Enforcement of Religious Marriage Contracts

 By Joel R. Brandes

Historically, the courts of New York have reluctantly passed upon the validity and enforcement of religious marriage contracts. The restrictions of the First Amendment (as read into the Fourteenth Amendment), constrain state courts from limiting the free exercise of religion or the use of civil law to support or further its establishment.

 The reported decisions dealing with the enforcement of religious marriage contracts involve Jewish and Islamic marriage contracts that we discuss in this article.

The Jewish marriage system” is complementary to, but apart from, the secular marriage requirements.” The couple must obtain a divorce in a secular court too. The division of assets may be done by the Beth Din, the rabbinical court, or by the court. A Jewish divorce involves the husband transferring to the wife, in front of witnesses, a Get, which is a personalized 12-line document written by a scribe at the command of the Beth Din. The husband’s transfer of the Get, and the wife’s acceptance of it, must be of their own free will. (See Ann., Application, Recognition, or Consideration of Jewish

Law by Courts in United States, 81 A.L.R.6th 1**)**

Under Jewish law, the requirement that a woman's husband issue her a get (a religious divorce) before she may remarry is binding in Orthodox and Conservative Judaism. (See [https://reformjudaism.org/reform-jewish-life/youth-family-community/jewish-waydivorce)](https://reformjudaism.org/reform-jewish-life/youth-family-community/jewish-way-divorce) Even if a civil divorce is granted, a husband must grant a wife a *Get,* before she can date or remarry. Without receiving a *Get*, a Jewish woman is an “*agunah*,” or a chained woman, in the Jewish community. (R.I. v T.I., 60 Misc. 3d 1226(A), 110 N.Y.S.3d 499 (Sup Ct, 2018)).

The granting of the Get is solely in the control of the husband. A wife whose husband refuses to give a Get may attempt to have the husband summoned to a religious tribunal known as a Beth Din (or Bais Din). Once at the Beth Din the tribunal can hear testimony and determine if a Get should be given. However, the tribunal itself cannot give the Get, it still must come from the husband. (Schwartz v Schwartz, 153 Misc.2d 789, 583 N.Y.S.2d 716 (Sup Ct, 1992)). The divorce has no validity unless the husband's consent is given voluntarily and without coercion or duress. It can only be obtained upon his assertion to the rabbinical court that it is being sought of his own free will. (Margulies v Margulies, 42 A.D.2d 517, 344 N.Y.S.2d 482 (1 Dept., 1973)).

 New York courts have described a “Siruv” (or seruv) as a judgment of contempt. One who ignores a summons to appearbefore a Bais Din may be found in contempt of the Bais Din. Such a person is placed under a ban of excommunication. He must conduct himself as though in mourning until the ban is lifted. He is shunned by the community until he corrects the situation. (Mikel v. Scharf, 105 Misc.2d 548, 432 N.Y.S.2d 602 (1980) affirmed 85 A.D.2d 604, 444 N.Y.S.2d 690) A ‘siruv,’ entails a type of ostracism from the religious community, and is prescribed as an enforcement mechanism by religious law. (Matter of Greenberg v. Greenberg*,* 238 A.D.2d 420, 656 N.Y.S.2d 369 (2 Dept., 1997);Berg v Berg, 85 A.D.3d 950, 926 N.Y.S.2d 568 (2 Dept., 2011)).

The Bais Din of America explains a seruv differently. According to it, a summoning Beth Din may issue a “seruv,” or a contempt order. A seruv is a public declaration by a Beth Din that someone was summoned to Beth Din but refused to meet their obligation under Jewish law to appear in front of the beth din. Sometimes, Jewish communities or synagogues impose sanctions on such people, such as not giving them aliyos (being called up to the reading of the Torah) or refraining from social interaction, to pressure the person to meet their obligation. The Beth Din is not necessarily involved at that point; the community or synagogue decides what measures are appropriate.( http://bethdin.org/wp-content/uploads/2015/07/LaymansGuide.pdf)

New York Courts cannot order a Jewish husband to give his former spouse a Get because the consent is not given voluntarily and without coercion or duress.

