Re Morris and Morris: A Case Comment

Religious considerations frequently arise in the divorce process. Catholics, for example, do not recognize the concept of divorce in their ecclesiastical law, and this sometimes inhibits their resort to civil divorce. Parties of other persuasions, such as Jews, may regard a civil divorce as inadequate to break the ties of marriage, unless also accompanied by a religious divorce.[1] Although the civil law of the parties' domicile may recognize and give full civil effect to a religious divorce (as is the case under the law of Pakistan[2] or Israel[3]), in much of the rest of the world a religious divorce itself does not sever the legal ties of marriage: only a civil divorce will suffice. Nevertheless, the mere obtaining of a civil divorce, while necessary, may not be regarded by one of the parties (particularly a devout adherent to the faith) as sufficient to permit remarriage: only a religious divorce will suffice. This problem may be compounded if the religious divorce, such as the Jewish *Get* or the Moslem *talak*, is essentially a unilateral act of repudiation of the wife by the husband. For example, if an orthodox Jewess after a civil divorce requests that her former husband give her a rabbinical divorce (or *Get*), he may refuse, thus preventing her from remarrying in good conscience. Can a woman in this position resort to the civil courts to compel her former husband to grant the religious divorce? This was the issue in *Re Morris and Morris.*[4]

Mr and Mrs Morris had been married in Winnipeg in 1955 by a rabbi in an orthodox Jewish wedding ceremony incorporating the orthodox Jewish marriage contract of *Kethubah.* This ceremony complied with the requirements of the Manitoba *Marriage Act.*[5] In

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[1] See generally Maidment, *The Legal Effect of Religious Divorces* (1974) 37 M.L.R. 611; for the position in the United States, see *Enforceability of Religious Law in Secular Courts — It's Kosher But Is It Constitutional?* (1973) 71 Mich.L.R. 1641-53.

[2] Whereby Moslem husbands are entitled to divorce their wives by *talak* — a three-fold act of renunciation.

[3] Whereby Jewish husbands are entitled to institute a rabbinical divorce or *Get.*

[4] (1973) 36 D.L.R. (3d) 447 (Man.Q.B.), (1974) 42 D.L.R. (3d) 550 (Man.C.A.); (1975) 51 D.L.R. (3d) 77 (Man.C.A.; leave to appeal to S.C.C. granted, on terms).

[5] *The Marriage Act,* R.S.M. 1970, c.M50. Under ss.91 and 92 of the *British North America Act, 1867,* 30-31 Vict., c.3 (U.K.) divorce is a matter within the legislative competence of Parliament, while the solemnization of marriage falls under the comptetence of provincial legislatures.

1972 the marriage was ended by a civil divorce from the Manitoba Courts.[6] The wife, as an orthodox Jewess, did not regard her marriage as ended until the husband had instituted proceedings for a *Get*, which he, for unexplained reasons, declined to do. In the meantime, as the wife wished to remarry, she instituted civil proceedings to compel her husband to grant her the religious divorce.[7] The petitioner based her claim on the marriage contract, which professed to be governed by Jewish law and the fact that Jewish law requires a woman to obtain a *Get* before remarrying. If she did not obtain the *Get* and nevertheless remarried, any subsequent children would be *mamzerim* (illegitimate) in the eyes of orthodox Jewish law. Wilson J., at first instance, granted an order declaring Mrs Morris' right to a *Get*, as well as a further order of *mandamus*[8] compelling Mr Morris to institute proceedings for the *Get*.

Four of the extraordinary five-man Court of Appeal[9] reversed Wilson J.'s decision and refused to grant either a declaratory order or *mandamus*. The majority declined to extend the process of the civil court to interfere with proceedings of a religious tribunal. Nor did the majority regard the matter simply as turning on a question of contract. They noted that the religious marriage contract lacked the precision of a normal civil contract and might have been regarded as part of the marriage ceremony, the vows being similar to those of a number of different denominations.[10] Furthermore, as two

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[6] In fact, a number of other proceedings were instituted both in Manitoba and in Quebec, the location of the former matrimonial home.

[7] Before the case was heard, she in fact remarried in a civil ceremony.

