To: **New Jersey Law Revision Commission**
From: **Laura C. Tharney, Executive Director**
Re: **Religious Divorce in New Jersey**
Date: **March 11, 2024**

MEMORANDUM

Project Summary

Chapter 34 of Title 2A (Administration of Civil and Criminal Justice) of the New Jersey statutes concerns the Divorce and Nullity of Marriage – Alimony and Maintenance – Care and Custody of Children.[1] This Chapter deals with matters including the causes for nullification and divorce, jurisdiction, parties, fees, judgments and appeals, alimony and maintenance, and the custody of children.[2]

Neither that Chapter, nor any other provision of New Jersey's statutes, pertains to a religious divorce that may be sought by a party to a civil divorce proceeding.

By letter of October 31, 2023, the New Jersey State Bar Association ("NJSBA") requested, consistent with N.J.S. 1:12A-8, that the New Jersey Law Revision Commission review the issue of the withholding of a Get – a Jewish decree of divorce – in response to opinions in two separate cases last year.[3] The letter from the NJSBA explained the request as follows:

> It is our understanding that New Jersey has no remedies for withholding a get in a Jewish divorce. In an effort to address fundamental fairness in divorces between the parties, the NJSBA wishes to explore the way other states address this issue – especially when it involves the intersection between secular and religious divorces. It is the aim of the NJSBA to make recommendations in light of any information the NJLRC uncovers on the issue, including any history of how this issue has been handled in New Jersey law, should the NJLRC wish to undertake this issue.[4]

In addition to the letter, the NJSBA provided a five-page memorandum to explain its "understanding of the issue of withholding Gets and the more recent treatment in the courts regarding same."[5]

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[1] N.J. STAT. ANN. § 2A:34-1 to 2A:34-95 (West 2024).
[2] *Id.*
[3] Email from Amy Conrad, Government Affairs Manager, New Jersey State Bar Association, to Laura C. Tharney, Exec. Dir., N.J. Law Revision Comm'n, forwarding October 31, 2023, letter and attached memorandum from Timothy F. McGoughran, Esq., President of the New Jersey State Bar Association (October 31, 2023, 09:34 a.m. EST), (on file with the NJLRC).
[4] *Id.*
[5] *Id.*

Background

As the NJSBA explained in its memorandum,

> in the Jewish religion, just as a civil marriage must be dissolved with a judgment of divorce, a Jewish marriage must be dissolved with a religious divorce, which is known as a Get. Accordingly, for parties who adhere to Jewish laws, a civil divorce is not sufficient to divorce them under Jewish law. As Jewish law does not accept a civil marriage ceremony, it does not accept a civil divorce. Therefore, even if parties are civilly divorced, in the eyes of Jewish law, they are still considered to be married.[6]

The memorandum states that, like a civil marriage, a Jewish marriage "is not just a spiritual union but a contractual union as well."[7] It notes that "not all people who identity as Jewish adhere to all Jewish laws" but that to

> obtain a religious divorce, parties must participate in a divorce proceeding in front of a Beis Din, which is a rabbinical court comprised of three rabbis. During this proceeding, the husband provides the wife with a Get, which is a dated and witnessed document wherein the husband expresses his intention to divorce his wife in the presence of rabbis from Beis Din, who serve as witnesses. The husband must then deliver the Get to his wife by handing it to her or hiring a shliach, or messenger, to deliver the Get to his wife on his behalf… It is essential to note that only the husband can deliver or arrange for the delivery of a Get to the wife. Under Jewish law, the wife does not have the authority to deliver the Get.[8]

"When a husband refuses to provide his wife with a Get, the woman is referred to as an agunah. The translation for agunah is chained, thereby signifying how the woman is chained to a dead marriage. An agunah cannot get remarried…"[9] The memorandum also explains that "[i]n recent years, prominent Jewish organizations like the Beth Din of America, have recognized a disproportionate number of women who are agunot."[10]

In an effort to combat the "agunah crisis" a halachic prenuptial agreement was

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[6] Memorandum from Sheryl J. Seiden, Esq. and Shelby R. Arenson, Esq., to New Jersey State Bar Association, Board of Trustees, October 10, 2023, regarding Litigants' Fundamental Right to Marry, forwarded by Timothy F. McGoughran, Esq., President of the New Jersey State Bar Association, (citing Jewish Divorce Basics: What is a 'Get'? *Chabad.org.* Retrieved from: https://www.chabad.org/library/article_cdo/aid/557906/jewish/Jewish-Divorce-Basics-What-Is-a-Get.htm) p. 1-2.
[7] *Id.* at 2.
[8] *Id.*
[9] *Id.* (citing Silberberg, Naftali. The Agunah. *Chabad.org.* Retrieved from: https://www.chabad.org/library/article_cdo/aid/613084/jewish/The-Agunah.htm.)
[10] *Id.* 2-3.

