Religious Postmarital Dispute Resolution: Jewish Marriage Contracts and Civil Courts

I. INTRODUCTION

The resolution of marital problems can take many different forms such as conciliation, mediation, and counseling. But when a marriage breaks down completely, there are only two results recognized by the civil courts of the United States—a termination of marriage signalled by either a divorce or a dissolution decree.[1] Even in instances where the parties mutually agree to terminate their marriage, the state requires an official divorce or dissolution, which defines the legal duties of the parties.[2]

There are many circumstances, however, in which official divorces do not fully resolve the dispute between the parties. In those circumstances, the parties need recourse to alternate methods.[3] This is the case when Jewish people seek not only civil divorce, but also divorce recognized within their faith. "To the Orthodox Hebrew, it is as crucial to the legitimacy of divorce as it was to wedlock that religious rites be followed scrupulously."[4] In order for a Jewish couple to be divorced, the husband must release his wife, and the wife must accept the release. This release is called a *get*. Only after the husband releases the wife, will the woman be free to marry again in her religion.[5] If the release is not given, and the woman remarries regardless, any children born to this union, which is not formed within the faith, will be considered illegitimate.[6]

The requirement for Jewish divorces compels several difficult questions. First, are religious courts better suited than civil courts to address domestic disputes? Often, divorce is seen as a termination of marriage as well as a resolution of any conflicts which stem from it. Consequently, there is no reason for the court to lay a groundwork upon which the parties may build an ongoing relationship.[7] In truth, however, conflicts

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1. Jones v. Jones, 136 Me. 238, 8 A.2d 141 (1939).

2. Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 227 & n.80 (1984).

3. S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 313 (1985). "It is important that any dispute settlement system help to facilitate constructive relationships in the future. . . . Even in . . . cases [where families are seeking divorce] there will be continuing relations between the parties concerning financial and child-rearing questions."

4. Meislin, *Jewish Divorce in American Courts*, 16 J. FAM. L. 19, 19 (1977-1978).

5. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From* Avitzur *to the* Get *Statute*, 50 BROOKLYN L. REV. 229, 234 (1984).

6. *Id.* at 234. *See also* 2 J. BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 103 (1983) and *infra* text accompanying note 22.

7. Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 735-36 (1985).

may continue to arise between the parties, particularly in such areas as child support and visitation. Consequently, mediation before divorce is instumental in enabling parties to cooperate. Mediation may be the only way to avoid the disputes which arise postdivorce.[8] In addition, if problems do arise, the couple could again use mediation to resolve the controversies. This way, the postdivorce relationship is not destroyed by acrimony resulting from court proceedings. Because the couple will be involved in a "continuing relationship," they should handle conflict through procedures that emphasize reconciliation and mutual decisions.[9] Religious arbitration and mediation allow the parties to resolve their disputes without destroying the necessary continuing relationship.

Second, if religious arbitration must exist in concert with civil divorce in order to solidify the status of Jewish divorces, how can secular courts uphold, promote, and administer such religious decisions without violating the establishment clause of the first amendment to the United States Constitution? The establishment clause forbids state action which promotes the establishment of any religion.[10] It is not yet clear whether a court's action in upholding or compelling a religious divorce is unconstitutional.[11]

This Note will first examine the Jewish legal system and how it deals with divorce. Then it will reveal the dilemma civil courts encounter when attempting to grant complete divorce without violating first amendment prohibitions.

II. THE JEWISH LEGAL FRAMEWORK

A. *The* Ketubah

The *ketubah* is at the core of a traditional Jewish marriage. The *ketubah* is a contract setting forth the rights and obligations of the parties to be married.[12] The husband's principal obligations which Jewish law demands are that he provide for his wife's physical and monetary needs. He must also fulfill the requirements necessary in the event of a *get*.[13] The *ketubah* is a "lien and a prior claim on the husband's estate with respect to all property owned by him during his lifetime,

8. Comment, *The Best Interest of the Divorcing Family—Mediation Not Litigation*, 29 LOY. L. REV. 55, 68-73 (1983).

9. Yngvesson, *Re-Examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623, 624.

10. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.*

11. *See infra* text accompanying notes 54-76.

