

The death of good faith in filing for divorce in Israel

Given: September 23, 2010

I chose to speak about the death of good faith in filing for divorce in Israel which is basically a SMJ issue.

I will give you some background about the court system in Israel before moving to the issue itself. Then I will present the problem of inequality between men and women in a specific aspect of the legal system and the following attempts that were made in hope to correct this problem AND the final failed attempt by the Supreme Court in Israel which resulted, in my opinion, with somewhat absurdity.

Let me just say that I practiced real estate law for a few years so this area of law could not be further away from me, HOWEVER I found it fascinating and I wanted to share it with you.

Background

I want to give a bit of background about the Israeli court system: 3 instances (city which is the peace court [trial for issues under 5M shekels + less than 7 years incarceration: diversity juris + \$75K: 1332 of USC], county (trial court for all issues that are not brought to city court + specific issues like the federal court [antitrust: 1337 of USC, patents and IP rights: 1338 of USC] AND reviewing court for city court decisions, supreme), no constitution but guild lines with variations from the American constitution such as no "fruit of the poisonous tree" doctrine.

Civil court, criminal court and religious court. The Muslims have their court, the Christians have their court and the Jews have the Rabbinical court. The key element is that Rabbinical court is basing his decisions on what the Tora and other religious scriptures order. It regards the common law as a recommendation only.

Rabbinical court was combined in the legal reality of a young country (declaration of independence was Nov 1949) through the Matrimony Act of 1953 (1953 Act). The Matrimony Act stated that the Rabbinical court has exclusive Jurisdiction over marriage and divorce between Jewish people only. For example: are 2 people married according to the Tora or not? Is someone an unintentionally polygamist? Is the marriage annulled because of severe abuse? Other much less significant matters were put under the SMJ of the Rabbinical court such as Kosher Certification for businesses, conversions (who is a Jew?) NOTE: to present evidence of someone's Jewishness in Rabbinical court can be by presenting a statement from a Rabbi whereas in civil court, it would be inadmissible.

So the Rabbinical courts were given the exclusive power over Matrimony and Divorce. However, somewhere in history the Rabbinical courts had decided that since they have power to rule over civil and criminal matters, they might as well rule exclusively on things that derive from it and are still related to matrimony. We call it "Matrimony Related Issues". For example, civil matters like child support and alimony were not given at all to the Rabbinical court under the Matrimony Act and still they ruled on it and not only did they rule on it, they did so exclusively.

So, Rabbinical courts have exclusive power over Matrimony and they took to themselves to rule exclusively on Matrimony Related Issues.

I. Inherent Inequality: Men or Women

Problem: As I mentioned, the Rabbinical courts basing their decisions on Judaism. For those who don't know, in any matter that is related to spousal relationships, the Jewish religion favors the male over the female. As a result, the rabbinical court with accordance to Judaism is favored the man over the woman in its perception as well as in its ruling. This became the legal reality. However, in progressive times such as ours, such thing is unthinkable so after a long cry and intense lobbying a solution to the inequality was presented in 1995 – The establishment of family court under the Family Court Act of 1995 (herein: 1995 law). The 95 Act determined the establishment of a secular court that is NOT basing its decisions on religion but on common law. The SMJ of the family court would include the parallel power to rule on all matters that the rabbinical court saw fit to rule on, namely all “Matrimony Related Issues” [chart]

II. Rabbinical Court or Family Court

SO NOW WE HAVE 2 COURTS – We also have 2 problems:
Suppose you want a divorce, which of the 2 courts are you supposed to go to? The way to resolve this dilemma is the simple rule of chronology - FIRST COMES FIRST SERVED: the court in which the divorce proceedings commenced in first, would preside. This race between spouses is called The Authority Race.

