

Getting the "Get": Obtaining a Jewish Divorce in Colorado

by Richard I. Zuber

This newsletter is prepared by the Family Law Section of the Colorado Bar Association. This month's article was written by Richard I. Zuber, Denver, a sole practitioner emphasizing family law. The author wishes to express his appreciation to Rabbi Daniel Goldberger and Rabbi Mordecai Twerski for their valuable assistance in the preparation of this article.

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It is a familiar scenario: Two lawyers stand outside a courtroom, waiting for their case to be called. Their respective clients pace the hallway, muttering to themselves while glaring at one another. The clients, formerly husband and wife, have been civilly divorced for years, yet each bears the scars of countless post-decree hearings. One attorney, nodding his head toward the clients, repeats to the other a time-worn cliché: "The entry of the divorce decree certainly didn't dissolve the marriage of our clients."

While the attorney was speaking figuratively, his comment could be literally true if the contesting parties were Jewish. With the practitioners of Judaism, at least those adhering to the orthodox or conservative branch, a civil divorce decree does not terminate the religious bonds of marriage.^(fn1) To such adherents, a Jewish ceremonial marriage may be terminated only according to Jewish law. This article discusses the issues practitioners may encounter in the dissolution of a Jewish marriage.

Historical Perspective

According to Jewish law, at least until the eleventh century, matrimonial bonds could be severed in only one of two ways: by the death of one of the parties or by means of a "get"---a bill of divorce written at the specific request of the husband and delivered by him or his agent to the wife.^(fn2) Until this time, a Jewish husband could divorce his wife at will simply by delivering a get into her possession.^(fn3)

In an attempt to eliminate the unfairness of the "divorce at will" situation, a religious precedent was established in the eleventh century when a rabbinical decree was promulgated giving women the right to refuse a *get*.^(fn4) In addition, this same decree prohibited the practice of polygamy, which previously had been permitted to husbands under biblical law.^(fn5)

Religious Consequences For the Wife

Despite the intentions of the eleventh-century decree, potentially disastrous consequences exist today for a Jewish wife should she not receive a *get* from her husband following a civil divorce:

1. The wife remains married under Jewish law until her husband gives her a *get* and she accepts it.
2. Until she receives and accepts a *get*, the wife cannot remarry in a religious ceremony.(fn6)
3. If the wife legally remarries in a secular ceremony prior to receiving the *get*, she is considered an adulteress under Jewish law.(fn7)
4. Should the remarried wife subsequently obtain a Jewish divorce, she is nevertheless forbidden a religious marriage to her second husband.(fn8)
5. The wife cannot return to her first husband after she has consorted with another man, whether or not she received a Jewish divorce from the first husband.(fn9)
6. Any children she has as a result of her subsequent secular marriage are forever stigmatized as "*mamzerim*," or illegitimate. These children have no recourse (such as conversion) to alter their status,(fn10) nor will a *get* obtained after their birth change their status, which they will pass on through generations.(fn11)
7. Children from a subsequent secular marriage are forbidden to marry anyone except other *mamzerim* or converts to Judaism.(fn12)
8. Under Jewish law and tradition, the wife who fails to receive a *get* bears the stigma of being labeled as an "*agunah*" or "chained woman," who cannot remarry absent a *get*.(fn13)

Religious Consequences For the Husband

For the Jewish husband who is religiously married but civilly divorced, the consequences are not as severe as with his spouse:

1. If the husband remarries in a secular ceremony without a *get* being delivered and accepted, he is not considered guilty of adultery under biblical law. However, as previously noted, he is violating a rabbinical decree prohibiting polygamy. Although this rabbinical prohibition is a significant impediment to a husband's remarriage, it lacks the force of a biblical injunction. As already noted, there is no biblical injunction prohibiting Jewish men from having more than one wife.(fn14)
2. Any children born from his subsequent marriage are not considered illegitimate within the Jewish faith.(fn15)
3. Even if the wife should refuse a *get* from the husband, he may, in certain circumstances, obtain permission ("*heter*") from the rabbinical authorities to contract an additional, religiously valid marriage.(fn16) This is generally the case where the wife is insane or has some form of mental incapacity or has abandoned the husband.(fn17)