[8] *Mandamus* is generally thought to be a prerogative remedy which is used to enforce a *public* duty owed to the applicant. The question of whether there is a *public* duty on a divorced Jewish husband to grant his former wife a *Get* was not canvassed by Wilson J. or by the Court of Appeal. This may be because of the broad wording of s.58 of Manitoba's *The Queen's Bench Act*, R.S.M. 1970, c.C280, s.58, which provides as follows:

> "a *mandamus* to command the fulfilment of any duty in the fulfilment of which the party claiming it is personally interested may be granted in any action in which it is claimed by the statement of claim or by the counter-claim; but, notwithstanding anything herein, the court may upon motion, not in an action, in all cases where the prerogative writ of *mandamus* might at any time formerly have been granted, grant an order of *mandamus* which shall have the same effect as the writ of *mandamus* formerly had."

Note that the proceedings in *Morris* were brought by way of a notice of motion, not by action. *Quaere*: does s.58 broaden the availability of *mandamus* beyond the former writ, so that a *public* duty is not required *in an action*?

[9] (1974) 42 D.L.R. (3d) 550, Guy, Hall, Monnin and Matas JJ.A.; Freedman C.J.M. (dissenting).

[10] *Ibid.*, 550, 565.

members of the Court pointed out,[11] "one who comes to a Court of equity must come with clean hands". In this case, Mrs Morris herself had launched the divorce proceedings and had remarried under civil law. Although she realized that her conduct was contrary to Jewish law, she proceeded while this very action was before the Court.[12] All of the judgments in the Court of Appeal noted that in earlier Canadian cases civil process issued to protect the property of religious societies and associations. Nevertheless, the majority in *Morris* held that the civil courts will only intervene in the affairs of such an institution in order to protect civil rights.[13] The Courts will not allow the use of their process to enforce a purely ecclesiastical order. The majority of the Court of Appeal was not prepared to categorize either the opportunity of marrying in a state of grace within the Jewish community, or the prevention of illegitimate children under Jewish law, as pertaining to Mrs Morris' civil rights. For all civil law purposes, the applicant's second marriage was valid, and any children thereof would be legitimate.

Did the Court of Appeal hold (i) that it had no jurisdiction to issue the orders sought, or (ii) that, having jurisdiction, it would exercise its discretion not to issue the orders? Both Guy and Matas JJ.A.,[14] in their separate majority opinions, referred to the difficulties which would arise if Mr Morris refused to comply with Wilson J.'s mandatory second order. What could the court do in such a situation? The contempt powers are hardly appropriate as a way of ensuring that the husband grant his wife a *Get;* the Court is always reluctant to make an order which is an idle threat or *brutum fulmen* which would not itself secure the *Get.* Matas J.A. went further and referred to the possible invalidation for duress under Jewish law of any rabbinical divorce for which the husband was compelled to apply by a civil court.[15]

Freedman C.J.M., strongly dissented. In his view, the present case clearly involved a contract, and hence civil rights. To refuse to acknowledge that the religious stigma was a matter of serious concern to Mrs Morris was to ignore reality. Nor was there any reason of public policy which might make the issuance of such orders improper.

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[11] *Ibid.,* 568 *per* Guy J.A. (Monnin J.A. concurring).

[12] *Sed quaere* whether the vagaries of the court calendar and the speed with which a case is heard should be a determining factor.

[13] Only Hall J.A. deals with what constitutes a "civil right", see *supra,* note 9, 572.

[14] *Ibid.,* 569 *per* Guy J.A. (Monnin J.A. concurring): *ibid.,* 575 *per* Matas J.A.

[15] *Ibid.,* 574-75.

