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JEWISH DIVORCES AND THE COURTS IN NEW YORK AND NEW JERSEY

I. Introduction

For an Orthodox Jewish couple to divorce in America, they must obtain a civil divorce as required by civil law, and a Jewish divorce (a *Get*) as required by Jewish law. The source for a Jewish Divorce is Deuteronomy 24:1:

כִּי יִקַּח אִישׁ אִשָּׁה וּבְעָלָהּ וְהָיָה אִם לֹא תִמְצָא חֵן בְּעֵינָיו כִּי מָצָא בָהּ עֶרְוַת דָּבָר וְכָתַב לָהּ סֵפֶר כְּרִיתֻת
וְנָתַן בְּיָדָהּ וְשִׁלְּחָהּ מִבֵּיתוֹ

> When a man takes a wife and is intimate with her, and it happens that she does not find favor in his eyes because he discovers in her an unseemly [moral] matter, and he writes for her a bill of divorce and places it into her hand, and sends her away from his house

A civil court in the United States can issue a civil divorce, but a civil court cannot issue a Jewish divorce. The Jewish divorce can only be effectuated when the husband issues a *Get* to his wife.[1] Without a *Get*, no matter how long the couple is separated, and no matter how many civil documents they may have in their file cabinet, in the eyes of Jewish law the couple remain married. Without a *Get*, the wife remains an "agunah" (a "chained" woman) and may not remarry in the eyes of Jewish law.

The entire *Get* procedure is usually performed in front of a Beit Din[2]. Though technically only the presence of the husband, wife, and two witnesses is required to effectuate the Jewish divorce, practically, the *Get* process is so complex that it is recommended that it be performed in the presence of experts in the field. In fact, rabbinic law automatically invalidates any *Get* which was not written and transmitted in front of experts. The *Get* must be given by the husband of his own free will without compulsion. The rules surrounding the *Get* make it an unfortunate situation where a husband refuses to voluntarily give a *Get*.

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[1] The Mishnah (Yevamot 14:1), states:

> A man who wishes to divorce his wife is not like a woman who seeks divorce from her husband. A woman is divorced in accordance with her will or against her will. A man cannot divorce his wife except of his own free will.

[2] A Beit Din is a rabbinical court consisting of three rabbis, sometimes spelled "Beth Din" or "Bait Din".

In the context of the parties proceeding with a Jewish divorce from a Beit Din the parties may agree or outside individuals may suggest that the parties submit all of their disputes in connection with the divorce to a Beit Din.[3] We strongly advise that one seek the assistance and advice of an attorney well-versed in this area before agreeing to submit all divorce issues to a Beit Din.

From a secular law perspective, a Beit Din is only binding upon the parties when both parties have agreed to submit appropriate issues to the Beit Din as an arbitration tribunal. (Uniform Arbitration Act, §1 and §16). Thus, from a secular law perspective, it is necessary for the Beit Din to comply with the rules of arbitration procedure in order for the Beit Din award to be enforceable. (Uniform Arbitration Act §§12-13).

A Beit Din's compliance with the rules of arbitration has been litigated in both New York and New Jersey, and other states, as well. This article will discuss the interplay between the Beth Din and the secular courts in New York and New Jersey, particularly in the context of divorce proceedings.

II. Jewish Divorce in New York

In 1983, New York enacted the "Get Law", 253 of the Domestic Relations Law, "Removal of Barriers to Remarriage". New York State is one of the only States whose laws directly deal with religious barriers to remarriage. Section 253 states that a plaintiff shall affirmatively state that to the best of his or her knowledge, he or she has prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the Defendant's remarriage following the divorce. One is simply obligated to remove any barrier to the remarriage of one's spouse. In the case of Orthodox Jews, this means the husband giving the wife a valid *Get*. Before the Court can issue a divorce, the parties must state that he or she has removed all barriers to remarriage, including giving and accepting the *Get*. While the statute called for the plaintiff (one who commenced the action) to make such verification, the Courts have extended the obligation where the recalcitrant husband is a defendant. New York has uniquely passed the law, without other states following.[4]

New York State has enacted Article 75 of New York's Civil Practice Law and Rules ("CPLR."), finding arbitration a favorable dispute resolution method. CPLR 7501 (1983). See 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 93 (1991) ("Arbitration is a favored method of dispute resolution in New York, as this Court has repeatedly held . . . ."). New York courts try to interfere "as little as possible with the freedom of consenting parties" to submit disputes to arbitration. Siegel v. Lewis, 40 N.Y.2d 687, 689 (1976) (New York courts interfere "as little as possible with the freedom of consenting parties" to arbitrate disputes). The courts favor arbitration where the agreement is binding and complied with procedural requirements of arbitration law, such as allowing each party to be represented by counsel, providing the parties with a fair opportunity to present their cases, not exceeding the scope of the jurisdiction, etc. Once a matter is arbitrated to

