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Case no. 2015/134

Esther Schmeltz v. Avraham Kolitz

During the Fall of 2008, the couple married in accordance with Orthodox Jewish law. Four years later, Avraham informed Esther that they would be getting divorced and at that time he left the marital home. During the last three and a half years, Esther attempted to receive her *get* from Avraham but until now he has refused to give his wife her *get* unless he would receive \$100,000. There were settlement negotiations but at the end the negotiations fell apart. To this date, despite the fact that we obligated a *get*, a *get* was not forthcoming.

It was clear to Esther that Avraham would continue to refuse giving a *get* and therefore requested from the panel whether there would be grounds to void the marriage based upon the fact that she contracted from her spouse a sexually transmitted disease called human papilloma virus (hereafter: HPV). Women usually discover that they have HPV when they have a pap smear. Esther visited her doctor for her annual physical exam soon after she married and her doctor informed her that her Pap smear results were irregular. After testing, her physician told her that she had HPV. There are approximately 100 types of HPV, some cause cervical cancer, some generate genital warts and others are subclinical and there are no recognizable symptoms. After further testing, Esther found that the HPV that was transmitted by Avraham was harmless and that it would disappear in a few years. Given the fact that Esther alleges never had intercourse with any other man except Avraham,¹ she knew that the HPV could only have been sexually transmitted by Avraham. Upon inquiry, Avraham told her that he had intimate relations with a woman prior to marriage. Despite the fact that her doctor counseled her to refrain from having relations with Avraham, she continued to engage in conjugal relations. In effect, though she was infecting herself again and again every time she cohabitated with him, Esther who was in love with Avraham allegedly continued to engage in conjugal relations in order to keep her husband happy. Had she known prior to the marriage that he had HPV she never would have married him. In other words,

¹ Since as the panel determined there was no basis for voiding the marriage based upon "*kiddushei ta'ut*" (see infra condition no. 3), there is no need to address the halakhic trustworthiness of her statement that in fact Avraham transmitted the HPV and she had relations only with Avraham.

Esther is contending that her husband's failure to disclose intentionally or unintentionally² that he had HPV is grounds to void her marriage and therefore she is free to remarry without receiving a *get* from Avraham.

Discussion:

Before determining whether there is a basis to argue that there is "*a mum gadol*", a major flaw which Avraham failed to disclose and may serve as a reason to void the marriage, the threshold question is whether there are grounds to coerce a *get* due to a sexually transmitted disease by the husband? Specifically, we will address this issue through the prism of a husband who contracted AIDS and transmitted HIV to his spouse.

1. Grounds for *get* coercion due to a sexually transmitted disease by the husband

The grounds for compelling the issuance of a *get* such as physical defects are mentioned in the Talmud. See Ketubot 63b, 76a, 77a-b; Yevamot 65b. After the close of the Talmud, the question arises whether a *beit din* may compel a husband to give a *get* to his wife in circumstances not specified in the Talmud? May a *beit din* compel a *get* if a husband was infected his wife with a sexually transmitted disease, a disease which not mentioned in the Talmud? Is the list a closed list or can we expand the list based upon *medameh milta le-milta*, utilizing analogical reasoning? This question is subject to much debate among the *Poskim*.

However, even if an authority claims that the list in the Talmud is a closed list, one should refrain from assuming that there will be no situation(s) where the *posek* will refuse to coerce a *get* in a new case. For example, on one hand, addressing the situation of a mentally dysfunctional husband, Rosh refuses to sanction *get* coercion due to the fact that such disorder is not cited in the Talmud. See Teshuvot ha-Rosh 43:3. Yet, on the other hand, when dealing with an epileptic wife Rosh permits *get* coercion. See Teshuvot ha-Rosh 42:1. This seeming contradiction between the two rulings is addressed by Teshuvot Ma'aset Moshe, vol. 1, EH 17 which notes,

"...when Rosh states that one should not add to the cases mentioned in ha-Madir (referring to a *perek* in Ketubot- AYW) that does not mean that there are no situations where there are grounds for coercion. But rather what is meant, that one should not add unless a case is like those mentioned..."

In other words, if we can engage in *medameh milta le-milta* then we may add other situations. See also, Teshuvot Maharam Gavison 10. Consequently, though a particular dangerous disease is absent from the list, nevertheless since there is mention in the Talmud that a husband who has skin boils there is a basis for *get* coercion similarly one can invoke another dangerous malady, And Rosh's view is not "a lone ranger". There are numerous *Poskim* who will coerce a *get* in situations of a husband who is infected by a

² Currently, there is no test for HPV for men.

