YERUCHOM F. KOSLOWIZ,

Plaintiff-Appellant,

v.

LIEBA N. ROTHSTEIN,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Civil Action

On Appeal from Superior Court of New Jersey
Chancery Division
Family Law Part
Ocean County
Docket No.: FD-15-843-20
Appellate Docket No.: A-001647-24T2

Sat Below
Hon. Sean D. Gertner. J.S.C.
Hon. Kimberley Casten, J.S.C.

PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF NOTICE OF APPEAL

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Dated: May 19, 2025

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Yeruchom Koslowitz ("Koslowitz"), appeals the trial court's orders dated January 18, 2024, October 17, 2024, and January 8, 2025 (denying reconsideration) (the "Orders"), which infringed upon his free exercise of religion and parental autonomy following the dissolution of his religious marriage to Defendant-Respondent, Leiba Rothstein ("Rothstein"). The impact of the Orders improperly imposed the substitution of an attorney in place of a rabbi to arbitrate the parties' ongoing custody dispute. This substitution directly contravened the parties' express written intent to freely exercise their religion, as underscored by their confirming course of performance pursuant to the Arbitration Clause of their Marital Settlement Agreement ("MSA").

Agreements to arbitrate disputes are fundamentally creatures of contract and demand strict adherence to the parties' agreed-upon terms. In 2009, Fawzy v. Fawzy affirmed New Jersey's recognition of parents' constitutional right to autonomously enter into agreements for their children, including as to the choice of an arbitral forum. Thus, consistent with the state's policy that only religious tribunals can adjudicate areas of religious dispute, the parties' MSA contemplates and provides for religious arbitration under the auspices of a presiding rabbinic authority, with provisions for empaneling a full *Bais Din* [Rabbinical Court] at the discretion of that rabbinic arbitrator.

A review of the MSA confirms this intent by featuring undefined Judaic terms, communal standards, and interpretation of strictures throughout, including, without limitation: *Takanos, Mihagim, Tefilos, Schar Limud, Kapporos, Bentch, Chol Hamoed, Seudas Mitzvah, Yahrtzeit Seudah, Netilas Yadayim, Aufruf, Shalom Zachor, Morah, TAG filter, Upsherin, Mechilla, Siyum, B'peh Malay, Kesubah, Chasuna, Tefillin, Shidduchim, Simchos, Daven, Yom Tov, Tishrei, Nissan, Mesiftos, Menahel, Pshetels, Leining, Aliyah, Seforim, Mezuzos, Toen, Kinyan Sudar, Hischayvus, Ayn Bo Mamash, Kinyan Dvorim,* and *Kablan.* These terms are foreign to this Court because they are concepts within Orthodox Jewish law and practice requiring a qualified rabbi to accurately interpret and apply in accordance with the contracted arbitration provisions of the parties' MSA and their course of performance thereunder.

Over the course of eight (8) years, the parties manifested their express written intent via their designation of nine (9) different rabbis to serve as arbitrators. Ignoring this contractual intent and course of performance confirming that only a rabbi familiar with the parties could select a replacement rabbinic arbitrator, the trial court dispensed with any application of the parties' MSA and appointed a practicing attorney from outside the parties' insular community, who lacks experiential knowledge of Ultra-Orthodox Judaic law and religious authority to apply religious doctrine.

If left undisturbed, the trial court's decision could cause the attorney appointed - lacking the requisite vocational religious expertise and experience - to misapply religious terms and doctrine, or, at best, seek extra-contractual rabbinic consultation in rendering religious-based decisions. Such a process would inevitably cause the unwieldy clash of opposing religious authorities advocating on behalf of each party, replicating the cumbersome and inefficient process that the Arbitration Clause was designed to avoid with the selection of a rabbinic authority to select an arbitrator who could conclusively apply binding religious doctrine.

Just as a court would not appoint an arbitrator without family law experience in a family law dispute, it is equally untenable to appoint an arbitrator without vocational expertise in Jewish law where the MSA's interpretation hinges on religious principles. The trial court's decision disregards the parties' contractual intent to freely exercise their religion, their course of performance, and the inherent complexities of interpreting religiously grounded agreements, particularly where these parties agreed to the mechanism for such interpretation. Therefore, this Court should vacate the Orders, reverse the trial court's decision, and enforce the parties' contracted right to rabbinic arbitration.

STATEMENT OF PROCEDURAL HISTORY

This is a non-dissolution matter involving the adjudication of custody and parenting time issues, including relocation, relating to two (2) children: E.K., born April 11, 2013, and M.K., born July 9, 2015. Pa13.[1]

The parties' MSA, dated August 25, 2017, arose from their religious marriage. Pa994. The parties were never married under civil law. Pa21. In accordance with standards of the parties' Orthodox Jewish community, the MSA contained an Arbitration clause, which appointed a respected rabbinic authority to adjudicate disputes ("Arbitration Clause") [Pa1019-1021]:

> *The parties both agree that any disagreement between them shall be arbitrated with binding arbitration solely by the Arbitrator, prior to seeking the Civil Court's intervention. The Arbitrator chosen by both sides temporarily just for the purpose of finalizing this agreement is Reb Yitzchok Herszaft and both parties agree to pursue and cooperate to agree on a permanent Arbitrator. If no permanent arbitrator is agreed on within 3 months of this agreement being signed then Reb Yitzchok Herszaft will have the sole discretion of choosing another permanent Arbitrator and both parties shall sign their Agreement to use the choice for Binding Arbitration with him.*
>
> *In the instance that the Arbitrator decides that a disagreement must be adjudicated upon by a Bais Din, then the Arbitrator has the right to choose which Bais Din the disagreement shall be taken to.*

[1] Pa_ refers to the Appendix of Plaintiff-Appellant filed contemporaneously herewith.

The MSA further contains considerable religious language, potential areas of religious dispute, and application of communal standards. Pa994-1025.

Pursuant to the MSA, the parties engaged in interim custody arbitration with Rabbi Herszaft. Pa1019. The parties thereafter agreed to utilize Rabbi Ari Marburger as permanent arbitrator. The parties executed an Agreement to Arbitrate in English, as well as a *Shtar Berurin*[2] in Hebrew, on September 18, 2017. Pa11-12.

In June 2020, Koslowitz filed a Verified Complaint and Order to Show Cause to compel the children's return to New Jersey after Rothstein permanently removed them to Los Angeles, California without notice—and in defiance of Rabbi Marburger. Pa13-30. The Order to Show Cause was resolved by Consent Order, dated June 17, 2020, which reflected the parties' mutual agreement to designate Rabbi Leib Landesman as Arbitrator. Pa44-45.

The parties executed a second Agreement to Arbitrate on June 22, 2020, and appeared for arbitration hearings with *To'anim* (Rabbinic advisors) before a fully empaneled *Bais Din* of three (3) rabbinic arbitrators: Rabbi Landesman

[2] The Hebrew term "Shtar Berurin" is a bill of arbitration that confers jurisdiction on a Bais Din under Jewish law.

(presiding), Rabbi Nathaniel Sommer, and Rabbi Shalom Shuchat.[3] Pa46-50. Following this religious hearing, Rabbi Landesman issued a comprehensive Arbitration Award, in the form of a *Psak Din*[4], retroactively permitting Rothstein's relocation due to her remarriage in a decision dated August 11, 2020. Pa52-89. The parties confirmed the Arbitration Award by Consent Order dated November 25, 2020, which provided that "The Arbitration Award may be subject to modification by the Arbitrator/Beth Din…" Pa104-105.

On December 21, 2020, Rabbi Landesman requested that the trial court "not confirm the 'Arbitration Ruling (Psak Din)' dated August 11th 2020 as a 'Final Ruling,'" due to certain changes of circumstances since the August *Psak Din*, including the dissolution of Rothstein's second religious marriage. Pa108. At the urging of an involved community rabbi, Rabbi Avrohom Notis, the parties submitted names of rabbis to replace Rabbi Landesman, and ultimately agreed to the designation of a new rabbinic arbitrator, Rabbi Dovid Markin,

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[3] Also referred to as Beis Din, Beth Din, and Beit Din, a Bais Din is a rabbinical court or tribunal which means "house of law" in Hebrew. Jodi M. Solovy, Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate, 45 DePaul L. Rev. 493, 500 n.54 (1996).

[4] A written verdict under Jewish law in *Bais Din* is known as a "*Psak Din*." Jay M. Zitter, J.D., Application, Recognition, or Consideration of Jewish law by Courts in United States, 81 A.L.R.6th 1 (Originally published in 2013).

with the understanding that Rothstein would return to New Jersey immediately thereafter, on condition of such agreement. Pa117, 123.

The parties executed an Agreement to Arbitrate with Rabbi Markin on January 18, 2021. Pa116-122. Paragraph 18 set forth methodology for selection of an arbitrator in the event of Rabbi Markin's unavailability; namely, that either Rabbi Markin or Rabbi Marburger would select a new arbitrator. Pa118. The parties designated the Uniform Arbitration Act, N.J.S.A. 2A:23B-1et seq., (UAA) to govern their arbitration. Pa116.

On February 22, 2021, the parties finalized a Consent Order providing that the children would be returned to the state as soon as practicable. Pa124-125. On February 23, 2021, Rabbi Markin permitted Rothstein to relocate from Los Angeles to Far Rockaway, New York via informal directive, undercutting a material term of the parties' Consent Order for the immediate return of the children. See 2T19:23-20:3. Immediately thereafter, Rabbi Markin suspended Koslowitz's midweek parenting time and truncated his weekend parenting time to accommodate Rothstein's relocation. Pa127. Rabbi Markin's formal Arbitration Award permitting relocation is dated March 8, 2021. Id.

In a series of punitive decisions that followed, Rabbi Markin suspended all contact between Koslowitz and his children and barred his involvement with the children's schooling and medical care. Pa162, 233-235, 295-297. Rabbi

Markin directed the children's school to cease communication with Koslowitz. Pa253, 532, 818. On September 17, 2021, Hon. Brian White, J.S.C. confirmed the Arbitration Award of March 8, 2021, and closed the FD matter. Pa239.

In an Order dated May 17, 2022, filed August 30, 2022—more than a year after Koslowitz had last seen his children—Judge White found that "the punitive nature of the parental suspension advanced by the arbitrator in this matter, whether it was intended as a good-faith device to gain compliance with the process or not, has persisted to the point where there exists a substantial likelihood of harm to the children in this matter." Pa597. The trial court directed both parties to agree upon a reunification therapist as soon as possible. Id. A subsequent Order was entered on October 21, 2022 vacating reunification therapy in lieu of summer parenting time to occur in the summer of 2022 via a Consent Order. Pa471-472. Judge White's Order further restored Koslowitz's weekend parenting time, effective immediately. Id.

On November 16, 2023, the Hon. Sean D. Gertner, J.S.C. issued an oral decision disqualifying Rabbi Markin and vacating the Arbitration Award of March 8, 2021, which addressed relocation, parenting time, and child support. 2T24:19-23; 28:6-8.[5] The trial court's written order is dated January 18, 2024.

[5] 2T__ refers to the Transcript of Decision before the Honorable Sean D. Gertner, J.S.C., November 16, 2023.

Pa783-784. Under the Order, a new arbitrator or *Bais Din* [Rabbinical Court] was to be mutually agreed upon, or if the parties could not agree, chosen by the Court upon each party's provision of three (3) names. Pa784.

The parties exchanged names of potential rabbinic arbitrators in letters between counsel to the trial court of December 8, 2023 and January 3, 2024. Pa736-753. Unable to agree upon a rabbinic arbitrator, the parties sought trial court intervention. Pa769.

On July 19, 2024, Rothstein retained Angelo Sarno, Esq. in place of Jeffrey Epstein, Esq. Pa835. Thereafter, three (3) new names were submitted to the trial court that included only one rabbinic authority (affiliated with Rabbi Markin's *Bais Din*) and no *Batei Din*[6] from within the Orthodox community. Instead, Rothstein's attorney, for the first time in the history of the case, proposed the names of retired judges and practicing attorneys, including Ira Senoff, Steven Enis, Marion Solomon, Robert Kornitzer, and Hon. Angela White Dalton, J.S.C. (ret.). Pa886-887.

On October 15, 2024, the Honorable Kimberley S. Casten, J.S.C. issued a Letter Decision appointing Robert Kornitzer, Esq. as Arbitrator. Pa4-5. An Order to that effect was entered on October 17, 2024. Pa1-3.

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[6] The plural of *Bais Din* is *Batei Din*.

Koslowitz timely filed a Motion for Reconsideration on November 4, 2024, which was denied by Order dated January 8, 2025. Pa6-8. Koslowitz's Notice of Appeal was filed as within time on February 6, 2025 (amended February 14, & March 31, 2025). Pa983-993.

STATEMENT OF FACTS

It is undisputed that both parties are practicing members of the ultra-Orthodox Jewish community. Their repudiation of state involvement in favor of religious practice was present from the earliest moments of their relationship, as they were never civilly married and only solemnized a religious marriage that produced two (2) sons. Pa21, 149.

At the time of the parties' marriage and divorce, they were members of the Lakewood, NJ Orthodox community, where each have deep roots, large immediate and extended family, and communal support. Pa22, 32, 54, 483, 767. Koslowitz was and remains a student of Talmudic law and has not been consistently employed in secular environs. The children were registered in Lakewood *Cheder* Schools, Pa210-211, known within Orthodox circles as "the Harvard" of Lakewood schools. Pa483. See also 1T36:8-10. By all measures, the children were thriving, close to both parties and their respective families. Id. See also 1T36:11-14.

A. Marital Settlement Agreement

Upon the breakdown of the parties' religious marriage, the parties negotiated an MSA with the assistance of Rabbi Daniel Kester, Rabbi Notis, and Rabbi Zeev Rothschild (now deceased). The MSA reflects the parties' adherence to Orthodox Jewish strictures and customs, which they mutually intended to maintain post-divorce on behalf of their children. Pa994-1025.

For example, the parties' parenting arrangement reflects traditional caretaking roles common within Orthodox communities. Pursuant to Article III of the MSA, Rothstein was designated parent of primary residence, Pa999, subject to Koslowitz's parenting time set forth in Article V, which included alternate weekends, Wednesday evenings, and every Sunday, which would increase as the children age. Pa1003-1005. Additional terms reflecting Jewish cultural norms appear throughout the MSA, including, an allowance for Rothstein's relocation in the event of remarriage, Pa997-998; additional holiday parenting time for the father triggered as the boys are required to attend prayer services, and to fulfill certain other religious requirements, including additional time during Passover and other holidays, Pa1005-1008; special occasion parenting time to accommodate attendance at various cultural and religious events, Pa1009-1010; enhanced tuition obligations upon the father, Pa1011; an opt-out of college contribution laws, Pa1011-1012, among other terms.

Further in accordance with standards in the parties' Orthodox community, Article XII contained an Arbitration Clause, which appointed a Rabbinic authority to adjudicate disputes and apply the various clauses throughout the parties' agreement that require decisions grounded in *halacha.*[7] Pa1019-1021. The rabbi appointed was bestowed with further authority to empanel a full *Bais Din* at his discretion. Pa1019.

Indeed, embedded in the MSA are Judaic terms and concepts, requiring the expertise and knowledge of a practicing Orthodox rabbi to interpret and apply its material terms. Pa994-1025. In addition to the culturally-based terms found in agreements between spouses of the traditional Jewish faith, the following terms are contemplated to be adjudicated by an arbitrator with specific religious acumen and intricate knowledge of accepted communal standards (translations in parenthesis not in original MSA):

- Article III, Paragraph B, requiring the parties to raise the children "in the same environment and as the standard of those in the Children's school classes." Pa998.

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[7] *Halacha* is the word "law" in Hebrew, literally "the way on which one goes." Chad Baruch & Karsten Lokken, Research of Jewish Law Issues: A Basic Guide and Bibliography for Students and Practitioners, 77 U. Det. Mercy L. Rev. 303, 306 (2000). *Halacha* is based on the written law, known as the Bible or Old Testament, and the oral law, explanations of the written law as expounded by rabbinical authorities in the Mishnah and Talmud. Id.

- Article III, Paragraph C, requiring both parties to abide by all internet *Takanos* [religious edicts] of all Jewish Schools and if deemed necessary for either party to have internet access in their home, it shall only be with a *TAG approved system*. Pa998.

- Article III, Paragraph E, requiring the children to adhere to the father's religious *minhagim* [customs]. Pa999.

- Article IV, Paragraph A, requiring the children be raised "in the same way that the parties have raised them up until now and they will attend the type of yeshiva/school that is attended by the other children in their community…" Pa1002.

- Article VI, Paragraph F, discussing shidduchim [Orthodox matchmaking for marriage], upsherins [first haircuts], bar mitzvahs, and weddings, all deferring conflicts regarding these religious events to the arbitrator to make decisions in accordance with communal standards. Pa1012-1013.

The Arbitration Clause itself, contained in Article XII, thus anticipated either a sole rabbinic arbitrator, or a *Bais Din* as designated by the arbitrator, to adjudicate the parties' disputes, which would have "the sole and exclusive power, authority and jurisdiction, both now and in the future, to amend, modify, clarify, interpret, terminate and/or otherwise effect part or all of this Agreement in any way, manner, or form as said *Bais Din* may deem proper, and the resultant Agreement and or matter shall be fully binding on, and shall fully commit, each of the parties." Pa1020.

Article XIII underscored this intent, stating [Pa1022-1023]:

> All stipulations specified in this instrument are made with the full severity of stipulated as dictated by Rabbinical law, as per the stipulations of the children of Gad and the children of Reuven, and both Parties accept as conclusive and binding the

> position of any Jewish Halachic authority, even if in the minority or otherwise not generally accepted, that most broadly supports the validity and enforceability of this Agreement and its implied intent.
> …This instrument is effective immediately, in accordance with Talmudic jurisprudence with the severity of the laws of Jewish documents and documents of gift and documents of debt and admissions, as practiced according to Jewish jurisprudence…
> …
> This Agreement is intended to be, and is, binding, consistent with the binding nature of all agreements, documents, obligations, and acquisitions that are properly effected in a Jewish Court or Law in accordance with the laws and rules established by Rabbinical authorities.

B. Post-Judgment Arbitration[8]

Relevant to this appeal is the parties' course of conduct implementing the Arbitration clauses of their MSA in the years following their divorce. At all times, the parties' custody disputes were adjudicated by a series of rabbinic authorities acting as arbitrators. Full *Batei Din* were repeatedly empaneled at the direction of the arbitrators, including by Rabbi Landesman and Rabbi Markin, who presided over each of their respective tribunals

[8] The procedural history of this matter following the divorce reveals a considerable volume of litigation between the parties in their chosen arbitral forums, primarily due to Rothstein's deliberate and repeated interference with Koslowitz's parenting rights, which will not be recounted herein.