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[3] According to the website of the Beth Din of America, "In addition to the *get* process, the Beth Din maintains an active practice in matrimonial cases dealing with property division, custody and visitation. The Beth Din will convene a *din torah* (Jewish arbitration proceeding) in accordance with the requirements of Jewish law, comprised of expert *dayanim* (judges) experienced in adjudicating divorce cases. If necessary, the Beth Din will include a child psychologist on the panel of *dayanim* or as an expert witness to assist the panel in deciding custody and visitation matters." (http://www.bethdin.org/jewish-divorce.asp)

[4] While no other state currently has statutes guaranteeing the right to a get, there is case law in the statutory annotations of many states regarding this topic. Get cases are sometimes argued under the "free exercise" clause of the First Amendment of the United States Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Free Exercise Clause prohibits governmental regulation of religious beliefs but does not absolutely prohibit religious conduct. Braunfeld v. Brown, 366 U.S. 599 (1961); Cantwell v. Connecticut, 310 U.S. 296 (1940).

conclusion, a Court in New York will confirm the award upon the application of a party, unless the award is vacated or modified, pursuant to Section 7511. CPLR 7510.

It is well established that a New York court can enforce an agreement in which parties agree to refer a divorce matter to a Beit Din. Avitzur v. Avitzur, 58 N.Y.2d 108 (1983), *cert. denied* 464 U.S. 817 (1983) (the court could enforce that portion of a *Ketubah*, in which the parties agreed to refer the matter of a religious divorce to a nonjudicial, religious forum, such as a Beit Din); Hirsch v. Hirsch, 37 N.Y.2d 312 (1975) (an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity); Rakoszynski v. Rakoszynski, 174 Misc.2d 509, 515 (1997) (parties may elect to arbitrate their differences in a religious tribunal). Accordingly, the Court of Appeals has affirmed an arbitration award rendered in an arbitration proceeding in which "the parties undertook to fulfill the judgment to be granted by the Beth Din either by judgment or by settlement according to Jewish law, as the said judges will see fit'". Meisels v. Uhr, 79 N.Y.2d 526, 532 [1992], *motion denied* 79 N.Y.2d 1036 (1992); *accord*. Kingsbridge Center of Israel v. Turk, 98 A.D.2d 664, 666 (1st Dept. 1983).

While the CPLR and case-law have discussed that arbitration is a favored dispute resolution method, this is not the case with all facets of a divorce. Under CPLR 7511(b)(1), an arbitration award may be vacated where the rights of a party were prejudiced by:

1. Corruption, fraud, or misconduct in procuring the award; or
2. Partiality of an arbitrator; or
3. The arbitrator exceeded his or her power or failed to make a final and definite award; or
4. The arbitration did not follow the proper procedure.

CPLR 7511(b); see Matra Bldg. Corp. v. Kucker, 2 A.D.3d 732, 733 (2d Dept. 2003), Murray v. Cornette, 2008 N Y Slip Op 50786[U] [2008]).

The burden of proof that an arbitrator's award has been imperfectly rendered or is the result of fraud, or is subject to vacatur on any other ground enumerated within CPLR 7511(b), rests upon the petitioner. Rose v. J.J. Lowrey & Co., 181 A.D.2d 418 (1st Dept. 1992).

"Although the issue of child support is subject to arbitration, an award may be vacated on public policy grounds if it fails to comply with the [Child Support Standards Act (CSSA)] and is not in the best interests of the children." Hirsch v. Hirsch, 4 A.D.3d 451, 452-453 (2d Dept. 2004), citing Hampton v. Hampton, 261 A.D.2d 362 (2d Dept. 1999); accord Friedman v. Friedman, 34 A.D.3d 418 (2d Dept. 2006) (the level of child support may be prospectively determined by an arbitration subject to vacatur on public policy grounds if it violates the CSSA); Frieden v. Frieden, 22 A.D.3d 634 (2d Dept. 2005), *appeal denied* 6 N.Y.3d 712 (2006) (child support issues may be subject to arbitration, since such arbitration does not violate the objectives of the CSSA because an arbitration award is subject to vacatur if it fails to comply with the CSSA and is not in the best interest of the child). So long as the Beit Din has sufficient information to make a determination and the Beit Din follows the CSSA, the Courts in New York have reluctantly affirmed Beit Din's awards of child support.

In contrast to an arbitrator's award of child support, the New York Courts have consistently held that disputes concerning child custody and visitation are not subject to arbitration. Schechter v. Schechter, 63 A.D.3d 817 (2d Dept. 2009), citing to Hirsch, *supra*, Hom v. Hom, 270 A.D.2d 391 (2d Dept. 2000), Cohen v.

Cohen, 195 A.D.2d 586 (2d Dept. 1993). "The court's role as *parens patriae*[5] must not be usurped" by an arbitrator or the Beit Din. Glauber v. Glauber, 192 A.D.2d 94, 98 (2d Dept. 1993); see Lipsius v. Lipsius, 250 A.D.2d 820 (2d Dept. 1998); Nestel v. Nestel, 38 A.D.2d 942 (2d Dept. 1972).

