N v N (JURISDICTION: PRE-NUPTIAL AGREEMENT)

[1999] 2 FLR 745

Family Division

Wall J

1 July 1999

Divorce – Orthodox Jewish parties – Husband not seeking get – Antenuptial agreement that parties would submit to arbitration of Beth Din – Whether antenuptial agreements enforceable – Whether jurisdiction to compel husband to obtain get

Before their marriage in 1996, the Orthodox Jewish parties entered into an antenuptial agreement which dealt primarily with property matters, but which also required them to attend and comply with the ruling of the Beth Din in the event of any matrimonial dispute. The short marriage which produced one child failed and although a decree absolute of divorce was granted under the Matrimonial Causes Act 1973 in 1998 the husband did not apply to the Beth Din for a get (a bill of divorce in Jewish law). A consent order was made in relation to ancillary relief and the contact dispute remained outstanding. According to Jewish law the husband and wife remained married and this had particularly serious consequences for the wife. She sought to compel the husband to initiate the get by asserting that he was in breach of both the terms of the antenuptial agreement and his agreement, recited in the contact order, to progress the obtaining of the get expeditiously. The husband argued that the court had no jurisdiction to grant such relief and applied to strike out the summons.

Held – dismissing the summons on the basis that the court lacked jurisdiction to grant the relief sought by the wife –

(1) On the basis of public policy, antenuptial agreements as a class are not specifically enforceable in English law. The existence of an agreement and its evidential weight are factors to be taken into account when the court is deciding whether or not to exercise its discretion under s 25 of the Matrimonial Causes Act 1973 to make orders for financial provision under ss 23 or 24. Each individual clause is unenforceable on public policy grounds and there is no power in any statutory provision to compel the parties to implement part of the agreement.

(2) The husband's agreement recited in the contact order could not be enforced by way of mandatory injunction as the wife's reliance on an unenforceable clause in the antenuptial agreement could not found the basis for an injunction. Had the husband given an undertaking, that would have been enforceable by committal.

(3) There were no relevant means by which the court could indirectly compel the husband's performance under the antenuptial agreement. The divorce decree had been made absolute and s 10 of the Matrimonial Causes Act 1973 had no application. The consent order in relation to ancillary relief meant that the court's jurisdiction in relation to financial issues was spent. The obtaining of a get should not be imposed as a condition of the contact order under s 11(7) of the Children Act 1989, nor could it be the subject of a specific issue order under s 8 of that Act since it had no connection with parental responsibility. However, a judge hearing future contact proceedings had discretion to decline to do so until the husband had honoured his agreement, as long as this course was compatible with the child's welfare.

Per curiam: the government's delay in implementing Part II of the Family Law Act 1996 including the get clause contained in s 9(3) and (4) means that the injustice which Jewish spouses, particularly women, suffer as a consequence of a refusal by the other spouse to agree to a get will not be remedied in the foreseeable future. However, the court currently has the power to refuse to permit a decree nisi of divorce to be made absolute on the application of a spouse who is refusing to co-operate in the grant and receipt of a get.

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Statutory provisions considered

Matrimonial Causes Act 1973, ss 23, 24, 25, 34
Supreme Court Act 1981, s 37
Children Act 1989, ss 3, 8, 11(7)
Family Law Act 1996, ss 9, 13, 29

Cases referred to in judgment
Baker v Baker (No 2) [1997] 1 FLR 148, CA
Berkovits v Grinberg (Attorney-General Intervening) [1995] Fam 142, [1995] 1 FLR 477, [1995] 2 WLR 553, [1995] 2 All ER 681, FD
Brett v Brett [1969] 1 WLR 487, [1969] 1 All ER 1007, CA
CB and JB (Care Proceedings: Guidelines) [1998] 2 FLR 211, FD
D (Minors) (Conciliation: Disclosure of Information), Re [1993] Fam 231, [1993] 2 WLR 721, [1993] 2 All ER 693, *sub nom D (Minors) (Conciliation: Privilege), Re* [1993] 1 FLR 932, CA
Des Salles d'Epinoix v Des Salles d'Epinoix [1967] 1 WLR 553, [1967] 2 All ER 539, CA
Edgar v Edgar (1981) 2 FLR 19, [1980] 1 WLR 1410, [1980] 3 All ER 887, CA
F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45, FD
Frey v Frey (unreported) 22 February 1984, Family Court of Australia
Hadkinson v Hadkinson [1952] P 285, (1952) FLR Rep 287, [1952] 2 All ER 567, CA
Hyman v Hyman [1929] AC 601, (1919) FLR Rep 342, HL
Joseph v Joseph [1953] 1 WLR 1182, [1953] 2 All ER 710, CA
O (Contact: Imposition of Conditions), Re [1995] 2 FLR 124, CA
Richards v Richards [1984] 1 AC 174, [1983] 3 WLR 173, [1983] 2 All ER 807, HL
S v S (Divorce: Staying Proceedings) [1997] 2 FLR 100, FD
Wickler v Wickler [1998] 2 FLR 326, FD

Jonathan Cohen QC for the wife
David Burles for the husband

WALL J: This case raises issues of considerable importance to Jewish spouses who are involved in divorce proceedings. For that reason, although the hearing before me was in chambers, and this judgment is also being handed down in chambers, I propose, subject to argument, to give leave for the judgment to be reported under initials. I will, accordingly, refer to the parties as 'the husband' and 'the wife' respectively, and to their one child by initials. Nothing must be published which identifies the parties or the child of the family by name or location.

