# 9 Prenuptial Agreements and State Regulation as Tools to Avoid Religious Marital Captivity

*The Orthodox Jewish Experience in America and Related Legal Developments*

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## 9.1 Preface

Besides the preface and roadmap, this chapter has five parts. Parts 1, 2, and 3 explain the tension between the contractual and covenantal models of marriage in the Jewish tradition, both as a matter of history and normative Jewish law. Parts 4 and 5 explain how New York and other states actually regulate Jewish marriage to prevent marital captivity both in theory and in practice, exploring contract law, prenuptial law, and state regulation of religious marriage. The recent case of *Masri v. Masri*,[1] which challenges the constitutionality of some of these matters, is discussed at the end of Section 9.5.3. The conclusion puts these issues in context of religious human rights generally.

There is number a of sample prenuptial arbitration agreements used to one degree or another in the Orthodox Jewish community in the United States. I have included these as appendices, with the intention that the reader refer to them prior to reading the body of this chapter. Each of them has a different theme and approach, but each is an attempt to avoid marital captivity in some way. The first one is the widely used Beth Din of America agreement (which I had a hand in writing), and the second contains four different initial models, an older version of the Beth Din of America agreement, and a model that looks to secular law.[2] The final agreement, entitled the Tripartite Agreement, is something I wrote a decade ago and is independent of secular law.

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1 *Masri v. Masri* 55 Misc 3d at 488 (NY Supreme Court, 2017). In New York, the Supreme Court is the trial court and the Court of Appeals is the highest court of the state.

2 The appendix contains three different models of prenuptial agreements. See https://theprenup.org/the-prenup-forms/ for a collection of Beth Din of America Prenuptial forms (they are updated regularly, so that the forms posted evolve as the law changes in different states) and this is the material in Appendix 1. Appendix 2 (the second set of forms) are taken from Appendix F of Broyde, 2001 while the third appendix is take from Broyde, 2010, pp. 1-15.

This chapter will not address the question of general arbitration law or religious arbitration law. Rather, it assumes that the reader knows the basic holding of the US Supreme Court in *Good News Club v. Milford Central School*,[3] that any right generally available must be made available to those religiously motivated as well, and that the Federal Arbitration Act permits arbitration without substantive judicial review of the fairness of the arbitration.

Finally, those who are not interested in the historical give-and-take of Jewish law particularly and in detail might be well served by reading only Part 1, and skipping Parts 2 and 3, and reading from Part 4 and onward.

## 9.2 Introduction to Jewish Marriage Law

It is an ancient question whether and to what extent Jewish marriage and divorce law is essentially covenantal or contractual. A covenantal (or sacred) marriage is one in which the religious community imposes its values on a marriage independent of the wishes of the participants and a contractual marriage is one in which the parties can reach private ordering agreements between themselves on matters. The answer has changed over time, varies according to different authorities, and is still in flux today.

On the one hand, Jewish tradition is replete with references to the sacred nature of the marital relationship. The Talmud recounts that a person is not complete until he or she marries and is not even called a person until two are united.[4] Furthermore, the classical sources recount the profound Divine hand in the creation of marriage. One Talmudic source goes so far as to state, "Forty days prior to birth, the Holy One, Blessed be He, announces that so-and-so should marry so-and-so."[5] Marriages appear to be holy relationships that embrace and are embraced by the Divine. For example, the earliest commentaries on the Bible posit that God performed the wedding ceremony between Adam and Eve.[6] Indeed, the blessings recited at a Jewish wedding recount that it is God who commanded us with regard to forbidden relationships, forbade [merely] betrothed women to us, and permitted wives [to husbands] through the Jewish wedding ceremony.[7]

But the incorporation of Godliness, sanctity, and covenant into the union is but one facet of marriage in the Jewish tradition. The tradition also presents a countervailing set of factors that provide insight into the nature of Jewish marriage: the Jewish law mechanics of entry into and exit from marriage are rooted in private contractual rights. Central to this model is the rabbinic tradition of the *ketubah*, the premarital contract to which the

3 *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).
4 Babylonian Talmud (herein referred to as BT), *Yevamot* 63a.
5 BT *Sotah* 2a.
6 Louis Ginzberg, et al., *The Legends of the Jews*, Jewish Publication Society, 1968, p. 68.
7 See e.g., Rabbi Nosson Scherman (Ed.), *The Complete Artscroll Siddur, Rabbinical Council of America Edition*, Mesorah Publications, 1995, pp. 202-203.

couple agrees that spells out the terms and conditions of both the marriage and its termination. This tradition, discussed in dozens of pages of closely reasoned Talmudic texts (including an entire tractate in the Talmud devoted to the topic, entitled *Ketubot*, the Hebrew plural of *ketubah*), describes marriage as a contract that is freely entered into by both parties, and dissolvable by divorce with little sacred to it. Further refinements to marriage in the immediate post-Talmudic period were in keeping with the spirit of this contract or partnership model of marriage.

These two divergent perspectives on marriage in the Jewish tradition are not merely variant strands of Jewish law and lore, nor are they parallel courses that never cross paths. Around one thousand years ago, European Jewish legal authorities worked, particularly by enacting significant restrictions on exit from marriage, to minimize the contractual view of marriage found in the earlier Talmudic *ketubah* literature. This backlash against the long running Talmudic tradition moved marriage closer to a covenantal scheme and also established the normal mode of marriage as one husband and one wife for life. But in the past 50 years, Jewish law has perforce reemphasized and restored elements of the contractual view of marriage. It has also added another model: the statutory paradigm.

This shifting between marriage as covenant and contract, coupled with the absence of authority of rabbinical courts in America to enforce even an equitable divorce settlement, has created a situation in which Jewish law in America is unable to regulate (or even determine) its own marriage constructs. This, in turn, has led to an absolutely unique situation – the regulation of Jewish marriage by the state of New York since 1983, and the creation of the first covenant marriage statute in the United States, to solve the problems created by Jewish marriage doctrines.[8] It has also given rise to attempts to straight-out regulate Jewish marriage rules by prenuptial contract, mostly but not exclusively to prevent marital captivity.[9]

This chapter will describe the covenant-contract conflict and interplay in four parts. The first section will lead the reader though the Talmudic history of family law, emphasizing its contractual roots.[10] The second section will explain the post-Talmudic developments

8 Section 253 of the Domestic Relations Laws of New York State.

9 See, e.g., I. Breitowitz, 1992, pp. 312 and 327.

10 A full survey of the sources of Godliness, sanctity, and especially the use of the specific term "covenant" with regard to Jewish marriage is beyond the scope of this paper. Indeed, the collation and analysis of these sources would be a significant contribution to the field, which, to this author's knowledge, has yet to be undertaken. This would be particularly helpful to distinguish between variant understandings of covenant in Judaism and Christianity. For example, while a number of Christian Bible commentators take the use of the term in Proverbs 2:16-17, which extols the virtue of wisdom, "To deliver thee from the strange woman…. That forsaketh the lord of her youth, and forgetteth the covenant of her God", as an explicit reference to the marriage covenant, three of the four classic medieval Jewish commentaries printed in the standard mikraot gedolot editions (Rashi, Ralbag, and Metzudot) understand the phrase as referring to the covenant of commandments between God and Israel, not a covenant of marriage. Only Ibn Ezra connects the repeated imagery of straying and adultery to the particular use of covenant: "For women enter with

in family law, and the rise of the marriage as covenant. The third section will examine the dialectic tension of Jewish covenant and contract marriage in the laws of New York State and explain how New York had, in effect, the nation's first covenant marriage act, and why it was a Jewish covenant marriage act. The fourth section will explain how this secular regulation of marriage by both law and contract has impacted Jewish marriage and divorce in practical terms.

## 9.3 Jewish Marriage Laws Part 1: Marriage as Contract in Talmudic Times

### *9.3.1 Introduction*

Marriage and divorce in Jewish law differ from other mainstream legal or religious systems in that entry into marriage and exit from marriage through divorce are private contractual rights rather than public rights. In the Jewish view, one does not need a governmental "license" to marry or divorce. Private marriages are fundamentally proper; a political and even a religious official's regulation of marriage or divorce is the exception rather than the rule.[11]

As a brief aside, the general mechanics of contracts in the Jewish tradition are different as well. While Jewish law requires the clear consent of both parties to a contract, the contract itself is executed by only one party and received by the other.[12] Thus, one who is transferring property drafts a contract, has it signed by witnesses, and finally hands it to the acquirer, thereby effecting the sale. Furthermore, Jewish law contracts encompass more than

men into a covenant of God not to forsake them, and so too men with women, and she forsook him by straying." (Ibn Ezra also offers a second explanation indicating that God is a partner to the marriage, lending His name to the Hebrew words "man" and "wife" – though this seems to imply that the marriage itself is not a covenant to God, but a human bond which God joins).

11 This view stands in sharp contrast to the historical Anglo-American common law view, which treats private contracts to marry or divorce as the classic examples of an illegal and void contract; the Catholic view, which treats marriage and annulment (divorce) as sacraments requiring ecclesiastical cooperation or blessing; or the European view, which has treated marriage and divorce as an area of public law. This should not be misunderstood as denying the sacramental parts of Jewish marriage (of which there are many); the contractual view, however, predominates in the beginning-of-marriage and end-of-marriage rites. This is ably demonstrated by J.D. Bleich, 'A Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement', *Connecticut Law Review*, Vol. 16, No. 2, 1984, p. 201.

12 See Meiselman, 1978, pp. 97-98.

financial transactions; they may effect changes of personal or ritual status.[13] Marriage and divorce, it should be noted, fall into the latter category.[14]

While the Bible recounts a number of stories and incidents concerning marriage,[15] little is known in terms of divorce law other than the Talmudic description of Biblical law and the brief verses that incidentally mention divorce in the course of describing the remarriage of one's divorcee. Deuteronomy states:

> When a man marries a woman and lives with her, and she does not find favor in his eyes, as he finds a sexual blemish on her part, and he gives her a bill of divorce, which he puts in her hand and sends her from the house. She leaves his house and goes to the house of another. However, if the second husband hates her and writes her a bill of divorce, gives it to her and sends her from the house, or the second husband dies, the first husband, who sent her out, cannot remarry her.[16]

According to the Talmudic understanding of Biblical law, the husband has a unilateral right to divorce; the wife has no right to divorce except in cases of hard fault.[17] Because there was a clear biblical concept of divorce no stigma was associated with its use.[18] In addition, marriages could be polygamous, although polyandry was never permitted in the Jewish tradition. Thus, according to Biblical law, exit from marriage differed fundamentally from entry into marriage in that it did not require the consent of both parties. The marriage could end when the husband alone wished to end it. This was accomplished by the husband executing a writ of divorce (in Hebrew called a *get*, or plural *gittin*).

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13 Meiselman, 1978, pp. 96-97.

14 Many other differences exist between Jewish law contracts and those in American law. For example, a contract which violates American law is void under American law, while a (financial) contract which violates Jewish law is enforceable under Jewish law. For more on this topic, see Elon, 1973.

15 See, e.g., Genesis 4:19-23, 25:1-6, 35:22, Exodus 21:11, among many other instances.

16 Deuteronomy 24:1-4. Incidental mention of divorce is also found in Genesis 21:10, Leviticus 21:7, and 22:13.

17 The Talmud records a three-sided dispute as to when divorce was proper on the man's part. The school of Shammai recounted that divorce was only proper in cases of fault. The school of Hillel asserted that divorce was proper for any displeasing conduct. Rabbi Akiva maintained that a man could divorce his wife simply because he wished to marry another and could not support both wives. See BT *Gittin* 90a-b. As is always the rule in Jewish law, the school of Shammai is rejected as incorrect.

18 The exception is the case that proves the rule. There are a small number of cases where marriage is not discretionary, but ethically mandatory; see, e.g., Deuteronomy 22:19. These cases involve either fault or detrimental reliance by the other. In the case of seduction, the Bible mandates that the seducer is under a religious duty to marry the seduced, should she wish to marry him. That marriage does not require the same type of free-will consent to marry, in that the religious and ethical component to the Jewish tradition directs the man to marry this woman; indeed, in certain circumstances he can be punished if he does not marry her. No divorce is permitted in such cases.

As soon as Jewish law was first redacted, the notion of the dower (*ketubah*) was developed for all brides. The dower was payable upon divorce or death of the husband and this became, by rabbinic decree, a precondition to every marriage.[19] Thus, while the right to divorce remained unilateral with the husband, it was now restricted by a clear contractual financial obligation imposed on the husband to compensate his wife if he exercised his right to engage in unilateral divorce absent judicially-declared fault on her part. Thus, the Jewish tradition always had prenuptial contracts as part of its religious tradition.

The wife, as a precondition to entry into the marriage, could insist on a dower higher than the minimum promulgated by the rabbis.[20] Furthermore, the wife or husband could use the *ketubah* as a forum for addressing other matters between them that ought to be regulated by contract, such as whether polygamy would be permitted, or what would be the response to childlessness or other potential issues in the marriage. These *ketubah* documents followed the standard formulation of contracts and openly contemplated divorce.[21] They said little about marriage as sacred or covenantal.

