

**The Prenuptial Agreement of Mutual Respect, *Get*
and English Law**

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I. Introduction

The Jewish person in today's post modern world lives simultaneously, to one degree or another, in two worlds—that of democratic Western values and thought while still steeped in, or at least influenced by, the two thousand year old Jewish tradition. These two distinct weltanschauungs can manifest themselves in the same individual or social group in accommodative parallelism or at times as a dichotomy.

The Orthodox Jew, more than others, is aware of this ongoing duality. It is brought into sharp relief at life-cycle events for the lay person who is an observant Jew. However, for the society of Orthodoxy as a whole, and for given individuals as well, the potential conflict between our thousands-year-old tradition and law and our personal sensibilities erupts full force in the case of Jewish divorce.

An illustration of this point is the fact that if any Rabbinical Court today—anywhere in the world—were to rule for coercion of a *get* against a recalcitrant husband they could not use physical coercion under any circumstances—for fear of being charged with assault and battery. Although the halakha may allow the rabbis to beat or whip a disobedient person, human rights, societal norms and most importantly civil law do not allow them to do anything of the sort in their court or out of it. The civil law ties the hands of the Jewish law-makers.

During the last century, the rabbinical establishment in the diaspora¹ has been aware of the severity of the problem of the “modern day agunah”—the victim of *get*-refusal.² In the United States the use of a prenuptial agreement for the prevention of *get*-refusal³ is not only accepted, but is recommended by the rabbinical establishment.⁴ In December 1999, eleven *roshei yeshiva* of Yeshiva University's Rabbi Isaac Elchanan Theological Seminary (RIETS) issued an open call, a “*kol koreh*”, which elucidated the agunah problem and called on rabbis to erase this blight

¹ There is a misconception that since the Israeli Rabbinical Courts have power to levy sanctions against recalcitrant husbands that there is no problem in Israel. Quite the contrary: cases drag on for years, there is a policy of pacification of the husband on the part of the judges in the rabbinical court and dayanim are reluctant to use their powers for fear of causing a *get meuseh*-a coerced *get* which is invalid. Israeli Chief Rabbis themselves have cried out portraying the problem as severe--see Rav Eliyahu Bakshi Doron, “*Kakh Nitán Lifter Et Be'ayat Mesuravot ha-Get*,” *Meimad* (Av-Elul 5755): 8-9 (introduction); Rav Shear-Yeshuv Cohen, “Coercion of a Get in Our Times”, *Techumin* 11, pp. 195-202.

² For an historical overview of the development in the diaspora of prenuptial agreements for the prevention of *get*-refusal see Rachel Levmore, “Get Refusal in the United States and One Method of Prevention: Prenuptial Agreements”, *Women in Judaism* [ed. Tova Cohen], Bar Ilan University, Ramat Gan 2001.

³ The agreement which is in most widespread use in the US is that which is recommended by the Rabbinical Council of America and its affiliated Rabbinical Court—the Beth Din of America. The Binding Arbitration Agreement can be found on the Beth Din's website at http://www.bethdin.org/PNA_web_with_instructions.pdf and on the website of the Orthodox Caucus at http://www.ocweb.org/index.php/pre_nuptial/.

⁴ There have been various decisions made by rabbinic organizations to implement the signing of prenuptial agreements, such as several resolutions of the Rabbinical Council of America. See the latest resolution at <http://www.rabbis.org/news/article.cfm?id=100772>.

on the Jewish community by means of signing marrying couples on a halakhic prenuptial agreement:⁵

A Message to Our Rabbinic Colleagues and Students

The past decades have seen a significance increase in the number of divorces in the Orthodox Jewish Community. In the majority of these situations, the couples act in accordance with Jewish law and provide for the proper delivery and receipt of a Get. Each year, however, there is an accumulation of additional instances in which this is not the case.

We are painfully aware of the problems faced by individuals in our communities tied to undesired marriages. Many of these problems could have been avoided had the couple signed a halakhically and legally valid prenuptial agreement at the time of their marriage. We therefore strongly urge all officiating rabbis to counsel and encourage marrying couples to sign such an agreement.

The increase utilization of prenuptial agreements is a critical step in purging our community of the stressful problem of the modern-day Agunah and enabling men and women to remarry without restriction. By encouraging proper halakhic behavior in the sanctification and the dissolution of marriage, we will illustrate דרכיה דרכי נעם וכל נתיבותיה שלום, *all the Torah's paths are peaceful*.

(Signed by: Rabbi Norman Lamm, Rabbi Zevulun Charlap, Rabbi Herschel Schachter, Rabbi Moshe Dovid Tendler, Rabbi Mordechai Willig, Rabbi Yosef Blau, Rabbi Michael Rosensweig, Rabbi Yaakov Neuburger, Rabbi Yonason Sacks, Rabbi Meir Goldwicht, Rabbi Jeremy Weider – Roshei Yeshiva of the Isaac Elchanan Theological Seminary, an affiliate of Yeshiva University, December 1999; Tevet 5760)

This paper is an attempt to reconcile the two separate legal systems which exist in tandem for a given individual—the Orthodox Jew in the Diaspora—via a framework which incorporates the rules of both. The suggestions made are specifically for England, primarily in the form of a prenuptial agreement which can help eradicate the agunah problem in the future for English Jewry.

II. Halakha vs. Civil Law in the Diaspora

The decisors of Jewish law throughout the ages were the rabbis. They had, and still have, the authority within the Jewish community to adjudicate, respond to specific halakhic questions and to develop the halakha in response to change. From the rabbinic point of view, if one goes back far enough in Jewish history, the source of the rabbi's authority is found "on-high". Each successive rabbi is a link of this chain. However, the fact that the rabbi is an authoritative figure does not mean that he has

⁵ See

http://www.ocweb.org/index.php/pre_nuptial/article/prenuptual_agreement_graphic/http://www.ocweb.org/index.php/pre_nuptial/article/prenuptual_agreement_graphic/. Published in *The Jewish Press* on Feb. 25th, 2000, p. 28; "Chained Women Could Have Used Prenuptial Pacts", *Forward*, Feb. 25th, 2000.

the power to enforce his rulings. In the diaspora the power which lies in the rabbi's hands is the power of religious persuasion, leadership of followers or perhaps social pressure within a defined social group. From the point of view of a congregant or litigant in the Rabbinical Court, neither the rabbi himself nor his court have any legal standing. The weakening of communal cohesion and the increase of an individual's mobility, geographically and socially,⁶ have contributed to the lack of enforceability of a Beth Din's rulings.

On the other hand, every citizen of a state is under the jurisdiction of the judicial system of that state. The state not only has authority to rule regarding the individual within its borders, it also has the power to enforce those rulings. In many areas the approach of the halakha and that of civil law will be similar, so as not to cause any discord within the individual or the society which attempts to adhere to both systems of law simultaneously. In some areas the two systems can live in harmony. However, in regards to divorce proceedings there exist two major inherent differences between the halakha and civil law.

The first difference lies in the necessity to bring forth proof of fault before the court. In democratic countries, as a rule, there is a no-fault option when suing unilaterally for divorce, amongst other grounds. The no-fault divorce proceedings essentially means that the spouse who wants a divorce is not required to prove, or even mention, the other's negative traits or acts. However, when suing for a divorce in a rabbinical court, and the spouse opposes a divorce, the suing party must convince the rabbinical judges that a divorce is necessary in this case by presenting fault in that spouse. Moreover, the faults which are considered acceptable as grounds for divorce must come from a limited list of legitimate grounds in accordance with the halakha. The fault of the spouse being sued must be proven to the rabbinical judges so that a ruling will be issued, in various degrees of severity, that the spouse must go ahead with the administration of a *get*.

The second inherent difference between the two systems lies in the power or lack thereof, of the judge in his respective legal system to change the individuals' personal status. While a civil Family Court judge has the authority to rule that the parties in question must divorce, he also has the power to issue a decreed which transforms both individuals' personal status from married to divorced, or "remarriageable". The judge may do so even against one of the spouse's wishes. However, while a rabbinical court judge has the authority to rule that the parties in question must divorce, he does not have the power to change the individuals' personal status through the vehicle of divorce. That power lies solely in the hands of the two parties themselves. In order for a *get* to be valid, Torah law (*d'oraita*) dictates that the husband must place the *get* in the wife's hand out of his own free will;⁷ according to rabbinic ordinance (*derabanan*) the wife must accept the *get* out of her own will.⁸ A rabbinic judge cannot divorce a wife in the husband's stead. At most he can persuade or even coerce a husband to give his wife a *get*. However, the means at the disposal of today's rabbi to do so are limited.

The combination of both these circumstances in the Rabbinical court—that of the necessity to prove fault before the court and the inherent inability of the Rabbinic Court to actually put their own ruling into effect—gives rise to an impossible situation for one who is suing for divorce. Proving fault leads to angering the husband while lack of proof would lead to the refusal of the Rabbinical court to arrange the divorce

⁶ to another neighborhood, synagogue or country.

⁷ Bavli *Yevamot* 112b; Rambam, *Hikhot Gerushin* 1:1.

⁸ *Cherem d'Rabbeinu Gershom*-- see *Shulhan Arukh, Even ha-Ezer* 119:6.

proceedings! The plaintiff is forced to act against his or her own interests. The husband against whom negative claims have been made feels either that lies were perpetrated against him before a most venerable panel of rabbis or feels shame at having his unacceptable behavior brought to light. In any case the husband would most likely retaliate with the ultimate tool he holds—a tool more powerful than the Rabbinical Court itself—refusal to grant the *get* to the wife who dared bring up his faults before the court.

