Chapter 36

Jewish Divorce

By Rabbi Edward Sukol and Andrew A. Zashin[*]

§ 36:1 Marriage and divorce under Jewish law

Jewish law, or Halacha, views the relationship of marriage as consisting of a complex intertwining of legal, personal, and religious obligations.[1] The legal obligations imposed upon the husband include providing his wife with sustenance, shelter and clothing, and conjugal rights. The wife owes her husband fidelity and support. Accordingly, the religious ceremony of marriage recognizes both the legal and the

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[*]Based on the 1984 Edition by Harry M. Brown, Esq. Text §§ 36:2 to 36:11 prepared by Andrew A. Zashin, Esq., Co-Managing Partner of Zashin & Rich, Co., L.P.A. in Cleveland and Columbus, Ohio. He is a Certified Family Law Relations Specialist, a Fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers and the International Academy of Family Lawyers and is an Adjunct Professor of Law at Case Western Reserve University School of Law.

[Section 36:1]

[1]Maurice Lamm, *The Jewish Way in Love and Marriage* (1982).

religious aspects of the relationship. During the ceremony, in addition to the religious sanctification of marriage, the husband presents the wife with a Ketubah, or marriage contract, detailing his financial obligations to her in the event of divorce or his death. Today, in recognition of new roles for men and women, many Ketubot are egalitarian in nature, outlining both husband's and wife's responsibilities to each other. While an egalitarian Ketubah may not have Halakhic status or validity, it is used by the majority of Jewish couples who are married by non-Orthodox rabbis. The ring, or other article of tangible value presented to the wife during the marriage ceremony, is the "consideration" for her conveyance to the husband of the exclusive right of conjugal access. As with Ketubah, the majority of non-Orthodox wedding ceremonies are double ring ceremonies, in which both groom and bride present the other with a ring as a tangible sign of their commitment. This "transaction" is essentially contractual. For most couples, the aspect of marriage as a transaction has receded into the background. The wedding ceremony, including the Ketubah, ring, and vows are an expression of commitment, devotion, and love. Nonetheless, marriage within Jewish tradition does retain legal status with rights and responsibilities for both partners. Once having conveyed this right, the wife cannot regain possession of it without a reconveyance by the husband.

Halacha, therefore, requires that the dissolution of a marriage must take cognizance of its dual aspects, the civil and the religious. Originally, the Bet Din, or rabbinical tribunal, fulfilled both functions, determining whether a divorce would be allowed, making all property settlements, and administering the actual divorce. In the United States, rabbinical tribunals no longer have original, exclusive jurisdiction as the arbiters of civil obligations and claims, as they did in other countries. Under general principles of American law, rabbinical tribunals are at best arbitration panels, which obtain their jurisdiction and power solely by agreement of the parties, either in the form of a general contract agreeing to arbitrate all disputes or pursuant to a specific submission agreement.[2] Divorce-related civil matters have been excluded from the jurisdiction of arbitrators, and an agreement to submit divorce issues to arbitration may not be enforceable.[3] Nonetheless, rabbinical tribunals retain the sole jurisdiction to issue a Get, or Jewish law divorce.

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[2]*Rabbinical Courts: Modern Day Solomons*, 6 Colum. J.L. & Soc. Probs. 48 (Jan. 1970), reprinted in II Studies of Jewish Jurisprudence (1972).

[3]See Annot., Validity and construction of provision for arbitration of disputes as to alimony or support payments, or child visitation or custody matters, 18 A.L.R.3d 1264 (superseded by Validity and construction of provisions for arbitration of disputes as to alimony or support payments or child visitation or custody matters, 38 A.L.R.5th 69).

The importance of obtaining a Get, in addition to a civilly granted divorce decree, has been noted by commentators.[4] A Jewish woman, civilly divorced but without a Get, remains a married woman under Jewish law, and any subsequent marriage or liaison is considered adulterous. It must be noted that there are internal divisions among people within the Jewish community who view this matter differently. Orthodox Jews attempt to live within a Halakhic (Jewish legal) framework, and therefore the Get is the only valid form of Jewish divorce. Reform Jews, on the other hand, do not require the issuance of a Get. In the Reform Jewish community, a civil divorce is considered adequate for purposes of being divorced and/or remarried. Conservative Judaism, in principle, requires the issuance of a Get. Yet, many, but certainly not all, Conservative rabbis will officiate over a marriage ceremony in which a previously married bride and/or groom does not have a Get.