The second problem is: suppose you file for divorce in Rabbinical court, Can your spouse ask for alimony in Family court? It would create to parallel proceedings!
The solution presented by the 1995 Act was that if you start divorce proceedings in one court you can tie all MRI issues under the same set of laws. For example, if a man goes to the rabbinical court to file for divorce, he can tie all related matters such as alimony, to the motion for divorce. It works the other way around too for the woman. Now, since rabbinical court favors the man and family court was established to correct that, men would want to go to rabbinical courts and women would prefer family courts.

However, because of the Authority Race, so much is at risk. You don't want couples that are on the fence, start thinking about divorce straight from the beginning because they are afraid of loosing the Authority Race should things won't work out. In other words, imagine a woman that may or may not wish to divorce her husband and she goes to see a lawyer. The best advice the lawyer can give is saying “maybe things at home will go back to what it was, but just to be on the safe side, don't waste time talking to me – run to your court and file for divorce first, since you don't want to loose the Authority Race.” Such legal reality, get people thinking about filing for divorce even before they decided to do so.

III. Lawsuit or Motion

Now, in Israel, in order to start divorce proceedings you need to file a complaint against your spouse and you need as a matter of fact to argue with “specificity” much like Rule 9 of the Federal Rules of Civil Procedure, namely to give **details** concerning your accusations. The outcome is 2 bitter people with a messy divorce with no room for any negotiations whatsoever.

Solution: the justice department was aware of this problem and in 1996 the AG of Israel published a regulation in which he allows a divorcee to file a motion to either of the courts (Rabbinical OR Family) – motion and not a complaint – and NOT to give details while filing; not meet the specificity requirement. And so you refrain from accusing your spouse openly and leave room for dialogue or at least allowing the court to help breeching the gap.

NOTE: Since we are talking about the AG and not the Supreme Court, there is no rule of binding resolutions, and therefore it was unclear whether the AG regulation is valid or not, since the family and rabbinical courts ruled as they saw fit. They considered the AG regulation was a recommendation and not a binding resolution. It damaged the uniformity of the law; lawyers could not advise their clients. This was an unbearable situation until 23.6.09 when the supreme court ruled on a case on this issue: the validity of the AG regulation: 7 judges against 2 agreed that the AG's regulations are valid and indeed the procedure of filing a motion is the appropriate procedure, **under one condition** – the person who files the motion, done so in good faith, AND the court who rules on whether it was done in good faith is the court to which the motion was submitted to?!?!?!

AGAIN – for illustration

2 people getting a divorce; the man runs to rabbinical court and the woman to family court. If you file a complaint that obligates you to include details, the chances for dialogue are less than good. So, according to the Supreme Court and the AG, you can file a motion that leaves room for settlement. According to the Supreme Court if you want to file a motion you have to do so in good faith. Who determines good faith? The same court that would hear the case if the negotiations fail.

This currently is the situation in Israel !

Now I'm going to give you my opinion about this situation.

IV. The Absurdity: the Finish Line is also the Starting Line

The absurdity: the result of such ruling by the Supreme Court, De-Facto kills the possibility for filing a non-detailed motion and to that extent kills the chances for dialogue between spouses. Because now they would be forced to file a complaint that meets the specificity requirement and back to the Authority Race.

REMEMBER: until 1995 the rabbinical court exclusively ruled on matrimony issues as well as MRI, and in **most cases favored the man**. Now imagine a man filing a motion for divorce to rabbinical court and the court has to determine if he had done so in good faith... what do you think the rabbinical court will say? "You did so **not** in good faith"? NO – the rabbinical court would want to hear the case. The Rabbinical court would want back the exclusivity on ruling on Matrimony issues as well as on MRI. And the Supreme Court reinstated the Rabbinical Court with the power to do so and send the couple back to the Authority Race.

And in fact, following the Supreme Court's decision, 2 motions for divorce were brought by men before the rabbinical court and it was asked to rule on the issue of good faith and what do you think the ruling was? "It's in good faith! Now let's hear your opening statements!"
What a Surprise!!!

That concludes my lecture. If you have any questions...