

Ensuring the Power of the Beth Din: Creation of the Halakhic Prenuptial Agreement

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One purported solution to the agunah problem is the halakhic prenuptial agreement. This paper examines the process that created the halakhic prenup through focusing on the Conservative movement's adoption of the Lieberman Clause, the Koepfel v. Koepfel case, and the growing Orthodox feminist movement. In examining the cultural forces that led to the creation of the halakhic prenup, it becomes clear that the Orthodox Rabbinate designed the halakhic prenup to secure the power of the Orthodox Beth Din. The halakhic prenup was created as a direct result of increasing numbers of Jewish women turning to secular courts for a solution to the agunah problem.

Introduction

Since biblical times, Jewish women seeking a divorce have been plagued by the problem of the *agunah*: in order for a divorce to be considered valid within the Jewish community, a man must provide his wife with a *get*.⁵⁴ If the husband is unable or unwilling to do so, and they separate, his wife becomes an *agunah*, or “chained woman.” Under Judaism’s adultery laws, *agunot* are forbidden to remarry and, if they have a child with another man, that child is considered illegitimate.⁵⁵ As Jewish society has progressed, it has become increasingly clear that putting women in this abhorrent position is unacceptable. Nevertheless, Jewish authorities are aware that they cannot disregard *halakhic* law (i.e. Jewish law) which initially created the *agunah* problem. This is of particular concern for the Orthodox community, as this community adheres to a stricter interpretation of Jewish law than other Jewish denominations. Accordingly, the challenge arises of how to solve or

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⁵⁴ An *agunah* is a woman who is unable to leave her religious marriage due to being unable to obtain a *get*. A *get* is a document in Jewish religious law, given from husband to wife, which effectuates a divorce.

⁵⁵ This child is known as a *mamzer* and is subjected to second-class status within Judaism. For instance, a *mamzer*, as well as the descendants of *mamzerim*, are prohibited from marrying a non-*mamzer* Jewish spouse. While certain Jewish sects have discarded this practice, it remains a salient tradition within the Orthodox community.



mitigate the problem of the *agunah* in a way that adheres to *halakha*. Various solutions have been proposed within the Orthodox community in the United States, with the *halakhic* prenuptial agreement being a particularly salient one.⁵⁶

Origins of the Halakhic Prenup

From 1950 to 1980, the Orthodox community in the United States underwent radical change. Jewish people paid attention to women's issues, and it was evident that the Orthodox Rabbinate needed to address the problem of the *agunah*.⁵⁷ However, the Rabbinate waited. Indeed, the Orthodox Rabbinate only created the *halakhic* prenup in the wake of innovations in Jewish law, U.S. civil law, and feminist advocacy, which threatened to undermine the authority of the Orthodox Rabbinate. This threat manifested in women, feeling neglected in the face of patriarchal Jewish law, turning to secular civil courts to seek redress in the case of *get* refusal. Looking for a way to preserve their power over Jewish law, the Rabbinate began creating a *halakhic* prenup that addressed the issue of the *agunah* and ensured the continued authority of the *Beth Din* (i.e. rabbinical court). These dual ambitions led to the formation of a *halakhic* prenup that only partially served women's needs. Significantly, these prenups did lower the frequency of *get* refusal. However, this was not its purpose nor what it aimed to accomplish. In prioritizing the aims of the *Beth Din*, the *halakhic* prenup created by the Orthodox Rabbinate systematically blocked Jewish women's access to seek redress for *get* refusal in civil court.

By the 1950s, the pressure was mounting on American Orthodox authorities to solve the *agunah* problem. Part of the pressure stemmed from the Conservative Jewish community which was already making headway on this issue. For decades, the Rabbinical Assembly urged the Conservative movement not to address the *agunah* problem until the Orthodox authorities were ready to take joint action. Thus they waited,

⁵⁶ A *halakhic* prenuptial agreement is a Jewish law document that makes provisions for the case of religious divorce. It is usually used as a tool to prevent or mitigate the effects of *get* refusal.

