

A PROPOSED TRIPARTITE  
AGREEMENT TO SOLVE SOME OF  
THE *AGUNAH* PROBLEMS:  
A SOLUTION WITHOUT  
ANY INNOVATION

by

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A. Introduction

Innovation in *halakhah* comes from great minds who adduce analytically brilliant Talmudic proofs for halakhic propositions that until voiced by such scholars were thought to be incorrect, but after they survey the field, the halakhic concepts become clear and obvious. I wish I were such a person, and hope my children will be.

But I am not, and therefore much of my time in *halakhah* is spent reading and summarizing other people's work. At times when I am particularly insightful, I am able to shed some new light on a halakhic topic by creatively stitching together others' work – and thus creating a new solution, without any innovation. More often than not, my role as a writer and as a *dayan* requires that I recount and apply what others have said. However, I hope this article is an instance when I am able to create a whole more acceptable than the sum of its parts.

Two years ago, while writing a vigorous critique of a book that proposed a halakhically unacceptable solution to the *agunah* problem, I drafted a three-pronged prenuptial agreement to address the need for a solution that works independent of the husband's will upon separation. I wrote:

Yet some...are seeking a solution that works independent of the will of the husband upon separation. The search for such solutions has been widely written about,<sup>1</sup> and I would like to use this review essay as an opportunity to present what such a proposal

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<sup>1</sup> For an excellent survey, see Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Santa Barbara, California: Greenwood Press, 1993).

would have to look like in order to have a chance to be accepted. First, it would have to rely on opinions found in mainstream, classical halakhic sources that are inherently valid. One cannot build a system of Jewish divorce law based on opinions of writers and scholars no one has heard of. In addition, such a proposal would require acknowledgement on the part of significant halakhic authorities that even if it is not ideal (*lekhatehilah*), it is a halakhically satisfactory after-the-fact (*bedi'avad*) response to a situation.

There are many valid reasons why such a proposal has never been forthcoming and endorsed by significant segments of the rabbinic community, and I have elsewhere explained them.<sup>2</sup> Were such a proposal to be crafted and accepted by mainstream halakhic authorities, it would likely be formulated, I think, to combine three different mechanisms into a single document, and in a way that if any of them were halakhically valid, then the resulting *get* would be valid. The three elements would be conditions applied to the marriage (*tenai bekiddushin*), authorization (*harsha'ah*) to give a *get*, and broad communal ordinance to void a marriage (*taqqanat haqahal*). Each of these avenues has significant halakhic support of both classical and modern *posqim*; consequently, a real case could be made that a single document that successfully incorporates all three elements would survive any *bedi'avad* halakhic criticism, and the *get* issued as a result of such a document would be valid according to most authorities. Indeed, in the twentieth century alone, one can cite a list of luminary rabbinic authorities who have validated such agreements in one form or another, including Rabbi Yosef Eliyahu Henkin, Rabbi Isaac Herzog, Rabbi Jechiel Jacob Weinberg, and Rabbi Ovadia Yosef, as well as many others. And no less an authority than Rama approved of conditional marriages (although maybe only in *yibbum* situations).

Even with this broad conceptual foundation, I would never actually use such a document unless and until a significant number of reputable *posqim* determine that (at least) this document is effective *bedi'avad* and that it would be respected as valid *bedi'avad* even by *posqim* who do not advocate its use. Maybe it would be halakhically better to rely on the array of leniencies advanced by various eminent *posqim* in support of such documents with our understanding that *sha'at hadehaq kemo bedi'avad* (“a time of urgency is to be treated as if it is after-the-fact”), rather than maintaining the none-too-pleasant or successful status quo, which also leads to *mamzerut*. That calculus would require the approval of the foremost halakhic authorities of our times.<sup>3</sup>

A full text of the proposed agreement was appended to that article, with the words *shelo lahalakhah* noted in the title. The agreement incorporates elements from three possible ways a marriage might dissolve: (1) If a man and a woman

<sup>2</sup> See Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (Hoboken, NJ: Ktav, 2001).

<sup>3</sup> Michael J. Broyde, “Review Essay: An Unsuccessful Defense of the Bet Din of Rabbi Emanuel Rackman: *The Tears of the Oppressed*”, *Edah Journal* 4(2), 1–28 (footnotes deleted). 2004 [http://www.edah.org/backend/JournalArticle/4\\_2\\_Broyde.pdf](http://www.edah.org/backend/JournalArticle/4_2_Broyde.pdf).

agree to marry on the condition that one or more conditions will be met. (2) By presenting the wife with a *get*. In the agreement I proposed, the man pre-authorizes that a *get* be given at the wife's request. (3) By annulment which suggests that a halakhic marriage never existed. The revised text includes a reciprocal condition to which the woman agrees and allows for a claim of error in the creation of the marriage if the provisions are void as a matter of *halakhah*.

