The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 96
INTRODUCER:	Senator Aronberg
SUBJECT:	Marital Assets and Liabilities
DATE:	March 17, 2008 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	**Favorable**
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill defines "barrier to remarriage" within the dissolution of marriage chapter of the Florida Statutes, and provides that the court can look at whether a spouse has failed or refused to remove a barrier to remarriage of the other spouse when determining equitable distribution of marital assets pursuant to a dissolution of marriage proceeding.

This bill substantially amends sections 61.046 and 61.075, Florida Statutes.

II. Present Situation:

Jewish Divorce Law

The source of Jewish divorce law is found in a biblical verse found in the Old Testament of the Bible, which states:

> When a man takes a wife and marries her, if it then comes to pass that she finds no favor in his eyes for he has found something unseemly in her, he shall write her a document of divorce and give it to her hand, and send her out of his house.[1]

[1] Edward S. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 56-57 (1993) (quoting Deuteronomy 24:1 (translation by Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 313 n. 2 (1992))).

In Jewish biblical law, the husband was vested with the unilateral power to grant a divorce, even without the consent of his wife, as long as he voluntarily delivered to his wife a bill of divorce, known as a get pitturin (Get).[2] If the Get was not delivered, the religious marriage remained intact regardless of whether the couple obtained a civil divorce.[3] If the husband did not provide a Get, the wife was considered an "agunah," or chained woman, unable to remarry or date, and any children born to the woman were considered bastards.[4] Changes over the years, such as the Conservative movement, solved the Get problem for many women of the Jewish faith; however, the problem remains to this day for Orthodox Jews, who are the most traditional.[5]

Almost six million Jews live in the United States, with nearly 1.7 million living in New York.[6] In the last 25 years, divorce rates have increased to a point where approximately 33 percent of all Jewish marriages will end in divorce.[7] In 2006, data indicated that there were as many as 15,000 Orthodox Jewish women living in New York who were considered "chained women."[8]

New York "Get Laws"

In response to the plight of the agunah, the New York legislature enacted the Get statute in 1983. New York's removal of barriers to remarriage law provides that if a cleric solemnized the marriage, the person seeking the divorce must allege in a 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.[9]

The court may not enter a final divorce if the plaintiff does not swear that he or she has removed all barriers or if the cleric who married the couple certifies that the plaintiff has not taken all steps to remove the barriers.[10] The court is also prohibited from determining any religious issues.[11]

The statute defines a barrier to remarriage to include "without limitation, any religious or conscientious restraint or inhibition, 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

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[2] *Id*. at 57.
[3] Myrna Felder, *Are the 'Get' Statutes Constitutional?*, N.Y.L.J., April 13, 1998, at 1. Besides Judaism, Catholicism and Islam also require religious dissolution of a religious marriage. *See* Jeremy Glicksman, *Almost, But Not Quite: The Failure of New York's Get Statute*, 44 FAM. CT. REV. 300, 302 (2006).
[4] Myrna Felder, *supra* note 3, at 1.
[5] 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, 10 (1997).
[6] Jeremy Glicksman, *supra* note 3, at 302. The author approximates that there are 14.5 million Jews in the world.
[7] *Id*.
[8] *Id*. at 302-303.
[9] N.Y.Dom.Rel.Law s. 253(2).
[10] Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 822 (1998).
[11] *Id*.

minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act."[12]

In 1992, New York amended its equitable distribution law (EDL) in order to fill some gaps left by the original Get statute. The EDL amendments provide that "courts 'shall, where appropriate' take into account barriers to remarriage when they decide the distribution of marital property, and the amount and duration of maintenance."[13] The amendments capture another group of individuals: "plaintiffs *and* defendants in divorce suits, regardless of whether the parties were originally married in a religious ceremony."[14] The purpose of the EDL amendments is that in order for the court to equitably divide the marital assets, it must consider the financial implications of one party's inability to remarry.[15]

Also in 1992, prior to the enactment the EDL amendments, the Supreme Court of Kings County, New York, decided *Schwartz v. Schwartz*, where the court issued, in part, the following opinion:

> Obviously, the misuse of a power differential between the parties be it a monetary differential or otherwise (i.e. the withholding of a Get or withholding one's appearance before a Beth Din) can be taken into account by a court in equity. Thus, such misuse of a power differential *may* be a factor in determining equitable distribution under the catchall clause of subdivision 13 of the of Domestic Relations Law § 236(B)(5)(d).[16]

Several years later, in *Pinto v. Pinto*, the court affirmed the lower court's order granting the plaintiff wife title to all of the assets on both the plaintiff's and defendant's statements of net worth if the defendant husband did not deliver a religious divorce ("Get") within a specified time period.[17]

New York is the only state that has enacted "Get laws" to address the agunah problem.[18] Similar legislation has been proposed in California, New Jersey, Connecticut, and Pennsylvania, but has failed to pass.[19] Most recently, in the 2007 legislative session, Senator Lisa Gladden from Baltimore, Maryland, proposed a "Divorce and Annulment – Removal to Religious Barriers to Remarriage" bill, but it was ultimately voted down by the Maryland Senate on a 22 to 22 vote.[20]

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[12] N.Y.Dom.Rel.Law s. 253(6).
[13] Kent Greenawalt, *supra* note 10, at 823 (quoting N.Y.Dom.Rel.Law s. 236B(5)(h) (McKinney 1993)).
[14] Edward S. Nadel, *supra* note 1, at 75 (emphasis added).
[15] Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703, 734 (1995).
[16] *Schwartz v. Schwartz*, 583 N.Y.S.2d 716, 719 (Sup. Ct. 1992). However, in 2005, the Supreme Court of Kings County refused to reduce the Plaintiff husband's equitable distribution upon his conduct in obtaining a divorce granted by a Jewish Rabbinical Tribunal ("Heter"). *Sieger v. Sieger*, 2005 WL 2031746, ***52 (Sup. Ct. 2005).
[17] *Pinto v. Pinto*, 688 N.Y.S.2d 701, 701-02 (Sup. Ct. 1999).
[18] Lisa Zornberg, supra note 15, at 736.
[19] *Id*. at 752 fn. 228.
[20] See Dep't of Legislative Servs., Md. General Assembly, *Fiscal and Policy Note, SB 533* (2007), *available at* http://senate.state.md.us/2007RS/fnotes/bil_0003/sb0533.pdf (last visited March 15, 2008); *Senate, Fearing an Entanglement of Church and State, Kills Divorce Bill*, WASH. POST, March 18, 2007, at C04, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031701126.html (last visited March 15, 2008).

Constitutional Implications of New York's "Get Laws"

Commentators have suggested that although New York's "Get Laws" have not been ruled unconstitutional, most likely because of its sound public policy, they may violate the Free Exercise Clause and the Establishment Clause.

Free Exercise Clause

The Free Exercise Clause of the U.S. Constitution prohibits infringement on an individual's religious freedom. Specifically, the clause "'affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.'"[21] In 1963, the United States Supreme Court held that claims under the First Amendment's religion clauses should be judged by the highest level of scrutiny, the "compelling interest" test.[22] The Court found that "[g]overnment action constitutes a violation of free exercise rights where it imposes a significant burden upon a person's free exercise of religion and this imposition is not overcome by a compelling state interest."[23] Under the compelling interest test, the burden is on the state to prove that any interference with an individual's religious practice meets two criteria:

1. The state must show that the interference is "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"
2. The state must "demonstrate that no alternative means of regulation would [meet the state interest] without infringing First Amendment Rights."[24]

Some commentators believe that the Get laws force a husband to commit an act despite his religious objection and therefore place a substantial burden on the husband's religious conduct.[25] A controversial question that often arises is whether the act of getting a Get is a religious act or not. Some courts and commentators believe that the act is not a religious one because it does not involve worship or the profession of faith, a husband who has renounced Judaism can obtain a Get, and appointed representatives can actually obtain the Get on behalf of the husband.[26] Opponents counter that the delivery of a Get is clearly a religious act because the sole justification for it is attached to the Jewish religion and that "there is no secular justification for such a [religious] divorce since a civil divorce legally terminates the marriage."[27]

