

# SOME THOUGHTS ON NEW YORK STATE REGULATION OF JEWISH MARRIAGE: COVENANT, CONTRACT OR STATUTE?

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*Jewish Law's view of marriage has elements of both covenant (holiness) and contract (agreement) in it, and both of these two values compete in any full description of Jewish marriage. This article aims to explain both contractual and covenantal approaches to Jewish marriage, and relates them to how Jewish Law interacts with secular law in the United States and other countries in the enforcement of rabbinical court decisions and secular court decisions about when and how a marriage ought to end.*

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## I. INTRODUCTION

It is an ancient question whether and to what extent Jewish marriage and divorce law is essentially covenantal or contractual. 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.<sup>1</sup> 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".<sup>2</sup> 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.<sup>3</sup> 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".<sup>4</sup>

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 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", 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

1 Babylonian Talmud (hereinafter – *BT*), *Yevamot* 63a.

2 *BT Sotah* 2a.

3 LOUIS GINSBERG, *THE LEGENDS OF THE JEWS* 68 (1968).

4 See e.g., NOSSON SCHERMAN, *RABBINICAL COUNCIL OF AMERICA EDITION OF THE ARTSCROLL SIDDUR* 202-203 (1995).

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 fifty years, Jewish law has performed 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.

This paper will describe the covenant-contract conflict and interplay in five parts. The first section will lead the reader through the Talmudic history of family law, emphasizing its contractual roots.<sup>5</sup> The second section will explain the post-Talmudic developments 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 has impacted upon Jewish marriage and

5 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. It 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 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).

divorce in practical terms. The final section will conclude with some observations about living under two legal systems in the modern age.

## II. JEWISH MARRIAGE LAWS PART I: MARRIAGE AS CONTRACT IN TALMUDIC TIMES

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.<sup>6</sup>

As a brief aside, the 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.<sup>7</sup> 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 financial transactions — they may effect changes of personal or ritual statuses.<sup>8</sup> Marriage and divorce, it should be noted, fall into the latter category.<sup>9</sup>

While the Bible has a number of stories and incidents concerning marriage,<sup>10</sup> in terms of divorce law little is known 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:

6 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. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201 (1984).

7 See MOSHE MEISELMAN, *JEWISH WOMEN IN JEWISH LAW* 97-98 (1978).

8 *Id.* 96-97.

9 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. For more on this topic, see MENACHEM ELON, *PRINCIPLES OF JEWISH LAW* (1973). s.v. contracts.

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

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....<sup>11</sup>

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.<sup>12</sup> Because there was a clear biblical concept of divorce, no stigma was associated with its use.<sup>13</sup> 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*).

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. 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.

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

12 The Talmud records a three-sided dispute as to when divorce was proper. 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.

13 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.

The wife, as a precondition to entry into the marriage, could insist on a dower higher than the minimum promulgated by the rabbis.<sup>14</sup> 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.<sup>15</sup> They said little about marriage as sacred or covenantal.

The Talmud clearly set out—and 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.<sup>16</sup> Though she could not sue for divorce as a general rule, she could restrict his rights through a *ketubah* provision.<sup>17</sup>

Although it is true that soon after the close of the Talmudic period, the rabbis of that time (called *Geonim*) changed or reinterpreted<sup>18</sup> Jewish law to vastly increase the right of a woman to sue for divorce, that change 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.<sup>19</sup>

14 See Michael Broyde & Jonathan Reiss, *The Ketubah in America: Its Value in Dollars, its Significance in Halacha and its Enforceability in American Law*, 47 J. HALACHA & CONTEMPORARY SOC. 101-124 (2004). Nonetheless, in the case of divorce for provable fault by the wife, the obligation to pay the dower was removed.

15 For an excellent survey of the Ketubot from Talmudic and the immediate post-Talmudic time, see MORDECHAI AKIVA FRIEDMAN, *JEWISH MARRIAGE IN PALESTINE* (1983), whose second volume contains dozens of actual ketubahs from before the year 1000 C.E.

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

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

18 Through a mechanism called *takanta demitivta*, or decree of the academy, whose exact mechanism is unclear. See IRVING A. BREITOWITZ, *BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY* 50-53 (1993).

