New Jersey Law Journal

VOL. 208 - NO 7 FEBRUARY 13, 2012 ESTABLISHED 1878

COMMENTARY

Chipping Away at Divorce Quagmire For Muslim and Jewish Women

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The ideal solution to protect New Jersey women whose husbands refuse to grant them a religious divorce is to adopt a New York-style law. There, litigants must allege in the verified complaint that before entry of final judgment of divorce, any barrier to the spouse's remarriage has been removed.

But a New Jersey state appeals court, ruling in *Lowy v. Lowy*, has given women the next-best thing: an enforceable mechanism for a religious divorce.

The issue of whether a court has the authority to order a litigant to grant a religious divorce has perplexed courts across the country, resulting in conflicting opinions.

In 1981, the Chancery Division, relying on implied contract theory and interpretation of Jewish law, directed the husband in *Minkin v. Minkin*, 34 A.2d 665, to grant his wife a religious divorce, called a get, because he agreed to be bound by Jewish law. *In Burns v. Burns*, 538 A.2d 438 (Ch. Div. 1987), the court directed the husband to initiate proceedings for the get in the Rabbinical Court. But *Afalo v. Afalo*, 685 A.2d 523 (Ch. Div. 1996), held that the court lacked authority to direct the husband to give his wife a get because it would violate the First Amendment.

The only reported appellate court decision in New Jersey is *Mayer-Kolker v. Kolker*, 359 N.J. Super. 98 (App. Div.), cert. denied, 177 N.J. 495 (2003). There, the court affirmed a trial judge's refusal to direct the husband to grant a divorce but remanded for the "development of a more complete record as to the parties' obligations under Mosaic law, including the ketubah [the Jewish marriage contract] and for a determination in light of such facts as to whether the court can compel defendant to cooperate with plaintiff in obtaining a get."

The Appellate Division has finally spoken on a trial court's authority to order a party to grant a religious divorce. In *Lowy*, A-472-10, issued last December, the parties' final judgment of divorce incorporated a Rabbinical Court decision in their dual final judgment of divorce.

The rabbinical decision provided: "If the arrangements for a Get will be made between Plaintiff and Defendant, Plaintiff shall pay for Get fees incurred." Studying the decision as a whole, the trial court creatively concluded that the husband was obligated to grant the wife a religious divorce.

The Appellate Division correctly noted that on its face, the rabbinical decision "did not require defendant to provide plaintiff with a Get." Finding that the trial judge lacked the authority to order a religious divorce, the trial court's order, therefore, constituted an unconstitutional entanglement in religious doctrine.

The *Lowy* court noted that the express language of the litigant's ketubah did not require the husband to grant his wife a religious divorce. Without the rabbinical decree or the agreement of the parties, as a source of authority, the *Lowy* court held that directing the husband to grant a get "constitute[d] impermissible judicial involvement in a matter of religious practice ... [and the] defendant ... was not bound by any contractual agreement to do so."

In sum, *Lowy* makes clear that an agreement to grant a religious divorce is enforceable by a trial court. New York is the only state that provides a civil remedy to compel a spouse to remove barriers to remarriage — in effect, granting a religious divorce — without the existence of an agreement between the parties. Many husbands refuse to grant religious divorces so they can extract better financial settlement terms or because they simply desire to punish the wife, as occurred in *Segal v. Segal*, 650 A.2d 996 (App. Div. 1994).

In most states, it is extremely difficult for a woman to obtain a religious divorce without her husband's consent. Ohio, for example, will not even enforce a settlement agreement providing for the granting of a religious divorce on unconstitutional entanglement grounds. *Steinberg v. Steinberg*, 1982 WL 2446 (Ohio App., 1982).

Without a religious divorce, a woman is religiously chained to her husband. Despite obtaining a civil divorce, a woman

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must obtain a religious divorce to remarry. If a Jewish woman remarries without one, she is considered an adulterer. As a result, children born out of this adulterous relationship may be considered illegitimate, with serious religious legal consequences ranging from inheritance ineligibility to marriage restrictions.

In the Muslim context, without a religious divorce, a woman cannot remarry. If she does, her marriage will be void and she will be committing adultery. With a Muslim woman's marriage still subsisting, her former husband will be considered the legally surviving husband entitled to inherit. The situation is even more complicated for Muslim women who marry abroad or continue to visit their native country. For example, several Muslim countries subject wives to travel restrictions.

Our country needs a legal remedy to protect women within our secular legal system. The U.S. Supreme Court anchors its separation of church and state jurisprudence in elaborate balancing tests. To best serve our clients, lawyers must balance the secular, legal remedies with our clients' religious requirements.

Religious requirements and secular remedies intersect in so many ways. While not the ideal solution because a husband could still refuse to agree to the religious divorce in the settlement or premarital agreement, *Lowy* does provide an effective secular remedy to a women's religious divorce quagmire short of a get law.■