

The Family Law Act 1996:

The changing face of divorce

Myrella Cohen

The ways in which the new Family Law Act, the prenuptial agreement and family mediation might help solve the problems of the *agunah* in the future are discussed. The author explains why it is essential for all ministers to explain to an engaged couple the value of signing the PNA even before the new Act comes fully into operation.

There is no aspect of the law that has changed so dramatically in this country over the last 25 years as the law relating to divorce. Despite the growing acceptance that a dead marriage should be buried as quickly and painlessly as possible, the concept of divorce continues to be based on the theory of matrimonial fault. An innocent spouse could petition for divorce against a guilty spouse who had committed a matrimonial offence such as adultery, desertion or cruelty; and was obliged to give evidence in open court to prove the case. This often proved to be a humiliating and emotive experience.

The Matrimonial Causes Act 1973 purported to ease this experience by introducing a simplified procedure which became known as a 'quickie divorce'. The Petitioner was no longer required to give evidence in person. Documents were to be filed with the Court setting out the matters relied on and a provisional divorce (*decree nisi*) would be pronounced by the Judge on the basis of the information contained in the documents. Six weeks later the decree would be made absolute leaving all ancillary matters concerning children and financial arrangements, almost as an afterthought, to be dealt with at some later stage. The theory behind this change was that it would remove the acrimony and bitterness from the proceedings if the Petitioner's grievances were not aired in open Court.

Regrettably, experience has shown that in very many cases this did not happen. Pent-up hostility frequently resurfaced during the ancillary proceedings and, among many Jewish couples, has increased the disgraceful and immoral bargaining and horse-trading over the future of their children

and/or money matters which can precede the giving and/or receiving of a *get*. Such behaviour exacerbates the harm which can be caused to children when they are used as pawns by parents locked in conflict, and it certainly does nothing to save what might otherwise have been a saveable marriage.

In 1996 a major piece of social legislation reached the statute book in the form of the Family Law Act. The law on marriage and divorce has to strike a balance between the freedom of the individual and the interest of the state in maintaining social cohesion and bearing the public cost of supporting broken families. The Family Law Act approaches this in a novel way by its emphasis on support for marriage as well as a new law for divorce. Unlike earlier divorce legislation, the new Act explicitly sets out to support the institution of marriage. Part I of the Act sets out the underlying principles. This first is that the institution of marriage is to be supported. The second is that, where a marriage may have broken down, the couple are to be encouraged to take all practical steps to save the marriage, whether by marriage counselling or otherwise. Third, where a marriage is being brought to an end, this should be done with minimum distress to the couple and any children, so as to encourage the best possible continuing relationships between the parents and the children, and without incurring unreasonable costs.

As under the existing law, the sole ground for divorce will be the irremediable breakdown of a marriage now evidenced in the main by fault on the part of the Respondent. But under the new system, the way in which irremediable breakdown is to be proved will be radically different. The sole method

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of establishing irretrievable breakdown will be the passage of a period of time for reflection and consideration, which will enable the couple to address what has gone wrong in their marriage and see whether there is any hope of reconciliation. If they decide that the breakdown is indeed irretrievable, they will be required to make appropriate financial and other arrangements before the divorce is granted and not afterwards. The Act is being brought into operation piecemeal. When it is fully operational next year it promises to have a great impact on the Jewish community by emphasising its support for the institution of marriage, and by encouraging a less adversarial approach if the marriage breaks down. This will be achieved by removing the concept of fault as a ground for divorce and then by emphasising the resolution of disputes by mediation.

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The sole criterion for a divorce will be that the marriage has broken down, without any reference whatsoever to blame by either party. A statement to this effect will be filed with the Court and there will then be a compulsory freeze on the proceedings to provide the parties with an opportunity for reflection and consideration of their future and the future of their children. This cooling period will allow the couple to reflect on what had gone wrong with their marriage. If the parties had reached their decision to divorce in haste, this period will give them time to seek a reconciliation. If the divorce is to continue the parties would be required to make proper arrangements for living apart *before* and not after a divorce order had been made. This cooling period would not be a passive period for the parties to wait out this legally required period without any clear objective. It will be a time for them to resolve the consequences of divorce such as the arrangements for separate accommodation, whether any home owned by them is to be sold or a tenancy transferred, how furniture and possession are to be divided, with whom the children will live and how contact with the other parent is to be organised and ensured, maintenance and pension rights, etc. and at this stage consideration can also be given to agreement for a *get*. In this way the parties will learn to adjust gradually to the emotional, social and psychological changes in their lives. Once all these arrangements have been finalised and *only* then will a Court be

prepared to certify that the break is irreparable and grant a decree of divorce.

