THE EFFECT OF JEWISH DIVORCE LAW ON FAMILY LAW LITIGATION

By
Alexandra Leichter[*]

As any family law litigator can attest, divorces can be extremely contentious. But when the marriage was created via an Orthodox Jewish wedding, the conflict is magnified to its highest level. That is because Jewish law requires that an Orthodox Jewish wedding be terminated not only by civil law, but also by a Jewish divorce, called a "*Get*". Without a *Get* the parties are not considered divorced, and the consequences, especially for a woman, are life-altering.

Under Jewish law, marriage is a contract between and man and a woman, willingly entered into by each, with the marriage contract, called the *ketubah,* defining the rights and obligations of each, being executed (there are other ceremonial requirements, but the *ketubah* is a key ingredient). Jewish marriage is not a creature of the state, and no state action, no state involvement[1], nor state ceremony is mandated. Divorce, however, is unilaterally accomplished only by the man writing a *Get.* Even if the divorce is done by mutual agreement, the *Get* is still written only by the man (and accepted by the woman).

Tracing its origins to the Bible, Jewish law states that it is the husband who gives the wife a bill of divorce (called a "*Get*"). A woman has no power to divorce her husband — and so long as the husband fails to write the *Get* the woman remains married to him. Under Orthodox tradition, because a woman is "acquired" by her husband in marriage via the marriage contract, the contract cannot be broken or terminated by anyone, except the husband. Not even the rabbi has the power to terminate a Jewish marriage[2].

---

[*] Alexandra Leichter is a family law attorney in Beverly Hills, California, where her practice emphasizes family law litigation, consultation, private judging and arbitration. She is certified as a Specialist in Family Law by the California Bar Board of Legal Specialization. Ms. Leichter may be contacted at: leichterlaw@usa.net.

The *Ketubah* is deemed to be at least 2000 years old, and is one of the most ancient documents still in use today. While not all *Ketubot (*plural of *Ketubah)* are identical, it came into use historically as a remedy for the wife in the event a husband wished to unilaterally divorce her. Since husbands had the unfettered right to divorce their wives, and since in ancient times women couldn't simply seek work to support themselves, the *ketubah* was created for the wife's assurance that in the event of a divorce or death, she would not remain penniless. The *ketubah* also delineated that the husband's obligation during marriage was to support the wife, provide her with conjugal relations, and treat her in accordance with rights a wife is entitled to under Jewish law. Indeed the words in the *ketubah,* which have been in use for all those years, states that the groom "consecrates (the bride) onto (himself) in accordance with the laws of Moses and Israel". These words have behind them thousands of years of Jewish Talmudic scholarship defining the rights and obligations of the husband and wife in a marriage. Indeed, several tractates of the *Talmud* are devoted to the definitions of such obligations, and the rights the wife may claim as a result of her marriage and the *ketubah*.

The development of Jewish law is hierarchic. The "Torah" (the Bible), over 3,000 years old, is deemed to be the supreme word of God, as told to Moses and written down on Mount Sinai; the *Mishnah* (the written version of the "oral law") was only written down in approximately 200 C.E. & the *Gemarah* (also known as the "Talmud") was written about 500 C.E. The *Mishnah* & the *Gemarah* are rabbinic disputations and scholarship that expounded upon the Torah, explained the oral law, and formed the basis of Jewish laws — all of which have its grounding in the words of the Torah. Subsequently, numerous rabbis through the ages expounded on those laws written in the *Talmud.* That scholarship still continues to today. The basic rule, however, is that no rabbinic interpretation can contradict that of the Torah — it can only construe it to accommodate the needs of the age or current events, but the words of the *Torah* are supreme.

Historically, and during Biblical times, Jewish men were allowed to practice polygamy (to wit, the Biblical Jakob had two wives and two concubines, while King Solomon had 300 wives and some 700 concubines), but Jewish women were only allowed one husband at a time, and were

forbidden to marry another until they obtained a *Get* from their current husband, or the husband died. Among the Ashkenazic[3] Jews, however, a rabbinic decree issued more than 1,000 years ago forbade polygamy, and, to prevent indiscriminate divorces by husbands, this rabbi also issued a decree mandating that no woman may be divorced against her will. Thus, as a result of that decree, for over 1,000 years, Ashkenazic Jews were required to obtain the wife's consent or "acceptance" of any *Get* before it could be valid. (This decree had no effect on Sephardic Jews, who continued to practice polygamy until the formation of the State of Israel, in the middle of the 20th century, when Israeli law forbade all Jews from having more than one wife at a time. However, some Sephardic rabbis, to this date, in many countries outside of Israel, still maintain that a wife's consent to a divorce is not necessary to make the *Get* valid).

