



INTERNATIONAL
BEIT DIN
בית דין בינלאומי לעניני אישות

File No. 145

Bella (Plaintiff) vs. Alan (Defendant)

Names and dates have been changed to preserve anonymity of parties

On April 17, 2016, Bella submitted a request to the International Beit Din to void her marriage due to the fact that her husband, Alan refused to give her a *get*. Despite the fact that we obligated him to give a *get* on June 20, 2016, until today, Alan continues to refuse to give a *get* to Bella.

In light of the arguments submitted by Bella during our *beit din* hearing, we were aware of our concern that the inability to have a *get* executed may lead to *tarbut ra'ah*, infidelity. Centuries ago, Rabbi Hayim Pelagi warned that if a married couple separate and the *beit din* sees no hope for reconciliation and *shalom bayit*, a *get* ought to be executed lest the couple engage in sin. See Teshuvot Hayim ve-Shalom 2:102. And given the breakdown of the nuclear family unit and laxity in moral standards in contemporary times, argues Rabbi O. Yosef,

“Today ... in the free world where each man acts in accordance to his perception of what is proper and *hutzpa* is pervasive in the world and experience shows that when wives leave their husbands...without giving them a *get*, they live with other men and they have no shame...and *mamzerim* abound in the world” (Teshuvot Yabia Omer, Helek 3, Even ha-Ezer (hereafter, “EH”), siman 18(13)).

In light of the fact that the couple separated in July 2014, there are no prospects for marital reconciliation, a *get* has not been forthcoming, and there is concern for sinning, we must address whether there are grounds for *bittul kiddushin*, voiding the marriage.

The focus of our deliberation centers upon the wife’s argument regarding her husband’s refusal to engage in conjugal relations. In her presentation to this panel, she claims that her husband was

incapable of ejaculation, generally there existed no intimate relations between her husband and at the end of the day, the husband desired to engage in anal sex and nothing else.¹

I. *Kiddushei Ta'ut* (lit. A mistaken betrothal, loosely translated as a mistaken marriage)

Prior to invoking the tool of *kiddushei ta'ut* to void a marriage retroactively and claim there was an error in the creation of the marriage, three preconditions must have been obtained:

- (1) The husband's defect must be a major one (a *mum gadol*) such as sexual impotency, refusing to have children, insanity, homosexuality, apostasy, a marital expectation communicated by the prospective husband prior to the marriage which turns out to be a misrepresentation, engaging in criminal behavior such as business fraud or exposing one's mate to a contagious disease, such as syphilis or HIV, a flaw which must have been preexisting prior to the onset of the marriage. All of the aforementioned examples of a husband's flaws have been characterized by one or more *poskim* as a *mum gadol*. Whether a particular defect serves as major defect and therefore grounds for voiding a marriage is subject to the discretion of the *beit din*.

Though to the best of our knowledge, there are no extant *teshuvot* dealing with a husband's inability to copulate where *Poskim* have voided marriages, there are numerous rulings where a husband who is sexually impotent may be labeled a *mum gadol* and may be grounds to void the marriage.

Notwithstanding some decisors such as Rabbi Sofer in Teshuvot Da'at Sofer, siman 49, Rabbi Schneersohn in Teshuvot Tzemach Tzedek, helek 2, siman 312, Rabbi Liebes in Teshuvot Beit Avi, helakim 2-3, siman 135, and Rabbi Taubes in Teshuvot Hayim ve-Shalom, helek 2, siman 6 who argue that one is proscribed from voiding *kiddushin* of a sexually impotent husband, there are *Poskim* such as Rabbi Spektor, op. cit., Rabbi Feinstein, op. cit., Rabbi Schwadron in Teshuvot Maharsham, helek 3, siman 15, Rabbi Klatzkin in Teshuvot Devar Eliyahu, siman 48, Rabbi T. Frank in Teshuvot Har Tzvi, EH helek 2, siman 181, Rabbi Abramski in Hazon Yehezkel, op. cit. and R. Yosef in the name of Atzei Arazim, ha-Mikneh and Tiv Kiddushin in Teshuvot Yabia Omeir, helek 7, EH siman 7 who sanctioned voiding a marriage in such a situation.

