A Suggested Antenuptial Agreement: A Proposal in Wake of *Avitzur*

Rabbi J. David Bleich

During much of the medieval period European Jewish communities constituted a veritable *imperium in imperio*. Throughout this period Jews were denied many of the rights and freedoms enjoyed by citizens of their host countries. Paradoxically, it was precisely acknowledgement of their status as an alien community, a state that gave rise to so many forms of discrimination, which served as the basis for according Jews a precious privilege, viz., judicial autonomy. Jewish communities were commonly authorized to establish their own independent judicial system for the purpose of adjudicating monetary disputes which might arise among members of the Jewish community. At times jurisdiction over criminal matters was vested in these courts as well. But of greatest socio-religious significance was the virtually absolute authority with regard to matters of marriage and divorce vested in these courts. To all intents and purposes, no Jew, male or female, could contract a marriage without the acquiescence of the recognized rabbinic authorities. Hence entry into a second marriage was effectively precluded unless the first marriage was terminated by the death of a

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Rosh Yeshiva, Rabbi Isaac Elchanan Theological Seminary; Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University

spouse or dissolved by execution of a valid religious divorce. The option of a civil marriage without ecclesiastic sanction was simply non-existent.

With emancipation and the conferral of the full complement of civil rights upon Jews, authority over matters of marriage and divorce was no longer permitted to remain the exclusive domain of rabbinic authorities. Thus, a marriage valid in terms of religious law might be terminated by the divorce decree of a secular court. Although of unquestionable validity for purposes of civil law, such divorce decrees are totally devoid of significance insofar as religious law is concerned.

When both marriage partners profess allegiance to Jewish law and both desire to be free to enter into a new marital relationship, the parties usually cooperate in the execution of a religious divorce, or *get*, thereby satisfying the requirements of Jewish law. A problem arises when one of the parties is unconcerned with religious proscriptions concerning remarriage without a prior *get* or when one party does not contemplate remarriage and, by reason of acrimony or malice, seeks to impede the other party from entering into a new marriage.

Such problems usually arise as a result of the refusal on the part of the husband to execute a *get*. It is indeed true that, by virtue of an edict promulgated by the 11th century authority, Rabbenu Gershom, no religious divorce may be effected without the consent of the wife and hence a wife may prevent the remarriage of her estranged husband if she refuses to accept a *get*. However, in practice, it often proves to be much easier to secure compliance of a recalcitrant wife than of a recalcitrant husband. Although all plural marriages are now banned by virtue of another edict promulgated by Rabbenu Gershom, biblical law does sanction polygamy. In certain very limited circumstances, e.g., insanity or mental incapacity of the first wife, a man may marry a second wife even subsequent to the edict of Rabbenu Gershom. Another exception to the ban against polygamous marriage is found in the situation of a husband whose wife has abandoned him but who steadfastly refuses to accept a bill of divorce. Since the disintegration of the marriage is attributable to abandonment by the wife, and since it is

she who refuses to accept a divorce, it would, in the absence of a biblical prohibition against polygamy, be inequitable to bar the husband from taking another wife by reason of rabbinic legislation. However, the edict of Rabbenu Gershom does require that a minimum of at least one hundred scholars domiciled in at least three different countries or, according to some authorities, three different jurisdictions, certify that dispensation for a second marriage is factually justified. The rationale underlying this exception to the ban against plural marriage is particularly cogent if the edict against plural marriage is construed as having been designed to safeguard the welfare and status of the wife. A woman who has abandoned her husband and home without leave of a *Bet Din* is not entitled to, and presumably does not need, such protection. This resembles the legal principle that equitable relief and protection is accorded only to those who appear before the court with "clean hands." Hence, unless the wife has contested the civil divorce or otherwise professes a desire for restoration of domestic harmony, the wife's refusal to accept a *get* subsequent to the civil decree may, in fact, entitle the husband to a dispensation to remarry, known as a *heter me'ah rabbanim*. Often the realization that, in the light of her own intransigence, the husband's petition for a *heter me'ah rabbanim* is likely to be granted is sufficient to engender a willingness on the part of the wife to enter into negotiations for the execution of a religious divorce.

