

# 1 The Ketubah in America

Its Value in Dollars, its Significance in *Halacha*  
and its Enforceability in Secular Law

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## Introduction

One of the questions frequently posed in contested divorces is how to assess the value of a ketubah, the marriage contract that serves as an indispensable part of every Jewish wedding. People generally understand that the ketubah describes the Jewish law obligations of a husband towards his wife during marriage, as well as his financial obligations upon death or divorce. For example, the standard form ketubah states that the husband obligates himself to pay his wife 200 zuz as well as 200 zekukim of silver upon death or divorce. However, many people view the ketubah more as a quaint symbol of the marriage ritual rather than as a legally enforceable document. What happens, however, when one party seeks to enforce their ketubah rights?

This article explores three different issues related to enforcing *ketubot*.<sup>1</sup> The first is the value – in dollars – of the

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1 'Ketubot' is the plural of ketubah.

payments mentioned in the ketubah. The second is whether the ketubah is still an enforceable agreement in cases of divorce according to Jewish law, in light of Rabbenu Gershom's ban on coerced divorce. Finally, this article discusses whether a ketubah creates a contract legally enforceable in American law.

## **I. The Dollar Value of the Ketubah**

### **A. Zuzim, Zekukim and Dollars**

The Ketubah recounts the following recitation of obligations by the Husband:

Be thou my wife in accordance with the laws of Moses and Israel and I will work, honor, support, and maintain you in accordance with the practices of Jewish husbands who work, honor, support, and maintain their wives in faithfulness. **And I will give you 200 zuz<sup>2</sup> as dowry for your chastity which is due to you under the law of the Torah** as well as

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<sup>2</sup> *In cases where the woman was previously married or has converted to Judaism, the amounts written in the ketubah are generally 100 zuz for the base amount, and 100 zekukim for the additional amount.*

food, clothing, needs, and cohabitation according to the way of the world.

The talmud makes clear mention of the fact that the standard amount of money in a ketubah was 200 zuz for a first marriage.<sup>3</sup>

The amount of 200 zuz is equivalent to 50 *shkalim* in the Jewish monetary system.<sup>4</sup> Each *shekel* is generally valued at approximately 20 grams of silver,<sup>5</sup> so that 200 zuz, strictly speaking, should equal the value of about 1000 grams of silver, or one kilogram (2.2 pounds) of silver.<sup>6</sup> Yet other halachic authorities posit an even lower amount as many Sefardic authorities rule that the ketubah can be paid in diluted silver (called *keseif hamidana*, commercial grade silver) which might only contain as little as 120 grams of silver in 200 zuz.<sup>7</sup> Thus, if the ketubah is valued by the silver content of 200 zuz, it is a paltry amount.<sup>8</sup>

The standard Ashkenazi ketubah also recounts as follows:

The dowry that she brought from her father's home in silver, gold, ornaments, clothing, household furnishing, and her clothes **amounting in all to the value of 100 zakukim of pure silver, the groom has taken upon himself.**

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3 See e.g., *Ketubot* 10b; *Rambam, Ishut* 10:7; *Shulchan Aruch* EH 66:6.

4 A *pidyon haben* requires 5 sela'im or shekalim, and in each sela/shekel there are four *denarim*; a dinar and a zuz are the same amount. See *Encyclopedia Talmudit, Dinar*, 7:398- 406.

5 See *Encyclopedia Talmudit, Dinar*, 7:398- 406.

6 *Chazon Ish* EH 66:21 notes that much silver sells in the modern market place as only 84% silver, with the rest being additives, and thus one has to add 16% additional weight to sterling silver to make it 'pure'. In addition, *Chazon Ish* notes that one needs to factor in the costs of delivery and taxes into the husband's payment obligations. In fact, in modern America, silver sells in a number of different purity grades; pre-1965 coins are 90% silver, and thus sell at a discount to the spot silver market for pure silver. Other silver coins are only 40% silver and thus sell at a deeper discount. For a discussion of the modern silver market, see [www.certifiedmint/silver.htm](http://www.certifiedmint/silver.htm).

7 See *Sefer Nisuin Kehilchata* 11:80- 83.

8 *Chazon Ish* himself posits that a 200 zuz is worth only 570 grams of silver, or a little more than 1 pound.

**The groom has also consented to match the above sum by adding the sum of 100 zakukim of pure silver making a total in all of 200 zakukim of pure silver.**

Based on this recounting of the pre-agreed upon value of the assets of the wife, Ashkenazi halachic authorities concluded that it would be more appropriate to value the ketubah in accordance with his understanding of the value of the "200 zekukim of pure silver" that are added in every standard ketubah in addition to the base amount of 200 zuz that is the husband's obligation, as this amount also needs to be returned to the wife upon divorce. <sup>9</sup>

However, the term *zekukim* is not a talmudic term, and there is quite a bit of disagreement as to what it means and what coin it refers to. Rabbi Moshe Feinstein places the value of 200 *zekukim* of silver at 100 pounds of silver (approximately 45.5 kilograms).<sup>10</sup> A similar such view can be found in the Chazon Ish<sup>11</sup> who posits that the value is closer to 127 pounds of silver (approximately 57 kilograms).<sup>12</sup> Both of these views assume that the term *zekukim* is a reference to a large medieval coin of considerable value. Each *zakuk* weighs a half of a pound or more.

There are at least two other viewpoints concerning the valuation of the 200 *zekukim* of silver described in the ketubah: the first is that of Rabbi Chaim Naeh<sup>13</sup> who ruled that the value of 200 *zekukim* is 8.5 pounds of silver (approximately 3.85 kilograms).<sup>14</sup> Yet others posit that the term *zakukim* reflects yet some other coin, and 200 *zekukim* are valued at between 10 and 14 pounds of silver.<sup>15</sup> Of course, there is the view of many *seferdi poskim* who posit that the 200 *zekukim* can be paid with diluted silver,

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9Indeed, this is the standard and unchangeable text of the ketubah for ashkenazim, thus increasing its universality and thus its enforceability. See *Otzar Haposkim Even Haezer, Nusach Haketubah* Volume 19, pages 57-103.

10*Iggerot Moshe EH* 4:91-92.

11*Even Haezer* 66:21.

12Based on the comments of the Vilna Gaon to *Yoreh Deah* 305:3

13*Shiurei Torah* 50:44.

14It should be noted that this amount is also consistent with, although perhaps not identical to, the view of the author of the *Nachlat Shiva*. See *Nisuin K'Helchatam* 11:97. (*Nachlat Shiva* 12:49 is sometimes quoted as holding that 200 *zekukim* is worth 2.5 times the value of 200 *zuz*, but probably held that 200 *zekukim* is closer to 3.75 times the value of 200 *zuz*.)