However, the decree preventing men from being able to divorce their wives without the wives' consent, is not as "hard and fast" as it sounds, nor is it as much of a preventative. That is because *Torah* law is considered supreme over all subsequently issued rabbinic-devised laws. Because the *Torah* permitted polygamy, the man's remarriage without giving his wife a *Get* or without obtaining his wife's consent to the divorce, does not incur the penalties for the husband that are imposed upon a married woman who fails to obtain a *Get* before she remarries. Additionally, the rabbis also permit a man to divorce his wife without her consent if he obtains the consent of 100 rabbis[4] (or as is most often practiced in Israel, with the consent of only 6 rabbis). This option, again, is not available to a woman who wants to free herself from a marriage—her only options out of a marriage are the *Get* or her husband's death.

Until a woman obtains a "*Get*" from her husband (or until her husband dies, whichever first occurs), she is considered still married to her husband and has no ability to remarry, nor to have children from another relationship. If she violates this law, she is considered an adulteress, and a child born to such a "married" woman from that subsequent relationship is deemed to be a *mamzer*[5]. A *mamzer* is forbidden to marry another Jew, and the "mamzer" may also not marry a Gentile, as he/she is still deemed to be a Jew – a "mamzer" is permitted to marry only another "mamzer". Furthermore, progeny of "mamzerim", are also considered "mamzerim" for all

subsequent generations, and they, too, are forbidden to marry anyone other than other mamzerim. This stigma is so severely imposed on all descendants of a woman who gives birth to the child of a man while still married to her previous husband, that she might as well stick a huge scarlet letter “M” on the forehead of all her offspring and condemn them to live on the sidelines of Judaism. Thus, traditional observant Jewish women cannot and will not remarry, or even date, without having first obtained a "*Get*" from their husband.

In contrast, because men were permitted more than one wife during Biblical times, and they are now forbidden to practice polygamy only because of rabbinic decree (or by civil law) the man’s progeny from a subsequent marriage (even if he hadn’t given a *Get* to his former wife) is <u>never</u> deemed to be a “mamzer” (unless the woman with whom he has offspring is deemed to be still married to someone else).

Because the *Get* is the only lifeline for a married woman who wants out of her marriage, and because it is only the husband who is authorized to give it to her, the *Get* has become a tool used by many Orthodox men to either extort huge sums of money from the wife and/or her family, to force the woman to give up all her civilly authorized property rights and support, and in a number of cases, to force her to give the husband custody of the children. In the most egregious cases, husbands may refuse to give a *Get* out of sheer vengeance, so that they blithely go on with their own lives, even remarry, while they refuse to give a *Get* to the prior wife leaving that wife in limbo[6]. A woman who is unable to obtain a *Get* is loosely termed an *Agunah*[7] (a chained woman). While a woman may also wield her power to refuse to accept the *Get,* and may even try to extort a price for her “acceptance”, her power to withhold the *Get* is, in many cases, illusory. Because a man may freely remarry without a *Get* and without consequences to his progeny, and may also avail himself of the “100 rabbi” rule to get rabbinic authority to remarry, the wife’s refusal of the *Get* will not get her very far.

There are numerous, very technical, rules that devolve around the issue of when, how, and where the husband can or should give the *Get*. In general, however, it is imperative that the husband

give the *Get* of “his own free will” — to wit, without “coercion”.[8]

Rabbinic courts are permitted, according to Jewish law, to beat a man or imprison him, take away his driver’s license & professional license (as they are authorized to do in Israel) until he “willingly” gives his wife a *Get*, and this type of “inducement” is not deemed by Jewish law, to be “coercive”. However, if a civil court imposes an order on a husband to give his wife a “*Get”* and impliedly threatens him with jail or monetary sanction if he disobeys that order, the “*Get”* is deemed to be “coercive” and therefore invalid.

Notwithstanding the apparent gender inequity inherent in the Jewish divorce laws, Orthodox Jews do adhere to such laws if they wish to remain traditional, observant, wish to maintain the family relationship within Jewish tradition, and be accepted within the Orthodox Jewish community.

