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The Propriety of a Conditional Divorce

For many years, our Torah-observant community has encountered both here, abroad, and in Israel, situations where a recalcitrant spouse chooses to condition the giving or the acceptance of a *get* upon receiving certain benefits such as receiving monetary remuneration from the opposing spouse or having certain issues related and/or unrelated to the end-of-marriage resolved in a *beit din*.

Let me share two cases which I have encountered in the last few years. For over five years a wife shares a bedroom with her husband and refuses to engage in conjugal relations with him and is unwilling to accept a *get* from her husband. Knowing very well that the majority of *battei din* in New York City, barring the existence of a wife's legal title to the marital home, will not give a wife a fifty per cent share of the home upon divorce, one day the wife informs her husband "I will accept the *get* on condition that you transfer fifty per cent of the ownership of our home to me." He transferred fifty per cent of the ownership of the home to his wife but she remained recalcitrant. Subsequently, she advanced another demand which the husband honored. And still the wife remained adamant about refusing to receive the *get*. In another case, a husband demanded hundreds of thousands of dollars from his wife in exchange for giving the *get*.

According to Halakhah, dissolution of the matrimonial bond requires the voluntary agreement of both spouses, and failure of one spouse to assent to the divorce action precludes execution of the divorce. Coercing a recalcitrant spouse to grant a *get* produces a divorce that is arguably invalid, a *get me'usseh*. Nonetheless, in the absence of a *beit din* obligating him to grant a *get*, and in the absence of a *minhag*, practice to proscribe executing a *get* upon fulfillment of a particular condition, there exists no halakhic impediment for a husband to proffer his consent at the time of *seder ha-get*, execution of a Jewish writ of divorce, provided that his wife complies with certain conditions, *gerushin*

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al tenai. For example, should he stipulate "I will grant you your *get* on the condition that you give me 200 *zuz*, she is divorced and he remits it."[1] *A fortiori*, in the wake of the handing down of a *beit din* divorce judgment, financial as well as non-financial inducements brokered between the couple, whether to appease a recalcitrant husband or a recalcitrant wife, do not contravene the strictures against a coerced divorce. Echoing the view of earlier authorities in various judgments 'obligating divorce',[2] R. Elyashiv permits a husband whose wife refuses to accept a *get* to appease his recalcitrant spouse by offering money in exchange for her accepting the *get*; the ensuing divorce is not deemed to be unlawfully coerced.[3] Such a conclusion equally applies to a wife's attempt to

[1] Mishnah *Gittin* 7:5-9; *Mishneh Torah*, *Hilkhot Gerushin* 8:1; *Shulhan Arukh*, *Even ha-Ezer* (hereafter: *E.H.)* 29:7, 143:1.

[2] *Teshuvot ha-Tashbets* 1:1; *Teshuvot ha-Rosh* 35:2; *Teshuvot Hemdat Shlomo E.H.* 80 (2); *Teshuvot Tsemah Tsedek* 262-263."

[3] *Piskei Din Rabbaniyyim* (hereafter: *PDR*) 7:111; 8:36; 9:65. For further discussion, see this writer's *Rabbinic Authority: The Vision and the Reality* (Jerusalem: Urim, 2013), 150-152.

Implicit in this conclusion is that the recalcitrant husband receives a pecuniary benefit for granting the *get*, similar to a sales transaction (see *Shulhan Arukh*, *H.M.* 205:12,264:8) where he freely committed to the exchange. Therefore, the exchange of the benefit for the *get* is not tainted by duress. See *Or Zarua* 1:754; *Teshuvot Maharah Or Zarua* 126; *Beit Yosef*, *E.H.* 134 in the name of Rashba; *Teshuvot ha-Rashba* 4:40; *Teshuvot ha-Tashbet*s 1:1, 35 (end);*Teshuvot Maharbil* 1:110; *Teshuvot Maharashdam*, *E.H.* 63; *Teshuvot Maharash*, *Kuntres ha-Moda'ah* 35c; *Teshuvot Avodat ha-Gershuni* 35 (end); *Beit Meir*, *E.H.* 134 (end);*Teshuvot Beit Ephraim*, *E.H.* 125; *Teshuvot Mikhtav me-Eliyahu*, *Sha'ar* 7:11-12; *Teshuvot Tsemah Tsedek,* Schneersohn *E.H.* 262:9; *Teshuvot Divrei Rivot* 291; *Teshuvot Oneg Yom Tov* 167-168; File no. 2573-64-1, Tel Aviv Regional Beit Din, *Ploni v. Plonit*, November 3, 2005.

Cf. other *posekim* who would construe the giving of monies in exchange for a *get* as duress. See *Teshuvot ha-Rivash* 127; *Hiddushei ha-Ritva*, *Kiddushin* 50a; *Beit ha-Behira*, *Bava Batra* 48a; *Teshuvot Betsalel Ashkenazi* 93; *Rema*, *Shulhan Arukh*., *E.H.* 134:8; *Keneset ha-Gedola*, *Tur E.H.* 134, *Hagahot ha-Tur* 31; *Torat Gittin*, *E.H.* 134:4.To state it differently, following in the footsteps of *Tosafot*, *Bava Metsia* 8a, s.v. *ileima me-ha*, these *posekim* contend that one cannot compare a sale finalized under duress to coercing a *get*. Regarding the latter, there is an additional requirement of complying with the directives of rabbinic authorities to give a *get*. Hence, the halakhot of duress regarding sales are inapplicable to matters of *get*. Consequently, though *gemirat da'at*, firm resolution of the parties is obtained by transferring money in finalizing a sales transaction, such an exchange will invalidate the giving of a *get* which requires *ratson*, a willingness which is defined by complying with rabbinic authority. For conceptual differences between *gemirat da'at* required for a sale and *ratson* mandated for a divorce, see *Hiddushei Rabbeinu Hayyim ha-Levi*, *Dinnei Yibbum va-Halitsa* 4:16; *Teshuvot Helkat Yoev*, vol. 1, *Dinnei Ones*, *Anaf* 5; File no. 467862/1, Netanya Regional Beit Din, *Plonit v. Ploni*, January 16, 2011.

appease her recalcitrant husband by offering a material inducement.[4] In other words, the acceptance of a material inducement avoids the strictures of a *get me'usseh*. On the other hand, for example, in our two cases, whether such inducement advanced will be recognized will be dependent upon whether Halakhah recognizes such agreements as exploitative or not, a matter, albeit important and of timely concern, we will not address it here.

What happens, however, if a husband requests of his spouse that the matter of parenting arrangements should be resolved in *beit din*. The wife refuses and summons him to civil court and a decision is rendered. Subsequently, the couple appears in *beit din* in order to arrange for a *get* and the panel obligates the husband to grant a divorce to his wife. Upon hearing the *beit din*'s ruling, the husband turns to his wife and says "I am willing to comply with the *beit din*'s *pesak din* of obligating me to give a *get* on the condition that you will revisit the parenting arrangements here in *beit din*."

In the wake of a *beit din* obligating a *get*, we will present the differing views regarding this issue of a husband's demand for certain preconditions prior to giving a *get* in general and how various *beit din* panels serving in the network of Israel's Chief Rabbinate have addressed this matter, in particular concerning a recalcitrant husband.[5]

Even if the transaction is tainted by duress, nonetheless, according to an intermediate view, if it becomes clear to the *beit din* afterwards that the husband has been appeased, the exchange is valid. See *Teshuvot Maharik*, *shoresh* 63;*Teshuvot Hemdat Shlomo*, *E.H.* 80; *Hazon Ish*, *E.H.* 99:2.

[4] *PDR* 16:271, 275-276.

[5] The case of a recalcitrant husband is the more frequent occurrence than the instance of a recalcitrant wife and therefore we are dealing with the situation of a recalcitrant husband.