With respect, it is submitted that the weakness in Freedman C.J.M.'s decision lies in his analysis of the previous cases involving rabbinical divorce. He cited, among others, the decisions in *Har-Shefi* v. *Har-Shefi*,[16] *Joseph* v. *Joseph*[17] and *Brett* v. *Brett*[18] to support his argument that the courts had in the past decided upon cases involving the effects of religious divorces. In these cases the facts and issues were quite different. In *Har-Shefi,* the parties were domiciled in Israel and had obtained a religious divorce from the London *Beth Din.* The husband remarried in Germany and the wife then petitioned the English court for divorce on the grounds of his adultery. The question arose in these proceedings as to whether the parties were still civilly married despite the *Get.* The question in *Har-Shefi,* therefore, was whether the religious divorce had civil effect because it was recognized by the law of the parties' domicile, *i.e.* Israel.[19] Since the parties in *Har-Shefi* had already received the *Get,* that case is no authority where a civil court is asked to force a husband to institute proceedings for a rabbinical decree. Moreover, the question of the *Get* arose during the course of normal proceedings to test the validity of a divorce decree granted by the courts of the parties' domicile.

In *Joseph* v. *Joseph,*[20] a wife who was petitioning for divorce alleged that her husband had deserted her for the period required by statute. In fact, during that period the husband had acceded to the wife's request to grant her a *Get.* The court concluded that, as a

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[16] [1953] 2 All E.R. 373.

[17] [1953] 2 All E.R. 710. See also the English case of *Preger* v. *Preger* (1926) 42 T.L.R. 281 which involved two Jews divorced in England. Though the husband gave the wife a *Get* both parties realized this had no effect as a divorce in England. The husband then remarried in Germany without taking further divorce proceedings, whereupon his wife petitioned for divorce on the grounds of his adultery. The court granted the wife a decree saying that the parties realized that they were not free to remarry merely on the strength of the *Get.* However, in *dicta* there is the suggestion, reiterated in *Leeser* v. *Leeser,* (*The Times,* London, February 5, 1955) to the effect that if the wife knew that the husband contemplated living with another woman this might be evidence of the wife conniving at the adultery.

[18] [1969] 1 All E.R. 1007 (C.A.).

[19] The civil consequences of such a religious divorce are now governed by the *Recognition of Divorces and Legal Separations Act 1971,* 1971, c.53 (U.K.) which restricts the recognition of foreign divorces to those granted (a) within the British Isles by a British Court or (b) outside of the British Isles. A decree pronounced by the London *Beth Din,* therefore, would not come within this statutory provision, and the point in *Har-Shefi* could not now arise before a British court.

[20] *Supra,* note 17.

result of the *Get,* the wife and husband were thereafter living apart by consent. Therefore the husband did not have the necessary *animus deserendi* to be in desertion. It should be noted that the factual existence of the *Get* was relevant in the civil divorce proceedings to determine whether a necessary element (the *animus deserendi* of desertion) could be established in order to constitute one of the then-existing grounds for civil divorce. There was no question in *Joseph* v. *Joseph* of the Court's recognizing the *Get* itself as a valid civil divorce.

Brett v. *Brett*[21] arose under the pre-1970 English divorce law.[22] In previous proceedings the wife had obtained leave to petition for divorce within the first three years[23] of marriage on the grounds of her husband's revolting sexual demands,[24] and had obtained both a decree *nisi* and a decree absolute of divorce. She now sought ancillary relief, namely, financial provision.[25] The wife, 23, had been admitted as a solicitor just before the marriage. She could only expect at that stage to earn approximately £ 1,250 *per annum,* and she wished to purchase a flat in London costing between £ 7,500 and £ 10,000. A practising orthodox Jewess, she could not in conscience remarry until her husband granted a rabbinical divorce. Her husband possessed large capital assets, many of which had been transferred outside the jurisdiction and from which only a small income was generated. The English Court of Appeal ordered him to pay her £ 30,000 as a lump sum payment, payable in two instalments. The

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[21] *Supra,* note 18.

[22] Under previous English law, conduct was a relevant criterion in the assessment of maintenance. Since 1970, however, conduct is only relevant where the disparity between the spouses' behaviour is "so obvious and gross" that it would be "repugnant to anyone's sense of justice to disregard it". See *Wachtel* v. *Wachtel* [1973] Fam. 72; and the cases listed in Seago and Bissett-Johnson, *Cases and Materials on Family Law* (1976), 299 *et seq.*

[23] In fact, the marriage was only 5½ months old. Under English law if one marries in haste one may repent at leisure. Under successive legislation, the most recent being s.3(1) of the *Matrimonial Causes Act 1973,* 1973, c.18 (U.K.), a petitioner seeking a divorce within the first 3 years of the marriage must show that the case involves exceptional hardship to the petitioner or exceptional depravity on the part of the respondent and that the judge must be of the opinion that there is no reasonable probability of a reconciliation between the parties. See further Seago and Bissett-Johnson, *ibid.,* 116 *et seq.*

[24] The essence of which is not disclosed in the law reports.

