4

AN ANALYSIS OF RABBI MOSHE STERNBUCH'S TESHUVAH ON THE BETH DIN OF AMERICA'S PRENUPTIAL AGREEMENT

by

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1. Introduction

Prenuptial agreements have been widely hailed both within the Jewish law community and by popular media outlets as a compelling solution to the modern *agunah* problem of husbands refusing to grant give their wives a *get* even after the functional dissolution of their marriages.[1] These agreements vary widely; some are simple, others more complex; some merely commit both spouses to adjudicating the giving of a *get* in a particular *beit din*, while others go further in providing failsafe mechanisms designed to ensure that the husband gives and that the wife accepts a *get* in a timely manner.[2]

Perhaps the most commonly used document–certainly within the American Modern Orthodox community–is a prenuptial agreement developed by the Beth Din of America in cooperation with the Rabbinical Council of America and in consultation with prominent rabbinic authorities in the United States and Israel.[3] This document, hereafter referred to as the BDA Prenup, attempts to solve the contemporary *agunah* problem by (1) committing both spouses to binding arbitration before the Beth Din of America over the issue of the giving of a *get*, and (2) providing that once the couple separates, the husband will be

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[1] See, e.g., S. Weissmann, *Ending the* Agunah *Problem as We Know It* (August 23, 2012), *https://www.ou.org/life/relationships/ending-agunah-problem-as-we-know-it-shlomo-wiessmann/; Halakhic Prenuptial Agreements:* Agunah *Prevention*, The Jewish Orthodox Feminist Alliance, *https://www.jofa.org/Advocacy/Halakhic_Prenuptial_Agreements_Agunah_Prevention*; S. Brody, *Can Prenuptial Agreements Prevent* "Agunot"*?*, *The Jerusalem Post* (November 15, 2012), *http://www.jpost.com/Jewish-World/Judaism/Can-prenuptial-agreements-prevent-'agunot*; B. Siegel, "Sign on the Dotted Line," *Tablet Magazine* (March 6, 2015), *http://www.tabletmag.com/jewish-life-and-religion/189149/sign-on-the-dotted-line*; M. Oppenheimer, "Where Divorce Can Be Denied, Orthodox Jews Look to Prenuptial Contracts," *The New York Times* (March 16, 2012), *http://www.nytimes.com/2012/03/17/us/orthodox-jews-look-to-prenuptial-contracts-to-address-divorce-refusals.html*. See also *https://www.getora.org/educational-initiatives* (describing educational initiatives by ORA–The Organization for the Resolution of *agunot* to promote prenuptial agreements as a solution to the modern *agunah* problem. But see S. Weiss, "Sign at Your Own Risk–The "RCA" Prenuptial Agreement may Prejudice the Fairness of your Future Divorce Settlement" *Cardozo Women's Law Journa*l 35 (1999); T. Lavin, "The Prenup is Not Foolproof," *The New York Jewish Week* (December 4, 2013), *http://jewishweek.timesofisrael.com/the-prenup-is-not-foolproof/*. For a review of both the benefits and drawbacks of prenuptial agreements as a solution to the *agunah* problem, see R. Levmore, "The Prenuptial Agreement for the Prevention of GET-Refusal," *JOFA Journal* 4 (Summer 2005). For a discussion of the contemporary *agunah* problem, see M.J. Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America* (New York: KTAV Publishing, 2001).

[2] For examples of some prenuptial agreements designed to address the *agunah* problem, see *https://www.jofa.org/Advocacy/Halakhic_Prenuptial_Agreements_Agunah_Prevention*;

[3] The text of this agreement can be found at *http://theprenup.org/pdf/Prenup_Standard.pdf*. A list of rabbinic endorsements supporting the viability of this document under Jewish law can be found at *http://theprenup.org/rabbinic.html*.

obligated to pay the wife $150 per day until the giving of a *get* in fulfilment of the husband's Jewish law obligation to support his wife during their marriage.[4] The first mechanism authorizes the Beth Din of America to oversee the divorce process, thereby avoiding the issues of forum shopping and spousal disagreements over which *beit din* to appear in, which lie at the root of many *agunah* cases.[5] The second mechanism creates an incentive for the husband to quickly comply with any order from the Beth Din of America (BDA) to give his wife a *get* since delaying the giving of a *get* results in his being liable for the liquidated amount of daily spousal support provided for in the document–an obligation that can, if necessary, be enforced in state court.[6]

The BDA Prenup is structured this way so as to not directly coerce or even legally pressure a husband to give his wife a *get*, and instead formalizes and enforces the husband's preexisting but civilly unenforceable Jewish law obligation to provide his wife with a reasonable standard of living.[7] This indirect incentive for the husband of a permanently separated couple to formalize their divorce by giving a *get* is important because Jewish law requires that a *get* be given by a husband willingly.[8] Thus, if a state court were to order a husband to give his wife a *get* under threat of sanctions for contempt, a *get* given pursuant to such an order would be invalid under Jewish law.[9] The same is true when a *beit din* improperly applies coercive measures to compel a husband to divorce his wife; the *get* is invalid, and the couple remains married in the eyes of Jewish law.[10] While Jewish law does authorize the use of certain measures to pressure husbands to agree to divorce their wives, these measures can only be utilized in situations where in the eyes of the *beit din* the husband is legally obligated to grant his wife a *get*.[11] There are very many cases, however, in which many rabbinic authorities would agree that it is wise, prudent, and appropriate that a couple be divorced, but where there are not clear adequate grounds for imposing on the husband a halakhic duty to give a *get* or, therefore, for applying direct pressure to convince him to do so.[12] Moreover, it is generally accepted that a *get* might be considered to have been given under duress even if the husband had previously agreed to subject himself to some kind of coercive penalty for refusing to grant his wife a divorce.[13] Since it is imprudent to utilize a mechanism that could produce *gittin* that might possibly be invalid, the BDA Prenup does not utilize the self-imposed penalty model to help prevent the *agunah* problem.

Instead, the BDA Prenup is carefully structured so as to avoid the critical concern of a coerced *get*. The BDA Prenup memorializes a Jewish husband's halakhic obligation to support his wife. During the course of a couple's peaceful cohabitation as husband and wife, this obligation is fulfilled without notice, as the couple shares finances, pays for their home, groceries, clothing, and other necessities together in a collaborative and cooperative

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[4] See *http://theprenup.org/pdf/Prenup_Standard.pdf*.

