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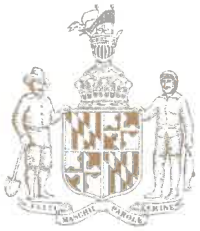

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February 10, 2020

The Honorable Cheryl C. Kagan
2 West Miller Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Kagan:

You have asked for advice concerning the constitutionality of Senate Bill 536, "Divorce and Annulment – Removal of Barriers to Remarriage," which requires parties to a divorce or annulment to file affidavits relating to the removal of barriers to remarriage in some cases. While the matter is not free from doubt, it is my view that the law could be upheld against constitutional challenge. It is also possible that the requirement could be found to be unconstitutional as applied in some cases without being facially constitutional.

Senate Bill 536 applies only to a marriage that was solemnized by an official of a religious order or body authorized by the rules and customs of that order or body to perform a marriage ceremony. It requires a person who files a complaint for absolute divorce or annulment to file an affidavit stating that the affiant has taken, or will take before the entry of final judgment, all steps within their control to remove all barriers to marriage by the other party, or an affidavit stating that the other party has, in writing, waived the submission of an affidavit with respect to the removal of barriers. The bill also permits the person who files a complaint to request the other party to submit an affidavit with respect to the removal of barriers. The bill states that if an affidavit is not filed as requested by the complaining party, "a court may not enter a final judgment of divorce or annulment unless that affidavit is filed." This limit is not expressly stated with respect to the affidavit from the complainant, but it presumably follows from the fact that it must be filed with the complaint. Even if the required affidavits are filed a court may not enter a final judgment for a divorce or annulment if the individual who solemnized the marriage certifies that "to the individual's knowledge, a party to the marriage failed to remove a barrier to remarriage of the other party." The bill expressly states that it does not authorize a court to inquire into or determine any ecclesiastic or religious issue or to order a party to remove a barrier to remarriage.

Senate Bill 536 defines the term "barrier to remarriage" to mean "any conscientious restraint of inhibition, secular or religious, affecting remarriage according to principles not by the parties to the marriage to be held by the person who solemnized the marriage of the parties." While this bill is written without reference to any specific religion, it, like the New York law on which it is based, is directed at a specific practice:

> [U]nder traditional Jewish law, a civil divorce does not dissolve the marriage. Only a religious divorce, provided by a signed writ of divorce called a "get," completely dissolves the marriage for a person who wishes to remarry within the Orthodox Jewish religion. By tradition, only the husband has the power to grant or withhold the get. The rabbinic authorities may not compel the husband to grant the get if he does not wish to do so. Until a woman receives a get she may not remarry within her religion. If she does remarry without the get, the new marriage is not considered valid. The woman is considered an adulterer, and any children from the new marriage are considered illegitimate.

Lang v. Levi, 198 Md. App. 154, 165 (2011) (citing Fiscal and Policy Note on House Bill 324 of 2007).

This bill is very similar to New York legislation enacted in 1986. N.Y. Domestic Relations Law, § 253. That law has been challenged twice but neither case has led to a decision on the constitutionality of the law. In *Kaplinsky v Kaplinsky*, 603 N.Y.S.2d 574 (App. Div. 2d Dept. 1993), the court held that the issue of constitutionality had not been preserved for appellate review and declined to reach it. In *Chambers v. Chambers*, 122 Misc.2d 671 (Sup. 1983), the court noted that, to the extent the New York Law permitted a defendant to defeat a divorce by not filing an affidavit, while the plaintiff was required to file in all cases, it might violate constitutional due process requirements.[1] The court avoided this question, however, by interpreting the statute to apply only prospectively, with the result that it did not apply to the parties before it who had entered into the separation agreement in question prior to the effective date of the law.[2] To the best of my knowledge, New York is the only state to have adopted a law of this type.

In a letter about the 2007 bill regarding the removal barriers to remarriage to the Honorable Samuel I. Rosenberg dated January 12, 2007, in which I applied the test set out in *Lemon v.*

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[1] Senate Bill 536 avoids this problem by requiring an affidavit from the defendant only if it is requested by the plaintiff.

[2] Commentators are divided on the constitutionality of the New York get statutes, with some finding that it violates the Establishment Clause, Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 Colum. J.L. & Soc. Probs. 55 (Fall 1993); Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 Brooklyn L. Rev. 229, 252 (1984) and others saying that it could be upheld, Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 Yale L.J. 1147 (April, 1987); Feldman, *Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get*, 5 Berkeley Women's Law Journal 139 (1990); Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 Md. L. Rev. 312, 319 (1992); Adetokunbo Arowojolu, *How Jewish Get Law Can Be Used as a Tool of "Spiritual Abuse" in the Orthodox Jewish Community*, 16 U. Md. L.J. Race Relig. Gender & Class 66 (2016); Michelle Kariyeva, *Chained Against Her Will: What a Get Means for Women Under Jewish Law*, 34 Touro L. Rev. 757 (2018).