[25] In England maintenance and transfer of property between the spouses are both dealt with under the *Matrimonial Cases Act 1973,* 1973, c.18 (U.K.). In Canada maintenance is a federal matter ancillary to divorce but the post-divorce resolution of property disputes is governed by provincial law.

first instalment, payable immediately, was for £25,000. A further instalment, for £5,000, was ordered to be paid three months later if the husband did not grant the applicant a *Get*. It should be noted that the wife did not apply to the Court for the sole purpose of obtaining a *Get*. Rather, the matter came before the Court on a specific statutory right to apply for maintenance. The relevance of the ex-husband's refusal to grant the *Get* arose because (i) the Court perceived that the husband was using the *Get* as a bargaining point to reduce the wife's claims to maintenance; and (ii) the absence of the *Get* meant that the wife could not in conscience remarry and thus reduce her requirements for maintenance.[26] In short, the question of the *Get* only arose in the quantification of maintenance, a determination which was undoubtedly within the competence of civil courts. It is true, of course, that the effect of the judgment in *Brett* v. *Brett* would be to encourage the *Get* to be granted.[27] But, unlike the *Morris* case, that was not the relief specifically sought.

A further difficulty with the reasoning of Freedman C.J.M. in *Morris* lies in his analysis of the contract involved. Nothing in that particular marriage contract specifically referred to the husband's duty to grant a *Get*. In *Koeppel* v. *Koeppel*[28] (not referred to by the Court of Appeal in *Morris*), the marriage contract expressly required the husband to appear (whenever this might be necessary) before a Rabbi and to execute any and all papers necessary for a divorce. Such a covenant was clearly more specific than the clause in *Price* v. *Price*[29] (also not cited in *Morris*), where the husband merely agreed to submit all marital disputes to a rabbi and to recognize his power

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[26] Until recently in England the possibility of a wife remarrying was a relevant factor in the assessment of her post-divorce financial needs: (a) see *Snelling* v. *Snelling* [1952] 2 All E.R. 196; Bromley, *Family Law* 3d ed. (1966), 25 and even in actions under the *Fatal Accidents Act, 1959*, 7-8 Eliz.II, c.65 (U.K.) for loss of a breadwinner. However, in both torts: (b) see *Law Reform (Miscellaneous Provisions) Act 1971*, 1971, c.43 (U.K.); and family law the position has now changed. Since the *Matrimonial Proceedings and Property Act 1970*, 1970, c.45 (U.K.), the courts have refused to consider the speculative prospects of remarriage as a relevant factor: (c) see *Wachtel* v. *Wachtel* [1973] Fam. 72; though where it has already taken place or is certain to take place shortly, the courts have taken it into account: (d) see *Smith* v. *Smith* [1975] 2 All. E.R. 19. See further Seago and Bissett-Johnson, *supra*, note 22, 299 *et seq.*

[27] Although, clearly, the husband in *Brett* could pay the second lump-sum instalment and not grant the *Get*.

[28] 138 N.Y.S. 2d 366 (1954). Discussed in Foote, Levy and Sander, *Cases & Materials on Family Law* (1966), 809.

[29] 16 Pa.D. & C. 290 (1931) (C.P.).

of "arbitrator and jurisdicter" (although the Court refused to order the husband to grant the *Get*). But even in a case like *Koeppel* one might question whether such a clause is enforceable in the civil courts. Did the parties intend to create a binding civil obligation? And if there is a valid civil contract, is such a contract to submit marital disputes to bodies other than civil courts contrary to public policy?