I indicated then that I did not favor the actual use of this agreement. Nonetheless, some rabbis have endorsed this agreement,<sup>4</sup> articles have appeared about it,<sup>5</sup> couples are using a form of it, and the Internet is brimming with discussion about it. I write this paper to provide insight into the theory and technique of a tripartite agreement and to outline each of the contract's sections' strengths and weaknesses. A revised text reflecting these improvements follows as the Appendix.

### B. A Methodological Insight

There are many instances in *halakhah* when unrelated minority solutions to a halakhic problem are interwoven to reflect a majority of *poskim* who then agree on the result, regardless of the fact that each of the *poskim* does not agree on each of component solutions. Such is the case here. This technique, often called a *sefek sefeka lehakel* (a double doubt, allowing one to rule leniently),<sup>6</sup> is not novel and is firmly founded in classical Jewish law. Rather than putting forth a grand halakhic innovation or staking the position of an isolated minority, the tripartite prenuptial agreement applies this technique and collects five approaches to *agunah* issues proposed by the *poskim* and stitches them together.

In assessing solutions to the *agunah* problem, two virtues arise from using the combinational method. The first is that it makes a consensus possible despite many differing, but not contradictory opinions. When reviewing each of the five approaches on their own, one finds that a considerable number of contemporary halakhic authorities support one approach or another and a majority of *poskim* oppose it. But theoretically, one written agreement could represent each approach such that authorities could clearly see that the solution they support is present, and then a great many *poskim* should validate the resulting agreement.

<sup>4</sup> See Ben Harris, "Feminists urged to push agunot issue", *Jewish News of Greater Phoenix*, February 16, 2007 (available online at [http://www.jewishaz.com/issues/story\\_mv?070216+agunot](http://www.jewishaz.com/issues/story_mv?070216+agunot)).

<sup>5</sup> Rivka Lubitstsch, "Lehoshia et haagunot", *Ma'ariv*, June 29, 2006 (available online at <http://www.nrg.co.il/online/11/ART1/442/396.html>).

<sup>6</sup> See Shach, *Yoreh De'ah* 242, at the end. For a brief theoretical overview of the compilation of minority opinions in the context of a discussion of "normative" views and legal doubt, see Michael Broyde, "Letter to the Editor: Halakhic Pluralism," *Tradition* 27 (1993), 108–110.

Even more interesting is the synergistic effect that this technique has in this particular application. While synergy of the components is not a criterion of this technique, it can be a welcomed byproduct. This is a case when the individual solutions, which are arguably inherently weak, are themselves strengthened and their validity is reinforced after being combined with other solutions. For example, a drawback to *hafka'at kiddushin* (annulment) to remedy this problem is that a significant school of thought among *rishonim* and *aḥaronim*<sup>7</sup> maintain that after marital intimacy, a *beit din* is unable to invoke an annulment unless a *get* (a written bill of divorce) is also given. Even if that bill of divorce is invalid as either a matter of *Torah* law or rabbinic decree, it is still considered to be a necessary precursor to a rabbinic annulment. As the Shittah Mekubbetzet incisively notes:

One should ask why a woman ought to be an *agunah* if her husband drowns in boundless waters – shouldn't the rabbis simply annul her marriage? The answer is that the rabbis cannot annul marriages unless the man gave his wife a *get* [of some sort, even an invalid one].<sup>8</sup>

These authorities argue that *hafka'at kiddushin* is intended to act as a safeguard only in cases when the *get* given is defective or where the marriage is not consummated.<sup>9</sup> The *get* should be such that the woman, left with her own judgment, could presume that the *get* effectively allows her to remarry.

Advocates for annulment will claim that restricting its use to these two specific cases is merely a minority view which need not be followed. Still, no matter how one counts minority or majority opinions, it is clear that normative *halakhah* has always placed strict boundaries on using *hafka'ah* as a sole means to end a marriage, and this is why even their proponents have not implemented its practical use. But by stitching together a *hafka'ah* approach effectuated by a communal decree with a requirement that the man pre-authorize the writing and delivering of a *get*, not only is a second basis for dissolution inserted, but the annulment becomes more acceptable because a *get*, even if considered problematic by some, is given regardless. Once a *get* is given, annulment becomes a real halakhic possibility. The reverse is true as well: Once annulment is valid as a matter of *Torah* law (since it follows the giving of a *get*), a claim could be made that even a debatably unfit *get* (*get pasul*) is sufficient to end a marriage which is no longer valid by *Torah* law.

