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Civil Enforceability of Religious Prenuptial Agreements

MICHELLE GREENBERG-KOBRIN

In the years since Perri Victor's divorce has been finalized, she has tried to move on with her life. She is raising a young daughter from that marriage and finishing up law school. Perri and Warren Victor were married in an Orthodox Jewish ceremony in Florida in 1976. They received a civil divorce in 1990. However, as an Observant Jew, Perri cannot remarry until Warren gives her a Jewish religious divorce known as a get. Since late 1987, she has been pleading with Warren to give her a get. When Warren asked her to give up a portion of her equity in the family home in exchange for the get, she agreed. Realizing the power he had over Perri, Warren further demanded sole custody of their daughter before he would grant the get. Perri refused. Vindictively, Warren refused to give her a get. Thus, in the eyes of Jewish law, she remains a married woman. Perri would like to date, remarry, perhaps have other children, but because Warren refuses to grant her a get, she is unable to. She is an agunah,
literally, a chained woman, bound against her will to a man she no longer loves.²

I. INTRODUCTION

An Observant Jew adheres to two sets of laws: the secular laws of the country in which he or she lives and the Jewish legal system. For example, an American couple that wished to observe Jewish law would be married both religiously and civilly.³ Just as a civil marriage only can end with a civil divorce or the death of one of the parties, a Jewish marriage only can end with death or Jewish divorce.⁴ Thus, a couple wishing to observe Jewish law must obtain both a Jewish and a civil divorce.⁵

Because it is the state that originally confers marital status, a

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⁴ The Biblical source for Jewish divorce is found in Deuteronomy 24:1-4 (“When a man takes a wife and marries her, and it comes to pass that she find no favor in his eyes, because he has found something scandalous in her, then let him write her a bill of divorcement and give it in her hand, and send her away out of his house.”). See also Babylonian Talmud: Kiddushin at 2a (“She is freed [from marriage] by obtaining a get or by her husband’s death.”).
⁵ At this point, a brief introduction to the Jewish legal literature is appropriate. For observant Jews, the supreme source of law is the Pentatuch (the Five Books of Moses) which contain laws relating to religious, civil, and criminal issues. Along with these written laws, an oral tradition exists which supplements and explains the written law. At the end of the third century CE, the oral law was compiled into a written code by Rabbi Judah the Nasi called the Mishnah. The Mishnah served as an outline to the corpus of the oral tradition. Centuries of discussion and exegesis of the Mishnah were incorporated into the Talmud in the seventh century. There are two versions of the Talmud, named after the countries where they were redacted, the Palestinian and the Babylonian. The Talmud is not an organized code of black letter law, but a description and discussion of various opinions, often without arriving at a definitive conclusion. There were several attempts to codify the Talmud and rabbinic discussion into a code of definitive legal principles and rulings. Two of these codes which received near-universal acceptance, are noted to in this article: the Mishnah Torah, by Maimonides (12th century), and the Shulchan Aruch, by Rabbi Yosef Caro (16th century).
⁶ See Deuteronomy 24:1-4 for Jewish divorce. See also Babylonian Talmud: Kiddushin at 2a. For a history of civil divorce, see Homer H. Clark, The Law of Domestic Relations in America §15.8 at 110 (2d ed. 1988) (“The final [divorce] decree...grant(s) the dissolution of the marriage to one spouse or another, or in states permitting such a decree, to both spouses.”).
civil judge has the power to dissolve a marriage.\(^6\) However, under Jewish law, both marriage and divorce are contractual relationships between the parties.\(^7\) Because Jewish marriage begins when the husband and wife enter into a contractual relationship in which they each accept certain responsibilities towards one another, it can only be brought to an end by a contractual recognition that those obligations have ceased.\(^8\) A Jewish divorce is a contract,\(^9\) a *get*, stipulating that the marital obligations of the couple have come to an end.\(^10\) To be valid, a *get* must be freely given by the husband, and freely accepted by the wife.\(^11\) The original marriage contract, the *ketubah*, is then slashed to indicate its invalidity.\(^12\)

Without a *get*, an individual who recognizes the authority of Jewish law cannot remarry, even if the individual receives a civil divorce. Since the *get* is a contractual proceeding, if either the husband or the wife refuses to participate, there cannot be a divorce agreement. The parties remain married in the eyes of Jewish law.\(^13\) The problem arises, as in the case of Perri Victor, when one party wishes to be divorced, but the other party refuses to grant or accept the divorce. The spouse wanting divorce is left with two undesirable options: The spouse can either abandon her religious convictions by remarrying in a civil ceremony or in another denomination of Judaism permitting remarriage without a *get*,\(^14\) or she can remain chained to the recalcitrant spouse.\(^15\)

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\(^6\) See Clark, supra note 5, at § 15.1 at 72–73 ("Marriage occupies a special position in our society such that it can only be dissolved by a court proceeding.").

\(^7\) See Babylonian Talmud, Kiddushin at 2a (discussing the occurrence of a marriage established by the parties).

\(^8\) See Breitowitz, supra note 3, at 5–6.


\(^10\) See id. A *get* can refer to any type of legal document. Its common usage is in reference to divorce documents and that connotation is assumed wherever the term is found unless otherwise indicated. See Tosafis, 2a, S.V. Hamavi; Babylonian Talmud, Trudglat Gitten. A *get* states that 1) the husband divorces the wife, and thus no longer has any rights in anything belonging to her; 2) a relationship no longer exists between the two of them; 3) the purpose of it is for the wife to receive a divorce; and 4) the transfer of it from the husband to the wife effectuates the divorce. 5 Encyclopedia Talmudit *Get* at 568 (1973).

\(^11\) See 5 Encyclopedia Talmudit *Get* at 568 (1973). See also infra Section I.

\(^12\) See 5 Encyclopedia Talmudit *Get* at 568 (1973).

\(^13\) See id.

\(^14\) The Conservative and Orthodox movements do not permit the marrying of an individual who does not have a *get* from a previous marriage. However, the Central Council of American Rabbis (the Rabbinic arm of the Reform movement) has stated that
The problem of the agunah has increased due to both the gradually increasing divorce rate in the traditional Orthodox community and the rise of distribution and custody statutes that are more favorable to women than those at early common law. Increasingly, some spouses, usually men, have withheld religious divorces. They do so to secure concessions concerning property, custody, alimony, or out of sheer maliciousness. In response to the growing number of agunot, scholars and organizations have suggested a number of legal and communal responses to free spouses in this situation. These proposed solutions include utilizing civil courts and state legislatures, mediation, community pressure, and the development of a Beit Din.

no get is needed in order to remarry. There is no official position on performing a new marriage for a person who has refused to give his previous spouse a get. Thus, the ethical decision of whether to marry these individuals in a Reform ceremony is left to the individual rabbis. However, some Reform rabbis, especially those of the younger generations, have begun to focus more on this issue, and may insist on a get from the first ceremony. Certainly, it is disingenuous to assume, as much of the literature does, that most Reform rabbis will remarry a man whom they know has maliciously refused to grant his wife a get. The Reconstructionist movement also permits remarriage without a get. Conversation with Rabbi Jennifer Ro•• (Mar. 17, 1998).

15. See Breitowitz, supra note 3 at 2 n.4. Although either party can refuse to participate in the get process, in an overwhelming number of cases, it is the husband who refuses. While not wishing to minimize the pain of those husbands whose wives refuse to accept a get, this article will refer to the recalcitrant spouse as the husband unless otherwise specified.

16. See Mica Schnieder, World Jewish Congress Study: Jews in Israel Will Surpass U. S. Community, Jewish Telegraph Agency, Sept. 18, 1998, at 5. See also Judith Forman, Pure Devotion: Elie Shochet and Abby Siegel Built a Renewed Faith and Unbreakable Bond Through Orthodox Judaism, The Baltimore Sun, Sept. 5, 1998, at 1F. While the “current divorce rate [is] about 40 percent for United States first marriages...the rate is between three percent and four percent for Orthodox Jews.” Id. However, the divorce rate is rising.

17. See Nat Hentoff, Who Will Rescue the Jewish Women Chained in Limbo?, The Village Voice, Sept. 13, 1983, at 6 (stating that there are some 15,000 agunot). But cf. Breitowitz, supra note 3, at 2 n.4. The controversies for a difference of opinion as to whom should be considered an agunah (i.e. every woman who has a civil divorce but no get, any woman who has appealed to a Beit Din for a get, only woman in whose cases the Beit Din has issued a seruv against their husbands) as well as the lack of a centralized organization that can accurately track this phenomenon.

18. See Breitowitz, supra note 3, at 1–2.

19. See infra Section III.

20. See Breitowitz, supra note 3, at 59. There are organizations that have mediation counselors who attempt to help a couple arrive at an agreement to reach a get. See id.

21. For example, a group of Canadian women refused to have relations with their husbands until a husband in the community gave his wife a get. The Agunah Problem, The Jewish Press, Oct. 26, 1979, at M41.
more open to the use of halakhic innovation to end the marriage. All of these solutions are problematic in some way, and none have been fully accepted by the entire observant community.

These attempts to address this problem focus on ex post solutions, once there is already a marriage that is dissolving and a recalcitrant spouse who refuses to consent to the Jewish divorce. This article, in contrast, focuses on an ex ante solution — a prenuptial agreement, essentially a secular contract signed before the wedding ceremony, with the possibility of eliminating the problem of the agunah in the future.