In *Bais Din*, Koslowitz was represented by a *To'en,* Rabbi Simcha Roth. Rothstein was represented by Rabbi Gershon Speigel, Pa43, as well as her brother-in-law, Jacob (Yanky) Ainsfeld, as Jewish-law counsel.

The parties' Agreements to Arbitrate with their various arbitrators memorialized the application of religious law to their disputes by their designated religious authority. The parties' Agreement to Arbitrate with Rabbi Marburger (leader of *Bais Din Maysharim* in Lakewood) provided that he could render Arbitration Awards upon the convening a *Din Torah*,[9] as well as contemplated proceedings in languages other than English. Pa11. A concurrent religious document, *Shtar Berurin*, was executed, providing for application of religious precepts to the parties' custody disputes and others as recognized under Jewish law in Bais Din. Pa12.

Likewise, the parties' Agreement to Arbitrate with Rabbi Landesman contemplated involvement of other rabbinic authorities, including assisting rabbis, and rabbinic counsel (*To'anim*). Rabbi Landesman's ensuing Arbitration Awards were *Piskei Din* (plural of *Psak Din*), written verdicts adjudicated under Jewish law and doctrine. Pa46-50.

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[9] A rabbi or panel of Rabbis who sit without a jury and render decisions in proceedings known as "Din Torahs" through the application of Jewish law. Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354–55 (D.C. 2005).

Upon Rabbi Markin's designation as arbitrator, consistent with the MSA, the parties agreed that he had the authority to empanel a *Bais Din* of rabbinic judges, *Dayanim*[10], at his discretion, which he did on several occasions. Pa118; see, e.g., 672. The proceedings were conducted in a *Bais Din* in Lakewood, Bais HaVaad Rabbinical Court. See Pa117.

Paragraph 27 reflected the parties' mutual desire for Rabbi Markin to apply Jewish law to their disputes: "The Arbitrator will reach a decision according to the principles of *Halacha*, its understanding of *Torah* law, and/or general principles of equity customarily employed in arbitration." Pa120.

Finally, Paragraph 18 set forth the process for the appointment of a new arbitrator in the event of Rabbi Markin's unavailability:

> In the event that Rabbi Markin is incapacitated or cannot continue for any reason, Rabbi Markin will work with the Parties to appoint the new Arbitrator. In the event he is unable to do so for any reason, the Parties agree to work together with the previous Arbitrator, Rabbi Ari Marburger, who will act as an interim Arbitrator and will help the Parties find a new Arbitrator. Pa118.

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[10] *Dayanim* are Jewish law judges. Across the spectrum *Dayanim* apply Jewish law to all disputes. Michael C. Grossman, Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process, 107 Colum. L. Rev. 169, 180–81 (2007).

C. Disqualification of Rabbi Markin

Rabbi Markin's involvement in this matter as Arbitrator was almost immediately marred by his arbitrary and punitive religious rulings that damaged both Koslowitz and the children, and impinged upon Koslowitz's right to parent. After immediately permitting Rothstein to relocate to Far Rockaway on February 23, 2021 (with the formal *Psak Din* following on March 8, 2021)—days after her agreement to return with the children to New Jersey—Rabbi Markin systematically chipped away at Koslowitz's relationship with the children, to the point where Koslowitz was cut off of all contact for fifteen (15) months. Pa603. Rabbi Markin also suspended phone contact (see Pa936), Koslowitz's ability to participate in schooling, directed the school to deny his requests to receive basic academic information like notices, report cards, etc., and revoked his involvement and participation in the children's medical care. Pa162, 233-235, 295-297, 603-604.

Judge White confirmed Rabbi Markin's March 8, 2021 Arbitration Award on September 17, 2021. Almost a year after Koslowitz was stripped of all contact and involvement with his children with no end in sight, he filed another application to vacate Rabbi Markin's Arbitration Awards and disqualify him as arbitrator. Pa481. In support of his application, Koslowitz submitted statements from six (6) community rabbis attesting to Rabbi

Markin's inequitable and unlawful conduct, demonstrating the practice of addressing religious disputes within the religious community with the aid and advocacy of various prominent rabbis. Pa518-519, 521-524, 527-531, 960, 964.

On May 17, 2022, via Order filed August 30, 2022, Judge White vacated Rabbi Markin's decisions relative to the suspension of parenting time upon a finding of substantial harm. Pa597.

As a result of Rabbi Markin's continued punitive conduct, together with Koslowitz's unsuccessful efforts to secure records, in mid-2023, Koslowitz filed an additional application to disqualify Rabbi Markin. Pa600-635.

On September 13, 2023, the Court heard oral argument on Koslowitz's application to disqualify Rabbi Markin. 1T.[11] In both counsel's discussions concerning the anticipated replacement of Rabbi Markin, only rabbinic arbitrators from within the parties' Orthodox Jewish community were discussed. 1T14:8-16.

The trial court rendered an oral decision disqualifying Rabbi Markin on November 16, 2023. 2T24:19-23; 28:6-8. As the trial court considered Rabbi Markin's replacement, it repeatedly articulated its understanding that the MSA required a rabbinic arbitrator upon Rabbi Markin's disqualification, but

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[11] 1T__ refers to the Transcript of Decision before the Honorable Sean D. Gertner, J.S.C., September 13, 2023.

selected a methodology different than either the MSA, or the more recently executed Agreement to Arbitrate.

In its oral decision, the trial court repeatedly articulated that a secular authority would be unable to appropriate apply the terms of the parties' MSA as a result of the prevalence of undefined Judaic terms (2T25:9-26:9):

> --the Court can – can find and reasonably infer that the parties have agreed to mandatory arbitration. For instance, and the reason the Court read from the initial determination paragraphs, particularly paragraphs 4 and 5, is those two issues in the Court's mind, amongst others quite frankly that – that the arbiter articulates clearly indicate to – to this Court that there – there are issues and items that are better for the parties to resolve in a manner not before a – in this particular case a secular court because for – for instance the idea that a – that there should be the ability for the father to arrange time to learn with – with the boys is the Court reasonably infers is a structure of a particular education that the parties agree should be provided for the children as well as the provision in the arbitration determination addressing the Internet. Those types of issues clearly would not be in the Court's mind issues that would be partic (sic) – that a – even a Family Court would be particularly educated sufficiently about despite argument, any argument from counsel to – to address in – in a proper fashion. And that is – that supports, therefore, the initial indication that this – these matters should be arbitrated.

In light of the foregoing, the trial court found, "That leaves the parties to revert to article 12 of the marital agreement in determining who should arbitrate this – this award." 2T28:6-7. The trial court then went on to dispense with Article XII's mandate that Rabbi Herszaft was to select a replacement arbitrator for the parties, or that the parties' agreement in the subsequently executed

Agreement to Arbitrate with Rabbi Markin provided for a similar methodology with Rabbi Marburger.

In purporting to apply Article XII's mechanism for the appointment of the Arbitration clause of the parties' MSA, the trial court consistently interchanged the terms "arbiter [sic]" with "*Bais Din*" 2T29:1-13; 29:24-30:7; 31:21-32:13. The trial court went on to determine that the MSA's contemplated appointment of a rabbi or *Bais Din* potentially rendered it unqualified to makes its own independent assessment and appointment (2T31:12-16):

> …The Court's concern, then I'll hear from you, is that – that given the nature of the arbiter's or [*Bais Din*] contemplated in the original MSA I'm not sure the Court is qualified to determine which of a choice would be better or not.

Ultimately, however, relying upon the statements of Rothstein's counsel that the trial court would be in a no better or worse position than counsel from outside the community to make the selection, the trial court agreed that in the event the parties were unable to agree on an arbitrator, the trial court would make the selection upon the provision of three (3) names, and a description of qualifications of each arbitrator/*Bais Din* by each counsel. 2T33:18-34:12.

The trial court entered an Order on January 18, 2024, Pa9, vacating the March 8, 2021 Arbitration Award, *inter alia*, permitting relocation and restricting Koslowitz's parenting time, and stated as follows with regard to selection of arbitrator/*Bais Din*:

> The March 8, 2021, Arbitration Award is vacated as the Court finds that the requirements to maintain a proper record and recording of the proceedings were not met under R.5:3-8 as well as Fawzy v. Fawzy. 199 N.J. 456 (2009). For this reason, the Court did not reach a determination as to bias or prejudice on the part of the arbitrator nor issues of law. The parties are to mutually select a new Arbitrator or *Bais Din* within thirty (30) days. If the parties cannot agree upon a new Arbitrator or *Bais Din*, then each party shall submit three (3) recommendations from which the Court will choose. The arbitrator chosen shall be familiar with the chosen education and religious upbringings of the children. The Arbitration shall be conducted as required by New Jersey law and an Arbitration agreement with the new Arbiter or *Bais Din*, addressing all issues to be arbitrated, shall be entered by and between the parties within thirty (days) after the Arbiter or *Bais Din* is chosen and as otherwise required by New Jersey law. Pa784.

D. Trial Court's Selection of Non-Rabbinic Attorney as Arbitrator

Pursuant to the January 18, 2024 Order, Koslowitz's former attorney, Ian Goldman, Esq. proposed the names of at least ten (10) rabbis from within New Jersey Orthodox Jewish communities to serve as replacement arbitrator. Pa736-751. Rothstein's former attorney, Mr. Epstein, proposed three (3) *Batei Din*, including: *Vaad Harabonim* of Queens, *Bais Din Agudas Harabonim*, and *Bais Din Kollel Harabonim* – Rabbi Landesman. Pa752-753.

The case was thereafter transferred to Hon. Kimberley Casten, J.S.C. and Mr. Epstein withdrew from the case. Pa835. No Order followed and the selection of arbitrator remained unresolved.

In July 2024, Koslowitz filed an enforcement application to address Rothstein's ongoing parenting time violations. Pa754-834. As the motion was pending, Rothstein hired new counsel who, for the first time in the entire history of the case, proposed non-rabbinic arbitrators, including retired judges and matrimonial law practitioners. Pa886-890. This supplemental submission was made well after the thirty (30) day timeframe Ordered by Judge Gertner under the January 18, 2024 Order. Pa783-784.

Koslowitz strenuously objected to Rothstein's proposed arbitrators as (a) they were not rabbis with full *halachic* authority to make Jewish law decisions as agreed under the MSA; and (b) their fee structure is far more onerous than rabbinic arbitrators or *Batei Din*, which adjudicate disputes for little or no compensation as a community service[12]. Pa873-875. He further underscored that none of the arbitrators proposed are of the Lakewood community, whose standards the parties bound themselves to. Pa873.

On October 15, 2024, Judge Casten issued a Letter Decision appointing Mr. Kornitzer as arbitrator. Pa5. In the Letter Decision justifying her disregard

[12] The financial concern was in the forefront for Judge Gertner, who expressed that "any inhibition economics should not be -- should not be part -- if there was one, economics should not be a part of it." 2T45:19-21.

of the parties' Arbitration Clause, Judge Casten stated "Reb Yaakov Herszaft was removed as Arbitrator", id.; however, that was directly contradicted by the record wherein it is uncontroverted that only Rabbi Markin was removed as Arbitrator. In so finding, Judge Casten ignored that Rabbi Herszaft's role under the MSA was contemplated to be temporary; limited to acting as an interim arbitrator until he selected his own replacement, Pa1019, which he did in 2017 with his appointment of Rabbi Marburger to serve as permanent arbitrator.

Mr. Kornitzer is not a rabbi, nor is he a member of any ultra-Orthodox community to which the parties belong. Most importantly, Mr. Kornitzer does not possess the requisite Judaic training to make binding decisions for the parties grounded in Jewish law, as expressly required by the MSA.

Koslowitz filed a Motion for Reconsideration requesting that the trial court enforce the MSA's Arbitration Clause for Rabbi Herszaft to select an arbitrator. Pa892. In advance of oral argument, Koslowitz filed a letter from Rabbi Herszaft, which refuted Rothstein's representation that he would be unwilling to serve as interim arbitrator (just as he did in 2017), Pa925, 930, as well as from an individual involved in the formulation of the MSA, Rabbi Daniel Kester, who attested to the parties' intentions in drafting the Arbitration Clause. Pa932-933. However, the trial court declined to consider the

submissions despite their unequivocal relevance in assessing the parties' expressed intentions at the time of the MSA. 3T10:1-12:25.[13]

During oral argument on January 8, 2025, Koslowitz's counsel further requested a plenary hearing in the event of the trial court's finding of ambiguity with respect to the parties' intentions in their selection of arbitrator. 3T4-5.

Despite the methodology agreed upon by the parties for the selection of arbitrator under the MSA and subsequent Agreement to Arbitrate with Rabbi Markin, the trial court substituted a different term for the parties, expressing its unsupported reasoning that they needed a "clean slate," stating (3T28:20-29:4):

> Additionally, the transcript provided by plaintiff, which the application to enforce Judge Gert – with the application to enforce Judge Gertner's order included the transcript of his oral decision. On page 47 of that transcript on which the 1/18/24 order was based addresses that Judge Gertner called for a clean slate for this case which would therefore exclude Rabbi Herszaft from consideration because he had previously been involved servicing as the party during and after the divorce.

Notably, Judge Gertner never considered or mentioned Rabbi Herszaft as a replacement Arbitrator. Id. Instead, he simply dispensed with the parties' multiple agreements that only a rabbi could select the parties' replacement Arbitrator. Id. Thus, the notion that a "clean slate" would have negated the MSA

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[13] 3T__ refers to the Transcript of Decision before the Honorable Kimberley Casten, J.S.C., January 8, 2025.

and/or excluded Rabbi Herszaft from acting as arbitrator or making a subsequent appointment was contravened by the actual record.

Koslowitz's Motion for Reconsideration was denied by Order dated January 8, 2025. Pa7. This appeal follows.

POINT I

THE TRIAL COURT'S APPOINTMENT OF A NEW JERSEY ATTORNEY AS ARBITRATOR MUST BE REVERSED BECAUSE IT VIOLATED THE ARBITRATION CLAUSE CONTAINED IN THE PARTES' MARITAL SETTLEMENT AGREEMENT AND OTHER AGREEMENT OF THE PARTIES (Pa2, 5, 7, 10)

A. De Novo Standard of Review

Whether a party is bound to arbitrate is a question of law, and this Court conducts a plenary review of that legal issue. Morgan v. Sanford Brown Inst., 225 N.J. 289, 302-03 (2016); Skuse v. Pfizer, 244 N.J. 30 (2020). Accordingly, this Court need not defer to the findings or interpretive analysis of the trial court. Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019).

B. The Trial Court was Required to Strictly Enforce the MSA's Arbitration Clause and Subsequent Agreement to Arbitrate

The trial court's disregard of the parties' twice expressly written methodology for the selection of an arbitrator by a rabbi in favor of its own methodology and ultimate selection of a non-rabbinic authority as arbitrator violates basic contract principles, as well as the provisions of the New Jersey

Arbitration Act ("NJAA") (N.J.S.A. 2A:23B-1 to -32), and therefore, must be reversed and remanded.

i. Matrimonial Settlement Agreements Generally

Settlement of matrimonial disputes is "encouraged and highly valued in our system." Quinn v. Quinn, 225 N.J. 34, 44 (2016). "The prominence and weight we accord such [settlements] reflect the importance attached to individual autonomy and freedom, enabling parties to order their personal lives consistently with their post-marital responsibilities." Weishaus v. Weishaus, 180 N.J. 131, 143 (2004) (quoting Konzelman v. Konzelman, 158 N.J. 185, 193 (1999)). "'[S]trong public policy favor[s] stability of arrangements' in matrimonial matters." Konzelman, 158 N.J. at 193.

Matrimonial agreements are governed by basic contract principles and, as such, courts should discern and implement the parties' intentions. J.B. v. W.B., 215 N.J. 305, 326 (2013). "[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." Quinn, 225 N.J. at 45. "[A] court should not rewrite a contract or grant a better deal than that for which the parties expressly bargained." Ibid. "The court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the 'expressed general purpose.'" Ibid.

ii. Arbitration of Custody Disputes & Selection of Arbitrators under the NJAA

Arbitration, including in the matrimonial arena, is "a creature of contract." Fawzy v. Fawzy, 199 N.J. 456, 469 (2009) (quoting Kimm v. Blisset, LLC, 388 N.J.Super. 14, 25 (App.Div.2006), certif. den., 189 N.J. 428 (2007)). An agreement contained in a Martial Settlement Agreement to submit any controversy between the parties to arbitration is enforceable and irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract. Minkowitz v. Israeli, 433 N.J.Super. 111 (2013); see also N.J.S.A. 2A:23B-6(a).

All agreements to arbitrate made on or after January 1, 2005, are governed by the NJAA N.J.S.A. 2A:23B-3, which the parties in the instant matter also specifically designated to govern their arbitration proceedings. Pa116-17. The NJAA expressly prohibits a court from selecting an arbitrator if the parties have contracted to a selection methodology. See N.J.S.A. 2A:23B-1 to -32.

The NJAA's legislative history confirms the Legislature's view that the statute permitting a court to select an arbitrator would operate as a "default" provision only to the extent the parties did not otherwise agree. As did Congress when it enacted 9 U.S.C. § 5, the Legislature ensured in the NJAA that a court can act only when the parties have not agreed on a specific arbitrator or designated a method of choosing an arbitrator, or when an agreed-upon selection process has failed:

> If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on application of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method. [N.J.S.A. 2A:23B-11(a).]

iii. The Parties Expressly Contracted for Arbitration before Rabbinic Authorities

In Article XII of the parties' MSA, they expressly contracted to engage in arbitration to adjudicate both their current and future custody and parenting time disputes. Pa1019-1021. They further set forth the method for the selection of an arbitrator; namely, that Rabbi Herszaft had "the sole discretion of choosing another permanent Arbitrator and both parties shall sign their Agreement to use the choice for Binding Arbitration with him." Pa1019.

The parties thereafter entered into an Agreement to Arbitrate on January 18, 2021 providing that in the event of Rabbi Markin's unavailability or inability to select a replacement, Rabbi Marburger would be appointed to act as an interim arbitrator, and Rabbi Marburger would be vested with the authority to select the replacement arbitrator. Pa118.

Nonetheless, following Rabbi Markin's disqualification, the trial court directed the parties to undertake neither of their contracted methods for the selection of arbitrator. Pa784. Instead, Judge Gertner's January 18, 2024

Order substituted the trial court's own methodology for the selection of arbitrator that bore no relation to the parties' agreements, providing that the parties would attempt to agree, and in the event they were unable to do so, the trial court would make the appointment. Id. Judge Gertner, however, made his view that the parties' MSA contemplated a rabbinic arbitrator or *Bais Din*, as categorically synonymous terms reflecting religious adjudicative bodies, abundantly clear. Id.

