Written Materials for

The Role of Secular Law in the Din Torah Process

Rabbi Yona Reiss

Conflicts between Jewish Law and Secular Law
Rabbi Yona (Jonathan) Reiss, Esq.

I. Talmudic and Jewish Law Sources

א. שמות פרק כא פסוק א

וְאֵלֶּה הַמִּשְׁפָּטִים אֲשֶׁר תָּשִׂים לִפְנֵיהֶם:

ב. רש"י שמות פרק כא פסוק א

לפניהם - ולא לפני גוים, ואפילו ידעת בדין אחד שהם דנין אותו כדיני ישראל, אל תביאהו בערכאות שלהם, שהמביא דיני ישראל לפני גוים מחלל את השם ומיקר שם עבודה זרה להחשיבה, שנאמר (דברים לב לא) כי לא כצורנו צורם ואויבינו פלילים, כשאויבינו פלילים זהו עדות לעלוי יראתם:

ג. רמב"ן שמות פרק כא פסוק א

ודרשו לפניהם ולא לפני כנענים (תנחומא א, גיטין פח ב) . . . ודרשו עוד (שם) לפניהם, ולא לפני הדיוטות, . . ואף על פי שהזכירו חכמים שתי הכתות האלה כאחת, יש הפרש ביניהם, שאם רצו שני בעלי הדין לבא לפני ההדיוט שבישראל מותר הוא, ובדקבלום עילויהו דינו דין, אבל לפני הגוים אסורין הם לבא לפניו שידון להם בדיניהם לעולם, ואפילו היו דיניהם כדיננו באותו ענין:

ד. תלמוד בבלי מסכת בבא קמא דף צב עמוד ב

אמר ליה רבא לרבה בר מרי, מנא הא מילתא דאמרי אינשי: קרית חברך ולא ענך, רמי גודא רבה שדי ביה? א"ל: +יחזקאל כ"ד+ יען טהרתיך ולא טהרת מטומאתך לא תטהרי עוד.

ה. רא"ש מסכת בבא קמא פרק ח' סימן יז

מכאן פסק רב פלטאי ז"ל ראובן שיש לו תביעה על שמעון ומסרב לבוא עמו לדין שרשאי להביא לערכאות של נכרים כדי להוציא את שלו מתחת ידו.

ו. <u>דברים פרק טז פסוק יח</u>

שֹׁפְטִים וְשֹׁטְרִים תִּתֶּן לְךָ בְּכָל שְׁעָרֶיךָ אֲשֶׁר יְקֹוָק אֱלֹהֶיךָ נֹתֵן לְךָ לִשְׁבָטֶיךָ וְשָׁפְטוּ אֶת הָעָם מִשְׁפַּט צֶדֶק:

ז. <u>מדרש תנחומא (ורשא) פרשת שופטים סימן ב</u>

(ב) שופטים ושוטרים - . . . רבי אלעזר אומר אם אין שוטר אין שופט כיצד כיון שנתחייב אדם בבית דין לחבירו אם אין שוטר שיוציא ממנו כיון שפורש מן הדיין אין ספיקה ביד הדיין לעשות לו כלום אלא אם כן מוסרו ביד השוטר והשוטר מוציא ממנו

ח. <u>תלמוד בבלי מסכת גיטין דף פח עמוד ב</u>

מתני'. גט מעושה, בישראל - כשר, ובעובדי כוכבים - פסול; ובעובדי כוכבים, חובטין אותו ואומרים לו עשה מה שישראל אומרים לך (וכשר).

גמ'. . .אביי אשכחיה לרב יוסף דיתיב וקא מעשה אגיטי, א"ל: והא אנן הדיוטות אנן, ותניא, היה ר"ט אומר: כל מקום שאתה מוצא אגוריאות של עובדי כוכבים, אע"פ שדיניהם כדיני ישראל, אי אתה רשאי להיזקק להם, שנאמר: +שמות כ"א+ ואלה המשפטים אשר תשים לפניהם, לפניהם ולא לפני עובדי כוכבים, דבר אחר: לפניהם - ולא לפני הדיוטות! א"ל: אנן שליחותייהו קא עבדינן, מידי דהוה אהודאות והלואות. אי הכי, גזילות וחבלות נמי! כי עבדינן שליחותייהו - במילתא דשכיחא, במילתא דלא שכיחא - לא עבדינן שליחותייהו.

ט. <u>חידושי רבי עקיבא איגר, חושן משפט סימן ג</u>

נ"ב בשו"ת מגן גבורים ס' ה בשם הרש"ך ח"ב ס' רכ"ט על מחלוקת בין תובע לנתבע א' אומר שרצונו להתדיין בד"ת וא' אומר שאין לו להתדיין אלא בפני אחרים שכך הוא המנהג במקום שנעשה העסק, הדין עמו. כיון דבמקום שנעשה העסק יש מנהג להתדיין כפי דרך הסוחרים ולא כפי ד"ת מנהג מבטל הלכה, והביא ההיא דאסטימת' עי"ש.

י. <u>חזון איש, חושן משפט סימן טו, אות ד</u>

. . . ואע"ג דליכא ביניהם דיין שידין ע"פ משפטי התורה ומוכרחים להמנות בעל שכל לפי מוסרי האדם, אינם רשאים לקבל עליהם חקי עמים או לחוקק חקים, שהשופט כל דין שלפניו לפי הנראה אליו זהו בכלל פשרה ואין ניכר הדבר שעזבו מקור מים חיים לחצוב בורות נשברים, אבל אם יסכימו על חוקים הרי הם מחללים את התורה ועל זה נאמר אשר תשים לפניהם ולא לפני הדיוטות וכדאיתא בסי' כ"ו.

יא. <u>שו"ת הרשב"א חלק ו סימן רנד</u>

תשובה כל דבר שבממון תנאו קיים . . . ומ"מ לנהוג כן מפני שהוא משפט גויים באמת נ"ל שאסור לפי שהוא מחקה את הגויים וזהו שהזהירה תורה לפניהם ולא לפני גויים ואע"פ ששניהם רוצים בכך והוא דבר שבממון. שלא הניחה תורה את העם שהוא לנחלה לו על רצונם שייקרו את חקות הגויים ודיניהם ולא עוד אלא אפי' לעמוד לפניהם לדין אפי' בדבר שדיניהם כדין ישראל. ע"כ אנו פה תמהים מקום המשפט בעירכם מקום תורה ויתרון דעת איך נתנו יד לכלל דברים אלו שאסרתן תורה שלמה שלנו. . ואם נאמר כן בטלה ירושת בנו הבכור דכל הנחלות ותירש הבת עם הבנים. ובכלל עוקר כל דיני התורה השלמה ומה לנו לספרי הקודש המקודשים שחברו לנו רבי ואחריו רבינא ורב אשי ילמדו את בניהם דיני הגויים ויבנו להם במות טלואות בבית מדרסי הגויים חלילה לא תהיה כזאת בישראל ח"ו שמא תחגור התורה עליה שק.

II. **Excerpt from Rules and Procedures of the Beth Din of America**

1. RULES AND PROCEDURES OF THE BETH DIN OF AMERICA

(a) One of the purposes of the Beth Din of America is to provide a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law (halacha) and with the recognition that many individuals conduct commercial transactions in accordance with the commercial standards of the secular society.
(b) These Rules of Procedure are designed to provide for a process of dispute resolution in a Beth Din which are in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise. This will be done in a manner consistent with the requirements for binding arbitration so that the resolution will be enforceable in the civil courts of the United States of America, and the various states therein.

Section 3 – Choice of Law
(a) In the absence of an agreement by the parties, arbitration by the Beth Din shall take the form of compromise or settlement related to Jewish law (p'shara krova l'din), in each case as determined by a majority of the panel designated by the Beth Din, unless the parties in writing select an alternative Jewish law process of resolution.
(b) The Beth Din will strive to encourage the parties to resolve disputes according to the compromise or settlement related to Jewish law principles (p'shara krova l'din); however, the Beth Din will hear cases either according to Jewish law as it is understood by the arbitrators or compromise (p'shara) alone, if that is the mandate of the parties
(c) The Beth Din of America accepts that Jewish law as understood Beth Din will provide the rules of decision and rules of procedure that govern the functioning of the Beth Din or any of its panels.
(d) In situations where the parties to a dispute explicitly adopt a "choice of law" clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.
(e) In situations where the parties to a dispute explicitly or implicitly accept the common commercial practices of any particular trade, profession, or community -- whether it be by explicit incorporation of such standards into the initial contract or arbitration agreement or through the implicit adoption of such common commercial practices in this transaction -- the Beth Din will accept such common commercial practices as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.
(f) Unless otherwise indicated, all references in these Rules to "arbitration" shall refer to dispute resolution utilizing any of these principles and the Rules set forth herein shall be applicable equally to any of these modes of resolution.

III. **Articles (see enclosures)**

1. *When a Jew Sues*, Rabbi Jonathan Reiss, Wall Street Journal, May 12, 2006.

2. *Jewish Law, Civil Procedure: A Comparative Study*, Rabbi Yona Reiss, The Journal of the Beth Din of America, Volume I, No. I, 18-29 (2012).

IV. **Court Cases (see enclosures)**

A. Schoenfeld v. Ochsenhaut, 452 NYS2d 173 (1982) (intersection between mitzvah and legal action)
B. Avitzur v. Avitzur, 459 NYS2d 572 (Ct. of Appeals, 1983) (arbitration of Jewish law issues)
C. Leibovici v. Rawicki, 290 NYS2d 997 (1968) (intersection between Jewish law and civil law)
D. Aflalo v. Aflalo, 685 A.2d 523 (1996) (limitation of court jurisdiction over Jewish law matters)

When a Jew Sues

Last month's passing of Satmar Grand Rabbi Moshe Teitelbaum has provoked a widely publicized dispute over which of his sons will control the Orthodox Jewish sect he led for 26 years. The Satmars trace their origins back to 18th-century Eastern Europe. Rabbi Joel Teitelbaum (Moshe's uncle) is considered the founder of the movement as it exists today. Saved from a concentration camp in 1944, he came to Brooklyn, where he rebuilt the Satmar community, which had been largely destroyed by the Holocaust. Today there are around 120,000 Satmars concentrated mostly in the Williamsburg neighborhood of Brooklyn, with some in Kiryas Joel, N.Y., Jerusalem and London, and the group allegedly has assets valued in the hundreds of millions.

How do rabbinical courts work?

Beyond the matter of who will control these assets, this dispute (which reportedly began more than seven years ago) raises a number of general questions regarding the appropriate legal system for the resolution of disputes within the Jewish community. For instance: What is the province of a rabbinical court (also known as a beit din)? Are Jewish disputants permitted to settle their differences in a secular court? Which law is applicable—Jewish law or secular law? Who decides?

The presumptive rule is that when members of the Jewish faith have a dispute, they must submit it to a Jewish court to resolve the matter in accordance with Jewish law. Nonetheless, it takes two to tango. Let's take a simple situation of two brothers: Reuben claims that Simon robbed him out of a portion of his inheritance by forging their father's signature on a deed transferring the family summer house to himself. What recourse does Reuben have?

He first needs to summon his brother to ascertain whether he will in fact submit to beit din. If Simon says no, the beit din may issue a contempt order against him, which would typically be accompanied by official permission for Reuben to take the matter to a civil court. A beit din may also authorize Reuben to pursue emergency injunctive relief in civil court. For example, if it were alleged that Simon was about to sell the house and have the proceeds put in a Swiss bank account, the beit din could authorize Reuben to pursue the freezing of Simon's assets until an agreement has been reached by both parties to submit their dispute to the jurisdiction of a beit din.

But which beit din? There is no single institutional rabbinical court that serves the entire Jewish community in America. In New York there are at least a dozen such courts. If Simon and Reuben cannot agree on a beit din, they can request an ad hoc rabbinical court comprised of three rabbis—one selected by each side and a third selected by the first two.

Assuming that Simon and Reuben do agree upon a beit din in which to resolve their dispute, they then enter into a binding arbitration agreement, thus vesting the rabbinical court with the powers of a secular arbitration panel. Its decisions must be enforceable, however, according to Jewish law. Thus a beit din must either comply with the requirements of secular law or arrange for the parties to waive the right to have the dispute enforced by secular law.

If they wanted to, Simon and Reuben could ask the beit din to decide their matter in accordance with local law. So if, for example, the deed was valid but the transfer of property from father to son was not properly recorded in a public registry, as required by secular law, then the beit din might find in favor of Reuben.

Interestingly, the procedures followed are not likely to be all that different for Simon and Reuben whether they go to a secular or a rabbinical court. Just as in secular court, for example, a beit din will accept the testimony of Reuben only in the presence of Simon, and vice versa.

But there are substantive issues on which a beit din may differ with a secular court. While American law is perfectly suited to resolving disputes over, say, summer houses, it does not have much to say about the legality of Jewish marriages or validity of religious conversions. And it has virtually nothing to say about the dynastic inheritance of Grand Rabbis.

Jewish law, on the other hand, has wrestled with succession from the days of the Davidic monarchy in Israel. According to some authorities, rabbinic positions of leadership are inherited by one's sons like kingship, meaning the elder gets the crown; according to others, rabbinic leadership represents the "crown of Torah," which is dependent upon merit alone.

Even according to those who maintain that the rabbinate can be inherited like kingship, some commentators say that this type of inheritance only applies if there is no strife among the sons. Thus, since King Solomon's brother also laid claim to the throne of their father, David, Solomon had to be specifically anointed by a high priest. Other commentators argue that King Solomon's anointment was window dressing meant to quell the disharmony, but that the laws of inheritance were still applicable. And so forth.

The overarching Jewish law principle in all such matters is "gadol hashalom" or, roughly translated, "peace is great." A worthwhile objective, though as the Teitelbaums and many others can attest, it's often a long time in coming.

Rabbi Reiss is the director of the Beth Din of America, one of the rabbinical courts in New York City (www.bethdin.org).

Civil Court, City of New York,
Kings County, Small Claims Part.
Naftula SCHOENFELD, Claimant,
v.
Irving OCHSENHAUT, Defendant.

June 29, 1982.

Volunteers who paid for funeral of deceased neighbor who appeared to have no surviving relatives sued the newly discovered surviving brother of the decedent for reimbursement for decedent's funeral expenses. The Civil Court of the City of New York, County of Kings, Small Claims Part, David B. Saxe, J., held that: (1) the performance of a duty or "mitzvah" under Jewish law, did not require the decedent's brother to pay the costs of the obligation that the volunteers incurred, and (2) any oral contract obligating the brother to pay the funeral expenses would be unenforceable, since contracts to answer for the debts of another must be written.

Judgment for defendant.

West Headnotes

[1] Contracts 95 ⟹329

95 Contracts
95VI Actions for Breach
95k329 k. Time to Sue and Limitations. Most Cited Cases

Where neighbors of decedent entered into contract with funeral home to pay for decedent's burial expenses, they were involved in genuine controversy with funeral home regarding the bill and could sue the decedent's brother, who they alleged subsequently agreed to reimburse them, even though they had not paid all the funeral expenses.

[2] Executors and Administrators 162 ⟹261

162 Executors and Administrators
162VI Claims Against Estate
162VI(E) Priorities and Payment
162k259 Statutory Classification and Order of Payment
162k261 k. Particular Classes of Claims. Most Cited Cases
(Formerly 162k4.26)

Primary liability for funeral expenses lies with decedent's estate.