The essential facts
In this case the husband is 26 and the wife 22. They were married on 10 March 1996 and separated in October 1997. They have one child, a boy, AS, born on 19 February 1997, and so aged 2 years and 5 months.

The wife petitioned for divorce in the Principal Registry on 20 January 1998 under the provisions of s 1(2)(b) of the Matrimonial Causes Act 1973. The petition was undefended and a decree nisi of divorce was pronounced on 7 May 1998. That decree was made absolute on 22 June 1998. Thus in English law, the parties are no longer husband and wife.

On 1 December l998 an order was made by consent in the divorce proceedings whereby each party's claim against the other for ancillary relief was dismissed. Accordingly, neither has any financial claim against the other.

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The husband currently pays £15 per week for AS, who lives with his mother. There is an outstanding issue in relation to the father's contact with AS, and aspects of his religious upbringing are in dispute between the parties.

The difficulty in the case arises because both the husband and the wife are Orthodox Jews. The wife is a member of the Orthodox Ashkenzi community, and the husband is a member of the Sephardi Orthodox community, and what they have called their 'Jewish marriage' remains in being.

The particular cause of contention is that the husband has taken no steps to apply to the Beth Din for a 'get' (a bill of divorce in Jewish law) to be delivered to the wife. As a

consequence, according to Jewish law, the husband and the wife remain married.

By a summons dated 25 March 1999, the wife seeks the following relief:

(1) The husband do promptly take and co-operate in the necessary steps to progress the obtaining of a get.
(2) The respondent do attend the London Beth Din for consideration of the grant of a get on a date and time to be fixed by the London Beth Din.
(3) The respondent do comply with all procedural requirements and rules of the London Beth Din.
(4) The order be penally endorsed.
(5) [Costs].

The husband asserts that the court has no jurisdiction to grant the relief the wife seeks, and applies to strike out the summons in limine.

Background: the antenuptial agreement

On 18 February 1996, some 3 weeks before their marriage, the husband and the wife entered into a deed, described in argument before me as an antenuptial agreement, which is expressed to have been made in contemplation of and conditional upon the couple's marriage.

The preamble to the deed records the couple's wish to enter into an agreement recording their wishes and intentions regarding their finances and property. Both wish to retain their separate property whether now owned or acquired later. The preamble also records that the couple intend the agreement should be legally binding and that each received independent legal advice prior to the execution of the deed.

The first nine clauses of the deed deal with property. They provide that each party will retain ownership of property both which belongs to each at the celebration of the marriage and which is subsequently acquired.

The agreement records that in the event of the dissolution of the marriage they agree that neither will make a claim on the property of the other, and all jointly acquired property 'shall belong to them in the shares to which the purchase moneys were contributed and no presumption of advancement shall apply'.

Clause (8) of the agreement provides as follows:

> 'In the event of the dissolution or annulment of the marriage the separation of [the wife] and [the husband] or upon the death of either of
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> them neither shall make any financial claims of any kind upon the other nor upon the estate of the deceased without prejudice to the rights of either to make such a claim in respect of a child of the marriage and [the parties] agree to incorporate the terms of this deed so far as may be relevant into a consent order of the court.'

For the purposes of the present argument, the critical clauses in the deed are (10) and (11), which read as follows:

> '(10) The wife and the husband agree that in the event of any matrimonial dispute they will both attend the Court of the Chief Rabbi, the London Beth Din (or such other Beth Din as that Beth Din shall direct) when requested to do so and that they will comply with the instructions of that Beth Din, including co-operation in any mediation recommended, in seeking to resolve any problems concerning their Jewish marriage.
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> (11) [The wife] and [the husband] further agree that if the problems concerning their Jewish marriage are not resolved under the immediately preceding paragraphs above, any dispute arising out of or in connection with that marriage shall be

referred to and finally resolved by arbitration by the London Beth Din (or such other Beth Din as that Beth Din shall direct) in accordance with Halacha under the Arbitration Acts 1950, 1975 and 1979 (or any amendment, consolidation or replacement thereof) and in accordance with the procedural rules of the relevant Beth Din.'

It is, I think, also relevant to note the following terms of the deed:

'(12) [The husband] further undertakes that irrespective of civil proceedings being instituted in respect of the marriage he will fulfil all his financial obligations to his wife as determined by the London Beth Din (or such other Beth Din as that Beth Din shall direct). This obligation shall not affect the authority of a civil court under the Matrimonial Causes Act 1973 or any amendment or replacement thereof, and shall be subject to obtaining the approval of the court where required or appropriate.

(13) Neither [the wife] nor [the husband] shall apply in any civil proceedings without the prior approval in writing of the Beth Din for an order to enforce an award of the Beth Din.'

The deed also provides that the invalidity or unenforceability of any provision of the deed shall not affect the validity or unenforceability of any other provision and any invalid or unenforceable provision will be severable. Moreover, the deed is to continue in force notwithstanding the dissolution of the marriage and is to be governed by and construed in accordance with the laws of England.

The wife asserts that the husband is in breach of his covenants under cls (10) and (11) of the agreement. She says he refuses to submit to the authority of the London Beth Din; and that he has not complied with that Beth Din's instructions. In particular, he has taken no steps to procure the writing of a get.

