Articles by Sharon Faith and Deanna Levine first published by Family Law Journal (Legalease) about the interaction between the civil law in England and Wales and the Get (Jewish divorce)

The series of three articles reproduced on this website at www.gettingyourget.co.uk were first published by the Family Law Journal (Legalease). The following points about the articles are drawn to your attention:

Divorce, Religion and the Law first published by Family Law Journal (Legalease) in November 2002 at pages 23-24

The first article explains the Divorce (Religious Marriages) Act 2002 after it was passed, but before it was brought into force on 23 February 2003 by article 2 of the Divorce (Religious Marriages) Act 2002 (Commencement Order 2003 (SI 2003 No 186). The information contained in the article remains applicable. The third article, "Religious Divorce" published in May 2003 at pages 11-14 explains the regulations which are envisaged by this first article.

Divorce, Religion and the Law first published by Family Law Journal (Legalease) in December 2002/January 2003 at pages 18-20

The second article was also published prior to commencement of the Divorce (Religious Marriages) Act 2002, but again the information remains applicable.

Religious Divorce first published by Family Law Journal (Legalease) in May 2003 at pages 11-14

The third article contains references in the middle column of page 14 (lines 7 to 9) to "pp5-19 for clients and pp13, 28 and 31-36 for family law practitioners". This refers to the third edition (February 2003) of the e-book, *Getting your Get* at www.gettingyourget.co.uk, which is now into its sixth (2008) edition. Accordingly, the part which contains the references should now read as follows:

"…authors of *Getting your Get* (May 2008) edition at pp14-31 and 34 (except for those parts which relate to Scotland) for clients and pp10-11, 25, 32 and 36-44 (except for those parts which relate to Scotland) for family law practitioners. See www.gettingyourget.co.uk".

A note about *Getting your Get* at www.gettingyourget.co.uk

Getting your Get at www.gettingyourget.co.uk by solicitors Sharon Faith and Deanna Levine provides information for Jewish men and women in England, Wales and Scotland about divorce according to Jewish law and contains articles, forms and explanations for lawyers.

The articles first published by the Family Law Journal (Legalease) were based on the e-book, *Getting your Get,* at www.gettingyourget.co.uk, but they provide considerably more detailed information about the civil law than is contained in *Getting your Get*. The article in the sixth edition of *Getting your Get* at pp36-44 (Annexe 7) was written specifically for family law practitioners to provide an understanding of the religious background to the legislation, as this will, in turn, enhance the advice which is given.

Sharon Faith and Deanna Levine
August 2008

Divorce, religion and the law

Deanna Levine of Barnett Alexander Conway Ingram and Sharon Faith explain the significance of the Divorce (Religious Marriages) Act 2002 for Jewish clients seeking to obtain a divorce

Some religions require a divorce to be obtained by a procedure which is independent of the civil divorce and, if only the civil divorce is obtained, the spouses remain religiously married, the civil divorce being disregarded for religious purposes.

Take, for example, the case of Jewish spouses who have a civil divorce, but not a religious one (called a Get). If the couple only have a civil divorce, they will generally be unable to remarry within their own faith. Additionally, in certain circumstances, there will be serious consequences adversely affecting the status of any children born to the wife after the civil divorce, as she and her husband remain religiously married.

On 24 July 2002, a momentous new piece of legislation was enacted in England and Wales – the Divorce (Religious Marriages) Act 2002. It was passed in order to resolve an anomaly in the law. When a Jewish couple enters into a religious marriage in the UK, the form of marriage ceremony also provides for a civil marriage ceremony at the same time, as the laws in the different jurisdictions of the UK have long acknowledged this dual form of ceremony as valid. This duality is not, however, maintained when it comes to divorce, for if there is no accompanying Jewish divorce, the parties remain married in Jewish religious law. The consequence of this is that the parties may remarry in a civil ceremony, but may not do so under Jewish religious law. In order to obtain the Get, the spouses have to co-operate with each other, as the Get is essentially of a contractual nature, as is the nature of a Jewish marriage.

Helping to obtain a Get

The 2002 Act will be of considerable assistance to members of the Jewish faith, as explained below. If any other faith requires spouses to co-operate with each other in order to obtain the religious divorce (as happens in Judaism), there is provision for it to be brought within the ambit of the 2002 Act, should it subsequently be considered to be appropriate to do so.

> 'Rushing to secure a civil divorce before the Get has been obtained may lead to serious problems in the future.'