[3] Dead Bodies 116 ⟹6

116 Dead Bodies
116k2 Burial
116k6 k. Liabilities for Expenses. Most Cited Cases

Performance by strangers of what was alleged to be either duty or "mitzvah" under Jewish law, i.e., arranging for burial of their deceased Jewish neighbor who appeared to have no surviving relatives to perform this function and incurring the obligation for the costs of burial, did not require decedent's newly discovered surviving brother to pay costs of obligation that strangers incurred.

[4] Dead Bodies 116 ⟹6

116 Dead Bodies
116k2 Burial
116k6 k. Liabilities for Expenses. Most Cited Cases

Statute rendering spouses and parents liable for funeral costs was enforceable only by public welfare officials, not by private citizens who sought to shift obligations they had assumed to those more closely related. McKinney's Social Services Law § 141.

[5] Dead Bodies 116 ⟹6

116 Dead Bodies
116k2 Burial
116k6 k. Liabilities for Expenses. Most Cited Cases

In absence of contract, there is no legal duty upon brother to pay funeral expenses of deceased brother.

[6] Contracts 95 ⟹76

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k76 k. Moral Obligation. Most Cited Cases

Moral obligation will not create legal duty where none exists.

[7] Frauds, Statute Of 185 ⟹14

185 Frauds, Statute Of
185III Promises to Answer for Debt, Default or Miscarriage of Another
185k14 k. Nature of Debt, Default, or Miscarriage. Most Cited Cases

Any oral contract on part of decedent's brother to reimburse parties who paid decedent's funeral expenses would be unenforceable, since section of General Obligations Law requires that contracts to answer for debts of another be written. McKinney's General Obligations Law § 5-701.

*585 **173 Naftula Schoenfeld, pro se.

Reich, Rosen, Barrison & Felzen, New York City (Krista Gottlieb, Brooklyn, of counsel), for defendant.

DAVID B. SAXE, Judge.

The principal issue that I must resolve in this novel Small Claims case is the following: Does the performance by a stranger of what is alleged to be either a duty or a "mitzvah" (a good deed) (See Issac Klein, *A Guide to Jewish Religious Practice* (New York Jewish Theological Seminary of America, 1979, p. 229)) under Jewish law—*viz.*, arranging for the burial of their deceased Jewish neighbor who appeared to have no surviving relatives to perform this function and incurring the obligation for the costs of burial—require the decedent's newly discovered surviving brother to pay the costs of the obligation that the volunteer incurred?

**174 The essential facts are as follows: On the Friday evening of March 26, 1982, Naftula Schoenfeld and his wife, Gittel, both Orthodox Jews, were at home at their apartment in Brooklyn, New York. They heard some commotion coming from the floor above and they alighted from their apartment to ascertain the nature of the disturbance. They discovered that the police had broken down the door of a neighbor's apartment—one Alexander Ochsenhaut, who had died. The Schoenfelds did not know the decedent but *586 ascertained that he was Jewish and apparently had no surviving family. They consulted with their rabbi, who told them that according to Judaic law and theology, it was extremely important that deceased Jews receive a proper Jewish burial. They testified that the rabbi informed them that burying a deceased Jew who died without surviving family was either a duty or the highest form of kindness—a "mitzvah".

The Schoenfelds therefore, on their own, contacted an undertaker who arranged the funeral and burial. They agreed to assume these expenses although no written contract was executed. I find that the claimants became bound to the funeral home to perform the terms of the agreement.

Shortly after the funeral was held, the long-lost brother of the decedent appeared: Irving Ochsenhaut, who had not seen his brother for 37 years. The funeral home informed him that the claimants were paying the bill and he called on them to express his gratitude. At this point, the stories diverge. The claimants contend that the defendant promised to pay the costs of his brother's funeral and burial as well as to make a donation to a synagogue in memory of his brother. The defendant testified that his largesse only extended to a contribution to a synagogue.

[1] The defendant first contends that the claimants are not proper plaintiffs because, at the time of trial, they had not paid all of the funeral expenses which are the subject of this law suit. Never-

theless, it is apparent that the claimants obligated themselves to make these payments by entering into a contract with the funeral home. They are indeed involved in a genuine controversy with the funeral home regarding the bill. (Siegel, *New York Practice*, Sec. 136). Therefore, they do not have to wait until they are sued or have completed their payments in order to assert their claim for payment against the defendant. In other words, I hold that they have standing to sue. (*Id.*)

[2][3] The second contention is that the defendant was legally bound according to New York law to pay for the costs incurred by the claimants in their observance of Jewish law or morality. The claimant's position is incorrect. First, *587 the primary liability for funeral expenses lies with the decedent's estate. *Jaudon v. White*, 60 Misc.2d 86, 302 N.Y.S.2d 281 (Civil Court, N.Y.Co., 1969); SCPA, section 1811. Second, it was not adequately proven that Jewish law mandated the actions by the Schoenfelds. But, even if Jewish law or custom required their acts, I am required to apply the law of this State solely *Moloney Funeral Homes, Inc., v. Gurnell*, 45 Misc.2d 678, 257 N.Y.S.2d 355 (Sup.Ct.Suff.Co., 1975) to determine what legal obligations may be imposed upon the defendant. In New York, there is no statute or decisional law that would bind the defendant to the plaintiffs for their costs.

[4] Social Services Law, Section 141 is not applicable. That section applies only to render spouses and parents liable for funeral costs; no similar liability is cast upon brothers. Moreover, that statute is enforceable only by public welfare officials, not by private citizens who seek to shift the obligations they have assumed to those more closely related. See *Moloney Funeral Homes, Inc., v. Gurnell, supra*, **175*Fairchild Sons, Inc., v. Diskin*, 196 Misc. 495, 94 N.Y.S.2d 175 (AT2 1949) *leave to app. den.*, 276 A.D. 847, 93 N.Y.S.2d 800 (2nd Dep't 1949).

[5][6] Therefore, the general rule is *this*: in the absence of contract, there is no legal duty, of the type urged by the claimants, upon a brother to pay the funeral expenses of a deceased brother. *Moloney Funeral Home, Inc. v. Gurnell, supra; Fairchild Sons, Inc. v. Diskin, supra; Rutecki v. Lukaszewski*, 273 App.Div. 638, 79 N.Y.S.2d 341 (4th Dept. 1948). Nor will a moral obligation create a legal duty where none exists. See Lon L. Fuller, *The Morality of Law*, Rev.Ed. (Yale University Press, New Haven, Connecticut, 1969) pp. 9, 10.

[7] The final issue for resolution is whether the defendant contracted to pay for these expenses. I find, based upon the testimony at trial, that the defendant did not expressly promise to pay the claimants the costs they incurred for the funeral and burial. Even if I found that the defendant had made an oral promise, as the claimants contend, this promise would be unenforceable since it was not supported by a writing as required by the Statute of Frauds. See General Obligations Law section 5-701. G.O.L. section 5-701 requires contracts to answer for the debts of another to be written. The defendant's alleged promise to assume the claimant's financial obligation relating to funeral and burial expenses, would have had to be contained in writing to be enforceable. It was not. Therefore,*588 I find that there was no enforceable contract between the claimants and the defendant.

Therefore, I hold that although the claimants performed a "mitzvah", they are not entitled to recover damages. Judgment for defendant. No costs.

N.Y.City Civ.Ct.,1982.
Schoenfeld v. Ochsenhaut
114 Misc.2d 585, 452 N.Y.S.2d 173

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2. Constitutional Law ⇐84.1

Not only does free exercise clause bar state's legislature from making law which prohibits free exercise of religion, but it likewise inhibits state's judiciary. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84.1

Free exercise clause prohibits governmental regulation of religious beliefs but does not absolutely prohibit religious conduct. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐84.1

To pass constitutional muster under free exercise clause, law must have both secular purpose and secular effect; law must not have sectarian purpose, must not be based upon disagreement with religious tenet or practice, and must not be aimed at impeding religion. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐84.1

Only when state action claimed to violate free exercise clause passes threshold tests of having both secular purpose and secular effect is there need to balance competing state and religious interests; court is to engage in such balancing when conduct or action sought to be regulated has invariably posed some substantial threat to public safety, peace or order. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇐84.5(1)

Divorce ⇐154

Wife seeking dissolution of marriage was not entitled to order compelling husband to grant wife Jewish bill of divorce known as "get," as such order would violate husband's right to free exercise of religion. U.S.C.A. Const.Amend. 1.

7. Religious Societies ⇐14

Civil courts may not override decision of religious tribunal or interpret religious law or canons; while religious parties and organizations are entitled to adjudication in civil courts of secular legal questions, civil court cannot decide any disputed questions of religious doctrine. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐84.5(1)

Divorce ⇐154

Superior Court would not attempt to compel particular course of conduct before religious tribunal by wife seeking civil dissolution of marriage and religious divorce and husband who wished to pursue reconciliation with wife before religious tribunal, as such action would violate parties' rights to free exercise of religion. U.S.C.A. Const.Amend. 1.

Chen Kornreich, Freehold, for plaintiff (Kornreich & Harkov, attorneys).

Neil M. Pomper, for defendant.

FISHER, J.S.C.

I

INTRODUCTION

This case requires the court to visit an issue that has previously troubled our courts in matrimonial actions involving Orthodox Jews—a husband's refusal to provide a "get".[1]

Here, the parties were married on October 13, 1968 in Ramle, Israel, and have one child, Samantha. Plaintiff Sondra Faye Aflalo ("Sondra") has filed a complaint seeking a dissolution of the marriage. Defendant Henry Arik Aflalo ("Henry") has answered the complaint. The matter is on the court's active trial list and should be reached for trial in the very near future. Henry does not want a divorce and has taken action with The Union of Orthodox Rabbis of the United States and Canada in New York City (the "Beth Din"[2]) to have a hearing on his attempts at reconciliation.

The issues at hand came to critical mass when the parties engaged in a settlement

1. A "get" is a bill of divorce which the husband gives to his wife to free her to marry again. The word "get" apparently signifies the number 12, the "get" being a twelve-lined instrument. The word is a combination of "gimel" (which has a value of three) together with "tet" (which has a value of nine). *See Rubin v. Rubin*, 75 *Misc.*2d 776, 348 *N.Y.S.*2d 61, 65 n. 2 (Fam.Ct.1973).

2. The "Beth Din" is a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law.

tained "no clearcut promise by the tenant or landlord with respect to the repair of the defect here involved." *Id.* at 238, 140 *A.*2d 199. Thus, a jury question arose. *Ibid.* However, the Court clearly stated that lacking ambiguity construction of the lease was a matter of law to be decided by the court. *Id.* at 237, 140 *A.*2d 199.

The contractual arrangement between defendant Port Authority of New York and New Jersey and the injured plaintiff's employer, Hudson Refrigerating Company, set forth above, contains no ambiguity with regard to responsibility for maintenance and repairs with regard to the loading dock which was the site of the accident. Section 7 places the onus on the lessee. And although Section 13 reserves a right in the landlord to perform repairs if the tenant fails to meet its contractual obligations, it contains no covenant by the landlord to do so. Furthermore, unlike the lease considered in *Michaels*, in Section 13(d) the following unambiguous clause appears:

> (d) Nothing in this Section shall or shall be construed to impose upon the Port Authority any obligations so to construct or maintain or to make repairs, replacements, alterations or additions, or shall create any liability for any failure so to do. The Lessee is and shall be in exclusive control and possession of the premises and the Port Authority shall not in any event be liable for any injury or damage to any property or to any person happening on or about the premises nor for any injury or damage to the premises nor to any property of the Lessee or of any other person located in or thereon (other than those occasioned by the acts of the Port Authority).

Defendant moved for a directed verdict on this point at the end of the plaintiffs' case and again at the end of the entire case. *R.* 4:37-2(b). The trial court erred in denying the motions. Defendant was entitled to judgment for the reasons stated above.

In light of our disposition of this issue, we need not address the other issues raised by defendant.

Reversed and remanded for entry of judgment in favor of defendant.

295 N.J.Super. 527

Sondra Faye AFLALO, Plaintiff,

v.

Henry Arik AFLALO, Defendant.

Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County.

Decided Feb. 29, 1996.

Wife sought dissolution of marriage. On wife's motion seeking to compel husband to give wife Jewish divorce, known as "get," and on motion of husband's attorney to be relieved as counsel, the Superior Court, Chancery Division, Family Part, Monmouth County, Fisher, J.S.C., held that: (1) attorney's alleged religious problem with husband's position did not warrant withdrawal as counsel; (2) order compelling husband to grant "get" would violate husband's right to free exercise of religion; and (3) court would not compel any action before religious tribunal.

Ordered accordingly.

1. Attorney and Client ⇐76(.5)

Counsel for husband in action for dissolution of marriage would not be relieved as counsel, despite counsel's claim that representation would create religious problem for counsel because husband refused to give wife Jewish bill of divorce known as "get"; husband agreed he would give wife "get" if so ordered by Jewish tribunal, apparent misunderstanding regarding counsel's retainer did not warrant withdrawal, and trial of dissolution action was imminent. R. 1:11-2.

religion and the raising of taxes for the support of certain religions. Punishments were prescribed for the failure to attend religious services and for entertaining heretical opinions. *See Reynolds v. United States*, 98 *U.S.* 145, 162-163, 25 *L.Ed.* 244 (1878). In 1784 the Virginia legislature attempted to enact a bill "establishing provision for teachers of the Christian religion." This brought to bear the determined and eloquent opposition of Thomas Jefferson and James Madison. Madison responded in his "Memorial and Remonstrance" that "religion, or the duty we owe the Creator" was not within the cognizance of civil authority. The next session of the Virginia legislature led to the defeat of the aforementioned bill and the passage of a bill drafted by Jefferson which established "religious freedom" and declared that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty."

Not long after the adoption of the Constitution and the Bill of Rights, Jefferson made clear the meaning and intent of the First Amendment in his famous "reply" to the Danbury Baptist Association:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the Nation in behalf of the rights of conscience, I shall see, with sincere satisfaction, the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Since then the dimensions of this "wall of separation between Church and State" have been robustly debated and described frequently by our Nation's highest court.

[2] The "Free Exercise Clause" of the First Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *Cantwell v. Connecticut*, 310 *U.S.* 296, 60 *S.Ct.* 900, 84 *L.Ed.* 1213 (1940). Not only does it bar a state's legislature from making a law which prohibits the free exercise of religion but it likewise inhibits a state's judiciary. *In re Adoption of E.*, 59 *N.J.* 36, 51, 279 *A.2d* 785 (1971).

[3, 4] In the first instance, the Free Exercise Clause prohibits governmental regulation of religious beliefs but does not absolutely prohibit religious conduct. *Braunfeld v. Brown*, 366 *U.S.* 599, 603, 81 *S.Ct.* 1144, 1145, 6 *L.Ed.2d* 563 (1961); *Cantwell, supra*, 310 *U.S.* at 303-304, 60 *S.Ct.* at 903-904. Second, to pass constitutional muster, a law must have both a secular purpose and a secular effect. That is, a law must not have a sectarian purpose; it must not be based upon a disagreement with a religious tenet or practice and must not be aimed at impeding religion. *Braunfeld, supra*, 366 *U.S.* at 607, 81 *S.Ct.* at 1148; *Sherbert v. Verner*, 374 *U.S.* 398, 402-403, 83 *S.Ct.* 1790, 1793-1794, 10 *L.Ed.2d* 965 (1963).