Opponents to the EDL amendments also argue that depriving a man of financial assets because of his failure to obtain a Get takes away his free will and, according to Jewish law, would render

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[21] Jamie Alan Aycock, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J.L. & PUB. POL'Y 231, 270 (2006) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)).
[22] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[23] Jamie Alan Aycock, *supra* note 21, at 271 (citing *Sherbert*, 374 U.S. at 403).
[24] Comm. on Governmental Operations, Fla. House of Representatives, *Bill Research & Economic Impact Statement, CS/HB 3201*, at 2 (April 7, 1998), *available at* http://www.flsenate.gov/data/session/1998/House/bills/analysis/pdf/HB3201S1.GO.pdf (last visited March 14, 2008) (quoting *Sherbert*, 374 U.S. at 403, 407).
[25] Edward S. Nadel, *supra* note 1, at 95; Lisa Zornberg, *supra* note 15, at 742
[26] Lisa Zornberg, *supra* note 15, at 741; Lawrence C. Marshall, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 218 (1985).
[27] Lawrence C. Marshall, *supra* note 26, at 219.

the Get invalid because it must be given voluntarily.[28] Following this argument, one commentator said, "In other words, laws have been passed that prevent Jewish couples from procuring a religious divorce. Such laws are a violation of the Free Exercise Clause of the Constitution because they prevent an individual from committing a religious act."[29]

Establishment Clause

The Establishment Clause of the United States Constitution, which provides that "Congress shall make no law respecting an establishment of religion," prohibits government from "favoring one religion over another, as well as favoring religion over nonreligion."[30] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the United States Supreme Court provided a three-part test ("Lemon test") to determine whether a neutral law violates the Establishment Clause:

1. The law must have a secular legislative purpose (purpose prong);
2. The primary or principal effect of the law must neither advance nor inhibit religion (effects prong); and
3. The law must not foster an excessive government entanglement with religion (entanglement prong).[31]

The purpose prong requires the government action to be "'justifiable in secular terms, broadly defined'" and not be motivated by purely religious concerns.[32] The state could legitimately argue that the secular purpose behind the Get statute and EDL amendments is to promote the fundamental right to marry (or remarry), as well as, promoting the fair equitable distribution of property by awarding a wife whose future income is limited by the inability to remarry a larger amount.[33] Additionally, the statutes are phrased in neutral terms and define the term "barrier to remarriage" to include "without limitation, any religious or conscientious restraint or inhibition."[34] The counterargument to these secular purposes is that "accommodation of one person's religion will not be permitted where such accommodation coerces others to perform a religious practice."[35]

The primary effects prong of the Lemon test requires that any religious effect of a law must be indirect or incidental and the "government may not pass a law that has the effect of forcing a person to commit a religious act."[36] At first glance, the Get law would violate the effects prong because it forces a husband to perform a religious act prior to getting a civil divorce. As discussed previously, the debate is then raised whether the delivery of a Get is in fact a religious

[28] Lisa Zornberg, *supra* note 15, at 757; Edward S. Nadel, *supra* note 1, at 96.
[29] Edward S. Nadel, *supra* note 1, at 98.
[30] *Id*. at 79.
[31] *Lemon*, 403 U.S. at 612-13. Although the Lemon test has undergone some criticism, it remains the primary test for evaluating possible Establishment Clause violations.
[32] Edward S. Nadel, *supra* note 1, at 80 (quoting Laurence H. Tribe, *American Constitutional Law* 1168, 1204 (2d ed. 1988)).
[33] *Id*. at 83. *See also* Kent Greenawalt, *supra* note 10, at 825; Jamie Alan Aycock, *supra* note 21, at 271.
[34] Edward S. Nadel, *supra* note 1, at 85 (quoting N.Y.Dom.Rel.Law s. 253(6)).
[35] *Id*. at 84.
[36] *Id*. at 81.

act. The EDL amendments produce a similar result because, by accommodating a Jewish woman's free exercise of religion, the husband's free exercise rights are violated.[37]