19 A more detailed explanation of this historical event and its mechanism is recounted in MICHAEL BROYDE, *MARRIAGE, DIVORCE AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL APPROACH TO THE AGUNAH PROBLEMS IN AMERICA* (2001).

*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<sup>20</sup>) and the later Shulhan Arukh imposed other requirements (such as insisting that there be an engagement period<sup>21</sup>), Talmudic Jewish law treated marriage formation as a private contract requiring the consent of both parties,<sup>22</sup> and divorce as the other side of that marriage contract, albeit with certain limitations.

There was little notion in the Talmudic period and the centuries that followed of marriage as an inabrogable covenant. Three basic points highlight this. First, marriage was never centrally constructed as monogamous, and monogamy was never constructed in its hard form of one husband with one wife in one life. Second, divorce was always recognized as normative and 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.

III. JEWISH MARRIAGE LAWS PART II: 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 tenth-century European Jewry, Rabbenu Gershom, a decree<sup>23</sup> was enacted that moved Jewish law toward 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 only a few cases could the husband actually be forced to divorce his wife or the reverse.<sup>24</sup> Equally significant, these decrees prohibited polygamy, thus

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

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

22 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, *supra* note 19, in Appendix B, entitled "Errors in the Creation of Jewish Marriages".

23 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* ENCYCLOPEDIA TALMUDIT § HEREM DERABBENU GERSHOM 17:378 (1996).

24 This insight is generally ascribed to the 11th century Tosafist Rabbenu Tam in his view of

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.<sup>25</sup> 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 Gaonic 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<sup>26</sup> called into question the value of the marriage contract itself. The Talmudic rabbis instituted the *ketubah* payments to deter the 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*.<sup>27</sup> As the leading codifier 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.

- 25 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.
- 26 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.
- 27 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.

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<sup>28</sup> where it states that in a situation where one only may divorce with the consent of the woman, one does not need a *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....<sup>29</sup>

The *ketubah* did remain a fixture of Jewish weddings after the tenth century,<sup>30</sup> but it was transformed from a 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 matter 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 ....<sup>31</sup>

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 ....<sup>32</sup>

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:

28 The case of rape discussed, *Id.*

29 *Shulhan Arukh, Even HaEzer* 66:3.

30 See Broyde & Reiss, *supra* note 14.

31 Moses Feinstein, *Iggrot Moshe, Even HaEzer* 4:91 (This *responsum* was written in 1980).

32 *Id.*, 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 ones sins are forgiven, as it states, "One who finds a wife finds goodness, and obtains the favor of God"; Proverbs 18:22.*<sup>33</sup>

Rabbi Karo subscribes to a view that marriage, though mandatory, is but a necessary precondition to the fulfillment 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 favor 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 functioned and at least let 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. But 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 covenant understanding of marriage and divorce has proved difficult to maintain. It was workable only in pre-modern Europe because divorce was not common and was limited, given the social and economic reality of that time and place, to cases of hard fault.<sup>34</sup> Moreover, in these communities, Jewish law courts had the authority to

33 *Shulhan Arukh, Even Haezer* 1:1.

34 For a detailed discussion of the problems posed in pre-emancipation Russia by this construct of Jewish law, see CHEARAN Y. FREEZE, MAKING AND UNMAKING THE JEWISH FAMILY:

provide equitable 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 vacuousness 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.

#### IV. 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.<sup>35</sup> 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, 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. The American states did not, and the coercive jurisdiction of the rabbinical courts — a fixture of European Jewish communal life and 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.<sup>36</sup> Each of them involved the secular law of the United States in some form. None has worked very well.

MARRIAGE AND DIVORCE IN IMPERIAL RUSSIA, 1850-1914 (1997) (unpublished Ph.D. dissertation, Brandeis University) who notes that Jewish divorce was more common than Orthodox Christian divorce but still relatively uncommon.

35 For more on this, see Michael Broyde, *Informing on Others for Violating American Law: A Jewish Law View*, 41 J. HALACHA & CONTEMPORARY SOC. 5 (2002).