[5] Only when state action passes these threshold tests is there a need to balance the competing state and religious interests. The court is to engage in such balancing when the conduct or action sought to be regulated has "invariably posed some substantial threat to public safety, peace or order." *Sherbert, supra*, 374 *U.S.* at 403, 83 *S.Ct.* at 1793. Here, the relief Sondra seeks from this court so obviously runs afoul of the threshold tests of the Free Exercise Clause that the court need never reach the delicate balancing normally required in such cases.

The court will first endeavor to describe precisely what it is that Sondra seeks. And, while it seems beyond doubt, the court will then indicate why it cannot and certainly will not provide that relief.

B. *The Jewish Divorce*

"When a man takes a wife and possesses her, if she fails to please him because he

conference on February 14, 1996, while awaiting trial in this court. At that time the court was advised by counsel that the matter was "95% settled" but that Henry had placed what Sondra viewed as an insurmountable obstacle to a complete resolution: he refused to provide a "get." Unlike what the court faced in *Segal v. Segal*, 278 *N.J.Super.* 218, 650 *A.2d* 996 (App.Div.1994) and *Burns v. Burns*, 223 *N.J.Super.* 219, 538 *A.2d* 438 (Ch.Div.1987), Henry was not using his refusal to consent to the "get" as a means of securing a more favorable resolution of the issues before this court. That type of conduct the *Burns* court rightfully labelled "extortion". 223 *N.J.Super.* at 224, 538 *A.2d* 438. On the contrary, Henry's position (as conveyed during the settlement conference) was that regardless of what occurs in this court he will not consent to a Jewish divorce.

II

COUNSEL'S MOTION TO BE RELIEVED

[1] Henry's position spun off an unexpected problem; it caused his attorney to move to be relieved as counsel. Arguing that since he, too, is a practicing Orthodox Jew, *Pomper Certification* (February 19, 1996), ¶ 4, Henry's counsel claims that he would "definitely have a religious problem representing a man who at the conclusion of a divorce proceeding refused, without reason, to give his wife a Get." *Id.*, ¶ 7.

This motion was heard on an expedited basis. At oral argument on February 20, 1996, Henry's counsel expanded on his position and indicated, upon questioning from the court, that *his* religious quandary comes not from Henry's use of his consent to a Jewish divorce as leverage in negotiations (which was not occurring), but in the blanket refusal of his client to give a "get" without reason.

Henry opposed his attorney's motion. He stated under oath that he seeks a reconciliation and that Sondra had been summoned to appear before the Beth Din for this purpose. The court was also advised during oral argument that should reconciliation fail the Beth Din could recommend that Henry give Sondra a "get"; Henry stated under oath that while he desires a reconciliation he would follow the recommendations of the Beth Din and give the "get" if that was the end result of those proceedings. The court finds Henry both credible and sincere in this regard; his position clearly eliminates his counsel's stated concerns[3].

III

PLAINTIFF'S ATTEMPTS IN THIS COURT TO OBTAIN A "GET"

The problem, however, festers since Sondra appears unwilling to settle this case without a "get". Accordingly, this court must now try to rest whether any order may be entered which would impact on Sondra's securing of a Jewish divorce.

Sondra claims that this court, as part of the judgment of divorce which may eventually be entered in this matter, may and should order Henry to cooperate with the obtaining of a Jewish divorce upon pain of Henry having limited or supervised visitation of Samantha or by any other coercive means. She claims that *Minkin v. Minkin*, 180 *N.J.Super.* 260, 434 *A.2d* 665 (Ch.Div.1981) authorizes this court to order Henry to consent to the Jewish divorce. That trial court decision certainly supports her view. This court, however, believes that to enter such an order violates Henry's First Amendment rights and refuses to follow the course outlined in *Minkin*.

A. *An Overview Of First Amendment Jurisprudence*

Prior to the adoption of our Nation's constitution, attempts were made in some colonies to legislate on matters of religion, including the governmental establishment of

3. Contentions were also made by Henry regarding his counsel's use of a retainer. Counsel argues that the attorney/client relationship is now clouded by the discord created by these contentions. The court, however, senses that the dispute may be one which is based on a lack of communication and nothing more. In light of the fact that trial in this matter is imminent, this and the other reasons relied upon by counsel in support of his motion to be relieved are rejected and the motion denied. *R.* 1:11-2.

413 *U.S.* 756, 772-773, 93 *S.Ct.* 2955, 2965-2966, 37 *L.Ed.2d* 948 (1973), the *Minkin* court said:

> Relying upon credible expert testimony that the acquisition of a *get* is not a religious act, the court finds that the entry of an order compelling defendant to secure a *get* would have the clear secular purpose of completing a dissolution of the marriage. Its primary effect neither advances nor inhibits religion since it does not require the husband to participate in a religious ceremony or to do acts contrary to his religious beliefs. Nor would the order be an excessive entanglement with religion. [180 *N.J.Super.* at 266, 434 *A.2d* 665.]

Also, in reliance upon the expert testimony found credible, the *Minkin* court concluded that an order compelling a husband to acquire a "get" is "not a religious act." *Id.* The court apparently relied on one of the rabbis who testified "that Jewish law cannot be equated with religious law, but instead is comprised of two components—one regulating a man's relationship with God and the other regulating the relationship between man and man. The *get*, which has no reference to God but which does affect the relationship between two parties, falls into the latter category and is, therefore, civil and not religious in nature." 180 *N.J.Super.* at 265-266, 434 *A.2d* 665.

Minkin's approach that the "ketubah" may be specifically enforced without violating the First Amendment is in accord with the decisional law of New York, *Avitzur, supra*, Illinois, *In re Marriage of Goldman*, 195 *Ill.App.3d* 785, 143 *Ill.Dec.* 944, 554 *N.E.2d* 1016 (1990) and Delaware, *Scholl v. Scholl*, 621 *A.2d* 808, 810-812 (Del.Fam.Ct.1992), and at odds with Arizona, *Victor v. Victor*, 177 *Ariz.* 231, 866 *P.2d* 899, 901-902 (App.1993) and, now, this court. *Minkin* and its followers (including the New Jersey trial court in *Burns*)[4] are not persuasive for a number of reasons.

First, it examined the problem against the backdrop of the Establishment Clause and not the Free Exercise Clause. The Establishment Clause[5] prohibits government from placing its support behind a particular religious belief. The Free Exercise Clause[6], obviously implicated here, prohibits government from interfering or becoming entangled in the practice of religion by its citizens.

[7] Second, the conclusion that an order requiring the husband to provide a "get" is not a religious act nor involves the court in the religious beliefs or practices of the parties is not at all convincing. It is interesting that the court was required to choose between the conflicting testimony of the various rabbis[7] to reach this conclusion. The one way in which a court may become entangled in religious affairs, which the court in *Minkin* did not recognize, was in becoming an arbiter of what is "religious". As Justice Brennan observed in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 *U.S.* 696, 709, 96 *S.Ct.* 2372, 2380, 49 *L.Ed.2d* 151 (1976):

> [W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the rel-

> the defendant by an agent on his behalf and forego the actual appearance before the 'Bet Din'." *Id.*

5. "Congress shall make no law respecting an establishment of religion...."

6. "Congress shall make no law ... prohibiting the free exercise thereof."

7. One rabbi testified that the acquisition of a "get" was a religious act. 180 *N.J.Super.* at 266, 434 *A.2d* 665.

finds something obnoxious about her, then he writes her a bill of divorcement, hands it to her, and sends her away from his house." *Deuteronomy* 24:1-4. From this biblical verse, the Jewish law and tradition that the "power of divorce rests exclusively with the husband" has its genesis. Wigoder, *The Encyclopedia of Judaism* (1989) 210.

The "get" is written almost entirely in Aramaic on parchment, *id.* at 211, and is drawn up by a "sofer" (a scribe), upon the husband's instruction to write "for him, for her, and for the purpose of a divorce," 6 *The Encyclopedia Judaica* (1971) 131. The materials used in the creation of the "get" must belong to the husband; the "sofer" presents them as a gift to the husband before the "get" is written. *Id.* The spelling and the form of the document "are enumerated in minute detail in halakhic literature" and acknowledged by two witnesses. Wigoder, *supra* at 211. The rabbi who presides retains the "get": he cuts it "in criss-cross fashion so that it cannot be used again," *id.*, and to "avoid any later suspicion that it was not absolutely legal", *Encyclopedia Judaica*, *supra* at 132. The wife is given another document ("petur") which proves that she has been divorced and the "get" is filed away in its torn state. Wigoder, *supra* at 211.

Without such a divorce, the wife remains an "agunah" (a "tied" woman) and may not remarry in the eyes of Jewish law. Wigoder, *supra* at 211. If she remarries without a "get" she is considered to be an adulteress because she is still halakhically married to her first husband; any subsequent children are considered to be "mamzerim" (illegitimate) and may not marry other Jews. Himelstein, *The Jewish Primer* (1990) 161.

C. *The Clash Of The First Amendment And Plaintiff's Desire For A Jewish Divorce*

[8] The court is not unsympathetic to Sondra's desire to have Henry's cooperation in the obtaining of a "get". She, too, is sincere in her religious beliefs. Her religion, at least in terms of divorce, does not profess gender equality. But does that mean that she can obtain the aid of this court of equity to alter this doctrine of her faith? That the question must be answered negatively seems so patently clear that the only surprising aspect of Sondra's argument is that it finds some support in the *few* cases on the subject.

In *Minkin*, the trial court requested the testimony of several distinguished rabbis. The court viewed the issue as whether a state court could order specific performance of the "ketubah". The "ketubah" is the marriage contract in which the couple is obligated to comply with the laws of Moses and Israel. *Minkin*, *supra*, 180 *N.J.Super.* at 262 n. 2, 434 *A.2d* 665. It contains the promise of the husband "to honor and support thee and provide for thy needs, even as Jewish husbands are required to do *by our religious law* and tradition." *See, e.g., Avitzur v. Avitzur*, 58 *N.Y.2d* 108, 459 *N.Y.S.2d* 572, 576, 446 *N.E.2d* 136 (1983) (emphasis added), cert. denied 464 *U.S.* 817, 104 *S.Ct.* 78, 78 *L.Ed.2d* 88 (1983). The "ketubah" also contains the parties' agreement "to recognize the Beth Din ... as having authority to counsel us in the light of Jewish tradition ... and to summon either party at the request of the other...." 459 *N.Y.S.2d* at 576, 446 *N.E.2d* at 140.

In determining that it could specifically enforce the "ketubah", *Minkin* relied on a New York decision which stated:

> Defendant has also contended that a decree of specific performance would interfere with his freedom of religion under the Constitution. Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence (paragraph Second of the complaint not denied in the answer). His appearance before the Rabbinate to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.

[*Koeppel v. Koeppel*, 133 *N.Y.S.2d* 366, 372 (Sup.Ct.1954).] Analyzing the case against the test used to determine whether state action violates the Establishment Clause which is set forth in *Committee for Public Education and Religious Liberty v. Nyquist*,

wife a "get" a husband must "act without constraint." Wigoder, *supra* at 210. Indeed, during the proceeding the husband is asked "whether he ordered [the "get"] of his own free will." Singer, *The Jewish Encyclopedia* at 647. What value then is a "get" when it is ordered by a civil court and when it places the husband at risk of being held in contempt should he follow his conscience and refuse to comply? Moreover, why should this court order such relief when that is something which the Beth Din will not do? If a "get" is something which can be coerced then it should be the Beth Din which does the coercing. In coercing the husband, the civil court is, in essence, overruling or superseding any judgment which the Beth Din can or will enter, contrary to accepted First Amendment principles. *See Serbian Eastern, supra*, 426 *U.S.* at 709, 96 *S.Ct.* at 2380.

Avitzur suggests a more indirect way of providing relief to the wife. A majority of the New York Court of Appeals found that the wording of the "ketubah" suggested an agreement of the marital partners to appear before the Beth Din and held that such an agreement could be enforced by the civil court without running afoul of First Amendment law. The majority was careful in recognizing that it was not called upon to order the husband to provide a "get", noting that "plaintiff is not attempting to compel defendant to obtain a Get or to enforce a religious practice arising solely out of principles of religious law." 459 *N.Y.S.2d* at 574, 446 *N.E.2d* at 133. An order requiring defendant to appear before the Beth Din was found to be available because the majority viewed the role of the civil court as enforcing "nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum." *Id.* The three members of the court which dissented, however, in this court's view correctly ascertained that even the limited relief which the majority of four approved required "inquiry into and resolution of questions of Jewish religious law and tradition" and thus inappropriately entangled the civil court in the wife's attempts to obtain a religious divorce. *Id.* at 577-578, 446 *N.E.2d* at 141-142.

[6] Even if the majority opinion in *Avitzur* were followed by this court, the circumstances of this case do not support the relief endorsed in *Avitzur*. The "ketubah" only states the parties' recognition of the Beth Din as "having authority to counsel" them and "to summon either party at the request of the other...." Here, Sondra has never sought relief in the Beth Din and in fact has not appeared in response to the summons forwarded to her by the Beth Din regarding Henry's pursuit of reconciliation. Even *Avitzur*, it is suspected, would not enforce any attempt by Sondra to compel Henry to appear before the Beth Din when she has not honored a similar request.[11]

Minkin ultimately conjures the unsettling vision of future enforcement proceedings. Should a civil court fine a husband for every day he does not comply or imprison him for contempt for following his conscience? Apparently so, according to New York law. *See, e.g., Megibow v. Megibow*, 161 *Misc.2d* 69, 612 *N.Y.S.2d* 758, 760 (Sup.Ct.1994); *Kaplinsky v. Kaplinsky*, 193 *A.D.2d* 212, 603 *N.Y.S.2d* 574, 575 (1993). Or, as suggested by Sondra, should visitation of Samantha be limited pending Henry's cooperation? That argument finds no support anywhere. Unlike *Minkin* (where a judgment of divorce had already been entered), Henry seeks the intervention of the Beth Din in order to effect a reconciliation with his wife.[12] Should this court enjoin Henry—no matter how imperfect he may be pursuing it—from moving for reconciliation in that forum and order other relief which the Beth Din apparently cannot give? This court should not, and will not, compel a course of conduct in the Beth Din no matter how unfair the consequences. The spectre of Henry being imprisoned or surrendering his religious freedoms because of action by a civil court is the very image which gave rise to the First Amendment.

11. During a brief hearing via telephone on February 22, 1996, Sondra's counsel indicated that Sondra had responded in writing to the summons from the Beth Din but has never provided a copy of that response to this court.

12. Apparently, however, Henry has not paid the necessary fee and the matter now sits moribund at the Beth Din level.

gious issues of doctrine or polity before them.

Accordingly, civil courts may not override a decision of a religious tribunal or interpret religious law or canons. *See also, Watson v. Jones*, 80 *U.S.* (13 *Wall.*) 679, 722-730, 20 *L.Ed.* 666 (1871); *Presbyterian Church v. Hull Church*, 393 *U.S.* 440, 445, 89 *S.Ct.* 601, 604, 21 *L.Ed.2d* 658 (1969); *Elmora Hebrew Center, Inc. v. Fishman*, 125 *N.J.* 404, 418-414, 593 *A.2d* 725 (1991). Of course, religious parties and organizations are entitled to the adjudication in our civil courts of "secular legal questions." *Elmora, supra*, 125 *N.J.* at 413, 593 *A.2d* 725. But in doing so the civil court cannot decide any disputed questions of religious doctrine. That is exactly what the *Minkin* court did when it sifted among the rabbinical testimony to find the most credible version.