[5] See M.J. Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America*, (New York: KTAV Publishing, 2001), 163 note 24; I. Breitowitz, "The Plight of the *Agunah*: A Study in *Halacha*, Contract, and the First Amendment," *Maryland Law Review* 51 (1992), 312-421, 327.

[6] The legal enforceability of the BDA Prenup was upheld by a Connecticut court in *Light v. Light*, 2012 WL 6743605 (Conn. Super.).

[7] Maimonides, *Mishneh Torah*, *Hilkhot Ishut* 11:2.

[8] *M.Yeb.* 14:1; Maimonides, *Mishneh Torah, Hilkhot Gerushin* 1:1-2.

[9] M.J. Broyde, *supra* n.5; C. Malinowitz, "The New York State Get Bill and its Halachic Ramifications," *Journal of Halacha and Contemporary Society* 27.5 (1994), 7; M.J. Broyde, "The 1992 New York State Get Law," *Tradition* 29.4 (Summer 1995), 5-13.

[10] *Gitt.* 88b; *Shulḥan Arukh, Even Ha'ezer* 134:7.

[11] *Supra* n.10 and also T. Gartner, "Problems of a Forced Get," *Journal of Halacha and Contemporary Society* 9 (1985), 118.

[12] I. Breitowitz, "The Plight of the Agunah" *supra* n.5, at 312, 332-335.

[13] *Shulḥan Arukh, Even Ha'ezer* 134:4.

way. The Prenup merely makes clear that if a couple permanently separates and their joint marital home is no longer functioning, the husband remains obligated to provide a specific amount of daily spousal support to the wife for as long as they remain married in the eyes of Jewish law–that is, until he gives her a *get*. The husband is left technically free to withhold a *get*, but if he chooses to do so, he must bear the burdens and duties of marriage by continuing to support his wife at the agreed-upon rate. Since husband's who are not living with or maintaining any actual relationship with their wives are unlikely to want to shoulder the financial responsibility of supporting them in a reasonable standard of living, the BDA Prenup's spousal support provision provides a strong incentive for the giving of a *get* soon after the functional dissolution of a marriage.[14]

When utilized, the BDA Prenup has proven to be a highly effective tool for ensuring that timely giving of a *get*.[15] Additionally, it has been upheld as legally binding and enforceable by American courts.[16]

The BDA Prenup is not without its detractors, however. In 2015, Rabbi Moshe Sternbuch, a prominent halakhic authority for the *ḥareidi* community in Israel issued a ruling strongly critical of the BDA Prenup.[17] This article explains why Rabbi Sternbuch's analysis of the issue is not persuasive. Part II provides a brief overview of the five principal arguments offered by Rabbi Sternbuch to explain why the BDA Prenup does not succeed in avoiding the problem of a coerced *get*, and to explain why the Prenup–and prenuptial agreements in general–are a bad idea as a matter of communal religious policy. Part III presents responses to each of Rabbi Sternbuch's claims in order to explain why the BDA Prenup rests on solid halakhic foundations. Part IV concludes with some closing observations regarding several important and interesting methodological and jurisprudential issues raised by Rabbi Sternbuch's responsum, which have broader relevance to Jewish law analysis and decision making in areas far beyond *gittin* and the *agunah* problem.

I. Rabbi Sternbuch's Teshuvah

In the summer of 2015, Rabbi Moshe Sternbuch, the *Av Beit Din* of the '*Edah Ḥareidit* in Israel, circulated a responsum criticizing the BDA Prenup that explains why, in his view, the Prenup amounts to "a literal destruction of the faith, and an obstacle that creates concerns about adultery and multiplies *mamzerim* among the Jewish people."[18] Rabbi Sternbuch's position rests on several grounds, some legal, others factual, and still others rooted in extra-legal policy concerns. This section explains each of these objections to the Prenup.

a. Later Authorities Rejected the View of the Rema on which the BDA Prenup Relies

Rabbi Sternbuch's first objection to the BDA Prenup is that its apparent reliance on the view of R. Moshe Isserles, that a *get* given under the cloud of a previously accepted, self-imposed penalty for withholding the *get* can be considered valid once given, is misplaced. On this question, R. Joseph Karo ruled that such a *get* is invalid, and that therefore the husband should be formally released from this prior commitment prior to his giving of the

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[14] For a discussion of this mechanism and its historical usage, see J.D. Bleich, *Contemporary Halakhic Problems*, (New York: KTAV Publishing, 1977), 155-159.
[15] See *https://www.getora.org/faqs-about-the-prenup*.
[16] *Light v. Light*, 2012 WL 6743605 (Conn. Super.).
[17] R. Moshe Sternbuch, *Condemnation of the BDA Prenup* (hereinafter Sternbuch Teshuvah), *available at https://www.scribd.com/doc/273292099/Rav-Moshe-Sternbuch-condemns-prenuptial-agreements?secret_password=tfA9agf8H8M7dDE9Hk4N.*
[18] Sternbuch, *supra* n.17, at 2.

get.[19] Rema, however, clarifies that in his view, "if [the husband] accepted fines upon himself in case he later refuses to divorce [his wife], this is not considered coercion, for the giving of the *get* is a separate issue, and he can [if he wishes] pay the [self-imposed] fines while refusing to grant the divorce."[20] The Rema himself notes that such a *get* is valid only after the fact, and that ideally, a *get* should not be given until any liability the husband may have due to self-imposed penalties for refusing to grant his wife a divorce is legally waived.[21] Moreover, Rabbi Sternbuch notes that some later authorities have disagreed with even the Rema's *post hoc* validation of a divorce granted under such conditions.[22] These authorities include the *Mishkenot Ya'akov*[23] and *Arukh Hashulḥan*,[24] all of whom object to the possibility that a *get* given by a husband in order to avoid liability for self-imposed penalties for *get* refusal.[25]