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

### 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.<sup>37</sup> 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 pre-nuptial agreement between herself and her husband. (The ketubah had been signed after the pre-nuptial 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.<sup>38</sup> 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 where a secular court has enforced the ketubah provision mandating payments.<sup>39</sup> 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.<sup>40</sup> Moreover, the absence of an English text (where either the husband or wife are 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.<sup>41</sup> 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 that the wedding was performed, where the

37 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.

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

39 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.

40 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.

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

ketubah is a legally enforceable document.<sup>42</sup>

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.<sup>43</sup>

### 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 seventeenth century Europe,<sup>44</sup> the earliest use of arbitration agreements in America to govern Jewish marriages was in 1954 under the direction of Rabbi Dr. Saul Lieberman. 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.<sup>45</sup>

This exact formulation was upheld as a valid arbitration agreement by the New York Court of Appeals in the now famous case of *Avitzur*.<sup>46</sup> It is generally understood as a matter of secular law that all binding arbitration agreements undertaken to enforce

42 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 law of Morocco would have enforced this ketubah. These same conflicts 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).

43 For more on this, see Broyde & Reiss, *supra* note 14.

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

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

46 *Avitzur v. Avitzur*, *supra* note 41.

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).<sup>47</sup>

While the particular form used in the Lieberman clause (as it became known) has been subject to intense criticism,<sup>48</sup> 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 fifty 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 Internet site devoted to sharing such agreements (and I myself have been involved in such).<sup>49</sup> 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.<sup>50</sup>

Although Jewish law-based 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 general 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.<sup>51</sup>

47 See e.g., Linda Kahan, *Jewish Divorce and Secular Court: The Promise of Avitur*, 73 GEORGETOWN L. J. 193 (1984) and Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts*, 50 Brooklyn L. Rev. 229 (1984).

48 See Norman Lamm, *Recent Additions to the Ketubah — a Halakhic Critique*, 2(1) TRADITION 93 (1959); A. LEO LEVIN & MEYER KRAMER, *NEW PROVISIONS IN THE KETUBAH: A LEGAL OPINION* (1955).

49 See [www.orthodoxcaucus.org](http://www.orthodoxcaucus.org).

50 This document and its attendant instructions are available as a PDF file at [www.theprenup.org/pdf/BDA%20PS%201.0%20\(Prenup%20Standard\).pdf](http://www.theprenup.org/pdf/BDA%20PS%201.0%20(Prenup%20Standard).pdf), and are appended to this paper.

51 For more on this issue and the many practical problems with these arbitration agreements,

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

There has been one serious -- and indeed successful -- attempt to introduce Jewish law as a foundation in secular marriage law in the United States. Indeed, 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 state to be the first state with a covenant marriage act,<sup>52</sup> and the covenant is grounded in the Jewish marriage tradition.

New York, because of its concentrated population of Jews deeply observant of Jewish law, has had a lengthy history of secular courts interacting with the Jewish legal traditions and its conceptions of marriage and divorce. Especially in the last thirty 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.<sup>53</sup> (In the alternative, they can choose not to marry according to secular law and thus not be bothered by secular divorce law at all).<sup>54</sup>

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.<sup>55</sup> Both are governed by the rules promulgated by

*see* BREITOWITZ, *supra* note 18.

52 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.

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

54 This phenomenon requires more study.

55 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*,

society. One needs a license to be married and one must seek legal permission (typically through the court system in America) to be divorced. Were society to rule that divorce be prohibited, divorce would cease to be legal.<sup>56</sup> Indeed, there were vast periods of time when divorce essentially never happened in the Western legal world.<sup>57</sup> 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.<sup>58</sup> Indeed, the Jewish tradition does not mandate the participation of a rabbi in

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. 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.

56 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 Alan Reed, *Transnational non-Judicial Divorces: A Comparative Analysis of Recognition under English and R.S. Jurisprudence*, 18 *LOYOLA J. INT'L. & COMP. L.* 311 (1996).

57 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 SUSAN DOWELL, *THEY TWO SHALL BE ONE* 139 (1990). 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).

58 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*

any manner in either the marriage or divorce rite (although the custom always has been to do so).<sup>59</sup>

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 both hoops -- Jewish divorce and secular divorce -- does not become one that abuses those who are weak? The two New York Jewish divorce laws and the controversy they have engendered is at its core a controversy which acknowledges the ultimate power of the secular divorce law.<sup>60</sup> 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<sup>61</sup> 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, lest it be struck down on church-state grounds.<sup>62</sup> 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, that he or she has taken or that he or she will

*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*).