For earlier treatments of this issue of a conditional divorce, see Samuel Landesman, "Can a Husband who is Obligated to Grant a Divorce Impose Conditions," [in Hebrew] , *Divrei Mishpat*, vol. 2, 145-152-- (1996); S. Bibi, Y. Goldberg, N. Prover, "A Husband who is Obliged to Grant a Divorce- Can He Delay it because of a Monetary Claim?" [in Hebrew], *Divrei Mishpat*, vol. 2, 153-157 (1996); Tzvi Gartner, *Kefiyyah be-Get*, 70-78 (1997); David Bass, "Imposition of Conditions by a Husband who has been Obliged to Grant a Divorce," [in Hebrew] *Tehumin*, vol. 25, 149-162 (2005); S. Dichovsky, "A husband who makes the granting of a divorce contingent on cancellation of his previous obligations," [in Hebrew], *Tehumin*, vol. 26, 156-159 (2006); N. Prover, " Obligation to give a *Get,* Return of Gifts, a Justified Claim: Concerning a Couple who are not Interested in Each Other," [in Hebrew], in *Conference of Dayanim* 5768, 116-121= *Shurat ha-Din*, vol. 16, 155-166 (2008); S. Dichovsky, "The Proper Procedure of Adjudication in Rabbinical Courts," [in Hebrew] *Tehumin*, vol. 28, 19-27 (2008); U. Lavi, *Ateret Devorah*, vol. 2, 647-661 (2008); A. Yanai, "A Husband who is Obliged to Grant a Divorce can Impose

Our question deals with a husband who ostensibly desires to grant a *get* provided that a condition(s) is first fulfilled? Assuming that a *beit din* agrees that that there is an *illat gerushin*, a ground to obligate a husband to give a *get*,[6] may he demand certain conditions from his wife *prior* to granting the *get* at the time when other divorce matters are being addressed or resolved at the *beit din* or in civil court, which will in effect cause a delay in the *seder ha-get*?[7]

Conditions," [in Hebrew], *Shurat ha-Din*, vol. 15, 361-376 (2009); E. Shochetman, "And he shall write a Sefer Keritut and Place it in her Hand," [in Hebrew], Israel's Ministry of Justice, *gilyon* 393-399 (2010); Y. Fris, "Imposition of Conditions in Granting a *Get*: an Explanation of Maharashdam's Position," [in Hebrew] *Tehumin*, vol. 33, 229-239 (2013); A. Radzyner, "Problematic Halakhic Creativity in Israeli Rabbinical Court Rulings," *Jewish Law Annual*, vol. 20, 103,110-135 (2013).

[6] Though much of the discussion of our topic focuses upon a *beit din* which issues a judgment to coerce a divorce, the particular rulings apply equally to obligating a *get*. See File no. 043387083-21-1, Beit Din ha-Gadol of Yerushalayim, May 19,2004, *ha-Din ve-haDayan*, *gilyon* 7, 7-8; File no. 0027-21-1, Beit Din ha-Gadol of Yerushalayim, *Plonit v. Almoni*, August 29, 2004; File no. 022290027-21-1, Beit Din ha-Gadol of Yerushalayim, February 1, 2005, *ha-Din veha-Dayan*, *gilyon* 9, 6-7. Our discussion equally applies to a *beit din* that obligates a *get* as a *get mi-safek* or a *get le-humra*, a *get* given as a precautionary stringency. See File no. 866381/1, Netanya Regional Beit Din, *Plonit v. Ploni*, December 19, 2012.

The basis for this conclusion is that once an "obligating divorce" judgment is issued, one can coerce a divorce in time of need. See Rashi, *Nedarim* 90b; Tosafot Ri, *Yevamot* 39a and *Ketubbot* 77a, *Magid Mishnah*, Mishneh Torah, *Ishut* 14:8; Ran, *Nedarim* 90b.

Whether one requires a *beit din* of three rabbinic authorities or one individual rabbi is sufficient to address the grounds for divorce is subject to debate. See this writer's *Rabbinic Authority: The Vision and the Reality,* Volume 2 (Jerusalem: Urim, 2015), preface.

The chances that a *beit din* will address the grounds for divorce are slim, generally speaking. Absent the mutual agreement of a divorcing couple to execute a *get* prior to resolving their end-of-marriage issues, the prevailing practice among *battei din* in New York City is to refrain from executing a *get* prior to the couple's resolution of their marital differences. Once everything is resolved, one executes a *get* and therefore there is usually no discussion concerning the grounds for divorce. However, there is a view that a *get* should be given prior to addressing marital differences. (See *Teshuvot ha-Rivash* 317; *Teshuvot Binyan Tzion* 144; File no. 1887-24-1, Netanya Regional Beit Din, February 1, 2010; File no. 871233/1, Rehovot Regional Beit Din, November 28, 2013) In such a situation, the grounds for divorce may be addressed followed by a *beit din* ruling. Or if the differences have been resolved and the husband is unhappy with some of the terms of the divorce settlement or the *beit din* or civil court judgment and the husband refuses to give a *get* until these matters are revisited, the grounds for obligating a *get* may arise.

[7] Both time slots (i.e. prior to the *seder ha-get* – the procedure of executing a *get* – or during the *seder ha-get*) are viewed as "*asukim be-oto inyan*" (lit. engaged in the same matter) and therefore serve as the appropriate times to raise such conditions. See *Teshuvot ha-Bah ha-Hadashot* 90; *Teshuvot Divrei Hayyim* (Urbach), *E.H. Gittin* 1.

Addressing the situation of a childless marriage, [which served as grounds for the *beit din* judgment to coerce a divorce] the husband desirous to remarry stipulated that his wife would receive her *get* provided that she assent to refrain from marrying any man who was a member of the Jewish municipal government. Rashba of thirteenth century Barcelona, Spain, rules,[8]

> Regardless of the circumstances, anyone who is obligated to divorce cannot stipulate that she cannot marry whomever she wants, and anyone who divorces thus (under such a condition), we coerce him to divorce with a definitive divorce (*get gamur*) without a condition.

Seemingly, one may contend that Rashba's opposition to imposing a condition *prior* to a husband's granting a *get*,[9] which appears in volume four of his *teshuvot*, is limited to the specific condition of the case which circumscribes a wife's inability to remarry anyone she desires. But, in fact, Rashba's concluding words "we coerce him to divorce with a definitive divorce (*get gamur*) without a condition" teaches us that, in the wake of a *beit din*'s decision to coerce or obligate a Jewish writ of divorce under all circumstances, a precondition is proscribed. And, in fact, Maharsham and others accordingly understand Rashba's posture.[10] Other authorities including Rosh, Tashbets, and Rashbash did not explicitly mention Rashba's view but agreed with him.[11] Already in the sixteenth century normative Halakhah coalesces around *Shulhan Arukh*'s acceptance of Rashba's position.[12] In fact, R. Jacob Castro (Maharikash), a contemporary of R. Caro (author of the Shulhan Arukh), states, "we listen to the Rishonim,"[13]

[8] *Teshuvot ha-Rashba* 4:256.

[9] One of the requirements at the *seder ha-get* is that either the *beit din* state that if a *beit din* decision or a term of the divorce agreement has been breached, the divorce remains valid, or the husband declare that he is giving the *get* without any compulsion or conditions. However, if the actual *get* is granted under duress or provided a certain *condition* is met, should the condition be not fulfilled, the giving of the *get* is null and void. See *Teshuvot Beit Ephraim*, *Mahadura Tinyana E.H.* 75, Maharsham, infra n.10.

On the other hand, if a wife advances a *promise* to her husband before the writing of a *get* and the promise remains unfulfilled the *get* is valid. See *Beit Ephraim*, op. cit.; Maharsham, infra n.10.

[10] *Teshuvot Maharsham* 5:60; File no. 9707-21-1, infra n. 14; File no. 040135832-21-1, infra n. 19; Dichovsky, 2006, supra n. 5 at 158; *Ateret Devorah*, supra n. 5

[11] *Ateret Devorah*, supra n. 5 at 655 in the name of *Teshuvot ha-Rosh* 43:3, 106:4; *Teshuvot ha-Tashbets*, 4 (*Hut ha-Meshullash*), Tur 1, 6; *Teshuvot Rashbash* 208,383.

[12] *Bedek ha-Bayit* on *Beit Yosef*, Tur *Shulhan Arukh*, *Hoshen Mishpat* (hereafter: *H.M)*. 143; *S.A.*, *E.H.* 143:21.

