No one can guarantee the outcome of a petition in advance or even a date for a final decision. For that reason, it is generally a policy in Catholic dioceses to urge that a wedding date not be set if one of the spouses needs a church annulment or has to petition for a dissolution of a prior marriage.

Neither rich nor famous

Even more than this difficulty, however, is the matter of the cost. Church law allows a diocesan Bishop to set fees for cases presented to the Tribunal. After all, there are clerical and other costs associated with maintaining the office and processing the petitions. Some diocesan Bishops agree to support financially in whole or in part the activity of their Tribunals, while others expect the Tribunals to fund themselves. That disparity of policy has resulted in a difference of the structure and payment of the case fees or stipends. In the State of New Jersey, the fees or stipends generally run between $25 and $300, depending upon the nature of the case, the time and complexity of its preparation, and so forth. People who cannot afford the fee may not be restricted from petitioning and may not be discriminated against in the hearing of their causes. Tribunal officials are forbidden by law to accept gifts of any sort in connection with the cases in which they serve. Tribunal personnel in New Jersey, and indeed throughout the United States, are salaried by the dioceses whose Tribunals they staff; there is no per-case remuneration. Rumors of fees in the thousands of dollars are generally untrue. If in a particular case a person has actually paid that much, that is certainly an abuse which should be reported to the Bishop or to the judicial vicar of the Tribunal where the payment has been alleged.

If one does not have to be rich to seek an annulment or dissolution, neither does one have to be famous. Tens of thousands of people every year approach the Tribunals in the United States. The vast majority of final decisions grant the petitioned annulments or dissolutions. Almost half of these fall into the first two categories of nullity and are documentary or summary processes.

Church responsive

From time to time the attorney in divorce practice will be asked, especially by Catholics, about the possibility of a church annulment, or about defense against a petition entered by one's spouse in a church court. While most Tribunals guard their case files with the zeal of a priest protecting a penitent or a lawyer the client, general information about an individual Tribunal's practices is usually available, and the Tribunal official will try to give a full and accurate picture of the matter to the person directly involved, the petitioner or respondent.

Pastors of Catholic parishes have directories which list the local Tribunals and their officials, and usually the best place to refer a Catholic involved in a divorce action is to his or her parish priest. The Catholics Dioceses in New Jersey also have offices of Ministry to the Separated and Divorced. These too are listed in the Directories and can often help even if a church annulment or dissolution is not contemplated at the time.

While the term, "Catholic Divorce" may be an inaccurate and misleading label, there is no doubt that Catholic Bishops and their Tribunals are increasingly responsive to the needs and desires of divorced Catholics to remain close to their Church, and that church courts are becoming equipped to deal with the massive number of requests, which have increased more than tenfold in the past 15 years. As Catholics come to understand better and prosecute more vigorously their rights in the Church, the system of church courts will continue to evolve, and their relevance for the attorney in divorce practice will increase.

To Get or Not To Get: The Role of the Family Court in Religious Divorces

by Bonnie M.S. Reiss

In July, 1981, a New Jersey Superior Court judge ordered Barry Minkin to appear before a Jewish rabbinic tribunal, called a Bet-Din, and secure and deliver to his former wife, Brenda, a religious divorce (Get).[1] New York's highest court entered a similar order in 1983 against Boaz Avitzur, compelling him to appear before the tribunal so that it could adjudicate his wife's request for a Get which, according to Jewish law, can only be obtained by the husband.[2] Both decisions were grounded on contract where the civilly divorced wife sought to specifically enforce the Ketubah, a religious marriage contract, signed by the parties immediately before their marriage. The civilly divorced wives in both cases sought specific enforcement of the Ketubah since without a Get they were in a state of religious limbo where they were not considered married, but could not remarry according to religious law.

The New York State Legislature has sought to prevent the problem faced by Brenda Minkin and Susan Avitzur by enacting a statute, signed by Governor Cuomo in August 1983, which provides that a plaintiff seeking a divorce who was married in a religious ceremony must certify that he has taken all steps solely within his power to remove religious barriers to the spouse's remarriage.[3] A similar bill has been introduced in New Jersey.[4]

Statute challenged

A violation of the First Amendment? Both the New Jersey and New York courts have answered

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no; however, the New York statute has been challenged by a Manhattan woman who charges that compelling her to comply with the new law requires her to become indoctrinated to the principles of a denomination. The law has also been challenged on Fourteenth Amendment grounds.