> created that empowers the Beth Din with tools to determine when a Get should be issued. Like a prenuptial agreement, parties who enter into the halachic prenuptial agreement sing [sic] the document prior to marriage. Pursuant to the agreement, the husband is obligated to pay his wife a daily monetary penalty for each day that he refuses to provide his wife a Get.[11]

The NJSBA, in its memorandum, cited some of the New Jersey cases that have considered the issue of a Get, and whether one may be compelled by a court in the context of a civil divorce.

The NJSBA noted that "[h]istorically, New Jersey trial courts have differed on the issue of whether a civil court has the authority to compel a husband to provide a get" and that "recent decisions by New Jersey courts have interpreted the law to deny any request to compel the issuance of a Get."[12] It also noted that New Jersey "is not alone in its lack of consistency in decisions regarding whether a Ketubah can and should be enforced. Throughout the United States, 'courts have gone both ways on whether the agreements violate the First Amendment and whether such agreement is specific enough to enforce.'"[13]

In October of 2023, the "Family Law Executive Committee of the NJSBA appointed a task force to study this issue" and the NJSBA memorandum suggested that "NJLRC's collaboration on this issue would be very helpful."[14]

Analysis

Staff engaged in preliminary research regarding the state of the law as it pertains to Gets. This research is summarized below.

New Jersey Statutes and Constitutional Provisions

There are no provisions in the New Jersey statutes or the New Jersey Constitution that directly address either religious divorce generally or Gets specifically.

The New Jersey Rules of Court also do not contain any provisions addressing either religious divorce or Gets.

New Jersey Cases - Chronologically

In the absence of statutory guidance, Staff reviewed New Jersey's case law to assess the

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[11] *Id.* at 3 (citing Weissmann, Rabbi Shlomo. Ending the Agunah Problem as We Know It. *The Orthodox Union.* Retrieved from: https://www.ou.org/life/rekationships/ending-agunah-problem-as-we-know-it-shlomo-weissmann/).
[12] *Id.* at 4.
[13] *Id.* (citing Comment, Enforceability of Agreements to Obtain a Religious Divorce, Kimberly Scheuerman, Journal of the American Academy of Matrimonial Lawyers, Vol 23, No. 2 (2010).)
[14] *Id.* at 5.

guidance it might provide. Preliminary research revealed references to Jewish divorces/Gets in approximately thirty New Jersey state and federal cases dating back to 1910.

The earliest is the 1910 decision in *Gans v. Gans*[15], in which the court considered a case of a divorce decree made in favor of the complainant husband in 1902 and made reference to a "Jewish divorce."[16] The 1945 decision in *Hollander v. Hollander*[17] similarly made reference to, but did not turn on, what the Court referred to as a "Jewish divorce" a "rabbinical divorce."[18]

- *Minkin v. Minkin*

The next case referring to a Jewish divorce appears to be the 1981 Chancery Division case of *Minkin v. Minkin*,[19] in which the court dealt with substantive issues regarding a Get when it considered the motion of the plaintiff wife for an order compelling the defendant husband to obtain and pay for "a Jewish ecclesiastical divorce known as a 'get'."[20]

The *Minkin* court explained that the issues to be decided were whether the parties had entered into a contract enforceable by the court and whether "the relief sought by plaintiff would unconstitutionally infringe upon defendant's First Amendment right of exercise of religious freedom."[21] It said that to "compel the husband to secure a get would be to enforce the agreement of the marriage contract (ketuba). A court of equity will enforce a contract between husband and wife if it is not unconscionable to do so and if the performance to be compelled is not contrary to public policy."[22] The court determined that the contract was not against public policy and should be specifically enforced.[23]

When it considered whether ordering specific performance of the ketuba would violate the defendant's freedom of religion under the First Amendment of the Constitution, the *Minkin* court referred to two New York cases that it said were "within the standards promulgated by the U.S. Supreme Court in its landmark holding of *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 772-773…(1973)."[24] It quoted the three-pronged *Nyquist* test for determining whether a law violates the Establishment Clause, saying that the law "first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive entanglement with religion."[25]

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[15] 77 N.J. Eq. 309 (Ct. of Chancery 1910).
[16] *Id.* at 311.
[17] 137 N.J. Eq. 70 (Ct. Err. & App. 1945).
[18] *Id.* at 76.
[19] 180 N.J. Super. 260 (Ch. Div. 1981).
[20] *Id.* at 261.
[21] *Id.* at 262.
[22] *Id.*
[23] *Id.* at 263
[24] *Id.*
[25] *Id.* at 264.

