

# Kavod HaBeriyot Series - Agunah

November 21, 2015 ט' כסלו תשע"ו

HIR—The Bayit - Sources compiled by Rabbinic Intern Dan Margulies

<p style="text-align: center;"><u>דברים כד:א-ב</u>          כִּי-יִקַּח אִישׁ אִשָּׁה, וּבִעְלָהּ; וְהָיָה אִם-לֹא תִמְצָא-חֵן בְּעֵינָיו, כִּי-מָצָא בָּהּ עֲרוּת דָּבָר--וְכָתַב לָהּ סֵפֶר כְּרִיתוּת וְנָתַן בְּיָדָהּ, וְשָׁלְחָהּ מִבֵּיתוֹ. וַיֵּצֵאהָ, מִבֵּיתוֹ; וְהִלְכָה, וְהָיְתָה לְאִישׁ-אַחֵר.</p>	<p><u>Deuteronomy 24:1-2</u>          In the case that a man takes a wife and possesses her, and she finds fault in his eyes because he finds her doing something unseemly, and he writes her a bill of divorce, and hands it to her, and send her away from his house, and she leaves his house and becomes the wife of another man ...</p>
<p style="text-align: center;"><u>גיטין מט ע"ב</u>          אשה יוצאה לרצונה ושלא לרצונה, והאיש אינו מוציאה אלא לרצונו.</p>	<p><u>Gittin 49b</u>          A woman can be divorced with her consent or against her consent, and <b>a man cannot divorce her except with his consent.</b></p>
<p style="text-align: center;"><u>יבמות צד ע"א</u>          הוא ניהו דלא מהימן, הא עד אחד מהימן? בשלמא גבי אשה, משום עיגונא אקילו בה רבנן.</p>	<p><u>Yevamot 94a</u>          Is it only he who is not believed, but one witness is believed? In the case of a woman [whose husband's whereabouts are unknown] one can understand that <b>in order to prevent her becoming an agunah the Rabbis have relaxed the law in her favor.</b></p>
<p style="text-align: center;"><u>שו"ת הב"ח (החדשות) ס"ו סד</u>          וכל מי שמתיר עגונה אחת בזמן כאלו בנה אחת מחרבות ירושלים העליונה להציל בחינה אחת מן אשת חיל ודי למבין.</p>	<p><u>New Responsa of R' Joel Sirkis (1561-1640) #64</u>          And whoever releases even one <i>agunah</i> quickly it is as if he rebuilt one of the ruins of the heavenly Jerusalem, saving one [kabbalistic] aspect of "<i>Eshet Hayil</i>", and this is enough explanation for one who understands.</p>
<p style="text-align: center;"><u>שלחן ערוך אבן העזר ס"ו קנד סע' כא</u>          כל אלו שאמרו להוציא, כופין אפילו בשוטים. וי"א שכל מי שלא נאמר בו בגמרא בפירוש כופין להוציא, אלא יוציא בלבד, אין כופין בשוטים אלא אומרים לו: חכמים חייבוך להוציא, ואם לא תוציא מותר לקרותך עבריין.</p> <p>הגה: וכיון דאיכא פלוגתא דרבוותא, ראוי להחמיר שלא לכופ בשוטים, שלא יהא הגט מעושה. וכל מקום שאין כופין בשוטים, אין מנדין אותו ג"כ. ומכל מקום יכולין ליגזור על כל ישראל שלא לעשות לו שום טובה או לישא וליתן עמו, או למול בניו או לקברו, עד שיגרש. ובכל חומרא שירצו ב"ד יכולין להחמיר בכהאי גוונא, ומלבד שלא ינדו אותו.</p>	<p><u>Shulchan Aruch Even HaEzer 154:21</u>  <b>All these [husbands] who the Rabbis said must divorce, we force him even with whips.</b> And there are those who say that whoever is not mentioned explicitly in the gemara that "we force him to divorce" but rather only that "he must divorce" we cannot force with whips, rather we say to him, "The sages have obligated you to divorce, and if you do not divorce, it is permitted to call you a sinner."  <i>Gloss [of the Rema]: And since there is a disagreement between the Rabbis, it is fitting to be stringent to not force him with whips, so that the get with not be a "coerced get."</i>  <i>And in every case where we do not force him with whips, we also cannot excommunicate him. However, we can forbid all Jews not to do him any favors, or to do business with him, or to circumcise his son or to bury him, until he divorces. And any stringency that the court wishes to impose on him they can be strict in this regard as long as they do not excommunicate him.</i></p>
<p style="text-align: center;"><u>שלחן ערוך אבן העזר ס"ו מב סע' ב</u>          המקדש שלא בעדים, ואפילו בעד אחד, אינם קדושין.</p>	<p><u>Shulchan Aruch Even HaEzer 42:2</u>          A person who gets married without witnesses, or even with only one witness, it is not a marriage.</p>
<p style="text-align: center;"><u>שלחן ערוך אבן העזר ס"ו מב סע' ה</u></p>	<p><u>Shulchan Aruch Even HaEzer 42:5</u></p>

