

Comment,  
**ENFORCEABILITY OF AGREEMENTS TO  
OBTAIN A RELIGIOUS DIVORCE**

Religion and divorce are not complementary ideas in our society. Most religions, at the very least, discourage divorce.<sup>1</sup> The spectrum is very broad and some religions are stricter than others regarding their approaches to marriage and divorce policy. Religious groups have not come as far in equal rights for women as the U.S. government has. In many religions, women are treated more harshly than men when it comes to divorce.

This Comment will discuss whether a court may enforce an agreement that requires one spouse to provide the other spouse or ex-spouse with a religious divorce. Part I will describe secular approaches to marriage and divorce agreements and give an overview of a number of separate faiths with regard to marriage and divorce. Part II will describe judicial approaches to religious marriage and divorce agreements. This will include arguments for and against enforcing agreements to provide a religious divorce and an explanation about the courts' limited enforcement ability. Part III will conclude this Comment by reviewing the restrictions on remarriage to women of different religions and the arguments for and against judicial involvement in forcing religious divorces including how courts have ruled on the constitutional arguments for and against such.

## **I. Secular Approaches to Marriage and Divorce Agreements**

Religion is an area where people have strong opinions and beliefs that are different from the opinions and beliefs of others. Different may not even be a strong enough word. Some people build their entire lives around religion and would stop at nothing

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<sup>1</sup> See *Answers To Frequently Asked Questions About Church Annulments*, The Catholic Diocese of Kansas City-St. Joseph (last visited Oct. 12, 2010), [http://www.diocese-kcsj.org/content/offices\\_and\\_agencies/marriage\\_tribunal/faq/](http://www.diocese-kcsj.org/content/offices_and_agencies/marriage_tribunal/faq/); *Divorce*, Jewish Virtual Library (2010), <http://www.jewishvirtuallibrary.org/jsourc/Judaism/Divorce.html>; *Divorce and the LDS Church*, Religious Tolerance (last visited Oct. 12, 2010), [http://www.religioustolerance.org/lds\\_divo.htm](http://www.religioustolerance.org/lds_divo.htm).

to protect what they believe in. For example, suicide bombers act with the belief they will be rewarded in the afterlife for their devotion.<sup>2</sup> Although Islam, the religion most often associated with suicide bombers today, forbids violence and suicide, those believers are still acting based on their idea of what religion is. When it comes to marriage, religion also plays a vital role for many people. Many weddings take place in churches where priests and ministers are commissioned by state and local governments to perform the ceremonies that have legal consequences. So it would only make sense that very real religious implications surface when a marriage is dissolved. The following section discusses how Judaism, Christianity, and Islam differ in how each practices and handles marriage and dissolution of marriage.

#### A. *Judaism*

Judaism does not encourage divorce but does plan for it in anticipation of marriage. A Jewish husband provides his bride with a *ketubah*, a marriage contract, preceding the marriage ceremony.<sup>3</sup> The *ketubah* defines all of the husband's responsibilities to his wife including during the marriage, in the event of the husband's death, and for the couple's potential divorce. In the *ketubah*, the husband agrees to provide the wife with a *get* in the event that they later divorce. A *get* is a document that releases the wife to remarry within the Jewish faith. The *get* ceremony is performed before the *beth din*, the rabbinical court,<sup>4</sup> and only the husband has the power or authority to release his wife from the marriage.

Civil marriage alone is not recognized in Judaism without the actual Jewish marriage ceremony just as a civil divorce is not recognized without a *get* ceremony.<sup>5</sup> The marriage is entered into through a marriage contract which is why termination of the marriage must be accomplished through a document voiding that

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<sup>2</sup> *Inside the Mind of a Suicide Bomber* (June 22, 2007), <http://www.medicalnewstoday.com/articles/74879.php>.

<sup>3</sup> Richard J. Kurtz, *The Jewish Wife's Right to a Divorce*, 2 *FAM. ADVOC.* 10, 10-12 (1979-80).

<sup>4</sup> See <http://beth-din.org/>.

