

Coercion in the delivery of a Jewish divorce

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June 8, 2016

In Jewish law, a divorce is achieved by the delivery of a bill of divorce, called a get, from husband to wife. A wife cannot deliver a get to her husband. A rabbinical court cannot issue a divorce.

For the most part, a valid Jewish divorce requires the consent of both husband and wife. The husband must deliver the divorce of his own free will and the wife must consent to receive it of her own free will. There are exceptional circumstances where the wife's consent may be dispensed with, but the husband's consent is always formally necessary to create a valid Jewish divorce.

Jewish law is generally very concerned for the autonomy of the husband in choosing to divorce his wife. A Jewish bill of divorce delivered by the husband without his free-willed consent will be invalid.

However, Jewish law is also deeply concerned that wives not be trapped in dead or untenable marriages. To this end, Jewish law defines "free-willed consent" on a sliding scale, thus allowing certain levels and forms of pressure to be applied to the husband in circumstances where divorce is seen as morally desirable or required. The validity of consent-to-divorce obtained via such pressures also depends on who Jewish law construes as having applied the pressure.

For this reason, it is essential that all attempts to pressure a husband to give a Jewish divorce be closely coordinated with a qualified rabbinic court, or follow pellucid guidelines set forth by such a court. Otherwise, there is a severe risk that the husband will "consent", but be unable to act on his consent, as the rabbinic court will consider him "coerced".

How does Jewish law define "coercion"?

Coercion is any act by any party that is aimed at compelling the husband to grant a divorce. The third party may be the wife, an advocate for the wife, members of the broader Jewish community, the civil court or a rabbinical court.

Jewish law theoretically permits **physical, financial** and **psychological** coercion under certain circumstances. However, Jewish law also requires that Jews comply with the law of the land. Accordingly, contemporary Jewish law does not countenance physical coercion to grant the get, and American law prosecutes attempts to do so under the criminal law.

What is permissible vs. impermissible coercion?

Jewish law does envision situations in which coercion upon the husband to grant a divorce may be permitted. The coercion is permitted when:

- a) a duty to grant the get arises under Jewish law,
- b) the husband has been ordered to grant the get by a rabbinical court
- c) the husband refuses to comply.

The coercion aims to bring him into compliance with the principles of Jewish law and the order of the Beit din.

The standard legal theory which renders such compliance “consensual” is that all Jews at core wish to obey the rabbinical court. Therefore, coercion renders a bill of divorce invalid if the coercion is not sanctioned by a rabbinical court which has ruled that it is permissible under Jewish law. This includes coercive action undertaken by civil courts. In practice, this means that civil remedies are best used to compel appearance before the beit din, rather than to directly compel the get, and that secular judges should wait until a beit din has ruled that a duty to divorce exists before using any civil remedies.

The classic case is one in which a husband develops a physical or mental condition that, in the opinion of a competent beit din, would make it impossible for an ordinary woman to live with him. In such a case, if the wife asks for divorce, and the husband refuses, a beit din will rule that the husband is obligated to divorce her. If he continues to refuse, the beit din may authorize any and all means of coercion to obtain his willingness.

Jewish law distinguishes at least two broad categories of cases in which coercion is justified. A rabbinical court may rule that the husband has a **mitzvah** to deliver the get or that the husband has a **chovah** to deliver the get. *Chovah* implies a more absolute legal obligation to divorce. The level of *chovah* was necessary to justify extreme physical coercion. Rabbinical courts rarely rule *chovah*, especially in the US where they lack the power to enforce such orders. In most cases in the US, therefore, the rabbinical court will rule that the giving of the get is a *mitzvah*.

Some batei din will generally rule *mitzvah* in any case where the marriage is demonstrably over and the husband is using the Jewish divorce as leverage in the civil case. Some batei din will do so only if either the wife initially tried to arbitrate the financial issues in beit din, or at the least if she did not resist an attempt by the husband to do so – otherwise they will wait to rule until the civil case is complete. The Boston Beit Din does not have a formal position on this issue, and I cannot speak for my colleagues. My expectations are that

- a) we will rule *mitzvah* once the civil divorce is complete regardless of prior circumstances

- b) we will regard any attempt to use the Jewish divorce as leverage as illegitimate and grounds for summoning the husband to beit din.
- c) we will also rule *mitzvah* in any case where the threat or actuality of get-recalcitrance has been used for any purpose other than trying to compel agreement to arbitrate the financial issues in beit din.