Given the limited power of the rabbis in the diaspora to ensure the giving of a *get*, the situation of the “modern-day agunah” has arisen. The husband may resort to naming a price for his acquiescence or he may simply refuse to give his wife a *get*. The fact that a civil divorce may be in place does not help alleviate this situation.⁹

III. Prenuptial Agreements for the Prevention of *Get*-Refusal

In the past decade a prenuptial agreement was developed in Israel by individuals well versed in halakha, named “The Agreement for Mutual Respect”,¹⁰ which is in use in Israel as well as in coordination with the Beth Din of America.¹¹ The Hebrew version is recommended for use by marrying couples by a variety of Israeli religious organizations¹² and indeed its use is spreading.

Although the Agreement for Mutual Respect differs from the Binding Arbitration Agreement of the Beth Din of America in that it is a reciprocal obligation put in place by the couple, it is built upon the same halakhic construct—the self-imposed obligation of spousal support which becomes actionable under specified conditions. It is solely a monetary agreement which makes reference to support during marriage, while making no direct mention of divorce. The Agreement for Mutual Respect also includes a requirement for attendance at marital therapy, should one of the spouses request it. In an elegant manner the linkage between the giving of a *get* and any other issues surrounding a divorce process is severed. All issues, including child custody and support or division of properties, are to be settled by negotiation leading up to the *get* which would take the form of a divorce agreement or by the court (civil or rabbinic) without a connection to the *get*—as determined by each individual couple. When used in Israel, there is a form of a halakhic acceptance - *kiblu alaihu* – of the Israeli community property law. In cooperation between the Council of Young Israel Rabbis in Israel and the Beth Din of America, a specific clause was added to the original agreement which assigns jurisdiction to the Beth Din of America as an arbiter in the case when the agreement would be found to not be enforceable in Israel – in

⁹ In fact, with a civil divorce in place the situation may be much worse. The man is then free to remarry civilly, while able to arrange a Jewish marriage, since according to Torah law he may have more than one wife simultaneously. The woman, in that situation may be able to remarry civilly, but is prohibited halakhically from joining in any kind of union with another man. Any children born of such a union would be categorized as *mamzerim*.

¹⁰ The *Heskem L'Kavod Hadadi* - Agreement for Mutual Respect, was developed in Hebrew primarily by two rabbis and a rabbinical court advocate—Rabbi Elyashiv Knohl, Rabbi David Ben-Zazzon and RCA Rachel Levmore-- in consultation with experts in various fields, ranging from Supreme Rabbinical Court judges, to jurists, academics, feminists and psychologists.

¹¹ A special English version, developed by the Council of Young Israel Rabbis in Israel together with the Beth Din of America, can be found at

<http://www.youngisraelrabbis.org.il/texts/Englishtranslationrevised%20040906.doc>

¹² Council of Young Israel Rabbis in Israel: <http://www.youngisraelrabbis.org.il/prenup.htm>
Yeshivat Hakibbutz Hadati: <http://www.ykd.co.il/hebrew/publications/publications.asp?item=heskem>
Itim: <http://www.itim.org.il/?CategoryID=206&ArticleID=600>

essence giving international jurisdiction to the Beth Din of America for those couples who may live in Israel and in the Diaspora.¹³

The Agreement for Mutual Respect serves as a basis for a proposed agreement for use in England, thoroughly adapted to English law.

IV. English Law

In this section, we will consider to what extent the Prenuptial Agreement of Mutual Respect is compatible with the English law on divorce and to the extent that it is not we will suggest possible changes that could be made. We will also briefly outline the other solutions to the "agunah problem" that currently exist in English law.

The English Judiciary's attitude to solving the "agunah problem"

"Civil Law judges are system builders. Common Law judges are problem solvers".

This statement, made by Professor Sir Basil Markesinis QC, during one of the author's seminars at University College London, gets to the heart of the attitude of English common law judges towards judging. Unlike, for example, French judges, who make their decisions with the aim of reinforcing the secular nature of state, English judges do not have an agenda. They aim neither to ensure a strict separation of Church and State nor to enforce the observance of any religion. Instead they aim to solve problems in cases before them, whether of a religious character or otherwise, using the legal powers that have been given to them by the British legislature.

In the case of agunah, the English judges have stated on number of occasions that the ability of one party to withhold a religious divorce from the other is a serious problem; "*The English courts have long been aware of the injustice to Jewish women in particular which arises when a husband refuses to initiate the Get procedure*": N v N [1999] 2 FLR 745. In the county court case of O v O (Jurisdiction: Jewish Divorce) [2000] 2 FLR 147, Judge Viljoen even said that to grant a civil divorce where the parties were still married under Jewish law would "circumvent and defeat the purposes of the Matrimonial Causes Act 1973" (which was to "try and effect a clean break in all aspects of the relationship so that the parties can go their respective ways without the former ties of the marriage). He said that parties that are married under Jewish law, but divorced under English civil law, "*for all intents and purposes ... remain married*".

In this way, there can be no doubt that the English judiciary has both a great sympathy with Jewish women that are refused gets by their husbands and a determination to use the powers available to it to help them. Instead the key question is whether the English courts have sufficient powers to deal with this problem. After a brief summary of the English divorce process, it is to this question that we will turn. In light of our findings we will then consider whether the Prenuptial Agreement of Mutual Respect or any part of it would be enforceable in English Law.

¹³ For guidance as to the methods of presenting the prenuptial agreement to a marrying couple see excellent articles available on the internet site of the Orthodox Caucus www.ocweb.org and the Council of Young Israel Rabbis in Israel <http://www.youngisraelrabbis.org.il/prenup.htm>.

The Divorce Process in English Civil Law (Basic Details)

i. Grounds for Divorce

No married couple can divorce under English civil law unless they have grounds for doing so. The sole ground that is recognized by law is the "irretrievable breakdown" of the marriage: Matrimonial Causes Act (MCA) 1973, s.1(1). The marriage will be held to have irretrievably broken down in one of five circumstances including adultery. If the respondent does not consent to the decree of divorce being granted, there will only be an "irretrievable breakdown" if the parties have lived apart for a continuous period of at least five years immediately proceeding the presentation of the petition: MCA 1973, s.1(2).

ii. Decree Nisi

If the parties believe that the conditions specified in subsection i above are satisfied they will submit a petition to divorce. If the judge decided that the parties do indeed have the requisite grounds to divorce, he will grant a Decree Nisi/Decree of Divorce: MCA 1973, s.1(4). At this point the parties are still legally married.

iii. Decree Absolute

Once the Decree Nisi has been granted the petitioner will be issued a Form D29 which will inform them when they are able to apply for a Decree Absolute. Usually, the waiting period is six weeks and one day. Once and only once the Decree Absolute has been granted will the parties be divorced under English civil law: MCA 1973, s.1(5).

iv. Ancillary Relief

The court and only the court has the power to decide how the parties' financial resources will be divided upon divorce: MCA 1973, s.21 and subsequent, see particularly, ss.23(1), 23(5), 25(1), 25(2). This power is known as Ancillary Relief and the question will be finally determined at the Final Ancillary Relief Hearing. If the parties agree amongst themselves how they would like to divide their resources, they may draw up a Consent Order, setting out the terms of their agreement. However even in this scenario, the court will need to approve their agreement and this is not a "rubber stamp" procedure. The court's power only arises on or after the grant of the Decree Nisi: Board (Board Intervening) v Checkland [1987] 2 FLR 257.

v. Maintenance Pending Suit

Prior to the Final Ancillary Relief Hearing, the court may a financial maintenance pending suit order for a term that it thinks "reasonable". The term may begin not earlier than the date of the presentation of the divorce petition and will end at the determination of the ancillary relief suit at the Final Ancillary Relief Hearing: MCA 1973, s.22.

vi. Orders regarding Children

The court also has the power to decide which parent the child(ren) will live with on divorce (a 'residence order') and to what extent the other parent will be allowed to have contact with the child(ren) (a 'contact order').

Existing Legal Solutions to the "Agunah Problem"

As already stated, the court is limited by its powers in the help that it can give agunot. We will now examine the existing legal solutions that the courts have held are open to them.

a. Refusal to make a decree nisi of divorce absolute

i. The Husband's Agreement

In N v N (divorce: ante-nuptial agreement) [1999] 2 FLR 745, Wall J held that:

The court has a discretion to decline to make a decree nisi of divorce absolute on the application of a spouse against whom the decree nisi has been pronounced if there would be prejudice to the spouse who had obtained the decree: see, for example, W v W (decree absolute) [1998] 2 FCR 304 and the cases there cited.

Thus, in a case in which a husband had agreed to obtain a Get and had not done so, I have no doubt that it would be within the proper exercise of the court's jurisdiction to allow a wife petitioner to delay making the decree nisi absolute, and then to decline to give leave for the decree nisi to be made absolute on the husband's application until such time as he had honoured his agreement to obtain a Get. (Our emphasis added).

ii. Divorce (Religious Marriages) Act 2002

Section 1(1) of this recently passed piece of legislation provides that the following provisions are to be inserted into the MCA 1973 under a section 10A:

(1) This section applies if a decree of divorce has been granted but not made absolute and the parties to the marriage concerned—

(a) were married in accordance with—

(i) the usages of the Jews, or

(ii) any other prescribed religious usages; and

(b) must co-operate if the marriage is to be dissolved in accordance with those usages.