Additionally, American Jews have developed increasingly strong ties with Israel, where all laws relating to birth, death, marriage, and divorce are strictly interpreted, governed, and enforced by the Orthodox rabbinate (and primarily by the ultra-Orthodox). For example, a Jewish couple may not marry in Israel, regardless of their affiliation as Orthodox, Conservative, Reform, Reconstructionist[9], or even non-affiliated, unless the Rabbinate is provided proof that neither one is a “*mamzer*” or “*mamzeret*”[10].

Thus, Jewish women all over the world, who seek to protect their children from being excluded from Jewish society in Israel, will adhere to these laws at all cost to their own personal freedom and happiness, even if they no longer consider themselves Orthodox. The potential stigma of a *mamzer* label that may be attached to children and subsequent progeny is much too great.

It is this looming threat of the woman remaining in marital limbo even after a divorce is granted by the civil courts that has affected so much litigation and negotiation in civil divorce and custody matters involving observant Jewish women.

<u>ISSUES INVOLVING THE *KETUBAH* AND JEWISH DIVORCES</u>

ENFORCEMENT OF THE *KETUBAH* DOWER AMOUNT:

Very little litigation has revolved around the dower amount that is written in the *Ketubah,* as the amount is the traditional amount dating back over 2,000 years. Most *ketubot* have a pre-printed amount of "dower" that is the ancient Hebraic amount of 200 *zuz* (the equivalent of 2.2 pounds of silver—currently worth about $400) but which sum was supposed to be sufficient for the wife to support herself for a year. A husband's attempt to enforce this amount in lieu of a wife's property interests or spousal support/alimony, will probably be met with no success. It is not considered to be the true value of what a woman is to receive upon her divorce or upon her husband's death. Not only is the *ketubah* amount minuscule, it is in pre-printed format, and usually has not been subject to any negotiation. (In fact, the *Ketubah* is written in the *Aramaic* language which is not spoken or understood by the average bride and groom). Any attempts to enforce the *ketubah* amount would probably fail the test of most prenuptial agreement laws in the U.S., and will fail the test of standard contract law. In fact, there is no record of a single case in the U.S. where such a *ketubah* was enforced.

There are, of course, exceptions to the standardized amounts in the *ketubah*, especially in some Persian and some Middle Eastern Jewish communities where the amount of the dower may be a negotiated sum which may, in fact, be meaningful. (The Cairo Geniza, which contained over 200,000 Jewish manuscripts dating between 870 C.E. and 1880[11] for example is replete with ancient *ketubot* which indicate hefty sums that were promised to the bride in case of divorce or death). In such cases, the wife could possibly be successful in enforcing her *ketubah* as long as the interpretation of the *ketubah* can be made under neutral principles of contract law, and does not involve the entanglement of the courts with matters of religion[12]. However, if the parties seek to enforce the *ketubah* as a premarital agreement which would make the *ketubah* the sole remedy of support and property, the courts would have to examine the *ketubah*, and the

conditions under which it was negotiated, signed, etc. to determine if it meets all the tests of that state's premarital agreement statutes.[13] Most likely, it will fail that test.

ENFORCEMENT OF THE *KETUBAH* AS A TOOL FOR ORDERING A "*GET*"

The far greater issue is how to solve the problem of the wife who may get her property rights, support & custody, as well as her civil divorce in civil courts, but still be forced to remain married to the man who refuses to give her a *Get.* There have been attempts in some states to force a husband to give a "*Get*" via a "specific performance" action. In such cases, litigants have attempted to have the *ketubah* enforced as a contract whose terms, it is maintained, would require the husband to abide by the laws of "Moses and Israel" to give his wife a *Get* — in other words, to have the *ketubah* be "specifically performed" by ordering the husband to abide by its terms. Of course, the problems with such "specific performance" suits is the requisite proof of the *ketubah* mandating the giving of the *Get*, without having the court resort to religious law interpretations of that marriage contract.

Civil enforcement of a Jewish marriage contract in this manner has met with variable degrees of success. In Re Marriage of Goldman[14], Avitzur v. Avitzur[15], and Minkin v. Minkin[16] resulted in successful civil enforcement of the *Ketubah* to order the husband to give a *Get*. (However, many Rabbinical authorities claim that a civil order compelling the giving of a *Get* is coercive, and thus invalidates the subsequent *Get* the husband gives. This provides the wife with a Pyrrhic victory).

