

How to 'Get' on With Your Life *

by Cary B. Cheifetz and Brian Roffman

With the addition of the irreconcilable differences to the causes of action for divorce, there has never been an easier time for men and women seeking a divorce in New Jersey to get on with their lives.¹

However, for some women of the Jewish faith there is an additional obstacle to getting on with their lives after a civil divorce. This obstacle is known as obtaining a get.

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In order for a Jewish woman to remarry according to halakha (Jewish law) she must receive a bill of divorce from her husband called a get. The foundation for this rule is found in the book of Deuteronomy:

When a man takes a wife and marries her, if it then comes to pass that she finds no favor in his eyes for he has found something unseemly in her, he shall write her a document of divorce and give it to her hand, and send her out of his house.²

If a Jewish man and woman obtain a secular divorce in New Jersey or anywhere else in the world, there will be no change in their marital status according to halakha because "[I]n order for a divorce to be considered complete, thus severing all marital ties of a couple, a Jewish husband must issue his wife a get."³ If a Jewish husband refuses to give his wife a get for any reason, they will continue to be married according to halakha, even if they are no longer living together as husband and wife. A Jewish woman left in this state of limbo is called an 'agunah,' which means a chained woman.

Agunah status is very undesirable for a Jewish woman because halakhically she cannot remarry, and any children she has with any man besides the man she is still halakhically married to will be considered the offspring of an adulterous affair. Most Conservative and Orthodox rabbis will not agree to perform a wedding for a woman with agunah status. This means that unless an agunah obtains a get from her husband, she may not be able to

remarry and cannot move on with her life. Furthermore, even if a Reform rabbi or a judge is willing to perform a wedding ceremony for an agunah to marry another man, her children and their offspring would still be considered mamzers (bastards) according to halakha.

Being a mamzer can be a very difficult situation for a Jewish person. Even though he or she is considered to be Jewish, a mamzer may only marry other mamzers or someone who converts to the Jewish faith.⁴ This is a major problem, even if an agunah does not believe in halakha. If the agunah bears a child with mamzer status, few Orthodox or Conservative rabbis will perform a marriage between the agunah's child and another Jew unless the child's partner is also a mamzer or a convert. Even the agunah's grandchildren and great grandchildren will be marred by mamzer status, and will not be able to marry most Jews according to halakha.

While this is a major problem for a Jewish woman, her husband is not in the same predicament, because he can refuse to give the get more or less consequence-free. Thus, many men demand a more favorable divorce settlement in exchange for giving a get. Many women agree to their husband's demands because, according to their beliefs, they cannot remarry without the get. The get can only be obtained voluntarily by the husband.

However, a man can also become 'chained' if his wife refuses to accept his get. The chief rabbinate of Israel recently released a study claiming that more men have been chained to marriages than women during the last two years in Israel.⁵

However, being a chained man does not entail the same level of hardship as being a chained woman. For example, if a man has children with another woman while he is still halakhically married to his wife, his children will not be mamzers. Polygamy is not outlawed in the Torah, and thus if a chained man has children with another woman, those children will not be considered mamzers.

While it is true that a ruling by Rabbi Gershom 1,000 years ago created a ban on polygamy that would prevent a man from remarrying until he is divorced from his first wife, there is a loophole men can use to get around this ruling.⁶ A man can remarry even if his wife refuses to accept a get if he is able to obtain the signatures of 100 rabbis from three different countries.⁷ It may be difficult to get 100 rabbis to agree to allow a chained man to remarry, but with the ease of travel and communication today, it is not impossible that a man could become unchained from his marriage in this manner. Women do not have a similar loophole.

