

THE CURE BEFORE THE MALADY? PRE-NUPTIAL AGREEMENTS AND JEWISH DIVORCE

JULIAN SHINDLER

Rabbi Dr Julian Shindler is the Director of the Marriage Authorisation Office at the Office of the Chief Rabbi. He is also Rabbi of the Muswell Hill Synagogue, London.

Background

Until relatively recently, the Anglo-Jewish Community could take justifiable pride in one of its most precious institutions: the Jewish Home. For though marital strife and breakdown were not unknown in Jewish families, the divorce rate in Anglo-Jewry was minimal only a generation ago. Indeed to this day, non-Jewish religious and political leaders still, perhaps mistakenly, express their admiration for Jewish family life.

However, over the past 20 years or so, the stability of the Jewish home has been seriously undermined and eroded. In a previous article¹ it was suggested that the rate of divorce within our community now approaches that predicted for the general population which, according to Haskey, amounts to about four out of every ten marriages ending in divorce.² This development doubtless reflects the 'success' with which Jews have acculturated in Britain and is, *inter alia*, probably also a manifestation of what the Chief Rabbi has termed the 'fourth generation phenomenon'.³ Nevertheless, whatever the cause, the escalating trend of divorce in the community is one of the most lamentable facets of Anglo-Jewish life today.

Divorcing Jewish couples, in addition to any civil proceedings, are of course required to effect a *Get* in order to terminate their Jewish marriage. Doing so, however, requires the willing cooperation of both husband and wife. This is especially true of the former, according to the Torah, it is he who must initiate the *Get* and he shall write her a bill of divorce and place it in her hand.⁴ In the small but significant proportion of cases where either the husband or the wife is unwilling to cooperate in the proceedings, the Jewish marital bond remains intact precluding either of them from remarriage in Jewish law.

Whilst this unhappy situation is inconvenient to both parties to the divorce, the halakhic consequences for the wife are more serious in that a relationship entered into with another Jewish man is adultery, which according to biblical law is, at least theoretically, a capital offence. Furthermore, should she conceive from such an illicit relationship prior to receiving a *Get* from her husband, any child from this union and its progeny suffer the biblical disqualification of being ineligible to marry within the Jewish community.

Given the escalation in the over-

divorce rate and the anticipated increase in the incidence of such cases, the orthodox rabbinate and other interested bodies have, for some time, been considering what legitimate measures could be put in place to alleviate the avoidable emotional stress experienced by the 'chained' husbands and wives in these 'limping' marriages. One such measure which could be of considerable help in averting the problems associated with the dissolution of some Jewish marriages is the Pre-Nuptial Agreement, or PNA.

The notion of introducing a PNA was first considered as a serious option at least 12 years ago by the Jewish Marriage Council in early discussions with the London Beth Din. But these discussions did not materialise into anything concrete until early in the 1990s, by which time the Beth Din was more acutely aware of the growing scale of the potential problems. By November 1993, the Chief Rabbi had announced his agreement in principle to the future implementation of a PNA for marriages authorised under his jurisdiction. This declaration was particularly welcomed by the Preston Report whose findings had highlighted the hardship suffered by some women who had been unable to remarry - in exceptional cases, for many years - because of the obstinate behaviour of a recalcitrant spouse.⁵

Following an extensive period of consultation with leading ecclesiastical and legal authorities a PNA was drawn up and for the past several months, has been offered to engaged couples when they attend the Office of the Chief Rabbi to obtain authorisation for their marriage. In this article, we examine some of the issues behind the PNA and consider its possible future impact in combination with two other recent initiatives which have been implemented to minimise and, if at all possible, prevent the problems experienced by some couples as they disengage from a failed marriage.

Why a Coerced *Get* is Invalid

The Torah distinguishes between two situations in which a betrothed woman has sexual relations with another man.⁶

It first considers a case in which the offence was committed 'in a town'. Where the woman could have cried for help but did not, it is assumed that she consented. Accordingly, she is liable to be punished.

However, assumptions about the woman's consent to intercourse cannot be made where the incident took place 'in the field' as, even had she cried for help, there would have been no one within hearing distance to rescue her. Since, in this case, the distinction between seduction and rape cannot be made with any certainty, the Torah prescribes: *velannaarah lo ta'aseh davar*, 'You shall not impose any penalty upon the woman'. The Torah's presumption is that she was forced to submit to this man against her will and she is therefore exempt from punishment.

