

A Conversation about the Prenup

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One of the major issues currently affecting the religious community is the issue of the modern-day *agunah*—a woman who is trapped in a marriage that has functionally ended, but has not been halachically terminated because her husband has refused to give her a *get*, a Jewish writ of divorce. Sometimes this refusal is temporary and is simply a manifestation of the anger and confusion that surrounds the initial stages of a divorce. However, the withholding of a *get* is often used as leverage by a husband to extract concessions from his wife during their divorce negotiations, such as a more favorable custody arrangement or a reduction in child support or maintenance (alimony) payments. Since 1992, the Beth Din of America (BDA), in conjunction with leading rabbinic and legal scholars, has promulgated the BDA Prenuptial Agreement (the “Prenup”),² which quickly has become the most viable and far-reaching solution to this modern-day *agunah* problem.³

Through my work as Administrative Attorney at the BDA, I am routinely asked questions about how the Prenup practically works. This article is meant to address the most commonly asked questions in order to give the layperson a fuller understanding of how the Prenup operates. This article, however, is not intended to be a comprehensive halachic or legal analysis of the Prenup.

Can you explain what the Prenup is and what it does? I thought a prenuptial agreement deals with financial arrangements in case of a divorce, I didn’t think it had anything to do with a *get*.

Generally, a prenuptial agreement signed in the secular world is a written contract between two people who are about to marry, which sets out the terms surrounding the treatment of assets should the marriage ultimately terminate. Like all such agreements, the Prenup is a written agreement that is properly witnessed and notarized and entered into by a *chassan* and *kallah* prior to their wedding. However, unlike a secular prenuptial agreement, the goal of the Prenup is

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² The latest version of the Prenup can be found at www.theprenup.org.

³ It should be noted that although the Prenup generally addresses the problem of a man who refuses to grant a *get*, there are situations in which a man requests a divorce from his wife and the woman refuses to accept a *get*. The BDA is committed to helping all individuals, male or female, obtain a *get* in a timely manner.

not to stipulate the manner in which assets are to be divided in the event of a divorce.⁴ Rather, the objective of the Prenup is to ensure that certain procedures surrounding the *get* ceremony occur in the event that a couple decides to divorce.

There are two main provisions of the Prenup that work together toward the goal of preventing an *agunah* situation. These provisions state that:

- If so requested by either party, both spouses agree to (i) appear before a panel of *dayanim* (judges) arranged by the BDA, (ii) discuss when the *get* ceremony should occur and (iii) abide by the decision of these *dayanim* with respect to the timing of the *get* ceremony, and
- If the couple physically separate and is no longer living together in one home, the Jewish law obligation of the husband to support his wife is formalized, and the husband is obligated to pay \$150.00 per day (indexed to inflation), from the date he receives written notice from the wife of her intention to collect that sum, until the date a Jewish divorce is obtained.

Together, these two provisions ensure that a *get* is given in a timely manner while providing a financial incentive for the husband to abide by the decision of the *dayanim* with respect to the timing of the *get*.

One might think that the Prenup seems to disproportionately favor the wife. What is to stop a woman from requesting a *get* and then dragging out the process to ensure a large payment from her husband?

The Prenup is meant to ensure that a *get* is given in a timely fashion. It is not meant to be used as a means to extract money from a husband who is ready and willing to give his wife a *get*. It is important to note that the Prenup gives the *dayanim* discretion to decide when the support obligation begins once it is requested by the wife. Therefore, if a woman requests a *get*, the parties promptly agree on a date to appear before the *dayanim*, and the husband appears before the *dayanim* and abides by their decision regarding the timing of the *get*, little or no support obligation would be justified. Additionally, the Prenup states that the support obligation terminates should the wife fail to appear at the BDA or to abide by a decision of the *dayanim*.⁵

Does the Prenup really work to ensure that a *get* is given in a timely fashion?

The answer to this question is a resounding yes. Anecdotally, I can say that when we speak to parties on the phone regarding an impending divorce there is an implicit understanding by the majority of couples who have signed the Prenup that the *get* is a non-negotiable issue since the parties are bound by the agreement they signed prior to their marriage. The Prenup is a legally enforceable document and is based on well-settled principles of contract law. As such, attorneys in these cases routinely advise their clients that the Prenup will hold up in court and it is not worth the energy or money that would be necessary to contest the document. Finally, there have

⁴ It should be noted that the relevant portions of the Prenup can be incorporated as part of a larger prenuptial agreement. See <http://www.theprenup.org/prenupforms.html> for the appropriate language.