<sup>7</sup> See Rashi, Gitt. 33a; Rashi, Ket. 3a; *Encyclopedia Talmudit*, s.v. *afke'inhu rabbanan lekiddushin mineih*; Rabbi Jeremy Wieder, "Hafka'at kiddushin; a rebuttal," *Tradition* 36 (2002), 37-43; "Rejoinder," *ibid.* 37 (2003), 61-78.

<sup>8</sup> *Shittah Mekubbetzet*, Ket. 3a.

<sup>9</sup> Tzvi Gartner, *Kefiyah BeGet* (Jerusalem: Otzar HaPoskim, 1998), 115.

This synergy is itself significant and extends the analytic strength of both views beyond a mere mathematical combination of the two.

### C. Conditional Marriage

The first section of the revised agreement found in Appendix A, formulates a marriage existent upon certain conditions being met and thus creates a conditional marriage as permitted by Rema, *Even Ha'Ezer* 157:3. Conditional marriages have been used in many situations.<sup>10</sup> Although the general validity of conditional marriages to address issues of *yibbum* is a dispute between Rema and Meḥaber, many great halakhic authorities have accepted the Rema's view that one may in fact craft a conditional marriage arrangement to address issues of *yibbum*. That list includes Noda BiYehudah, Ḥatam Sofer, Terumat HaDeshen, Baḥ, Rabbi Akiva Eiger, Beit Meir, and Arukh HaShulḥan.<sup>11</sup> Even Pitḥei Teshuvah,<sup>12</sup> who normally only catalogues and summarizes views, endorses Rema's view on this matter. Furthermore, the exact formulation found in this document (but not in the original version, which should certainly no longer be used) addresses the problem of voiding this condition in the presence of marital intimacy, thus allowing one to add Beit Shmuel to the list of supporters.<sup>13</sup>

Nonetheless, conditional marriage, by itself, is still not deemed sufficient as a matter of Jewish law to allow a woman to leave her marriage when her husband is alive. This is in part because a significant strain of rabbinic thought argues that *ein tenai benisu'in*, i.e., there is no conditional marriage after the couple lives together and thus no condition exists that can be violated. Many *poskim* adopt this view as correct in cases other than *yibbum* (where the husband is dead).<sup>14</sup> If a couple is living together and thus is presumed to be intimate, this rabbinic view reasons that any stipulations that existed have either been adequately met or jointly abandoned. This is why, traditionally, couples that intend to marry do not live together until the condition on which the marriage is predicated is complete.

As Rabbi Yitzchok Breitowitz notes:

For a collection of the newspaper articles, correspondence, and *halakhic* responsa detailing [conditional marriage] proposals and the arguments against them, see Y.

<sup>10</sup> See the sources cited in n.11.

<sup>11</sup> See *Noda BeYehudah*, EH 1:56; *Chatam Sofer*, EH 111; *Terumat HaDeshen* 223; *Baḥ*, EH 157; *Teshuvot Rabbi Akiva Eiger* 93; *Beit Meir*, Responsa (*Tzela'ot HaBayit*), 6; and *Arokh haShulḥan*, EH 157:15.

<sup>12</sup> EH 157:8.

<sup>13</sup> EH 157:6.

<sup>14</sup> See Y. Lubetsky, *Ein Tenai BeNisu'in* (Vilna, 1930); *Melamed LeHo'il* 3:22; *Tzitz Eliezer* 1:27.

Lubetsky, EIN T'NAI B'NISUIN (“There Are No Conditional Marriages”) published in Vilna (Vilnius) in 1930. Without numerating all of the authorities in opposition, suffice it to say that they constituted the most illustrious, erudite, and respected spiritual and *halakhic* leaders of the 19th and early 20th Centuries: Rabbis Chaim Ozer Grodzensky of Vilna, David Friedman of Karlin, David Hoffman of Berlin, Salmon Beruer of Frankfurt, Chaim Soloveitchik of Brest-Litovsk, Meir Cohen of Dvinsk, Yechiel Epstein, and many others.<sup>15</sup>

The appended agreement mitigates this concern with two additional clauses. The first is a *hoda'at haba'al* (declaration by the husband) that he will never revoke his consent to the condition outlined in the appended agreement and he grants his wife the ability to state this. The second clause notes that should this agreement be deemed completely void and not halakhically binding, the parties did not intend to marry. Of course, as a matter of normative *halakhah*, we would not allow a woman to leave a conditional marriage after intimacy (prior to the death of her husband) even if the condition is not fulfilled, unless a *get* is given. As the *Encyclopedia Talmudit* states:

The *halakhah* is that a man who betroths on condition and marries without condition or has a sexual relationship without condition needs a *get* as a matter of doubt.<sup>16</sup>

However, the addition of an annulment provision to this document increases the likelihood that the condition is, in fact, valid. The rationale is simple. The primary critique of the acceptability of a conditional marriage is that an Orthodox man wishes that his sexual activity be marital, rather than extra-marital. However, the annulment provision is evidence of the husband's explicit wish to the contrary of the presumption *ein adam oseh be'ilato be'ilat zenut* (a man generally prefers licit rather than illicit sexual relationships). Yet if the husband were to maintain a desire to minimize *be'ilat zenut*, it is clear that he would prefer the termination of a valid conditional marriage to its dissolution by annulment. What's more is that he would rather have the pre-authorized *get* be given because that completely eliminates the problem of non-marital relations.<sup>17</sup>

#### D. Advance Authorization to Give a Get

The second section of this agreement incorporates the proposal of Rabbis Henkin and Herzog, that the marriage be preceded by the man's authorization that

<sup>15</sup> Irving Breitowitz (*supra* n. 1), 60 n. 169.

<sup>16</sup> *Encyclopedia Talmudit*, s.v. *Ein adam oseh be'ilato be'ilat zenut*, 1:553 at 556.

<sup>17</sup> See Rabbi Yehiel Ya'akov Weinberg in *Seridei Eish* 1:90, 1:168 and Rabbi Weinberg's introduction to Eliezer Berkowitz, *Tenai beNisu'in veGet*.

a get may be written and delivered in the future even if a sexual relationship exists.<sup>18</sup>

It is clear that this proposal has its difficulties. The possibility that the husband may revoke his authorization always looms in the background.<sup>19</sup> So too, Rambam's formulation that an authorization to write a *get* is automatically repealed upon intimacy between the parties is a significant concern.<sup>20</sup> However, Rambam's objection can be addressed by proposing that the husband explicitly waive his right to engage in such conduct, as Rabbi Herzog suggests (although this position is not fully persuasive, as a happily married couple does not really contemplate divorce). So too, Rambam's formulation is not explicitly accepted by Shulḥan Arukh, and many *poskim* rule such a *get* to be valid *de facto* or only invalid by rabbinic decree (*miderabbanan*).<sup>21</sup> Certainly, the *get* that is written in this case fulfills the obligation that a *get* be given before annulment can be considered, and is sufficient to eliminate any *mamzerut* issue for children of a subsequent relationship. Furthermore, any man who signs this pre-authorization agreement and then attempts to revoke his agency not in front of his wife will fortify the case for annulment (the *get* will ultimately be given nonetheless).<sup>22</sup>

More significantly, we assume the Orthodox man genuinely desires that the divorce given in this case be valid. Without a valid *get*, the marriage will become void due to the violation of the condition or the annulment, both of which raise significant concerns of *ein adam oseh be'ilato be'ilat zenut*. It is only with a divorce that his relations are still marital as *halakhah* wishes. If he were to invalidate the *get*, the marriage would still end, but in a way that creates *be'ilat zenut*.<sup>23</sup>

Finally, if the husband revokes his agency to pre-authorize a *get*, then the wife is provided with a basis to claim erroneous and hence invalid betrothal (*kiddushei ta'ut*), if this was his intention at the time of marriage.

<sup>18</sup> Rabbi Yosef Eliyahu Henkin, *Perushai Ivra*, 110-117. The section on sexuality prior to divorce not voiding the authorization can be found in Rabbi Yitzḥak Isaac Herzog, *Hechal Yitzḥak*, 2:41. See also Rabbi Yitzchak Katzenellenbogen, *Zera Yitzḥak* 16:8.

<sup>19</sup> See Git. 32a.

<sup>20</sup> Rambam, *Hilkhot Gerushin* 8:1 and 9:25.

<sup>21</sup> *Shulḥan Arukh*, EH 148:1–2. See also Breitowitz (*supra* n. 1), nn. 86 and 188.

<sup>22</sup> This is exactly the case where the Gemara (Gitt. 33a and Yev. 90b) explicitly permits *hafka'ah*.

<sup>23</sup> But see *Iggerot Moshe* EH 1:147.

E. *Communal Decree to Annul Marriages*

The next approach is based on the views of Rashba and Maharam Alshakar that a public *takkanah* limiting marriage in specific ways is valid.<sup>24</sup> This document stipulates a communal decree that all marriages must end with a *get* given within fifteen months of the woman's request, and if not, they are subject to annulment as well as the writing of a *get*. The agreement seeks to identify the couple within the communal locus of those who adhere to this *takkanah* and by their explicit self-identification with such a *takkanah* to validate it for their marriage.