Additionally, in accordance with Sedei Hemmed ha-Shalem (Kelalei ha-Poskim siman 17) and Rabbi Yosef in Teshuvot Yabia Omeir, helek 3, EH siman 18, one may rely *le'ma'aseh* (in practice) upon Rabbi Schmelkes in Teshuvot Beit Yitzhak EH helek 1, siman 24 and Rabbi Bachrach in Teshuvot Havot Yair 221 who voided marriages in this situation *le'halakha ve'lo le'ma'aseh* (in theory but not in practice).

¹ Despite the fact that Alan was absent from the *beit din* proceeding and we are well aware that there is "a presumption that a wife will not be impudent in the presence of her husband" (Ketubot 23a; SA EH 17:2, 100:10), consequently we should not give credence to some of Bella's allegations which were advanced in his absence. For one of the halakhic reasons which permit us to accept the trustworthiness of some of her claims, such as the lack of intimacy and his inability to copulate, see Teshuvot Ma'sat Binyamin 1:126; Gevurat Anashim 5-6; Bi'ur ha-Gra, SA EH 17:12; Teshuvot Yabia Omer, helek 4, EH siman 11(5).

Moreover, addressing the grounds for a release from *halitzah*² due to a missing levir (brother-in-law) where the wife discovers after marriage that her husband is sexually impotent, in Teshuvot Ein Yitzhak EH siman 24(38), Rabbi Spektor writes,

“In truth, ... this is a major defect to void a marriage as Beit Yosef ...in the name of Rashba writes that this flaw that one cannot engage in intercourse at all we know why a bride enters the wedding canopy...and we coerce to free ...we see that this is severe flaw because the majority are particular about this...and the halakha like all defects...that it depends on the agreement of the citizenry as it is elucidated in Hoshen Mishpat 232:6 and therefore we coerce in regard to this defect...”

To state it differently, the combination of invoking the *sevara* that “we all know why a bride enters the wedding canopy” and *omaid ha-da’at*, a person’s expectations that certain flaws like impotency void a couple’s agreement to marry, propels Rabbi Spektor to arrive at the conclusion that there are grounds to free her without performing *halitzah*.

On the other hand, in Iggerot Moshe EH 1:79, Rabbi Feinstein states a different rationale when he addresses the grounds for voiding a marriage where the wife discovers after marriage that her husband is sexually impotent:

“Since it is clear and straightforward that he isn’t capable to engage in intercourse which is the primary component of intimate relations for this is the reason why a bride enters the wedding canopy (embarks upon marriage) and the Torah identifies it as “*innui*” (torment)...and if in matters which that one doesn’t decide to become married...one cannot refrain from giving her (maintenance and clothing), ... Therefore, it is clear that an individual who is not capable of intercourse is the greater defect...and one does not have to bring proofs for this...”

In other words, R. Feinstein’s line of reasoning equally applies to our situation of a couple who sired a child yet the husband who is unable to copulate. Just as a husband’s sexual impotence creates a situation of “*innui*” for the wife, similarly a husband’s inability to copulate engenders pain for the wife. In short, implicitly following Shulhan Aruch EH 76:13 and 154:7, the above is summed up in Shakh’s words:

² Our purpose of citing the ruling of R. Spektor is in order to cull from his *teshuva* an approach for defining impotence as a *mum gadol*. Whether one can utilize the *halitzah* ruling to conclude that one can equally void the marriage of a husband who is impotent is open to much debate. Even though a *shomeret yavam* (a widow waiting for her deceased husband’s brother to perform *halitzah*) is biblically prohibited to anyone else and her status is not as stringent as the status of a married woman who is biblically prohibited to anyone else, one may nonetheless apply *halitzah* rulings to marriage cases in matters of *kiddushei ta’ut*. See Yevamot 119a (Rava’s dictum); Teshuvot Terumat ha-Deshen siman 250; Teshuvot Noda be-Yehuda, Mahadura Tinyana EH siman 66 (end) and compare with Madura Kama Orach Hayim 21; Hazon Yehezkel, op. cit.; Teshuvot Har Tzvi, EH 1: 95, 99. Cf. Teshuvot Torah Hessed Orach Hayim siman 29; R. Safran, Teshuvot Rabaz siman 88(3) who would reject such an application of *halitzah* rulings to marriage situations in light of the stringency of the status of a married woman.

“And if she claims that her husband does not sleep with her and does not engage in intercourse with her, the halakhah is identical to the halakhah when a wife claims that her husband is impotent.” (Gevurat Anashim 1).