Limited Remedies Of Religious Authorities

As a result of the *get*-related problems that remained despite the eleventh-century decree, countries other than the United States (where the interaction between church and state is limited) frequently authorize rabbinical courts to take punitive action against the recalcitrant husband or wife who has refused to cooperate in the giving or acceptance of the *get*, if sufficient grounds for a divorce are found.(fn18) For example, in Israel where rabbinic tribunals have jurisdiction over domestic matters the husband can be held liable for the support of his wife until such time as he executes a bill of divorce.(fn19)

Further, rabbinical authorities worldwide (including the United States) have instituted internal reforms both to ensure that husbands do not divorce their wives capriciously or unreasonably refuse to cooperate in giving a *get*. First, restrictions have been placed on husbands forbidding them to divorce a mental incompetent.(fn20) Second, to circumvent a recalcitrant husband's or wife's refusal to cooperate in the giving or acceptance of the *get*, rabbinical courts have been given the power to annul marriages, even though they were valid according to Jewish law.(fn21) Third, in certain circumstances, Jewish women have been given the right to petition the rabbinical courts ("Beth Din") to order their husbands to execute and deliver a *get*.(fn22)

Finally, it has been deemed religiously permissible for secular courts to enforce Jewish court decrees. In this regard, Conservative Judaism amended its version of the traditional Jewish marriage contract ("*ketubah*") to provide specific terms for the granting and acceptance of the *get*. This was done with the hope that the secular court would enforce the clause as a private, legally valid contractual agreement.(fn23) Despite these reforms, the rabbinical courts in countries such as the U.S. have lacked the authority to compel compliance with their decisions.(fn24) An example of the religious authorities' efforts to address this difficult problem in a secular manner is found in the Appendix to this article (a sample prenuptial agreement).

"Potentially disastrous consequences exist today for a Jewish wife should she not receive a *get* from her husband following a civil divorce."

One effect of the inability of the rabbinical courts to enforce compliance with their orders, at least in the U.S., is to give husbands substantial bargaining leverage in the civil divorce proceeding.(fn25) This leverage frequently allows the husband to extort financial concessions concerning property division, maintenance and attorney fees or to obtain favorable custody and visitation arrangements. As one author states:

The wife (if she contemplates remarriage) has two choices: she can refuse to impoverish herself and suffer the consequences of being an adulteress and raising illegitimate children, or she can agree in return for the *get* to an inequitable divorce contract which deprives her of all fair return from her contribution to the marriage.(fn26)

It should be noted that while Jewish law places greater sanctions on a divorcing wife than on her husband, a husband who adheres to the dictates of rabbinic authority also is

subject to leverage by his wife in a civil divorce proceeding if he wants to remarry and his spouse refuses to accept the *get*.(fn27)

The Colorado family law practitioner should note that Jewish couples who practice Reform Judaism are not necessarily immune to the problems associated with obtaining a Jewish divorce. In the nineteenth century, religious authorities in the Reform movement determined that divorce, unlike marriage, was a secular matter and that a civil divorce would be deemed to be religiously valid even without a *get*.(fn28) However, an adherent of Reform Judaism still may be concerned about future problems that could confront any children born from the second marriage. These children and their descendants would forever be precluded from marrying an orthodox or conservative Jew in an orthodox or conservative religious ceremony.(fn29)

Seeking Solutions

It is questionable what measures, if any, are available in Colorado to ensure that the entry of a civil divorce decree actually dissolves the bonds of a Jewish marriage. There is no Colorado appellate court decision addressing the issue of whether a Colorado court can constitutionally order (directly or indirectly) Jewish litigants to cooperate in obtaining a religious divorce. It has been argued that any such order would violate