Furthermore, the woman's recitation makes it clear that the *takkanat hakahal's* validity was a predicate to this marriage, such that one who thinks the whole document is void could conclude that no marriage took place.

Of course, one could critique this by noting that such a community does not exist geographically, and by noting that Rashba seems to require a wide-ranging majority and not merely a local one. More significantly, Rema rules that:

A community that decrees with the consent of all its citizens that anyone who marries without ten present or other such examples and one violated this rule and married, one must worry that they are married and she needs a *get*, even though the community explicitly noted that the marriage should be void and voided the transaction.<sup>25</sup> Even so, one must be strict as a matter of practice.<sup>26</sup>

Indeed, while there has been much written in favor of using annulment to solve the *agunah* problem, the fact remains that most *rishonim* and nearly all *aḥaronim* believe that, as a matter of normative *halakhah*, annulment alone does not work to actually permit a woman to remarry.<sup>27</sup> There is no realistic chance that annulment alone will be accepted as the global solution for *agunot*. As Rabbi David Zvi Hoffman noted, "No rabbi who fears heaven agrees that today's rabbis are empowered to annul marriages in the absence of a Sanhedrin."<sup>28</sup> However, it is clear from the language of the Rema quoted above as well as by reviewing many different *rishonim* and *aḥaronim*<sup>29</sup> that this is a matter in genuine dispute and thus

<sup>24</sup> *Teshuvot Rashba* 185, 1163; *Maharam Alshakar* 48.

<sup>25</sup> Through the mechanism of *hefker beit din hefker*.

<sup>26</sup> Rama, EH 28:21.

<sup>27</sup> *Be'ur HaGra*, EH 28:57.

<sup>28</sup> *Melamed LeHo'il* 3:51.

<sup>29</sup> See *Encyclopedia Talmudit* 2:137b, s.v. *Afke'inhu Rabbanan lekiddushin mineih*, at pp. 139-140, which states:

There is a dispute between *geonim* and *rishonim* as to whether the sages of every generation after the completion of the *Talmud* can annul marriages performed against their will. Some say that they can enact public decrees that clearly set out that one who marries in violation of the



we are strict. But as one side in a multi-sided *sefek sefeka*, annulment by communal decree, certainly when a *get* is also given, is a reasonable solution to consider. This is noted explicitly by Rabbi Ovadia Yosef.<sup>30</sup>

In addition, this type of annulment provision seems to be the type that Rabbi Benzion Uziel envisioned to generate an annulment that functions as a conditional marriage, since it makes the marriage conditional on the action of a *beit din*.<sup>31</sup> Rabbi Uziel's point, which Rabbi Shelomoh Yosef Zevin also accepts,<sup>32</sup> is that classical conditional marriages were unaffected by anything other than the parties' fulfillment of the conditions – and that was problematic as a matter of the *halakhah* that *ein adam oseh be'ilato be'ilat zenut*, and the parties (or the husband) were presumed to have waived the conditions prior to intimacy. But once the husband delegated the validity of the marriage to a *beit din*, the possibility of rabbinical annulment became a form of conditional marriage, as the husband clearly understands that he is waiving his right to have his sexuality not classified as *be'ilat zenut*.

Within Jewish Law it is normative and widely accepted to use an annulment after a *get*, even if of debatable validity, has been delivered.<sup>33</sup> Of course, this communal decree reinforces the man's desire that a *get* be given, so as to avoid the issue of *be'ilat zenut*.

#### F. Intent to Marry with This Agreement Binding

In the last section of the revised agreement, the recital by the man is predicated on the possibility that this couple would rather not marry than marry without this document being in force. Should no part of this agreement have any validity, the man notes that he has expressed an interest in not being married and that he is not concerned with the problem of his relationship attaining the status of *be'ilat zenut*. Of course, this result will never be reached, as the rest of the agreement validly creates a marriage and allows for a typical wedding ceremony. (However, I think it is proper for the husband to change the marriage formula to *הרי את מקודשת לי בטבעת*. Nevertheless, even if this is not done,

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decree, the marriage is void. . . . Others argue and rule that unless there is an explicit [talmudic] decree to annul the transaction and void the marriage . . . the marriage is not void.

<sup>30</sup> See Rabbi Ovadia Yosef, "Kol hamekaddesh Ada'ata deRabbanan Mekaddesh," *Sinai* 48 (1961), 186–193.

<sup>31</sup> *Mishpetei Uziel* EH 44.

<sup>32</sup> See Rabbi Shlomo Yosef Zevin, *LeOr HaHalakhah* (Jerusalem: Beth Hillel, 1956), 77.