Almost a year later, however, Judge Casten - purportedly relying on Judge Gertner's sentiments that the parties required a "clean slate," which, in context, clearly reflected only Judge Gertner's aspirational belief that the parties should put their differences aside and begin anew (2T47:3-22) - dispensed with any analysis of the parties' intentions at the time of their agreements, and appointed Mr. Kornitzer; an attorney whom the parties neither contemplated nor agreed at any time. Pa1-5.

As a result, there was and could be no finding that the parties' agree-upon methodology "failed" or otherwise triggered NJAA's provision for the court's appointment of arbitrator, as there was no effort by the trial court to implement the MSA or Agreement to Arbitrate as an initial matter via the selection of Rabbi Herszaft or Rabbi Marburger to make the selection in accordance with the agreements' "clear and unambiguous" language. Instead,

the trial court rewrote the parties' contract and granted them a different deal than their express bargain. This decision cannot stand as a matter of contract interpretation and must be remanded for strict application of the parties' contracted-to terms. See Quinn, 225 N.J. at 45 ("When the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written…a court should not rewrite a contract or grant a better deal than that for which the parties expressly bargained.").

POINT II

THE TRIAL COURT'S FAILURE TO CONSIDER THE PARTIES' INTENT, AS INFORMED BY EXTRINSIC EVIDENCE AND COURSE OF PERFORMANCE, AND UNDULY INTERFERED WITH THEIR PARENTAL AUTONOMY (Pa2, 5, 7)

Even assuming *arguendo* that the trial court found the Arbitration Clause or Agreement to Arbitrate ambiguous, or that the methodology for the selection of arbitrator "failed" – neither of which was specifically found by the trial court, constraining it to strictly apply their terms – it should have considered the context of the drafting of the parties' MSA in its appointment of replacement arbitrator to preserve the parties' free exercise of their religion. The trial court's failure to do so deprived the parties of the material religious underpinnings of their MSA, and undermined the purpose of custody arbitrations; namely, for parents to exercise autonomy to decide how issues of custody will be resolved.

Parents have the right "to choose the forum in which their disputes over child custody and rearing will be resolved, including arbitration." Fawzy, supra, at 461-62; see also Faherty v. Faherty, 97 N.J. 99, 108-09 (1984). "[T]he 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." Fawzy, 199 N.J. at 476. Thus, "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." Id. at 477.

The parties in this matter did not intend to abdicate this fundamental right to just "anyone." In their MSA, the Arbitration Clause specifies rabbinic selection as a substantive commitment to a religiously-informed process, and comprises the very reason they opted out of the readily available, cost-free, and enforcement-backed court system. Pa1019-1021. The inherent advantages of the Ocean County Court – its local presence and allowance for in-person proceedings – further underscore the illogicality of substituting a geographically distant non-rabbinic arbitrator. The only rational basis for the parties to cede the benefits of a Court was the unique capacity of a religious arbitrator, deeply familiar with their community and lifestyle to resolve their disputes with

appropriate sensitivity. To now impose a non-rabbinic arbitrator defeats this foundational purpose and renders the entire Arbitration Clause nonsensical, offering no advantage over the Courts the parties intentionally sought to avoid.

To disregard this specific choice and substitute a private attorney, as the trial court has done, fundamentally undermines the premise of parental autonomy that Fawzy acknowledges, as well as the express intent of their contract. It presumes that the parties would be equally willing to submit their deeply personal and religiously significant custody dispute to any legally trained individual, stripping away their carefully considered decision to vest authority in someone aligned with their faith.

In abandoning its obligation to consider what was written in the context of the circumstances at the time of drafting the parties' Arbitration Clause, the trial court failed to uncover the intentions of the parties and the true meaning of the contract. Cottrell v. Holtzberg, 468 N.J.Super. 59 (2021); see also Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993) (in discerning the application of an arbitration clause, a court's "goal is to discover the intention of the parties," by considering, *inter alia*, "the surrounding circumstances").

In that regard, courts are guided by well-established principles in interpreting a contract which the trial court here failed to accurately apply. "A basic principle of contract interpretation is to read the document as a whole in a

fair and common sense manner." Hardy ex rel. Dowdell v. Abdul–Matin, 198 N.J. 95, 103, 965 A.2d 1165 (2009). "Literalism must give way to context." Borough of Princeton v. Bd. of Chosen Freeholders of County of Mercer, 333 N.J.Super. 310, 325 (App.Div.2000), aff'd, 169 N.J. 135 (2001). Moreover, "[d]isproportionate emphasis upon a word or clause or single provision does not serve the purpose of interpretation." Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426 (1956). "Words and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose." Ibid.

As the MSA reflects, the parties' religion is more than mere intercession of practices; it is a way of life that dictates every decision, including child rearing. See Pa994-1025. Consistent with that way of life, the parties' religion was so inextricably ingrained in their daily practices, that they negotiated their MSA under the auspices of a rabbi, and designated other rabbis to interpret all aspects thereof. As memorialized in their MSA, "…[t]his Agreement was intended to be, and is consistent with the binding nature of all agreements under Jewish law", to be adjudicated "in a Jewish Court or Law in accordance with the laws and rules established by Rabbinical authorities." Pa1023.

A review of the parties' foundational term itself – the MSA's Arbitration Clause – underscores this precept. Pa1019-1021. The language provides for the

selection of "an Arbitrator or *Bais Din*" to adjudicate post-judgment, which is reflective of the parties' intent to create equivalence between these two terms. Id. The use of the disjunctive "or" signifies that "Arbitrator" and "*Bais Din*" are presented as alternative options *within the same overarching category* of dispute resolution forums deemed acceptable by the parties. Id. This phrasing does not create two distinct, unrelated categories (secular vs. religious), but rather offers choices within a single class of adjudicators suitable for their post-judgment matters. Id. Indeed, this is precisely the interpretation that was afforded to the term by Judge Gertner. 2T29:1-13; 29:24-30:7; 31:21-32:13.

In that regard, the parties' use of "an arbitrator or *Bais Din*" in their MSA must be understood within the framework of Jewish law itself. The term "Arbitrator" in this context is not a generic reference to any neutral third party; rather, it serves as a translation of the Hebrew term *Dayaan Yachid* (a singular rabbi authorized to adjudicate legal matters). While a standard *Bais Din* typically comprises a panel of three *Dayanim*, Jewish law, as codified in the *Shulchan Aruch* (code of Jewish law), permits a *Dayaan Yachid* to act as a sole adjudicator under certain circumstances. See, e.g., Shulchan Aruch, Choshen Mishpat 3:11. The MSA's phrasing, therefore, offers two pathways within a religiously-sanctioned system of dispute resolution: a single Rabbi acting as an "arbitrator" (*Dayaan Yachid*) or a full three-member *Bais Din*. Pa1019-1021.

Consider in this context the analogy of selecting a dispute resolver from the American Arbitration Association ("AAA"). The MSA might state "an arbitrator or arbitrators from AAA." This phrase does not suggest that one could choose any individual or any other dispute resolution service; it specifies a category and allows for the selection of one or many arbitrators *within that category*. Similarly, "Arbitrator or *Bais Din*" establishes a category of religiously-inclined dispute resolvers, offering "*Bais Din*" as one type and "Arbitrator" as another acceptable option *within that same realm*. Pa1019-1021.

The fact that the MSA does not state "an Arbitrator, or other fact-finder, or a dispute resolver from JAMS, or AAA" underscores the specific and limited nature of the parties' chosen options. Pairing "Arbitrator" with "*Bais Din*," infuses the concept of "Arbitrator" with a religious requirement, as it represents a religiously qualified *Dayaan Yachid*, possessing the same foundational religious knowledge and authority as a member of a full *Bais Din* - inherently a religious tribunal operating under Jewish law – but authorized by the parties' explicit consent to act alone.

Furthermore, the disjunctive "or" can function in an inclusive conjunctive sense, particularly when the underlying intent points towards a shared characteristic. See Coffin v. Coffin, 105 N.J. Eq. 8, 10 (Ch. 1929) ("The grammatical and ordinary sense of the words is to be adhered to, 'unless that

would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument...'"). Here, the shared characteristic is the capacity to resolve disputes in a manner acceptable to parties who clearly contemplated a religious forum. The trial court's interpretation allowing for a non-rabbinic Arbitrator would effectively render the inclusion of "*Bais Din*" meaningless. See Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011) (quoting Cumberland Cty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497 (App. Div. 2003)) ("[a] contract 'should not be interpreted to render one of its terms meaningless.'").

The trial court's appointment of Mr. Kornitzer to serve as Arbitrator, therefore, cannot stand as it interfered with the parties' express, contracted-to right to freely exercise religion by compelling them to arbitrate outside of religious forum; an affront to Orthodox Jewish religious laws. South Jersey Catholic School Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elementary School, 290 N.J. Super. 359 (1996) (in cases where state action imposes restrictions on religious decisions, courts may not interfere unless the agreement between the parties indicates they waived their free exercise rights).

Still, in the event unresolved questions of intent remained for the trial court following its examination of the parties' contract, the trial court was required to hold a plenary hearing. Pacifico v. Pacifico, 190 N.J. 258 (2007).

In Pacifico, supra, the trial court rendered decisions concerning a term in the parties' Property Settlement Agreement. Id. at 263. The Appellate Division reversed, concluding that the PSA was ambiguous and directed the trial court to conduct a plenary hearing. Ibid. At the plenary hearing, both parties testified, and various drafts of the PSA were received into evidence. Id. at 263–64. "After the plenary hearing, the trial judge concluded that the PSA was ambiguous," and crafted an alternate term, but "made no findings about the parties' intentions or credibility." Id. at 265. The husband appealed, and the Appellate Division affirmed. The husband then filed a petition for certification that the Supreme Court granted. Pacifico v. Pacifico, 188 N.J. 576 (2006).

In reversing the Appellate Division's decision, the Supreme Court made clear that a court may only craft its own term on behalf of the parties if their agreement was silent on a specific issue. Ibid. A court may not draft its own term or impose meaning without ascertaining the parties' intentions. Ibid.

Against Rothstein's eleventh-hour position that differed from the commonsense interpretation of the parties' agreement, Koslowitz's clearly and consistently expressed understanding, and the unanimous course of conduct of both parties, the trial court was required to hold a plenary hearing to resolve questions of the parties' intentions. Its failure to do so constitutes reversible error. See Celanese Ltd. V. Essex County Improvement Authority, 404

N.J.Super. 514 (App. Div. 2009) (reversing a decision to resolve ambiguities from a paper record without allowing parties to challenge credibility).

POINT III

THE TRIAL COURT'S ORDERS INTERFERED WITH THE PARTIES' FREE EXERCISE OF RELIGION (Pa2, 5, 7)

New Jersey provides robust protection for the free exercise of religion, balancing these rights against other compelling state interests. The New Jersey Constitution, in Article I, paragraph 3, ensures that no person shall be deprived of the privilege of worshipping according to their conscience, nor be compelled to support any place of worship contrary to their beliefs (N.J.S.A. Const. Art. 1, ¶ 3)[1]. This clause is interpreted to provide protections that are at least as broad as under the federal Constitution, and in some cases, offers greater protections. Farhi v. Commissioners of Borough of Deal, 204 N.J. Super. 575 (1985).

According to Orthodox Jewish belief, Jews are not permitted to resolve conflicts in secular courts and are required to resolve conflicts in rabbinical courts before rabbinical judges applying Jewish law. Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, 915 F. Supp. 2d 574, 582 (S.D.N.Y. 2013), aff'd sub nom. Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY, 945 F.3d 83 (2d Cir. 2019). While Orthodox Jews recognize and obey the laws of this country, they consider it their religious duty to settle their

differences according to their own law. S.S. & B. Live Poultry Corp. v. Kashruth Ass'n of Greater New York, 285 N.Y.S. 879, 883–84 (Sup. Ct. 1936).

Historical evidence documents that rabbinical courts - *Batei Din* - have operated throughout Europe from the Middle Ages through today. James Yaffe, So Sue Me! The Story of a Community Court, 8 (1972). In the United States, rabbis at Orthodox synagogues established local tribunals, while national associations of Jewish synagogues created dispute resolution boards. As a result, a large number of U.S. cities have many Jewish courts. Michael C. Grossman, Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process, 107 Colum. L. Rev. 169, 180–81 (2007).

Generally, a *Bais Din* consists of three rabbinic judges. Ibid. Judges apply *halacha* - Jewish law - but the procedures of each panel differ. Ginnine Fried, Comment, The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts, 31 Fordham Urb. L.J. 633, 653-54 (2004).

There exist fundamental differences between religious and conventional arbitration; particularly, ecclesiastical doctrine predetermines categorically whom parties can select as arbitrators. See 1 Emanuel Quint, A Restatement of Rabbinic Civil Law 255-56 (1990) (noting that Jewish law forbids "women, invalids, non-Jews, and others" from testifying); see also Steven F. Friedell, The

"Different Voice" in Jewish Law: Some Parallels to a Feminist Jurisprudence, 67 Ind. L.J. 915, 946 (1992) ("[O]nly men could become rabbis and judges.").

At threshold, Judaic arbitrators must be of a certain religion and strict Jewish law requires a certain level of rabbinical ordination. 1 Quint, supra, note 111, at 52, 61 n.37, 255. These requirements do not contradict the applicable Arbitration statute; the UAA notes that parties often choose arbitrators due to their expertise or other bias. See UAA § 11 cmt. 1, 7 U.L.A. 41-42 (2000) "Bias" does not refer to partiality to a party, and is not to be confused with "impartiality," but rather refers to "biases and prejudices inherent in particularly worldly experience." See id. § 12 cmt. 1 ("[P]arties frequently choose arbitrators on the basis of... pertinent... expertise.").

In proceedings under Jewish law, the specialized knowledge possessed by the arbitrator is knowledge of Jewish law, *halacha*:

> Today, there is a preference for a beth din when a dispute involves underlying Jewish concepts, and the disputants doubt whether a non-Jewish adjudicator could sufficiently comprehend those foreign concepts and properly rule on the dispute. This echoes one of the positive aspects of arbitration in general, the ability to choose an arbitrator with expertise in a certain field to decide a case.
> [Fried, supra, 31 Fordham Urb. L.J. at 639–40.]

A *Bais Din* must always play a major role in the area of Jewish divorce, regardless of whether parties agree to arbitrate all their disputes. See Fried, supra, at 640-41. According to Jewish law, Jewish courts have exclusive

jurisdiction in the divorce process. Ibid. One must obtain a religious divorce with the aid of a rabbinical court to terminate a Jewish marriage; a civil divorce alone does nothing to change the couple's marital status. Due to this necessary interaction with the *Bais Din*, the parties are often encouraged, as here, to submit all disputes related to the divorce to the *Bais Din*, including child custody, support, and equitable distribution. Ibid.

Against this backdrop, the only conclusion to be reached is that the parties intended to select a sole rabbinic arbitrator or *Bais Din* to apply the religious terms throughout their agreement. The parties' course of performance under the Arbitration Clause, demonstrating a consistent reliance on religious guidance for dispute resolution, underscores this intent and constitutes critical extrinsic evidence that was wholly disregarded by the trial court. Journeymen Barbers, etc., Local 687 v. Pollino, 22 N.J. 389, 395 (1956) (extrinsic evidence includes conduct of the parties after execution of the agreement).

In the years following the MSA, the parties agreed upon and/or were heard before nine (9) separate rabbis sitting as single arbitrators, or as a *Bais Din* panel convened by the single arbitrator. That same arbitrator selection language appeared again in 2021, in Rabbi Markin's Agreement to Arbitrate, wherein either Rabbi Markin or Rabbi Marburger were empowered to select Rabbi Markin's replacement. Pa118. Never did the parties contemplate or bargain for

a secular authority, i.e. a civil court, to make the appointment, and particularly not of a non-rabbinic authority.

Even after Judge Gertner's January 18, 2024 Order wherein he repeatedly utilized Arbitrator and *Bais Din* as interchangeable terms, the parties' conduct reflected their mutual intent to select a rabbinic arbitrator or *Bais Din*[14]. Immediately following the January 18, 2024 Order, each party initially submitted names of either rabbis or, in the case of Rothstein, three (3) fully empaneled *Batei Din*. Pa736-753. Never were any secular or non-rabbinic authorities from outside the ultra-Orthodox community considered by either party or the trial court until Rothstein's new counsel became involved almost a year after Judge Gertner's decision. Pa886-887.

Judge Casten thereafter supplanted her own notion of an appropriate arbitrator without any examination whatsoever of the language of the parties' agreement, their course of conduct in the years that followed, or their mutual intentions just months prior. Until the day of the selection of arbitrator, Rothstein's counsel never asserted that Rothstein's intention was for a non-rabbinic arbitrator to be appointed, nor could it even be argued.

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[14] Judge Gertner's interpretation of the parties' intentions at the time of the MSA was the law of the case and should not have been disturbed. Lombardi v. Masso, 207 N.J. 517, 539 (2011) (the law of the case doctrine is triggered when a court is faced with a ruling on the merits by a different and co-equal court on an identical issue).

Instead, the trial court engaged in no analysis of intent and egregiously disregarded evidence Koslowitz submitted in advance of the January 8, 2025 motion hearing[15], which included statements from Rabbi Kester, Pa932-933, the rabbi who assisted the parties in drafting the MSA itself, as well as by the initially designated arbitrator, Rabbi Herszaft. Pa925, 930. Rabbi Herszaft indicated that he would currently be willing to act as interim arbitrator to appoint a permanent arbitrator, as set forth under the express terms of the MSA. Id. Rabbi Kester further explained, "Only an arbitrator who himself is living 'in the same environment' and upholds in his own house 'the standard of those in the Children's school classes' can properly arbitrate on these issues. It is not a matter of trust, an Arbitrator has to be 'living it' to be able to honestly represent both parties interest." Pa933.

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[15] The trial court refused to consider this critical and relevant evidence in a non-dissolution summary proceeding, solely based on its determination that the submissions were "late," having been filed a day prior to the scheduled date for argument on Koslowitz's Motion for Reconsideration of the trial court's October 17, 2024 Order. 3T9-10. However, non-dissolution proceedings are distinct from motions filed on the dissolution docket. Directives #08-11, dated September 2, 2011, and #20-19, dated September 3, 2019, make clear that all non-dissolution actions will be processed as summary actions, and distinguish between non-dissolution motions and the dissolution motion process governed by R. 5:5-4 and 1:6-2. Absent from non-dissolution motion practice are the same rules and timeframes for service and filings governing submissions in dissolution actions. Highlighting this critical difference is that according to R. 5:4-2(b), a defendant in a non-dissolution action need not even file an answer, appearance or acknowledgement in order to be heard if the defendant appears on the return date.