⁵⁷ In referring to the Orthodox Rabbinate, I refer to the body of Orthodox rabbis in the United States. This is different from the Rabbinical Assembly (an international organization of Conservative rabbis) and the Rabbinical Council of America (an organization of Orthodox rabbis located in New York City).



refusing to act unilaterally.⁵⁸ However, after a substantial period of proposing collaborative solutions—which the Orthodox Rabbinate rejected—the Conservative movement decided to act alone. Their proposed “solution” came in 1953 with the Lieberman Clause. This clause, stipulated in the *ketubah* (i.e. Jewish marriage contract), stated that upon civil divorce, both parties must appear before the *Beth Din* so that the husband may provide his wife with a *get*. If either party refuses to appear before the *Beth Din*, the spouse may seek redress in civil court.⁵⁹ Notably, this was the first time American Jewish rabbis employed the secular state to assist in solving the *agunah* issue. As the Conservatives made strides in solving this problem, Orthodox Jews began placing increased pressure on their authorities to do the same.

The Agunah Problem in Secular Court

Within the Orthodox community, it was feared that secular courts would undermine the power of the Jewish court. Tensions began to rise after the introduction of the Lieberman Clause and increased in 1957 with the *Koepfel v. Koepfel* case. In this legal dispute, two individuals—Maureen and William Koepfel—entered a postnuptial agreement stipulating that both of them would appear before a *Beth Din* to execute a *get* in the case of civil divorce. Upon civil divorce, William failed to uphold the agreement, and Maureen filed suit in civil court. William’s defense argued that the civil court could not effectuate a *get*, or force William to appear before the *Beth Din* for the same purpose, because of the separation of church and state. The court dismissed this argument, stating that it was constitutional for it to rule on the case because “[c]omplying with his agreement would not compel the defendant to practice any religion . . . Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.”⁶⁰ While Maureen did not ultimately win her case, *Koepfel v. Koepfel* demonstrated that, in theory, the secular court could uphold a Jewish nuptial agreement.⁶¹ This decision did not occur in isolation; it was one of

⁵⁸ Laura R. Frank, “Dependent on the Gentiles: New York State, the Orthodox Rabbinate and the Agunah Problem 1953–1993,” at: www.academia.edu/4044598/The_Agunah_and_the_Secular_State (accessed May 11, 2021).

⁵⁹ Frank, “Dependent on the Gentiles.”

⁶⁰ *Koepfel v. Koepfel*, 138 N.Y.S.2d 366, 373 (Sup. Ct. Queens Co. 1954).

⁶¹ The court ultimately ruled against Maureen because she violated the terms of her postnuptial contract by remarrying.



the first U.S. court cases to enforce a Jewish nuptial agreement in secular court, but it was not the last.

Cases such as *Waxstein v. Waxstein* in 1976, and *Avitzur v. Avitzur* in 1982, upheld the decision made in *Koepfel v. Koepfel*.⁶² The combination of the Conservative movement's adoption of the Lieberman Clause and the *Koepfel v. Koepfel* decision showed a new willingness to address the problem of the *agunah* in secular courts. Orthodox rabbis quickly realized that increased reliance on secular courts would disinvest the *Beth Din* of its power to decide matters of Jewish divorce along strict *halakhic* lines. If secular courts could effectuate a *get*, more and more women would turn to the secular courts over Jewish tribunals.

The Rise of Orthodox Feminism

Throughout the early twentieth century, Orthodox authorities were able to keep the problem of the *agunah* on the backburner. While pressure to address the *agunah* problem driven by the Lieberman Clause and the *Koepfel v. Koepfel* certainly alarmed them, divorce rates were still relatively low in the Orthodox community.⁶³ Similarly, those who most vehemently advocated for equal rights within Jewish law were often within the Reform or Conservative sects of Judaism, but in the 1970s, this all began to change. Orthodox women began noticing and resenting how different their lives and marriages were under American law versus Jewish law and subsequently, Orthodox feminism was born. Women began organizing, spreading information, and drawing attention to the ways that women were being mistreated within the Orthodox community. This led to the foundation of various groups whose purposes were to serve and advocate for the rights of *agunot*. These organizations also publicized the issue of the *agunah* in ways that the Orthodox authorities could not ignore.