dangerous disease. Some authorities will require that in fact the disease is a danger to the wife should she be exposed to it and some will mandate an additional requirement that the wife cannot tolerate living with a husband who has succumbed to such a disease. See Teshuvot Re'em in Teshuvot Sefer Amukim 19; Teshuvot Maharit, vol. 2, EH 14; Teshuvot Divrei Ribot 402; Teshuvot Maharam Gavison 10; Teshuvot Maharitz 229. Consequently, as such it is unsurprising that today, contemporary authorities would coerce a *get* if a husband had AIDS and infected his wife with HIV. See Teshuvot Mishneh Halakhot 17:46; Teshuvot Ateret Devorah, EH 2:90

However, as noted by Ravyah, Hatam Sofer and Dvar Yehoshua, should the disease fail to pose a danger, there would be no grounds to obligate the husband to give a *get*. See Mordekhai, Ketubot 7:201; Teshuvot Hatam Sofer EH 116; Teshuvot Devar Yehoshua 3:30.

2. *Kiddushei Ta'ut* (lit. A mistaken betrothal, loosely translated as a mistaken marriage)

Given that today, at least in the Gola, the Diaspora, we legally and therefore halakhically aren't empowered to coerce a *get*, some *Poskim* such as Rabbis Elhanan Spektor, Eliyahu Klatzkin, Tzvi P. Frank and Moshe Feinstein argue that one must seek whether the conditions are ripe that enables a *Posek* to void a marriage based upon *kiddushei ta'ut* in a situation where a *get* will not be given. See Teshuvot Ein Yitzhak, helek 1, EH 24; Teshuvot Devar Eliyahu 48; Teshuvot Har Tzvi EH 2:181; Iggerot Moshe EH 1:79.

Prior to a *beit din* invoking the tool of *kiddushei ta'ut* to void a marriage retroactively and claim there was an error in the creation of the marriage; three preconditions must have been obtained:

- (1) The husband's defect must be a major one (*a mum gadol*) such as sexual impotency, refusing to have children, insanity, homosexuality, apostasy, a marital expectation communicated by the prospective husband prior to the marriage which turns out to be a misrepresentation, or engaging in criminal behavior such as business fraud a flaw which must have been preexisting prior to the onset of the marriage. All of the aforementioned examples of a husband's flaws have been characterized by one or more *Poskim* as a *mum gadol*. Whether a particular defect serves as major defect and therefore grounds for voiding a marriage is subject to the discretion of the *beit din*.

The emerging issue is whether transmitting sexual disease to a wife which is infectious and therefore entails danger to the spouse is that disease to be labeled "*a mum gadol*"? Addressing the situation of a husband infected with AIDS, though initially Rabbi Menashe Klein writes that given that the STD emerged after the marriage and there was no corroborating evidence that in fact the disease existed prior to the marriage, one might infer that if in fact supporting evidence would have been produced, assuming other conditions would have been obtained, R. Klein would conclude that there are grounds to engage in *bittul kiddushin*, voiding the marriage. However, it is clear from his subsequent argumentation that in fact he is in principle opposed to invoking "*kiddushei ta'ut*" as a vehicle to void any marriage. See Teshuvot Mishneh Halakhot 17:46.

However Dayan Shalom Messas and Rabbi Avraham Shulsinger rule that having been infected with AIDS,

the HIV is a *mum gadol*. See Teshuvot Shemesh u-Magen, helek 4, EH 100; Teshuvot Be'air Shrim 5:49. Seemingly, one may argue that there is the Talmudic statement "one who is performing a *mitzvah* will never experience anything bad". As such, in our case Esther should not be concerned about becoming infected with HPV during cohabitation and therefore one cannot classify this STD as "*a mum gadol*".

The implicit assumption here is that the wife is performing a *mitzvah* by engaging in intercourse. Clearly, a wife is exempt from the biblical *mitzvah* of *p'ru ur'vu*, increase and multiply (Bereshit 9:1, 7), however according to some *Poskim* it is incumbent upon her to fulfill two rabbinic duties, namely "*la-shevet*", populating the world (Yeshayiah 45:18) and "*la-erev*", "in the evening do not withhold your hand from planting" (Kohelet 11:6). See Atzei Arazim 1:2; Teshuvot Hatam Sofer EH 1:20; Beit Shmuel, SA EH 1:2; Tosafot Shabbat 110b, s.v. *ve'ha'tanya*. Without addressing the difference between these two *mitzvot*, suffice is to say that there is an obligation incumbent upon the wife to promote procreation beyond the statutory requirement of a son and daughter which is mandated by the *mitzvah* of *p'ru ur'vu*. See Perush ha-Ramban al ha-Torah, Bereshit 9:7. In fact, some *Poskim* reprovved families who had only two children. See Teshuvot Helkat Ya'akov 2:11; Teshuvot Melamaid le-Ho-eil 3:18. Others claim that she performs a *mitzvah* due to the fact that she assists him in fulfilling the duty of *p'ru ur'vu*. See Hiddushei ha-Ran, Kiddushin 41a.