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The order of the court dated 7 October 1998

The wife does not rely solely on the antenuptial agreement. She has a second string to her bow. On 7 October 1998 there was a conciliation appointment before District Judge Bowman in the Principal Registry in relation to the husband's application for contact to AS. Both parties were represented by their respective solicitors.

Conciliation appointments are, of course, privileged occasions: see *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231, sub nom *Re D (Minors) (Conciliation: Privilege)* [1993] 1 FLR 932. Accordingly, unless the conciliation appointment results in an agreement, neither party can make any use of what is said in the course of such an appointment. In this case, however, there plainly was an agreement, which resulted in a consent order. Its terms are of importance to the current summons. The whole order reads:

'Upon hearing the solicitor for the wife and the solicitor for the husband upon a conciliation appointment

And upon the husband agreeing (i) that he will forthwith send the mother copies of documentation prepared to date in relation to the get, and that he will progress the obtaining of the get expeditiously and (ii) that he will forthwith take all necessary steps to remove the child's name from his (husband's) passport

BY CONSENT IT IS ORDERED THAT:

1. Husband do have contact with the child as follows:

(i) every Sunday from 2 until 6 pm
(ii) midweek, Wednesdays from 5 until 6pm
(iii) on such other or alternative occasion [sic] as the husband and the wife may agree

2. The matter be listed for review at a conciliation appointment on 15 February 1999 at 10.30 am before a district judge at First Avenue House, High Holborn, London, WC1V 6NP.'

The husband's application for contact is now due to be heard before a circuit judge in the Principal Registry on 26 July 1999 with a time estimate of 3 days. Substantial evidence has been filed, and there is a court welfare officer's report.

On 29 January 1999 the husband had made an application for residence of AS because he said he believed AS was at risk if he remained with the wife 'due to her mental condition'. He also expressed concerns about the wife's care of AS to the social services department of the local authority. The mother filed a medical report which stated that her mental health had been good since June 1994, and that she was a loving and capable mother. The local authority made it clear that they had no concerns and the court welfare officer has recommended that AS live with his mother. As a consequence, the father was given leave on 9 June 1999 to withdraw his application for a residence order.

Despite this, it is clear that the level of acrimony between the parents is high, and that a major bone of contention is what the mother regards as the father's bad faith in refusing to apply for a get, notwithstanding both the

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terms of the antenuptial agreement and the terms of the consent order of 7 October 1998.

My approach to the facts of the case

As the husband's objections to the current summons go to jurisdiction, counsel on his behalf accepted that for present purposes I should take the facts as the wife states them to be, although the documentation makes it plain that they are in issue.

I therefore approach this case on the premise that the husband is in breach both of his covenants in the antenuptial agreement and of the agreement recorded in the order of the district judge dated 7 October 1998, and that there is no justification for either breach.

The wider background

In *Berkovits v Grinberg (Attorney-General Intervening)* [1995] Fam 142, [1995] 1 FLR 477 I decided that a get written in London but delivered to the wife in Israel did not dissolve the parties' marriage in English law, even though the divorce was valid in Israel. At 149F–G to 151F and 484B–486A respectively, I cited in extenso a passage from the argument of Rabbi Bernard Berkovits which set out the procedure for obtaining a get. I will not repeat that passage. For present purposes, the following aspects of the get procedure are relevant:

(1) A get, to be valid, must be a mutually consensual transaction. The husband must freely deliver the get, and the wife must freely receive it.
(2) Only the husband can initiate the get process.
(3) A get obtained by compulsion on either the husband or the wife is invalid in Jewish law.

In *Law, Religion and the State: The Get Revisited* by Professor Michael Freeman published as chapter 24 of *Families Across Frontiers*, edited by Lowe and Douglas (Martinus Nijhoff, 1998 on behalf of the International Society of Family Law) Professor

Freeman points out that the consequences for a wife if her husband refuses to deliver a get which she is willing to receive are much more serious than they are for a husband whose wife refuses the delivery of a get.

Under certain conditions, Professor Freeman states that a husband can invoke a procedure which enables him to circumvent the need for his wife's consent to a divorce. No such procedure is available to a wife. Secondly:

> '... if a wife is separated from her husband and has not received a get she is regarded as "agunah", literally a "chained" or "anchored" woman. She is still "married" to her husband and cannot remarry in religious form until she obtains a get from her husband. If she cohabits with a man other than her husband, whether the man is married or not, she and her lover are guilty of adultery. Any children from such a union are "mamzerim" (bastards). She forfeits her alimony rights, and even if her husband subsequently gives her a get, she is barred from marrying her lover. But the husband who is separated from his wife without granting her a get is not similarly stigmatised. If he cohabits with another woman he does not

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> commit adultery – he is technically "guilty" of polygamy – and any resulting children are not regarded as "mamzerim". Furthermore, if he subsequently delivers a get to his wife, he can marry the woman with whom he has been cohabiting. The consequences of failing to obtain a get can be cataclysmic for a religious Jewish woman, but if her husband refuses to grant her one, the consequences for him are minor in comparison.'

A get delivered and received by a Jewish couple domiciled or resident in England does not, of course, dissolve their marriage in English law: see *Joseph v Joseph* [1953] 1 WLR 1182. However, the English courts have long been aware of the injustice to Jewish women in particular which arises when a husband refuses to initiate the get procedure.