12. Warmflash, *supra* note 5, at 232. *See also* 2 J. BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 89 (1983).

13. I. HAUT, DIVORCE IN JEWISH LAW AND LIFE 7 (1983).

and in the event of his death or divorce, is paid out of the 'best' and 'desirable' portions thereof."[14] The *ketubah*, therefore, makes provision for the distribution of assets between the parties in the event of a *get*. The *ketubah* has three parts: the main *ketubah*, which sets forth a specific amount the wife will receive in the event of a *get*; the *ketubah* increment, which establishes an optional, incremental addition to the main *ketubah*; and the return, which stipulates that all money the wife brought into the marriage will be returned to her in the event of divorce.[15]

B. *The* Get

A Jewish marriage terminates within the faith in only two ways: if one of the spouses dies or if the husband and wife obtain the *get*.[16] Originally, the *get* consisted of the husband driving the unwanted wife from his property.[17] Consequently, the rule developed that only husbands could obtain the *get*, because the wife had no property of her own.[18]

Throughout its development, Jewish philosophers have defined various acceptable grounds for the *get*. The most common view is that of the School of Hillel, which holds that a husband may obtain a *get* whenever there is cause, however slight.[19] The *get* is considered the personal rescission of a contract, and Jewish law looks with disfavor upon attempts to breach this personal relationship.[20] For this reason, if any person except the *bet din*, a rabbinical arbitration council, uses force to compel the husband to obtain a *get*, the *get* will not be considered valid in the faith.[21] If the wife should remarry without receiving a *get* from her civilly divorced husband, the Jewish faith will consider her marriage adultery, and any children of the marriage will be *mamzer*, or illegitimate.[22] The faith will consider her an "*agunah*," a woman still anchored to her husband.[23] Hence, religious leaders recognized that women in intolerable marriages needed a method to effectuate a valid *get* while avoiding the stigma of *agunah*.

In response to this problem, the *bet din* developed the constructive consent, so that it could force the reluctant husband to grant a *get*.[24]

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14. *Id.* at 9.
15. Bleich, *supra* note 2, at 201.
16. *Id.*
17. L. EPSTEIN, THE JEWISH MARRIAGE CONTRACT 200 (1973).
18. *Id. See also* I. HAUT, *supra* note 13, at 20.
19. I. HAUT, *supra* note 13, at 20.
20. *Id.*
21. Bleich, *supra* note 2, at 287. *See also* L. EPSTEIN, *supra* note 17, at 206.
22. B. MEISLIN, JEWISH LAW IN AMERICAN TRIBUNALS 71 (1976).
23. *See* Warmflash, *supra* note 5, at 234.
24. Note, *Jewish Divorce and Secular Courts: The Promise of* Avitzur, 73 GEO. L.J. 193, 200-01 (1984).

Historically, the *bet din* was able to exert whatever pressure it felt warranted, including physical force, to compel a reluctant husband to grant a *get*.[25] The pressure the *bet din* exerts today is still effective, although it is more limited. The pressure is "moral and social," rather than economic or physical.[26] The *bet din* is still the only body which can render the legal fiction of constructive consent. Although a secular or civil court cannot compel a valid *get*,[27] it can compel the husband to obey the *bet din*'s ruling and the fiction would still result. The *bet din* is always required in cases where the *get* must be compelled because the rules regarding the *get* are so intricate.[28]

C. *The* Seder Haget

The *seder haget*, or *get* procedure, is a complex procedure which requires both the writing and the delivery of the *get*. The *get* itself has many technical requirements which must be met in order for it to be fully effective. The *get* must set forth the Jewish calendar date, and the names, including the nicknames, and the residences of the parties.[29] Most importantly, the *get* must contain a complete and explicit statement explaining the separation of the parties.[30] The separation must be unconditional so that the woman may remarry at will. If the separation limits the wife's ability to remarry, the bill of divorce may be invalid.[31]

The actual *seder haget* is the ceremony where the husband releases the wife. The *bet din* need not, and usually does not, officiate. Instead, an individual rabbi oversees the proceeding. The husband, the wife, a scribe, and two witnesses are present at the proceeding.[32] The rabbi asks the husband if he is giving the *get* under any compulsion, and, if so, will free him of the compulsion. The husband must give the paper and pen to the scribe and ask him to produce a *get* "without flaw both in the writing and in the attestation."[33] When the scribe has written the *get*, the witnesses must sign it, and the husband or his agent must deliver it to the wife, or her agent.[34] When the husband delivers the bill directly to the wife, she must take it freely and without help into her own hands. If the husband gives the *get*, he must say: "This is