Not only should the parties' intent surrounding their adjudication of religious disputes have been examined, but their expectations concerning the financing of arbitration should have analyzed as well. The parties are not of significant means, as specifically recognized by Judge Gertner. 2T45:14-15. Koslowitz is a Yeshiva student, Pa611, and Rothstein is a nurse. Pa316, 710. Neither party had or has sufficient means to pay a private attorney to function as their judge long-term, and bargained for a rabbinic authority to arbitrate, charging little to no money for their community service as a consequence of living in a Jewish environment with its own court system. See Pa613-614.

Had they been faced with the possibility that a private attorney would be appointed by a secular court at the time they entered into the MSA, it could have materially affected each of their decisions to waive their right to be heard in court free of charge. Arbitration clauses are material because they can significantly affect the rights and obligations of the parties. See Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014) (finding that arbitration clauses are material because they can significantly affect the rights and obligations of the parties). This material consideration should also not have been overlooked by the trial court, particularly against the weight of the religious and constitutional considerations at play.

The trial court's failure to examine the religious underpinnings of the parties' agreements, therefore, deprived them of the benefit of their bargain, interfered with their free exercise of religion, and constitutes reversible error.

POINT IV

THE TRIAL COURT'S APPOINTMENT OF A NON-RABBINIC ARBITRATOR TO ADJUDICATE RELIGIOUS DISPUTES IMPLICATES THE RELIGIOUS QUESTION DOCTRINE (Pa2, 5, 7)

The trial court's substitution of a non-rabbinic attorney for a contractually agreed-upon rabbinic authority constitutes a direct and impermissible intrusion into religious matters, squarely triggering the prohibitions of the Religious Question Doctrine and must be reversed and remanded, accordingly.

The constitutional strictures on government action concerning religion seek to avoid certain evils. They include discrimination among religions or between religion and nonreligion, symbolic union between government and a given religion, sponsorship of the religious mission of a group, excessive entanglement between government and religion, and political divisiveness incited by the government's favoritism of a particular religious faith. See Grand Rapids School Dist. v. Ball, 473 U.S. 373, 390, 392–97 (1985); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794–98 (1973); Lemon v. Kurtzman, 403 U.S. 602, 611–15 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

Under the Religious Question Doctrine, religious questions may only be decided by religious authorities. Watson v. Jones, 80 U.S. 679, 727 (1871). The Religious Question Doctrine cautions against entanglement of civil and religious issues consistent with the policy that only religious tribunals can adjudicate areas of religious dispute. Elmora Hebrew Center, Inc., supra, 125 N.J. 404. "[T]he only person authorized to explain the substance of Jewish law… [is] the Beth Din." Lang v. Levi, 16 A.3d 980, 991 (Md. Ct. Spec. App. 2011).

A poignant example of the transgression of the Doctrine is found in Ran-Dav's Cnty. Kosher, Inc., 129 N.J. at 163–65, which the October 15, 2024 Letter Decision misapplied in its appointment of Mr. Kornitzer. There, the state, through the Attorney General, initiated an action against Ran-Dav's, alleging violations of kosher food regulations, defining kosher as "the laws and customs of the Orthodox Jewish religion." Ran-Dav's challenged the constitutionality of the regulations, arguing that they violated the Establishment Clause and the corresponding provision of the New Jersey state constitution.

In determining the state's regulations unconstitutional, the Court opined that the state violates the Establishment Clause where individuals are used by and for the state in their religious capacity to interpret and enforce state law. In such event, "the religious and civil authority possessed by them is virtually indistinguishable." As the Court stated, "[e]ven a symbolic union between

government and religion would contravene the effects prong of the Establishment Clause." Grand Rapids School Dist., supra, 473 U.S. at 389. Government practices may not "have the effect of communicating a message of government endorsement or disapproval of religion." Lynch v. Donnelly, supra, 465 U.S. at 692 (O'Connor, J., concurring).

In Larkin v. Grendel's Den, supra, the U.S. Supreme Court observed that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." Id. at 125–26. The Court concluded that state action promoting such an image violates the Establishment Clause, for it has "a 'primary' and 'principal' effect of advancing religion." Ibid.

This is not to state that a court's enforcement of agreements to submit to arbitration in *Bais Din* implicates the Religious Question Doctrine. To the contrary; courts have long adhered to the principle that where parties voluntarily agree, either through pre-existing religious affiliation or contractual stipulation, to submit to religious arbitration, judicial enforcement does not equate to impermissible entanglement. Satz v. Satz, 476 N.J. Super. 536 (App. Div. 2023) (enforcing an MSA requiring ex-husband to submit to jurisdiction of rabbinical court for Get proceeding and to accept its judgment where parties agreed that their submission to rabbinical court shall constitute an agreement to be bound

as to any issue the rabbinical court addressed); Elmora Hebrew Center, Inc., supra, 125 N.J. 404 (finding parties are bound by Beth Din's decision because they agreed to submit their disputes to the Beth Din). And that is precisely what the trial court should have, but failed, to do here.

The parties' express, written selection of a religious arbitrators involved inherently religious considerations regarding the children's upbringing, religious education, and adherence to religious practices. The parties implemented these express, written provisions until the state interceded and designated a private individual to enforce the parties' religious compliance as set forth in their MSA.

While a rabbi is preeminently equipped to address these issues within the framework of religious law, the trial court's appointment of a non-rabbinic arbitrator implicates the state's entanglement in interpreting and potentially misapplying religious principles; an area where, as recognized by Judge Gertner, secular courts lack expertise and where intervention infringes upon religious freedom. 2T31:12-16.

While the trial court could have directed a prior rabbinic arbitrator to make a selection as proper enforcement of the parties' MSA and Agreement to Arbitrate, it could not itself parse through resumes, determine levels of religious observance, and make the appointment on the basis of their ability or inability to interpret religious doctrine. Even Judge Casten's Letter Decision itself

reflects the trial court's entanglement in religion with its analysis of whether an individual is a member of a specific religious community versus "familiar" with that community. Pa5. Whether or not an individual is "familiar" with a community, only a rabbi possesses the required training and experience to determine questions of religion.

If the trial court's orders stand, Mr. Kornitzer will be required to consult with rabbinic authorities to make religious determinations. Such process may impermissibly enmesh a court in decisions if a party claims "harm" based upon religious precepts, rendering it impossible to neutrally select between differing viewpoints should it be necessary. See Alicea v. New Brunswick Theological Seminary, 128 N.J. 303 (1992) (finding that state intervention in intra-religion disputes should effectuate the intent of the parties and enforce express agreements to comply with religious doctrine if the court can determine compliance by applying neutral principles of law). This impermissible religious entanglement is avoided by a final, binding religious authority assigned to the matter as agreed in the parties' MSA, which is necessary to preserve the court's *parens patrie* oversight and the parties' parental autonomy without impermissible religious entanglement. See McKelvey v. Pierce, 173 N.J. 26 (2002); Welter v. Seton Hall University, 128 N.J. 279 (1992).

In other words, religious questions arising under the MSA can only be answered by a rabbi, having been ordained to function as a religious law judge specifically for instances where, as astutely recognized by Judge Gertner, a court would otherwise have no basis to adequately review such determinations. 2T31:12-16. Thus, the trial court's "state action" in appointing Mr. Kornitzer to adjudicate the parties' religiously based disputes impugned the parties' religious practices in favor of its own concept of appropriate dispute resolution to which the parties never acquiesced. Reversal and remand is warranted as a result.

CONCLUSION

For all of the foregoing reasons, Koslowitz respectfully requests the Court reverse the Orders of January 18, 2024, October 17, 2024, and January 8, 2025.

Respectfully submitted,
FOX ROTHSCHILD LLP
Attorneys for Plaintiff-Appellant

_____ Dated: May 19, 2025
Eliana T. Baer

YERUCHOM F. KOSLOWITZ, Plaintiff-Appellant, v. LIEBA N. ROTHSTEIN, Defendant-Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001647-24T2 Civil Action **On Appeal From:** SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, FAMILY PART OCEAN COUNTY FD-15-843-20 Sat Below: HON. KIMBERLEY S. CASTEN, J.S.C. HON. SEAN D. GERTNER, J.S.C.

BRIEF FILED ON BEHALF OF DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

This Appeal concerns a religious divorce and an Agreement between the parties to arbitrate issues in accordance with their ultra-Orthodox religious beliefs. Yet, extensive litigation in the civil Court demonstrates Plaintiff's utter failure and refusal to abide by the arbitration awards and process that he claims to demand. Instead, Plaintiff's practice is to litigate whenever he doesn't get his way. Dissatisfied with the Court's selection of an arbitrator, Plaintiff is once again playing fast and loose with the rules.

By way of background, a procedural failure in the creation of an arbitration award led a New Jersey Court to determine that the requirements of Fawzy were not adhered to, and the arbitration award (which had been repeatedly challenged by the Plaintiff on other grounds and confirmed by the Court) was overturned. A procedure for selecting a replacement arbiter was established by the Court whereby each party proposed the names of three arbiters familiar with the education and religious upbringings of the children, from which the Court would select an arbitrator. The parties accepted this ruling. Plaintiff never challenged the methodology or stated qualifications of the arbitrator established by the Court in a motion for reconsideration or a motion for leave to appeal. To the contrary, unable to reach an agreement, Plaintiff moved to enforce this ruling, requesting that the Court appoint a new arbitrator (as did Defendant in her Cross-Motion).

Plaintiff chose to submit the names of close allays and highly biased individuals and submitted no response, favorable or unfavorable, to the arbitrators proposed by Defendant, as directed by the Court.

Upon review, the Court appointed Robert Kornitzer, Esq., who is intimately familiar with the Orthodox community, its practices, and beliefs, having received referrals from Jewish halachic arbitrators and worked with many other Orthodox families.

In response to this appointment, Plaintiff filed a motion to "reconsider" relief, which Plaintiff had never asked for in his initial motion, which was improper and correctly denied by the Court. Plaintiff's belated assertion that the MSA required Rabbi Herszaft to appoint or serve as an arbitrator was not supported by the plain language of the MSA or persuasive, considering the procedural posture and Plaintiff's prior contradictory positions. Incredibly, Plaintiff now argues, for the first time on appeal, a new and entirely different position: that the Court should have utilized the methodology outlined in the Arbitration Agreement entered with Rabbi Markin to select the new arbiter.

The Court's appointment of an arbitrator was consented to by the parties. Plaintiff's arguments, otherwise, including that the Court's appointment of an arbitrator violates the Establishment Clause, are completely disingenuous and improper. Plaintiff's dissatisfaction with the selection of an arbitrator proposed by

Defendant is not a basis for an Appeal, and Plaintiff's ever-evolving rationale to overturn the Court's decision is impermissible and unpersuasive.

Plaintiff's newly created requirement that the arbitrator must be a rabbi (as opposed to "familiar with the education and religious upbringings of the children" as provided in the unchallenged Order) is similarly misplaced and unpersuasive. The Agreement does not provide for "religious arbitration under the auspicious of a presiding rabbinic authority," as stated by Plaintiff. The Agreement does require the arbitrator to be a rabbi as is evident as well from the fact that Plaintiff did not respond to Defendant's proposed arbitrators (in his Reply) by saying that a rabbi was required or contemplated by their Agreement. Notably, Defendant, herself Orthodox, proposed Mr. Kornitzer and other qualified attorney arbitrators in the wake of the Court's reversal of arbitration decisions made years earlier relative to her relocation and the sanctioning of Plaintiff for his complete and utter refusal to abide by his obligations including payment of support, tuition, basic compliance with the parenting schedule and participation in the arbitration process.

The parties agreed that the Court would select an arbitrator, and there has been no abuse of discretion in the appointment of Robert Kornitzer, Esq. There is no inconsistency with the MSA or interference with Plaintiff or Defendant's right to exercise his or her religion or parental autonomy freely. Plaintiff is unhappy with the Court's selection and wants a do-over.

STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The parties entered a religious marriage on March 15, 2012, and have two children together: [redacted] (age 11) and [redacted] (age 9). (Pa149). The parties obtained a Jewish divorce and, despite having never been civilly married, entered into a full and comprehensive Marital Settlement Agreement on August 25, 2017 ("Agreement"). (Pa149)(Pa994).

The Agreement provides for binding arbitration in Article XII to resolve disputes. It details the process and contains mutual waivers of the right to seek judicial intervention in the civil Court. (Pa1019-Pa1021). Article XII provides as follows:

> **ARTICLE XII**
>
> **COOPERATION AND CONFLICT RESOLUTION**
>
> A. The parties both agree that any disagreement between them shall be arbitrated with binding arbitration solely by the Arbitrator, prior to seeking the Civil Court's intervention. The Arbitrator chosen by both sides temporarily just for the purpose of finalizing this agreement is Reb Yitzchok Herszaft and both parties agree to pursue and cooperate to agree on a permanent Arbitrator. If no permeant [sic] arbitrator is agreed on within 3 months of this agreement being signed then Reb Yitzchok Herszaft will have the sole discretion of choosing another permanent arbitrator and both Parties shall sign their Agreement to use the choice for Binding Arbitration with him.

[1] Defendant's Statement of Procedural History and Statement of Facts have been combined to avoid duplication and for purposes of clarity.

B. In the instance that the Arbitrator decides that a disagreement must be adjudicated upon by a Bais Din, then the Arbitrator has the right to choose which Bais Din the disagreement shall be taken to. Only said Bais Din has the right to rule that a situation may be taken to adjudication in the secular court. Under no circumstances shall either party decide on their own without the explicit written permission of the Arbitrator, take any disagreement to a Bais Din or a Civil Court. Any party not confirming to this stipulation hereby accepts upon themselves with a veritable commitment to pay for all legal costs, or Bais Din costs, or *toien* costs, incurred by the other Party in defending themselves in said litigation, regardless of the Court's decision on the issue. Any Court Order that results when a Party brings Court litigation without express permission from the Bais Din upon referral by the Arbitrator can be vacated and overruled by decision of the Arbitrator or by the Bais Din upon referral by the Arbitrator. This is fully binding upon both parties, except:

    i) A medical emergency where there is imminent threat to life or limb; or

    ii) If the Arbitrator is unable to solve the issue within seven days, as specified above, or in timelier manner if the matter is more urgent and requires a more immediate adjudication, for whatever reason whatsoever.

C. In the event that the Arbitrator is unavailable and has not appointed a designee, or cannot act for any reason, or cannot rule on the matter(s) for any reason, then he shall advise that the issue be submitted to the Bais Din of his choice for review and final decision.

D. The Parties agree that the Bais Din chosen by the Arbitrator or his appointee, shall have the sole and exclusive power, authority and jurisdiction, both now

> and in the future, to amend, modify, clarify, interpret, terminate and/or otherwise effect part or all of this Agreement in any way, manner, or form as said Bais Din may deem proper, and the resultant Agreement and or matter shall be fully binding on, and shall fully commit, each of the parties.
>
> E. The Parties understand that although the Civil Court would normally have the right to adjudicate matters involving custody, parenting times and other child-related issues, both Parties have nonetheless agreed that they have chosen to waive to Court Adjudication and instead to arbitrate these issues as concluded herein. This is in accordance with the Fawzy v. Fawzy law.
>
> F. The Parties had the ability to consult with counsel as to the rights that they are waiving by agreeing to appoint an Arbitrator on child-related issues.
>
> G. The Parties understand the legal rights that they are waiving in binding themselves to Arbitration in this matter.

(Pa1019-Pa1021).

As designated in Article XII, paragraph A, the parties initially engaged in arbitration with Rabbi Herszaft following the execution of the Agreement. (Pa912)(Pa1019). According to the Agreement, he acted as the Arbitrator only temporarily and served for a few months. (Pa1019)(Pa912). The parties then agreed that Rabbi Marburger would serve as the permanent Arbitrator. (Pa912). He remained in that role for approximately two years but then expressed it was too much and sent the parties to a Bais Din for approximately one year. (Pa912).

Thereafter, the parties participated in the arbitration process with Rabbi Leib Landesman, who rendered a 38-page ruling on August 21, 2020, which allowed Defendant to relocate to California. (Pa315). Because Plaintiff was unhappy with the Arbitrator's decision, he was difficult in agreeing to confirm the award. (Pa149). Eventually, the Court confirmed the award in an Order dated November 25, 2020, and the matter was closed. (Pa104).

Defendant's second marriage was brief, and she planned to return to a Jewish Community in Far Rockaway, Queens. (Pa150). Defendant had family and friends in the area and had obtained employment as a registered nurse in Queens, New York. (Pa150). Plaintiff opposed Defendant's move to Far Rockaway and another dispute ensued. (Pa150).

At Plaintiff's insistence, because he was unhappy with the decision of the parties' last Arbitrator (Rabbi Landesman), a new Arbitrator was selected. (Pa150). Plaintiff suggested Rabbi Dovid Markin. (Pa150). Defendant was uncertain as to whether to agree to arbitration with Rabbi Markin, in part because Plaintiff selected him, but also because relocation to Far Rockaway was within the permissible 75-mile radius from Lakewood, so there was no reason for Defendant to submit the issue to arbitration. (Pa150). Specifically, Article II, paragraph I of the MSA gave Defendant the right to relocate so long as it was not more than 75 miles from Lakewood, which Far Rockaway is not. (Pa997). Yet, as a showing of

good faith, Defendant agreed to allow Rabbi Markin to decide the relocation dispute. (Pa150). An Arbitration Agreement with Rabbi Markin was entered on January 18, 2021. (Pa116).

Ultimately, Rabbi Markin permitted Plaintiff to relocate with the children to Far Rockaway and issued a formal determination on March 8, 2021. (Pa126-Pa127). Plaintiff was dissatisfied and decided to ignore and disobey Arbitrator Rabbi Markin's directives. (Pa150). Plaintiff's behavior became completely obstreperous. (Pa128)(Pa150). He stopped paying child support, refused to pay tuition, disagreed with the use of a mental health professional appointed by Rabbi Markin, and became oppositional to Defendant, the Rabbi, and the process. (Pa128-Pa135) (Pa150)(Pa160)(Pa162). Not only was Plaintiff oppositional and defiant, but he was also attempting to alienate the parties' young children against Defendant, poisoning their minds with negativity and hate toward their mother. (Pa151) (Pa162)(Pa233-Pa235). Plaintiff's conduct led the Arbitrator to suspend Plaintiff's parenting time. (Pa120)(Pa150-Pa151)(Pa160)(Pa162)(Pa233-Pa235). The Arbitrator determined that Plaintiff required therapy and evaluation for personality disorders or psychological illness. (Pa151). Plaintiff stopped appearing at scheduled hearings and then kidnapped the parties' son from camp. (Pa150)(Pa160)(Pa162). It was at this point that the Arbitrator allowed Defendant

to file an emergent application with the civil Courts (in accordance with Article XII of the MSA). (Pa152).