The Talmud clearly establishes the *ketubah* notes, the wife's right to sue for divorce where her husband is at fault. These included not only hard faults such as adultery, but also softer faults such as repugnancy, impotence, un-livability, cruelty, and a host of other such grounds. In such cases, the husband had to divorce his wife (and in most instances, pay his wife the dower, too). The wife's access to fault-based divorce was expanded into a clear and concrete legal right in the Talmud. She even had a right to have children, and her husband's refusal to have children was grounds for divorce by her.[22] Though she could not sue for divorce as a general rule, she could restrict his rights through a *ketubah* provision.[23]

Soon after the close of the Talmudic period around 500 A.D., the rabbis of that time (called *Geonim*) changed or reinterpreted[24] Jewish law to vastly increase the right of a woman to sue for divorce. However, those changes had little impact on the basic nature of marriage as essentially contractual, though the marital bonds were now weaker, and the penalty for the breach of contract was somewhat reduced.[25]

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19 See *Shulhan Aruch Even HaEzer 61:1.*

20 Broyde & Reiss, 2004, pp. 103-105. Nonetheless, in the case of divorce for provable fault by the wife, the obligation to pay the dower was removed.

21 For an excellent survey of the *ketubot* from Talmudic and the immediate post-Talmudic time, see Friedman, 1983 whose second volume contains dozens of actual *ketubot* from before the year 1000 C.E.

22 See BT *Yevamot* 64a, *Shulhan Arukh, Even HaEzer* 154:6-7 and *Arukh HaShulhan, Even HaEzer* 154:52-53.

23 BT *Yevamot* 65a; *but* see view of Rav Ammi.

24 Through a mechanism called *takanta demitivta*, or decree of the academy, whose exact mechanism is unclear. See Breitowitz, 1993, pp. 50-53.

25 A more detailed explanation of this historical event and its mechanism is recounted in Broyde, 2001.

### 9.3.2 Summary of the Talmudic Model of Marriage as Contract

In sum, the contractual model of marriage was basic to Talmudic Jewish law that prevailed until around 1000 c.e. While the Talmud imposed some limitations on the private right to marry (such as castigating one who marries through a sexual act alone, without any public ceremony)[26] and the later Shulhan Arukh imposed other requirements (such as insisting that there be an engagement period),[27] Jewish Talmudic law treated marriage formation as a private contract requiring the consent of both parties,[28] and divorce as the other side of that marriage contract, albeit with certain limitations.

Thus, in the Talmudic period and in the centuries that followed, Jewish law did not treat marriage as an irrevocable covenant. Instead, Jewish law marriage was viewed as a contractual arrangement to be entered into and dissolved based on the agreement of the marrying parties. Marriage was never centrally constructed as monogamous and monogamy was never constructed in its hard form of one husband with one wife for life. Furthermore, divorce was always recognized as permissible; it was free of governmental or religious restrictions. Finally, couples constructed the social, fiscal, and logistical basis of their own marriage as they wished, through contract.

## 9.4 Jewish Marriage Laws Part 2: The Rise of Covenant in Jewish Marriage

Among European Jews, this contractual tradition did not continue much beyond the end of the first millennium of the common era. Through the efforts of the luminous leader of 10th-century European Jewry, Rabbenu Gershom, a decree[29] was enacted that moved Jewish law towards a covenantal model of marriage. Rabbenu Gershom's view was that it was necessary to restrict the rights of the husband and prohibit unilateral no fault divorce by either husband or wife. Divorce was limited to cases of provable fault or mutual consent. In addition, fault was vastly redefined to exclude cases of soft fault such as repugnancy. In

26 Even though such an activity validly marries the couple; see BT *Yevamot* 52a; *Shulhan Arukh, Even HaEzer* 26:4.

27 *Shulhan Arukh, Even HaEzer* 26:4.

28 Marriages entered into without consent, with consent predicated on fraud or duress, or grounded in other classical defects that modern law might find more applicable to commercial agreements are under certain circumstances void in the Jewish tradition. For more on this see Broyde, 2001, Appendix B, entitled 'Errors in the Creation of Jewish Marriages'.

29 The decree of Rabbenu Gershom was enacted under penalty of ban of excommunication (*herem*). The collective decrees of Rabbenu Gershom are thus known as *Herem deRabbenu Gershom*. See *Herem deRabbenu Gershom, Encyclopedia Talmudit* (Yad Harav Herzog, 1996) Vol. 17. p. 378.

only a few cases could one spouse be actually forced to divorce the other.[30] Equally significant, these decrees prohibited polygamy, thus placing considerable pressure on the man and woman in a troubled marriage to stay married. Since, absent fault, he could not divorce her without her consent, and she could not seek divorce without his consent, unless divorce was in the best interest of both of them (an unlikely scenario), neither would be able to divorce.[31] Divorce thus became exceedingly rare and possible only in cases of dire fault.

Once the refinements of Rabbenu Gershom were implemented, the basis for Jewish marriage changed. In Talmudic and immediately post Talmudic times, the parties negotiated the amount the husband would have to pay the wife if he divorced her against her will or if he died. She could not prevent the husband from divorcing her, except by setting the payment level high enough that the husband was deterred from divorce by dint of its cost. All this changed in light of the decrees of Rabbenu Gershom, which simply prohibited that which the Talmudic sages had only sought to discourage. Together, the decrees severely restricted the likelihood of divorce and essentially vacated the economic provisions of the *ketubah*. As a result, though the original mechanism stayed in place, marriage in effect became a covenant between the parties, and not a contract.

Rabbenu Gershom's ban against divorcing a woman without her consent or without a showing of hard fault[32] called into question the value of the marriage contract itself. The Talmudic rabbis instituted the *ketubah* payments to deter a husband from rashly divorcing a wife. But now, since the husband could not divorce his wife without her consent, there seemed to be no further need for the *ketubah*.[33] As the leading codifier of European Jewry, Rabbi Moses Isserles (Rama), wrote at the beginning of his discussion of the laws of *ketubot*:

> See *Shulhan Arukh Even HaEzer* 177:3[34] where it states that in a situation where one only may divorce with the consent of the woman, one does not need a

30 This insight is generally ascribed to the 11th century Tosafist Rabbenu Tam in his view of the repugnancy claim (Heb.: *mais alay*). In fact, it flows logically from the view of Rabbenu Gershom, who not only had to prohibit polygamy in order to end coerced divorce, but even divorce for soft fault.

31 Absent the prohibition on polygamy, the decree restricting the right to divorce would not work, as the husband who could not divorce, would simply remarry and abandon his first wife. This prevented that conduct.

32 In which case, the value of the *ketubah* need not be paid as a penalty for misconduct imposed on the woman. What exactly is hard fault remains a matter of dispute, but it generally includes adultery, spouse beating, insanity, and frigidity; see *Shulhan Arukh, Even HaEzer* 154.

33 Thus, for example, *Shulhan Arukh* (*Even HaEzer* 177:3) states that "a man who rapes a woman … is obligated to marry her, so long as she … wish[es] to marry him, even if she is crippled or blind, and he is not permitted to divorce her forever, except with her consent, and thus he does not have to write her a *ketubah*." The logic seems clear. Since he cannot divorce her under any circumstances without her consent, the presence or absence of a *ketubah* seems to make no difference to her economic status or marital security. When they want to both get divorced, they will agree on financial terms independent of the *ketubah*, and until then, the *ketubah* sets no payment schedule. Should she insist that she only will consent to be divorced if he gives her $1,000,000 in buffalo nickels, they either reach an agreement or stay married.

34 The case of rape discussed in note 33

> *ketubah*. Thus, nowadays, in our countries, where we do not divorce against the will of the wife because of the ban of Rabbenu Gershom … it is possible to be lenient and not write a *ketubah* at all….[35]

The *ketubah* did remain a fixture of Jewish weddings after the 10th century,[36] but it was transformed from a prenuptial marriage contract (which governed a contractual marriage) to a ritual document whose transfer initiated a covenantal marriage. The *ketubah* held no economic or other value as a contract. Indeed, the contractual model of marriage ended for those Jews, all European Jews, who accepted the refinements of Rabbenu Gershom. Consider the observation of Rabbi Moses Feinstein, the leading American Jewish law authority of the last century, on this matter:

> The value of the *ketubah* is not known to rabbis and decisors of Jewish law, or rabbinical court judges; indeed, we have not examined this matter intensely as for all matters of divorce it has no practical ramifications, since it is impossible for the man to divorce against the will of the woman, [the economics of] divorce are dependent on who desires to be divorced….[37]

Elsewhere Rabbi Feinstein writes:

> One should know that in divorce there is no place for evaluating the *ketubah*, since the ban of Rabbenu Gershom prohibited a man from divorcing his wife without her consent. Thus, divorce is dependent on who wants to give or receive the *get*…. Only infrequently, in farfetched cases, is it relevant to divorce…[38]

The contrast between those Jewish communities that accepted the enactments of Rabbenu Gershom and those that did not can be clearly seen in the juxtaposed comments of the European and Oriental authorities which comprise the classic law code of the Shulhan Arukh in the area of family law. Rabbi Moses Isserles (of Poland) accepts these refinements and values the essence of marriage as a covenant. Rabbi Joseph Karo (of Palestine), who does not incorporate them, portrays a less lofty ideal of marriage. Consider the opening discussion of marriage which states:

35 *Shulhan Arukh, Even HaEzer* 66:3.
36 Broyde & Reiss, 2004, pp. 102 and 117-118.
37 Moses Feinstein, *Iggrot Moshe, Even HaEzer* 4:91 (this *responsum* was written in 1980).
38 Moses Feinstein, *Iggrot Moshe, Even HaEzer* 4:92 (this *responsum* was written in 1982).

> Karo: "Every man must marry a woman in order to reproduce. Anyone who is not having children is as if they are killers, reducers of the place of people on this earth, and causing God to leave the Jewish people."
> Isserles: "Anyone who is without a wife lives without blessing and without Torah and is not called a person. Once one marries a woman, all of one's sins are forgiven, as it states, One who finds a wife finds goodness, and obtains the favor of God;" Proverbs 18:22.[39]

Rabbi Karo subscribes to a view that marriage, though mandatory, is but a necessary pre-condition to the fulfilment of the Jewish law obligation to have children. The marriage is a means to an end and governed by mutually agreeable contractual provisions. Rabbi Isserles, by contrast, sees the value of taking a wife in and of itself. One who marries moves beyond a state of incompleteness to the goodness inherent to finding one's life mate. It is the union of marriage itself that "obtains the favour of God". This is a marriage of covenantal nature.

The covenantal model of marriage set out by Rabbi Isserles, however, suffers from a grave defect. It eliminates the clear rules that are the foundation of Jewish divorce law. In the Talmudic period and beyond, Jewish divorce law was contractual: Women and men protected themselves from the consequences of divorce by contractually agreeing to the process and costs of divorce. Although that approach had failings, it at least led to predicable results that the parties had negotiated in their *ketubah*. After Rabbenu Gershom's decrees, Jewish divorce law lacked the basic element of a rules-based legal system, namely, clear rules to follow. Except in cases of fault (where a Jewish law court could order a divorce) all Jewish divorces became negotiated exercises between a husband and a wife. Jewish decisors could not force a divorce, nor could they direct its financial arrangements. At best, Jewish law courts could enact a settlement based on the principles of equitable authority, conferred or vested in them by the principalities and, later, nation-states. These resolutions were not at all based on any provisions of the *ketubah*, but on the product of the later negotiation between the estranged parties. Divorce law governed by contract ceased to exist except in cases of fault; rather, divorces became negotiation exercises that could only be resolved by consent.

This covenantal understanding of marriage and divorce has proved difficult to maintain. It was workable in pre-modern Europe only because divorce was not common and was limited, given the social and economic reality of that time and place, to cases of hard fault.[40] Moreover, in these communities, Jewish law courts had the authority to provide equitable

39 *Shulhan Arukh, Even HaEzer* 1:1.

40 For a detailed discussion of the problems posed in pre-emancipation Russia by this construct of Jewish law, see Freeze, 1997, who notes that Jewish divorce was more common than Orthodox Christian divorce but still relatively uncommon.

relief in cases where the parties appearing before the court desired to divorce, but could not agree on the terms. The modern American Jewish experience, with divorce becoming increasingly commonplace, while religious courts are not legally empowered to offer equitable resolutions enforceable by the state, has brought the viciousness of the *ketubah* contract to the forefront, and raised very serious issues about the continued functioning of Jewish law in the United States. Three basic solutions have been advanced, all of which involve the innovative use of secular law to enforce Jewish law, and they form the subject of the next section.

## 9.5 Jewish Marriage Contracts and American Law

The use of the secular legal system to produce Jewish law solutions is unique and represents a noteworthy break from the Jewish tradition, which had a deep resistance to allowing a secular legal authority into the details of Jewish law.[41] Such innovations were perceived by many to be necessary, however, because in America, Jewish law now confronted a central challenge to its vision of family law. Until the massive migration to the United States between 1880 and 1920, even as there was no substantive Jewish family law that could be examined to compel the rabbinical courts except in cases of hard fault, there was clear equitable authority in rabbinical courts to resolve matters of divorce fairly. The laws of nearly all European states recognized the authority of Jewish law courts in many matters to be binding and enforceable. American states, of course, did not offer similar recognition to Jewish law, and the coercive jurisdiction of the rabbinical courts, a fixture of European Jewish communal life upon which equitable relief found its authority, disappeared. American rabbinical courts thus ceased to be a significant source of authority in the American Jewish community unless and until the individuals in a particular marriage not only empowered the rabbinical court to resolve their dispute, but also refused to challenge the outcome in a secular court. Under the expansive freedoms of America, the Jewish marriage covenant was in essence unenforceable.