Part II of this Article describes the development of the Jewish laws of divorce, and the role of Jewish courts in the process of Jewish divorce. Part III outlines the current status of Jewish divorces in the United States. Part IV describes the response of American courts and legislatures to the problem of a spouse who refuses to give a get. It also describes the difficulties that arise because of the interplay between Jewish and secular law. Part V examines the development of religious prenuptial agreements. It describes various types of prenuptial agreements and attempts to use prenuptial agreements to resolve this issue within the affected Jewish community. Part VI describes the status of these prenuptials under civil law, focusing on the constitutional issues involved in the enforcement of these agreements by American courts. It also looks at other possible legal alternatives for re-

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22. *Batei Din* is the plural of *Beit Din* (also spelled as *Beth Din*), meaning local Jewish court. See 3 Encyclopedia Talmudit, "Beit Din" 140–73 (1973).

23. The halakha is the Jewish legal system. Jewish law is composed of a single body of law dealing with civil, criminal, and religious matters. See Menachem Elon, The Principles of Jewish Law 5 (1974). The system has its own procedural and substantive rules derived from the Pentateuch and the interpretation of the Pentateuch as codified in the Talmud. Id. at 19–20. See also Babylonian Talmud: Kiddushin 13b.

24. See Nadine Brozan, Annulling a Tradition: Rabbis Stir Furor by Helping 'Chained Women' Leave Their Husbands, N.Y. Times, Aug. 13, 1998, at B1. The Beit Din Tzedek L'Baayot Agunot, or the Rackman Beit Din, as it has become known, is mired in controversy. Rabbi Emanuel Rackman has attempted to resolve some cases of agunah through a process called hakfa'at kiddushin, which annuls original marriage and does not require the appearance of the recalcitrant spouse. This process has been met with much criticism, in part because it does not have a long-standing continuous tradition. Id. See also Eric Greenberg, Court Strives to Inform Critics, The Jewish Week, Aug. 28, 1998, at 9.

25. There are several versions of this document. See Appendix for sample versions of a prenuptial agreement. This article will discuss the idea of the prenuptial agreement in general, focusing on specific provisions where necessary.
solving the issue of a recalcitrant spouse. Finally, Part VII describes the halakhic implication of the prenuptial at Jewish law and possible means to resolve the various difficulties that may arise. This Article presents the effect of the interaction of civil and Jewish law on both the enforceability and practicality of these agreements. It also suggests steps to maximize the acceptance of these prenuptial agreements in civil and religious law.

II. THE JEWISH DIVORCE

The Jewish law of divorce has evolved over time. According to Biblical law, the husband had the power to divorce his wife at will. In the tenth century, Gershomides, the leading Rabbinic sage, issued a decree that is still binding, requiring that the woman willingly accept the get for it to be valid, thus preventing men from divorcing their wives without their consent. Since the tenth century, Jewish law has required the get (similarly to the ketubah) to be given willingly by the husband and to be accepted willingly by the wife. This approach of Jewish law is analogous to the common law requirement that contracts are invalid if entered into under duress.

The role the Beit Din in marriage and divorce proceedings is very different from the role of a court at common law because at Jewish law, marriage and divorce are interpersonal contracts, in which the parties lay out their rights and duties to each other. All that is needed are witnesses to the contract to effectuate the marriage or divorce. Thus, the Beit Din is involved only in con-

26. See Breitowitz, supra note 3, at 6. See also Deuteronomy, 24:1-4; Rambam, Mishnah Torah, Hilchot Gerushin 1:2 ("He can only divorce his wife willfully.").
27. See Rema, glosses on Shulchan Aruch: Even HaEzer 119:6 ("But Rabbenu Gershom excommunicated those who would divorce a woman against her will."). This decree is binding on all Ashkenazic Jews. There are two primary Jewish traditions, Ashkenazic and Sephardic. The Ashkenazic Jews are those of European descent, while Sephardic Jews are of Middle Eastern, African, Spanish and Portuguese descent. The historical developments focused on in this article relate to the Ashkenazic community, as the American Jewish community is overwhelmingly of Ashkenazic origin.
28. See id.
31. Rambam, Mishnah Torah, Hilchot Gerushin 1:1 (describing the process of a get, including the requirement of witnesses). Rambam is the Hebrew acronym for Rabbi Moses Ben Maimon, commonly known as Maimonides. Witnesses for a get must be acceptable under Jewish law which requires them to be: male, over the age of 13, of good
tested divorces to determine the appropriateness of the parties to get divorced.\textsuperscript{32}

If a divorce is contested in a place and time where the \textit{Beit Din}'s authority is recognized, the \textit{Beit Din} hears the case.\textsuperscript{33} The \textit{Beit Din} inquires into two major issues: the basis for the divorce and the settlement.\textsuperscript{34} If the husband instigates the divorce, he is permitted to divorce his wife for a wide range of reasons.\textsuperscript{35} Alternatively, the wife wanting to divorce her husband can initiate the divorce proceeding only in certain situations.\textsuperscript{36} Examples of facts which allowed women to petition for divorce included impotence or sterility, physical or verbal abuse, habitual infidelity, refusal to engage in sexual relations, refusal to provide financial support to the wife, or forcing the wife to violate the \textit{halakha}. Other reasons would include certain changes in expectation or status, such as the husband's becoming a non-believer, getting a disease which rendered him repulsive to his wife, or engaging in

\begin{itemize}
\item moral character, observant of Jewish laws, and unrelated to either husband or wife or to the other witness. See Elon, supra note 23, at 606. See also Shulchan Aruch: Even Ha\textit{Ezer} 154:21 (stating that in order to get a divorce the husband is required to have a scribe and two witnesses). While the presence of a rabbi is not required at the signing of a \textit{get} because it is an interpersonal contract, a rabbi or some other person well-versed in Jewish law commonly performs the ceremony because of the law's intricacies and the importance of ensuring a valid \textit{get}. See Breitowitz, supra note 3, at 6. For the requirement of witnesses during the wedding ceremony, see Rambam, Mishnah Torah, Hilchot Ishut, 3:1–5, 4:6.
\item This approach is in contrast to that of most secular systems, in which the state makes the determination of marital status, and one cannot get married or divorced without the approval of the state. See Clark, supra note 5, § 2.1 at 73 ("Underlying all aspects of the definition of marriage was the principle, frequently announced by the courts, that the method of contracting marriage and the incidents of the relationship were the province of the law and were not within the control of the parties."). Id.
\item See Elon, supra note 23, at 415.
\item See id. at 19–22.
\item See id. at 415. See also Shulchan Aruch, Even Ha\textit{Ezer} 154 (describing the cases in which the parties should divorce, and cases in which the woman receives or forfeits the monies stipulated in the \textit{ketubah}).
\item 35. Grounds for divorce include a wide range of reasons such as if his wife no longer pleases him. While the School of Shamai holds that a husband should not divorce his wife unless she has committed adultery, the School of Hillel permits divorce for something as trivial as burning soup. See Babylonian Talmud: Gittin 90a-b. Some believe that adultery is the only morally proper reason for divorcing one's wife. See Shulchan Aruch, Even Ha\textit{Ezer} 119:3.
\item 36. The Talmud stated certain categories of facts that allowed women to petition the court for divorce. See Babylonian Talmud: Ketubot 77a. See also Shulchan Aruch Even Ha\textit{Ezer} 154.
\end{itemize}
an occupation which rendered him physically repulsive.\textsuperscript{37}

Based on the grounds for divorce, the court would issue a finding of \textit{yotze} or \textit{kofin}. A decision of \textit{yotze} means that the court found valid grounds for divorce, and it would require the husband to grant the \textit{get}, although it could not use coercive measures.\textsuperscript{38} Alternatively, a finding of \textit{kofin} gives the wife a right to a divorce rather a simple permission to divorce. In this more serious situation, the court would compel the husband to divorce his wife.\textsuperscript{39} For example, a finding of \textit{kofin} is appropriate if the husband were to refuse to support his wife financially or to engage in sexual relations with her, thereby violating his contractual obligation under the \textit{ketubah}.\textsuperscript{40} However, if the husband wished to get a divorce because the couple had been married for a period of ten years but were unable to have children, then a finding of \textit{yotze} would be appropriate.\textsuperscript{41}

In a \textit{yotze} situation, the court can enforce its decision only by imposing psychological measures on the husband, such as community pressure or public proclamation of disobedience.\textsuperscript{42} Alternatively, if the court were to find that the situation was dire enough to force the husband to grant the divorce — a \textit{kofin} situation — the court could use coercive measures, including fines, corporal punishment, imprisonment, or even threat of death to insure compliance.\textsuperscript{43} The use of coercive measures seems to vio-

\textsuperscript{37} See Babylonian Talmud: Ketubot 77a. Some of these categories allowed the woman to divorce with the financial settlement stipulated in the \textit{ketubah}, but in some instances, she forfeited her financial claim. See id.

\textsuperscript{38} See J. David Bleich, Jewish Divorce: Judicial Misconceptions and Possible Means of Enforcement, 16 Conn. L. Rev. 201 (1984).

\textsuperscript{39} See Shulchan Aruch, Even HaEzer 154:21. Some of the categories are clearly \textit{kofin} or \textit{yotze}, others depend on the particular facts. For example, a loathsome disease is one of \textit{kofin}, whereas the husband's refusal to co-habitate with his wife was one of \textit{yotze}. See Babylonian Talmud, Ketubot 77a. For an in-depth discussion of this issue, see Breitowitz, supra note 3, at 42–43.