Hundreds of years ago, an agunah had a halakhic solution to her situation. Usually a man must give a get of his free will, otherwise the get is invalid. However, there was a time when Jewish people lived in communities where their own courts had the power to enforce judgments. In some instances, if a man refused to give a get the local Jewish religious court, called a Beth Din, would issue a kofin "we force" order. According to Jewish law, "the [kofin] order may be enforced by sanctions including fines, incarceration, and corporal punishment."⁸

This is no longer a solution today in the United States, because Beth Dins in America do not have the power to make legally binding decisions. The Beth Din of America cannot throw a man in jail or order people to beat the man up if he does not give his wife a get. "In a sense, the agunah crisis does not stem from any limitations internal

to the hala[k]hic system itself, but from the interaction of that system with the non-hala[k]hic societal structure."⁹ Without the authority to pressure a man into giving a get through halakhic authority, the get must be given of the man's free will, otherwise the get is called a 'get meusah,' and is considered invalid.

WHAT SOLUTIONS HAVE THE CONSERVATIVE AND ORTHODOX MOVEMENTS TRIED?

The general rule of thumb when attempting to come up with solutions for agunot is that no solution will work unless every stream of Judaism accepts the solution.¹⁰ If Reform Jews accept a potential solution, but Conservative and Orthodox Jews do not, it is not a complete solution.

If Conservative and Orthodox Jews do not accept the potential solution the woman will still be considered an agunah, and will not be able to marry into the streams of Judaism that do not accept the potential solution. Additionally, if the agunah has any children with another man without receiving a get that is acceptable to a branch of Judaism that follows halakha, her children, grandchildren, etc. will be forever barred from marrying any normal-status Jews that strictly follow halakha.

The Orthodox branch of Judaism looks to halakha in its attempts to find solutions for agunot. The only solutions Orthodox Jews will accept are those that are consistent with halakha and cited in Jewish texts. It is important to realize that Orthodox Jews will always side on being overly careful not to violate halakha. Any solutions Orthodox Jews would accept must be carefully tailored to conform to halakha because of the high stakes involved in this issue.

Annulment

One potential solution is to issue a woman an annulment. The Orthodox and Conservative movements

both will annul a marriage if there are certain circumstances mentioned in the Talmud. If an Orthodox or Conservative Beth Din annuls a marriage there is no need for the woman to receive a get because she would have never been considered to be married at all.

However, the Conservative movement created other instances not mentioned in the Talmud where they will annul marriages. The Conservative movement justifies the creation of new instances of issuing annulments on the ground that "all who marry within the Jewish community do so with the implied consent of, and under the conditions, laid down by the rabbis [and] [h]ence, the marriage exists as long as the rabbis agree it does."¹¹

A scenario where the Conservative movement issued an annulment, but the Orthodox movement would not, was a scenario where an agunah received "seventeen decisions from Orthodox [Beth] Din ordering her husband to give her a get...[however,] [h]e refused to abide by these decisions."¹² A Conservative Beth Din annulled the agunah's marriage because it was clear that her husband was never going to issue a get, no matter what.

Only in extreme scenarios such as a husband refusing to give a get after 17 orders from a Beth Din would the Conservative movement grant an annulment not mentioned directly in the Talmud. However, the Orthodox movement would not allow an annulment in this scenario because the Talmud does not cite a scenario where a marriage was annulled because a husband absolutely refused to give a get.

Refusal to Recognize Non-Halakhic Marriages

An attempt by Orthodox Jews to eliminate the problem of agunot and mamzerim for many non-observant Jews was suggested by Rabbi Moshe Feinstein.¹³ Since, the Reform movement of Judaism abolished the requirement of a woman to obtain a get to remarry, many Jewish people

in America divorce civilly, but not halakhically. Therefore, potentially hundreds, if not thousands of American Jews could be mamzers according to halakha. Additionally, if a less observant woman becomes more observant after her civil divorce and wants to marry an Orthodox Jew, she will be unable to marry him unless she receives a get from her first husband.

To attempt to avoid these scenarios, Rabbi Feinstein argued that because weddings conducted by more liberal streams of Judaism are not halakhically sound, either because the two witnesses to the marriage do not meet the halakhic requirements to be witnesses at a Jewish wedding or because the more liberal rabbi does not meet the standards of the Orthodox rabbinat, the couple is not actually married. If the couple is not actually married according to halakha, then the woman does not require a get to marry another man and her children will not be mamzers.