Three distinctly different solutions have been advanced to preserve the centrality of the legal status of Jewish marriage within the Jewish tradition.[42] Each of them involved the secular law of the United States in some form. None has worked very well.

41 For more on this, see Broyde, 'Informing on Others for Violating American Law: A Jewish Law View', *Journal of Halacha and Contemporary Society*, Vol. 41, 2002, pp. 5-49.

42 Reform Judaism in America abandoned such and accepted civil marriage and divorce.

### 9.5.1 A. The Enforceability of the Ketubah in American Law

The earliest effort sought to have the provisions of the *ketubah* enforced as a matter of American contract law.[43] This was litigated in a number of cases. For example, in 1974 a widow tried to collect the amount of her husband's *ketubah* and claimed that the *ketubah* superseded her prior waiver of any future claims pursuant to a prenuptial agreement between herself and her husband. (The *ketubah* had been signed after the prenuptial agreement, and thus, if it were a valid contract, would have superseded it.) The New York Supreme Court denied the claim, concluding that even for the observant Orthodox Jew, the *ketubah* has become more a matter of form and ceremony than a legal obligation.[44] The basic claim of the litigant seemed reasonable from a Jewish law view. She had entered into a marriage, which was bound by Jewish law, and the courts ought to enforce it. The New York courts did not agree.

There is not a single case that I know of in which a secular court has enforced the *ketubah* provision mandating payments.[45] The financial obligations described in the *ketubah* in *zuzim* and *zekukim*, which require determinations of Jewish law to ascertain the proper value, are not considered specific enough to be enforceable.[46] Moreover, the absence of an English text (where either the husband or wife is not fluent in Aramaic and Hebrew) and the absence of signatures of the husband and wife would seem to render the *ketubah* a void contract under American law.

Although the New York Court of Appeals, in a subsequent case, enforced a *ketubah* provision in which the parties agreed to arbitrate future marital disputes before a rabbinical court, the court did not revisit the issue of the enforceability of the *ketubah*'s financial obligations.[47] Although it has not been tested, a *ketubah*'s financial provisions might be enforceable in the United States when it is executed in a country (such as Israel) where it is recognized as a binding contract. In such an instance, American conflict-of-law rules might determine that the rules governing the validity of the *ketubah* are found in the location where the wedding was performed, where the *ketubah* is a legally enforceable document.[48]

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43 See, e.g., *Hurwitz v. Hurwitz*, 215 N.Y.S. 184 (NY App. Div. Second, 1926) where the court refers to the *ketubah* by the term "koshuba" and has no context to examine it.

44 *In Re Estate of White*, 356 N.Y.S.2d 208, at 210 (NY Sup. Ct, 1974).

45 While it is true that *in dicta*, an Arizona court suggested that financial obligations described in a *ketubah* could perhaps be enforceable if described with sufficient specificity, *Victor v. Victor*, 866 P.2d at 902 (Arizona, 1993), the practice has never been to seek to conform the text of the *ketubah* to the contract requirements of American law.

46 Whether or not the language of a *ketubah* forms a basis for compelling a *get* according to secular law doctrine is a question beyond the scope of this article.

47 *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (1983).

48 This principle was first noted in *Montefiore v. Guedalla*, 2 Ch 26 Court of Appeals, England (1903), where a British court enforced the *ketubah* of a Sephardic (Moroccan) Jew who had moved to England, since the

However, to the best of this writer's knowledge, no American court has ever enforced the financial component of a *ketubah* written in America in a case of divorce. Thus, court-ordered enforcement of a Jewish marriage contract seems unlikely to be the ultimate source for the Jewish marriage law in the United States.[49]

### 9.5.2 B. Rabbinic Arbitration Agreements to Construct Jewish Marriages

The second method to provide American law support for Jewish marriage has been the use of private arbitration law. While attempts to use prenuptial agreements to enforce the covenantal aspect of Jewish marriage date back over three hundred years and can be found in a standard book of Jewish legal forms from 17th century Europe, the earliest use of arbitration agreements in America to govern Jewish marriages was in 1954 under the direction of Rabbi Saul Lieberman.[50] These arbitration agreements were included in an additional clause to the *ketubah*:

> [W]e the bride and the bridegroom … hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having the authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion and to summon either party at the request of the other in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.[51]

This exact formulation was upheld as a valid arbitration agreement by the New York Court of Appeals in the now famous *Avitzur* case.[52] It is generally understood as a matter of secular law that all binding arbitration agreements undertaken to enforce religious values in a marriage are thus binding on the parties so long as they follow the procedure and forms mandated by New York (or whatever local jurisdiction governs procedure).[53]

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law of Morocco would have enforced this *ketubah*. These same conflict of law principles could well enforce an Israeli *ketubah* in America. It has been followed in many American cases where the parties were married in another jurisdiction; see *Miller v. Miller*, 128 NYS 787 (Sup. Ct., 1911) and *Shilman v. Shilman*, 174 NYS 385 (Sup. Ct., 1918).

49 For more on this, see Broyde & Reiss, 2004, pp. 112-113.

50 Shmuel ben David HaLevi, *Nahlat Shiva* 9:14.

51 *Proceedings of the Rabbinical Assembly of America XVIII* (1954), 67.

52 *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (1983).

53 See, e.g., Kahan, 1984, p. 193; Warmflash, 1984, p. 229.

While the particular form used in the Lieberman clause (as it became known) has been subject to intense criticism,[54] and ultimately not accepted by the vast majority of the Jewish law community, the idea of using binding arbitration agreements to enforce the promises and expectations of Jewish marriage has taken firm hold. Over the last 50 years, many different Jewish law-based arbitration agreements have been composed in an attempt to create a legal construct in which Jewish law has a significant stake in the outcome of a divorce and cannot simply be ignored when one of the parties wishes to ignore it. Indeed, there is an organization with a section of its website devoted to sharing such agreements (and I myself have been involved in such).[55] The most recent version of the binding arbitration agreement widely used in the Orthodox Jewish community incorporates a binding arbitration agreement into a prenuptial agreement, such that one who signs this form of an agreement integrates Jewish law into the divorce process in a legally binding manner according to American law.[56]

Although binding arbitration agreements designed to mandate adherence to Jewish law are quite common in the community that observes Jewish law, such agreements suffer from a number of defects. First, they require forethought. They must be composed, executed, and filed in anticipation of difficulty in the pending marriage. Second, they require, prior to the commencement of the marriage, a clear comprehension of the process of divorce and the various options available to the couple in terms of divorce. Such foresight is rare in newlyweds. Finally, they are subject to litigation that can hinder their effectiveness. Thus, while such agreements are clearly a part of the process of returning the legal covenant of Jewish marriage to its place among couples who seek a genuinely Jewish marriage, they are not the global solution they were thought to be when first developed. Indeed, the fact that the community sought statutory assistance is itself a measure of the failures of the prenuptial agreements.[57]

Indeed, the use of prenuptial arbitration agreements has become ubiquitous in the Orthodox Jewish tradition in America: major rabbinical groups mandate them[58] and they are common. It is worth noting that, while this chapter reproduces the most common of them in its opening section, others have been used and advocated, some of which are

54 See Lamm, 1959, pp. 93-119; Levin & Kramer, 1955.

55 See www.theprenup.org.

56 This document and its attendant instructions are available as a PDF file at http://theprenup.org/pdf/Prenup_Standard.pdf.

57 For more on this issue and the many practical problems with these arbitration agreements, see Breitowitz, 1993.

58 www.rabbis.org/news/article.cfm?id=105863 noting that the Rabbinical Council of America has mandated such for all its members.

reproduced at the end of this chapter and others of which are simply commonly present, including this author's Tripartite agreement, which is used widely.[59]

### 9.5.3 C. The New York State Jewish Divorce Laws

There has been one serious and successful attempt to introduce Jewish law as a foundation in secular marriage law in the United States. Although it is commonly asserted that the first covenant marriage statute was passed by the state of Louisiana in 1996, this writer suspects that the changes to New York's marriage laws designed to accommodate the needs of those Jews who observe Jewish law, which were enacted in 1983, revised in 1984, and modified again in 1992, actually make New York the first state with a covenant marriage act,[60] and the covenant is grounded in the Jewish marriage tradition.

Because of its concentrated population of Jews deeply observant of Jewish law, New York has had a lengthy history of secular courts interacting with the Jewish legal tradition and its conceptions of marriage and divorce. Especially in the last 50 years, Jewish women have appealed to the state of New York to address the pressing problem of recalcitrant husbands who were refusing to participate in Jewish divorces or using the requirements of Jewish divorce to seek advantages in the division of finances in the secular divorce proceedings.

In essence, unlike the situation under the self-contained Jewish law system of only a short time ago, observant Jews in America who wish to be divorced now must effectuate a divorce in a manner that is valid according to both Jewish and secular law.[61] (In the alternative, they can choose not to marry according to secular law and thus not be bothered by secular divorce law at all).[62]

Every system of law that ponders divorce and marriage recognizes that there are two basic models for marriage and divorce law: the public law model and the private law model. In the public law model, marriage and divorce are governed by societal or governmental rules and not exclusively by private contract or right. There is no "right" to marry and no "right" to divorce.[63] Both are governed by the rules promulgated by society. One needs a

59 See the opening material in this paper. See as well www.cwj.org.il/sites/default/files/CWJ%20Prenup%20Eng%20January%202016%20final.pdf.

60 Meaning, a law which provides a religious framework for marriage, especially in restricting its termination. While covenant marriage laws may have secular or religiously neutral motivations for limiting easy access to divorce (such as to protect children's well-being), the use of the term covenant clearly indicates the influence of religious values.

61 One for religious reasons, and one for cultural, social, and secular law reasons.

62 This phenomenon requires more study.

63 While the Supreme Court has declared that freedom to marry is one of the vital personal rights essential to the orderly pursuit of happiness by all free [persons] [*Loving v. Virginia*, 388 U.S. 1, 12 (1967)], it has never asserted a right to divorce as a fundamental right. The Supreme Court has additionally never found a Constitutional right to remarry. If they had done this, a right to divorce could be inferred. In *Zablocki v.*

license to be married and one must seek legal permission (typically through the court system in America) to be divorced. If society were to decide to prohibit all divorce, divorce would cease to be legal.[64] Indeed, there were vast periods of time when divorce essentially never happened in the Western legal world.[65] The American legal tradition, in the laws of the various states, including New York, exemplifies the public law model.

In the private law model, marriage and divorce are fundamentally private activities. Couples marry by choosing to be married and divorce by deciding to be divorced; no government role is needed. Law is employed only to regulate the process to the extent that there is a dispute between the parties, or to adjudicate whether the proper procedure was followed. Government is not a necessary party in either a marriage or divorce.

Jewish law, in its basic outline and contours, adheres to the private law model for both marriage and divorce, and it recognizes that divorce in its essential form requires private conduct and not court supervision. Thus, private marriages and private divorces are valid in the Jewish tradition, so long as the requisite number of witnesses (two) is present.[66] Indeed, the Jewish tradition does not mandate the participation of a rabbi in any manner in either the marriage or divorce rite (although the custom always has been to do so).[67]

New York has pondered the plight of those Jews who consider themselves bound by both legal systems: What are they to do, and how should divorce law be constructed so that the process of leaping through the hoops of both Jewish divorce and secular divorce does not become one that abuses those who are weak? The two New York Jewish divorce laws sought to address these questions, and the controversy they have engendered highlights the challenges that the ultimate power of secular divorce law poses to religious marriage

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*Redhail*, 434 U.S. 374 (1978), the Court struck down a statute as unconstitutional where the state could deny a person the right to remarry if he or she had failed to pay child support. This is the closest the Court has come to saying there was a right to remarry.

64 Indeed, for many years, divorce was simply illegal in many Western jurisdictions. Even when there was mutual consent and a desire to be divorced, divorce was not allowed. Some states did not permit divorce at all until the late 1950s, and Ireland did not permit divorce until 1997. (Some of these jurisdictions did permit some form of Jewish divorce ritual; see Reed, 1996, p. 311.)

65 There were only 291 civil divorces in all of England during the 181-year period from 1669 to 1850, an average of 1.6 divorces every year for the whole country, or less than one divorce per one million individuals. See Dowell, 1990, p. 139. The current divorce rate in America is 4,800 per one million individuals, nearly a 5,000-fold increase from the English statistics of 150 years ago. (For statistics for the United States, see *Vital Statistics of the United States*: Marriage and Divorce Table 1-1, at 1-5 and Table 2-1 at 2-5 (1987).)

66 This is different from, for example, the Jewish law approach to Levirate separation (*halitzah*) which the codes clearly state is a court function and cannot be validly done absent a proper Jewish court. Marriage and divorce, on the other hand, do not need a proper court; the role of the rabbi is merely as a resident expert aware of the technical law. This is, indeed reflected in the common Hebrew terms used. One who performs a marriage is referred to as the *mesader kiddushin*, merely the "arranger of the marriage", and one who performs a divorce as the *mesader gittin*, "arranger of the divorce", as a rabbi is not really needed. The participants in a levirate separation (*halitzah*) are, in contrast, called judges (*dayanim*).

67 Indeed, as is demonstrated in Bleich, 1984, p. 201 the term "rite" is a misnomer; "contract" would be more accurate.

and divorce.[68] The purpose of the 1983 statute was not, however, to compel the secular vision of marriage and divorce on the Jewish community, but rather to bend the model of divorce employed by the state of New York to the needs of those Jews who have an alternative model grounded in the Jewish marriage covenant.