The aim is to remove the adversarial aspect of divorce and this will be achieved by requiring those wishing to divorce to attend an information-giving session conducted by a specially designated official who will explain divorce law and procedure to them and outline the services available to help them, such as marriage guidance, family mediation, the role of lawyers, costs of these services, etc. which information would help them to make important decisions. In particular the value of mediation would be explained and, if the parties agree, the person conducting the interview would arrange an appointment with a specially trained and approved mediator. Many mediators are lawyers qualified in both disciplines who seek to damp down a couple's feeling of antagonism for each other which some divorce lawyers in the past have exploited, and explain to them where they are going wrong and nudge them gradually towards a compromise or agreement. Any such agreement could be either a private agreement enforceable as a contract, or more formally approved by the Court in a consent order. It has been said that mediation is not a 'cost-cutting' exercise but a 'grief-cutting' exercise. It will not be compulsory but the alternative could well be long, protracted and expensive proceedings which benefit no one.

The new procedures raise concerns for the Jewish community because different ethnic and religious groups may wish to apply their own cultural consideration and standards in regulating their personal lives. A mediator must therefore understand and appreciate this. For a Jewish couple, matters relating to the *get*, the religious affiliation and education of their children, contact with children on *yamim tovim* are all important, and therefore only mediators who are familiar with these issues will be assigned to advise Jewish couples.

The Jewish Marriage Council has already taken the initiative by launching a new mediation service 'Dialogue' to help with family mediation in the community. Its members are drawn from qualified and accredited counsellors and therapists as well as experienced family lawyers. They can all offer expertise on the issues of *get*, cultural dynamics of the Jewish family and interfaith matters across the spectrum of the Jewish faith, being trained by both the National Family Mediators Association and the Jewish Marriage Council. Their training ensures they are sensitive to and appreciative of the religious

and cultural issues which can affect members of a Jewish family. They are accredited members of the Jewish Family Mediation Register which has been set up by Norwood/Ravenswood and the Jewish Marriage Council.

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Rabbonim and members of the clergy are *not* necessarily qualified mediators. They do not have the training to defuse a potentially charged situation and they should not attempt to do so. However sensitive they may be to the issues involved, they may lack the expertise and/or training to approach the problem correctly. Whereas the correct approach at the earliest possible opportunity can prevent a problem escalating, the wrong approach or wrong advice can cause untold harm. Members of the clergy who learn of a problem case should advise the parties to consult a professional mediator as soon as possible. If the problem concerns the refusal to give or receive a *get* then the member of the clergy involved can consult with the mediator as to what, if any, pressures can be applied to a recalcitrant spouse; and can further consult with the local Beth Din as to communal sanctions that it may be appropriate to apply. Why should someone who causes pain and distress to their spouse by refusing to give or receive a *get* occupy positions of honour in the community? The Chief Rabbi, together with the London Beth Din, approved a range of communal sanctions which the Honorary Officers of the United Synagogue incorporated into their bye-laws. Other synagogue bodies should follow this example. In Israel, the *batei din* have been empowered by the Knesset to impose sanctions on a recalcitrant spouse by withholding a driver's license and/or passport, freezing a bank account, etc. We as a community have it in our power to ensure that those whose marriage is failing conduct themselves in such a way that is in keeping with the true spirit of Jewish ethics

and morality. However, before naming and shaming anyone in the press or on the Internet, great care should be taken to ascertain the full facts, and legal advice should be sought so as to avoid the possibility of an action for libel.