Third, the conclusion that its order concerned purely civil issues is equally unconvincing. In determining to specifically enforce the "ketubah", the court recognized that "w]ithout compliance [the wife] cannot marry in accordance with her religious beliefs." 130 *N.J.Super.* at 263, 434 *A.2d* 655. As noted earlier the later children of a wife who remarries without a "get" are prohibited from marrying other Jews. No matter how one semantically phrases what was done in *Minkin*, the order directly affected the religious beliefs of the parties. By entering the order, the court empowered the wife to remarry in accordance with her religious beliefs and also similarly empowered any children later born to her. The mere fact that the "get" does not contain the word "God", which the *Minkin* court found significant, is hardly reason to conclude otherwise. Nor is it sound to argue that religion involves only one's relation to the creator and not one's relation to other persons, as may be obligated by religious traditions or teachings. *Minkin* might as well have said that a civil court may order a Christian to comply with the Second Great Commandment[8] but not the First[9]. The concept of "religion" certainly does have reference to one's relation to the creator but it also has relation to one's obedience to the will of the creator. In one's pursuit to comply with the creator's will one is certainly engaged in religious activity. While engaging in such conduct, one may also be subjected to civil authority but that does not remove that conduct from the scope of religious activity. *Minkin* draws too fine a line in its rejection of the latter as an area constituting "religion" to command this court's assent to its holding.

Fourth, *Minkin* fails to recognize that coercing the husband to provide the "get" would not have the effect sought. The "get" must be phrased and formulated in strict compliance with tradition, according to the wording given in the Talmud. 6 *Encyclopedia Judaica* (1971) 181.[10] The precisely worded "get" states that the husband does "willingly consent, being under no restraint, to release, to set free, and put aside thee, my wife...." *Id.* Accordingly, in giving his

8. "Thou shalt love thy neighbor as thyself."

9. "Thou shalt love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole mind, and with thy whole strength."

10. According to the *Encyclopedia Judaica*, the following is a translation of an Ashkenazi "get":

> On the ... day of the week, the ... day of the month of ..., in the year ... from the creation of the world according to the calendar reckoning we are accustomed to count here, in the city ... (which is also known as ...), which is located on the river ... (and on the river ...), and situated near wells of water, I, ... (also known as ...), the son of ... (also known as ...), who today am present in the city ... (which is also known as ...), which is located on the river ... (and on the river ...), and situated near wells of water, do willingly consent, being under no restraint, to release, to set free, and put aside thee, my wife, ... (also known as ...), daughter of ... (also known as ...), who art today in the city of ... (which is also known as ...), which is located on the river ... (and on the river ...), and situated near wells of water, who has been my wife from before. Thus do I set free, release thee, and put thee aside, in order that thou may have permission and the authority over thyself to go and marry any man thou may desire. No person may hinder thee from this day onward, and thou art permitted to every man. This shall be for thee from me a bill of dismissal, a letter of release, and a document of freedom, in accordance with the laws of Moses and Israel.
>
> ... the son of ..., witness.
>
> ... the son of ..., witness.
>
> [*Id.* at 131.]

their own sake and, most importantly, for Samantha's sake.[13]

295 N.J.Super. 544

HOUSING AUTHORITY OF JERSEY CITY, Plaintiff,

v.

Walter MYERS, Defendant.

Superior Court of New Jersey, Law Division, Special Civil Part, Hudson County.

Decided Aug. 23, 1996.

Public housing authority brought summary dispossession action to terminate tenancy due to alleged drug activity on leased premises. On tenant's motion to dismiss, the Superior Court, Special Civil Part, Hudson County, Cavanaugh, J.S.C. held that defendant was entitled to 30 days notice of termination, absent showing that his conduct threatened health or safety of other tenants or authority's employees.

Dismissed.

1. Landlord and Tenant ⇐220

Special Civil Part of Superior Court does not have jurisdiction to enter judgment of possession in landlord-tenant dispute unless notices served comply with all statutory dictates; proper notice must also comply with provisions of lease between parties. N.J.S.A. 2A:18-61.2.

2. United States ⇐82(2.5)

Federal regulations controlling Department of Housing and Urban Development (HUD) leases must be complied with fully for trial court to have jurisdiction to enter judgment of possession against tenant who is party to such lease.

3. United States ⇐82(2.5)

Public housing authority which sought to terminate tenancy due to tenant's alleged involvement in drug activity was required to give tenant 30 days notice, absent showing that tenant's drug activity threatened health or safety of other tenants or authority's employees, such that tenant would be entitled only to "reasonable" notice. United States Housing Act of 1937, § 6(l)(2), as amended, 42 U.S.C.A. § 1437d(l)(2); N.J.S.A. 2A:18-61.1(p).

4. United States ⇐82(2.5)

Whether public housing tenant's drug activity threatens health or safety of other tenants or of public housing authority's employees, so as to justify only "reasonable" notice rather than 30-day notice for termination of tenancy, is dependent on facts of case. United States Housing Act of 1937, § 6(l)(2), as amended, 42 U.S.C.A. § 1437d(l)(2); N.J.S.A. 2A:18-61.1(p).

Ignacio Perez, Jersey City, for plaintiff.

John Ukegbu, Jersey City, for defendant (Hudson County Legal Services, attorneys).

CAVANAUGH, J.S.C.

This case is a summary dispossess action to terminate defendant's, Walter Myers, tenancy because of alleged drug activity on the leased premises. *See N.J.S.A.* 2A:18-61.1(p). Myers resides at 569 Montgomery Street, Apartment # 2R-5, Jersey City. Plaintiff, Housing Authority of Jersey City is a public housing agency subject to the United States Housing Act of 1937, and the regulations pursuant thereto.

On April 7, 1995, Myers was arrested for possession of CDS paraphernalia—three empty glassine bags bearing logos by which CDS is commonly distributed. Myers was charged with a violation of *N.J.S.A.* 2C:36-2.

Plaintiff mailed a notice terminating Myers' tenancy by regular mail and certified mail on October 23, 1995. The notice stated

13. Sondra's request for the issuance of a bench warrant due to Henry's alleged failure to timely make support payments shall be held in abeyance pending the four-way conference.

It may seem "unfair" that Henry may ultimately refuse to provide a "get".[13] But the unfairness comes from Sondra's own sincerely-held religious beliefs. When she entered into the "ketubah" she agreed to be obligated to the laws of Moses and Israel. Those laws apparently include the tenet that if Henry does not provide her with a "get" she must remain an "agunah". That was Sondra's choice and one which can hardly be remedied by this court. This court has no authority—were it willing—to choose for these parties which aspects of their religion may be embraced and which must be rejected. Those who founded this Nation knew too well the tyranny of religious persecution and the need for religious freedom. To engage even in a "well-intentioned" resolution of a religious dispute requires the making of a choice which accommodates one view and suppresses another. If that is permitted, it readily follows that less "well-intentioned" choices may be made in the future by those who, as Justice Jackson once observed, believe "that all thought is divinely classified into two kinds—that which is their own and that which is false and dangerous." *American Communications Ass'n v. Douds,* 339 *U.S.* 382, 422, 70 *S.Ct.* 674, 704, 94 *L.Ed.* 925 (1950) (dissenting opinion).

The tenets of Sondra's religion would be debased by this court's crafting of a short-cut or loophole through the religious doctrines she adheres to;[14] and the dignity and integrity of the court and its processes would be irreparably injured by such misuse. The First Amendment was designed to protect both institutions against such unwarranted, unwanted and unlawful steps over the "wall of separation between Church and State." This court will not assist Sondra in her attempts to lower that wall. As Justice Frankfurter said, "[I]f nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" *McCollum v. Board of Education,* 333 *U.S.* 203, 232, 68 *S.Ct.* 461, 475, 92 *L.Ed.* 649 (1948) (dissenting opinion).

IV

CONCLUSION

For these reasons, the court has denied the motion to be relieved as counsel. Further, any relief sought by either party with respect to any proceedings either currently being maintained or contemplated in the Beth Din is denied. The parties are directed to engage in a four-way conference within seven (7) days of this date and attempt to amicably resolve the issues that are actually before this court. Thereafter, they will forthwith report any results back to the court.

Henry's consent, or refusal to consent, to the providing of a "get", and Sondra's consent, or refusal to consent, to appear before the Beth Din for proceedings relating to Henry's attempts at reconciliation, are matters which are not to be bargained for or against. *Accord, Segal, supra.* The parties are urged, having previously resolved "98%" of the case, to resolve the remaining 2% for

13. That Sondra has not cooperated with the summons of the Beth Din regarding Henry's attempts at reconciliation could also be viewed as "unfair".

14. New York's legislature has provided such a short-cut. New York Domestic Relations Law § 253 requires that where a marriage has been solemnized by a clergyman, a party who commences a matrimonial action must verify that he or she has acted to remove all "barriers to remarriage." It has been held that this requirement places an obligation on a husband of the Jewish faith to provide his wife with a "get". *Mayflower v. Mayflower,* 161 *Misc.2d* 69, 612 *N.Y.S.2d* 758, 760 (Sup.Ct.1994). In fact, that seems to have been the precise purpose of that statute. The then Governor of New York made the following statement upon passage of the statute:

> This bill was overwhelmingly adopted by the State Legislature because it deals with a tragically unfair condition that is almost universally acknowledged.
>
> The requirement of a get is used by unscrupulous spouses who avail themselves of our civil courts and simultaneously use their denial of a get vindictively or as a form of economic coercion.
>
> Concededly this use of our civil courts unfairly imposes upon one spouse, usually the wife, enormous anguish.

[*Perl v. Perl,* 126 *A.D.2d* 91, 94-95, 512 *N.Y.S.2d* 372, 373 (1987).] This statute does not appear to have yet been challenged on First Amendment grounds.

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(Cite as: 58 N.Y.2d 108, 446 N.E.2d 136)

Avitzur v Avitzur
58 N.Y.2d 108, 459 N.Y.S.2d 572
N.Y. 1983.

58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, 29 A.L.R.4th 736

Susan R. Avitzur, Appellant,
v.
Bosz Avitzur, Respondent.
Court of Appeals of New York

Argued January 3, 1983;
decided February 15, 1983

CITE TITLE AS: Avitzur v Avitzur

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 21, 1982, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (Aaron E. Klein, J.), entered in Albany County, denying defendant's motion to dismiss the complaint and plaintiff's cross motion for summary judgment. The modification consisted of reversing so much of the order as denied defendant's motion to dismiss the complaint and granting the motion.

Plaintiff and defendant were married in 1966 in a ceremony conducted in accordance with Jewish tradition. Prior to the marriage ceremony, the parties signed a document known as a "Ketubah", in which they both agreed to recognize the "Beth Din", a rabbinical tribunal, as having authority to counsel the couple in matters concerning their marriage. In 1978, the defendant husband was granted a civil divorce upon the ground of cruel and inhuman treatment, but, notwithstanding this civil divorce, the wife is not considered divorced and may not remarry pursuant to Jewish law, until such a time as a Jewish divorce decree, known as a "Get", is granted. A Get may be obtained only after the husband and wife appear before the Beth Din, and plaintiff sought to summon defendant before this tribunal pursuant to the provisions of the Ketubah. After defendant refused to appear, plaintiff brought this action seeking an order compelling defendant's specific performance of the Ketubah's requirement that he appear before the Beth Din. Defendant moved to dismiss upon the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action. Special Term denied defendant's motion to dismiss and also denied plaintiff summary judgment. The Appellate Division modified and granted defendant's motion to dismiss, concluding that the document constituted a liturgical agreement, unenforceable where the State, having granted a civil divorce, has no further interest in the parties' marital status.

The Court of Appeals reversed and denied defendant's motion to dismiss the complaint, holding, in an opinion by Judge Wachtler, that nothing in law or public policy prevents judicial recognition and enforcement of the secular terms of a religious marriage agreement.

Avitzur v Avitzur, 86 AD2d 133, reversed.

HEADNOTES

Husband and Wife--Divorce--Agreement to Secure Religious Dissolution of Marriage

(1) Nothing in law or public policy prevents judicial recognition and enforcement of the secular terms of an agreement, known as a "Ketubah", which was entered into as part of a religious marriage ceremony. The provisions of the Ketubah, whereby defendant husband promised that he would appear before a religious tribunal known as a "Beth Din" for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a "Get", a Jewish religious divorce, constitute nothing more than an agreement to refer the matter of a religious

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divorce to a nonjudicial forum, and are thus closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. Nor would enforcement of the terms of the Ketubah by a civil court violate the constitutional prohibition against excessive entanglement between church and State on the ground that the court must necessarily intrude upon matters of religious doctrine and practice, since this dispute can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle; the fact that all of the Ketubah's provisions may not be judicially recognized does not prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum.

POINTS OF COUNSEL

Richard A. Hanft for appellant.

I. Execution and enforcement of the marriage contract does not constitute entanglement in a religious question. (Matter of "Rubin" v "Rubin", 75 Misc 2d 776;Matter of Blum Folding Paper Box Co. [Rafien – Friedlander], 27 NY2d 35;Board of Educ. [Auburn Teachers Assn.], 49 AD2d 35.)II. Appellant has stated a cause of action warranting a plenary trial. (Jones v Wolf, 443 US 595;Hurwitz v Hurwitz, 216 App Div 362;Serbian Orthodox Diocese v Milivojevich, 426 US 696;Beulah Wesleyan Methodist Church v Henry, 187 Misc 502;Koeppel v Koeppel, 3 AD2d 853;Margulies v Margulies, 42 AD2d 517;Waxstein v Waxstein, 90 Misc 2d 784, 57 AD2d 863;Shapiro v Shapiro, 110 Misc 2d 726; Peristein v Peristein, 76 AD2d 49.)III. Application of the doctrine of "unclean hands" is properly a matter for a Trial Judge. (Da Silva v Musso, 53 NY2d 543;Meyer v Nebraska, 262 US 390;Griswold v Connecticut, 381 US 479.)*110

Louis-Jack Posner for respondent.

I. New York civil courts may not properly adjudicate religious issues. (McCollum v Board of Educ., 333 US 203;Presbyterian Church v Hull Church, 393 US 440;Jones v Wolf, 443 US 595;Sherbert v Verner, 374 US 398;Russian Church of Our Lady of Kazan v Dunkel, 33 NY2d 456.)II. This action was properly dismissed for failure of the complaint to state a cause of action. (Sivakoff v Sivakoff, 280 App Div 106;Weiss v Mayflower Doughnut Corp., 1 NY2d 310.)III. Summary judgment was properly granted to respondent dismissing the complaint. (Margulies v Margulies, 42 AD2d 517;Pal v Pal, 45 AD2d 738;Waxstein v Waxstein, 90 Misc 2d 784; Koeppel v Koeppel, 3 AD2d 853.)IV. Appellant's relief is barred by laches. (Sherbert v Verner, 374 US 398;Ehrod v Burns, 427 US 347;Wisconsin v Yoder, 406 US 205.)V. New York State has preempted the field of divorce by the statutory scheme of the Domestic Relations Law, and the cause of action which appellant attempts to assert herein is not properly cognizable by the courts of the State of New York.