Unfortunately, while Rabbi Feinstein's opinion is accepted by many Modern Orthodox Jews, many of the other streams of Orthodox Judaism would still require the woman to obtain a get. Many Orthodox rabbis argue that even if two Jewish people do not have a kosher wedding, there is a "halak[h]ic presumption that people do not desire their intercourse to be promiscuous," and when the couple has marital relations the marriage becomes valid despite any halakhic defects in the wedding ceremony.¹⁴ Furthermore, most Orthodox rabbis, including Modern Orthodox rabbis, would probably still require the woman to obtain a get from her first husband before they would be willing to perform a wedding for her because they would not want there to be any chance that the woman's children would be mamzers.

Conditional Gets and Marriages

In biblical times if a woman's husband went off to war and was captured or missing, his wife would

become an agunah because there was no way to know if her husband was dead. The Talmud explains that King David ordered his soldiers to give their wives conditional gets before leaving for war.¹⁵ These conditional gets would activate if the woman's husband did not return after X number of years.

The idea of having every Orthodox man give his wife a conditional get after they are married, making their marriage a conditional marriage, has been considered as a potential solution. The conditional get could declare that if the husband lives separately from his wife for more than 18 months, the get is activated, and the marriage is ended. This would be a halakhically acceptable solution to the agunah problem, because it has precedent in the Talmud and does not bend halakha or come up with new rules that deviate from halakha.

Unfortunately, conditional gets cannot solve an agunah's dilemma. This solution is flawed because a married couple having marital relations "subsequent to a conditional marriage constitute[s] a waiver of condition thereby making the marriage absolute and in need of a get" to terminate the marriage.¹⁶

The wife could ask the husband to issue another conditional get, but the next time they have marital relations he will have to issue another conditional get. This process would be tedious and ultimately worthless, because even if a man gave his wife a new conditional get after the last time they had marital relations before they separated, there is no way for her to prove that they did not have relations after the last conditional get was given. Furthermore, few Orthodox rabbis would perform a wedding for a woman in this scenario unless her husband gives her an actual get, because of the chance that she is still an agunah.

Beth Din of America Binding Arbitration Agreement

Recently, the Beth Din of America created a prenuptial agreement

that many Orthodox rabbis require a couple to sign before the rabbis will agree to marry that couple. This prenuptial agreement is a binding arbitral agreement carefully worded to not violate halakha, and at the same time not violate the Constitution.

A halakhically valid prenuptial agreement cannot specifically demand money from the husband if he fails to give the get to his wife. If the contract is worded in that manner, and the husband gives the get under the duress of monetary penalties without a kofin order from the Beth Din, the get will be get meusah. To avoid this problem, the prenuptial agreement requires the "husband to pay his wife \$150 in spousal support per day as long as their domestic residence together shall cease for whatever reasons."¹⁷ It also requires the husband to waive his halakhic right to his wife's earnings while they are separated. That provision is very important, because under Jewish law a husband is entitled to all of his wife's earnings while they are married unless he waives that right.

The contract also requires that the parties agree to appear in person before the Beth Din of America at the demand of the other party. This requirement is potentially very important because it is imperative that an agunah seeking a get, first goes to a Beth Din *before* she tries to obtain the get through a secular court. If the agunah tries to bypass the Beth Din, any penalties a secular court might impose on her husband will be completely ineffective in acquiring a get for her. If the husband gives the get under pressure from a secular court, and the wife never went through the proper channels at the Beth Din, the get will be get meusah.

CAN NEW JERSEY COURTS HELP AN AGUNAH?