\textsuperscript{40} See id. at 154:3 (“He who says: I will not feed and I will not support...is forced to divorce immediately, and so too he who refuses to have relations with his wife.”).

\textsuperscript{41} See Shulchan Aruch, Even HaEzer, 154:10 (“[If] he married a woman and lived with her ten years and she did not give birth, he should divorce her and pay her \textit{ketubah}.”).

\textsuperscript{42} See id. (“They may decree upon all of Israel not to extend any favors to him or conduct any business dealings with him, nor circumcise his sons, nor bury them until he divorces...”).

\textsuperscript{43} See Rambam, Mishnah Torah, Hilchot Gerushin 2:20 (“A \textit{Beit Din} in every time and every place can beat him [the recalcitrant husband] until he says “I want to” [give the \textit{get}] and the \textit{get} is written and it is kosher.”). See also, Shulchan Aruch, Even HaEzer 154:21.
llate the requirement that the *get* cannot be executed under duress. Maimonides, however, explains that the true will of every person is to do what is right, and if they refuse to do so, that is not their true will. Thus the husband’s eventual consent to the will of the *Beit Din* is his true desire. This “persuaded” consent applies only to *kofin* divorces. In a non-*kofin* situation, a *get* that is obtained through coercion results in an invalidation of the *get* because it is a contract entered into under duress.

### III. The History and Current Status of Get Proceedings

The smooth functioning of the *get* proceeding in cases of contested divorce depended to a great extent on a strong judiciary and a unified community. Both of these factors began to break down in the eighteenth century. As Enlightenment ideals spread throughout Europe, Jewish communities were emancipated. Countries gave Jews citizenship, provided they relinquished their judicial and legal autonomy. Jewish law continued to govern private action and religious worship, but the applicable secular law governed all other action. Marriage and divorce sometimes remained within the Jewish community and sometimes came under the secular authority’s control. With the dissolution of the autonomous Jewish community, the *Beit Din* lost its official status. The power and influence of the *Beit Din* shrank, especially as Jews came to view the use of the secular courts as a promising development in the attainment of equality.

44. See Rambam, Mishnah Torah, Hilchot Gerushin 2:20.
45. See id.
46. See Rema, glosses on Shulchan Aruch: Even HaEzer 154:21 (“It is fitting to be stringent not to force (giving the *get*) so that it should not be a coerced *get*.”). For a discussion of whether this distinction is valid, see Breitowitz, supra note 3, at 35 n.101.
47. Even though Jewish law has authority to govern civil law matters as well, in countries such as the United States, where the courts are reliable and fair, most observant Jews, even in disputes with other observant Jews, will refer civil matters to secular courts instead of a *Beit Din*. See Isaac Herzog, The Main Institutions of Jewish Law 28 (1980) (noting the difference between secular and Jewish law and describing the various forces which led to the decline of Jewish courts).
48. Breitowitz, supra note 3, at 164. For example, in some jurisdictions, even when Jews were emancipated, religious marriages and divorces continued to be recognized by the government. One example was in England, where it was only in 1866 that the state took control of marriages and divorces from religious courts. Until that point, the government recognized marriages and divorces performed by ecclesiastical officials or courts. See id.
49. See Elon, supra note 23, at 19.
Many of the current Batei Din are not standing courts. Rather, similar to many arbitration tribunals, the Batei Din are composed of three judges, where each party picks a judge, and the two judges agree on a third. As temporary bodies, these courts have limited influence. In addition, because each party selects a judge, the courts are often subject to allegations of corruption, because the judges may be misperceived as advocates. However, some Batei Din are standing courts. They are often connected with institutions or movements such as the Beth Din of the Rabbinical Council of America, the Beit Din of the Agudat HaRabbonim, and courts connected with specific Hasidic sects. These institutional courts tend to have slightly more influence.

Today the Beit Din’s power exists only to the extent that it is recognized. The Beit Din’s only real tool to enforce its determinations is communal pressure. However, the effectiveness of the community pressure is compromised because a party can move geographically, or change synagogue affiliation. A Beit Din’s decrees are supposed to represent Jewish law, but if litigants disagree with an outcome, they often condemn the court as corrupt. Thus, Jewish courts are reluctant to even hold someone in contempt (issue a seruv) because they do not wish to issue statements that are ignored.

Thus, in secular society, a contested Jewish divorce has proven to be most troublesome. If one party refuses to participate in the get proceeding, there is no way to compel him or her. One can attempt to convince the recalcitrant party to participate in the process, but even if the recalcitrant spouse appears before a Beit Din, and the Beit Din orders the spouse to participate, the
Beit Din has no means of enforcing its decrees. Thus, one party is forced to remain married to someone to whom they do not wish to be married, without the possibility of dating and remarrying.

A. THE AGUNAH PROBLEM

The fragmentation of the Jewish community and the growing prevalence of divorce factor heavily in the current agunah problem. The fairly common occurrence in divorce cases where one spouse is more observant than the other exacerbates the conflict. One spouse may have nothing to lose in not participating in the get process, because they may be comfortable remarrying without one. As Rivka Haut, the director of Agunah Inc., a support and service group for agunot has noted, “until 15 or 20 years ago, divorce in the Orthodox world was almost unheard.” Today, about 21 percent of American Jews have been divorced. A survey of 800,000 divorced Jews indicated that 113,000, approximately 14 percent, had a get.

In the typical agunah case, the husband refuses to give his wife a get until she makes concessions on property, alimony, visitation, or custody that otherwise would not be, or were not, granted by the civil court. For example, “Claire’ worked with a New York divorce-court judge to offer [her ex-husband] a ‘fair and reasonable compromise.” Claire gave her husband $200,000 and accepted minimal child-support payments in exchange for a get. “The package was extremely beneficial to him financially” said Claire, who is now remarried, “but I took it because otherwise he never would have given me a get.”

In some instances, the husband does not want a divorce, and will refuse to give a get in the hope that his wife will change her mind and agree to remain married. For example, during Linda R.’s five-year marriage, her husband drank and had a bad temper. He began abusing Linda until she fled with her toddler.

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60. See Breitowitz, supra note 3, at 14–15.
62. See id.
63. See id. Study done by Barry Kosmin, research director of the Council of Jewish Federation, in 1990. At the time of the study there were three to four million adult Jews in the United States. See id.
After the marriage collapsed, Linda spent two years as an *agunah*. "He was obsessed with me," said Linda R., 33. "It was, 'if I can't have you, nobody can.' People don't know what to do with us. It's a type of slavery. We're at their mercy." In other instances, such as an abusive relationship, the husband will refuse to give a *get* out of spite. Such is the case of Hannah Fine, a Queens resident and mother of three, whose husband, Larry Fine, a divorce lawyer, withheld a *get* from her for seven years. Upon finally receiving her *get* she remarked, "I can go to sleep every night peacefully now... I feel a sense of relief you can't imagine."

If a husband who withholds a *get* then wishes to remarry in an Orthodox or Conservative ceremony at a later date, he can execute the *get* at that time, or if he wishes remarry in a Reform or civil ceremony without executing the *get*. His wife will remain an *agunah*, bound to a man from whom she is civilly divorced, unable to remarry except in a Reform or civil ceremony.

IV. ATTEMPTS AT CIVIL SOLUTIONS TO THE AGUNAH PROBLEM

A. JUDICIAL RESPONSES

Some *agunot* have turned to the civil courts in an attempt to arrive at a solution to the problem of a recalcitrant spouse. One line of cases deals with an explicit agreement, usually in the civil divorce decree, whereby the parties agree to give a *get* at a specified time, usually simultaneously with receiving a civil divorce. When one party fails to fulfill this obligation regarding the *get*, the other party brings an action requesting specific performance. Some jurisdictions have enforced these provisions, holding that they do not create First Amendment difficul-

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65. Waxman, supra note 61, at A16.
67. See Breitowitz, supra note 3, at 164 n.474.
68. See Shulchan Aruch Even HaEzer 4:1 Any children born from a subsequent marriage without a prior *get* are considered *mamzerim* — children of adultery — according to Jewish law. The children themselves bear this stigma, and may only marry other *mamzerim* or converts. See generally Shulchan Aruch, Even HaEzer 4:13.
ties. The courts have stated that fulfilling the agreement does not require a profession of faith, rather, that it simply requires the party to perform an act to which he himself previously agreed. For example, the court in Waxstein v. Waxstein upheld a provision of a separation agreement requiring a husband to give a get. The wife had already transferred property as required under the agreement.

A second line of cases has gone farther and inferred agreements to give a get. These courts have found that marriage in a religious ceremony or the clause in the ketubah indicating a commitment to live “according to the laws of Moses and Israel” infers a prior commitment to grant a divorce should the marriage dissolve. Thus, these courts have created a de facto prenuptial agreement to give a get.

Courts enforcing an agreement to give a get, whether express or implied, have provided two possible remedies. Some courts have ordered the recalcitrant party to give (or receive) a get.

70. See Koepell v. Koepell, 138 N.Y.S. 2d 366, 373 (Sup. Ct. 1954) (requiring the husband to give a get in such an instance would simply be “requiring the defendant to do what he voluntarily agreed to do.”). See also Rubin v. Rubin, 348 N.Y.S.2d 61 (Fam. Ct. 1973). In Rubin, the wife refused to accept the get, which was a condition for her receiving alimony. The court held that where one party to a get declines to perform, the court will refuse any relief to the defaulting party until that party complies. Rubin at 68.

