

The Prenuptial Agreement: Recent Developments

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In 1992, in response to growing concern regarding a husband's ability to purposefully withhold a *get* from his wife without *halachic* reason to do so, as well as the modern day *beit din's* lack of authority to ensure that *gittin* were delivered in a timely manner, a prenuptial agreement was developed. Its purpose was to ensure that a husband would deliver a *get* in a timely fashion, while being sensitive to the *halachot* that would render a "forced" *get* null and void. The agreement, known as the Rabbinical Council of America and/or Beth Din of America prenuptial agreement, received approval from significant Torah authorities, and has resulted in the efficient resolution of scores of divorce cases in the years since its introduction. The current form of the agreement is available at www.theprenup.org.

The prenuptial agreement obligates the husband to pay a set sum, currently \$150 a day, which begins when the couple no longer continues domestic residence together and is in effect for the duration of the Jewish marriage. This obligation for food and support (*parnasah*) terminates if the wife refuses to appear before the Beth Din of America when summoned, or if she fails to abide by the decision or recommendation of the Beth Din of America.

From its inception, there was a concern that a wife might demand the daily sum in circumstances not envisioned by the parties or the agreement's formulators. For example, in some cases a couple ceases living in the same residence, but some time passes before either spouse takes any steps to request or schedule a *get*. Where the husband has not declined to give a *get* in a timely manner, it would seem inequitable for the support obligation to silently accrue until one spouse or another decides to request a *get*. This is because the obligation is meant to serve as an incentive for the husband to issue a *get* upon his wife's request in a timely fashion. It was not intended to provide the wife a means to demand additional money beyond any negotiated or *beit din* or court imposed settlement. While the text of the document is appropriately silent on this matter, a supplemental informational page states that the agreement is intended to facilitate the timely and proper resolution of marital disputes, and this is clearly the parties' intention when they sign the agreement.

To allay these concerns the following statement was added to the agreement in May 2008: "Furthermore, Wife-to-Be waives her right to collect any portion of this support obligation attributable to the period preceding the date of her reasonable

attempt to provide written notification to Husband-to-be that she intends to collect the above sum. Said written notification must include Wife-to-Be's notarized signature." This new language eliminates the possibility of a latent accrual of the support obligation. The obligation only begins once the wife has affirmatively put the husband on notice that she intends to collect the sum.

Notwithstanding this addition, the concerns that motivated the adoption of the new language still remain with respect to prenuptial agreements signed prior to May of 2008. In addition, even with the new language, there remains the possibility that some time will pass between the wife's delivery of the requisite notice and the actual delivery of the *get* – either because of legitimate logistical reasons beyond the control of the parties, or because the wife fails to act to schedule the *get* in a timely manner. Ultimately, any award under the prenuptial agreement can only be made by a *beit din* convened to hear testimony and gather evidence regarding the facts and circumstances of the particular case. This article will explore three possible bases that a *beit din* may utilize to exempt a husband from payment of the daily sum in circumstances similar to those we have set forth above.

INTENT

As mentioned, there are cases when the document's plain language obligates the husband even though it is clear that the intent of the parties and the original formulators of the agreement was not to obligate him. What is the *halacha* in these cases?

Shulchan Aruch cites an opinion which states that if one writes a condition in a document, we follow the intention of the condition, rather than the language that is written.¹ The opinion is based on a case that appears in the Talmud (*Kiddushin* 60b) involving a man who marries a woman on the condition that he shows her a measure of land. The Talmud rules that if he shows her land that he owns, she is married, but if he shows her land which is not owned by him, she is not married. The Talmud, citing a *Tosefta*, explains that, "she did not intend to see anything but his land." Although the literal language of the condition, "I will show you a measure of land," makes no mention of ownership, we follow her presumed intention. It is

¹ *Shulchan Aruch, Choshen Mishpat*, 61:16.

from here that Rabbeinu Yerucham derived and proclaimed what he referred to as a major principle: that we ignore the literal language of an agreement and follow the intention of its parties.²

Since the intent of the prenuptial agreement was to serve as an incentive for the husband to deliver a *get* in a timely fashion, the husband cannot be obligated to pay the daily sum in a case where the husband has acted in good faith, even if the plain language of the document may imply otherwise.

EQUITY

Another important consideration is the governing law provision contained within the prenuptial agreement. The agreement provides for the Beth Din to render its decision “in accordance with... Beth Din ordered settlement in accordance with the principles of Jewish law (*peshara krova la-din*).” A *beit din* empowered to decide a case based on *peshara krova la-din* has wide latitude to decide a case based on its equities, and avert an inequitable and unintended consequence that may result from the literal reading of a contractual provision.