15See Rabbi Aryeh Kaplan, *Made in Heaven* at page 113.

thus drastically reducing the amount that needs to be paid.<sup>16</sup>

Once we value the ketubah based on no more than 200 *zekukim* of silver and follow the view of Rabbi Feinstein or Chazon Ish concerning the amount (rather than focusing on the base amount of 200 zuz), most decisors generally follow the view of the author of the Bet Shmuel<sup>17</sup> that we do not separately add the value of the base ketubah obligation of 200 zuz to our calculation but rather consider everything included in the 200 *zekukim* of silver, since the face value of 200 zuz, as noted earlier, represents such a paltry amount in comparison to 200 *zekukim* that it is considered to be subsumed within that amount (although it may be appropriate to add the 200 zuz separately if the view of Rav Chaim Naeh is adopted).<sup>18</sup>

One final view is worth noting. The Mishnah and the Jerusalem Talmud<sup>19</sup> indicates that the base amount of "200 zuz" is meant to correspond to a year's worth of support for a single person.<sup>20</sup> Rabbi Shimon Meshantz and Rabbi Ovadya Bartenura state explicitly that "One who has 200 zuz cannot take charity as this

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16The Israeli work, *Nesu'in Kehilchata* 11:97(note 200) avers that such in the practice of the Israeli Rabbinical courts.

17*Even Haezer* 66:15.

18See *Drisha*, *Even Haezer* 66:3. See generally *Nisuin Kehilchata* 11:98.

19*Peah* 8:7 (in the standard mishnah, it is 8:8).

20 For an elaboration on this, with a full discussion of the many sources supporting this view, see Rabbi Chaim Benish, *Medot Usheurai Torah* Chapter 23, at pages 398-405. He explicitly states that in talmudic times 200 zuz was a years support.

On a more theoretical level, there is a claim to be made that 200 zuz is not the amount needed for one years support, but rather is the amount of principle needed to generate yearly income equal to a years support. Thus, a person with no skills and no job, is considered poor if he has less than 200 zuz and may take charity, whereas a person with 200 zuz is never poor, even if they lack any skills at all; *Shulchan Aruch Yoreh Deah* 253:1-2. This approach also explains why a widow is entitled to either perpetual support out of her husband's estate or her ketubah payments – the two serve the same purpose, and are equal to the same amount; *Shulchan Aruch Even Haezer* 93:3. However, these writers have found not a single halachic authority who accepts this valuation of 200 zuz for the purposes of valuating the ketubah.

amount [200 zuz] is the cost of food and clothes for a year."<sup>21</sup> Based on this understanding of the function of 200 zuz as a year's support, it has been the practice of a number of rabbinic tribunals to assess the 200 zuz in the ketubah in accordance with the amount of contemporary currency that would reasonably correspond to one year's support even if this amount is far in excess to the formal value of the silver coinage described in the ketubah document itself.<sup>22</sup> By this measure, all Jewish law weights and measures change as it is their food and goods purchasing power (in dollars) that the Talmudic Rabbis focused on, and not their silver content.<sup>23</sup> The silver coins used in the Ketubah represented certain values corresponding to different purchasing power, but did not necessarily establish a fixed value for all time based on the worth of the silver alone. Therefore, some poskim have concluded that, irrespective of the current value of silver, the value of the ketubah should be equivalent to one year's support.<sup>24</sup>

#### **B. A Sample Calculation in Dollars**

A troy ounce of .999% silver was worth approximately \$4.60 on August 6, 2002 in the New York City silver spot market, and this can be used to calculate the value of a ketubah, according to the various views.<sup>25</sup> The net cost on that day for actually

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21 *Rash Meshatz* and *Bartenura* on *Peah* 8:8.

22 This view is clearly contemplated by *Sema*, *Choshen Mishpat* 88:2, and is perhaps accepted as correct by *Shach* YD 305:1. (See also *Derisha* CM 88 who elaborates on the above *Sema*.) See *Avnei Meluim* 27:1 who avers that Rashi and Ritva accept this view. (But see *Chazon Ish*, *Even Haezer* 148, who posits that the Ritva rejects this view). See also *Rivash* 153 who also poses this question, but rejects the conclusion of the *Sema*.

23 Indeed, there are significant halachic authorities who suggest that this is the rule for most amounts found in the Talmud, such as the *perutah* or the dinar, which should be linked to the price of food the a day, or week or month or year. See *Sema*, *Choshen Mishpat* 88:2 who states "according to this, nowadays, when one cannot purchase with a perutah only a very small amount, according to Jewish law we should say that a woman cannot marry with a perutah". A *perutah* in talmudic times was one-thirteenth of the amount a person needed to support himself for a day; see Rabbi Benish, *supra* note at page 401.

24 The mean cost of living in Switzerland is 1.67 that of the mean cost of living in the United States (\$167,000 in Switzerland purchases that which \$100,000 purchases in America). The cost of living in Atlanta, Georgia is less than half the cost of living in Manhattan.

25 One kilogram equals 32.15076 troy ounces. One gram equals .03215 troy

delivery of one ounce of pure silver was about \$5.60 per ounce.<sup>26</sup>

1. The current value of the ketubah (*zuzim* plus *zekukim*) according to the Chazon Ish would be approximately \$10,263.
2. The current value of the ketubah (*zuzim* plus *zekukim*) according to Rabbi Feinstein would be approximately \$8,192
3. The current value of the ketubah (*zuzim* plus *zekukim*) according to Rabbi Chaim Naeh would be approximately \$693.).
4. The value of 200 *zuz* alone<sup>27</sup> would be approximately \$180.<sup>28</sup>.
5. The value of the ketubah as one year's support would be between \$15,000 and \$55,000.<sup>29</sup>

Each of these amounts (except for the last) would be reduced by 87.5% according to those sefardic authorities who allow for diluted silver (*keseif hamidinah*) which is only one-eighth silver (although nearly no Ashkenazic decisors accept this view).<sup>30</sup>

### C. How To Rule on this Dispute

Given the diversity of views found in the normative halacha, whose view should one follow? Three different answers to that

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ounces.

<sup>26</sup>See *Chazon Ish*, supra note , for an explanation. In order to actually purchase and take delivery of a 100 ounce silver bar one needs to add between 65 and 85 cents per ounce delivery fee plus sales tax of 6%. (Verified by operator, at Certified Mint Inc., and noted as correct at <http://certifiedmint.com>. For this article, we assume an average of 75 cents.)

<sup>27</sup>Representing the base amount of the ketubah, which is equivalent to 50 *shkalim*, which would be 10 times the amount of the value of *pidyon haben* .