71. Rubin, 348 N.Y.S.2d at 68.


74. See id. at 881.


76. See e.g. Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983); Minkin v. Minkin, 434 A.2d 665 (N.J. Super. Ct. 1981); In Re Marriage of Goldman, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (stating that marriage and divorce are not religious events, but rather contractual in nature); Cook v. Cook No. FA 90-0376937, 1992 Conn. Super. Lexis 1589 (Conn. Super. Ct. May 26, 1992) (holding that the court could compel both parties to participate in obtaining the get); In re Scholl v. Scholl, 621 A.2d 808 (Del. 1992) (get provision is proper because simply enforcing a contract that the husband had agreed to when he agreed to the ketubah); Fleischer v. Fleischer, 586 So.2d 1253 (Fla. Dist. Ct. App. 1991) (holding that in participating in a ketubah ceremony, husband waived his First Amendment challenge to delivering the get); Burns v. Burns, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987) (It is not a violation of the Establishment Clause to force the husband to submit to the authority of the Beit Din since his refusal to give a get is not based on genuine belief).

77. See e.g. Minkin, 434 A.2d at 668; Scholl, 621 A.2d at 812.
Other courts have required the party to appear before a *Beit Din*. This distinction between these two orders is significant because of the interplay of religious and civil law. The prohibition against a coerced *get* ("*get meuseh*") invalidates a *get* that is given or received under duress. Thus, in most instances, any coercion used to pressure the husband to give a *get* will result in the invalidation of the subsequent *get*. Thus, for example, if the civil court were to order a party to give his wife a *get* under threat of incarceration, the *get* may be invalid as a *get meuseh*. In addition, the order might be construed as requiring the party to perform a religious act, a direct violation of the First Amendment.

The only possible exception to civil enforcement constituting a *get meuseh* would be a situation where there is a prior finding of kofin by the *Beit Din*. In these rare instances, the *Beit Din* will apply the doctrine of constructive consent and permit coercive measures, thus an order by the civil court to give a *get* might be viewed by some *Batei Din* as a legitimate enforcement of their judgment. However, under most circumstances, a direct order

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78. See e.g. Koepell, 138 N.Y.S.2d at 375; Avitzur, 446 N.E.2d at 137; Burns, 538 A.2d at 266; Goldman 554 N.E.3d at 1021 (giving defendant choice of freely giving a *get* or appearing before a *Beit Din*); Waxstein, 395 N.Y.S.2d at 788 (requiring parties to take “whatever steps are necessary to secure a *get* either giving a *get* or appearing before the *Beit Din*”).

79. Babylonian Talmud: Gittin 88b ("A *get meuseh* entered into under duress is valid if it is in accordance with a *Beit Din*’s order to give a *get*, it is not valid if it is not in accordance with a ruling of a *Beit Din* to give a *get*.").

80. See Rambam, Mishnah Torah, Hilchot Gerushin 2:20 (discussing when compulsion is and is not permitted).

81. See Pal v. Pal 356 N.Y.S.2d 672 (App. Div. 1974). The court released the husband from jail, after recognizing that jailing him would not result in a valid *get*, and thus would not achieve the objective of alleviating the woman’s plight. See id.

82. See infra Section V.B.


84. See Breitowitz, supra note 3, at 15. These coercive measures include community ostracism, restriction of honors in synagogue, and may include action by the secular court to compel the *get*. See id. Corporal punishment has been allegedly used by certain Hasidic sects, who use clandestine “enforcers” to carry out the decree of the *Beit Din*. See Breitowitz at 35. Such coercion is rarely applied as findings of kofin are relatively rare, and most *Beit Dins* do not condone the use of violence as a means of enforcement. See supra note 42—46 and accompanying text.

85. J. David Bliech, Jewish Divorce: Judicial Misconceptions and Possible Means of Enforcement, 16 Conn. L. Rev. 201 (1984). Rabbi J. David Bliech believes that in cases where a kofin situation is found, Jewish law would permit the secular court to order the husband to give a *get*, and would recognize such a *get* as valid, provided that the secular
from a civil court to execute a *get* may indicate sufficient duress to invalidate the *get*.\(^86\) If the court requires the party to appear before a *Beit Din*, or simply suggests that the party give a *get*, then a *get* given subsequent to such a suggestion will not suffer the *halakhic* problems of a *get meuseh*.\(^87\)

Other courts\(^88\) have refused to either enforce specific provisions or to infer an agreement to give a *get* on constitutional grounds, arguing it would excessively entangle the state in sectarian matters. Such interference would thereby offend the Establishment Clause or, on a narrower ground, would be beyond the statutory jurisdiction vested in the court.\(^89\)

### B. LEGISLATIVE SOLUTIONS

In 1979, at the behest of the Agudat Israel of America (an umbrella group for ultra-orthodox causes) the New York Legislature considered the question of the *agunah*, and drafted the first New York "*get* law."\(^90\) In 1980, the legislature passed the bill and Governor Cuomo signed it into law.\(^91\) Under this "*get* law", a

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\(^86\) See Bleich, supra note 85, at 235.

\(^87\) See id. There are practical differences as well. Although the secular court can force the husband to appear before the *Beit Din*, it cannot force the husband to comply with the findings of the *Beit Din*. This action thus may be fruitless in resolving the problem of the *agunah*. See Elon, supra note 23, at 19.

\(^88\) See Victor v. Victor, 866 P.2d 899 (Ariz. Ct. App. 1993) (court has no jurisdiction to force a husband to give a *get*); Turner v. Turner, 192 So. 2d 787 (Fla. Dist. Ct. App. 1966) (*get* provision in *ketubah* is unenforceable by religious court); Steinberg v. Steinberg, 1982 WL 2446 (Ohio Ct. App. Jun. 24, 1982) (*get* provision is unenforceable because enforcement would violate the Constitution); Wener v. Wener, 301 N.Y.S.2d 237 (Sup. Ct. 1969) (denying in a child support dispute that the *ketubah* is an enforceable contract); Margulies v. Margulies, 344 N.Y.S.2d 482 (App. Div. 1973) (court would deny the ability to enforce a contract to give a *get*).

\(^89\) See Turner v. Turner, 192 So.2d 787 (Fla. Dist. Ct. App. 1966) (holding that the chancellor had no statutory authority to impose a provision in the final divorce decree requiring husband to give wife a *get*); Steinberg v. Steinberg, 1982 WL 2446 (Ohio Ct. App. Jun. 24, 1982) (holding that the court could not condition receipt of alimony on the wife's cooperation in the *get* process).

\(^90\) N.Y. Dom. Rel. Law § 253 (McKinney 1986).

\(^91\) N.Y. Dom. Rel. Law § 253 (McKinney 1986). Telephone Interview with David Zwiebel, Counsel for Agudat Israel (Mar. 9, 1998). Governor Cuomo's subsequent statement that if the law is unconstitutional, "our excellent courts will make that clear in due time," was criticized by the press, which felt that Governor Cuomo had abdicated his
plaintiff in a civil divorce can ask the judge to require both parties to sign an affidavit specifying that they have removed all impediments to religious remarriage by the other party. Failure to sign the affidavit leads a court to withhold the benefits of civil divorce. The law only allows plaintiffs to request the affidavit, leaving defendant agunahs still without effective remedy. Thus, if the defendant wishes to receive the get, this law will not help her.

In 1992, the New York legislature passed a second get law. This law allows judges to take into account religious impediments to remarriage in distributing property, allowing judges to set a higher level of alimony until a get is executed, subject to reduction afterwards. Agudat Israel, sponsors of the first get law, has argued that financial penalties for non-participation in the get process pressures the husband to such an extent that they eliminate the spouse’s ability to give a get free of duress. This interpretation suggests that gets given pursuant to the second get law are invalid because they were compelled. Not all groups agree with this reasoning, but the lack of consensus indicates that legislative solutions have complicated the agunah issue rather than resolved it. A comprehensive solution to the agunah problem acceptable to the entire Jewish community is still needed.

V. THE PRENUPTIAL AGREEMENT

The failures of post-nuptial solutions for agunahs have led
traditional Jewish couples to look toward prenuptial agreements to address potential problems that may arise in the dissolution of a marriage. The suggested prenuptial agreement, a civilly enforceable contract, requires either appearance before a Beit Din or the giving of a get at the time of a separation or civil divorce. Two such prenuptial agreements are currently used. One is a simple arbitration agreement requiring parties to appear before a designated Beit Din when the couple no longer lives together. Some of these prenuptials permit the Beit Din to issue fines against a party who fails to appear. The second type of prenuptial is a document, executed by itself or in addition to an arbitration agreement, indicating if the couple separates without a get, the husband must pay the wife a stipulated sum, either specified or calculated according to a certain formula. Granting the get would end this financial obligation.

These prenuptials create a complicated situation where contractual obligations, ordinarily enforceable at common law, are formed within the context of a religious document. The enforcement of these agreements raises several issues. The propriety of venue must be first addressed: whether secular courts can oversee the fulfillment of these prenuptial agreements. This concern brings into the discussion the Establishment Clause and the right to free exercise of religion as articulated in the First Amendment of the U.S. Constitution. Furthermore, even though secular courts can sit for these cases, their decisions may not be an effective means of enforcement as their halakhic validity comes into question.

