David Joseph Mescheloff

Rabbi Dr. David Mescheloff received *semikha* from R. Aaron Soloveichik, and Israeli rabbinic certification from Chief Rabbis Abraham Shapira and Yisrael Meir Lau, and served as a kibbutz and a community rabbi in Israel. He holds a Ph.D. in mathematics, lectures widely, and has authored many Hebrew papers on topics in halakha and Jewish thought.

A Marital Agreement to Mediate

INTRODUCTION

Prenuptial agreements have been discussed many times in *Tradition*.[1] Much effort has gone into searching for a "halakhically and legally valid"[2] marital agreement that will help alleviate the contemporary

[1] An early treatment was Judah Dick, "Is an Agreement to Deliver or Accept a *Get* in the Event of a Civil Divorce Halakhically Feasible?" *Tradition* 21:2 (1983), 91-106. Another was J. David Bleich, "The Device of the 'Sages of Spain' as a Solution to the Problem of the Modern-Day *Agunah*", *Tradition* 22:3 (1986), 77-87. Indeed, R. Bleich has addressed this issue several times, as in "A Suggested Antenuptial Agreement: A Proposal in Wake of *Avitzur*", *Journal of Halacha and Contemporary Society* 7 (1984), 25-41. See also Jonathan Reiss and Michael J. Broyde, "Prenuptial Agreements in Talmudic, Medieval, and Modern Jewish Thought," in *Marriage, Sex and Family in Judaism: The Past, Present, and Future*, ed. Michael J. Broyde, and Michael Ausubel, 192-213 (Rowman and Littlefield, 2005), for an analysis of the use of prenuptial agreements, with an emphasis on their use today. See also Michael Broyde, "An Unsuccessful Defense of the *Beit Din* of Rabbi Emanuel Rackman: *The Tears of The Oppressed*" by Aviad Hacohen, *Edah Journal*, www.edah.org/backend/JournalArticle/4_2_Broyde.pdf.

[2] In Tevet 5759 (January 1999), the heads of RIETS addressed their rabbinic colleagues and students in an open letter, to "strongly urge all officiating rabbis to counsel and encourage marrying couples to sign …a halakhically and legally valid prenuptial agreement." No particular agreement was specified in this call to action. I examined seven different halakhic attempts to solve the contemporary *aguna* problem, and a dozen different proposed prenuptial agreements, in "Prenuptial Agreements" [in Hebrew], *Tehumin* 21 (Alon Shevut: Zomet, 5761/2001), 288-323. In May 2006, the Rabbinical Council of America reaffirmed earlier resolutions, declaring "that no rabbi should officiate at a wedding where a proper prenuptial agreement on *get* has not been executed." The Rabbinical Council of America and the Beth Din of America currently encourage the use of an agreement that can be seen on their internet sites: http://www.rabbis.org/Prenuptial_Agreement.cfm, and http://www.bethdin.org/agreement.asp.

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aguna problem, which is caused by a live spouse who refuses to cooperate in the delivery of a *get*. Indeed, this has remained a vexing problem that has motivated aggressive attempts to find solutions.[3]

Believing that no other valid and effective agreement exists, many rabbis use an agreement in which a man voluntarily undertakes "increased support (*mezonot*) payments," relying on the authority of the great *poskim* who approved such an agreement for use in America. Since the man's financial obligation will remain in effect as long as the couple is married according to Jewish law, it is expected that he will feel pressed to give his wife a *get*, in order to free himself of that expense.[4] Alternatively, it is expected that he will appear before a *bet din* to request that he be released from his obligation, and that the *bet din* will then use that opportunity to persuade the man to do the right thing and give his wife a *get*.

Nevertheless, many rabbis have refrained from using that agreement, since other great *poskim* have expressed their opposition to it.[5] Indeed,

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See also Kenneth Auman and Basil Herring, eds., "The Prenuptial Agreement: Halakhic and Pastoral Considerations" (New Jersey: Jason Aronson Inc. 1996).

[3] The obstinate misbehavior of an individual locked in a cruel power struggle with his spouse can infuriate anyone with a sense of justice and compassion. The individual suffering of *agunot* is horrendous. Denied enforcement authority by the modern secular state and limited by the fact that halakha rarely permits coercing a spouse to divorce, the halakhically committed community and its leaders may come to feel helpless. This combination of anger, pain and helplessness is intensified by frequent attacks on halakha, on the Torah observant community, and on its leaders by individuals and organizations, against the background of the *aguna* problem. All this combines to create a mood for using the most forceful, legitimate means possible against the recalcitrant spouse. In this paper we propose that using a less aggressive approach is more effective and more in consonance with Jewish law.

[4] The idea that every groom enter a legally binding civil contract stipulating that he would support his bride to the extent provided by Jewish law, so that a Jewish husband would still be bound by enforceable civil law to support his wife until giving her a *get*, even if they had been divorced civilly, was first proposed by R. Dr. Elyakim Ellinson in the Tammuz-Sivan 5731 issue of Sinai (see J. David Bleich, *Contemporary Halakhic Problems* vol. 1, 154-159 (New York: Ktav 1977)).

[5] Rachel Levmore wrote of "Rabbinic Responses in Favor of Prenuptial Agreements," in *Tradition,* 42:1 (2009), 29-49. That "rabbis favor a prenuptial agreement" is self-evident—the *ketuba* is a prenuptial agreement! The question is which specific agreements rabbis favor and which they oppose, and why (see my article, note 2). Unfortunately, besides the correct information about the RIETS and RCA statements, that article seems to contain numerous significant inaccuracies, which I hope to address in more detail elsewhere. Here are two examples. First, Levmore stated that "R. Yosef Dov Soloveitchik expressed his approval of the agreement." However, the only reference she provided for this was a student publication at Yeshiva University. To borrow a phrase from the

the RCA reports that it is "always looking for ways to improve this already excellent document."[6]

I present here a marital agreement that takes a different approach to this issue. It is a "Marital Agreement to Mediate." Adapted for use in America and offered by the RCA to rabbis as an additional option, it will significantly strengthen the effort towards achieving spousal cooperation in divorce, while avoiding the halakhic and practical problems that have been raised regarding "increased support payments."[7]