After noting this rabbinic opposition to the Rema's view, Rabbi Sternbuch makes a methodological point. Given the gravity of matters of marriage and divorce in Jewish law, it is improper for contemporary decisors to resolve the dispute between R. Moshe Isserles and his interlocutors in favor of the former's more lenient ruling. "In our generation, where we are orphans of orphans, which scholar has the strength to stick himself out and uphold this prenuptial agreement based on the rulings of the Rema and Ḥazon Ish, and to determine a matter of marital law, which is among the most stringent [areas of law], and not be concerned for accounting for all these other later decisors [who disputed the Rema's view]."[26]

b. A Husband's Consent to the Terms of the BDA Prenup is Not Binding

Rabbi Sternbuch next argues that the a *get* given under the pressure of the BDA Prenup's spousal support provision is a legally invalid coerced *get* because a husband's signing the Prenup prior to the marriage does not actually create a binding obligation to abide by its terms at the time of divorce. Thus, even if one were to grant the legitimacy of relying on R. Isserles's *post hoc* validation of a *get* given under the cloud of a self-imposed penalty for not granting a divorce, a *get* given through use of the BDA Prenup remains invalid. Since at the time he grants the *get* the husband is not halakhically bound to uphold the terms of the Prenup, any *beit din*'s enforcement or threatened enforcement of the spousal support provision amounts to a coercive penalty to which the husband did not previously consent. Consequently, such pressure is best characterized not as the "self-imposed penalty" (*kones es 'atzmo*) allowed by the Rema, but as overt, non-consensual financial coercion of the husband, which surely invalidates the *get*.[27]

Rabbi Sternbuch supports this position by referencing a ruling issued by R. Samuel de Medina, the Maharashdam.[28] The Maharashdam dealt with a case in which a husband willingly took an oath to uphold the decision of an arbitrator appointed to mediate between himself and his wife. The arbitrator ultimately ordered the husband to divorce his wife.[29] The Maharashdam ruled that if the husband was compelled to carry out the arbitrator's order, this would be considered a coerced *get*, and would therefore be invalid. He reasoned

[19] *Shulḥan Arukh, Even Ha'ezer* 134:4.
[20] Rema to *Shulḥan Arukh, Even Ha'ezer* 134:4.
[21] See Rema, *Even Ha'ezer* 134:4. ("And it is proper to be concerned for this view in the first place and absolve him of the penalty. But if he already divorced her because of this–and even if he divorced her due to the force of an oath he previously took to divorce her–the *get* is valid since originally no one coerced him.").
[22] Sternbuch, *supra* n.17, at 2.
[23] *Responsa Mishkenot Ya'aqov*, no. 38.
[24] *Arukh Hashulḥan: Even Ha'ezer* 134:28-29.
[25] *See also Pitḥei Teshuvah: Even Ha'ezer* 134:10; Sternbuch, *supra* n.17, at 2.
[26] Sternbuch, *supra* n.17, at 2.
[27] Sternbuch, *supra* n.17, at 2-3.
[28] *Responsa Maharashdam, Even Ha'ezer*, no. 63.
[29] *Ibid.*

that this case was different from one in which a husband accepts a specific self-imposed penalty for refusing to give a *get*, where the *get* could be considered valid after the fact according to some authorities. In this case, the Maharashdam said, the husband's earlier oath to respect the arbitrator's decision did not bind him because "perhaps at the time he swore he never considered that the arbitrator might order him to divorce her."[30] In other words, according to this view, a self-imposed penalty is only binding if the specific penalty was known at the time the commitment was made, or if the person making the commitment considered that he would later be subject to a specific order as a result of his present commitment.

Based on this, Rabbi Sternbuch concludes that the husband is not bound by the spousal support penalty provision of the BDA Prenup because "it is possible that [when he signed the Prenup] before the marriage, he never considered that they would later separate– and it was only in reliance on this assumption that he agreed to obligate himself [to pay the spousal support]."[31] If the husband's earlier acceptance of the terms of the Prenup is consequently not binding upon him, then, if he divorces his wife in order to avoid having to pay the assessed spousal support, he is effectively being coerced to give a *get* under the pressure of a penalty that he did not actually accept upon himself. A *get* given under such circumstances, Rabbi Sternbuch writes, is invalid even according to the Rema.[32]

c. The BDA Prenup's Spousal Support Provision is Functionally a Coercive Penalty

Rabbi Sternbuch further argues that a *get* given under the cloud of the BDA Prenup is invalid because all parties to the process understand that the spousal support provision is designed to put direct, halakhically-unacceptable pressure on the husband to give the *get*.[33] Rabbi Sternbuch notes that in his view, the Prenup relies on a ruling of the *Torat Gittin*, who held that a *get* given in order to avoid liability for some self-imposed penalty is not considered coerced and is not invalid so long as the giving of the *get* and avoiding the liability are not expressly made to be contingent on each other.[34] The reason for this ruling, Rabbi Sternbuch writes, is that so long as there is no express relationship between the giving of the *get* and the avoidance of liability for the penalty, one cannot truly say that the threat of the penalty is being used to pressure the husband to give the *get*. Instead, the penalty exists for some other reason, and the husband only happens to incidentally avoid the liability by giving the *get*.[35] Moreover, while all parties to the arrangement may understand the *quid pro quo* that is at play, the *Torat Gittin* holds that "the issue depends on what is said rather than on what the parties intend."[36] Thus, Rabbi Sternbuch writes, supporters of the BDA Prenup rely on the *Torat Gittin* since on his view the pressure created by the spousal support provision does not invalidate the *get* because the agreement never expressly connects this obligation to the giving of the *get*.[37]

Rabbi Sternbuch, however, thinks that any reliance on the *Torat Gittin* to support the BDA Prenup is misplaced. He bases this conclusion in an explanation/qualification of the ruling of the *Torat Gittin* offered by the Ḥazon Ish. According to the Ḥazon Ish, the ruling of the *Torat Gittin* does not apply in cases where "every party knows in his heart– without explicitly saying so–that their intent is to coerce him into giving a *get*."[38] In such

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[30] Sternbuch, *supra* n.17, at 2
[31] Sternbuch, *supra* n.17, at 3.
[32] *Ibid.*
[33] Sternbuch, *supra* n.17 at 3-4.
[34] R. Jacob Lorderbaum, *Torat Gittin* 134:4.
[35] Sternbuch, *supra* n.17, at 3.
[36] Sternbuch, *supra* n.17, at 3-4.
[37] Sternbuch, *supra* n.17, at 3.
[38] Sternbuch, *supra* n.17, at 3-4.