25. *Id.* at 201.
26. *Id.*
27. L. EPSTEIN, *supra* note 17, at 206. *See also* B. MEISLIN, *supra* note 22, at 74 (quoting MAIMONIDES: LAWS OF DIVORCE, cap. 2, ¶ 20).
28. Meislin, *supra* note 4, at 21.
29. I. HAUT, *supra* note 13, at 27.
30. *Id.* at 27-28.
31. *Id.* Certain restraining clauses were, however, permitted. For instance, a husband could make it a condition that his divorced wife not marry a certain man.
32. *Id.* at 31-32. The scribe cannot also be a witness, and the scribe cannot be related to either the husband or the wife.
33. *Id.* at 33.
34. *Id.* at 34.

your *get*, and you are divorced by it from me, and are permitted to marry any man."[35] At the rabbi's request, the wife will either return the *ketubah* or waive its provisions.[36] The procedure is lengthy and complex and, therefore, the *bet din* is the only body with the expertise and knowledge to compel it.

D. *The* Bet Din

The *bet din* (or *beth din*) is, as previously discussed, a rabbinical arbitration council.[37] The council consists of three rabbis. Each of the married partners selects one rabbi, and these two rabbis select the third member.[38] Historically, *batei din* were standing panels which adjudicated disputes in fixed geographic areas.[39] As geographic concentrations of Jewish people shifted, the various *batei din* were usually not seated bodies, but were called when necessary.[40] In the United States, *batei din* are formed within denominational frameworks. The Orthodox Jews have one standing *bet din* in the Jewish community of Washington Heights in New York City.[41] The Orthodox Rabbinical Council of America also sponsors local *batei din* in large cities.[42] Conservative Jews sponsor one national *bet din* at the Jewish Theological Seminary. Likewise, individual rabbis sponsor ad hoc *batei din* when they are necessary.[43]

The *bet din* domestic relations function now consists of administering *get* proceedings, but the responsibility to encourage conciliation whenever possible remains. Although the *batei din* cannot compel counseling as a prerequisite for a *get*, they have the discretion to delay granting the *get* where they feel that such delay might result in conciliation. Likewise, the terms of the *ketubah*, which spell out the financial repercussions of the *get*, sometimes provide considerable incentive to the parties to mediate their differences before they go through the *get* procedure.[44]

III. The Position of Religious Arbitration in Secular Courts

A. Gets *Granted Outside of the United States Courts*

Secular courts in the United States generally will recognize a *get* which the parties obtained in a foreign jurisdiction if the *get* meets

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35. *Id.* at 39.
36. *Id.* at 40.
37. *See* text accompanying notes 24 to 28.
38. B. Meislin, *supra* note 22, at 122-23.
39. *Id.* at 121-22.
40. *Id.*
41. *Id.* at 123.
42. *Id.*
43. *Id.*
44. Note, *supra* note 24, at 198.

basic jurisdictional requirements. The first jurisdictional requirement is that both parties or their representatives appear after receiving adequate notice of the hearing.[45] Another requirement is that the country in which the parties obtained the *get* must recognize its validity.[46] On their face, these requirements seem reasonable. At times, however, courts have had trouble making the distinction between *gets* which foreign law governs and those which American law governs. When the husband resides in the United States and wishes to divorce his wife, residing in another country, he will have the *get* drafted in the United States and taken by messenger to his wife.[47] American courts have presumed that this kind of *get* was a product of American invention and hence invalid under controlling American law.[48] Jewish scholars argue that the law of the country where the wife lives governs the *get* because the *get* cannot take legal effect until it has been delivered.[49] Therefore, courts in the United States should recognize these *gets* as valid.

A recent New York case dealt with this issue. In *The Matter of Sandra S. v. Glenn M. S.*,[50] a couple was married in New York and later moved to Israel. The husband-respondent thereafter returned to New York. The wife-petitioner sought custody and support through the rabbinical court in Israel. The husband was reluctant to undergo the *get* proceedings in Israel because he believed the resulting divorce would not be valid in New York.[51] Although the parties had not yet obtained the *get* at the time the court rendered the decision, the court stated that a *get* so procured "would probably be valid in New York State."[52]

B. *The Status of the* Get *Within United States Jurisdictions*

The principal problem with obtaining the *get* in the United States is not recognition of validity. Rather, the conflict is between the religious requirements for a valid *get* and American constitutional prohibitions against church-state entanglements. If a civil court in the United States forced a husband to grant his civilly divorced wife a *get*, this might arguably violate the establishment clause of the first amendment.[53] The resultant *get* would also be invalid under Jewish law.[54] The establishment

