Refusal to Remove Barriers to Remarriage: Did the Appellate Division Second Department Eliminate Economic Sanctions?

By Martin E. Friedlander and Nathan Lewin

In *Cohen v. Cohen*,[1] the Second Department effectively nullified a clear statutory directive in Section 236B(5) of the Domestic Relations Law. That provision explicitly prescribes that a court take into consideration a party's refusal to remove a barrier to remarriage as defined in DRL § 253 in arriving at an equitable distribution of marital property. The legislative directive was known as "the Second *Get* Law" because women whose husbands denied them a *Get* (a Jewish religious divorce) were disadvantaged economically by their permanent remarriage disqualification.

Several years earlier, the Legislature had enacted "the first *Get* law" to deny a civil divorce where a marriage has been performed by a clergyman and the spouse seeking a divorce imposes a barrier to remarriage by, for example, deliberately withholding a *Get*.[2] That law was effective, however, only if the plaintiff in a divorce proceeding was the spouse withholding the *Get* and thereby imposing the barrier to remarriage. Section 236B(5) was designed to incentivize a defendant in a divorce proceeding to remove any barrier to remarriage by, for example, agreeing to give or receive a *Get*.

The Appellate Division's decision correctly vacated the trial court's order directing the husband to give his wife a *Get*. No provision of New York law authorizes such a court order, and, in fact, a Jewish divorce document that is written under the direct compulsion of a court order is invalid under Jewish law. However, Section 236B(5) clearly authorizes the court to consider refusal to give or receive a *Get* when the party who maintains the barrier to remarriage is the defendant, as was true in *Cohen*. The court should then modify maintenance awards and resolve equitable distribution issues against the recalcitrant spouse. In *Waxstein v. Waxstein*,[3] the court withheld stock and a deed to marital former residence from the defendant until he delivered a *Get*.

The Appellate Division in *Cohen* should have approved the trial court's discretion to withhold the transfer of assets to the defendant until he removed the barrier to remarriage by delivering a *Get*. DRL § 253 was not designed to authorize a court to order a *Get,* but only to consider the party's deliberate refusal in the issuance of it in the court's final judgment. It is inequitable for one spouse to benefit from a judgment of divorce while keeping the other shackled to a religiously performed marriage. The Second Department, in *Cohen*, effectively overrode clear legislative intent.

In deciding *Schwartz v. Schwartz*,[4] Justice William Rigler stated that issuance of a *Get* should be considered in the equitable distribution of marital assets. DRL § 236[B][5][d][13] grants discretion to the trial court to consider "any other factor of which the court shall expressly find to be just and proper." The ability to address the refusal to give or receive a *Get* is within the broad authorization conferred by DRL § 236. In 1997 the Appellate Division affirmed Judge Rigler's decision in *Schwartz* and held that the former husband's initial refusal to give a *Get* forfeited his right to distributive awards.[5]

In *Gindi v. Gindi*,[6] the court explained the reasoning for the enactment as follows:

> [The wife's] economic future will clearly be limited due to the fact that she will be unable to remarry within her community, or if she decides to remarry, she will be ostracized from her community, her family and her support network. In order for plaintiff to be financially viable she should not be required to leave her community to remarry. It would be an abdication of the Court's responsibility not to award plaintiff maintenance under these circumstances…The maintenance award shall continue until one of the following occurs, either party dies or plaintiff remarries.

In *S.A. v. K.F.*,[7] a 61-year-old wife had supported her 80-year-old ill husband for 20 years. The court noted that the wife might be required to pay non-durational maintenance to the husband, but the husband was withholding a *Get*. Consequently, the court conditioned the husband's right to maintenance on his delivery of a *Get* within 45 days of entry of the judgment of divorce. The court reasoned as follows: "It would be unjust and inappropriate to have the wife pay spousal support for the husband's benefit yet she is still 'chained' to him."