The willingness of the court to mark its disapprobation of a husband's conduct in refusing to give his wife a get is demonstrated by the decision of the Court of Appeal in *Brett v Brett* [1969] 1 WLR 487. In that case the Court of Appeal so disapproved of a husband's refusal to obtain a get that it provided in its order that he should pay an additional instalment of a lump sum within 3 months, if, by that time, he had not obtained a get. However, the courts have also, of course, been aware that a get obtained by compulsion is invalid in Jewish law, and according to Professor Freeman, the rabbinical authorities now regard a get obtained in circumstances such as those prevailing in *Brett v Brett* as coerced and thus invalid.

One of the questions thus incidentally raised by this case, but which is, of course, outside the scope of the present judgment, is whether specific enforcement of the terms of the antenuptial contract would be regarded by the Beth Din as coercion on the husband. However, that question, in my judgment, only arises if I find there is jurisdiction, and would go to the exercise of any discretion which the court may have specifically to enforce the agreement.

The questions in the instant case

Three questions arise:

(1) Are antenuptial agreements as a class specifically enforceable?

(2) If the answer to the first question is 'no' are particular and severable clauses of an otherwise unenforceable antenuptial agreement specifically enforceable?

(3) If the answer to (1) and (2) is 'no' in each case, can an antenuptial agreement or particular clauses in an antenuptial agreement be enforced by other means?

I will deal with each of these questions in turn.

Are antenuptial agreements as a class specifically enforceable?
The attitude of the English courts to antenuptial agreements (as opposed to antenuptial settlements, which are, of course, variable under s 24 of the Matrimonial Causes Act 1973) has always been that they are not enforceable.

The difference between an antenuptial settlement and an antenuptial contract or agreement is that the former seeks to regulate the financial affairs

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of the spouses on and during their marriage. It does not contemplate the dissolution of the marriage. By contrast, an agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union.

Although held to be unenforceable, the courts have accepted that antenuptial agreements may have evidential weight when the terms of the agreement are relevant to an issue before the court in subsequent proceedings for divorce.

The most recent statement of the position in this respect is that by Thorpe J (as he then was) in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, 66. The whole passage merits citation:

> 'The other special condition which has to be considered in this case, albeit briefly, is the existence of the antenuptial contracts. It is not in dispute that contracts of this sort are commonplace in the society from which the parties come. They are much emphasised by the husband in his affidavits, since if strictly applied they would have the ridiculous result of confining the wife to the pension of a German judge, whatever that may be. Equally, in the affidavits the wife is urgent in protesting the circumstances in which they came to be signed. I regard the protestations of both in relation to these contracts as having an urgency that the documents themselves do not demand. In this jurisdiction they must be of very limited significance. The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society. It is said that these contracts would be strictly enforced against the wife in Germany. I have declined to enlarge the arena to allow evidence from German experts in that field. I cannot think that even in Germany the wife would not have the right to deploy a case either that there was some inequality of bargaining power, alternatively undue influence, or that they are inconsistent with social policy in Germany. For the purposes of my determination I do not attach any significant weight to those contracts.'

The critical phrase in this extract is, of course, 'the rights and responsibilities of those whose financial affairs are regulated by statute'. The English law of divorce and financial provision consequent upon divorce is exclusively statutory. There is no divorce at common law, nor can one spouse be required to make financial provision for the other save by agreement or pursuant to an order of the court exercising a statutory jurisdiction. Moreover, even 'maintenance agreements' made between spouses are themselves in their essential terms governed by statute: see the Matrimonial Causes Act 1973, s 34, to which I will return in a moment.

The philosophy which underlies the attitude of the English courts to maintenance agreements is that stated in *Hyman v Hyman* [1929] AC 601. The headnote of that case reads:

> 'A wife who covenants by a deed of separation not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for her by

the deed, and thereafter obtains a decree for

dissolution of the marriage on the ground of her husband's adultery, is not precluded by her covenant from petitioning the court for permanent maintenance.'

At 614 the Lord Chancellor, Lord Hailsham, in a well-known passage, said:

'... it is sufficient for the decision of the present case to hold, as I do, that the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction.'

The same philosophy was subsequently enshrined in s 34 of the Matrimonial Cause Act 1973. That section reads:

'If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then—

(a) that provision shall be void; but
(b) any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable for any other reason ... be binding on the parties to the agreement.'

However, the fact that an antenuptial agreement, or an agreement between spouses, that neither will make a claim for ancillary relief in future divorce proceedings is unenforceable does not mean that the court will not, in appropriate circumstances, hold the parties to that agreement, provided it is just to do so: see, for example, *Edgar v Edgar* (1981) 2 FLR 19. The existence of the agreement, and the weight to be given to it, are both factors to be taken into account in the overall balance when the court is deciding (on the facts of the individual case) whether or not to exercise its discretion under s 25 of the Matrimonial Causes Act 1973 to make orders for financial provision under ss 23 and 24.

Furthermore, in a different context, the terms of an antenuptial agreement may be 'influential or even crucial': see *S v S (Divorce: Staying Provisions)* [1997] 2 FLR 100, 103 per Wilson J. The issue in that case was whether or not divorce proceedings between the spouses should be heard in London or New York. There was an antenuptial agreement between the parties which made provision for the wife in the event of divorce and which was governed by the laws of the state of New York.

