

The Halakhic Prenuptial Agunah-Prevention Agreement - FAQ Rabbi Aryeh Klapper

1. Why are halakhic prenuptial agreements becoming widespread now? Why do we need them when our parents and grandparents didn't?

Over the past two decades the community and rabbinate have gradually reached the consensus that the agunah problem, whatever its precise quantitative dimensions, requires a substantive and effective halakhic response, and that prenuptial agreements are an appropriate avenue of response. This consensus was generated by the recognition that, owing to rabbinic tribunals' lack of formal coercive power, the declining efficacy of social sanctions, and the unfortunately high divorce rate, the contemporary agunah problem cannot be adequately addressed by previous halakhic approaches to agunah issues.

A wide variety of prenuptial agreements have been proposed. Each had its halakhic proponents and detractors, but for better or worse none gained the kind of widespread support necessary for effectiveness until seven years ago. At that time, a mechanism originally suggested by Rabbi J. David Bleich and developed by Rabbi Mordekhai Willig gained overwhelming halakhic approval throughout the Orthodox rabbinate. Rabbinical organizations such as the RCA and Young Israel, and lay organizations such as the Orthodox Caucus and the Wedding Resource Center, then began the continuing effort to make signing this agreement universal practice.

This effort is meeting with growing success. The number of couples signing the agreements is growing dramatically, as is the number of rabbis strongly recommending it, or even refusing to officiate without it, in prenuptial meetings.

2. Are the current agreements perfect? What if the bride and groom want to change some details?

Like all consensus documents, the original agreement required compromises and trade-offs, and like all untested contracts, it failed to account for all contingencies. As the document has spread, accordingly, many rabbis, grooms, and interested laypeople have suggested modifications. Some of these are well taken, and should be incorporated into the standard form or offered as options. Others, unfortunately, would render the document ineffective or generate negative unintended consequences.

Evaluating these suggestions requires deep comprehension of the halakhic, legal, practical, and policy issues associated with the agreements. Such comprehension is necessary in any case for those involved in facilitating the signing of such agreements, who at this stage will often still meet resistance from grooms and even brides. Competent halakhic authorities who have extensive knowledge of and experience with the agreement should be consulted before any changes are made to the standard document.

3. Is the prenuptial agreement only an internal halakhic document, or is it a valid contract enforceable in secular court?

To be effective, the prenuptial agreement must be legitimate according to halakhah and enforceable according to American law¹. Enforceability under American law is clearly necessary because rabbinic tribunals have no coercive power in America. Halakhic legitimacy is necessary because a get given under halakhically illegitimate duress is considered invalid.²

¹ Ideally, it should be enforceable according to the legal systems of foreign states as well, especially Israel. The current document should be enforceable under Israeli law.

² This is the prima facie halakhic barrier to effective so-called "Get laws" - any get coerced under such a law is presumptively invalid. This is not the forum to discuss whether the actual laws passed in New York State effectively solve this problem.

4. How do halakhic prenuptial agreements solve the agunah problem?

Halakhic prenuptial agreements cannot end the agony of existing agunot, but they can help greatly in preventing future cases. They do so by creating a strong financial incentive for the husband to give the get. This incentive outweighs the husband's current incentive to use the threat of refusing a get to compel the wife to accept unfavorable terms in the civil divorce settlement, or to extort money from her after the settlement. People familiar with such cases say that most long-term agunah situations begin with the husband using the get as a financial lever; the extreme vindictiveness that characterizes such situations develops from the ensuing bitter negotiations. Halakhic prenuptial agreements, by eliminating the use of the get as a financial lever, will prevent long-term agunah cases from developing.

5. What legal problems are faced by such agreements?

a. American law, does not enforce penalty clauses. Penalty clauses are statements of the form "If I don't do x for you, then I will pay you y dollars", as for example "If I don't finish building your new house by September, I will pay you one million dollars". So a simple contract in which the groom agrees to pay the bride a large sum if he fails to give her a get upon request ("If I don't give you a get upon request, I will pay you one million dollars") would probably not be enforced by American courts.

b. Constitutional law as currently interpreted prevents the courts from compelling someone to perform a religious act. It seems difficult to argue that giving a get does not require participation in a religious ceremony. So a simple contract to give a get or face contempt of court sanctions would probably not be enforced by American courts.³