Defendant filed an Order to Show Cause on July 30, 2021, to compel Defendant to return the party's son and to cooperate with the Arbitrator's directives concerning child support and tuition, to abide by the parenting schedule, orders, and requirements of the Arbitrator and appointed mental health professional (Dr. Mandelbuam). (Pa144). Additionally, to establish a probation account and confirm the March 8, 2021, arbitration award. (Pa144).

As Plaintiff consented to voluntarily return the parties' child by August 2, 2021, the Court denied Defendant's Order to Show Cause, finding no irreparable or immediate harm to the children, and carried the motion. (Pa166).

On August 9, 2021, Plaintiff filed a Cross-Motion seeking (1) vacatur of the May 28, 2021 Order of Rabbi Markin suspending parenting time and communication until Plaintiff complies with his directions involving child support, tuition payment, returning the children to their mother on time; (2) vacatur of the March 8, 2021, Arbitration Agreement, which allowed Defendant to move to Far Rockaway and requesting a myriad of substantive relief from the Court relative to parenting time, child support, transportation of the children, school attendance, all of which was to be determined by the Arbitrator pursuant to the parties' Agreement. (Pa169).

On August 24, 2021, Rabbi Markin supplied the court with a supplemental arbitration decision, expanding and providing additional detail concerning his prior decision and clarifying the reasons for the suspension of parenting time and other directives. (Pa233 to Pa235). The matter was heard on September 2, 2021, and resulted in an Order entered on September 17, 2021. (Pa238). The Court granted the relief requested in Defendant's application, including confirming the March 8, 2021, Arbitration Award, and denied the relief requested in Plaintiff's Cross-Motion in accordance with the parties' Agreement to arbitrate. (Pa239).

Rather than do that which Rabbi Markin indicated was necessary to regain his parenting time (essentially follow the parenting schedule), Plaintiff continued in his refusal to participate in arbitration, abide by Arbitrator directives, or even simply follow the parenting schedule. (Pa316-Pa317). Instead, Plaintiff chose to have no contact with his children and to file additional applications with the Court to set aside the Arbitration Agreement and confirmed Arbitration Award. (Pa318).

Plaintiff "refiled" his prior Cross Motion as an Order to Show Cause on January 18, 2022, seeking the same relief as on September 2, 2021 (to set aside the Agreement to Arbitrate and the arbitrator award) and to now also disqualify Rabbi Markin. (Pa241). The time for the filing of a motion for reconsideration or appeal had long since passed. (Pa317-Pa318). The Court denied Plaintiff's application, finding it to be non-emergent, and converted the application to a regular motion

returnable on March 8, 2022. (Pa265). Meanwhile, Defendant emailed Rabbi Markin for guidance as to how to proceed and asked that he again email a clear and precise explanation for Plaintiff to understand how to reinstate his parenting time. (Pa336). Rabbi Martin responded in a letter dated February 22, 2022. (Pa337).

Defendant filed a Cross Notice of Motion on February 15, 2022, to deny Plaintiff's motion based upon *inter alia* the principles of res judicata and collateral estoppel. (Pa300). The matter came before the Court (Judge White) on May 17, 2022, and thereafter, an Order was entered on August 30, 2022. (Pa591). The Court denied *without prejudice* Plaintiff's request for removal of the Arbitrator and denied Plaintiff's request to prevent the children from moving to Far Rockaway, New York. (Pa597). Relative to Plaintiff's request for parenting time, the Court found a "prima facie showing of harm to the children has been demonstrated by the prolonged suspension of parenting time for the Plaintiff based upon his failure to abide by the other terms of the Arbitration award," and ordered reunification therapy. (Pa597). The Court denied, *without prejudice*, the remaining issues raised in Plaintiff's application and found the Agreement to Arbitrate remains in effect. (Pa598).

Instead of undertaking reunification therapy, Plaintiff and Defendant agreed upon a parenting time schedule for Plaintiff for the summer of 2022. (Pa437) (Pa461). Almost immediately, Plaintiff violated the Agreement, unilaterally

changing the terms of the parenting schedule on numerous occasions, which became the subject of another Arbitration Order on August 30, 2022. (Pa434-Pa459)(Pa461). The violations consisted in part of changing the location for visitation, changing the times for visitation, bringing the children back very late, and, most importantly, keeping and secreting the children (as is his pattern) for unauthorized and extended periods of time over multiple days without even providing prior notice or on one occasion, guaranteeing their return and failing to do so. (Pa434-459).

Another Order was entered by the Court (Judge White) on October 13, 2022 (filed on October 21, 2022). (Pa472). In lieu of the reunification therapy previously ordered, the interim parenting time, which had been agreed to by the parties on June 3, 2022, was reinstated (after it had again been suspended by the Arbitrator due to Plaintiff's non-compliance). (Pa472). The Court directed Plaintiff to comply with the interim parenting time and to not unilaterally modify or extend his parenting time. (Pa472). Subject to the resumption of the interim parenting time, the March 8, 2021 (confirmed September 17, 2021) and August 30, 2022, Arbitration Decisions were confirmed by the Court. (Pa471). The Court directed the Arbitrator to address any future violations of interim parenting time at his discretion, consistent with the Agreement to Arbitrate. (Pa471-Pa472). As to an intervening motion filed by Defendant, the Court directed Plaintiff to deposit

$1,500 toward the cost of producing records requested of all proceedings and directed the Arbitrator to produce transcripts, audio recordings, and a final invoice. (Pa472).

In February 2023, Plaintiff filed still more litigation seeking to remove Dovid Markin as Arbitrator and vacate the March 8, 2021, Arbitration Award allowing Defendant to relocate with the children to Far Rockway, New York, and seeking their return to the State of New Jersey, despite that the children had been living in Rockaway for the past 2 years, were thriving in their environment, and established in their community and schools. (Pa482)(Pa554).

On April 12, 2023, Defendant filed a Cross-Motion to enforce the September 17, 2021, and October 21, 2022, Orders of the Court affirming the Arbitration Decision(s) and directing those disputes be arbitrated as mandated by the Agreement. (Pa551).

The matter came before the Court (the Honorable Sean D. Gertner, J.S.C.) on September 13, 2023 (1T), at which time the Court gave each party until October 4, 2024, to supplement their argument before rendering a decision. 1T58-13-19.

Following supplemental submissions by the parties, an additional oral argument was heard on November 16, 2023, and a decision was rendered by the Court (Honorable Sean D. Gertner, J.S.C.). 2T. In first addressing Defendant's Cross-Motion, the Court noted that several requests relate not to the underlying

arbitration but to the Orders of the Court. 2T6-15-22. The Court emphasized that there cannot be unilateral action nor a failure to follow through on Court orders, citing Plaintiff's failure to pay counsel fees and child support (noting that probation account records reflect no payments since March 10, 2024), among other things. 2T6-25 to 2T7-17. In rendering its decision, the Court noted:

> And mind you the background here is that plaintiff does not pay child support he's supposed to pay, he does not pay the school tuitions he's supposed to pay, he makes no contribution towards camp or unreimbursed medical expenses. And -- and -- hang on.
>
> …
>
> And the record – I -- I have to note, and I'd be remiss not to specifically articulate. The records and information provided to the Court leave (sic) the Court to a conclusion that in fact the plaintiff does not respect authority. Absent even addressing the arbiter's aware the fact that there are segments from the secular Court, not the arb -- the arbiter that have yet to be followed, is troubling -- is troubling to the Court. 2T16-12 to 2T17-5.

The Court addressed specifically that it was "concerned that the -- given the entirety of the record that the plaintiff will not in good faith corroborate in the arbitration the Court is ordering to have a -- the hearing and findings necessary to support a move and/or have the children remain in Far -- Far Rockaway." Nonetheless, finding that the requirements to maintain a proper record and recordings of the proceedings were not met under R. 5:3-8 and Fawzy v. Fawzy, 199 N.J. 456 (2009), the Court vacated the arbitration award. 2T28-2-8. The Court expressly stated that it "did not reach a determination as to bias or prejudice on the part of the arbitrator nor issues of law." 2T23-6-14:

> .. it is clear to the Court that the arbiter took substantial time, and it is also clear to the Court, I'm not ready to define, there's not sufficient evidence of his bias or -- or -- or any sort of prejudice. I want to make that clear for the record as well, that the determination of the Court is solely based upon the -- the arbitration agreement and the Fawzy case law with which the arbitration agreement memorializes. 2T23-6-14.

The Court then turned to Article XII of the Agreement. 2T28-6-8. Initially, the Court considered that if an Agreement as to an arbitrator or Bais Din could not be reached, the Court could conduct a hearing as to the limited issue of relocation, as there was a need for finality. However, the Court was troubled this may be intellectually inconsistent with the determination that the parties had agreed to arbitrate. 2T29-10-13.

The Court offered the parties the opportunity to be heard and "make a record" as to this suggestion.

> I will for limited purposes here argument as to this point recognizing preserving any rights that you may have, either party may have, in disagreement of my ultimate determination. The other alternative would be to submit three names of -- of – either three separate based ins or an individual arbiter if -- if you can't determine and for the Court to pick one. My -- the Court's concern would be, but I'll -- I'll hear from you onto -- on this limited issue, please, is that the Court would have no basis even amongst the three chosen based ins (sic) as to determine which of the three may be the best. 2T29-21 to 2T30-7.

After hearing from counsel, the Court decided:

> So I think under the circumstances and having heard and looking -- review of the agreement that notwithstanding the Court's concern of -- that the parties may not be unable to agree, Mr. -- Mr. Epstein articulated something that resonated to the Court that ultimately the Court is in no worse position than -- than the -- the

> attorneys or their -- or their clients to make the determination. So if an agreement cannot be made within 30 days, it appears there -- there can at least be a consensus as to -- for the Court to determine amongst three arbiters or -- and/or Bais Din (sic).
>
> So I will remain intellectually consistent with the determination and that intellectual consistency is based certainly on what has been filed. So I will provide in the order that if a -- if an arbiter or Bais Din (sic) cannot be agreed upon between the parties in 30 days, within that same period of time the parties are to submit three arbiters and/or Bais Din -- full Bais Din from which to choose. And the Court will appoint an arbiter from that -- from that list. 2T33-18 to 3T34-12.

The Court specifically indicated that there was no prejudice as to the determination of the Court as to this issue, highlighting Plaintiff's (or Defendant's) ability to revisit whether appointment by the Court was appropriate.

The Court ordered the parties to submit names along with the resumes of their proposed Arbitrators or Bais Din and parenting coordinators and indicated its desire to move forward with a clean slate:

> But the Court is -- is – and the record should be clear. The Court is persuaded that -- that there -- there needs to be a clean slate. And the reason for this -- for that determination, by the way, is a practical one in the Court's mind. And that is this is the clear opportunity for a clean slate. And ultimately the proofs will be provided to determine whether there was simply a need for a clean slate or, in fact, some of the concerns raised by the defendant and at least articulated through the arbitration agreements are in fact true.
>
> This is the clean slate. This is -- this is the -- the opportunity to -- to begin a new. It can be first day of the rest of -- of the -- your lives. 2T47-3-20.

An order memorializing the Court's ruling (prepared by counsel at the direction of the Court) was entered on January 18, 2024. (Pa733). The Order, at paragraph 7, provides:

> The March 8, 2021, Arbitration Award is vacated as the Court finds that the requirements to maintain a proper record and recording of the proceedings were not met under R. 5:3-8 as well as Fawzy v. Fawzy, 199 N.J. 456 (2009). For this reason, the Court did not reach a determination as to bias or prejudice on the part of the arbitrator nor issues of law. The parties are to mutually select a new Arbitrator or Bais Din within thirty (30) days. If the parties cannot agree upon a new Arbitrator or Bais Din, then each party shall submit three (3) recommendations from which the Court will choose. The arbitrator chosen shall be familiar with the chosen education and religious upbringings of the children. The Arbitration shall be conducted as required by the New Jersey law and an Arbitration agreement with the new Arbiter or Bais Din, addressing all issues to be arbitrated, shall be entered by and between the parties within thirty (days) after the Arbiter or Bais Din is chosen and as otherwise required by New Jersey law. (Pa10).

The Order further provided at Paragraph 8:

> New Jersey retains jurisdiction to confirm any Arbitration Award and New Jersey law applies to any review of an Arbitration Award. Pending the decision of the new Arbitrator or Bais Din, the Court has not mandated the Defendant return with the children to Lakewood Township nor addressed issues of custody, removal, and parenting time, as the parties shall Arbitrate those issues at an Arbitration to be conducted by the new Arbiter or Bais Din, pursuant to New Jersey law. (Pa10).

Following the issuance of the January 18, 2024, Order, the parties, through counsel, exchanged proposed arbitrators, but no agreement was ever reached. (Pa736)(Pa752). Plaintiff did not ask the Court to reconsider the method for appointment of the Arbitrator, did not dispute or seek to further define the qualifications of the Arbitrator, or appeal the January 18, 2024, Order.

Instead, on July 17, 2024, Plaintiff filed an application "compelling a new arbitrator per the Court's January 18, 2024, Order," and again seeking substantive relief related to custody, parenting time, and child support, expressly within the jurisdiction of the arbitrator or Bais Din (and therefore contrary to the parties' Agreement to arbitrate). (Pa754).

With respect to Plaintiff's request for the appointment of a new arbitrator, Plaintiff took issue with the fact that Defendant had proposed only Bais Dins rather than sole arbitrators and that they were in New York and not New Jersey. (Pa768). Plaintiff asserted that "The MSA was specifically designed to have a 'sole arbitrator' and not a Bais Din." (Pa769).

Defendant retained present counsel and, on September 16, 2023, filed a Notice of Cross-Motion with an appended legal brief and asked that the Court select a new arbitrator and enforce the agreement to arbitrate. Plaintiff proposed Marion Solomon, Esq., Robert Kornitzer, Esq., and Rabbi Shlomo Stein and attached their respective resumes. (Pa835)(Pa845).

Plaintiff objected to these suggestions in his Reply. (Pa872). Plaintiff referred to Ms. Solomon and Mr. Kornitzer as "expensive attorneys up north" and, without any basis, claimed that neither was familiar with the Lakewood community or the ultra-Orthodox upbringing. (Pa873). Plaintiff was concerned with the cost and complained, "How is it that Defendant cannot pick one of the ten arbitrators I provided?" (Pa873-Pa875). Plaintiff took issue with Rabbi Stein for being part of the same Bais Din as the parties' former arbitrator, Dovid Markin, and found all of Defendant's selections unacceptable. (Pa874). What Plaintiff did not say in response was that the parties' Agreement contemplated the appointment of a rabbi or that the Arbitrator needed to be a rabbi.

The parties appeared in Court (Honorable Kimberley S. Casten, J.S.C.) on their respective applications on September 27, 2024. At that time, Defendant added the Honorable Angela White Dalton, J.S.C. (Ret)., to the proposed list of arbitrators. 3T7-4 to 3T7-6. The Court entered an Order directing each party to provide all favorable/unfavorable information regarding the other party's list of proposed arbitrators within seven days. (Pa883). 3T6-25 to 3T7-3. (Pa883).

Given yet another opportunity, Plaintiff still did not assert that the parties had intended or agreed in their Agreement to utilize only a rabbi as Arbitrator. Plaintiff did not submit any correspondence to the Court with respect to Defendant's list of proposed arbitrators.

Defendant, on the other hand, detailed her objection to each of the individuals proposed by Plaintiff, all of which were either close family friends of his or had previously shown their support for him within the community, in a letter to the Court dated October 7, 2024. (Pa886). Additionally, it was Defendant's position that none of the arbitrators proposed by Plaintiff were qualified to serve in the role, which begged for a professional familiar with both the applicable civil law and the religious aspects that will pervade the custody and parenting time issues. To Defendant's knowledge, several of the individuals proposed by Plaintiff had never conducted an arbitration for a divorced couple. (Pa886).

With respect to Rabbi Herszaft, Defendant's attorney explained:

> He previously served as a temporary arbitrator per the Marital Settlement Agreement. The rabbi was originally selected by Mr. Koslowitz and showed bias over the years. He has stated that he will not re-involve himself in this matter and my client has been told it is out of fear that Mr. Koslowitz will blackmail his family if he does not like the rabbi's decision, as was done to the previous arbitrator. (Pa886).

In a letter to counsel dated October 15, 2024, the Court (Honorable Kimberley S. Casten, J.S.C.) set forth its decision appointing Robert Kornitzer, Esq., as Arbitrator. (Pa894)(Pa4-5).

The Court found that no interpretation of religious doctrine was required but rather that only Article XII of the party's MSA needed to be interpreted. Additionally, Judge Gertner's January 18, 2024, Order provided that the Court

would appoint an arbitrator (as a Bais Din was not mandated in the MSA) if not agreed upon. Further, the Order required only that the arbitrator be familiar with the education and religious upbringings of the children and did not require the arbitrator to be part of the same religious community. (Pa4-Pa5).

Specifically, the Court stated:

> Given the fact that Reb Yitzchok Herszaft was removed as Arbitrator, Judge Gertner's paper order dated January 18, 2024, stated the Court would select an Arbitrator OR Bais Din if the parties could not agree. The MSA and Judge Gertner's paper order complement each other in that same regard: no Bais Din is mandated. Further, the same order requires that the Arbitrator be familiar with the education and religious upbringings of the children; the order does not require the Arbitrator be part of the same religious community. Accordingly, the Court selects Robert Kornitzer, Esq. of Pashman Stein Walder Hayden, P.C. to serve as the binding arbitrator in this matter. (Pa5).

The Court's appointment of Robert Kornitzer, Esq. to serve as arbitrator was thereafter memorialized by an Order dated October 17, 2024. (Pa1).

As Plaintiff did not "get his way," he refused to proceed with Mr. Kornitzer as Arbitrator and unfairly attacked him as lacking in qualification in a Notice of Motion for Reconsideration filed November 4, 2024. (Pa892). By email dated November 10, 2024, Plaintiff's counsel canceled an attorney-only Zoom conference scheduled for the next day, advising that his client (Plaintiff) would not engage in arbitration until the Court ruled on his motion for reconsideration. (Pa916). At Mr. Kornitzer's request, Defendant's counsel provided him a copy of

Plaintiff's motion. (Pa916). In a letter dated November 12, 2024, Mr. Kornitzer wrote to the Court to address his qualifications. Specifically, he wrote:

> Without taking any position on the best choice of Arbitrator (as this is not my place), I feel constrained to write to the Court regarding a comment and a theme of counsel's brief trivializing my familiarity with the religious and custodial issues addressed in this community. Counsel states: "Ordering Mr. Kornitzer to arbitrate is no different than asking a dentist to perform spinal surgery." Given my Judaic education, my activity in orthodox family law issues, the many referrals I have received from Jewish Halachic Arbitrators in this community and my extensive experience in secular courts with orthodox families of varying communities, I believe counsel's comments are well over-the-top and should be retracted. (Pa916-Pa917).