In addition, within the Reform and Conservative communities, alternatives to the Get have been developed which recognize the egalitarian nature of contemporary society. As with an egalitarian Ketubah, these documents would have no legal standing within a Halakhic framework, but are recognized as valid within the non-Orthodox Jewish world. An observant Jewish man may not marry her, and any children resulting from a subsequent marriage or liaison would be deemed "Mamzerim," which status carries with it serious implications in terms of such children's marriage opportunities as issue of a prohibited marriage. Similarly, a Jewish man who has not given a Get may not remarry, although his issue would not be deemed Mamzerim.

The majority of American Jews, and the overwhelming majority of nonobservant Jews, are unfamiliar with the need for a Get, being misinformed as to what a Get is and how it is delivered. The purpose of this article is to clarify some of the misconceptions surrounding this area of law.

§ 36:2 *Obergefell v. Hodges* through the lens of American Judaism[1]

Obergefell v. Hodges,[2] represents a watershed case in American jurisprudence. *Obergefell* guarantees same-sex couples the right to marry, including all of the rights and responsibilities that go along

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[4]Merrill I. Hassenfeld, *A Lawyer's Role in a Jewish Divorce*, 50 Ohio B. 951 (8-8-77).

[Section 36:2]

[1]Text §§ 36:2 to 36:11 prepared by Andrew A. Zashin, Esq., Co-Managing Partner of Zashin & Rich, Co., L.P.A. in Cleveland and Columbus, Ohio. He is a Certified Family Law Relations Specialist, a Fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers and the International Academy of Family Lawyers and is an Adjunct Professor of Law at Case Western Reserve University School of Law.

[2]Obergefell v. Hodges, 135 S. Ct. 2071, 191 L. Ed. 2d 953 (2015).

with that. After the ruling, all 50 states are required to perform and recognize same-sex marriages just as they would the marriages of heterosexual couples. The legal logic underpinning the decision was based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Looking to United States Supreme Court precedent set in earlier cases involving issues such as a ban on interracial marriage (such as *Loving v. Virginia*),[3] a ban on the marriage of delinquent child support obligors (*Zablocki v. Redhail*)[4] and a ban on the marriage of prisoners (*Turner v. Safley*),[5] the *Obergefell* court upheld marriage as a fundamental right guaranteed to all individuals by the Constitution. The Court looked also to changing societal norms and attitudes toward the institution of marriage, the decriminalization of homosexual acts that had previously been banned in some states, as well as changed understandings and acceptance of gay and lesbian individuals and relationships.

Wildly applauded in some circles and roundly criticized in others, the 5–4 decision generally did not move the needle of Jewish thought and certainly did not move the needle of Jewish law. As the old saw goes, "you stand where you sit." This is certainly true of the Jewish community. The liberal streams of Judaism found in *Obergefell* validation. The more conservative streams, especially the various Orthodox branches of Judaism, found in the ruling more evidence of modern society's eroding values. The centrist Conservative movement, once the largest stream of Judaism in America, which has consistently defined itself in negative terms (we are not them—those on the Left, or those on the Right) took a more typically ambiguous position. Thus, it is fair to say, *Obergefell* has had a minimal impact on American Jewish thought. Sections 36:2 to 36:11 of this work will attempt to briefly review the status of gay marriage in American Jewish law and thought in light of the *Obergefell* ruling.

§ 36:3 *Obergefell v. Hodges* through the lens of American Judaism—Historic view

Homosexual behavior has traditionally been banned by Judaism. The book of Leviticus is the essential basis of this position which sees homosexuality as abhorrent. Interestingly, Lesbian behavior is not specifically prohibited, but is nonetheless forbidden. The idea of same-sex marriage is something that was historically, and is traditionally, simply beyond contemplation.

§ 36:4 *Obergefell v. Hodges* through the lens of American Judaism—Modern liberal view

In modern times cracks have appeared in this absolute ban against

[3]Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

[4]Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618, 24 Fed. R. Serv. 2d 1313 (1978).