While the rulings and rationales are similar, the decision in the New Jersey case, *Minkin v. Minkin,* required the husband to appear before the religious tribunal, secure the Get[5] and deliver it to his wife, while the New York decision held only that the husband appear before the tribunal to have the matter adjudicated. Both courts undertook a two-tiered analysis asking first if the Ketubah, the religious marriage contract, was enforceable, and second, whether enforcement of that contract would violate the First Amendment's prohibition against freedom of religion. In both cases, the Ketubah was found to be enforceable and its enforcement not repugnant to the First Amendment.

Judge Minuskin, in *Minkin,* found that the language of the Ketubah requires both parties to conform to the provisions of the Law of Moses and Israel, which laws require the husband to secure a Get, when *he* alleges adultery by his wife.[6] Brenda Minkin sought to compel the Get since her husband had been granted a civil divorce on his counterclaim for adultery. Focusing first on the agreement, the Court found that it can enforce a contract between husband and wife so long as it is neither unconscionable nor contrary to public policy. Since the purpose of the Ketubah is to promote successful marital relationships, the court found that its enforcement actually advances public policy and should be encouraged.[7] To compel the defendant to secure the Get is only to require him to do that which he agreed to do when he signed the Ketubah.

In dealing with the husband's claim that to enforce the agreement violated the First Amendment, the Court relied on two New York cases[8] which held that enforcement did not compel him to practice religion but only to appear before a religious tribunal to give evidence upon which a decision could be based. The Court called as its own witnesses several learned rabbis who testified that the giving of the Get was a secular rather than a religious act, not involving a religious ceremony, belief in or profession of faith in any doctrine.[9] Based on this testimony Judge Minuskin viewed the Get as a release document[10] and held that compelling the husband to secure it did not infringe upon his First Amendment rights. The decision was not appealed.

Avitzur case

The terms of the Ketubah in the *Avitzur* case were more specific than in *Minkin,* since that document was prepared by the Conservative Jewish sect, and specifically provided that the parties acknowledged the Rabbinical Assembly of the Jewish Theological Seminary as the authority with regard to their marriage. It obligated them to consult that authority to counsel them in light of Jewish tradition and to appear before an appointed tribunal when summoned.

Pursuant to this term of the agreement Susan Avitzur brought an action for specific performance to enforce that term of the contract which compelled the parties to appear before the religious tribunal. Her former husband opposed the application arguing that the court lacked jurisdiction and that the complaint failed to state a cause of action upon which relief could be granted since the resolution of the dispute involved a civil court's interference in a religious matter. The trial court rejected this argument and set the matter down for hearing to interpret certain terms of the Ketubah. Defendant husband appealed and the Appellate Division reversed essentially adopting defendant's claim that since Ketubah was entered as part of a religious ceremony, by its own terms it was a liturgical agreement unenforceable by the state. Once the state granted a civil divorce, it had no further interest in the parties' marriage.[11]

The New York Court of Appeals reversed in a four to three decision finding that since plaintiff was seeking merely to enforce an antenuptial contract in which the parties agreed to appear before a designated tribunal there was no infringement upon defendant's First Amendment rights.[12] Otherwise stated, the Court of Appeals held that plaintiff was seeking enforcement of an "agreement to arbitrate" in accordance with a law and tradition chosen by the parties. The Court placed the Ketubah on the same footing as other agreements in which the parties agree in advance to the forum for resolution of their dispute. Crucial to the court's decision was its finding that enforcement of the Ketubah did not involve a consideration of or ruling on matters of religious doctrine. It accorded the Ketubah no less weight because it was of religious origin or the tribunal before which the parties were to appear was religious in nature.

Thus, while the New York decision rested on similar grounds to the New Jersey decision—to enforce the Ketubah was not a religious act but a secular act, there is an important factual distinction between the two cases. In *Minkin,* the plaintiff actually sought to compel former husband to obtain the Get and deliver it to her. In *Avitzur,* the plaintiff sought only to compel her ex-husband to appear before the religious tribunal to have the matter adjudicated. Indeed, the *Avitzur* court specifically noted that it was not ordering the defendant to give plaintiff the religious divorce.[13]

Dissenters' view

The three dissenters in *Avitzur* adopted the husband's position and the holding of the Appellate Division that to compel the defendant to appear before the Bet Din was constitutionally prohibited. They viewed the dispute as one in which the State had no interest and one which could not be resolved under normal principles of law without reference to religious dogma and doc-

trine. They found it impossible to discern "discretely secular obligations" from the religious document. The dissenters focused on the prayer for relief in the plaintiff's complaint in which she asked the court to "declare the rights and legal relations of plaintiff and defendant in the marriage contract." In support of her request, she submitted affidavits of rabbis expressing opinions on the interpretation of certain provisions of the Ketubah. This, in the view of the dissenters, exceeded the authority of a civil court. They also noted that where the parties agreed in the Ketubah to appear in response to the summons of the *religious tribunal,* in this case the summons had been issued by the plaintiff-wife. This issue was not addressed by the majority. Simply stated, it was the view of the dissenters that the parties had agreed that their forum and their remedies came from the religious authorities not the civil courts.

