Rav Osher Weiss' Endorsement of the RCA/BDA Prenuptial Agreement

Since its introduction in 1992 The Rabbinical Council of America (RCA)/Beth Din of America (BDA) prenuptial agreement has become an increasingly standard aspect of marriage preparation within many segments of the Orthodox community. When executed and stored properly the prenuptial has proven to be extraordinarily impressive in its ability to prevent situations of Igun (inability for someone to remarry due to the recalcitrance of their spouse to participate in a Get ceremony). In December 1999 eleven Rashei Yeshivah of Yeshiva University signed a letter distributed to all members of the Rabbinical Council of America "strongly urg[ing] all officiating rabbis to counsel and encourage marrying couples to sign such an agreement." The Rabbinical Council of America in 2006 has even issued a resolution declaring that rabbis should not officiate at a wedding where a proper prenuptial agreement has not been executed. As a practicing Mesader Gittin (Get administrator) for the seventeen years I most wholeheartedly support this resolution.

The prenuptial has been endorsed since its inception by a number of leading Poskim including Rav Zalman Nechemia Goldberg**,** Rav Yitzchak Liebes, Rav Herschel Schachter, Rav Gedalia Dov Schwartz, Rav Elazar Meyer Teitz, Rav Mordechai Willig, Rav Ovadia Yosef and Rav Chaim Zimbalist. Recently Rav Osher Weiss has added his name to this list in a responsum to Rav Tzvi Gartner and Rav Mordechai Willig. Rav Weiss' endorsement of the Halachic validity is a highly significant event, not only because he is one of the world's leading Halachic authorities but also because his rulings are respected throughout the spectrum of Orthodoxy. His responsum is worth reviewing carefully for his explanation of how the prenuptial alleviates concern for Igun while not creating illicit coercion upon a spouse to give or receive a Get.

Rejection of Earlier Prenuptial Agreements

In 1984 a prenuptial agreement was circulated in which husbands agreed to pay a penalty of two hundred and fifty dollars each day a get is not given when a Beit Din determines that it is appropriate to do so. Supporters of this agreement cited as a precedent the centuries old practice of engagement contracts (Tena'im), in which both sides agree to indemnify the other in case they call off the engagement (Shulchan Aruch Even Haezer 50:6). They noted that Pitchei Teshuvah (E.H. 50:8) cites Yeshu'ot Yaakov who raises the problem that these agreements coerce husbands to marry (Halacha requires the consent of both the bride and groom, Shulchan Aruch E.H. 42:1).

He cites the Rama (E.H. 134:4) who quotes the Rashba who invalidates a Get in which the husband signed a separation agreement in which he consented to penalties in case he did not hand his wife a Get. Although the Rama also cites the Maharik who rules that the husband is giving the Get of his own free will, because he voluntarily agreed to pay this monetary penalty, he concludes with a normative compromise approach, that initially (Lechatchilah) the penalty should be eliminated before the husband gives the Get.

However, if the husband already gave a *get* to his wife out of fear of monetary penalty (Bedi'eved), the *get* is considered acceptable.

Among the Yeshu'ot Yaakov's justifications of Tena'im is that the Rama's concern for the opinion of the Rashba is "merely a stringency". Thus, advocates of the 1984 prenuptial argued that we may overlook the Rama's recommendation to accommodate the strict opinion, in order to counteract the problem of Igun.

Mainstream Halachic opinion at the time, as does Rav Weiss in his recent responsum, rejects this approach due to the controversy surrounding an agreement that includes a self-imposed monetary penalty. In fact, this author saw Rav Zalman Nechemia Goldberg (in 1993, as a member of the Jerusalem Rabbinate District Court) refuse to perform a Get for a couple with a separation agreement that penalized the husband for withholding a Get.

Indeed, although Taz (E.H. 134:6), Gra (E.H. 134:14), and Chazon Ish (E.H. 99:5), who endorse the Rama's decision, Pitchei Teshuvah (E.H. 134:10) and Aruch Hashulchan (E.H. 134:26-29) cite a critique of this ruling from Teshuvot Mishkenot Yaakov (38) who invalidates a Get written in such circumstances even B'dieved. Thus, Rav Weiss joins the chorus of Rabbanim who reject this simple prenuptial which relies solely upon the ruling of the Maharik.

One cannot compare the level of stringency required at a Get to Halachic standards expected at a wedding ceremony. For example, the Rama (E.H. 154: Seder HaGet number 2) writes that even third cousins should not serve jointly as witnesses at a Get and that witnesses should repent prior to a Get in case they became disqualified to serve as a witness due to sin. The Rama does not record any such stringency regarding a Chuppah. Thus we cannot extrapolate from the leniency adopted in the context of Tena'im to a divorce agreement since we are far stricter in the situation of divorce. The strictness by a Get stems from the horrific consequences of an invalid Get, including the capital crime of adultery and the eternal consequence of Mamzeirut.

Distinguishing between the Rashba's Case and the RCA/BDA Prenuptial Agreement

The 1992 RCA/BDA prenuptial agreement adopts a far more appropriate approach than the 1984 document. The husband agrees to pay $150 per day to support his wife in case they do not maintain domestic residence. In addition, the husband waives his rights to the Ma'asei Yadayim (earnings) of his wife. This obligation remains in effect for the duration of the Halachic marriage. The document carefully avoids linking the husband's support obligation to his giving a Get to avoid being construed as a penalty for not giving a Get.