Just as Shulhan Arukh EH 76:13, 154:7 and Shakh, Gevurat Anashim 1 argue that a husband refraining from having conjugal relations is halakhically equivalent to being sexually impotent, similarly the inability to copulate is to be treated like sexual impotence. Just as sexual impotence prevents a husband from performing his duty of “*onah*,” intimate relations, similarly, the inability to copulate undermines this duty of conjugal relations and engenders pain. See Ba’air Hetev EH 46:1 and Pithei Teshuva EH 46:1 in the name of Teshuvot Radvaz 4:1188(118); Sha’ar ha-Melech, Issurei Biah 3:15; Knesset ha-Gedolah, Hagat Tur 154:39.

Given the halakhic equivalence of the inability to copulate to sexual impotence, consequently there ought to be grounds to coerce a husband to give a *get*, similar to a case of sexual impotence. See SA EH 154:7; Teshuvot Maharashdam EH 103; Piskei Din Rabbanayim (hereafter: PDR) 9:94, 96 (Rabbis Unterman, Elyashiv and Yisraeli).³ Given the fact that today outside of Eretz Yisrael, the civil authorities will not enforce a *beit din’s* directive to coerce a *get*, Rabbi Klatzkin, Rabbi Feinstein, Rabbi Tzvi P. Frank, Rabbi O. Yosef and others state there is a need to implement *kiddushei ta’ut* should the circumstances dictate that type of solution.⁴ As such, we view a husband’s inability to copulate as “a *mum gadol*.”

Seemingly, our conclusion that the inability to copulate constitutes a major defect is insufficient to void the marriage. In Teshuvot Tashbetz helek 1, siman 1 and Teshuvot ha-Rivash siman 127, the authorities are posed with a scenario in which, after eight months into the marriage, the wife argues that her husband is impotent. One of the reasons both decisors chose to refrain from voiding the marriage was that there were prospects that the husband would be cured and then ready to engage in relations with his wife. See also Teshuvot Be’air Yitzhak, EH siman 4, anaf 2.

Moreover, we have assumed until now that the husband was either obligated to give a *get* or ought to be coerced to give a *get*. Nonetheless, since treating the problem with medication may have solved the problem, under such circumstances there would be no duty to give a *get*. See Teshuvot Noda be-Yehuda, Mahadura Tinyana EH siman 89; PDR 12:103,118,121-122 (Rabbis O. Yosef and Waldenberg); File no. 38781-2, Ashdod Regional Beit Din, July 14, 2013. If there is no foundation to obligate a *get* in our case, *a fortiori* there were no grounds for *get* coercion and as such there is clearly no basis to void the marriage!

We have three replies to this position. Firstly, Rabbi Yitzhak Kolitz’s opinion, which reflects a minority view, will obligate a *get* even if the husband has yet to seek medical assistance. See PDR 12:115-116.

Secondly, Rabbi Tzvi Pesach Frank in Teshuvot Har Tzvi EH, helek 2, siman 181 states the following:

³ Cf. some *battei din* that will only *obligate* a *get* when dealing with a husband who is unable to copulate. See File no. 867976-1, Tiberias Regional Beit Din, March 7, 2016, File no. 3878-1, Ashdod Regional Beit Din, July 14, 2013.

⁴ Teshuvot Dvar Eliyahu 48; Iggerot Moshe EH 3:43 (end), 4:52; Teshuvot Har Tzvi EH 2:81; Teshuvot Yabia Omer 9: EH 38.

“This concern that he may be cured applies to the halakha of coercing him to free her. In this context, one must distinguish between a permanent flaw and a temporary flaw where our Sages did not say we coerce a *get* when there are prospects of improvement. However, when dealing with a mistaken transaction since it is dependent upon human expectations and the expectation is that a person does not want to enter a situation where there is a doubt (whether the person will be cured)...”

In contradistinction to Rabbi Menahem Schneersohn’s view found in Teshuvot Tzemach Tzedek, helek 2, siman 312(2) where he contends that the issue of curability is a factor in *kiddushei ta’ut* as well as *get* coercion, Rabbi Frank claims this factor of curability only relates to whether one coerces a *get*.

In our case, if the wife would have been aware that the flaw may not be curable, clearly she would not have married him. Secondly, the husband refused to avail himself of medical assistance. In fact, he cannot decide to refrain from engaging in *onah* if he has a medical issue. It was the husband’s responsibility to seek help. See Helkat Mehokeik, EH 76:18. In the event that the husband refuses to be cured, as Rabbi Stern argues the *hazakah* of “*tav lemeitav...*” is inapplicable. See Teshuvot ha-Shavit, helek 7, siman 20. As such, *bittul kiddushin* may be applicable.