59 Indeed, as is demonstrated in Bleich, *supra* note 6, the term "rite" is a misnomer; "contract" would be more accurate.

60 See Edward S. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 COLUM. J. L. & SOC. PROBS. 55 (1998); Patti A. Scott, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L. J. 1117, (1996).

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

62 See *supra* note 60.

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.

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.<sup>63</sup> 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 only to be divorced according to secular law, and thus leaving their wives forever chained to the dead marriage as a matter of Jewish law.<sup>64</sup> 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.<sup>65</sup> Furthermore, should there be any dispute between the parties to

63 *Golding v. Golding*, 581 N.Y.S.2d 4, 176 A.D.2d 20 (N.Y.A.D. 1 Dept. Feb 18, 1992); *Perl v. Perl*, 512 N.Y.S.2d 372, 126 A.D.2d 91 (N.Y.A.D. 1 Dept. Mar 03, 1987).

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

65 Indeed, other sections of this statute make it clear that this section does not apply to the

this divorce about 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.<sup>66</sup>

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<sup>67</sup> -- 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<sup>68</sup> 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 considers themselves married until a Jewish divorce was

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.
- 66 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.

67 See for example, Elizabeth R. Leiber, *Avitzur v. Avitzur: The Constitutional Implications of Judicially Enforcing Religious Agreements*, 33 CATH. U. L. REV. 219 (1983).

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

executed. How did the 1983 law fix this problem? It prevented the civil authorities from exercising their authority to divorce civilly a couple who still needed a religious divorce. *The law prevented a splitting of the civil and religious statuses by precluding the civil authorities from acting, absent the religious authorities.*<sup>69</sup> 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 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.<sup>70</sup> 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 -- 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<sup>71</sup>

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

70 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 paragraph (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.

71 For an examination of the issues raised in the Jewish tradition, see Michael Broyde, *The New York State Get [Jewish Divorce] Law*, 29(4) TRADITION 3 (1995); this article was followed

and within the secular law community,<sup>72</sup> 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 claim therefore that New York State had not only the first covenant marriage law, but it 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. 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.<sup>73</sup>

#### V. 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

by Michael Broyde & Chaim Malinowitz, *The 1992 New York Get Law: An Exchange*, 31(3) TRADITION 23 (1997) and concludes with *The 1992 New York Get Law: An Exchange III*, 32(1) TRADITION 99, and 33(1) TRADITION 109 (1999).

72 See, for example, Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J. L. & SOC. PROBS. 359 (1999); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (1998); Patti A. Scott, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CON. L. J. 1117 (1996); Lisa Zornberg, *Beyond The Constitution: Is The New York Get Legislation Good Law?*, 15 PACE L. REV. 703 (1995); Edward S. Nadel, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L. J. 131 (1995); Paul Finkelman, *New York's Get Laws: a Constitutional Analysis*, 27 COLUM. J. L. & SOC. PROBS 55 (1993).

73 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 Ghada G. Quaisi, *Religious Marriage Contracts: Judicial Enforcement of Mahar Agreements in American Courts*, 15 J. L. & RELIGION 67 (2000-2001).

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 has been and continues 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 husband's free-exercise rights in being 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 — someone 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,<sup>74</sup> 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,<sup>75</sup> 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 converted 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.<sup>76</sup>

74 Bleich, *supra* note 6.

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

76 See Michael J. Broyde, *Forming Religious Communities and Respecting Dissenters'*

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).<sup>77</sup> 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 insure 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 wishes of the secular

*Rights, in* HUMAN RIGHTS IN JUDAISM: CULTURAL, RELIGIOUS, AND POLITICAL PERSPECTIVES 35–76 (Michael J. Broyde & John Witte Jr. eds., 1998).

<sup>77</sup> See also *supra* note 50.

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.<sup>78</sup>

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 \$950 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.<sup>79</sup>

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 demands of Jewish law 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.<sup>80</sup> 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

78 For this reason, the Beth Din of America notes on its writ 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.

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

80 See *supra* note 71.

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 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. Jewish law could seek to act autonomously, as they did in premodern 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 exceedingly rare. But American law is loathe 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.