cases, since the understood function of the threatened penalty is to pressure the husband into giving a *get*, and consequently, that fact that two are not formally connected is of little moment. Such a *get* is effectively "forced," and, the Hazon Ish says, therefore invalid.[39]

According to Rabbi Sternbuch, this is precisely what is taking place when the BDA Prenup is used to secure a *get*. The husband gives the *get* in order to avoid liability for the spousal support payments. While the text of the Prenup assiduously avoids connecting the giving of the *get* to the release from the spousal support liability, the husband, wife, and *beit din* all understand that that is exactly what is at play.[40] Indeed, that is precisely why the Prenup was drafted and signed prior to the marriage. According to Rabbi Sternbuch, therefore, the BDA Prenup represents just the sort of case in which the Hazon Ish held that the ruling of the *Torat Gittin* does not apply, and is therefore invalid.[41]

d. The BDA Prenup's Spousal Support Obligation is Unreasonably High

In addition to Rabbi Sternbuch's arguments that the BDA Prenup does not satisfactorily alleviate the problem of a coerced *get*, he further asserts that the Prenup's liquidated spousal support amount is far too high, and is therefore self-defeating.[42] He observes that the liquidated spousal support payments provided for in the Prenup obligate the husband to pay the wife $150 per day from the time that the couple permanently separates until such time as the marriage is dissolved by his giving her a *get*. Rabbi Sternbuch notes that "a reasonable person does not have the means to pay such a sum."[43] According to Jewish law, he writes, "when a person does not have the means to pay a debt, he is absolved from paying it, and it is prohibited to imprison him for this or to apply other means of coercing [payment]."[44]

The halakhic principle to which Rabbi Sternbuch refers is indeed well established in Jewish law. The Torah provides for a variety of protections for debtors against their creditors, including prohibitions against a lender's entering a borrower's home to seize personal property as security against repayment of a loan, and against a creditor's holding the debtor's clothing previously given as security for repayment of the debt if the borrower needs the clothing.[45] Moreover, the Torah only provides for the involuntary indentured servitude of a debtor in the case of a thief who is unable to repay the value of the property he stole; no such provisions for coercion or punitive measures against debtors unable to repay their loans are contemplated.[46] The Talmud reinforced these rules,[47] and while it does recognize that repaying a debt is a *mitzvah*, and that a *beit din* may whip a debtor who is capable of repaying a loan but refuses to do so,[48] it does not provide for such measures in cases where the debtor has no ability to pay.[49] Indeed, post-Talmudic authorities have ruled that it is a violation of Jewish law to impose coercive measures against debtors who simply do not have the means to repay their debts.[50]

Based on this, Rabbi Sternbuch argues that when a wife, relying on the BDA Prenup, seeks to compel her husband to pay the required unreasonably high spousal support amount–an amount that he surely cannot afford–in order to put pressure on him to give the

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[39] Sternbuch, *supra* n.17, at 4.
[40] Sternbuch, *supra* n.17, at 4-5.
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] *M.B.M.* 9:13.
[46] *Kidd.* 14b; Maimonides, *Mishneh Torah, Hilkhot 'Avadim* 1:1.
[47] *B.M.* 113a-116a.
[48] *Ket.* 86a.
[49] See, e.g., *Responsa Rivash*, no. 484; R. Joel Sirkes, B*ayit Ḥadash to Arba'ah Turim*: *Ḥoshen Mishpat* 97:28.
[50] See, e.g., R. Isaac Ben Sheshet, *Responsa Rivash*, no. 484.

get, "this involves coercing him to give her money that he is not obligated to pay in order to get him to divorce her."[51] When a *get* is given under such circumstances, Rabbi Sternbuch writes, "it is a *get* that was given because they coerced him financially without legal basis, which according to all opinions is an invalid coerced *get*."[52] Rabbi Sternbuch reinforces this conclusion by citing the rulings of R. Avraham Yeshayahu Karelitz, R. Yomtov Lippman Heller, and R. Yechiel Michel Epstein.[53] According to Rabbi Sternbuch, these decisors held that "even if financial coercion is not used to directly compel the giving of a *get*, but they merely force him to pay money that he is not legally obligated to pay, and the husband himself decides for himself that he will divorce her in order to save himself from this coercion–this is a coerced *get*."[54]

According to Rabbi Sternbuch, this is precisely what takes place when the spousal support provision of the BDA Prenup is used to convince a husband to give a *get*. Since the $150 daily support amount is exorbitantly high and beyond the means of any normal husband, the husband is not legally obligated to pay this debt and cannot legally be compelled to do so. Consequently, a *beit din*'s use of this spousal support obligation to indirectly pressure the husband to give the *get* in order to avoid having to pay amounts to illegal financial coercion, and any *get* given under the cloud of such pressure will be considered coerced and invalid.[55]

e. Prenuptial Agreements Will Result in More Divorces

Rabbi Sternbuch concludes his *teshuvah* by noting that even without his aforementioned halakhic concerns, adopting the BDA Prenup is a "breach in the House of Israel" that increases the rate of divorce among Jews.[56] In marriages not governed by the Prenup, Rabbi Sternbuch argues, it is often the case that when a husband refuses to give a *get*, the wife ultimately agrees to reconcile with him in order to avoid being left an *agunah*.[57] However, as a result of the Prenup, wives are able to force their husbands to divorce them, and this "is likely to undermine Jewish marriage" entirely.[58]

Rabbi Sternbuch acknowledges that in fact the Prenup provides that a husband will only be liable to pay the required spousal support–and thus will only be subject to pressure to give a *get*–in cases where the *beit din* concludes that reconciliation between the couple is not possible. However, he nevertheless maintains that the Prenup will cause "a multiplicity of unjust divorces, likely even in cases where reconciliation is appropriate" because "the wife and her family work to force the *beit din* to not advise the couple to [reconcile] so as to force the husband to divorce her."[59] He concludes that while the BDA Prenup is only helpful for the very small minority of women whose husbands genuinely chain them to their marriages unlawfully, but at the same time it will also ruin the institution of Jewish marriage.[60]

[51] Sternbuch, *supra* n.17, at 4-5.
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] Sternbuch, *supra* n.17, at 5
[58] Sternbuch, *supra* n.17, at 4-5.
[59] *Ibid.*
[60] *Ibid.*

II. Analysis

a. The BDA Prenup is a Spousal Support Agreement, not a Self-Imposed Penalty

At the core of Rabbi Sternbuch's criticisms of the BDA Prenup lies a fundamental misunderstanding of the halakhic underpinnings of the document, and the mechanism it seeks to use in order to ensure that *gittin* are given in a timely manner once a marriage has irreconcilably broken down. Rabbi Sternbuch appears to believe that the BDA Prenup is grounded in the view of the Rema, who rules that a *get* given under the color of a self-imposed penalty is valid, at least after the fact.

