Division ruled otherwise, its reasoning is disapproved.

VI.

We turn then to the issue of the standard of review of a child-custody arbitration award. Relying on *Faherty*, Mr. Fawzy contends that we have already developed a template for judicial oversight of family law arbitration that requires a review de novo based on a best-interests-of-the-child standard, and that that is the standard we should adopt here.

Admittedly, the *Faherty* paradigm has confused the issue because of our references in the opinion to "best interests" and "substantial best interests." 97 *N.J.* at 110, 477 *A.*2d 1257. However, we are satisfied that Mr. Fawzy's reading of *Faherty* emphasizes the references to "best interests" at the expense of the broader holding that a further inquiry, beyond the narrow arbitration standard, is only required where the "substantial best interests" of the child are "adversely affect[ed]" by the award. *Ibid.* In our view, the language in *Faherty* was an effort to remain true to the constitutional "avoidance of harm to the child" standard of which the Court was certainly aware as a result of long-standing United States Supreme Court jurisprudence on the subject. *See, e.g., Prince, supra*, 321 *U.S.* at 169–70, 64 *S.Ct.* at 444, 88 *L.Ed.* at 654 (holding State may intervene in otherwise protected areas of parental autonomy where necessary to prevent harm to child).

[13] It was for that reason that *Faherty, supra*, referenced not "best interests" but "substantial best interests" and, more importantly, used a synonym for harm—"adversely affect"—in its analysis. 97 *N.J.* at 110, 477 *A.*2d 1257. Under *Faherty*, the review of an arbitration award is to take place within the confines of the Arbitration Act, unless there is a claim of adverse impact or harm to the child. *Id.* at 109–10, 477 *A.*2d 1257. Only in that case will further review be required. *Ibid.* We reaffirm that standard today as in conformity with our long-standing jurisprudential principles that require deference to parental choices where they do not implicate harm to the child. *See, e.g., Moriarty, supra*, 177 *N.J.* at 115, 827 *A.*2d 203.

[14] Put another way, where no harm to the child is threatened, there is no justification for the infringement on the parents' choice to be bound by the arbitrator's decision. In the absence of a claim of harm, the parties are limited to the remedies provided in the Arbitration Act. *See Faherty, supra*, 97 *N.J.* at 109–10, 477 *A.*2d 1257. On the contrary, where harm is claimed and a prima facie case advanced, the court must determine the harm issue. If no finding of harm ensues, the award will only be subject to review under the Arbitration Act standard. If there is a finding of harm, the presumption in favor of the parents' choice of arbitration will be overcome and it will fall to the court to decide what is in the child's best interests. *See Moriarty, supra*, 177 *N.J.* at 115, 827 *A.*2d 203.

[15] Mere disagreement with the arbitrator's decision obviously will not satisfy the harm standard. The threat of harm is a significantly higher burden than a best-interests analysis. Although each case is unique and fact intensive, by way of example, in a case of two fit parents, a party's challenge to an arbitrator's custody award because she would be "better" is not a claim of harm. Nor will the contention that a particular parenting-time schedule did not include enough summer vacation time be sufficient to pass muster. To the contrary, a party's claim that the arbitrator granted custody to a parent with serious substance abuse issues or a debilitating mental illness could raise the specter of harm. Obviously, evidential support establishing a prima facie case of harm will be required in order to trigger a hearing. Where the hearing yields a finding of harm, the court must set aside the arbitration award and decide the case anew, using the best-interests test.

We recognize that some other jurisdictions have approached the standard of review issue differently. For example, Pennsylvania has adopted a pure best-interests test for judicial review of an arbitrated custody award. *See Miller, supra*, 620 *A.*2d at 1165. We decline to adopt that model, which allows a court to substitute its judgment regarding the child's best interests for that of the arbitrator chosen by the parents and fails to accord the constitutionally required deference to the notion of parental autonomy. We do not perceive in that model the advancement of the goals underlying family or arbitration law.

In our view, the hybrid model we have adopted at once advances the purposes of arbitration by providing a final, speedy, and inexpensive resolution of the dispute; affords deference to parental decision making by allowing the parents to choose the person who will resolve the matter; and leaves open the availability of court intervention where it is necessary to prevent harm to the child.

VII.

Procedurally, a party aggrieved by an arbitrator's award regarding custody or parenting time must move pursuant to the Arbitration Act to vacate or modify the award. *N.J.S.A.* 2A:23B–23, 24. In the absence of a claim of harm to the child, the standards in the Act will apply. *See In re Arbitration Between Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 135 *N.J.* 349, 358, 640 *A.*2d 788 (1994) ("Because the record before us contains not even a hint of misconduct by the arbitrator, and because no statutory ground exists for invalidating or modifying the award, we uphold the arbitrator's award.").