Talmud (*Yevamot* 22a), R. Soloveitchik "did not sign that statement." Of at least equal weight to that student publication are the private reports I have received from some of R. Soloveitchik's students, members of the RCA, who were present when he responded on the matter, and they report no such approval. Moreover, since "the agreement" in question went through numerous stages of development, and the details are of utmost significance in determining halakhic validity, R. Soloveitchik's approval of one prenuptial is not equivalent to his approving all prenuptials. Second, Levmore stated that R. Moshe Feinstein supported the use of prenuptial agreements. However, his opposition is reported in R. Shalom Mashash, *Shemesh u-Magen* (Jerusalem: 1984), *Even ha-Ezer*, *siman* 11, a responsum to which Levmore referred, while ignoring its reference to R. Feinstein's opposition. R. Feinstein did approve of an agreement in which the bride and groom gave their word that they would cooperate in a divorce proceeding if a *bet din* would order them to do so (*Iggerot Moshe*, *Even ha-Ezer*, 4:107). That is no more "halakhically binding" than Jewish law is already, without any such "prenuptial agreement." Yet even that mild undertaking was accompanied by R. Feinstein's admonition that the rabbi must know both bride and groom well, and refrain from proposing such an agreement if doing so before their wedding might lead to strife. See more below, notes 20 and 22.

[6] See http://www.rabbis.org/news/article.cfm?id=100790.

[7] See my article in *Tehumin* (note 2 above). See also http://thejewishstate.net/nov2009prenups.html, the report of a presentation of the RCA-BDA agreement to students at Rutgers University in November 2009. *Inter alia*, the presenter pointed out that the agreement is not recognized in Canada. It should be noted, as well, that nonpayment of *mezonot* is a chronic problem of major proportions in Israel, casting serious doubt on the effectiveness of the obligation to pay "increased *mezonot*" as a means to press a husband to give his wife a *get*. The most substantial "pragmatic reason" presented at Rutgers "for signing the prenuptial was that divorces are often long, bitter, and expensive battles, and instead of both sides running out of money before reaching a settlement in court anyway, it's wiser to make a pre-marital pact to skip the fighting and settle right away. There is even a romantic reason for signing prenuptials … because spouses promise each other when they marry that they will get through tough times. A prenuptial ensures that even if a marriage collapses, spouses will not harm each other, making it a document that starts off the marriage with a foundation of mutual respect..." As we will show below, these are actually reasons to prefer the Marital Agreement to Mediate over all other current prenuptials.

The Marital Agreement to Mediate is based on a complete acceptance of the principle that halakha requires mutual agreement for divorce in all but a few extreme cases that no prenuptial is likely to resolve. It is also based on the belief that people can be brought to agree with the aid of wise professional help, and on the conviction that doing so is preferable to continuing the power struggles between them. Thus the agreement is in complete consonance with both the letter and the spirit of the Jewish law of divorce. Since it does not coerce or pressure people to divorce against their will, it carries no risk of causing the disqualification of a *get* on the grounds of halakhically illegitimate coercion to divorce (*get me'useh she-lo ka-din*).

First composed almost twenty-five years ago, the Marital Agreement to Mediate was implemented in Israel for the first time in 1988, after it had earned the approval of world renowned halakhic authorities, *poskim* and *dayyanim* (partially detailed below). It does not rely on halakhic minority opinions or innovations. It uses a halakhically valid form of self-obligation as a powerful means of motivating compliance. The method is not an *asmakhta* (an undertaking that is not binding, on the grounds of insufficient sincerity), and is used in *batei din* in Israel today.

The Marital Agreement to Mediate is completely egalitarian in its formulation, and helps men and women equally. It does not insult either partner as they enter marriage by casting doubts on their future behavior. Radically different from all prenuptial agreements in contemporary use, the Marital Agreement to Mediate is not threatening, and need not be entered into in haste or under pressure before the wedding. Moreover, it does not support, enable or encourage unilateral divorce or divorce on demand.

The agreement has successfully prevented *aginut.* The agreement will not solve all *aguna* problems—but that is true of all agreements. Indeed, a variety of approaches is necessary to solve any problem as complex as this one. As with most complex, long-term social problems, the *aguna* problem, too, must also be addressed through a combination of non-halakhic actions, including education, marriage preparation, marital counseling, and mediation.

AGREEMENT – THE KEY TO JEWISH DIVORCE

The marital agreement we will present here is firmly rooted in a fundamental principle of Jewish divorce law, as it has been practiced for many centuries: the agreement of both husband and wife is a necessary prerequisite

for divorce. The requirement that a *get* be delivered by the husband of his own free will is of Torah origin.[8]The requirement that the wife's receipt of the *get* must be of her own free will reflects the early medieval authorities' desire to protect women from arbitrary unilateral divorce implemented without the supervision of a *bet din*.[9]

The requirement of mutual agreement has several additional benefits. First, it enables each spouse to prevent the dissolution of the marital bond and the family, if he or she believes there is a genuine prospect that harmony can be restored to their home. Second, it prevents normal marital strife from leading too easily to unnecessary divorce, coerced by a momentarily unhappy spouse aided by well-meaning family, friends, and legal advisors. Third, if divorce were perceived as an easy solution to marital discord, husbands and wives might prefer divorce to making the effort necessary to live together in harmony. Fourth, the requirement of mutual agreement prevents the violence and the social chaos that might erupt if coercing a husband or a wife to divorce were socially acceptable and legally effective. Fifth, it enables each spouse to protect his or her rights, if he or she feels unjustly exploited in the divorce process, or that they are being forced into an unsatisfactory position. Thus this halakhic principle is aimed at encouraging marital stability and justice.