(2) On the application of either party, the court may order that a decree of divorce is not to be made absolute until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court.

(3) An order under subsection (2)—

- (a) may be made only if the court is satisfied that in all the circumstances of the case it is just and reasonable to do so; and*
- (b) may be revoked at any time.*

It should be noted that a woman who married in a foreign jurisdiction, but wishes to divorce her husband in England, will not be able to make use of the Act.

b. Ancillary relief

i. Decline to exercise jurisdiction under ss 23, 24 of MCA 1973

In N v N (divorce: ante-nuptial agreement) [1999] 2 FLR 745, Wall J held that:

*The court, by means of s 25 of the Matrimonial Causes Act 1973 has a discretion whether **or not** to exercise its jurisdiction under ss 23 and 24 to make orders for financial provision and property adjustment*. In my judgment it follows that, in a case **where a husband had agreed to provide a Get**, the court could properly decline to exercise its jurisdiction to make an order dismissing all a wife's claims unless and until he had done so (Our emphasis added)..*

* = Ancillary relief.

ii. Setting aside of consent order

In N v N, Wall J also held that:

Alternatively, a wife could properly seek to extract an undertaking or an agreement from the husband in the terms of paras 1 and 2 of the current summons as the price of her agreement to the dismissal of her claims. If the husband then failed to honour his agreement, the court could set aside the consent order.*

* = In this case the wife issued a summons seeking specific performance of an ante-nuptial agreement and in particular the obtaining of a Get (This ante-nuptial agreement will be discussed in detail in subsection c immediately following). For the moment, the key information is the relief the wife sought in paragraphs 1 and 2 of the summons:

Paragraph 1 - *The husband does promptly take and co-operate in the necessary steps to progress the obtaining of a Get.*

Paragraph 2 - *The Respondent does attend the London Beth Din for consideration of the grant of a Get on a date and time to be fixed by the London Beth Din.*

c. Refusing to entertain a husband's claim for contact with his children

In the case of N v N (divorce: ante-nuptial agreement) [1999] 2 FLR 745, the husband and wife drew up a Consent Order in which they agreed that upon divorce the husband would have contact with their child at specified times. According to the terms of the Contact Order, the husband's right to contact was dependant:

UPON the husband agreeing (i) that he will forthwith send the mother copies of documentation prepared to date in relation to the Get, and that he will progress the obtaining of the Get expeditiously...

Wall J considered this 'recital' to be lawful and binding. However because the action the husband was required to take was not within the jurisdiction of the court to order (under ss 23 and 24 of MCA 1973 or otherwise), it could not be specifically enforced. In other words, the court could not require the husband to progress the obtaining of the Get expeditiously. It was, however, open to the judge hearing the husband's application for contact to decline to do so unless and until the husband had honoured the terms of the Contact Order.

This power to decline jurisdiction is subject to the consideration of the child's welfare, which is paramount. If the child's welfare requires the court to entertain the father's application, then this "will outweigh the court's reluctance to entertain a claim by a man who has made an agreement in the face of the court and then resiled from it without apparent cause" (per Wall J). This proviso means that in these situations the court will be slow to decline jurisdiction (though on the facts of the instant case, Wall J felt that the court could properly decline jurisdiction).

d. Problems with the legal solutions set out in subsections a to c above.

We have already noted the following two problems with the legal solutions set out:

1) In deciding whether to decline to exercise jurisdiction on the basis that the husband has failed to obtain a Get, the court will have to take into account any overriding considerations. For example, a judge will only refuse to entertain a husband's application for contact if to do so would not be detrimental to the child's welfare.

2) The Divorce (Religious Marriages) Act 2002 only applies to Jewish couples married in England.

There are however several other important problems:

1) All these solutions give the judges discretion. For example, under the Divorce (Religious Marriages) Act 2002, the judges are under no obligation to order that the decree of divorce not be made absolute. It may be, for instance, that the judges will refuse to exercise their discretion if it was the wife who caused the marriage to break down irretrievably by committing adultery.

2) None of these solutions will have any effect if the husband does not care whether he is divorced or not or has contact with his children. A man who is living happily with another woman and who has no intention of remarrying in synagogue or otherwise may well not be persuaded to give his wife a Get merely on the basis that the decree of divorce will not be made absolute or that his contact application will not be considered. Likewise, a man who does not want to be divorced civilly or religiously and would rather remain married under any conditions, would be content with the fact that a decree of divorce would not be made absolute in his case.

3) Most of the above solutions rely on the fact of their being a previous agreement between the parties where the husband has agreed to provide a Get in a prenuptial agreement or - as a price for contact or ancillary relief - in a consent order.

The Divorce (Religious Marriages) Act does not specify whether previous agreement is necessary for its provisions to apply; however, this power is discretionary and in future cases the courts may require a prenuptial agreement as a condition precedent for its exercise.

4) None of these solutions, bar the one laid out in subsection c. "Refusing to entertain a husband's claim for contact with his children" above, help existing agunot. Unless the husband has agreed to obtain a Get as a condition for contact with his children and he applies to the court to have the terms of the contact order varied, there is nothing that the courts can do in a case where the Decree Absolute has already been granted and the Ancillary Relief application has already been dealt with.

Existing Non-Legal Solutions to the "Agunah Problem"

In the event that a husband refuses to give a Get, it is open to the Beth Din to impose communal sanctions including the withdrawal of all synagogue honours and privileges and the right of the husband to stand next to his sons on the occasion of their bar mitzvahs. In addition there is the possibility of press publicity concerning the husband's refusal to give a Get. The effectiveness of such sanctions is of course dependent on the importance that the husband places on such matters.

The Use of Prenuptial Agreements as a Solution to the "Agunah Problem" - Introduction

We propose to ask the following questions:

(1) Are prenuptial agreements enforceable at all?

(2) The Prenuptial Agreement of Mutual Respect (PAMR) contains provisions in relation to financial obligations and reconciliation. Do English courts have statutory jurisdiction to make orders in respect of these issues? [NB: Even if prenuptial agreements are enforceable, the court will not order the specific enforcement of any clause that requires the husband to do something that the court has no statutory jurisdiction to order. "In my judgment, a court exercising a statutory jurisdiction can only make and enforce orders which the statute permits it to make": N v N (divorce: ante-nuptial agreement), per Wall J.]

(3) If the answers to the above questions are "yes", will the English courts specifically enforce the provisions in the PAMR?

The Use of Prenuptial Agreements as a Solution to the "Agunah Problem" - Enforceability

The traditional view of the English courts towards prenuptial agreements is that they are not enforceable. The reason for this was set out in N v N (divorce: ante-nuptial agreement) by Wall J:

An agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union.

However he continued:

Although held to be unenforceable, the courts have accepted that ante-nuptial

agreements may have evidential weight when the terms of the agreement are relevant to an issue before the court in subsequent proceedings for divorce.

The Use of Prenuptial Agreements as a Solution to the "Agunah Problem" - Financial Provisions

The English courts clearly have a power to make orders for financial provision and property adjustment i.e. ancillary relief under ss 23 and 24 of MCA 1973. Therefore if a prenuptial agreement contains financial provisions the problem of statutory jurisdiction does not arise; the court will not be able to say that it cannot enforce the agreement on the basis that it cannot make financial orders.

The issue in hand is to what extent a prenuptial agreement with financial provisions will be taken into account when the court is considering an ancillary relief application (or, in Wall J's language, what is such an agreement's "evidential weight"?). In Part A, we will consider whether the English civil courts are likely to make condition financial orders, in line with the Obligations set out in clauses E and F of the PAMR, at the Final Ancillary Relief Hearing. In Part B, we will consider whether the English civil courts are likely to make condition financial orders in line with the Obligations at the Maintenance Pending Suit Hearing.

a. Final Ancillary Relief Hearing

i. General Law

We will now briefly set out the general law of prenuptial agreements. However it should be noted that most of the cases on the subject concern situations where a wealthy man wants to protect his wealth on marrying a less wealthy partner by the use of a prenuptial agreement. Hence the court has been keen to put safeguards in place to protect the weaker, less wealthy partner from the other's undue influence. To what extent the following law is relevant to the situation of a couple signing a PAMR will be considered in due course:

1) "The wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction": Hyman v Hyman [1929] AC 601. In other words a couple cannot agree in a prenuptial or any other type of agreement to take away the court's jurisdiction to consider their ancillary relief application and make orders about the division of their financial resources.

2) In determining what financial order to make under ss 23 and 24 of the MCA 1973, the court *must* consider all the factors listed under section 25(2) of the same Act. One of the other factors the court *must* have regard to is the conduct of the parties. The court *may* have regard to the prenuptial agreement as conduct which "it would be inequitable to disregard". The weight of the prenuptial agreement will depend on the facts of the case. In M v M (Prenuptial Agreement) [2002] FLR 654, for example, Connell J held that "I do bear the agreement in mind as one of the more relevant circumstances of this case". In the final analysis, the overriding duty of the court is to arrive at a solution that is fair, just and equitable in all the circumstances and if holding the parties to a prenuptial agreement would not achieve that result then it will have little weight. In Wall J's words in N v N:

The fact that an ante-nuptial agreement, or an agreement between spouses ... is unenforceable does not mean that the court will not, in appropriate circumstances, hold the parties to that agreement, provided it is just to do.