The first New York law[69] that addresses Jewish marriages, entitled "Removal of Barriers to Remarriage", makes this clear. A close and detailed read of the statute is important, although many aspects of the statute are quite cryptic, and some have claimed that this is because the statute wanted to make no mention of its clear purpose, let it be struck down on church state grounds.[70] The statute states in part:

> 1. This section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in subdivision one of section eleven of this chapter.

This section limits this law to clergy marriages, as opposed to secular marriages performed by a judge or mayor. The reason for this is obvious: Jewish law-based marriages require clergy solemnization.

> 2 Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, 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.
>
> 3 No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

68 See Nadel, 1998, pp. 55-100; Scott, 1996, p. 1117.

69 See McKinney's Consolidated Laws of New York Annotated Domestic Relations Law (Refs & Annos) § 253.

70 Broyde, 1995, pp. 3-14; this article was followed by Malinowitz & Broyde, 1997, pp. 23-41 and concludes with Bleich, 1997, pp. 99-100; Gardner & Broyde, 1998, pp. 91-97.

Although these sections are linguistically cryptic, the intent and purpose of this section is to require that a husband give and a wife receive a Jewish divorce prior to the granting of a civil divorce.[71] The words "solely within his or her power" were put in so as to make it clear that this was not a reference to the annulment process used in the Catholic rite, which is made clearer in the next sections, too. Why do this? The answer is that men (and some women) were marrying in the Jewish tradition, but when it came time for ending their Jewish marriages, they were refusing to do so, and seeking to be divorced only according to secular law, thus leaving their wives forever chained to the dead marriage as a matter of Jewish law.[72] The solution to that problem is simple: prevent such people from having access to the secular divorce process.

The statute continues with its most crucial section; section six defines the barriers to remarriage that the state of New York cares to regulate.

> 6 As used in the sworn statements prescribed by this section "barrier to remarriage" includes, 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 minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act…

This section makes it clear that the barrier to remarriage is a reference to a religious principle that derived from the process of solemnization in a religious marriage. The further text of section six makes it clear that this is not a reference to a Catholic annulment process.[73] Furthermore, should there be any dispute between the parties to this divorce about

71 *Golding v. Golding*, 581 N.Y.S.2d 4, 176 A.D.2d 20 (N.Y.A.D. 1 Dept. 18 February 1992); *Perl v. Perl*, 512 N.Y.S.2d 372, 126 A.D.2d 91 (N.Y.A.D. 1 Dept. 3 March 1987).

72 Sections four and five of the statute deal exclusively with form and timing of the affidavits that need to be filed.

> 4 In any action for divorce based on subdivisions five and six of section one hundred seventy of this chapter in which the defendant enters a general appearance and does not contest the requested relief, no final judgment of annulment or divorce shall be entered unless both parties shall have filed and served sworn statements: (i) that he or she has, to the best of his or her knowledge, taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce; or (ii) that the other party has waived in writing the requirements of this subdivision.
>
> 5 The writing attesting to any waiver of the requirements of subdivision two, three or four of this section shall be filed with the court prior to the entry of a final judgment of annulment or divorce.

73 Indeed, other sections of this statute make it clear that this section does not apply to the Catholic annulment process. For example, the statute states:

> 6 … All steps solely within his or her power shall not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination.

what are the substantive requirements of divorce in any given faith, the statute denies to the court the ability to determine the substantive rules employed by the faith, but instead directs that:

> 7 No final judgment of annulment or divorce shall be entered, notwithstanding the filing of the plaintiff's sworn statement prescribed by this section, if the clergyman or minister who has solemnized the marriage certifies, in a sworn statement, that he or she has solemnized the marriage and that, to his or her knowledge, the plaintiff has failed to take all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce, provided that the said clergyman or minister is alive and available and competent to testify at the time when final judgment would be entered.[74]

To put this in plain English (something the statute does not seek to do), as a full millet marriage system would be fraught with constitutional challenges[75] if one marries in a Jewish ceremony in the state of New York and one seeks a divorce in the state of New York without providing a Jewish divorce, the state of New York will not grant such a divorce. New York State is handing the keys to secular divorce to the rabbi who performed the religious ceremony – that is certainly a covenant marriage.

To recast this slightly, one could say the 1983 New York Jewish divorce law[76] recognized that a fundamental wrong was occurring when secular society allowed a person to be civilly divorced (who had been married in a Jewish ceremony) while the spouse of that person considered themselves married until a Jewish divorce was executed. How did the 1983 law fix this problem? It prevented the civil authorities from exercising their authority to civilly divorce a couple who still needed a religious divorce. *The law prevented a splitting of the civil and religious status by precluding the civil authorities from acting absent the religious authorities.*[77] This law harmonizes civil law with Jewish law, in that Jewish law maintains that the couple is married until a *get* is issued, and New York commits itself to not issuing a civil divorce in such cases until a *get* is issued. It contains no incentive for a person

74 Section eight imposes a penalty for perjury with regard to such affidavits and section nine is a conclusionary statement with regard to certain first amendment issues.

> 8 Any person who knowingly submits a false sworn statement under this section shall be guilty of making an apparently sworn false statement in the first degree and shall be punished in accordance with section 210.40 of the penal law.
>
> 9 Nothing in this section shall be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue. The truth of any statement submitted pursuant to this section shall not be the subject of any judicial inquiry, except as provided in subdivision eight of this section.

75 See, e.g., Leiberman, 1983, p. 219.

76 N.Y. Dom. Rel. Law § 253 (McKinney, 1986).

77 N.Y. Dom. Rel. Law § 236 (b) (McKinney, 1992).

actually to issue a Jewish divorce unless that person is genuinely desirous of being divorced. To put this in a different way, the divorce process employed by the state of New York is different for those married in the Jewish faith than anyone else. *Fundamentally, that is a covenant marriage.*

Although the 1983 New York Jewish divorce law addressed certain cases, it had one obvious limitation. It was written so as to be applicable only in cases where the plaintiff is seeking the secular divorce and not providing a religious divorce. *Only the plaintiff is obligated to remove barriers to remarriage, and a defending spouse who does not desire to comply with Jewish law, need not.* To remedy this, the 1992 New York Jewish divorce law took a completely different approach. While the problem it confronted remained the same, the solution advanced by the 1992 law was different. It allowed the secular divorce law to impose penalties on the recalcitrant spouse in order to encourage participation in the religious divorce by changing the division of the assets in equitable distribution in cases in which a Jewish divorce has been withheld.[78] The law sought to prevent the splitting of the religious and civil marital statuses by encouraging the issuance of the religious divorce when a civil divorce was to be granted. This law functions in the opposite manner of the 1983 law. It harmonizes Jewish law with New York law by committing state authorities to a policy of encouraging a Jewish divorce to be issued. That, too, is a form of covenant marriage, albeit one with a totally different focus on the relationship between Jewish and secular law.

The technicalities of both these laws are beyond the scope of this article. They have generated a considerable amount of scholarly debate, both within the Jewish tradition[79] and within the secular law community,[80] precisely because they were an attempt to impose a vision of religious marriage on a subset of the population through the vehicle of secular law. The 1983 New York State Get Law did so by restricting access to secular divorce when the rules of religious divorce were not followed. The 1992 statute did so by compelling religious divorce. Both approaches, however, are grounded in the centrality of Jewish marriage to its adherents and the simultaneous desire to respect access to civil divorce.

One could therefore claim that New York State had not only the first covenant marriage law, but had the first two such laws, the 1983 Jewish divorce law and the 1992 Jewish divorce law, each with a different approach to Jewish marriage. Furthermore, a prenuptial agreement both supplements and supplants the statutory grant of rights, in that if the rabbi

78 Domestic Relations Law § 236 was modified to add: "In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in para. (d) of this subdivision," thus allowing a judge to change the equitable distribution in a situation where the husband or wife will not give or receive a Jewish divorce. Section 253(6) limits "barriers to remarriage" to situations where a *get* is withheld.

79 For an examination of the issues raised in the Jewish tradition, see the many articles cited in *supra* note 70.

80 See, e.g., Greenberg-Kobrin, 1999, p. 359; Greenawalt, 1998, p. 781; Nadel, 1993, p. 55; Nadel, 1995, p. 131; Scott, 1996; Zornberg, 1995, p. 703.

who performed the marriage defers to the prenup, so must the court. Granted, New York does not offer a covenant marriage option to all, since, practically speaking, Jewish clergy will not allow non-Jews to opt into Jewish marriage. But in terms of reframing or superimposing secular and religious definitions of marriage and divorce and offering a state-sanctioned model of religious union and dissolution, these statutes pave the way and the prenups reinforce this.[81]

The recent case of *Masri v. Masri*,[82] in which the trial court judge declared unconstitutional parts of New York's Get Law II that could have financially penalized a husband who withheld a Jewish divorce (*get*) from his Orthodox Jewish wife, is worthy of discussion. This is the first and only case to declare any part of New York's regulation of Jewish marriage to be constitutionally problematic.

The trial court focused on simony, something no other court had done. The Court stated:

> The withholding of a Get to extort financial concessions from one's spouse constitutes simony, i.e., an exchange of supernatural things for temporal advantage. When the husband himself so unambiguously subordinates his religion to purely secular ends, he may properly be said to have forfeited the protective mantle of the First Amendment.

But, the Court said, the husband in this case is different here he is "sincerely" withholding a *get* since the wife refused to go to a rabbinical court:

> Defendant has invoked religious grounds for refusing to cooperate in obtaining a Jewish religious divorce, i.e., that Plaintiff by going to secular court has waived her right to rabbinical arbitration concerning the Get.

This distinction has never been made before and if permitted to stand creates a loophole in the *get* law that functionally destroys the value of the law. The court has drawn a distinction of little value and this writer suspects that the court is wrong in both directions. It is incorrect and unprecedented in American law for the court to claim that religious freedom protections that are generally present are waived when money is at play, and the court is

81 The question of the applicability of this statute to Islamic marriages (a result never contemplated by the New York State Legislature) is a fascinating one and requires further analysis; See Quaisi, 2000/2001, p. 67.

82 *Masri v. Masri,*, 55 Misc 3d at 488 (NY Supreme Court, 2017). In New York, the Supreme Court is the trial court and the Court of Appeals is the highest court of the state.

equally incorrect to claim that the absence of these motives prevents regulation of the husband's conduct.[83]

If the Court is correct here, a new and substantial limitation on both religious freedom and secular law has been created that hampers both religious freedom and governmental regulation of religious abuses. First and foremost, almost any case in which one is withholding a *get*, other than a sincere conversion to another religion, is actually saying that for right price, the *get* will be provided. In this argument, simony is uniquely inapplicable to Jewish religious divorce, since the heart of the argument is about the conditions in which a *get* will be provided.

Second, and more importantly, the claim by the husband in this case that he would gladly provide a *get* if the wife would go to a rabbinical court and obey its decision is simony at its core. Instead of directly asking for money, the husband is asking for a different legal system to apply to his divorce other than the law of the state of New York. He is withholding the *get* to achieve an advantage, or a perceived advantage, that he cannot achieve through negotiations. That is exactly simony.

More importantly, the basic distinction between cases in which money is sought and those in which it is not has never been the lens through which the secular consequences of religious actions are determined to be regulatable under our Constitution. The presence or absence of money is not a distinction important to American religious freedom law for good reason: what allows government to regulate is a secularly important value in this case, that divorced women are functionally free to remarry.

That the government can regulate religious conduct when it has a secular impact and the law is neutral in application is the holding of *Smith v. EEOC*,[84] which is still generally thought of as the law of the land. Even those who think that *Smith* was wrongly decided, or decide these cases based on the *Church of the Lukumi Babalu Aye v. City of Hialeah*[85] standard and argue that such regulation is practically prohibited, have never focused on the question of whether money is or is not present. If New York can regulate the withholding of a *get* due to the secular harm – after all, in fact, the woman will not remarry until a *get* is given – then money is unimportant, since the harm is present. If it cannot regulate, as it interferes with religion unduly, then money is also unimportant.

Until now, both academic critics and supporters of the New York Get Law II have had worthwhile discourse on the appropriate place of secular legislation in the area of Jewish divorce without discussing simony, and that is the right approach. In short, *Masri* introduced a distinction in American religious freedom law that is unfounded and incorrect.

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83 To some extent, this is the exact holding of *Hobby Lobby*. See *Burwell v. Hobby Lobby*, 573 U.S. (2014). But this case is actually simpler, as it addresses core religious matters, rather than an essentially secular and commercial activity.

84 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

85 *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

## 9.6 New York Statutes in Practice: Covenant Marriage in New York

The previous section outlined three basic approaches used by American Jews to create Jewish marriages within a secular state. Upon analysis, only two of the options were found to be viable: prenuptial agreements and the New York State *get* laws. This section will explore what Jewish divorce law looks like in practice when either of these options is employed. While I am not interested in writing a "practice manual" for Jewish divorces, to some extent an exploration of the realities of the system explains much. Indeed, this section is much less academic in tone, and reflects some of my practical experience working in a rabbinical court.