A. DEVELOPMENT OF THE RELIGIOUS PRENUPTIAL

Perhaps the earliest version of a prenuptial agreement akin to those in use today was suggested over 300 years ago by the Nachalat Shiva who incorporated such a document into his book.

99. See Appendix A. The Orthodox movement neglects the Lieberman clause, primarily because the indeterminate monetary penalty raises difficulties with the principle of asmachta. The arbitration agreement can be inserted into the ketubah or executed separately. See infra Section IV.A. See also infra note 120 and accompanying text.
100. See id.
101. See Appendix B.
of standard halakhic forms. The Conservative movement produced the first and simplest prenuptial agreement in this century. In 1954, under the direction of Rabbi Dr. Saul Lieberman, an arbitration agreement (hereinafter “Lieberman clause”) was incorporated into the traditional ketubah, stating:

[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 that if one spouse summons the other to a Jewish court, that party agrees to go and to be bound by the decision of the Beit Din of the Rabbinic Assembly and the Jewish Theological Seminary of America. This agreement subjects the recalcitrant party to fines imposed by the Beit Din in case of refusal to appear.

Many Orthodox versions of a prenuptial agreement also exist. The Orthodox Caucus, a Modern Orthodox public policy group, help to disseminate one such version most utilized by the Orthodox community. This prenuptial agreement consists of

102. See Sefer Nachalat Shiva: Chapter 9. The Nachalat Shiva included such a form in the Tenaim, the traditional prenuptial contract, which has been through several incarnations. One of these variations included the amount of the dowry, the financial agreements between the families, and the financial obligations owed by the parties if one of them refuses to enter into the marriage. See id.

103. The Rabbinic Assembly and the Jewish Theological Seminary [JTS] are respectively, the rabbinic organizational arm and the theological seminary of the Conservative Movement.


105. See Breitowitz, supra note 3, at 120-44.

106. This agreement was later incorporated into a volume by Basil Herring and Kenneth Auman, The Prenuptial Agreement: Halakhic and Pastoral Considerations 45-54 (1996). It should be noted here that prenuptial agreements in general have received support in the more modern Orthodox community. See Leichman, supra note 64, at R1.
two documents: The first is a binding arbitration agreement, where a spouse is required to appear before a specified Beit Din if called by the party. The second is an agreement for a stipulated sum of spousal support for every day after the effective end of the marriage that the husband does not give his wife a get. These agreements are secular documents written in English. Because severe financial pressure to give a get can result in a get meuseh, the stipulated sum is not a fine for failure to give a get, but rather the sum is intended for financial support and is calculated to be within a reasonable range.

In another approach, espoused by Professor Irving Breitowitz, the parties execute two documents before the marriage — a promissory note by the husband and a release by the wife. In the case of separation, the note takes effect and the husband owes the wife a large sum of money. The wife’s release is triggered by the husband’s participation in the get process. If the husband refuses to participate, his promissory note is triggered, but the wife’s release is not. A husband’s refusal to grant a get

The community that is more closely affiliated with the Agudat Israel has not endorsed the idea of a standardized prenuptial, perhaps based on a responsa of Rabbi Moshe Feinstein, the spiritual leader of that community and one of its greatest halakhic voices of the 20th century. When asked about the binding arbitration agreement, he responded that it was permissible, and the get was not considered coerced, but one should be familiar with the couple before broaching the topic with them. As some couples will be scared away from marriage by the discussion of divorce, and as marriage is considered a religious act, it is important not to do anything that may dissuade young couples from marrying. See Igrot Moshe Even HaEzer, VII No. 107 (large volume edition).

107. See Herring and Auman, supra note 106, at 45-47 (parties must fill in the name of the Beit Din they wish to handle their case). Most couples will fill in the name of a standing Beit Din, such as the Beth Din of the Rabbinic Council of America, a central body of rabbis who tend to be affiliated with Yeshiva University, or the Beit Din of Agudat Rabbonim which is affiliated with the Agudat Israel, an organization whose roots are in Europe and many of whose members are educated in more ultra-Orthodox yeshivot. See id.

108. See id. This document was initially drafted by Rabbi Mordechai Willig at the behest of the Orthodox Caucus. It has since been adopted by the Rabbinical Council of America [RCA], a Modern Orthodox umbrella group, which has recommended that all of its members utilize this agreement when performing marriages.

109. As opposed to the Lieberman clause, which is in Aramaic as part of the ketubah. See infra note 104 and accompanying text.

110. See supra note 80.

111. See Herring, supra note 106, at 60.

112. See Breitowitz, supra note 3, at 119.

113. See id. at 119. See also Irwin Haut, Divorce in Jewish Law (1987).

114. See Breitowitz, supra note 3, at 119.

115. See id.
gives the wife a legally enforceable promissory note against the husband.\footnote{116}

VI. ENFORCEABILITY OF THE PRENUPTIAL AGREEMENTS IN CIVIL COURTS

A. VALIDITY OF DOCUMENTS

The prenuptial agreement must be a legally binding agreement, which generally has not been problematic with self-contained prenuptials, because experienced lawyers usually draft them. The more difficult issue is that the standard hallmarks of a contract are often absent in religious prenuptials, as they are rarely freely negotiated.\footnote{117} Typically, the rabbi gives the couple a completed prenuptial agreement.\footnote{118} Therefore, the legal implications of the prenuptial often are not fully explained to the couple before the signing.\footnote{119} While couples could consult with lawyers, many view the signing of the document as a ritual and do not seek legal advice. Some rabbis reinforce this ritualistic sense of the agreement by having the couple sign a prenuptial in Hebrew as well as in English.\footnote{120}

While few cases have addressed the enforceability of religious prenuptials, the New York Court of Appeals in \textit{Avitzur v. Avitzur}\footnote{121} upheld the Lieberman clause.\footnote{122} In \textit{Avitzur}, the couple

\begin{footnotes}
\footnotenumbers

\footnote{116. See id.}
\footnote{117. Religious prenuptials are normally given to the couple by the rabbi who is officiating at the marriage. While sometimes the rabbi will give the couple the prenuptial agreement in advance of the wedding, the prenuptial is often presented immediately preceding the wedding ceremony, thus leaving the couple without the opportunity of consulting an attorney.}
\footnote{118. See Rabbi Reuven P. Bulka, The Rabbinical Council of America Lifecycle Madrikh (1977). This book, directed at rabbis, contains several lifecycle documents, including a prenuptial. See id. at 69-77.}
\footnote{119. See id.
\footnote{120. The addition of a Hebrew version is especially difficult with the Lieberman clause, because very often the couple does not know the meaning of the \textit{ketubah}, since it is in Aramaic or Hebrew. While the couple may have been advised that the clause is present before participating in the \textit{ketubah} ceremony, it is very possible for a couple to sign a \textit{ketubah} without being aware of the clause. This has become increasingly problematic as many couples select their \textit{ketubah} from Judaica shops based on the artistic merit of the document. Thus, a couple could literally purchase a document with this clause contained in it without any knowledge that it is there.}
\footnote{121. 446 N.E.2d 136 (N.Y. App. Div. 1983).}
\footnote{122. See id. at 573.}
\end{footnotes}
had been married in a Jewish ceremony utilizing a *ketubah* containing the Lieberman clause. The civil court granted the husband a divorce on the grounds of cruel and inhumane treatment. The wife then wished to bring the defendant husband before a *Beit Din* in order to receive a religious divorce, but he refused to appear. The wife argued that the *ketubah* was a marriage contract that the husband breached. She sought a judicial declaration to that effect and specific performance of the requirement that he appear before a *Beit Din*. The court enforced the Lieberman clause in the Conservative *ketubah*. Applying equity principles, it held that a legally valid agreement should not escape enforceability simply because it appears in a religious document. The Court stated:

[The contractual obligation plaintiff seeks to enforce is closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There can be little doubt that a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable.]

**B. CONSTITUTIONALITY**

Courts have tended to brush over the question of constitutionality in the cases that have addressed the *get* issue, in an attempt to avoid an inequitable solution. For instance, in *Burns*, the court dismissed the constitutional issues with a few lines, noting that religious faith was not at issue because the husband would have been willing to give a *get* for an amount of money. However, the First Amendment issues raised by the use of these prenuptial agreements cannot be so conveniently

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123. See id.
124. See id.
125. See id.
126. See id.
127. See id. at 574.
129. See *Burns*, 538 A.2d 438 at 439.
Tension exists between the Establishment Clause, which proscribes the state from advancing religion, and the Free Exercise Clause, which prohibits government restrictions on the practice of religion. The Due Process Clause of the Fourteenth Amendment makes these guarantees applicable to the states. The Supreme Court analyzes these two prongs of the First Amendment — the Establishment Clause and the Free Exercise Clause — under different tests. Thus, state action must not run afoul of either the Establishment or Free Exercise Clause to be constitutional. The difficulty lies in the application of Supreme Court tests for these two clauses to state court enforcement of these prenuptial agreements.