Generally, in recent cases, the courts have awarded wives less than they would have received if they had signed no prenuptial agreement, but more than specified in the clauses of the agreement. In other words, the judges are increasingly taking notice of prenuptial agreements but don't feel bound by their exact terms.

3) a) In order for a prenuptial agreement to be at all influential in a judge's decision regarding financial provision, the following conditions, set out in K v K (Ancillary Relief: Prenuptial Agreement) [2003] 1 FLR 120, need to be met (these conditions assume that the husband is the dominant party):

- The wife needs to fully understand the agreement. The provisions regarding financial provision must be clear.

- The wife must have received independent legal advice (separately to the husband) as to the terms of the agreement.

- The wife must willingly sign the agreement, free from pressure from her husband or otherwise.

- The husband must not *exploit* a financially or otherwise dominant position.

[NB: Merely having a dominant position is acceptable.]

- No unforeseen circumstances should have arisen since the agreement, making it unjust to hold the wife to it. For example, was the agreement entered into in the knowledge that there would be a child?

- Prior to signing the agreement, there needs to be full disclosure of assets, pensions worth and incomes.

b) In addition it is good practice for the agreement to be signed at least 21 days before the marriage in order to avoid any suggestion that one party had put pressure on the other at the last minute. This period was laid down in Supporting Families (at p 33, para 4.23), a 1998 Government consultation document which recommended making "'Prenuptial' written agreements about property legally binding for those who wish to make them'. Although Parliament never passed any legislation to this effect, it is recommended that the 21 days condition is followed.

ii. The Use of Conditional Financial Provisions to Encourage a Husband to give a Religious Divorce

The PAMR provides that if the marriage has not been terminated in accordance with Jewish law by the end of "The Period" (or the "Extended Period" if applicable), the recalcitrant party will have conditional financial obligations towards the other party. These obligations will come to an end upon the marriage being terminated in accordance with Jewish law i.e. the Get being freely given by the man and freely received by the woman. We will now consider two previous cases in which the courts have made conditional financial orders with the aim of forcing a husband to terminate his marriage in accordance with the rules of his religion. We will then consider the effect of these decisions on the weight of the PAMR financial provisions in subsection iii below.

1) A v T (Ancillary Relief: Cultural factors) [2004] 1 FLR 977

BACKGROUND TO MOSLEM/IRANIAN LAW OF DIVORCE:

Under Iranian/Moslem matrimonial law, the husband is expected to provide a "marriage portion", that is the provision of capital (negotiated between the parties prior to marriage) which shall, on the marriage and thereafter, be her sole property absolutely. The sum of the marriage portion is agreed prior to the marriage and is set out in a written marriage contract (the equivalent of a prenuptial agreement).

There are two types of divorce under Sharia law, a Talaq and a Khul'a:

"Talaq" = A woman can be divorced unilaterally by her husband. The husband can obtain a Talaq merely by pronouncing it three times before witnesses in accordance with the particular requirements of Iranian law. If a man divorces his wife in this manner she is entitled to retain the entire sum of the marriage portion.

"Khul'a" = This type of divorce is initiated by the wife. A wife may only obtain a Khul'a if the husband consents to the divorce or if the court finds that she has proved one of the grounds specified in her marriage contract. Where the wife requires her husband's agreement to divorce, she will need to negotiate in relation to the amount of the marriage portion she would be prepared to forgo in order to achieve her freedom.

An Iranian woman who decides to separate instead of divorcing would be entitled to keep her entire marriage portion. However she would have some substantial restrictions on her future life. These include a prohibition on remarriage, a prohibition on any new relationship with a man and the loss of her right to be maintained by her husband. In addition her husband would be able to control her travel arrangements and her ability to renew her Iranian passport.

FACTS OF THE CASE:

The husband and wife were both Iranian nationals and married in Iran. In Iran, the law of marriage and divorce is governed by the code of Sharia (Moslem) law. According to Sharia law, as applied by Art 6 of the Iranian Civil Code, Iranian nationals remain subject to the laws of Iran in respect to matters of their personal status, even if they have gained a second nationality and are resident abroad. Thus, even though the husband in this case possessed dual Iranian and British nationality and was resident in England, the couple were both still subject to Iranian law on the matter of divorce. It is highly unlikely that the Iranian courts would recognize any divorce under English civil law and if this presumption is correct, would not enforce any order the English courts made ancillary to it.

In the instant case, the wife sought a divorce under English law on grounds which would not have entitled her to a divorce in Iran. As such she would need her husband's agreement (and in order to achieve this, renegotiate the sum of her marriage portion) to obtain a Khul'a divorce. The wife considered a religious divorce to be important and argued that in the event of her not receiving one, her prospects in Iran would be detrimentally affected. Further she argued that she wanted her marriage portion to be paid in full in order to clear her debts.

BARON J OF THE HIGH COURT (FAMILY DIVISION) ORDERED:

Having considered the factors listed in s.25(2) of the MCA 1973, Baron J ordered the husband to pay a lump sum of £35,000 to his wife on condition that he gave her a Talaq divorce; the judge held that it would not be fair to make the husband pay the full amount of the marriage portion as the marriage had only lasted a few months. However, if the husband failed to obtain a Talaq divorce within three months of the date of the judgment, the lump sum would be increased to £60,000,

approximately the sum of the full marriage portion. By using a conditional financial order to force the husband to unilaterally divorce his wife, the need for the wife to renegotiate the amount of her marriage portion was avoided.

BARON J MADE THE FOLLOWING IMPORTANT STATEMENTS:

- 'I also have to consider the cultural background of this case... (In determining the sum of the lump sum order) I will take into account the agreement which the parties reached and determine how the Iranian court would have been wont to deal with this case'.

- 'I am of the clear view that at the end of this hearing there should be an end to proceedings in both jurisdictions. Moreover, there should be a Talaq, so that both parties are free to lead wholly independent lives hereafter'.

- 'This contingent order is in line with the case of Brett v Brett [1969] 1 WLR 487, by which it was decided that the court had jurisdiction to make an order for additional capital in circumstances where a wife would be disadvantaged by the failure of a husband to grant a religious divorce'.

Brett v Brett [1969] 1 WLR 487 2

In this case the husband, a non-orthodox Jew, had failed to obtain and give his orthodox Jewish wife a Get. Judge Phillimore LJ said the following in respect of the husband's motives: "I have not the slightest doubt that his failure to apply for a gett has been due to ...the hope that he could use his power to bargain to avoid payment of part of any maintenance award by the court".

In this case there was no prenuptial agreement and the lump sum award that the husband was to pay to the wife (namely £30,000) was calculated exclusively on the basis of the English law of ancillary relief in force at the time. It was held that £25,000 of the £30,000 figure was to be paid within 14 days. The balance was to be paid in three months' time if by then the husband had not obtained a Get.

iii. *Applicability of the Above Law to the Prenuptial Agreement of Mutual Respect*

a. *General Conclusions*

The cases of Brett v Brett and A v T appear to establish the principle that the courts are prepared to make conditional financial orders in order to force a party to obtain a religious divorce where the other party would be disadvantaged by the failure to do so. In the case of both Jewish and Moslem Sharia law, a woman is severely disadvantaged if her husband fails to consent to a religious divorce and the English courts recognize this. It should be noted that A v T is a High Court case and Brett v Brett is a Court of Appeal case. As such these cases are strong authority and we can be confident that in future cases the courts will be prepared to make conditional financial orders.

An interesting point about A v T is that the husband was not preventing his wife from divorcing. If she had been prepared to renegotiate the sum of her marriage portion, he would have no doubt consented to a Khul'a divorce. However the High Court was concerned to give the wife a lump sum that was fair in all the circumstances in line with s.25 of the MCA 1973. In order both to prevent the

husband from negotiating an unfair sum as the price of a Khul'a divorce and to ensure that the divorce would be recognized by Iranian/Sharia law, the court used a conditional financial order to force the husband to give his wife a Talaq divorce.

This situation is analogous with the situation in Brett v Brett and many cases throughout the Jewish world where the husband is prepared to grant his wife a Get provided that she accepts a lower level of financial provision. Again the court in Brett prevented the husband from exploiting his dominant position by the use of a conditional financial order. In this way the principle in the PAMR – "It is understood that a woman who consents to end the marriage in accordance with Jewish law, even if she does not consent to the terms or demands of the Other Matters (inc: child custody, maintenance, financial support etc.), shall not be deemed as refusing to terminate the Marriage": See G: Termination of the Marriage – is already firmly embedded in English law.

b. Is it necessary to sign a prenuptial agreement?

These cases do however raise the issue of the necessity of prenuptial agreements/marriage contracts. In Brett v Brett, there was no such agreement and yet the court still ordered the husband to pay an additional £5,000 in the event that he had not granted his wife a Get within a three month period. Nevertheless it seems to us that it is important that a prenuptial agreement be signed. In N v N, Wall J doubted the future applicability of Brett v Brett on the basis of halakhic considerations: "*A Get obtained by compulsion is invalid in Jewish law, and according to Professor Freeman, the rabbinical authorities now regard a Get obtained in circumstances such as those prevailing in Brett v Brett as coerced and thus invalid.*" He then ended his judgment by inviting the Jewish community to bring about reform in this area of the law.