<sup>5</sup> Tracy Rich, *Jewish Attitude Toward Divorce*, <http://www.jewfaq.org/divorce.htm>.

contract.<sup>6</sup> The Jewish community views a Jewish woman as if she is still married to her husband until she receives the get, and any subsequent marriage is not recognized. A woman in this situation is referred to as *Agunah*.<sup>7</sup> Most rabbis refuse to marry women who have not been released from a previous marriage through a get; however, such marriages do occur and any children born of those marriages are considered as *mamzerim*,<sup>8</sup> meaning illegitimate or bastards. Such children are then forbidden from marrying another Jew in a Jewish religious marriage ceremony. The *Agunah* and *mamzerim* problems are limited, for the most part, to Orthodox or Conservative Jews.<sup>9</sup>

The treatment of men and women in the Jewish faith is quite unequal. A man who divorces his wife need not provide her with a get for him to remarry.<sup>10</sup> A man who remarries without providing a get to his previous wife does not plague his future children with the status of bastardy or illegitimacy. As time has evolved, the rabbinical court has made some movement toward equality for women. Originally, a man need only provide his wife with a get in order to terminate the marriage. He was allowed and able to do that with or without his wife's consent. Over time, the Jewish law has evolved to require the consent of both parties before there will be a Jewish divorce.<sup>11</sup> Another way the rabbinical court has moved toward equality is to require a husband to provide his wife with a get in certain situations where there is abuse or the husband is trying to secure an unfair divorce settlement. The *ketubah* requires that the husband provide his wife with a get willingly, but the *beth din* have given a get in situations where the husband appears and is unwilling to provide the get for his wife.<sup>12</sup>

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<sup>6</sup> Jewish Virtual Library, *Divorce*, <http://www.jewishvirtuallibrary.org/jsourc/Judaism/Divorce.html>.

<sup>7</sup> See Alan C. Lazerow, Comment, *Give and "Get"? Applying the Restatement of Contracts to Determine the Enforceability of "Get Settlement" Contracts*, 39 U. BALT. L. REV. 103 (2009).

<sup>8</sup> See Kurtz, *supra* note 3, at 10.

<sup>9</sup> *Id.*

<sup>10</sup> See Jill Wexler, Note, *Gotta Get a Get: Maryland and Florida Should Adopt Get Statutes*, 17 J.L. & POL'Y 735, 741 (2009).

<sup>11</sup> Kurtz, *supra* note 3, at 12.

<sup>12</sup> Wexler, *supra* note 10, at 742.

## B. *Christianity*

### 1. *Catholicism*

Catholics believe that marriage lasts until death. They believe this regardless of whether the wedding ceremony was civil in nature or a Catholic ceremony in the church. Although Catholics are aware that divorce is sometimes inevitable, they do not believe that divorce ends a marriage. The only way to truly end a marriage is to obtain an annulment from the church. A civil annulment will not suffice. The church does not issue annulments lightly, and there is a lengthy process to obtain one.<sup>13</sup> It may be easier if the marriage was performed outside of the Catholic faith, but there is still a process that must be completed.<sup>14</sup> The annulment does not per se end the marriage, but declares that it never existed to begin with. One worry with such a declaration is the legitimacy of any children born of a marriage that is subsequently declared to have never occurred. Fortunately, an annulment in the Catholic Church does not affect the legitimacy of any children born of such a marriage.

Catholics believe that a person who divorces and remarries without first obtaining an annulment is guilty of adultery. Those who do remarry in this fashion are not shunned from the church or cast out, but there are consequences for such behavior. When a person divorces and remarries without an annulment of the first marriage, those persons are forbidden from receiving certain sacraments within the church, including receiving Holy Communion and remarrying within the church.<sup>15</sup>

A Catholic who wishes to obtain an annulment should first speak with his or her priest. This process may take place before or after the civil divorce or annulment is final.<sup>16</sup> The case is then referred to the marriage tribunal where each case is investigated.<sup>17</sup> The marriage tribunal is a unit within the church trained to handle marital, divorce, and annulment matters. The marriage

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<sup>13</sup> Interview with Father James Toronto, Pastor St. Mark's Catholic Church (Spring 2003).

<sup>14</sup> *Id.*

<sup>15</sup> *Answers To Frequently Asked Questions About Church Annulments*, *supra* note 1.

