

May a Jewish Marriage be Annulled?

A man and a woman in their fifties were granted a civil divorce five years ago. After years of pleading, the husband still refuses to grant his ex-wife a get. The woman would like to remarry but there is little likelihood that she will receive a get. Can the marriage be annulled?

In contrast to the Christian tradition, Jewish marriage is a contractual relationship between two freely consenting parties, not a status conferred on the parties by an ecclesiastical body. Consequently, the termination of Jewish marriage—other than by the demise of either spouse—is effected by the parties themselves, not by ecclesiastical or civil authority.

Yet, in the absence of the husband, who alone is scripturally charged with issuing a *get* or divorce (Deuteronomy 24:1–2), or in the case of the willful refusal of the husband to grant a *get*, the woman can never legally remarry. She is called an *agunah* (Ruth 1:13), a woman “chained” to the institution of marriage yet without a present partner.

Throughout Jewish history, sad to say, there have been many cases of *agunot*; mostly cases where the husband has disappeared. The vast amount of halakhic literature on the subject heretofore dealt with a husband who went abroad and is claimed to have been killed or to have died, a husband who drowned or suffered shipwreck, a soldier who was killed in battle or is missing in action, or a husband who was a Holocaust victim.

To alleviate the anguish of *agunot*, halakhic authorities have permitted many relaxations in the rules of evidence (Shulhan Arukh, *Even ha'Ezer* 17:1f; Rabbi Isaac Klein, *A Guide to Jewish Religious Practice*, pp. 451–456) which would be especially useful in these kinds of cases. To avoid the situation of a woman becoming an *agunah*, especially important in other kinds of cases as well as these, halakhic authorities have proposed various strategies.

Perhaps the earliest attempt at preventing the eventuality of a wife becoming an *agunah* is the practice the Talmud (*Ketubot* 9b) ascribes to the time of King David. Soldiers "going out to the wars of the House of David" would customarily "write a bill of divorce" for their wives. This conditional *get* became effective only if the husband failed to return by a specified date (See RaShI & Tosafot *loc. cit.*; Shulhan Arukh, *Even ha'Ezer* 143). This practice, which had fallen into disuse by Israel's Defence Forces because it was subject to some halakhic difficulties (S.J. Zevin, *Sinai*, vol. 10 (1942), pp. 21–35), is now enjoying somewhat of a revival in support (See Rabbi Shiloh Rafael, "*Gitei Milhama*", *Torah She-b' al Peh*, vol. 11, 1969, pp. 123–30; Rabbi J. David Bleich, *Contemporary Halakhic Problems*, Ktav, 1977, vol. 1, pp. 150–154).

Another strategy proposed was the stipulation of a condition at the time of marriage, that states that the marriage would become retroactively void should that condition obtain. Examples of such conditions would be if the husband should fail to return to his wife after a specified period of absence, or if the marriage were subsequently terminated by a civil court, or if the husband should die childless, leaving a brother who refuses to perform levirate marriage (See *Responsa Hatam Sofer*, *Even ha'Ezer* 1:111 on this last case; see also Rabbi Eliezer Berkovits, *Tenai beNissu'in uveGet*).

A variation of this strategy is the celebrated Lieberman clause inserted in the *ketubah* issued by the Conservative movement in the 1950's. The reasoning behind the inclusion of this clause is cogent and compelling, and its sheer elegance is worthy of approval (see David Novak, *Law & Theology in Judaism*, First Series, pp. 49–52). By signing this document, the bride and groom obligate themselves contractually to submit any marital disputes to a *Bet Din* and be bound by any decision issued by that legal body. This implies that should the *Bet Din* demand a *get* be issued or should the *Bet Din* impose a financial penalty for failure to grant a *get* or to receive one, the parties are constrained to comply. The efficacy of this clause as an enforceable contract in civil court has been amply demonstrated in the well-publicized New York case of *Avitzur vs Avitzur* [58 N.Y.2d108, 446 N.E.2d136, 459 N.Y.S.2d572 (1983)]. However, some authorities are uncomfortable with the innovativeness of the clause as well as being concerned that it may imply a form of unlawful coercion which may invalidate the *get* (See Bleich, *op. cit.*, yet compare with what follows, pp. 154–9).

The most daring of all strategies was the rabbinic enactment that allowed for the retroactive annulment of a marriage. This strategy is based on an important Talmudic discussion. According to scriptural law, as long as a divorce document was not placed in the wife's possession, the husband has the right to change his mind and to declare it invalid. Consequently, she is not divorced. Nonetheless, the elder Rabban Shimon ben Gamliel ruled that a man who divorces his wife through

an agent may not annul the *get* while the agent is on his way, that is to say, without the knowledge of either the agent or the wife (*Gittin* 32a). Should the husband cancel the divorce sent by the agent anyway, the rabbis declare the husband's cancellation null and void, the *get* is valid and the wife is divorced. This ruling means that the rabbis were willing to uphold the validity of a *get* against scriptural law. The Talmud itself (*Gittin* 33a) questions the boldness of this ruling and its far-reaching consequences by asking: "Is it possible that where a *get* is issued and canceled in accordance with scriptural law we should, in order to preserve the authority of the *Bet Din*, declare it valid and allow a married woman to marry another?" The question proves to be rhetorical for the Talmud emphatically answers: "Yes!—when a man marries a woman, he does so under the conditions set down by the Rabbis and in this case the Rabbis annul his (i.e., the first husband's) marriage (*afka' inhu rabbanan la-kiddushin mineih*).” This strategy for obviating the problem of the *agunah*, however, has rarely been employed since the fourteenth century. (See A. Freimann, *Seder Kiddushin veNissuin* and B. Schreshevsky, *Dinei Mishpahah* and Elon, *Mishpat Ivri*, vol. 3 on *Hafka'at Kiddushin* for a full discussion.)

Today, it seems, there are an increased number of *agunot* where a recalcitrant husband flatly refuses to grant a *get* in retaliation for perceived mistreatment at the hands of his civilly divorced wife, or as leverage for gaining a more favorable civil settlement, or simply as a means of extorting financial concessions. Especially in cases such as these, some contemporary rabbis are inclined to be halakhic activists when it comes to remedying the *agunah* problem and are in favor of annulling marriages (See, for instance, Rabbi David Novak, *Halakhah in a Theological Dimension*, Brown University Judaic Studies Series, no. 68, Chapter 3). This conforms with the ruling of Rabbenu Asher ben Yehiel who wrote that finding a way for permitting an *agunah* to remarry is deemed a great mitzvah (*Teshuvot haRosh* 51:2). Nevertheless, our tradition also teaches that in such serious matters where permission to remarry may result in *mamzerut*, i.e., children born of an illicit union, a broad consensus of other rabbi's is required before any annulment can take place (Rabbi Moses Isserles, *Shulhan Arukh*, *Even ha'Ezer* 17:34). Until such consensus develops, this panel would not presume to annul any halakhically initiated marriage.

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