The *Minkin* court also requested the testimony of distinguished rabbis, four of whom testified that acquiring a Get is not a religious act.[26] (A fifth rabbi testified that it *is* a religious act, but added that the other testifying rabbis were "far better Jewish scholar(s)" than he was.)[27] The court found that

> the entry of an order compelling defendant to secure a get would have the clear secular purpose of completing a dissolution of the marriage. Its primary effect neither advances nor inhibits religion since it does not require the husband to participate in a religious ceremony or to do acts contrary to his religious beliefs. Nor would the order be an excessive entanglement with religion. In addition to testimony to that effect, the court takes judicial notice that the Legislature has seen fit to authorize clergy to perform marriages and, in doing so, permits the use of a religious ceremony.[28]

The court added that "[t]he get procedure is a release document devoid of religious connotation and cannot be construed as any more religious than the marriage ceremony itself."[29]

- *Burns v. Burns*

In the 1987 Chancery Division case of *Burns v. Burns*[30], the court considered a post-judgment motion by the defendant wife to compel the plaintiff husband to secure a Get.[31] When the defendant wife initially asked the plaintiff – who had since remarried – for the Get, he indicated that he no longer believed in the need for a Get, but that if she would invest $25,000 in a trust for the benefit of their daughter, he would obtain the Get.[32]

The court cited the decision in *Minkin*, in which the court enforced the "ketubbah" between the parties, noting the requirement on the husband to give his wife a Get in cases of adultery.[33] The court said that "[i]n studying the laws of Moses and Israel this court finds there are various circumstances which would require the husband to secure a "get" from his wife. The *Minkin* court found the husband compelled to grant his wife a "get" due to her acts of adultery."[34] The *Burns* court said that there are other circumstances in which a husband is compelled to secure a Get, and that adultery is not the exclusive ground for compelling one.[35] It stated that

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[26] *Id.* at 266.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] 223 N.J. Super. 219 (Ch. Div. 1987).
[31] *Id.* at 221.
[32] *Id.* at 222.
[33] *Id.* at 224.
[34] *Id.* at 225.
[35] *Id.* at 226.

> [f]or the court to compel the plaintiff to submit to the jurisdiction of the Jewish ecclesiastical court, the "Bet Din," and initiate the procedure to secure a "get" is within the equity powers of this court to do what ought to be done. In doing equity, the court has power to adapt the equitable remedies to the particular circumstances of each particular case… The ultimate decision of whether a "get" is to be granted is that of the "Bet Din" and not of this court.[36]

- *Segal v. Segal*

The 1994 appellate Division case of *Segal v. Segal* involved competing claims to ownership of a residential property owned by a husband and wife and discussed the "particular danger of overreaching by a husband with the power to withhold consent to a Get."[37] The Appellate Division referred to *Burns*, noting that "[a]lthough our State has not given this problem the same degree of attention as New York, one reported trial court decision adopts essentially the same approach as the New York courts" and determined that the wife's assent to a marital settlement agreement – memorialized by a Get – was secured by duress.[38]

- *Aflalo v. Aflalo*

In the 1996 chancery Division case of *Aflalo v. Aflalo*, the court diverged from the determinations in the previous cases that had considered a husband's refusal to provide a Get.

The *Aflalo* court explained that the case required "the court to visit an issue that has previously troubled our courts in matrimonial actions involving Orthodox Jews—a husband's refusal to provide a 'get'."[39] Unlike cases in which the husband attempted to use a refusal of the Get to seek more favorable resolution of a civil divorce, the husband in *Aflalo* simply refused to consent to a Get.[40]

The court in *Aflalo* explained that although *Minkin* supported the plaintiff wife's view that the court could order the defendant husband to consent to a "Jewish divorce," it "believe[d] that to enter such an order violates Henry's First Amendment rights and refuses to follow the course outlined in *Minkin.*"[41] The court said that the Free Exercise Clause of the First Amendment bars the legislature from making certain laws, and "likewise inhibits a state's judiciary."[42] It briefly described the history and process of the "Get" and the consequences to a civilly-divorced wife who is not also religiously divorced.[43] The court stated the question in issue, and its answer, as "does that mean that she can obtain the aid of this court of equity to alter this doctrine of her faith? That

[36] *Id.*
[37] 278 N.J. Super. 218, 223 (App. Div. 1994).
[38] *Id.* at 225.
[39] 295 N.J. Super. 527 (Ch. Div. 1996).
[40] *Id.* at 530-531.
[41] *Id.* at 532.
[42] *Id.* at 533.
[43] *Id.* at 534-535.

the question must be answered negatively seems so patently clear that the only surprising aspect of Sondra's argument is that it finds some support in the few cases on the subject."[44]

The court in *Aflalo* discussed the approach taken by the court in *Minkin* and explained that

> *Minkin*'s approach that the "ketubah" may be specifically enforced without violating the First Amendment is in accord with the decisional law of New York, *Avitzur, supra,* Illinois, *In re Marriage of Goldman,* 196 *Ill.App.*3d 785, 143 *Ill.Dec.* 944, 554 *N.E.*2d 1016 (1990) and Delaware, *Scholl v. Scholl,* 621 *A.*2d 808, 810–812 (Del.Fam.Ct.1992), and at odds with Arizona, *Victor v. Victor,* 177 *Ariz.* 231, 866 *P.*2d 899, 901–902 (App.1993) and, now, this court. *Minkin* and its followers (including the New Jersey trial court in *Burns*)[4] are not persuasive for a number of reasons.