If the rabbinical court has ruled *mitzvah*, they may also order communal remedies considered “soft coercion”. The “*harchakot deRabbeinu Tam*”, are shunning methods aimed at imposing communal pressure on the get refuser. They consist of limited social ostracism within the local community, including refusal to do business with the recalcitrant or to allow him participation in synagogue ritual. Contemporary expressions include the publication of formal beit din notices of contempt (*seiruvim*) encouraging such ostracism; organizing demonstrations at recalcitrants’ homes or businesses; social media shaming campaigns, and the like.

On many issues, significant Jewish legal authorities may differ as to whether the method of coercion is proper given the circumstances. In such a case, a beit din would not approve the coercion *in advance*, but would retrospectively validate a divorce given as a result. However, if a third party engaged in the coercive behavior without securing advance permission from the beit din, in full knowledge that it would not be approved by a beit din in advance (*lekhatchilah*), a beit din may be resistant to retrospectively validating the resulting divorce.

There are two key factors that must be considered in determining whether a husband’s participation in the divorce process will be considered by a rabbinical court to be an act of his own free will:

1) Threats of deprivation of rights vs. withdrawal of privileges

A divorce may be viewed as coerced if the husband grants it under threat of being deprived of another right he enjoys under civil or Jewish law. Thus threats by a civil court to withhold property that the husband is otherwise entitled to could invalidate a get.

However, a **threat to withhold the issuing of a secular divorce** would not be considered coercive. Under Jewish law, the state is not obligated to grant a married couple the right to divorce. Therefore, if a secular judge refuses to issue a divorce decree until the husband gives the get, this would not be considered coercion. A clause in a separation or divorce agreement that requires the husband to give a Jewish divorce *before* the civil divorce becomes final, *as a precondition* for filing an agreement, or for allowing a decree nisi to become final (in Massachusetts, which has an interlocutory period), is perfectly acceptable.

A clause in a divorce agreement that obligates the husband to give the Jewish divorce *after* the secular divorce becomes final is difficult to enforce civilly, and even if the court seeks to enforce it via contempt, this may lead to a beit din refusing to write or validate the divorce because it is being given under coercion. Enforcing such a contempt order would be depriving the husband of a right to freedom or to property, rather than withholding the boon of divorce.

In determining the **equitable distribution** of family assets, a court may not make an award that withholds or reduces a husband's entitlements to property unless and until he delivers the get or as **punishment** for having failed to deliver the get. This is because Jewish law considers the husband to have a vested right to whatever is generally considered his share of the marital property under the law.

However, equitable distribution awards that recognize the **adverse financial impact** that get refusal may have on the wife are permissible. For example, if a judge informs the husband that refusal to give a get will materially affect the wife's chances to remarry, and that one factor in deciding the allocation of marital assets will be her chances of remarriage, this would not be considered coercion.

2) Enforcing prenuptial or postnuptial contractual provisions relating to delivery of the get

An agreement under which the husband is liable for **specified reasonable spousal support** so long as the Jewish marriage endures is also enforceable. (This is the mechanism used by the Rabbinical Council of America Prenuptial Agreement).

An agreement under which the husband is liable for **specified damages** if he fails to give a Jewish divorce within a specified time might be enforceable halakhically, but might not be. The difficulty here is that Jewish law generally does not enforce penalty clauses (known as *asmakhta*). For this reason such clauses are not recommended. If they seem the only viable option, the beit din must be consulted as to the language of the agreement.

An agreement **to appear in beit din to discuss the get** in good faith is enforceable civilly by any means, up to and including contempt, so long as it does not specify that the husband must deliver the get. Indeed, so far as Jewish law is concerned, the secular court may order and enforce an order for the husband to appear in beit din, and to pay the reasonable expenses of such meetings, even without an agreement by the parties.

Any financial award by a beit din, such as under the support obligation of the RCA Prenuptial Agreement, is enforceable civilly by any means, including contempt, garnishment of wages, and seizure of assets, without prejudice to the get.