(2) The wife must be unaware of the defect prior to the inception of the marriage and only discovered it after the marriage. On the other hand, if for example, during the marriage a husband commits adultery or contracts Alzheimer’s, though both may be characterized as a *mum gadol* that significantly impairs the matrimonial relationship, nevertheless since the conduct or disease, respectively, occurred after the onset of the marriage, there would be no grounds for a wife’s claim that the marriage was consummated in error.

Based upon the cumulative evidence submitted, we find that Bella became aware of her husband’s inability to copulate after the onset of the marriage.

Lest one challenge our conclusion based upon the fact that there is no proof that, in fact, this *mum* preexisted the marriage and therefore we should follow Rabbi Aharon Walkin’s ruling in Teshuvot Zekhan 2:104 that one is proscribed from voiding the marriage based upon “*kiddushei ta’ut*” when it isn’t clear that sexual impotence preexisted the marriage, we must respectfully disagree.

In contradistinction to R. Walkin’s posture, the *teshuvot*, rulings, dealing with impotence and which explore the possibility of voiding the marriage via the vehicle of *kiddushei ta’ut*, only inquire whether there is medical testimony or documentation if the husband was impotent after the marriage was executed or if the wife still was a virgin. See Beit Avi, Teshuvot 2-3:135; Teshuvot Beit Av, helek 7, siman 14; Devar Eliyahu, 48; Teshuvot Hayim ve-Shalom, helek 2, siman 6; Teshuvot Maharsham helek 3, siman 16; Iggerot Moshe EH helek 3, simanim 45, 48, helek 4, siman 52. There is an implicit premise in the aforementioned *teshuvot* that the flaw existed prior to the marriage. Addressing a case where there was no proof that prior to the marriage the husband was sexually impotent, Mahari Enzel in Teshuvot Mahari Enzel 35, s.v. omnan rules that we invoke the *hazakah*, the presumption that in fact he was impotent prior to the marriage! Therefore, in our case, even though no proof was submitted that

demonstrated that his disorder of being unable to copulate existed prior to the marriage, this should not preclude this panel from voiding the marriage.

(3) Finally, upon a wife's awareness of the major latent defect, she must decide to leave the marriage. Regarding this condition, whether she must immediately leave the marriage or not is subject to debate. Though in accordance with certain *Poskim*,⁵ upon discovery of a major latent defect, one must bolt the marriage immediately or refrain from remaining in the marriage for an extended period of time, nonetheless, following Rabbi Moshe Feinstein, Dayyanim E. Goldschmidt, S. Karelitz and Y. Bavliki and others⁶ argue that she may continue to live with him provided she offers a reasonable explanation.

In our situation, the couple married in January 2010. The defect was discovered in August-September of 2011 and she left the marital home during July 2014. In pursuance to the first approach, one cannot void the marriage since it seems she accepted the fact that he had a flaw ("*savra ve-kibla*") given that she only left almost three years after her discovery.

The compelling question is why did she discover her husband's disorder of the inability to ejaculate after one and a half years of marriage? Secondly, upon discovery of the defect, why did she stay with the marriage? Why did she wait three years before separating from him?

In response to our first question, let's cite an excerpt from Dayan Boaron's ruling found in Teshuvot Sha'arei Tzion, helek 3, EH siman 4 dealing with a husband who was mentally dysfunctional. Rabbi Boaron describes the wife's mindset prior to discovering that he had a mental disorder in the following fashion.

"And one should not conclude that since she lived with him for seven years and gave birth to two children, she observed the defect and forgave him ("*mehilah*"). That is not the case. When dealing with such matters, a person cannot understand the nature of the disease until much time has elapsed since sometimes due to her love for him she rationalizes his anger and temper and his agitated condition as being transient and she longs and hopes that the situation will improve. In particular, a person who takes medication regularly, there are times when he is content and silent....One cannot say one observes and one is appeased as written in Maharsham...when he was asked about a couple who lived together for over 14 years. Since episodes of mental dysfunctionality occur from time to time and a man hopes to be cured and therefore...one cannot speak of seeing and being appeased."

