

Jewish Divorce for Same-Sex Couples in 2015

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Pope Francis' recent visit to the United States, including the apparent meeting attended by Kim Davis, the County Clerk of Rowan County, Kentucky, who chose her religious devotion over following the Supreme Court's same sex marriage decision, together with the Pope's recent reforms to the Catholic Annulment process, remind us that regardless of any Supreme Court decision or Constitutional amendment, religion will always play a part in the discussion of marriage. The subject of religion and marriage has been at the forefront of a national debate since before "same sex marriage" was even a topic of conversation, but the topic of religion and divorce has largely been left undiscussed.

As the Supreme Court's decision in Obergefel v. Hodges and the reactions by the religious community in the United States remind us, while the government has the authority to make decisions regarding marriage that must be followed by government officials, how religious organizations and religious rule making bodies decide to adopt to civil decisions regarding marriage will be up to those organizations. As religious divorces such as a *Get* (a Jewish Divorce Decree) and a Catholic annulment largely operate independently of civil divorces, there has historically been the opportunity for former spouses to be considered divorced under civil law but married under religious law for several more years, if not indefinitely.

Prior to universal recognition of same sex marriage throughout the United States, a same sex couple marrying in a state that recognized their marriage would likely not be able to be divorced in a state that did not recognize same sex marriage, leaving a married couple in a position where their residency would prevent them from divorcing. Now that same-sex marriages are recognized in all 50 states, same-sex couples are able to move to any state and be divorced in that state. Same-sex couples are no longer trapped in a marriage by virtue of their move to a state that would not recognize their marriage.

Religious same-sex couples who wish to have not only a civil, but a religious ceremony, need to understand how their marriage will be recognized by their religion and how their religion is prepared to divorce them, if necessary, and to prepare for changes in how their religion will recognize their marriage. The most observant camps of the world's major religions do not explicitly support or provide for same-sex marriages. More liberal divisions of the religions and individual wedding officiates are crafting same sex religious wedding ceremonies allowing same-sex couples to have their marriage recognized by their religion, which then raises the question of the ability for those couples to obtain a religious divorce so that they are free to remarry.

Jewish divorce decrees, or *Gets*, are typically granted by the husband to the wife, with the husband given the power of refusing to grant his wife a *Get* causing her to become an *agunah*, which means a “chained woman”, unable to remarry. If the Jewish divorce process assigns different roles to the spouses based on their gender, how will the process accommodate spouses that are the same gender?

Same-sex couples and divisions of Judaism that are preparing same-sex wedding ceremony texts allowing the couple to incorporate their religion into their wedding ceremony and marriage may be customizing their divorce procedures as well. The exact language used in the wedding ceremony will influence what must take place if the couple divorces as there is generally a “coupling” of phrases used in a religious wedding ceremony or religious marriage contract that has a companion phrase in the divorce document. To the extent that the wedding ceremony becomes more identical to a heterosexual wedding ceremony, the steps taken in the divorce will need to more closely mirror the steps in a heterosexual religious divorce. While couples may be able to draft their own religious marriage and divorce documents at this time, rules may change and religions may adopt new views that alter the marriage and divorce process that may have unintended consequences for a previously married couple.

As there is no official *Get* document for a same-sex couple at this time, the best course of action for a same-sex couple having a religious wedding ceremony, whether Jewish or of another faith, might be to enter into an agreement prior to the wedding that dictates how a religious divorce would proceed, including that the parties agree to comply with whatever requirements exist at the time of the divorce. In recent years, Jewish marriage contracts, or *Ketubahs*, have included optional clauses, referred to as the “Lieberman clause” that commits both parties to submit to the *Beth Din* (the Jewish divorce court) to have their marriage dissolved if either party wishes to divorce. Lieberman clauses have been used in the Conservative, Reform and Reconstructionist movements to prevent the situation in which a husband refuses to grant his wife a *Get*. With the uncertainty of how a *Beth Din* will address cases where one of two husbands or one of two wives refuses to consent to the *Get*, a Lieberman clause prevents either of the same gender spouses from having leverage over the other spouse.

The need for same-sex couples to address the stricter formalities that religious institutions place on marriage and divorce will depend on to the extent to which the more “traditional” sects of the religion recognize same-sex marriages and eliminate any differentiations between same-sex couples and heterosexual couples. The dilemma of planning for a change in religious custom or practice is akin to the planning that couples do when they enter into a prenuptial agreement governing their future economic rights. When a couple marries, they understand their rights and obligations as they exist at the time of the marriage. However, absent a written agreement, the law that applies to their divorce will be the law at the time of the divorce, regardless of what the couple believed their rights would be. A prenuptial agreement gives the couple the opportunity to create their own plan for their future divorce, regardless of the law at the

time (assuming that their agreement is not against public policy). Although a marrying couple cannot dictate what their own religion will recognize or permit, an agreement between marrying parties, whether in the form of the *Ketubah* or a civil prenuptial agreement can ensure that both parties comply with whatever requirements exist at the time of the their religious divorce.