6. What halakhic problems are faced by such agreements?

a. Halakhah under most circumstances does not enforce conditional agreements, known as *asmakhtot*. Conditional agreements are statements of the form "If X happens, then I will pay you y dollars", as for example "If it rains tomorrow, I will give you one million dollars". So a simple contract in which the groom agrees to pay the bride a large sum if he fails to give her a get upon request ("If I don't give you a get upon request, I will give you one million dollars") would not be halakhically binding.

b. Halakhah declares a get invalid if obtained under duress⁴. Many if not most rabbinic tribunals will invalidate a get even if the duress is purely financial, and certainly most rabbis will not encourage signing an agreement designed to produce a get under financial duress. This applies even if the financial duress is otherwise halakhically legitimate. In other words, if halakhah recognized a contract in which a groom agreed to pay money if he failed to give a valid get upon request, we would make him pay because he would be unable to give a valid get.

³ This, incidentally, is the *prima facie* legal barrier to "Get laws".

⁴ Unless such duress is mandated by and directly supervised by a rabbinic tribunal which has ruled that the husband should be coerced to give this get. In America today, no rabbinic tribunals have the secular legal authority to supervise coercive measures.

7. How does the current agreement solve these problems?

Rabbi Bleich's fundamental insight was that all the above issues can be circumvented by an agreement which makes marriage, rather than failure to give a get, expensive. The agreement Rabbi Willig developed thus takes the form of a specific and large daily monetary commitment by the groom to support the bride for the duration of their Jewish marriage whenever she chooses to take that money rather than share his household. This agreement

- a. is not a penalty clause, as the obligation stems from marriage rather than failure to give a get
- b. does not in any way coerce the husband into performing a religious act
- c. does not mean that the husband is under financial duress to give the get - the financial pressure is no different than any calculation of the cost of marriage
- d. is not an *asmakhta*, as the agreement begins immediately after marriage.⁵

8. What are the policy considerations related to this agreement?

Clearly, the impetus for developing the agreement was the *agunah* problem. But while focused on that issue, the developers tried to be sure that their solution would be effective in practice as well as theory, and that it would not create new practical or halakhic problems.

A primary practical concern was to prevent husbands from using "rabbinic tribunal shopping" and various other tactics that can stall halakhic courts so as to prevent the agreement from being enforced. This could, of course, be avoided by bypassing rabbinic tribunal altogether and allowing the contract to be litigated directly in secular court. However, halakhah forbids Jews from litigating intra-Jewish cases in secular court unless the other Jewish party refuses to appear in rabbinic tribunal. Accordingly, the agreement involves a binding arbitration contract which specifies the rabbinic tribunal or rabbinic tribunals before whom the agreement will be litigated. This contract also means that the rabbinic tribunal's decision will be enforced by the secular courts.

A second practical concern was to prevent women from using this agreement to extort money from their husbands by invoking the agreement and then refusing to accept a get. To prevent this, the agreement specifies that the husband's obligation ceases should the wife be declared in contempt of rabbinic tribunal on any relevant issue, including refusal to accept a get when instructed by rabbinic tribunal to do so. A woman who refused to live with her husband would be directed by rabbinic tribunal to accept a get.

⁵ The text of the agreement includes several other phrases that according to some positions prevent *asmakhta*, among them *קנין לפני בית דין חשוב* and *מעכשיו* - these do not in any way affect the substance of the agreement.

9. American divorce law generally gives a larger share of marital property to wives than they would receive under halakhah according to some halakhic authorities. Doesn't this agreement take away a husband's only way of defending his halakhic rights to a larger share of marital property?

A number of rabbis, especially in Israel, were very concerned that the agreement would have this effect. Accordingly, the standard text of the agreement states that the husband's obligation ceases if the wife is declared in contempt of rabbinic tribunal on *any* issue related to the divorce. Thus to enforce the agreement a wife would have to agree to settle the marital estate in rabbinic tribunal.

Many American rabbis, however, realized that if left unmodified this clause would make the whole agreement ineffective, as husbands might think that they would gain more by litigating the estate in rabbinic tribunal than the agreement would compel them to pay. Accordingly, they include in the arbitration agreement a clause stating that if a rabbinic tribunal adjudicates the marital estate, it will do so in accordance with the principles of equitable distribution used by the state in which the couple marries as of the date of their marriage.

This clause is in perfect consonance with halakhah, as parties can agree in advance to decide financial issues under any terms they want - halakhah mandates only that a rabbinic tribunal apply those terms.⁶

10. Isn't it possible that a wife will abuse this agreement by, for example, going on a business trip for a year and asking for a divorce plus a year's support on her return?