Marriage is a comprehensive relationship with intimate personal, spiritual, emotional, financial, social, legal and religious aspects. It has far-reaching ramifications for the emotional and spiritual health of the next

[8] See *Mishna Yevamot* 14:1, Maimonides *Hilkhot Gerushin* 1:1-2, and *Shulkhan Arukh Even ha-Ezer* 119:6. I described the rationale for this in detail, in the overall legal-theoretic context of all possible nuptial relations recognized in halakha, in "Jewish Divorce Given Freely or Under Duress, Imposed by Jews or by Gentiles, Legitimate or Not Legitimate – A Halakhic, Literary, and Historic Study of Tannaitic and Amoraic Literature and Its Applications in the Halakhic Decisions of the *Geonim* and *Rishonim*", (Hebrew) a doctoral dissertation in Talmud, (Ramat-Gan: Bar-Ilan University, 2002) 356pp. I also showed there that the Torah law requirement of the man's free will refers primarily to the time of the writing and the delivery of the *get*. Evaluating the degree of his free will at that moment based on earlier events, or disqualifying a *get* due to unacceptable coercion that was applied earlier, is a complex issue discussed there in full.

[9] "For [R. Gershon] saw that the generation had broken down the boundaries [of decent behavior], and that they related with disrespect to the women of Israel by throwing a *get* [into her possession against her will]; so he established that women should have rights equal to a man's. Just as a man effects divorce only [if he does so] willingly, so a woman's divorce from her husband is valid only if [she received it] willingly" (R. Asher ben Yehiel, responsa 42:1, quoted by *Helkat Mehokek* 77:3).

generation. Thus, precisely as marriage must be entered into only by the willing agreement of both parties, so it should be dissolved only by their mutual agreement.[10]Indeed, from a civil rights perspective, this principle seems to be ideal: Jewish law insists that people's most intimate personal marital status must be determined by the two individuals involved, and not by any social or legal institution. The principal function of the halakhic institution of *bet din* is to supervise and record the formal process.

The principal disadvantage of the requirement of mutual agreement is the ease with which the right of refusal can be misused. A man or a woman may refuse to cooperate, holding a spouse hostage in a clearly dead marriage, with the aim of hurting the spouse, or of forcing the spouse to agree to unjust terms of divorce. Since divorcing couples generally are hostile to each other, such misuse is a common occurrence. More women are victimized this way than men, which is why one speaks primarily of an *aguna* problem and not of a "chained husband" problem. Nevertheless, misuse of the right of refusal is known to occur both ways.

Halakha is quite strict about protecting each spouse's right to divorce only of his or her free will, with only few exceptions. Thus Jewish courts are generally restricted from using coercion or pressure in order to resolve cases of malicious recalcitrance. This has made it appear to some as if halakha supports such immoral behavior. In fact, however, no ethically committed Jew encourages such misbehavior; rather halakha seeks to gain the advantages mentioned above even in the presence of the risk of misuse.[11]The challenge we face is to maintain the advantages of the halakha requiring mutual consent while minimizing the possibility of misuse.

In Israel, the application of social and financial pressure by *batei din* has been found to be justified halakhically in fewer than five percent of divorce cases, and fewer than half of a percent are so extreme as to justify either physical coercion of the husband—through incarceration, or circumvention of the wife's refusal by permitting the man to remarry anyway. Thus *batei din* almost always insist that the husband and wife come

[10] There is a different school of thought that focuses more intently on the right of each individual to personal happiness, and justifies unilateral divorce. This attitude has been expressed by some halakhic authorities in earlier periods, yet it has not become the accepted practice in Jewish law.

[11] Even non-Jewish civil judges, although authorized by civil law to declare a couple divorced, recognize that such a step would be woefully unwise before the couple has resolved all the issues they must deal with as they divorce. Long, drawn-out, expensive, and traumatic divorces are common problems in the general population, and are not unique to Torah observant Jews.

to an agreement about the conditions of their divorce before implementing the formal divorce procedure. Indeed, in the more than 95% of cases where pressure and coercion are not justified, the couple ultimately reaches a divorce agreement—but it is quite often after a long, traumatic, and costly legal process. Some cases may drag on for many years, or remain unresolved as litigation proceeds endlessly.

DIVORCE MEDIATION

Litigation is, by its nature, a process in which each side accuses and makes demands on the other and defends itself from the other's accusations. In divorce, this process spirals, and becomes an expensive, drawn-out trauma. It is characterized by animosity, attacks, and counter-attacks. Relatives and friends rally around each side, fanning the flames of controversy. Sometimes this is encouraged by legal counsel, whose profession calls for an approach of accusation and defense, of trying "to defeat the opponent." If a couple has one or more children, they are typically pulled into the battlefield, and are often traumatized.

Divorce mediation is a process in which a professional third party—a mediator—helps two people who wish to divorce negotiate an agreement which is acceptable to both of them. This works even if initially only one of the couple wishes to divorce, but, upon examining their situation, both see that divorce is the wisest choice for both of them. The mediator generally works with both spouses together, but may also work with them separately, as the situation requires.

With the help of the mediator, the couple addresses issues of child custody and visitation rights, financial issues and property division. The mediator facilitates effective communication between the spouses, encouraging cooperation, maturity, and compromise, with the aim of helping them make decisions that are agreeable to both of them. Mediation improves communication channels and makes negotiations on complex issues smoother and less stressful. The supportive presence of a third party creates a non-threatening environment that can give each side the confidence necessary to make wise, mature decisions. The mediator can guide the way to eliminating or reducing stumbling blocks and to a more practical agreement.

Divorce mediators are trained to conduct themselves objectively and neutrally during negotiations. The mediator's aim is not to make decisions for the spouses, nor to decide who is right and who is wrong. A legal review ensures that the legal rights of mediating spouses are protected.

Divorce mediation generally costs much less than adversarial litigation. It is also generally a much shorter and more streamlined process than litigation. It could take a single day, but usually it takes place over the course of several sessions spread out over a few weeks or months. Since the details of the agreement are decided upon by the husband and wife of their own free will, mediation generally results in a more solid, stable agreement than working through the courts. This is of particular importance if the relationship between the parties will be ongoing, as is generally the case if they have children together.

Mediation is qualitatively different from arbitration, though both involve a neutral third party who is not a judge. In arbitration, the arbitrator gathers all the facts by listening to both sides, and then decides the case in the same way as a judge. The spouses have no say in the final decision made by an arbitrator. This is in sharp contrast to mediation. Mediators help spouses negotiate agreements; again, mediators do not make decisions for them.

Mediation is a different method of helping divorcing couples deal with the hostility between them. It provides an alternative to continuing the power struggles that may have characterized the deterioration of their married life. Mediation has come into widespread use over the course of recent decades.