Let me give four examples from my own involvement in the rabbinical courts to illuminate what this cooperation looks like.

#### *Case One*

Husband and wife had been married for many years and had a number of children. They then wished to be divorced. There was no prenuptial agreement between the parties. Husband and wife had a very intense disagreement over how to divide the marital estate, worth nearly \$5,000,000. Husband consented to give a Jewish divorce at the conclusion of the civil divorce; wife agreed. Wife filed for divorce. Wife essentially triumphed in the civil divorce and was afraid that husband would refuse to give a Jewish divorce. Judge directed that the Jewish divorce be written, signed, and given in his chambers during the processing of the civil divorce and delayed issuing the civil divorce until the Jewish divorce was granted.

#### *Case Two*

Husband and Wife have been married for only a short period of time – less than 10 days – and wife has filed for an annulment on the grounds that husband is inclined to physical violence and hit wife twice in the first week of marriage. An annulment is not – by statutory lacuna – included in the jurisdiction of the New York get laws. Judge asks the parties, who are clearly observant of Jewish law, what a secular annulment will do to the ability of either the husband or wife to remarry as a matter of Jewish law. Husband lawyers responds by stating that this question is beyond the statutory purview of the Judge in deciding whether to allow the annulment to proceed. Judge responds by ordering the parties to contact the Beth Din of America to request written confirmation that after a civil annulment, the parties are free to remarry as a matter of Jewish law and then adjourns the proceedings. Beth Din of America writes the court a letter stating that Jewish law would not accept an annulment issued by New York in lieu of a Jewish divorce, and that while there is an annulment procedure in Jewish law, it is disfavored. Judge issues an order allowing the annulment to proceed only if before specific date husband gives and wife receives a Jewish divorce.

#### *Case Three*

Husband has refused to give the wife a Jewish divorce for a number of years and the judge has refused to issue a civil divorce decree because of that. Wife came to Beth Din of America to ask how can we encourage husband to give a Jewish divorce, and we advised her to seek an increase in her pre-divorce payments. Wife requested that judge increase the *pendente lite* support for the wife to the rate of \$1750 a month, which is nearly \$900 more per month than the husband was previously ordered to pay. Judge told the husband that the keys to releasing himself from this obligation are in his own hands. All he needs to do is finish his civil divorce and then payments go back to \$850.

#### *Case Four*

Husband and wife have been divorced since 1996, when they both lived in New Jersey, but no Jewish divorce was ever written. Wife moves to Brooklyn and files for an increase in maintenance, citing her inability to remarry consistent with her faith as a grounds for increased maintenance. Husband declines to appear and judge orders an increase in maintenance. Husband refuses to pay and is in contempt of court. Ultimately is arrested in New York and the judge immediately orders his incarceration on the grounds of civil contempt. Has a court hearing and tells the husband that he will waive the contempt hearing if the husband will issue a Jewish divorce now. A lively discussion takes place whether as a matter of Jewish law such a divorce is valid in the courtroom and the decision is made that such a divorce is valid. The Jewish divorce is written in the Brooklyn detention center that afternoon.

In each of these cases, the outcomes were successfully reached only because the civil courts and the rabbinical courts in New York worked closely together to accomplish a goal that neither could meet on its own.

Finally, rather than relying on prenuptial agreements or the New York State *Get* laws, many members of the Orthodox community opt out of the secular legal system entirely and resolve all their disputes before rabbinical courts. This solution is the most complex of the three mechanisms to retain traditional Jewish practice in divorce proceedings because secular law does not really allow the arbitration of child custody disputes outside of family court — which can always be reviewed *de novo* by the secular courts.

However, it is clear that many such arbitration hearings do take place, and they entail the substantive application of Jewish law to the area of divorce. These rules include fault-based adjudication in some instances, evaluation of parental fitness as suitable religious role models in certain situations, and the placement of children consistent with their religious needs in deciding matters of child custody. There are dozens of such cases a month in the United States.