[5]Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

homosexual marriage. Reconstructionist and Reform Judaism, Liberal streams, for instance, reject this ban entirely. The *Obergefell* decision was celebrated in these circles. A typical rallying cry was that the decision was a "start" and not an "end."[1]

§ 36:5 *Obergefell v. Hodges* through the lens of American Judaism—Conservative movement

The Conservative movement's view of the issue has evolved over the years. Interestingly, this stream of Judaism—which has an official legal body, The Committee on Jewish Law and Standards (CJLS), which decides theological issues—allows its members to choose alternative positions. In 1992 the committee prohibited homosexual conduct. By 2006 the CJLS had taken a more nuanced position and adopted multiple opinions. Thereafter, in 2012, the CJLS reversed course and approved same-sex marriage in a 13-0 vote. Thus, the *Obergefell* decision was theologically irrelevant except to validate the evolution of the CJLS's decision.

§ 36:6 *Obergefell v. Hodges* through the lens of American Judaism—Orthodox Judaism

As one might expect, traditional Judaism, represented by the myriad of Orthodox groups, uniformly rejects homosexual behavior. In so doing, they reject the *Obergefell* decision. The Orthodox Union's "Statement on Supreme Court's Ruling in *Obergefell* v. Hodges" made this rejection abundantly clear: "*In response to the decisions announced today by the United States Supreme Court with reference to the issue of legal recognition of same-sex marriage, we reiterate the historical position of the Jewish faith, enunciated unequivocally in our Bible, Talmud and Codes, which forbids homosexual relationships and condemns institutionalization of such relationships as marriages. Our religion is emphatic in defining marriage as a relationship between a man and a woman. Our beliefs in this regard are unalterable*."[1]

Perhaps, however, there is a more interesting element to the knee jerk rejection of the decision. The statement goes on to reveal something more than a concern for the fear of general moral erosion. There seems to be a fear that the erosion caused by this decision could infect the purity of the Orthodox community itself. The statement continues: "In the wake of today's ruling, we now turn to the next critical question for our community, and other traditional faith communi-

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[Section 36:4]

[1]As set forth in: *Marriage Equality: Celebrating Success With More to Do,* ReformJudaism.org, June 7, 2018, Noah Fitzgerald, *"The Supreme Court's decision was momentous. But it was part of a larger- and still unfolding – battle for LGBTQ equality."*

[Section 36:6]

[1]Posted on June 26, 2015 In Marriage and Family (http://advocacy.ou/.org/marriage-and-family/), press releases (https://advocacy.ou/.org/press-releases/).

ties – will American law continue to uphold and embody principles of religious liberty and diversity, and with the laws and implementing today's ruling and other expansions of civil rights for LGBT Americans contain appropriate accommodations and exemptions for institutions and individuals who abide by religious teachings that limit their ability to support same-sex relationships?"[2]

§ 36:7 *Obergefell v. Hodges* through the lens of American Judaism—Paradigm shift

For an academic review of why Jewish law should change to accommodate gay marriage see: Same-Sex Marriage and Jewish Law: Time for a New Paradigm?[1] Professor Kalir's paper argues that for the acceptance of gay marriage. Specifically, he states: "[P]roperly read, the relevant Biblical text was never intended to restrict sexual relations between consenting adults of the same gender; rather, its sole purpose was to prevent intra-family same-sex relations between males of the same household, as part of a more comprehensive code of incest. Such interpretation [. . .] is supported by the three organizing interpretive principles of Jewish law, namely the notion that each person was created in the image of God; the duty to love your neighbor as yourself; and the understanding that the interpretation of the bible is not in the heavens, but rather in our hands. Further, 'the article demonstrates that such interpretation is easily compatible with a proper contextual reading of the relevant verses,' both appearing in the Book of Leviticus."

§ 36:8 *Obergefell v. Hodges* through the lens of American Judaism—Jewish divorce documents ("GET")

Of course, with same-sex marriage comes same-sex divorce, in a civil sense, at least. That is, if someone is civilly married, they will be able to get a civil divorce under *Obergefell*. As a side note, pre-*Obergefell*, an interesting body of case law was created by couples whose marriage was valid in one state but invalid in another, and many had difficulties getting civilly divorced.