No method solves all problems.[12] Mediation does not solve all problems. Some couples find communication with each other impossible even with help. However, there is evidence that suggests mediation produces agreement in 50 to more than 80 percent of cases.[13] Almost all divorcing couples initially believe communication is impossible even with help; one

[12] Prenuptials do not solve all problems. It seems likely that there is a process of self-selection that makes people who sign prenuptials likelier than others to cooperate in divorce. Even where this is not the case, it would appear that prenuptials work largely by creating a mental set in the mind of those who sign them; that is, their expectations of themselves are that they will behave decently in the event that they divorce. Indeed, this is also one of the ways in which the Marital Agreement to Mediate is effective.

[13] See Jay Folberg, Ann Milne, and Peter Salem, eds., *Divorce and Family Mediation: Models, Techniques, and Applications* (New York/London: Guilford Press, 2004). See also http://www.divorceinfo.com/doesmediationwork.htm. See also the list of articles at http://www.divorcesource.com/archives/mediation.shtml. Numerous conditions have been identified that indicate when mediation is likeliest to succeed. However, even if one or more of the indicators does not hold concerning a given couple, with proper timing and guidance by a mediator, the two sides can often be brought together for successful mediation. A great deal depends on the professional and personal skills of the mediator.

of the first challenges a mediator often faces is to demonstrate to the couple that that is not the case. In cases of domestic violence or substance abuse some degree of legal and other professional help may have to be combined with mediation.

THE MARITAL AGREEMENT TO MEDIATE[14]

The agreement we are presenting here combines the idea of a binding prenuptial agreement with the practice of mediation. It is unique in several principal features.

First, the genuine, direct aim of the agreement is to bring both sides to free-will cooperation, so that the halakhic requirement of mutual agreement will be used to each side's advantage and will not be abused. Second, the driving force behind the agreement is the promise of reward for cooperation—postponement of the due date of a pre-existing debt. Third, the agreement encourages beginning the process with marriage counseling when that is appropriate. Fourth, it includes a means of encouraging the spouses to return to cooperation in the mediation process if they reach a temporary impasse. Fifth, it is completely egalitarian. Finally, if either spouse insists that strict justice be done rather than the kind of compromises that characterize mediation, the option is left open to do so according to halakha; there is no attempt to give the couple or anyone else powers that belong to a *bet din*.

The halakhic method used in the Marital Agreement to Mediate is the formal admission of the existence of a debt subject to stipulations. This method is used in practice in *batei din* in Israel today.[15] Clearly, one who creates a debt by his own admission—a debt which exists on the

[14] The agreement has been revised since I first published it in *Tehumin* (see note 2) in three principal ways: –First, I leave open the option for an aggrieved party to contest the other's action in *bet din*, if he or she insists "that justice be done"; Second, I adjusted the mediator's role so that it accords with Israel's professional code of ethics for mediators, which did not exist when the agreement was first composed; Third, I cancelled the debt a year after a divorce agreement is reached, rather than making the cancellation contingent upon fulfillment of the stipulations in the divorce agreement.

[15] I observed this in a *bet din* in *Rehovot*, whose *Av Bet Din*, R. Isirer, is now a member of the *Bet Ha-din Ha-gadol* in Jerusalem. This method was used in *shtar hatzi zakhar* for hundreds of years, and has been proposed for contemporary use; see R. Z. N. Goldberg, "The Daughter's Inheritance (Towards the Renewal of the Practice of Writing A Bill for Half the Portion of a Male)" [in Hebrew], in *Tehumin* 4 (Alon Shevut: Zomet, 5743/1983), 342-353.

basis of his statement alone—has the authority to state what stipulations accompanied the debt, as long as doing so does not create a limitation or obligation on the "lender" that would not have existed otherwise.

Each spouse admits—in a separate document—that he owes the other a very large sum of money that was received from the other as a loan. However, each borrower notes that the loan was made subject to stipulations, which we will describe in broad terms here, and in more detail below. First, the due date of the loan is suspended as long as the borrower lives with the lender in harmony. If the lender invites the borrower to meet with a mediator, then a due date will be set for the debt; however, the borrower will be rewarded with a postponement of the due date if he or she meets with the lender and the mediator. They first examine the possibility of marital counseling. When marital counseling can help, this prevents unnecessary divorce. The due date is suspended again while the couple tries marriage counseling. If counseling does not help or if they decide that it is inappropriate, and mediation becomes necessary, then a due date is set, but again the borrower is rewarded with a postponement for participating in mediation. The mediator then has time to help the couple work out the divorce agreement that is a necessary prerequisite for the formal writing and delivery of a *get*. Ultimately, the debt is waived a year after the successful conclusion of the mediation.

The Marital Agreement to Mediate is designed so that people do not divorce if that is not appropriate. It does not provide husbands and wives with weapons to use against each other, enabling "divorce on demand." The agreement also does not arm a person with means to apply financial pressure to divorce where halakha does not justify the use of pressure or coercion. It does not seek to solve the problem of misuse of the right of free choice in divorce on the part of a few people by weakening that right for all couples. Mediation makes it possible for each partner to receive his or her due without harming the other. This is precisely the way that halakha prescribes going about divorce in almost all cases—by mutual agreement.

Thus the Marital Agreement to Mediate carries no risk of *get me'useh she-lo ka-din*, for three reasons: a) it creates pressure to mediate, not to divorce; b) mediation itself is a process in which both spouses make their own free-willed decisions; c) the agreement sets rewards, not fines or threats of fines—neither explicit nor implicit. Each party is rewarded for cooperation, at every stage, with the suspension of the due date of the pre-existing debt, and, ultimately, with its complete waiver.

Thus the aim of the Marital Agreement to Mediate is to alleviate the suffering of the 95% or more of divorcing couples who are required by halakha to divorce by mutual agreement. It saves them from sliding down

the slippery slope of hostility into a brutal, traumatic, and expensive legal battle. Without the Marital Agreement to Mediate, mutual consent may be difficult to obtain, due to hostility between the husband and wife. It is also hoped that some who may already have gone onto the track of litigation will step back from the brink and move on as smoothly as possible to better lives—which is what people hope for when they decide to divorce. As for the small but significant minority who cannot be brought to cooperate because of the extreme hostility that reigns between them, or because they feel so terribly wronged that they insist on their day in court, it seems likely that no prenuptial agreement would help them. Other means must be applied; in Israel, the agreement allows them to turn to *bet din* for adjudication.