In Margulies v. Margulies, (42 A.D.2d 517, 344 N.Y.S.2d 482 (1st Dept.,1973)), after a judgment of divorce, the defendant-husband voluntarily stipulated to “appear before a Rabbi to be designated for the purposes of a Jewish religious divorce.” He failed to comply with the stipulation and was held in contempt twice and fined, subject to the provision that he could purge himself by paying the fines and appearing before a Jewish court to obtain a religious divorce. The husband refused to comply with the two contempt orders and was committed to jail for 15 days with the same opportunity to purge himself. On appeal from the third order, he argued that the court was without power to direct him to participate in a religious divorce, because it is a matter of one's personal convictions and is not subject to the court's interference. It was noted further, that since a Jewish divorce can only be granted upon the representation that it is sought by the husband of his own free will, any such divorce, if obtained under compulsion by the court, would in any event be a nullity. The First Department agreed that the defendant could not, under these circumstances, be incarcerated for his failure to honor the stipulation (incorporated into a court order) and vacated that portion of the order directing his commitment.

 In Pal v. Pal, (45 App Div 2d 738, 356 NYS2d 672 (2d Dept.,1974)) the Appellate Division reversed an order that enforced a provision in an agreement incorporated into a judgment of divorce which directed the parties "to submit to a rabbinical tribunal as to whether the plaintiff should be directed to take the necessary steps to grant a Jewish divorce, and included provisions concerning the selection of rabbis to constitute the rabbinical tribunal." The order appointed a certain rabbi as the plaintiff's designee and directed that rabbi and the rabbi designated by the defendant to select a third rabbi to serve on the rabbinical tribunal and directed that tribunal to furnish the court with a written translation of its decision. The Appellate Division, reversing the Supreme

Court's order, held that Special Term "had no authority to, in effect, convene a rabbinical tribunal."

 However, New York Courts will recognize and enforce the secular provisions of religious marriage contracts that require a former spouse to appear before a religious tribunal.

A Ketubah is a Jewish marriage contract. (See Yusupov v Baraev, 197 A.D.3d

538, 152 N.Y.S.3d 497 (2 Dept., 2021)). In Avitzur v Avitzur (58 N.Y.2d 108, 459 N.Y.S.2d 572 (1983)) the Court of Appeals found nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of a Ketubah, which was entered into as part of the Jewish marriage ceremony. The plaintiff and defendant were married on May 22, 1966, in a ceremony conducted under Jewish tradition. Before the marriage ceremony, the parties signed both a Hebrew/Aramaic and an English version of the “Ketubah”. According to the English translation, the Ketubah evidences both the bridegroom's intention to cherish and provide for his wife as required by religious law and tradition and the bride's willingness to carry out her obligations to her husband in faithfulness and affection according to Jewish law and tradition. By signing the Ketubah, the parties declared their “desire to \* \* \* live under the Jewish law of marriage throughout [their] lifetime” and further agreed as follows: “[W]e, the bride and bridegroom \* \* \* hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.” After the husband was granted a civil divorce the Plaintiff sought to summon him before the Beth Din according to the provision of the Ketubah recognizing that body as having authority to counsel the couple in the matters concerning their marriage. The defendant refused to appear, preventing the plaintiff from obtaining a religious divorce.

The plaintiff brought an action, alleging that the Ketubah constituted a marital contract, which the defendant had breached by refusing to appear before the Beth Din. She sought a declaration to that effect and an order compelling the defendant's specific performance of the Ketubah's requirement that he appear before the Beth Din. The defendant moved to dismiss the complaint, arguing that the resolution of the dispute and any grant of relief to the plaintiff would involve the civil court in impermissible consideration of a purely religious matter. Special Term denied the defendant's motion. The Appellate Division modified, granting the defendant's motion to dismiss. The Court of Appeals held that the provisions of the Ketubah relied upon by the plaintiff constituted nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum. The contractual obligation the plaintiff sought to enforce was closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There was little doubt that a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable. Similarly, an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity. It held that this agreement, the Ketubah, should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of this State. The Court of Appeals concluded that the case could be decided solely upon the application of neutral principles of contract law, without reference to any religious principle. Consequently, the defendant's objections to enforcement of his promise to appear before the Beth Din, based as they were upon the religious origin of the agreement, posed no constitutional barrier to the relief sought by the plaintiff. The relief sought by the plaintiff was simply to compel the defendant to perform a secular obligation to which he contractually bound himself. Avitzur v Avitzur (58 N.Y.2d 108, 459 N.Y.S.2d 572 (1983)).