...the First Amendment's establishment clause (violative of the separation of church and state), the free exercise clause, the free speech clause and the Fourteenth Amendment's guaranty of equal protection of the laws.(fn30)

Despite such constitutional arguments, legislatures and secular courts in other jurisdictions have followed different approaches to remedy the potential injustice to litigants who are civilly divorced but remain religiously married. The first approach some courts have followed is to provide judicial remedies to enforce the contractual promises of the parties. Promises to deliver or accept a *get*---whether made in open court or embodied in settlement agreements or antenuptial agreements---have been enforced.(fn31) However, judicial enforcement frequently has not been through an order specifically compelling either spouse to give or accept a *get*. Rather, to avoid the constitutional dilemma, courts have used indirect means of enforcement, such as fines, contempt orders or dismissal of cross-motions by the offending spouse.(fn32)

Second, some courts have applied contract principles to enforce the provisions of the *ketubah*. This traditional document sets forth certain obligations that each spouse owes the other as a result of the marriage, including the explicit reference that the wife shall have the status of a wife "according to the law of Moses and Israel." Some courts have interpreted portions of the *ketubah* as a secular contract. They have concluded that under the law of Moses and Israel, the wife is entitled to receive a *get* from her husband. Accordingly, it has been found appropriate for a court to enter a specific performance order compelling the husband to deliver a *get* to his wife(fn33) or to attend a religious tribunal empowered to arbitrate the *get* dispute.(fn34)

A more innovative approach advocated by legal commentators and based on European precedent is for the injured spouse to sue the recalcitrant spouse for the tort of intentional infliction of emotional distress.^(fn35) Rather than seeking an award of money damages for the tort, the injured spouse should seek equitable relief in the nature of a mandatory injunction. This equitable remedy is based on the theory that a damage remedy would be inadequate to address the ongoing injury. To circumvent the biblical rule that---unless ordered by a Jewish court---a *get* is invalid if not voluntarily given or accepted, the injunction should direct the offending spouse to appear before a religious tribunal and to follow their orders.^(fn36)

Finally, with an eye to reducing the litigation over this issue, the New York state legislature enacted legislation (commonly known as the "*Get Law*"), which it hoped would solve the problems associated with the refusal of a spouse to cooperate in the giving or acceptance of a *get*. This statute *inter alia* requires every party who commences a divorce or annulment proceeding to allege in a Verified Complaint that

to the best of his or her knowledge that he or she has taken or that he or she will take prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce....^(fn37)

The statute further provides for the imposition of serious criminal penalties should a spouse knowingly submit a false verified statement. Unfortunately, this statute fails to recognize that (1) only a husband can deliver a *get* and (2) if the husband does not bring the divorce action, the petitioner's/wife's promise to remove the barriers of remarriage are ineffective.

Conclusion

Counsel representing the Jewish client in a divorce proceeding should no longer automatically assume that the issue of the giving or acceptance of a *get* is purely a religious question that can be constitutionally ignored in divorce negotiations. The dire consequences of failing to obtain a *get* can affect the parties and their children for generations.

Certainly, it is not uncommon in Colorado for parties and their counsel to negotiate concerning the religious upbringing of children as part of any custody order. In this author's opinion, it makes little sense to ignore constitutional objections as to one issue, then rely on these infirmities as to the *get* issue. Both issues are important and should be addressed by the conscientious practitioner.

NOTES

1. 6 *Encyclopedia Judaica* 126 (1978); 2 *Encyclopedia Judaica* 430 (1978). Note: This article is applicable only to Ashkenazi (North and Central European) Jews, who comprise most of the U.S. Jewish population. It does not apply to Sephardic Jews. See, Pfeffer and Pfeffer, "The Agunah in American Secular Law," 31 *J. of Church and State* 487, 489 (1989).

2. Aiardo, "*Avitzur v. Avitzur* and New York Domestic Relations Law Section 253: Civil Response to a Religious Dilemma," 49 *Alb. L.Rev.* 131,132-33, n.5 (1984).