<sup>28</sup>See also *Piskei Din Rabanim* 11:362. According to these values, the current monetary value of the 5 *shkalim* that need to be given for *pidyon haben*, which is variously evaluated at either 96 grams, 100 grams (or 101 grams of pure silver), would be between \$14.20 (96 grams of silver) and \$14.94 (101 grams of silver; 100 grams of silver would currently be \$14.79). Since the 5 *shkalim* for *pidyon haben* is equivalent to 3,840 *perutot* - or 1,920 it follows that the technical value of a *perutah* is currently less than half a penny.

<sup>29</sup>And would vary depending on location; see note . If the possibility of 200 *zuz* being equal to perpetual support were seriously considered, the amount would be even more; but see the end of note .

<sup>30</sup>See *Nesuin Kehilchata* 11:77- 83.

question are found.

One view is that matters of ambiguity in a document are decided against the one who is seeking enforcement. Thus, Rabbi Ovadya Yosef and Rabbi Yosef Kapach adopt the view that the woman receives the lowest amount plausible, as she bears the burden of proof, which she cannot meet.<sup>31</sup> (A similar such view is suggested by Rabbi Chaim Gedalia Zimbalist in a letter to a member of the Beth Din of America.<sup>32</sup>)

Another possible answer is accepted by Rabbi Mordechai Eliyahu, who posits that normative halacha accepts the view of Rabbi Feinstein and the Chazon Ish, and that a ketubah is worth about 120 pounds of silver.<sup>33</sup> Indeed, a strong claim could be made that minhag Ashkenaz is to follow this view, and it is only sefardi decisors (such as Rabbis Yosef and Kapach, above) who reject this view.<sup>34</sup> For that reason, all Ashkenazi ketubot make clear reference to the 200 *zekukim* standard, rather than the sefardic practice of varying the amount depending on the woman and man.

Another possible answer this that matters of interpretation have a local context to them, particularly in words such as *zakukim* that are ill defined, and that one should follow local custom on these matter;<sup>35</sup> in America, this is a strong argument to follow the view of Rabbi Feinstein in evaluating the ketubah, who was the pre-eminent decisor for American Jewry.

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31 See the Israeli Rabbinical Court in PDR 11:362 (5740) in a psak din co-signed by Rabbi Ovadya Yosef and Rabbi Yosef Kapach. See, e.g., *Yevamot* 89a.

32 Letter of Rabbi Zimbalist dated Rosh Chodesh Menachem Av 5759.

33 See the dissent by Rabbi Mordechai Elayahu in Israeli Rabbinical Court in PDR 11:362 (5740).

34 Indeed no Ashkenazi decisor with the stature of these two authorities has argued with them.

35 This is explicitly noted as a significant factor by *Maharshdam EH* 187. Indeed, there is an open question as to whether one says that the one who is seeking to enforce a contract has the weaker hand in cases such as this were the woman had no hand in the crafting of the document; see for example, *Nachal Yitzchak* 61:4 who notes that there are cases where a document is constructed against the one who wrote it, and not against the one who is seeking to use it.



This view is additionally supported by the basic talmudic principle that the purpose of the ketubah was to mandate payments in cases of divorce high enough so that a man would not hastily divorce his wife. Payments of \$25, \$100, or even \$1,000 hardly accomplish this talmudic mandate. Consistent with this notion, it is noteworthy that Rabbi Feinstein dismissed the European practice which was to evaluate the ketubah at 75 rubles because this sum would be laughably small nowadays.<sup>36</sup>

All of this, however, assumes that the ketubah is of worth in resolving financial disputes related to divorce. As explained below, that is, itself, subject to dispute.

## **II. Is a Ketubah Enforceable as a Matter of Jewish Law?**

### **A. Talmudic Rules**

The intrinsic nature of marriage and divorce in halacha is different from that of any other mainstream legal or religious system in that entry into marriage and exit from marriage through divorce are private contractual rights rather than public rights. Thus, in the Jewish view, one does not need a governmental "license" to marry or divorce. Private marriages are fundamentally proper, and governmental or even hierarchical (within the faith) regulation of marriage or divorce is the exception rather than the rule.<sup>37</sup>

<sup>36</sup>See *Iggerot Moshe YD* 1:189 - 191 where Rabbi Feinstein clearly endorses the view that the Ketubah has to be an amount large enough to deter divorce no matter what the price of silver really is. Indeed a plausible argument can be advanced that Rabbi Feinstein fundamentally accepts the view that 200 zuz is a reference to a years support, and that Rabbi Feinstein wrote his teshuva because the rapid increase in silver prices at the time the responsa (*teshuva*) was written (circa 1980) had created the anomalous situation where the value of the 200 *zekukim* of silver in the ketubah exceeded the cost of supporting a single woman for a year (silver peaked in 1980 at \$25 an ounce for pure silver, in which case 100 pounds of pure silver delivered to the door would have been worth more than \$40,000, which would be much more than one years support in 1980 for a single person. According to this position, Rabbi Feinstein's view is that one pays the greater of (1) the value of 100 pounds of silver or (2) the cost of supporting the woman for one year.

<sup>37</sup>This view stands in sharp contrast to the historical Anglo- American common law view, which treats a private contract to marry or divorce as the classical examples of an illegal and void contract; the Catholic view, which treats marriage and annulment (divorce) as sacraments requiring ecclesiastical cooperation or blessing; or the European view, which has treated marriage and divorce as an area of public law. This should not be misunderstood as denying the sacramental parts of marriage (of which there are many); however the

This view of entry into and exit from marriage as contractual doctrines is basic and obvious to those familiar with the rudiments of Talmudic Jewish law. While the Gemara imposes some limitations on the private right to marry (such as castigating one who marries through a sexual act alone, without any public ceremony<sup>38</sup>) and the Shulchan Aruch impose other requirements (such as insisting that there be an engagement period<sup>39</sup>), basic Jewish law treats entry into marriage as one of private contract requiring the consent of both parties.<sup>40</sup>

Exit to marriage was also purely contractual (except in cases of fault), but according to Torah law, was a unilateral contract that did not require the wife's consent. Thus, according to unmodified Torah law, exit from marriage was drastically different from entry into marriage. Divorce did not require the consent of both parties. The marriage could end (absent fault) when the husband alone wished to end it. Marriage was imbalanced in other ways as well; a man could be married to more than one wife, any of whom he could divorce at will, whereas a woman could be married to only one man at a time, and she had no clearly defined right of exit, perhaps other than for fault.

From very ancient times, and according to some authorities, in some marriages even according to Torah Law,<sup>41</sup> the husband's unrestricted right to divorce was curtailed through contractarian means, the *ketubah*. The *ketubah* was a pre-marital

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contractual view predominates in the beginning- of- marriage and end- of- marriage rites. This is ably demonstrated by Rabbi J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 Conn. L.R. 201 (1984).