Nathan Lewin, Dennis Rapps, Daniel D. Chazin and *Ivan L. Tillem* for National Jewish Commission on Law and Public Affairs, *amicus curiae*.

I. A prenuptial agreement to submit to rabbinical arbitration any controversy between husband and wife regarding "the standards of the Jewish law of marriage" is enforceable under CPLR 7501. (Matter of Grayson-Robinson Stores [Iris Constr. Corp.], 8 NY2d 133;Lawrence Co. v Devonshire Fabrics, 271 F2d 402;Matter of Weinrott [Carp], 32 NY2d 190; Bowmer v Bowmer, 50 NY2d 288;Hirsch v Hirsch, 37 NY2d 312;Sheets v Sheets, 22 AD2d 176;Grien v Grien, 51 AD2d 543;Siegel v Ribak, 43 Misc 2d 7;Board of Educ. v Cresovia, 36 AD2d 851.)II. The parties in this case signed a binding prenuptial agreement to arbitrate any postmarital religious obligations before a specified rabbinical tribunal. (Matter of Hub Inds. [George Mfg. Co.], 183 Misc 767, 269 App Div 177, 294 NY 897.)III. Enforcement of the parties' arbitration clause does not involve the court in religious entanglement. (Hurwitz v Hurwitz, 216 App Div 362;Berman v Shames Lab., 43 AD2d 736;Matter of Koslowski v Seville Syndicate, 64 Misc 2d 109;Matter of Berk, 8 Misc 2d 732;*111 Serbian Orthodox Diocese v Milivojevich, 426 US 696;Jones v Wolf, 443 US 595; Maryland & Va. Churches v Sharpsburg Church, 396 US 367;Margulies v Margulies, 42 AD2d 517.

33 NY2d 894;Matter of "Rubin" v "Rubin", 75 Misc 2d 776;Waxstein v Waxstein, 90 Misc 2d 784, 57 AD2d 863.)

Robert J. Jossen and *Stanley J. Friedman* for Jewish Theological Seminary of America, *amicus curiae*.

As a matter of law there is no proscription against specific performance of the Ketubah to require defendant to submit to the jurisdiction of a Beth Din. (Matter of Philips, 293 NY 483, 294 NY 662;Matter of Sunshine, 51 AD2d 326,40 NY2d 875;Johnston v Spicer, 107 NY 185;Strebler v Wolf, 152 Misc 859;Hurwitz v Hurwitz, 216 App Div 362; Perlstein v Perlstein, 76 AD2d 49;Margulies v Margulies, 42 AD2d 517;Waxstein v Waxstein, 90 Misc 2d 784,57 AD2d 863;Matter of "Rubin" v "Rubin", 75 Misc 2d 776,Koeppel v Koeppel, 3 AD2d 853.)

OPINION OF THE COURT

Wachtler, J.

This appeal presents for our consideration the question of the proper role of the civil courts in deciding a matter touching upon religious concerns. At issue is the enforceability of the terms of a document, known as a Ketubah, which was entered into as part of the religious marriage ceremony in this case. The Appellate Division held this to be a religious covenant beyond the jurisdiction of the civil courts. However, we find nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of such an agreement. There should be a reversal.

Plaintiff and defendant were married on May 22, 1966 in a ceremony conducted in accordance with Jewish tradition. Prior to 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,*112 the parties declared their "desire to * * * live in accordance with 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."

Defendant husband was granted a civil divorce upon the ground of cruel and inhuman treatment on May 16, 1978. Notwithstanding this civil divorce, plaintiff wife is not considered divorced and may not remarry pursuant to Jewish law, until such time as a Jewish divorce decree, known as a "Get", is granted. In order that a Get may be obtained plaintiff and defendant must appear before a "Beth Din", a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law. Plaintiff sought to summon defendant before the Beth Din pursuant to the provision of the Ketubah recognizing that body as having authority to counsel the couple in the matters concerning their marriage.

Defendant has refused to appear before the Beth Din, thus preventing plaintiff from obtaining a religious divorce. Plaintiff brought this action, alleging that the Ketubah constitutes a marital contract, which defendant has breached by refusing to appear before the Beth Din, and she seeks relief both in the form of a declaration to that effect and an order compelling defendant's specific performance of the Ketubah's requirement that he appear before the Beth Din. Defendant moved to dismiss the complaint upon the grounds that the court lacked subject matter jurisdiction and the complaint failed to

state a cause of action, arguing that resolution of the dispute and any grant of relief to plaintiff would involve the civil court in *113 impermissible consideration of a purely religious matter. Plaintiff, in addition to opposing the motion, cross-moved for summary judgment.

Special Term denied defendant's motion to dismiss, noting that plaintiff sought only to compel defendant to submit to the jurisdiction of the Beth Din, an act which plaintiff had alleged defendant bound himself to do. That being the only object of the lawsuit, Special Term was apparently of the view that the relief sought could be granted without impermissible judicial entanglement in any doctrinal issue. The court also denied plaintiff's motion for summary judgment, concluding that issues concerning the translation, meaning and effect of the Ketubah raised factual questions requiring a plenary trial.

The Appellate Division modified, granting defendant's motion to dismiss. Inasmuch as the Ketubah was entered into as part of a religious ceremony and was executed, by its own terms, in accordance with Jewish law, the court concluded that the document constitutes a liturgical agreement. The Appellate Division held such agreements to be unenforceable where the State, having granted a civil divorce to the parties, has no further interest in their marital status.

Accepting plaintiff's allegations as true, as we must in the context of this motion to dismiss, it appears that plaintiff and defendant, in signing the Ketubah, entered into a contract which formed the basis for their marriage. Plaintiff has alleged that, pursuant to the terms of this marital contract, defendant promised that he would, at plaintiff's request, appear before the Beth Din for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a Get. It should be noted that plaintiff is not attempting to compel defendant to obtain a Get or to enforce a religious practice arising solely out of principles of religious law. She merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal.

Viewed in this manner, the provisions of the Ketubah relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a *114 nonjudicial forum. Thus, the contractual obligation plaintiff seeks to enforce is closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There can be 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 (e.g., Matter of Sunshine, 40 NY2d 875,affg51 AD2d 326;Matter of Davis, 20 NY2d 70). Similarly, an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity (Hirsch v Hirsch, 37 NY2d 312; see Bowmer v Bowmer, 50 NY2d 288, 293). 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 (Hirsch v Hirsch, supra, at p 315).

Defendant argues, in this connection, that enforcement of the terms of the Ketubah by a civil court would violate the constitutional prohibition against excessive entanglement between church and State, because the court must necessarily intrude upon matters of religious doctrine and practice. It is urged that the obligations imposed by the Ketubah arise solely from Jewish religious law and can be interpreted only with reference to religious dogma. Granting the religious character of the Ketubah, it does not necessarily follow that any recognition of its obligations is foreclosed to the courts.

It is clear that judicial involvement in matters touching upon religious concerns has been constitutionally limited in analogous situations, and courts should not resolve such controversies in a manner requiring consideration of religious doctrine (Pres-

byterian Church v Hull Church, 393 US 440, 449; Serbian Orthodox Diocese v Milivojevich, 426 US 696, 709;Jones v Wolf, 443 US 595, 603: see, e.g., Reardon v Lemoyne, ___NH___ [Dec. 23, 1982]). In its most recent pronouncement on this issue, however, the Supreme Court, in holding that a State may adopt any approach to resolving religious disputes which does not entail consideration of doctrinal matters, specifically approved the use of the "neutral principles of law" approach as consistent with *115 constitutional limitations (Jones v Wolf, supra, at p 602). This approach contemplates the application of objective, well- established principles of secular law to the dispute (id., at p 603), thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms.

The present case can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle. Consequently, defendant's objections to enforcement of his promise to appear before the Beth Din, based as they are upon the religious origin of the agreement, pose no constitutional barrier to the relief sought by plaintiff. The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable. Solemnization of the marital relationship often takes place in accordance with the religious beliefs of the participants, and this State has long recognized this religious aspect by permitting duly authorized pastors, rectors, priests, rabbis and other religious officials to perform the ceremony (Domestic Relations Law, § 11, subds 1, 7). Similarly, that the obligations undertaken by the parties to the Ketubah are grounded in religious belief and practice does not preclude enforcement of its secular terms. Nor does the fact that all of the Ketubah's provisions may not be judicially recognized prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum (see Ferro v Bologna, 31 NY2d 30, 36). The courts may properly enforce so much of this agreement as is not in contravention of law or public policy.

In short, the relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result. Certainly nothing the Beth Din can do would in any way affect the civil divorce. To the extent that an enforceable promise can be found by the application of neutral principles of contract law, plaintiff will have demonstrated entitlement to the relief sought. Consideration of other substantive issues bearing upon plaintiff's entitlement to a religious divorce, however, is *116 appropriately left to the forum the parties chose for resolving the matter.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendant's motion to dismiss the complaint denied.
Jones, J.
(Dissenting).

We are of the opinion that to grant the relief plaintiff seeks in this action, even to the limited extent contemplated by the majority, would necessarily violate the constitutional prohibition against entanglement of our secular courts in matters of religious and ecclesiastical content. Accordingly, we would affirm the order of the Appellate Division.

We start on common ground. Judicial intervention in disputes with respect to religious and ecclesiastical obligation is constitutionally proscribed, save with respect to a narrow class of issues, as to which, under "neutral principles of law", the secular component of the religious and ecclesiastical rights and obligations may be resolved without impermissible trespass on or even reference to religious dogma and doctrine (pp 114-115). We depart from the conclusion of the majority that in this case the courts may discern one or more discretely secular obligations which may be fractured out of the "Ketubah", indisputably in its essence a document prepared and executed under Jewish law and tradition.

We are constrained, as is the majority, by the allegations of the complaint. Plaintiff therein alleges: that the parties were married on May 22, 1966 in a religious ceremony in accordance with Jewish law and tradition; that pursuant to the terms and conditions of the religious ceremony they entered into a contract known as a "Ketubah"; that under the Ketubah the husband declared and contracted with the wife to be her husband according to the law of Moses and Israel and to honor and support her, faithfully cherishing her and providing for her needs as Jewish husbands are required to do pursuant to Jewish religious law and tradition; that pursuant to the Ketubah the parties agreed to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America as having authority to summon either party at the request of the other *117 and further agreed that in the event of any civil divorce decree the husband would grant and the wife accept a Jewish divorce ("get") in accordance with the authority vested in the Beth Din; that under the law of Moses should the husband arbitrarily refuse to give a "get" the wife, such as plaintiff in this case, is known and referred to as an "Aguna" which is a state of limbo wherein the wife is considered neither married nor divorced; that a judgment of civil divorce of the parties was entered on May 16, 1978 in the Albany county clerk's office; that the wife has requested and summoned the husband to appear before the Beth Din of the Rabbinical Assembly pursuant to the terms of the Ketubah but that he has willfully and intentionally refused to appear before the assembly in violation of his contractual obligations; that in consequence the wife is consigned to the status of "Aguna" and is barred from remarrying within the context of a Jewish religious ceremony. The wife demands judgment against the husband: declaring "the rights and other legal relation of the plaintiff and defendant in the marriage contract (Ketubah), created by reason of the written instrument"; declaring that the husband specifically perform pursuant to the terms and conditions of the Ketubah in that he appear before the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives pursuant to the wife's request; declaring that failure of the husband so to appear constitutes a breach of contract; and for other incidental relief.

Determination whether judicial relief may be granted the wife without constitutionally impermissible interjection of the court into matters of religious and ecclesiastical content requires examination of the English translation of the Ketubah in the context of the wife's allegation that this document was made and entered into as part of the religious ceremony in accordance with Jewish law and tradition:

"On the First Day of the Week, the 3rd Day of the Month Sivan, 5726, corresponding to the 22nd Day of May, 1966, Boaz Avitzur, the bridegroom, and Susan Rose Wieder, the bride, were united in marriage in Old Westbury, N.Y. The bridegroom made the following declaration to his bride: 'Be *118 thou my wife according to the law of Moses and Israel. I shall honor and support thee, faithfully I shall cherish thee and provide for thy needs, even as Jewish husbands are required to do by our religious law and tradition.'

"In turn, the bride took upon herself the duties of a Jewish wife, to honor and cherish her husband, and to carry out all her obligations to him in faithfulness and affection as Jewish law and tradition prescribe.

"And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: As evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and 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.

"This Ketubah was executed and witnessed this day in accordance with Jewish law and tradition.

"Boaz Avitzur bridegroom Susan Wieder bride Melvin Kieffer rabbi Abraham Weisman witness Melvin Kieffer witness."

At the outset we observe that the complaint contains no allegation that the parties intended that the Ketubah should manifest secular promises or have any civil or secular status or any legal significance independent of the religious ceremony between them of which it was an integral part. Nor is any such assertion advanced in the papers submitted by the wife in support of her cross motion for summary judgment.

Moreover, it appears evident to us that any determination of the content and particulars of the rights of the wife *119 or the obligations of the husband under this document cannot be made without inquiry into and resolution of questions of Jewish religious law and tradition. We think it inaccurate to identify the relief sought by plaintiff, as does the majority, as "simply to compel defendant to perform a secular obligation to which he contractually bound himself." (At p 115.)

The complaint's first request for relief paints with a broad brush, asking that the court "declare the rights and other legal relation of the plaintiff and defendant in the marriage contract" created by reason of the Ketubah. That such an all-encompassing declaration of rights exceeds the authority of the civil court seems to be implicitly conceded by the majority's attempt to limit its consideration to enforcement of an obligation characterized as "secular" -- the alleged obligation of the husband to appear before the Beth Din.

The wife's pleading itself, however, not to mention the affidavits submitted by her, makes it clear that even a definition of the purported "secular obligation" requires an examination into the principles and practice of the Jewish religion. Although the English translation of the Ketubah attached to the complaint recites that the parties "recognize the Beth Din * * * as having authority * * * to summon either party at the request of the other", the complaint seeks a declaration that the husband specifically perform "in that he appear before the Beth Din * * * pursuant to the request of the plaintiff". Thus, the wife tenders her construction of the document, which in turn presumably is predicated on what she contends is tradition in the faith, i.e., that there is an obligation imposed by the agreement to appear before the Beth Din at the summons alone of the other party to the marriage despite the facial reference to a summons by the Beth Din. The husband, tendering his own construction of the document, denies that he is under any obligation to appear before the Beth Din because an earlier request by him for convocation of such a body was refused. Thus, it appears evident that any judicial determination whether the husband is obligated to appear before the Beth Din, or what nature of summons is required to call such *120 obligation into play, necessarily involves reference to substantive religious and ecclesiastical law.[FN*]

> FN* The recital in the testimonium clause itself is indicative -- "this Ketubah was executed and witnessed this day in accordance with Jewish law and tradition."