1. The Establishment Clause

In Lemon v. Kurtzman, the Supreme Court set forth a three-prong test for determining Establishment Clause violations. Lemon requires that government actions: (1) have a secular purpose, (2) a primary effect that neither advances nor inhibits religion, and (3) avoid creating an “excessive government entanglement with religion” which might erode the principle of government neutrality in religious decision-making.

a. Secular Purpose

Enforcement of a religious prenuptial serves secular objectives. While the removal of barriers to religious remarriage does not seem to be a “secular purpose,” if the get is not given after a civil divorce, the parties may not remarry, although they are divorced in the eyes of the state. Since one of the purposes of a civil divorce is to permit the parties to remarry, assuring their ability to remarry can be construed as serving an important
"secular purpose." Moreover, the prenuptial, if properly drafted and executed, is a valid contract to which the parties agreed. The state has an obvious interest in enforcing valid contracts. While this contract does involve religious issues, the law has enforced contracts that are more deeply entangled in religion. For example, the Illinois Court of Appeals enforced a prenuptial agreement that required the children of a marriage to be raised as Jews.

b. Primary Effect

The second prong of *Lemon* requires that the state action have the primary effect of neither advancing nor inhibiting religion. The question of what exactly constitutes a "primary effect" does not have a clear answer. One possibility emerging from Establishment Clause cases is that "primary effect" is synonymous with "direct and immediate" as opposed to "indirect and attenuated." A "direct" effect is one which is precisely the result that the operation of the statute produces. Some argue that the prenuptial advances religion by compelling participation in a religious "ceremony" in which one party does not want to partake. Although a religious element exists in the enforcing of the prenuptial, the more immediate and direct effects include appearing before a specific tribunal or providing financial support to an ex-spouse. Additionally, the court's enforcement of a contract would have the effect of giving agunahs the option of remarriage, which is as much of a secular act as a religious one. Thus, enforcement of these contracts does not directly advance religion.

137. See In re Sunshine, 357 N.E. 2d 999 (N.Y. 1976); see also *Avitzur*, 446 N.E.2d at 137 (holding a prenuptial contained within a ketubah is enforceable and subject to specific performance).
138. The right to enter into contracts is recognized by both the federal and state constitutions. See, e.g., U.S. Const. art. I, § 10; Ill. Const. 1970, art. I §16.
140. See *Lemon*, 403 U.S. at 612.
144. See Breitowitz, supra note 3, at 88–89.
c. Excessive Entanglement

Courts have interpreted the third prong of the Lemon test, the excessive entanglement prong, as a ban on extensive government monitoring of religious activity, or alternatively, as a prohibition on courts deciding religious questions. A binding arbitration prenuptial involves the fewest entanglement problems if it requires arbitration before an institutional Beit Din. If the prenuptial agreement specifies a standing Beit Din, the prenuptial can simply function like a binding arbitration agreement subject to judicial enforcement. When a Beit Din is not specified, the prenuptial can potentially enmesh the secular court in the selection of a particular religious tribunal, which might violate the entanglement prong.

The Establishment Clause may be implicated in regard to monetary support payments if the parties disagree over the religious sufficiency of the get or participation in the get process. In most cases, however, the enforcement of the monetary support agreement is not problematic; the court only determines if a spouse has been given a sufficient end to the marriage. Such an inquiry will rarely result in the government having to make deep determinations of religious policy. To pass the entanglement prong of Lemon, both the drafters of the prenuptial agreement and the judges involved need to tread carefully.

2. Alternatives to the Lemon Test

Justice O'Connor has suggested an alternative standard to the Lemon test. Her “endorsement test” focuses on the issue whether the government act tends to convey a message of en-

148. See Jones, 443 U.S. at 602 (First Amendment severely limits courts from involving themselves in questions involving religious doctrine).
149. This is because of the issue of asmachta. See infra Section VI.
150. This is because of the issue of asmachta. See infra Section VI.
151. See Jones, 443 U.S. at 602 (1979). Judicial involvement is permitted to the extent that it can be accomplished in purely secular terms, i.e. the application of objective, well-established principles of secular law. Many of the prenuptial cases may be resolvable by the application of secular contract law.
endorsement or disapproval to religion. In *Allegheny County v. ACLU*, Justice Blackmun, writing for the Court, decided that the placing of a creche on the staircase of the Allegheny County courthouse violated the Establishment Clause because “the [Establishment] Clause . . . prohibits government from appearing to take a position on questions of religious belief.” In *Lee v. Weismann*, the Court held that a clergyman reciting an invocation and benediction at a public high school graduation violated the Establishment Clause because the government’s involvement with religion was pervasive. It is “beyond dispute that at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”

Enforcement could be construed as judicial coercion of participation in religion, in violation of *Lee*. Such a conclusion would be tenuous, however, as courts would be simply enforcing an agreement to which the parties themselves have freely bargained. They are not required to take a position on religious questions. This position has the support of many scholars, who have argued that granting a get is not a “religious” act, but rather a contractual one. Therefore, even if there is judicial coercion to appear before a Beit Din or to grant a get, the required act is secular and thus, outside the scope of the Establishment Clause.

A binding arbitration agreement has greater difficulty in not violating the Establishment Clause. Even if the agreement specifies a standing Beit Din, under *Lynch* and *Lee*, sending the parties to a religious court may be considered endorsement or coercion. If the prenuptial specifies a zabla situation that could involve the court in determining who should sit on the Beit Din, it might implicate *Allegheny County* by requiring the court

153. See id.
155. Id. at 574.
157. See id.
158. Id. at 587.
159. See *Lynch*, 466 U.S. at 688; *Allegheny*, 492 U.S. at 574.
160. See infra note 178 and accompanying text.
161. See *Minkin*, 434 A.2d at 668.
162. See supra Section I and note 58.
to take a position on religious beliefs. However, the court could choose to ignore the religious nature of the Beit Din and treat it simply as an arbitration panel. Despite recent Supreme Court criticism of Lemon, it has failed to elucidate a single standard for Establishment cases. Thus, one cannot conclusively determine the constitutionality of secular court enforcement of prenuptial agreements.

3. The Free Exercise Clause

The Free Exercise Clause of the First Amendment, in conjunction with the Fourteenth Amendment, forbids the government from imposing burdens on, or giving benefits to, people because of their religious beliefs. Again, the Supreme Court has failed to articulate a single test for Free Exercise questions.

In Sherbert v. Verner, the Court applied strict scrutiny to analyze the Free Exercise issue. It articulated a two-prong, balancing test to determine if a government act violated this part of the First Amendment. The government bears the burden of showing a compelling interest in its act and proof that its act is the least restrictive means to active its goal. As a prerequisite for this test, the Court required a showing of interference with a party's sincere religious belief. The Supreme Court, in Wisconsin v. Yoder, enumerated factors to determine whether a particular religious belief is "sincerely held." These included: the length of time the belief has been held; the importance of the belief to everyday practice; the nature of the belief, either personal or communal; and the origins of the belief.

164. See id. at 610.
168. See id. at 73.
169. See id. at 1221.
170. See id. at 205.
171. See id. at 205 (1972).
The application of a Free Exercise analysis to the prenuptial agreement rests on whether requiring the giving of a get or the submission of a party to ecclesiastical court arbitration of a get, constitutes a burden on a sincerely-held, religious belief. Courts have found that the giving of a get is not a “religious act,” since it does not require the profession of a particular faith. Also, experts have testified that the body of halakha can be divided into two distinct categories: laws governing the relationship between a person and God and laws governing relations between persons.

J. David Bleich, professor of Jewish law at Cardozo Law School, has also argued that the get is secular. First, he states that a get is an institution that “gains effect solely through the actions of the parties themselves,” and cancels — by mutual consent — a contractual relationship. Furthermore, Bleich argues that a get is not a religious act because it does not involve a “confession of faith.” A court of Jewish law would see its execution as routine, as would be a rescission of contract, or the execution of a promissory note by a state court. Many civil courts have accepted this premise that a get is not a religious act—in one case, after hearing the expert testimony of four rabbis. In Koepell, for example, the court held that the appearance of the husband before a rabbinic tribunal to “answer questions and give evidence needed by them to make a decision is not a profession of faith.” Other courts have accepted similar arguments.

174. See Minkin, 434 A.2d at 667–68.
175. See id.
176. See Bleich, supra note 85, at 233
177. See Scholl v. Scholl, 621 A.2d 808 (Del. Fam. Ct. 1992). The court ordered the husband to give his wife a get per stipulation of the settlement, because although the court could not require the husband to participate in religious ceremony, here the court was simply ordering him to do what he had promised. See also Burns v. Burns, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987) (requiring the husband to assist the wife in getting a get does not violate First Amendment).
178. Minkin, 434 A.2d at 667–69. The rabbis variously testified that “the get does not involve a religious ceremony or require a rabbi’s presence, and although the husband is required to take the initiative, he does not have to be a believer, state any doctrine or creed, or even acknowledge his Jewishness”; “the document contains no reference to God’s name”; and “the get is a general release document where the husband releases the wife and frees her to marry in compliance with the ketubah contract.” Id.
180. Id. See also Bleich, supra note 85, at 230 n.88 (“It should be noted here that the court did not understand the nature of the get . . . . [H]owever, the salient point, namely that no ‘profession of faith is involved’ is entirely true.”).
This conclusion, however, has not been universally accepted, as a profession of faith is not necessary for all religious acts. Though Jewish law can be divided into two categories, interpersonal and theological, both categories are considered divine in origin, and performance of either is a religious obligation, a positive religious act. "Judaic law is only secular in the very limited sense that it deals with many of the subjects that are commonly dealt with under non-religious law such as contracts, tort and agency." Thus, the giving of a get can be construed as demonstrating a belief in the authority of Jewish law above civil law, as well as a belief in the rabbinic system. Such a view may be valid, but prior case law suggests that courts have been more likely to find that the refusal to give or receive a get is not a religious act.