38 Even though such an activity validly marries the couple; *Rav mangid aman demakadish bebiah*, *Yevamot* 52a; *Shulchan Aruch*, *Even Haezer* 26:4.

39 *Shulchan Aruch*, *Even Haezer* 26:4.

40 Marriages entered into without consent, with consent predicated on fraud or duress, or grounded in other classical defects that modern law might find more applicable to commercial agreements are under certain circumstances void in the Jewish tradition. For more on this see Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America*. (Ktav, 2001) in Appendix B, entitled "Errors in the Creation of Jewish Marriages."

41 There is a dispute as to whether this requirement is biblical or rabbinic in cases of a first time marriage; all agree it is rabbinic for second marriages; see *Shulchan Aruch EH* 65.

contract, agreed to by the husband and wife,<sup>42</sup> that contained terms regulating the conduct of each party in the marriage and discussing the financial terms would the marriage dissolve through divorce or death. While the *ketubah* does not explicitly restrict the unilateral right of the husband to divorce his wife for any reason, it did impose a significant financial obligation on the husband should he do so without cause – he would pay her a considerable amount of money. Indeed, the Talmud readily states that the *ketubah* was instituted so that "it will not be easy [cheap] for him to divorce her."<sup>43</sup> In addition, and more significantly, the Talmud mandates that the couple may not commence a marital (sexual) relationship unless both the husband and wife have agreed on the provisions of the *ketubah* and one has been executed.<sup>44</sup>

Thus, while the right to divorce remained unilateral with the husband, with no right of consent<sup>45</sup> by the wife, it was now restricted by a clear financial obligation imposed on the husband to compensate his wife if he exercised his right to engage in unilateral divorce (absent judicially declared fault on her part). There are even views among the rishonim that if the husband cannot pay the financial obligation, he is prohibited from divorcing her except in cases of fault.<sup>46</sup> Indeed, the wife, as a precondition to entry into the marriage could insist on a *ketubah* payment higher than the minimum

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42For reasons beyond the scope of this paper, this agreement is not signed by either the husband or wife, but merely by witnesses. This is so because the Jewish tradition mandated generally that all contracts need not be signed by the parties, but merely by witnesses, so long as the parties assent to the conditions found within them.

43*Yevamot* 89a, *Ketubot* 11a.

44There is considerable evidence that the presence of such a mandatory prenuptial agreement provided considerable leverage for women to add provisions to their prenuptial agreements regulating other aspects of their marriage. Indeed, there are prenuptial agreements in the archives (*genizot*) that are 2,000 years old that condition the marriage on the husband's waiver of his right to marry another at some future date, contractually limiting the husband's biblical right to be polygamous. See Rabbi Abraham H. Freimann, *Seder Kidushin veNisu'in Acharai Chatimat Ha-Talmud* (Mossad Harav Kook, 1944) and Mordechai Akiva Friedman, "Polygyny in Jewish Tradition and Practices: New Sources from the Cairo Geniza," *PAAJR* 49 (1982), 55.

45The wife, however, needs to be aware of the divorce, even as she does not consent. See Rambam, *Gerushin* 1:1-3.

46See *Shulchan Aruch*, *Even Haezer* 119:6, and *Chelkat Mechokek* 119:5 for a presentation of the different views on this matter.

promulgated by the rabbis.<sup>47</sup> Of course, divorce could be by mutual consent, subject to whatever agreement the parties wished.

Thus in talmudic times, the economic rules for divorce were as follows:

1. The husband had a unilateral right to divorce and had to pay a pre-agreed upon amount to his wife (agreed to in the ketubah, but never less than 200 zuz) upon divorce, except in cases of fault.
2. There was divorce by mutual consent with payment to be determined by the parties.

Consequently, in a case where the husband wanted to divorce his wife, he could do so against her will, and pay her the Ketubah. She could not under such circumstances sue for divorce<sup>48</sup> as a general rule, although she could perhaps restrict his rights through a *ketubah* provision.<sup>49</sup>

#### **B. The Impact of the Ban of Excommunication of Rabbenu Gershom concerning Coerced Divorce and Polygamy**

Rabbenu Gershom, through his bans on polygamy and forced divorce, fundamentally changed the basic halacha in divorce. The decree of Rabbenu Gershom<sup>50</sup> was, for a variety of reasons, social, economic, and in order to equalize the rights of the husband and wife to divorce, it was necessary to restrict the rights of the husband and prohibit unilateral no-fault divorce by the husband.<sup>51</sup> Divorce was limited to cases of provable fault or mutual consent. In addition, Rabbenu Tam posits, and the normative halacha accepts that fault is narrowed to exclude cases of soft fault such as unprovable repugnancy, and in only a few cases could the husband be actually forced to divorce his

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47And, as noted above, the Ashkenazic custom was to do just that and add the term 200 *zekukim* to the ketuba.

48Unless she had not yet had a child with him, which was a form of fault on his part; *Ta'ananat b'eyna hutra l'yada*, see *Yevamot* 64a, *Shulchan Aruch*, *Even Haezer* 154:6-7 and *Aruch HaShulchan*, *Even Haezer* 154:52-53.

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

50See *Cherem Derabbenu Gershom*, *Encyclopedia Talmudit*, 17:378.

51See *Responsa of Rosh* 43:8, who indicates that one of the consequences of this model is that women (and men) will not be able to leave a marriage when they wish. See also *Teshuvot HaRosh* 42:1 who indicates that the basic purpose of the ban of Rabbenu Gershom is to create balance of rights between the husband and the wife.

wife or the reverse.<sup>52</sup>

Equally significant, the decrees of Rabbenu Gershom prohibited polygamy, thus placing considerable pressure on the man in a marriage that was ending to actually divorce his wife, since not only would she not be allowed to remarry, but neither would he.<sup>53</sup> According to *Cherem deRabbenu Gershom*, Jewish law now permitted divorce only through mutual consent or fault on either part.

Since the promulgation of the ban in the name of Rabbenu Gershom against divorcing a woman without her consent or without a

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52 This insight is generally ascribed to Rabbenu Tam in his view of *meus alay*; see Tosafot, *Ketubot* 63b *s.v. aval*. In fact, it is worth noting that this view fits logically with the view of Rabbenu Gershom, who not only had to prohibit polygamy and coerced divorce, but divorce for easy fault, as Rambam's concept of repugnancy as a form of fault is the functional equivalent of no fault, identical in result to the *gaonim*'s annulment procedure.