The question of how a harm claim can be advanced within the arbitration matrix is a more difficult one in light of the fact that the Arbitration Act does not require a full record to be kept of arbitration proceedings. Nor does it compel the recordation of testimony or a statement by the arbitrator of his findings and conclusions beyond the issuance of an award, *N.J.S.A.* 2A:23B–19(a), although parties are free to agree upon other procedures, *see N.J.S.A.* 2A:23B–4. Because we do not discern that an empty arbitration record can supply any basis on which to evaluate a party's claim that the award threatens harm to the child, and in order to avoid a complete replay of the arbitration proceedings, we will require more than that in child-custody cases.

[16, 17] We therefore direct that when parties in a dissolution proceeding agree to arbitrate their dispute, the general rules governing the conduct of arbitration shall apply, *N.J.S.A.* 2A:23B–1 to –32. However, in respect of child-custody and parenting-time issues only, a record of all documentary evidence shall be kept; all testimony shall be recorded verbatim; and the arbitrator shall state in writing or otherwise record his or her findings of fact and conclusions of law with a focus on the best-interests standard. It is only upon such a record that an evaluation of the threat of harm can take place without an entirely new trial. Any arbitration award regarding child-custody and parenting-time issues that results from procedures other than those that we have mandated will be subject to vacation upon motion.[4]

4. Consonant with our holding, Michigan also mandates that "[a] record shall be made of

Although we recognize that those standards may increase, to a minimal extent, the cost of arbitration, we presume that experienced family law arbitrators have already incorporated some, if not all, of those procedures in order to create an evaluative baseline for judicial review in the case of the ubiquitous changed-circumstances motion. Moreover, we do not anticipate a new cottage industry of post-arbitration litigation. Indeed, it seems to us that parties engaged in a highly contentious struggle over custody and parenting time will be unlikely to agree upon arbitration in the first instance. Where the parties have been sufficiently cooperative to agree to arbitration and to choose an arbitrator who reflects their own values, we expect that they will be more, not less, likely to be satisfied with the outcome.

VIII.

We turn finally to the question of how parents may exercise their rights and bind themselves to arbitrate a child-custody dispute. Reflecting the fact that arbitration "is, at its heart, a creature of contract," *Kimm, supra*, 333 *N.J.Super.* at 25, 905 *A.2d* 887, the Arbitration Act provides that: "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract," *N.J.S.A.* 2A:23B–6(a).

[18] The Act defines a record necessary to establish an agreement to arbitrate as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *N.J.S.A.* 2A:23B–1. Thus, at a minimum, an agreement to arbitrate must be in writing or recorded in accordance with the requirements of *N.J.S.A.* 2A:23B–1. In addition, it must state in clear and unmistakable language: (1) that the parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right; (2) that the parties are aware of the limited circumstances under which a challenge to the arbitration award may be advanced and agree to those limitations;[5] (3) that the parties have had sufficient time to consider the implications of their decision to arbitrate; and (4) that the parties have entered into the arbitration agreement freely and voluntarily, after due consideration of the consequences of doing so.

[19, 20] It goes without saying that parties are not bound to arbitrate on an all-or-nothing basis, but may choose to submit discrete issues to the arbitrator. The arbitration agreement should reflect, with specificity, which issues are to be subject to an arbitrator's decision. We commend to the Supreme Court Committee on Family Practice the development of form agreements and scripts for use by lawyers and judges in cases in which the parties seek to bind themselves to arbitration in family law matters.

IX.

[21] Applying the standards we have enunciated to the facts of this case, we are satisfied that the agreement to arbitrate was insufficient to bind the parties. Although both Mr. and Mrs. Fawzy responded affirmatively to questions regarding their agreement, the nature of what was spread upon the record was inadequate to assure that they fully understood the consequences of removing their custody dispute from the judicial arena and into binding arbitration.

As we have said, there was no written arbitration agreement. Thus, the colloquy on the record had to establish that the parties understood their rights, knew what they were waiving, and especially that they were aware of what review was available. As is evident from the colloquy, that did not occur here. Although the judge fully explained "changed circumstances," which does not implicate the narrow arbitration standard of review, he did not as fully explain the parties' statutorily limited ability to challenge the award without such a change. Nor did he allude to the particular standards under which modification or vacation of the award would be allowed, or what other standards would warrant judicial intervention. Further, he erred in suggesting that bias on the part of the arbitrator would not be a basis for challenge under the Arbitration Act. *See N.J.S.A.* 2A:23B–23(a)(2).