"Get Law"

The State of New York adopted, in August, 1983, the "Get Law,"[14] which requires that a plaintiff seeking a divorce must submit an affidavit stating that he has taken or will take all steps reasonably within his power to remove impediments to his spouse's remarriage. Even where the affidavit has been submitted, if the clergyman who solemnized the marriage submits a certified or verified statement that to his or her knowledge the plaintiff has failed to take steps to remove impediments to remarriage no final judgment will be entered. The law applies only to marriage solemnized by a clergyman and specifically exempts Catholics whose religion requires application to a marriage tribunal, which can be made by either party, to dissolve or annul the marriage. There is an inherent problem in the statute as it relates to Judaism in that only men have the authority to procure a religious divorce. Since the statute, by its terms, applies only to plaintiffs, female plaintiffs are accorded no relief since it is still the defendant-husband who must obtain the religious divorce. In a situation where the husband files an answer and counterclaim, the statute imposes upon him no obligation to certify to the Court that he has taken steps to remove religious impediments to remarriage. A nearly identical bill is currently pending before our own state legislature.

Both laws have provoked strong reactions from the religious and secular communities. Proponents include Orthodox Jewish Organizations, while Reform Jewish Organizations (which do not require a Get for religious remarriage) oppose the measure along with the American Civil Liberties Union and the American Jewish Congress. Challenges rest on both First and Fourteenth Amendment grounds.[15]

Constitutional questions

In order to pass muster under the Establishment Clause of the First Amendment a law, whether legislative or judicial, must have a clearly secular purpose, neither advance nor inhibit religion and avoid excessive entanglement with religion.[16] The *Minkin* and *Avitzur* courts found a secular purpose. The giving of the Get was, according to rabbinic experts, a secular act since it related to the relationship between man and woman rather than that existing between man or woman and God.[17] Commentators have asserted a legitimate state interest in removing barriers to remarriage and to obliterating a spouse's right to extort favorable civil custody or financial settlements by the threat that the Get will be withheld. Opponents of the law summarily reject this argument urging that the giving of a Get is a religious act since it occurs solely within the religious milieu and without it people are still permitted to remarry civilly. The woman's status, of "Agunah," or abandoned woman, not married but not divorced, exists only within and as a result of religious law. The State, it is argued, has no interest in encouraging marriage under religious law.

Detractors of the "Get Law" also urge that it advances religion in that it gives religious authorities a veto power over the State's power to grant divorces. Even the appearance of joint exercise of authority by church and state provides a symbolic benefit to religion.[18] An additional criticism of the Statute is that by incorporating the requirements of Jewish divorce law but not that of Catholic precepts, the legislation, prefers one religion over another. This criticism may be a bit shortsighted since the problem of one spouse having veto power over the other's religious remarriage does not exist within the Catholic faith.

Supporters of the legislation find no advancement of religion since the law applies only to those who have already embraced the religious requirements by being married in a religious ceremony. The Free Exercise issue of the right of an individual to practice or not practice religion as he or she sees fit, along with the right to modify or abandon religious beliefs and practices during the course of one's life is not effectively addressed by this argument. The Fourteenth Amendment guarantee of access to the courts is infringed where the filing of an affidavit required by the Get Statute is a condition precedent to the right to obtain a civil divorce. Our Supreme Court has struck down statutes requiring that one swear a belief in God in order to become a notary public,[19] compelling participation in school prayer[20] and giving churches a veto over the location of liquor licenses.[21] Is a law which gives religious authorities an effective veto over access to the courts for a civil divorce constitutionally distinguishable?

The final hurdle in order for the statute to be deemed constitutional under the First Amendment is that there must be no excessive entanglement with religion. Proponents of the Get legislation resolve this question by asserting that the law requires only that plaintiffs enter the civil divorce courts with "clean hands." Courts are not called upon to resolve questions of religious law

and they do not compel a party to perform a religious act. The law's challengers disagree arguing that in enforcing the law, the courts will have to resolve questions of religious law, and thus become enmeshed in religious doctrine. This problem was pointed out by Justice Jones in his dissenting opinion in *Avitzur* where that Court dealt with the issue of interpretation of the language in the Ketubah relating to whether only the rabbinic tribunal had the authority to summon the parties to appear before it or whether the parties could summon one another as well.