Most of Rabbi Sternbuch's challenges to the BDA Prenup proceed from the assumption that the Prenup is in fact based on the Rema's ruling, and that it works utilizing the mechanism of *qanas etzamo*–a self-imposed penalty–in order to bring pressure on a husband to give a *get*. He first contends that one cannot construct a Prenup relying on the Rema's view in light of the fact that several important later authorities disagreed with the Rema's ruling and instead held that a *get* given under the pressure of a self-imposed fine are invalid even after the fact.[61] Next, Rabbi Sternbuch argues that the Prenup's spousal support mechanism is not actually binding because, based on the view of the Maharashdam, prior consent to an uncertain future penalty is not binding.[62] Rabbi Sternbuch further contends that the Prenup's spousal support provision functions as a coercive penalty that essentially directly pressures a husband to give a *get*, which invalidates the *get* even where the penalty was previously accepted by the husband.[63] Moreover, Rabbi Sternbuch argues that the Prenup's support provision of $150 per day is not binding because it is so unreasonably high that no husband to afford to pay it.[64] This contention supports Rabbi Sternbuch's view that the BDA Prenup's spousal support provision is a *qenas* penalty, since in his mind it bears no reasonable relationship to the actual financial means of ordinary husbands to provide for their wives' normal cost of living.

In fact, however, the BDA Prenup does not rely on the view of the Rema that a *get* given under the cloud of a self-imposed fine is valid after the fact. Instead, the Prenup builds on a mechanism developed by R. Samuel ben David Moses Halevi in his *Naḥalat Shiv'ah*.[65] According to the *Naḥalat Shiv'ah*, a husband may legally bind himself to support his wife at the customary and reasonable rate common in the couple's community. Most importantly, because this kind of commitment merely memorializes the husband's preexisting Jewish law obligation to support his wife, it is not regarded as a "penalty" or "fine," and does not fall within the scope of the Rema's ruling regarding the validity of a *get* given under the cloud of a self-imposed "*qenas.*" Consequently, if a wife were to secure her husband's willingness to give a *get* by offering to forgive her rights to these support payments, the *get* would not be regarded has having been given under the coercive pressure of a penalty, but would instead be the result of a freely made bargain between husband and wife over the enforcement of the latter's legal right to the promised spousal support.[66]

Since the BDA Prenup is structured as a spousal support agreement for the time and place in which it is used, it is not subject to the concerns raised by Rabbi Sternbuch, which apply only to self-imposed penalties for *get* refusal and not to spousal support agreements. It is important to point out, moreover, that while Rabbi Sternbuch is correct in noting that several important halakhic authorities have questioned and qualified the applicability of the Rema's ruling regarding the *post hoc* validity of a *get* given under pressure of a self-imposed penalty, no authorities have noted their disagreement with the

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[61] *Supra* n.17, passim.
[62] *Supra* n.17, passim.
[63] *Supra* n.17, passim.
[64] *Supra* n.17, passim.
[65] For a discussion of this mechanism and its historical usage, see J.D. Bleich, *supra* n.14, at 155-159. See also M.J. Broyde, *supra* n. 5, at 13-15.
[66] See generally *Naḥalat Shiv'ah* 9:14.

basic position of the *Naḥalat Shivah* that the existence of a spousal support obligation cannot be regarded as coercive and does not jeopardize the halakhic acceptability of a *get*.

Rabbi Sternbuch, of course, argues that the Prenup cannot be read as a spousal support agreement, and must be understood as a *qenas* penalty because, in his view, the Prenup's provision for payments by the husband to the wife in the amount of $150 per day in an unreasonable amount of spousal support.[67] We note, however, that Rabbi Sterbuch's assessment of the BDA Prenup's spousal support provision appears grounded in factually incorrect assumptions about typical incomes and costs of living for the Jews living in Orthodox communities in the United States, whom the BDA Prenup is intended to serve. His analysis may accurately reflect his own reality in Har Nof, Jerusalem, and of the economic realities of the Israeli *ḥareidi* community in general, which is in general quite poor. According to a 2010 report by *Haaretz*, more than half of the Israeli *hareidi* population lives in poverty, and the average gross monthly income of *ḥareidi* families is only NIS 6,100, or approximately $1,500.[68] Under such conditions, it is easy to understand why Rabbi Sternbuch would characterize the BDA Prenups spousal support formula of $150 per day as an amount that no ordinary person could manage to pay.

But the BDA Prenup was not written for or expected to be used by Israeli *ḥareidim*, and in fact the economic situation of Orthodox Jews in the United States is dramatically different from that of their *ḥareidi* brethren in Israel. Even a very cursory review of average incomes, home prices, and standards of living in regards to food, clothing, shelter, recreational activities, education, transportation, and the like in areas of the United States inhabited by Modern Orthodox Jews who typically utilize the BDA Prenup shows that the $150 per day spousal support provision is reasonable in light of the typical means of American Orthodox Jewish husbands and the needs of American Orthodox Jewish wives.

Consider, for instance that the average household income in Manhattan's Upper West Side, Riverdale, Teaneck, Woodmere, and Scarsdale–all areas with strong concentrations of Orthodox Jews–ranks in the 99th, 86th, 69th, 94th, and 98th percentile, respectively, when compared to national averages in the United States. Average home prices in these neighborhoods hover around $700,000.[69] Moreover, Jews in these communities almost exclusively send their children to private Orthodox Jewish elementary and high schools, typically paying anywhere from $10,000 to $25,000 per child per year.[70] Most of these families own at least one, if not two or more cars; many take regular expensive vacations to foreign destinations; pay upwards of $5,000 per person to attend holiday programs in exclusive hotels; consume expensive specialty food products and eat out at restaurants; and wear above average clothing.[71] The standards and costs of living in many of America's Modern Orthodox communities is very high. As Dimitry Shapiro has

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[67] *See supra* n.17, at Part II.4.