From this we derive the principle: '*anus rachamana patrei*, someone who is forced to sin is exempt from any penalty that might otherwise be a consequence of his/her transgression.'⁷ Applying this principle to mitzvot, it can be argued that a mitzvah which one is forced to perform unwillingly is ineffectual. Similarly, a *Get* (a religious act) which is effected under duress is invalid.⁸

Rambam, adopting a more contextual (rather than logical) approach, arrives at the same conclusion,⁹ noting that the effecting of the *Get* by the husband is linked to the conditional clause 'if she does not find favour in his eyes'.¹⁰ This linkage implies that the husband's willing cooperation to divorce his wife is a *sine qua non* for a *Get* to be valid.

What Constitutes Coercion?

A *Get* which is obtained by means of physical threat or injury to the husband or by way of financial pressure would, in most cases, be considered a *Get me'useh* — a forced *Get*, and is invalid. One could argue that in every failed marriage there is some internal pressure to divorce, but this is not equivalent to duress because, even if a husband is unhappy in his marriage and wishes to opt out, it is his choice to do so. No

one compels him to give his wife a *Get*.

A sample survey of *teshuvot* may be instructive here. *Maharik*¹¹ considers a case where a man was imprisoned for refusing to give his wife a *Get*. Upon release, he gave it 'freely'. *Maharik* still regards the *Get* so obtained as *me'useh* as long as the authorities still had the possibility of threatening to re-incarcerate him.

*Tashbatz*¹² discusses a case where a man was told that a third party would be physically harmed unless he gave his wife a *Get*. *Tashbatz* rules that a *Get* given in these circumstances is valid even though the husband agreed to do so in order to save his fellow from a beating, since any 'duress' was indirect.

In another case, a man refused to consummate his marriage and ran away. Despite attempts at reconciliation, no progress was made over a considerable period of time. The man was eventually ordered by the religious authorities, to live together with his wife. Rather than do this, he elected to give her a *Get*. *Rivash*¹³ ruled that this *Get* was not *me'useh* because although he was compelled to live with his wife, he was not compelled to give her a *Get*.

A more recent interesting case has been analysed by Rabbi Dichovsky of the Tel Aviv Beth Din.¹⁴ A man was imprisoned for drugs/theft related offences. His wife subsequently asked for a divorce and disclosed that she was now living with somebody else. The Beth Din interviewed the husband and requested that he cooperate but instead he was verbally abusive to the court judges. Bearing in mind that a prisoner is entitled to 33% remission for good behaviour, the Beth Din considered the possibility of negotiating his entitlement to remission on condition that he agreed to give his wife a *Get*. Rabbi Dichovsky concludes that a *Get* obtained by this means would be valid because the withdrawal of a privilege (in this case, the right to remission) is not considered coercion.

From these few examples, it will be apparent that the halakhic criteria for what constitutes coercion are not

straightforward. Consequently, it will be appreciated that any PNA which can be enforced through the civil courts must be carefully worded. If a PNA could be construed by the courts as a means to compel a man to give his wife a *Get*, the *Get* so obtained would in all probability be deemed invalid. In fact, in order to avoid this difficulty, the PNA currently in use makes no explicit reference to *Get* or even divorce.

Provisions of the PNA

The key provisions of the PNA are:

i) An undertaking by the bride and groom that, in the event that their marriage should run into serious difficulties, they agree to attend the London Beth Din (or another approved Beth Din) to seek guidance on how to resolve their marital problems.¹⁵

Where the Beth Din is satisfied that there is no realistic prospect of saving the marriage, it would recommend and explain to the couple how to effect a *Get*.