[13] *Erekh Lehem*, *E.H.* 154.

a position which dates back to the Tosafot[14] and which has been understood as prohibiting the imposition of all types of conditions. After the completion of the *Shulhan Arukh* in the sixteenth century, the *minhag* in Ashkenazic communities of Prague, Lublin and Pozan was that any precondition was prohibited.[15] In subsequent generations, many Ashkenazic *Posekim* as well as Sephardic authorities such as *Maharashah*, *Mishneh le-Melekh*, *Levush*, *Arukh ha-Shulhan*, R. Bezalel Ashkenazi, *Mishha de-Revuta* (Alfasi), *Nofet Tsufim* (Birdugo), *Penei Hayyim*, *Nehor Shraga*, and *Berit Abraham* equally agreed with *Shulhan Arukh* that in the wake of a *beit din* order to obligate a divorce, a husband cannot impose any condition(s) prior to giving a divorce which will delay its giving.[16]

Regarding the stipulation of a condition at the actual time of granting a get, the *minhag* in nineteenth century Navardok, Poland, and Lvov, Ukraine proscribed *gerushin al tenai* and in 2006, an Israeli *dayyan*stated that such was the *minhag* in Erets Yizrael.[17] In light of this prevailing practice, R. Fris,who serves as the *av beit din* on the Ma'aleh Adumim Beit Din le-Mamonot argues that a husband ought to be prohibited equally from advancing a condition which will only delay the *seder ha-get*.[18]

[14] *Tosafot Ketubot* 77a, s.v. *kofin o-to lehotsi*; File no. 1-64-5082, Beit Din ha-Gadol of Yerushalayim, *Ploni v. Plonit*, May 29, 2002 (R. Z. N. Goldberg's opinion). See also, File no. 9707-21-1, Netanya Regional Beit Din, *Ploni v. Plonit*, May 12, 2008. Cf. *Kefiyah be-Get*, supra n. 5, at 75 who argues that *Tosafot* deals with a prohibition to precondition the granting of a *get* upon a wife's waiving her right to the value of her *ketubba*. Given that a wife is entitled to her *ketubba* and is a debt that the husband owes his wife, one cannot conclude that a husband's imposition of other preconditions could not be advanced. However, R. Algrabli and R. Amos perceive no reason to distinguish between the waiving of a right to the *ketubba* and other conditions. In all instances, the imposition of preconditions prior to granting a *get* is proscribed. See File no. 3222-25-1, Yerushalayim Regional Beit Din, *Plonit v. Ploni*, January 3, 2002; File no. 860977-1, Netanya Regional Beit Din, *Plonit v. Ploni*, May 20, 2013.

[15] *Levush*, *E.H.* 145:10.

[16] *Teshuvot Maharshah* 1:28; *Teshuvot R.Bezalel Ashkenazi* 6; *Mishneh le-Melekh*, *Mishneh Torah Hilkhot Gerushin* 8:11; *Levush E.H.* 143:21;*Arukh ha-Shulhan E.H.* 143:83; *Teshuvot Mishha de-Revuta E.H.* 137; *Teshuvot Nofet Tsufim E.H.* 129; *Ateret Devorah*, supra n. 5 at 653 in the name of *Nehor Shraga; Teshuvot Penei Hayyim, E.H. 5; Pithei Teshuva E.H.* 119:4 in the name of Bris Abraham.

[17] *Arukh ha-Shulhan E.H.* 147:11; *Teshuvot Hessed le-Abraham* (Teomim), Mahadura Tinyana, *E.H.* 72; File no. 0027-21-1, August 29, 2004, infra n.52. On the other hand, a divorce settlement may state that a husband consents to give a *get* on the condition that the conditions mentioned in the agreement will be fulfilled. See File no. 9110643, Tel Aviv –Yaffa Regional Beit Din, *Ploni v. Plonit*, March 26, 2009.

[18] Fris, supra n. 5 at 237.

In contemporary times, some Israeli panels of *dayyanim* including Rabbis Rabinowitz, Algrabli, and Eliezrov, Rabbis Lavi, Bazak and Ariel, Rabbis Amar, Dichovsky and Ben-Shimon, R. Boaron in a dissenting opinion, Rabbis Abergil, Hirscherik, and Lerer, Rabbis Amar, Dichovsky, and Bar Shalom, Rabbis Amos, Pardes, and Yanai,Rabbis Zamir, Schindler, and Ben-Menahem and Rabbis Gamzu,Ushinsky, and Rosenthal have aligned themselves with the majority opinion represented by Rashba and others.[19] After a lengthy presentation of the matter, R. Dichovsky, writes,

> Clearly, the husband cannot seek to impose any condition that he fancies, even if it is unrelated to the divorce, such as matters having to do with maintenance payments for the children… [20]

An intermediate position echoed in earlier generations by Teshuvot ha-Geonim, Riaz, and *Darkhei Moshe*,[21] was adopted later by R. Shalom Schwadron of nineteenth century Galicia[22] and R. Tsevi Gartner of Yerushalayim[23] and subsequently endorsed by numerous *dayyanim* serving on various Israeli panels including Rabbis Bibi, Y. Goldberg, and Prover serving on two cases,[24] Rabbis Bakshi-Doron, Tufik, Ben-Shimon, Z.N. Goldberg, and Sherman,[25] Rabbis Sheinfeld, Rieger, and Domb,[26]

[19] File no. 3222-25-1, Jerusalem Regional Beit Din, January 3, 2002;File no. 043387083-21-1,Tiberias Regional Beit Din, May 19,2004;File no. 031411390, Beit Din ha-Gadol of Yerushalayim, January 11, 2006, *ha-Din ve-haDayan*, *gilyon* 12, 3-5; File no. 028981702-21-2, Beit Din ha-Gadol of Yerushalayim, February 25,2007 *ha-Din ve-haDayan*, *gilyon* 27,3; File no. 040135832-21-1, Be'air Sheva Regional Beit Din, February 26,2007, *ha-Din ve-haDayan*, *gilyon* 15, 3; File no. 029612306-68-1,Beit Din ha-Gadol of Yerushalayim, July 17, 2007, *ha-Din ve-haDayan*, *gilyon* 19, 4-6; File no. 022868244-21-1, Beit Din ha-Gadol, February 11, 2008, *ha-Din ve-haDayan*, *gilyon* 19, 6;File no. 9707-21-1, Netanya Regional Beit Din, May 12, 2008; File no. 860977-1, Netanya Regional Beit Din, May 20, 2013; File no. 833000-5, Netanya Regional Beit Din, July 22, 2013; File no. 989884-1, Haifa Regional Beit Din, October 28, 2014.

[20] Dichovsky, 2006, supra n. 5, at 157. Translation culled from Radzyner, supra n. 5, at 128.

[21] *Teshuvot Geonim*, *Sha'arei Tsedek* 2, Sha'ar 2, Siman 27; *Piskei Riaz* 88, haga'hah 63; *Darkhei Moshe Tur E.H.* 88:2.

[22] Maharsham, *supra* n. 10. Whether *Teshuvot Shevat Tsiyyon* 96, *Teshuvot Maharik*, *shoresh* 120 and *Beit Meir*, *E.H. 77* subscribe to this view is subject to much debate and beyond the scope of our presentation.

[23] *Kefiyyah be-Get*, supra n. 5, at 78.

[24] *PDR* 21:176; *Dayyanim* S. Bibi, Y.Goldberg, and N. Prover, *supra* n. 5.

[25] File no. 1-64-5082, supra n. 14.

[26] File no. 022855183-21-1, Tel Aviv Regional Beit Din, October 2, 2005, *ha-Din ve-haDayyan*, *gilyon* 12, 6-7.

R. Izirer,[27] Rabbis Prover, Bibi, and- Attias[28] and Rabbis Prover, Goldberg, and Attias[29] who contend that in cases where a *beit din* coerces [or, for that matter, obligates[30]] a *get*, the husband can impose a condition to which he is entitled according to Halakhah such as recovering property that his wife had stolen from him or recovering outstanding debts from his wife. This posture is predicated upon the fact that Halakhah sanctions self-help ("*aveid inish dina lenafsheih*") and it is a condition is "easy to fulfill."[31] For example, if the amount of the stolen assets exceeds significantly the wife's financial ability to repay them, the parties will execute a *get* and subsequently the financial issue which was the condition of the *get* will be addressed by the *beit din*. Should the wife refuse to receive her *get* under such terms, since the husband is advancing a claim which he is entitled to according to Halakhah, we can neither coerce nor obligate him in the *get* because we do not perceive the wife as an *agunah*. On the contrary, she has "chained herself" regarding her *get*. Her husband is willing to grant a *get* but the impediment is created by her refusal to address her husband's outstanding legitimate claim which is a precondition for the execution of the *get*.[32]

According to this approach, what would constitute another legitimate claim which may serve as a precondition to giving a *get*? Let us say a husband summons his wife to resolve their end-of-marriage matters in *beit din* and she refuses and proceeds to have everything (except the matter of the *get*) resolved in civil court. After the issuance of the civil court judgment, husband informs his wife and states "I am unhappy with how the court divided up our assets and I want to revisit this issue in *beit din* and recoup my court and legal fees which were incurred while fighting you in court. Therefore, I am demanding that we now appear in *beit din* to address these matters. And, a *get* will only be forthcoming provided that these matters are addressed in *beit din*." The couple appears in *beit din* and is told that there are grounds to obligate a *get* but, in accordance with R. Schwadron and others, the husband's demands are legitimate and

[27] File no. 028981702-21-2, Beit Din ha-Gadol of Yerushalayim, February 25, 2007.

[28] File no. 7479-21-1, Tel Aviv Regional Beit Din, "Ploni v. Plonit," November 18, 2007.

[29] File no. 036425809-21-1, Tel Aviv Regional Beit Din, November 11, 2009, *ha-Din ve-haDayyan*, *gilyon* 27, 5-6.