The unsoundness of the position espoused by the majority to justify judicial action to compel the husband to appear before the Beth Din, is revealed by projection of the course the continuing litigation will take in this case. The motion to dismiss and the cross motion for summary judgment having both been denied, the case will be set down for trial. The evidence which the wife may be expected to introduce is revealed by examination of the affidavits she submitted in opposition to the motion to dismiss and in support of her cross motion for summary judgment. Her affidavit conveys information furnished her by Rabbi Mordecai Kieffer who in his accompanying affidavit describes himself as "qualified to render an expert opinion concerning matters of Jewish laws and custom". She relies on his affidavit to support her claim that there was "good and legal consideration" for the ketubah and that the Beth Din presently has no authority to compel the husband to submit to its jurisdiction. The rabbi, predicated on what he offers as a more accurate translation of the Ketubah into English, expresses the opinion that "good and legal consideration" is to be found in the document itself. Then, describing in detail the procedures incident to the issuance of a "get", the rabbi concludes that the husband was obligated to submit to the jurisdiction of the Beth Din without the issuance of any summons by it. Accordingly, it is evident that the wife and her counsel are themselves of the view that substantiation of her position will depend on expert opinion with respect to Jewish law and tradition.

The majority's reference to the fact that marriage relationships solemnized within a religious context are recognized by the civil law is not determinative of the question here presented where what is sought to be enforced is an aspect of the relationship peculiar to the religion within which the ceremony creating it took place. No authority is cited in which a civil court has enforced a concomitant undertaking required by the ecclesiastical authority under which the marriage ceremony was solemnized. That no *121 such civil enforcement of the obligation to appear before the Beth Din was contemplated either by the drafter of the Ketubah or by the parties as its signatories is evident from the inclusion of explicit authorization to 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". Nothing in the record suggests that it was the intention of the parties when they signed this religious document that the civil courts of the State of New York were to have jurisdiction to determine the substantive rights created thereby or to invoke civil procedures and remedies for the enforcement of such rights. Indeed, any conclusion on the part of our courts that this express provision was not intended by the parties as the exclusive remedy available to them for any breach of their obligations under the Ketubah would itself necessarily entail examination of Jewish law and tradition.

Finally, the evident objective of the present action -- as recognized by the majority and irrefutably demonstrated by the complaint -- even if procedural jurisdiction were to be assumed, is to obtain a religious divorce, a matter well beyond the authority of any civil court. (Again supplying her own interpretation of the Ketubah, the wife alleges: "That pursuant to the terms of the Ketubah, the plaintiff and defendant agreed that in the event of any civil divorce decree that the husband grant and the wife accept a Jewish divorce decree in accordance with the authority vested in the Beth Din of the Rabbinical Assembly".) As was noted at the Appellate Division, the interest of the civil authorities of the State of New York in the status of the marriage between these parties was concluded when the final judgment of divorce was entered in 1978.

Chief Judge Cooke and Judges Fuchsberg and Meyer concur with Judge Wachtler; Judge Jones dissents and votes to affirm in a separate opinion in which Judges Jasen and Simons concur.
Order reversed, etc. *122

N.Y. 1983.
Susan R. Avitzur, Appellant, v. Boaz Avitzur, Respondent.
58 N.Y.2d 108, 446 N.E.2d 136578459 N.Y.S.2d 57260229 A.L.R.4th 736849, 446 N.E.2d 136578459 N.Y.S.2d 57260229 A.L.R.4th 736849, 446 N.E.2d 136578459 N.Y.S.2d 57260229 A.L.R.4th 736849

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Civil Court, City of New York,
New York County, Trial Term, Part 5.
Leib LEIBOVICI and Regina Leibovici, Plaintiffs,
v.
S. RAWICKI, Defendant.

June 5, 1968.

Action by plaintiffs against defendant to recover money given to defendant pursuant to a 'Hetter Isske' contract. The Civil Court of the City of New York, County of New York, Harold Baer, J., held that 'Hetter Isske' agreement wherein plaintiff gave defendant $5,000 for investment and defendant guaranteed the return of the capital and a guaranteed maximum return of 10 per cent was not usurious.

Judgment for plaintiffs.

West Headnotes

[1] Usury 398 ⇐38

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k36 Contracts and Transactions Involving Hazard or Contingency
398k38 k. Partnership Agreements. Most Cited Cases

"Hetter Isske" or "heter 'iska" was a device developed in the 12th to 14th centuries to overcome the biblical prohibition against charging interest by one Jew to another and was patterned upon agreement of partnership or joint venture wherein the lender would supply the money and the "borrower" or working partner had complete freedom to use the capital and be guaranteed the investment against loss and guaranteed a minimum return.

[2] Usury 398 ⇐12

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k10 Elements of Usury
398k12 k. Intent, Knowledge, and Mutual Assent of Parties. Most Cited Cases

Intent to overcharge is an essential and necessary element of usury. General Obligations Law §§ 5-501, 5-511.

[3] Usury 398 ⇐12

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k10 Elements of Usury
398k12 k. Intent, Knowledge, and Mutual Assent of Parties. Most Cited Cases

Intent to overcharge which is necessary element of usury may be gleaned from the instrument or the action of the parties.

[4] Usury 398 ⇐16

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k16 k. Nature and Subject-Matter of Transaction in General. Most Cited Cases

It is not necessary that usurious agreement be expressed in specific terms if the effect of the transaction is a usurious contract. General Obligations Law §§ 5-501, 5-511.

[5] Usury 398 ⇐16

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k16 k. Nature and Subject-Matter of Transaction in General. Most Cited Cases

"Hetter Isske" agreement wherein plaintiff gave defendant $5,000 for investment and defendant guaranteed the return of the capital and a guaranteed maximum return of 10 per cent was not usurious. General Obligations Law §§ 5-501, 5-511.

[6] Usury 398 ⇐115

Usury
3981 Usurious Contracts and Transactions
3981(B) Rights and Remedies of Parties
398k112 Evidence
398k115 k. Parol Evidence. Most Cited Cases

Parol evidence may be admitted to prove usurious intent. General Obligations Law §§ 5-501, 5-511.

[7] Usury 398 ⇐1

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k1 k. Nature of Usury in General. Most Cited Cases

To pay a part of profits in lieu of interest with no guaranty of profits is not "usury." General Obligations Law §§ 5-501, 5-511.

[8] Usury 398 ⇐1

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k1 k. Nature of Usury in General. Most Cited Cases

For a lender to receive no interest but a share of profits which may or may not exceed the legal interest rate is not "usury." General Obligations Law §§ 5-501, 5-511.

[9] Usury 398 ⇐38

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k36 Contracts and Transactions Involving Hazard or Contingency
398k38 k. Partnership Agreements. Most Cited Cases

An investment in property in the nature of a joint venture is not converted into a loan of money, and therefore usurious, by fact that one party guarantees the other against loss on the capital advanced by him and that his profit shall amount to a certain sum.

[10] Usury 398 ⇐113

398 Usury
3981 Usurious Contracts and Transactions
3981(B) Rights and Remedies of Parties
398k112 Evidence
398k113 k. Presumptions and Burden of Proof. Most Cited Cases

Borrower who asserts that transaction is usurious has burden not only to establish a usurious intent but to prove the facts from which the intent is to be deduced.

[11] Usury 398 ⇐82

398 Usury
3981 Usurious Contracts and Transactions
3981(A) Nature and Validity
398k82 k. Persons Who May Take Advantage of Existence of Usury in General. Most Cited Cases

The defense of usury is not available to one who promotes the advances for the purpose of employing the money in the business venture and who dictates the terms of repayment. General Obligations Law §§ 5-501, 5-511.

[12] Usury 398 ⇐113

Usury
3981 Usurious Contracts and Transactions
3981(B) Rights and Remedies of Parties
398k112 Evidence
398k113 k. Presumptions and Burden of Proof. Most Cited Cases

The presumption is against taking of usury. General Obligations Law §§ 5-501, 5-511.

[13] Usury 398 ⇐113

Usury

398I Usurious Contracts and Transactions
398I(B) Rights and Remedies of Parties
398k112 Evidence
398k113 k. Presumptions and Burden of Proof. Most Cited Cases
A usurious agreement will not be presumed from facts equally consistent with a lawful purpose. General Obligations Law §§ 5-501, 5-511.

**998 *142 Milton Chasin, New York City, for plaintiffs; by Arnold Davis, New York City, of counsel.

Isaac Anolic, New York City, for defendant.

HAROLD BAER, Judge.

This action is to recover the sum of $5000 with interest from the date of the demand for the return of that sum. The parties entered into a written agreement prepared by the defendant on October 30, 1961 whereby plaintiffs deposited with defendant $3000 for the purpose of investing same. Defendant guaranteed the return of the money upon three months' **999 written notice (plaintiff's exhibit 1). On January 2, 1963 plaintiffs gave defendant an additional $2000 upon the same terms and similar written agreement (plaintiffs' exhibit 2.) The defense is that the agreements were usurious.

The agreement (plaintiffs' exhibit 1) is set forth in full:

'I, the above, have this date received from Mr. Leib Leibovici and Regina Leibovici, residing at 187 Pinehurst Avenue, New York, N.Y., the amount of $3,000.00 (THREE THOUSAND DOLLARS) for the purpose of investing the same in the Real Estate Field, Apartment Houses, Office Buildings Mortgages, Real Estate improvements, etc. Said money is guaranteed by me personally, and shall be returned by me upon three months written notice. In case of my departure this money is to be paid out of the belongings of mine or my corporations.

'This agreement is drawn according to, and with the full understanding of the 'HETTER ISSKE', which forbids the acceptance or the payment of interest. This is definitely not interest, rather it is a profit sharing arrangement. However, upon payment of 10% To the investor, I shall be free of any further obligation whatsoever towards the investor, and all the profit over that will be considered mine.

'The above money is jointly owned by Leib Leibovici and Regina Leibovici, and may be withdrawn by either one of them separately, as per above terms.

*143 'The money is joint ownership, and will go to either survivor in case of survivorship. Thereafter, the money will go to their son Abraham Raphael.

'Agreed, approved and signed by all parties concerned:'

The plaintiff Leib Leibovici testified that the money was 'an investment in real estate'. He did not know exactly what real estate or whether it was to be invested by the defendant personally or by one of the corporations in which defendant was interested. He also testified that he received some payments from defendant or Nahdiv Realty Corp. but did not know how much. He needed the money in 1966 and sent a written demand (plaintiffs' exhibit 4) but never received the return of the $5000.

Plaintiff contends that the agreement unambiguously shows the intent to treat the transaction as an investment; that the 10% Return is not interest but the maximum return on an investment; and, besides, it does not guarantee this return or require any per annum return.

Defendant contends that the reference to 'Hetter Isske' is a clear indication of subterfuge to avoid the taint of usury. Defendant admitted that plaintiff gave him the money to invest; that the money was invested **1000 in an apartment house that was lost through foreclosure. He contended that the ledger sheets of the corporate owner of the

apartment house show the payment of $500 a year to the plaintiffs; but the ledger sheets (defendant's exhibit A) do not bear out such contention as they cover only a partial period of the transaction (1965—1966). Further, defendant did not produce proof of any payments to plaintiffs during the period 1961 through 1964. There are no ledger sheets, canceled checks or other evidence of payments. He 'could not find' the 'Hetter Isske' agreement. The defendant relies on his own testimony that there was 10% Interest to be paid to the plaintiffs even though the agreements and plaintiffs' testimony make no mention of interest (except for mention in plaintiffs' exhibit 4) but that this money was an investment Limited to a return of 10%. The defendant did not guarantee or obligate himself to pay 10%. He only limited plaintiffs' return to 10%, all additional profits to belong to the defendant. However, he did guarantee the return of principal on notice and demand. He insisted on a 'Hetter Isske' agreement so that there would be no taint of usury, or interest in any amount. He invested the money, he testified, in Nahdiv Realty Corp., which owned an apartment house, and which corporation made most of the 'interest' payments. Defendant used this circuitous method *144 to make an investment for the plaintiffs and himself. His answers were evasive and he failed to document his contentions. On credibility, he left much to be desired.

The agreement (plaintiffs' exhibit 1) mentions 'Hetter Isske'. Neither party could produce the 'Hetter Isske' agreement but both acknowledge that such agreement was entered into. In fact, defendant wrote to plaintiffs in July 1963 (plaintiffs' exhibit 5), stating, 'even though our agreement is distinctly based on 'Hetter Isske', a profit sharing arrangement, I notice that a formal 'Hetter Isske' had not been signed between us.

,'kindly sign the enclosed 'Hetter Isske' and mail it to me, so that we are both covered according to our religion.'

[1] 'Hetter Isske' or 'heter 'iska' was a device developed in the 12th to 14th centuries to overcome the biblical prohibition against charging interest by one Jew to another (Lev. 25, 36—38, Deut. 23, 19—20). It was patterned upon an agreement of partnership or joint venture. The 'lender' would supply the money and the 'borrower' or working partner had complete freedom to use the capital, and he guaranteed the investment against loss. He also guaranteed a minimum return (The Spirit of Jewish Law by George Horowitz, section 265, page 492). This is substantially the form of agreement between the parties here (plaintiffs' exhibits 1 and 2) except that there is no minimum return guaranteed, rather a maximum return to the 'lender'.

**1001 [2][3][4][5][6][7][8] While the 'Hetter Isske' agreement is not a part of the record, it is referred to in the agreements in evidence (plaintiffs' exhibits 1 and 2) and in a later letter (plaintiffs' exhibit 5). The court is not bound by these references but they are helpful in arriving at the intention of the parties when these agreements were entered into. Intent to overcharge is an essential and necessary element of usury (Hennessey v. Personal Finance Corporation of N.Y., 176 Misc. 201, 26 N.Y.S.2d 1012; Condit v. Baldwin, 21 N.Y. 219; Rosenstein v. Fox, 150 N.Y. 354, 44 N.E. 1027; Bullock v. Becker, 52 Misc.2d 698, 276 N.Y.S.2d 213, aff'd 27 A.D.2d 647, 277 N.Y.S.2d 119; Cohen v. Beaudry, City Ct., 100 N.Y.S.2d 519; Hinman v. Brundage, Sup., 13 N.Y.S.2d 363). The intent may be gleaned from the instrument or the action of the parties. It is not necessary that the usurious agreement be expressed in specific terms if the effect of the transaction is a usurious contract (Shoop v. Clerk, 40 N.Y. 181, 4 Abb.Ct.App.Dec. 235; 1 Keyes 181; Quackenbos v. Sayer, 62 N.Y. 344). However, there is nothing in these contracts that spells usury or illegality per se. Parol evidence was admitted ostensibly to show the usurious intent (Grushkin v. Feinberg, 161 Misc. 657, 292 N.Y.S. 631, Solomon v. Van De Maele, 21 A.D.2d 396, 250 N.Y.S.2d 772; Von Haus v. Soule, 146 A.D. 731, 131 N.Y.S. 512) but there was no such acceptable credible evidence. To pay a part of profits in lieu of interest with no guaranty *145 of profits is

not usury (Mueller v. Brennan, Sup., 68 N.Y.S.2d 517; Cliñ v. Barrow, 108 N.Y. 187, 192—194, 15 N.E. 327, 328—330). For a lender to receive no interest but a share of profits which may or may not exceed the legal rate is not usury (Johnston v. Ferris, 14 Daly 302, 12 N.Y.St.R. 666; Davis v. Myers, 86 Hun, 236, 33 N.Y.S. 352; 32 N.Y.Jur., Interest and Usury, Section 41).