But what about Jewish divorce? As an initial matter, does the decision in *Obergefell* impact Jewish law as it relates to divorce? The simple answer is "no." But gitten will doubtless remain exactly the same as they have for millennia, in spite of *Obergefell*. The Jewish divorce document, or GET, derives from Deuteronomy 24. It must be willingly offered by a husband to a wife, and the wife must accept it. The issue of Jewish divorce is generally outside the scope of this article. However, to the extent it matters, one must understand two

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[2]Posted on June 26, 2015 In Marriage and Family (http://advocacy.ou/.org/marriage-and-family/), press releases (https://advocacy.ou/.org/press-releases/).

[Section 36:7]

[1]Same-Sex Marriage and Jewish Law: Time for a New Paradigm?, Doron M. Kalir, Cleveland-Marshall College of Law, Cleveland State University, 2015.

basic concepts. The first is that of the "agunah," or "chained woman." An agunah is a woman denied a divorce and therefore denied the right to remarry under Jewish law. To remarry in that circumstance would be to commit adultery. The second is the "mamzer." A "mamzer" is a child born to an "agunah." That child, while Jewish, is not able to marry another Jew except another mamzer.

§ 36:9 *Obergefell v. Hodges* through the lens of American Judaism—Jewish divorce documents ("GET")—Reform and reconstruction movements

Reform and Reconstructionist Judaism will generally accept a civil divorce as the end of a Jewish marriage, without need for a get. Thus, many same-sex married couples would see little need for a religious divorce. But, more importantly, the philosophy behind the Jewish divorce in the first place—as the protection of the religious legitimacy of biological children—is something that same-sex couples will simply not face. In the article, "Yes, There Is a Reform Divorce Document,But Don't Call It a 'Get,' " Rabbi Simeon J. Maslin, explains the movement's logic.[1]

Today, the Reform Movement in the United States accepts civil divorce as completely dissolving the marriage and permitting the remarriage of the divorced persons. No get or any substitute form of religious divorce is required. Some Reform rabbis in America continue to recommend obtaining a get, because they fear that a child born to a divorced woman without a get will be considered by the Orthodox as a mamzer, an "illegitimate" child who, upon reaching adulthood, will be forbidden to marry any other Jew except another mamzer. Reform Judaism has abandoned the concept of mamzerut; it is morally repugnant to place such a crushing disability upon a child whose only "crime" was to be born to a divorced parent without a get. If a Reform rabbi did not have to be concerned about the possible future marriage of a child of a non-get marriage to an Orthodox Jew, the issue would be moot; civil divorce would be sufficient. But as part of k'lal Yisrael, the community of world Jewry, we cannot ignore the legal traditions that govern a significant portion of our people. Perhaps this is why, outside of the United States, in countries where liberal Judaism is generally in the minority, most Reform rabbis insist on a get as a prerequisite for remarriage.

§ 36:10 *Obergefell v. Hodges* through the lens of American Judaism—Jewish divorce documents ("GET")—Conservative movement

To address the problem of the Agunah and mamzerim the Conser-

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[Section 36:9]

[1]Rabbi Simeon J. Maslin, "Yes, There Is a Reform Divorce Document,But Don't Call It a 'Get,' " Reform Judaism magazine (https://reformjudaism.org/yes-there-reform-divorce-document).

vative Movement started adding to the Jewish marriage contract (the Ketuba) a "Lieberman Clause" that insisted upon a civil divorce a GET could never be denied. This was controversial even within the movement itself. And the use of the clause has been largely abandoned, replaced with a prenuptial agreement requiring a Get upon divorce. This approach is less controversial and supported by many Orthodox groups. Yet another approach was the retroactive annulment of the marriage itself, called hafka'at kiddushin. The essential point, is that the Conservative Movement still recognizes the religious gravity of the Get, or Jewish divorce.

§ 36:11 *Obergefell v. Hodges* through the lens of American Judaism—Jewish divorce documents ("GET")—Orthodox movement

Interestingly, the easiest position of all is that of the various streams of Orthodox Judaism. Since people of the same sex cannot be married in the first place, considering their divorce is irrelevant. There is no issue of an agunah. Likewise, even were a homosexual couple to marry and have a child that child would not be the biological offspring of the two parties. Therefore from a religious point of view, there is no issue of mamzarim. This is not to say that other issues do not arise, but not as they relate to *Obergefell* and not as they relate to the scope of this article.