<sup>33</sup> See, e.g., Rabbi Tzvi Gartner, *Kefiyah BeGet*, p. 115, who notes this rationale to explain why a coerced *get* is sometimes valid.

the conditions still attach, as the written document is conclusive evidence of both the intent and actions of the parties.)<sup>34</sup>

### G. Conditional Acceptance

The woman's response adds layers of validity to this agreement as well. First and foremost, she does not merely accept his conditional marriage, but imposes a condition of her own. Although not explicitly noted by many *poskim*, a condition imposed by a woman on her own marriage is not logically limited by *Ein adam oseh be'ilato be'ilat zenut* (the presumption that a man generally prefers licit rather than illicit sexual relationships), as she need not concern herself as a matter of *halakhah* with the resultant, retroactive "extramarital" status of his relations if he fails to divorce her properly.<sup>35</sup> Thus her recitation of the condition is extremely powerful. (The woman should verbalize this at the time of *kiddushin* as well by responding to the husband in a low voice, הרי אני מקבלת טבעת זו כדת משה וישראל על פי – although if she does not, the written document is still valid.)

For reasons that I am hard-pressed to explain, there is very little halakhic literature on marital conditions imposed by the woman and not the man, although all agree that such conditions may be imposed and are valid.<sup>36</sup> (To the extent that this paper contains an innovation, it is this one, but it is not my own, having been suggested to me by an eminent Torah scholar who works for the Chief Rabbinate of Israel and wishes to remain anonymous.)

Finally, her declaration of the fact that she would not have accepted this marriage proposal absent this document gives rise to the distinct possibility that if the document really is invalid, she would not have married, and her marriage is then predicated on error, a classic case of *kiddushei ta'ut*.

### H. Conclusion

Let me conclude with a summary of my view. This tripartite document sews together three basic approaches (which produce five specific mechanisms) found in the *poskim* to address cases when a husband refuses to authorize a *get* at his wife's

<sup>34</sup> See the second part of *Pithei Teshuvah* EH 157:9.

<sup>35</sup> This is a gross simplification of a complex issue, but it is correct in this context. See *Pithei Teshuvah* EH 149:2, *Avnei Milu'im* 33, *Shut Shivat Tziyon* 71 and 72, *Mishneh LeMelech*, *Hilchot Gerushin* 10:18, and *Noda BiYehudah* EH 54. As noted by many, in any situation where the waiver of the *be'ilat zenut* issue by the woman would be to her detriment, we do not assume that she waived her claim. See *Noda BiYehudah* 54, s.v. *ela da* and *ubifrat*, and *Encyclopedia Talmudit* (*supra* n. 16), section 7, at 159-160.

<sup>36</sup> EH 38:1 directly notes that conditions by the woman are valid.

request. The first is conditional marriage, the second is authorization at the inception of marriage to give a *get*, and the third is annulment of marriage based on communal decree. Many, many contemporary *poskim* support one of these three approaches.

Even more significantly, these approaches interlock with each other so that the whole is stronger than the sum of its parts. The main problem with *hafka'ah* is that it can be implemented only when some kind of *get* is given as well; here, one is. The main weaknesses with *kitvu utenu* are subsequent relationships and possible revocation at a later date; the text of this document explicitly builds its conditions even following marital intimacy and also limits the revocation problem through *hafka'ah*. And the main objection to *tenai bekiddushin* is *ein adam oseh be'ilato be'ilat zenut* (which is not a problem, we assume, after death, hence the Rema's lenient position in the *halitzah* context); but one can argue that if *hafka'ah* could work in this context, the *sevara* of *ein adam* can then be employed to presume that there is no real cancellation of the *kitvu utenu*, since the husband would prefer the implementation of the conditional *get* in order to avoid the *hafka'ah* and resultant *be'ilat zenut*. The woman's conditional acceptance makes this even clearer.

Having said all this, I remain a deep supporter of the standard prenuptial agreement drafted by Rabbi Mordechai Willig, endorsed by countless *poskim*, and distributed under the letterhead of the Beth Din of America. The prenuptial agreement I have drafted is much more halakhically complex, and thus far less ideal than the agreement of the Beth Din of America. Nonetheless, the approach of this agreement, I think, is vastly superior to any other self-effectuating agreement that presently exists. Many contemporary halakhic authorities of the last hundred years<sup>37</sup> would have ruled that a woman freed by operation of this agreement is divorced *al pi din*. I am not aware of a single halakhic authority who has discussed this type of composite agreement, or all the separate components therein, and disapproved of each of them.