[9] It has been held that an investment in property in the nature of a joint venture is not converted into a loan of money, and therefore usurious, by the fact that one party guarantees the other against loss on the capital advanced by him and that his profits shall amount to a certain sum (Orvis v. Curtiss, 157 N.Y. 657, 661, 662, 52 N.E. 690, 691, 692).

[10][11][12][13] The burden was on this defendant, not only to establish a usurious intent but to prove the facts from which the intent is to be deduced (Valentine v. Conner, 40 N.Y. 248; Rosenstein v. Fox, supra; Margulis v. Messinger, 34 Misc.2d 699, 210 N.Y.S.2d 855; Leavitt v. DeLauny, 4 N.Y. 363). This the defendant failed to do by a fair preponderance of the credible evidence. This defendant promoted the investment and drew the contracts. The defense of usury is not available to the one 'who promotes the advances for the purpose of employing the money in the business venture and who dictates the terms of repayment' (Salter v. Havivi, 30 Misc.2d 251, 254, 215 N.Y.S.2d 913, 916; Orvis v. Curtiss, supra). The presumption is against taking of usury. A usurious agreement will not be presumed from facts equally consistent**1002 with a lawful purpose (Grannis v. Stevens, 216 N.Y. 583, 111 N.E. 263; White v. Benjamin, 238 N.Y. 623, 33 N.E. 1037). It is only by twisting the facts that this transaction can be converted to the usurious agreement contended for by defendant. This should not and will not be done (Valentine v. Conner, supra; Cameron v. Fraser, 48 Misc. 8, 94 N.Y.S. 1058; Meaker v. Fiero, 145 N.Y. 165, 169, 170, 39 N.E. 714; also General Business Law, sections 371 and 373, which were in effect prior to September 1964, when the transactions at issue were consummated, now General Obligations Law, 5—501, 5—511).

Judgment for plaintiffs for $5000 with interest from August 16, 1966.

N.Y.City Civ.Ct. 1968.
Leibovici v. Rawicki
57 Misc.2d 141, 290 N.Y.S.2d 997

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Jewish Law, Civil Procedure: A Comparative Study

Rabbi Yona Reiss

PART I: THE ARBITRATION AGREEMENT[1]

The *Shulchan Aruch* sets forth the procedures of a *din torah* proceeding under Jewish law.[2] From a secular law perspective, a *din torah* is only binding upon the parties when both parties have agreed to submit to the *beit din* as an arbitration tribunal.[3] 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.[4]

The laws of secular arbitration may vary from state to state within the United States. While many states have adopted the Uniform Arbitration Act as their lodestar,[5] a number of states, such as New York, have retained separate arbitration statutes which contain certain variations from the provisions of the Uniform Arbitration Act.[6] A *beit din* needs to adhere to the procedural demands of *halacha*, while at the same time being mindful of relevant requirements of secular law in order to ensure that its judgments will be enforceable. This article shall set forth a comparison between Jewish law and relevant arbitration law with respect to a number of relevant procedural requirements.

According to the Uniform Arbitration Act, an agreement by parties to submit to arbitration is enforceable as a binding contract between parties, subject to the limitations under relevant contract law with respect to the revocation of contracts in general. Thus, absent a showing of duress, fraud or other grounds for revocation under contract law, the agreement between parties to submit a dispute to the

[1] Part 1 of this article is reprinted from R. Yona Reiss, "Jewish Law, Civil Procedure: a Comparative Study," *Inside Beth Din of America* (2000), 1. The article was prepared as the first part of a series exploring the interface between secular arbitration law and the *beit din* process. Part 2 of this article is presented here for the first time, and represents the second installment of the series.

[2] See generally *Shulchan Aruch, Choshen Mishpat*, 1-27 which contain the bulk of laws relating to *beit din* court procedures. For an excellent review of these topics in general, see R. Eliav Shochetman, *Seder ha-Din* (Jerusalem: *Sifrit ha-Mishpat ha-Ivri*, 1988).

[3] See Uniform Arbitration Act, §1 and §16 and New York CPLR §7501-7502.

[4] See Uniform Arbitration Act §§12-13.

[5] The Uniform Arbitration Law was adopted by the National Conference of the Commissioners on Uniform State Laws in 1955 and approved by the House of Delegates of the American Bar Association in 1955 and 1956. See, generally, Thomas A. Oehmke, Commercial Arbitration §4. For federal arbitration matters relating to maritime transactions and the like, the United States Arbitration Act (9 USC §§1-15, 201-208, 301-307) is applicable.

[6] See Oehmke at §4.

arbitration of a *beit din* is treated as an enforceable agreement.[7] The New York statute goes further to emphasize that a written agreement to arbitrate is enforceable "without regard to the justiciable character of the controversy" so that a court is duty-bound to enforce an arbitration agreement even if the court is of the opinion that the underlying claim clearly has no legal merit.[8]

In Jewish law as well, the signing of an arbitration agreement is significant. As a general matter, Jewish law requires a Jewish person to submit to the jurisdiction of a *beit din* with respect to the adjudication of all monetary disputes between Jewish parties. However, a particular *beit din* cannot assert exclusive jurisdiction unless it is a *beit din kavua*, meaning a *beit din* that has been established as the only *beit din* for a particular community.[9] In the United States, due to the multifarious nature of the various Jewish communities and leaders throughout the land, no *beit din* has yet assumed the mantle of *beit din kavua* in order to compel all parties to go to that particular *beit din*.[10] Thus, for a particular *beit din* to have jurisdiction over a certain case, both parties usually have to agree to choose that particular *beit din* to hear the matter. In the event that the parties cannot agree about which beit din to select, Jewish law provides for a mechanism known as *ZABLA*[11] whereby each party chooses one *dayan* (i.e., arbitrator) and the two chosen *dayanim* appoint a third *dayan* to round out a panel of three arbitrators to hear the matter as an ad hoc *beit din*.[12]

However, what enables *beit din* to function in either case is the explicit submission of the parties to a particular *beit din* or a particular ad hoc *beit din* panel. This submission is typically achieved through a *shtar berurin* which is the Jewish law document traditionally used to denote an arbitration agreement.[13]

Besides the *shtar berurin*, there is another method by which parties may accept

[7] Uniform Arbitration Act §1.

[8] CPLR §7501.

[9] See Rama, *Choshen Mishpat* 3:1; *Halacha Pesuka*, *Choshen Mishpat*, 13:11-16.

[10] See R. Moses Feinstein (1895-1986), *Iggerot Moshe*, *Choshen Mishpat* I, 3.

[11] "*ZABLA*" is an acronym for "*Ze Borrer Lo Echad*", or "he chooses one for himself," referring to this process of selecting judges.

[12] See *Shulchan Aruch, Choshen Mishpat*, 13:1.

[13] The Talmud (*Bava Metzia* 20a) employs the term "*shtar berurin*" in the context of a *ZABLA* case where the two sides draw up a document identifying the respective arbitrators chosen by each side. In the context of the present-day *batei din*, the term "*shtar berurin*" (or "*shtar borerus*") is typically used to refer to any arbitration agreement by parties to submit to a *beit din*.

the jurisdiction of a particular *beit din* panel under Jewish law, and that is through a *kinyan sudar* in front of the *beit din*. A *kinyan sudar* (which literally means "handkerchief acquisition"), in this context, consists of the ceremonial act of a litigant lifting a handkerchief or some other trivial item presented to him as a demonstration of undertaking a serious commitment to submit to the jurisdiction of the *beit din*. However, because secular law only ensures the enforceability of the *beit din* judgment in the case where there has been a written arbitration agreement, it is important for any *beit din* to require that the parties enter into an arbitration agreement even when a *kinyan sudar* will be performed by each party. [14]The question arises under Jewish law whether a written agreement to submit to arbitration without a *kinyan sudar* is sufficient. It has been argued that a written agreement should suffice even without a *kinyan sudar* based on the following arguments: (1) Jewish law recognizes the enforceability of *situmta* – actions or gestures (such as a handshake) which are commonly understood by parties as creating binding obligations in the society in which they live;[15] (2) Jewish law itself recognizes the enforceability of obligations undertaken through written contracts (*shtarot*) signed by the parties themselves.[16] However, reliance on the second argument alone may be insufficient based on the fact that a *shtar* is not capable of creating a binding obligation with respect to certain types of transactions.[17]

The practice of most *batei din* is to have the parties perform a *kinyan sudar* in addition to their signed arbitration agreement. One possible explanation for this practice is that the performance of the *kinyan sudar* is deemed necessary as a matter of Jewish law. However, it appears that, as a general rule, there is a recognition by *halachic* authorities that the arbitration agreement constitutes a valid submission under Jewish law.[18]

Rather, the main purpose of having the parties enter into the *kinyan sudar* in addition to the arbitration agreement may be to preserve traditional Jewish law procedure at the outset of the *beit din* proceeding in order to instill in the parties a sense of religious reverence for the *din torah* process.[19]

PART 2:
COMPELLING PARTICIPATION IN A *BEIT DIN* ARBITRATION PROCEEDING

I. INTRODUCTION

"You shall appoint Judges and Officers in all of your gates," (Deuteronomy 16:18; "*shoftim v'shotrim titen licha*"). The *Midrash* notes, based on this Biblical verse, that a Jewish law judge (operating within the framework of a *beit din*) cannot be effective unless there are "police officers" capable of enforcing his decisions.[20] In contemporary times, the secular courts in the United States serve the police function of the *beit din* by being the enforcement arm of the *beit din*'s decisions. This relationship is enabled through arbitration laws that provide that the decisions of an arbitration tribunal such as a *beit din* have the same force and effect as that of a duly constituted court.[21]

There is, however, one significant difference between the civil court and a *beit din* operating as an arbitration tribunal. While a civil court enjoys automatic jurisdiction over the parties, a *beit din* receives jurisdiction based on the parties' formal submission to the authority of the *beit din* through a written arbitration agreement.[22] Once such an agreement is signed, the *beit din* is empowered by civil

[14] In fact, this may be a fulfillment of the commandment set forth in *Deuteronomy 16* for Jewish communities to have both "*shoftim*" – judges, and "*shotrim*" – policemen to enforce the judgments. Taking steps to ensure that the arbitration will be enforced by the secular court system provides the "*shotrim*" needed for a *beit din* to be able to function. See R. Yoezer Ariel, "*Hatzorech Habelchati Be'Shtar Bororut*," *Techumin* 14 (1994), 147.

[15] See *Bava Metzia* 74a; *Shulchan Aruch, Choshen Mishpat*, 201:2.

[16] See *Shulchan Aruch, Choshen Mishpat*, 40 and 69.

[17] See, e.g., *Kiddushin* 26a. A possible solution to any such limitation is to insert language in the *shtar* specifying that the parties accept any decision of the *beit din* as a binding obligation, which would constitute a "*bitchayvut*" – irrevocable obligations – under Jewish law. Once a party submits in a manner of "*bitchayvut*", a *shtar* is able to encompass obligations that would not otherwise have been covered, such as obligations relating to chattel items, or to cash. See R. Ariel, "*Hatzorech Habelchati Be'Shtar Bororut*," 149-150. There may also be certain Jewish law advantages to having kosher witnesses sign the arbitration agreement in addition to the parties themselves, in order to ensure the collectability of any judgment from encumbered assets. See *Shulchan Aruch, Choshen Mishpat*, 69. Of course, if the *shtar berurin* works through the mechanism of *situmta*, it is sufficient for the *shtar* to contain the customary language used for such contracts in secular society.

[18] See Rama, *Choshen Mishpat*, 12:7; *Sma, Choshen Mishpat*, 12:18; *Halacha Pesukah* to *Hilchot Dayanim* 12:298.

[19] Cf. the Rules and Procedures of the Beth Din of America which do not make reference to the need for a *kinyan sudar* at *din torah* sessions, but rather leave this matter to the discretion of the *dayan* or *dayanim* who are appointed to sit on a given case.

[20] *Midrash Tanchuma, Parshat Shoftim*, 3, s.v. "*shoftim v'shotrim*."

[21] See, *e.g.*, Kingsbridge Center of Israel v. Turk, 469 NYS2d 732 (1983).

[22] See New York CPLR §7501

law authorities (serving as the "police officers") to summon the parties for a proceeding and to issue an enforceable decision.[23]

Above, we discussed the need for the arbitration agreement under both Jewish law and civil law. Now, we shall explore the circumstances pursuant to which a party can be compelled to submit to a *beit din* arbitration proceeding, both in Jewish law and in civil law.

It is important to note that, regardless of whether or not a specific *beit din* has the ability to compel parties to appear before it, Jewish law requires that parties not bring their litigation before a civil court.[24] Even if both parties are willing to waive this requirement and litigate before a civil court, the *halacha* compels them to submit their dispute before a duly constituted *beit din* or other tribunal recognized as a legitimate option according to Jewish law.[25]

II. The Power of a *Beit din* to Compel a Party's Submission

Under Jewish law, a specific *beit din* can compel a party to submit to its jurisdiction if it is the *beit din kavua* – the established rabbinical court of jurisdiction in a particular locale.[26] In order for a *beit din* to achieve this status, it has to be accepted by the local population as its official *beit din*.[27] Nowadays, in highly populated communities where there are multiple rabbinical courts, there is no single *beit din* that has the status of a *beit din kavua*.[28]

In the absence of a *beit din kavua*, a *beit din* would need both parties to submit to its jurisdiction in order to compel their appearance. The traditional mode of

[23] In an unusual case, a Connecticut court (Koenig v. Middlebury Land Associates, 2008 Conn. Super. LEXIS 1816 (2008)) ruled that an agreement to arbitrate before a *beit din* did not automatically remove jurisdiction from the civil courts unless it included language that the arbitration was a "condition precedent to litigation." However, this ruling does not appear to be consistent with the Uniform Arbitration Act adopted in most states nor with New York arbitration law. See Ercoli v. Empire Professional Soccer, LLC 833 NYS2d 818 (2007) (in which a New York court considered and rejected the argument that the "condition precedent" language in the parties' arbitration agreement actually implied that the dispute could still be litigated in civil court, describing the parties' unusual usage of this language as a "vestige from usage under the common law").

[24] See Rashi, Exodus 21:1, s.v. *"lifneihem."* See also R. Yaacov Feit, "The Prohibition Against Going to Secular Courts," *The Journal of the Beth Din of America* 1 (2012): 30.

[25] See Commentary of the *Ramban*, Exodus 21:1.

[26] See Rama, *Choshen Mishpat*, 3:1.

[27] R. Avrohom Yeshaya Karelitz (1878-1953), *Chazon Ish, Sanhedrin* 15:7.

[28] See *Iggerot Moshe, Choshen Mishpat* II, 3.

evidencing such submission to an ad hoc *beit din* panel is through a *shtar berurin*, a document of submission similar to a civil arbitration agreement.[29] Once a *beit din* has been given jurisdiction through a *shtar berurin*, it can require parties to appear before the *beit din*.