More recent cases in a number of states have rejected requests to compel a husband to give a *Get*, and have held that enforcement of the *ketubah* to order the husband to give a *Get* was an unauthorized civil entanglement into religion, and that the *ketubah* was certainly not specific enough (without interpretation by religious authorities, in any case), to allow the court to construe it as a document mandating the husband to give his wife a *Get*. In Aflalo v. Aflalo[17], the New Jersey court disapproved of Minkin, supra, on Constitutional grounds and refused to

order the husband to give the *Get*. Similarly, in Victor v. Victor[18], the Arizona court refused to grant specific performance of the *Ketubah* claiming that the Jewish marriage contract contained no specific terms regarding the granting of the *Get*. Similarly, a trial court in Los Angeles, a few years ago, refused to grant specific performance of the *Ketubah*, refused to order the husband to give a “Get”, and even refused to impose penalties for intentional infliction of emotional distress upon the husband who demanded a hefty price in exchange for the *Get* — the reasoning of the court was that this was strictly a religious document, a religious law, and it would require too much entanglement by a civil court in religious matters[19].

STATUTORY AIDS IN FREEING A WOMAN FROM HER JEWISH MARRIAGE

Given the vagaries of the judicial system, and the likelihood that civil courts will not deem the *ketubah* to be an enforceable agreement that would allow them to order the husband to give a *Get,* New York State adopted, what is commonly referred to as the “*Get* law”[20] in 1983, which prohibited the granting of a divorce to a party requesting it, if that party failed to “remove barriers to the other party’s ability to remarry”.

However, that New York statute required only that the plaintiff seeking the divorce must remove all impediments to the other party’s ability to remarry; it did not help the one who was seeking the divorce (ie. the wife) who was ready to remove the impediments, but whose husband (the defendant) was unwilling to do so. Therefore, a second “*Get* law”[21] was enacted in New York state, which enables the judge in a divorce case to award a larger proportionate interest in the marital property and/or increase the spousal support award to the wife whose husband refuses to give her a *Get* (or to the husband if the wife refuses to accept the *Get*). Again, this statute has no mention of the word *Get* in it. It is couched in civil legal language which allows the court to take into consideration, when awarding property or support, whether one party has refused to "remove the impediments to the other party’s ability to remarry". Indeed, this statue applies to Jewish as well as Islamic divorces[22]. Although this N.Y. statute has been under Constitutional attack in the

courts in several cases, no decision holding it unconstitutional has been rendered to date. (No other country or state in the U.S. is known to have a similar statute).

The most vocal opponents of the second *Get* law have been the ultra-orthodox rabbis. They claim that the specter of a penalty to be imposed by the courts, of loss of property or payment of additional spousal support, in essence creates an atmosphere of "coercion" on the husband, so that the *Get* is rendered invalid just by the mere existence of such a law in New York. (There are ultra-Orthodox rabbis who maintain that no *Get* granted in New York since the enactment of the second *Get* law is valid, as there is a cloud of "coercion" that taints every *Get* that has been given in N.Y. since 1992).

Notwithstanding the legal and religious attacks on the *Get* statute, it is undisputed that the number of cases of possible *agunot* in New York has decreased as a result of the *Get* law.
The first and second New York *Get* laws, however, have not been emulated by a single other state in the U.S. Statutes similar to the first N.Y. *Get* law were enacted in Scotland, Ontario (Canada), England, South Africa, but a recent attempt to enact such a statute in Maryland failed. No other state in the U.S. has a *Get* law, and no country or state is known to have any statute similar to the 1992 N.Y. *Get* law. Indeed, the second New York *Get* law is workable in New York primarily because New York is an "equitable property division" state; in other words, property acquired during marriage will be "equitably" divided by the court, not, as in California, for example, "equally" divided. Thus, the New York courts have far more latitude in determining what is equitable in the property division.

JEWISH PRENUPTIAL AGREEMENTS:

Rabbis have not been unmindful of this inequity in Jewish divorce law and the potential for major extortion. In prior centuries, when Jews lived in very closely-knit, interdependent communities, extortion or refusal of the *Get* was almost unheard of, because the price the man would pay as an outcast in his community simply prevented such action. The increased mobility,

and the loosening of communal ties in the 20th century brought with it the current set of problems for these Orthodox women.

Israeli law, with its intertwining of religious law and secular law, allows its rabbinic courts to order imprisonment, loss of driver's and professional licenses, and other penalties to be imposed on a "recalcitrant" husband, who refuses to give his wife a *Get*[23]. However, in any other country, outside the state of Israel, many rabbinic courts exist, however, they essentially operate as "arbitrators", and have absolutely no power to enforce their rulings or decisions. Thus, for example, while rabbinic courts in the U.S. may order that the husband should give his wife a *Get,* they have no power to enforce that order, they cannot put the husband in jail, cannot remove his drivers' license or his professional license, nor do anything else to enable the wife to be freed. Nor would a U.S. Court enforce such a ruling made by the rabbinic court.