The drafters of the original agreement assumed that rabbinic tribunal and the courts would rule that the wife had forgiven the obligation on any day she failed to claim it. This assumption probably was and still is valid. However, a clause has been devised that takes care of this problem explicitly. The clause requires the wife to notify the husband of her intention to collect her cash support payment at the outset of each period for which she intends to collect it.

11. Doesn't this agreement make rapid divorce more likely, as husbands will be under financial pressure to divorce their wives immediately on demand rather than ask for a cooling-off period?

When the agreement was first developed, it was assumed that, because of the *asmakhta* issue, this was a necessary cost of helping *agunot*, but that helping *agunot* made paying it worthwhile.⁷ However, a clause has been developed that can solve this problem. A competent rabbi should be consulted if such a clause is deemed necessary.

Earlier suggestions for incorporating a cooling-off period ran afoul of the *asmakhta* problem, as they would have delayed the onset of the obligation past the wedding day. The new clause gives the wife the right to claim the support payment without advance notice for the first thirty one days of the marriage, and thereafter requires her to give thirty days advance notice. This clause enables the obligation to begin at the wedding and continue unbroken throughout the marriage, but nonetheless guarantees a thirty day cooling-off period after the first month of marriage if the agreement is invoked.

This clause can create a cooling off period of any length, so long as it became operative only after a commensurately long period of marriage.

⁶ Many rabbis argue that these principles are in any case the halakhically correct ones, as couples marrying in accordance with a state's laws generally intend to divorce in accordance with the same laws. Many rabbinic tribunals have also derived principles of equitable distribution from halakhic precedents. In other words, the husband's advantage in some rabbinic tribunals is the result of a halakhic choice by those rabbinic tribunals, and is not a halakhic necessity.

⁷ Rabbi Bleich added that another benefit of the agreement is preventing *mamzeirut*, as many *agunot* would unfortunately but understandably not have the strength to remain unmarried regardless of halakhah.

12. Is there a standard form the bride and groom can just decide to sign, or are further decisions involved?

A standard form is available from the Rabbinical Council of America for a nominal sum. This version comes as part of a set of wedding-related documents including a ketubah and tennaim. The set is printed on expensive paper and embossed with a gold seal. The aesthetics make the document seem more romantic and appropriate for signing at the wedding itself.

However, some optional clauses don't appear in that text, some clauses that do appear should often be crossed out, and the space for some important fill-ins is very cramped. Rabbis should have a way to produce a customized agreement if necessary after consultation with the couple. Couples can also commission a calligraphic or artistic text after consulting with their rabbi as to the exact text.

13. Once the bride and groom decide to sign a halakhic prenuptial agreement, are there any further decisions to be made?

Two important decisions must be made whichever text is used:

- a) which rabbinic tribunal or rabbinic tribunals to name in the arbitration agreement
- b) the amount of the support obligation.

a) It is advisable to give a series of acceptable rabbinic tribunals in case the first or second choices go out of business or are unavailable. Generally, one should choose either an institutional rabbinic tribunal or delegate the choice to a rabbi whom both groom and bride trust but who is not particularly close to either. Rabbis should know which institutional rabbinic tribunals they are prepared to recommend.

b) Generally, the amount chosen is between 125 and 200 dollars a day, depending on the groom's projected income. One must be careful not to choose too high a sum, as this would encourage both rabbinic tribunal and secular courts to "pierce the veil" of this agreement and see it as a device to compel the husband to give a get. This would generate the problems listed under questions 5 and 6 above.

The couple must also decide whether to put in either of the notification clauses mentioned above.

14. Do we need witnesses at the signing?

It is preferable for the signing to be witnessed by two halakhically valid witnesses. In addition, it is best to have the signature notarized. The agreement can be signed in multiple copies, so one can be notarized and another halakhically witnessed. Rabbis should have notaries and witnesses available.

The signing of the agreement can take place at the wedding during or instead of tennaim. This has the advantage of publicizing the signing and provides the couple with extra honors to give out at the wedding.

14. Why should the husband voluntarily give up a power which halakhah gives him? Isn't that second-guessing halakhah?

Absolutely not. Under halakhah, husbands should not have the power to refuse to give a get when rabbinic tribunal thinks they should give one. Rabbinic tribunals are halakhically entitled to use any mode of coercion, including flogging, to compel a get⁸. The present situation is a distortion caused by rabbinic tribunals' loss of coercive authority. By signing this agreement grooms are helping restore the situation halakhah prefers.