What makes the Free Exercise analysis particularly difficult when applied to the issue of enforcement of the prenuptial binding arbitration or support agreement is determining which individual's religious right is being preserved. On one side, the recalcitrant party could claim the right not to be compelled to submit to a particular religious ceremony. Alternatively, the state's refusal to enforce a valid prenuptial contract may violate the Free Exercise rights of the party who wishes to remarry, and "to exclude from contractual agreement areas that impinge upon religious practice is to interfere with the free exercise of religion." Courts articulated several rationales for requiring the recalcitrant party to participate in the divorce, believing the impact on him to be slight. First, they have held that if the recalcitrant party freely participated in the ketubah ceremony, it is not "such a violation" of his Free Exercise rights to force him to appear before a religious tribunal. Also, courts have not accepted

181. See supra notes 76, 176 and accompanying text.
182. The Babylonian Talmud: Kiddushim 41b notes the get is "hol", not religious. However, this may just be in the context of the particular discussion of the holy priestly offering, and not in a context of a larger discussion of secular verses religious. See id.
183. See Elon, supra note 23, at 5.
184. Breitowitz, supra note 3, at 353.
185. See supra note 76 and accompanying text.
186. Id.
the argument that enforcement violated the recalcitrant party's religious beliefs in cases where there is evidence that he would give the get for monetary concessions. Finally, courts have found that participation in the get process is not a religious act. The last two responses, finding that the parties were insincere or that the get is not a religious act, are suspect because they require court inquiry into the nature of the religious belief and act.

4. Religious Accommodation

The Supreme Court first articulated the doctrine of religious accommodation in Zorach v. Clauson. "Reasonable accommodation" allows the government to make exceptions for those whose religious beliefs would be violated by a particular government action.

The nation is understood not as secular, but as pluralistic. Religion is under no special disability in public life; indeed, it is at least as protected and encouraged as any other form of belief — and in some ways, more so. The idea of an accommodation of religion, which is foreign to the religion clauses, based on strict neutrality interpretation, follows naturally from the pluralist understanding.

The conflict between the prohibition of the Establishment Clause and the necessity, or at least permissibility, of reasonable accommodation has never been definitively resolved. The Sherbert and Yoder decisions were two rare cases where the government granted a religious-based exemption from a law of general applicability. These cases precipitated Employment Division v. Smith, where the Court seemed to hold that ac-

190. See supra note 76 and accompanying text.
192. Id.
194. See Breitowitz, supra note 142, at 350.
195. See Nowak, supra note 165, at 1290.
196. 494 U.S. 872 (1990). One such exception would be where law is designed specifically to burden religious beliefs. This type of law was the subject of the Church of Lukumi Babaly Aye v. Hialeah, 508 U.S. 420 (1993). Such a law will be subject to strict
commodation in the face of a generally applicable law is not usually required. The Court in *Smith* suggested that a legislative accommodation of religion might be possible, but is not constitutionally mandated. 197 It held that the government is prohibited from regulating religious beliefs, including using religious doctrine as a basis for judicial decisions. 198 Furthermore, the Court found the Free Exercise Clause invalidates a law, though facially neutral, if it can be shown that the purpose of the law is to burden religious belief. 199

Breitowitz divides the reconciliation of reasonable accommodation into three theoretical frameworks. 200 At one extreme is a position of strict neutrality, in which it is constitutionally impermissible for a court to grant religious exemption from neutral legislation. 201 At the other is the position that the government may remove barriers or costs of religion when such accommodations are "reasonable." A third option takes an intermediate position in allowing the state, acting under the Free Exercise Clause, to remove those barriers that result from governmental action and retain other barriers that arise under Establishment Clause. 202 This type of accommodation is deemed "reasonable" because in situations where strict application of the Free Exercise Clause would result in hardship, the courts will remove it to the extent permissible by the Establishment Clause. 203

Under this last understanding of accommodation, certain judicial actions — even if they enforce an agreement to appear before a rabbinic court — should not constitute compelled specific performance of a religious obligation. The judicial action in question involves the removal of barriers resulting from governmental action and would result in severe hardship to the spouse.

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scrutiny by the courts and the compelling interest test. See Nowak, supra note 165, at 1292–93.
198. See id.
199. See id.
200. See Breitowitz, supra note 3, at 192–93.
203. See Nowak, supra note 165, at 1280–90.
who wishes the divorce if the agreement to appear before rabbinic court is not enforced. This reasonable accommodation principle, however, would also prevent the courts from enforcing specific performance of a religious obligation or discipline.\textsuperscript{204} Such action would excessively entangle the judiciary in religious matters.

Thus, even if the granting of a \textit{get} is found to be a "religious act" and judicial involvement unconstitutional, a court could be able to enforce a prenuptial agreement to effect a degree of relief for the party that wishes a \textit{get} under the theory of reasonable accommodation.

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C. REMEDY IN TORT
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Another means to award relief to an \textit{agunah} through the civil courts may be through bringing suit against the recalcitrant party for intentional infliction of emotional distress.\textsuperscript{205} Such a claim arises when "by extreme and outrageous conduct [the tortfeasor] intentionally or recklessly causes severe emotional distress to another."\textsuperscript{206} The action must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."\textsuperscript{207} Conduct is "outrageous" if the tortfeasor knows that a particular act will unusually distress the plaintiff.\textsuperscript{208}

Courts have been reluctant to apply this tort in general, and to spousal relationships in particular, for fear of abuse of the court system.\textsuperscript{209} Since \textit{agunah} cases are relatively infrequent as compared with other intra-spousal disputes, permitting a suit based on emotional distress of the \textit{agunah} would not unduly burden the courts. Additionally, the \textit{agunah}'s predicament is a

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\textsuperscript{204} See Rubin v. Rubin, 348 N.Y.S.2d 61 (Fam. Ct. 1973) (distinguishing between \textit{Koepell}, 138 N.Y.S.2d 366, and Margulies v. Margulies, 344 N.Y.S.2d 482 (App. Div. 1973), on grounds that the court was not attempting to enforce religious discipline, but rather was enforcing other relief for a party who refused to participate in an agreement, and the actions which were a condition precedent to receiving relief, happened to have religious significance).

\textsuperscript{205} Restatement (Second) of Torts § 46 cmt. f (1965). See also generally Prosser and Keeton the Law of Torts §54 at 364–65, and nn.57–61, § 122 at 901–05.

\textsuperscript{206} Id. at § 46 cmt. d.

\textsuperscript{207} Id. at § 46 cmt. f.

\textsuperscript{208} See Breitowitz, supra note 3, at 239 n.703.
\end{flushright}
prototypical emotional distress cause of action — namely, a case where one party knowingly exploits the sensitivities of the other party.\textsuperscript{210} If an agunah’s emotional distress claim is successful, then the court only can provide the remedy of a financial payment, and not specific performance.\textsuperscript{211} The agunah can then use the court-ordered remedy as leverage against her spouse. The damage award may therefore have the same monetary effect as a prenuptial support agreement.\textsuperscript{212}

Such a tort action would not violate the Supreme Court’s Establishment Clause test as defined in \textit{Lemon}.\textsuperscript{213} The claim serves the secular purpose of punishing tortfeasors and it neither advances nor inhibits religion. Furthermore, it does not involve excessive entanglement because the only factual determinations implicating religion are that the wife does not have a get and that she will not remarry without one.

Under the \textit{Yoder} standard, violation of the Free Exercise Clause turns on whether the giving of a get constitutes a “sincerely held belief.”\textsuperscript{214} Since courts have held that the get is a secular agreement,\textsuperscript{215} they would probably find that the giving of a get fails the \textit{Yoder} standard. Even under the \textit{Smith} standard,\textsuperscript{216} courts would hear this action because it does not involve accommodation. Thus, tort law may provide an effective avenue for women who did not sign a prenuptial agreement.

\section*{VII. Halakhic Validity of the Prenuptial Agreement}

The question of halakhic validity further complicates the drafting of a constitutional and enforceable prenuptial agreement. A prenuptial agreement that results in a get given in exchange for debt forgiveness by a civil court decision, or out of fear of further litigation, will probably be considered a compelled divorce, and thus invalid under Jewish law.\textsuperscript{217}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{210} See id. at 240.
\item \textsuperscript{211} Patti L. Scott, Divorce Law and the Religion Clause: An Unconstitutional Exorcism of the Jewish Get Law, 6 Seton Const. L.J. 1117 (1996) at 1189.
\item \textsuperscript{212} However, this tactic may raise halakhic problems, because of the problem of get meuseh. See supra note 79 and accompanying text.
\item \textsuperscript{213} See Lemon v. Kurtzman, 403 U.S. 602, 611 (1971).
\item \textsuperscript{214} See Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
\item \textsuperscript{215} See supra note 76 and accompanying text.
\item \textsuperscript{216} See Employment Division v. Smith, 494 U.S. 872 (1990).
\item \textsuperscript{217} See discussion of get meuseh, supra note 79 and accompanying text.
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\end{footnotesize}
There are two primary issues with regard to the *halakhic* validity of a prenuptial agreement. The first is the problem of the *get meuseh*, or coerced *get*.\(^{218}\) The court in *Margulies v. Margulies*, for instance, noted that jailing the husband for contempt for his refusal to give a *get*, would not be effective because any *get* subsequently given would be coerced and therefore invalid.\(^{219}\) The second principle relates to a definition of "freely given." This is the issue of the mens rea (known in Jewish law as *asmachta*) of the parties at the time the prenuptial agreement was signed.