In our case, when Bella married Allen, she was 21 years old and in her words "naïve." It was only in August 2011, a year and half after her marriage that she began to understand partially what was happening in her bedroom. And only after conversing with her girlfriend did she fully understand that her husband had a serious problem, namely an inability to copulate.

⁵ Tur and Beit Yosef EH 154, Rabbi Yosef Kolon (Teshuvot Maharik, shresh 24), Rabbi Akiva Eiger (Teshuvot R. Akiva Eiger, Mahadura Tinyana, siman 56).

⁶ Iggerot Moshe EH 3:45 ("*ta'am hagun*" or "*tiruzim nekhonim*"), 48, 4:113; PDR1:5,11-12.

After she recognized “the situation,” she did not leave him because he promised that he would seek medical help for his problem. Rabbi Boaron argues that sometimes it takes time to be educated to what is transpiring in front of one’s eyes and one cannot say “she observed and was appeased” because her mentally impaired husband was taking medication. *A fortiori* in our case, where it took time for Bella to comprehend what was happening and even after she came to the realization of what she was dealing with, nonetheless, her husband refused to take medication, one cannot say “she observed and was appeased!” After a brief time, she realized that all his promises to seek medical assistance would never materialize; nonetheless, she remained in the marital home due to the fact that she had no money to pay for the rent as well as ongoing domestic expenses. As Rabbi Feinstein rules in Iggerot Moshe, EH, helek 3, siman 45, in a situation in which a wife has “a *ta’am hagun*,” a proper reason, or “*tiruzim nehonim*,” reasonable explanations, to remain with her husband, one may remain despite his major defect. Finally, after three years, upon being able to address her financial matters, she left him due to his inability to copulate and to live with her intimately. Rather than bolt the marriage, the wife should wait and see if the situation is curable. See Tur EH 76; Derisha, Tur, EH 76:6; Helkat Mehokeik, SA EH 76:18; Beit Shmuel SA EH 76:17; Teshuvot Noda-beYehuda, Mahadura Tinyana, EH 89; Teshuvot Mateh Avraham 11. Unknowingly, Bella was following the view of some *Poskim* that one waits two or three years hoping that a cure would be found. See Teshuvot Maharashdam 103 in the name of Teshuvot Maharlbah 33; PDR 12:100,122 (R. O. Yosef).

Let us summarize our presentation by citing from Dayan Boaron’s aforementioned *teshuva* dealing with a mentally dysfunctional husband.

“We find that in our case that the *kiddushin* have been undermined certainly in terms of the *hazaka* that a person is not appeased with such a defect...and there is *omeid hadat*, (a clear expectation) that if she had known about the disease prior to the marriage surely she would have not consented to marry him. So at least this matter “lowers” the *kiddushin* to the level of *safek* (doubtful) *kiddushin*.

And when the *kiddushin* are doubtful, the Ran writes “...we construe it that presumptively she is unmarried” as per Pri Hadosh citing the Ran’s words.

In accordance with the halakhic thinking of Rabbi Boaron, there is a presumption that a wife will not appease herself by living with a husband who has problems with copulation and there is a clear expectation that if she knew about what would occur “in the bedroom” during the marriage, she never would have continued to live with a husband who possessed such a major defect.

2. *Umdana*- A wife’s assessed expectations of the marriage

The question is whether a husband's abstention from conjugal relations may serve as grounds to void a marriage?

There is a duty upon a husband to have conjugal relations with his wife. Whereas according to some authorities the obligation is derived from the Biblical word in Shemot 21:10 "*she'erah*...he shall not diminish" or "*ve'onata* he shall not diminish" (see Mekhilta de R. Yishmael Mishpatim 3, ed. Horowitz-Rabin), others derive the duty by logical inference. See Mekhilta de R. Yishmael, op. cit.; Ketuvot 48a. Elaborating upon this position, R. Naftali T. Berlin states,

"Reason informs us that (the husband) is so bound....as everyone knows, for this purpose that a bride enters into marriage...Hence if he denies her sexual ties, she is deprived of her right." (Birkat ha-Netziv, Mekhilta, op. cit.)