<sup>16</sup> Neil Smith, *How to Get a Catholic Annulment*, 2 *FAM. ADVOC.* 11, (1979-80).

<sup>17</sup> *Id.* at 13.

tribunal gathers as much information as possible from the person requesting the annulment, the person to whom that person was married, and any other persons whom may have information regarding the couple's marriage and life prior to and during the break down of the marriage.<sup>18</sup>

It is important that the party to the marriage, other than the party seeking the annulment, be contacted and informed of the annulment request and investigation.<sup>19</sup> If an annulment, also called a declaration of invalidity, is granted, it affects and is applicable to both parties of the marriage. As such, if no other reasons exist barring the party who did not seek the annulment from remarrying within the church or receiving other sacraments, that party is also free to do so.

Unlike people in the Jewish faith, both Catholic men and women alike are allowed to seek an annulment. And unlike the rules of Orthodox Judaism, neither the other party's cooperation nor approval is vital to receiving an annulment; however, the church does want to ensure that both parties are aware of the proceedings. The similarities lie in the nature of the proceedings in that both require review from a governing body of religious leaders to determine whether the marriage should be declared either invalid or ended within the eyes of the church.

## *2. Latter Day Saints, Including Mormonism*

Mormon men and women are sealed together in a temple ceremony when married. Mormons believe that married couples who are sealed together in a temple ceremony are able to be together after death as well as during life.<sup>20</sup> A civil marriage ceremony alone is not sufficient to bind a husband and wife together in the afterlife. Men are allowed to be sealed to more than one woman at a time, but women are only allowed to be sealed to one man at any given time.<sup>21</sup>

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<sup>18</sup> *Purpose of Tribunal*, The Catholic Diocese of Kansas City-St. Joseph, [http://www.diocese-kcsj.org/content/offices\\_and\\_agencies/marriage\\_tribunal/purpose\\_of\\_tribunal/](http://www.diocese-kcsj.org/content/offices_and_agencies/marriage_tribunal/purpose_of_tribunal/) (last visited Oct. 12, 2010).

<sup>19</sup> *Id.*

<sup>20</sup> *Divorce and the LDS Church*, Religious Tolerance, [http://www.religioustolerance.org/lds\\_divo.htm](http://www.religioustolerance.org/lds_divo.htm) (last visited Oct. 12, 2010).

<sup>21</sup> *Id.*

Divorce and annulment are allowed in the Mormon faith, but are not recognized by the church until there is a sealing cancellation or temple divorce.<sup>22</sup> Therefore, for a woman to remarry after divorce or annulment, she must first obtain such a temple divorce.<sup>23</sup> This is much like the Jewish faith where men are free to remarry after a civil divorce whereas a woman must first obtain a religious divorce before she is free to remarry within the church.

### C. *Islam*

Islamic couples who marry enter into a *Mahr* agreement, and the marriage itself is considered to be a contract.<sup>24</sup> The husband contracts to pay the wife an agreed upon dower amount, usually one-half at the time of the marriage and one-half to be paid at the wife's demand.<sup>25</sup> The second one-half payment is usually not demanded by the wife except in the event of the husband's death or the couple's divorce.<sup>26</sup>

Because the marriage is viewed as a simple contract, divorce is allowed and may be initiated by either party.<sup>27</sup> When the wife initiates the divorce and the husband is not at fault, it is called a *Khul*, and the wife then forfeits the *Mahr* payment and must repay any amounts received at the time of the marriage ceremony.<sup>28</sup> The divorce is called *Talaaq* in opposite situations where the husband initiates and is at fault in the divorce.<sup>29</sup> Although Islam does not require the parties obtain a religious divorce in order to remarry, the *Mahr* agreement is a similar marriage contract to the Jewish *ketubah* and will be analyzed as such.

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<sup>22</sup> *Id.*

<sup>23</sup> *Frequently Asked Questions*, The Mormons (2007), <http://www.pbs.org/mormons/faqs/#7>.

<sup>24</sup> Kathleen A. Portuan Miller, *Who Says Muslim Women Don't Have the Right to Divorce?—A Comparison Between Anglo-American Law and Islamic Law*, 22 N.Y. INT'L. L. REV. 201, 209 (2009).