As demonstrated, as important as *Obergefell* is for American jurisprudence, its impact on American Jewish Law has been limited because, of course, *Obergefell* does not require any rabbi or other cleric to perform a ceremony for a same-sex couple. Those that condemned same-sex marriage prior to *Obergefell* have not changed their opinion as a result of it, and those that championed same-sex marriage have found some vindication. The most striking impact has been on traditional faith communities. In this context, it is mostly Orthodox Judaism that has seen in *Obergefell* the potential for the expansion of others' civil rights impinging on their own.

§ 36:12 The Get document and its meaning

The Biblical reference to divorce is set forth in *Deuteronomy* as follows:

> When a man takes a wife, and marries her, and it comes to pass, if she finds no favor in his eyes because he has found in her some unseemly thing, that he write her a Bill of Divorcement, and deliver it to her hand, and send her out of his house.[1]

According to Talmudic law, it was possible for a man to divorce his wife against her will. At the beginning of the tenth century, Rabbenu Gershom of Mayence reformed the divorce laws, stipulating among other things that a wife could not be divorced without her consent.

[Section 36:12]

[1]*Deuteronomy* 24:1-4.

The Bill of Divorcement referred to in verse 1 is called a "Get Peturin" in Aramaic and is written in Aramaic and Hebrew. The word "get" means "instrument" or "document." A "get peturin," therefore, is a "document of release."[2] The text may be translated as follows:

> On the [_____] day of the week, the [_____] day of the month in the year [_____] since creation of the world, according to our accustomed reckoning here, in [_____] the city which is situated on the River [_____] I, [_____], the son of [_____], who stand this day in [_____] the city of [_____] situated upon the River [_____], do hereby grant a Bill of Divorce, to thee, my wife, [_____], daughter of [_____], who have been my wife from time past, and with this I free, release and divorce you, that you may have control and power over yourself, from now and hereafter, to be married to any man whom you may choose, and no man shall hinder you from this day forever more, and you are permitted to any man. And these presents shall be to you from me a Bill of Divorce, a letter of freedom, and a Deed of Release according to the law of Moses and Israel.
>
> [_____], son of [_____], witness
>
> [_____], son of [_____], witness

Clearly, the text of the Get contains no religious formulae, nor does it reference Jewish religious law, save that it is intended to be effective "according to the law of Moses and Israel." The formula of "according to the law of Moses and Israel" hearkens back to antiquity. This phrase is itself recited as part of the marriage ceremony, when the groom says, "Be thou sanctified unto me with this ring, according to the law of Moses and Israel."

§ 36:13 Proceedings

The entire process of obtaining a Get takes approximately three hours because the Get must be handwritten by a highly qualified scribe, on parchment or other special medium, and it must be written with requisite intent. Consequently, no preprinted forms may be used. Each Get is specifically written for the man and woman whose relationship will be affected thereby, and the scribe must intend to write it for that couple at that time.

The necessary parties to a Get are the wife or her legally appointed messenger, the husband or his legally appointed messenger, a rabbinical tribunal or Bet Din consisting of three rabbis, a competent scribe, and witnesses who are competent under Jewish law.

When the Bet Din had plenary jurisdiction (as late as the early twentieth century in certain countries), it had the power to determine whether the marriage would be dissolved, and the Bet Din had the discretion to refuse a Get. In modern times, this discretion has been abrogated, and the rabbinical tribunal will invariably assist in the granting of the Get where a civil divorce has been or will be granted,

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[2]See Machransky v. Machransky, 31 Ohio App. 482, 484, 6 Ohio L. Abs. 315, 166 N.E. 423 (8th Dist. Cuyahoga County 1927) ("The word 'GET' among the Jews signifies a divorce.").

with limited exceptions upon the Halachic status of the original marriage.

Arrangements for the Get proceedings are generally made in advance, and the presiding rabbi will have satisfied himself that a Get is proper and necessary. Preparatory to the proceedings, the presiding rabbi will have obtained all necessary biographical information regarding the identities of the parties, including their Hebrew and English names, and the time, place, and method of solemnization of the marriage.