In the PAMR, we have a halakhically-valid document where a married couple-to-be agree to future conditional financial obligations. Unlike in the Brett v Brett judgments, the PAMR provides that the obligations are dependent on the recalcitrant party's failure to terminate the marriage in accordance with Jewish law and not on his/her failure to grant/receive a Get. Because the halakhic objections to the Brett decision are overcome if a PAMR is signed, it is logical to assume that the Brett/AvT principles will still apply in the event that one is.

c. If the court makes a conditional financial order, will it follow the figures set out in the PAMR?

We would also contend that the signing of a prenuptial agreement in general and the PAMR in particular is important as it will influence the court in its determination of the sum of the conditional financial order. The existence of a prenuptial agreement does not rob the court of its jurisdiction to make conditional financial orders even if it explicitly states that it does. Further, the court is not bound by the figures stated in a prenuptial agreement, which in the case of the PAMR are the figures stated in sections E and F. However, despite the limited case law, we would contend that the court would give great weight to the figures in the PAMR. Our reasoning is as follows:

- In A v T, the court used the factors under s.25 to determine what would be a "fair" lump sum order. But in determining what the husband should pay in the event

of no Talaq being granted, it considered the agreement that the parties reached and how the Iranian courts would have dealt with the issue. The judge concluded that the law of Iran would have entitled the husband to the *full amount* of the marriage portion as set out in the marriage contract/prenuptial agreement. This conclusion was reached despite the fact that the sum of the marriage portion was almost double the lump sum that would otherwise be fair in the circumstances. Despite the clear differences between the factual matrix of A v T and a case where a PAMR is signed, we consider that the English courts would probably respond to the two situations in the same way; where a PAMR is signed, the court is likely to use the s.25 factors to determine what would be a "fair" lump sum/maintenance order in the circumstances. Then to calculate the sum of the conditional financial order, the court is likely to "take into account the agreement that the parties reached" i.e. use the figures in sections E and F of the PAMR.

- In addition, the English courts have signaled their disapproval of a husband's conduct in refusing to give a Get in a number of previous cases (*"The English courts have long been aware of the injustice to Jewish women in particular which arises when a husband refuses to initiate the Get procedure: N v N [1999] 2 FLR 745*). As such they may be keen to hold a husband to his agreement in the event that he has signed a PAMR. This contrasts with the usual prenuptial agreement situation where a wealthy man is trying to secure his fortune in the event of divorce. In these situations, the courts are often less sympathetic towards the person who is trying to enforce the agreement as it may be unjust to hold the other party to it.

- Another issue to be considered is the importance Jewish law attaches to the figures in sections E and F. As these figures were determined according to halakhic principles, then in line with A v T, the courts *may* attach more significance to them (In A v T, Baron J considered it important how the Iranian courts would have dealt with the issue. Similarly *weight may* be given to the figure the Beth Din would have awarded if it had the power. Alternatively, *no weight may* be given to the figure the Beth Din would have awarded because unlike the Iranian courts, it recognizes the financial orders made by the English civil courts.). In our view, the halakhic importance of the figures set out in the PAMR *probably will* prompt the English civil courts to use them; An invalid Get (which would be the unfortunate consequence of halakhically invalid figures being used) is of no use to the non-recalcitrant party, whose cause the court is trying to assist. Further it would lead to the purposes of the MCA 1973 being defeated ("...for all intents and purposes (the couple) will remain married": see O v O).

d. Are the K v K conditions applicable to a situation where a PAMR is signed?

The answer to this question is of course open in light of the limited case law. Our inclination though is to believe that the courts would be prepared to enforce the PAMR clauses even if the conditions laid down in K v K were not met as:

1) The importance of the obtaining of a Get has been confirmed by previous judicial statements and is in line with the purposes of the MCA 1973 (which is to *"try and effect a clean break in all aspects of the relationship so that the parties can go their respective ways without the former ties of the marriage"*: see O v O). In N v N, Wall J even encouraged the Jewish community to come up with reform in this area of

the law: "In my judgment, if there is to be reform in the area of the law covered by this judgment it is for Parliament and/or the Jewish community to bring it about".

2) The conditional financial obligations are reciprocal. So despite the reality that husbands are more likely to refuse to give gets than wives are to receive them, in theory the couple are under equal pressure to sign the agreement and receive equal benefits from it.

3) The safeguards set out in K v K were designed to protect the weaker party (usually the woman) against the wealthier party in situations where the latter has encouraged the former to sign a prenuptial agreement in order to protect his wealth. By contrast, in a PAMR situation, the weaker party is the one who is trying to enforce the prenuptial agreement. Would the court really insist upon these conditions in order to prevent the weaker party from relying upon the agreement?

In spite of the above conclusions, it would be preferable if:

- a married couple-to-be receive independent legal advice before signing;
- the agreement is signed 21 days before marriage where possible; and
- the London Beth Din use their resources to inform couples about the PAMR, not to force them to sign it.

b. Maintenance Pending Suit Hearing

i. Does the court have jurisdiction to make conditional financial orders in the terms of the Obligations in sections E and F of the PAMR?

'Maintenance pending suit ... is governed by s.22 of the 1973 (Matrimonial Causes) Act which gives the court as wide and unfettered discretion as can well be imagined. It provides that the court may order such periodical payments until the hearing as "the court thinks reasonable", reasonable, that is to say, in light of the means and needs of the parties and any other relevant circumstances. Other relevant circumstances may well include, in some cases, the conduct of the parties. ... But in most cases the conduct of the parties is in issue and ... has yet to be decided': See Offord v Offord (1982) 3 FLR 309, per French J.

The entry of a couple into a prenuptial agreement may be regarded as conduct that it is inequitable to disregard under s.25(2)(g) of the MCA 1973: K v K (Ancillary Relief: Prenuptial Agreement) [2003] 1 FLR 120. Further, unlike adulterous actions which it is claimed have brought about the end of a marriage (the 'conduct' in Offord v Offord), there will be no dispute (or, in other terms, it will not be "in issue" and "yet to be decided") over whether a PAMR has in fact been signed. In this way the court does have the *jurisdiction* to make financial orders at a maintenance pending suit hearing in the terms of PAMR.

ii. Even if the court has jurisdiction, is the court likely to make conditional financial orders in the terms of the Obligations in sections E and F of the PAMR?

There is a reasonable prospect of such conditional financial orders being made at maintenance pending suit hearings, but only if/once the judicial acceptance of PAMRs at final ancillary relief hearings becomes standard. Why? The maintenance

pending suit hearing is meant to be quick hearing where, in an ordinary case, the court makes "rough and ready" conclusions as to the means and needs of the parties: See F v F (Maintenance Pending Suit) (1983) 4 FLR 382. At present the issue of prenuptial agreements is a controversial one that cannot be considered quickly and will therefore be left for determination at the final ancillary relief hearing. However if the use of PAMRs was to become uncontroversial, the court hearing the maintenance pending suit application could be comfortable making orders in the terms of the Obligations without much deliberation.

iii. What is the advantage of the Obligations being given legal force at the maintenance pending suit hearing?

Under section 23(5) of the MCA 1973, orders made at a final ancillary relief hearing can only take effect once the decree of divorce becomes absolute. By contrast, the term of a maintenance pending suit order can begin "not earlier than the date of the presentation of the divorce petition": MCA 1973, s.22. In this way if a delay in the Decree Absolute is applied for and ordered under the Divorce (Religious Marriages) Act 2002, the recalcitrant party will be bound to pay the other party the sums specified in the maintenance pending suit order before *and throughout the course of* the delay.

[NB: the term of a maintenance pending suit order comes to an end when the final ancillary relief orders are made. It is therefore hoped that any conditional financial payments ordered in a maintenance pending suit hearing would be remade in the final ancillary relief hearing if the recalcitrant party had failed to terminate the Jewish marriage.]

The Use of Prenuptial Agreements as a Solution to the "Agunah Problem" - Reconciliation Provisions

The PAMR provides that the Notice Recipient may request to rehabilitate the marriage with the help of a professional marriage counselor. The problem of statutory jurisdiction does not arise in respect of these provisions as the court has the following powers in respect of reconciliation:

MCA 1973, s.6 – Attempts at Reconciliation of Parties to Marriage

(1) Provisions shall be made by rules of court for requiring the solicitor acting for a petitioner for divorce to certify whether he has discussed the possibility of reconciliation and given him the names and addresses of persons qualified to help...

(2) It at any stage of the proceedings it appears to the court that there is a reasonable possibility of a reconciliation ...the court may adjourn the proceedings for such a period as it thinks fit to enable attempts to be made to effect such a reconciliation.

In this way if the Notice Sender has thus far failed to attend three or any of the professional counseling sessions on the request of the Notice Recipient (as required in the PAMR) and the court judges that there is nevertheless a reasonable possibility of reconciliation, it may use its powers under s.6(2) to order that the grant of the decree nisi be delayed until Notice Sender attends. However the court will not be bound by the terms of the PAMR and the parties will not be able to rob it of its jurisdiction by

agreement. On the application of the Notice Recipient, the court will act in accordance with the machinery set up in Practice Direction [1971] 1 All ER 894:

(a) Where the court considers that there is a reasonable possibility of reconciliation or that there are ancillary proceedings in which conciliation might serve a useful purpose, the court may refer the case, or any particular matter or matters in dispute therein, to the court welfare officer.