Kurtzman, 403 U.S. 602, 614 (1971) to determine whether the requirements of the bill would violate the Establishment Clause of the United States Constitution. Under that test, a statute can be upheld if it has a secular purpose, neither advances nor inhibits religion in its principal or primary effect, and does not foster an excessive entanglement with religion. The test was restated somewhat in *Agostini v. Felton*, 521 U.S. 203, 232 (1997), in which the Court suggested that entanglement should be considered as part of the effects prong, saying that the factors used to assess whether an entanglement is "excessive" are similar to those used to examine effect.[3]

The 2007 letter concluded that the proposed legislation has secular purposes, in that it promotes the possibility of new family formation by removing voluntarily maintained barriers to remarriage. Freeing parties to remarry is a purpose of civil divorce, and the proposed legislation may be seen as ancillary to that purpose. The proposed legislation also protects women from coercion in negotiations related to their divorce. And it serves the secular purpose of requiring a party seeking relief to do so with "clean hands."[4] A similar concept is reflected in the traditional maxim, "He who seeks equity, must do equity." *Merryman v. Bremmer*, 250 Md. 1, 11 (1968). It has also been suggested that legislation of this type can protect families from emotional distress caused by the withholding of a get and the coercion that may accompany it. Michelle Kariyeva, *Chained Against Her Will: What a Get Means for Women Under Jewish Law*, 34 Touro L. Rev. 757, 783 (2018); Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 Md. L. Rev. 312, 354-355 (1992).

With respect to the second prong of the *Lemon* test, the 2007 letter concluded that a court could reasonably conclude that the principal or primary effect of the proposed legislation is to advance these secular purposes, not to advance religion. The proposed legislation does not contain any explicit reference to the religious practices of Orthodox Judaism that could be taken as a governmental endorsement. Although the proposed legislation is doubtless motivated by an

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[3] In *American Legion v. American Humanist Association*, the plurality opinion criticized the *Lemon* test, but did not discard it, instead holding that it should not apply to cases involving the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. *American Legion*, 139 S. Ct. 2067, 2080-2082 (2019) (Alito, J. joined by Roberts, C.J., Breyer and Kavanaugh, J.J.). Justice Kagan agreed with the reasoning for the decision of the Court but defended the usefulness of the *Lemon* test in other circumstances, *id.* at 2094 (Kagan, J. concurring in part) while Justice Gorsuch joined by Justice Thomas took the position that the test should be discarded altogether. *Id.* at 2101. Despite this lack of support for *Lemon* test, the Court has not enunciated an alternate test outside the specific context of ceremonial, celebratory, or commemorative matters, and certain other specific areas. *See e.g, Marsh v. Chambers*, 463 U.S. 483 (1983) (legislative prayer). As a result, I continue to apply the *Lemon* test.

[4] It is an open question "whether the doctrine of unclean hands, in the broad sense, has any application to 'matrimonial' litigation." *Schneider v. Schneider*, 335 Md. 500, 508 (1994). In a constitutional analysis of proposed legislation, however, the point is that a statute applying the doctrine in these circumstances serves a traditional - and secular - purpose of equity.

awareness of a problem affecting some Orthodox Jews, it is not drafted so as to be limited to that religious group and does not incorporate into civil law any aspect of Jewish religious practice. The primary short-term effect of the proposed legislation, it may reasonably be contended, is to prevent coercion by a party in the civil divorce proceeding. That the instrument of coercion is religious in character does not negate the proposed legislation's secular effect. Moreover, the proposed legislation's primary long-term effect is likely to be a greater rate of remarriage - again, a secular effect.

The 2007 letter also concluded that the proposed legislation was drafted to avoid excessive entanglement with religion. Senate Bill 536 is similar to the 2007 bill in that it is up to the parties whether the affidavit is to be required. The plaintiff may request an affidavit from the defendant, and the defendant may waive the requirement that the plaintiff file it. Where it is required, the court need not adjudicate matters of religious doctrine. In fact, the bill specifically states that the court "may not . . . inquire into or determine any ecclesiastic or religious issue." The Court need only note whether the required affidavits are filed, and whether the truth of the affidavit is challenged by the person who performed the wedding. It seems clear that this is not excessive entanglement.

With respect to the Free Exercise Clause of the First Amendment, the 2007 letter said:

> It is also my view that the proposed legislation does not, on its face, violate the Free Exercise Clause of the First Amendment. It does not compel any person to embrace a religious practice that he or she had not already accepted voluntarily, by forming a marriage in accordance with that religious practice. Moreover, the delivery of a get "involves neither professions of faith nor devotional acts. The text of the get makes no reference to God by name. It merely states that the husband is releasing the wife from her marital obligations and freeing her to remarry." Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 Yale L.J. 1147, 1168 (April, 1987). In fact, a get may even be executed by a person who has renounced Judaism completely. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 Colum. J.L. & Soc. Probs. 55, 87 (Fall 1993). Thus, at least in the ordinary case, where the motivation for failure to give a get is itself not religiously motivated, the proposed legislation would not violate the Free Exercise Clause.