The obligations and rights between a husband and wife emerge from the establishment of marriage regardless of whether the parties put these duties and rights into writing and regardless if they spoke about them. One of the husband's duties is to provide "*onah*," the engagement in intimate relations. See Mishneh Torah, Ishut 12:1, SA EH 69:1. Here we are not referring to creating a family but rather engaging in sexual relations. The husband's performance of the imperative of *onah* applies even if his wife gave birth to children in a former marriage or from him. See Teshuvot ha-Rosh 43:5; Tur and Beit Yosef EH 154; SA EH 154:7; Piskei Din Rabbanayim 1:55, 59, 10:104. A husband's failure to perform *onah* places him in the category of "*a moreid*," a rebellious husband and we coerce a *get* even without forewarning him. See SA EH 77:1; R. Me'tarlow, Dvar Eliyahu 73. Others such as Teshuvot ha-Rosh 43:10 and Hazon Ish EH 108:13 require a forewarning.

In short, Bella is arguing that had she known that there would be no conjugal relations, she never would have married him. In effect, she is advancing an *umdana* known as "*ada'ata dehakhi lo kidsha nafshe*," (on this assumption she did not betroth⁷ him.)

In contradistinction to *kiddushei ta'ut* which focuses upon a husband's flaw prior to the marriage, namely the existence of pre-existing grave flaw in the husband's physiology or behavior which if failed to be disclosed may under certain conditions be grounds to void a marriage (*bittul kiddushin*), *umdana* deals with an event(s) which transpires *after* the inception of marriage. For example, "had I known that my husband would have become a *mumar* (an apostate Jew), become a criminal or would have become mentally dysfunctional during our years of marriage, I never would have married him" may serve as illustrations of a wife invoking an *umdana demukhach*, a major inference from assessed expectations (hereafter: *umdana*) which if proven may serve grounds to void a marriage without the giving of a *get*. For examples of various *umdanot* which served as a basis to void a marriage, see Teshuvot Maharam of Rothenburg, vol. 4, Prague ed., 1022; Teshuvot Beit ha-Levi 3:3; Teshuvot Hessed le-Avraham, Mahadura Tinyana EH 55; Teshuvot She'eilot Moshe EH 2; Teshuvot Zichron Yehonathan, vol. 1, YD 5; Teshuvot Avnei Hefetz 30; Teshuvot Sha'arei Ezra, vol. 4 EH 26; Teshuvot Divrei Malkiel 4:100; Teshuvot Tzvi Ti'feret 4; Teshuvot Meishivat Nefesh EH 73-77; Teshuvot Divrei Hayyim, vol. 1, EH 3; Teshuvot

⁷ Loosely translated as she did not marry him.

Maharsham 7:95 (a matter of a wife's mentally dysfunctional state); Iggerot Moshe, EH 4:121; Teshuvot Har Tzvi EH 2:133.⁸

The question is whether a husband's unwillingness to engage in sexual relations rises to the level of *an umdana demukhach*, a major inference from assessed expectations for his wife? If, in fact, in this case, we are dealing with *an umdana demukhach*, according to many *Poskim*, the assessed expectation of one person suffices in order to void a commercial transaction and, according to certain *Poskim*, a marriage or a *halitzah*. See Mordekhai, Yevamot 4:29; Teshuvot She'ailat Yitzhak, 174,186 (R. Stern's opinion); Teshuvot Hakham Tzvi 40; Teshuvot Noda be-Yehuda, Mahadura Kama, Yoreh Deah 69; Teshuvot Tiferet Tzvi 4; Teshuvot Divrei Hayyim EH 1:3; Teshuvot Helkat Yoav EH 25; Teshuvot Ohel Moshe 1:62, Mahadura Tiltali 123; Beit Meir, Tzal'ot ha-Bayit 6; Teshuvot Sheilot Moshe EH 2(4); R.Y. Frankel, Derech Yeshara, be-Din Halitza in the name of R. Feinstein; Iggerot Moshe EH 4: 121; Teshuvot Sha'arei Ezra 4:26.

This *umdana* of marriage of "*ada'ata dehakhi lo kidsha nafshe*" is to be understood as an implicit condition to the marriage.⁹ See Teshuvot Binyamin Ze'ev 71; Teshuvot Terumat ha-Deshen 223; R. Shkop, Sha'arei Yosher 5:18. In other words, in our case, given that the husband here failed to have intimate relations he is undermining a *tenai*, a condition to the marriage and therefore we may invoke the *umdana* "*ada'ata dehakhi lo kidsha nafshe*."