The husband sought a stay of the wife's English divorce proceedings, which the judge granted. In the course of his judgment, he said:

'Where other jurisdictions, both in the USA and in the European Union, have been persuaded that there are cases where justice can only be served by confining parties to their rights under prenuptial agreements, we should be cautious about too categorically asserting the contrary. I can

find nothing in s 25 to compel a conclusion, so much at odds with personal freedoms to make arrangements for ourselves, that escape from solemn bargains, carefully struck by informed adults, is readily available here. It all depends.'

These observations, however, inevitably beg the question in the instant case. It is one thing to hold a party to certain aspects of his or her bargain: it is another to hold that the bargain is, itself, specifically enforceable.

A good example of the way the English law operates is demonstrated by the terms of cl 8 of the antenuptial agreement in the instant case. That clause is plainly unenforceable; but that does not mean that the court would refuse to make an order for the mutual dismissal of the parties' financial claims. Such an order is an exercise of the court's discretion under s 25 of the Act taking into account the fact that this was what the parties agreed prior to the marriage and were proposing now.

Leading counsel for the wife did not cite to me any case in which an antenuptial agreement had been specifically enforced. The reason he was unable to do so, in my judgment, is that there is no such case, and that, as a class, antenuptial agreements are not specifically enforceable in English law. As a consequence, the agreement between the parties in this case cannot, in my judgment, be specifically enforced against the husband.

Are particular clauses of an antenuptial agreement specifically enforceable?

As I have already related, the antenuptial agreement in this case provides in terms that the invalidity or unenforceability of any provision of the deed shall not affect the validity or unenforceability of any other provision and any invalid or unenforceable provision will be severable.

Leading counsel for the wife sought strenuously to persuade me that cls (10) and (11) of the antenuptial agreement, together or separately, were severable from the agreement as a whole, and that, in particular, the husband's agreement in cl (10) of the agreement to attend the Court of the Chief Rabbi, the London Beth Din (or such other Beth Din as that Beth Din shall direct) when requested to do so and to comply with the instructions of that Beth Din was specifically enforceable against the husband as a matter of contract. On this basis, it was argued, the court had jurisdiction to make orders in the terms of paras 1 and 2 of the summons. I am unable to accept that argument.

Even if one divides up the antenuptial agreement in this case, and looks at the individual clauses separately, one cannot, in my judgment avoid the fundamental proposition that each is part of an agreement entered into before marriage to regulate the parties' affairs in the event of divorce. The public policy argument, therefore, continues to apply.

Furthermore, cl (11) is clearly an agreement to arbitrate. I was referred to *Snell's Equity* (Sweet & Maxwell, 29th edn, 1990), p 596 where the following propositions are advanced:

> 'Equity will not directly enforce an agreement to appoint an arbitrator. But the court may indirectly compel performance of the agreement by staying any action which is brought, if a party to the proceedings so applies; and in certain cases the court has statutory powers to appoint arbitrators, or itself act as the arbitrator.'

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I take that to be an accurate statement of the law. There is no power in any of the statutory provisions governing this case to appoint an arbitrator or compel the parties to implement cl (11) of the agreement.

In my judgment, a court exercising a statutory jurisdiction can only make and enforce orders which the statute permits it to make. An analogy can be drawn here with s 29 of the Family Law Act 1996, which amends s 15 of the Legal Act 1988 to provide that:

> 'A person shall not be granted representation for the purposes of proceedings relating to family matters, unless he has attended a meeting with a mediator ...'

Mediation is a voluntary process. The court cannot compel parties to mediate. However, s 13(1) of the Family Law Act empowers the court to give a direction:

> '... requiring each party to attend a meeting in accordance with the direction for the purpose—
>
> (a) of enabling an explanation to be given of the facilities available to the parties for mediation ... and
> (b) of providing an opportunity for each party to agree to take advantage of those facilities.'

Section 13 of the Family Law Act 1996 is not, of course, in force. It is, however, significant that statutory provisions are required to give the court jurisdiction to compel parties to attend meetings relating to mediation.

The same argument applies to cl (10) of the antenuptial agreement in this case. In the absence of any power in the Matrimonial Causes Act 1973 or in the Children Act 1989, I cannot compel specific performance of cl (10) of the agreement.

Specific enforcement of the order of District Judge Bowman made on 7 October 1998

In my judgment, similar considerations apply to the order made by the district judge. The actual order she made is for contact. The husband's agreement that he will progress the obtaining of the get expeditiously is a recital. The husband did not give an undertaking to do so, and even if he had, such an undertaking would only be enforceable by committal, not by specific performance.

Apart from agreements or undertakings to pay or procure the payment of money (to which different rules apply) an undertaking to the court to perform a particular act is, of course, enforceable by committal for contempt of court: thus, if a husband undertook to the court to apply promptly for a get to be written, and failed to do so, he would, in my judgment, be prima facie in contempt of court and liable to committal proceedings.

Any argument on behalf of such a husband that he was not in contempt because the court had no jurisdiction to order that which he undertook to do; or that the court should not enforce by committal that which it has no jurisdiction to order is, once again, outside the scope of this judgment.

It is true that in proceedings for ancillary relief following divorce, cases are routinely compromised on the basis either of undertakings by one party

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to carry out actions which are not within the jurisdiction of the court to order under ss 23 and 24 of the Act or 'on the basis that' one or both of the parties will undertake such acts. Examples are agreements by one spouse to pay debts incurred to third parties by the other; or to discharge a mortgage; or to procure the transfer into the ownership of the other spouse property - such as a motor car - belonging to a third party. It is easy to multiply examples.