On December 30, 2024, Defendant filed a Notice of Cross-Motion opposing Plaintiff's reconsideration motion, asking the Court to enforce its October 17, 2024, Order appointing Robert Kornitzer, and denying Plaintiff's application. (Pa901).

Notably, Plaintiff's motion disingenuously asked the court to reconsider "the Court's decision denying Rabbi Yitzchoks Herszaft the opportunity to appoint an arbitrator or, in the alternative, not awarding an arbitrator from the 'Chareidi' Orthodox community." (Pa892). The relief that Plaintiff asked the Court to "reconsider" had never been requested (or even argued) in his July 17, 2024, Notice of Motion, which formed the basis for the Court's October 17, 2024, Order.

(Pa754)(Pa892). Plaintiff never requested that Rabbi Herszaft be allowed to appoint an arbitrator; Plaintiff had asked the Court to do it. (Pa767-Pa769).[2]

Specifically, Plaintiff's July 17, 2024, Notice of Motion sought an Order "Compelling a new arbitrator per the Court's January 18, 2024, Order," which provided for the appointment of an arbitrator by the Court. (Pa765). Paragraph 21 of Plaintiff's certification specifically stated, "Since Defendant and I cannot agree upon an arbitrator, we are requesting the Court to select one." (Pa769).

Judge Gertner's (unchallenged) directive, set forth in the January 18, 2024, Order, was simply that the arbitrator "be familiar with the chosen education and religious upbringings of the children." (Pa9); Defendant complied with Judge Gertner's instruction in proposing a list of arbitrators, including Robert Kornitzer, Esq., Marion Solomon, Esq., Rabbi Shlomo Stein and the Honorable Angela White Dalton, J.S.C. (Ret). (Pa887). Mr. Kornitzer was plainly familiar with the beliefs and practices of the Orthodox community and well-qualified to serve as arbitrator, No legitimate basis was advanced by Plaintiff to demonstrate that the Court erred in appointing him as arbitrator. (Pa6)(Pa917).

The day before the oral argument was scheduled to occur, Plaintiff submitted documents that the Court made clear it would not consider. Plaintiff's counsel,

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[2] Plaintiff never suggested (even in his Motion for Reconsideration), as he does now for the first time in his appeal, that the Arbitrator must be appointed pursuant to the January 18, 2022, Agreement to arbitrate with Rabbi Markin.

nonetheless, persisted in referencing his late submission, which the Court indicated it would not consider because it was not only untimely but also impermissible hearsay. 4T1-5. Although not part of the record below, Plaintiff has included these documents in his Appendix (Pa922 to Pa933), and he relies upon them in his arguments to this Court, asserting there are no rules in FD proceedings, ignoring the Court's discretion and ruling.[3]

At oral argument on January 8, 2025, Plaintiff's counsel claimed that the appointment of Mr. Kornitzer "was maybe not rational with regards to who an arbitrator would be." 4T7-18-20. He disputed the Court's observation that Rabbi Herszaft had been removed and argued that it would be most rational if Rabbi Herszaft had been selected as Arbitrator or, in the alternative, permitted to select the arbitrator. 4T7-21- to 4T9-2. Plaintiff's evolving position directly contradicted the January 18, 2024, Order of the Court, which provided for the selection of the arbitrator by the Court. (Pa883). For the first time, Plaintiff's counsel argued that a plenary hearing was required to determine the understanding and intent of the parties relative to the term Arbitrator, which, again, had not been requested in Plaintiff's application (July 19, 2024), as no such contention was ever raised. (Pa754). 4T4-8-25.

[3] The documents and any reference thereto in Plaintiff's brief should be stricken from the record.

After reviewing the standard for review of a party's motion for reconsideration, the Court noted:

> The court order of January 18th, 2024 supersedes the marital settlement agreement between the parties of August 25th, 2017. 4T26-5-7.

The Court then proceeded to review provision 7 of the January 18, 2024, Order, and procedural history leading to the entry of the Court's October 17, 2024 Order:

> In plaintiff's certification filed in support of the application to enforce the 1/18/2024 order plaintiff requested the court appoint an arbiter in accordance with the January 18th order. Plaintiff never requested that this matter should be referred to Rabbi Herszaft or his designee to appoint the arbitrator.
>
> Also in that certification plaintiff requested that Rabbi Herszaft be appointed in the interim if needed. This court didn't appoint an arbiter -- arbitrator in the interim. This court enforced Judge Gertner's order of January 18th, '24 and of particular importance are the provisions of number 7 of that order which states … The parties are to mutually select a new arbitrator or Beth Din within 30 days. If the parties cannot agree upon a new arbitrator or Beth Din, then each party shall submit three recommendations from which the court will choose.
>
> The arbitrator chosen shall be familiar with the chosen education and religious upbringings of the children. The arbitration shall be conducted as required by New Jersey law and an arbitration agreement with the new arbiter or Beth Din addressing all issues to be arbitrated. 4T26-8-20. 4T27-4-13.

The Court reviewed the procedural history after the January 18, 2024, Order, including the directive for each side to submit three recommendations from which the Court would choose if the parties could not agree, and the

Court's directive on September 27, 2024, to submit favorable and unfavorable comments with respect to the names provided. The Court stated:

> The Court then chose the arbitrator, Robert Kornitzer, Esq., and that is reflected in the court's letter of 10/15/24 (sic).
>
> The court finds that Mr. Kornitzer is well equipped to make the decisions in this matter and has sufficient knowledge. Plaintiff's counsel even states in his motion for reconsideration that Mr. Kornitzer is held in the highest esteem.
>
> Judge Gertner's 1/18/24 order indicated that the arbitrator chosen shall be, and I emphasize, familiar with the chosen education and religious up -- upbringing of the children.
>
> Judge Gertner's order does not state or require that the arbitrator be a member of the orthodox Jewish community.
>
> Additionally, the transcript provided by plaintiff, which the application to enforce Judge Gert -- with the applications to enforce Judge Gertner's order included the transcript of his oral decision. On page 47 of that transcript on which the 1/18/24 order was based addresses that Judge Gertner called for a clean slate for this case which would therefore exclude Rabbi Herszaft from consideration because he had previously been involved servicing as the party during and after the divorce.
>
> Plaintiff's motion for reconsideration is denied as it doesn't meet the applicable legal standard under the court rule or case law.
>
> Because plaintiff is dissatisfied with the outcome is not a valid ground for reconsideration. 4T28-5 to 4T29-9.

The trial court entered an Order on January 8, 2025, properly denying Plaintiff's motion for reconsideration. (Pa7).

Plaintiff filed a Notice of Appeal on February 6, 2025 (together with a motion to extend the time to file such). (Pa991). An amended Notice of Appeal was filed on February 13, 2025, including the October 17, 2024, Order (Pa987). A second Amended Appeal was filed by Plaintiff on March 31, 2025 (Pa983). On February 20, 2025, the Appellate Division entered an Order granting Plaintiff's motion to file an appeal as within time.

LEGAL ARGUMENT

I. THE TRIAL COURT'S APPOINTMENT OF ROBERT KORNITZER, ESQ., AS ARBITRATOR WAS NOT AN ABUSE OF DISCRETION (Pa1)(Pa4)

A. STANDARD OF REVIEW

The issue presented is not whether a party is bound to arbitrate, as stated by Plaintiff, but rather whether the Court abused its discretion in appointing Robert Kornitzer, Esq., as Arbitrator, pursuant to the parties' Agreement and the agreed upon methodology set forth in the January 18, 2024, Order. Courts are afforded wide discretion in making such determinations, and the standard of appellate review is an abuse of discretion. "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021)(quoting State v. R.Y., 242 N.J. 48, 65 (2020). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of

discretion was 'manifestly unjust' under the circumstances. Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth. 423 N.J. Super. 140, 174 (App. Div. 2011). As shall be addressed *infra*, the appointment of Robert Kornitzer, Esq., was consistent with the methodology consented to by the parties and which Plaintiff requested the Court employ in his July 17, 2024, Notice of Motion. Mr. Kornitzer is a highly experienced and regarded matrimonial attorney, intimately familiar with the orthodox community, and well qualified to act as an Arbitrator. Selection of Mr. Kornitzer by the Court was consistent with the arbitration clause of the parties' Agreement and not an abuse of discretion.

B. THE SELECTION OF AN ARBITRATOR BY THE COURT WAS IN ACCORDANCE WITH THE JANUARY 18, 2024 ORDER WHICH PLAINTIFF ASKED THE COURT TO ENFORCE, NOT RECONSIDER (Pa9)

Disingenuously, Plaintiff's brief disregards the fact that Plaintiff consented and explicitly asked the Court to appoint an Arbitrator, in a motion filed July 17, 2024, where he sought to compel a new arbitrator per the Court's January 18, 2024, Order. (Pa765). Plaintiff certified "Since Defendant and I cannot agree upon arbitrator, we are requesting the Court to appoint one." (Pa769). It is untrue that some other methodology for the selecting an arbitrator existed and was disregarded by the Court, as Plaintiff argues.

Further, the Court's meticulous review of the history of the matter, which led the Court to overturn the prior arbitration based upon the absence of an appropriate record pursuant to Fawzy, also led the Court to understand that the Agreement did not provide, and the parties would likely not agree, upon the selection of an arbitrator.

The Agreement addressed the initial temporary appointment of Rabbi Herszaft, and his selection of the first permanent arbitrator. (Pa1019). The Agreement did not provide a mechanism for the appointment of an Arbitrator under the circumstances presented. Certainly, the Agreement did not designate Rabbi Herszaft as interim rabbi or appointer of arbitrators for all time, as Plaintiff urges by misstating and distorting the language in Article XII. If this were true, then the Court and parties would not have had to look any further than the Agreement to find a replacement.

Instead, in addressing the methodology to be employed in determining an arbitrator, Defendant's counsel (Jeffrey Epstein, Esq.) suggested, during oral argument, that if the parties were unable to agree, the Court appoint one from a list comprised of three arbitrators proposed from each party. There was no objection to this suggestion from Plaintiff's counsel, and by consent, it was adopted and memorialized in the Court's January 18, 2024, Order. (Pa116) 2T33-18 to 3T34-12.

More specifically, Defendant's counsel suggested that the Court was in no worse position than counsel or the parties to select an arbitrator. Plaintiff never asserted that this was untrue, violated the parties' Agreement or Arbitration Agreement with Rabbi Markin, interfered with his free exercise of religion, or was contrary to the establishment clause. It must be noted that during the November 16, 2023, hearing, the Court invited further consideration of this precise issue and made clear that the determination of the Court as to the methodology for selection of an Arbitrator was *without prejudice*. Plaintiff did not challenge or seek to overturn that ruling based upon any or even one of several different arguments raised in his appeal. To the contrary, Plaintiff embraced the Court's proposed methodology for the appointment of a replacement Arbitrator, as did Defendant, both asking in subsequent motion practice before the Court for it to be enforced. (Pa765)(Pa845).

There was no violation of the NJAA or N.J.S.A. 2A:23B-11(a), as Plaintiff suggests. The record could not be more clear - the Agreement did not provide for the appointment of a replacement arbitrator in the circumstances presented, so the parties' asked the Court to appoint an Arbitrator. (Pa765)(Pa845).

It was not until after the court appointed Robert Kornitzer instead of a close friend or ally of Plaintiff (as comprised the list of arbitrators he proposed), that Plaintiff argued some other manner was required, and that the Court had erred,

undoubtedly because he was unhappy with the selection made by the Court. It was not until his reconsideration motion that Plaintiff first asked for Rabbi Herszaft to be allowed to appoint the Arbitrator or argued that such was required by the parties' Agreement (even though it clearly is not). (Pa765)(Pa891)(Pa1019).

The intellectual dishonesty and lack of credibility in Plaintiff's position were observed by the Court in rendering its decision on Plaintiff's motion for reconsideration. It is evident as well in this Appeal, where Plaintiff argues for the first time that the Court's appointment of an Arbitrator violated the Arbitration Agreement with Rabbi Markin dated January 18, 2021 (an agreement he disavowed), his parental autonomy, free exercise of religion, and the religious questions doctrine.

Plaintiff never asked that the Arbitration Agreement with Rabbi Markin be enforced relative to the appointment of an Arbitrator. (Pa765)(Pa891). Just the opposite, Plaintiff argued that Arbitration Agreement was not legitimate and void because of Rabbi Markin's failure to abide by NJAA requirements. Nonetheless, it is important to note that Plaintiff's representations concerning the agreement are purposefully misleading and inaccurate. The arbitration agreement first provides for Rabbi Markin to select his own replacement: "In the event that Rabbi Markin is incapacitated or cannot continue for any reason, Rabbi Markin will work with the parties to appoint the new Arbitrator." So, it is not simply that Rabbi Marburger

would act as interim Arbitrator and appoint a new Arbitrator. (Pa118). Plaintiff glosses over whatever language is contrary to the result he wishes to achieve. It is likely that Plaintiff purposefully chose not to seek the appointment of the replacement arbitrator pursuant to this agreement since it called for the involvement of Rabbi Markin. The Court made clear that aside from the failure of Rabbi Markin to abide by the requirements of Fawzy, no bias or impropriety was determined by the Court. (Pa10) 2T23-6-14. Judge White found that Rabbi Markin's findings were thorough and thoughtful. Judge Gertner relied, in part, upon Rabbi Markin's findings in concluding that it was likely Plaintiff would not cooperate with the arbitrator in the hearing he had been granted to again determine the relocation issue. Regardless, we will never know because Plaintiff never raised the issue of appointment under this agreement below and instead opted for the "clean slate" that the Court selection offered. Plaintiff is bound and limited on appeal by the positions he has taken below and must accept the consequences of his own agreements.

C. THE DOCTRINE OF JUDICIAL ESTOPPEL BARS PLAINTIFF FROM ARGUING THAT THE COURT ERRED IN APPOINTING AN ARBITRATOR AND NOT ALLOWING RABBI HERSZAFT OR RABBI MARBURGER TO APPOINT THE ARBITRATOR (NOT ARGUED BELOW)

Judicial estoppel applies here to preclude Plaintiff from assuming positions on appeal that are inconsistent with (diametrically opposed to) the one he

previously asserted. Judicial estoppel examines the connection between the litigant and the judicial system. Cummings v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996). The doctrine of judicial estoppel is designed to prevent litigants from "playing fast and loose" with the courts, Id. at 387, and to preserve judicial integrity by preventing a party from asserting inconsistent positions. Levin v. Robinson, 246 N.J. Super. 167, 180 (Law Div. 1990). As explained by the Appellate Division in Cummings, "if a court has based a final decision, even in part, on a party's assertion, that same party is thereafter precluded from asserting a contradictory position." The Court's decision to select an Arbitrator was based upon the parties' request that it do so, in accordance with the methodology set forth in the January 18, 2024, Order.

A party who advances a position in litigation that is accepted is barred from advocating a contrary position in subsequent litigation to the prejudice of the adverse party. Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606 (App. Div. 2000) certify. denied, 167 N.J. 88 (2001). Judicial estoppel is an equitable doctrine, applied only where there are intentional inconsistencies, and not applied where doing so would work injustice. Levin, 246 N.J. Super. at 184. Thus, it has been stated that the doctrine requires that the person sought to be estopped had a knowledge of the facts. Chattin v. Cape May Greene, 243 N.J. Super. 590,

620 (App. Div. 1990), quoting Brown v. Allied Plumbing & Heating, 129 N.J.L. 442, 446 (Sup. Cit. 1943).

In the within matter, Plaintiff accepted the methodology set forth in the January 18, 2024, Order and then specifically asked the Court to appoint an Arbitrator in his July 17, 2024, motion, with knowledge of all relevant facts. His change in position after the consequences of his decisions have played out, is an affront to our state's limited judicial resources, which the Appellate Division cannot tolerate. Plaintiff cannot be allowed to "play fast and loose" with the rules and continue to prejudice Defendant, as he has throughout the litigation by failing to follow agreed-upon procedure and rules, and generally acting in bad faith.

D. THE COURT DID NOT ABUSE ITS DISCRETION IN SELECTING ROBERT KORNITZER, ESQ. FROM THE LIST OF PROPOSED ARBITRATORS (Pa1)(Pa4)

The January 18, 2024, Order provided that the Court would choose from a list of arbitrators proposed by the parties. The Order provided that the arbitrator or Bais Din be "familiar with the chosen education and religious upbringings of the children." (Pa4-Pa5).

Defendant, proposed Marion Solomon, Esq., Robert Kornitzer, Esq., Honorable Ann Dalton, J.S.C. (Ret.) or Rabbi Shlomo Stein, to arbitrate the matter. Plaintiff proposed approximately 10 potential arbitrators. Before deciding as to the selection of the arbitrator, the Court directed each party to submit their "response –

favorable or unfavorable" as to the list of arbitrators proposed by the other side. Defendant submitted a letter to the Court demonstrating that several of the arbitrators proposed by Plaintiff were previously involved with the process (including some who had submitted affidavits to the Court), were close family friends of Plaintiff, or had contacted Defendant's family on Plaintiff's behalf in the past. Despite being given yet another opportunity, Plaintiff did not provide any response, and until his Appeal, never took the position that the arbitrator had to be a rabbi.

Ultimately, the Court (Judge Casten) found that no interpretation of religious doctrine was required in this case but rather that only Article XII of the party's Agreement and the January 18, 2024, Order, need be interpreted. Contrary to the impression which Plaintiff attempts to create, the parties' extremely detailed Agreement does not provide or require that the Arbitrator must be a rabbi or rabbinical authority. The Agreement provides: "The parties both agree that any disagreement between them shall be arbitrated with binding arbitration solely by the Arbitrator, prior to seeking the Civil Court's intervention." The Agreement further provides, "[I]n the instance that the Arbitrator decides that a disagreement must be adjudicated upon by a Bais Din, then the Arbitrator has the right to choose which Bais Din the disagreement shall be taken to."

The Court determined that (although permitted by Judge Gertner's Order) a Bais Din was not mandated by the parties' Agreement. Plaintiff does not dispute this, as it was Plaintiff's position that a sole arbitrator, not a Bais Din, was required. The Court noted that the January 18, 2024, Order required the arbitrator to be "familiar with the education and religious upbringings of the children" and did not require the arbitrator to be part of the same religious community. (Pa4-Pa5).

