

Religious practices in the modern world: Divorce

How the civil law in England and Wales can assist in the process - an overview

Introduction: The Law Society's Family Law Protocol

A useful starting point for explaining how the civil law can be used in religious divorce cases is the Law Society's Family Law Protocol, from which I quote¹.

"The Protocol is the standard by which members of the Law Society and Resolution are judged... There may be reasons to depart from the Protocol, but the onus is on those wishing to depart to justify their position."

"The ... religious implications of divorce should be considered" eg obtaining a Get [Jewish divorce]. To some clients obtaining the Get "may be as important as, or more important than, a civil divorce".

"Solicitors must consider these issues when they are given instructions and ... help clients to obtain a religious divorce."

Section 10A of the Matrimonial Causes Act 1973

Certain fundamental changes were made to the divorce laws of England & Wales when section 10A of the Matrimonial Causes Act 1973 (as subsequently amended) came into force on 24 February 2003. Section 10A was added by the Divorce (Religious Marriages) Act 2002. Briefly, if one spouse is not co-operating with obtaining the Get, the other spouse may apply for an order that the decree of divorce is not to be made absolute until they have both produced to the court a declaration that they have taken such steps as are required to dissolve the marriage in accordance with Jewish law. I'll be mentioning this later.

The first part of section 10A states as follows²:

"10A Proceedings after decree nisi: religious marriage

(1) This section applies if a decree of divorce has been granted but not made absolute and the parties to the marriage concerned —

(a) were married in accordance with —

(i) the usages of the Jews, or

(ii) any other prescribed religious usages; and

(b) must co-operate if the marriage is to be dissolved in accordance with those usages."

I emphasise **any other prescribed religious usages** because I read an article in Family Law Week by a barrister who wrote about section 10A being applied by legal representatives and the judiciary to Muslims. When I read it, I searched the web to find the "any other prescribed religious usages" as it was important that I knew this. I would just pause to explain that this phrase means that section 10A could be applied to other religions if there were to be an order made by the Lord Chancellor after consulting the Lord Chief Justice. That order has to be made by statutory instrument. Section 10A

¹ © The Law Society. Reproduced from the Family Law Protocol, 3rd edition, with permission from the Law Society.

² Crown copyright material contains public sector information licensed under the Open Government Licence v2.0 as detailed at <http://www.nationalarchives.gov.uk/doc/open-government-licence/version/2/>. This applies to section 10A (1). of the Matrimonial Causes Act 1973 (as amended).

would then apply to them. My search for such a statutory instrument was fruitless, so I asked the barrister to tell me where I could find it. She was unable to do so, as no such order had been made. The result was that her article was hurriedly removed from the website and I then received an e-mail from her, seeking my approval to the article which had been amended.

The court has discretion as to whether or not to grant an order delaying the decree absolute until the Get has been obtained and can cancel the order at any time. We are not aware of any case in which the judge has refused to grant the application.

In addition to section 10A, there are rules of court and Practice Directions governing the procedure in the courts. I have in mind some of the heavily amended Family Procedure Rules 2010 (known as rules of court) and certain Practice Directions which supplement the Family Procedure Rules and which are also quite heavily amended. I mention them in passing, but am not going into the detail about them today. Suffice it to say that section 10A and these many procedural aspects make it possible to assist a Jewish spouse when the other spouse is not co-operating with obtaining the Get, but that other spouse only wants the civil divorce. If the spouse who wants the Get applies to the court, the judge may refuse to make the divorce decree absolute until the Get has been obtained – this depends on suitable evidence being provided as to the reasons for the application. Section 10A will only be effective if the refusing spouse wants the decree nisi to be made absolute. If, however, the refusing spouse is not interested in having the divorce decree absolute, section 10A will not be helpful because the refusing spouse does not care about the civil divorce being made absolute any more than he or she cares about the Get being obtained.

The declaration and the certificate

If the application is successful and the Get has been obtained, the rules of court and Practice Directions specify the form and content of the declaration to be made by both husband and wife that they have their Get, thereby clearing the way for the divorce to be made absolute.

Normally, a certificate to the effect that the Get has been obtained must accompany the declaration. That certificate has to be given by a “relevant” religious authority (ie a Beth Din). The husband or wife who has made the application for the divorce not to be made absolute is the one who considers that the particular Beth Din which has finalised the arrangements for the Get is acceptable to him or her.

Now listen to this. It’s important to understand what is meant by a “relevant” religious authority. It would be any Beth Din that certifies that the Get has been obtained. That Beth Din may be Orthodox, Masorti, Liberal or Reform. These are the different movements within Judaism, but only the certificate of an Orthodox Beth Din would be universally accepted when both spouses are also Orthodox – as would mostly be the case. This is so even if they now consider themselves not to be Orthodox because they have joined one of the other movements in Judaism. A Get from a non-Orthodox Beth Din does not gain this universal recognition and many divorced wives who have subsequently remarried and gone on to have children in ignorance of this fact have suffered enormously due to a lack of awareness of this aspect – especially those children, for they are mamzerim, who will forever be unable to marry someone under Orthodox auspices. Tragically, this will also apply to all their descendants, whether male or female. This is extremely important if one such child were to have become religiously observant within Orthodoxy, but only subsequently found out that he was a mamzer or she was a mamzeret, as a person with such a stigma could only marry another mamzer or mamzeret or a convert to Orthodox Judaism – but then it would be highly unlikely that they could find an Orthodox rabbi to

officiate at the wedding because no one wants to create a community of mamzerim which would happen if they in turn were to have children.