Such agreements are plainly lawful and binding, and the order of the court may be enforced by judgment summons, attachment of earnings, garnishee, charging orders, execution against goods, writs of possession or sequestration, the appointment of a receiver, and so on. However, as already stated, such agreements, even when recited in an order of the court, are not, in my judgment, specifically enforceable.

In such cases, if one of the spouses refuses to fulfil an obligation recorded in the order by way of recital or agreement but which is not enforceable by conventional means, the court has the jurisdiction to set the order aside and make a different order or, where it has jurisdiction to do so, to vary its terms.

The agreement recorded in the order of District Judge Bowman on 7 October 1998 is not an undertaking. It is not, therefore, in any event enforceable by committal, nor, for the reasons I have attempted to give, is it specifically enforceable. I therefore cannot

make an order in the terms of the husband's agreement as recorded in the court's order.

The only means available to the court specifically to enforce the order of the district judge would be by way of mandatory injunction. However, as is well known, the court can only make an injunction under s 37 of the Supreme Court Act 1981 in support of a legal right. In cases where the legal right is given by a particular statute, the procedure laid down by that statute must be followed. Where the subject matter is not governed by statute, the circumstances must appear to the court to be 'just and equitable': see *Richards v Richards* [1984] 1 AC 174, 199A–200D, per Lord Hailsham LC.

Whilst it may well be 'just and equitable' to order the husband to do that which he has agreed to do, the only 'right' upon which the wife can rely is an unenforceable clause in an antenuptial agreement. Ex hypothesi that cannot, in my judgment, found the basis for an injunction.

Furthermore, the claim for the injunction must arise out of or be incidental to the substantive relief sought in the proceedings: see, for example, *Des Salles d'Epinoix v Des Salles d'Epinoix* [1967] 1 WLR 553. As counsel for the husband pointed out, the only proceedings pending between these parties relate to AS. I do not think that such proceedings can give rise to injunctive relief under s 37 of the Supreme Court Act 1961 of the type sought in the wife's summons.

I shall, however, return in due course to the interrelationship between the agreement to progress the obtaining of the get expeditiously and the husband's application for contact with AS.

Can an antenuptial agreement or particular clauses in an antenuptial agreement be enforced by other means?

As the extract from *Snell's Equity* set out above indicates, there are ways in which the court has the power indirectly to compel performance, if it were to take the view that the husband was in unwarranted breach of his covenants under the antenuptial agreement and/or the terms of the agreement recited in

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the order of the district judge. The question is whether or not any of them apply in the instant case.

Refusal to make a decree nisi of divorce absolute

In this case, the wife petitioned for divorce; it was she who obtained a decree nisi and applied for it to be made absolute. She did so, moreover, almost immediately after the expiration of the minimum period permitted (6 weeks) between decrees nisi and absolute. The wife plainly wanted the decree made absolute.

The court has a discretion to decline to make a decree nisi of divorce absolute on the application of a spouse against whom the decree nisi has been pronounced if there would be prejudice to the spouse who had obtained the decree: see, for example, *Wickler v Wickler* [1998] 2 FLR 326 and the cases there cited.

Thus, in a case in which a husband had agreed to obtain a get and had not done so, I have no doubt that it would be within the proper exercise of the court's jurisdiction to allow a wife petitioner to delay making the decree nisi absolute, and then to decline to give leave for the decree nisi to be made absolute on the husband's application until such time as he had honoured his agreement to obtain a get.

Equally, in a case proceeding on the basis of 2 years' separation, s 10 would plainly apply if a Jewish wife gave her consent to a divorce on the basis that the husband would obtain a get, and he did not do so.

I can also envisage circumstances in which the refusal to initiate the get procedure would result in grave 'financial or other hardship' under s 5 of the Act.

However, none of these options applies in the instant case. The wife was the petitioner. The decree nisi which she obtained has been made absolute on her application. Both the court's statutory and discretionary jurisdiction in this respect is

thus spent.

The dismissal of the wife's claims for ancillary relief

The court, by means of s 25 of the Matrimonial Causes Act 1973, has a discretion whether or not to exercise its jurisdiction under ss 23 and 24 to make orders for financial provision and property adjustment. In my judgment it follows that, in a case where a husband had agreed to provide a get, the court could properly decline to exercise its jurisdiction to make an order dismissing all a wife's claims unless and until he had done so.

Alternatively, a wife could properly seek to extract an undertaking or an agreement from the husband in the terms of paras 1 and 2 of the current summons as the price of her agreement to the dismissal of her claims. If the husband then failed to honour his agreement, the court could set aside the consent order.

In the event, this is not what happened in this case. No doubt, in consenting to the order, the wife was demonstrating her good faith. However, the order of the court is in conventional form. Its recital simply confirms that it is designed to achieve a clean break and that the contents of the former matrimonial home have been divided between themselves. Save in relation to AS's maintenance, therefore, the jurisdiction of the court in relation to financial issues between the spouses is spent.

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There is no application before me to set aside the consent order, and given that it appears to have been negotiated between experienced solicitors, I think it highly unlikely that such an application would have any prospect of success. Furthermore, since the court's financial jurisdiction (save insofar as it relates to AS) is spent, there are, in my judgment, no pending financial proceedings in which the husband's agreement to progress the obtaining of a get expeditiously, or any undertaking by the husband that he would do so, could in any event be enforced.