In any case, grooms give up nothing by signing other than the possibility of behaving immorally. The husband cannot, as a result of this disagreement, get less than he deserves under halakhah, as he has the right under the agreement to litigate the divorce settlement in rabbinic tribunal.

⁸ But only rabbinic tribunals can coerce a get - see question 6 above.

15. What if the groom's lawyer tells him not to sign it?

A lawyer's responsibility to his client is to protect his material interests at all cost. By signing this agreement the groom gives up his power to hurt his bride under some circumstances, or at least make himself financially liable if he does so. Signing is thus against the groom's material interest - but it is in his spiritual interest. He should sign regardless.

16. What if the bride's lawyer tells her not to sign it?

Her lawyer is probably misreading the arbitration agreement. Have the lawyer call a rabbi or lawyer who has experience with the agreement.

17. But this groom is a nice guy! He would never do anything mean to his bride, even if they were G-d forbid to separate! Why should he have to sign it?

Thank G-d this groom is wonderful. But not all grooms are, and few grooms will sign if told they have to because they specifically are suspected of latent cruelty. The nice guys must sign so that signing becomes a standard expression of love and commitment rather than a badge of mistrust.

18. The bride and groom see themselves as economic equals entering the marriage. Why should the agreement be written so that the groom has the only support obligation?

Attempts have been made to devise a two-way agreement, but none has yet been successfully developed. Meanwhile, the halakhic reality is that women are the victims in the overwhelming majority of cases, as husbands have the heter meah rabbanim as an alternative halakhic remedy. Thus women currently suffer a disadvantage in this aspect of halakhic marriage - the agreement equalizes the relationship.

19. Isn't signing this unromantic? Shouldn't we want the bride and groom to be thinking about anything other than divorce before the wedding?

Halakhah does not believe in the value of romance divorced from responsibility. The act of kiddushin follows the form of a kinyan because it symbolizes - no, actualizes - the acceptance of serious and legally enforceable mutual obligations by the bride and groom. By signing the agreement, the bride and groom express in concrete form the depth and sincerity of their commitment to each other's happiness.

The ketubah, the original halakhic prenuptial agreement, talks not only about divorce but about death. That it has become a mere ritual is a good thing in that no one balks at signing it, but a bad thing in that it diminishes the seriousness of the commitments it records.

Also, the wedding ceremony frequently stresses that marriage is intimately connected with membership in the community of Israel, with the privileges and responsibilities that membership entails. As explained in questions 1 and 12 above, each bride and groom who sign help the community eliminate the moral stain of the modern agunah problem. Thus signing expresses the deepest values of Judaism both on the individual and communal level.

.RCA ARBITRATION AGREEMENT BETWEEN HUSBAND AND WIFE

MEMORANDUM OF AGREEMENT made this ___ day of _____, in the City of _____, State of _____, between _____, husband to be, who resides at _____, and _____, the wife to be, who resides at _____.

WHEREAS, the aforementioned parties are presently to be united in matrimony as husband and wife;

THEREFORE, IT IS HEREBY AGREED by and between them that

I. Should a dispute arise between the parties, Heaven forbid, so that they do not live together as husband and wife, they will, at the request of either party, submit their dispute to a Beit Din chosen by Rabbi _____, or if he is unable, unwilling, or unavailable, the Beit Din of America (RCA Beit Din), or, if it should no longer operate, the Beit Din designated in writing as its successor, or any Beit Din designated in writing by the Beit Din of America before proceedings commence, or, if none of these Beit Dins is available, the parties will submit their dispute to a mutually agreeable institutional Beit Din. If no such Beit Din can be agreed upon, the parties will each choose one member of the Beit Din, and the two so chosen will appoint a third member. Each of the parties agrees to appear before the panel at the request of the other party. The award or decision of the panel or a majority of the panel shall be fully enforceable in any court of competent jurisdiction.

The parties hereby agree to arbitrate all matters pertinent to disputes between them, as defined in Section II, before an arbitration panel, namely the aforementioned Beit Din.

II. (a) The parties agree that the Beit Din is authorized to decide all issues relating to a get (Jewish Divorce) and all issues stemming from the RCA PRENUPTIAL AGREEMENT signed by the parties.