Legal analysts involved in the community of adherents to Jewish law in New York are aware that both the New York State *get* laws and the *Avitzur* appellate decision are vulnerable to constitutional challenge. There have been and continue to be a great deal of communal resources invested in defending these laws and rulings when challenged in the lower courts of the state. Furthermore, there has been more than a small amount of communal pressure within the Orthodox community to prevent a plaintiff husband from presenting a "free exercise" claim to a court. (This claim, which I sense would have considerable legal merit, would be that it violates the husband's free exercise rights by allowing him to be pressured into engaging in a religious act, a Jewish divorce ritual, that he objects to on religious grounds.) Such pressure is applied by implicitly threatening to exclude a person who files such a claim from the Orthodox Jewish community, with attendant religious and social consequences. So far, there has not been a single challenge to the constitutionality of either *get* law, nor a single case since *Avitzur* raising such issues (and it is commonly thought in the legal community that *Avitzur* was an arranged test case).

The reason is itself an important reflection on the nature of the religious Jewish (mostly Orthodox) community in New York. A free exercise challenge to the *get* laws entails a community member married by an Orthodox rabbi maintaining in court that the giving or receiving of a *get* is a violation of their right to practice religion as they see fit, and that New York law is, in essence, coercing them by subtle statutory means into participating in a religious ritual. Although an argument has been put forward to explain why coerced participation in a Jewish divorce ritual might not be a free exercise violation,[86] this argument is hard to accept as correct as a matter of First Amendment jurisprudence. Even if the Jewish legal tradition views the Jewish divorce ritual as civil,[87] there is little doubt that American law views participation in a Jewish divorce rite as an activity that cannot be compelled as a matter of law. This insight hardly needs a footnote. Thus, for example, a man or woman who married under the Orthodox Jewish rite and then subsequently con-

86 Bleich, 1984, p. 201.

87 It is, for example, without blessings or invocation of the deity.

verted to Catholicism would have a substantial claim that the statutes in question violate their free exercise rights. Yet no husband has sought to make such a claim, because doing so would lead to exclusion from the community through formal or informal excommunication, demonstrating the powerful cohesion of the Orthodox community.[88]

In practice, vast segments of the traditional Orthodox community in New York use three mechanisms to ensure (or at least seek to ensure) that traditional Jewish values are predominant during the divorce proceedings.

The first is the use of prenuptial agreements signed by both parties. These agreements set out the basic mechanism the parties wish to use to end their marriage and allow such a determination to be made by the Beth Din of America. The most popular of these agreements is one circulated by the Beth Din of America, the largest rabbinical court in the United States. (The standard text used is appended to this paper, and the reader would be well advised to read it now).[89] Its purpose is three-fold. First, the agreement ensures that a Jewish divorce is given in a timely fashion by assigning a penalty of $150 per day for delay in the delivery of a *get*. Second, the agreement assigns the authority to resolve disputes about rights to a Jewish divorce to a named rabbinical court (usually the Beth Din of America) as a matter of binding arbitration. This forces secular courts to recognize such assignment of jurisdiction as a matter of secular arbitration law, and to compel the husband and wife to appear in front of the rabbinic arbitration panel if necessary. Finally, the agreement gives couples at the time of its drafting the ability to choose to assign all matters of their divorce, financial dissolution and custody in addition to Jewish divorce, to the rabbinical court, if they wish.

In practice, this agreement forces a close and tight interrelationship between the civil and Jewish divorce processes when the couple does not conduct themselves in a manner consistent with the obligations of both Jewish law and secular law. It is not unusual for hotly contested divorces to shuttle back and forth between secular and rabbinical court, seeking rulings from each on various matters in the divorce proceedings. Sometimes rabbinical courts will agree to hear Jewish divorce proceedings upon reference from a judge handling the secular divorce, and sometimes the secular judge will direct that the parties appear in their court only after they have received a letter from the rabbinical court certifying their compliance with the mandates of the rabbinical court consistent with the arbitration agreement. In other cases, rabbinical courts will seek assistance from the secular courts in compelling adherence to arbitration rulings, and in yet other cases, secular court judges will enlist the rabbinical courts to help ensure compliance. The reason is obvious. To couples who sign this type of an agreement, ending the marriage without giving or receiving a Jewish divorce does not accomplish either the wishes of the parties or the real

88 See Broyde, 1998, pp. 35-76.

89 It can also be found at www.bethdin.org.

wishes of the secular government, which is that both parties ought to part ways and not be married. Civil divorce absent a Jewish divorce does not really allow both parties to go on with their lives in the hope of finding another mate. The same is true for a religious divorce without a civil divorce being issued.[90]

Particularly if one allows the named rabbinic arbitration panel, such as the Beth Din of America, to serve in the capacity of a full arbitration panel, the Jewish law court then has considerable civil authority. Even without such, the agreement signed by the parties consenting to a hearing before the Beth Din of America grants the rabbinical court the authority to assign civil penalties of up to $1,050 per week if the parties defy the direction of the rabbinical court. The close relationship between civil and rabbinic courts can sometimes produce complexities. It is not surprising that there are dozens of reported appellate division cases dealing with rabbinic arbitration.[91]

The second mechanism employed by the observant community is the New York State *get* laws. In New York, as we explained above, the statutory regime directly regulates the giving and receiving of a Jewish divorce, though the statutes make no reference to any religion in particular. Family law judges, however, are quite familiar with the *get* laws and their applications and do not hesitate to apply them. Indeed, practicing lawyers inform their clients that when the husband is the plaintiff in a divorce action, the judge will explicitly ask if a *get* has been given and, if so, at what rabbinical court. The husband should expect considerable difficulties, he is told, if at the time of the final civil divorce decree he has not complied with the requirements of the 1983 New York *get* law.

The application of the 1991 *get* law is much more complex. Jewish law has raised grave questions about how to apply the *get* law consistent with the internal Jewish law requirement that a Jewish divorce only be given through the free will of the husband or after an order of compulsion issued by a rabbinical court. The problem is easy to explain, but hard to solve. New York State has a real interest in ensuring that all of its citizens are in fact free to remarry after they receive a civil divorce. (Although it should seem obvious, this secular interest is worth articulating.) New York understands that if a group of its citizens will not, in fact, conduct themselves as if they are divorced unless they are also divorced according to Jewish law, the state becomes legitimately concerned, as the purpose and function of the secular divorce law is now defeated by the absence of a religious rite. Thus, New York wishes to regulate by statute that its Jewish residents receive a *get* if they wish. Jewish law and the Jewish community share that basic concern – they also wish that couples be Jewishly divorced when they are civilly divorced. In particular, they recognize that once

90 For this reason, rabbinical courts all write on their writs of Jewish divorce that the parties are not, in fact, free to remarry (even as a matter of Jewish law) until a civil divorce is issued.

91 Thus, it is not surprising that there are more reported cases in New York that discuss Jewish law than Canon law, even as there are many more Catholics than Jews in New York.

a couple has in fact separated and are no longer living together, it is wise to ensure that a Jewish divorce is issued.

Either secular law or Jewish law alone could easily attempt to resolve this problem, to the dissatisfaction of the other. Rabbinic courts could seek to act autonomously, as they did in pre-modern Europe. Given full freedom, rabbinical courts might compel the giving and receiving of a bill of divorce through the use of physical force. In lesser cases, the courts could impose fines in the form of support payments to the wife in order to entice the husband to give a Jewish divorce. With these two methods of judicial coercion, cases where the husband refused to give a Jewish divorce were exceeding rare. But American law is loath to give religious tribunals such authority.

On the other hand, State legislatures could do away with religious divorce (and perhaps even religious marriage!) entirely. This would, of course, be anathema to the religious community. Legislatures or courts could also choose to compel religious divorce when they saw fit. But Jewish law unswervingly rules that, when Jewish divorce is compelled by a secular court or by private citizens, the act of compulsion *voids* the entire Jewish divorce.

In light of this tension, the reality in New York is an extremely complex and mostly invisible dance between the New York judges who enforce state law and the rabbinic court judges who ensure that the religious divorces are valid as a matter of Jewish law. If the New York state courts were to apply direct coercion without some involvement of a rabbinical court, the rabbinical courts would likely refuse to issue a Jewish divorce in such a case, as it would be deemed coerced as a matter of Jewish law. On the other hand, the rabbinical courts acknowledge that the keys to coercion will never be placed in the hands of the rabbinical courts in the United States. Jewish leaders thus acknowledge that, if the problem of men withholding Jewish divorces from their wives is to be well addressed, it is by the rabbinical courts working hand in hand with the family courts to craft solutions.

## 9.7 Conclusion

The intersection of secular and religious law raises serious concerns about the practical availability of divorce for religiously observant Jews living in many modern societies that maintain strict separations of church and state. While the American rejection of religious establishments is in part designed to protect fundamental human rights to freedom of conscience, in the context of Jewish marriage and divorce it also has the unintended consequence of restricting some people's ability to exercise what has come to be seen as a basic human right to enter into and leave marital relationships on a private contractual basis.

The problem is simple: Jewish law demands that divorces be willingly executed by both spouses, and therefore generally rejects the common public law model of judicially ordered dissolutions of marriage. In pre-modern times, Jewish communities had legal and judicial

powers delegated to them by the state and rabbinic courts were able to use various coercive methods permitted by Jewish law to convince recalcitrant spouses to grant a divorce. Jewish law does not validate civil divorces granted by non-rabbinic courts, however, and refuses to recognize even a divorce overseen by a rabbinic court if a divorcing spouse was subject to pressures exerted by non-rabbinic authorities. Today, in the United States and in many other jurisdictions, the state has a monopoly on the use of judicial force, and rabbinic courts can no longer exercise the persuasive function they once did in matters of Jewish matrimonial law. As a result, while traditionally observant Jews can obtain civil divorces from state authorities like any other citizen, Jews seeking to be religiously free to remarry are sometimes unable to do so in cases where their spouse refuses to grant a religious divorce. Within the framework of their deep religious commitments, commitments that the state has agreed to respect and even enshrine through protections for religious freedom, such individuals are functionally trapped in non-functioning marriages.

This chapter has reviewed some of the major legislative initiatives that have been adopted in the United States to attempt to address this problem for traditionally observant Jewish citizens. The human rights challenge here is unique, however. While most often restrictions on basic human rights are the result of government action, and can therefore be remedied by the adoption of alternative laws and policies by government, the problem of access to Jewish divorce does not lend itself to legislative or judicial solutions. The particulars of Jewish divorce law actually make divorces secured by state-sanctioned pressure less religiously valid, and thus compound rather than ameliorate the basic problem.

The case of the right to secure a religious divorce thus presents an interesting example of how some human rights issues cannot be solved by government action through law or policy making, and can indeed be exacerbated by such efforts. Instead, as this article has explained, some of the most promising attempts to address the challenge of religious Jewish divorce have been produced in the private sphere, through the development and use of various prenuptial agreements that utilize neutral state law doctrines upholding the validity of private arbitration to help secure divorces from recalcitrant spouses through religiously acceptable means.

The prenuptial solution has proven to not be a complete panacea for the problem of Jewish divorce in modern secular countries. The extent to which this approach has proven helpful, however, highlights important lessons for how governments looking to facilitate and protect human rights should think broadly and creatively about such problems. First, not all human rights problems result from direct government action; some, like the challenge of Jewish religious divorce, are the product of more subtle interactions between some citizens' religious commitments and neutral features of state law that produce human rights dilemmas by accident and circumstance rather than by design. Second, not all human rights problems can be solved by direct legal or political interventions. Especially with respect to these kinds of more subtle relationships between secular and religious norms,

legal solutions taken without a thorough understanding of the religious concerns involved can sometimes make the problems worse. Third, at times, good solutions to human rights problems can be found through private arrangements. In such cases, government and law can best promote human rights by providing the legal backdrop necessary to make such private solutions work in practice, as exemplified by how prenuptial agreement approaches to dealing with Jewish divorce rely on the existence of a robust legal endorsement and enforcement of private arbitration agreements and contractual rights.