*(b) The court welfare officer will, after discussion with the parties, decide whether there is any reasonable prospect of reconciliation (**experience having shown that reconciliation is unlikely to be successful in the absence of readiness to co-operate on the part of the spouses**) or that conciliation might assist the parties to resolve their disputes or any part of them by agreement.*

(c) If the court welfare officer decides that there is not such reasonable prospect, he should report accordingly to the court.

(d) If the court welfare officer decides that there is some reasonable prospect of reconciliation, or that conciliation might assist the parties to resolve their disputes or any part of them by agreement, he will, unless he continues to deal with the case himself, refer the parties to either (i) a probation officer, or (ii) a fully qualified marriage guidance counselor recommended by the branch of the appropriate organisation concerned with marriage guidance and welfare; or (iii) some other appropriate person or body indicated by the special circumstances (e.g. denominational) of the case.

(e) The person to whom the parties have been referred will report back to the court welfare officer, who in turn will report to the court. These reports will be limited to a statement whether or not reconciliation has been effective, or to what extent (if at all) the parties have been assisted by conciliation to resolve their disputes or any part of them by agreement. (Our emphasis added).

In this way it is quite proper that the parties' obligations vis-à-vis rehabilitation of the marriage are specified in the PAMR. However in the event that the Notice Sender refuses to attend the sessions, it is unlikely that the court will enforce that section of the agreement.

Please note the following in relation to reconciliation:

- Practice Direction [1971] 1 All ER 894 states that:

Moreover, even if complete reconciliation cannot be achieved, expert help will often enable the parties to resolve, with the minimum possible anxiety and harm to themselves or their children, many of the issues liable to be ancillary to the breakdown of a marriage. Short of this, it should at least identify the issues on which the parties remain seriously at variance and on which in consequence they require adjudication of the court.

In this way, if a Get has not yet been granted/received by the recalcitrant party, the court/court welfare officer may use its powers under s.6(2) to delay the granting of the Decree *Absolute* and order (a) session(s) with a probation officer, a fully qualified marriage guidance counselor or some other appropriate person or body to resolve the Get issue with the minimum possible anxiety or harm. The parties could, for example, use their conciliation sessions to draft a consent order in which they set out how they would like to divide their financial resources and arrange contact with their children on divorce. The consent order may contain an undertaking by both parties to terminate their marriage in accordance with Jewish law and state that the remainder of

the agreement will only take effect upon this condition being fulfilled: Refer to 'Existing Legal Solutions to the "Agunah Problem"' above.

The PAMR and its Compatibility with the English Divorce Process

The PAMR is designed to be compatible with Israeli law, a system where the wife's receipt of a Get is necessary for the termination of both the civil and Jewish religious marriage. In England, however, there are different conditions for the termination of the civil and Jewish religious marriage. The PAMR procedure has been adapted in the following way to make it compatible with the English civil divorce process:

a. The Timeline

According to the redrafted PAMR the Obligations become active upon the petition for civil divorce being filed by either party. This is the case regardless of whether the parties have undertaken the specified number of reconciliation sessions, whether the 180 (or 270 day) period has passed and which party has filed the divorce petition. Nevertheless the PAMR also sets out the ideal procedure; preferably the *Sender* should file the divorce petition, after the 180 (or 270) day period has passed, the specified number of sessions having been completed. This method of setting out the ideal next to a default procedure will allow the PAMR to work effectively in English law (by protecting the couples statutory right to apply for civil divorce when they wish) *and* function as an educational tool.

In addition the redrafted PAMR sets out the rights of the Sender upon the Obligations becoming active; he/she “may apply to the civil court for a maintenance pending suit order and notwithstanding the success of that application, a final ancillary relief order in the exact terms of the Obligations”. This new clause reflects the English law reality that the terms of a prenuptial agreement only gain legal force upon the civil court making an order in those terms.

b. The Obligations

In order to reduce the possibility that the civil court will depart from the figures set out the ‘Obligations of the Couple’ section of the PAMR (in the event that it decides to make a conditional financial order), it has been necessary to add a new explanatory clause; this clause makes it clear that these figures were calculated in accordance with Jewish Law and that any alterations may render them and any subsequent purported termination of the Jewish marriage invalid under that law.

The new clause also states that these figures were not calculated with reference to the health or wealth of either party. This point is important as we don't want the court to depart from the figures set out in clauses E' and F' on the basis of an irrelevant change of circumstances (a change of circumstances may lead the court to disregard the terms of a prenuptial agreement: see K v K); it would not be relevant, for example, if the recalcitrant husband became ill and needed more money for himself as the only circumstance which led the parties to sign the PAMR and adopt the figures therein was the potential that the Jewish Marriage may not be terminated according to halakha.

It has also been necessary to state expressly that the Couple intend for any child maintenance payments ordered by the court to be *in addition* to any payments ordered in line with the terms of the Obligations; the Obligations relate solely to the maintenance of the recalcitrant party's spouse. If the court were to include the child maintenance payments within the sums set out in the 'Obligations of the Couple' section, the Obligations would lose their deterrent effect. A recalcitrant man who, in any case, had to pay half his income to his wife for the care of their children would have no financial incentive to terminate the Jewish marriage.

In the same way, the redrafted PAMR expressly states that if the court orders one party to pay the other a "fair" monthly sum for the latter's maintenance (the "fair" sum having been calculated in line with the s.25 factors), that sum should *be included within* the sum ordered in line with clause E (or F as applicable) for failure to terminate the Jewish marriage: This is an A v T situation, please see above.

c. The Role of the Beth Din

The original PAMR provides that where a recalcitrant party, who has signed the PAMR, refuses to terminate his/her Jewish marriage, the case should be referred to the local Beth Din. This use of the Beth Din as an arbitration body in each individual case could prove problematic in England as it is questionable whether ancillary relief is a matter that may be submitted to arbitration. In any case the Beth Din's judgment would count for little as the civil court remains the only body that can give ancillary relief financial orders the force of law; the civil court would be free to disregard the ruling of the Beth Din, just as they are able to disregard what a couple has expressly agreed in a Consent Order.

In light of this, we believe that it would be preferable if the London Beth Din could be persuaded to generally approve the PAMR as halakhically valid, thus avoiding the need for each individual case to be referred to the Beth Din. This would have the added benefit of giving the civil court confidence that the agreement is *definitely* valid under Jewish law; otherwise the court may be reluctant to make a conditional financial order in its terms. In the event that the need for arbitration is avoided, the related clauses in the PAMR should be removed.

Recommended Change to English Law - Section 23(5) Matrimonial Causes Act 1973

Section 23(5) of the MCA 1973 currently provides that "...Where an order is made under subsections (1)(a), (b) or (c) above [Orders for lump sum and periodical payments to be made to the other party] on or after the granting of a decree of divorce ... neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute".

In this way (final) ancillary relief orders can be made on or after the granting of the Decree Nisi, but they can only take effect from the granting of the Decree Absolute. This has the effect of causing the two tools available in English law to help 'agunot' to work against each other. If the granting of the Decree Absolute is delayed under the provisions of the Divorce (Religious Marriages) Act 2002, this will also have the effect of delaying the coming into effect of the ancillary relief orders made by the court (including any conditional financial orders made under the terms of the PAMR).

In our submission, s.23(5) needs to have a sub-s (b) added in the following terms:

*(b) Where -
(i) an order is made under section 10A(2) above*; and
(ii) a conditional financial order is made under either sections 23(1)(a), (b) or (c) above prior to the decree of divorce being made absolute; and
(iii) it is ordered that the conditional financial order referred to in subsection (ii) will cease upon the marriage being dissolved in accordance with prescribed religious usages -
the conditional financial order referred to in subsections (ii) and any settlement made in pursuance of that order shall take effect upon the order referred to in subsection (i) taking effect**.*

* i.e. a delay is ordered in the granting of the Decree Absolute.

** i.e. the conditional financial obligation will take effect upon the commencement of the delay in the granting of the Decree Absolute.

- Further, we propose that the current s.25(5) be transformed into a sub-s (a) and have the following phrase added at the end:

...This subsection is inapplicable in the situation set out in subsection (b) below

The effect of adding these provisions would be that a conditional financial order made to encourage a recalcitrant party to divorce his partner in accordance with religious law (Jewish, Moslem or other) would take effect upon the Judge ordering a delay in the granting of the Decree Absolute under the Divorce (Religious Marriages) Act 2002 (inserted as s.10A(2) in the MCA 1973). In this way the two principal tools available in English Law for encouraging the consensual delivery of a Get would work together.

Summary of Key Points

Following is a summary of our key conclusions regarding the compatibility of the PAMR with English law:

1) It is within the courts power to make conditional financial orders to encourage a recalcitrant party to divorce the other party in accordance with the usages of his religion. In our submission the court is likely to make such an order in the final ancillary relief hearing where a PAMR is signed. Further in those circumstances it is likely to give great weight to the figures in sections E and F of the PAMR despite not being bound by them.

2) There is a reasonable prospect of such conditional financial orders being made earlier at maintenance pending suit hearings, but only if/once the judicial acceptance of PAMRs at final ancillary relief hearings becomes standard.