The *Aflalo* court identified four reasons why it deemed the *Minkin* decision unpersuasive: (1) "it examined the problem against the backdrop of the Establishment Clause and not the Free Exercise Clause"; (2) "the conclusion that an order requiring the husband to provide a 'get' is not a religious act nor involves the court in the religious beliefs or practices of the parties is not at all convincing;"[45] (3) "the conclusion that its order concerned purely civil issues is equally unconvincing"[46]; and (4) "*Minkin* fails to recognize that coercing the husband to provide the "get" would not have the effect sought" adding that "[i]f a 'get' is something which can be coerced then it should be the Beth Din which does the coercing."[47] The court added:

> It may seem "unfair" that Henry may ultimately refuse to provide a "get"… But the unfairness comes from Sondra's own sincerely-held religious beliefs. When she entered into the "ketubah" she agreed to be obligated to the laws of Moses and Israel. Those laws apparently include the tenet that if Henry does not provide her with a "get" she must remain an "agunah". That was Sondra's choice and one which can hardly be remedied by this court.[48]

The *Aflalo* court further stated that the

> tenets of Sondra's religion would be debased by this court's crafting of a short-cut or loophole through the religious doctrines she adheres to;[14] and the dignity and integrity of the court and its processes would be irreparably injured by such misuse. The First Amendment was designed to protect both institutions against such

[44] *Id.* at 535.
[45] *Id.* at 537-538.
[46] *Id.* at 538.
[47] *Id.* at 539-540.
[48] *Id.* at 542.

> unwarranted, unwanted and unlawful steps over the "wall of separation between Church and State."[49]

After *Aflalo*, it does not appear that New Jersey courts directly addressed the issue of compelling a Get for more than twenty-five years.

- *Mayer-Kolker v. Kolker*

In 2003, the Appellate Division in *Mayer-Kolker v. Kolker*[50] noted that New Jersey "trial courts have not been in complete accord on the issue of whether a civil court has authority to compel a husband to cooperate in obtaining a *get*" citing the division between the *Minkin* and *Burns* cases and the *Aflalo* case.[51]

The *Mayer-Kolker* court concluded that it did not have to "determine the limits of judicial authority in this field" but instead focused " on the threshold issue, namely, whether the particular *ketubah* of the parties in this case had the effect of subjecting the parties to Mosaic law."[52] It stated that "Plaintiff has not established the effect of this particular *ketubah* nor the mandate of Mosaic law, if applicable. Without such a record we lack the necessary factual context to determine whether a New Jersey court has power to compel cooperation in obtaining a *get.*"[53]

Thereafter, there seem to have been limited additional mentions of "Jewish divorce" or "Get" in the case law, including federal cases involving individuals charged with the kidnapping of husbands associated with efforts to obtain a Get.[54]

- *Satz v. Satz*

In 2023, the Appellate Division directly addressed the issue of compelling a Get when it decided *Satz v. Satz,*[55] in which the

> parties engaged in two years of contentious litigation prior to the divorce trial, which began in September 2020. They continued attempts to settle their dispute throughout the duration of the trial. A critical area of dispute centered on plaintiff's desire to obtain a get—a divorce recognized under Jewish religious law… Before a verdict was reached in the Family Part divorce trial, the parties tentatively reached an agreement on all issues, including each party's obligations with respect to a beis din proceeding to obtain the get that plaintiff sought.[56]

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[49] *Id.* at 543.
[50] 359 N.J. Super 98 (App. Div. 2003).
[51] *Id.* at 100-103.
[52] *Id.* at 103.
[53] *Id.* at 105.
[54] See, for example, *United States v. Wax*, 2020 WL 3468219 (D.N.J. 2020).
[55] 476 N.J. Super. 536 (App. Div. 2023).
[56] *Id.* at 543-544.

Testimony was taken by the trial court to confirm the understanding and agreement of the defendant husband regarding his response to the *bes din*, the fact that he would be bound by its decision, and would be subject to sanctions by the Family Part if he did not cooperate pursuant to his agreement, which was memorialized in writing[57] and signed by the parties.[58] The Appellate Division considered the case after the defendant failed to comply with the signed agreement of the parties, and multiple notices of appeal were filed.[59]

The Appellate Division in *Satz* noted that a *bes din* hearing did occur, and that body issued a ruling finding that the defendant's refusal to provide the plaintiff wife with a get was a "form of abuse."[60] With regard to the substantive legal principles in issue, the Court said that

> "[s]ettlement of disputes, including matrimonial disputes, is encouraged and highly valued in our system." … "Indeed, there is a 'strong public policy favoring stability of arrangements in matrimonial matters.' "… Our Supreme Court has "observed that it is 'shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal matrimonial problems that have been advanced by the parties themselves.' "[61]

The court added that "'[m]arital agreements are essentially consensual and voluntary[,] and as a result, they are approached with a predisposition in favor of their validity and enforceability.'"[62] It explained that it was

> satisfied on this record the MSA is a legally binding contract based on ample consideration from both parties and entered into knowingly and voluntarily. The Family Part judge—who was intimately familiar with this protracted litigation and the litigants—thus had the lawful authority to enforce the agreement as written.
>
> Defendant argues that he agreed in the MSA only to "respond to a summons" issued by the beis din, not to participate in its proceedings. He claims that he complied with his contractual obligations under the MSA when he responded to a beis din summons by asserting that the beis din had no jurisdiction over him. We reject that argument and agree with the trial court that defendant agreed to participate in the beis din proceedings. Importantly, the MSA provision specifically states that "[b]oth parties shall timely participate in the [b]eis [d]in proceeding" and "[t]he parties agree that their submission to the [b]eis [d]in shall constitute an agreement to be bound by the [b]eis [d]in [d]ecision on any issue the [b]eis [d]in addresses."