At the outset of the ceremony, the identity of the parties is established and confirmed through a series of questions and responses, and the presiding rabbi ascertains that no member of the rabbinical tribunal is related to either the husband or the wife and that none of the other participants (i.e., scribe, witnesses, etc.) are related to each other or to the parties. The rabbinical tribunal must then establish that the Halachic requirements of the Get are met, including the following:

(1) That the husband and wife are divorcing of their free will and are subject to no compulsion;

(2) That the husband has appointed the scribe to draft the divorce, and has designated the witnesses to attest to the writing and delivery of the Get, of his own free will;

(3) That the scribe has properly written the Get with the requisite intent;

(4) That the witnesses have been properly designated to witness the Get and its delivery and do so of their free will; and

(5) That the Get has been properly delivered to and accepted by the wife.

The husband designates the scribe to write the Get, appointing him as his agent. The husband then designates and appoints the witnesses to witness the Get and its delivery and acceptance. As part of this formal appointment and designation procedure, the husband publicly declares, in front of the witnesses and the tribunal, that he has not raised and will not raise any questions regarding the validity of the Get, the effect of which would be to jeopardize the wife's status as a divorced woman.

Upon her voluntary acceptance of the Get, the woman signifies her approval by raising it in her hands and redelivering it to the presiding rabbi. The rabbinical tribunal then conducts an inquiry to establish that all of the mandated requirements have been satisfied. The scribe is asked to confirm his proper appointment, as are each of the witnesses, who identify their signatures; the man and woman confirm their voluntary participation.

Upon satisfactory conclusion of the inquiry, the presiding rabbi partially destroys the Get, usually by cutting through the text, so that it may never be used again, and to indicate that it had been properly written, witnessed, delivered, and accepted. The tribunal then announces the completion of the Get proceeding, and that the woman is

free to marry any man. The original Get, so defaced, remains in the permanent file of the tribunal; the former spouses are issued a written confirmation of the fact of the proper conduct of the divorce ceremony. Upon completion of the proceedings, the husband is immediately permitted to remarry; the wife must wait at least ninety-one days, to assure that any subsequent pregnancy could not be the result of cohabitation with her former spouse.

The husband and wife need not be present throughout the entire ceremony, although most rabbis desire that they be present or available.

All rabbinical tribunals maintain a permanent record of their proceedings; most rabbis, on remarriage of divorced persons, will request confirmation of the original Get from the tribunal. It is therefore essential that the proceedings be conducted under the aegis of an established tribunal. In Ohio, the premier tribunal is the Orthodox Rabbinical Council of Cleveland.

§ 36:14 Problem of Aguna—Enforcement

Because of the nature of the Get process, voluntary participation by the parties is essential. In fact, the constant inquiry regarding the parties' free will during the procedure is designed to insure that neither party is participating in the Get other than voluntarily. Coercion, intimidation, or bribery is not permitted.

Because of the inability of an observant spouse to remarry without a Get, the withholding of consent and the refusal to participate in the Get have often become negotiating tools. There have been numerous documented cases in which a spouse has refused to participate in the Get process, solely out of spite and in a desire to hurt the other spouse. More often, however, spouses have conditioned their participation in the proceedings on tangible benefits, such as favorable alimony or child support settlements, or as a weapon to extort payments or other financial concessions.

This problem is especially severe as it affects the wife, because she can never remarry without the Get. A woman who has been abandoned by her husband, or whose husband has disappeared, is called an Aguna, or "bound." She is bound by the strictures of Halacha to her first husband, and she cannot remove the bindings without a Get.

When the rabbinical tribunals had plenary authority, a recalcitrant husband could be "convinced" to perform his duty and deliver a Get through various means. The use of such convincing tactics did not constitute impermissible coercion, because they were not deemed to force the husband's participation in the proceeding. Rather, they were

deemed to induce his willing participation and overcome his reluctance to cooperate.[1]

As the problem has become more common and because rabbinical tribunals have no enforcement powers, different suggestions have been made to solve this grievous inequity. The most common suggested solution is to include, as part of the negotiations of a separation or property settlement agreement, a specific clause whereby the parties mutually covenant and agree to cooperate in obtaining a Get. If the Get does not become the subject of contention, to be bargained over, the problem can readily be solved.

However, where one of the parties does not desire to participate in the Get proceedings, because of sincere belief, out of spite, or because of a desire for personal gain, there appears to be little that can be done to force such participation through the courts. Many documented cases exist, both in the United States and Israel, in which husbands have refused to grant their wife a Get, thus creating an entire subclass of women who are Agunot, or "bound women." This problem presents serious challenges within the Orthodox Jewish community. At present, no complete resolution to this problem has been found within a Halakhic framework.