But see *Teshuvot Maharam MeRuthenberg* 4:250 who indicates that Rabbenu Gershom also subscribed to the general view of the Geonim who held, unlike Rabbeinu Tam, that a woman could compel divorce upon an assertion of repugnancy (*meus alay*). Rabbi Professor Elimelech Westreich makes the same assumption in his recent work *Temurot Bema'amad Haisha Bemishpat Haivri* (Jerusalem 5762, pages 71-73) in which he points out that the views of the Geonim in general and those ascribed to Rabbeinu Gershom are often interchangeable. Westreich actually poses the question of how these two positions (prohibiting coerced divorce and effectively permitting unilateral no-fault divorce through an assertion of repugnancy (*meus alay*)) could both be held at one time and place, especially given the aforementioned Responsum of the Rosh (42:1) who indicated that according to Rabbeinu Gershom's model, a man could compel divorce in the same circumstances in which it could be compelled by a woman (so that not only a woman could compel a divorce through an assertion of *meus alay*, but a man could as well). Westreich offers two answers:

(1) only one type of repugnancy (*meus alay*) was considered grounds for divorce according to the Geonim but not another type (which was even softer fault) (*beina lei umetz'arna lei*) so there still would be cases where divorce could not effectively be coerced even according to the Geonim, thus generating the need for the separate *takanah* against coercion with respect to these cases; or (2) the claim of repugnancy (*meus alay*) did not really lead to no-fault divorce as it needed to be substantiated through very strong circumstantial evidence; in cases where a husband wanted a divorce but did not have very strong circumstantial evidence supporting his claim of repugnancy (*meus alay*), there would still be a need for the decree against coerced divorce.

We find both of these solutions to be obviously difficult, in that they advance an explanation of the view of the Geonim that is at tension with the common explanation. We suggest that the simpler explanation is that the nascent

showing of hard fault<sup>54</sup>, the basic question of the value of the Ketubah has been questioned. Since the talmudic rabbis instituted the Ketubah payments so as to deter the husband from rashly divorcing a wife, the basic value and purpose of the ketubah in cases of divorce is limited to cases where the husband can divorce his wife without her consent, and yet has to pay the Ketubah. However, in cases where the husband cannot divorce his wife without her consent, there is no need or purpose to a ketubah. For example, Rambam<sup>55</sup> and Shulchan Aruch both agree that when a man rapes a woman and thus has to marry her if she wishes to marry him, and may not divorce her, there is no ketubah payment. Shulchan Aruch states in such a case:

A man who rapes a woman who is a virgin is obligated to marry her, so long as she and/or her father wish to marry him, even if she is crippled or blind, and he is not permitted to divorce her forever, except with her consent, and thus he does not have to write her a ketubah. If he sins, and divorces her, a rabbinical court forces him to remarry her.<sup>56</sup>

The logic seems clear. Since he cannot divorce her under any circumstances without her consent, the presence or absence of a ketubah seems to make no difference to her economic status or marital security. When they want to both get divorced, they

views of Rabbenu Gershom are incompatible with the established views of the geonim and that became clear over time.

(Perhaps there is room for another approach also: that, contrary to the position of the Rosh, the Geonim were prepared to allow a woman to demand divorce based on virtually any grounds, but not a man, who needed a reason. The basis for this argument would be that: (a) Gittin 89a- b clearly circumscribes those instances in which a man is entitled to a divorce, but does not explicitly limit the circumstances where a woman may seek a divorce; (b) women were seen as more vulnerable and thus in need of more protection than men (For an example of this, see Igrot Moshe EH 1:80 and Acheizer 1:27 both of whom are inclined to argue that *kedushai ta'ut* may be used more quickly by women than by men, as they are otherwise without any option in some cases.

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

54 In which case, the value of the ketubah need not be paid as a penalty for misconduct imposed on the woman. What exactly is hard fault remains a matter of dispute, but it generally includes adultery, spouse beating, insanity, and impotence; See *Shulchan Aruch, Even Haezer* 154.

55 *Rambam, Ishut* 10:10.

56 *Shulchan Aruch, Even HaEzer* 177:3.

will agree on financial terms independent of the ketubah, and until then, the ketubah sets no payment schedule. Should she insist that she only will consent to be divorced if he gives her \$1,000,000 in buffalo nickels, they either reach an agreement or stay married. The Ketubah serves no economic purpose in divorce.<sup>57</sup>

This case stands in clear contrast to the standard marriage in Talmudic times. In such a marriage, prior to marriage the husband and wife negotiated over the amount the husband would have to pay the wife if he divorced her against her will or he died. She could not prevent the husband from divorcing her, except by setting the payment level high enough that the husband was economically deterred from divorce by dent of its cost.

All this changed in light of the two decrees of Rabbenu Gershom. Rabbenu Gershom decreed that a man may not divorce his wife without her consent, except in cases of serious fault on her part, and a man may not marry a second wife under any circumstances. The net effect of these two decrees was to impose a form of parity of rights in a marriage. Neither the husband nor the wife could ever compel divorce, except in cases of fault, and in cases of fault both could.<sup>58</sup>

What then is the purpose of the Ketubah in cases of divorce after the ban on polygamy and unilateral no-fault divorce? Rabbi Moshe Isserless (Ramo) provides a very important answer. He states in the beginning of his discussion of the laws of ketubah:

See Shulchan Aruch Even Haezer 177:3<sup>59</sup>where it states that in a situation where one only may divorce with the consent of the woman, one does not need a ketubah. **Thus, nowadays, in our countries, where we do not divorce against the will of the wife because of the ban of Rabbenu Gershom, as explained in Even Haezer 119, it is possible to be lenient and not write a ketubah at all; but this is not the custom and one**

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57Consider a very simply question in such cases: How much must husband pay wife to induce her consent? The answer to that question is very dependent on the situation of the parties — the ketubah neither helps not hinders that negotiations.

58This is a bit of a simplication in cases of fault, as in cases of fault a woman would have to go to a bet din to seek the right to compel the husband to divorce her, whereas the husband could, upon a finding of fault by a bet din divorce her against her will directly. This difference is one of mechanism, however, and not of rule.