[68] *See* Z. Zrahiya, "More Than Half of Israel's Ultra-Orthodox Living in Poverty," *Haaretz* (Nov. 7, 2010), *http://www.haaretz.com/israel-news/business/more-than-half-of-israel-s-ultra-orthodox-living-in-poverty-1.323309*.

[69] Collecting data from *http://newyork.homelocator.com* and entering zip codes 10024 (Manhattan's Upper West Side), 10471 (Riverdale), 07666 (Teaneck, New Jersey), 11598 (Woodemere, New York), and 10583 (Scarsdale) strongly suggests what many in the Jewish community know all too well: Modern Orthodox communities have high housing prices (on average $700,000) and very high incomes (99th, 86th, 69th, 94th, and 98th percentile, respectively, relative to the rest of the United States).

[70] For an informal, but perhaps the most extensive collection of tuition data for Jewish day schools around the United States, see *https://docs.google.com/spreadsheets/d/1jJF9icyyd5jMqY-pm06QbJqqAKXe0b9X-1-DOzbo4yk/edit#gid=0*.

[71] C.I. Waxman, "Is Modern Orthodoxy Thriving? Don't Be So Sure," *Times of Israel Blog* (Nov. 13, 2014), *http://blogs.timesofisrael.com/modern-orthodoxy-thriving-maybe-not/*.

noted, "it's very much the case that if you are in the Modern Orthodox community and you're making $200,000 or even $300,000 a year, you're struggling."[72]

Given the reality of Modern Orthodox incomes and lifestyles in the United States, it is not unreasonable to demand that the average husband making a six-figure salary make spousal support payments of $150 per day, or just under $55,000 per year. The American Modern Orthodox community is wealthy even by wealthy American standards while the Israeli *ḥareidi* community is poor even by porr Israeli standards. This understandably contributes to Rabbi Sternbuch's sense that $150 a day is an outrageous sum of money that no husband can reasonably be expected to pay. An examination of the data, however, shows quite clearly that this is simply not true in the United States, where Orthodox Jewish men earning high salaries certainly can be expected to afford to make such payments in fulfilment of their halakhic obligations to support their wives.

The reasonableness of the BDA Prenup's spousal support provision in its American Orthodox context is further supported by cost of living realities in the kinds of communities that the Prenup is designed to serve. Appendix A reproduces a sample cost of living chart prepared by Professor Leon Metzger.[73] The chart aggregates daily cost of living data for thirty-eight different zip codes across the United States with heavy concentrations of Orthodox Jews. The graph clearly shows that in these neighborhoods, the average daily cost of living for an individual female–including housing, food, clothing, transportation, health insurance, and other basic needs hovers around $150, the daily spousal support amount prescribed by the BDA Prenup.[74]

Given the actual economies of Orthodox Jewish life in the United States, it is in fact quite reasonable to set an American Orthodox Jewish husband's halakhic obligation of spousal support at $150 per day. Moreover, it is critical to understand that in light of the reasonableness of this amount given economic realities, the BDA Prenup's spousal support provision is not, as Rabbi Sternbuch incorrectly surmises, a form of *qenas*, or penalty–self-imposed or otherwise. It is instead a formal memorialization of a Jewish husband's *mezonot* obligation, his legal duty to provide his wife with a reasonable standard of living.[75]

The suitability and halakhic viability of the BDA Prenup in the American Jewish context–and its admitted unsuitability to the very different economic realities of Israeli Jews–is reinforced by the fact that the Beth Din of America has actually drawn up a separate prenuptial agreement to be used by Israeli couples.[76] This agreement is virtually identical to the standard BDA Prenup used in the United States, but with one critical emendation. In the place of the BDA Prenup's provision for $150 per day in spousal support, the Israeli version states

> I hereby now (*me'akhshav*), obligate myself to support my Wife-to-be from the date that our domestic residence together shall cease for whatever reasons, at the rate of $75 per day or the *shekel* equivalent . . . in lieu of my Jewish law obligation of support so long as the two of us remain married according to Jewish law . . .[77]

The Israeli version of the Prenup thus directly recognizes the central component of Rabbi Sternbuch's critique. It knows quite well that the $150 per day spousal support payment prescribed by the standard Prenup is an unreasonably high amount as applied to Israeli Jews. For this reason, the standard version that is the subject of Rabbi Sternbuch's criticism is not supposed to be used by Israelis; the alternative

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[72] D. Shapiro, "For U.S. Orthodox, Upper Class Incomes Often Not Enough," *Times of Israel Blog* (Feb. 5, 2015), *http://www.timesofisrael.com/for-us-orthodox-upper-class-incomes-often-not-enough/*.
[73] *See infra* Appendix A 1.
[74] *Ibid*.
[75] Maimonides, *Mishneh Torah*, *Hilkhot Ishut* 11:10-11.
[76] This Israel-specific version of the BDA Prenup is on file with the author.
[77] This is from the text on file with the author.

Israeli version of the Prenup, with its more reasonable $75 spousal support provision is intended to be used instead.

The BDA Prenup, in other words, is a spousal support agreement, not a self-imposed penalty; for that reason, the Prenup is not reliant on the Rema's ruling regarding the validity of a *get* given under the cloud of pressure created by a self-imposed *qenas*, and is therefore not susceptible to Rabbi Sternbuch's criticisms stemming from that premise. Indeed, it was precisely in order to avoid entanglement with the issues surrounding the Rema's ruling that the original prenuptial agreement developed by the Rabbinical Council of America in the early 1980s was abandoned in favor of the BDA Prenup currently under discussion. The earlier document included a liquidated damages clause that did constitute exactly the kind of self-imposed penalty to which Rabbi Sternbuch's criticism would apply.[78] The current BDA Prenup, however, abandoned the liquidated damages penalty mechanism, and instead opted to utilize the approach of the *Naḥalat Shivah*, structuring the document as a spousal support agreement that avoids these concerns.