[30] See supra n. 6.

[31] *Bava Kamma* 27b; *Shulhan Arukh*, *C.M.* 4; Maharsham, *supra* n. 10; File no. 1-64-5082, supra n. 14.

[32] Additionally see, Shivat Tsiyyon and Maharik, *supra* n. 22, Maharashdam, infra n. 45; File no. 1-64-5082, *supra* n. 14; File no. 9707-21-1, *supra* n. 19.

therefore will insist that these matters be addressed by the *beit din* prior to the execution of the *get* process. There is a clear prohibition to litigate one's matters in a civil proceeding and a defendant who wanted to appear in *beit din* and was denied that opportunity may proceed to *beit din* to revisit matters resolved in court[33] and recoup his court and legal fees.[34] A husband therefore is entitled to revisit these matters in a *beit din*. As such, in pursuance to this view, such preconditions are permissible and must be addressed prior to granting a *get*.[35]

On the other hand, if the husband did not summon his wife to *beit din* and thus willingly appeared and resolved their matters in civil court, then should the *beit din* direct him to give a *get*, the husband cannot propose any such preconditions because Halakhah does not recognize that he is entitled to revisit in a *beit din* any issues that were litigated and resolved in a civil court due to his acquiescence to appear in civil court. Consequently, he cannot recoup any court and legal fees. As various *dayyanim* have noted,[36] under all circumstances, Halakhah does not sanction a husband's "forum shopping" and looks askance at the employment of such tactics for the purpose of either impeding the *get* process or facilitating the brokering of a more favorable divorce settlement. As such, in pursuance of a *beit din's* divorce action to obligate a *get*, he is duty-bound to participate in the divorce process without foisting any such preconditions upon his wife.

Our aforementioned conclusions regarding a wife who summons her husband to court despite the husband's protestation to resolve matters in *beit din*, and of a couple who both agree to have their issues handled in court rather than *beit din*, assume that we are dealing with Torah-observant Jews. However, should we be dealing with a secular Jewish couple where the wife for decades has resolved her monetary matters in civil court and her husband voluntarily appears in this judicial forum to resolve their end-of-marriage issues, one cannot countenance to a husband's request to discontinue their litigation in court and proceed to *beit din* and demand such an action as a precondition to granting a divorce.[37] In this instance, acceding to the husband's request,

[33] This scenario is presented assuming the plaintiff agrees to proceed to *beit din*.

[34] *Tur C.M.* 26:7 in name of Rosh 18:5; *Teshuvot ha-Radvaz* 1:172; *Teshuvot ha-Mabit* 3:12; *Teshuvot Divrei Hayyim* 2, *C.M.* 1; *Teshuvot Teshurat Shai*, *Mahadurah Tinyana*, 162.

[35] *PDR*, supra n. 24, at 182.

[36] Dichovsky, *supra* n. 5, at 158-159; File no. 9707-21-1, *supra* n. 19; File no. 833000-5, *supra* n. 19.

[37] File no. 1-64-5082 (R. Sherman's opinion), *supra* n. 14.

> is in some ways a desecration of God's name. Many of those who demand adjudication by Torah law do not really seek [to comply with] Torah law, but rather material benefits. They use the Torah for personal gain… to advance an obvious interest. This is true of our case too, when the husband cynically embraces Torah law to force his wife to obtain a divorce in a manner that accords with his interests, even when he is obligated to grant the divorce.[38]

Finally, there is another position albeit a *shitat yahid*, a minority opinion, which, as we will show, has garnished significant support in recent years among many *dayyanim* who served and/or continue to serve on panels within the network of Israel's Chief Rabbinate.[39] The background for this view emerges from a story which unfolds in sixteenth century Salonika of the Ottoman Empire where a Jewish girl was betrothed to a Jewish male peer who passed away unexpectedly. Since the couple never formally consummated the marriage, there were no children. Therefore, the boy's brother, an older man with a wife and children, became obligated either to marry this girl due to the mitsva of *yibbum* or release her by means of *halitsa* and thereby free her to marry another man.

The surviving brother-in-law was aware that this young woman had a Jewish uncle who desired to marry her despite the girl's preference to marry a younger man. Additionally, the wife's uncle was a relative of the *yavam*, the surviving brother-in-law. Worried that the uncle's wife (his relative) would divorce his aunt, the brother-in-law was hesitant to perform the *halitsa* and thereby facilitate the girl's ability to marry his uncle. Seeking to protect the uncle's wife from a potential divorce, he was willing to perform the ceremony of *halitsa* only on the condition that the uncle would refrain from marrying the young girl after the *halitsa* rite, i.e. *halitsa al tenai*.

Addressing the factual context of the case, R. Samuel de Medina (known by the acronym: Maharashdam) writes,[40]

> …the levir is a decent man, and his sole intention is that his brother's widow not marry her uncle… and the intention of her uncle is to divorce his wife, who is the levir's aunt, and marry the young woman.

[38] Dichovsky, 2006, supra n. 5 at 158-159. The translation of the excerpt from this essay is culled from Radzyner, *supra* n. 5, at 123.

[39] Given that the only accessible reasoned *piskei din* concerning a husband's setting up a condition prior to giving a *get* are those handed down within this network, we were unable to ascertain how other panels – whether they serve in the Diaspora or elsewhere – treat our issues.

[40] Translation of the *teshuva* is culled from Radzyner, *supra* n. 5, at 126.

> To this I say, because this matter depends on this, that it is proper for her (the widow) to make herself unavailable to this man by every stringent means possible, and the same goes for the husband of his aunt, so as to bring the matter to a satisfactory conclusion, that is not contested or doubted, and inspires confidence so that the levir can grant the levirite release, and we will not need to resort to any sort of compulsion.

Dealing with a family situation of extreme sensitivity, Maharashdam empathized with the *yavam*'s attempt to protect the welfare of his relative, the uncle's wife, as well as the young girl's best interests. As such, implicitly subscribing to the view that a *yavam*'s precondition to *halitsa* is permissible and rejecting the Shulhan Arukh's ruling,[41] he refrained from compelling a *halitsa* out of fear and trepidation of the dire consequences resulting in the invoking of such a position.

What was the basis for his ruling? In his introductory remarks to the aforementioned *teshuva*, Maharashdam notes,[42]

> After I wrote and signed my name to the written and signed ruling above, I constantly whether I would find support for what I had written, namely, that given that the levir wants to grant the levirate release, but with the intention that his brother's widow who is subject to levirate marriage… [to him] not [if released] marry her uncle, who is married to his aunt, if so, it is impossible to compel him grant the levirate release under any circumstances…
>
> But until now I have not found a source for this, and in searching the laws of [stipulating] conditions… I found written in… *Hazeh ha-Tenufa* that even in the case of one who grants a bill of divorce to his wife with the intent… that she not go to her father's home, the divorce is effective and the condition stands. Yet no one should allow the granting of a divorce on such a condition, for there is no doubt that this condition cannot be fulfilled, as it is impossible that she should not go to her father's home… If the husband granting the divorce is one of those who was compelled [by the court] to do so, and does not want to grant the divorce except on this condition, we do not listen to him, and he is compelled to grant the divorce without this condition.

[41] R. Gatinieu, a Salonikan decisor in the nineteenth century followed in Maharashdam's footsteps. See *Teshuvot Tsel ha-Kessef E.H.* 13. Cf. *Shulhan Arukh*, *E.H.* 169:50.

[42] Translation of the *teshuva* is culled from Radzyner, *supra* n. 5, at 112,125.

Invoking Talmudic legal reasoning of "*medameh milta le-milta*" (lit. comparing one matter with another),[43] Maharashdam finds a fruitful source of comparison in *Hazeh ha-Tenufa*'s ruling regarding divorce. On the basis of *Hazeh ha-Tenufa*'s opinion, invoking a *masorah* attributed to Rosh dealing with halakhot of divorce,[44] Maharashdam's reply was that, just as attaching conditions to a *get* is permissible regarding a divorcing couple, similarly the halakhot of a *yibbum* (levirate marriage) allow for the imposition of conditions.[45] Therefore, one cannot obligate the brother-in-law to undergo *halitsa*. Moreover adds Maharashdam, the condition must be "easy to fulfill." Clearly, he argues, it is easy for the uncle to refrain from marrying his niece. On the other hand, in divorce situations a condition which is "almost impossible to fulfill," such as mandating that a divorcing wife should refrain from returning to her father's home or to move away from her family, Maharashdam and numerous *posekim* would argue that a husband cannot mandate such a condition prior to giving a *get*.[46] Therefore, in cases where we are dealing with a condition which can be easily executed, should a wife refuse to comply, she is responsible for impeding the execution of her own divorce.[47]

Though to the best of my knowledge, we find only a few *posekim* who possibly subscribe to Maharashdam's position nonetheless, as noted by others by dint of his authoritative status[48] and due to the concern for *hezkat issur* (presumptive prohibition) of the stringency of an *eshet ish* (a married woman),[49] where the condition is "easy to fulfill" Maharashdam's posture became the basis in recent years in some Israeli *battei din* for validating a husband's right to impose various conditions upon his wife prior to granting a *get*. In accordance with Maharashdam's position, the justification in allowing a husband to set a condition(s) which is easy to fulfill prior to executing a *get* stems from the fact that Halakha did not mandate coercion because she is not an *agunah* rather than due to a husband's entitlement to delay the *get* process.[50]

[43] For a brief discussion of the role of analogical reasoning in the halakhic decision making process, see *Rabbinic Authority: The Vision and the Reality*, supra n. 3, at 53-57.