59The case of rape discussed in text, supra note .

should not change it.<sup>60</sup>

Almost all of the classical commentators disagree with this Ramo and rule that one still needs a ketubah even after the ban of Rabbenu Gershom, even as such is not required in cases of rape. Chelkat Mechokek, Bet Shmuel and Gra all state that one should not rely on this view as one could distinguish between a rabbinic ban and a torah prohibition to divorce.<sup>61</sup> Mishnah Lemelech posits that since there was a rabbinical decree mandating a ketubah, latter rabbinic authorities are incapable of repealing that obligation, and thus the Ramo ought not be relied on, even as the ketubah serves no clear purpose any more, as we are powerless to change the talmudic decree mandating a ketubah even as it no longer serves its purpose in cases of divorce.<sup>62</sup>

Avni Mishpat<sup>63</sup> argues that Ramo's central analogy is incorrect, in that the Ketubah serves a purpose in the case of widow-hood; The Talmudic Sages did not decree a ketubah even in the case of widow-hood in the case of a rape victim who marries the rapist, as the mandatory payment of 50 *shekalim* directed by the torah as his punishment was equal (not by coincidence, either, it is claimed<sup>64</sup>, to the value of the ketubah). So too, the Ketubah establishes rights in the marriage itself that can be enforced,<sup>65</sup> and death benefits, and effects rights in cases of chalitza as well.

Indeed, the custom and practice is not to follow the possibility suggested by the Ramo,<sup>66</sup> without other lenient factors present as well.<sup>67</sup> Thus, every Jewish wedding still starts with a ketubah, as Ramo himself notes to be the custom.

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60 *Even Haezer* 66:3.

61 *Chelkat Mechokek* 66:18.

62 *Ishut* 10:10.

63 *EH* 66:10.

64 See *Toldot Adam EH* 66:3. See also *Derech Hamelch* on *Rambam Ishut* 10:10 . *Tosafot Chaim* 2:10 notes another difference, which is that a man who violates Cherem Derabbenu Gershom is not forced to remarry his ex-wife, whereas when the rapist divorces his victim against her will, he is forced to remarry her.

65 In Jewish law, a bet din can compel support of one spouse by another even absent divorce.

66 See for example, *Teshuvot Vehanhagot* 760. But see *Aruch Hashulchan EH* 177:1 in the parentheses and the last line *Shelot Uteshuvot Mutzal MeAsh* 21, *Sefer Kinyan Torah* (page 14).



However, no one argues with the basic economic assertion of the Ramo: The purpose of the Ketubah written to impose a cost on the husband for divorce – so that he should not divorce her rashly – has become moot; this basic purpose has been overtaken by the ban of Rabbenu Gershom which simply prohibited that which the Talmudic Sages sought to discourage. The ketubah neither establishes nor effects nor modifies any economic rights in cases of divorce without fault in places<sup>68</sup> where *Cherem deRabbenu Gershom* is accepted. In situations where *Cherem deRabbenu Gershom* is not applicable due to misconduct, fault is always found, and no ketubah payment is thus mandated by Jewish law.

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67 One of the common questions encountered is whether a couple may continue to live together when the ketubah is misplaced and cannot temporarily be found. Sometimes, even at the end of the wedding itself, the newly married couple cannot find the ketubah. A number of different factors, combined together, could provide grounds for the couple to be alone together even in these circumstances until a replacement ketubah can be written. Besides the view of the Ramo that nowadays a ketubah is not needed, these other factors include:

- (1) Many halachic authorities rule that the ketubah is in force after the *kinyan* (legal transfer) effectuated before the wedding ceremony, even if no written document is actually present, as the ketubah is merely a proof of a ketubah, but the actual witnesses are also sufficient. (*Otzar Haposkim* 66:1(7))
  - (2) Once it is known that there was a ketubah, and witnesses will attest to the fact that there was a ketubah and they signed it, that is as if the wife has the ketubah. (See *Even Haezer* 66:1 and *Otzar Haposkim* 66- 3(22(2))). (In the United States our practice is to read the Ketubah out-loud, thus there are many witnesses to its existence.)
  - (3) In Israel, the Rabbinical courts require that a photocopy of the ketubah be kept on file in the rabbinical courts. In America, it is not unusual that there will be an actual photograph of the ketubah. (See *Teshuvot Vehanhagot* 1:760) (While a photocopy or photograph likely does not allow for the enforcement of the ketubah, it does provide evidence of the factors previously described.)
  - (4) The husband can remit to his wife for safekeeping the monetary value of the ketubah in lieu of the right to collect. (*Shulchan Aruch EH* 66:2)
  - (5) Permitting the couple just to be alone together (such as for *yichud*) is permitted according to many authorities in all circumstances; *Ramo EH* 66:1.
  - (6) Some rishonim are of the view that a ketubah is imposed as a condition of marriage by the talmudic rabbis (*tenai bet din*), and thus even absent a ketubah, it is present (Tur, EH 66 and *Chuk Umishpat* 229 (at page 67)).
- These matters require a case by case analysis by one expert in Jewish law. For a worthwhile review of these issues, see *Ohel Yosef Even Haezer* 22 and *Otzar Haposkim* 66:2- 3.

**68** Such as Israel, America, Canada, Europe (both east and west). Places where it was not accepted include Egypt, Iran, Iraq, Morocco.

The only practical case where the ketubah is relevant is where the husband's fault generates the grounds for divorce, and the wife seeks a divorce grounded in her husband's fault, and payment of the ketubah.<sup>69</sup> Although it might have some value in cases of widowhood as well as a matter of theory, normally it does not.<sup>70</sup>

Consider the observation of Rabbi Moshe Feinstein on this matter. He states:

The value of the ketubah is not known to rabbis and decisors of Jewish law, or rabbinical court judges; indeed we have not examined this matter intensely as for all matter of divorce it has no practical ramifications, since it is impossible for the man to divorce against the will of the woman, [the economics of] divorce are dependent on who desires to be divorced, and who thus provides a large sum of money as they wish to give or receive a divorce.<sup>71</sup>

Elsewhere Rabbi Feinstein writes:

I will write briefly the value of the ketubah in American nowadays, for use in those circumstances where it is needed. One should know that in divorce there is no place for evaluating the ketubah, since the ban of Rabbenu Gershom prohibited a man from divorcing his wife without her consent. Thus, divorce is dependent on who wants to give or receive the get and who will give or receive money as an inducement. But it is relevant to an widow, or a *yavamah* who wishes to have *chalitza* done, and who wishes to have her ketubah paid from the assets of the brother who is doing *chalitza* [her deceased husband].<sup>72</sup> Only

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69 Since the central purpose of the Ketubah was not to allow the husband to easily divorce his wife, Ramo might not have considered these matters truly significant insofar as the main purpose of the ketubah was to protect the woman from divorce in cases which she desired to stay within the marriage.

70 The reason this is so is that widows are entitled according to Jewish law to either perpetual support from the estate or their ketubah payment as the widow wishes; see *Shulchan Aruch EH 93:3* and *Pitchai Choshen*, Volume 8, Chapter 11:1-3. Since the former is much more valuable than the latter, no reasonable person would exercise her ketubah rights in cases of widowhood, and thus the proper evaluation of the ketubah is practically irrelevant.