The Marital Agreement to Mediate is completely egalitarian, obliging the woman towards the man precisely as it obligates the man towards the woman. This can solve the problem of a woman's arbitrary refusal to accept a *get* even when such acceptance is appropriate. It also removes the insult towards men that is common in prenuptial agreements that oblige only the man towards the woman. It is not surprising that a man would balk at entering a prenuptial agreement that relates to him as one who is suspected of being likely to behave in a dastardly fashion at some future time. It is also understandable that a woman about to marry the man she loves would balk at requesting that he enter into an agreement that may carry such an insult.[16]

The Marital Agreement to Mediate strengthens a different approach to divorce—mediation—by creating expectations in each partner's mind as to how they will solve their marital conflicts. If divorce ever proves necessary, a couple will not spend their family's assets and drag out the hostilities in a struggle to prove who is right and who is wrong.[17] Mediation is more effective, faster, less expensive, and less traumatic—especially for children—than divorce through litigation.

[16] This form of egalitarian agreement also avoids the transparent attempt to disguise what is really a fine as if it were *mezonot* (maintenance). This is one of the flaws of another agreement that has been advanced in Israel in recent years, in which the woman undertakes to pay the man "*mezonot*," a non-existent halakhic concept.

[17] R. Shlomo Daichovsky, a former *Av Bet Din* of the *Bet Hadin Hagadol* in Jerusalem, has written that it is preferable for a couple to compromise and divorce immediately, and to get on with their lives, rather than to waste their time, their strength, and their money in an attempt to prove who was at fault (*Techumin* 21 (Alon Shevut: Zomet, 5761/2001), 286-287). If the couple has children, they are the first to suffer from their parents' accusations and counter-accusations. As in other areas of life, it is preferable to behave wisely rather than to be in the right.

Although the agreement encourages "no-fault divorce," it does not make that the exclusive possibility. Nothing in the agreement implies any stipulation of relinquishing the right to seek punishment of the guilty one in court. While one must respond to the other's invitation to mediation, in order to receive the postponement of the due date, neither one of them has to issue such an invitation. However, if one of them so desires, he or she is free to refuse to cooperate in counseling and in mediation, and may present his or her case in *bet din*.

RABBINIC APPROVAL

Nearly twenty-four years ago, on 14 Kislev 5747, I brought a *kuntress* about prenuptials[18] to R. Yoseph Shalom Elyashiv, and described to him the Marital Agreement to Mediate.[19] R. Elyashiv confirmed that there is no prohibition or halakhic risk, and that there is no reason to refrain from using the Marital Agreement to Mediate.[20] However, he added, every couple must be given a full explanation about the significance of the agreement, personally. He was concerned lest some organization apply pressure to make the signing of such an agreement obligatory. In that case, he said, it is likely that a form would be handed to the couple to sign, whose significance they would not understand—and then the agreement would not be binding.

Since then it has been my practice to present the agreement to couples in two separate sessions. At the first session I give the couple a full explanation, and read the documents in full. I give each of them copies so

[18] Part of it, revised, appeared subsequently as part of "The Problem of a Forced Jewish Divorce and Prenuptial Agreements as a Solution to the Problem of Abandoned Wives" [in Hebrew], my master's thesis in Talmud (Ramat Gan: Bar-Ilan University, 1994), 152 pp.

[19] I came during his receiving hours, when long lines would form to ask him questions. We spoke for about fifteen minutes, until Rabbanit Elyashiv came to remind us that there were many others waiting in line to ask their questions.

[20] This is in contrast with a *pesak din* by R. Elyashiv, together with R. Nissim and R. Zholti, which concluded, *inter alia*: "A. If a husband obliged himself to deliver a *get* to his wife and to pay her a fine if he changes his mind, then: 1) If he changes his mind and delivered the *get* due to the pressure of the fine, then the *get* is disqualified as a *get me'useh* [*she-lo kadin*]; 2) If he did not change his mind but divorced willingly, then the *get* is valid; 3) *Ab initio* [a *bet din*] may not authorize a divorce agreement in which a husband undertakes to pay a fine if he changes his mind about delivering a get to his wife." *Piskei Din Rabani'im* vol. 2, 9-17 [in Hebrew].

they can consult with whomever they wish—rabbis, family, friends, and lawyers—so that they are confident that the agreement will not harm them, but can only help. At the second meeting, I read the man's agreement aloud to the couple and to two *kosher* witnesses. The witnesses perform a *kabbalat kinyan* from the man to the woman and sign, and then the man signs. Then I read the woman's agreement aloud to the couple and to the witnesses. The witnesses perform a *kabbalat kinyan* from the woman to the man and sign, and, finally, she signs.

I hold the documents in trust for each of them, so that they will not be too readily available at home in case of normal marital disagreements. Although it is possible to arrange this agreement before the wedding, I have never done so. This is why I call it "a marital agreement" and not "a prenuptial agreement." Since the Marital Agreement to Mediate does not imply that the husband may behave in a dastardly fashion, and since it does not grant one side weapons to use against the other in a possible future power struggle, it does not create an environment of fear and suspicion, as if danger lurks immediately after the wedding. Although I introduce the couple to the matter prior to the wedding, it is not necessary to feel pressed to sign the agreement before the wedding, when there are many pressures already on a couple preparing to marry. The agreement can be entered into after the wedding, when pressures are fewer, and without arousing discomfort between bride and groom by implications of lack of trust.

Although the need to explain the agreement to each couple in full detail places an additional burden on already over-burdened rabbis, a marriage agreement is a serious matter, with significant financial and personal consequences; it is only proper that each couple receive a full explanation. A kit containing an introduction and explanation to the couple ("Maintaining Your Love"), copies of the agreement, and a halakhic introduction and instructions for the rabbi who will arrange the agreement, which I have prepared (in Hebrew), has proven helpful.[21]

I brought the Marital Agreement to Mediate to R. Shaul Yisraeli at about the same time. At first he thought it was like other agreements that he had recently rejected, including one based on "increased *mezonot*."[22]

[21] Kits will be mailed on request, by writing to the author at djm765@gmail.com.