[44] See *Teshuvot ha-Rosh* 43:3; Lavi, *supra* n. 5, at 648, 655-656.

[45] *Teshuvot Maharashdam*, *E.H.* 41.

[46] *Mishnah le-Melekh*, *supra* n. 16; *Keneset ha-Gedola*, *Tur E.H.* 154, *Hagahot ha-Tur* 1; *Teshuvot Ein Yitshak*, *E.H.* 2:40 (17).

[47] *PDR*, *supra* n. 24

[48] His opinion was cited by *Knesset ha-Gedola*, *supra* n. 46; *Ba'er Heitev*, *E.H.* 154:1; Landesman, *supra* n. 5, at 146; *Kefiyyah be-Get*, *supra* n. 5, at 70-71.

[49] *PDR* 5: 66, 79-80 (R. Elyashiv)= *Kovets Teshuvot* 1:181; *Dayyanim* Prover, Goldberg, and Bibi, *supra* n. 5, at 157.

[50] Landesman, *supra* n. 5, at 146; *PDR* 66, 79-80.

There have been varying interpretations of the scope of Maharashdam's view in general and the type of condition that would be permissible in particular. One approach is that a *beit din* will recognize any condition which is legitimate in the eyes of Halakhah provided that the condition is easy to fulfill, such as recovering property that his wife had stolen from him or recovering outstanding debts from his wife.[51] On the other hand, a condition which is not easily fulfilled by a wife is for example a husband mandating that his spouse dress properly and/or consume certain foods.[52] Consequently, such a precondition will not be recognized. Similarly, according to the majority of *battei din* under the Chief Rabbinate any condition which will emotionally or financially affect the wife is illegitimate.[53] Hence, extortion as a precondition for granting a divorce is prohibited.[54] Whereas the intermediate position only required that the demand be halakhically legitimate, Maharashdam requires that the condition be "easy to fulfill" as well as halakhically valid.

Alternatively, Maharashdam's view was understood to encompass all conditions that a husband may fancy, even those which are at variance with Halakhah. It has been contended that *dayyanim* extrapolated such an interpretation from reviewing an excerpt of his opinion found in *Ba'er Heitev*, a digest found in current editions of *Shulhan Arukh* on *Even ha-Ezer* which is authored by R. Judah Ashkenazi, eighteenth century Lithuanian authority. He writes,[55]

> And when do you coerce [a *get*]: when he refuses to divorce. However, if he wants to divorce on condition [assuming the precondition is complied with], we do not coerce.

Based upon this citation, one would conclude that any condition, regardless

[51] Maharsham's, *supra* n.10 understanding of Maharashdam's posture; File no. 1-64-5082, *supra* n. 14 (R. Sherman's opinion); File no. 322-25-1, *supra* n. 19; File no. 7479-21-1, *supra* n. 28; File no. 036425809-21-1, *supra* n. 29.

[52] File no. 0027-21-1, Beit Din ha-Gadol of Yerushalayim, August 29, 2004 (R. Izirer's opinion). Cf. File no. 0027-21-1, Beit Din ha-Gadol of Yerushalayim, February 1, 2005, *ha-Din ve-haDayan*, *gilyon* 9, 6-7 where R. Izirer modified his posture.

[53] File no. 1-64-5082 (R. Sherman's opinion); (R. Amos's opinion) *supra* n.14.

[54] File no. 860977-1 (R. Amos's opinion) *supra* n.20.For the grounds for invalidating an exploitative agreement regarding a *get*, see *Yevamot* 106a; *Bava Kamma* 116a-b; *Teshuvot Maharshal* 24-25. Cf. File no. 1-059024273-21, Supreme *Beit Din*, 21 Kislev 5761 (unpublished opinion of *Dayyanim* Nadav and Bar Shalom).

[55] *Ba'er Heitev*, *E.H.* 154:1. Bracketed expansions supplied by the author.

of its halakhic legitimacy, ought to be permissible.[56] In bold contrast to the interpretation offered by R. Elchanan Spektor,[57] expositions dating back to the late 1990's of the late R. Elyashiv z"l, a *gedol ha-dor* for Ashkenazic Jewry, R. Landesman, R. Tzvi Gartner, and R. Joseph Goldberg, both leading experts in the realm of *get* coercion, have understood Maharashdam in accordance with *Ba'er Heitev*'s understanding.[58] In fact, some *battei din* analyze Maharashdam's position by citing *Be'er Heitev* rather than the text of his actual responsum.[59]

Subsequently, numerous *dayyanim* followed in their footsteps and concluded that the type of condition which a husband may demand prior to granting a divorce must be "easy to fulfill." Obviously, it will be left to the *beit din's* discretion to determine which conditions are easy for the wife to comply with and which are impossible to fulfill.[60] Obviously, R. Elyashiv was of the opinion that a husband's "excessive demands"[61] in a particular case were to be viewed as "easy to fulfill" and therefore a legitimate precondition to a husband's giving a divorce. On the other hand, R. Lavi rejected a husband's demand to reduce a father's child support as a precondition to granting a divorce which would be impossible to fulfill.[62] Yet, in another case, Rabbis Abergil and Hershrik recognized such a condition as legitimate.[63] In short, addressing the gray area, a condition which may fall in between a condition which is easily fulfilled and a demand which would be impossible to fulfill, is subject to the *beit din*'s discretion how to label the condition.

Furthermore, a review of some of these decisions indicates that *dayyanim* implicitly felt that a husband's demand to revisit parenting arrangements [custody and/or visitation] or child support orders mandated by a civil court were "easy to fulfill" conditions.[64] Two panels took the unusual position that an abusive husband could impose a condition that his

[56] Bass, *supra* n. 5, at 153.

[57] *Teshuvot Ein Yitshak*, *E.H.* 2:40 (17).

[58] *Kefiyyah be-Get*, *supra* n. 5, at introduction, 78; Landesman, supra n. 5 at 146; *Dayyanim* Provar, Goldberg, and Bibi, *supra* n. 5, at 156.

[59] File no.0027-21-1, *supra* n. 6.

[60] For criteria, see File no. 0027-21-1, *supra* n. 6, at 4; File no. 1-64-5082 (R. Sherman's opinion), *supra* n. 14.

[61] *Kefiyyah be-Get*, *supra* n. 5, introduction (= *Kovets Teshuvot* 1:181).

[62] File no. 043387083-21-1, *supra* n. 19.

[63] File no. 040135832-21-1, *supra* n. 19.

[64] File no. 0027-21-1, *supra* n. 6, at 4; File no. 4273-21-1, *Beit Din ha-Gadol* of Yerushalayim, December 18,2000 cited by Bass, *supra* n. 5 , at 155 and Radzyner, *supra* n. 5 , at 117, n. 38; File no. 029612306-68-1, Yerushalayim Regional Beit Din, February 13, 2007, *ha-Din ve-haDayan*, *gilyon* 19, 4-5.

children receive a Torah education prior to a *beit din* compelling a divorce.[65] On the other hand, Rabbis Landesman and Dichovsky as well as some other *dayyanim* take the position that Maharashdam's ruling was limited to conditions relating directly to the divorcing couples. However, preconditions relating to child support and parenting arrangements that entail a third party's best interests may not serve as a reason to delay a *seder ha-get*. In fact, a parent advancing a claim on behalf of his/her child in *beit din* is actually representing his child and hence must submit claims which promote the child's best interests. Even with the absence of *beit din* involvement, any agreement finalized between the divorcing parents regarding their children must promote the child's best interests. Should an agreement undermine these interests, the agreement is null and void.[66] As such, any conditions dealing with child support or parenting mandated by the husband prior to the granting of the *get* are invalid.[67]

Given that Maharashdam's distinction between a condition which is 'easy to fulfill' such as "she will not marry a particular person" and a condition that is 'impossible to fulfill' such as "that she will not go to her father's home" are all non-financial conditions, R. Lavi concludes that all financial conditions are invalid, regardless of their reasonability in terms of compliance.[68]

Finally and significantly, one must take cognizance of the factual context of Maharashdam's ruling,[69]

> There is doubt that even those Sages in the Mishnah who said they compel… did not say that they compel him to grant a divorce unless he does not want to grant a divorce at all. But, if he wants to grant a divorce, but wants to impose some condition for granting the divorce, as to this, they certainly did not say that they compel him to grant a divorce unconditionally.