This provision is useful in that it facilitates mediation to try and save a failing marriage, one of the principle concerns of Lord Mackay's Family Law Act, which has recently passed through Parliament. Additionally, even where 'difficult' divorces are concerned, experience demonstrates that the likelihood of resolving a deadlocked situation and achieving a *Get* is greatly increased where both parties agree to attend the Beth Din.

ii) The husband undertakes to continue to fulfil all his financial obligations to his wife as determined by the London Beth Din in accordance with the halakhah.¹⁶ This is an acknowledgement by the husband that the termination of the civil marriage leaves the Jewish marriage unaffected and with it his financial obligations to his wife. It is an enforceable re-statement of one of the provisions of the *Ketubah* which is, itself, a pre-nuptial agreement. It provides for the possibility of legitimate financial pressure on an uncooperative husband in a way which would not invalidate

any *Get* subsequently obtained.¹⁷ It should be apparent from the foregoing that the PNA should not be construed as a reform of the halakhah. On the contrary, it has been constructed to support and work within the framework of existing Jewish law.

iii) A further provision, advocated by the Beth Din of the Federation of Synagogues, requires the bride and groom to sign an agreement that their divorce settlement should be subject to arbitration at the Beth Din.¹⁸ Those who favour this approach argue that it greatly strengthens the power of the Beth Din in respect to how the divorce settlement is apportioned. However, it has been received somewhat less enthusiastically by a significant body of opinion from within the judiciary who are opposed to what is, in effect, a transfer of judicial powers from the civil courts to a Beth Din. Since legal opinion is divided over the principle of arbitration in the context of divorce, it has been the policy of the Marriage Authorisation Office at the Office of the Chief Rabbi (under whose auspices fall the majority of Orthodox marriages in the UK) to offer the couple the choice of signing two versions of the PNA, one including and the other excluding this arbitration clause.

At the time of writing this article, approximately 40% of couples who have been offered the PNA have signed one. Bearing in mind that signing a PNA is a voluntary act, these early results are an encouraging sign that couples are receptive to the idea of a PNA and it is expected that the proportion who sign will steadily increase in the months ahead. However, less than 5% of couples who agree to sign a PNA have opted for the version which includes the arbitration clause. Thus, though theoretically feasible, arbitration by the Beth Din has largely been rejected as an option by couples who are otherwise sympathetic to the principle of the PNA.

Communal Sanctions

A further joint initiative between the batei din has been the approval of a range of communal sanctions which

could be imposed when a husband or wife unreasonably refuses to cooperate in *Get* proceedings. These sanctions involve the discretionary withdrawal of synagogue honours or privileges after consent has been obtained from the Beth Din. This would not be considered coercion in Jewish law, though the withdrawal of a right, such as burial in a Jewish cemetery, would be.

Earlier this year, the United Synagogue formally adopted the principle of imposing communal sanctions of this kind under the appropriate circumstances.¹⁹ Admittedly, such measures are only likely to make a difference where the recalcitrant party is religiously observant or communally active. However, even where sanctions are ineffective, they are of value insofar as they signal communal disapproval of the husband's/wife's unacceptable behaviour and give public support to the 'chained' spouse.

Get Legislation

Another recent significant development has been the inclusion of an amendment to the Family Law Act which is expected to become operational in 1998. This amendment, submitted to Parliament by Lord Jakobovits and Lord Meston, is the result of a cross community initiative coordinated by the Board of Deputies. A consequence of this is that the courts, on the application of either the husband or the wife, may direct that before a civil divorce is finalised, a declaration be produced by both parties that they have taken such steps as are required to dissolve their Jewish marriage. The resolution of the issue of the *Get* should thus become an integral part of the mediation process.

Whilst this amendment, as it stands, allows a judge the possibility of overlooking *Get* proceedings (i.e., it is discretionary rather than compulsory), this is less likely to happen where a couple have signed a PNA. The legislation should thus act in tandem with the PNA to ensure that the effecting of a *Get* will, in most cases, become a condition for the granting of

a decree absolute.

Conclusion

During the past six months or so, three important communal initiatives have come to fruition: the introduction of the Pre-Nuptial Agreement, the implementation of communal sanctions and the passing of *Get* legislation. These initiatives are remarkable in that they are the product of the collaborative efforts and talents of many individuals, rabbis, lawyers, community professionals and lay leaders. Although not everyone's problems will be solved by these means, it must be confidently anticipated that they will alleviate the difficulties experienced by many divorcing couples and significantly reduce the incidence of *agunot* ('chained women') in the future.