It is worth noting that this response to Rabbi Sternbuch's criticism of the Prenup's spousal support provision does raise one important question regarding the prenup that is worth considering. Specifically, it highlights the fact that due to the Prenup's prescribing a uniform $150 per day for spousal support, the halakhic and practical feasibility of the BDA Prenup may well be limited to communities–like those American Orthodox communities previously discussed–where this amount is a reasonable measure of wives' cost of living and husbands' ability to pay. Rabbi Sternbuch is likely correct that using the BDA Prenup with its $150 per day spousal support provision in a place where typical incomes could never sustain such liability and where people regularly live quite reasonably on much less money would result in the Prenup being considered a self-imposed fine, and therefore subject to the halakhic vagaries associated with the previously discussed ruling of the Rema. This means that BDA Prenup does not provide a universal solution to the contemporary *agunah* problem. It can be reliably utilized only in times and places in which the $150 per day financial obligation it places on the husband can be regarded as a reasonable amount of for spousal support rather than a fine. In other such places, the amount must be lowered, as is done in Israel.

One potential way to expand the usability of the BDA Prenup might be to construct a new document in which the spousal support provision was not set at a fixed number, but was instead indexed to some official government averages for income and cost of living in the time and place in which the couple was domiciled prior to the dissolution of their marriage. While such a provision could be drafted with the right economic and legal expertise, this does not change the basic fact that the BDA Prenup as currently formulated works both halakhically and legally to ensure that husbands give their wives *gittin* in a timely manner. It is perhaps true that a more universal version of the Prenup indexed to local income and cost of living levels might satisfy Rabbi Sternbuch and induce him to recognize that the Prenup is a spousal support agreement rather than a self-imposed fine. Nevertheless, the current formulation works well for the communities for which it was designed, and perhaps if it 'ain't broke, we'd be better off not trying to "fix it."

b. **The BDA Prenup Does Not Directly Coerce the Giving of a Get**

In light of the fact that the BDA Prenup operates as a memorialization and enforcement mechanism for the husband's prior and independent *mezonot* obligation to support his wife rather than as a self-imposed penalty, Rabbi Sternbuch's claim that the Prenup is invalid because it directly coerces the giving of a *get* is likewise misplaced.

[78] For a copy of this earlier prenuptial agreement, see M.M. Bayer, *The Jewish Woman in Rabbinic Literature*, vol. 2, (New York: KTAV Publishing, 1986), 223.

It is a well-established halakhic principle that a *get* given under financial pressure is valid so long as the financial pressure on the husband is not a direct *quid pro quo* for the giving of the *get*, but is instead an independently valid legal obligation incumbent on the husband that the wife offers to relieve in exchange for the giving of the *get*.[79] This principle is found in a number of medieval rabbinic responsa. For instance, in one case, a husband had been imprisoned by gentile authorities for offenses unrelated to his refusal to grant his wife a *get*. The local Jewish community refused to intervene with the authorities on the husband's behalf until he gave a *get* to his wife, and on these terms, the husband consented to the divorce. R. Joseph Colon ruled that such a *get* was not invalid, since the community had not coerced him to give but had instead merely refused to render assistance unless he did so.[80] In another case decided by R. Isaac ben Sheshet, a recalcitrant husband who had been imprisoned for failure to pay his debts agreed to give his wife a *get* after her family offered to pay his debts in exchange for the divorce. There too, the *get* was found to be valid because the husband had been imprisoned on account of unrelated debts, not because he had refused to divorce his wife, and therefore the granting of the divorce was formally his own free-willed–albeit highly prudent–decision.[81]

As in these cases, the BDA Prenup merely spells out and makes legally enforceable the husband's prior halakhic obligation of spousal support. Releasing him from this potentially onerous financial liability if a *get* is given, or directing that the amount be paid if it is not, is therefore not direct coercion to compel the giving of a *get*.

c. The BDA Prenup is Good Policy, and Does Not Undermine the Institution of Jewish Marriage

Rabbi Sternbuch's criticism that the BDA Prenup helps encourage divorce by placing husbands and wives in unequal bargaining positions in the event of marital discord, and therefore undermines the foundations of the institution of Jewish marriage fails for at least three important reasons.[82]

First, Rabbi Sternbuch seems to assume that from the perspective of Jewish law and thought, the financial and marital relations between husbands and wives should be structured in a certain way, and he is therefore critical of the terms of the BDA Prenup which in his mind alter this ideal state. The premise is incorrect. The terms of marriage in the Jewish tradition are primarily contractual.[83] While some non-financial aspects of marital relationships are dictated by Jewish law,[84] there is no ideal model in *halakhah* for the correct disposition of financial rights and responsibilities within a marriage. Jewish law does embrace the default terms found in the standard *ketubah*, but Jewish law also permits couples to agree to change these standard marital terms as they see fit, as has been the practice in many communities–and is still the practice in some communities today. The terms of the BDA Prenup, which Rabbi Sternbuch criticizes for undermining the proper allocation of rights and duties in a Jewish marriage, are just such a change. It may not be written into the *ketubah* itself, since in Ashkenazi communities the *ketubah* has taken on a formal, ritual character and its terms are not altered, but the Prenup is simply the kind of agreed-upon structing of the marital relationship between husband and wife that has been a mainstay of Jewish marriage for centuries.[85] Simply put, there is no essential or ideal

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[79] I. Breitowitz, "The Plight of the Agunah" *supra* n.5, at 312, 328.
[80] R. Joseph Colon, *Responsa Maharik*, no. 123.
[81] R. Isaac Ben Sheshet, *Responsa Rivash*, no. 127.
[82] See *Supra* n. 17 at Part II.5.
[83] M. J. Broyde, "The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law" in John Witte and Eliza Ellison (eds.) *Covenant Marriage in Comparative Perspective,* (Grand Rapids: Eerdmans, 2005).
[84] Maimonides, *Mishneh Torah*, *Hilkhot Ishut* 11:2-5.
[85] See Broyde, *supra* n.83, at 62-68.

form of Jewish marital relationships; whatever agreements a couple signs with respect to financial matters is *per se* proper and binding.