We should be able to put our own house in order. However the Civil Law has also come to our assistance. Section 9(3) of the Family Law Act provides that, where the parties were married to each other in accordance with Section 26(1) of the Marriage Act 1949 (this includes a Jewish marriage) and are required to co-operate if the marriage is to be dissolved in accordance with their usages (i.e. requires a *get*), 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, before a Civil Divorce will be granted. A great deal of work went on behind the scenes, spearheaded by Lord Jakobovits, to enable this clause to be added to the Act. It will prove extremely important. It means that if one of the parties to a divorce wishes to invoke the Section, all information concerning the *get* must be included in the information given to the Court at the stage when the Court is notified that appropriate arrangements have been made for the future. However, the section does not impose a compulsory obligation on the Court to refuse a civil divorce if this is not done – it is discretionary, and a consensus among a number of Divorce Judges seems to be that they will only implement the section if the parties can show they have always wished to regulate their personal relationships according to Jewish religious law. This wish can be demonstrated if the couple have signed a pre-nuptial agreement (PNA) undertaking their willingness to consult a Beth Din and comply with its instructions in the event of a matrimonial dispute.

The PNA is not a new device, merely an extension of the tradition going back 2,000 years in which the rights and obligations of marriage are set out in a written document – the *ketubah*. Provided the PNA is explained to the couple in a sensitive way as part of their preparation for marriage alongside a discussion, for example, on *kashrut*, family life, details of the marriage ceremony, etc., it should not cause offence. However much a bride and bridegroom love each other most people these days are sufficiently responsible to realise that not all marriages are successful, and by signing a PNA they are in fact demonstrating their selfless concern for

each other; and focusing their minds on an aspect of Jewish life of which they might have been unaware.

The PNA was one of the proposals of the Get and Agunah Working Party of the Chief Rabbi's Review. It had a troubled history. The original agreement was drafted by Dayan Chanoch Ehrentreu in consultation with Judge Dawn Freedman and the writer of this article; and was approved by a number of halachic authorities abroad and Divorce Judges here. It ran into difficulties because some Rabbonim refused to accept it and it took the Chief Rabbi some two years before he managed, in the interests of communal harmony, to persuade all sections of the orthodox community as to its merit, and a PNA in a slightly different form than the original is now being offered to couples marrying under his jurisdiction. Over 60 per cent of couples in London are signing. In the provinces it is much less; perhaps provincial clergy who advise a couple before marriage will realise how important it is, not only in the exercise of *halacha*, but also because it is in the spirit of the new legislation and is an important and vital accessory to its provisions. Even under the existing law the PNA will have great evidential value if as in the following examples its terms are relevant to other issues before the Court, and it is properly applied, namely:

- 1 After a *decree nisi* has been pronounced, either party may apply to have this made absolute. A court has a discretion to refuse to do so if this will cause prejudice or hardship to the wife – which would happen if the husband had failed to comply with his agreement to give a *get* and she was unable to marry according to her religious beliefs. No application should be made to have the decree made absolute until there has been a *get*.
- 2 It reinforces the existing obligation of a husband to maintain his wife as a wife, because the marriage still exists in Jewish law, and not as a former wife, until there has been a *get*. The level of maintenance and extent of any order regarding property may thus depend on whether or not the PNA has been implemented, and no financial

arrangements should be finalised until this has taken place.

- 3 Where the terms of the PNA are repeated in court as an undertaking, and form part of the court order – as opposed to a mere recital of the parties' intentions – any failure to comply with the order could amount to a contempt of court, punishable by imprisonment or other sanctions.
- 4 In any dispute, a judge may have to decide which party is the more credible. If a husband fails to honour an agreement, a court is entitled to conclude that he may not be reliable or trustworthy and that he cannot be believed. This consideration may be relevant in all other proceedings, even those involving residence of, and contact with, children.

Finally, a little-publicised section of the Family Law Act was brought into operation last November giving a Court the power to order a second transfer of capital to a wife in the event of a change of circumstances in lieu of maintenance, even after divorce where the parties believed everything to have been finalised. This also can extend to pension rights. This power at the moment is unclear and untested. Can it operate against a husband who has received a lump sum in order to give a *get* to return some of the money? If so, the blackmail and extortion that sometimes precedes the *get* would not be worthwhile. A court might subsequently reconsider the matter, and once and for all it might help to relegate to the history books the injustice, distress and immoral bargaining that so often takes place.

Even if we cannot help the present generation who are caught in a limping marriage where there is no *get*, perhaps this new legislation will help to prevent future generations suffering the same fate.

Note: Since writing this article the Government has regrettably announced that the date for the implementation of that part of the Family Law Act 1996 dealing with changes in the divorce law has been deferred. No new date has as yet been given.