A Prenuptial Agreement for a Second Marriage

When an older widow and widower marry, both of whom have children and possibly grandchildren from a previous marriage, there are concerns that arise that relate to comingling their assets. The children of the widow do not want their stepfather to inherit their mother's estate, if she predeceases her new husband. Similarly, the widower's children may be concerned that if their father predeceases their stepmother, her care may become very costly, leaving significantly less for them to inherit. Another concern may arise if she owns property that produces income. *Nichsei melog* property remains the wife's but the husband has the right to the benefit of that property (*peiros*)[1]. Her family may have a strong interest in the profit generated by such properties to remain with them rather than her new husband being able to keep them for himself. Both sides understand and appreciate the concern and want to know whether something can be done so that halachically, the assets that each one brings to the marriage remains separate so that her children will inherit her assets and his children will inherit his estate without her medical care and support being funded from his assets.

The concern expressed is genuine because in the absence of any agreements, a man inherits his wife's estate when she predeceases him[2] and a woman is financially supported from her husband's estate[3] if he predeceases her and that includes her medical care[4]. These are both examples of enactments put in place by Chazal concerning the financial obligations and standard practices of married couples. The question is whether individual couples can make agreements between themselves to protect each of their assets during the marriage as well as after one of them dies.

Shulchan Aruch[5] rules that a couple can stipulate that a husband will not inherit his wife's estate. Although this ruling addresses at least one of the above-mentioned concerns, Shulchan Aruch adds an important qualification to this ruling. He writes that this stipulation must be adopted before their marriage, while she is an *arusah*, or, alternatively, it can be incorporated into the *kesubah*. However, once they are married, i.e., post *nisuin*, such an agreement is no longer binding, and the husband will inherit his wife's estate. The reason why a couple cannot make an agreement once they are married that the husband will not inherit his wife's estate is that at that point he has already acquired the right to inherit her estate and a verbal declaration does not

[1] See E.H. 85 for a lengthy discussion of the details of the *halachos* of *nichsei melog*.
[2] E.H. 69:3, 90:1.
[3] See E.H. 93
[4] E.H. 79
[5] E.H. 92:7

dissolve that right. The Bais Shmuel[6] equates such an attempt with a son making a verbal declaration that he will not inherit his father's estate. Such a declaration is ineffective to relinquish his inheritance rights since he already possesses them. Moreover, even making a *kinyan* to relinquish one's inheritance rights is ineffective since he does not yet own the estate to be able to transfer those assets via a *kinyan*. The husband is in a similar situation. Once he is married, he already acquired the right to inherit his wife's estate. A declaration renouncing those rights is no longer effective and a *kinyan* will not transfer his rights since he does not actually own her estate for a *kinyan* to be effective.

It is also not possible for the husband to renounce his rights before the *eirusin* since before *eirusin* those rights do not yet exist – *davar shelo ba l'olam* and a renouncement of rights that do not yet exist is ineffective[7].

It seems clear that a mechanism exists for a couple to renounce financial rights that Chazal assigned them in marriage, but it must be done between the *eirusin* and *nesuin*. In the time of Chazal this may have been a reasonable option since *eirusin* and *nesuin* were done at different times, sometimes even a year apart. Nowadays, we do the *eirusin* and *nesuin* together and it may prove awkward to interrupt the wedding ceremony to sign documents renouncing their financial rights. Is there another option for them to renounce their rights other than in the middle of the wedding ceremony?

The *Pischei Teshuvah*[8] quotes the Yeshuos Yaakov who expresses surprise that in his time it was common practice to sign documents renouncing financial rights after the couple is engaged (*shidduchim*) and before the wedding. The basis for his surprise at this common practice was that in his time the *eirusin* and *nissuin* were performed together and thus the renouncement of rights was being done even before *eirusin*, which, as mentioned above, is not effective. He concludes that it may be possible to justify the practice of signing renouncement documents in advance of *eirusin* but when such documents are presented to him to rule on their validity, he seeks to find a *pesharah* – settlement.