<sup>25</sup> *Odatalla v. Odatalla*, 810 A.2d 93, 97-98 (N.J. Super. Ct. Ch. Div. 2002).

<sup>26</sup> *Id.*

<sup>27</sup> Miller, *supra* note 23, at 211.

<sup>28</sup> Islamweb, *Divorce in Islam*, <http://www.islamweb.net/emainpage/index.php?page=articles&id=92752> (last visited Jan. 10, 2011).

<sup>29</sup> *Id.*

## II. Doctrinal Approaches to Religious Marriage and Divorce Agreements

### A. Arguments Regarding the Enforcement of Agreements to Provide a Religious Divorce

#### 1. Contract Theory

Courts of equity will enforce marital contracts that are not unconscionable and that are not contrary to public policy.<sup>30</sup> For an award of specific performance, the terms of the contract must be sufficiently certain and definite to enable the court to be sure of what specific act or acts were promised that it is ordering be performed.<sup>31</sup>

A distinction exists between contracts made in contemplation of marriage and contracts made in contemplation of divorce or civil annulment. A ketubah is considered a valid premarital agreement or contract so long as it comports with those requirements of any other premarital agreement that does not have a religious implication. Most ketubahs are not considered to be unconscionable or against public policy.<sup>32</sup> However, a separation or pre-annulment agreement that calls for a husband to provide his wife with a get may be deemed unconscionable or against public policy when the wife is coerced or unduly pressured into more than just a bad bargain.<sup>33</sup> In *Golding v. Golding*,<sup>34</sup> the court held that the “plaintiff did not freely and voluntarily enter into the subject agreement but was compelled to do so by her husband’s invocation of his power to refuse to give her a Jewish divorce.”<sup>35</sup>

One major argument that a marital contract requiring a husband to provide his wife with a religious divorce is against public policy is because such a contract promotes divorce. On the con-

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<sup>30</sup> Scholl v. Scholl, 621 A.2d 808, 811 (Del. Fam. Ct. 1992); Minkin v. Minkin, 434 A.2d 665, 666 (N.J. Super. Ct. Ch. Div. 1981); Ahmed v. Ahmed, 261 S.W.3d 190, 195 (Tex. App. 2008).

<sup>31</sup> Goldman v. Goldman, 554 N.E.2d 1016, 1022 (Ill. App. Ct. 1990).

<sup>32</sup> See Lubbell v. Stolls, 202 N.Y.S. 229 (N.Y. App. Div. 1923); Koepfel v. Koepfel, 138 N.Y.S.2d 366, 372 (N.Y. Sup. Ct. 1954); Minkin, 434 A.2d at 666.

<sup>33</sup> Lazerow, *supra* note 7, at 111-12 (discussing the unfairness of get settlement contracts).

<sup>34</sup> 581 N.Y.S.2d 4, 6 (N.Y. App. Div. 1992).

<sup>35</sup> *Id.* at 6.

trary, some agreements conditioned on divorce or which become effective upon divorce are not against public policy as promoting divorce.<sup>36</sup> In *Minkin v. Minkin*,<sup>37</sup> the court held that the ketubah was not against public policy because when the contract was read as a whole, it promoted a lasting and flourishing marriage.<sup>38</sup> The fact that only one aspect of the contract dealt with responsibilities of the parties in the event of a divorce did not render that contract void as against public policy by promoting divorce. When determining whether a marital contract is sufficiently certain and definite, courts will look “to the relationship between the parties and the circumstances surrounding the contract to determine if the terms were sufficiently definite for the parties to understand their obligations.”<sup>39</sup>

Some courts have held that they are unable to order specific performance in requiring a husband to provide his wife with a get because of the language in the ketubah that “the husband does ‘willingly consent, being under no restraint, to release, to set free, and put aside thee, my wife.’”<sup>40</sup> In *Margulies v. Margulies*,<sup>41</sup> the court held that a husband could not be incarcerated for failing to provide his wife with a religious divorce where a get may only be given by the husband voluntarily and if he were compelled to do so against his will, the get would be nullified.<sup>42</sup>

## 2. Constitutional Issues

Husbands and wives who refuse to provide a religious divorce to their spouses usually claim that ordering them to do so would violate their constitutional rights under the First Amendment. Some argue that ordering them to do so would be a violation under the Establishment Clause<sup>43</sup> and others argue the violation would occur under the Free Exercise Clause.<sup>44</sup> “The

<sup>36</sup> *Koepfel*, 138 N.Y.S.2d at 372.