Proceedings under the Children Act

It appears that the husband was making an application to the court for residence in relation to AS, although that is now withdrawn. He is, however, seeking contact. These proceedings are, accordingly, pending, and it was in these proceedings that the husband gave his agreement on 7 October 1998 that he would progress the obtaining of the get expeditiously, something which he has plainly not done.

In the course of argument in this case, the possibility was canvassed that the court could impose an obligation on the husband to progress the obtaining of the get as a condition of contact under s 11(7) of the Children Act 1989. For the reasons which follow, I do not think that s 11(7) is apt for this purpose.

Under s 11(7) of the Children Act, the court has power to give directions about how a contact order is to be carried into effect. By virtue of s 11(7)(b) it can impose conditions which must be complied with by any person (i) in whose favour the order is made; (ii) who is a parent of the child concerned; (iii) who is not a parent of the child in question but who has parental responsibility for the child; or (iv) with whom the child is living and to whom the conditions are expressed to apply. Under s 11(7)(c) and (d) of the Act the court can make a contact order which is to have effect for a specified purpose, or contain provisions which are to have effect for a specified period; and can also make 'such incidental, supplemental or consequential provision as it thinks fit'.

In *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 128, Sir Thomas Bingham MR (as he then was) described s 11(7) as conferring 'a wide and comprehensive power to make orders which will be effective to ensure contact between the child and the non-custodial parent where to do so is judged to promote the welfare of the child'.

Although the words of the section are very wide, the court is given its powers under s 11(7) 'as a necessary means of facilitating contact': per Sir Thomas Bingham MR in *Re O* (above, at 133A). I can envisage extreme circumstances in which a father's refusal to

provide a get so adversely affected the relationship between the child's parents and/or the father and the child that contact could not be said to be in the interests of the child whilst the issue of the get remained outstanding. In these circumstances it would, I think, be possible for the court either to make no order for contact or to refuse to order contact whilst the issue remained outstanding, provided always that the order so made was in the interests of the child.

That said, I would be extremely reluctant to interpret the wide words of s 11(7) as embracing the obtaining of a get as a condition of contact. The courts have always set their face against financial provision for a child as a

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bargaining counter in proceedings for contact: it seems to me that similar considerations apply to the question of a get.

It should, however, be noticed that in *Frey v Frey* (unreported) 22 February 1984, the Family Court of Australia made access to children a condition of the granting of a get. In the chapter by Professor Freeman in *Law, Religion and the State: The Get Revisited* to which I have already referred Professor Freeman describes the decision as 'unprecedented elsewhere'. He comments further (at p 370):

> 'The court made access to the children a condition to the granting of a get. It claimed that if it is entitled to deny the access of one parent when the tension between the former spouses detrimentally affects the children, a court must be entitled to impose such conditions as would reduce parental tensions. The decision has been praised (see (1987) 6 Jewish Law Annual 210) as establishing family needs as the cardinal principle, but it is dubious whether it meets the requirements of halakah and therefore cannot be recommended as a solution.'

I am dealing in this judgment with jurisdiction, not discretion. Whether a get obtained as the result of an order such as that made in *Frey v Frey* meets the requirements of halakah seems to me to go to the discretion whether or not to make such an order, not to jurisdiction, and thus outside the scope of this judgment.

Whilst, as I have said elsewhere, 'never' is a difficult word to say in the Family Division (*Re CB and JB (Care Proceedings: Guidelines)* [1998] 2 FLR 211, 219), I do not think that making the delivery or acceptance of a get a condition of contact sits easily with s 1 of the Children Act 1989 or that it can easily be construed 'as a necessary means of facilitating contact' within *Re O (Contact: Imposition of Conditions)* (above).

Whether or not there is jurisdiction to impose the obtaining of a get as a condition of contact, however, there remains, in my judgment, a residual discretion not to entertain an application for contact by a husband in the position of this husband. This is a proposition to which I will return.

A direction to obtain a get as a specific issue order

Similar considerations, in my judgment, apply to an application under s 8 for a specific issue order. A specific issue order is defined by s 8(1) of the Children Act 1989 as 'an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child'.

'Parental responsibility' is defined by s 3(1) of the Act as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.

I do not think it can be said that co-operation in the obtaining of a get falls within, or has any connection with any aspect of parental responsibility for a child. It is, of course, desirable that there should be parental co-operation in relation to all aspects of a child's life, but in the same way that a specific issue order could not be used to compel a spouse to take divorce proceedings under the Matrimonial Causes Act 1973 it cannot, in my judgment, be used to direct a parent to agree to a get.

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Entertaining the husband's claim for contact

It is well established that the court has a discretion not to hear a party who is in contempt of court: see *Hadkinson v Hadkinson* [1952] P 285, (1952) FLR Rep 287, most recently applied in *Baker v Baker (No 2)* [1997] 1 FLR 148. In the latter case, the court applied the dictum of Lord Denning MR in *Hadkinson* that refusal to hear a party would only occur when the contempt impeded the course of justice and there was no other effective means of securing the husband's compliance.

In my judgment, similar considerations can apply where a husband, as here, has agreed in the face of the court to take a particular course of action and his agreement to do so is recorded in the order of the court. There is no jurisdiction to require the husband to co-operate in obtaining a get, but in the same way that the court could properly decline to entertain his application for the decree nisi of divorce to be made absolute, or his application for the wife's claims for ancillary relief to be dismissed, it would in my judgment be open to the judge hearing the husband's application for contact to decline to do so unless and until the husband had honoured the agreement recorded in the order of the district judge on 7 October 1998.