However, even when there is no *shtar berurin*, a respondent has an obligation to submit to a *beit din* in the event that there is a dispute and the other party has approached a legitimately constituted *beit din* to issue a summons. The fact that a *beit din* is not a *beit din kavua* only means that the respondent is not required to submit to the *beit din* that issues the summons (sometimes referred to as the *"beit din hamazmin"*).[30] If the respondent does not wish to submit to the *beit din hamazmin*, the respondent is required under Jewish law to name an alternative *beit din* or to agree to submit to an ad hoc *"ZABLA"* panel pursuant to which each party would choose one judge and the two judges would select a third judge to complete the *beit din* panel. In the event that the respondent refuses to submit to any such duly constituted *beit din*, the *beit din hamazmin* can issue a contempt order (*"siruv"*) declaring the respondent to be in contempt and authorizing the petitioner to bring the case to secular court.[31]

A respondent may argue to the *beit din hamazmin* that the case falls outside of *beit din* jurisdiction. For example, the respondent may argue that the petitioner previously chose to adjudicate the case in civil court,[32] that the case had been previously settled,[33] or that the case is a criminal matter that falls outside of the *beit din*'s civil jurisdiction.[34] While any of these defenses may be deemed legitimate as a matter of Jewish law, it is ultimately the province of the *beit din hamazmin* to determine whether a sufficient showing has been made by the respondent that the case falls beyond *beit din* jurisdiction.[35] In the event that the *beit din* is not satisfied that the case had been adequately made, it may still issue a *siruv*.

[29] *Mishna, Moed Kattan* 3:3, commentary of R. Ovadia Bartenura *ad loc.*

[30] See R. Shimon ben Tzemach Duran (1361-1444), *Shu"t Tashbetz* I, no. 161.

[31] See R. Avrohom Derbamdiker, *Seder Hadin* (2009), 1:32.

[32] See *Rama, Choshen Mishpat*, 26:1 (petitioner who brought and lost case in civil court cannot compel respondent to re-litigate in *beit din*).

[33] See *Shach, Choshen Mishpat*, 12:12 (settlement between parties is considered binding).

[34] See R. Avraham Dov Kahane Shapiro (1870-1943), *Teshuvot D'var Avrohom*, no. 1:1 (3) (criminal prosecution is within province of governmental authority).

[35] See *Rama, Choshen Mishpat*, 11:1.

Nowadays the standard practice of *batei din* is to decide cases on the basis of "*peshara k'rova l'din*" – taking into account not only the strict law ("*din*") but also equitable considerations ("*peshara*"; sometimes defined as "compromise").[35] There is an interesting question as to whether a *beit din* can insist that a respondent submit to both *din* and *peshara* in the event that the respondent agrees to submit to *beit din* jurisdiction but only if the *beit din* decides the case according to *din*, the strict interpretation of the law. In one such case, a Brooklyn *beit din* issued a *siruv* against the respondent because of the respondent's failure to submit to the *pshara* standard customarily employed by the *beit din*. The respondent in turn brought a suit for libel, alleging that the *siruv* failed to reflect his willingness to submit to a *din* proceeding. The New York court ruled that the *beit din*'s determination of recalcitrance was ecclesiastical in nature and therefore not subject to court review.[37]

The civil court's conclusion that the *beit din* determination was essentially an ecclesiastical determination is consistent with the diversity of opinions among Jewish law authorities regarding this issue. According to some Jewish law authorities, a litigant indeed has the right to insist upon *din*, while others maintain that a litigant can be compelled to submit to an adjudication based on *pshara* considerations as well.[38] Finally, it could be argued that a submission to *din* actually subsumes *pshara*.[39]

[35] See R. Malkiel Tzvi Tannenbaum (1847-1910), *Shu"t Divrei Malkiel*, no. 2:133. The author explains that if the "*din*" would require the respondent to pay $100 to the petitioner, a settlement of not less than $51 (i.e., more than half the "*din*" amount) might be awarded based on *pshara krova l'din* if this would lead to a more equitable and peaceful settlement, while under pure *pshara* it is possible that based on equitable considerations, such as the good intentions of a respondent laborer who accidentally broke some barrels of the petitioner while trying to transport them from place to place, the petitioner may be forced to forego payment altogether and even pay the respondent for his efforts. See *Bava Metzia* 83a. By contrast, according to R. Yaakov Reisher (1661-1733), *Shvut Yaakov*, no. 2:145, a *pshara krova l'din* determination would as a general rule not vary more than 1/3 from the amount required to be paid based on strict *din* considerations.

[37] Neiman Ginsburg v Goldburd, 684 NYS2d 405, at 407 (1998).

[38] See the conflicting opinions of Rabbi E. Shapiro and Rabbi M.Y. Miletzky in the case reported in *Pitkei Din Rabbanim* 11, 259 (1979). Among the relevant texts cited in this discussion are: the Talmudic dictum in *Sanhedrin* 6b that it is a *mitzvah "livtzoa"* (to settle disputes through pshara); the dispute recorded in the *Rama, Choshen Mishpat*, 12:2 regarding whether or not a *beit din* has the ability to compel parties to act "beyond the letter of the law;" and the story from the Jerusalem Talmud (*Sanhedrin* 1:1) that records how the great sage R. Yosi ben Chalafta told litigants that he did not feel equipped to judge them according to strict *din* Torah.

[39] See *Shulchan Aruch, Choshen Mishpat*, 12:5 (codifying the notion that judges adjudicating a case according to *din* occasionally need to resort to *peshara* if a decision cannot otherwise be properly rendered) and 12:20 (recording as normative law that judges should refrain from deciding cases according to strict *din*).

In the event that a party agrees to submit to the jurisdiction of the *beit din* but refuses to sign an arbitration agreement, it is generally held that this effectively constitutes refusal to submit to the authority of the *beit din* since the *beit din* will not be able to issue a decision capable of the fullest degree of enforcement.[40] Nonetheless, a *beit din* may insist that a party submit to the *beit din* with respect to a matter that would not be subject to court enforcement.[41] This is because the lack of an enforcement mechanism does not inherently exempt a party from the *beit din* process, although in certain cases it may prompt the *beit din* to authorize that the case be referred to the civil court system functioning as an "agent" of the *beit din*.[42]

If there is an "industry custom" where all disputes are resolved by an arbitration board of that industry which is not technically an arm of the secular court but rather an informal arbitration tribunal, a party to a dispute may insist that a dispute be submitted before that panel even though it is not a *beit din* tribunal.[43] Similarly, if parties on their own agree to submit a dispute to an arbitration tribunal outside of the province of *beit din* but also outside the province of a secular court bound by secular law (*i.e.*, the arbitrators are empowered to make decisions based on general principles of equity rather than secular law), there would no Jewish law violation inherent in such submission.[44]

III. Civil Court Enforcement of *Beit din* Jurisdiction

As previously discussed, once parties sign a binding arbitration agreement before a particular *beit din* entity, the parties are bound as a matter of secular law to submit to that *beit din*. The enforcement of this obligation can be achieved in two different ways: (1) the *beit din* can schedule a proceeding based on the parties' commitment pursuant to the arbitration agreement, and issue a default judgment in the event that one party does not appear, which will be capable of enforcement in court; or (2) the moving party can petition the court to compel arbitration and thus require the

[40] See, *e.g.*, R. Derbamdiker, *Seder Hadin*, 1:45.

[41] For example, as a matter of Jewish law, parties are presumed to be required to submit child custody disputes to *beit din* rather than civil court, even in jurisdictions where the *beit din*'s decision would not be enforceable as a matter of civil law. See below, text accompanying notes 52-53.

[42] See R. S. Sha'anan, "*Hafniyat Tovea LeBeit Mishpat*," *Techumin* 12 (1992), 251 at 252 and R. Moshe Sofer (1762–1839), *Shu"t Chatam Sofer, Choshen Mishpat*, no. 3.

[43] R. Akiva Eiger (1761-1837), Glosses to *Shulchan Aruch, Choshen Mishpat*, 3:1.

[44] See *Aruch HaShulchan, Choshen Mishpat*, 22:8

other party to appear before the *beit din*.[45] In order to ensure that the enforcement of the arbitration agreement can be exercised by the *beit din* directly, it is prudent for the *beit din* to articulate in the arbitration agreement, or in its written rules that are incorporated into such agreement by reference, that it has the right to exercise the option of issuing a default judgment in the event that one party refuses to appear after signing the arbitration agreement to submit to the *beit din*.[46]

It is not obvious from the perspective of Jewish law that the second option (of petitioning the court to compel arbitration) is actually permissible. According to Rabbi Moshe Isserles (the Rama), it is forbidden for one party to utilize the secular court system for the purpose of compelling the other party to appear before *beit din*.[47] This prohibition is premised upon the general proscription against *mesirah* – handing in a Jewish offender to secular authorities.[48] However, Rabbi Yechiel Michel Epstein (the author of the *Aruch HaShulchan*), noted that the interdiction against *mesirah* was primarily applicable to sovereign states that discriminated against Jewish parties and exploited any type of violation as a pretense to impose excessive fines and punishments.[49] By contrast, in a fair and just government (such as the United States), this prohibition would presumably not be applicable.[50] Even according to the Rama, a motion to compel arbitration would be perfectly permissible if explicitly authorized by the *beit din*.[51]

In certain cases, a civil court may refuse to compel arbitration if the subject matter is subject to a "public policy" exception to arbitration. There are two forms of public policy limitations on *beit din* arbitration. One form of public policy limitation is to preclude an arbitration tribunal, such as a *beit din*, from being empowered to adjudicate certain types of disputes. For example, in New York, there are numerous appellate court decisions that indicate that child custody cases are not subject to arbitration.[52] Therefore,

[45] New York CPLR §7503(a), Uniform Arbitration Act §7.

[46] See Rules and Procedures of the Beth Din of America, Sections 2(j) and 17, accessed January 27, 2012, http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf.

[47] *Rama, Choshen Mishpat*, 26:1.

[48] *Ibid.*

[49] *Aruch HaShulchan, Choshen Mishpat*, 388:7.

[50] See R. Eliezer Y. Waldenberg (1915-2006), *Teshuvot Tzitz Eliezer*, no. 19:52.

[51] See R. Yehoshua Falk (1555-1614), *Sefer Meirat Eynaim, Choshen Mishpat*, 26:5.

[52] See, *e.g.*, Hirsch v. Hirsch 774 NYS2d 48 (2004). Glauber v. Glauber 600 NYS2d 740 (1993).

even in cases where the parties have signed an arbitration agreement to submit a child custody dispute before a *beit din*, arbitration will not be compelled by the civil court. Nonetheless, it is common for New York parties who submit to arbitration before the Beth Din of America in child custody cases to appear voluntarily before the *beit din* and then incorporate the decision of the *beit din* into a signed divorce agreement, which is capable of enforcement.[53]

The other type of public policy limitation is that with respect to certain types of cases, the arbitration tribunal may adjudicate the case under civil law but is obligated to demonstrate that it followed a certain type of standard in reaching its conclusion. In New York, child support determinations fall into this category.[54] Thus, a *beit din* deciding a child support dispute must demonstrate that it took into account the Child Support Standards Act in rendering its decision in order to ensure its enforceability. In New Jersey, child custody determinations also fall into this latter category, with a *beit din* empowered to render decisions provided that it demonstrates that it decided the case in accordance with the "best interests of the child" standard.[55]

The fact that a matter has been submitted to arbitration before a *beit din* also enables the *beit din* to issue enforceable decisions regarding ecclesiastical matters that would otherwise be beyond a civil court's purview. For example, certain courts have concluded that issuing an order requiring a husband to execute a *get* (bill of Jewish divorce) is a religious matter beyond the purview of the court system.[56] Nonetheless, an arbitration agreement signed by the parties requiring them to submit to a *beit din* panel and abide by its decision with respect to the issue of granting a *get* remains an enforceable agreement as a matter of arbitration law.[57]

In the same fashion that a *beit din* may refer a case outside of its purview to civil court jurisdiction, a civil court may determine that an ecclesiastical matter in dispute should be referred to a *beit din*.[58] An interesting question arises when a civil court actually does refer such a matter to a *beit din*. Does the *beit din* that was designated by

[53] See New York Domestic Relations Law, §236(B)(3).

[54] See Rakosynski v. Rakosynski, 663 NYS2d 957 (1997).

[55] Pawzy v. Pawzy, 199 NJ 456 (2009), Johnson v. Johnson 204 NJ 529 (2010).

[56] See Aflalo v. Aflalo, 295 N.J.Super. 527 (1996).

[57] See Avitzur v. Avitzur, 459 NYS2d 572 (1983); cf. Aflalo, supra note 56 at 541.

[58] This is unlikely to occur in New York, where it has been held that a court may not convene a rabbinical tribunal. See Pal v. Pal, 356 NYS2d 673 (1974).

the civil court have jurisdiction from the standpoint of Jewish law? This question was discussed by Rabbi Shlomo Zalman Auerbach in the context of a case where a *get* (Jewish divorce) dispute was referred by a British civil court to *beit din* for adjudication despite the fact that there had been no signed arbitration agreement by the parties to appear before a *beit din*. Rabbi Auerbach ruled that in such a case, since the matter was unlikely to be resolved properly before any alternative *beit din* tribunal chosen by the husband, and the fate of a potential *agunah* (woman chained to marriage) was at stake, the civil court designation of a *beit din*, based on the woman's specific selection of the *beit din* of her choice, should be viewed as binding as a matter of Jewish law.[59]

The issue of civil court designation of a *beit din* could have other ramifications as well. For example, in secular law, if an ad hoc arbitration panel similar to a *halachic ZABLA* panel is formed, and the two arbitrators selected by the two respective parties fail to agree upon a third arbitrator,[60] a civil court may designate the identity of the third arbitrator. However, from the standpoint of Jewish law, there are certain rules and regulations regarding the selection process of both the initial two arbitrators and the third arbitrator that may diverge from the civil law process of selection.[61] In the next installment in this series, we will explore at greater length the intersection between the Jewish law process and civil law process in the formation of such an ad hoc *ZABLA* panel.

IV. Conclusion

The *beit din* in the modern era functions both as a Jewish law court for Jewish law purposes and as an arbitration tribunal for secular law purposes. Both of these functions are a fulfillment of the Biblical mandate to establish "judges and officers."

From a Jewish law perspective, parties to a dispute are obligated to appear before a *beit din* (or a *beit din* approved arbitration tribunal) rather than a civil court. Nonetheless, from both a Jewish law and secular law perspective, a specific *beit din* cannot as a general rule compel the parties' appearance before it absent a signed arbitration agreement between the parties. When such an agreement has been executed,

[59] R. Shlomo Zalman Auerbach (1910-1995). *Minchat Shlomo*, 3:103(24).

[60] See, *e.g.*, New York CPLR §7504, Uniform Arbitration Act §11.

[61] See *Sanhedrin* 23a.

the civil courts will usually compel the parties to submit to the jurisdiction of the *beit din* and to abide by its decision, although there may be certain cases that will fall subject to "public policy" exceptions limiting the *beit din*'s jurisdiction in certain ways. Even in cases where a *beit din* does not have secular law jurisdiction to compel appearance before the *beit din*, it may issue an ecclesiastical determination that a party is not in compliance with its Jewish law obligation to submit to a *beit din*, and that the other party is free to pursue remedies in civil court.[62] In certain instances, a *beit din* may even assume jurisdiction of a case based on civil court designation of that *beit din* to hear the case.

Ultimately, the *beit din* model successfully functions through a symbiotic relationship between the *beit din* and the civil courts. This relationship is based upon a shared respect for arbitration law procedures and appreciation for the freedom of parties to adjudicate their disputes in accordance with their religious beliefs.

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[62] See *Rosh, Bava Kamma* 92b, s.v. *mina bach milta*.