<sup>37</sup> Rabbi Yosef Eliyahu Henkin, Rabbi Isaac Herzog, Rabbi Yehiel Ya'akov Weinberg, Rabbi Benzion Uziel, Rabbi Shelomoh Yosef Zevin, and Rabbi Ovadia Yosef.

*Appendix: Suggested Tripartite Document*

This document is to certify that on the [ordinal number] day of the month of [name of month], in the year [calendar year], in [location], [name of groom], the groom, and [name of bride], the bride, of their own free will and accord entered into the following agreement with respect to their intended marriage.

The groom made the following declaration to the bride under the *huppah* (wedding canopy):

“I will betroth and marry you according to the laws of Moses and the people of Israel, subject to the following conditions:<sup>38</sup>

“If I return to live in our marital home with you present at least once every fifteen months until either you or I die, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) shall remain valid and binding;<sup>39</sup>

“But if I am absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) will have been null and void. Our conduct should be like unmarried people sharing a residence, and the blessings recited a nullity.<sup>40</sup> The ring I gave you should be a gift.<sup>41</sup>

“I recite this condition to our marriage not only during the wedding ceremony, but prior to our intimate relationship and *yihud* (seclusion). I take a public oath that I will never remove this condition from the marriage.<sup>42</sup>

“I acknowledge that I have effected the above obligation by means of a *kinyan* (formal Jewish transaction) before a *beit din hashuv* (esteemed rabbinical court) as mandated by Jewish law. The above condition is made in accordance with the laws of the Torah, as derived from Numbers Chapter 32.<sup>43</sup> Even a sexual relationship between us shall not void this condition.<sup>44</sup> My wife shall be believed like one hundred witnesses to testify that I have never voided this condition.<sup>45</sup>

<sup>38</sup> *Noda BiYehudah* EH 56.

<sup>39</sup> This duration was selected as 15 months, since it is so far longer than the norm for marital absence that its violation would indicate divorce is proper.

<sup>40</sup> *Hatam Sofer* EH 110 and 111.

<sup>41</sup> *Noda BiYehudah* EH 56.

<sup>42</sup> Responsa of Rabbi Akiva Eiger 93.

<sup>43</sup> Rama EH 38:3–4.

<sup>44</sup> *Beit Shmuel* EH 157:6.

<sup>45</sup> *Pithei Teshuvah* EH 157:8; Responsa *Beit Meir* 6.

“Under the *huppah* I recite the formula, ‘*Harei at mekudeshet li betaba‘at zo kedat Moshe veYisrael al pi hatena'im shekatavtnu ve'hatamtu*’ (‘Behold you are betrothed to me with this ring according to the practices of Moses and Israel, subject to the conditions that we have written and signed’).<sup>46</sup>

“Should a Jewish divorce be requested of me for whatever reason, by any Orthodox rabbinical court (*beit din*) selected by my wife, even if at the time of our separation I explicitly reject the particular rabbinical court (*beit din*) she selects, I also appoint anyone who will see my signature on this form or a copy of this form to act as scribe (*sofer*) to acquire pen, ink and feather for me and write a *Get* (a Jewish Document of Divorce), one or more, to divorce with it my wife, and he should write the *Get lishmi*, especially for me, *velishmah*, especially for her, *uleshem gerushin*, and for the purpose of divorce. I herewith command any two witnesses who see my signature on this form or a copy of this form to act as witnesses to the bill of divorce (*Get*) to sign as witnesses on the *Get* that the above-mentioned scribe will write. They should sign *lishmi*, especially for me, *velishmah*, and especially for her, *uleshem gerushin*, and for the purpose of divorce, to divorce with it my above-mentioned wife. I herewith command anyone who sees my signature on this form or a copy of this form to act as my agent to take the *Get*, after it is written and signed, and be my messenger to give it into the hands of my wife whenever he so wishes. His hand should be like my hand, his giving like my giving, his mouth like my mouth, and I give him authority to appoint another messenger in his place, and that messenger another messenger, one messenger after another, even to one hundred messengers, of his own free will, even to appoint someone not in his presence, until the *Get*, the document of divorce, reaches her hands, and as soon as the *Get* reaches her hands from his hands or from his messenger’s hands, or from his messenger’s messenger’s hands, even to one hundred messengers, she shall be divorced by it from me and be allowed to any man. My permission is given to the rabbi in charge to make such changes in the writings of the names as he sees fit. I undertake with all seriousness, even with an oath of the Torah, that I will not nullify the effectiveness of the *Get*, the Jewish Document of Divorce, to divorce my wife or the power of the above-mentioned messenger to deliver it to my wife. And I nullify any kind of a statement that I may have made which could hurt the effectiveness of the *Get* to divorce my wife or the effectiveness of the above-mentioned messenger to deliver it to my wife. Even if my wife and I should continue to reside together after the providing of this authorization to divorce her, and even if we have a sexual relationship after I have authorized the writing, signing and delivery of a *Get*, such a sexual relationship should not be construed as implicitly or explicitly nullifying this authorization to write, sign and deliver a *Get*.<sup>47</sup> My wife shall be believed like one hundred witnesses to testify that I have not nullified my authorization to appoint the

<sup>46</sup> *Noda BiYehudah* EH 56.