The Court selected Robert Kornitzer, Esq., an experienced matrimonial attorney who is knowledgeable, experienced, and involved with the orthodox community, to serve as the binding arbitrator. (Pa5). Mr. Kornitzer has experience and respect in the community and possesses adequate knowledge of the Orthodox law and practice and communal standards to act as arbitrator and could address matters to the Bais Din if deemed necessary. Importantly, Mr. Kornitzer is a neutral and capable professional, with arbitration experience and with no history of involvement or allegiance to either party. There was no abuse of discretion by the court in his appointment.

II. PLAINTIFF'S MOTION FOR RECONSIDERATION WAS PROPERLY DENIED BY THE TRIAL COURT (Pa6)(4T24-28 to 4T29-2)

The denial of a motion for reconsideration is reviewed for abuse of discretion. Triffin v. Johnston, 359 N.J. Super. 543, 550 (App. Div. 2003).

In D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990), the Court explained the applicable standard surrounding a court's review of a litigant's motion for reconsideration:

> Reconsideration is within the sound discretion of the court, to be exercised in the interest of justice. A litigant should not seek reconsideration because of dissatisfaction with a decision. Rather, the preferred course when one is disappointed with a judicial determination is to seek relief by means of a motion for leave to appeal or, if the order is final, by a notice of appeal. Reconsideration should be utilized only when either 1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence.
>
> Said another way, a litigant must initially demonstrate that the court acted in an arbitrary, capricious, or unreasonable manner. The arbitrary or capricious standard calls for a less searching inquiry than other formulas relating to the scope of review. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review.

It has been clearly held that "[a] litigant should not seek reconsideration because of dissatisfaction with a decision." Ibid. The purpose of reconsideration motions is not to give a party a second bite at the proverbial apple but "to allow a losing party to make a statement of matters or controlling decisions which counsel believes the Court has overlooked or as to which it has erred." State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995).

The Court stated, "the magnitude of the error cited must be a game-changer for reconsideration Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010), to be appropriate." Reconsideration is properly denied when the application is based on unraised facts known to the party seeking reconsideration prior to the entry of the challenged order and "cannot be used to expand the record." Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008). "A motion for reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion, R. 1:7-4, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Ibid.

Plaintiff filed a Notice of Motion asking the Court to reconsider its "decision denying Rabbi Yitzchoks Herszaft the opportunity to appoint an arbitrator or in the alternative, not awarding an arbitrator from the 'Chareidi' Orthodox community."

The relief sought by Plaintiff was without basis, did not meet the applicable standard for reconsideration, and was properly denied by the Court. Plaintiff did not make these requests in his initial motion and were therefore inappropriate for a motion for reconsideration. Additionally, Plaintiff failed to demonstrate that the Court's appointment of Robert Kornitzer, Esq., as arbitrator, was in any way arbitrary, capricious or unreasonable. Instead, the factual and procedural history

demonstrated Plaintiff was simply dissatisfied with the outcome and looking for a second attempt, exactly what the reconsideration rule proscribes.

Plaintiff's initial application specifically asked the Court to appoint an Arbitrator, stating "[s]ince Defendant and I cannot agree upon an arbitrator, we are requesting the Court to select one." Plaintiff never asked to have Rabbi Herszaft select the new arbitrator – he put it in the hands of the Court, as did Defendant. Plaintiff's assertion that Rabbi Herszaft was the most logical person to serve as arbitrator, was not persuasive. Rabbi Herszaft was one of ten arbitrators proposed by Defendant. Plaintiff's assertion that he was the "most logical choice" was disputed by Defendant. In responding to Plaintiff's list of proposed arbitrators (as requested by the Court), Defendant set forth reasons as to why Rabbi Herszaft was not fit to serve in this role, in addition to evidence that Rabbi Herszaft was being pressured to serve despite that he no longer wanted to be involved in the matter. The Court's determination to not select Rabbi Herszaft, who had been previously involved in the matter, was not irrational. As stated by the Court, he was not the "clean slate" that Judge Gertner had envisioned.

In the alternative, Plaintiff asserted that the chosen arbitrator must be a member of his ultra-Orthodox community. But again, this had never been requested or asserted. The Agreement did not state "a qualified rabbi" was required or that the arbitrator "must belong to the insular community" or have

"experiential knowledge." The Agreement did not specify any of the requirements urged by Plaintiff. Plaintiff was trying to add terms and requirements into the Marital Settlement Agreement that simply do not exist. In interpreting an Agreement, Courts do not "supply terms to contracts that are plain and unambiguous" or "make a better contract for either of the parties than the one which the parties themselves have created." Barr v. Barr, 418 N.J. Super. 18, 31-32 (App. Div. 2011).

Judge Gertner's unchallenged directive was that the arbitrator be "familiar with the chosen education and religious upbringings of the children." It was this standard that Plaintiff cited to in his initial application seeking the Court's appointment of an Arbitrator. Defendant's proposed arbiters were in accord with this standard, that the arbitrator needs to be versed in ultra-Orthodox practices, but did not have to be part of the Lakewood community. Mr. Kornitzer met these requirement and Plaintiff never showed otherwise.

Contrary to Plaintiff's attempt to trivialize Mr. Kornitzer as simply a New Jersey attorney, his resume and the evidence before the Court demonstrated his education, knowledge, and experience with the orthodox community and custody issues involved therein. Mr. Kornitzer was involved with orthodox family law issues, had received many referrals from Jewish Halachic Arbitrators in this

community, and had extensive experience in secular courts with orthodox families of varying communities.

Mr. Kornitzer was appropriate under the parties' Agreement, satisfied the requirements set forth in the January 18, 2024, Order, and was well qualified to serve as Arbitrator. Plaintiff failed to identify with specificity either: (1) an incorrect or irrational basis for the Court's October 17, 2024, order appointing Mr. Kornitzer or (2) any evidence that the Court failed to appreciate/consider. D'Atria, Supra, 242 N.J. Super. 401. The court properly denied Plaintiff's motion for reconsideration.

Plaintiff's assertion that he was entitled to a plenary hearing is equally unpersuasive for much the same reason as set forth above. Plaintiff's newly devised contention of differing interpretations of the Marital Settlement Agreement did not arise until after an arbitrator (which Plaintiff did not propose) was chosen. Only then, did Plaintiff's interpretation of the Agreement suddenly and conveniently proscribe the Court from appointing an Arbitrator and preclude Mr. Kornitzer, from serving as one.

A plenary hearing is only required if there is a genuine, material and legitimate factual dispute. See, e.g., Lepis v. Lepis, 83 N.J. 139 (1980) (holding that "a party must clearly demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary"); Faucett v. Vasquez, 411 N.J. Super.

108, 128 (App.Div.2009) (explaining that party's "conclusory certifications" are insufficient to warrant plenary hearing in child custody dispute), *certif. denied*, 203 N.J. 435 (2010); Hand v. Hand, 391 N.J. Super. 102, 105 (App.Div.2007) (explaining that hearing is required only when there "is a genuine and substantial factual dispute).

Plaintiff's position was not supported by the plain language of the Agreement or order of the Court which the parties asked be enforced, and his newly devised assertions were inconsistent with his own prior positions and statements contained in his certifications filed with the Courts. Plaintiff never previously claimed that only a rabbi familiar with the parties could select a replacement rabbinic arbitrator, or that the arbitrator had to be a rabbi, or that appointing a well-qualified attorney with extensive knowledge of Jewish Law and experience practicing in the orthodox community, was contrary to their contractual intent.

Based on this factual and procedural history and considering the extensive evidence of Plaintiff's inability to accept any determination which was contrary to his desired result, it was apparent that Plaintiff's application was filed in bad faith to control the arbitration process, and that grounds upon which to be afforded an evidentiary hearing had not been demonstrated.

The Court properly determined no genuine and legitimate factual dispute existed as to what was intended in the Agreement based upon Plaintiff's belated, inconsistent, and convenient assertions, raised for the first time in his motion for reconsideration.

III. PLAINTIFF'S APPEAL RAISES PARENTAL AUTONOMY, FREE EXERCISE AND ESTABLISHMENT CLAUSE ISSUES NEVER RAISED BELOW AND WHICH CONTRADICT HIS PRIOR POSITIONS (NOT ARGUED BELOW)

There is no dispute that parents have the right "to choose the forum in which their disputes over child custody and rearing will be resolved, including arbitration." Fawzy, supra, at 461-62; see also Faherty v. Faherty, 97 N.J. 99, 108-09 (1984). Article XII of the parties' Agreement requires the parties to attend binding arbitration and expressly waive their respective rights to adjudicate matters in civil court. The parties agreed to the methodology and qualifications of the arbitrator in the January 18, 2024, Order. The appointment of Mr. Kornitzer, a knowledgeable and educated practitioner satisfies the agreement requirements as set forth in the January 18, 2024, Order.

Plaintiff never previously argued (or even asserted) that (1) the "January 18, 2022, Agreement to Arbitrate with Rabbi Markin" should control the appointment of an Arbitrator; (2) that only a rabbi may select; and (3) only a rabbi may serve as Arbitrator in this matter; (4) that the Court's appointment of a non-rabbinic

arbitrator violates his free exercise of religion; or (5) that the Court's appointment of a replacement arbitrator violates the establishment clause because it requires the Court to access qualifications of an appropriate arbitrator. The arguments of the Plaintiff on appeal are directly contrary to the positions which Plaintiff previously asserted and are otherwise not supported by the record below. As repeated addressed herein, Plaintiff specifically requested in his July 17, 2024, motion that the Court appoint an arbitrator. He never said that appointment of the replacement Arbitrator should be pursuant to the Agreement with Rabbi Markin. Plaintiff never claimed the Court's appointment would interfere with his First Amendment rights. To the contrary, he specifically asked the court to appoint a replacement arbitrator and found nothing objectionable whatsoever until an individual he did not want was selected.

If the intent of the parties' Agreement was that only a rabbi was allowed to serve as Arbitrator, why would Defendant have included individuals who were not rabbis on her list of proposed arbitrators? Why, when Defendant proposed Mr. Kornitzer, Ms. Soloman and Judge Dalton, did Plaintiff not immediately respond that the arbitrator had to a rabbi? Why didn't Plaintiff say that only a rabbi could interpret and apply its material terms and make binding decisions?

The myriads of sources and religious authority cited to in Plaintiff's appellate brief was never presented to the Court. None of the "facts" or arguments

which Plaintiff asserts on appeal were presented, even in Plaintiff's reconsideration motion. If a rabbi was required, why was that not explicitly included in the parties' very detailed Agreement –it could have easily been included in the Agreement, but contrary to Plaintiff's repeated misleading statements throughout his brief, it was not included or intended by the Agreement. Plaintiff never suggested this, his position was simply that a "sole arbitrator" not a Bais Din be appointed, and then cost and not being part of the community.

That the parties chose to utilize a rabbi as arbitrator historically does not guarantee or create a requirement that a rabbi be used. Plaintiff's claim that a singular rabbinic authority can conclusively apply binding religious doctrine, but the facts of this case highlight Plaintiff's disregard for the rulings made by rabbinical authority involved in the matter and Plaintiff's repeated dissatisfaction and return to civil courts following nearly every determination made by the rabbis involved in this matter.

It is only because of Plaintiff's dissatisfaction with the Court's selection of Mr. Kornitzer that Plaintiff suddenly argues the procedure was constitutionally flawed, and inconsistent with the parties' "contractual intent" in the Agreement.

Plaintiff's evolving position and bad faith litigation tactics should not be believed or entertained by this Court.

A. ISSUES NOT RAISED BELOW ARE NOT PROPERLY BEFORE THE COURT ON APPEAL

Generally, issues not raised below, even constitutional issues, will not ordinarily be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest. *See, e.g.,* Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). This has been said regarding issues not raised before the Family Part and is especially true when the opportunity for presentation was available. N.J. Div. of Youth & Fam. Servs. v. B.H., 391 N.J. Super. 322, 343 (App. Div. 2007) N.J. Div. of Youth & Fam. Servs. v. B.H., 391 N.J. Super. 322, 343 (App. Div. 2007) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229 (1973)). "[A]n appellate court will not reverse an error not brought to the attention of the trial court unless the appellant shows . . . it was 'plain error,' that is, 'error clearly capable of producing an unjust result.'" *Ibid.* (citing R. 2:10-2). Further, if the error was not raised below, the plain error rule, R. 2:10-2, applies.[4] In civil cases, relief under the plain error rule "is discretionary and should be sparing employed." Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999)(quoting Ford v. Reicher, 23 N.J. 429, 435 (1957)).

[4] Defendant has failed to comply with the R. 2:6-2(a)(1) which requires a statement indicating in the table of contents of his appellate brief the issues not raised below.

Particularly apt in this matter, is the observation of the Court in State v. Santamaria, 236 N.J. 390, 404-405 (2019), that a litigant who "does not raise an issue before a trial court bears the burden of establishing that the trial court's actions constituted plain error because 'to return a trial when the error could easily have been cured on request would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.'"

This Court should decline to consider the arguments raised at Points II, III and IV of Plaintiff's brief as they were not raised below and are not properly before the Court.

IV. THE COURT'S ORDER APPOINTING ROBERT KORNITZER, ESQ. AS ARBITRATOR DOES NOT INTERFERE WITH PLAINTIFF'S FREE EXERCISE OF RELIGION OR VIOLATE THE ESTABLISHMENT CLAUSE (NOT ARGUED BELOW)

Even if the Court were to consider these issues no violation of Plaintiff's rights has occurred. The First Amendment's Establishment Clause bars a state from placing its support behind a religious belief, while the Free Exercise Clause bars a state from interfering with the practice of religion. Satz v. Satz, 476 N.J. Super. 536, 552 (App. Div. 2023) (citing *U.S. Const.* amend. I). Our Supreme Court has recognized, "civil courts may resolve controversies involving religious groups if resolution can be achieved by reference to neutral principles of law, but that they may not resolve such controversies if resolution requires the

interpretation of religious doctrine." Ran-Dav's Cnty. Kosher v. State, 129 N.J. 141, 162 (1992).

In this case, the trial court was asked to enforce the parties' Agreement and the January 18, 2024, Order of the Court, which expressly provided (1) the methodology for selection of an arbitrator and (2) the qualification for the replacement arbitrator. Both parties asked the Court to enforce this Order, and the Court did so, applying neutral principles of law. The court did not abuse its discretion in enforcing the explicit and detailed provisions of the January 18, 2024, Order as the parties had asked it to do. No interpretation of religious doctrine was required by the Court's selection of an Arbitrator, as the methodology and qualifications of the Arbitrator were established and agreed upon in the January 18, 2024, Order. The Court's interpretation of the January 18, 2024, Order did not require interpretation of religious doctrine. The Court's interpretation of Article XII of the Agreement, as to was whether a sole arbitrator or Bais Din was required, also did not require interpretation of religious doctrine (and is not disputed by Plaintiff in his appeal).

Regarding the Establishment clause, the United States Supreme Court has recognized that the Establishment Clause is violated where there is clearly no secular purpose for the state action being challenged and the "activity was

motivated wholly by religious considerations." Lynch v. Donnelly, 465 U.S. 668, 680, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984).

In Satz v. Satz, supra 476 N.J. Super. at 552-54, the Court found enforcing the provisions of a marital settlement agreement, in which the parties agreed to participate in a *beth din* proceeding to obtain a get, did not violate the ex-husband's First Amendment rights, because the orders "served the secular purpose of enforcing the parties' contractual obligations under the MSA, which in turn serves the secular purpose of encouraging divorce litigants to resolve their disputes by negotiating and entering an MSA."

The orders Plaintiff challenges similarly served the secular purpose of enforcing the parties' contractual obligations to arbitrate under the Agreement, and the secular purpose of encouraging divorce litigants to resolve their disputes as they had done by adopting and seeking enforcement of the January 18, 2024, wherein the method and qualifications for an arbitrator charged with making religious decisions, was determined.

The Court did not interfere with Plaintiff's free exercise of religion, nor violated the Establishment Clause. At the request of the litigants, the Court applied neutral principles to enforce an Order which provided the method and qualifications to be utilized in selecting a replacement arbitrator from a list provided by the parties of potential arbitrators.

CONCLUSION

For all the foregoing reasons, the October 17, 2024, Order appointing Robert Kornitzer, Esq., Arbitrator, and the January 8, 2025, Order denying Plaintiff's Notice of Motion for Reconsideration, should be affirmed.

Respectfully submitted,
SARNO DA COSTA D'ANIELLO MACERI WEBB LLC
Attorneys for Defendant-Respondent

_____

ANGELO SARNO

DATED: July 18, 2025

YERUCHOM F. KOSLOWIZ,

Plaintiff-Appellant,

v.

LIEBA N. ROTHSTEIN,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Civil Action

On Appeal from Superior Court of New Jersey
Chancery Division
Family Law Part
Ocean County
Docket No.: FD-15-843-20
Appellate Docket No.: A-001647-24T2

Sat Below
Hon. Sean D. Gertner. J.S.C.
Hon. Kimberley Casten, J.S.C.

PLAINTIFF-APPELLANT'S REPLY BRIEF IN SUPPORT OF NOTICE OF APPEAL

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PRELIMINARY STATEMENT

As the first sentence of Rothstein's brief concedes, "This Appeal concerns a religious divorce and an Agreement between the parties to arbitrate issues in accordance with their ultra-Orthodox religious beliefs." The trial court's appointment of a secular attorney as arbitrator violated this foundational premise, which demands a religious arbiter of religious law. The trial court's unwarranted substitution infringes upon Koslowitz's fundamental rights to free exercise of religion and parental autonomy, directly contradicting the express written intent and course of performance under the Marital Settlement Agreement ("MSA"), which mandates a rabbinic arbitrator.

Rothstein's brief then attempts to divert this Court's focus by painting a picture of a "recalcitrant litigant" who has demonstrated an "utter failure and refusal to abide by the arbitration awards and process." This narrative is a calculated misdirection. Crucially, the trial court's decision to substitute a secular attorney for the contractually agreed-upon rabbinic authority was **not** predicated on any finding of Koslowitz's alleged non-compliance. Nor did the trial court find that the MSA's specific methodology for arbitrator selection had "failed" as required by statute to justify judicial intervention. Instead, the trial court's fundamental error lies solely in its misinterpretation of the parties' contractual intent regarding the makeup of the dispute resolver; an error that directly implicates the Religious Question Doctrine.

The parties' deliberate choice to arbitrate, foregoing the inherent advantages of the civil court system – including its local accessibility, cost-free nature, and direct enforcement powers - underscores their intent to have their personal custody disputes resolved by an adjudicator possessing specific religious qualifications and sensitivities. For Rothstein to suggest otherwise renders her foundational agreement meaningless.