In the U.S., and in a number of other countries, (as well as in Israel) Modern Orthodox rabbis have devised what passes for a deterrent: a "Jewish Pre-Nuptial Agreement". There are various versions of such a Pre-Nuptial agreement, but they essentially provide for the husband's payment of a certain amount of support (or liquidated damage) per day for each day that he refuses to give a *Get*, and the agreement provides for the Arbitration of the *Get* issue to be submitted to a "Beth Din" (Jewish Court of Law – a rabbinic court). Such an arbitration agreement should, theoretically, be enforceable by the civil court, and the award of the set amount made by the rabbinic courts pursuant to the Arbitration Agreement should, theoretically, be enforceable by the civil courts.

This accomplishes two things: first, it raises the threat of a large daily payment to be made by the husband if he refuses the *Get* and reduces the possibility of extortion or vengeful *Get*-refusal. Second, because the order from the rabbinic court is an arbitration award of a monetary amount, the enforcement of same by the civil court will not render the *Get* invalid under the "coercion" rules of Jewish divorce. There are various versions of these types of Jewish Prenuptial Agreements, but because they only impose monetary penalties for *Get*-refusal, and do not order

the husband to actually give a *Get* it has the drawbacks of any contract that imposes monetary penalties: the very rich husband, and the very poor husband, can both afford to thumb their noses at these agreements and still refuse to give the wife her *Get.* Furthermore, there is no published state court decision in the U.S. wherein the enforceability of such pre-nuptial agreement has been tested[24].

Another problem with these Jewish Prenuptial Agreements is that many of them presuppose that the Rabbinic Courts will rule favorably for the woman, and mandate that the husband give her a *Get* automatically as soon as she so requests. But that is not necessarily the case. As many of these Jewish Prenuptial Agreements provide, the sum payable to the wife in case of *Get*-refusal, commences on the date that the rabbinic court orders the husband to give her a *Get* — but that may be many months, or even years of attempts by the rabbinic courts to "negotiate" rather than "rule".

One of the greatest dangers in these Jewish Prenuptial Agreements, however, is the insertion of a provision (often by simply checking off some boxes), that not only the *Get,* but also all issues arising out of the divorce, including, but not limited to, property division, spousal/child support, custody and restraining orders, will be submitted to the rabbinic court for arbitration. This is a major trap for the unwary woman. Jewish law does not provide the same rights to a woman that civil law does. Spousal support (alimony), if any, is very limited under Jewish law; property division is not divided equally under Jewish law, and there is a paternal preference in Jewish law for custody of boys and maternal preference for girls of a certain age that is no longer existent in civil statutes of most of the states in the U.S. Women have traditionally fared very poorly in rabbinic courts on most of the issues of divorce, (unless these women can prove that the husband has grossly, and continuously violated Orthodox Jewish law — in which case they may obtain the sympathy of the rabbinic court). Procedure in rabbinic courts disfavors representation of the parties by lawyers; and historically, women were very rarely taught the Talmudic laws necessary to enable them to represent litigants before rabbinic courts — even those who have

civil law degrees are rarely capable or qualified to represent their client's interest in rabbinic courts. Although Israel does have women who are trained rabbinic pleaders (*toenot*) and are qualified to represent women in rabbinic courts, that is not the case in rabbinic courts in the U.S. and in most other countries.

In sum, it is very dangerous for family law attorneys to allow their female clients to have their property, support and custody issues be arbitrated in rabbinic courts. Thus, a pre-nuptial agreement that provides for resolution of <u>all</u> issues, not just the issue of the "*Get*", is not a panacea for the Jewish woman – if she submits all marital issues to the *Beth Din,* she may ultimately obtain a "*Get*" but at the expense of having the rabbinic court rule that she is not entitled to the property rights or support that she would have under civil law.[25]

SOLUTIONS FOR THE FAMILY LAW ATTORNEY:

When faced with a divorce case involving traditional or observant Orthodox Jewish women, the family law attorney should do the following:

1. At the outset of the case, before any proceeding has been filed, determine whether the woman needs a *Get*. If she does, and she has not yet obtained one, steer her to an Orthodox Rabbi who oversees Jewish divorce proceedings. The attorney should also contact the Rabbi to impress upon him[26] the importance of obtaining an <u>immediate</u> *Get* for the wife <u>before</u> any proceedings are instituted in civil court. Make sure to instruct the client not to sign any agreement allowing the *Beth Din* to determine any issues other than the *Get*. If the *Get* is obtained prior to the institution of the civil divorce, the opportunity for extortion or use of the *Get* for vengeance is destroyed.[27]

2. In the event the family law proceedings have already commenced and unreasonable demands for concessions are being made as the price of the *Get* during the

proceedings, it is important to bring the matter to the attention of the court for the following reasons:

a. An unfavorable settlement agreement obtained through coercion may possibly be set aside subsequent to the granting of the *Get.*

b. In states where property division is based upon "equitable" principles, impress on the judge that the wife will be unable to remarry, her means of self-sustenance are limited by the husband's *Get*-refusal, and therefore, a larger share of the property should be awarded to the wife. In states that have equal division laws, such as California, for example, there is still room for lawyering in the arena of spousal support (alimony), as those are usually discretionary amounts awarded by the court, and the court should become aware of the fact that, even in short marriages, the wife who is an *agunah* may need lifetime support because her husband refuses to give her a *Get,* thus preventing her ability to ever remarry.

c. Some courts have even denied visitation and/or custody to the husband who refuses to give his wife a *Get* on the grounds of moral turpitude. No lawyer should ever give up bringing the *agunah* issue to the court's attention, and attempting to obtain means by which the husband can be subtly "encouraged" (but not "coerced") into giving his wife a *Get.*

3. The divorce attorney may have substantial difficulty controlling his/her own client from acceding to the extortion demands of a recalcitrant husband. It must be remembered that the *Get* is very precious to these women. It is the key to their freedom–-freedom to remarry, freedom to date, freedom to have children with another man (this latter is most important to young women of child-bearing age, whose biological clocks are ticking). These women are often likely to give up almost anything in exchange for the *Get*. They, too, have heard of a number of cases where women have been stuck in marital limbo for decades. They need that

piece of paper desperately. If there are no means to prevent the client from acceding to outrageous demands of the husband as the price for the *Get*, the family law attorney should make sure, at the very least, that such demands are documented. It will be the key evidence to a possible "set-aside" action, or possible modification action.

4. In the event the husband can be convinced to give the *Get* upon entry of the Judgment of Dissolution of marriage, beware of the language that is used in the Judgment. Many rabbis refuse to participate in the *Get* process if the Judgment "orders" the husband to give it. That is because they are convinced that under those circumstances, the giving of the *Get* is coerced, and thus tainted irrevocably, by the possible threat of contempt and possible imprisonment inherent in disobeying a civil judgment. The better practice is to insert in the Judgment that a certain item of property to be transferred by the wife, or certain action the wife is to perform, will occur immediately upon husband giving wife a *Get*. Under any circumstances, it is best to obtain the advice of the rabbi who will be asked to participate in the *Get* process to determine whether the language used in the Judgment is appropriate to satisfy Jewish law.

5. In the event the issue of the *Get* arises after judgment for divorce has been granted, and the extortion demands occur after such civil divorce decree is entered, the civil litigator may wish to file an action for:

a. Specific performance of the *Ketubah* (See In Re: Marriage of Goldman, supra).

b. File an action for fraud.

c. File an action for intentional infliction of emotional distress, or some other civil that may be available in the particular state court.

6. If all attempts to obtain a *Get* have failed, have the client contact some rabbis in New York or in Israel who have had some limited success in "annulling" the Jewish marriage under certain circumstances. Although this is a highly controversial method of freeing a woman from her marital chains, it is increasingly being attempted in those cases where all else has failed. (Indeed, there is a form of a Jewish Prenuptial Agreement that is currently being circulated and used by a limited number of people, wherein the agreement provides, *inter alia,* that if the husband refuses, or fails, to give a *Get* within a set period of time following the parties' separation, it will be deemed that he never intended, *ab initio,* at the time of marriage, to abide by his Jewish obligations to give her a *Get*, and the marriage will thus be declared annulled by the rabbis.[28] It is important to note that, although this type of prenuptial agreement is, by far, the most efficacious, it has not been universally accepted among Orthodox rabbis. Nonetheless, family law attorneys who have the opportunity to consult with clients entering into Orthodox marriages, would be well advised to recommend not only the standard "monetary" type of Jewish Prenuptial Agreement, but this latter "annulment" type of agreement as well. A copy of each of these two types of Prenuptial Agreements is being attached as Exhibit "A" to this article).