Since Avitzur, supra, New York Courts have enforced the secular terms of contracts where the parties have agreed to “remove any and all barriers to the wife's remarriage”; to “appear at the Beth Din “for the purpose of a ‘Get’”; and to “appear before a religious tribunal and voluntarily give the wife a get.”

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In Kaplinsky v Kaplinsky (198 A.D.2d 212, 603 N.Y.S.2d 574 (2 Dept., 1993)) the Appellate Division found that the Supreme Court properly held the former husband in contempt of court for his failure to deliver a Get to his former wife pursuant to the stipulation of settlement entered into by the parties in open court, and incorporated in their judgment of divorce, in which he agreed to “remove any and all barriers to the wife's remarriage”.

 In Schwartz v Schwartz, ( 79 A.D.3d 1006, 913 N.Y.S.2d 313 (2 Dept., 2010)) during their divorce action, the parties entered into a written stipulation “so-ordered” by the court, which provided, inter alia, that before the wife's return to England on March 31, 2008, the parties would appear at the Beth Din Beth in Brooklyn “for the purpose of a ‘Get’….” The husband failed to appear, and the wife moved to hold him in contempt. In November 2008 Supreme Court directed the husband to “cooperate in all phases of obtaining a Get” on behalf of the wife. The husband appeared before the Beth Din on December 14, 2008. However, by letter dated December 15, 2008, the Beth Din declined his “request” that it “supervise the execution of the [G]et” based upon its conclusion that the husband would be executing the Get under duress resulting from the terms of the November 2008 order. In January 2009 the wife moved, inter alia, in effect, to hold the husband in contempt of court for failure to comply with the Stipulation and the November 2008 order. Supreme Court denied the wife's motion. The Appellate

Divison reversed. It observed that “the relief sought by [the wife] ... is simply to compel [the husband] to perform a secular obligation to which he contractually bound himself” and “[t]he New York courts have enforced precisely the type of stipulation which the parties entered into in the present case, by compelling the breaching party to comply by use of fines or by the withholding of civil economic relief”.

In Fischer v Fischer (237 A.D.2d 559, 655 N.Y.S.2d 630 (2 Dept., 1997)) pursuant to a stipulation of settlement and the divorce judgment, the former husband promised to submit to the jurisdiction of a rabbinical court and voluntarily give the former wife a Jewish divorce, He repeatedly refused to cooperate in obtaining the “get”. The former wife moved to hold him in contempt for, inter alia, his failure to comply with the provisions of the divorce judgment regarding the procurement of a “get”. The Supreme Court held him in contempt and committed him to jail. The contempt order provided that the former husband could purge the contempt by, among other things, fully cooperating in obtaining the “get”. Although he arranged to appear before the rabbinical court, he failed to voluntarily give the “get”. After the wife moved to enforce the contempt order, the court held that the former husband had purged himself of the contempt. The Appellate Divison disagreed. It observed that the New York courts have enforced precisely the type of stipulation which the parties entered into, by compelling the breaching party to comply by use of fines or by the withholding of civil economic relief. The record indicated that the former husband did not voluntarily give the “get”. Thus, he did not purge himself of that aspect of the contempt.

A nikah agreement is a mutual agreement signed by spouses during their Islamic religious marriage ceremony that is typically verified by two male witnesses and includes a mahr provision. A mahr provision, or sadaq, is a term in the nikah agreement whereby the husband gives something of value to the wife. The mahr provision functions to protect the bride's financial interests and independence and is typically only awarded in the case of divorce or upon the husband's death. The amount of the mahr is typically negotiated by the spouses' relatives before the wedding, rather than by the couple themselves. The mahr is usually paid in two parts; the first is paid immediately at the time of the religious ceremony and the second is deferred until one of the two previously stated occurrences. (73 Misc. 3d 422, 153 N.Y.S.3d 752 (Sup 2021) citing, inter alia, Annotation, *Application, Recognition, or Consideration of Islamic Law by Courts in United States*, 82 ALR 6th 1.)