Since polyandry is forbidden by biblical law, no provision similar in effect to that of the *heter me'ah rabbanim* could possibly be instituted on behalf of the wife. In the absence of a valid *get* any subsequent marriage which may be contracted by the wife is nothing other than an adulterous liaison and any issue of such an adulterous union will unavoidably suffer the stigma of bastardy. Since no device similar in nature to the *heter me'ah rabbanim* could be devised in order to enable the wife to remarry, it is not surprising that the number of women prevented from remarrying by reasons of religious scruples far exceeds the number of men finding themselves in the same quandary.

Post-emancipation Jewry is increasingly confronted by the problem of the modern-day *agunah*, a "chained" woman denied

consortium and other marital prerogatives but unable to enter into a new marital relationship because of the husband's refusal to execute a religious bill of divorce. In an age of an ever increasing rate of divorce what was once the tragic plight of the few has become a societal problem of statistically significant dimension. In times gone by, the husband's own desire to be free to enter into a second marriage usually constituted a measure of self-interest sufficiently strong to guarantee cooperation. Moreover, an autonomous judiciary had available to itself other coercive measures which it might employ at its discretion. With the loss of formal judicial authority there remained only the power of moral persuasion; with the erosion of moral authority such already weakened power may, at times, degenerate into total impotence. As a result there has arisen a pressing need for finding ways and means of assuring that a Jewish husband will not avail himself of civil remedies for relief of his own marital obligations and constraints while refusing to make it possible for his estranged wife to remarry with ecclesiastic blessing.

Some thirty years ago, the Conservative movement, through its Rabbinical Assembly of America, sought to resolve this modern-day *agunah* problem by incorporating into the *ketubah* executed in conjunction with the marriage ceremony a clause which would have the effect of compelling the parties to seek a *get* upon the breakdown of their marriage. The following is the English-language text of the Conservative amendment to the *ketubah*:

> And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: as evidence of our desire to enable each other to live in accordance with the Jewish law of marriage, throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensations as it may see fit for failure to respond to its summons or to carry out its decision.[1]

The desired effect of this amendment is to obligate both husband and wife to submit to the authority of the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America. Authorization of the Beth Din to impose a financial penalty upon the recalcitrant party which, it was presumed, would be enforceable through the civil courts, was designed to assure compliance with a directive requiring cooperation in the execution of a *get*.

Halachic authorities vigorously opposed this innovation on a number of grounds:

1. The Beth Din established by the Rabbinical Assembly and the Jewish Theological Seminary is composed of Conservative clergymen who are disqualified from serving as judges on rabbinic courts. The doctrinal beliefs expressly or tacitly accepted by the Conservative movement constitute a departure from the teachings of traditional Judaism of a magnitude such as to disqualify its adherents from serving as judges sitting on a Beth Din.[2]

2. The proposed penalty constitutes an *asmachta* which is not enforceable in Jewish law,[3] just as penalty clauses are ordinarily not enforceable in civil law, albeit for different reasons.[4] Hence, from the vantage point of Jewish law, any attempt to exact a monetary penalty would constitute illicit extortion. Moreover, a *get* executed in fear that such a penalty would actually be assessed were

1. *Proceedings of the Rabbinical Assembly of America*, XVIII (1954), 67.
2. See this writer's "Parameters and Limits of Communal Unity from the Perspective of Jewish Law," *Journal of Halacha and Contemporary Society*, no. 6 (Fall, 1983), p. 14; R. Norman Lamm," Recent Additions to the Ketubah," *Tradition*, vol. II, no. 1 (Fall, 1959), p. 94; and R. Eliezer Waldenberg, *Tzitz Eli'ezer*, V (Jerusalem, 5717), introduction, chap. 7.
3. For a discussion of the nature of *asmachta* see *Encyclopedia Talmudit*, II, 108-115. (Eng. ed., 522-538).
4. See Uniform Commercial Code § 2-718.

cooperation not forthcoming would, according to many authorities, constitute a *get me'useh* i.e., a divorce executed under duress. Such a *get* would be invalid.[5]

3. Even assuming that the *asmachta* problem may be overcome in some manner and the monetary penalty rendered actionable in Jewish law, there exists grave question with regard to the validity of a *get* executed in circumstances in which the *get* is granted by a husband in order to free himself from the burden of such penalty.[6]

There were—and indeed still are—many serious question regarding the enforceability of this agreement in civil courts. Nevertheless, a recent decision of the New York Court of Appeals in *Avitzur v. Avitzur*[7] serves to endow this document with some legal authority. Despite the halakhic and legal questions which remain, the *Avitzur* decision points the way to the crafting of an agreement which poses no halakhic difficulty and which is enforceable in civil courts.