The halakhic requirement for a couple to appear before the Beth Din prior to asking a secular court to intervene is important because

the New Jersey case, *Aflalo v. Aflalo*, "determined that the Free Exercise clause (U.S. Const. amend. 1) did not allow the court authority to compel either husband or wife to appear before the religious tribunal, whether to obtain a *get* or to discuss reconciliation."¹⁸ The court in *Aflalo* also noted an establishment clause concern when it quoted the dissent in a New York case, *Avitzur v. Avitzur*, as saying:

[E]ven the limited relief which the majority of four approved required inquiry into and resolution of questions of Jewish religious law and tradition and thus inappropriately entangled the civil court in the wife's attempts to obtain a religious divorce.¹⁹

If an agunah seeking a *get* in New Jersey did not sign the Beth Din prenuptial agreement or a similar contract, and her husband will not go to the Beth Din, the secular courts in New Jersey cannot order him to go to the Beth Din because of free exercise and establishment clause concerns. In this situation, where the husband will not go to the Beth Din, the only thing the Beth Din can do is issue a '*seruv*' after the husband ignores three of its summons.²⁰

A *seruv* might persuade a court in New York (where the courts have determined it is constitutional to require the parties appear before the Beth Din) to use their power to order the husband to go to the Beth Din.²¹ In New York, the courts also have the power to fine the husband until he goes to the Beth Din if he ignores their order.²² However, in New Jersey, if an agunah obtains a *seruv* without having signed the Beth Din prenuptial contract, the court will not have the authority to force the husband to appear before the Beth Din.

CAN A NEW JERSEY SECULAR COURT ENFORCE THE BETH DIN PRENUPTIAL AGREEMENT AND REQUIRE A HUSBAND TO ABIDE BY A SERUV ORDER

DEMANDING APPEARANCE?

There are no reported cases yet, where a New Jersey court has ordered a husband to go before the Beth Din against his will if he has signed the Beth Din prenuptial agreement and the Beth Din orders him to appear for arbitration. The argument can be made that he signed the contract, it is binding, and he must appear before the Beth Din to arbitrate. On the other hand, the contract may violate the free exercise clause, the establishment clause, and New Jersey public policy, thus rendering the contract unenforceable.

Professor Irving A. Breitowitz, who has written a law review article on the plight of agunot, as well as a book, believes there is no violation of the establishment clause if a secular court orders a husband to appear before the Beth Din. Professor Breitowitz believes "a secular court would and should enforce an arbitration agreement."²³ However, in New Jersey, where the courts believe it is unconstitutional to force a man to appear before the Beth Din, he believes "the [New Jersey] court might rule the same way even with a prenup."²⁴

However, the director of the Beth Din of America, Rabbi Yona Reiss, "would not interpret *Aflalo* as barring a New Jersey court from enforcing the Beth Din prenup."²⁵ Rabbi Reiss believes that "the prenup is a legally binding arbitration agreement and the secular courts in New Jersey should uphold the provision of the contract requiring the husband to appear before the Beth Din."²⁶

There is precedent for New Jersey courts upholding decisions by the Beth Din when the litigants signed an arbitration agreement. For example, in *Elmora Hebrew Center, Inc v. Fishman*, the New Jersey Supreme Court found that "it is appropriate that the [Elmora Hebrew Center], like a party to a civil arbitration, should be bound to observe the Beth Din's determination of any issues that the [Elmora

Hebrew Center], agreed to submit to that tribunal."²⁷ The ruling in *Elmora Hebrew Center* seems to strongly suggest that New Jersey courts would uphold the ruling of a Beth Din for a husband to appear before it if he and his wife had signed the Beth Din prenuptial agreement.

However, there are still reasons to believe the New Jersey courts would not uphold the Beth Din prenuptial agreement. The New Jersey Supreme Court in *Elmora Hebrew Center* also stated:

Our conclusion is not an endorsement of the mesne procedural determinations by which the lower courts surrendered jurisdiction over the civil aspects of this case...It is not proper for a trial court to refer civil issues to a religious tribunal in the first instance.²⁸

If it is not proper for a civil court to surrender jurisdiction over civil issues in a case, it may be improper to give the Beth Din of America jurisdiction to decide whether or not the parties can be divorced. However, the New Jersey case law in *Aflalo* suggests that determining whether or not to give a *get* is a religious issue, not a secular one, and, therefore, the Beth Din could have jurisdiction to arbitrate.