[57] *Id.* at 544.
[58] *Id.* at 545.
[59] *Id.* at 546-547.
[60] *Id.* at 547.
[61] *Id.* at 550 (citing *Quinn v. Quinn*, 225 N.J. 34, 44 (2016) (citing Konzelman v. *Konzelman*, 158 N.J. 185, 193 (1999)).)
[62] *Id.* (citing *Massar v. Massar*, 279 N.J. Super. 89, 93 (App. Div. 1995).)

> The clear import of the plain language of the MSA is that defendant agreed to submit to the jurisdiction of the beis din and to accept its judgment.[63]

With regard to the defendant husband's arguments that the trial court violated his first amendment rights, the Appellate Division stated that "The First Amendment's Establishment Clause bars a state from placing its support behind a religious belief, while the Free Exercise Clause bars a state from interfering with the practice of religion. U.S. Const. amend. I. It is a fundamental principle that civil courts may not become entangled in religious proceedings."[64]

Noting that New Jersey's "trial courts have not been in complete accord on the issue of whether a civil court has authority to enforce a ketubah" the *Satz* court said that in that case, the trial court was asked to enforce a civil contract, not a religious one."[65] It added that the New Jersey Supreme Court has recognized that

> "civil courts may resolve controversies involving religious groups if resolution can be achieved by reference to neutral principles of law, but that they may not resolve such controversies if resolution requires the interpretation of religious doctrine." … The Court specifically noted that "[n]eutral principles may be particularly suited for adjudications of ... civil contract actions," so long as the dispute does not "involve interpretations of religious doctrine itself."[66]

The court concluded its discussion of the First Amendment issue by explaining that in the *Satz* case,

> the orders defendant challenges served the secular purpose of enforcing the parties' contractual obligations under the MSA, which in turn serves the secular purpose of encouraging divorce litigants to resolve their disputes by negotiating and entering an MSA. Accordingly, the trial court did not violate defendant's constitutional rights by ordering him to fulfill his contractual obligation under the MSA to sign an arbitration agreement implementing the results of the independent beis din proceedings.[67]

- *S.B.B v. L.B.B.*

Less than a month later, the Appellate Division decided *S.B.B v. L.B.B.*[68], in which the defendant wife appealed from the entry of a final restraining order against her after she created and disseminated a video asking community members to "press" her husband to deliver a Get after

[63] *Id.* at 551-552.
[64] *Id.* at 552.
[65] *Id.* at 552-553.
[66] *Id.* at 553 (citing *Ran-Dav's Cnty. Kosher v. State*, 129 N.J. 141, 162 (1992).)
[67] *Id.* at 553-554.
[68] 476 N.J. Super. 575 (App. Div. 2023).

he refused to do so.[69] The court described the case as a "contentions and acrimonious" process in which the parties had been engaged since mid-2019, which was complicated by "a dispute over a get – a religious bill of divorce."[70] The court began by explaining that in the

> Orthodox Jewish tradition, a married woman cannot obtain a religious divorce until her husband provides her with a contract called a "get" (pluralized as "gittin"), which must, in turn, be signed by an "eid," or witness. A woman who attempts to leave her husband without obtaining a get becomes an "agunah" (pluralized as "agunot"), which subjects her to severe social ostracism within the Orthodox Jewish community. Agunot may seek relief in a "beth din," a rabbinical court presided over by a panel of three rabbis. The beth din may then issue "psak kefiah," or contempt orders authorizing sanctions, which include, but are not limited to, the use of force against a husband to secure a get.[71]

In *S.B.B v. L.B.B.,* the plaintiff husband sought a TRO based on a domestic violence complaint alleging harassment after the defendant made a video claiming that the plaintiff had refuse to provide a Get, and asking those who viewed the video to "press" her husband to give her the Get.[72] As a result of the video, plaintiff testified that he received numerous phone calls from unknown numbers, a photo identifying him as a "get refuser," and the video defendant had created.[73] He further testified that defendant's actions had "subjected him to kidnappings and brutal beatings" and disputed that he had withheld the Get.[74]

The Appellate Division explained that "in cases implicating the First Amendment, we must 'conduct an independent examination of the record as a whole, without deference to the trial court.'"[75] The court noted that the finding of harassment was based solely on the creation and dissemination of the video, that N.J.S. 2C:33-4(a) "does not proscribe mere speech, use of language, or other forms of expression," that the criminal offense is "directed at the purpose behind and motivation for" communications, and that speech is not criminalized – even if intended to annoy – if the manner of speech is non-intrusive.[76]

> Speech ... cannot be transformed into criminal conduct merely because it annoys, disturbs, or arouses contempt."… "The First Amendment protects offensive discourse, hateful ideas, and crude language because freedom of expression needs breathing room and in the long run leads to a more enlightened society." Ibid. To

[69] *Id.* at 584.
[70] *Id.*
[71] *Id.* at 585.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* 594-595 (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 567 (1995) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)); *see also Ward v. Zelikovsky*, 136 N.J. 516, 536-37 (1994) (applying the same rule in New Jersey).)
[76] *Id.* at 596-598.