The 2002 Act is a significant achievement, as it will assist Jewish husbands and wives in obtaining their Get where one of them is not co-operating and wants the civil divorce, but not the Get, or is making heavier financial or other demands than would be sanctioned by the civil courts in exchange for the Get.

Procedural device

The 2002 Act is a procedural device used to amend the Matrimonial Causes Act 1973. Section 1(1) of the 2002 Act inserts a new s10A(1)-(7) in the 1973 Act, while s1(2) repeals ss9(2) and 9(3) of the Family Law Act 1996. Rules of court to enable the various administrative requirements that are envisaged by the 2002 Act to be met have yet to be made. In addition, s1 of the 2002 Act will not come into force until a commencement order has been made by statutory instrument.

Using the statute

As explained below, however, it may yet be possible to make use of the fact that the 2002 Act is on the statute books – even before s1 comes into force. Once s1 of the 2002 Act is in force (which for practical purposes means s10A of the Act of 1973), if one spouse finds that the other is making it difficult to obtain a religious divorce, then this is what may happen.

By s10A(2) of the Act of 1973, if either spouse applies to the court, an order may be made that the decree of divorce is not to be made absolute until a declaration is made by both spouses that they have taken such steps as are required to dissolve the marriage in accordance with 'the usages of the Jews', as s10A(1)(a)(i) so quaintly expresses it, adopting the terminology of the Marriage Acts, which go back to 1949. Put simply, this means that the Get should have been obtained before the decree nisi will be made absolute. The declaration to this effect is required to be produced to the court. The rules of court will specify the form of declaration, the documents that are to accompany it and, in certain cases yet to be specified, other requirements that will have to be satisfied. The court then has discretion whether or not to grant such an order and will only grant it if it is 'satisfied that in all the circumstances of the case it is just and reasonable to do so' (s10A(3)(a) of the 1973 Act). Moreover, by s10A(3)(b), the court may revoke the order at any time.

This article was first published in Family Law Journal (Legalease)

Further Information

The authors have written *Getting your Get: Information for Jewish men and women in England, Wales and Scotland* about divorce according to Jewish law. Annexes 4 and 6 of this publication are intended for solicitors and barristers advising Jewish Matrimonial clients. *Getting your Get* can be downloaded free of charge from htt;//www.gettingyourget.co.uk and the Divorce (Religious Marriages) Act 2002 is similarly available from Http://www.hmso.gov.uk/acts/acts2002/20020027.htm

As a result of the administrative, procedural and legislative matters that remain outstanding, as explained above, there will be a delay until the rules of court and the new s10A of the 1973 Act come into force. It is anticipated that this will be spring 2003 and so it will take until then before spouses can benefit directly from the new legislation. There appears, however, to be an immediate – albeit indirect – benefit to be gained where one spouse is not co-operating in obtaining the Get.

All in the timing

It is suggested that it would be prudent for solicitors and barristers with Jewish clients to be aware of the 2002 Act even at this stage, because, if arranging the Get becomes a difficult issue while the civil divorce proceedings are ongoing, clients' positions may be protected by advising them to delay applying for the decree nisi until such time as the rules of court and the commencement order are made, thereby bringing the 2002 Act into full force and effect. Only at that stage would the decree nisi be applied for. When it is granted, the application to the court may then be made under s10A(2) of the 1973 Act for the court to order that the decree of divorce should not be made absolute until the Get is obtained.

Rushing to secure a civil divorce before the Get has been obtained may lead to serious problems in the future, as has so clearly happened in the past, when (in the case of either spouse) it comes to remarrying within the faith or (in the case only of the wife) having children subsequent to the decree nisi being made absolute. It is highly likely that, if it can be achieved, delaying the application for the decree nisi until the 2002 Act is in force may well allow the Get to be obtained in the vast majority of cases. Even the threat of delaying the civil divorce may, it is suggested, have the desired effect of securing the co-operation of an otherwise reluctant spouse in obtaining the Get if that spouse is keen to press ahead with the civil divorce, or is made to realise that a non-co-operative or forceful attitude will be to no avail if seeking in exchange for the Get a better settlement than the court would sanction.