45. Meislin, *supra* note 4, at 21-22.
46. Bleich, *supra* note 2, at 207-08.
47. I. HAUT, *supra* note 13, at 34-35.
48. Bleich, *supra* note 2, at 216-17.
49. *Id.*
50. 133 Misc. 2d 370, 506 N.Y.S.2d 259 (N.Y. Fam. Ct. 1986).
51. *Id.* at 376, 506 N.Y.S.2d at 264.
52. *Id.*
53. Bleich, *supra* note 2, at 227. This article features a complete discussion of the constitutional and other legal problems of Jewish religious divorce.
54. Note, *supra* note 24, at 210.

clause, as interpreted by the Supreme Court, prohibits government action which (1) lacks a secular purpose, (2) has the primary effect of advancing or inhibiting religion, or (3) entangles the government with religion to an excessive degree.[55] The resulting dilemma traps thousands of American Jewish women, making remarriage within their faith impossible. Consequently, the civil courts are striving to address the dilemma, and this response has centered on the *bet din.*

If the *ketubah,* or a settlement agreement made at the time of civil divorce, contains an explicit provision that the parties will have a *bet din* arbitrate any marital controversy, the courts can uphold the clause and force *bet din* arbitration.[56] Parties to commercial and employment contracts frequently include dispute resolution clauses in the contracts. These clauses "are enforced almost universally, and attempts to evade such agreements are discouraged by courts' declarations that strong public policy favors arbitration."[57] In family law, mediated settlement agreements frequently feature clauses establishing arbitration for future disputes. In New York, however, the courts are split in which circumstances they should enforce these clauses.[58] If the disputes concern alimony, property division, or child support, New York courts will generally uphold the arbitration clause.[59] However, if the parties dispute the custody or visitation provisions of a settlement agreement, the courts have not always enforced arbitration clauses.[60] There are many reasons why courts are less likely to permit parties to submit custody disputes to binding arbitration. Principal among these is the court's interpretation of its *parens patriae* responsibility.[61] For example, the first and second departments of the New York appellate division have split on the question of enforcing arbitration in custody cases. The first department has held that arbitration is permissible, but when one challenges an arbitration decision, the court will examine the decision to determine whether the best interests of the child have been served.[62] Conversely, the second

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55. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

56. Bleich, *supra* note 2, at 248-49. *See also* Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (N.Y. Sup. Ct. 1954).

57. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense,* 2 CARDOZO L. REV. 481, 482 (1981).

58. Meroney, *Mediation and Arbitration of Separation and Divorce Agreements,* 15 WAKE FOREST L. REV. 467, 483-84 (1979).

59. *Id.* at 483.

60. *Id.* at 484.

61. Philbrick, *Agreements to Arbitrate Post-Divorce Custody Disputes,* 18 COLUM. J. L. & SOC. PROBS. 419, 447 (1985). *Parens patriae* refers traditionally to the role of the state as a sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

62. Sheets v. Sheets, 22 A.D.2d 176, 179, 254 N.Y.S.2d 320, 325 (N.Y. App. Div. 1964).

department has held that courts are "better suited [than arbitration] to reach the ultimate objective" of serving the child's best interest.[63]

In a case where a settlement agreement included a clause providing for a *get*, the New York Court of Appeals, in *Avitzur v. Avitzur*,[64] followed the trend of courts dealing with arbitration clauses in disputes which do not involve custody. The court rejected defendant husband's argument that enforcing the *ketuḇah* would violate the establishment clause of the Constitution.[65] Instead, the court held that the plaintiff was entitled to specific performance of the contract and that defendant must "perform a secular obligation to which he contractually bound himself."[66] In this way, the court avoided the constitutional prohibition, by merely enforcing a private contract between individuals, albeit the contract has a religious content. The court also avoided the risk of invalidating the resulting *get* by leaving the actual compulsion of constructive consent to the only body which can effectively complete it, the *bet din*.[67]

In New York, courts have taken another approach to the problem of *agunah*. New York Domestic Relations Law Section 253 requires in part:

> Any party to a marriage... who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint, (i) that, to the best of his or her knowledge, that he or she has taken, or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce.[68]

Courts can apply this statute to force a reluctant husband to arrange for the *bet din* if he has begun a civil divorce action. The law, however, does not address those situations where the Jewish wife begins the civil divorce action. As the plaintiff, the law requires her to remove non-existent impediments to her husband's remarriage, but cannot compel the removal of the very real religious impediment to her own remarriage.