Avitzur represents the first occasion on which the highest court of any state has acted on a matter pertaining to the execution of a *get*. If proper procedures are implemented, this decision will make it easier to force a recalcitrant husband to grant a religious divorce in accordance with Jewish law. In order to assess the implications of this recent decision of the New York Court of Appeals, it is necessary to bear in mind the facts of the case.

Susan and Boaz Avitzur were married in May 1966. The ceremony was performed by a Conservative clergyman who used a *ketubah* in which the earlier-cited clause was incorporated. The Avitzurs obtained a civil divorce in 1978. Susan Avitzur then summoned Boaz to appear before the Beth Din named in their

5. See *Piskei Din Shel Batei ha-Din ha-Rabbaniyim*, II, 9-13; R. Isaac ha-Levi Herzog, *Ha-Darom*, no. 1 (Shevat 5717), pp. 3-28 [reprinted in *Osef Ma'amarim* ed. R. Charles B. Chavel and R. Nachum Rabinovitch (New York, 5726) pp. 42-67]; R. Eli'ezer Rabinowitz-Teumim, *No'am*, I (5718), 287-312; R. Yitzchak Glicksman, *No'am*, III (5720), 167-194; and R. Elyakim Ellinson, *Sinai*, XXIX (Tammuz-Sivan 5731), 141-150.

6. See conflicting authorities cited by Ramo, *Shulchan Aruch, Even Ha-Ezer* 154:5 and accompanying commentaries.

7. *N.Y.L.J.*, Feb. 17, 1983, p. 4, col. 1.

ketubah pursuant to the provisions of their agreement recognizing that body as having authority to counsel the couple in matters pertaining to their marriage. Boaz Avitzur refused to comply. Thereupon Susan instituted legal proceedings designed to compel Boaz to appear before the Beth Din. Boaz requested the court to dismiss the complaint, arguing that for the court to order him to appear before the Beth Din would involve the civil court in an impermissible consideration of a purely religious matter.

The Supreme Court, which in New York is a court of original jurisdiction, ruled in favor of Susan.[8] It stated that ordering Boaz to appear before a Beth Din on the basis of his own contractual agreement involves no judicial entanglement in any doctrinal issue. Boaz, however, argued that, for various reasons, even on the basis of the terms of the *ketubah* as applied to his particular situation, he was not obligated to appear before the Beth Din. The Supreme Court accepted Boaz' contention that his obligations under the *ketubah* were not unequivocal and therefore ordered a plenary trial in order to resolve those questions. (Boaz argued that the agreement which he signed obliged him to appear when summoned by the Beth Din itself, but not when such a demand was made only by his wife. Moreover, he contended that since his wife did not heed an earlier demand on his part to appear before the Beth Din, he was relieved of any further obligation.)

The trial never took place. Boaz appealed the decision of the Supreme Court and the Appellate Division overruled the lower court's ruling, declaring that the *ketubah* is a "liturgical agreement" which has no standing in civil law.[9] That finding has now been reversed by the Court of Appeals in a four to three decision. The legal effect of such reversal is that the original order of the Supreme Court requiring a plenary trial remains in effect. In its original ruling the Supreme Court declared that Boaz was entitled to a trial in order to determine upon the facts of that particular case whether he is indeed obligated to appear before the Beth Din.

Although the order of the Supreme Court required the parties

8. Avitzur v. Avitzur, No. 211-81 (Albany Co., Dec. 19, 1980).

9. Avitzur v. Avitzur, No. 41550 (3d Dep't April 8, 1982).

to appear before the Conservative Beth Din, virtually all Orthodox rabbinic and communal organizations joined in a brief as "friends of the court" urging that, as a matter of law, the order be upheld. They did so because the principles of law involved are of concern to the entire Jewish community.