(b) The parties agree that the Beit Din is authorized to decide any other monetary disputes that may arise between them, as well as issues of child support, visitation and custody, if both parties consent to such inclusion in the arbitration at the time that the arbitration itself begins. The Beit Din shall decide all monetary disputes in accordance with the principles of equitable distribution recognized by the laws of New York State as of June 1, 1999.

III. This agreement is recognized as a material inducement to marriage by the parties hereto. Failure of either of the parties to voluntarily perform his or her obligations hereunder if requested to do so by the other party shall render the noncomplying party liable for all costs as shall be awarded by the Beit Din, including attorney's fees, reasonably incurred by the requesting party in order to secure the noncomplying party's performance.

IV. The award or decision of the Beit Din, except where otherwise specified, shall be rendered in accordance with Orthodox Jewish Law (Halacha) and/or the general principles of arbitration and equity (psharah) customarily employed by rabbinic tribunals.

V. Should at any time there be a division of opinion among the members of the Beit Din, the award or decision of the majority of the tribunal shall be binding. Furthermore, should any of the members upon conclusion of the evidence remain in doubt as to the proper award or decision, resign, withdraw or refuse or become unable to perform his duties for any reason, the remaining members shall render the award or decision and it will be deemed that of the Beit Din.

VI. In the event of the failure or refusal of either party to appear before the Beit Din upon reasonable notice, the Beit Din may issue its award or decision in default of said party's appearance.

VII. This agreement shall be executed in one or more counterparts, each one of which shall be deemed an original.

VIII. The signing of this agreement constitutes a full and complete arbitration agreement, required in order to submit the indicated claims to the arbitration panel as indicated above.

IX. The parties acknowledge that they have been given the opportunity to consult with a rabbinic advisor and a legal advisor.

IN WITNESS WHEREOF, the Bride and Groom have entered into this Agreement in the City of _____, State of _____, U.S.A.

GROOM
Signature: _____
Name: _____
Address: _____

BRIDE
Signature: _____
Name: _____
Address: _____

Signed at: _____
Date: _____
Witness #1 signature: _____
Witness #1 name: _____
Witness #2 signature: _____
Witness #2 name: _____

RCA PRENUPTIAL AGREEMENT
Husband's Assumption of Obligation

I, the undersigned, _____, husband to be, hereby obligate myself to support my wife to be, _____, in the manner of Jewish husbands who feed and support their wives loyally. If, God forbid, we do not continue domestic residence together, then I now (me'achshav) obligate myself to give her _____ dollars per day, indexed annually to the Consumer Price Index for all Urban Consumers (CPI-U) as published by the US Department of Labor, Bureau of Labor Statistics, beginning as of December 31st following the date of our marriage, for food and support (*parnassah*) from the day we no longer continue domestic residence together, and for the duration of our Jewish marriage, which is payable each week during the time due, under any circumstances, even if she has another source of income or earnings. Furthermore, I waive my *halakhic* rights to my wife's earnings for the period that she is entitled to the above-stipulated sum. However, this obligation (to provide this sum for food and support, *parnassah*) shall terminate if my wife refuses to appear upon due notice before the Beit Din stipulated in the RCA ARBITRATION AGREEMENT signed by the parties for purpose of a hearing concerning any outstanding disputes between us, or in the event that she fails to abide by the decision or recommendation of such Beit Din. Furthermore, the sum shall be deemed forfeit unless my wife actually notifies me in writing on the first day of the weekly period that she intends to collect the sum. Said written notification must include her notarized signature.

I execute this document as an inducement to the marriage between myself and my wife-to-be. The obligations and conditions contained herein are executed according to all legal and halakhic requirements. I acknowledge that I have effected the above obligation by a *kinyan* (formal Jewish transaction) in an esteemed (*choshuv*) Beit Din.

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

I, _____, the undersigned wife-to-be, acknowledge the acceptance of this obligation by my husband to be, and in partial reliance on it agree to enter into our forthcoming marriage. I have been given the opportunity prior to executing this document of consulting with a rabbinic advisor and a legal advisor.

This agreement shall be executed in one or more counterparts, each one of which shall be deemed an original.

GROOM

Signature: _____
Name: _____
Address: _____

BRIDE

Signature: _____
Name: _____
Address: _____

Signed at: _____
Date: _____
Witness #1 signature: _____
Witness #1 name: _____
Witness #2 signature: _____
Witness #2 name: _____