3) Under s.6(2) MCA 1973, the court may adjourn divorce proceedings at any stage in order to enable attempts to be made to effect a reconciliation. However, if the Notice Recipient has requested sessions with a professional marriage counselor (in line with the terms of the PAMR) and the Notice Sender has failed to attend those

sessions, the court will only adjourn the proceedings prior to the grant of the Decree Nisi if there is a reasonable prospect of reconciliation.

4) The PAMR has been adapted in order to make it compatible with the English civil divorce process. Changes have been made to the sections of the agreement that deal with the timeline and the Obligations of the couple. In addition changes have been proposed in relation to the role of the Beth Din.

5) As English law currently stands, lump sum and periodical financial orders made by the court upon or after the grant of the Decree Nisi may only take effect upon or after the Decree being made Absolute. The court also has the power, given by the Divorce (Religious Marriages) Act 2002, to delay the granting of the Decree Absolute in order to encourage a recalcitrant party to divorce the other party in accordance with the usages of his religion. In order for these tools to work together, we recommend that the law be changed so that any conditional financial order made to encourage the termination of a religious marriage may take effect upon the commencement of the delay in the granting of the Decree Absolute.

V. Halakhic and Legal Validity of the English PAMR

The Prenuptial Agreement for Mutual Respect can merit the trust of the English civil courts as well as that of marrying couples under the condition that the Orthodox Rabbinical Courts of England, in particular the London Beth Din who works with the Board of Jewish Deputies, agree that this document is indeed halakhically valid. The civil courts will look for this stamp of approval of the London Beth Din in order to ensure that all of their rulings vis-à-vis the enforcement of the PAMR would help alleviate the agunah problem and not exacerbate the situation for the victim of *get*-refusal. Much can be learned from the spread and subsequent acceptance of the Agreement for Mutual Respect in Israel. Doubtful voices were raised by some Israeli rabbis at the beginning of the process of the agreement's use by idealistic young couples who wished to right a social wrong within the halakha, which lessened as the agreement spread and even proved itself. Recently the director of the Israeli Rabbinical Courts, Rabbi Eliyahu Ben-Dahan, stated in a public forum that there were a number divorce suits which were brought to the Israeli Rabbinical Courts in which the Agreement for Mutual Respect had been signed prior to the marriage.¹⁴ In each and every case the Rabbinical court arranged a *get*. He further reiterated that in no case did the Rabbinical Court find the agreement invalid from an halakhic standpoint.

This proposal of the Prenuptial Agreement for Mutual Respect has been submitted for the consideration of British Jewry and its halakhic decisors. The submission was made to the Family Law Group of the Board of Jewish Deputies in the beginning of the year 2008. To date the Family Law Group has considered the

¹⁴ Rabbi Ben Dahan's statements were made at the closing session of a two-day course for professionals entitled "The Agunah Problem and Halakhic Prenuptial Agreements" which took place May 18th and 25th, 2008. Several organizations collaborated in organizing the course, each one promoting the agreement: The Council of Young Israel Rabbis in Israel, The Rackman Center of Bar Ilan University, MaTaN, Mifnim and Yad Laisha. See Matthew Wagner, "Rabbinic Court Head Supports Use of Prenuptial Agreements", Jerusalem Post, June 2, 2008, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1212041459905>

proposal and has reached a decision not to implement at this time. As noted, prenuptial agreements do not stand well under British law. As a member of the Law Group stated: "there is no statutory basis for relying upon PMAs in England and it is not on any parliamentary timetable for statutory reform. Whilst judicial authorities have given indications that they would wish such agreements to be binding, there are considerable jurisdiction issues which your draft document imposes." The Family Law Group also believes that "the number of cases where there are difficulties with *gittin* in any one year is limited to under a handful". [ED. NOTE - The Family Law Group may be contacted through Sarah Anticoni, Sarah.Anticoni@charlesrussell.co.uk] Having taken these two points under consideration, nevertheless this material is presented to the English public to be used by individuals, or institutions who may feel the need to make use of it. The law regarding prenuptial agreements may change in the future—as indicated in the case of *Crossley v Crossley* by the Honorable Lord Justice Thorpe.¹⁵ Lord Justice Thorpe called for legislation to clarify the status of prenuptial agreements in England, stating that there was a "strong argument" for legislation, given that the European Union considered it important to tackle the differences that existed on property-sharing between member states.¹⁶ At such time that there will be legislation establishing the legal basis for the enforcement of prenuptial agreements it is the authors' hope that this proposal will serve as the foundation which is prepared and waiting for others to build upon.

VI. Conclusion

From these pages a call goes out to the Rabbinat of British Jewry to issue a resolution similar to that of the Rabbinical Council of America:¹⁷

"RESOLVED that since there is a significant *agunah* problem in America and throughout the Jewish world, the Rabbinical Council of America declares that no rabbi should officiate at a wedding where a proper prenuptial agreement on *get* has not been executed."

The prenuptial agreement for the prevention of *get*-refusal is an attempt to reconcile the two separate legal systems which exist in tandem for a given individual—the Orthodox Jew in the Diaspora—via a framework which incorporates the rules of both. British Jewry would do well to consider the *agunah* problem on a societal level and search out all means possible to eradicate it until the possibility of any woman finding herself an *agunah* in England does not exist. It is indeed within their reach.

¹⁵ Susan Mary Crossley v Stuart James Crossley (2007) CA (Civ Div) 19/12/2007 before the Honorable Lord Justice Thorpe, Lord Justice Keene and Lord Justice Wall.

¹⁶ Frances Gibb, "Divorcee worth £18m fights for a slice of fourth husband's fortune", *The Times*, December 20, 2007, <http://business.timesonline.co.uk/tol/business/law/article3075995.ece>.

¹⁷ May 18, 2006 resolution of the Rabbinical Council of America. See <http://www.rabbis.org/news/article.cfm?id=100772>.

APPENDIX
Proposed Prenuptial Agreement of Mutual Respect (PAMR)
for use in England

Prenuptial Agreement for Mutual Respect

Entered into in _____ on the date of _____

Between _____ I.D. _____ (to be called hereinafter: the "Man")

As one party;

And _____ I.D. _____ (to be called hereinafter: the "Woman")

As the second party;

Whereas The Man and the Woman (hereinafter: the "Couple") have mutually agreed to be married under Jewish law (hereinafter: the "Marriage"),

Whereas The Couple desire to act with respect for each other and resolve disputes among themselves with fairness in an agreeable manner,

Whereas The Couple have agreed to base their married life together on the grounds of love, harmony, peace, equality, respect, consideration, fairness and mutual concern,

Therefore, the Couple agree as follows:

Definitions

All Actions to Exercise the Obligations:

The Sender may apply to the civil court for a maintenance pending suit order and notwithstanding the success of that application, a final ancillary relief order in the exact terms of the Obligations.

Base payment:

A periodical payment that the court orders one party to pay to the other for the latter's maintenance that the court views as fair in the circumstances of the case regardless of whether the Jewish Marriage is terminated.

Obligations:

Obligations of the other party as set forth in clause E' or F', as applicable.

Termination of the Marriage (For purposes of the Obligations set forth in Clauses E' and F'):

The end of the Marriage between the Couple under Jewish Law without any reference or stipulation in any manner or form to other matters that are associated with or are

related to the Termination of the Marriage. This includes: child custody, maintenance and education issues, financial support, judicial authority, or any other related matters (hereinafter: "**Other Matters**"). It is understood that a woman who consents to end the marriage in accordance with Jewish law, even if she does not consent to the terms or demands of the Other Matters, shall not be deemed as refusing to terminate the Marriage.

The Act:

The Matrimonial Causes Act 1973, as amended by the Divorce (Religious Marriages) Act 2002.

Preamble

A. The preamble to this agreement constitutes an integral part thereof.

The Notice

- B. 1. A party who desires to live apart from the other may deliver written notice to the other party (hereinafter: "**Notice Recipient**") wherein the sending party (hereinafter: the "**Sender**") requests to exercise the obligations of the other party as set forth in clauses E' or F', as the case warrants (hereinafter: the "**Notice**").
2. The sending of a Notice by one party shall not prevent the sending of a Notice by the other party as well.
3. The Notice shall be hand-delivered or dispatched by registered mail or an alternative method of delivery in accordance with the Rules of Civil Procedure, 5744 - 1984.
4. The date of delivery of the Notice shall be called herein: the "**Notification Date**".
5. The Sender may revoke the Notice in writing and may independently choose to resend it.

The revocation of a Notice shall not affect the validity of a Notice sent by the other party.

Rehabilitation of the Marriage

- C. 1. The Notice Recipient may request to rehabilitate the Marriage with the help of a professional counselor accepted by both parties (hereinafter: "**Marriage Counselor**"). In the absence of an agreement among the parties as to the identity of the Marriage Counselor, the Marriage Counselor shall be appointed by the Jewish Marriage Education Council, 529B Finchley Road, London NW3 1AJ.
2. In the event of a request pursuant to clause C1 above, the Couple undertake to appear before the Marriage Counselor for up to three sessions. The Couple shall share equally in the payments for the sessions with the Marriage Counselor.

3. The Marriage Counselor shall, no later than 180 days from the Notification Date, deliver a letter to each member of the Couple which will state if the Couple had or had not reached an agreement to rehabilitate the Marriage. The letter shall also state if, in the Counselor's opinion, further counseling would assist the Couple in rehabilitating their marriage, notwithstanding the fact that an agreement had not been reached by the Couple to rehabilitate the Marriage.