Deanna Levine is a solicitor at Barnett Alexander Conway Ingram. Sharon Faith is non-practising. *The useful comments and suggestions of Eleanor Platt QC of One Garden Court are gratefully acknowledged.*

This article was first published in Family Law Journal (Legalease)

Divorce, religion and the law

In the second part of a two-part article, Deanna Levine of **Barnett Alexander Conway Ingram** and Sharon Faith advise on the procedure for obtaining a Jewish divorce and suggest clauses for inclusion in a consent order in a civil divorce

Deanna Levine (left) of Barnett Alexander Conway Ingram and Sharon Faith

When Jewish clients walk through your door, they will have the same issues to resolve as any other client but, in addition, they will need a Get (Jewish divorce) – provided both parties to the marriage are recognised as Jewish in accordance with Jewish law.

Without appreciating the full implications, clients may say to you that they are not religious or they are a member of the conservative/reform/liberal/progressive branch of Judaism and therefore believe that they do not need to obtain a Get. A Get, however, is not a religious document as such and does not indicate any acknowledgement of religious belief or practice. It is simply the method by means of which a Jewish marriage is terminated in Jewish law.

If a husband refuses to give a Get or the wife refuses to accept it, he is known as an agun and she as an agunah, for they remain 'chained' or married to each other. For the reasons that follow, failure to obtain a Get would be potentially disastrous if either party wishes to remarry and/or if the wife wishes to have more children. Furthermore, it is essential that the Get be obtained under the auspices of an Orthodox Beth Din (a court of Jewish religious law) for the Get to be universally recognised within the Jewish world.

Advice from family practitioners and barristers

Clients will not necessarily know what advice they can expect to receive. Family practitioners and barristers are aware that it is part of their professional duty to extract a full picture of the particular client's circumstances and to advise accordingly. Consideration of Get issues in respect of a Jewish client is (or should be) an integral part of any advice given.

What is a Get and why should your Jewish clients need one?

A Get is a divorce document. For technical reasons beyond the scope of this article, a Get is granted by mutual consent of both parties. The husband (or his legal agent) hands the wife the Get document, and she in turn has formally to agree to accept the Get.

In practice, both parties need an Orthodox Get in order to remarry in an Orthodox synagogue and to retain the option for themselves and any future children of remaining fully integrated within the Orthodox Jewish community for all religious and family purposes.

What legal advisers need to know

In such circumstances, the legal adviser should be aware that there are reasons why such an apparent lack of concern on the part of the client may be regretted in the future, when it may be too late to remedy the situation. For the reasons which follow, it would be prudent for the legal adviser to provide an explanation to such a client as to why issues of Get are given full and proper consideration along with all the other aspects to which reference has been made above.

- Nobody knows what the future may bring. A divorcing client may subsequently wish to marry someone who will refuse to marry a divorcee without an Orthodox Get. This is not uncommon and can be the case even if the parties are otherwise not religious.

- A client may, in the near or distant future, decide to become observant. Occasionally people who have not led religious lives have (for various reasons) decided to become observant. This phenomenon is not restricted to Judaism.

- Similarly, clients may not be Orthodox or religious but, if they were to remarry, any children of the subsequent marriage in due course may decide to adopt an Orthodox or religious lifestyle. If their parents were not validly divorced in Jewish

law, this would cause irreparably serious problems for the children.

- Any child a woman conceives while she is Jewishly married to a Jewish man who is not the child's father is deemed a mamzer, even although the mother has a civil divorce. Mamzer status applies only to children born of an adulterous (or incestuous) union and not to children merely born in what used to be called 'out of wedlock'. However, as a wife is deemed to be committing adultery in Jewish law if she has not received a Get from her first husband and then commences a new relationship, the status of mamzer will attach to children born from that new relationship. The mamzer status can never be removed and is passed to all the descendants of the original mamzer. A mamzer cannot marry another Jew or Jewess unless their intended is also a mamzer. It will be appreciated, therefore, that the status of mamzer is a very severe disability and every effort should be made to avoid such a status arising.

A failure to grasp and deal with the issue of Get can result in misery, not only for the client (whether husband or wife), but for any future children of a wife who only has a civil divorce, where those children have been fathered by another Jewish man. At the very least, family practitioners and barristers need to be able to advise clients of the above. As in all else, if clients choose to disregard legal advice, they must live with the consequences, but there is a professional duty to give advice in this respect.

Having explained this to the client, how does the family practitioner or barrister proceed?

The Get procedure

Many people still erroneously believe that the Get can only be obtained after the civil divorce. This used to be the case up to about 40 years ago, when connivance was an issue. The position today is that, on application, the Beth Din will facilitate a Get at any time during or indeed before the civil divorce proceedings are commenced. Accordingly, either the family practitioner/barrister or the client (if they are confident about doing so) is advised to contact the Beth Din direct at the earliest opportunity. The Beth Din will open their own file and will help to progress matters according to the circumstances of the particular case.