Whether the Get proceeding is religious in nature or inherently secular has been the source of much contention. The difference, of course, relates to the ability of a court to even involve itself in considering the issue, much less compelling participation in a Get proceeding, because of the constitutional safeguard of freedom of religion.

As early as 1954, the New York Supreme Court (a trial court of general jurisdiction) ordered a husband to appear and participate in proceedings before a rabbinical tribunal, by granting specific performance of a clause in a separation agreement which provided for appearance.[2] The court concluded, "Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence. . . . Specific performance herein would merely require the defendant to do what he voluntarily agreed to do."[3]

Subsequent New York cases, however, have seriously clouded the issue. In Margulies v. Margulies,[4] the court was faced with the situation of a husband who had agreed (in open court) to appear before the rabbinical tribunal and participate in the Get proceedings. Subsequently, he repeatedly refused to do so. The trial court issued repeated contempt citations, imposed a fine, and ultimately ordered the husband jailed, with the proviso that the husband could purge himself

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[Section 36:14]

[1]Moshe Meiselman, *Jewish Woman in Jewish Law* (1978).

[2]Koeppel v. Koeppel, 138 N.Y.S.2d 366 (Sup 1954).

[3]Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (Sup 1954).

[4]Margulies v. Margulies, 42 A.D.2d 517, 344 N.Y.S.2d 482 (1st Dep't 1973).

of the contempt by participating in the Get proceedings. On appeal, the appellate division ordered the husband released but allowed the fines to stand. Incarceration was deemed inappropriate because of the court's inability to order a party to "participate in a religious divorce, as such is a matter of one's personal convictions and is not subject to the court's interference."[5] However, the fines were permitted to stand because the defendant, knowing that a Get could only be obtained from a rabbinical tribunal (during the proceedings of which he would have to certify his voluntary participation in such proceedings), had no intention to perform the stipulation. Thus, "he utilized the court for his own ulterior motives" and therefore was fined for the contempt.[6] Thus, enforcement of even a contractual undertaking is not clearly available.

Decisions after Margulies have been equally inconsistent. In one celebrated decision, Justice Held ordered a husband to participate in Get proceedings, even in the absence of a separation agreement requiring such participation, on the basis that the Ketubah, or Jewish marriage contract, carries with it a contractual obligation on a husband to participate in Get proceedings.[7]

New York has proposed the only legislative solution to the problem of Aguna. The New York Get statute essentially provides that any party to a marriage who commences an annulment or divorce proceeding must file a sworn complaint that he or she has "taken . . . all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce."[8] The effect of the Get statute is to authorize the court to withhold a civil

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[5]Margulies v. Margulies, 42 A.D.2d 517, 517, 344 N.Y.S.2d 482 (1st Dep't 1973).

[6]Margulies v. Margulies, 42 A.D.2d 517, 518, 344 N.Y.S.2d 482 (1st Dep't 1973).

[7]Stern v. Stern, (N.Y. Sup., Kings 8-7-79); Avitzur v. Avitzur, 58 N.Y.2d 108, 114, 459 N.Y.S.2d 572, 446 N.E.2d 136, 29 A.L.R.4th 736 (1983) (secular terms of a Ketubah could be enforced independent of their religious nature), citing the "neutral principles of law" approach established by the United States Supreme Court in Jones v. Wolf, 443 U.S. 595, 604, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979) (A court may enforce a religious document provided that the court's inquiry does not require it to resolve doctrinal controversies. Where a court's examination of a religious document requires it to decide religious disputes, "the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."). See also Application, Recognition, or Consideration of Jewish Law by Courts in United States, 81 A.L.R.6th 1. Several commentators have noted that the Avitzur decision may be limited to those marriage contracts which essentially include arbitration clauses similar to antenuptial agreements whereby the parties simply agree to submit their religious disputes to a nonjudicial forum. See J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 Conn. L. Rev. 201 (Winter 1984); Note, *Avitzur v. Avitzur: The Constitutional Implications of Judicially Enforcing Religious Agreements*, 33 Cath. L. Rev. 219 (Fall 1983); Suzanne M. Aiardo, Note, *Avitzur v. Avitzur and New York Domestic Relations Law Section 253: Civil Response to a Religious Dilemma*, 49 Alb. L. Rev. 131 (Fall 1984); Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of* Avitzur, 73 Geo. L.J. 193 (Oct. 1984); Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From* Avitzur *to the Get Statute*, 50 Brook. L. Rev. 229 (Winter 1984).