The *Avnei Miluim*[9] also addresses the validity of the practice of renouncing financial rights in our times when *eirusin* and *nisuin* are performed together. He quotes the

[6] E.H. 92:18
[7] Rema E.H. 92:1 and Chelkas Mechokeik 4.
[8] E.H. 92:1
[9] 92:5

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Chavos Yair[10] who asserts that we follow the opinion that contends that *nisuin* is not completed until after the couple eats together[11] and thus they can renounce their rights after the *chuppah* since *halachically*, this is still called during *eirusin*. The *Avodas HaGershuni*[12] suggests that in our times we rely on the opinion of the Maharam who rules that one may renounce rights to something that does not yet exist[13]. The *Avodas HaGershuni* then suggests another rationale to justify such a declaration of renouncement. Since these agreements are framed as an admission that a renouncement was made in an effective manner, the admission is valid, even though we know that the renouncement was not made in a binding manner. The *Avnei Miluim*, however, challenges the assertion that a renouncement made in the form of an admission should be effective. How can an admission be effective in a circumstance in which even a *kinyan* would not be effective? An admission is only effective when one admits that an effective *kinyan* was performed, it cannot be effective in cases where even a *kinyan* does not work.

One potential solution is noted in the *Lishkas HaSofrim*[14] in the name of the Chasam Sofer. He argues that since the *tenaim* includes a *cherem* and financial penalties for either side that reneges on the agreement to marry, the relationship is considered to be in existence – *davar sheba l'olam* and thus they can renounce their rights. Consequently, the *Kuntres HaYashar V'Hatov*[15] writes that if a couple signs a *tenaim* that includes a *cherem* as well as a financial penalty for one who reneges on his/her commitment to marry, the renouncement of rights will be effective, even though it was made in advance of the *eirusin*. Moreover, even though our *tenaim* does not include a *cherem* for the party that reneges, a financial penalty for one who reneges is sufficient to allow them to renounce their rights. Support for this perspective can be found in the Taz (printed in Rosh Pinah) where he adopts a similar approach.

Another solution is based on the Chazon Ish's understanding of the Rema's ruling[16]. The Chazon Ish writes that Rema's ruling that renouncement is ineffective before *eirusin* means that if, after renouncing one's rights, one decides that he wants to pursue the rights that Chazal granted him, he is not bound by the renouncement that was made

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[10] 47

[11] See Rema E.H. 55

[12] 50

[13] See HaYashar V'Hatov 7:20 where he challenges the notion that a *minhag* can override the *halacha* in such circumstances

[14]

[15] 7:20

[16] E.H. 77:9

before *eirusin*. However, if they renounce their rights before *eirusin* and allow that renouncement to remain in force after *eirusin*, it becomes binding. Performing *eirusin* with a renouncement in place is comparable to performing *eirusin* with that condition and is binding. A similar approach is found in the Avnei Nezer, although he does not issue a final ruling in favor of this approach.

In conclusion, if the couple draft a *tenaim* that includes, at least, a financial penalty for either party who reneges on the agreement to marry, most *Poskim* maintain that the renouncement of rights is effective. In circumstances in which a *tenaim* with a financial penalty is not a viable option, or to prevent either party from claiming *kim li* and refusing to honor their renouncement of rights, the parties can use the method known as *Takanas Chachmei Sefared*[17]. *Takanas Chachmei Sefard* is utilized to bind parties to financial agreements that they could otherwise refuse to honor. For example, *Takanas Chachmei Sefard* is used to assure that *halachic* heirs honor their father's wishes to share the inherited estate with non-*halachic* heirs. Let us use as an example a husband renouncing his rights to inherit his wife's property. Before the marriage, the husband drafts an admission that he owes his wife, or her heirs a very large sum of money. It is further stipulated that this "debt" is due immediately after the husband reneges on his renouncement of inheritance rights. Therefore, if the husband honors his renouncement, he will not become obligated to pay that debt. If he does renege, the debt becomes activated and that will cost him more than honoring renouncement of his rights. Obviously, the amount of the debt must be large enough to serve as a disincentive for him to want to renege on his renouncement of inheritance rights.

Attached is a sample copy of a financial prenuptial agreement that is based on the conclusion of this article.

[17] See C.M. 207:15