To state it differently, his ruling is limited to an instance of attaching a condition to a *get* where a husband sincerely intends to become

[65] File 7178-25-2, Yerushalayim Regional Beit Din, August 31, 2004, *ha-Din ve-haDayan*, *gilyon* 8, 6-7; File no. 015692353-21-1, Yerushalayim Regional Beit Din, July 6, 2006, *ha-Din ve-haDayan*, *gilyon* 19, 5-6.

[66] *Teshuvot ha- Mabit* 2:62; *PDR* 2:300, 3:353,358, 7:3, 9.

[67] Landesman, supra n. 5 , at 151-152; Dichovsky, 2006, supra n.5 , at 157; File no. 029612306-68-1, Beit Din ha-Gadol of Yerushalayim, July 17,2007, *ha-Din veha-Dayan*, *gilyon* 19, 4-5; File no. 02286244-21-1, Beit Din ha-Gadol of Yerushalayim, February 11, 2008, *ha-Din veha-Dayan*, *gilyon* 19, 6.

[68] *Ateret Devorah*, supra n. 5, at 649.

[69] Radzyner, supra n. 5 at 112.

divorced and demands a condition prior to undertaking the *get* process. However, in a situation where the husband has no interest in giving a *get* and imposes a demand in order to simply stonewall the *get* process and leave his wife an *agunah* or negotiate a more favorable settlement, clearly his position does not contemplate validating the imposition of any condition, even one which is "easy to fulfill" under such circumstances.[70] And, in fact, R. Menashe Klein understood Maharashdam's ruling to be limited to a husband who sincerely intends to grant a *get*.[71] As *Dayyan* Yehuda Fris writes in trenchant terms,[72]

> When a *beit din* hands down a divorce judgment which directs that the *get* ought to be coerced, and the husband appears and announces that he is prepared to give a *get* after his wife transfers monies to him, nullifies claims in civil court and the like. In such a case he is not requesting to impose "a condition regarding the *get*" (*tenai ba-get*); rather he is petitioning to impose a condition "to the *get*" (*tenai la-get*). In other words, there is no consent to divorce accompanied by a condition to granting a *get*, but rather the imposition of a condition to the actual execution of the divorce and implementation of the *beit din* decision. In practice, in this context there is no imposition of a condition, but a husband's opposition to implement a *beit din* judgment which obligates him to divorce…this request was never mentioned in Maharashdam's words…
> Our scholars… established grounds for *get* coercion (see *Shulhan Arukh*, *E.H.* 154) and if a husband is permitted to establish conditions and delay the *get* process in these instances, "what have our scholars gained by setting their guidelines" (See Radvaz 1:157)

Or addressing those who interpret *Maharashdam*'s position as encompassing even conditions which are at variance with Halakhah, R. Landesman exclaims,[73]

> Is it logical to say that a husband controls such a matter to the extent that he can prevent the execution of a *beit din* decision by imposing any condition? Remember, concerning other claims between man and his neighbor that one can coerce a *beit din* judgment of "obligated to pay" and he refuses to implement the decision, should we say that one who is obligated

[70] R. D. Bigman, "Interpretation which is open to controversy," [in Hebrew], *Makor Rishon*, gilyon 720, 23 Iyar 5771.
[71] *Teshuvot Mishneh Halakhot* 17:82.
[72] Fris, supra n. 5 at 235.
[73] Landesman, *supra* n. 5, at 147. A similar reservation has been expressed by *Dayyanim* Prober, Goldberg, and Bibi, *supra* n. 5, at 157.

> to pay is empowered always to delay the implementation of a judgment by imposing any condition upon the opposing party? I wonder.

More recently, the Supreme Beit Din of Yerushalayim notes,[74]

> In a situation where the husband's claims are unjustified and he attempts to extort from his wife concessions which are unjustified, we need to reject his claim and obligate him in a *get*.

Furthermore, in R. Fris's estimation, stipulating a condition which is easy to fulfill only applies, according to Maharashdam, prior to a *beit din*'s ruling that one is obligated to give a *get*. However, once *beit din* renders such a judgment, there can be no delay in executing the *seder ha-get*. At best, for Maharashdam, the husband may insist on a condition for granting the *get*. However, given that today *gerushin al tenai* is not practiced, R. Fris concludes that his view is contemporaneously inapplicable.[75]

In sum, there are four differing interpretations of Maharashdam's position. Firstly, preconditions which are recognized by Halakha and which are easy to comply with are grounds for delaying the *get* process. Some decisors contend that even claims which are against Halakha will be permitted as preconditions as long as they are easy to fulfill. Furthermore, other authorities argue that the conditions must be non-financial in order to pass muster.

Finally, some *posekim* claim that one may invoke his position only with regard to instances where the husband sincerely intends to grant a *get*. However, in situations where the advancing of demands by the husband seeks to stonewall the *get* process and leave the wife an *agunah* or to serve as a negotiating tactic to gain a more favorable divorce settlement, such conditions will not be recognized.

Despite the fact that the factual context of Maharashdam's ruling dealt with a man who sincerely was willing to perform a *halitsa* (and by inference was applied by him to a husband who was willing to give a *get*), nonetheless, in recent years *dayyanim* have expanded his ruling to encompass situations where the husband attempted to stonewall the *get* process by demanding certain conditions be addressed. For example, partially relying upon Maharashdam's view, Rabbis Rabinowitz, Algrabli, and Eliezrov issued a judgment coercing the husband to give a *get* since "he neither wanted *shalom bayit*, matrimonial reconciliation, nor wanted

[74] File no. 880581/9, Supreme *Beit Din* of Yerushalayim, *Ploni v. Plonit*, July 23, 2014.

[75] Fris, *supra* n. 5, at 236-237.

to divorce his wife, only the imposition of conditions."[76] In another instance, eight months after being obligated by a *beit din* to give his wife a *get*, a husband appears in *beit din* and states that he is ready to grant a divorce on the condition that she agrees that the authority to resolve matters of property and maintenance be transferred from civil court to the *beit din*. Here again, his approach is examined, this time by *Dayyanim* Prover, Y. Goldberg, and Bibi, who are dealing with a husband who has been delaying giving a *get*, apprehensive regarding whether the court will rule in favor of his claims and therefore now wants his issues adjudicated in *beit din*.[77]

In another instance, an Israeli husband fled to Holland, remarried a non-Jewish woman, sired a child from the relationship, and abandoned his wife in Erets Yisrael; she has been an *agunah* for eight years. After a series of negotiations between the couple, the husband agreed to grant a divorce, assuming that that custody of his child will be transferred to him and that he would receive tens of thousands of dollars of maintenance that the wife collected from Israel's national insurance. Subsequently, determining that there were grounds to give a *get*, two Israeli Jews meted out physical coercion and a *get* was forthcoming from the husband.[78] However given that the husband had demanded certain conditions prior to the issuance of the divorce and a *beit din* did not address if he could be coerced (much less physically coerced) without first complying with his demands, there existed a doubt regarding the validity of the divorce. Clearly, the circumstances of this case belie a husband who is a non-observant Jew and for eight years recalcitrant regarding the *get*, who ostensibly changes his mind and is ready to give a *get* but attempts simultaneously to extort monies from his wife. At the end of the day third parties realize that a *get* will only be forthcoming if he is physically coerced. Yet, both Rabbis Bar-Shalom and Nadav, and later Rabbis Mordechai Eliyahu and Shalom Messas, who subsequently became involved in this case, factor into consideration Maharashdam's view which addresses a Torah-observant husband who genuinely wants to perform *halitsa* and a husband who is willing to give a *get* to his wife.[79] In short, these cases are being resolved by invoking Maharashdam's position, despite the fact that the context of his decision is markedly different than the three aforementioned cases

[76] File no. 3222-25-1, *supra* n. 19.

[77] *PDR*, supra n. 24.

[78] See S. Messas, "A doubt regarding *get* coercion," [in Hebrew] *Tehumin* 23, 120-124, at 122 (2002).

[79] File no. 1-059024273-21 cited by Bass, *supra* n. 5, at 155.

which deal with halakhically non- observant husbands who are manipulative and engage in *get* recalcitrance.