3. Cobin, "Jewish Divorce and the Recalcitrant Husband---Refusal to Give a Get as Intentional Infliction of Emotional Distress," 4 *J. of Law and Religion*, 405,407 (1986).

4. *Id.* at 407.

5. *Id.* 408.

6. Aiardo, *supra*, note 2 at 133.

7. *Id.* at 138, n.26.

8. Pfeffer and Pfeffer, *supra*, note 1.

9. Redman, "Jewish Divorce: What Can Be Done In Secular Courts to Aid the Jewish Woman," 19 *Ga. L.Rev.* 389,390 (1985).

10. Cobin, *supra*, note 3 at 409; Pfeffer and Pfeffer, *supra*, note 1 at 488-89.

11. Pfeffer and Pfeffer, *supra*, note 1 at 489.

12. Redman, *supra*, note 9 at 391.

13. Cobin, *supra*, note 3 at 409; Pfeffer and Pfeffer, *supra*, note 1 at 487.

14. Cobin, *supra*, note 3 at 408-09; Pfeffer and Pfeffer, *supra*, note 1 at 488-89.

15. Pfeffer and Pfeffer, *supra*, note 1 at 489.

16. *Id.* at 489.

17. Cobin, *supra*, note 3 at 408-09.

18. *Id.* at 407-08.

19. *Id.* at 408, n.8.

20. Aiardo, *supra*, note 2 at 138, n.30.

21. *Id.* at 136, n.20.
22. *Id.* at 138, nn.30, 32.
23. *Id.* at 138-39, n.33.
24. *Id.* at 139-40.
25. Redman, *supra*, note 9 at 392.
26. *Id.*
27. Aiardo, *supra*, note 2 at 140.
28. Pfeffer and Pfeffer, *supra*, note 1 at 489.
29. Cobin, *supra*, note 3 at 409.
30. Pfeffer and Pfeffer, *supra*, note 1 at 513-25.
31. For detailed discussion and citation of cases, *see*, Pfeffer and Pfeffer, *supra*, note 1 at 490-501.
32. *Id.* 492-94.
33. Pfeffer and Pfeffer, *supra*, note 1 at 495-501.
34. *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).
35. Cobin, *supra*, note 3 at 415-30; Redman, *supra*, note 9 at 416-25.
36. Cobin, *supra*, note 3 at 423.
37. McKinney's Session Laws of New York, Ch. 945 (1984). *See also*, Ontario Family Law Act, Statutes of the Province of Ontario, Canada, Ch. 4, § 56(5) (1986).

APPENDIX
Rabbinical Council of America
Pre-Nuptial Agreement

AGREEMENT, dated ____ 19 ____ between ____ an individual residing at ____ (the "Bride") and ____ an individual residing at ____ (the "Bridegroom").

WHEREAS, the Bride and Bridegroom, both of the Jewish faith, are about to be married in accordance with the laws of this jurisdiction as well as the laws, traditions and teachings of the Jewish religion ("Halachah"), with the mutual desire and expectation that for the remainder of their natural lives they will live together as man and wife; and

WHEREAS, the Bride and Bridegroom agree that in the unfortunate event that their marriage is terminated by a court of competent jurisdiction, such termination will also be effected in accordance with the procedures mandated by Halachah.

NOW THEREFORE, in consideration of their forthcoming marriage and in order to give effect to the foregoing, the Bride and Bridegroom agree:

1. In the unfortunate event that our marriage be terminated for any reason by a court of competent jurisdiction, each of us agrees that we shall each promptly take such steps as will effect the termination of our marriage by the giving and acceptance of a divorce (a "GET"), which Get shall comply with the dictates of Halachah. Such Get will be given and received, as the case may be without further consideration, within thirty (30) days of the above-mentioned termination.