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In this landmark Appellate Division decision of *Schwartz v. Schwartz*,[8] the court ruled that trial judges have "discretion under Domestic Relations Law 236[B][5][h] to disproportionately distribute marital assets in the event that a voluntary *Get* is not delivered." In *S.A. v. K.F.*, *supra*, the court also provided a brief history of the legislative intent and the case-law precedent that authorizes courts to exercise such discretion.

The equitable distribution statute was amended in 1992 to authorize a trial judge in a matrimonial action to consider the effects of a barrier to remarriage imposed by one spouse when determining equitable distribution. In the sponsoring Member's Memo, Assemblyman Sheldon Silver stressed that a judge should be able to consider "whether one party maintains a 'barrier to remarriage' in arriving at said decision."[9] This codified the decision that had characterized the husband's refusal to give a *Get* as one "factor" under Domestic Relations Law § 236[B][5][d][13] in determining the distribution of assets between the parties.[10]

In *Pinto v. Pinto*,[11] the Appellate Division held that it was not an improvident exercise of discretion to grant the wife 100% of the property listed on the parties' statement of net worth if the husband did not deliver a *Get* within a specified time. The court cited *Schwartz* as relevant to the effect of a husband's refusal to give a *Get* on the court's determination of equitable distribution.[12]

In light of this history, the court's decision reversing the economic award in *Cohen v. Cohen* is puzzling. The Appellate Division, Second Department, declared that since it could not direct the defendant to give a *Get*, it could not impose any other sanction for maintaining a barrier to remarriage. Yet, DRL §§ 253 and 236 were enacted to authorize a court, in the distribution of marital assets, to correct the economic imbalance that results from maintaining a barrier to remarriage. These provisions were not enacted to authorize a court to order a Jewish religious divorce because such an order might raise church-state issues.

The Appellate Division's surprising ruling is not supported by *Matter of Smith v. De Paz*,[13] which the Second Department cited in support of its decision. The *Cohen* court justified its ruling with the following inapt analogy:

> To sustain a finding of civil contempt based upon a violation of a court order, it is necessary to establish that *a lawful court order clearly expressing an unequivocal mandate was in effect* and the person alleged to have violated the order had actual knowledge of its terms. (see *Matter of Smith v. De Paz*, 105 AD3d 749, 751; *Delijani v. Delijani*, 73 AD3d 972, 973; *Vujovic v. Vujovic*, 16 AD3d 490,491).

But, DRL § 236 does *not* depend on a finding of civil contempt. A spouse need not be found to have violated a court order to have his or her share of the marital assets reduced. The Second *Get* Law was enacted to impose a cost on a party who fails to remove a barrier to remarriage *without* a prior court order that he or she do so.

It seems clear that the Appellate Division's decision conflicts with the relevant sections of New York's Domestic Relations Law as previously applied by the Second Department. Will the decision in *Cohen v. Cohen* be reviewed, overturned, or stand as a troublesome precedent?

Endnotes

1. 172 A.D.3d 999 (2d Dep't 2019).
2. DRL § 253 was drafted by attorney Nathan Lewin to reduce instances in which one spouse to a Jewish marriage prevents the other from remarrying after a civil divorce by refusing to participate in a *Get*.
3. 90 Misc.2d 784 (Sup. Ct. Kings Co. 1976), *aff'd*, 57 A.D.2d 863 (2d Dep't 1997), *lv den.*, 42 N.Y.2d 806 (1977).
4. 153 Misc.2d 789 (Sup. Ct. Kings Co. 1992), *aff'd* 235 A.D.2d 468 (2d Dept 1997).
5. 235 A.D.2d 468 (2d Dep't 1997).
6. NYLJ May 7, 2001 at 31, Col. 3 (Sup. Ct. Kings Co.).
7. 22 Misc.3d 1115(A) (Sup. Ct. Kings Co. 2009).
8. *Schwartz*, *supra*, at 5.
9. (Sponsor's Mem, Bill Jacket, L 1992, ch 415).
10. *See Schwartz, supra,* at 4.
11. 260 A.D.2d 622 (2d Dep't 1999).
12. *Id.* at 622. *See also S.A. v. K.F.*, *supra*, at 7.
13. 105 A.D.3d 749 (2d Dep't 2013).