The actual Get procedure is relatively straightforward and the Beth Din will advise the couple regarding each step. The husband and wife do not have to meet one another at any stage if they prefer not to, or if it is logistically difficult. Except in the most exceptional circumstances, it is never prudent for the parties to postpone consideration of Get issues until after the decree nisi has been made absolute.

> 'A failure to grasp and deal with the issue of Get can result in misery, not only for the client... but for any future children.'

Legal advisers should therefore raise the issue of the Get at the earliest opportunity, preferably before the parties have become entrenched in acrimonious recriminations. It is an unfortunate fact of life that divorce involves negotiations, whether relating to money or contact with the children. Ideally, the Get would be given by the husband and accepted by the wife willingly but, sadly, the Get has all too often been used as a financial and emotional weapon. Until the recently enacted Divorce (Religious Marriages) Act 2002 takes effect, family practitioners and barristers may wish to consider protecting their clients' position by delaying the civil divorce. The issue of Get should not be sidelined to 'later', or 'the end'. (See the article in last month's *Family Law Journal* by Sharon Faith and Deanna Levine.)

As a matter of good practice, a consent order or even a court order in contested ancillary proceedings should not be made without giving consideration to the client's need for a Get, in the same way as the issue of the home or maintenance should not be ignored.

Get clauses and undertakings

The objective of the family practitioner or barrister should be for both parties to provide appropriate undertakings to facilitate a Get in any consent order within a defined period of time. Such undertakings can then be enforced as a matter of civil law. An example of a form that can be incorporated in consent orders is included below. In disputed ancillary proceedings the matter should be raised with the court and referred to in any affidavit filed.

Get clauses are clauses that are included in a consent order made by the civil court in relation to financial matters or occasionally in divorce proceedings themselves. It is essential to incorporate into the Get clause a time limit by which a Get should be applied for, otherwise it becomes almost impossible to bind anyone to the terms of the clause. It is also preferable to add a time limit for the conclusion of the Get as well as the date of initial application, as in the examples below. The following

Glossary of terms

Agunah (plural Agunot)
A woman who is 'chained' to her Jewish husband who refuses to grant her a Get (Jewish divorce document). A man will also be an Agun (plural Agunim) if his wife refuses to accept a Get.

Beth Din (plural Batei Din)
Court of Jewish religious law.

Get (plural Gittin)
Jewish divorce document

Mamzer (plural Mamzerim)
A Jewish child whose status is religiously 'illegitimate'. Such a child, together with any descendants, cannot marry in accordance with Orthodox Jewish law. A child will be a mamzer if he or she is born to a Jewish mother who married her husband in an Orthodox Synagogue but who did not obtain a Get from him before she became pregnant by another Jewish man with that child – even if she did obtain a civil divorce.

Reference Point

Deanna Levine and Sharon Faith collaborated on producing the new and widely acclaimed handbook, *Getting your Get*, which can be downloaded free of charge from www.gettingyourget.co.uk.

Annexes 4A and 6 (on which this article is based) are intended for solicitors.

A reception to launch *Getting your Get* and the website is to be held in February 2003.

drafts are suggested. They are based on those used for the London Beth Din (a court of Jewish religious law).

For initiating the Get within a specific time

Upon the petitioner/respondent hereby undertaking to apply within six weeks of this order/within six weeks of the decree nisi/decree absolute to the London Beth Din (Court of the Chief Rabbi) for a religious divorce (Get), to take all such steps thereafter as are directed by the Court of the Chief Rabbi to complete the Get, such completion to take place not later than six weeks/three months from the date of application to the Court of the Chief Rabbi, costs thereof to be borne by the petitioner/respondent/to be shared equally between the parties and to be received by the Beth Din not less than five working days before the Get is written.

For co-operation with an application for a Get after one party has requested it

Upon the petitioner/respondent hereby undertaking upon application by the respondent/petitioner to the London Beth Din (Court of the Chief Rabbi) for a religious divorce (Get), to take all such steps as are directed by the Court of the Chief Rabbi to complete the Get, such completion to take place not later than three months from the date of application to the Court of the Chief Rabbi, costs thereof to be borne by the petitioner/respondent/to be shared equally by the parties and to be received by the Beth Din not less than five working days before the Get is written.