#### VI. LIVING WITH GOD AND CAESAR: OBEYING TWO LEGAL SYSTEMS

This article has served to highlight an ongoing dialectic (and perhaps schizophrenic) patterning within the Jewish marriage tradition -- the basic elements of Jewish marriage law seem in contest, and have shifted over time. What started as equality in contract in Talmudic times reverted to covenant for vast segments of the European Jewish community in the next millennium. Even the contours of secular

interference into Jewish law during the last twenty years have been whipsawed by this conflict: The 1983 New York State Jewish divorce law sought to harmonize New York law with Jewish law, as if to emphasize the primacy of the sacred covenant; whereas the 1991 New York Jewish divorce law sought to force Jewish law to mimic New York law, giving the covenant far less emphasis.

New York's covenant marriage differs completely from that of every other such marriage. The New York State Jewish divorce laws only work because Jewish law courts comfortably work with New York State courts to ensure that couples who marry according to Jewish law and New York law are divorced according to both as well. One could almost say that there is a covenant here -- but it is between the rabbinical courts in New York and the secular courts of the Empire State.



# BINDING ARBITRATION AGREEMENT

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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\_\_\_\_\_, in the City/Town/Village of \_\_\_\_\_, State of \_\_\_\_\_  
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. 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 the Beth Din of the United States of America, Inc. (currently located at 305 Seventh Ave., New York, NY 10001, tel. 212 807-9042, www.bethdin.org), acting as an arbitration panel, for a binding decision.
- II. The decision of the Beth Din of America shall be fully enforceable in any court of competent jurisdiction.
- III. The parties agree that the Beth Din of America has exclusive jurisdiction to decide all issues relating to a *get* (Jewish divorce) as well as any issues arising from this Agreement or the *ketubah* and *tena'im* (Jewish premarital agreements) entered into by the Husband-to-Be and the Wife-to-Be. Each of the parties agrees to appear in person before the Beth Din of America at the demand of the other party.

**SECTION IV:A regarding additional financial issues is optional.** Parties may select IV:A(1), IV:A(2) or IV:A(3) (but not more than one of these paragraphs). Unless one of these options is chosen, the Beth Din of America will be without jurisdiction to address matters of general financial disputes between the parties. For more information, see the instructions.

**IV:A(1).** 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. We choose to have Paragraph IV:A(1) apply to our arbitration agreement.

**IV:A(2).** 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 based on principles of equitable distribution law customarily employed in the United States as found in the Uniform Marriage and Divorce Act. We choose to have Paragraph IV:A(2) apply to our arbitration agreement.

**IV:A(3).** 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 based on principles of community property law customarily employed in the United States as found in the Uniform Marriage and Divorce Act. We choose to have Paragraph IV:A(3) apply to our arbitration agreement.

Signature of Husband-to-Be \_\_\_\_\_

Signature of Husband-to-Be \_\_\_\_\_

Signature of Husband-to-Be \_\_\_\_\_

Signature of Wife-to-Be \_\_\_\_\_

Signature of Wife-to-Be \_\_\_\_\_

Signature of Wife-to-Be \_\_\_\_\_

**SECTION IV:B regarding parenting disputes is optional.** Unless this option is chosen, the Beth Din of America will be without jurisdiction to address matters of parenting disputes between the parties. For more information, see the instructions.

**IV: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 IV:B apply to our arbitration agreement.**

Signature of Husband-to-Be \_\_\_\_\_

Signature of Wife-to-Be \_\_\_\_\_

**IV: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 Section IV:A or Section IV:B.

INITIALS



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- V. 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.
- VI. The decision of the Beth Din of America shall be made in accordance with Jewish law (*halakha*) or Beth Din ordered settlement in accordance with the principles of Jewish law (*peshara krova la-din*), except as specifically provided otherwise in this Agreement. The parties waive their right to contest the jurisdiction or procedures of the Beth Din of America or the validity of this Agreement in any other rabbinical court or arbitration forum other than the Beth Din of America. The parties agree to abide by the published Rules and Procedures of the Beth Din of America (which are available at [www.bethdin.org](http://www.bethdin.org), or by calling the Beth Din of America) which are in effect at the time of the arbitration. 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 of America.
- VII. The parties agree 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 as legally permitted. Furthermore, Husband-to-Be acknowledges that he recites and accepts the following:
- I hereby now (me'achshav), obligate myself to support my Wife-to-Be from the date that our domestic residence together shall cease for whatever reasons, at the rate of \$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 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.*
- However, this support obligation shall terminate 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. 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.
- VIII. This Agreement may be signed in one or more duplicates, each one of which shall be considered an original.
- IX. This Agreement constitutes a fully enforceable arbitration agreement. Should any provision of this 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. As a matter of Jewish law, the parties agree that to effectuate this agreement in full form and purpose, 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 contained in Section VII and the procedures and jurisdictional mandates found in Sections I, II, III and VI of this Agreement.
- X. 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. The obligations and conditions contained herein are executed according to all legal and *halachic* requirements.