Raising the Get as an issue in the civil divorce proceedings – building it into the negotiations

The Get can and should be raised direct with the other spouse if the relationship is amicable. If this is not possible, it should be raised with the other spouse's solicitor. During a mediation, it would be prudent for advice to be given about the Get alongside the mediation process.

There is normally always something to negotiate over regarding finances or arrangements for the children that one spouse can concede because he or she doesn't feel too strongly about it. If the Get issue is not raised early in the course of the civil proceedings, this can lead to problems of delay and blackmail, as the refusing spouse wishes to get a better deal than the court would allow for the finances or arrangements for the children. Essentially, it is an abuse of Jewish Law if a spouse refuses to give or accept the Get. It is an ongoing exercise of control over the life of the refused spouse, who will be unable to remarry under Orthodox auspices. Moreover, the refused spouse can suffer dreadfully from the psychological or emotional abuse to which he or she is subjected by the refusing spouse in not co-operating with the Get. This is why I emphasise using negotiation tactics during the divorce proceedings to avoid the problems and pitfalls that may arise.

I received interesting feedback from Geraldine, who had read Getting your Get. She told me she had obtained the Get before the civil divorce, which meant there was less pressure and it made her feel stronger about negotiating over the other matters. She said she had nudged her solicitor at every opportunity and this was a successful strategy. She added that, because she had read Getting your Get, the Get became an issue in the divorce much earlier on in the process than if she had not read it.

The problems surrounding refusal of a Get have been well documented. Both husband and wife need to co-operate in order for the Get to be obtained. Going back to basics, the husband is expected to give the Get and the wife is expected to accept it. If one of them refuses to do this, there can be no Get and problems of Agunim, Agunot and mamzerim can arise.

DIY divorce

Let me turn briefly to DIY divorce. If a client wishes to take advice about various matters before conducting the divorce him/herself, it would be prudent for the solicitor to give advice about the desirability of obtaining the Get before decree absolute or at the latest to make use of Get Clauses and Undertakings if the finances have not yet been finalised, even if they have the decree absolute.

Get Clauses and Undertakings

If the decree absolute has been granted, it's too late to use section 10A, as it can only be used after decree nisi. There is, however, another opportunity to obtain the Get – this is before the final financial order. In this case, cross undertakings to obtain Get should be included in the final financial order. An undertaking is a promise to the court and is as binding as a court order. It's called a cross undertaking because the husband undertakes to give the Get and the wife undertakes to accept it.

Get clauses are conditions to give and receive a Get which are included in a financial consent order and made by the civil court. A consent order is the legal document by which financial matters are finally agreed and this often happens after the civil divorce. To ensure that the undertakings are

binding and can be enforced in court if necessary, it is essential to include time limits by which the Get should be applied for and also by which the Get should be concluded.

There are very serious consequences if a spouse does not comply with the undertakings to give or receive the Get. Failure to comply is contempt of court, for which there are penalties of fine or imprisonment or assets may be seized. Statements are required to be made and signed by each spouse in the consent order that they understand the document and are aware of the penalties if they do not comply with their undertakings. This is not regarded by the Beth Din as pressure, for if it were, it would mean that the Get procedure could not go ahead, but the Beth Din do ask whether the Get is being given or received because of having given the undertakings. If the answer is in the affirmative, the Get process could not proceed, but fortunately it is believed that this has never happened.

The benefit of having Get clauses and undertakings is that they assist the spouse who wants the Get to obtain it, while making it part of civil divorce proceedings.

Knowledge is power

While I have emphasised the difficulties that can surround the Get, fortunately most Jewish divorces are obtained without any or with a minimal amount of problems. Having said that, it is wonderful that, for those whose spouses do not co-operate with obtaining the Get, the civil law is by their side and ready to assist them. Sadly, however, I come across cases where advice about the Get is not made available to them because their solicitors have been unaware of what can be done and will tell the client that the religious divorce is nothing to do with any legal advice that would be given and that they must sort out the religious divorce themselves.

It is the fundamental professional duty of the solicitor to ensure that appropriate advice is given. The more that people know and understand about the Get and how the civil law can be used to assist them, the more in control they feel. I should like to leave you with this thought: **KNOWLEDGE IS POWER**. And that must be a good thing.

Deanna Levine

Consultant Solicitor

Barnett Alexander Conway Ingram LLP

Direct Tel & Fax: 020 8492 0220

E-mail: d.levine@bacsolicitors.co.uk

Date: 19 January 2016

London