<sup>37</sup> 434 A.2d at 666.

<sup>38</sup> *Id.*

<sup>39</sup> *Ahmed*, 261 S.W.3d at 194.

<sup>40</sup> *Aflalo v. Aflalo*, 685 A.2d 523, 529 (N.J. Super. Ct. Ch. Div. 1996).

<sup>41</sup> 344 N.Y.S.2d 482, 483 (N.Y. App. Div. 1973).

<sup>42</sup> *Id.*

<sup>43</sup> “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST., amend. I.

<sup>44</sup> “Congress shall make no law . . . prohibiting the free exercise thereof.” U.S. CONST., amend. I.

Establishment Clause prohibits government from placing its support behind a particular religious belief. The Free Exercise clause . . . prohibits government from interfering or becoming entangled in the practice of religion by its citizens.”<sup>45</sup> The U.S. Supreme Court declared the three prong test to ascertain whether a law defied the Establishment Clause in *Committee for Public Education and Religious Liberty v. Nyquist*.<sup>46</sup> The Court stated that the law “first must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion.”<sup>47</sup>

States have conflicting case law on whether enforcing an agreement between Jewish couples that the husband will provide the wife with a get is constitutional or not. States have viewed these First Amendment issues from the viewpoint of both the Establishment Clause and the Free Exercise Clause. Delaware,<sup>48</sup> Illinois,<sup>49</sup> and New York<sup>50</sup> have held that enforcement of such agreements is constitutional. Arizona has held that enforcement is unconstitutional,<sup>51</sup> New Jersey has produced conflicted authority holding that enforcement of agreements to provide a get are both constitutional<sup>52</sup> and unconstitutional.<sup>53</sup>

New York is home to a large Jewish community, so it only makes sense that the majority of the cases on this issue stem from that state. New York courts seem to follow the idea that enforcing agreements, usually in the form of ketubahs, by husbands to appear before and comply with decisions of the beth din, do not unconstitutionally offend those husbands’ religious rights.

New York addressed the issue of whether the civil courts may enforce an agreement between a married, or once married, couple for the husband to appear before the beth din so the wife may be granted a get, or religious divorce, in *Koepfel v. Koep-*

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<sup>45</sup> *Aflalo*, 685 A.2d at 528.

<sup>46</sup> 413 U.S. 756, 772-73 (1980).

<sup>47</sup> *Id.* (citations omitted).

<sup>48</sup> *Scholl v. Scholl*, 621 A.2d 808 (Del. Fam. Ct. 1992).

<sup>49</sup> *Goldman v. Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990).

<sup>50</sup> *Koepfel*, 138 N.Y.S.2d 366.

<sup>51</sup> *Victor v. Victor*, 866 P.2d 899 (Ariz. Ct. App. 1994).

<sup>52</sup> *Minkin*, 434 A.2d 665.

<sup>53</sup> *Aflalo*, 685 A.2d 523.

*pel*.<sup>54</sup> In *Koepfel*, the wife began annulment proceedings in the civil court system. While the annulment action was pending, the parties entered into a separation agreement where the husband agreed to appear before the beth din in the event that the civil annulment was granted. The court in *Koepfel* held that “specific performance . . . would merely require the [husband] to do what he voluntarily agreed to do.”<sup>55</sup> The court reasoned that meeting the terms of the agreement would not require the husband to do any religious act, but would only require that he make himself available to the beth din which would then make a decision based on the evidence and testimony before it.<sup>56</sup> The court never addressed whether ordering specific performance of delivering a get to his wife would have been unconstitutional as interfering with his freedom of religion.