[22] R. Shaul Yisraeli protested vigorously against prenuptial agreements: "All sorts of contractual arrangements whose purpose is not the financial undertaking [itself], but rather the pressure and the coercion applied to the husband, due to the payments, so that he will agree to divorce—all of these are a waste of effort, for all agree that the law of an [illegitimately] coerced *get* applies to this [*i.e.*, a *get* delivered on account of such pressure]" (*Sefer ha-Yovel li-Khevod ha-GRYD Soloveitchik* [in Hebrew], (Jerusalem 5734), I, 236-240). I also heard him criticize

However, after I explained to him the nature of mediation and how the agreement works, he withdrew his objections—except for one. He asked, "How do we know who these mediators are? And how do we know they will abide by halakhic principles?"

Subsequently, to my sorrow, R. Yisraeli became weak and ill, and inaccessible, before I could answer his questions. However, several points should be noted: First, the agreement must be reviewed and approved, at least in Israel, by a *bet din* or by a family court. Second, since that time, mediation has developed into a reliable profession, with clear-cut rules and codes of ethics. Third, since that time, training programs for rabbis and other religious Jews have been created in Israel, which have prepared hundreds of religious mediators under religious auspices.

The agreement was approved, again, in a ruling issued on 9 Iyyar 5754 (File 1306-54) in the Petach Tikva Rabbinical Court, headed by the *Av Bet Din* R. Shlomo Moshe Amar, now Israel's Sefardic Chief Rabbi.[23]

HOW THE AGREEMENT WORKS

The agreement consists of two documents, one admission of debt by the man to the woman, and one admission of debt by the woman to the man. We will describe the man's obligation to the woman; the other is identical,

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the RCA agreement sharply on more than one occasion, including in a public lecture delivered at *Makhon Erets Hemda* in Jerusalem. *Be-Mar'eh Ha-Bazak* 1:94 is a responsum on this subject, dated 5750 (1990), when R. Yisraeli was still alive and the responsa were published only after receiving his approval. It states that any prenuptial that will press the husband to give a *get* is inadequate, since, if the husband will not want to give a *get* at a later date, but will do so only because of his financial undertaking in the agreement, the *get* will be null and void. The only prenuptial that is acceptable is an undertaking to appear before a *bet din*; generally the *bet din* will be able to persuade the husband to do the right thing and to give a *get*. R. Yisraeli died in 5755 (1995). An editorial footnote to the internet edition of this responsum states that "now (5760 / 2000) there is a prenuptial agreement to which R. Yisraeli agreed … it is recommended today by the RCA to its members." In light of what R. Yisraeli said and wrote during his life time, I am highly skeptical about the accuracy of this posthumous footnote. Perhaps it is based on R. Yisraeli's acceptance of an undertaking to appear before a *bet din*, and an understanding that it is not the actual content of the RCA agreement that is intended, but rather only that the husband will appear before the *bet din*. This responsum may be seen at http://www.eretzhemdah.org/Data/UploadedFiles/FtpUserFiles/Books/shotBemarehH/1.pdf.

[23] A copy of the *bet din* decision is available from the author on request.

except for those changes necessitated in Hebrew by the difference of gender. A translation of the principal operative paragraphs (1 – 9) appears in the Appendix.

The establishment of the debt appears at the beginning of the document. The man admits that he owes a very large sum of money to the woman. In the woman's document, she admits to owing the same sum to the man. The sum must be sufficiently large so that it will not be tempting for a person—or for those who may incite him—to refuse to cooperate as spelled out in the stipulations of the loan. In one case of the daughter of a very wealthy family, I wrote a sum of five million dollars. Precisely that case became a test case. The husband called me one day and asked, "Do I really have to fulfill the conditions of the agreement that I signed?" My positive answer saved him, his wife, their children and their families a long, expensive, traumatic legal battle. They divorced amicably, and, although each has since remarried, they work together cooperatively to this day in the rearing of the children they had together.

The terms of the loan are spelled out beginning with paragraph 1: the due date for payment of the debt is suspended indefinitely while the couple lives in harmony.

The stipulations for collection of the debt are first spelled out in Paragraph 2. If the woman invites the man to a mediator who is named in the document (as is a method for choosing a different mediator if the named one is unavailable), then the debt will come due after four months. This allows the man sufficient time to respond, to discuss, to calm down—and to come to a meeting with his wife and the mediator.

A reward for the man—if he meets with his wife and the mediator—is established in Paragraph 3. If the couple decides to continue the mediation process, then, after their second meeting with the mediator, the due date of the debt will be suspended for eight months. That should suffice to complete the mediation process; I have never heard of a case of mediation lasting that long. Nevertheless, so that the process can take place in a non-pressured environment, the agreement allows for an extension of this suspension of the due date by another four months, if both husband and wife agree.

Paragraph 4 states that if the couple decides to go to marriage counseling instead of continuing the mediation process, then the due date of the loan will be postponed until eight months after their second meeting with the counselor. That should give them enough time to discover whether they can learn to live together in harmony or whether they would rather return to mediation. If they need more time, they can extend the period of counseling to a year.

Paragraph 5 stipulates that if the couple returns to living in marital harmony, at any time, then the entire process reverts to the initial state, and the date for collecting the debt is suspended indefinitely. It is not the aim of this agreement to encourage people to divorce if that is not really appropriate.

Paragraph 6 describes the next gift to the man. If the couple reaches a mutually satisfactory divorce agreement, whether with the help of the mediator or by any other means, the due date for payment of the debt will be postponed for twelve more months. Paragraph 7 constitutes the final gift; at the end of twelve months after concluding the divorce agreement, the debt will be waived completely. These twelve months provide ample time to see that the divorce agreement is being fulfilled satisfactorily, so that the Marital Agreement to Mediate is no longer needed.

