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N v N (Jurisdiction: Pre-Nuptial Agreement)

[1999] 2 FLR 745

01/07/1999

Barristers
Private: Jonathan Cohen QC

Court
Family Division

Facts
Before their marriage in 1996, the Orthodox Jewish parties entered into an antenuptial agreement which dealt primarily with property matters, but which also required them to attend and comply with the ruling of the Beth Din in the event of any matrimonial dispute. The short marriage which produced one child failed and although a decree absolute of divorce was granted under the Matrimonial Causes Act 1973 in 1998 the husband did not apply to the Beth Din for a get (a bill of divorce in Jewish law). A consent order was made in relation to ancillary relief and the contact dispute remained outstanding. According to Jewish law the husband and wife remained married and this had particularly serious consequences for the wife. She sought to compel the husband to initiate the get by asserting that he was in breach of both the terms of the antenuptial agreement and his agreement, recited in the contact order, to progress the obtaining of the get expeditiously. The husband argued that the court had no jurisdiction to grant such relief and applied to strike out the summons.

Held
Held – dismissing the summons on the basis that the court lacked jurisdiction to grant the relief sought by the wife –

(1) On the basis of public policy, antenuptial agreements as a class are not specifically enforceable in English law. The existence of an agreement and its evidential weight are factors to be taken into account when the court is deciding whether or not to exercise its discretion under s 25 of the Matrimonial Causes Act 1973 to make orders for financial provision under ss 23 or 24. Each individual clause is unenforceable on public policy grounds and there is no power in any statutory provision to compel the parties to implement part of the agreement.

(2) The husband's agreement recited in the contact order could not be enforced by way of mandatory injunction as the wife's reliance on an unenforceable clause in the antenuptial agreement could not found the basis for an injunction. Had the husband given an undertaking, that would have been enforceable by committal.

(3) There were no relevant means by which the court could indirectly compel the husband's performance

under the antenuptial agreement. The divorce decree had been made absolute and s 10 of the Matrimonial Causes Act 1973 had no application. The consent order in relation to ancillary relief meant that the court's jurisdiction in relation to financial issues was spent. The obtaining of a get should not be imposed as a condition of the contact order under s 11(7) of the Children Act 1989, nor could it be the subject of a specific issue order under s 8 of that Act since it had no connection with parental responsibility. However, a judge hearing future contact proceedings had discretion to decline to do so until the husband had honoured his agreement, as long as this course was compatible with the child's welfare.

Per curiam: the government's delay in implementing Part II of the Family Law Act 1996 including the get clause contained in s 9(3) and (4) means that the injustice which Jewish spouses, particularly women, suffer as a consequence of a refusal by the other spouse to agree to a get will not be remedied in the foreseeable future. However, the court currently has the power to refuse to permit a decree nisi of divorce to be made absolute on the application of a spouse who is refusing to co-operate in the grant and receipt of a get.