New York again addressed the issue of whether the terms of a ketubah were enforceable in *Avitzur v. Avitzur*.<sup>57</sup> In that case, the parties signed the ketubah before marrying in a Jewish religious marriage ceremony. In the ketubah, the parties agreed to appear before the beth din “for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a get.”<sup>58</sup> The court held that ordering specific performance in this case did not interfere with the husband’s First Amendment religious rights because the court was simply applying contract law. The court compared this case to that of one where the parties have agreed to arbitration as opposed to the traditional civil court system. Again, the court elided the issue of whether ordering specific performance to provide the wife with a get would pass constitutional muster.

#### B. Courts’ Limited Enforcement Ability

Although many courts of equity have upheld marital agreements that dictate one spouse must provide a religious divorce to the other spouse, enforcement of a specific performance award has been somewhat difficult. Courts have been willing to hold in contempt a husband or wife who refuses to provide a religious

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<sup>54</sup> 138 N.Y.S.2d 366.

<sup>55</sup> *Id.* at 373.

<sup>56</sup> *Id.*

<sup>57</sup> *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).

<sup>58</sup> *Id.* at 138.

divorce to his or her spouse when he or she has been ordered to do so by a court of equity.<sup>59</sup> A court may impose fines, order incarceration, or refuse to enforce other aspects of an agreement as punishment to a party in contempt.<sup>60</sup> However, in *Margulies v. Margulies*,<sup>61</sup> the court held that it would not incarcerate the husband for failing to comply with an order to provide his wife with a get. The court rationalized its decision by stating that because a Jewish divorce may only be granted when the husband willingly requests it on his own free will, the court was without the power to punish with incarceration.<sup>62</sup> However, the court did uphold the contempt fines previously imposed on the husband.<sup>63</sup> And in *Scholl v. Scholl*,<sup>64</sup> the court held that it may not enforce its order for a husband to provide his wife with a get by means of imprisonment or by actually convening the beth din to carry out the get procedure.<sup>65</sup>

### III. Conclusion

Different religions have different beliefs regarding the sanctity of marriage and the availability of divorce. Some believe that divorce is just part of life while others believe that marriage binds two people through life and beyond to where the bond cannot be broken simply by divorce. Whatever the specific belief of the religion, members and believers of each faith often take the rules and expectations of that faith seriously. So when the rules of Judaism and Mormonism say that a divorced woman may not remarry without a get or sealing cancelation from her former spouse, that woman will go to great lengths to ensure that she is compliant with the rules of her faith, but also that she is able to live a satisfying and fulfilling rest of her life. Other faiths are not as demanding with regards to religious divorce, but a devout fol-

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<sup>59</sup> See *Megibow v. Megibow*, 612 N.Y.S.2d 758, 760 (N.Y. Sup. Ct. 1994); *Kaplinsky v. Kaplinsky*, 603 N.Y.S.2d 574, 575 (N.Y. App. Div. 1993).

<sup>60</sup> See *Kaplinsky*, 603 N.Y.S.2d at 575; *Waxstein v. Waxstein*, 395 N.Y.S.2d 877, 881 (N.Y. Sup. Ct. 1976).

<sup>61</sup> 344 N.Y.S.2d 482, 483 (N.Y. App. Div. 1973).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 621 A.2d 808, 811 (Del. Fam. Ct. 1992).

<sup>65</sup> *Id.*

lower has specified procedures to follow in order to have any remarriage recognized by her church.

The spouse who is required by contract to provide the other spouse with a religious divorce is not always willing to do so. Common arguments against performing the contract duties are that the contract is unenforceable due to First Amendment rights and as against public policy. Another common position is that the contract does not have terms specific enough to enforce. Courts have overwhelmingly held that contracts for one spouse to provide the other with a religious divorce are not void as against public policy. However, courts have gone both ways on whether the agreements violate the First Amendment and whether each agreement is specific enough to enforce.

Finally, once a court holds that an agreement for a religious divorce is enforceable, that court next has to decide the proper way to enforce such an order. For parties who do not specifically perform according to the court orders, contempt is an available remedy. Unfortunately, not all jurisdictions view contempt for this type of action as being as serious as other grounds for contempt citations. Some courts refuse to incarcerate as punishment for failure to comply with the procedures of a religious divorce, seeing that as crossing the line into the religious realm.

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