© 2009—Alexandra Leichter

[1] The exception is in Israel, but even there, it is not the state involvement, but the rabbinate, that determines when, whom, and how one may marry.

[2] Under Conservative Jewish marriage laws, the *Ketubah*, authorizes the rabbinic court to dissolve the marriage in the event the husband refuses to do so. The Orthodox *Ketubah* does not contain such a clause. However, Conservative Jewish divorces are not recognized by many Orthodox rabbis as valid, nor are they recognized as valid by the ultra-Orthodox Israeli rabbinate, which controls all issues relating to marriage and divorce (as well as being in charge of determining who is a Jew).

[3] "Ashkenazic" Jews are those who are descendants of German/Eastern European Jews. "Sephardic" Jews are those who are descendants of Spanish/Middle Eastern Jews. In many instances, Jewish tradition and scholarship between the "Ashkenazic" and "Sephardic" Jews diverged, although they each follow the laws laid out basically in the Torah (the five books of Moses in the Bible).

[4] This method of consent for the husband to remarry is called a *Heter Meah Rabbanim*

[5] A *mamzer* is loosely translated as "illegitimate" in the English language, but it is far from it. In Jewish law, there is really no such thing as illegitimacy. An unmarried woman's child is considered just as legitimate as a married woman's child. A *mamzer (*masculine form), *mamzerim (*plural form), *mamzeret* (feminine form) is more accurately translated as a child of an incestuous relationship, eg. child of the union between a brother and sister, or between a father and daughter, etc. Thus, being labeled a *mamzer* is far more odious than being labeled "illegitimate" in the 21st century.

[6] Under Conservative Jewish marriage laws (as opposed to Orthodox), the *Ketubah* used in a Conservative Jewish wedding authorizes the rabbi to dissolve the marriage in the event the husband refuses to do so. The Orthodox *Ketubah* does not contain such a clause, and Orthodox rabbis have adamantly refused to allow the insertion of such a clause into the *Ketubah*. The differences between Orthodox and Conservative marriages and divorces, and the recognition by the Orthodox of Conservative marriages and divorces is beyond the scope of this article. Suffice it to know that where the Jewish couple is Conservative, the problem of the *Get* is a non-issue. And, Reform Judaism does not require a *Get* to remarry, therefore, the issues discussed in this article do not affect Reform Jewish couples either.

[7] Technically, that term was applied to women whose husband's disappeared, and who, as a result were never able to obtain a *Get.* There are other terms applied to women whose husbands refuse to give them a *Get,* but more recently the term *Agunah* (singular form) or *Agunot* (plural form) is being almost universally used to denote women who are chained to their marriages because of *Get-refusal.*

[8] Incidentally, the rabbi is not the one who gives the *Get,* it is the husband, but the rabbi supervises the procedure to assure it is correctly done, assures that the scrivener wrote the *Get* in the proper manner, ascertains the qualifications of the two witnesses who are necessary to aver that the husband gave the *Get*, and provides proof of the *Get* to the parties while he retains the records of same in his files.

[9] These are currently the four main branches of Judaism in the U.S. Orthodox

movement represents about 10% of Jews, while Reform movement and Conservative movement represent the largest percentage of American Jews. The Reconstructionist movement represents the smallest percentage of American Jews.

[10] There is no civil marriage in Israel. In Israel, Jews must marry in accordance with Jewish law, Muslims in accordance with Muslim law, and Christians in accordance with their respective Christian denominations. Similarly, there is no civil "divorce" in Israel, all divorce must be obtained through the respective religious institution. However, the civil court has co-equal jurisdiction with the religious courts over issues of custody, support and property division, and it is often the "race to the courthouse" that determines whether it is the civil courts or the religious courts that will decide those issues for the divorcing couple. It is possible, for example for the property, support, custody issues to be determined by the civil court, at the same time that the issue of the "divorce" or the *Get* is decided in the religious court.
[11] Wikipedia—Cairo Geniza