Thus, Rav Weiss notes the RCA/BDA agreement differs from the situation addressed by the Rashba and Rama in two manners. The support obligation is not a

penalty but a reasonable sum necessary to support the wife in an average manner. Moreover, there is no direct linkage between the support obligation and a Get, as the husband's financial obligations are a result of the marriage and are not a punishment for withholding a Get (linkage is a critical issue as explained by Pitchei Teshuvah E.H. 134:10 citing Torat Gittin, Aruch Hashulhan E.H. 134:25 and Teshuvot Igrot Moshe 1:137 and Rav Zalman Nechemia Goldberg's explanation, as told to me, of the concluding paragraph of Teshuvot Igrot Moshe E.H. 4:106).

Indeed, this agreement follows the divorce agreement formulated by the famed Rav Yaakov of Lissa to provide financial motivation for giving a Get, but in a manner that does not constitute coercion (Torat Gittin 134:4 s.v. Kenasot; cited in Pitchei Teshuvah 134:9). The husband waives his Halachic rights to his wife's earnings (Ma'asei Yadayim) while maintaining his obligation to support her. The man is thus motivated to give a Get in order to release himself from his financial obligation to his estranged wife. This is not coercion because the husband's financial obligations are a result of the marriage and are not a punishment for withholding a get. Therefore, he gives a get out of dissatisfaction with his marriage and not because of outside coercion. Concerns of invalidating a get only arise when a financial penalty is directly linked to the Get.

The Rama's Fundamental Ruling

Rav Weiss notes that the Rama fundamentally rules in accordance with the Maharik and not the Rashba, since he concludes "it is good to Lechatchilah accommodate the Rashba's opinion", meaning that it is preferable to satisfy the Rashba's opinion but fundamentally the Halacha follows the Maharik (Rav Hershel Schachter is fond of quoting the Rama's Torat Chatat who explains that whenever he rules leniently in case of great financial loss or B'dieved it means that fundamentally he rules in accordance with the lenient opinion except that absent such circumstances one should accommodate the stricter opinion). Although it is improper, as we noted, to create a prenuptial agreement entirely based on the Maharik, nonetheless since the Rama essentially follows the Maharik, there is a limit as to what extent we must be concerned for the opinion of the Rashba. Thus, since the 1992 document is entirely different than the Rashba's case, one need not be concerned that it does not satisfy the Rashba's concern.

I witnessed a similar approach adopted by the Jerusalem Beit Din, consisting of Rav Goldberg, Rav Masood Elchadad and Rav Shlomo Fisher, in the situation described above where the husband signed an agreement providing for penalties in case he did not give his wife a Get. The agreement was made in Israeli civil court and Israeli civil law did not allow the Beit Din to nullify the agreement. Rav Goldberg proposed solving the problem by neutralizing the penalty by the wife signing an agreement that she would return any money the husband would pay as a result of the penalty (in the manner in which Mordechai neutralized the decree of Haman without rescinding it, which Persian law forbade). When Rav Elchadad expresses reservations about this approach, Rav Fisher responded that there is a limit as to extent one must be concerned for the Rashba's

strict ruling, since the Chazon Ish endorses the Rama's ruling that fundamentally the Halacha follows the Maharik.

Shifting the Burden of Proof

Rav Weiss notes that the agreement entitles the wife to receive support payments even if she has not proven in Beit Din that she is entitled to such support. Normally, though, the burden of proof falls upon one who seeks compensation (Bava Kama 46a) and thus the wife should be required to prove in Beit Din that she is entitled to such support before the husband is required to provide it.

Rav Weiss points out, however, that the document (paragraph seven) states "However, this support obligation shall terminate if Wife-to-Be refuses to appear upon due notice before the Beth Din of America or in the event that Wife-to-Be fails to abide by the decision or recommendation of the Beth Din of America". Thus, if the Beit Din finds the wife is not entitled to such Mezonot the obligation is canceled. The document does not create an injustice, Rav Weiss explains. Rather it simply shifts the burden of proof from the wife to the husband to show that she is not entitled to such support. This shift is justified, explains Rav Weiss, since a man is usually more conversant and comfortable in court proceedings.

The Proof of Success

Rav Weiss concludes that this agreement is of "great importance" since he knows of

> "a number of cases that had the couple not signed such an agreement the divorce process would have dragged on interminably with endless baseless hatred and suffering, but due to this document they divorced efficiently in a mutually satisfactory manner with respect for one another".

Rav Soloveitchik notes that Chazal decided to establish Chanukah as a holiday only a year of the Chashmona'im's victory (Shabbat 21b). Chazal did not establish the holiday immediately upon the military victory. Rav Soloveitchik explains that they waited to see if the victory endured before they established a holiday. Once the success of the Chasmonaim was well established Chazal established the holiday.

The success of the prenuptial agreement is now well-established. The incidence of Igun is dramatically lower in those communities which utilize the prenuptial. In these communities the situation of prior generations has been restored, where incidence was rare. A review of the classic responsa literature reveals that there were few incidents of a vindictive spouse spitefully withholding a get before the twentieth century. In times when the authority of Beit Din was respected and enforced (when Jews enjoyed judicial autonomy) situations of Igun were rare. Currently, those communities where Beit Din is empowered by signing a binding arbitration agreement with financial inducements that can

be enforced in civil court, Beit Din's authority is once again enforced by the civil authority and incidence of Igun is rare.

Conclusion – The Evidence of Failure

I would add the following to Rav Weiss' conclusion. I asked a number of individuals who have endured great hardship and long waits to receive a Get if they had signed the RCA/BDA prenuptial. Their answer was that they wanted to do so but their spouses refused, claiming that they could be trusted without the need to sign a contract. Individuals engaged to be married and their families should consider the following: Would they enter into a business relationship with someone who refused to sign a contract with the claim that they could be trusted without the backing of a legally enforceable document? For more information on the RCA/BDA prenuptial see Gray matter 1:8-16, www.rabbis.org (the website of the Rabbinical Council of America and www.bethdin.org (the website of the Beth Din of America).