⁵ For further information see R. Mordechai Willig, "The Prenuptial Agreement: Recent Developments," *The Journal of the Beth Din of America* I (2012): 12.

been a number of highly contentious divorces that have occurred under the auspices of the BDA in which every issue was highly litigated, but where the Prenup was effective in ensuring that the *get* could not be used for leverage. The Prenup effectively stopped any argument for delaying the granting of the *get*.

I understand the importance of the Prenup for some couples, but I am certain that my marriage will work out. Why would I want to think about divorce during the happiest period of my life?

This is probably the most often heard objection to the Prenup. Understandably, many couples feel uncomfortable discussing the possibility of divorce during their engagement. There are two primary answers to this question that may help minimize this uneasiness:

1. *The signing of the Prenup is an expression of respect for your fiancée:* Although we hope that each and every marriage will work out, the reality is that this is not the case. While the signing of the Prenup may introduce fleeting, unhappy thoughts into the engagement period, this action is really an expression of mutual respect for one another. By putting your initial discomfort aside, you and your fiancée are committing to each other that regardless of what happens in the future, each of you will treat one another with dignity and respect should you be in the situation to need the Prenup.
2. *Sign it for someone else:* You have a wonderful relationship with your fiancée that will, with a lot of hard work and *siyata deshmaya*, develop into an even better marriage. However, the same may not be true for all couples. If the signing of the Prenup becomes universally accepted, then it will be there to help those couples for whom divorce becomes a reality. You therefore should approach the signing of the Prenup as an action that effectively will help others by making the Prenup standard practice among engaged couples.

I want to sign the Prenup, but I am nervous to bring up this issue with my fiancée and/or my future in-laws. Do you have any suggestions on the best way to do this?

Although engagement is one of the happiest times in a couple's life, it can be an extremely stressful period. Even small disagreements can potentially turn into major battles that threaten the integrity of newly formed relationships. While it is understandable to be nervous to speak about the Prenup with your fiancée and your future in-laws, it is nonetheless critical to have this conversation with them. The discussion should be couched in a manner that conveys that the signing of the Prenup is not an indication of your doubts regarding the viability of the marriage, but rather, as discussed above, it is an indication of your respect for your fiancée and a necessary step in the attempt to obliterate the modern day *agunah* problem.

If you really think this discussion would not be successful, it would be beneficial to confidentially discuss this issue with your parents and/or a trusted rabbi, rebbetzin, mentor or *chassan* or *kallah* teacher. It should be noted that many rabbis will not serve as a *mesader kiddushin* (officiator of the wedding) for a couple who has not signed the Prenup. It is advisable to contact your *mesader kiddushin* to find out his position on this issue and to ascertain if he is willing to speak with your fiancée or future in-laws about the Prenup.

What if I may live in Israel one day or I am getting married abroad. Should I still sign the Prenup?

If you are getting married in the United States, it is advisable to sign the Prenup regardless of any plans to live abroad. If you are getting married abroad but plan on living in the United States, you should sign the Prenup regardless of any temporary residence abroad or plans to move abroad in the future. If you are getting married abroad and plan to settle permanently abroad, please contact the BDA for more detailed advice.

I have a relative who is a lawyer and she wants to change some of the wording of the Prenup. Is that okay?

Certain portions of the Prenup can be altered, however it is very important that the BDA is consulted regarding any changes, to ensure that these alterations do not affect the halachic or legal enforceability of the document.

What should I do with the Prenup once it is signed and notarized?

The BDA recommends sending the original Prenup to us so it can be entered into the Prenup registry maintained by the BDA. The signed Prenup can be e-mailed to prenup@bethdin.org, faxed to 212.807.9183, uploaded using the upload function at www.theprenup.org or mailed to 305 Seventh Avenue, 12th Floor, New York, NY 10001. Copies should be made and kept by you as well as another party (such as a family member) in the event that it is needed.

Who can I contact if I have more questions about the Prenup?

Please call the BDA at 212.807.9042 or e-mail info@bethdin.org and we will be happy to discuss your questions or concerns about the Prenup.