The Supreme Court has held that both the Free Exercise and Establishment Clauses of the First Amendment prohibit judicial review of religious questions. *Lang v. Levi*, 198 Md. App. 154, 169 (2011). Senate Bill 536 is carefully drafted to avoid religious questions. The bill expressly states that it does not permit a court to "order a party to remove a barrier to remarriage." The courts are not called upon to determine whether a get is necessary or available, or what the effect would be. Instead they are limited to the determination of whether the required affidavits have

been filed, and if so, whether a contradictory affidavit has been filed by the person who solemnized the marriage.[5]

In a recent case, the Supreme Court of Orange County, New York, held that it could not order a defendant to pay spousal support until the defendant removed the barrier to plaintiff's remarriage. *Masri v. Masri*, 50 N.Y.S.3d 801, 2017 NY Slip Op. 27007 (Sup. 2017). The court noted that courts had ordered compliance with agreements between the parties that barriers would be removed. *Masri*, 50 N.Y.S.3d at 806, citing *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (N.Y. 1983); *see also Scholl v. Scholl*, 621 A.2d 808, 810 (Del. Fam. Ct. 1992); Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 Md. L. Rev. 312, 357 (1992) ("Compelling a party to do nothing more than what that party has already promised hardly offends the spirit of individual autonomy that lies at the root of the First Amendment."). It further noted that the Second Department had "gone so far as to hold" that it would not violate the Free Exercise Clause for a court to fashion awards of maintenance or equitable distribution where the husband was withholding the get "solely to extract economic concessions, or where an adjustment was needed to redress adverse economic consequences" resulting from the denial of the get. *Id.* at 805-806, citing *Mizrahi-Srour v Srour*, 29 N.Y.S.3d 516 (App. Div. 2d Dept. 2016); *Pinto v Pinto*, 688 N.Y.S.2d 701 (App. Div. 2d Dept. 1999]; *Schwartz v Schwartz*, 652 N.Y.S.2d 616 (App. Div. 2d Dept. 1997); *see also Burns v. Burns*, 538 A.2d 438 (1987) (ordering husband to submit to Beth Din where refusal was not on religious grounds where he had offered to do so if the wife would give him $25,000). But in the case before the court, the husband was refusing to cooperate in obtaining the get for religious reasons, namely his view that by going to a secular court, the wife had waived her right to rabbinical arbitration regarding the get. *Masri*, 50 N.Y.S3d at 807.

In *Masri* the court criticized the conclusions of other New York courts for not addressing the Free Exercise issue while relying on a case from New Jersey, *Aflalo v Aflalo*, 685 A2d 523 (N.J. Super. Ch. Div. 1996). That case in return, had criticized New York cases that had held that the acquisition of a get is not a religious act, *id*, at 527-531, and concluded that "the relief Sondra seeks from this court so obviously runs afoul of the threshold tests of the Free Exercise Clause that the court need never reach the delicate balancing normally required in such cases."

Most recently, in A.W. v I.N, __ N.Y.S.3d ___, 2020 WL 36024, 2020 N.Y. Slip Op. 20000 (Sup. 2020), the Supreme Court for Nassau County, New York held that it could not stay the entry of a final judgment of divorce until the wife took all steps to remove all barriers to the husband's remarriage where there was no contract between the parties to do so, including appearing before the Beth Din of her husband's choice and accepting a get from the husband. The court's decision also reflects that there were factual disagreements between the parties that involved religious matters including whether the husband needed the wife to accept a get in order to remarry when they were not married in a religious ceremony and whether he was a practicing Orthodox Jew. The court determined that it could not determine these issues by relying on secular and neutral principles of law. *A.W. v. I.N.*, Slip Op. at *2, citing *Jones v. Wolf*, 443 U.S. 595, 602 (1979);

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[5] In the absence of an affidavit from the person who solemnized the marriage, actual discrepancies in the affidavits filed by the parties can lead to perjury charges, but are not determined in the divorce or annulment proceeding.

Avitzur v. Avitzur, 58 NY2d 108, 114-115 (N.Y. 1983); *Golding v. Golding*, 581 N.Y.S.2d 4, 176 A.D.20 (1st Dept., 1992); *Congregation Yetev Lev D'Satmar, Inc., v. Kahana*, 820 N.Y.S.2d 62, 31 AD3d 541 (2nd Dept., 2006).

While these cases suggested that withholding a final order on the basis of failing to file the affidavits, which presumably reflects a failure to take the steps necessary to remove any barriers to remarriage, could violate the Free Exercise Clause, these cases are not only not from Maryland courts, but are not from the highest court in the state in which they arose and are arguably inconsistent with earlier cases from that state. In addition, these cases seem to recognize that this type of coercion is appropriate where the parties had agreed to take these steps,[6] or where one party is refusing to coerce the other into unfavorable terms in a separation agreement. Thus, their holdings would apply, if at all, only where there has been no agreement and the objection is on religious grounds. While it is possible that the provision could be found to be unconstitutional as applied in those circumstances, it could not be said to be facially unconstitutional.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
kagan09

[6] It has apparently become common in recent years for parties to include a clause, known as the "Lieberman Clause" in the marriage contract (ketubah). This clause provides that divorce will be adjudicated by a modern Beth Din in order to avoid issues with remarriage. *See* https://en.wikipedia.org/wiki/Lieberman_clause