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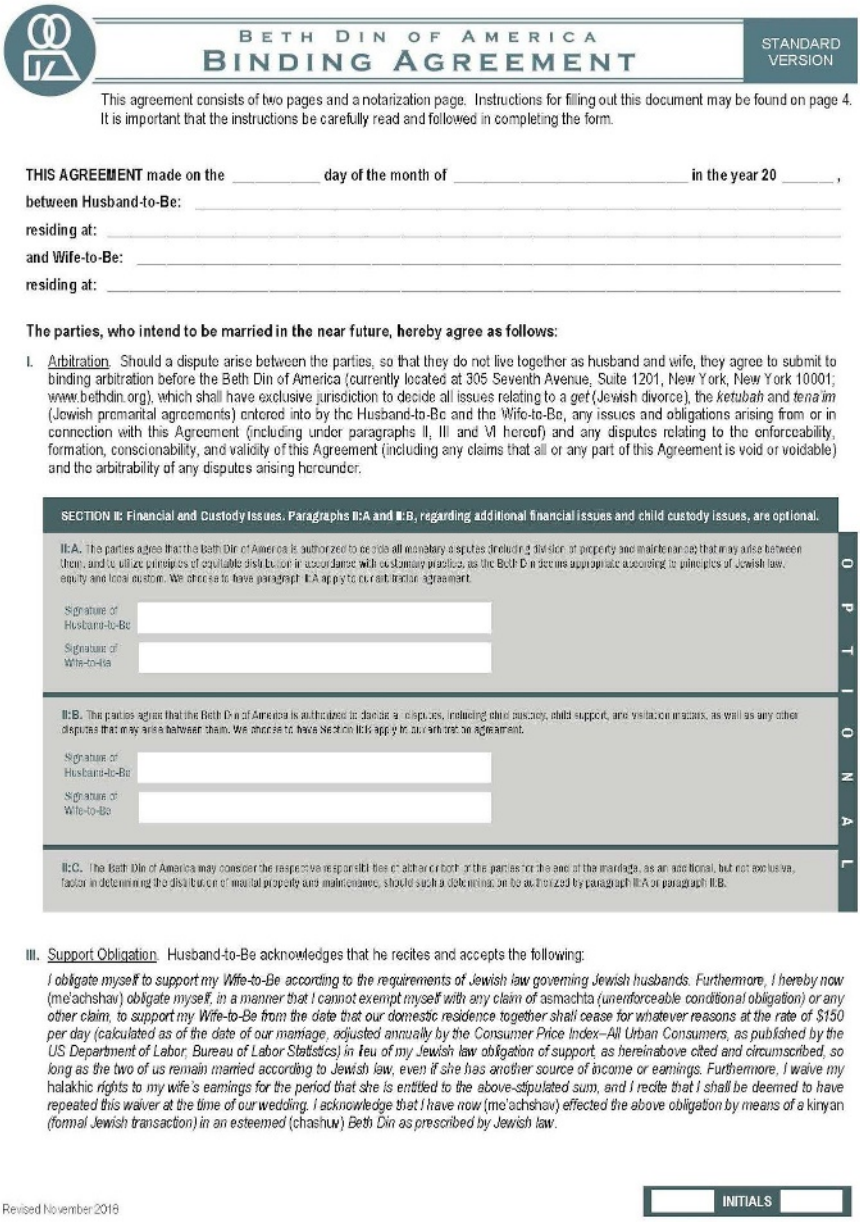
## Appendix 1



BETH DIN OF AMERICA
**BINDING AGREEMENT**
STANDARD VERSION

This agreement consists of two pages and a notarization page. Instructions for filling out this document may be found on page 4. It is important that the instructions be carefully read and followed in completing the form.

**THIS AGREEMENT** made on the _____ day of the month of _____ in the year 20 _____,
**between Husband-to-Be:** _____
**residing at:** _____
**and Wife-to-Be:** _____
**residing at:** _____

**The parties, who intend to be married in the near future, hereby agree as follows:**

I. Arbitration. Should a dispute arise between the parties, so that they do not live together as husband and wife, they agree to submit to binding arbitration before the Beth Din of America (currently located at 305 Seventh Avenue, Suite 1201, New York, New York 10001; www.bethdin.org), which shall have exclusive jurisdiction to decide all issues relating to a *get* (Jewish divorce), the *ketubah* and *tena'im* (Jewish premarital agreements) entered into by the Husband-to-Be and the Wife-to-Be, any issues and obligations arising from or in connection with this Agreement (including under paragraphs II, III and VI hereof) and any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement (including any claims that all or any part of this Agreement is void or voidable) and the arbitrability of any disputes arising hereunder.

**SECTION II: Financial and Custody Issues. Paragraphs II:A and II:B, regarding additional financial issues and child custody issues, are optional.**

OPTIONAL

**II:A.** The parties agree that the Beth Din of America is authorized to decide all monetary disputes (including division of property and maintenance) that may arise between them, and to utilize principles of equitable distribution in accordance with customary practice, as the Beth Din deems appropriate according to principles of Jewish law, equity and local custom. We choose to have paragraph II:A apply to our arbitration agreement.

Signature of Husband-to-Be _____
Signature of Wife-to-Be _____

**II:B.** The parties agree that the Beth Din of America is authorized to decide all disputes, including child custody, child support, and visitation matters, as well as any other disputes that may arise between them. We choose to have Section II:B apply to our arbitration agreement.

Signature of Husband-to-Be _____
Signature of Wife-to-Be _____

**II:C.** The Beth Din of America may consider the respective responsibilities of either or both of the parties for the end of the marriage, as an additional, but not exclusive, factor in determining the distribution of marital property and maintenance, should such a determination be authorized by paragraph II:A or paragraph II:B.

III. Support Obligation. Husband-to-Be acknowledges that he recites and accepts the following:

*I obligate myself to support my Wife-to-Be according to the requirements of Jewish law governing Jewish husbands. Furthermore, I hereby now* (me'achshav) *obligate myself, in a manner that I cannot exempt myself with any claim of* asmachta *(unenforceable conditional obligation) or any other claim, to support my Wife-to-Be from the date that our domestic residence together shall cease for whatever reasons at the rate of $150 per day (calculated as of the date of our marriage, adjusted annually by the Consumer Price Index–All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics) in lieu of my Jewish law obligation of support, as hereinabove cited and circumscribed, so long as the two of us remain married according to Jewish law, even if she has another source of income or earnings. Furthermore, I waive my* halakhic *rights to my wife's earnings for the period that she is entitled to the above-stipulated sum, and I recite that I shall be deemed to have repeated this waiver at the time of our wedding. I acknowledge that I have now* (me'achshav) *effected the above obligation by means of a* kinyan *(formal Jewish transaction) in an esteemed* (chashuv) *Beth Din as prescribed by Jewish law.*

Revised November 2018

INITIALS _____ _____

BETH DIN OF AMERICA
**BINDING AGREEMENT**

STANDARD VERSION

However, this support obligation shall terminate if, despite Husband-to-Be's compliance with the terms of this agreement and the decision or recommendation of the Beth Din of America, Wife-to-Be refuses to appear upon due notice before the Beth Din of America or in the event that Wife-to-Be fails to abide by the decision or recommendation of the Beth Din of America. Furthermore, Wife-to-Be waives her right to collect any portion of this support obligation attributable to the period preceding the date of her reasonable attempt to provide written notification to Husband-to-Be that she intends to collect the above sum. Said written notification must include Wife-to-Be's notarized signature. This support obligation under Jewish law is independent of any civil or state law obligation for spousal support, or any civil or state law imposed order for spousal support, and shall be determined only by the Beth Din of America.

IV. Opportunity for Consultation. Each of the parties acknowledges that he or she has been given the opportunity prior to signing this Agreement to consult with his or her own rabbinic advisor and legal advisor. Each of the parties further acknowledges that he or she has been fully informed of the terms and basic effect of this Agreement as well as the rights and obligations he or she may be giving up by signing this Agreement. Each of the parties expressly waives, in connection with this Agreement, (i) any right to consult with his or her legal counsel to the extent they have not done so and (ii) any right to disclosure of the property or financial obligations of the other party beyond any disclosures that have been provided. The obligations and conditions contained herein are executed according to all legal and halakhic requirements.

V. Governing Law. The decision of the Beth Din of America shall be made in accordance with Jewish law *(halakha)* or Beth Din ordered settlement in which the relative equities of the parties' claims are considered in accordance with principles of Jewish law *(peshara krova le-din)*, except as specifically provided otherwise in this Agreement.

VI. Rules, Default Judgment and Costs. The parties agree to appear in person before the Beth Din of America, at a location mutually convenient to the arbitrators and the parties, at the demand of the other party, to cooperate with the adjudication of the Beth Din of America in every way and manner, and to abide by the published Rules and Procedures of the Beth Din of America (available at www.bethdin.org), which are in effect at the time of the arbitration. If either party fails to appear before the Beth Din of America upon reasonable notice, the Beth Din of America may issue its decision despite the defaulting party's failure to appear, and may impose costs and other penalties as legally permitted. Both parties obligate themselves to pay for the services of the Beth Din of America. Failure of either party to perform his or her obligations under this Agreement shall make that party liable for all costs, including reasonable attorney's fees, incurred by one side in order to obtain the other party's performance of the terms of this Agreement.

VII. Jurisdiction; Enforceability. By execution and delivery of this Agreement, each party consents, for itself and in respect of its property, to the exclusive jurisdiction of the Beth Din of America with respect to the issues set forth in paragraph I. Each of the parties agrees that he or she will not commence any action or proceeding relating to such issues in any court, rabbinical court or arbitration forum other than the Beth Din of America. This Agreement constitutes a fully enforceable arbitration agreement, and any decision issued pursuant to this Agreement shall be fully enforceable in secular court. Should any provision of this Agreement be deemed unenforceable, all other provisions shall continue to be enforceable to the maximum extent permitted by applicable law. As a matter of Jewish law, the parties agree that to effectuate this Agreement they accept now (through the Jewish law mechanism of *kim li*) whatever minority views determined by the Beth Din of America are needed to effectuate the obligations, procedures and jurisdictional mandates contained in this Agreement.

VIII. Counterparts. This Agreement may be signed in one or more duplicates, each one of which shall be considered an original.

**In witness of all the above, the Husband-to-Be and Wife-to-Be have entered into this Agreement.**

| | | | |
|---|---|---|---|
| Signature of Husband-to-Be | | Signature of Wife-to-Be | |
| Signature of Witness | | Signature of Witness | |
| Signature of Witness | | Signature of Witness | |

***Special notes for parties notarizing the agreement online:***

***(i) If you do not have witnesses available, the agreement is binding even if signed without witnesses.***

***(ii) The agreement may be signed separately by Husband-to-Be and Wife-to-Be. Simply sign on separate counterpart documents and then attach the separate signature and notary pages together.***


## Notarization Forms

**Acknowledgment for Husband-to-Be**

State of _____ County of _____
On the ___ day of _____ in the year of _____ before me, the undersigned personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to within this agreement and acknowledged to me that he executed the agreement.

*Notary Public*

**Acknowledgment for Wife-to-Be**

State of _____ County of _____
On the ___ day of _____ in the year of _____ before me, the undersigned personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to within this agreement and acknowledged to me that she executed the agreement.

*Notary Public*

**In New York State, the officiating rabbi is qualified to notarize a prenuptial agreement, and he may use the following form. For other states, please check local rules and regulations.**

State of _____ County of _____
On the ___ day of _____ in the year of _____ before me, the undersigned, a person authorized to solemnize a marriage pursuant to Domestic Relations Law § 11(1), personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to within this agreement and acknowledged to me that he executed the same in his capacity, and that by his signature on the arbitration agreement, the individual executed the agreement.

*Officiating Clergy/Rabbi (print and sign name)*

*Address*

State of _____ County of _____
On the ___ day of _____ in the year of _____ before me, the undersigned, a person authorized to solemnize a marriage pursuant to Domestic Relations Law § 11(1), personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to within this agreement and acknowledged to me that she executed the same in her capacity, and that by her signature on the arbitration agreement, the individual executed the agreement.

*Officiating Clergy/Rabbi (print and sign name)*

*Address*

# Beth Din of America
# Binding Agreement

STANDARD VERSION

## INSTRUCTIONS

INTRODUCTION. Mazal tov on your upcoming marriage! This Agreement is intended to facilitate the timely and proper resolution of certain marital disputes. When a couple about to be married signs this Agreement they thereby express their concern for each other's happiness, as well as their concern for all couples marrying in accordance with Jewish law. To enter into the agreement, follow these five steps:

❶ Read the agreement. A detailed guide explaining the provisions of the agreement is also available at www.theprenup.org, and you can also discuss the agreement with an attorney. You can also call or e-mail the Beth Din of America (212-807-9042; info@bethdin.org) with any questions.

❷ Sign the agreement in front of witnesses and a notary. Put your initials on the bottom of page 1, and sign the agreement on the bottom of page 2. (Section II contains some optional provisions that you do not have to sign, but if you want these provisions to be effective you should sign the appropriate provisions.)

❸ Have the witnesses sign in the spaces provided beneath your signatures. The same people can witness each signature and sign twice, once under the signature of the Husband-to-Be, and once under the signature of the Wife-to-Be, or four witnesses can be used, each signing once.

❹ Have the notary complete the notary block on page 3, sign it at the bottom, and affix his or her notary stamp. Notaries can usually be found in banks, law offices, etc. In New York State, the officiating rabbi can notarize the agreement, even if he is not a notary. In New Jersey, any attorney who is licensed to practice law in New Jersey can serve as the notary.

❺ Husband-to-Be and Wife-to-Be should keep his or her own copy of this Agreement in a safe place. In addition, scan the signed agreement, or take a picture of it, and e-mail it to prenup@bethdin.org or fax it to (212) 807-9183. The Beth Din of America will retain a copy of your signed agreement in its confidential files in case it is ever needed.

These *Tenaim Achronim* (premarital agreement) should be discussed, and then signed, as far ahead of the wedding day itself as is practically feasible. While it is preferable that the *mesader kiddushin* (i.e., supervising rabbi at the wedding) take responsibility for explaining the background for, and then implementing the agreement itself, any other knowledgeable rabbi or individual, or the couple themselves, may coordinate the process. Advice of proper legal counsel on both sides is certainly encouraged.

BINDING CIVIL COURT EFFECT. When properly executed, this Agreement is enforceable as a binding arbitration agreement in the courts of the United States of America, as well as pursuant to Jewish law (*halakha*). The supervising rabbi should explain this to the parties. This Agreement should only be used when the parties expect to reside in the United States upon marriage. Parties should contact the Beth Din of America to inquire about appropriate forms when they will be residing outside the United States. For those who will reside in the United States, the Beth Din will appoint the proper *dayanim* (arbitrators) to hear and resolve matters throughout the country.