> that end, the right to free speech also includes the right to exhort others to take action upon that speech. "It extends to more than abstract discussion, unrelated to action."… In fact, "[t]he First Amendment protects the right to coerce action by 'threats of vilification or social ostracism.' ".[77]

The *S.B.B v. L.B.B.* court reviewed federal and State cases concerning the protections afforded by the First Amendment and said that it was "convinced that the video, whether viewed on its own or in the context in which it was disseminated, does not fall outside the First Amendment's protection" and that "an unspecified general history of violent treatment to which get refusers were subjected was insufficient to render defendant's video a true threat or an imminent danger to satisfy the incitement requirement."[78]

Islamic Mahr Agreement in New Jersey

Although it does not involve a Get, in the 2002 case of *Odatalla v. Odatalla*[79] the court addressed "the novel issue of whether a civil court can specifically enforce the terms of an Islamic Mahr Agreement" that was negotiated and signed before the parties' actual ceremony of marriage.[80] The court considered a constitutional challenge to its ability to review the Mahr Agreement and order specific performance.[81]

The court opined that it could "specifically enforce the terms of a Mahr Agreement provided it meets certain conditions," including that "the agreement can be enforced based upon 'neutral principles of law' and not on religious policy or theories"[82] and then the "the actual application of those 'neutral principles of law'" – in this case, the principles of contract law.[83]

The *Odatalla* court concluded that "the Mahr Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the Mahr Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war with any public morals" and was, therefore, enforceable.[84]

In light of the absence of New Jersey statutory guidance in this area and the limited (and contradictory) New Jersey case law, Staff expanded its preliminary review to other sources in an effort to provide additional context for Commission consideration.

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[77] *Id.* at 600 (citing *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (" 'Free trade in ideas 'means free trade in the opportunity to persuade to action, not merely to describe facts.") and *Carroll*, 456 N.J. Super. at 537 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982)).)
[78] *Id.* at 605.
[79] 355 N.J. Super. 305 (Ch. Div. 2002).
[80] *Id.* at 308.
[81] *Id.* at 309.
[82] *Id.*
[83] *Id.* at 309 and 312.
[84] *Id.* at 314.

American Law Institute

Based on a brief preliminary review, it seems that the American Law Institute (ALI) in its Principles of the Law – Family Dissolution, in Sec. 7.08 (Other Limitations on an Agreement's Terms), mentions the New York statute and cases, and some of the New Jersey cases.[85] Beyond that, it is not clear if it provides any substantive guidance on this issue.

Uniform Law Commission

Based on a brief preliminary review, it does not appear that the Uniform Law Commission provides guidance on this issue.

Other states - statutes

A preliminary review of the laws of other states suggests that New York is the only state with a statutory provision pertaining to the removal of barriers to remarriage. That statutory provision states, in pertinent part,

> 1. This section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in subdivision one of section eleven of this chapter.
>
> 2. Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.
>
> 3. No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.
>
> * * *
>
> 6. As used in the sworn statements prescribed by this section "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition,

[85] American Law Institute, Principles of the Law of Family Dissolution: analysis and Recommendations, Chapter 7. Agreements, Topic 3. Rules Concerning Particular Terms (March 2024 Update).

> of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act… Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses. "All steps solely within his or her power" shall not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination.[86]

The commentary to this statutory section provides that

> DRL § 253 was enacted during the 1983 legislative sessions and was promptly amended, in several material respects, the following year. The statute is virtually impossible to comprehend unless it is viewed with appreciation for the background of the issue the statute addresses and the specific purposes the statute attempts to achieve. Although the statute is phrased in ostensibly neutral language, its avowed purpose is to curb what has been described as the withholding of Jewish religious divorces, despite the entry of civil divorce judgments, by spouses acting out of vindictiveness or applying economic coercion. *See* Governor's Memorandum of Approval, McKinney's 1983 Session Laws of New York, pp. 2818, 2819. The statute seeks to provide a remedy for the "tragically unfair" situation presented where a Jewish husband refuses to sign religious documents needed for a religious divorce. *Id.*[87]

The commentary also recognizes the constitutional challenges and support for the provision, noting that the "ability to compel a party to obtain a religious divorce, where there is no separation agreement or stipulation covering the issue is more controversial," that it is not clear whether the statute can achieve its intended purpose, and that "[t]he statute is also capable of mischief." [88]

Other states – cases

A preliminary Westlaw search for cases that refer, in some way, to religious or Jewish divorce returns 304 cases[89] decided by courts in Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New

[86] N.Y. Dom. Rel. Law § 253 (McKinney).
[87] N.Y. Dom. Rel. Law § 253 (McKinney), See, Editor's Notes/Practice Commentaries, C253:1: Background and Constitutionality.
[88] *Id.*
[89] Search: (religious or jewish) /3 divorce.

Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, West Virginia, Washington, Wisconsin, Wyoming, and the District of Columbia.

At this early stage, most of those cases have not yet been reviewed, so it is not clear whether they provide substantive guidance, or merely mention the terms. The fact that the cases do not appear to be referenced in secondary sources suggests, but does not confirm, that they might be of somewhat limited assistance.

Secondary Sources

There are a number of secondary sources that refer, in some way, to religious or Jewish divorces. A basic Westlaw search for those terms in secondary sources nationwide yields more than 1,000 results.[90]

Some of the broad, nationwide references provide a high-level overview, summarizing the general concepts and/or referring to existing law in the states. Examples of this approach are shown below.

One Corpus Juris Secundum (C.J.S.) section, pertaining to divorce generally, states the following:

> A spouse seeking a dissolution of marriage is not entitled to an order compelling the other spouse to grant the first spouse a Jewish bill of divorce because such an order would violate the compelled spouse's right to free exercise of religion. Moreover, the court will not attempt to compel a particular course of conduct before a religious tribunal where such action would violate the parties' rights to free exercise of religion. While it has been held that a judge has no authority to order a spouse to participate in a religious ceremony by obtaining a Jewish divorce, it has also been held that under certain circumstances a court can direct the defendant to take whatever steps are necessary to secure a Jewish religious divorce.[91]

Another C.J.S. section pertaining to divorce under Islamic religious law notes that:

> A state court has refused to recognize a divorce that a husband obtained under Islamic religious law and secular Pakistan law, by performing talaq, because the foreign talaq divorce provision was contrary to state public policy, in that only a husband had an independent right to utilize talaq and a wife could utilize it only

[90] Search: (religious or jewish) /3 divorce.
[91] 27A C.J.S. Divorce Sec. 346, Incidental relief, Religious divorce (March 2024 Update) (footnotes omitted).

> with the husband's permission, which was contrary to the state's Equal Rights Amendment.[92]

The American Jurisprudence volume pertaining to Trials includes a section titled Arbitration of Faith-Based Disputes – Render Unto Caesar.[93] This section includes subsections pertaining to the Jewish Get, the Muslim talaq, and the Catholic annulment.[94] The section discussing the Jewish Get summarizes some of the New York, New Jersey, and Arizona cases.[95]

The section pertaining to the Muslim talaq explains that "[s]ome Muslim women find themselves in a similar position as the orthodox Jewish wife whose husband refuses to grant her a Get. Such a Muslim woman may be involve in a 'limping marriage,' divorced under civil law, but unable to get her husband to grant her a religious divorce (talaq)."[96] "Women do not have to be suspended (mu'allaqah) in marriages in which spiteful husbands refuse to give a talaq and Muslim scholars are reluctant to annul (fasakh) the marriage. The Quran condemns this state of mu'allaqah."[97] "Shariah Law is not codified law but embraces religious traditions that differ among Muslims."[98]

> Thus, a court will avoid determining the content of Shariah Law because that entangles the court in the parties' religious doctrines. However, for a Muslim woman who finds that her husband denies her a talaq, analogous arguments can be made to the experience of Orthodox Jewish wives in New York concerning their pursuit of a Get, perhaps, invoking the contempt power of the court.[99]

The section pertaining to Catholic annulment explains that "[a]ny marriage in which even one party is Catholic is governed by Canon Law."[100] "The Church has always stood firm that an annulment is not a 'Catholic Divorce.' Even though a Catholic is divorced by a civil court, once married, a Catholic remains 'married' in the eyes of the Church unless granted a Decree of Nullity (i.e., an annulment) by a Church tribunal."[101] "Because the annulment process involves an entanglement in Canon Law, secular courts have no jurisdiction pertaining to such matters."[102]

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[92] 16B C.J.S. Constitutional law Sec 1315, Domestic relations matters and equal rights amendments, Divorce under Islamic religious law (March 2024 Update) (footnote omitted).
[93] Thomas H. Oehmke, J.D. & Joan M. Brovins, J.D., 133 Am. Jur. Trials 379, Arbitration of Faith-Based Disputes – Render Unto Caesar, Section VII Arbitrable Disputes – Marriage, Sec. 59 Jewish Get, Sec. 60 Muslim talaq, and Sec. 61 Catholic annulment (Originally published in 2014, 2024 Update).
[94] *Id.*
[95] *Id.* at Sec. 59.
[96] *Id.* at Sec. 60.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at Sec. 61.
[101] *Id.*
[102] *Id.*

Other nationally-focused secondary sources consider possible avenues of relief that have not yet been addressed by American courts:

> There are no known American reported cases that have considered the refusal by one spouse to cooperate to allow the other spouse to obtain a religious divorce a tort; however, there are some European court decisions and legal publications that suggest that such a remedy does or should exist. Although the possible tort remedy is not confined to any one particular religion, all of the reported cases in the United States concerning the enforceability of an agreement requiring a spouse's cooperation in obtaining a religious bill of divorce have involved persons of the Jewish faith.[103]

