4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

In the matter of (1) RAI (2) MI (Children) sub nom AI v MT (2013)

2013 EWHC 100 (Fam)

30/01/2013

Barristers
Henry Setright KC
Private: Marcus Scott-Manderson QC
Teertha Gupta KC

Court
High Court (Family Division)

Practice Areas
International Children Law

Summary
The court explained its approach to making a consent order in matrimonial proceedings after the parties had reached agreement as a result of arbitration carried out by rabbinical authorities.

Facts
The court issued a judgment to explain its approach to making a consent order in matrimonial proceedings after the parties (H and W) had reached agreement as a result of arbitration carried out by rabbinical authorities.

H was Canadian and W was British. They were both observant orthodox Jews. The parties had difficulties in their marriage while living in Canada. W went to England and, against H's wishes, did not return to Canada with the children. H made an application in Canada under the Hague Convention on the Civil Aspects of International Child Abduction 1980. Before the final hearing was due to be held in England, the parties agreed to refer the matter to arbitration by the New York Beth Din. The issues between the parties included the children's welfare, financial matters, and the obtaining of a get, or religious divorce. The court, having obtained information as to the approach of the Beth Din and the effects of its rulings, stayed its proceedings to allow a non-binding arbitration to take place. The Beth Din issued its ruling 18 months later. The court subsequently considered and approved the order.

Held
(1) There were several legal principles particularly relevant to referring the dispute to arbitration. Insofar as the court had jurisdiction to determine issues arising out of the marriage, or concerning the children's welfare and upbringing, that jurisdiction could not be ousted by agreement, Hyman v Hyman [1929] A.C. 601 applied. Save where statute provided otherwise, regarding issues concerning the upbringing of children, the child's welfare was the paramount consideration. Statute provided otherwise in respect of

summary return applications under the Convention, but summary return applications under the inherent jurisdiction were to be determined by reference to the child's welfare, J (A Child) (Custody Rights: Jurisdiction), Re [2005] UKHL 40, [2006] 1 A.C. 80 followed. The court gave appropriate respect to the practice and beliefs of all cultures and faiths, but that did not oblige it to depart from the welfare principle, because that principle was sufficiently broad and flexible to accommodate many cultural and religious practices. It was always in parties' interests to try to resolve disputes by agreement wherever possible, including disputes concerning the future of children and ancillary relief. The rule in Hyman prevented arbitration awards in matrimonial cases from being binding, but it had been suggested that an award should be a "magnetic factor" in the court's subsequent analysis of the issue. In arbitration, the parties could select the arbitrator, unlike in litigation. In that respect, arbitration was in line with the principle underpinning the Children Act 1989 that primary responsibility rested with parents, who were entitled to raise their children without interference from the state save where the children would suffer significant harm. That principle was in line with the European Convention on Human Rights 1950 art.8 (see paras 26-32 of judgment). (2) Further features of the process warranted further comment. It was an integral aspect of the arbitration that it had taken place under the auspices of the Beth Din. The parties' profound belief had been that a marriage solemnised within the tenets of their faith should be dissolved within those tenets. Having been reassured as to the principles which would be applied by the rabbinical authorities, the court was content to respect the parents' wishes, subject to the proviso that the outcome could not be binding without the court's endorsement. It did not necessarily follow that a court would be content in other cases to endorse a proposal that a dispute concerning children should be referred for determination by another religious authority. Each case would turn on its own facts. It was notable that the court was able not only to accommodate the parties' wish to resolve their dispute by reference to religious authorities, but also to buttress the process at crucial stages, by adjourning the case for arbitration, by using wardship as a protective mechanism for the children pending the outcome of the arbitration, by making "safe harbour" orders that enabled W to travel to New York with the children to take part in the process, by holding an emergency interim contact hearing, and by giving provisional approval of the draft final order to facilitate the granting of the get. The resolution of the issues by arbitration had largely been in accordance with the overriding objective of the Family Procedure Rules 2010. The court had some concern about the delays in the process, raising questions about whether the case could be said to have been dealt with expeditiously, and it had no information as to costs. However, the outcome had been in the interests of the children's welfare, and the terms of the financial settlement had been unobjectionable (paras 33-37).