The only issue before the Court of Appeals was whether a person might be compelled to appear before a Beth Din on the basis of an undertaking executed as part of a *ketubah*. To this question the highest court of the State of New York answered with an emphatic "Yes!" The question of enforcing an order of the Beth Din directing the husband to execute a *get* was not before the court. However, although the matter is not entirely resolved, on the basis of the language of the *Avitzur* decision there is reason to assume that a decision of the Beth Din ordering the husband to execute a *get* would also be enforceable in civil courts.

In issuing this decision the Court of Appeals clearly recognized that the matter before the Court was not an order to execute a *get* but an action to enforce an undertaking to submit the matter to arbitration. Thus the court declared that:

> Viewed in this manner, the provisions of the ketubah relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum. Thus, the contractual obligation plaintiff seeks to enforce is closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There can be little doubt that a duly executed antenuptial agreement, by which the parties agreed in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable (e.g., *Matter of Sunshine*, 40 N.Y.2d 875, aff'g 51 A.D.2d 326; *Matter of Davis*, 20 N.Y.2d 70). Similarly an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity (*Hirsch v. Hirsch*, 27 N.Y.2d 312; see *Bowmer v. Bowmer*, 50 N.Y.2d 288, 193). This agreement — the ketubah — should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a non-judicial forum, so long as its enforcement violates neither the law nor the public policy of this State (*Hirsch v. Hirsch*, supra, at p. 315).[10]

In this decision the Court of Appeals ruled that an agreement to arbitrate the issue of religious divorce could be enforced "upon application of neutral principles of contract law, with no reference to any religious principle"[11] and hence that enforcement of such an agreement involves no judicial entanglement in matters of religion. The question of whether application of a neutral principles doctrine would similarly render an agreement to execute a *get* enforceable in a civil court was not decided since that issue was not before the court.

The Court of Appeals recognized that a *ketubah* is indeed a contract between the bride and the groom entitled to the same dignity and standing as any other civil contract. Antenuptial agreements to refer disputes associated with the marital relationship to arbitration are routinely upheld by the courts. The agreement to appear before a Beth Din was recognized by the court as an agreement to arbitrate disputes before a specific body. The court also acknowledged that in agreeing to submit their disputes to a Beth Din the parties recognized that the Beth Din would apply provisions of Jewish law in rendering a decision. The Court of Appeals found this to be entirely acceptable and upheld the right "to arbitrate a dispute in accordance with the law and tradition chosen by the parties."

It must be emphasized that the Court of Appeals was not asked to rule that in signing a *ketubah* the husband obligates himself to execute a *get* whenever an irreparable breakdown of a marriage occurs (as did a Canadian court in *Morris vs. Morris*)[12] or even when required by Jewish law (e.g., in cases of adultery, as did a New York court in *Stern vs. Stern*[13] and a New Jersey court in

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10. *N.Y.L.J.*, Feb. 17, 1983, p. 4, col. 2.
11. *Loc. cit.*
12. 36 D.L.R.3d 447, 3 W.W.R. 526, 10 R.F.L. 118 (Manitoba Q.B. 1973), *rev'd* 42 D.L.R 3d 550, 558 (Man. Ct. App. 1973) (Friedman, C.J., dissenting).
13. *N.Y.L.J.*, August 8, 1979, at p. 13, col. 5, F.L.R. 2810.

Minkin vs. Minkin).[14] In light of the narrow majority in *Avitzur* it is unlikely—but not impossible—that the same court would construe the traditional *ketubah* used by Orthodox Jews, which does not contain an explicit arbitration clause, as requiring the parties to submit to the jurisdiction of a Beth Din for the purpose of adjudicating a claim for the execution of a *get*. But the *Avitzur* decision does mean that when a separate document is executed at the time of a wedding explicitly binding the parties to appear before a particular Beth Din upon dissolution of the marriage by civil divorce, such an agreement would be enforced by the courts and appearance before the Beth Din could be compelled.