To be fair, the judge, who did not have the benefit of this opinion, most likely thought that all the details of the arbitration had been worked out and explained by the lawyers, and indeed, they might have been. We simply cannot tell from the record whether that is so. Thus, lacking a basis on which to conclude that the Fawzys understood what they were relinquishing by opting for arbitration, we cannot say that they agreed to arbitrate their custody dispute. Accordingly, we affirm the judgment of the Appellate Division overturning the arbitration award, but not for the reasons the panel expressed.

Contrary to the Appellate Division's view, and as we have concluded, pursuant to notions of parental autonomy, parties in a matrimonial litigation are empowered to agree upon arbitration as a way of resolving their differences over child custody and rearing. Here that power was imperfectly exercised and thus the arbitration award cannot stand.

X.

[22] We turn finally to the question of whether a guardian ad litem is empowered to serve as an arbitrator. Because this case is being remanded for the vacation of the arbitration award and for further judicial proceedings, the Appellate Division did not address that issue, which is technically moot. We nevertheless take this opportunity to comment briefly on the matter.

Rule 5:8B(a) permits a judge to appoint a guardian ad litem in a dispute between parties regarding custody and parenting time. Under the rule, the guardian ad litem renders service "to the court on behalf of the child," must be available to testify and, like any other witness, is subject to cross-examination. *Ibid.* Obviously, where an arbitrator is substituted for the judge, he cannot simultaneously function as guardian ad litem because the same party cannot be both a witness and an adjudicator.

In this case, Busch became the arbitrator after he had already served as the guardian ad litem and we assume that he did not continue in the latter role. Although that sequence of events may not present the particular conflict that flows from one party simultaneously holding both positions, it presents a set of problems of its own.

that portion of [an arbitration] hearing that concerns child support, custody, or parenting time in the same manner required by the Michigan court rules for the record of a witness's testimony in a deposition." *Mich. Comp. Laws* 600.5077(2); *Mich. Court Rule* 2.306(C)(2), (3).

5. The parties may agree to a broader review than provided for by the default provisions in the Arbitration Act. *See N.J.S.A.* 2A:23B–4. In such a case, the agreement shall accurately reflect the circumstances under which a party may challenge the award and the level of review agreed upon.

First, we note that an arbitrator, like a judge, is supposed to rule based on the evidence adduced by the parties during the arbitration proceedings and not on information that he has privately gleaned from other sources. Where, in his role as guardian ad litem, one who is later chosen to arbitrate has personally investigated the matter, he may be privy to facts about which the parties have no knowledge and which thus have not been tested in the crucible of cross-examination. That is a confounding factor in the exercise of the judicial role.

Moreover, to the extent that the guardian ad litem has interacted with the parties during his investigation or made preliminary reports to the court, he may be subject, if he later becomes the arbitrator, to a claim of partiality under *N.J.S.A.* 2A:23B-23(a).[6] Finally, if one individual is permitted sequentially to wear the two hats of guardian ad litem and arbitrator, a conflict may arise insofar as the guardian ad litem must testify if, for some reason the case goes back to court, whereas *N.J.S.A.* 2A:23B-14 specifically prohibits the arbitrator from becoming a witness except in the narrow circumstance of a challenge based on corruption, fraud, or undue means.

In light of the foregoing, and given the universe of potential arbitrators, we think it obvious that a guardian ad litem should not be tapped to fulfill both roles either simultaneously or sequentially.

XI.

The judgment of the Appellate Division is affirmed for the reasons to which we have adverted. The matter shall be handled expeditiously by the trial judge who will decide all outstanding issues.

For affirmance—Chief Justice RABNER and Justices LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO and HOENS—7.

Opposed—None.

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STATE of New Jersey, Plaintiff-Appellant,

v.

Oscar OSORIO, Defendant-Respondent.

Supreme Court of New Jersey.

Argued April 27, 2009.

Decided July 2, 2009.

Background: Defendant was convicted in the Superior Court, Law Division, Essex County, of various drug offenses. Defendant appealed. The Superior Court, Appellate Division, affirmed convictions and sentence, but remanded for prosecutor to justify her use of peremptory juror challenges. On remand, the Superior Court rejected claim that prosecutor made discriminatory use of her peremptory challenges. Defendant appealed. The Superior Court, Appellate Division, 402 N.J.Super. 93, 952 A.2d 1112, Skillman, P.J.A.D., reversed and remanded for new trial. Certification was granted.

Holdings: The Supreme Court, Rivera-Soto, J., held that:

6. There is no suggestion in this record that any of Busch's actions in the matter were, in any manner, untoward.