The entanglement prong has been called an "umbrella" because it prohibits "enactments creating a potential for political divisiveness, actual administrative entanglement, judicial interference with substantive ecclesiastic law, and acts that show a preference for a certain specific religion or religions."[38] The Get law, on its face, has been found to probably pass this prong because the court is not required to determine whether a Get was granted; this determination is made by the sworn statements of the plaintiff and the officiating cleric.[39] However, the "clergy veto" in the bill constitutes the delegation of power to a religious authority, which also arguably violates the third prong of the Lemon test.[40] The EDL amendments may also violate this prong because the court must determine whether any barriers to remarriage exist when distributing marital assets, which essentially is an inquiry of whether the husband delivered a valid Get, which requires a religious analysis.[41]

To conclude, although New York's Get law and EDL amendments are of questionable constitutionality, they have survived constitutional scrutiny in the courts. It is unclear how courts in other states, such as Florida, would react when presented with similar legislation.

Florida Equitable Distribution Law

Florida statutes provide that a court can consider a list of statutorily enumerated factors when it determines the equitable distribution of marital assets and liabilities.[42] Similar to New York's equitable distribution law,[43] Florida also provides a catchall provision that permits the court to consider "any other factors necessary to do equity and justice between the parties" when it determines the equitable distribution of marital assets and liabilities.[44]

In 1997, the Third District Court of Appeal implicitly held in *Bloch v. Bloch* that the court may consider the effect of a barrier to remarriage as a factor in the determination of the equitable distribution of assets.[45]

III. Effect of Proposed Changes:

The bill creates the definition "barrier to remarriage" in ch. 61, F.S. The term is defined to mean "without limitation and not exclusively, any religious, secular, or conscientious restraint or inhibition of which the spouse is aware, which is imposed on the other spouse, and which exists by reason of the spouse's commission or withholding of any voluntary act."

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[37] Ilene H. Barshay, *The Implications of the Constitution's Religious Clauses on New York Family Law*, 40 HOW. L.J. 205, 234 (1996).
[38] Lawrence C. Marshall, *supra* note 26, at 245.
[39] Edward S. Nadel, *supra* note 1, at 88.
[40] *Id*. at 89.
[41] Ilene H. Barshay, *supra* note 37, at 234.
[42] Section 61.075, F.S.
[43] N.Y.Dom.Rel.Law s. 236B(5)d)(13).
[44] Section 61.075(1)(j), F.S.
[45] *Bloch v. Bloch*, 688 So. 2d 945, 946-47 (Fla. 3d DCA 1997).

The bill amends s. 61.075, F.S., to include "the failure or refusal of one spouse to remove a barrier to the remarriage of the other spouse" as an additional factor the court may consider when determining the equitable distribution of marital assets and liabilities in a dissolution of marriage proceeding.

The bill provides an effective date of July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In addition to the United States Constitution's Free Exercise Clause and Establishment Clause discussed previously in this analysis, this bill would also be subject to article I, section 3 of the Florida Constitution. Similar to the First Amendment of the U.S. Constitution, Florida provides for religious freedom stating, "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof."[46]

Additionally, in 1998, the Florida Legislature passed the Religious Freedom Restoration Act (RFRA).[47] The RFRA addresses the standard by which courts judge an individual's claim alleging state interference with free exercise of religion.[48] It requires that alleged interference with religious free exercises be judged according to whether the state's action is in furtherance of a compelling state interest, and if so, whether that interest is met by the least restrictive means possible.[49]

Florida's RFRA is virtually identical to the Religious Freedom Restoration Act of 1993 passed by the U.S. Congress. Although the Florida RFRA continues to be upheld, the federal act was declared unconstitutional in 1997 because it exceeded the powers of Congress, as well as violated states' rights.[50]

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[46] FLA. CONST. art. I, § 3.
[47] Chapter 98-412, Laws of Fla. (codified in ss. 761.01-761.05, F.S.)
[48] Comm. on Governmental Operations, *supra* note 24, at 1.
[49] *Id*.
[50] *Id*. at 7. *See also City of Boerne v. Flores*, 521 U.S. 507 (1997).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill has the potential of awarding one party to a dissolution of marriage proceeding more of the marital assets based on the other spouse's refusal to remove a barrier to remarriage.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.