As noted earlier, Orthodox objections to use of the Conservative *ketubah* center upon the qualifications of the members of the particular Beth Din designated in that document and upon the monetary penalties provided for failure to abide by the decree of the Beth Din. It is readily apparent that an agreement which is not flawed in these respects is not halakhically objectionable.[15] Elimination of those aspects of the agreement would present no barrier to civil enforcement. Certainly, a stipulation to appear before a specific Orthodox Beth Din would be no less enforceable than an agreement to appear before a Conservative Beth Din. Moreover, subsequent to *Avitzur* there is no need to stipulate a penalty for non-appearance before the Beth Din or for failure to abide by its decision since the court is prepared to command specific performance upon pain of contempt proceedings. Since appearance before a Beth Din is a basic requirement of Jewish law there is no question that the threat of criminal contempt may be used to enforce the appearance of the parties.

A word of caution is in order. Execution of an agreement similar in nature to that upheld by the Court of Appeals in *Avitzur* would do much to ameliorate the plight of the *agunah* but would by

14. 880 N.J. Super. 260, 434 A.2d 665 (1981).

15. Various other proposals for antenuptial agreements emanating from Orthodox sources have been circulated in recent months. Proposals incorporating a simple penalty clause are substantially no different from the provision of the Conservative *ketubah* insofar as the defects of *asmachta* and *get me'useh* are concerned. Those proposals will be examined in detail in a forthcoming study.

no means serve as a panacea. The first problem which must be recognized is a legal one centering upon the import of the decision itself.

As noted earlier, it might be assumed that an order of the Beth Din to execute a *get* pursuant to the judicially mandated appearance before that tribunal would also be enforced by the *Avitzur* court. Indeed, the minority dissented in part because it viewed such an order as unenforceable and declared, "[T]he evident objective of the present action ... is to obtain a religious divorce, a matter well beyond the authority of any civil court."[16] The majority, it might be presumed, fully recognized that arbitration is pointless unless the decision of the arbitrators is enforceable in a court of competent jurisdiction. Hence, it might be surmised that the majority would have been willing to enforce a decision of the arbitrators for specific performance even though it might regard such a remedy to be unattainable in a judicial forum. However, it should be noted that in *Board of Education v. Carcovia*[17] an arbitration agreement to seek an advisory opinion was held to be enforceable. Hence, it is possible, although unlikely, that a future court might find confirmation of an arbitration decision commanding the husband to grant a *get* to be unenforceable and to construe *Avitzur* as mandating only that the parties seek the advice of the Beth Din.

More significantly, utilization of the judicial process as a means of compelling a husband to execute a *get* may in many cases invalidate the *get*. Utilization of the police power of the secular state in compelling the husband to cooperate in the execution of a *get* is appropriate only if: (1) The Court does not directly order the execution of the *get* but simply confirms the order of a competent and qualified Beth Din by means of a directive in the form of "*Aseh mah she-Yisra'el omrin lecha* — Do that which the Jewish court orders you to do;[18] and (2) there exist grounds in Jewish law which warrant a direct order by the Beth Din compelling the husband to grant a *get*.[19]

16. *N.Y.L.J.*, Feb. 17, 1983, p. 5, col. 1.

17. 36 A.D.2d 851 (2d Dept 1971).

18. See *Shulchan Aruch, Even ha-Ezer* 134:9.

19. For a discussion of such grounds see *Shulchan Aruch, Even ha-Ezer* 154.

These problems notwithstanding, the *Avitzur* decision is of great significance in ameliorating the plight of the *agunah*. Its significance lies in the fact that it points to a method by means of which the parties may be compelled to appear before a Beth Din. It is to be anticipated that when the parties appear before the Beth Din, the Beth Din will be able to use its ample powers of moral persuasion in order to effect the desired result.[20] Experience teaches that the primary problem is securing an appearance by the husband before the Beth Din. Upon appearance, the necessary agreement to the granting of a *get* can often be obtained. Furthermore, as discussed earlier, in those cases in which the Beth Din finds grounds in Jewish law for compelling the husband to execute a *get* there is reason to anticipate that such a decision would also be enforced by the courts.

The Court of Appeals has ruled that an agreement to arbitrate a marital dispute before a Beth Din constitutes a valid contract on the grounds that directing the parties to appear before an arbitration panel which is then free to reach any decision it finds to be just and equitable involves no judicial entanglement in religious matters. But is an explicit undertaking to execute a *get* or an undertaking to appear before a Beth Din for the specific purpose of executing a *get*, similarly enforceable?[21] The opinion of the court in

20. A more radical proposal for an agreement which would serve as the basis for actual enforcement rather than for mere moral persuasion has been advanced by this writer in "Modern-Day *Agunot*: A Proposed Remedy," *The Jewish Law Annual*, IV (1981), 167-187.