Paragraph 8 allows the couple to specify in advance what they will consider a fair agreement. This is generally a good idea, when possible. It is relevant in particular for the implementation of Paragraph 9, which will be explained below. It suffices to formulate paragraph 8 in general terms; in the example in Appendix I, the terms of the 1973 Israeli law are accepted. Broadly speaking, this law specifies that each will recover the property that belonged to him or her before their marriage, while the assets they accumulated during their marriage will be divided evenly between them (with some exceptions, such as personal gifts and inheritances). In other cases, I have written additional details in this paragraph, as the couple requested. In the final analysis, any divorce agreement in Israel must be officially certified by law, either by a *bet din* or by a civil court, which must ascertain that the agreement is reasonable and that both parties understood it and agreed to it.

What should happen if the man behaves reasonably, but the woman stubbornly refuses to agree, apparently without sufficient justification?[24] Should the due date of the debt arrive as planned, will the man have to pay his debt to his wife? It is important to note that the due date of both debts is set when the couple meets for the second time with the mediator or with the marriage counselor, independently of who initiated the process, so that, strictly speaking, the debts cancel each other. The more correctly phrased question, then, is this: Will the process come to a standstill, such that this couple's problem remains unsolvable? In such a situation will the man be unable to move the wife to reconsider her unfair or unreasonable position? Since he committed himself to mediation, will he not be allowed to present his claim to *bet din*?

[24] The opposite situation is dealt with in the document the woman writes to the man.

In actual practice I expect such a situation to be unusual, for a wise, experienced mediator generally has the skills and the tools necessary to help each partner move confidently and maturely towards a reasonable compromise. But what should happen if the woman stubbornly refuses in spite of the mediator's best efforts? And what should happen if the man does not want to compromise, because he feels strongly that an injustice was done to him and he wants his day in *bet din*? Will the process come to a standstill, because the due dates fall and the debts cancel each other? Paragraph 9 addresses these two possibilities.

Paragraph 9 stipulates that if the woman refuses unreasonably to come to a fair agreement—and it is a *bet din* that will determine what is reasonable and fair, including weighing the couple's statement in advance, in paragraph 8, as to what they agree is fair—then the husband's debt to the woman will be waived in stages, every three months, until it is waived completely after nine months. During this period, the woman's debt will have come due in full. This asymmetry between the debts should encourage the woman gradually to return to reasonable, cooperative behavior, all in accordance with the ruling of the *bet din*. Similarly, paragraph 9 in the woman's document of admission of debt to the man enables her to have their case brought before a *bet din* if the man is behaving unreasonably.

The remainder of the document consists of the technical details necessary for supporting the undertaking under various conditions, and arrangements for paying the debt over time, if the couple actually comes to a point where one must pay the other his debt.

SOME PRACTICAL CONSIDERATIONS

If an agreement such as this is to be offered in the United States, legal experts will have to adapt it to American law. The formal admission of debt, which creates the means of rewarding cooperation in the Marital Agreement to Mediate, is a legal fiction that may be acceptable and effective in halakha, but that may not be acceptable or effective in American civil law. To circumvent the possibility that this might be a problem in Israeli civil law, Paragraph 17 includes a general clause to the effect that the man or the woman who is author of the document desires that it be interpreted so as to be completely effective, through whatever means is necessary, in both halakha and civil law. Furthermore, if any particular paragraph should be disqualified, the man and the woman declare that they want all other paragraphs to remain valid.

Although it is true that this is a legal fiction, the fact that the debts are mutual and equal makes it palatable. No couple to whom I have explained this has ever had any difficulty accepting it.

At the moment, a great many divorcing couples outside Israel settle all their issues in a civil court and obtain a civil divorce before addressing the formal halakhic requirement of a *get*. It might be argued, then, that all that is needed from a Jewish perspective is something that will press them to complete the halakhic process; marriage counseling and mediation are superfluous. Yet I believe that the Jewish community and halakha should not abdicate their responsibility for the welfare of couples and families in distress, on the grounds that the non-Jewish world and the civil authorities take care of these matters. In any event, some couples do come to rabbis and *batei din* before they enter civil divorce suits; directing them to a path of counseling and, if necessary, mediation, will be doing them a great service. Finally, even couples who have already been divorced in the civil courts often have unresolved issues that it would be wise for them to address in the context of mediation prior to the execution of a *get*.

CONCLUSION

We have reviewed a painful problem that troubles tens of thousands of Jews whose marriages have reached their ultimate crisis. We have described a Marital Agreement to Mediate, which has been approved by widely recognized halakhic authorities, and which has been tested in real life and proved effective. If the agreement presented here will be adapted to an American context, and offered to officiating rabbis as an additional option—in addition to the current RCA-BDA agreement—I believe that it will significantly strengthen the use of marital agreements as one solution to the complex *aguna* problem.

When large numbers of couples enter the Marital Agreement to Mediate, I believe it will increase marital harmony. It will encourage people to resolve their differences with mutual respect and compromise, and reduce a wide-spread orientation people have towards achieving their aims through power struggles. It will lighten the burden on *batei din*, and sanctify God's name by demonstrating to the Jewish public that there is a halakhic solution to this problem, which preserves the rights of individuals to make wise, mature, free, unpressured choices that are both to their own benefit and to the benefit of others.

APPENDIX–TEXT OF THE MARITAL AGREEMENT TO MEDIATE - THE MAN'S UNDERTAKING

The Document the Man gives the Woman (Translation of the Principal operative paragraphs, 1-9) (the woman gives the man an identical document)

On ____ (the day of the week) _____ (the day of the month) _____ (the year in the Hebrew calendar), as we count it here _____ (the name of the place) (corresponding to the civil date _____), Mr. _____ (Jewish name, father's name, surname and Israeli identification number) came before us, the undersigned, and told us as follows: "I hereby accept you upon myself as valid and reliable witnesses, and request that you perform a formal act of *kinyan* from me, granting full, binding legal force in accordance with Jewish law to all that is written in this bill of admission of debt (henceforth: "the bill") – a fully binding *kinyan* by means of transfer of a kerchief, from this very moment on, and that you sign the bill and give it to my dear wife _____ (Jewish name, father's name, surname and Israeli identification number) (henceforth: "my wife"), so that the bill will be hers as a testimonial, for her benefit and as proof of all that is written in it."