[12] U.S. Constitution, First Amendment

[13] Two California cases which predate the premarital agreement act both held that enforcement of a dower in a religious marriage contract violates the state's prohibition against contracts which encourage divorce by delineating amounts to be paid upon divorce. See In re Marriage of Noghrey (1985) 169 C.A.3d 326, and Dajani v. Dajani (1988) 204 C.A. 3rd 1387—both these cases involved Islamic marriage contracts with a specified amount of *mahr* (dower) to be provided to the wife upon divorce. Islamic marriage contracts, called *nikkah* are very similar to the Jewish *ketubah*, although many *nikkah* agreements are actually negotiated a to terms, amount of *mahr,* conditions under which the wife may obtain a divorce, etc. while the *ketubah* is generally not a negotiated contract, but more often a pre-printed document setting forth ancient amounts of dower that have no monetary relevance in the 21st century. In theory, however, it is possible to craft the amounts in the *ketubah* and arrange to meet the requirements of current Premarital Agreement statutes to allow for enforcement. In California, for example, the case of In re Marriage of Bellio (2003)105 C.A.4th 630 held that a prenuptial agreement that provided for sums payable in case of divorce is no longer void in California, as parties are not allowed to contract provisions in case of divorce, so long as it meets the requirements of the Premarital Agreement Act.

[14] In re Marriage of Goldman 554 N.E.2d, 1016 (1990) (Illinois)

[15] Avitzur v. Avitzur 446 N.E.2d 136 (1983)(New York)

[16] Minkin v. Minkin 180 N.J. Super 260, 434 A.2d 265 (1981)(New Jersey)

[17] Aflalo v. Aflalo 295 N.J. Super 527, 685 A.2d 523 (1996)(New Jersey)

[18] Victor v. Victor 177 Ariz. 231, 866 P.2d 899 (1993) (Arizona)

[19] Indeed, husband successfully argued in the Los Angeles trial court that his

refusal to give the wife an Orthodox *Get* should not be penalized, nor questioned by a civil court, because the civil court would become excessively, and unconstitutionally, entangled in religion by the mere analysis of which religious court, to wit, Orthodox, ultra-Orthodox, or Conservative, should be involved in the *Get* process.

[20] New York Statute: DRL 253

[21] New York Statute: DRL 236B

[22] In Islamic cases, *shari'a* courts are empowered to grant the wife a divorce at her request, even if the husband refuses. However, the *shari'a* courts may also refuse to give the wife a divorce if she is not deemed worthy of obtaining the divorce against her husband's will. In other words, the husband may throw up all sorts of impediments to the wife's request to obtain a divorce. Orthodox Jewish women do not even have the option of obtaining a rabbinic court order to be divorced—only the husband can give his wife the *Get.*

[23] This is not as simple as it sounds. The Rabbinic Courts must first ascertain that the wife is entitled to a *Get* (on various grounds of fault, if the husband refuses to give her a *Get)*, and in many cases they simply refuse to find those grounds, even when the husband has remarried. In other cases, they try to negotiate a settlement with the husband to reduce the demand the husband claims as his price for the *Get.* A 2004 documentary made in Israel, entitled "Mekudeshet—Sentenced to Marry" reveals the inequities and embarrassments women often suffer in the rabbinic courts when seeking a *Get.*

[24] Query whether such Jewish prenuptial agreements would be enforceable if they did not meet the strict standards of the Premarital Agreement Acts in force in numerous states in the U.S. For example, in California, premarital agreements that insert a set amount of spousal support (or waiver), require the parties to be represented by counsel, or have a very specific waiver of same, and will be subject to inquiry as to the "fairness" of the support provision both at the time the agreement was made and at the time of its enforcement. See Calif. Fam. Code §1612.

[25] Binding arbitration of family law matters such as property division and spousal support (alimony) may be permitted in many states in the U.S., however, custody and child support issues cannot be resolved by binding arbitration, as the courts retain the ultimate right to make decisions regarding such matters vital to the interests of the state. See In re Marriage of Goodarzirad (1986) 185 Cal.App.3d 1020; Armstrong v. Armstrong (1976) 15 Cal.3d 942; In re Marriage of Bereznak & Heminger (2003) 110 Cal.App.4th 1062). In the Canadian provinces of Ontario and Quebec, for example, arbitration of family law issues by religious courts is prohibited, or severely curtailed.

[26] There are no women rabbis in Orthodox Judaism.

[27] Note that some Rabbis refuse to participate in the granting of a *Get* by the husband, if the civil family law matter has not yet been concluded. They claim, although wrongly so, that this is not permitted by Jewish law. It is up to the family law attorney to convince the Rabbi that the *Get* process should be completed before family law proceedings are instituted. If a rabbi refuses to perform the *Get* first, find another rabbi.

[28] Note that the children from such annulled marriages suffer no penalty, as they have been legitimately conceived by a woman who was not married to another man at the time.