At Jewish law, for a contract to be valid an individual must have fully anticipated and accepted all contingencies. This invalidates contractual penalties in most cases because it is expected that a party would not enter into a contract assuming non-performance.\(^{220}\) Thus, the contractual penalties in most cases of non-performance are invalid, because the expectation is that the party did not enter into the contract with the assumption that he would not perform his part.\(^{221}\) If the party had truly expected the contingency to occur, he would not have accepted the penalties.\(^{222}\) The clause, then, was not "freely" agreed to retroactively voiding the contract. This *asmachta* principle assumes that an individual cannot contract into accepting a penalty in the case for refusing to participate in the *get* process because the individual would not believe that such a situation would arise.\(^{223}\) Thus, any prenuptial that contains monetary damages must make clear that the money is for something other than a penalty for non-compliance, i.e., for spousal support.\(^{224}\)

Unfortunately, agreements that avoid monetary awards, such as a binding arbitration, often do not offer much to compel the

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218. See supra Section I.
221. See id.
223. Cf. id.
224. A person can accept an obligation to support someone else unconditionally for a specified period. See Babylonian Talmud: Ketubot 101b (one can support his stepdaughter for the period of her marriage). It has been extrapolated that one can make this agreement with one's own wife, despite her *halakhic* status as a rebellious wife or *moredet*, which would remove her husband's obligation to support her. In addition, a husband can waive his right to a wife's earnings and property, which is generally assumed in Jewish law. Even HaEzer 113, Beit Shmuel 2, Even HaEzer 134 Pitchai Teshuvah 9. However, in order to avoid the problem of *asmachta*, it is preferable to specify the amount, and have that amount directly correlate to the costs of support.
recalcitrant party to participate in the get process. Thus, while a court can enforce a binding arbitration agreement and can compel the parties to appear before a Beit Din, there is little that the Beit Din can do to compel the get itself.225 If the Beit Din instructs the husband to give his wife a divorce, then (constitutional issues aside) the order is enforceable in civil court since it is the finding of a valid arbitration panel.226 However, a get given under penalty of punishment by the civil court may be void as a get meuseh. An enforceable agreement that imposes monetary payments for refusal to give the get can avoid these halakhic and constitutional problems while giving real enforceability to the agreement.

As for the problem of asmachta, the monetary amount must not be a penalty for non-performance, but rather an amount related to something else.227 To avoid the problem of get meuseh, the monetary amount must be low enough to allow the husband to make a reasonable choice,228 rather than an amount which is so onerous as to force him to give the get. Thus, under civil law, the recalcitrant party has three options: payment, granting the get, or imprisonment. If he is jailed for failing to pay, he can then chose to pay or give the get. Because payments exists as a reasonable alternative, giving a get is not the only option available to him and the get is not considered coerced. However, where payment is well beyond the means of the individual, it is no longer reasonable, and a get given as a result would be invalid due to duress.229

While the issues of the get meuseh and asmachta are the most critical to the halakhic validity of the prenuptial, the practicality of the prenuptial as a real-life solution has halakhic implications as well. If the arbitration agreement allows all divorce settlement issues, rather than those involving the get, to be referred to the Beit Din, the Beit Din can choose to apply Jewish law of

225. See supra Section I.
226. See Domke, supra note 146, at 441.
227. See Breitowitz, supra note 3, at 133–34.
228. See id. While this may appear to be a legal fiction, the ability to make a realistic choice determines the validity of the get. Thus, the monetary amount selected must be one that is within reason for the couple — an amount that is too low would render it insignificant, however, and an amount that is too high might leave the spouse with no reasonable choice in deciding to give the get. See id.
229. See Breitowitz, supra note 142, at 373 n.268.
spousal distribution instead of state law. Under Jewish law, a husband has an obligation to support his wife. In exchange for the husband's support, the wife gives her earnings to the husband.

There are no provisions for on-going support after divorce, with the exception of the money allocated in the ketubah. A Beit Din would normally assign more than simply the ketubah to the woman. However, for a woman to receive what she would at civil law, the prenuptial agreements must address the reality of halakhic distribution. The simplest solution is for the prenuptial to state explicitly that the Beit Din will decide issues of property distribution according to the laws of a particular state. Alternatively, the agreement could insert a clause whereby the husband renounces his right to his wife's earnings from the time that they are no longer living together. A carefully drafted prenuptial agreement can thus both be halakhic and put parties in a fair financial position.

VIII. CONCLUSION

Prenuptial agreements seem to be the best means to prevent future agunot within the Jewish community. They initiate the

230. See Isaac Herzog, The Main Institutions of Jewish Law 32 (1980). It should be noted that the agreement that the RCA endorses contains a provision that directs the arbitration of monetary disputes to the Beit Din. Many object to the inclusion of the monetary disputes in the arbitration. They feel that the current secular laws of equitable distribution and maintenance favor women more than Torah Law does. Halakhically however, these disputes belong in the Beit Din, unless Beit Din allows the parties to resolve them in court. According to many halakhic interpreters, if both parties agree that Beit Din should base their decisions upon secular law as well as Torah law, the Beit Din will do so. See Prenuptial agreement, Introduction for Officiating Rabbi, pg. 3 in Accompanying notes to Agunah Conference, held at Cardozo Law School in 1993.

231. See Shulchan Aruch Even HaEzer 69:2. This obligation is formalized in the ketubah, but it exists independently of any formal agreement. See Elon, supra note 23, at 390.

232. See Shulchan Aruch Even HaEzer 80:1 ("The work of her hands is to go to her husband."), The wife can choose to keep them if she forgoes her husband's support. See id.

233. See id.

234. Note that some Batei Din will assign equitable distribution, or something akin to such a value. See supra note 227 and accompanying text.

235. It should be noted, however, that any custody agreement, even if decided by mutual decision, could be overturned by the state if the state determines that it is not in the best interests of the child. See Mookin and Wiesberg, Child, Family and State, 819 (3rd ed. 1995). For an example of such a clause, see Appendix A.
first crucial step towards getting the parties before a Beit Din. The prenuptial allows the subject of the get to be dealt with prospectively rather than retroactively. As a result, recourse will be available with a certain degree of certainty. Additionally, the prenuptial agreement makes couples address these issues when they are committed to each other, and not later, when there may be discord.

The advantages of the prenuptial, however, are not guaranteed. Civil court judges are often wary of alternate forums, especially ecclesiastical tribunals that are vulnerable to charges of corruption. As a result, many civil court judges would prefer to adjudicate the prenuptial agreement in their own court.

The effectiveness of the prenuptial also depends on the support of the rabbis because they must explain to couples the importance of entering into such an agreement. In addition, couples must recognize the civil law nature of the document. While only with widespread use can prenuptial agreements function as an effective solution, they should be implemented wherever rabbinic and community leaders will support them, in the hope that the signing of a version of the agreement will eventually become an accepted and established norm throughout the Jewish community.

236. See supra note 53 and accompanying text.
APPENDIX A: ARBITRATION AGREEMENT BETWEEN HUSBAND AND WIFE

Basil Herring and Kenneth Auman
The Prenuptial Agreement 49 (1996)

Memorandum of Agreement made this ____ day of ____ 57 ___ which is the ____ day of____ 199_ in the City of __ . State/Province of __ , between __ , the husband-to-be who presently lives at __ and the wife-to-be __ - who presently lives at __________. The parties are shortly to be married.

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

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

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

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

(b) The parties agree that the Beit Din is authorized to decide any other monetary disputes that might arise between them.

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

(d) In deciding disputes pursuant to paragraph III(b) the parties agree that the Beit Din shall apply the equitable distribution law of the State/Province of ______, as interpreted as of the date of this agreement, to any property disputes which may arise between them, the division of their property and questions of sup-
port. Notwithstanding any other provisions of the equitable distribution law, the Beit Din may take into account the respective responsibilities of the parties for the end of the marriage, as an additional, but not exclusive factor, in determining the distribution of marital property and support obligations.

IV. Failure of either party to perform his or her obligations under this agreement shall make that party liable for all costs awarded by either a Beit Din 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 terms of this agreement.

V. (a) In the event any of the Beit Din members are unwilling or unable to serve, then their successors shall serve in their place. If there are no successors, the parties will at the time of the arbitration choose a mutually acceptable Beit Din. If no such Beit Din can be agreed upon, the parties shall each choose one member of the Beit Din and the two members selected in this way shall choose the third member. The decision of the Beit Din shall be made in accordance with Jewish law (halakha) and/or the general principles of arbitration and equity (pesharah) customarily employed by rabbinic tribunals.

(b) At any time, should there be a division of opinion among the members of the Beit Din, the decision of the majority of the members of the Beit Din shall be the decision of the Beit Din. Should any of the members of the Beit Din remain in doubt as to the proper decision, resign, withdraw, or refuse or become unable to perform duties, the remaining members shall render a decision. Their decision shall be that of the Beit Din for the purposes of this agreement.

(c) In the event of the failure of either party to appear before it upon reasonable notice, the Beit Din may issue its decision despite the defaulting party’s failure to appear.

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

VII. This agreement constitutes a fully enforceable arbitration agreement.
VIII. The parties acknowledge that each of them have been given the opportunity prior to signing this agreement to consult with their own rabbinic advisor and legal advisor.

In witness of all of the above, the Bride and Groom have entered into this agreement in the City of __________, State/Province of __________.

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