CHOICE OF OPTIONS. The document has been designed to cover a range of decisions which the Husband-to-Be and Wife-to-Be may make regarding the scope of matters to be submitted for determination to the Beth Din. These alternatives are set forth in Section II. The *Tenaim Achronim* will be valid whether or not any of the alternatives are chosen. If none of such alternatives are chosen, the Beth Din will decide matters relating to the *get*, as well as any issues arising from this Agreement or the *ketubah* or the *tenaim*. Parties who wish greater certainty as to possible future divisions of property (for example, persons with substantial assets at the time of marriage or persons interested in taking advantage of the particular decisions of a state where they will be married) should sign a standard prenuptial agreement with the advice of counsel and incorporate this arbitration agreement by reference.

Section II:A deals with financial matters related to division of marital property. If Section II:A is chosen, the Beth Din will be authorized to decide financial matters related to division of financial property.

Section II:B deals with matters related to child custody and visitation. If the parties choose to refer matters of child custody and visitation to the Beth Din for resolution, they may do so by signing this Section II:B. They must, however, understand that in many states secular courts retain final jurisdiction over all matters relating to child custody and visitation. Section II:C deals with the question of whether the Beth Din may take into consideration the respective parties' responsibility for the ending of the marriage when Sections II:A or II:B are chosen. Section II:C only applies if the parties have authorized the Beth Din under Section II:A or Section II:B, but then it applies as a matter of course, reflecting normal Beth Din procedure. Thus Section II:C will apply to all decisions authorized under Section II, unless the parties strike it out. Striking out Section II:C, while discouraged by Jewish law, will not render the entire Agreement invalid or ineffective.

ADDITIONAL FORMS. Some couples, for financial or other reasons, sign other prenuptial agreements. In such cases they may find it useful or practical to sign this document and incorporate this arbitration agreement by reference into any additional agreement. Additional copies of this document and other materials can be obtained from the offices of the Beth Din of America, or by visiting www.theprenup.org.

FURTHER INFORMATION. Further information regarding this Agreement, or further information concerning the procedures to be followed for resolution of any matters or disputes covered by this Agreement, may be obtained from the Beth Din of America, which has disseminated this form Agreement. Background information is available at www.theprenup.org.


**Beth Din of America**
305 Seventh Ave., Suite 1201, New York, NY 10001
Tel: (212) 807-9042 Fax: (212) 807-9183
Email: info@bethdin.org
Web: www.bethdin.org www.theprenup.org

**In an Emergency:** Outside of normal business hours, questions may be addressed to Rabbi Shlomo Weissmann, Director of the Beth Din of America, at (646) 483-1188.


**This agreement was developed and is administered by the Beth Din of America, which is supported in part through the generosity of the following synagogues:**

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**Congregation Beth Abraham** (Bergenfield, NJ) ◇ **Congregation Shaaray Tefila** (Lawrence, NY) ◇ **Lincoln Square Synagogue** (New York, NY)

Signatories to this document benefit from the Beth Din of America, which is the forum named to adjudicate claims arising under the agreement. Please urge your synagogue to contribute generously to the Communal Fund of the Beth Din of America if it is not already listed above.

To arrange a contribution, please contact the Beth Din of America at info@bethdin.org

## Appendix 2 Sample Arbitration and Prenuptial Agreements

The purpose of this appendix is to create prototypes of possible prenuptial agreements, recognizing that part of the theme and thesis of this work is that Jewish law has within it a number of different possible models of marriage, and that individuals who are contemplating marriage should consider which model of marriage they wish to join, and to understand how that model of marriage might affect their rights if there is a divorce. While the Beth Din of America is the listed arbitration organization in these agreements, that can be changed at the discretion of the parties. Care, however, must be taken to choose a bet din wisely.

Each arbitration agreement consists of two distinctly different sections:

1. There is a boiler-plate material which lists the information about the parties and recites the formulaic invocation needed to create either a prenuptial agreement or an arbitration agreement, *and*
2. The substance of the dispute to be arbitrated and the rules to be used by the bet din in the arbitration process.

The first agreement found in this section contains the boilerplate information in smaller print; the relevant section of each agreement is found in paragraph III, which will be set out with its various possible texts immediately following the opening boilerplate of the agreement. Following that language which can vary, additional boiler-plate language is reproduced. (In many states prenuptial agreements, but not arbitration agreements, need to be notarized.)

Memorandum of agreement made on:

_____, day of the week, _____ of the month of _____ in the year _____, in the city of _____, State or Province of _____

between:

| Husband-to-be: | Wife-to-be: |
|---|---|
| _____ | _____ |
| residing at: | residing at: |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

The parties are shortly going to be married.

i. Should a dispute arise between the parties after they are married, so that they do not live together as husband and wife, they agree to refer their marital dispute to an arbitration panel, namely, the Beth Din of America, Inc., for a binding decision. Each of the parties agrees to appear in person before the Beth Din of America at the demand of the other party.
ii. The decision of the Beth Din of America shall be fully enforceable in any court of competent jurisdiction.

Possible paragraph III, and their effect on the rights of the parties at the end of the marriage.

*Model A*

This type of an agreement assigns to the Beth Din the authority to resolve all disputes between the parties consistent with Jewish law.

> III The parties agree that the Beth Din of America is authorized to decide all issues relating to a *get* (Jewish divorce) as well as any issues arising from premarital agreements (e.g., *ketubah, tena'im*) entered into by the husband and the wife. The parties agree that the Beth Din of America is authorized to decide any other monetary disputes that may arise between them.

*Model B*

This type of an agreement assigns to the Beth Din the authority to resolve all disputes between the parties consistent with community property laws prevalent in some jurisdictions in the United States.

> III The parties agree that the Beth Din of America is authorized to decide all issues relating to a *get* (Jewish divorce) as well as any issues arising from premarital agreements (e.g., *ketubah, tena'im*) entered into by the husband and the wife. The parties agree that the Beth Din of America is authorized to decide any other monetary disputes that may arise between them based on principles of community property that are the law in the state of California at the date of the wedding.

*Model C*

This type of an agreement assigns to the Beth Din the authority to resolve all disputes between the parties consistent with Jewish law. It differs from Model A only in that it explicitly grants to the Beth Din the authority to resolve child custody disputes, which are currently reviewed de novo by secular courts, and thus cannot be resolved in a binding way according to secular law in the United States.

III The parties agree that the Beth Din of America is authorized to decide all issues relating to a *get* (Jewish divorce) as well as any issues arising from premarital agreements (e.g., *ketubah, tena'im*) entered into by the husband and the wife. The parties agree that the Beth Din of America is authorized to decide any other monetary or custodial disputes that may arise between them.

*Model D*

This type of an agreement assigns to the Beth Din the authority to resolve all disputes between the parties consistent with the law of equitable distribution in force in many states of the United States.

III The parties agree that the Beth Din of America is authorized to decide all issues relating to a *get* (Jewish divorce) as well as any issues arising from premarital agreements (e.g., *ketubah, tena'im*) entered into by the husband and the wife. The parties agree that the Beth Din of America is authorized to decide any other monetary disputes that may arise between them based on principles of equitable distribution that are the law in the state of New York at the date of the wedding.

*Model E*

This type of an agreement assigns to the Beth Din the authority to resolve only disputes between the parties that revolve around the giving or receiving of a get.

III The parties agree that the Beth Din of America is authorized to decide all issues relating to a *get* (Jewish divorce) as well as any issues arising from premarital agreements (e.g., *ketubah, tena'im*), entered into by the husband and the wife.

**Additional Paragraph Governing Fault**

This additional paragraph governing fault is added by the Beth Din of America so as to grant the Beth Din the authority to penalize one party or the other for conduct that violates Jewish law and which causes the end of the marriage. One could delete this paragraph if one wishes, although such a change would profoundly affect the authority of the Beth Din to reward or penalize proper or improper conduct in ending the marriage.

> Notwithstanding any other provision of paragraph III, the Beth Din of America may consider the respective responsibilities of either or both of the parties for the end of the marriage as an additional, but not exclusive, factor in determining the distribution of marital property and support obligations.

Finally, the document ends with standard language:

> IV Failure of either party to perform his or her obligations under this agreement shall make that party liable for all costs awarded by either the Beth Din of America or a court of competent jurisdiction, including reasonable attorney's fees, incurred by one side in order to obtain the other party's performance of the terms of this agreement.
>
> V The decision of the Beth Din of America shall be made in accordance with Jewish law (*halakha*) and/or the general principles of arbitration and equity customarily employed by the Beth Din of America, unless the parties and the Beth Din of America explicitly agree to some other set of rules. The parties agree to abide by the published Rules and Procedures of the Beth Din of America (which are available at www.bethdin.org, or by calling the Beth Din of America). The Beth Din of America shall follow its rules and procedures, which shall govern this arbitration to the fullest extent permitted by law. Both parties obligate themselves to pay for the services of the Beth Din of America as directed by the Beth Din.
>
> VI The parties agrees to appear in person before the Beth Din of America at the demand of the other party, and to cooperate with the adjudication of the Beth Din of America in every way and manner. In the event of the failure of either party to appear before the Beth Din of America upon reasonable notice, the Beth Din of America may issue its decision despite the defaulting party's failure to appear, and may impose costs and other penalties legally permitted. Furthermore, husband-to-be hereby obligates himself now (*me'achshav*) to support wife-to-be from the date their domestic residence together shall cease, for whatever reasons at the rate of $100 per day (adjusted by the consumer Price Index All Urban Con-

sumers, calculated as of the date of the parties marriage) in lieu of his Jewish law obligation of support, so long as the parties remain married according to Jewish law, even if wife-to-be has one or more other sources of income or support. Additionally, husband-to-be waives all his claims (to the extent there are any) under Jewish law to his wife's earnings for the period that she is entitled to the above-stipulated sum. However, this support obligation shall terminate retroactively if wife-to-be refuses to appear upon due notice before the Beth Din of America or in the event that wife-to-be fails to abide by the decision or recommendation of the Beth Din of America.

VII This agreement may be signed in one or more copies each one of which shall be considered an original.

VIII This agreement constitutes a fully enforceable arbitration agreement. Should any provision of this arbitration agreement be deemed unenforceable, all other surviving provisions shall still be deemed fully enforceable; each and every provision of this agreement shall be severable from the other.

IX The parties acknowledge that each of them have been given the opportunity prior to signing this agreement to consult with their own rabbinic advisor and legal advisor. The obligations and conditions contained herein are executed according to all legal and halachic requirements. Both parties acknowledge that they have effected the above obligation by means of a *kinyan* (formal Jewish transaction) in an esteemed (*chashuv*) bet din as mandated by Jewish law.

In witness of all the above, the bride and groom have entered into this agreement.

Groom: _____
Signature: _____
Name: _____
Witnesses:_____
Acknowledgements
State/Province: _____
County of _____ ss.:
On the ___ day of _____, 200__,
before me personally came ___,
the groom, to me known and
known to me to be the individual
described in, and who executed

Bride:_____
Signature: _____
Name: _____
Witnesses:_____
Acknowledgements
State/Province: _____
County of _____ ss.:
On the ___ day of _____, 200__,
before me personally came ___,
the bride, to me known and
known to me to be the individual
described in, and who executed

the foregoing instrument,
and duly acknowledged to me
that he executed the same.

_____
Notary Public

the foregoing instrument,
and duly acknowledged to me
that she executed the same.

_____
Notary Public

*Model F*

**The Prenuptial Agreement Authorized by the Orthodox Caucus**

This two part agreement is designed to both compel that all matters be submitted to the bet din chosen by the parties, as well as provide for the support of the wife until such time as a Jewish divorce will be written or the husband is relieved of the obligation to support wife by the bet din chosen by both of them.

*A* *Husband's Assumption of Obligation*

i. I, the undersigned, _____, husband-to-be, hereby obligate myself to support my wife-to-be, _____ ____, in the manner of Jewish husbands who feed and support their wives loyally. If, God forbid, we do not continue domestic residence together for whatever reason, then I now (*meachshav*) obligate myself to pay her $_____ per day, indexed annually to the Consumer Price Index for all Urban Consumers (CPI-U) as published by the US Department of Labor, Bureau of Labor Statistics, beginning as of December 31st following the date of our marriage, for food and support (*parnasah*) from the day we no longer continue domestic residence together, and for the duration of our Jewish marriage, which is payable each week during the time due, under any circumstances, even if she has another source of income or earnings. Furthermore, I waive my halachic rights to my wife's earnings for the period that she is entitled to the above-stipulated sum. However, this obligation (to provide food and support) shall terminate if my wife refuses to appear upon due notice before the Beth Din of America before proceedings commence, for purpose of a hearing concerning any outstanding disputes between us, or in the event that she fails to abide by the decision or recommendation of such bet din.

ii. I execute this document as an inducement to the marriage between myself and my wife-to-be. The obligations and conditions contained herein are executed according to all legal and halachic requirements. I acknowledge

that I have effected the above obligation by means of a *kinyan* (formal Jewish transaction) in an esteemed (*chashuv*) bet din.

iii. I have been given the opportunity, prior to executing this document, of consulting with a rabbinic advisor and a legal advisor.

iv. I, the undersigned wife-to-be, acknowledge the acceptance of this obligation by my husband-to-be, and in partial reliance on it agree to enter into our forthcoming marriage.

*B* *Arbitration Agreement between Husband and Wife*

Memorandum of Agreement made this _____ day of _____, 57__, which is the _____ day of _____, 201__, in the City of _____ _____, State/Province of _____, between _____, the husband-to-be, who presently lives at _____ _____ and _____ the wife-to-be, who presently lives at_____.