On the other hand, the court in *Aflalo* said:

This court should not, and will not, compel a course of conduct in the Beth Din no matter how unfair the consequences. The spectre of Henry being imprisoned or surrendering his religious freedoms because of action by a civil court is the very image which gave rise to the First Amendment.²⁹

This suggests the prenuptial contract may be unenforceable because it is against New Jersey public policy. The New Jersey courts may also be reluctant to allow a religious court to determine a civil issue such as whether it has jurisdiction to hear a case and or force someone to appear before it.

COULD THE NEW JERSEY LEGISLATURE CREATE A TORT SOLUTION?

Some people have suggested that a tort remedy might be a solution for agunot. A woman could sue her husband for intentional infliction of emotional harm based on the horrible trauma of not being able to remarry or have more children. "While the failure to give a *get* is an omission rather than a commission, there is authority that even a failure to act may give rise to tortious liability."³⁰

The New York case of *Perl v. Perl* explored the possibility of a tort remedy existing for agunot in civil court.³¹ However, the court ruled that the husband was seeking "specific economic objectives [and] the component of mental distress became a regrettable by-product"³² Basically, what the court ruled is that "[d]riving a hard bargain; or even an unconscionable one, is not clearly conduct that go[es] beyond all possible bounds of decency, and should not be regarded as tortious."³³

It is very difficult to prove the intent part of the intentional infliction of emotional harm if a court takes the view that a husband's motivations for not giving the *get* are "not malicious but are economic."³⁴ However, evidence could be brought in to the court to show the husband's intent to emotionally harm his wife maliciously and not just economically. Perhaps, if the husband demanded full custody of the parties' children rather than a larger cut of equitable distribution the court would be more inclined to rule in favor of the wife.

However, a major problem with this type of tort claim is that it could cost an agunah a lot of money to pay for an attorney and bring the case to court. Additionally, there is a good chance she will not win based on the ruling in *Perl*, which currently is the only published case in the United States on the issue of suing for intentional infliction of emotional harm for failure to give a *get*. Another problem is

collection of damages, which also is a byproduct and not the goal of the party seeking the *get*.

Another tort solution could be to "create a law that specifically provid[es] that the maintenance of a barrier to remarriage subsequent to the grant of a civil divorce constitutes the intentional infliction of emotional distress."³⁵ A statute like this has the advantage that it would not be difficult to prove and would allow an agunah to successfully sue her husband for damages if he refuses to give her a *get*.

The problem with this tort law is that if a woman successfully sues her husband for intentional infliction of emotional distress for not giving a *get*, and then the husband gives the *get* because he does not want to get sued again, the *get* will be *get meusah*. This problem can be minimized if the agunah goes to the Beth Din before she sues in secular court. However, even assuming this statute would be halakhically acceptable, it would have an even harder time passing constitutional scrutiny. "A specially drafted law whose exclusive purpose is the protection of uniquely religious sensibilities carries with it at least the appearance of the state placing its imprimatur on religion."³⁶ The purpose of this law is not wholly secular like the *get* law, because "it makes sense to remove barriers to marriage in the context of a divorce proceeding." However, "there is no unique secular interest in singling out in tort law" this particular issue.³⁷

CONCLUSION

It seems unlikely that there are short cuts to ending the problem of agunot in cases that are tried. Often, people think there is a solution for everything in our court system, but this might be a time when there is not. Most states, including New Jersey, do not want to get involved in this issue because it is a religious issue that the government is not equipped to address or constitutionally allowed to entangle itself in.

It is a good idea for Jewish communities in New Jersey to require every couple getting married to sign some form of halakhic prenuptial agreement to help facilitate the divorce process and hopefully prevent the agunah problem. Even if the agreement is not actually enforceable in New Jersey, it will act as a pledge of honor that in the event of a divorce both parties will act civilly and maturely. Likewise, these issues should be addressed in property settlement agreements.