Obligating a husband who has acted in good faith to pay the daily sum provided for in the prenuptial agreement would certainly be considered inequitable. As such, the Beth Din may absolve him from such an obligation using the principle of *peshara krova la-din*.

WAIVER

The husband’s obligation of \$150 per day is characterized by the document as support, or *parnasah*. The agreement quantifies the *parnasah* obligation, and applies it when domestic residence together is discontinued “for whatever reason.” In the absence of the agreement, the husband’s obligation, which is not quantified, continues after the separation only if he is responsible for the separation.³ In such a case, the burden of proof would fall upon the wife and would be very difficult for her to demonstrate even if she is factually correct. This is especially true in light of the vagaries of the

² *Beit Yosef, Choshen Mishpat*, 61:16 and *Biur HaGra, Choshen Mishpat*, 61:16.

³ *Shulchan Aruch, Even Haezer*, 70:12.

present *beit din* system. The agreement, however, applies the obligation “for whatever reason,” thereby eliminating the need to determine responsibility for the separation.⁴

Notwithstanding these significant deviations from the classical concept of *parnasah*, the husband’s obligation under the prenuptial agreement resembles *parnasah*, and is explicitly described in the agreement as functioning “in lieu of my Jewish law obligation of support.” Classical *parnasah* is subject to claims of waiver. For example, *Shulchan Aruch* describes a couple that separated in a case in which the husband is obligated to support her, and concludes that if she did not claim the support when it came due, she has waived (“*machala*”) the earlier support obligation.⁵ Since the support obligation contained in the prenuptial agreement is akin to *parnasah*, it is likely subject to waiver as well. In a case where a wife does not demand the daily sum when it becomes due, there may be a presumed waiver or *mechila* of that sum.

These three considerations apply in virtually all Beth Din of America prenuptial arbitration agreements, prior to the updated language, when the husband is willing to give a *get* immediately but is constrained by mutual agreement. This includes attempts at reconciliation, mediation, and legal proceedings. Two additional considerations exist in a limited number of cases based on the wife’s conduct.

REFUSAL TO RECEIVE THE *GET*

In a case where the husband wishes to issue the *get* and the wife refuses to receive it, for the above reasons (reconciliation, mediation, or legal proceedings) or others, there is an additional reason to assume that the wife waives the daily sum of the prenuptial arbitration agreement for the duration of her refusal to receive the *get*. The Ritva states that even a woman who argued with her husband and left him is assumed to have forgiven a support obligation.⁶ As long as they are married, she may harbor hope for reconciliation and for that reason forgive the obligation. Some *batei din* have cited this Ritva as further precedent for waiving a husband’s *parnasah* obligation.⁷

⁴ Nevertheless, the *beit din* is authorized to consider the respective responsibilities of either or both of the parties for the end of the marriage as an additional, but not exclusive, factor in determining the distribution of marital property. This protects the husbands from possible inequity stemming from his unconditional obligation.

⁵ *Shulchan Aruch, Even Haezer*, 70:12.

⁶ *Chiddushei HaRitva, Ketubot* 96a.

⁷ *Piskei Din Rabaniyim* 2, no. 10 (1956), 291-292.

FINANCIAL CLAIM IN SECULAR COURT

If, prior to petitioning the *beit din* for support pursuant to the terms of the prenuptial agreement, the wife pursued financial claims in secular court, she may not be entitled to petition a *beit din* to address a similar claim. Rama cites an opinion that *beit din* will not accept the case of one who previously pursued a claim in secular court against a fellow Jew and turned to *beit din* after losing that case in secular court.⁸

According to many authorities, the plaintiff forfeits his or her right to pursue the claim in *beit din* from the moment that substantive proceedings have begun in secular court.⁹ A wife's claim for support in secular court is fundamentally the same as the support clause of the prenuptial arbitration agreement. As such, if she pursues support in secular court, she may forfeit her right to pursue the support clause of the prenuptial agreement in *beit din*.

The decision of any *beit din* or court on these matters is somewhat unpredictable.¹⁰ Therefore, notwithstanding the arguments set forth above, the recent language added to the Beth Din of America prenuptial agreement is a prudent step to avoid problems in the future

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⁸ Rama, *Choshen Mishpat*, 26:1.

⁹ R. Joseph Colon (1420-1480), *Shu"t Maharik*, no. 187 and *Beit Yosef, Choshen Mishpat*, 26:1 (s.v. *gedola mizu*). For a further discussion see R. Mordechai Willig, "He'arot Bireish Perek Zeh Borer," *Beit Yitzchak* 36 (2004), 24-25

¹⁰ See, for example, *Lang v. Levi*, 16 A.3d 980 (Md. App. 2011) (available at <http://www.courts.state.md.us/opinions/cosa/2011/1425s09.pdf>).