Whilst those who have made contributions to the development of these initiatives can rightly feel some sense of achievement, it must nevertheless be borne in mind that none of these measures will reduce the actual frequency of divorce. Where a marriage has totally failed and divorce is inevitable, it is of course important to terminate the marriage in as dignified and mutually acceptable a way as possible, in accordance with the halakhah. But given the incidence of Jewish divorce today, we should be alarmed at the human cost, particularly its effect on any children involved, and its catastrophic economic and demographic implications for the Anglo-Jewish community.

We have come some way towards disentangling some of the halakhic and legal problems of Jewish divorce. We must now confront far greater challenges: how to promote Jewish marriage/family values; how to sustain relationships within marriage; how to train young people to have realistic expectations from marriage and to develop responsible parenting skills. Success achieved in these vital areas would restore stability to Jewish family life, diminish the necessity for Pre-Nuptial Agreements and put Anglo-Jewish continuity on a much sounder footing.



ken from the painting
Jewish Wedding
by Ferle Hessing.

Notes

- 1 J. S. Shindler (1998), *Leitav*, vol. 35, p. 20.
- 2 J. Haskey (1989), in *Population Trends*, vol. 35, pp. 34-37 (OJC/S).
- 3 J. Sacks (1994), *Will We Have Jewish Grandchildren?*, p. 60 (N. deane Mitchell).
- 4 Devarim 24, v. 1.
- 5 *Women in the Jewish Community* (1992), Review and Recommendation, p. 22 (Office of the Chief Rabbi).
- 6 Devarim 22, v. 23-27.
- 7 Nedarin 27(a).
- 8 *Avukh Hachukim, Even HaEzer* (1983).
- 9 Mishneh Torah, *Hilkhot Gerushin* 1:2.
- 10 Devarim 24, v. 1.
- 11 *Maharik, Shornit* 63.
- 12 *Tashbatz* 1:1.
- 13 *Risshv Tehuvah* no. 127.
- 14 *Techumin* 1, pp. 254-258.
- 15 The bride and bridegroom agree that, in the event of any matrimonial dispute, they will both attend the Court of the Chief Rabbi, the London Beth Din (or such other Beth Din as the Beth Din shall direct), when required to do so, and that they will comply with the instructions of that Beth Din, including co-operation in any mediation recommended or seeking to resolve all

problems arising out of or in connection with their Jewish marriage.

- 16 The bridegroom neither and strikes in a respective of civil proceedings being instituted in respect of the marriage by way of fulfilment of his financial obligations to his wife, as determined by the London Beth Din or such other Beth Din as the Beth Din shall direct.

The obligation shall not affect the authority of the civil court under the Matrimonial Causes Act 1973 or any amendment or replacement thereof, or the authority of any civil court to whose jurisdiction the bride and/or bridegroom may be subject, and shall be subject to obtaining the approval of the court where required or appropriate.

- 17 Neither the bride nor the bridegroom shall apply in any civil proceedings without prior approval in writing of the Beth Din (or in order to enforce in award of the Beth Din, or for its order in relation to non-compliance with this agreement).

- 18 The bride and bridegroom further agree that if the problems concerning their Jewish marriage are not resolved (in terms of rule 15 above), any dispute arising out of or in connection with the marriage shall be referred to and finally resolved by arbitration by the London Beth Din (or such other Beth Din as the Beth Din shall direct) in accordance with *Halakah* under the Arbitration Acts 1950, 1975 and 1979 (or any amendment, consolidation or replacement thereof) and in

accordance with the procedural rules of the relevant Beth Din.

- 19 If, in the written opinion of the London Beth Din, either wrongly refuses to cooperate with granting or receiving of a *Get*, the member shall have privileges of membership, as directed by the London Beth Din withheld during the period that the Beth Din shall advise. The privileges shall include but shall not be limited to being appointed *Shvilach Tzibbur*, *Ba'ei Tekiyah*, *Ba'ei Karet*, *Chazan Torah* or *Bereche* the honour of regular *shabbat*, the entitlement to be a member of the Board of Management or represent the Synagogue on both local and national organisations, the appointment to positions of responsibility such as taking children's or youth services, as a teacher in the religion classes and/or synagogue security or protection.

If a member fails to give or receive a *Get* when directed by the Beth Din to do so, he or she could forfeit his or her right to membership. Such membership and all the privileges and rights of membership can be terminated by the Honorary Officers of the Synagogue on the written authority of, and for such period as has been determined by, the London Beth Din.