It sometimes happens that, at the conclusion of a contested application, one or both of the parties is prepared to give an undertaking regarding the Get, either on their own initiative or that of a lawyer. Sometimes, too, the court indicates that it will make a certain order provided one of the parties gives an undertaking regarding the Get. Such an undertaking should be included in a court order.

A final comment

Judaism is a religion whose laws and traditions have stood the test of time and preserved its people, just as they have preserved it. We hope that, having explained the issues involved, family law practitioners and barristers will now have such information as will enable them to explain to their clients the implications of their actions and any consequences in relation to issues surrounding the Get. As will be appreciated, decisions taken now could have very far-reaching effects.

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Religious divorce

Sharon Faith and Deanna Levine explain the new statutory rules dealing with religious divorce, particularly with regard to the Jewish faith

Sharon Faith (left) and Deanna Levine

The Divorce (Religious Marriages) Act 2002 (the 2002 Act) came into force on 24 February 2003 in accordance with the Divorce (Religious Marriages) Act 2002 (Commencement) Order 2003 (SI 2003 No 186).

If a Jewish husband and wife wish to remarry within the faith, they require both a civil divorce and a separate Jewish divorce, the latter being called a Get. Just as a Jewish marriage is essentially a contract requiring the consent of both parties, the Get is also of a contractual nature, for if one spouse does not consent, there can be no Get. For practical purposes, this means that husband and wife have to co-operate with each other in order to obtain the Get. The 2002 Act, which amends the Matrimonial Causes Act 1973 (the 1973 Act), was passed in order to make it easier for spouses to obtain the Get where one spouse is not co-operating with the other in doing so. The word Get does not appear in the 2002 Act, nor is it necessary for it to do so, but it is a useful word for family law practitioners to be aware of and is used throughout this article.

The 2002 Act is used in conjunction with new rules of court, the Family Proceedings (Amendment) Rules 2003 (Rules of Court 2003), which insert new rules in the Family Proceedings Rules 1991 (Rules of Court 1991). The Rules of Court 2003 came into force on the same date as the 2002 Act – 24 February 2003. The use of the 2002 Act in conjunction with the Rules of Court 2003 is explained below.

In what circumstances does the 2002 Act apply?

The key section that lets you know when the 2002 Act bites is s1(1), which inserts a new s10A in the 1973 Act. By s10A(1)(a) and (b) of the 1973 Act, the whole of s10A is stated to apply if a husband and wife find themselves in the following circumstances:

(1) the decree of divorce has been granted, but not made absolute;

(2) the spouses were married in accordance with the usages of the Jews; and

(3) they must co-operate with each other if the marriage is to be dissolved in accordance with those usages.

There is provision for the 2002 Act to apply also to other religious usages if and when prescribed by statutory instrument (see s10A(1)(a)(ii) and s10A(6) of the 1973 Act, inserted by s1(1) of the 2002 Act). Thus far, however, no other religion has made use of this option. The 2002 Act is procedurally and evidentially dependent for its operation upon the requirements of the Rules of Court 2003.

Judicial discretion

As family law practitioners will be only too well aware, family jurisdiction places heavy reliance on broad judicial discretion and this practice has found its way into the 2002 Act and the Rules of Court 2003, both of which are peppered with provisions in respect of which the court may do certain things in the exercise of its discretion.

Judicial discretion first enters the scene in s10A(2) of the 1973 Act, where it provides that, on the application of husband or wife, 'the court may order that a decree of divorce is not to be made absolute' until the Get has been obtained. In this connection, certain procedural and evidential requirements regarding a declaration (explained below) must be met. It should be borne in mind that, at this stage, the decree nisi will have been granted, but not yet made absolute.

The significance of this new section is that, if, in the exercise of the court's discretion, an application is successful – which means that the order is made for the decree nisi not to be made absolute – the Get must first be obtained before the decree of divorce will be made absolute. The success of any such application is dependent upon the discretion of the court being exercised in favour of the applicant, for the court 'may' make such an order – it is not obliged to do so. For the order to be made, this will in turn depend upon the strength of the evidence adduced with the application, as provided for by rule 2.45A of the Rules of

Court 1991 (inserted by rule 3 of the Rules of Court 2003) and explained below.

Other examples of judicial discretion are to be found in the provisions concerning the certificate in rules 2.45B(1)(d) and 2.45B(4) of the Rules of Court 1991 (inserted as mentioned above), the detail of which is set out below.