**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

End of Document. Notarization forms appear on the next page. For further information about notarization, see the instructions.



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## Notarization Forms

**Acknowledgement for Husband-to-Be**

State of \_\_\_\_\_

On the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ 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 \_\_\_\_\_

**Acknowledgement for Wife-to-Be**

State of \_\_\_\_\_

On the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ 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 \_\_\_\_\_

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 \_\_\_\_\_, 20\_\_\_\_, 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

\_\_\_\_\_  
 Address

State of \_\_\_\_\_ County of \_\_\_\_\_

On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, 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

\_\_\_\_\_  
 Address



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## INSTRUCTIONS

**INTRODUCTION.** 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. These *Tenaim Achronim* (premarital agreement) should be discussed, and then signed, as far ahead of the wedding day itself as is practically feasible. Full background materials and explanations can be accessed at [www.theprenup.org](http://www.theprenup.org) or [www.bethdin.org](http://www.bethdin.org). 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 IV. 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*. The Uniform Marriage and Divorce Act Section 307 is a general statement of the principles of equitable distribution or community property proposed as a model law. It is not the law of any particular state. 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 IV:A deals with financial matters related to division of marital property. If Section IV:A is chosen the Beth Din will be authorized to decide financial matters related to division of financial property. The Beth Din can decide these financial matters in one of three ways. The couple may choose one, but not more, of those ways. If more than one is chosen, all choices are void. If none of such Paragraphs are selected, the Beth Din of America will not be authorized to resolve any additional monetary disputes between the parties.

Section IV: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 IV:B. They must, however, understand that secular courts generally retain final jurisdiction over all matters relating to child custody and visitation. Section IV: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 IV:A or IV:B are chosen. Section IV:C only applies if the parties have authorized the Beth Din under Section IV:A or Section IV:B, but then it applies as a matter of course, reflecting normal Beth Din procedure. Thus Section IV:C will apply to all decisions authorized under Section IV, unless the parties strike it out. Striking out Section IV:C, while discouraged by Jewish law, will not render the entire Agreement invalid or ineffective.

**WITNESSES.** There must be two witnesses to each signature. 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. It is preferable that each page of the agreement be initialed by both parties.

**NOTARIZATION.** It is not always legally required to have this Agreement notarized in order for it to be valid and enforceable. Each couple should discuss this question with their legal advisors. Even if there is no legal requirement for notarization, it is certainly a good idea for it to be notarized; hence a notarization form is included in the document. Notaries can usually be found in banks, legal offices, etc. In New York State, the officiating rabbi can notarize the prenuptial.

**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](http://www.theprenup.org) or [www.bethdin.org](http://www.bethdin.org).

**SAFEKEEPING OF THIS FORM.** Husband-to-Be and Wife-to-Be should keep his or her own copy of this Agreement in a safe place. For additional protection, we strongly advise sending a copy to the Beth Din of America as well, for its confidential files. Copies may be uploaded at [www.theprenup.org](http://www.theprenup.org), faxed to (212) 807-9183, or scanned and e-mailed to [preup@bethdin.org](mailto:preup@bethdin.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](http://www.theprenup.org) or [www.bethdin.org](http://www.bethdin.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](mailto:info@bethdin.org)

Web: [www.bethdin.org](http://www.bethdin.org)

[www.theprenup.org](http://www.theprenup.org)

**In an Emergency:** Outside of normal business hours, calls may be made to either Rabbi Shlomo Weissmann, Director of the Beth Din of America, at (646) 483-1188 or Rabbi Michael Broyde, Dayan of the Beth Din of America, at (917) 208-5011.