Except for one decision,[80] in the majority of cases which have been published, whether a panel chooses to subscribe to the majority opinion represented by Rashba and others and reject Maharashdam's posture or to accept his view, there is no inquiry into the husband's motivation at the time he decides to advance his demands.[81] Though many facts of the case are communicated in the decision which potentially may facilitate distilling the husband's motives in raising such preconditions, the *beit din* chooses to focus upon his posture in general and whether the conditions are "easy to fulfill" or not in particular. Here again, these panels are implicitly positing that Maharashdam's approach applies both to a recalcitrant husband as well as a sincere husband who desires to participate in the divorce process. The aforementioned *battei din*'s need to invoke his ruling in cases of a manipulative husband stems from 'the gravitational pull' to avoid the strictures of a *get me'usseh* with its accompanying consequences of contributing to the proliferation of *mamzerim*. In other words, it is incumbent upon a *dayyan* to exhaust every possibility to avoid the strictures of a coerced *get*. As such, if there is a possibility that the husband will divorce voluntarily, such as by demanding a certain precondition to the *seder ha-get*, we are proscribed from coercing him. As Maharashdam notes regarding the situation of the levirate marriage, "This is the straight and clear path, in my opinion, so as not to engage in compulsion."[82]

Similarly, he states concerning the matter of divorce, "There is no doubt that compelling him to grant an unconditional divorce contributes to the proliferation of *mamzerim*."[83]

Undoubtedly, the factor of *hezkat eshet ish* plays an important role which may lead to a *pesak* which is stringent in order to avoid potential *mamzerut*,[84] however this presumption which concerns Maharashdam

[80] File no. 860977-1, *supra* n. 19.

[81] *Dayyanim* Prover, Goldberg, and Bibi, *supra* n. 5; File no. 1-64-5082, *supra* n. 14.

[82] Radzyner, *supra* n. 5, at 126.

[83] Radzyner, *supra* n. 5, at 113.For an identical understanding of his position, see *PDR* 5:66 *supra* n. 50, at 80 (R. Elyashiv's opinion).

[84] Shakh, *Shulhan Arukh*, *H.M.* 242:4; *Mishkenot Ya'akov*, *E.H.* 38; *Teshuvot Avodat ha-Gershuni* 39. Cf. others who contend that in situations where the accepted *minhag* is to follow the teachings of *Shulhan Arukh* and *Rema*, though there may exist dissenting positions; one ought to comply with the former rulings. See Hazon Ish, *E.H.* 99:5.

ought to play no role in our scenario, where we are dealing with a crafty and manipulative husband who engages in *get* recalcitrance!

some *dayyanim* to arrive at such conclusion and issue a decision which permits a husband to impose preconditions to the *seder ha-get*. Nonetheless, as we have shown, there is no basis that a *beit din* invoke such a presumption in our situation. It lacks a basis because the emergence of the centrality of *hezkat eshet ish* by Maharashdam was propounded within the context of particular set of facts, facts which are readily distinguishable from the fact pattern of our scenario.

FINAL AFTERTHOUGHTS: A HALAKHIC DESIDERATUM

R. Lavi, *av beit din* of Netanya Regional Beit Din, writes the following,[85]

> Here in our *beit din* we have authored in some of our decisions that according to Halakha we do not follow Maharashdam, given that many disagree with his view. Even according to this position, any condition which one cannot implement immediately, which is usually the case, which means delay in the divorce process in circumstances of separation and an obliging divorce judgment, is a condition which is not easily fulfilled.

In other words, implicitly following in Shakh's footsteps,[86] R. Lavi contends we should follow the majority opinion which proscribes a *beit din* from sanctioning a husband's right to advance a demand for insisting on the fulfillment of certain conditions prior to giving a *get*.[87]

Seemingly such a conclusion is open to challenge. Invoking *hilkheta ke-vatrai* (lit. the Halakhah is in accordance with the view of the later authority) Rema states,[88]

> In all cases where the views of earlier authorities are recorded and well-known and the later authorities disagree with them… we follow the view of the later… However, if a responsum by a Gaon is found that had not been previously published, and there are other [later] decisions that disagree with it, we need not follow the view of the later authorities… as it

[85] See letter cited by Shochetman, *supra* n. 5.
[86] Shakh, *Shulhan Arukh*, *Y.D.* 242 (end), *Hanhagat Hora'at Issur ve-Heter*.
[87] See text *supra* accompanying notes 8-20.
[88] Rema, *Shulhan Arukh*, *C.M.* 25:2. Translation culled from Menachem Elon, *Jewish Law*: History, Sources, Principles, vol. 1, (Philadelphia and Jerusalem: The Jewish Publication Society, 1994),1-473, at 271.

> is possible that they did not follow the view of the Gaon, and if they had known it they would have decided the other way.

One can infer from Rema's ruling that the "*batrai*" (lit. the later authority) in our scenario, namely Maharashdam who lived in the sixteenth century after the "*kadmai*" (lit. the earlier ones) may challenge and overrule the earlier authorities.[89] Consequently, despite the majority view which had crystallized in earlier generations, we ought to show deference to Maharashdam's opinion which supports the permissibility of a husband's imposition of conditions. Nonetheless, this interpretation of *hilkheta ke-vatrai* has been rejected by numerous *Rishonim*, early authorities.[90]

The decision-making rule of *hilkheta ke-vatrai* is not to be viewed as a rule which empowers a later authority to overrule the opinion of an earlier authority, but rather as one that allows a *posek* to examine the various views regarding an issue and identify the '*batrai*' and follow his position.[91] However, as noted by Rema, ascribing to the view of the '*batrai*' is contingent upon the fact that the later authority knew of the early authority.[92] In our case, as R. Yanai points out, it seems that Maharashdam did not have access to R. Yosef Karo's *Bedek ha-Bayit*, which was published in 1605, fifteen years after Maharashdam's demise, as well as volume four of Rashba's teshuvot, which appeared over a hundred years after his death.[93] Both Rashba and R. Yosef Karo disagreed with Maharashdam. In fact, there is equally no mention in the entire *teshuva* of other earlier authorities such as Rashbash, and Tashbets, who differed with Maharashdam. Therefore, it is unsurprising to find the following admission. After a detailed discourse on the halakhot of *yibbum*, Maharashdam concludes his responsum by stating,[94]

[89] R. Hayyim Yosef David Azulai, *Ya'ir Ozen*, *ma'arekhet* 5, *kelal* 51 in the name of R. Bezalel Ashkenazi

[90] "*Hilkheta ke-Vatrai*," *Encyclopedia Talmudit*, vol. 9, 343.

[91] I. Ta-Shma, "*Hilkheta ke-Batrai:* Historical Aspects of a Legal Rule," [in Hebrew], *Shenaton ha-Mishpat ha-Ivri*, 6-7, (1979-1980), 405-423, at 412.

As aptly noted by Dr. Wosner, though there are *posekim* such as Rosh and Abraham ben ha-Rambam who claim that the authority of the later authorities is preferable than the earlier ones, their postures should not be misconstrued as imparting authority to the later ones. See S. Wosner, "*Hilkheta Ke-Batrai*- A New Perspective," [in Hebrew] *Shenaton ha-Mishpat ha-Ivri*, 20,(1995-1997,151-168, at 152 , n. 5.

[92] Rema, *supra* n. 88.

[93] File no. 9707-21-1, *supra* n. 14.

[94] Radzyner, *supra* n. 5, at 112.

> But, until now I have not found a source for this [i.e. *haskama le-gerushin al tenai*- AYW], and in searching the laws of [stipulating] conditions, I found in… *Haze Hatenufa*…

Consequently, in the absence of any examination much less awareness of these opposing views, the rule of *hilkheta ke-vatrai* is inapplicable and therefore Maharashdam's posture cannot be determinative.[95]

Based upon our foregoing presentation, we have analyzed the relative strength, effectiveness, and plausibility of the three approaches to allowing a husband's to stipulate a precondition to giving a *get*. In pursuance to the rule of *rov*, majority rule, and the inapplicability of *hilkheta ke-vatrai*, it is our opinion that once it is clear that there are grounds for obligating a *get*, a *beit din* ought to be unwilling to accept a husband's demands as a precondition to granting a divorce. The underlying rationale for this conclusion is that once there are grounds to obligate a *get*, there is no need to be concerned about conditions advanced by the husband, in particular where the husband's motivation for raising these demands is to manipulate and obfuscate the process. Echoing the Rashbash's view and R. Yanai's,[96] R. Landesman writes,[97]

> Is it logical to say that a husband controls such a matter to the extent that he can prevent the execution of a *beit din* decision by imposing any condition?!