Rules of Court 2003

The Rules of Court 2003 enable the various procedural and evidential requirements that are envisaged by the 2002 Act to be met. Although these rules are lengthy and many in number, fortunately (at least for the purposes of this article) only rules 2(a), 3 and 4 are relevant, for it is only those rules which amend – mostly by way of insertion – the Rules of Court 1991 for the purposes of the 2002 Act. Rule 2(a) simply inserts new titles for the rules being inserted in the Rules of Court 1991 and numbered 2.45A and 2.45B respectively.

The title of the former is '2.45A Application under s10A(2) of the 1973 Act'. This refers to the application that may be made by one spouse to the court for an order for the decree nisi not to be made absolute where the other spouse is not co-operating in obtaining the Get. The title of the latter is '2.45B Order under s10A(2) of the 1973 Act'. This refers to the contents of the declaration to be made by the spouses that is to be produced to the court once the Get has been obtained if such an order has been made. The declaration is a pre-requisite to the decree nisi being made absolute following a successful application prohibiting this, pending the Get being obtained, to which reference has been made above. Rule 3 of the Rules of Court 2003 goes on to insert the substantive text for rules 2.45A and 2.45B in the Rules of Court 1991 and it is to those newly inserted rules, which we now turn our attention.

'The spouse who decides which religious authority is competent to confirm that the Get has been obtained is understandably the very spouse who has applied for the decree of divorce not to be made absolute in the first place.'

The application

Rule 2.45A(1) of the Rules of Court 1991 provides that rule 2.45A:

> ... applies to an application under s10A(2) of the 1973 Act for an order that the decree of divorce is not to be made absolute until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with the relevant religious usages is produced to the court.

Rule 2.42 of the Rules of Court 1991 contains procedural provisions concerning an application for re-hearing. By rule 2.45A(2) of the Rules of Court 1991, the procedures for making an application to the court under s10A(2) of the 1973 Act are to be governed by the same rules as paragraphs (3) and (5) of rule 2.42, with which family law practitioners will be familiar. Briefly, paragraph (3) of rule 2.42 sets out the procedures whereby an application is to be made in either the High Court or the divorce County Court, with a notice stating the grounds of the application in either case – and paragraph (5) of rule 2.42 provides for the applicant to file a certificate to the effect that the notice has been duly served on each person required to be served therewith.

The affidavit

Rule 2.45A(3) of the Rules of Court 1991 requires the application to:

> ... be supported by an affidavit setting out the grounds on which the applicant seeks the order and a copy of the affidavit shall be served with the notice on the other parties.

Thus it is that the spouse applying to the court for an order that the decree of divorce is not to be made absolute under s10A(2) of the 1973 Act is required to support their application for the order by an affidavit under rule 2.45A(3) of the Rules of Court 1991. The notice and certification requirements under paragraphs (3) and (5) of rule 2.42 of the Rules of Court 1991 (untouched by the Rules of Court 2003) are also relevant to the application.

The court waits...

What happens after the applicant is successful in obtaining the order under s10A(2) of the 1973 Act for the decree of divorce not to be made absolute? The result is that the court process is effectively suspended until such time as the parties have obtained their Get. This process takes place outside the arena of the civil court, but inside that of the religious court, the Beth Din (see glossary). The civil court, being of a secular nature, does not involve itself in religious

Glossary

Beth Din (plural, *Batei Din*): Court(s) of Jewish religious law. (For a list of Orthodox *Batei Din*, please see p35 of *Getting your Get* at www.gettingyourget.co.uk).

Get: Jewish divorce

Halachically Jewish: A status that applies to any person whose ancestors on the maternal side were Jewish, as recognised by an Orthodox *Beth Din* o someone who has undergone a conversion to Orthodox Judaism.

Mamzer (plural *Mamzerim*): A Jewish child whose status is religiously 'illegitimate'. Such a person, together with any descendants, cannot marry in accordance with Orthodox Jewish law. A child will be a *mamzer* if they are born to a Jewish mother who married her Jewish husband, but who did not obtain a *Get* from him before she got pregnant with that child by another Jewish man – even if she obtained a civil divorce.

customs and practices. Accordingly, the court waits until the husband and wife have attended to their religious affairs through the relevant religious authority – that is until the spouses have obtained their Get from the Beth Din. Once this has happened, husband and wife then return to the court for the decree nisi to be made absolute and at this stage the court is re-activated, with the Rules of Court 2003 coming into play once more.