Using the same Westlaw search terms as were used in the above-described national search to search for New Jersey-specific results yielded 20 sources. Some address the issue broadly:

> New Jersey has no rule or statutory provision permitting a court to recognize or enforce a religious provision in a marriage contract or authorizing it to compel a party to cooperate in granting a divorce in accordance with religious law. Such a provision would almost certainly be instantly unconstitutional. Yet the Superior Court has been called upon from time to time to acknowledge the coexistence of civil and religious law in the granting of divorces. Perhaps most commonly, the court has been asked on a number of occasions to order a husband to grant a Jewish "Get" divorce in accordance with the customs of the Jewish faith. While New York, for example, requires divorce litigants to remove barriers to remarriage and has ordered cooperation in granting Jewish Get divorces, New Jersey has been less than clear on the issue, leaning most recently against getting involved in such religious issues.[104]

The New Jersey Practice Series contains references to Jewish Gets and Catholic Annulments.[105] It summarizes the issues surrounding Gets, including the "serious consequences" created for a Jewish wife if her husband refuses to provide a Get and notes that in addition to the wife, there are significant impacts on any children since "[c]hildren born of a union not recognized by Jewish law are considered bastards. Under Jewish law, a bastard may not marry another Jew, except one of similar status. Therefore, a Jewish woman whose marriage is not dissolved by a 'Get,' essentially ostracizes her children from the mainstream of Jewish life."[106]

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[103] R. Keith Perkins, Domestic Torts, Part II. Domestic Tort Actions Against First Party Offenders, Chapter 8. Interference with Family Relationships, III. Other Causes of Action, Sec. 8:20. Refusal to cooperate in obtaining a religious divorce (September 2023 Update) (footnotes omitted).
[104] Mark S. Guralnick, Esq., Ph.D., Guralnick's New Jersey Family Law Annotated, Part A. Husband and Wife, Chapter 3. Dissolution of Marriage, I. Annulment and Divorce, K. Religious Divorce (January 2024 Update).
[105] Susan Reach Winters and Thomas D. Baldwin, 10 N.J. Prac., Family Law and Practice Sec. 7.6., Chapter 7. Divorce, Sec. 7.6 Miscellaneous considerations (September 2023 Update).
[106] *Id.*

That same New Jersey Practice Series section explains that a "Catholic annulment may be obtained before, during, or after the civil divorce procedure. The initial step of the church annulment process, is that contact is made with either the parish priest or to the local diocese marriage tribunal, who in turn submits the annulment case to the marital tribunal court."[107] When an annulment is granted, since "the marriage is held as never existing, the man and woman may both participate fully in all of the sacraments including 'remarriage' in the church."[108]

In addition to treatises, the New Jersey-specific secondary sources include journals and magazine articles.

A 2018 article in New Jersey Lawyer Magazine notes that

> Today, virtually all rabbis ordained through Yeshiva University will not preside over a wedding unless the bride and groom sign an agreement that a *geht* will be given upon the parties' physical separation or one party filing for divorce. Although the validity of that agreement has not yet been tested in New Jersey, the *Kolker* holding indicates that such an agreement could be upheld. However, this type of wedding agreement has not become commonplace among Hassidic Jews or among the more observant Orthodox Jewish communities, and the Hebrew-language *ketubah*s often signed in those circles do not address what should occur upon a divorce. Absent an enforceable marriage contract that addresses divorce, the *Kolker* holding indicates that a court will not compel a party to give or receive a *geht*.[109]

Journal sources include a 2015 article in the Seton Hall Law Review that discusses sharia law, including its impact on marriage formation and termination.[110] Earlier articles include one in the 2014 Rutgers Race & the Law Review discussing the withholding of a get as intentional infliction of emotional distress[111], a 2013 Rutgers Law Review article focusing on removing religion from civil divorce[112], and a 1997 article in the Rutgers Women's Rights Law Reporter regarding the history of the Agunah in America[113].

Pending Bills

[107] *Id.*
[108] *Id.*
[109] Cipora Winters, Jewish Divorces and Civil Courts, 310 Feb N.J. Law 54 (February 2018).
[110] James A. Sonne, Domestic Applications of Sharia and the Exercise of Ordered Liberty, 45 Seton Hall L. Rev. 717 (2015).
[111] Gital Dodelson, Outrage: Withholding a Get as Intentional Infliction of Emotional Distress? 15 Rutgers Race & L. Rev. 240 (2014).
[112] Julia Halloran McLaughlin, Taking Religion Out of Civil Divorce, 65 Rutgers L. Rev. 395 (2013).
[113] Jessica Davidson Miller, The History of the Agunah in America: A Clash of Religious Law and Social Progress, 19 Women's Rts. L. Rep. 1 (Fall 1997).

There are no bills pending in the 2024-2025 legislative session that pertain to Gets or to religious divorces more generally.

Conclusion

Staff seeks guidance from the Commission regarding whether it wishes to authorize Staff to engage in additional research and outreach in this area.