Furthermore, all of these conditions, such as modifying parenting arrangements, reducing child support, changes in a child's schooling, addressing marital assets, extortion of monies, discontinuing a civil proceeding, and revisiting civil claim(s)in *beit din*, etc., are unrelated to the actual delivery of a *get*.[98] Addressing a wife's breach of a divorce agreement which provided that the husband would only grant a *get* if certain items would be returned to him, Mahariz Enzel is posed with the question whether we must declare that "the giving of a *get* was in error," a *get mut'eh* which results in the need for arranging for a second *get*,[99]

[95] See *Ateret Devorah*, *supra* n. 5, at 651-652.
[96] *Teshuvot Rashbash* 208; 383; Yanai, *supra* n. 5 at 366.
[97] See *supra*, text accompanying n. 73.
[98] Yanai, *supra* n. 5, at 370; File no. 860977-1, *supra* n. 19.
[99] *Teshuvot Mahariz Enzel* 81. For a summary of the differing reviews of the consequences of *'a get mut'eh'*, see U. Lavi, "Is there a concern for the validity of the *get* when the husband was deluded in the divorce agreement," [in Hebrew] *Shurat ha-Din* 2, 146-190 (1994); A. Radzyner, "Annulment of divorce in Israeli Rabbinical Courts," *Jewish Law Association Studies*, 23, (2012)193-217.

> God forbid, that we should cast aspersions on this proper *get*, since he did not divorce her in order to recover some items but rather due to strife and hatred between them. The fact that a settlement was brokered that he would receive these items in exchange for a *get* are two different matters and neither one is dependent upon the other… There is no error in the divorce since both desired to become divorced and if he was delaying to give the *get* until she returns everything… this is a means of coercion and revenge that he makes her an *agunah* until she returns it to him… and he only has a claim for the items.

According to Mahariz Enzel as well as others,[100] one must distinguish between reasons which are related to the grounds for the divorce and reasons which, though advanced at the time of divorce, are unrelated to the grounds for the couple's undergoing divorce. As such, a wife's plea that her husband rapes and abuses her or a husband's claim that his wife is refraining from engaging in conjugal relations are claims directly related to the granting of the *get*. In Mahariz Enzel's case, the husband divorced his wife due to feelings of hatred rather than because she refused to return some objects belonging to him. Therefore, it becomes a *beit din's* responsibility to address this type of claim dealing with animosity in order to assess whether there are grounds for obligating a divorce. Once such determination is completed, the *beit din* will issue its directive for the couple to divorce. Upon the issuance of the divorce judgment, the only outstanding matter is simply whether the parties – and, in our cases, the husband – must comply with the *beit din's* judgment.

On the other hand, all reasons which are independent and unrelated to the grounds for divorce, such as the husband's demand that his wife return certain objects, are subsumed under the category of *gerushin al tenai* and are therefore invalid. And if the husband grants a *get* on the assumption that he will receive these items and the wife deceives him by failing to comply with his request, then, in accordance with Mahariz Enzel and others, there are no grounds for a divorce annulment.[101] In other words, there is no basis for demanding conditions which are unrelated to the grounds for the divorce.

In conclusion, many Rishonim, *Shulhan Arukh* and Aharonim insist that the *get* process be commenced once a *beit din* judgment has been

[100] *Teshuvot Hessed le-Abraham* (Teomim), *Mahadura Kamma*, E.H. 43; *Teshuvot Divrei Hayyim* 1:84, 2:85; *Teshuvot Helkat Yo'av* E.H. 25; *Teshuvot Oneg Yom Tov* 154; *Yeshuot Ya'akov*, *E.H.* 25; *Iggerot Moshe*, *E.H.* 3:37; *Teshuvot Divrei Yosef* (Cohen) 2: Section 119, 17-18.

[101] See *supra*, nn. 99-100.

handed down without deferring to a husband's series of demands. And should a husband have halakhically legitimate claims which are unrelated to the giving of the *get*, such as recovering property that his wife had stolen from him or recovering outstanding debts from his wife,[102] then prior to the *sederha-get* the parties ought to sign off on an arbitration agreement empowering the *beit din* to resolve these matters after the *get* has been delivered to the wife. In effect, in the wake of a *beit din's* decision to obligate a husband to grant a *get*, we suggest following in the footsteps of the majority opinion by invalidating any precondition(s)[103] while invoking Maharsham and others who recognize the husband's entitlement to deal with certain issues of halakhic import,[104] are matters which ought to be addressed in *beit din after the sederha-get* has been completed.[105]

Said conclusion that a husband's precondition will not be permitted in the wake of a *beit din*'s decision either coercing or obligating a Jewish writ of divorce may be explained in *jurisprudential* terms. For instance, according to the conventional example of the gunman, if gunman A tells B, "Your money or your life," B has a choice. Should B decide to give A his money, we do not consider B's decision voluntary. We consider this a robbery rather than a consensual transfer of property. On the other hand, if B has a life-threatening disease and doctor A offers to treat him for fair remuneration which upon payment will dissipate B's life's savings, if B opts for the treatment, he may say that A's offer was "an offer he could not refuse," or that he had no rational choice but to accept the doctor's proposal. Should B accept the offer, we would not consider B's acceptance involuntary.

Both offers by the gunman and physician convey the same message in which A tells B:

1. If you do x, then z.
2. If you do not do x, then not z.

To state it differently, gunman A informs B that if he gives A money, A will spare B's life; but if he fails to give him his money, A will die. The doctor A tell B that if he consents to pay a fee, A will treat his disease; but if he does not accept A's offer, A will not treat him.

[102] For another example, see *supra* text accompanying nn. 33-35.
[103] See text *supra* accompanying nn. 8-20.
[104] See text *supra* accompanying nn. 21-35.
[105] See *Mishpatekha le-Ya'akov* 3:41 (in the name of *Yeshuot Ya'akov E.H.* 119, *Perush ha-Katsar* 6).

Given that both the gunman and doctor are giving the identical message, what distinguishes one offer from the other? Why would we conclude that in the gunman scenario B's decision is given under duress, while in the case of the doctor, we think that B's decision is voluntary? One possible solution is that the gunman's offer is coercive while the doctor's offer is not coercive.[106]

The question, then, is what makes one offer coercive and the other not coercive? Various moral philosophers argue that the benchmark or what they call "the baseline" entails whether morality dictates if a proposal is coercive or not. In the gunman scenario, B has a moral right not to be placed in the position of choosing between his money and his life. Since the gunman's offer is worse than what B is morally obligated entitled to – the moral benchmark of retaining his life and his money – the offer is coercive and therefore B's decision is involuntary. On the other hand, in the case of the physician, B is not morally entitled to be cured by A gratis. Given that the offer is better than what B is entitled to (avoiding B's death), the proposal is not coercive, and therefore we view B's decision as voluntary.

Based upon the foregoing, is our conclusion that prohibiting the imposition a husband's precondition prior to executing a *get* which a *beit din* has mandated identical to the dilemma of the scenario of the physician or the gunman? Clearly, in our divorce situation, by dint of the fact that a *beit din* is either coercing or obligating the husband to grant a *get*, the moral baseline is that the husband is obligated to deliver a *get* without the setting down of any precondition. The *beit din*'s judgment that there are grounds for giving a *get* informs us that a husband's proposal is coercive due to the fact that it worsens what the wife is halakhically entitled to receive, namely her *get* therefore such conduct cannot be countenanced.

[106] Implicit in our understanding is that coercion is associated with the phenomenon of experiencing pressure to act in a particular fashion even though we do not want to do it. See Robert Nozick, "Coercion," in, *Philosophy, Science, and Method: Essays in Honor of E. Nagel,* ed. S. Morgenbesser, et. al 440-472 (New York: St. Martin's Press, 1969); James McCloskey, "Coercion: Its Nature and Significance, " *Southern Journal of Philosophy* 18 (1980), 335-351; Daniel Zimmerman, "Coercive Wage Offers," *Philosophy & Public Affairs* 10 (1981), 121-145; Joel Feinberg, Harm to Self, (N.Y.: Oxford University Press, 1986), 189-262; Joseph Raz, *The Morality of Freedom*, (Oxford: Oxford University Press, 1986), 148-154. For a contrasting approach, see Scott Anderson, "The Enforcement Approach to Coercion, " *Journal of Ethics & Philosophy* 5 (2010), 1-31.

In short, allowing a husband to impose a precondition is no different than a gunman A who tells B, "Your money or your life."[107]

May it be the will of Ha-Shem that we return to learn this topic in response to an inquiry, a study without practical application, in the format of "*derosh ve-kabbel sakhar*."

[107] Obviously, the two cases are on different halakhic planes in terms of sanctions which may be applied for such threats but both situations involve offers which are halakhically reprehensible.