There is also a distinction to be drawn, not only between the decisions of the courts in *Avitzur* and *Minkin,* but also between these two decisions and the Get legislation. Clearly, the ruling of the Court of Appeals in Avitzur allows the smallest degree of entanglement between government and religion. There the court noted the narrowness of its ruling in that it was only enforcing the parties agreement to submit marital issues to an arbitration panel made up of rabbis. The question, however, remains: Is the fact that the dispute is religious in nature and the arbitrators are religious authorities constitutionally fatal? In *Minkin,* based on the parties general agreement in the Ketubah to adhere to the laws of Moses and Israel which laws provided for a Get when one of the parties had committed adultery, the Court required the husband to give his wife the Get. This distinction, according to the majority in *Avitzur,* is the thread upon which constitutionality hangs.

The New York statute and proposed legislation in New Jersey make removal of religious barriers to remarriage a precondition to the granting a civil divorce. While few argue against the intent of the Get law, the issue of its constitutionality is by no means resolved. Until that occurs, practitioners should adopt the safest course which is to write into the civil divorce settlement the duty of the parties to take all steps necessary to remove impediments to their spouses remarriage.

Footnotes

1. *Minkin v. Minkin,* 180 *N.J. Super.* 260 (Ch. Div. 1981)
2. *Avitzur v. Avitzur,* 58 *N.Y.2d* 108, 446 *N.E.2d* 136 (1983), *cert. den.* No. 82-1854
3. Chapter 979, Laws of 1983
4. Senate Bill No. 1028, State of New Jersey, Introduced September 26, 1983, by Senator Feldman, Referred to Committee on Judiciary. An Act concerning divorce and nullity of marriage and supplementing chapter 34 of Title 2A of the New Jersey Statutes.
   Be it enacted by the Senate and General Assembly of the State of New Jersey:
   1. As used in this act:
      a. "Barrier to remarriage" includes any religious or conscientious restraint or inhibition imposed on a party to a marriage under the principles of the denomination of the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act, but shall not include a restraint or inhibition which cannot be removed by the party's voluntary act, nor a restraint or inhibition the removal of which would require a party to incur expenses for which the other party refuses to provide reasonable reimbursement.
      b. "All steps solely within the plaintiff's or party's power" does not include application to a marriage tribunal or other similar organization or agency or a religious denomination which has authority to annul or dissolve a marriage under the rules of that denomination.
   2. Any party to a marriage who is the plaintiff in a proceeding to annul the marriage or for a divorce from the bond of matrimony shall allege, in the complaint, that the plaintiff has taken or will take, prior to the entry of a final judgment, all steps solely within the plaintiff's power to remove any barrier to the defendant's remarriage following the annulment or divorce from the bond of matrimony.
   3. No final judgment of annulment or divorce from the bond of matrimony shall be entered unless, prior to the entry of the final judgment, the plaintiff shall have filed and served an affidavit that the plaintiff has taken all steps solely within the plaintiff's power to remove all barriers to the defendant's remarriage following the annulment or divorce from the bond of matrimony.
   4. In any action for annulment or divorce from the bond of matrimony in which the defendant enters a general appearance and does not contest the requested relief, no final judgment of annulment or divorce from the bond of matrimony shall be entered unless each party has filed and served an affidavit that all steps solely within the party's power have been taken to remove all barriers to the other party's remarriage following the annulment or divorce from the bond of matrimony.
   5. No final judgment of annulment or divorce from the bond of matrimony shall be entered, notwithstanding the filing of the plaintiff's affidavit prescribed by this act, if the clergyman or minister who has solemnized the marriage certifies, in an affidavit, that he has solemnized the marriage and that, to his knowledge, the plaintiff has failed to take all steps solely within the plaintiff's power to remove all barriers to the defendant's remarriage following the annulment or divorce from the bond of matrimony, provided that the clergyman or minister is alive and available to testify at the time when the final judgment would be entered.
   6. A person who knowingly submits a false affidavit under this section shall be subject to prosecution or punishment for perjury.
   7. This act shall take effect immediately.
5. 180 *N.J. Super.* 260
6. *Id.* at 262
7. *Id.* at 263
8. *Koeppel v. Koeppel,* 138 *N.Y.S.2d* 366 (Sup. Ct. 1954) *aff'd* 3 *AD2d* 854, *Rubin v. Rubin,* 75 *Misc.2d* 776, 348 *NYS.2d* 61 (Family G 1973). It should be noted that in both of these cases, the terms of the Ketubah which were enforced were also incorporated into a civil document.
9. *Id.*

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of a remarried parent would also be treated as support provided by that parent. In addition, any modification of the decree or agreement would trigger the application of the new rules unless the modification explicitly provided otherwise.