Secondly, while Rabbi Sternbuch may be correct that the BDA Prenup does not on its face put husbands and wives in the same financial position in case of divorce, it does so only in cases where a husband is already committing the injustice of withholding a *get* despite the functional dissolution of the couple's marriage.[86] Two of the greatest Jewish law authorities of 20th century America affirmed the essential idea that justice demands that a husband give his wife a *get* following the effective end of their marriage. R. Yosef Eliyahu Henkin ruled that

> If a husband and wife separate, and he no longer desires to remain married to he and she desires to be divorced from him, then in such cases it is a *mitzvah* to divorce, and Jewish law commands him to do so. . . . One who withholds a *get* because he desires money without any rightful entitlement is a thief; he is worse than a thief, since his conduct violates a substantive prohibition [*abizrayh*] related to the taking of human life.[87]

Likewise, R. Moshe Feinstein affirmed that

> In the matter of a man and a woman who for these past years have not had peace in their home, since the *beit din* sees that it is impossible to make peace and rectify between them…it is compelling that they should be divorced, and it is prohibited for either side to withhold a *get*–not the man to chain the woman to the marriage, or the woman to chain the man to the marriage, and certainly not over financial matters.[88]

The upshot of the positions expressed by both R. Henkin and R. Feinstein is that once a marriage has fallen apart and reconciliation is no longer reasonably possible, divorce is appropriate and indeed obligatory. In such circumstances, justice demands that a *get* be given, and any refusal to do so on the part of the husband is unethical, unrighteous, and unjust. While Rabbi Sternbuch takes issue with the perceived unfair imbalance of power between husband and wife in divorce proceedings created by the Prenup, we do not think it necessary to be too concerned about any small lack of complete, wholesome righteousness of the Prenup's response to the unrighteous and unjust conduct of a husband refusing to give a *get* when obligated to do so.

Finally, the most important response to Rabbi Sternbuch's policy objections to the BDA Prenup focuses once again on the major differences between Jewish life in Israel, where Rabbi Sternbuch lives, and in the United States, where the Prenup was drafted and intended to be used. Put simply, unlike in Israel, where *battei din* function as part of the state's legal system and enjoy the support of Israeli law enforcement institutions, rabbinical courts in the United States and other places in the diaspora have no official jurisdiction or power.[89] Israeli *battei din* have exclusive coercive jurisdiction in matters of divorce; rabbinical courts oversee and control the divorce process, and no divorce can be granted without the approval of rabbinic authorities.[90] More importantly, rabbinical courts in Israel

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[86] Rabbi Sternbuch's objection here is not a matter of Jewish law, but merely an ethical claim that the husband is being wronged. However, he is only be wronged because he is withholding a *get*, reducing (in this author's view) his ethical claim for sympathy for an otherwise non-actionable wrong.
[87] *Eidut leYisrael* 143-144, reprinted in *Kol Kitvei Harav Henkin* 1:115a-b.
[88] *Iggrot Moshe*, *Yoreh De'ah* 4:15.
[89] *Supra* n.5 at 43-58
[90] The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, S.H. 165 arts. 1-2.

have the legal power to hold husbands who refuse an order to give a *get* in contempt of court.[91] In the United States, however, there is no way to force any unwilling spouse to appear before a *beit din*, and there is no way for rabbinic courts to administer a *get* without the agreement of both husband and wife. In practice, this permits all manner of misconduct by parties going through divorce proceedings, and presents opportunities for husbands (and to a lesser extent, wives) to use their refusal to give (or accept) a *get* in order to obtain more favorable financial settlements in the divorce.

This uniquely diasporic situation explains why prenuptial agreements like the BDA Prenup are rigorously endorsed by numerous halakhic authorities for use in the United States, but not for use in Israel. It is important to make sure that *gittin* are given and divorces are administered. In the United States this entails reliance on prenuptial agreements, which have proven to be the most effective and halakhically principled way to address the *agunah* problem. Rabbi Sternbuch may not be entirely wrong in his policy critique of the Prenup insofar as his claims relate to conditions in Israel. But the situation among American Modern Orthodox Jews–who already experience a divorce rate that is likely much higher than in Rabbi Sternbuch's own community–is very different. In that community, policy favoring divorce when divorce is indicated by the functional end of a marriage demands that the means of affecting a halakhically valid and efficient divorce are made available and utilized. The BDA Prenup provides just this sort of means.

III. Conclusion

Halakhah, like any other system of law that seeks to be both principled and pragmatically functional in the real world, is fact driven. Legal rules and principles are only one part of the jurisprudential equation that produces a particular judgment; in additional to legal norms, one has to consider the facts of each case in order to correctly determine what the law requires and entails. The same set of legal rules, if applied to substantially different factual scenarios, will therefore produce different but nevertheless equally correct results. This appears to be the case in the matter of Rabbi Moshe Sternbuch's criticisms of the BDA Prenup.

When it was adopted, the BDA Prenup won the approval of many leading halakhic authorities, including R. Yitzḥaq Liebes and R. Ovadiah Yosef. It continues to enjoy the support of many of today's major rabbinic authorities, including R. Zalman Neḥemiah Goldberg, R. Gedalia Dov Schwartz, R. Osher Weiss, R. Ḥaim Zimbalist, and many of the *Rashei Yeshiva* of the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University. These numerous and highly regarded scholars have not approved of the Prenup because they disagree with the analysis of the issue presented by Rabbi Sternbuch; and he did not level his challenges to the Prenup because he disagrees with their halakhic position.

Supporters of the Prenup agree with Rabbi Sternbuch's fundamental point that we should not administer a *get* under the cloud of pressure created by a self-imposed *qenas* penalty previously agreed to by the husband. Likewise, it is clear from Rabbi Sternbuch's *teshuvah* that he too agrees with the basic position of the *Naḥalat Shiv'ah* that a spousal support agreement concretizing a husband's halakhic obligation to support his wife and providing for reasonable levels of support payments in case the couple separates without a *get* having been given does not invalidate a *get* given in order to avoid making such payments. Instead, Rabbi Sternbuch's *teshuvah* merely argues that in his own time and place–Har Nof in the year 2015–the $150 per day payments prescribed by the Prenup are too large to be considered anything other than a penalty. What Rabbi Sternbuch's *teshuvah* fails to recognize, however, is that given the economics of Modern Orthodox life in the

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[91] H.L. Capell, "After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel," *Texas International Law Journal* 33 (1998), 331, 337; E.R. Clinton, "Chains of Marriage: Israeli Women's Fight for Freedom," *Journal of Gender Race and Justice* 3 (1999), 283, 289.

United States, the Prenup's $150 per day spousal support provision is quite reasonable and should be viewed as a form of spousal support rather than as a penalty.

Appendix A