Lastly, Rothstein's assertion that these critical issues of parental autonomy, free exercise, and the Religious Question Doctrine were not raised below is unavailing. These constitutional and interpretive concerns arise directly from the trial court's erroneous orders and their practical effect on the parties' rights and the integrity of their religiously-based agreement. Koslowitz consistently sought to enforce the spirit and letter of the MSA, which the trial court's orders fundamentally undermined.

STATEMENT OF PROCEDURAL HISTORY & FACTS

Koslowitz relies on all facts and procedural history set forth in his moving brief, dated May 22, 2025.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S FAILURE TO ADHERE TO THE ARBITRATOR SELECTION METHODOLOGY VIOLATES STATUTORY REQUIREMENTS AND FUNDAMENTAL CONTRACT INTERPRETATION PRINCIPLES

Rothstein's argument that "The Selection of an Arbitrator by the Court was in accordance with the January 18, 2024 Order Which Plaintiff Asked the Court to Enforce,

Not Reconsider" (Db28[1]) fundamentally misrepresents the procedural history and the plain meaning of the parties' agreements. The New Jersey Arbitration Act ("NJAA"), which governs the parties' Agreement to Arbitrate, is unequivocal: "If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails." N.J.S.A. 2A:23B-11(a). This statutory mandate requires strict adherence to the parties' chosen methodology, and a court may only intervene as a default when no method is agreed upon, or the agreed method has failed. Here, the trial court's intervention was premature and improper, as the MSA and subsequent agreements explicitly provided a clear methodology for arbitrator selection that was neither followed nor found to have failed.

Rothstein's assertion that the "Agreement did not provide a mechanism for the appointment of an Arbitrator under the circumstances presented" (Db29) is directly contradicted by the plain language of the MSA and subsequent Agreement to Arbitrate. Article XII of the MSA states that Rabbi Herszaft had "the sole discretion of choosing another permanent Arbitrator"" Pa1019. Furthermore, the January 18, 2021 Agreement to Arbitrate provided an additional, specific mechanism: "In the event that Rabbi Markin is incapacitated or cannot continue for any reason, Rabbi Markin will work with the Parties to appoint the new Arbitrator. In the event he is unable to do so for any reason, the Parties

[1] Db__ refers to the brief of Defendant-Respondent, filed on July 18, 2025.

agree to work together with the previous Arbitrator, Rabbi Ari Marburger, who will act as an interim Arbitrator and will help the Parties find a new Arbitrator" Pa118. These provisions establish sequential methodologies for arbitrator replacement, none of which were implemented here.

Crucially, Rothstein repeated assertion that Rabbi Herszaft was "disqualified" by Judge Gertner is a factual error based on a misstatement in Judge Casten's ruling. Rabbi Herszaft was never part of Judge Gertner's discussions or orders concerning disqualification. The record reflects that Judge Gertner's consideration of disqualification pertained to Rabbi Markin, not Rabbi Herszaft. Rothstein's reliance on Judge Casten's misstatement, likely an error by a new judge to the case unfamiliar with the nuances of the prior proceedings, cannot serve as a legitimate basis for bypassing the MSA's explicit and unchallenged methodology for arbitrator selection. Indeed, Koslowitz initially identified Rabbi Herszaft as a "front runner" for the arbitral role; a fact acknowledged by Rothstein's counsel in correspondence to the trial court. Pa886.

Nonetheless, the trial court incorrectly dispensed with the parties' contracted methods, substituting its own methodology in the January 18, 2024 Order. See Garden State Plaza Corp. v. S. S. Kresge Co., 78 N.J.Super. 485 (App. Div.1963) (finding that a court must decline to follow the positions adopted by the parties if those positions conflict with the law or the clear terms of the contract). This was not a situation, however, where the agreed-upon method "failed"; it was a situation where the trial court simply bypassed

the parties' explicit contract. As this Court has repeatedly affirmed, matrimonial agreements are governed by basic contract principles, demanding that courts "discern and implement the parties' intentions" and "enforce the agreement as written, unless doing so would lead to an absurd result." Quinn v. Quinn, 225 N.J. 34, 45 (2016). The trial court's decision effectively rewrote the parties' contract, unwarrantedly granting them a different deal than they expressly bargained for.

In that regard, Rothstein's claim that Koslowitz "consented and explicitly asked the Court to appoint an Arbitrator" (Db28) is a mischaracterization of Koslowitz's position. Koslowitz's July 17, 2024 application sought to "compel a new arbitrator *per the Court's January 18, 2024, Order*." Pa765. This was not an abandonment of the MSA's intent or a concession that the MSA's methodology failed. Rather, it was a request to enforce the *new* court-imposed framework after the trial court had already deviated from the MSA's terms on an interlocutory basis. Koslowitz cannot be deemed to have waived his right to appeal the court's initial deviation from the MSA's explicit terms by seeking to compel action within the court's subsequently imposed framework.

Rothstein's judicial estoppel argument is further misplaced. Judicial estoppel prevents a litigant from taking inconsistent positions in litigation when a prior position was successfully asserted and adopted by the court. See Cummings v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996). Here, Koslowitz has consistently maintained that the parties' MSA mandates a religiously-qualified arbitrator selected through a specific, contracted-to

methodology. His request to compel a new arbitrator "per the Court's January 18, 2024, Order" was within the framework *imposed* by the trial court, not an endorsement or acceptance of the underlying legal premise that the trial court had the authority to bypass the MSA's explicit selection clauses. Koslowitz's current appeal directly challenges the validity of that January 18, 2024 Order's deviation from the MSA; a position consistent with his overarching argument for strict enforcement of the MSA's intent to engage in rabbinic arbitration. There has been no "playing fast and loose" with the courts (Db33); rather, Koslowitz has consistently sought to uphold the integrity of the parties' original agreement. The conditions for judicial estoppel – i.e., that a party successfully asserted a position that was adopted by the court - are not met here, as Koslowitz's primary contention regarding the proper selection methodology under the MSA was never "successfully asserted" or "adopted" by the trial court.

Indeed, contrary to Rothstein's argument, even Judge Gertner, in his November 16, 2023 oral decision, recognized the inherently religious nature of the disputes contemplated by the MSA, stating:

> ...the Court can – can find and reasonably infer that the parties have agreed to mandatory arbitration. For instance, and the reason the Court read from the initial determination paragraphs, particularly paragraphs 4 and 5, is those two issues in the Court's mind, amongst others quite frankly that – that the arbiter articulates clearly indicate to – to this Court that there – there are issues and items that are better for the parties to resolve in a manner not before a – in this particular case a secular court because for – for instance the idea that a – that there should be the ability for the father to arrange time to learn with – with the boys is the Court reasonably infers is a structure of a particular education that the parties agree should be provided for the children as well

> as the provision in the arbitration determination addressing the Internet. Those types of issues clearly would not be in the Court's mind issues that would be partic (sic) – that a – even a Family Court would be particularly educated sufficiently about despite argument, any argument from counsel to – to address in – in a proper fashion. And that is – that supports, therefore, the initial indication that this – these matters should be arbitrated. 2T25:9-26:9.

The afore-cited acknowledgment underscores that the intended arbitrator was one capable of addressing matters rooted in religious practice; a capability inherently tied to a rabbinic authority. The trial court's subsequent appointment of a secular attorney constitutes a misinterpretation of the parties' contract, violating the express written intent of the parties' agreement and statutory requirements for such selection.

POINT II

THE TRIAL COURT'S INITIAL ORDER APPOINTING A SECULAR ARBITRATOR WAS PALPABLY INCORRECT, AND ITS DENIAL OF RECONSIDERATION PERPETUATED THAT ERROR

The gravamen of this appeal lies with the trial court's October 17, 2024 Order, which unilaterally appointed a secular attorney as arbitrator in direct contravention of the MSA. The subsequent denial of Koslowitz's motion for reconsideration merely perpetuated this initial, palpable error. A motion for reconsideration is appropriate when the court has "expressed its decision based upon a palpably incorrect or irrational basis, or it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The

trial court's appointment of a secular attorney, in direct contravention of the MSA's plain meaning and the course of performance, constituted such an incorrect and irrational basis.

First, Rothstein's claim that Koslowitz's arguments were "new" and thus inappropriate for reconsideration is unpersuasive. While the specific request for Rabbi Herszaft to appoint a new arbitrator was articulated with more particularity in the reconsideration motion, the underlying contention – namely, that the MSA mandated a religiously-qualified arbitrator selected through a specific, religiously-informed methodology - has been consistent throughout. Koslowitz's earlier request for the court to appoint an arbitrator (Pa765) was made *within the procedural framework imposed by the trial court's January 18, 2024 Order* and absent any notion that a non-rabbinic arbitrator would ever be considered; not as an abandonment of his fundamental position regarding the MSA's intent. The trial court's refusal to consider the relevant evidence submitted with the reconsideration motion in the non-dissolution matter, including statements from Rabbi Kester (Pa932-933) and Rabbi Herszaft (Pa925, 930) attesting to the parties' intent further demonstrates its failure to appreciate the probative, competent evidence (highlighted by the trial court refusal to consider such evidence despite permitting Rothstein to submit proposed names of arbitrators past the thirty (30) day timeframe set by Judge Gertner).

Second, the trial court's misinterpretation of the MSA, leading to the initial erroneous appointment, was a critical and newly arising misinterpretation that demanded reconsideration. The trial court's appointment of Mr. Kornitzer rested on the flawed

premise that the MSA did not require a rabbinic arbitrator and that the court had the authority to bypass the parties' selection mechanisms. Rather, the MSA's "arbitrator or Bais Din" language, *coupled with* the parties' consistent course of conduct, unequivocally mandates a religiously-qualified adjudicator. The trial court's failure to recognize this fundamental aspect of the MSA, and its subsequent imposition of a secular attorney, constituted a "palpably incorrect or irrational basis" for its decision. This error was not a mere matter of "dissatisfaction" but a substantive legal error with profound implications for the parties' right to contract, parental autonomy, and free exercise of religion.

Third, even assuming, *arguendo*, that the trial court genuinely found ambiguity in the MSA's arbitration clause - a finding it never explicitly made - it was obligated to conduct a plenary hearing to ascertain the parties' contractual intent before appointing an arbitrator. As this Court has held, where unresolved questions of intent remain following an examination of a contract, a plenary hearing is required to resolve such ambiguities. Pacifico v. Pacifico, 190 N.J. 258 (2007). The trial court's failure to conduct such a hearing, particularly given Rothstein's eleventh-hour shift in position regarding the nature of the acceptable arbitrator, constitutes reversible error. See Celanese Ltd. v. Essex Co. Improvement Auth., 404 N.J. Super. 514 (App. Div. 2009).

Finally, the trial court's reliance on the "clean slate" concept to justify bypassing the MSA's clear terms was a misapplication of Judge Gertner's original sentiment. Judge Gertner's "clean slate" remark (2T47:3-20) was plainly an aspiration for the parties to

move forward constructively; not a judicial license to unilaterally rewrite their contract or disregard the methodology for arbitrator selection. Judge Gertner himself recognized the inherently religious nature of the disputes (2T25:9-26:9) and the limitations of a secular court in adjudicating such matters. Judge Casten's subsequent interpretation, which led to the appointment of a secular attorney, distorted this intent and compounded the initial error.

Given the trial court's palpably incorrect interpretation of the MSA, its disregard for compelling extrinsic evidence of the parties' intent, and the profound constitutional implications of its decision, the denial of Koslowitz's motion for reconsideration was an abuse of discretion and constitutes reversible error.

POINT III

THE TRIAL COURT'S ORDERS INFRINGED UPON PLAINTIFF-APPELLANT'S FREE EXERCISE OF RELIGION (PA2, 5, 7)

Rothstein's argument that the trial court's orders did not interfere with Koslowitz's free exercise of religion fundamentally misconstrues the constitutional protections afforded to religious practice and the specific nature of the MSA. New Jersey provides robust protection for the free exercise of religion, often interpreted to be even broader than federal constitutional protections. Farhi v. Commissioners of Borough of Deal, 204 N.J. Super. 575 (App. Div. 1985). This right extends to the autonomy of individuals to order their lives, including family matters, in accordance with their religious beliefs.

Rothstein's contention that the orders "served the secular purpose of enforcing the parties' contractual obligations under the MSA" (Db56) is a superficial analysis that ignores

the religious underpinnings of the very contract to be enforced. This particular MSA is not a secular agreement. Indeed, it did not even arise from anything other than a religious union between the two parties, which was never civilly formalized. The parties, both practicing members of the ultra-Orthodox Jewish community, chose to resolve their disputes, including custody, within a framework governed by Jewish law and rabbinic authority. This choice reflects a core tenet of their faith, which requires the resolution of conflicts in rabbinical courts before rabbinical judges applying Jewish law. Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, 915 F. Supp. 2d 574, 582 (S.D.N.Y. 2013).

Nonetheless, by substituting a secular attorney for the contractually agreed-upon rabbinic authority, the trial court directly compelled Koslowitz to arbitrate outside of the religiously-sanctioned forum mandated by his faith and the MSA. This is not a neutral application of law; it is an imposition that forces a party to abandon a religiously-required dispute resolution mechanism. The phrasing of the MSA, specifying "an arbitrator or Bais Din," unequivocally demonstrates the parties' intent to select an adjudicator from a category of religiously-qualified individuals. Given the MSA's explicit purpose concerning a "religious divorce" and "ultra-Orthodox religious beliefs," the term "arbitrator" cannot be divorced from its religious context. It must be understood as an individual capable of applying Jewish law and communal standards, akin to a Bais Din, not a generic secular professional. The trial court's action, therefore, effectively compelled Koslowitz to violate his religious duty to settle disputes according to Jewish law, thereby directly interfering

with his free exercise of religion. See South Jersey Catholic School Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elementary School, 290 N.J. Super. 359 (App. Div. 1996) (holding that courts may not interfere with religious decisions where state action imposes restrictions on religious choices, unless free exercise rights are waived). No such waiver occurred here; to the contrary, the MSA codified that right.

Finally, Rothstein's implicit suggestion that these free exercise issues were not properly raised below is unavailing. The constitutional claim of interference with Koslowitz's free exercise of religion, as presented in this appeal, arose directly and specifically from Judge Casten's October 17, 2024 Order appointing Mr. Kornitzer. Prior to this order, the parties were operating under Judge Gertner's January 18, 2024 Order and oral directives, which, while deviating from the MSA's original selection methodology, still contemplated the appointment of a "new Arbitrator or Bais Din" who would be able to adjudicate religious issues in accordance with Jewish precepts. Pa784. It was Judge Casten's subsequent, unforeseen action of appointing a secular attorney that constituted a direct interference with religious practice, triggering the constitutional challenge. Indeed, how could Koslowitz have "properly raised" an argument below that had not yet occurred and was not reasonably contemplated given Judge Gertner's prior statements? The free exercise concerns are not an afterthought, but are inextricably linked to the trial court's disregard of the parties' agreement, culminating in Judge Casten's specific appointment, which is the subject of the instant appeal.

POINT IV

THE TRIAL COURT'S APPOINTMENT OF A NON-RABBINIC ARBITRATOR IMPLICATES THE RELIGIOUS QUESTION DOCTRINE (PA2, 5, 7)

Rothstein's argument that the trial court's orders did not violate the Establishment Clause or interfere with Koslowitz's free exercise by applying "neutral principles" (Db56) fundamentally misapplies the Religious Question Doctrine. This doctrine, rooted in the First Amendment, mandates that courts abstain from adjudicating matters of religious doctrine, practice, or governance, recognizing their inherent lack of competence to do so. Elmora Hebrew Center, Inc. v. Fishman, 125 N.J. 404 (1991).

Rothstein's assertion that the court merely applied "neutral principles to enforce an Order which provided the method and qualifications to be utilized in selecting a replacement arbitrator" (Db57) is a perilous oversimplification. While courts can enforce agreements to arbitrate before religious tribunals, such enforcement must not lead to impermissible entanglement. Satz v. Satz, 476 N.J. Super. 536 (App. Div. 2023). Here, the trial court did not enforce the parties' MSA; it fundamentally altered it. The MSA explicitly contemplated a religiously-qualified dispute resolver, whether "an arbitrator or Bais Din"; a choice infused with the parties' desired adjudication under Jewish law.

Through the appointment of a secular attorney, the trial court invoked the Religious Question Doctrine because the underlying disputes, particularly those concerning child custody and upbringing within an ultra-Orthodox framework, are inherently intertwined

with religion. As Judge Gertner himself recognized, issues like "the ability for the father to arrange time to learn with – with the boys" and "the Internet" are matters "that a – even a Family Court would not be particularly educated sufficiently about... to address in – in a proper fashion." 2T25:9-26:9. A secular attorney, by definition, lacks the vocational expertise in Jewish law necessary to interpret and apply the myriad of Judaic terms and communal standards embedded in the MSA.

The trial court's decision forces the appointed arbitrator to either ignore the religious dimensions of the dispute, thereby failing to give effect to the parties' contractual intent, or to engage in the unqualified interpretation and application of religious law. The latter scenario creates the very "excessive entanglement" that the Establishment Clause forbids. Lemon v. Kurtzman, 403 U.S. 602, 611-15 (1971). If, on the other hand, Mr. Kornitzer is required to consult with rabbinic authorities to make religious determinations, as Koslowitz anticipates, this process would impermissibly enmesh the state-appointed arbiter in religious affairs, risking the appearance of government endorsement or disapproval of religious practices. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 389 (1985). This is precisely the concern highlighted in Ran-Dav's County Kosher, Inc. v. State of New Jersey, 129 N.J. 141, 163–65 (1992), where the use of individuals in their religious capacity to enforce state law blurred the lines between religious and civil authority.

Rothstein's argument that Koslowitz's free exercise was not violated because the court applied "neutral principles" fails to appreciate that the "neutrality" here is

undermined by the court's refusal to respect the parties' choice of a religiously-qualified arbitrator. The "neutral principles doctrine" allows courts to enforce religious agreements without interpreting religious doctrine, but it does not permit courts to impose a secular interpretation when the contract itself dictates a religious one. Abdelhak v. Jewish Press Inc., 411 N.J.Super. 211 (App. Div. 2009). The trial court's decision did not simply enforce; it fundamentally reshaped the arbitration, compelling a secular adjudication of what the parties intended to be a religiously-governed process. This constitutes an impermissible state action that impugned the parties' religious practices in favor of its own concept of appropriate dispute resolution.

CONCLUSION

For the foregoing reasons, Koslowitz respectfully requests the Court reverse the Orders of January 18, 2024, October 17, 2024, and January 8, 2025.

Respectfully submitted,
FOX ROTHSCHILD LLP, Attorneys for Plaintiff-Appellant

_____ Dated: July 28, 2025
Eliana T. Baer