Is A *Ketubah* An Enforceable Contract In American Courts?

By Rabbi Michael J. Broyde

Earlier this year, Justice Eugene D. Faughnan of New York State Supreme Court issued an opinion in the case of *Cohen v. Cohen*. The facts are simple: A couple married in Israel 21 years ago, and as is the custom there, the husband executed a *ketubah* with a payout of both 200 *zekukim* and 180,000 shekels (about $50,000). The couple divorced in 2018 with a financial agreement that settled the divorce and the wife sued in New York to enforce the terms of the *ketubah*.

The Court held that the *ketubah* could not be enforced, offering three grounds for its decision:

• The *ketubah* is a religious document and thus is not enforceable in a U.S. court, both for policy and constitutional reasons.

• The *ketubah* is enforceable under Israeli law but can only be enforced as part of the divorce process and not as a contract; thus, it would be a form of "double-dipping" to allow the wife to receive a divorce payout under American law and another payout under Israeli law.

• The *ketubah* falls short of a legal contract since the wife did not sign it, and it lacks the basic structure of a contract that New York (and every other state in America) requires.

The court reached the right conclusion. Indeed, there are several reasons that a *ketubah* should not be enforced in New York beyond those which the court mentioned.

First, after the decrees of Rabbenu Gershom prohibiting coerced divorce about 1,000 years ago, the *ketubah* lost much of its economic importance. The Talmudic rabbis mandated a *ketubah* so that a husband could not divorce his wife "freely," but in those places that accepted the decree – all Ashkenazi communities – a man cannot divorce his wife without her permission anyway. Thus, Rabbi Moshe Isserles writes in the *Shulchan Aruch* (*Even Ha'ezer* 66:3):

> [I]in a situation where one may divorce only with the consent of the woman, one does not need a *ketubah*. Thus, nowadays, in our countries, where we do not divorce against the will of the wife because of the ban of Rabbenu Gershom…it is possible to be lenient and not write a *ketubah* at all, but this is not our custom, and one should not change that.

The *ketubah* thus was transformed from a marriage "contract" to a ritual document. Consider the observation of Rabbi Moshe Feinstein (in *Iggrot Moshe*, *EH* 4:92) on this matter:

> One should know that in divorce there is no place for evaluating the *ketubah* since the ban of Rabbenu Gershom prohibited a man from divorcing his wife without her consent. Thus, divorce is dependent on who wants to give or receive the *get*…. Only infrequently, in farfetched cases, is it relevant to divorce…

Thus, typically, the parties themselves do not intend the *ketubah* to govern their marriage, and the payments mandated by the *ketubah* in cases of divorce are not intended to be binding in America. Because the parties did not intend to be bound by it, the *ketubah* cannot be considered a true contract.

Second, as the New York court correctly observed, the *ketubah* has several shortcomings under American contract law, which makes its enforcement almost impossible. It is not signed by both parties, it is written in a language that usually neither understands (Aramaic), and its signing occurs in an atmosphere of levity and drinking without any of the customary formalism that generally accompanies serious contractual negotiations. No one would sign a serious binding agreement this way.

Not surprisingly, then, there is not a single case in America where a secular court has enforced the *ketubah* provision mandating payments. Even when the New York Court of Appeals enforced a *ketubah* provision in which the parties agreed to arbitrate future marital disputes before a rabbinical court (*Avitzur v. Avitzur*), the court did not revisit the issue of the enforceability of the *ketubah*'s financial obligations under American law.

Third, even when the *ketubah* is negotiated under Israeli law, it is as an *alternative* to alimony and not a supplement. The court in this case correctly observed that it would be unfair for the parties to first enforce their rights under American law and then enforce the *ketubah*. Simply put, in Israel, where the *ketubah* is sometimes binding, American law is not binding, and in America, where the *ketubah* is not legally binding, American law governs the divorce.

Jewish law as spelled out in the Gemara intended that, upon divorce, the woman be given a large lump sum payment, rather than monthly payments of alimony. American law provides much smaller monthly payments. Both approaches might be reasonable, but they are alternatives to each other. It is unreasonable – and not what the parties intended – to enforce them both.

Finally, though of less importance, are First Amendment problems. Generally, courts in the United States are prohibited from resolving disputes that hinge on deciding core religious questions– so if a person died and left a sum of money to the "one true version of Judaism," courts in America would be precluded from determining what that is.

But courts are authorized to make determinations about what the parties intended when they used terms that are religious in nature. Secular courts can and do determine whether the meat sold in a contract for "kosher meat" is really "kosher" as the parties intended it to be, or whether a Jewish cemetery is conducting itself consistent with its bylaws which direct that it shall operate in a manner consistent with Jewish law.

Rabbi Broyde is a law professor at Emory University who served as an expert in this case. He is a Fulbright Senior Scholar at the Hebrew University now and is teaching Jewish Law at Stanford Law School in the fall.