Notwithstanding that Rabbi Shulsinger raises doubts whether fulfilling the *mitzvah* of "*la-shevet*" and "*le-erev*" would rise to the level of "one who is performing a *mitzvah* will never experience anything bad" (see Teshuvot Be'air Shrim 5:49), nonetheless there are other *Poskim* who would reject the applicability of this statement. For these authorities, it is applicable only to a disease which has been labeled as "*seguli*" such as "*a ruach ra'ah*", an evil spirit or "*minhag she'dim*", the practice of demons. See Rashi, Hullin 107b; Tosafot Yoma 77b; Rashi, Ta'anit 20b. On the other hand, diseases which are "*derech ha-teva*", which transpire naturally potentially may affect a person even if he/she is engaged in the performance of a *mitzvah*. And in cases where harm is a frequent occurrence, one cannot invoke "the agents who perform a *mitzvah* are not harmed". See Be'air Shrim, op. cit.

Notwithstanding some authorities such as Teshuvot Beit She'arim 350, Teshuvot Hatam Sofer, helek 1, EH 130 and Teshuvot Haham Tzvi 11 who argue that "one who is performing a *mitzvah* will never experience anything bad" is applicable to diseases linked to the natural order, Teshuvot Divrei Malkiel 2:53(6) and Teshuvot Haham Tzvi 1 disagree. In short, HIV is to be viewed as "*a mum gadol*" because despite the fact that a wife may be performing a *mitzvah* by engaging in intimate relations, such halakhic behavior will not protect her from contracting the STD.

Now let us address our situation. Clearly, based upon the battery of testing the type of HPV which infected Esther was harmless and therefore cannot be classified as "*a mum gadol*". Yet, since a woman may contract multiple types of HPV from the same man, it is in the realm of possibility that Avraham may have been infected equally with HPV 6, HPV16 or HPV18, STDs which have been known to significantly increase the risk of cervical cancer. Despite her physician's advice to refrain from having sexual relations with him, she continued to be intimate with him. Given that there exists the possibility that sometime in the future he may transmit one of these high risk HPV's to Esther resulting in the potential to cause cervical cancer to Esther, having HPV16 or HPV18 falls into the category of "*a safek sakanah*", a possible danger to life, and we would view it as a potential *mum gadol*.

A source that in a situation of "*safek sakanah*", one is obligated to coerce a get may be found in the

words of Rabbi Shmuel Vital who addressed the case of a wife who was afflicted with leprosy.

“ Even though we find daily occurrences that men who are lepers sleeping with wives who are healthy and are not infected by males, and some men who are healthy who sleep with women who are lepers and do not become infected by women. One should know that matters vary from one case to another- there is a type which infects and there is another type which does not infect... And the same applies to the disease of leprosy and the like. One person may be infected and another person isn't infected. And possibly this man may be one of the men who becomes infected, and we are more stringent with danger, and a man does not live in the same basket with a snake” (Teshuvot Be'air Mayyim Hayyim 7).

And similarly we should arrive at the same conclusion in our case. There are different types of HPV. There are some which are harmless and others which are harmful. And possibly in the future Avraham will be transmitting an HPV which is dangerous. Consequently, just as *get* coercion should be applied regarding the wife who is afflicted with leprosy, so too in our situation.

Rabbi Elchanan Spektor stressed the identical point and ruled that if there exists a doubt whether a particular malady is to be classified in the category of an infectious and dangerous disease, then a *get* ought to be coerced. (Teshuvot Ein Yitzhak, EH 2:35).

Therefore, there we may view this future HPV, possibly virulent one as a situation of “*safek sakanah*” and therefore it is a major flaw.

(2) The wife must be unaware of the mum prior to the inception of the marriage and only discovered it after the marriage.

Based upon the statement of Esther,³ we find that she only became aware of the STD after the onset of the marriage.

(3) Finally, upon a wife's awareness of this major latent defect, she must decide to leave the marriage. Whether she has to bolt the marriage immediately or may choose to remain for a period of time due to certain reasons is open to halakhic controversy.

In light of the facts in our case, we may refrain from staking out a position regarding this debate. Given

³ Since as the panel determined there was no basis for voiding the marriage based upon “*kiddushei ta'ut*” (see infra condition no. 3), we had no reason to perform due diligence by requesting of Esther to produce supporting documentation that in fact she was infected by HPV.

that she continued to have conjugal relations with him, "*savra ve-kibla*"-she accepted the possibility that in the future she may be infected with a high-profile HPV and therefore she cannot contend that there was an error in the marriage. Secondly, at the end of the day, Avraham divorced her. As such, due to her decision to stay with the marriage including having intimate relations with Avraham one cannot contend that the possibility of an endangerment by a virulent HPV may serve as grounds to void the marriage based upon "*kiddushei ta'ut*".

As we mentioned at the beginning of our *psak din*, we obligated Avraham to give a *get* to Esther.

Signed