71 *Iggerot Moshe Even Haezer 4:91* (This teshuva was written in 5740/1980).

72 The formulation used in this teshuva is different from the *Iggerot Moshe EH 4:91* where, with regards to the rights of the widow, Rabbi Feinstein posits that:

infrequently, in farfetched case, is it relevant to divorce, such as when she agrees to be divorced, only if she is paid the amount owed by her ketubah.<sup>73</sup>

A simple example from commercial law helps explain the point of Rabbi Feinstein in divorce law. Suppose someone owns a painting that another likes. The fair market value of this painting is \$100. For how much must this owner of the painting sell the painting to the one who wishes to buy it? The answer is that Jewish law does not provide a price. The seller need sell it only at a price at which he or she is comfortable selling it, and the buyer need buy it only at a price at which the buyer is comfortable buying it (so long as they are both aware of the fact that the fair market value is \$100). The same is true for a divorce, Rabbi Feinstein posits, after the Ban of Rabbenu Gershom absent a finding of fault – neither party needs to consent to divorce unless he and she agrees to a financial arrangement or agrees to go to a din torah about this matter, and the bet din resolves this matter in accordance with the rules of compromise or equity.<sup>74</sup> If they cannot work out a deal, or agree on a compromise or a process of compromise, divorce cannot be compelled.

### III. The Enforceability of the Ketubah in American Law

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Even widows, even when they are not the mothers of the surviving children, in most cases there is a will, and there is also secular law [i.e. spousal offset] which many people wish to actually use [to resolve this dispute].

<sup>73</sup>*Iggerot Moshe Even Haezer* 4:92 (This teshuva was written in 1982).

<sup>74</sup>There are provisions in Jewish law to resolve a matter purely based on equitable principles and compromise, and such is what a bet din does in these cases, unless secular law provides a bases for directing the answer and is applicable in this case. (A number of halachic authorities seem amenable to the practice of looking to secular law on these matters; See R. Yehuda Leib Grauburt, *Havalim ba- Neimim, Even ha- Ezer* 55 which rules, in the alternative, that secular law provides a woman with financial rights against her husband (or his estate);. R. Joseph Trani, *Mabit* 1:309, is another such responsa. For a similar type of claim, see R. Yitzhak Isaac Liebes, *Bet Avi* 4:169. Similar reasoning is advanced as plausible in R. Moshe Feinstein's ruling (*Iggerot Moshe, Even ha- Ezer* 1:137) that the wife's waiver of past- due support payments mandated by secular law, in return for the husband's issuing a *get*, is a form of permissible coercion which does not invalidate the *get* (create a *get me'useh* situation). This waiver of a financial claim is valid coercion only in a case where the woman's claim to the money is halachically valid, as the wife is entitled to these payments, or an amount roughly equal to them, through *dina demalkhuta* . Indeed, Rabbi Feinstein implies that this is the more likely result in his analysis found in *Iggerot Moshe, Even Haezer* 1:137 and *Even Haezer* 4:106; see also *Pitchai Teshuva, Even Haezer* 134:9- 10.)

The enforceability in American law of the ketubah payment is a matter that has rarely been litigated, although there is not a single case where a court has enforced the ketubah obligation to mandate a payment. Consider for example in 1974 a widow tried to collect the amount of her husband's ketubah and claimed that the ketubah superseded her prior waiver of any future claims pursuant to a pre-nuptial agreement between herself and her husband. The ketubah had been signed after the pre-nuptial agreement, and thus, if it were a valid contract, would have superseded it. In denying her motion, the New York Supreme Court concluded that "even for the observant and Orthodox, the ketubah has become more a matter of form and a ceremonial document than a legal obligation."<sup>75</sup>

Although the New York Court of Appeals, in a subsequent case, enforced a provision of the ketubah pursuant to which the parties agreed to arbitrate future marital disputes before a bet din, the court did not revisit the issue of the enforceability of the financial obligations included in the ketubah.<sup>76</sup> While it is true that in dicta, an Arizona court suggested that financial obligations described in a ketubah could perhaps be enforceable if described with sufficient specificity,<sup>77</sup> the practice has never been to seek to conform the text of the Ketubah to the contract requirements of American law.<sup>78</sup> The description of the financial obligations – in *zuzim* and *zekukim*, which require determinations of Jewish law to ascertain the proper value – are not be considered sufficiently specific to be enforceable.<sup>79</sup> So too the absence of an English text (where either the husband or wife are not fluent in Aramaic and Hebrew) and the absence of signatures of the husband and wife, would seem to make the ketubah void as a contract in American law.<sup>80</sup>

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

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

77 *Victor v. Victor*, 866 P.2d at 902 (1993).

78 See e.g., *Hurwitz v. Hurwitz*, 216 AD 362 (NY Appellate Division, 1928).

79 Whether or not the language of a ketubah forms a basis for compelling a Get according to secular law doctrine is a question beyond the scope of this article. See, e.g., *In Re Marriage of Goldman*, 554 N.E.2d 1016 (1990), in which an Illinois court came to the remarkable conclusion that the words "in accordance with the law of Moses and Israel" appearing in the ketubah created a contractual obligation to give a Get. But see *Aflalo v. Aflalo*, 295 N.J.Super. 527 (1996) (rejecting a similar argument) and *Morris v. Morris* 42 D.L.R.3d 550 1973 (Manitoba, CA, Ct of Appeals). For more on this, see Rabbi Yitzchak Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Greenwood Press, 1993), pp. 50- 55.

80 It should be noted that some rabbis have devised a legitimate solution to

When might a ketubah be enforceable in the United States? When it is executed in a country (such as Israel) where it is recognized as legally enforceable. This is because American conflict of law rules might determine that the rules governing the validity of the ketubah are found in the location of the wedding, where the ketubah was a legally enforceable document.<sup>81</sup> To the best of these writers knowledge, no American court has ever enforced the financial component of a ketubah written in America either in cases of divorce or cases of death.

## Conclusion

The Ketubah serves many valuable purposes, such as requiring the husband to affirm and memorialize his Jewish law obligations to support and honor his wife. Even though these obligations would be applicable even in the absence of the ketubah, the existence of a formal document memorializing these obligations serves as an important pastoral reminder of their vital role in a successful Jewish marriage. This article has focused, however, on the purpose and value of the ketubah in cases of divorce, which is the case where the Talmud most clearly sees the need for a ketubah. Not surprisingly, it is in cases of divorce where matters are most contested.<sup>82</sup> This article summarizes the value, worth and enforceability of the ketubah in cases of divorce.