<sup>47</sup> Rabbi Yosef Eliyahu Henkin, *Perushei Ivra* 110–117. The section on sexuality prior to divorce not voiding the authorization can be found in Rabbi Yitzhak Isaac Herzog, *Hechal Yitzhak* 2:41.

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scribe to write the *Get* on my behalf, or the witnesses to sign the *Get* on my behalf or any messenger to deliver it to the hand of my wife.<sup>48</sup>

“Furthermore I recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a *Get* within fifteen months of her requesting such a bill of divorce. I recognize that should I decline to give such a *Get* for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a *Get* given within fifteen months. We both belong to a community where the majority of the great rabbis and the *batei din* of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me.<sup>49</sup> The *beit din* selected by my wife shall be irrevocably authorized to annul this marriage when they feel such is proper and the above conditions are met.<sup>50</sup>

“Furthermore, should this agreement be deemed ineffective as a matter of *halakhah* (Jewish law) at any time, we would not have married at all.

“I hereby grant jurisdiction to any Orthodox *beit din* selected by my wife to enforce any and all parts of this document and do not consent to jurisdiction in any *beit din* that my wife does not wish to select. As a matter of Jewish law, I accept (through the Jewish law mechanism of *kim li*) whatever minority opinions determined by the *beit din* selected by my wife are needed to effectuate my statements.<sup>51</sup>

“I announce now that no witness, including any future testimony I might provide, shall be believed to nullify this document or any provision herein.”<sup>52</sup>

Signature of Groom: \_\_\_\_\_

The bride replied to the groom:

“I accept this proposal of marriage subject to the condition that we are both in residence together in our marital home at least once every fifteen months until either you or I die, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) shall remain valid and binding;

<sup>48</sup> The general text of a *kitvu utenu* similar to this one is used by the Beth Din of America, which originated in the *kitvu utenu* form given to this author by Rabbi Nathan (Nota) Greenblatt.

<sup>49</sup> Maharam Alshakar 48.

<sup>50</sup> *Mishpetei Uziel* EH 44–45.

<sup>51</sup> This paragraph is designed to strengthen the validity of the document generally.

<sup>52</sup> See *Seder HaGet* in *Shulhan Arukh*, following EH 118.

“But if either one of us is absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) will have been null and void, and I impose this as a condition of my acceptance of this marriage proposal. Our conduct should be like unmarried people sharing a residence.<sup>53</sup>

“I acknowledge that I have accepted the above obligation by means of a *kinyan* (formal Jewish transaction) before a *beit din hashuv* (esteemed rabbinical court) as mandated by Jewish law. The above condition is accepted in accordance with the laws of the Torah, as derived from Numbers Chapter 32. Even a sexual relationship between us shall not void the acceptance of this condition.<sup>54</sup>

“I further declare that I would not have accepted a marriage proposal from a man if he were ever to revoke his authorization to give me a *get*, or if as a matter of *halakhah* (Jewish law) as determined by an authorized *beit din* the communal *takkanah* (decree) were to be considered invalid.”<sup>55</sup>

Signature of Bride: \_\_\_\_\_

Signature of Groom accepting bride’s conditional acceptance: \_\_\_\_\_<sup>56</sup>

We the undersigned duly constituted *beit din* witnessed the oral statements and signatures of the groom and bride.

Rabbi \_\_\_\_\_

*Kiddushin* Witness<sup>57</sup> 1 \_\_\_\_\_

*Kiddushin* Witness 2 \_\_\_\_\_

*Yihud* Witness<sup>58</sup> 1 \_\_\_\_\_

*Yihud* Witness 2 \_\_\_\_\_

<sup>53</sup> EH 38:1, Hatam Sofer EH 110–111.

<sup>54</sup> Rav Herzog, *supra* n. 18.

<sup>55</sup> Maharam Alshakar 48.

<sup>56</sup> Reciprocal conditions need mutual acceptance.

<sup>57</sup> Since the document makes mention of *kiddushin*. These witnesses should sign after *kiddushin*, but must be present at the reading and signing of this document; otherwise, two other witnesses must sign then.

<sup>58</sup> Since the document makes mention of *yihud*, these witnesses should sign after *yihud*.