One of the most influential organizations created by Orthodox feminism was Getting Equitable Treatment (GET), founded in 1979, which helped women throughout the process of receiving a *get*. Notably, GET also advocated for the public and religious shunning of husbands

⁶² Frank, "Dependent on the Gentiles."

⁶³ *Waxstein v. Waxstein* affirmed that Jewish prenuptial agreements are to be treated as contracts. Like all other contracts, the provisions of a Jewish prenuptial agreement may be enforced in secular court. *Avitzur v. Avitzur* dismissed the claim that enforcement of a Jewish prenuptial agreement would require an unconstitutional entanglement between Church and State.



who refused to award their wives a *get*. GET became widely known within Orthodox circles, gaining 400 members by 1984. Gloria Greenman, the founder of GET, noted that as her organization gained notoriety, "...the rabbis have felt the need more than ever to do something."⁶⁴ The founding of GET was quickly followed by the formation of similar organizations, all working to pressure the Orthodox authorities into finding a solution to the *agunah* crisis.

As momentum grew, Orthodox authorities could no longer ignore the call for change. They realized that if this problem was not addressed, the faith and commitment of Orthodox women would be challenged. It also became apparent that if they did not address the concerns of Orthodox feminism now, feminists might begin pushing for more radical changes. This frightened the authorities, who often viewed feminist advocacy as a threat to Jewish Orthodoxy. Thus, addressing the problem of the *agunah* began to be seen as a way not only to maintain the *Beth Din's* authority over secular courts, but also as a way to satisfy Orthodox feminists just enough to quell their advocacy for more radical change.

The First Halakhic Prenups

In the wake of innovations in religious and secular law, and the ever-mounting pressure placed on the Orthodox authorities by Orthodox feminists in the 1970s, centrist Orthodox authorities began addressing the *agunah* problem. One of the tools they used was the *halakhic* prenup, which had proved effective in obtaining women a *get* in Conservative and Reform circles. The first noteworthy prenup introduced by Orthodox authorities in the United States was the Bleich Prenup in 1981. Rabbi J. David Bleich, inspired by Israeli rabbinical courts, created a prenup which stipulated that, in the case of civil divorce, the husband must financially support his wife until he provided her with a *get*. This was a stark change from the past, as *halakha* usually granted that if a wife had left the home or had a separate source of income, the husband was absolved of a responsibility to financially support her. Now, if a couple signed the Bleich prenup, the husband could only be relieved of his financial duties to his wife after he provided a *get*.

⁶⁴ Steven Feldman, "Grappling with Divorce and Jewish Law," in *Women in Chains: A Sourcebook on the Agunah*, ed. Jack Nusan Porter (New Jersey: Jason Aronson, Inc., 1995), 217.



As expected, the Bleich prenup received intense backlash from right-leaning Orthodox authorities, who claimed that this prenup used coercive elements in making the man provide a *get*. If this were true, the *get* received from the Bleich prenup would be considered *get me'useh* (i.e. a forced *get*) and thus deemed void. However, Bleich countered these charges, stating that "...the presence of an obligation for support and maintenance which can be terminated only by issuance of a *get* is, of course, not viewed as a coercive element compelling a *get*. Were Jewish law to take a different view of the matter, no divorce would be valid."⁶⁵ This view is backed by scholars who refer to a stipulation in the *ketubah* which verifies that the husband will provide for his wife throughout their marriage. If a husband does not issue his wife a *get*, and thus is still considered married, it is logical that he would be expected to continue material support for her. Certain members of the Orthodox community resisted this logic, asserting that the direct connection between financial penalties and *get* refusal, as stipulated in the Bleich prenup, marked a substantial deviation from the traditional material support provided for by the *ketubah*. The Orthodox Rabbinate claimed that it was due to this substantial difference that *gets* resulting from the Bleich prenup were *me'useh* and thus illegitimate.