 In Aziz v. Aziz, 127 Misc. 2d 1013, 488 N.Y.S.2d 123 (Sup Ct, 1985) a divorce was granted in 1984 and the Court reserved decision on the issue of whether the mahr agreement between the parties was an enforceable contract. At the time they were married in 1981 in New York a marriage certificate was issued by their religious leader and signed by the parties, which required a mahr of $5,032. The husband paid $32 but refused to pay the balance of $5,000. The wife claimed that the mahr, although a religious document, was enforceable by the court as a contract. The husband claimed that the mahr as a religious document was not enforceable by civil authority. Supreme Court, citing [Avitzur v Avitzur ( 58 NY2d 108)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000605&cite=58NY2D108&originatingDoc=I93b1f033d93011d9bf60c1d57ebc853e&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=2e9738db3a80487886cb6e7778804fd1&contextData=(sc.UserEnteredCitation)) found that the document conformed to the requirements of General Obligations Law § 5-701 (a) (3) and, although it was entered into as part of a religious ceremony, its secular terms were enforceable as a contractual obligation. As a secular document, the secular terms of the mahr (payment of the “bride price”) were enforceable by the court, and judgment was granted to the wife for $5,000.

In O.Y. v. A.G., 48 Misc. 3d 1222(A), 22 N.Y.S.3d 138 (Sup 2015) Supreme Court recognized that the mahr is an enforceable document in New York, although it is executed according to religious law. However, the Defendant did not produce satisfactory evidence that the mahr, which was executed in Egypt, was capable of enforcement in New York. It was not signed by the plaintiff, but by her uncle as her proxy. The defendant failed to provide proof that this was consistent with either Islamic law or Egyptian civil law. Among other things, it was not subscribed by the plaintiff, and not acknowledged by her as required by DRL §236(B)(3); RPL §§301, 301-a. Nor was it properly authenticated. The plaintiff's motion to dismiss the affirmative defenses relative to the mahr was granted, and the plaintiff was estopped from seeking recovery of the dowry due to her.

In Badawi v Alesawy,135 A.D.3d 792, 24 N.Y.S.3d 683 (Sup Ct.,2016)). the mahr agreement, although not acknowledged in accordance with Domestic Relations Law § 236 (B) (3), was signed by the parties and two witnesses, as well as the Imam of the

Islamic Cultural Center of New York. While the parties were living in Abu Dhabi, United

Arab Emirates, the plaintiff obtained a judgment of divorce against the defendant in the Abu Dhabi courts, which included an award of $250,000 according to the mahr agreement. The Appellate Division held that under the circumstances, the Supreme Court properly recognized so much of the foreign judgment of divorce as incorporated the mahr agreement under the principles of comity, as no strong public policy of New York was violated thereby.

In Khan v. Hasan, 73 Misc. 3d 422, 153 N.Y.S.3d 752 (Sup 2021), the Supreme Court held that an unacknowledged deferred mahr entered into in New York that granted the Wife $50,000 upon some unspecified occasion was unenforceable. It agreed with the Husband's argument that Matisoff v. Dobi ( 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997)) and Galetta v. Galetta (21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013)) were controlling precedent as they collectively establish that a proper acknowledgment is an “essential prerequisite” to comply with the terms of Domestic Relations Law §236(B)(3) and that the document was signed by two witnesses, instead of being acknowledged, did not satisfy the requirements of Domestic Relations Law §236(B)(3). The Appellate Division affirmed. (Khan v Hasan, 219 A.D.3d 1420, 196 N.Y.S.3d 136 (2 Dept., 2023)) distinguishing Badawi v Alesawy, which, unlike this case, involved principals of comity.

In Oleiwi v. Shlahi, 73 Misc. 3d 913, 156 N.Y.S.3d 825 (Sup 2021), the parties were married in Iraq and signed a Mahr which mandated certain payments from the husband to his wife at the time of marriage and after marriage, if a divorce occurs. The mahr was executed in accordance with the marriage laws of Iraq. Supreme Court held that under the doctrine of comity, a duly executed prenuptial agreement executed in a foreign nation in accordance with that nation's laws will be found to be valid and enforceable in New York. The wife's motion for a judgment declaring the mahr enforceable against the husband was granted.

 Conclusion

New York Courts cannot order a Jewish husband to give his former spouse a religious divorce. However, New York Courts will recognize and enforce the secular provisions of New York contracts that require a former spouse to appear before a religious tribunal so long as its enforcement violates neither the law nor the public policy of this State. An Islamic marriage contract (mahr) executed in New York, is an enforceable document. However, a proper acknowledgment is an “essential prerequisite” to comply with the terms of Domestic Relations Law §236(B)(3). If duly entered into in another jurisdiction a Mahr will be recognized under principals of comity.

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