In addition, the law is vulnerable to constitutional challenge. When

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63. Agur v. Agur, 32 A.D.2d 16, 20, 298 N.Y.S.2d 772, 777 (N.Y. App. Div. 1969). It is interesting to note that the *Agur* decision involved a contract to arbitrate child custody disputes in accordance with Jewish religious law. The second department neatly sidestepped the Constitutional considerations posed by the agreement when it declined to enforce it on a *parens patriae* basis.

64. 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983).

65. *Id.*

66. *Id.* at 115, 446 N.E.2d at 138-39, 459 N.Y.S.2d at 574-75. It should be noted that the New York Court of Appeals has followed the same "neutral principles of law" analysis in a recent case concerning a church property dispute. First Presbyterian Church v. United Presbyterian, 62 N.Y.2d 110, 120, 464 N.E.2d 454, 459-60 *cert. denied*, 469 U.S. 1037 (1984).

67. Warmflash, *supra* note 5, at 248.

68. N.Y. DOM. REL. LAW § 253 (McKinney 1986).

applied to a husband's refusal to grant a Jewish divorce, the law affects the "establishment" of religion, since it compels the husband to take part in a religious rite.[69] In situations where the husband has converted to another religion, there is a clear violation of his right to freely practice his chosen religion.

More broadly, the law does not pass the three-prong test, prohibiting excessive governmental entanglement in religion, which the Supreme Court set forth in *Lemon v. Kurtzman.*[70] The first prong requires that the law have a secular purpose. Since New York state has a policy of encouraging remarriage, this prong may be met.[71] The New York law also meets the second prong, which prohibits government action primarily advancing or inhibiting religion. Section 7 of the law prohibits an entry of final judgment if the clergyman who married the couple testifies that to the best of his knowledge, the plaintiff has failed to remove all barriers to the defendant's remarriage.[72] Such an entitlement of power to a clergyman or minister clearly advances religion. According to the law, therefore, the clergyman can at least delay the divorce trial, if not stop it altogether.[73] The third prong of *Lemon v. Kurtzman* prohibits any government action which entangles the government with religion to an excessive degree.[74] The law fails this prong. Because the clergyman's affidavit can delay or stop the divorce decree,[75] the court must consider evidence of the existence of religious barriers. Furthermore, the statute provides that the clergyman must be alive and available to testify in order for his sworn statement to be entered into the case. Consequently, an excessive entanglement does exist.[76]

Ordering specific performance of a contractually provided *get* is the best alternative for Jewish women as the law now stands. Only the *bet din*, working in conjunction with civil tribunals, can exercise the power necessary to resolve the conflict of constitutional prohibition with religious requirements. The position of the parties remains intolerable without the *bet din.*

IV. CONCLUSION

The American Jewish population is again turning to the *bet din* to resolve domestic problems. Jewish couples must still fulfill the require-

69. U.S. CONST. amend. I.
70. 403 U.S. 602, 612 (1971).
71. Warmflash, *supra* note 5, at 252. *But see* Note, *supra* note 24, at 206.
72. N.Y. DOM. REL. LAW § 253(7) (McKinney 1986).
73. Warmflash, *supra* note 5, at 252. *See also* Note, *supra* note 24, at 206.
74. Warmflash, *supra* note 5, at 252.
75. Note, *supra* note 24, at 206.
76. N.Y. DOM. REL. LAW § 253 (McKinney 1986).

ments for obtaining a civil divorce in order to effectively change their legal status. No viable alternative exists, however, to the *bet din* for Jewish couples desiring to forge a link between a legal divorce and a religious divorce. Without a resolution to this problem, Jewish women initiating a divorce would be outcasts from their religion and unable to marry again within their faith. Secular courts have tried several methods to meet the needs of the Jewish faithful. The most effective method appears to be court enforcement of a *ketubah* provision stipulating that the parties would submit to a *bet din* in event of any disputes. This is the approach the *Avitzur* court took. Of course, this method is only effective when parties include the provision in a *ketubah* or a settlement agreement, and not all Jewish couples do so. Jewish individuals entering into a *ketubah* must protect their interests by insisting that settlement agreements, or *ketubah*, are drafted to include a *get* provision. Courts must recognize the necessity of encouraging and supporting the *get*, without compelling it, and parties must include a *bet din* provision in their *ketubah* or settlement agreements. In this way, courts can recognize both the public policy concerns which the New York *get* statute attempts to address, and the needs of the Jewish faithful.

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