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translate the ketubah document into English so that the parties can be held accountable for understanding its meaning, and inserting certain very concrete obligations and undertakings that could be held to be enforceable with respect to the parties. This approach is similar to the practice discussed infra of couples entering into separate enforceable pre-nuptial documentation setting forth their specific expectations and commitments in the event of a divorce or marital separation.

<sup>81</sup>This principle was first noted in *Montefiore v. Guedalla* 2 Ch 26 Court of Appeals, England (1903), where a British court enforced the ketubah of a Sefardi (Morrocan) Jew who had moved to England, since the law of Morroco would have enforced this ketubah. These same conflict of law principles could well enforce an Israeli Ketubah in America. It has been followed in many American cases where the parties were married in another jurisdiction; see *Miller v. Miller* 128 NYS 787 (Sup. Ct., 1911) and *Shilman v. Shilman* 174 NYS 385 (Sup. Ct., 1918).

<sup>82</sup>Happily married couples rarely seek adjudication in a rabbinical court of their financial obligations to each other, although a rabbinical court is, in fact, jurisdictionally authorized to resolve such disputes; see *Shulchan Aruch, Even Haezer* 70:1- 4. (In contrast, American law does not authorize a court to resolve disputes between a husband a wife except when divorce is expected; see *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953) and Leslie Harris & Lee Teitelbaum, *Family Law* (2nd ed., 2000) at pages 45- 60.)

There are multiple views regarding how to assess the value of the 200 zuz and 200 zekukim described in the standard form ketubah as payable by the husband (or his estate) upon divorce or death. The breadth of the dispute – from less than \$200 to more than \$30,000 – is quite astonishing. What is the normative practice is also in dispute, and is hard to determine.

Additionally, as Rabbi Feinstein points out, since women today cannot be divorced against their will due to the famous tenth century enactment of Rabbenu Gershom prohibiting such a practice, a divorce today requires the husband to placate his wife with an amount that she would deem sufficient. Therefore, a woman can effectively "negotiate" for an amount greater than the value of the ketubah if her husband wishes to divorce her. Thus, the calculation of the amount of the ketubah only becomes relevant in very limited cases, such as when both parties expressly stipulate that they want the payment amount from the husband to the wife upon divorce to be determined solely based upon a rabbinical court's evaluation of the ketubah.

Hence, most couples never expect that the ketubah will actually be used for collection purposes and in fact the majority of Jewish women who have become divorced (or widowed) do not seek to collect their ketubah but rather use other channels to settle their claims. It is, therefore, virtually impossible to ascertain an established custom or practice with respect to the valuation of the ketubah in America.<sup>83</sup> Given these questions, it is not surprising, that there is no clear halachic answers relating to the value of the ketubah.

These three observations – that the ketubah's value is low (and in dispute), its significance as a matter of Jewish divorce law limited, and its enforceability in American law nearly impossible – also provide a posture to understand some of the cases of recalcitrant husbands (*igun*) in the Jewish community. Essentially, modern American law permits unilateral no fault divorce. One spouse may seek divorce without the consent of the other, force a financial resolution of the marriage and compel a divorce against the wishes of their spouse. Jewish law did not permit unilateral no-fault divorce after the ban of Rabbenu Gershom was accepted about a millennium ago, as it viewed the 'right' of the husband to discard his wife without her consent

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<sup>83</sup>Rabbi Zalman Nechemia Goldberg, taking note of this problem, has recommended that a dollar amount be inserted in the ketubah — just as Israeli ketubot often include an explicit amount in Israeli *shkalim* or even dollars — so that in the event the wife does register a claim pursuant to the ketubah, there will be no confusion concerning the proper amount to be paid. However, given the infrequency of cases in which parties intend to invoke the ketubah for financial purposes, it is presently unlikely that there will be a movement to accept such a proposal here in America.

to be religiously improper, and thus banned it, just as the reverse is prohibited as well. What then happens as a matter of Jewish law in cases of Jewish divorce where there is no discernable fault? Either the parties sign a pre-nuptial agreement prior to marriage governing such cases,<sup>84</sup> or they settle matters themselves after they realize that divorce is proper, or they agree to go to a bet din for compromise, or they do not get divorced. Solving the problems of *agunot* in a manner that repeals the ban against forced divorce is contrary to Jewish law.<sup>85</sup> Of course, there are many occasions where the community can and should impose social sanctions and other non-coercive pressure on a person who will not give or receive a *get* when the marriage is functionally over, so that he will agree to give a *get*.<sup>86</sup>

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84 Couples nowadays often enter into a separate form pre-nuptial agreement promulgated by the Orthodox Caucus and the Rabbinical Council of America in conjunction with the Beth Din of America. The pre-nuptial agreement is an English language document, drafted in accordance with both Jewish and secular law specifications, that provides for a specific dollar amount to be payable by a husband to a wife for support upon the event of a marital separation until the couple is no longer married according to Jewish law. Unlike what has become the practice with respect to the *ketubah*, the parties who enter into this document clearly comprehend that the financial terms of this document are meant to be enforceable.

The question of whether couples may explicitly reference secular law as the basis for dispute resolution in their pre-nuptial agreement is the subject of an exchange between Rabbi Zalman Nechemia Goldberg (approves) and Rabbi Tzvi Gartner (questions) in *Yeshurun* 11:698-703 (5762). The Beth Din of America is of the view that such pre-nuptial agreements are proper, and a copy of such an agreement can be found at [www.orthodoxcaucus.org/prenuptial.html](http://www.orthodoxcaucus.org/prenuptial.html) with explanation. For a further elaboration of this, see Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America*.

85 For more on this, see Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America*. (Ktav, 2001).

86 Rabbenu Tam as found in the *Sefer HaYashar (Chelek HaTeshuvot 24)* first noted that when a man refuses to give his wife a *get*, even when he is halachically entitled to do so, it is within the power of a rabbinical court to sanction him in cases where his conduct is improper ethically. Such sanction is that community members ought to avoid him. Rabbenu Tam states:

Decree by force of oath on every Jewish man and woman under your jurisdiction that they not be allowed to speak to him, to host him in their homes, to feed him or give him to drink, to accompany him or to visit him when he is ill. In the event that he still refuses

The ideal resolution to all disputes, but particularly divorce, is for the parties to mediate their differences amicably and come to a mutually agreeable settlement or compromise with respect to all issues.<sup>87</sup>

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to divorce his wife, you may add further restrictions upon him. This approach is endorsed by many halachic authorities (see *Yabi'a Omer*, VII:23 (Even HaEzer) (consigned by Rabbis Yosef, Waldenberg, and Kolitz) and remains used to this very day through such mechanism as the Rabbinical Council of America resolution directing that such individuals be excluded from the synagogue.

<sup>87</sup>With respect to this point, see *Pitchei Choshen* 8:7(12).