21. The question of enforceability in a civil court is germane only in situations in which there exist grounds in Jewish law for compelling the husband to grant a *get*. According to the vast majority of rabbinic authorities, such an agreement constitutes a *kinyan devarim* and is not binding as a voluntary undertaking. See *Teshuvot Kol Aryeh, Even ha-Ezer*, no. 85 and *Teshuvot Imrei Yosher*, I, no. 6; cf., *Bet Shmu'el, Even ha-Ezer* 134:7. In two reported cases rabbinical courts in Israel have ruled that such an agreement on the part of the husband cannot be enforced. See *Piskei Din shel Batei Ha-Din ha-Rabbaniyim*, VIII, 358-361 (Rabbinical District Court of Tel Aviv-Jaffa 1969; and *Piskei Din shel Batei Ha-Din ha-Rabbaniyim*, VIII, 179 (Rabbinical District Court of Tel Aviv-Jaffa 1980). Regarding enforceability of such an undertaking on the part of the wife see *Piskei Din shel Batei ha-Din ha-Rabbaniyim*, IV, 354 (Supreme Rabbinical Court of Appeals, 1956).

Avitzur does not provide a direct answer to that question. Such agreements have been enforced by lower courts in New York.[22] Indeed, the Appellate Division pointedly stated that such agreements are enforceable, but only when made in a nonliturgical context. The Appellate Division declined to enforce a stipulation incorporated in the *ketubah* only because it was an integral part of a religious covenant.[23]

Nevertheless, a future court might examine the *Avitzur* decision, and conclude that the Court of Appeals was willing to recognize only that agreements to arbitrate involve no judicial entanglement in matters of religion but that the court would concede the cogency of the dissenting view as applied to an explicit agreement to execute a *get*. Such a view would even be consistent with enforcement of an order of the Beth Din to execute a *get* pursuant to proceedings undertaking on the basis of an arbitration agreement, confirmation of an order of arbitrators to perform a religious act might well be regarded as removed from adjudication

22. Waxstein v. Waxstein, 90 Misc. 2d 784, 395 N.Y.S.2d 877 (Sup. Ct. 1976), *aff'd*, 57 A.D.2d 863, 394 N.Y.S.2d 253 (2d Dep't 1977). See also Koeppel v. Koeppel, 138 N.Y.S.2d 366 (Supp. Ct. Queens Cty. 1954), *aff'd*, A.D.2d 853, 161 N.Y.S.2d 694 (2d Dep't 1951) and Margulies v. Margulies 42 A.D.2d 517, 344 N.Y.S.2d 482 (1st Dep't 1973).

23. It should further be noted that Jewish divorce is in no way a matter of religion in the sense that that concept is understood in constitutional law. The procedure involves no profession of faith, requires no act of worship and does not invoke the Deity. It may be performed even by an atheist. Divorce in Jewish law is simply a formal mode of cancelling an obligation incumbent upon the parties by virtue of their marriage. Thus the Talmud, *Kiddushin* 41b, describes the *get* as "secular" (*chol*) in nature. The non-religious nature of Jewish divorce has been explicitly recognized in a number of lower court decisions. For a fuller discussion of this question and its implications see this writer's, "Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement," *Connecticut Law Review* vol. XVI, no. 2 (March, 1984).

Similarly, the marriage contract itself is in no way a religious document. It merely recites the obligations assumed by the groom for the support and maintenance of the bride and the financial provisions made for the wife upon dissolution of the marriage by death or divorce. Jewish law requires the document both for the protection of the bride and as a means of preventing precipitous divorce. The instrument itself is no more religious in content—or romantic in tone—than an insurance policy.

of matter to a degree sufficient to prevent infringement upon the Establishment Clause of the First Amendment, but direct involvement by the court in substantive matters pertaining to the *get* might well be construed as forbidden "entanglement" in a matter of religious practice. Therefore, prudence would dictate that any agreement drafted for use in the future omit reference to the *get* itself but provide simply that, upon dissolution of the marriage by a civil court, the parties bind themselves to the jurisdiction of a Beth Din for adjudication of any remaining disputes with regard to execution of a *get*. The agreement should name a specific Beth Din or, at the minimum, establish a mechanisim for convening a Beth Din since a New York court has previously held that the courts may not convene a Beth Din on behalf of the parties.[24] The drafting of such an agreement as a separate instrument, independent of the *ketubah*, would also obviate the objection expressed in the dissenting opinion in *Avitzur* to the effect that the *ketubah* is a religious document, not a civil contract.