While the reader's sympathies for Mrs Morris might incline him to prefer the result of Wilson J.'s judgment at first instance and Freedman C.J.M.'s dissent on appeal, the better legal view, it is submitted, is that civil courts should not compel attendance before religious tribunals. It is one thing for the courts to enforce valid civil obligations. To do so may frequently require consideration of religious factors. For example the recognition by Canadian courts of a foreign divorce may depend upon the effect given to a religious divorce by the civil law of the parties' domicile.[30] Similarly, rights affecting the property of a congregation or religious order may depend upon the proper construction of the constitution of the body involved.[31] Or, various forms of religious discrimination may[32] — or may not[33] — be unlawful. All of these examples concern rights

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[30] See, *e.g.*, *Har-Shefi* v. *Har-Shefi*, *supra*, note 16; or *Joseph* v. *Joseph*, *supra*, note 17.

[31] See *supra*, note 13.

[32] See, *e.g.*, *The Canadian Bill of Rights*, S.C. 1960, c.44; R.S.C. 1970, Appendix III, s.1.

[33] See, *e.g.*, *Re Tuck's Settlement Trusts* [1976] 1 All E.R. 545 (Ch.D.), in which it was intended that the entitlement to certain income should remain with members of the Jewish faith. The first beneficiary (a baronet) had to satisfy this criterion; and, in addition, his wife had to be of Jewish blood, to have been brought up in and never departed from and continued to worship in the Jewish faith. In case of doubt whether these religious qualifications were fulfilled, a conclusive ruling could be obtained, in accordance with the terms of the settlement, from the Chief Rabbi in London at the Portuguese or Anglo-German Community. The trustees of the settlement took the matter before the Court to determine, *inter alia*, whether the clauses in question were void for uncertainty. The Court ultimately held that they were valid, since the settlement and any reference thereunder to the Chief Rabbi provided a precise method for determining whether the religious qualifications had been met. This result seems consistent with freedom of testation and settlement of property. *Tuck's* case did not involve the use of a civil remedy to compel a party (such as the husband in *Morris*) to do some act which he was not otherwise compelled by the civil law to do.

Where, however, the Courts have no scheme for determining who qualifies as a member of a religious faith in order to take advantage of certain privileges, problems may arise. For example, under s.26(1) of the *Marriage Act, 1949*, 12-13-14 II Geo.VI, c.76 in England, Jews are permitted to marry in conformity with their own rites, provided both parties profess the Jewish

and duties which exist in the civil law, and which are enforceable in the civil courts. Exactly what constitutes a right or duty recognized by the civil law may be an accident of history or of legislation. But it is a matter for some reflection to suggest that the civil courts themselves are capable of extending the category of civil rights and duties. It goes even further to suggest that the civil courts should compel the performance of purely religious duties. Surely no one would argue that the Church should be able to sue for tithes — at least not in the absence of a valid *legal* contract. Nor would many people suggest that specific performance would be available to compel recalcitrant parents to bring their children to be baptized, although they may have a religious duty to do so. Although justice may sometimes raise a strong claim to civil relief for a religious wrong, as Mrs Morris' predicament obviously did, nevertheless, it is submitted that religion must be a matter of persuasion, and not enforceable in the civil courts. This conclusion is reinforced where Parliament has already provided a comprehensive civil remedy covering the same ground. Religious scruples which require more may well exist, but are not properly the concern of the civil courts.

Unfortunately, the Supreme Court of Canada will not have the occasion to deal with this problem in the present case. Although a majority[34] of the Court of Appeal granted[35] leave to appeal to the Supreme Court, on terms, the writers understand that a settlement has now been reached between the parties.

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religion. Yet this statutory provision does not indicate what is meant by "professing the Jewish religion". This (among other reasons) has led the Law Commission to recommend the abolition of this provision (which also applies to the marriage of Quakers), and to make such marriages conform to the other provisions of English civil law (as, indeed, is the case in Manitoba, as explained in the *Morris* case). See Law Commission Report 53, *Solemnisation of Marriage in England and Wales* (1973), 46 *et seq.*

[34] Freedman C.J.M., Hall and Matas JJ.A. (Guy and Monnin JJ.A. dissenting).

[35] (1975) 51 D.L.R. (3d) 77.

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