The declaration and the certificate

Once the Get has been obtained, a declaration to that effect is required to be produced to the court, allowing the application to be made for an order for the decree nisi to be made absolute. The Rules of Court 2003 specify the form of declaration under rule 2.45B(1)(a)-(c) of the Rules of Court 1991, inserted by rule 3 of the Rules of Court 2003. They also specify the documents that are to accompany it: the certificate and application to make the decree absolute under rules 2.45B(1)(d) and (e) respectively; and, where appropriate, translation of certificate and alternative to certificate under rule 2.45B(3) and (4) respectively of the Rules of Court 1991, inserted by rule 3 of the Rules of Court 2003.

Rule 2.45B of the Rules of Court 1991 regulates the procedure to be followed after an order has been made for the decree of divorce not to be made absolute. As explained above, such an order will have been made following the successful application for one under s10A(2) of the 1973 Act, which, as we recall, has been inserted by s1(1) of the 2002 Act. This brings into the picture the requirements concerning the nature of the declaration, which has to be made pursuant to s10A(2) of the 1973 Act. The declaration is to be made and signed by both husband and wife – and particulars are to be given of the proceedings in which the order under s10A(2) of the 1973 Act was obtained. In the declaration, the spouses are to confirm that the requisite steps have been taken:

> ... to dissolve the marriage in accordance with the religious usages, appropriate to the parties, referred to in s10A(1)(a) of the 1973 Act.

Let us pause for a moment to remind ourselves about the reference to this section. It applies if the decree nisi has been granted, but has not yet been made absolute and the parties to the marriage were married in accordance with the usages of the Jews – husband and wife must now file a declaration that the Get has been obtained. Reverting once more to the declaration, this has to be accompanied by a certificate from a 'relevant religious authority' that all such steps have been taken to dissolve the marriage, although the court may order that a certificate is not required under rule 2.45B(1)(d) of the Rules of Court 1991, inserted by rule 3 of the Rules of Court 2003.

The declaration is required to be filed at the court before or at the same time as an application is made to make the decree absolute under rules 2.49 or 2.50 of the Rules of Court 1991. Those last two rules, with which family law practitioners will be long familiar and which are not amended by the Rules of Court 2003, set out in not inconsiderable detail the requirements concerning decree absolute on lodging notice and decree absolute on application respectively.

'Once a divorce has been made absolute as a result of a Get having been obtained, switching to an Orthodox Beth Din (while possible in theory) will no longer be an option if the non-co-operative spouse were to continue not to co-operate.'

The certificate accompanying the declaration may be in a foreign language, in which case the declaration also has to be accompanied by a translation of the certificate into English and certified by a notary public or authenticated by affidavit, as required by rule 2.45B(3) of the Rules of Court 1991, inserted by rule 3 of the Rules of Court 2003.

The requirements and procedures relating to the certificate are sprinkled with discretionary powers accorded to the court. As mentioned above, the court may order that there is no need for a certificate, in which case it may direct the parties to file other documents showing that the relevant steps have been taken – showing that the husband and wife have obtained their Get. Moreover, the court is invested with a discretion to refuse to make the decree absolute until that direction has been complied with under powers given in rule 2.45B(4) of the Rules of Court 1991, inserted by rule 3 of the Rules of Court 2003.

The 'relevant' religious authority – which Beth Din?

Reference has been made above to a certificate given by a 'relevant religious authority' having to accompany the declaration (unless the court orders otherwise). A religious authority is defined as 'relevant' for these purposes in rule 2.45B(2) of the Rules of Court 1991, inserted by rule 3 of the Rules of Court 2003. According to this definition, a religious authority is 'relevant' if the party who made the application for the order under s10A(2) of the 1973 Act considers that authority competent to confirm that such steps as are required to dissolve the marriage referred to in rule 2.45(B)(1)(c) have been taken. In other words, the spouse who decides which religious authority is competent to confirm that the Get has been obtained is understandably the very spouse who has applied for the decree of divorce not to be made absolute in the first place.

Let us consider this a little more closely. For the purposes of paragraphs (1)(d) and (2) of rule 2.45B of the Rules of Court 1991 (inserted by rule 3 of the Rules of Court 2003), a 'relevant' religious authority may be a Beth Din of any of the following movements within Judaism – Orthodox, Masorti (also known as Conservative) or Reform. While the Union of Liberal and Progressive Synagogues (ULPS) is another movement within Judaism, it has no Beth Din as such, but it may be regarded as a 'relevant' religious authority, as it has the equivalent of one, which is called The Rabbinic Board. Apart from the first one (which is Orthodox), all the others are described as non-Orthodox.