In the face of opposition, Bleich modified his prenup in 1984. This adjustment, issued in Bleich's paper, *A Proposal In Wake of Avitzur*, recommended that a couple sign a prenuptial agreement which stipulated that all divorce proceedings would be submitted to private rabbinical court arbitration. At this arbitration, it was assumed that rabbinical courts would not have to rely solely on the financial support mechanism suggested by the initial Bleich prenup, but would instead use their broad powers to negotiate a fair divorce settlement. The idea was that the rabbinical courts would be able to use "moral suasion" to convince the husband to provide his wife a *get* upon civil divorce.⁶⁶ While this prenup was broadly unpopular, the Bleich prenup provided Orthodox authorities with a starting point from which they developed their own agreements.

Taking inspiration from Bleich, the Rabbinical Council of America (RCA) began endorsing its own prenups. In total, the RCA endorsed two different agreements: the Berman-Weiss Prenup of 1984

⁶⁵ David Bleich, "Modern Day Agunot: A Proposed Remedy," *Jewish Law Annual*, 4 (1981), 167-178.

⁶⁶ David Bleich, "A Suggested Antenuptial Agreement: A Proposal in the Wake of Avitzur," *Journal of Halacha and Contemporary Society*, no. 7 (1984), 25-36.



and the Willig Prenup of 1996. The Berman-Weiss prenup, drafted by Rabbis Saul Berman and Abner Weiss, stipulated that a husband give his wife a *get* in the case of civil divorce. If the husband refused his wife a *get*, thereby breaching the contract, he would be required to give his wife fixed liquidated damages. These liquidated damages were to be specified within the prenup, and the Rabbinic Arbitration Panel could not later change them. This limited the Rabbinic Arbitration Panel's authority, as it could award and enforce the deliverance of these predetermined damages but not modify them. Like both Bleich prenups, the Berman-Weiss prenup did not gain significant popularity. Soon after its proposal, the RCA rescinded its support for the Berman-Weiss Prenup due to *halakhic* objections.⁶⁷

The second prenup endorsed by the RCA—the Willig prenup—was markedly more successful. Drafted by Rabbi Mordechai Willig in 1996, it consisted of two parts. The first part, known as the Support Obligation Agreement, stated that in the case that either spouse demanded it, both the wife and husband agreed to appear before the *Beth Din*. Furthermore, both spouses agreed to abide by the decision of the *Beth Din* concerning the *get*.⁶⁸ If the husband refused to appear before the *Beth Din* and issue a *get*, the Willig prenup required the husband to pay his wife increased spousal support, starting at 150 dollars per day, until he issued the *get*. Notably, the initial Bleich prenup inspired this facet of the Willig prenup. Unlike the Bleich prenup, however, the amount owed to the wife in the case of a *get* refusal was not fixed. Once the parties appeared before the *Beth Din*, the support payments owed to the wife could be modified or, in some cases, dismissed entirely. Furthermore, if the wife failed to appear before the *Beth Din*, she forfeited her right to these support payments. In the second part of the Willig prenup, the Arbitration Agreement, the couple chose in advance how much authority would be given to religious courts versus secular courts in the case of divorce. The Willig prenup soon gained widespread popularity, with one

⁶⁷ Susan Weiss, "Prenups Meant to Solve the Problem of the Agunah: Toward Compensation, Not 'Mediation.'" *Nashim: A Journal of Jewish Women's Studies & Gender Issues*, no. 31 (2017), 61-90.

⁶⁸ The Beth Din of America, "What Does the Prenup Say"
<https://theprenup.org/explaining-the-prenup/what-does-the-prenup-say/>



rabbinic leader going so far as to call it “...a light at the end of the tunnel.”⁶⁹