<p>המקדש בפסולי עדות דאורייתא, אינן קדושין. אבל בפסולי עדות דרבנן או בעדים שהם ספק פסולי תורה, אם רוצה לכנוס חוזר ומקדש בעדים כשרים. ואם לא רצה לכנוס, צריכה גט מספק.</p>	<p><b>A person who gets married with witnesses disqualified by biblical law, it is not a marriage.</b> However, if with witnesses disqualified by rabbinic law or with witnesses who have a doubtful disqualification by biblical law, if they wish to proceed, they must go back and get married with kosher witnesses. And if not, she still requires a <i>get</i> because of doubt.</p>
<p><u>בבא בתרא מח ע"ב</u> ואמר אמיתר: תליוה וקדיש קדושין קדושין. מר בר רב אשי אמר: באשה ודאי קדושין לא הוו, הוא עשה שלא כהוגן, לפיכך עשו עמו שלא כהוגן ואפקעינהו רבנן לקידושיה מיניה.</p>	<p><u>Bava Batra 48b</u> And yet Amemar has laid down that if a woman consents to betroth herself under duress, the betrothal is valid. Mar son of R. Ashi, however, said: In the case of the woman the betrothal is certainly not valid; <b>he acted inappropriately and therefore the Rabbis treat him inappropriately and the Rabbis annul his betrothal.</b></p>
<p><u>בבא קמא קי ע"ב-קיא ע"א</u> אמרי: חטאת שמתו בעליה, הלכתא גמירי לה דלמיתה אזלא. אלא מעתה, אשם שמתו בעליו ליפוק לחולין, דאדעתא דהכי לא אפרשיה! אשם נמי הלכתא גמירי לה: כל שבחטאת מתה - באשם רועה. אלא מעתה, יבמה שנפלה לפני מוכה שחין תיפוק בלא חליצה, דאדעתא דהכי לא קדשה עצמה! התם אן סהדי דמינח ניחא לה בכל דהו, כריש לקיש, דאמר ר"ל: טב למיתב טן דו מלמיתב ארמלו.</p>	<p><u>Bava Kama 110b-111a</u> With regard to a trespass offering there is similarly a halachah handed down by tradition that whenever a sin offering would be left to die, a trespass offering it would be subject to the law of pasturing. But still, according to your argument why should a deceased brother's wife on becoming bound to one affected with leprosy not be released [even] without the act of halizah, <b>for surely she would not have consented to betroth herself upon this understanding?</b> In that case we all can bear witness that she was quite prepared to accept any conditions, as we learn from Resh Lakish; for Resh Lakish said: <b>it is better [for a woman] to dwell as two than to dwell in widowhood.</b></p>

Grey Matter (vol. 1) R' Chaim Jachter, 2000

### ***The Power of Prenuptial Agreements***

The Problem of Coercion: Formulating a halachically sound agreement is far from simple. One cannot simply sign an agreement to give or receive a *get* in case of a civil divorce. Such an agreement is not halachically valid, because it is a *kinyan devarim*, a commitment merely to perform an action, and lacks any monetary consideration. Furthermore, a husband must give a *get* without coercion. If a man is wrongly coerced to give his wife a *get*, the *get* is not valid, and the couple remains married. Accordingly, a rabbinical court may not coerce a husband to give his wife a *get* even if he promised to do so before their marriage. In addition, Rabbenu Gershom instituted that a wife's consent is necessary in a *get* proceeding.

...

A review of the classic responsa literature reveals that there were few incidents of a vindictive spouse spitefully withholding a *get* before the twentieth century. The proliferation of this phenomenon seems unique to the modern era. There is hopeful news, though, as surveys and anecdotal evidence indicate that a proper prenuptial agreement is being used in many of the weddings conducted in the Orthodox community. If utilized properly, this agreement has the potential to render this type of *igun* a rarity, as it was throughout most of Jewish history.

### ***Conditional Marriage***

Some French rabbis in the late nineteenth and early twentieth centuries suggested instituting a condition to every Jewish marriage in order to solve the *agunah* problem. The condition would abrogate the marriage retroactively in case of civil divorce. The proposal was immediately rejected by Rav Yitzchak Elchanan Spektor, and all the eminent halachic authorities of the following years spurned any mention of reviving it.

### ***Abuse of Kiddushei Ta'ut***

In the previous chapter, we discussed Rav Moshe Feinstein's position that a woman may remarry without a *get* (based on the principle of *kiddushei ta'ut*) if she documents that her husband had such serious defects that no woman would knowingly marry him. We concluded our discussion by noting that the defect must have existed before the marriage, such that the woman married the husband only because he concealed the defect from her. Rabbi Rackman argues that if a husband abused his wife during the course of the marriage, his actions indicate that at the time of the wedding he "had the seeds" of an "abuser personality" ... Rabbi Rackman's suggestion contains numerous flaws ...

### ***Writing a Get Against the Husband's Will***

According to press reports, Rabbi Morgenstern also grants a *get* on behalf of recalcitrant husbands. Rav Herzog, known for his extraordinary leniency on *agunah* issues, wrote that he would not even dream of doing such a thing. A husband must issue a *get* of his own free will, so a *get* is not valid unless the husband orders the scribe to write the *get* and witnesses to sign it.

### **A Response to the IBD Controversy, Rabbi Jeremy Wieder (RIETS), Sep. 7, 2015 (yutorah.org)**

Unfortunately I would say that there has been a lot of heat, but not so much light. One of the things I hope does not happen in the course of this discussion is that the plight of the agunot in these particular situations—in these particular *teshuvot* [responsa]—should not be forgotten. We can engage in whatever halachic dispute that we want and the conclusion can be *le-heter* [permissive] or *le-issur* [prohibitive], but particularly if it is *le-issur*, one has to remember that there are a whole bunch of women in these cases and other cases as well who are suffering and it's a serious problem and appropriate attention needs to be dedicated to the problem ... There are a lot of women who are unable to find a beis din willing to be [involved] in their cases ... I think it also has to be stressed that in our situation that on some level there's no such thing as a *humrah* [stringency]. Now what I mean by that is that of course there's a *humrah*—there can be a *humrah* that sometimes we prohibit a woman to remarry because she might be [a married woman], and there can also be a *humrah* that if a woman should be allowed to remarry, leaving her chained as an *agunah* is a horrible, horrible [injustice]. What I mean that there's no *humrah* is that each *humrah* leads to a *kula* [leniency] on the other side.