At this stage, it is useful to consider the potentially serious and problematic

implications and consequences for the client of such a definition if it is left unexplained. Apart from ULPS, each Beth Din facilitates a Get under its respective auspices. ULPS permits a couple to remarry in synagogue without a prior religious divorce, although, to safeguard them, they say that they recommend that the couple should obtain a Get and will put them in touch with the relevant Orthodox authorities. It is important that divorcing couples who are *halachically* Jewish (see glossary) are alert to the fact that a Get obtained under the auspices of a religious authority that is a non-Orthodox Beth Din is not recognised throughout the Jewish world, whereas a Get obtained from an Orthodox Beth Din benefits from such universal recognition.

It would be prudent for the client to ensure that their options are kept open by obtaining a Get from an Orthodox Beth Din, so that either of them can remarry in an Orthodox synagogue. Even if the client does not at the moment consider this to be important, it is possible that they may meet someone in the future for whom it is. If the couple are both *halachically* Jewish, and each subsequently meets someone else who is also *halachically* Jewish, they could be setting up intractable problems for the future if they were to obtain a Get through a non-Orthodox Beth Din. Such problems could arise even though the couple were married under non-Orthodox auspices or possibly even if they have been living together.

This is a fact of Jewish religious law, of which divorcing members of non-Orthodox movements (most of whom are *halachically* Jewish) may not be aware. Sadly, this has occasionally not been understood by a client until it is too late, the damage has been done and one is (or both of them are) devastated by what has happened if they have failed to ensure that the Get was facilitated by an Orthodox Beth Din as the 'relevant' religious authority. (A fuller explanation of the reasons for the need for a Get under the auspices of an Orthodox Beth Din, who needs one and the tragic consequences of a failure to obtain one are all explained in greater detail by the authors of *Getting Your Get* (February 2003 edition) at pp5-19 for clients and pp13, 28 and 31-36 for family law practitioners. See www.gettingyourget.co.uk)

It would accordingly be prudent for the family law practitioner to seek instructions from the husband or wife in advance of obtaining the Get as to which religious authority is to give the certificate that is to accompany the declaration and to alert them if it is not Orthodox. Alternatively, if the certificate has already been given, it would be prudent to advise the client to confirm with the selected religious authority (if not Orthodox) whether husband and wife are both *halachically* Jewish. If – as occasionally happens – the spouses are not sure whether they are *halachically* Jewish, they can be advised to check the position with an Orthodox Beth Din. Adopting these measures will ensure that the consequences of arranging for a Get from a non-Orthodox religious authority are properly understood, should the client insist on proceeding with this. Such measures will also give time to the spouses to enable them to arrange for the Get to be obtained from an Orthodox Beth Din before it is too late, for once the divorce has been made absolute as a result of the Get having been obtained, switching to an Orthodox Beth Din (while possible in theory) will no longer be an option if the non-co-operative spouse were to continue not to co-operate. It will, of course, be borne in mind that a failure to co-operate by one spouse in obtaining the Get is the reason why the other spouse has originally applied for the order for the divorce decree not to be made absolute until such time as it has been obtained.

'The Act will not be of assistance where one spouse is not co-operating in obtaining the Get because they do not care whether or not they are divorced, either religiously or civilly.'

Making the divorce decree absolute

Rules 4(a) and (b) of the Rules of Court 2003 amend rule 2.49(2) of the Rules of Court 1991, the effect of which is that district judges are to make a decree absolute if they are satisfied 'that any order under s10(A)(2) of the 1973 Act has been complied with'. In other words, if they are satisfied from the evidence placed before them, such as the declaration and certificate, that the Get has been obtained.

Conclusion

The 2002 Act and the Rules of Court 2003 have been passed to ease the plight of Jewish couples where one spouse is not co-operating in obtaining the Get, or if one spouse is making use of the Get as a weapon in obtaining a superior settlement than would otherwise be reached through the court – whether by way of a better financial settlement or enhanced arrangements for contact with the children. For the 2002 Act and the Rules of Court 2003 to be effective in this manner, both spouses need to desire the civil divorce, not just one of them. Accordingly, the Act will not be of assistance where one spouse is not co-operating in obtaining the Get because they do not care whether or not they are divorced, either religiously or civilly. It is, however, hoped – and indeed believed – that this legislation will be of assistance to the majority of the small number of divorcing spouses who find themselves in this difficult situation.

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Note

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