The Revised RCA Prenup

However, the RCA was not content with the final version of the Willig prenup. This stemmed from the fact that the two-part structure of the Willig prenup allowed people to sign only the Support Obligation Agreement and not the Arbitration Agreement. If a couple were to do so, the rabbinical courts would lose their authority to implement the Willig prenup in the way they saw fit. As a result, there was a fear that rabbinical courts would continue to lose power to secular courts. This led to the introduction of the Revised RCA Prenup in 2013, a modification of the previous Willig prenup. This version combined the two parts of the initial Willig prenup—the Support Obligation Agreement and the Arbitration Agreement—into one. Furthermore, the Revised RCA Prenup specified that rabbinical tribunals had “...exclusive jurisdiction to decide ... any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement (including any claims that all or any part of this Agreement is void or voidable) and the arbitrability [sic] of any disputes arising hereunder.”⁷⁰

The Revised RCA Prenup is now the dominant prenup advocated for by Orthodox authorities because it meets two needs: the need to appear to be addressing the *agunah* problem and the need to maintain the power of the Orthodox *Beth Din*. In signing the Revised RCA Prenup, women were ostensibly limiting themselves to solely seeking recourse for *get* refusal in religious court. There were even threats that if a woman sought redress in civil court, the *Beth Din* would not enforce for support obligations stipulated in the Revised RCA Prenup. As Willig put it, “...if she [the *agunah*] pursues support in secular court, she may forfeit her right to pursue the support clause of the prenuptial agreement in Beit Din.”⁷¹ By limiting the power of women to obtain legal recourse in civil court, the Orthodox Rabbinate was able to maintain its jurisdiction over

⁶⁹ Basil Herring and Kenneth Auman, *The Prenuptial Agreement: Halakhic and Pastoral Considerations* (Jason Arronson, Inc, 1996).

⁷⁰ Susan Aranoff and Rivka Haut, “Prenuptial Agreements,” in *The Wed-Locked Agunot: Orthodox Jewish Women Chained to Dead Marriages* (Jefferson, NC: McFarland, 2015), 172-195.

⁷¹ Mordechai Willig, “The Prenuptial Agreement: Recent Developments,” *Journal of the Beth Din of America* (2012), 12.



marriage and divorce law. Moreover, the increased authority of the *Beth Din* often comes at the expense of women, as rabbinic courts more often encourage women to barter away privileges in exchange for receiving a *get* than do secular courts.⁷²

This reality places Orthodox women in an untenable paradox. If a woman wants to avoid the threat of becoming an *agunah*, she is told to sign the Revised RCA prenup. If she signs the Revised RCA prenup, however, she is bound to seek assistance solely from religious courts. These religious courts tend to have a greater patriarchal bent than secular courts, and accordingly favor the husband throughout divorce proceedings. In proposing the Revised RCA prenup as a solution to the *agunah* crisis, the Orthodox Rabbinate tells women they must choose between taking on the risk of becoming an *agunah* or signing over their rights to seek redress in secular court. Either way, women leave this arrangement having lost something. In trying to create a *halakhic* prenup that upholds the power of the *Beth Din*, the Rabbinate has sidelined the goals of women seeking to avoid the *agunah* problem. The Orthodox *halakhic* prenup, as it is written now, does not meaningfully address the concerns of disadvantaged women in Jewish divorce proceedings.

Conclusion

The Jewish prenup was proposed as a solution to the *agunah* problem in the wake of growing fears that the rabbinical courts were losing their power to secular courts. Conservative authorities created the Lieberman clause in 1953, which allowed women to go to secular courts if their husbands chose not to appear before the *Beth Din*. The *Koepfel v. Koepfel* case in 1957 created the precedent that secular courts would, in theory, uphold a religious contract in court. And finally, the rise of Orthodox feminism in the 1970s created an environment in which women realized the untenability of their position within Jewish law, and thus looked elsewhere for legal help. This culminated in the Orthodox Rabbinate slowly losing its jurisdiction over marital law to secular authorities, a worrying reality that they tried to remedy through the creation of a *halakhic* prenup which cemented the authority of the *Beth Din* in matters of Jewish law. Unfortunately, this expansion of authority often comes at the expense of women. The *halakhic* prenup is not entirely ineffective—it has contributed significantly to reducing *get* refusals. Yet

⁷² Weis, “Prenups Meant to Solve the Problem of the Agunah.”



it is also true that the *halakhic* prenup is not the solution to the *agunah* problem that so many dreamed it would be.



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