"I hereby admit before you today that I have money that belongs to my wife, in the amount of _____ (in words: _____), that my wife lent me, of money that was hers alone, on which I had no liens and to which I had no rights. I accepted this money upon myself completely as a debt, and I am obliged to pay the above-mentioned sum to my wife in accordance with the stipulations that are expressed in this bill. I am making my admission before you of my completely free will, without any coercion at all, but with all my heart, with a willing spirit, in sound and settled mind. I deem this admission before you as equivalent in my sight to an admission before a proper, esteemed *bet din*, as a perfect admission with full legal force."

"This loan was implemented in accordance with the following stipulations, to which my wife and I have agreed in full:"

1. Deferral of the Due Date of the Loan While We Live Together in Harmony
   The due date of the aforementioned loan will not occur as long as my wife and I live together in normal marital harmony.
2. Setting the Due Date of the Loan Upon Receipt of an Invitation to Mediation

The due date of the aforementioned loan will occur four months after my wife invites me in writing to enter a process of family mediation with her with the help of the mediator _____ (name and Israeli identification number), or a mediator from _____ (name of mediation organization and registration number), or with the help of a different mediator or a different mediation organization that comes in their stead, or that _____ will direct us to for purposes of family mediation, or with the help of any other mediation organization or mediator to whom we will agree to turn for purposes of family mediation (henceforth: "the mediator"). If we do not agree about the mediator in one of the ways mentioned above, then the *bet din* that will certify this bill, or another *bet din*, will appoint the mediator.

3. Deferral of the Due Date of the Loan Upon Entering into the Mediation Process

   If my wife and I meet together with the mediator before the due date mentioned in paragraph 2 – whether said meeting was upon my wife's initiative or upon my initiative – and we decide to enter into a process of family mediation, then, after our second meeting together with the mediator, said due date will be deferred for eight months from that meeting. If our progress in the mediation process requires it, then, upon the written agreement of both of us, we may extend the deferral of the due date by an additional four months, that is, until twelve months from our second meeting together with the mediator.

4. Deferral of the Due Date of the Loan Upon Entering Marital Counseling

   If my wife and I meet together with the mediator before the due date mentioned in paragraph 2 - whether said meeting was upon my wife's initiative or upon my initiative – and both of us assess, then or at any stage, that it is possible to restore harmony to our home through appropriate marital counseling, and we enter a process of marital counseling, then, after our second meeting together with the marriage counselor, the due date will be deferred for eight months from that meeting. If our progress in the marital counseling process requires it, then, upon the written agreement of both of us, we may defer the due date by an additional four months, that is, until twelve months from our second meeting together with the marriage counselor.

5. Restoring the Situation to Its Initial State Upon Our Return to Living in Harmony

If, during any of the aforementioned periods, or at any other time, we resolve the matters over which we differed, on account of which we came to the mediator or to marital counseling, and we return to normal family life, then the situation will return to its original state and the due date of the aforementioned debt will be suspended, until such time as the stipulation noted above in paragraph 2 is fulfilled, or when we begin a process of family mediation, as mentioned in paragraph 3 above, or when we enter a process of marriage counseling, as stated in paragraph 4 above, all in accordance with the other stipulations in this bill of admission.

6. Deferral of the Due Date Upon Signing an Agreement Resulting from Mediation

   If my wife and I reach an agreement that is acceptable to both of us, not to restore the harmony to our home, but which settles all of the matters that were in dispute between us, whether we reach said agreement with the help of the mediator or whether we reach it without the help of the mediator, whether the due date of the loan will have occurred before signing said agreement or not, then the due date of the debt will be suspended again for a period of twelve months from the day of signing said agreement.

7. Waiver of the Debt One Year After Signing the Agreement in Paragraph 6

   Twelve months after signing the agreement mentioned in paragraph 6 above, I will be released from paying to my wife the aforementioned sum, or any balance of the debt due her after deducting any payments I will have made before that time according to the decision of a *bet din*, and said sum or said balance will be considered a gift to me as of now, never to be claimed.

8. A Reasonable Agreement in the Context of the Mediation Process

   If, when the due date for paying the above-mentioned debt arrives, I will be ready to come to a reasonable agreement that settles all issues in dispute between my wife and me, but my wife will refuse to accept said agreement, without there being any reasonable cause for her refusal, then the due date will be deferred for three more months. A reasonable agreement, for the purpose of the stipulations in this bill, will be an agreement that includes among its stipulations the division of property set out in paragraph 5 of the 1973 Israeli Law regulating financial relations between married couples, unless we both agree in writing to exceptions to that division. As to the remaining stipulations of that agreement, a *bet din* will determine

whether the refusal of one of us to accept the proposal of the other is reasonable or not.

9. Waiver of the Debt in Stages in the Event of Unreasonable Refusal
If, at the end of the aforementioned three month period, I will not have reached an agreement with my wife, with or without the mediator's help, and a *bet din* will examine our matter and determine that my wife has no reasonable cause for refusal to come to an agreement with me – all as the judges see fit – then one half of the aforementioned debt will be waived, and will be considered as a gift to me as of now, never to be claimed. If, at the end of three more months, my wife will continue to refuse to come to a reasonable agreement with me, as above, then half of the remaining debt will be waived, and will be considered as a gift to me as of now, never to be claimed, all as the judges see fit. If, at the end of three more months, my wife will continue to refuse, as above, then the entire remaining debt will be waived and the entire aforementioned sum will be a gift to me as of now, never to be claimed from me again. Only if the *bet din* determines that my wife's refusal to come to agreement with me is reasonable, then the entire debt will remain in effect, and I am obliged to pay the aforementioned sum in full.

Paragraph 10 declares the independence of this document from the *ketuba*, and its subservience to *halakha* and to civil law.

Paragraph 11 declares that the debtor will pay even after the *shemitta* year.

Paragraph 12 declares that any changes in this agreement must be in writing.

Paragraph 13 declares that the couple's marriage was unconditional.

Paragraph 14 details the conditions for payment of the debt when it falls due.

Paragraph 15 establishes the possibility of paying the debt over time.

Paragraph 16 establishes waiver of the debt in the event of death.

Paragraph 17 declares the total halakhic and civil validity of the document.

Paragraph 18 is a nullification of any statements that might undermine the agreement.

Paragraph 19 enables having the agreement endorsed by a *bet din*.

The document concludes with a description of the *kabbalat kinyan* and with the signatures.