5. ***Filing Status:*** Under existing rules, certain taxpayers who are married for state law purposes but are "living apart" can qualify as unmarried for Federal tax purposes. In order to qualify for this somewhat paradoxical "unmarried" status under the existing rules the taxpayer's spouse cannot have been a member of the taxpayer's household for any part of the year. Under the revised bill, such a taxpayer can qualify as a "single" taxpayer provided his or her spouse has not been a member of the household for the last six months of the year. In addition, the definition of head of household would be amended to require that the taxpayer maintain a household for the principal place of abode for the child for only half the year (rather than for the entire year as under present law). Further, since the earned income credit and the child dependent care credit rules require that the taxpayer be entitled to claim the dependency exemption, these rules would be amended to provide that a parent would still be treated as entitled to the exemption (for purposes of these rules) even though that parent had agreed to relinquish the exemption to the other spouse.

6. ***Innocent Spouse Provisions:*** The expansion of the protection rules afforded an innocent spouse under the original bill would essentially be retained. However, the percentage test requirements for application of the new rules would be abandoned in favor of a requirement that the new innocent spouse rules apply only when the understated tax is more than $500.

Editor's View

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to amicably adjust their controversy without judicial intervention. If such litigants do in fact settle their matter so quickly, is it really necessary that they be forced to prepare and file a public disclosure? We think not.

Second, how meaningful will such disclosures prove to be? Will a dependent spouse have sufficient financial information to complete a form which will have any real substance? Frequently, the dependent spouse knows little or nothing about family finances. Undoubtedly, a C.I.S. filed by the dependent spouse will contain more blanks than hard data.

Third, the amended rule will undoubtedly force parties to file at least two, and conceivably three, separate C.I.S. statements during the pendency of contested litigation. The new rule, much as did the old, places parties ". . . under a continuing duty to inform the Court of any changes in the information supplied on the Case Information Statement. . . ." Assuming literal compliance with the rule, there will be many situations in which the original C.I.S. is prepared prior to the filing of a Complaint, amended at the time of a *pendente lite* hearing and amended again before trial. Is it really necessary for litigants to be forced to that expense?

The real issue is whether any true benefit will be achieved by accelerating the process by 45 days. Although speeding the judicial process is always an objective to be coveted, is real harm suffered by permitting the previous time constraints to control? The prior rule mandated the filing of the P.D.S. prior to any matter receiving *pendente lite* consideration. What more is really needed?

The initial stages of matrimonial proceedings are hectic enough. Litigants are frequently emotional. The Complaint is filed at one of the most traumatic points in a litigant's life. Litigants become acquainted for the first time with the judicial process. For many, it may be simply too much to expect that they also simultaneously complete a comprehensive financial disclosure package.

All this having been said, 45 days represents ample time to abide by the existing rule requirements. Forty-five days is sufficient time to identify budgetary needs, catalogue assets and report income. No one should be heard to complain about the former rule requirement.

The principal cause for complaint has been that many judges have not enforced the P.D.S. rule. All too frequently, the P.D.S. will trickle in on the eve of trial. Perhaps the amended rule is a reaction to lax enforcement of the predecessor requirement. If so, the answer should not be to require the accelerated filing of disclosures in all cases, but instead to enforce the rule that has served the public well for almost three years.

Footnotes

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10. *Id.* at 266
11. 86 *A.D.2d* 133 (1982)
12. 58 *N.Y.2d* 108 (1983)
13. *See* 446 *N.E.2d* at 139
14. Chapter 979, Laws of 1983
15. For a persuasively written challenge to the New York Statute, See Kochen, *Constitutional Implications of New York's Get Statute.* New York Law Journal, October 27, 1983
16. *Committee for Public Education v. Nyquist,* 413 *U.S.* 756, 773 (1973)
17. 180 *N.J. Super.* at 265
18. *Larkin v. Grendel's Den.,* 74 *L.Ed 2d* 297, 304 (1982)
19. *Torcaso v. Watkins,* 367 *U.S.* 488 (1961)
20. *School District of Abington v. Schempp,* 374 *U.S.* 203 (1963)
21. *Larkin v. Grendal's Den, supra.*