In Hirsch, the Court found that the Beit Din did not apply the CSSA in making a child support award. In addition, the Court vacated the Beit Din's award for counsel fees, as the arbitration agreement did not authorize same. Further, the Beit Din directed the wife to withdraw her criminal complaint against her husband, but the Court found that it is a matter of public policy for a Beit Din to deprive a party of a constitutional right to seek redress. The Court vacated the Beit Din's entire award.

Overall, the Courts in New York favor arbitration for most matters, whether with a Beit Din or a different arbitrator. However, New York Courts expressly disapprove of arbitration of child custody. While child custody cannot be arbitrated in New York, there are other options to resolving child custody. Of course, the most lengthy and drawn out is litigation. If custody is litigated in the Courts, the judge will make the final determination as to custody of the child[ren], whether joint or sole, residential or legal. Where the parties seek to avoid litigation, thereby avoiding a third party [judge] from making such critical determinations about the parties' child[ren], the parties can mediate the matter. Mediation allows the parties to reach an agreement, instead of leaving it to the determination of a third party. The parties are often represented by counsel during the course of mediation, but mediation allows the parties to control the results, by reaching agreements with their spouse. The attorneys at the Law Offices of Jason I. Flynn have experience with serving as a mediator for the parties and serving as the counsel for the parties who are mediating. We are here to assist you in resolving your matter, either through mediation or in Court, or to a limited extent, with a Beit Din.

III. Jewish Divorce in New Jersey

In contrast to New York, the Courts in New Jersey have not issued many decisions regarding Beit Din awards or findings. Parties can agree to arbitrate any existing or subsequent controversy, so long as the agreement is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity". N.J.S.A. 2A:23B-6. Public policy favors arbitration. Coast Auto. Grp., Ltd. v. Withum Smith & Brown, 413 N.J. Super. 363, 369 (App. Div. 2010), citing Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 186 (1981). "Accordingly, arbitration clauses should be construed 'liberally to find arbitrability if reasonably possible.'" Id. (quoting J. Baranello & Sons, Inc. v. Davidson & Howard Plumbing & Heating, Inc., 168 N.J. Super. 502, 507 (App. Div.), *certif. denied*, 81 N.J. 340 (1979); see also Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993); Young v. Prudential Ins. Co. of Am., 297 N.J.Super. 605, 617 (App. Div.), *certif. denied*, 149 N.J. 408 (1997).

A Beit Din's decision is binding so long as both parties consented to having the dispute resolved by the religious court as a form of arbitration. Elmora Hebrew Ctr. v. Fishman, 239 N.J. Super. 229, 234 (App. Div. 1990) aff'd, 125 N.J. 404 (1991). The scope of judicial review of any arbitration award is extremely limited, absent proof of fraud, partiality, or misconduct on the part of the arbitrators. Id. The Courts in New Jersey are deferential to a Beit Din's determination if the parties consented to present their issues to the Beit Din.

[5] *Parens patriae*, literally "parent of the nation", is a term used by the Court wherein the Court steps in to intervene to protect the best interests of the children.

In New Jersey, a Beit Din is empowered to render child custody determinations provided that it demonstrates that it decided the case in accordance with the "best interests of the child" standard. Fawzy v. Fawzy, 199 N.J. 456 (2009), Johnson v. Johnson , 204 N.J. 529 (2010). It is evident that the Courts in New Jersey defer to a Beit Din's determination where the parties agreed to arbitrate and the arbitrator properly applied the law.

While New York has the "*Get Law*", New Jersey does not have an equivalent. In fact, the Courts in New Jersey have declined to compel a husband to give a *Get*. Mayer-Kolker v. Kolker, 359 N.J. Super. 98 (App. Div.), *certif. denied*, 177 N.J. 495 (2003). In Mayer-Kolker, the wife relied on the terms of the Ketubah to demand a *Get*, but the Court found that the terms of the Ketubah were not sufficiently clear to justify that the husband had agreed to give a *Get* at the conclusion of the marriage. 359 N.J. Super. at 103-04. The Court refused to compel the Husband to give a *Get* where the wife failed to establish the effect of a Ketubah or the basis that the husband must provide same. Id., see also Aflalo v. Aflalo, 685 A.2d 523 (Chancery Div. 1996).

In Burns v. Burns, the Court analyzed the terms of the parties' Ketubah, which delineated instances of when a husband is compelled to give a *Get*. 538 A.2d 438 (Chancery Div. 1987). The Court found that the terms of the Ketubah made it appropriate to compel the Husband to submit to the jurisdiction of the Beit Din. Id. While the husband was compelled to submit to the Beit Din's jurisdiction, "[t]he ultimate decision of whether a "get" is to be granted is that of the "Bet Din" and not of this court."

New Jersey Courts have enforced arbitration agreements between the parties, allowing for a Beit Din to make all determinations. A Beit Din appointed to arbitrate a divorce must follow the applicable standards, including best interest of a child for custody determinations. While the Courts in New Jersey offer greater latitude with respect to arbitration, the Courts in New Jersey have no mechanism available to ensure that the *Get* will be issued.

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