However reprehensible his conduct may be, the husband is not in contempt of court for the reasons I have already given. But his failure to honour his agreement means, in my judgment, that the court is given a discretion to decline to entertain his application for contact until such time as he does so.

Whether or not the court takes that course when the matter comes before the judge on 26 July 1999 will be a matter for the judge hearing the application. The judge will, of course, have to look at the welfare of AS. If AS's welfare, which is paramount, requires the court to entertain the father's application then that factor will outweigh the court's reluctance to entertain a claim by a man who has made an agreement in the face of the court and then resiled from it without apparent cause.

There is an order for contact already in force. The father seeks to alter the status quo and obtain additional relief from the court. In the circumstances of this case, it seems to me that the court could properly decline to take any such course on the application of a litigant who is in breach of an agreement recorded in a previous order of the court.

Thus, if, for example, the husband's application for residence now withdrawn (combined as it was with a suggestion that the mother is psychiatrically unwell and thus unable properly to care for AS) is perceived by the judge hearing the contact application as part of a campaign to intimidate or harass her – a campaign of which the refusal to obtain the get is a part – then the judge would, in my judgment, be entitled to exercise the court's discretion by refusing to entertain the father's claim, provided that the refusal to do so did not prejudice AS's welfare.

Clearly, where the welfare of a child is concerned, the court will be slow to refuse to exercise its jurisdiction if the welfare of the child requires the matter to be heard. It is, however, noticeable that in *Hadkinson v Hadkinson* the Court of Appeal was of the view that where the order relates to a child, the court should be adamant in the due observance of the rule.

Law reform

Under s 9 of the Family Law Act 1996 (until the recent announcement by the Government due to be brought into force in the latter part of the year

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2000) the parties to a marriage are obliged to have made 'arrangements for the future' of a specified nature before the court will make a 'divorce order'. The parties must produce to the court one of the following:

(a) a court order (made by consent or otherwise) dealing with their financial arrangements;
(b) a negotiated agreement as to their financial arrangements;
(c) a declaration by both parties that they have made their financial arrangements;
(d) a declaration by one of the parties (to which no objection is taken by the other) that there are no financial arrangements to be made because neither party has significant assets nor intends to make an application against the other.

Section 9(3) and (4) of the Act are in the following terms:

'(3) If the parties—

(a) were married to each other in accordance with usages of a kind mentioned in section 26(1) of the Marriage Act 1949 (marriages which may be solemnised on authority of superintendent registrar's certificate); and
(b) are required to co-operate if the marriage is to be dissolved in accordance with those usages,

the court may, on the application of either party, direct that there must also be produced to the court a declaration by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages.

(4) A direction under subsection (3)—

(a) may be given only if the court is satisfied that in all the circumstances of the case it is just and reasonable to give it; and
(b) may be revoked by the court at any time.'

These two subsections have becomes known as the 'get' clause, although they also apply to Quakers. Under the new legislation, therefore, the court will have the power to refuse to make a divorce order (that is to dissolve the marriage in English law and give the parties the status of divorced persons who are free to remarry) unless the husband has given the wife a get, and she has accepted it.

The Government's recent decision not to implement Part II of the Family Law Act 1996 means that the injustice which Jewish spouses, particularly women, suffer as a consequence of a refusal by the other spouse to agree to a get will not, in the foreseeable future, be remedied, even though, in an appropriate case the court, in my view, currently has the power to refuse to permit a decree nisi of divorce to be made absolute on the application of a spouse who is refusing to co-operate in the grant and receipt of a get.

Conclusion

Although, as set out above, there are steps which the court can take to demonstrate its disapproval of a refusal by a Jewish spouse to co-operate in

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the delivery and the receipt of a get, it does not, in my judgment, have jurisdiction to grant the relief sought by the wife in the instant summons. It follows, therefore, despite the fact that I reach the conclusion with considerable reluctance, that the wife's summons must be dismissed.

Footnotes

I wish to add two further comments. The first is that it was, I think, most unfortunate that such an important issue should have come before the court on a summons listed to last half an hour.
Whilst I understand the reasons for that listing (in particular that the husband's response to the wife's summons was very late), it was only by good fortune that there was time in my list for the matter to be argued.
Secondly, I observe that in his commentary to s 9 of the Family Law Act 1996 in vol 2 of *Current Law Statutes* for 1996, Professor Michael Freeman comments:

> 'It is a sad reflection on the dilemma of a religious minority that, having forgotten its liberal heritage, it has to call upon the dominant culture to bale it out. The Jewish community should not have to go cap in hand to legislatures in countries in which they live when, by rediscovering their own sources and interpreting these creatively and dynamically they can solve problems which their interpretations have created.'

My judgment in this case demonstrates the limited extent to which the civil courts can or should interfere in the life of any religious minority. The Government has recently canvassed the possibility of making antenuptial agreements binding. In my judgment, if there is to be reform in the area of the law covered by this judgment it is for Parliament and/or the Jewish community to bring it about.

Solicitors: *Levison Meltzer Pigott* for the wife
Roberts McCracken for the husband

DEBORAH DINAN-HAYWARD
Barrister