Ultimately, the solution to this problem is not in the hands of the New Jersey courts. The solution is in building strong Jewish communities that know right from wrong and raise sons who are 'mensches,' who are willing to help themselves and their former spouses get on with their lives. ■

ENDNOTES

1. N.J.S.A. 2A:34-2(D).
2. Deuteronomy 24:1
3. Marc S. Cwik, "The Agunah Divorce Problem in Jewish Society: Exploring the Possibility of an International Law SION," 17 *Wis. Intl L.J.* 109, 113-4 (1993).
4. Deuteronomy 23:3 "A mamzer shall not enter the congregation of HASHEM." This means that a mamzer may not marry normal status Jews.
5. www.israelnationalnews.com/News/News.aspx/123472.
6. This ban was accepted universally by European Jewish communities about 1,000 years ago, but was not accepted by Jews living in the Middle East or Africa until much more recently.
7. This process of getting an exemption from Rabbi Gershon's ban on polygamy is called 'heter meah rabbanim,' and can be obtained by a man without too much difficulty.
8. Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society*, at 34 West-

- port: Greenwood Press. 1993.
9. Irving Breitowitz, "The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment," 51 *Md. L. Rev.* 312, 341 (1992).
 10. Agunot is the plural of agunah.
 11. Felicia Moskowitz, "The Plight of the Agunah," 4 *Touro J. Transnat'l L.* 301, 306 (1993).
 12. www.jewishvirtuallibrary.org /source/Judaism/agunot.html.
 13. Mamzerim is the plural of mamzer.
 14. Breitowitz, *supra*, note 8 at 72-3.
 15. Breitowitz, *supra*, 51 *Md. L. Rev.* at 317-18.
 16. Breitowitz, *supra*, note 8 at 61.
 17. Beth Din of America, *Binding Arbitration agreement*, §VII.
 18. *Mayer-Kolker v. Kolker*, 359 N.J. Super. 98, 102 (App. Div. 2003); *Aflalo v. Aflalo*, 295 N.J. Super. 527, 542 (Ch. Div. 1996).
 19. *Aflalo, supra*, 295 N.J. Super. at 541; *Avitzur v. Avitzur*, 459 N.Y.S.2d 572, 577-78 (1983).
 20. A seruv is an order from the Beth Din stating that a party refused to appear before the Beth Din. It must be acquired by a woman prior to attempting to obtain any relief involving a get in a secular court.
 21. *Avitzur, supra*, 459 N.Y.S.2d 572.
 22. *Margulles v. Margulles*, 344 N.Y.S.2d 482 (1973). The court ruled that they could fine the husband, but not incarcerate him, despite his being in contempt of court for failure to appear before the Beth Din.
 23. Email from Irving A Breitowitz, Professor of Law, University of Maryland School of Law (Aug. 27, 2007, 22:35 EST).
 24. *Id.*
 25. Telephone interview with Rabbi Yona Reiss, Director, Beth Din of America (Sept. 12, 2007).
 26. *Id.*
 27. *Elmora Hebrew Center, Inc v. Fishman*, 125 N.J. 404, 418 (1991).
 28. *Id.* at 419.
 29. *Aflalo, supra*, 295 N.J. Super. at 542.
 30. Breitowitz, *supra*, note 8 at 401.
 31. *Perl v. Perl*, 512 N.Y.S.2d 372 (N.Y.A.D. 1 Dept 1987).
 32. *Id.* at 96.
 33. Breitowitz, *supra*, note 8 at 398.
 34. *Id.* at 241.
 35. Breitowitz, *supra*, 51 *Md. L. Rev.* at 402.
 36. *Id.* at 405.
 37. Breitowitz, *supra*, note 8 at 247.
- Cary Chelfetz is a partner in the law firm of Ceconi & Chelfetz, LLC, former chair of the Family Law Section and a fellow of the American Academy of Matrimonial Lawyers. Brian Roffman is a graduate of Seton Hall University School of Law and worked as a legal intern at Ceconi & Chelfetz, LLC. In September 2008 he began clerking for a family law judge of the superior court.*

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