The parties are shortly going to be married.

i. Should a dispute arise between the parties after they are married, Heaven forbid, so that they do not live together as husband and wife, they agree to refer their marital dispute to an arbitration panel, namely, the Bet Din of_____ for a binding decision. Each of the parties agrees to appear in person before the bet din at the demand of the other party.

ii. The decision of the panel, or a majority of them, shall be fully enforceable in any court of competent jurisdiction.

   a. The parties agree that the bet din is authorized to decide all issues relating to a *get* (Jewish divorce) as well as any issues arising from pre-marital agreements (e.g., *ketubah, tena'im*) entered into by the husband and the wife.

      [The following three clauses (b, c, d) are optional, each to be separately included or excluded, by mutual consent, when signing this agreement.]

   b. The parties agree that the bet din is authorized to decide any other monetary disputes that may arise between them.

   c. The parties agree that the bet din is authorized to decide issues of child support, visitation, and custody (if both parties consent to the inclusion of this provision in the arbitration at the time that the arbitration itself begins).

   d. In deciding disputes pursuant to paragraph III b, the parties agree that the bet din shall apply the equitable distribution law of the State/Province of_____, as interpreted as of the date of this agreement, to any property disputes which may arise between them,

the division of their property, and questions of support. Notwithstanding any other provision of the equitable distribution law, the bet din may take into account the respective responsibilities of the parties for the end of the marriage, as an additional, but not exclusive factor, in determining the distribution of marital property and support obligations.

iv. Failure of either party to perform his or her obligations under this agreement shall make that party liable for all costs awarded by either a bet din or a court of competent jurisdiction, including reasonable attorneys' fees, incurred by one side in order to obtain the other party's performance of the terms of this agreement.
    a. In the event any of the bet din members are unwilling or unable to serve, then their successors shall serve in their place. If there are no successors, the parties will at the time of the arbitration choose a mutually acceptable bet din. If no such bet din can be agreed upon, the parties shall each choose one member of the bet din and the two members selected in this way shall choose the third member. The decision of the bet din shall be made in accordance with Jewish law (*halachah*) and/or the general principles of arbitration and equity (*pesharah*) customarily employed by rabbinical tribunals.
    b. At any time, should there be a division of opinion among the members of the bet din, the decision of a majority of the members of the bet din shall be the decision of the bet din. Should any of the members of the bet din remain in doubt as to the proper decision, resign, withdraw, or refuse or become unable to perform duties, the remaining members shall render a decision. Their decision shall be that of the bet din for the purposes of this agreement.
    c. In the event of the failure of either party to appear before it upon reasonable notice, the bet din may issue its decision despite the defaulting party's failure to appear.

vi. This agreement may be signed in one or more copies, each one of which shall be considered an original.

vii. This agreement constitutes a fully enforceable arbitration agreement.

viii. The parties acknowledge that each of them has been given the opportunity prior to signing this agreement to consult with his or her own rabbinic advisor and legal advisor.

In witness of all of the above, the bride and groom have entered into this agreement in the City of_____, State/Province of_____.

In witness of all the above, the bride and groom have entered into

this agreement.

| | |
|---|---|
| Groom: _____ | Bride:_____ |
| Signature: _____ | Signature: _____ |
| Name: _____ | Name: _____ |
| Witnesses:_____ | Witnesses:_____ |
| Acknowledgements | Acknowledgements |
| State/Province: _____ | State/Province: _____ |
| County of _____ ss.: | County of _____ ss.: |
| On the ___ day of _____, 200__, | On the ___ day of ____, 200__, |
| before me personally came ___, | before me personally came ___, |
| the groom, to me known and | the bride, to me known and |
| known to me to be the individual | known to me to be the individual |
| described in, and who executed | described in, and who executed |
| the foregoing instrument, | the foregoing instrument, |
| and duly acknowledged to me | and duly acknowledged to me |
| that he executed the same. | that she executed the same. |
| _____ | _____ |
| Notary Public | Notary Public |

*Model G*

The arbitration agreement below, written at the request of Rabbi Haskel Lookstein, is designed to facilitate the giving of a get upon the conclusion of the civil divorce.[92]

> The undersigned hereby agree, promise and represent:
> In the event that the covenant of marriage to be entered into this day 200 ( ) by husband ( ) and wife ( ) shall be terminated, dissolved or annulled in accordance with any civil court having jurisdiction to effectively do so, then in that event husband ( ) and wife ( ) shall voluntarily and promptly upon demand by either of the parties to this marriage present themselves at a mutually convenient covenant of marriage in accordance with Jewish law and custom before the Ecclesiastical Court (Bet Din) of the Rabbinical Council of America—or before a similarly recognized Orthodox rabbinical court—by delivery and acceptance, respectively, of the *get* (Jewish divorce).

92 A similar such agreement, written consistent with the laws of the state of Israel (and in Hebrew) was written by Professor Ariel Rosen-Tzvi of Tel Aviv Law School.

This agreement is recognized as a material inducement to this marriage by the parties hereto. Failure of either of the parties to voluntarily perform his or her obligation hereunder if requested to do so by the other party shall render the noncomplying party liable for all costs, including attorneys' fees, reasonably incurred by the requesting party to secure the noncomplying party's performance, and damages caused by the demanding party's unwillingness or inability to marry pending delivery and acceptance of a "get."

The parties hereto recognize that the obligations specified above are unique and special and they agree that the remedy at law for a breach of this contract will be inadequate. Accordingly, in the event of any breach of this contract, in addition to any other legal remedies available, the injured party shall be entitled to injunctive or mandatory relief directing specific performance of the obligations included herein.

Entered into this day of 200__.

| | |
|---|---|
| Groom: _____ | Bride:_____ |
| Signature: _____ | Signature: _____ |
| Name: _____ | Name: _____ |
| Witnesses:_____ | Witnesses:_____ |

## Appendix 3 Tripartite Agreement

This is a modified version of the Tripartite Agreement first proposed in Michael J. Broyde "A Proposed Tripartite Prenuptial Agreement to Solve Some of the *Agunah* Problems: A Solution without any Innovation." *Jewish Law Association Studies XX: The Manchester Conference Volume*, edited by Moscovitz, Leib pages 1 at 12-16 (2010) and explained in greater length in *החוט המשולש לא במהרה ינתק: הסכם תנאי בקידושין, הרשאה לכתיבת גט ותקנת קהל Techumin* 37 (2017), pp. 228–40 [Hebrew].

This document is to certify that on the _____day of the month of _____, in the year _____, in _____[93], _____[94], the groom, and _____[95], the bride, of their own free will and accord entered into the following agreement with respect to their intended marriage.

The groom made the following declaration to the bride under the *chuppah* (wedding canopy):

"I will betroth and marry you according to the laws of Moses and the people of Israel, subject to the following conditions:

### Independent Condition One:

"If I return to live in our marital home with you present at least once every fifteen months until either you or I die, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) shall remain valid and binding;

"But if I am absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) will have been null and void. Our conduct should be like unmarried people sharing a residence, and the blessings recited a nullity. The ring I gave you should be a gift.

93 Location
94 Name of the groom
95 Name of the bride

Independent Condition Two:

"If we have children before either you or I die, or you are expecting a child when I die and that child is born, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) shall remain valid and binding;

"But if I died without children, and I have a brother alive at the time of my death who was also alive at the time of our marriage, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) will have been null and void. Our conduct should be like unmarried people sharing a residence, and the blessings recited a nullity. The ring I gave you should be a gift.

"I recite this condition to our marriage not only during the wedding ceremony, but prior to our intimate relationship and *yichud* (seclusion). I take a public oath that I will never remove this condition from the marriage.

"I acknowledge that I have effected the above obligation by means of a *kinyan* (formal Jewish transaction) before a *beit din chashuv* (esteemed rabbinical court) as mandated by Jewish law. The above condition is made in accordance with the laws of the Torah, as derived from Numbers Chapter 32. Even a sexual relationship between us shall not void this condition. My wife shall be believed like one hundred witnesses to testify that I have never voided this condition.

"Under the *chuppah* I will recite the formula, '*Harei at mekudeshet li be-tabaʿat zo ke-dat Moshe ve-Yisrael al pi ha-tena'im she-katavtnu ve-chatamtnu*' ('Behold you are betrothed to me with this ring according to the practices of Moses and Israel, subject to the conditions that we have written and signed').

"Should a Jewish divorce be required of me for whatever reason, by any Orthodox rabbinical court (*beit din*) selected by my wife, even if at the time of our separation I explicitly reject the particular rabbinical court (*beit din*) she selects, I also appoint anyone who will see my signature on this form to act as scribe (*sofer*) to acquire pen, ink and feather for me and write a *Get* (a Jewish Document of Divorce), one or more, to divorce with it my wife, and he should write the *Get lishmi*, especially for me, *ve-lishmah*, especially for her, *u-leshem gerushin*, and for the purpose of divorce. I herewith command any two witnesses who see my signature on this form or a copy of this form to act as witnesses to the bill of divorce (*Get*) to sign as witnesses on the *Get* that the above-mentioned scribe will write. They should sign *lishmi*, especially for me, *ve-lishmah*, and especially for her, *u-leshem gerushin*, and for the purpose of divorce, to divorce with it my above-mentioned wife. I herewith command anyone who sees my signature on this form to act as my agent to take the *Get*,

after it is written and signed, and be my messenger to give it into the hands of my wife whenever he so wishes. His hand should be like my hand, his giving like my giving, his mouth like my mouth, and I give him authority to appoint another messenger in his place, and that messenger another messenger, one messenger after another, even to one hundred messengers, of his own free will, even to appoint someone not in his presence, until the *Get*, the document of divorce, reaches her hands, and as soon as the *Get* reaches her hands from his hands or from his messenger's hands, or from his messenger's messenger's hands, even to one hundred messengers, she shall be divorced by it from me and be allowed to any man. My permission is given to the rabbi in charge to make such changes in the writings of the names as he sees fit. I undertake with all seriousness, even with an oath of the Torah, that I will not nullify the effectiveness of the *Get,* the Jewish Document of Divorce, to divorce my wife or the power of the above-mentioned messenger to deliver it to my wife. And I nullify any kind of a statement that I may have made which could hurt the effectiveness of the *Get* to divorce my wife or the effectiveness of the above-mentioned messenger to deliver it to my wife. Even if my wife and I should continue to reside together after the providing of this authorization to divorce her, and even if we have a sexual relationship after I have authorized the writing, signing and delivery of a *Get*, such a sexual relationship should not be construed as implicitly or explicitly nullifying this authorization to write, sign and deliver a *Get*. My wife shall be believed like one hundred witnesses to testify that I have not nullified my authorization to appoint the scribe to write the *Get* on my behalf, or the witnesses to sign the *Get* on my behalf or any messenger to deliver it to the hand of my wife.

"Furthermore I recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a *Get* within fifteen months of her requesting such a bill of divorce. I recognize that should I decline to give such a *Get* for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a *Get* given within fifteen months. We both belong to a community where the majority of the great rabbis and the *batei din* of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me. The *beit din* selected by my wife shall be irrevocably authorized to annul this marriage when they feel such is proper and the above conditions are met.

"Furthermore, should this agreement be deemed ineffective as a matter of *halakhah* (Jewish law) at any time, we would not have married at all.

"I hereby grant jurisdiction to any Orthodox *beit din* selected by my wife to enforce any and all parts of this document and do not consent to jurisdiction in any *beit din* that my wife does not wish to select. As a matter of Jewish law, I accept (through the Jewish law mechanism of *kim li*) whatever minority opinions determined by the *beit din* selected by my wife are needed to effectuate my statements.

"I announce now that no witness, including any future testimony I might provide, shall be believed to nullify this document or any provision herein."

Signature of Groom _____

The bride replied to the groom:

"I accept this proposal of marriage subject to the condition that we are both in residence together in our marital home at least once every fifteen months until either you or I die, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) shall remain valid and binding;

"But if either one of us is absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) will have been null and void, and I impose this as a condition of my acceptance of this marriage proposal. Our conduct should be like unmarried people sharing a residence.

"I acknowledge that I have accepted the above obligation by means of a *kinyan* (formal Jewish transaction) before a *beit din chashuv* (esteemed rabbinical court) as mandated by Jewish law. The above condition is accepted in accordance with the laws of the Torah, as derived from Numbers Chapter 32. Even a sexual relationship between us shall not void the acceptance of this condition.

"I further declare that I would not have accepted a marriage proposal from a man if he were ever to revoke his authorization to give me a *get*, or if as a matter of *halakhah* (Jewish law) as determined by an authorized *beit din* the communal *takkanah* (decree) were to be considered invalid."

Signature of Bride _____

Signature of Groom accepting bride's conditional acceptance _____

We the undersigned duly constituted *beit din* witnessed the oral statements and signatures of the groom and bride.

Rabbi _____

*Kiddushin* Witness[96] 1 _____
*Kiddushin* Witness 2 _____

*Yichud* Witness[97] 1 _____
*Yichud* Witness 2 _____

96 Since the document makes mention of *kiddushin*. These witnesses should sign after *kiddushin*, but must be present at the *kinyan* and signing of this document; otherwise, two other witnesses must sign at the tish and the two witnesses of the *kiddushin* after the *kiddushin.*

97 Since the document makes mention of *yichud.* These witnesses should sign after *yichud.*