The Period

D. 1. If 180 (one hundred and eighty) days have passed since the Notice was delivered by one party on the Notification Date (hereinafter: the "Period") and the Couple have not reached an agreement to rehabilitate the Marriage and the Marriage Counselor has not written that in the Counselor's opinion further counseling would assist the Couple in rehabilitating their marriage, then the Sender may file a petition for an English civil divorce and make an application under English civil law for ancillary relief.

2. If the Marriage Counselor had stated that, in the Counselor's opinion, further counseling would assist the Couple in rehabilitating their marriage - the Period shall be extended by an additional 90 days (hereinafter: the "Extended Period") and clause C (2) shall apply to the Extended Period. A party that files a petition for an English civil divorce or makes an application under English civil law for ancillary relief before the Period, or the Extended Period as applicable, has expired will not be acting in accordance with the spirit of this agreement.

3. Upon the petition for an English civil divorce being filed (by either party, whether before or after the expiration of the Period or Extended Period, as applicable), the Sender may take All Actions to Exercise the Obligations of the other party.

4. The Sender may, in writing, extend the Period or reduce this extension. The extension of the Period by one party shall not extend the relevant period in respect to the sending of a Notice by the other party.

5. The Couple expressly agree that:

A. The duration of the marriage counseling, as set forth in clause C', is included as part of the aforementioned Period and Extended Period (where applicable), and shall not be extended even if three sessions with the Marriage Counselor were not held.

B. Notwithstanding clause C' (2), the Sender of the Notice may take all steps to exercise the Obligations at the expiration of the Period and the Extended Period (if applicable) in any event, except in the event that a Marriage Counselor was appointed and the Sender of the Notice failed to appear upon a summons by the Marriage Counselor, as stated above.

The Obligations of the Couple

E. **Obligations of the Man:**

1. The Man hereby now (*me'achshav*)¹⁸ obligates himself to make monthly maintenance payments to the Woman in the greater of the following two sums:
 - A. The British pound equivalent of \$1,500 (one thousand five hundred U.S. dollars) according to the representative rate of the dollar published at the time payment becomes due.
 - B. A sum constituting 50% (fifty percent) of his mean monthly (net) income of the year preceding the Notification Date.

Notwithstanding this obligation of maintenance payments by the Man, the Woman agrees that she will be satisfied with the financial support she receives, as customary and lawful from the date of the Marriage until the expiration of the Period and the Extended Period (if applicable).

2. This **Obligation** by the Man is not dependent on earnings received by the Woman from a salary, wages, property or any other source, and may not be deducted from any type of debts owed to him by the Woman.
3. Notwithstanding the Man's **Obligation** to make monthly maintenance payments as set forth in subclause 1, the Man, hereby now (*me'achshav*) waives all lawful rights to income generated by the Woman during the period in which the Woman is entitled to implement/exercise the Obligations.
4. These Obligations are fully valid and enforceable regardless of any action or omission by the Woman.
5. Notwithstanding subclause 4, these **Obligations** are rescinded if the Woman refuses a Termination of the Marriage.
6. If the civil court that deliberates on the issue orders the Man to pay the Woman a **Base Payment**, that base payment should be included within the sum to be paid under subclauses 1A and 1B, as applicable, set out above. The rescission of the **Obligations** under subclause 5 shall not affect the Man's obligation to pay the Base Payment.

F. **Obligations of the Woman:**

1. The Woman hereby now (*me'achshav*) obligates herself, to make monthly maintenance payments to the Man from the expiration of the Period and the Extended Period (if applicable), in the greater of the following two sums:

¹⁸ The term "*me'achshav* " is necessary hebrew legal terminology—as are all italicized halakhic terminology following. It is used (as are the other terms) in the US agreements without any problem.

- A. The British pound equivalent of \$1,500 (one thousand five hundred U.S. dollars) according to the representative rate of the dollar published at the time of actual payment.
- B. A sum constituting 50% (fifty percent) of her mean monthly (net) income of the year preceding the Notification Date.
2. This Obligation by the Woman is not dependent of earnings received by the Man from a salary, wages, property or any other source, and may not be deducted from any kind of debts owed to her by the Man.
 3. Notwithstanding the Woman's Obligation to make monthly maintenance payments as set forth in subclause 1, the Woman, hereby now (*me'achshav*), waives all lawful rights to income generated by the Man during the period in which the Man is entitled to implement the **Obligations**.
 4. These **Obligations** are fully valid and enforceable regardless of any action or omission by the Man.
 5. Notwithstanding subclause 4, these **Obligations** are rescinded if the Woman agrees to a Termination of the Marriage.
 6. If the civil court that deliberates on the issue orders the Woman to the pay the Man a Base Payment, that Base Payment should be included within the sum to be paid under subclauses 1A and 1B, as applicable, set out above. The rescission of the Obligations under subclause 5 shall not affect the Woman's obligation to pay the Base Payment.

Child Support

- G. 1. The Couple undertake to jointly support the children born to them, including the value of their care.
2. The Couple expressly agree that a party's obligations under subclause 1 are in addition to that party's Obligations under clauses E' and F', as applicable. The latter obligations relate solely to maintenance payments to be made by one party for the benefit of the other party.

Reservation of Rights

- H. With the exception of the foregoing, this agreement shall not prejudice the rights of the Man and/or the Woman and/or the children and/or any other relief available to any of the Couple and/or the distribution of property between the Couple, as obligated by law and/or by an agreement among the parties and/or the practice of the State.

Validity of the Agreement

- I. The Couple desire to validate this agreement in accordance with Jewish law, **the Act** and all other laws.
- J. In exercising its powers to make financial orders under the Act, the Couple ask the court to note the following:
The sums set out in clauses E' and F' above were calculated in accordance with Jewish Law. Any alterations to these sums may render them and any subsequent **Termination of the Marriage** invalid under Jewish Law. The sums were not calculated with reference to the health or wealth of either party.
- K. The Couple agree that if any section of the agreement is disqualified, stricken, rendered invalid, unable to be performed or effectuated, the surviving sections of the agreement shall remain intact and fully enforceable.
- L. The delay by one of the Couple in claiming a right granted to said party under this agreement, shall not be considered a waiver of any such right.
- M. The parties hereby acknowledge the following, for the purposes of Jewish Law:
 - (1) If a disagreement arises among the deciders of Jewish law regarding the validity of the agreement or any provision therein under Jewish law, the Couple shall adopt the method that grants validity to the surviving clauses of the agreement. Each of the Couple undertakes to pay the other side any sum, and grants the other party all rights in accordance with the method granting validity to the surviving provisions of the agreement, such that the Jewish law mechanism of *kim li* may not be asserted.¹⁹
 - (2) All of the obligations in this agreement are effective immediately as obligations creating personal liability (*shi'abud haguf*), executed in an Esteemed Beit Din (*Beit Din Chashuv*) and should not be regarded as an indecisive contractual obligation (*asmachta*) or as a stereotyped form (*ketufsei shtarot*).
 - (3) Rather this document shall be regarded as a valid monetary document like those customarily used according to the traditions of Israel, in proper form and in accordance with the rulings of our rabbinic sages of blessed memory.
 - (4) All of the above stated conditions are made in accordance with the laws of the Torah, as derived from the Book of Numbers Chapter 32 (*tna'ei bnei gad v'reuven*). Both parties have stipulated that they will not invoke the release of obligations of the Sabbatical Year.
 - (5) The validity of this agreement shall be as the validity of all documents legislated by our sages of blessed memory, and the parties hereby render null and void any previous declarations (*modaot*) and/or implied statements (*moda'ei modaot*) that they may have made, no matter how far-fetched or distantly implied, that could harm the validity of this agreement and declare invalid any witnesses that may testify to any such declarations or implied statements.

¹⁹ This clause, preempting any future attempt at claiming "*kim li*", can play an important role in an Israeli Rabbinical Court. However, if the London Beth Din agrees to the validity of the document without it, then it can be removed. Considering the interaction between the PAMR and the English Court, it is possible that this clause will only plant doubt into the civil courts' mind about its validity under Jewish law ("If a disagreement arises among the deciders of Jewish law regarding the validity of the agreement or any provision therein under Jewish law..."), therefore the agreement may be clearer without this clause.

(6) The parties have accepted all of the above obligations via an accepted effective halakhic means of transaction (*kinyan hamo'il*), and by an oath of the Torah (*shvua*).

(7) The signatures of the parties on this document shall be an admission (*hoda'a*) to the declarations stated herein

- N. A clause that is rejected may be deleted by the drawing of a line through the clause accompanied by the abbreviated signatures of the Couple next to the deletion. Changes to this agreement shall not be effective unless made in writing with the approval of the competent judicial body
- O. The headings in this agreement are for convenience sake only and shall not be accorded any significance in the translation of the agreement.
- P. Any agreement or document that will be executed by the Couple subsequent to the signing of this agreement, which does not contain an explicit reference to this agreement, shall be interpreted in accordance with and subject to the wording and provisions of this agreement.
- Q. The Couple acknowledge and represent that they have read the agreement, that it was explained to them, and that they are signing this agreement of their own free will, in the absence of any coercion, after having been given an opportunity to consult with any person they so desired, including legal counsel and an advisor on Jewish law

SIGNED BY:

The Man

The Woman