[8]N.Y. Dom. Rel. L. 253(2)(i).

divorce until, in effect, the party petitioning for divorce removes all barriers to remarriage. This would include the execution of a Get since without it, under Orthodox Jewish law, a spouse would not be entitled to remarry. The New York Get statute has been highly criticized, and in one instance a portion of the law was declared unconstitutional.[9]

Apparently, only one other court (in New Jersey) has reached the same conclusion, holding that the Ketubah itself imposes a legally enforceable, contractual obligation upon the parties to cooperate in obtaining a Get.[10]

As a result, the enforceability of even a specific agreement to participate in Get proceedings is not clear. While the New York cases have been contradictory, for a time, it had appeared that the majority of courts would judicially enforce a separation agreement requiring proceedings before a rabbinical tribunal.[11]

It does not appear that this problem has been faced regularly by Ohio courts. In fact, there are no published opinions which specifically deal with this issue. However, a 1982 unpublished decision of the Eighth District Court of Appeals declared such provisions of separation agreements not to be judicially enforceable.[12]

In Steinberg v. Steinberg,[13] the parties had entered into a separation agreement, which provided that they would cooperate in obtaining a Get and had designated the couple's rabbi as the presiding rabbi of the tribunal. The separation agreement was incorporated into the divorce decree, but the wife refused to participate. After a series of hearings, the trial court, while finding that it had no authority to order a party to perform what such party considers a religious act, nevertheless permitted the husband to withhold regular alimony payments until such time as the wife would cooperate with the Get proceedings. On appeal, the court of appeals, relying on the explicit language of Ohio Const. Art. I § 7, held:

> Where parties to a separation agreement include therein an obligation relating to a religious practice, said obligation is unenforceable in a court of law either as a contractual provision or pursuant to the enforcement of a divorce decree which incorporated therein the terms of the separation agreement. Any action by a court to enforce such a provision or to punish a party for contempt for failure to comply with such provision is void. [Citations omitted.]
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> In its journal entry of November 29, 1979, the trial court attempted to do indirectly what it could not do directly, to wit, induce appellee to

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[9]See Chambers v. Chambers, 122 Misc. 2d 671, 471 N.Y.S.2d 958 (Sup 1983).

[10]Minkin v. Minkin, 180 N.J. Super. 260, 434 A.2d 665 (Ch. Div. 1981).

[11]Waxstein v. Waxstein, 90 Misc. 2d 784, 395 N.Y.S.2d 877 (Sup 1976), judgment aff'd, 57 A.D.2d 863, 394 N.Y.S.2d 253 (2d Dep't 1977).

[12]Steinberg v. Steinberg, 1982 WL 2446 (Ohio Ct. App. 8th Dist. Cuyahoga County 1982).

[13]Steinberg v. Steinberg, 1982 WL 2446 (Ohio Ct. App. 8th Dist. Cuyahoga County 1982).

perform a religious act. We hold that this order was unconstitutional and void.[14]

Despite the decision of Steinberg, the incorporation of a clause which evidences the parties' commitment to a Get is of inestimable value. It may be of great moral value and could support a contempt citation outside of Cuyahoga County. Finally, it could alert the parties and their counsel to the need for immediate action, contemporaneously with the agreement to participate in Get proceedings, without relying on a postjudgment judicial enforcement.

§ 36:15 Conclusion

The Get, or Jewish divorce, is essentially a religiously neutral proceeding involving no ritualistic conduct. It is a legal proceeding, necessary to sever the legal bonds of matrimony and is the only mechanism recognized by Halacha for doing so. It is important for lawyers to counsel their clients as to the need for a Get and to explain to them the nature and particulars of the proceedings. Some parties to a divorce may desire an alternative to a Get, to solemnize the divorce within a Jewish context, even though such alternatives have no Jewish legal validity.

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[14]Steinberg v. Steinberg, 1982 WL 2446 (Ohio Ct. App. 8th Dist. Cuyahoga County 1982).