2. Each of us agrees that any dispute as to full performance by either of us of our obligations under paragraph 1 above shall be resolved by final, binding and enforceable arbitration. Such arbitration shall be conducted by the Beth Din the ["Arbitrator(s)"] of America, or its successor, or its designee for such purpose, in accordance with the rules established from time to time by the Arbitrator(s) for such purpose. Each of us agrees that the decision of such Arbitration shall not be subject to review. Each of us agrees to take such actions, including the giving and acceptance of a Get, in such form and manner as the Arbitrator(s) may prescribe. Each of us consents to the exclusive jurisdiction of the Arbitrator(s) for the foregoing purpose.

3. The Arbitration referred to in paragraph 2 above may be initiated by either of us, by a written notice to the other and to the Arbitrator(s) of an intention to arbitrate. The Arbitrator(s) shall then designate the time and place for such arbitration. We shall each of us appear before the Arbitrator(s) at the place and time specified in its/their foregoing notice.

4. Each one of us recognizes that pursuant to Halachah, each of us will be unable to remarry without a Get. Each of us recognizes that such inability to remarry will constitute actual substantial damage which is not quantifiable. Since actual damages will be incapable of determination, the Arbitrator(s) shall be authorized to impose in its/their

decree liquidated damages in an amount of \$250.00 per day (the "Liquidated Amount") for the failure of either of us to abide by the decision of the Arbitrator(s) as provided for in the Agreement, provided that neither the imposition of such liquidated damages nor any payment thereof shall release either of us from our obligations to comply with the remainder of the decisions of the Arbitrator(s). The Liquidated Amount shall be adjusted based upon the percentage of change of the consumer price index from the date of this Agreement to the date of imposition by the Arbitrator(s).

5. Without limiting the authority conferred upon the Arbitrator(s) by paragraph 4 above, the jurisdiction of the Arbitrator(s) under this Agreement shall be restricted to a determination as to whether our marriage has been terminated in compliance with the Halachah, and, if not, what acts must be performed for such termination. This Agreement does not authorize the Arbitrator(s) to determine any property settlement, equitable distribution, alimony, child support, or custody arrangement.

6. The obligations of each party under this Agreement shall be in addition to any and all obligations which are contained in the Ketubah which will be given at our religious marriage ceremony.

7. This Agreement shall be construed and shall be enforceable in accordance with the laws of this jurisdiction. This Agreement may be executed in one or more counterparts, each one of which shall be deemed an original.

IN WITNESS WHEREOF, Bride and Bridegroom have entered into this Agreement in the City of _____ State of _____ U.S.A.

Witness:

Name: _____

Address: _____

Signature: _____

Witness:

Name: _____

Address: _____

Signature: _____

ACKNOWLEDGEMENT

STATE OF _____ COUNTY OF _____ On the day of _____ 19 _____ before me personally came _____ who resides at _____ to me known to be the individual described in and who executed the foregoing instruments, and acknowledge that she executed the same.

NOTARY PUBLIC

STATE OF _____ COUNTY OF _____ On the day of _____ 19 _____ before me personally came _____ who resides at _____ to me known to be the individual described in and who executed the foregoing instruments, and acknowledge that he executed the same.

NOTARY PUBLIC

Authors/Editors Needed for Elder Law Handbook

The CBA Legal Problems of the Elderly Committee, in conjunction with CLE, Inc., currently is producing a handbook on elder law. Volunteer authors and editors still are needed for this project. Interested attorneys should contact Jan Meyers at (303) 722-0300 or (800) 288-1376, or Martha Ridgway at (303) 442-0600.

Guardian *ad Litem* Training to be Held May 9-10

DU College of Law, DU Graduate School of Social Work and CLE in Colorado, Inc. will sponsor a two-day Guardian *ad Litem* ("GAL") Training Program on May 9-10 at the College of Law campus. The objective of the program is to provide substantive information for attorneys appointed as GALs in cases involving children, disabled persons and elderly persons.

The appointment of *GALs* has increased substantially. Unfortunately, training has not kept pace with the increasingly complex role of the GAL. The Training Program is meant to address this gap. Topics include ethics, substantive law, process and resource education. For more information, contact the Institute for Advanced Legal Studies, DU College of Law, (303) 871-6118.