An agreement designed to achieve these objectives might read as follows:

MEMORANDUM OF AGREEMENT made this _____ day of _____ 57____, corresponding to the _____ day of _______ 19 ____, in the City of ________ State of ________ between ________, who resides at ____________, City of _____ State of ________ ________, and ________, who resides at ____________, City of State of ________________.

WHEREAS the aforementioned parties are presently to be united in matrimony as husband and wife; and

WHEREAS the parties desire that, should their marriage be dissolved by a civil court, there be no unjustified impediment to remarriage due to considerations of Jewish law:

24. See Pal v. Pal, 45 A.D.2d at 739, 356 N.Y.S.2d at 673 and Waxstein v. Waxstein, *supra*, note 20.

THEREFORE, IT IS HEREBY AGREED by and between them that, should their marriage be annulled or dissolved by a civil court by means of an annulment or by means of a decree of divorce and should there arise a dispute of difference between the parties with regard to execution of a Jewish divorce known as a *get*, they will submit such dispute to a Beth Din for a binding decision in accordance with Jewish law. The parties hereby agree to refer all disputes and differences with regard to a *get* to award, order and final binding determination (of the Beth Din of the Central Congress of Orthodox Rabbis) (or: of the Beth Din of the Rabbinical Alliance of America) (or: of the Beth Din of the Rabbinical Council of America) (or: of the Beth Din of the Union of Orthodox Rabbis of the United States and Canada) (or: of a Beth Din composed of three qualified Rabbis, one Rabbi to be chosen by each of the parties and the third Rabbi to be chosen jointly by the two Rabbis named by the parties). Each of the parties agrees to appear in person before the Beth Din upon the request of the other party. The award or decision of the Rabbis or a majority of them shall be enforceable in any court of competent jurisdiction pursuant to the New York Law of Arbitration — CPLR ARTICLE 75.

The members of the Beth Din shall not be required to take an oath, nor to administer an oath to any witnesses at the hearing, nor to follow any particular rules or procedures except those generally followed at appearances before a Beth Din. The decision shall be rendered at the conclusion of the hearings or within thirty (30) days thereafter and a copy of the decision shall be delivered or mailed to each party. The decision shall be signed by the members of the Beth Din and, upon request of the prevailing party, they shall acknowledge their signature before a notary public so that it may be enforced in a court of competent jurisdiction.

IN WITNESS WHEREOF, Bride and Bridegroom have entered into this Agreement in the City of ________________ State of __________________, U.S.A.

Witness:
Name: ____________________ Bride: ____________________
Address: ____________________
Signature: ____________________

Witness:
Name: ____________________ Groom: ____________________
Address: ____________________
Signature: ____________________

ACKNOWLEDGEMENT[25]

STATE OF ______________ COUNTY OF ______________
On the day of ____________________ 19____ before me personally came ____________________
who resides at ____________________
to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

____
NOTARY PUBLIC

25. Acknowledgement before a notary public is necessary only when required by statute. An antenuptual agreement of this nature is not among the instruments requiring acknowledgement under New York statutes. See 1 N.Y. Jur.2d 202-204. However, in light of a 1980 amendment of the New York Domestic Relations Law requiring acknowledging of certain other antinuptial agreements it would be purdent to notarize an agreement of this nature as well. See New York Domestic Relations Law § 2,3,6, part B (3) (Consol.) In jurisdictions in which acknowledgement is required by statute, there is disagreement among the courts as to the effect, on its validity or enforceability, of noncompliance with these requirements. See 16 A.L.R.3d 372-378.

STATE OF ______________ COUNTY OF ______________
On the day of ____________________ 19____ before me personally came ____________________
who resides at ____________________
to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that she executed the same.

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NOTARY PUBLIC