As Rabbi Simcha Krauss, our *av beit din* aptly notes, a husband is proscribed from preparing a prenuptial agreement which releases himself from his duty to perform conjugal relations¹⁰ due to the fact that such abstention from relations engenders "*tza'ar*," pain for his wife. Notwithstanding the view of Talmud Yerushalmi, Ketubot 5:7 and Bava Metzia 7:7 as well as Ritva, Hiddushei ha-Ritva, Kiddushin 19b, Bava Metzia 51a and Bava Batra 126b, adopting the Talmud Bavli's position in Ketubot 56a, Kiddushin 19b and Bava Metzia 94a, the majority of *Poskim* invalidate such a condition due to the fact that it is "*matneh al mah sha-katuv ba-Torah*," it is a stipulation in variance to the Torah. See Rashi, Ketubot 56a; Rashbam, Bava Batra 126b; Hiddushei ha-Ramban Bava Batra 126b; Mishneh Torah, Ishut 12:7, Tur Even ha-Ezer 38:12-13, SA and Rema EH 38:5. In short, the performance of "*onah*" is one of the

⁸ For our conceptual distinction between *kiddushei ta'ut* and *umdana*, see Teshuvot Ohr Sameach 2:29; Teshuvot She'ailot Moshe EH 2; Teshuvot Zichron Yehonathan, vol. 1, YD 5. It is important to stress that this *umdana* has been employed in the *teshuvot* both regarding *kiddushei ta'ut* as well as emerging *after* the onset of the *kiddushin*. In other words, concerning *kiddushei ta'ut*, once the major latent defect has been identified, some *Poskim* will employ the *umdana* by stating "had she known prior to the marriage about this major defect she never would have married him." On the other hand, if the inappropriate behavior or *mum*, *flaw* only began after the onset of the marriage and did not preexist prior to the marriage, there may be grounds to employ an *umdana* where she would (for example) exclaim "had I known that he would become mentally dysfunctional during the marriage I never would have married him." For a discussion of these two types of *umdana*, see Teshuvot Zichron Yehonathan, YD 5(17).

⁹ For understanding this *umdana* as a "*ta'ut*," an error, see Teshuvot Meil Tzedakah 2.

¹⁰ Hiddushei ha-Ramban, Bava Batra 126b.

Alternatively, it is viewed as *mehilah*, waiving her right to engaging in relations. See Shitah Mekubetzet, Ketubot 56a in the name of Rashba.

foundations of a halakhic marriage and consequently a husband cannot decide to unilaterally opt out of it.¹¹

This *umdana* “contemplates” that the wife expects that she will be able to exit the marriage if her spouse acts improperly. As some *Poskim* point out prior to invoking the *umdana* one must be assured that there exists no basis to coerce the husband to give a *get*. See R. Meir Posner, *Tzal’ot ha-Bayit* 6; *Teshuvot Zichron Yehonathan* 5; *Teshuvot Divrei Malkiel* 4:100. If *get* coercion is a distinct possibility, she may have contemplated that her marriage could have been dissolved by *get* coercion due to her husband’s failure to perform *onah* and therefore there would be no basis for invoking an *umdana*.

If Bella had been residing in *Eretz Yisrael* or in Morocco where *get* coercion is an option, albeit employed on a limited basis, she may have contemplated that her marriage could have been dissolved by *get* coercion. And, in pursuance to certain *Poskim*, in light of the option of *get* coercion, Bella may have been unable to invoke the *umdana*. However, today outside of *Eretz Yisrael* and Morocco where Bella resides there is no *beit din* which is legally and thus halakhically empowered to coerce a husband to give a *get*. Consequently, in the absence of the ability to coerce Allen to give a *get*, based upon the submitted facts we may employ the *umdana* due to his failure to have relations with his wife.

Based upon the foregoing presentation and the cumulative evidence submitted to this *beit din*, notwithstanding contrary views recorded in *Teshuvot Avodat Gershuni* 35, *Teshuvot Beit Yitzhak* 1:106, *Teshuvot Hatam Sofer* EH 2:82 and *Teshuvot Heichal Yitzhak* EH 2:25 which reject the deployment of *umdana* as a means to void a marriage, following a *mesorah* which we alluded to at the beginning of our discussion we find that our analysis of the *umdana, ada’ata dehakhi lo kidshah nafshe* which may be invoked concerning the absence of marital relations on most occasions provides the grounds for freeing the Bella from her marriage without the giving of a *get*.

In sum, we are voiding this marriage due to the husband’s incapability of copulating based upon “*kiddushei ta’ut*” and his unwillingness to engage in conjugal relations based upon “*umdana*.”

Based upon the foregoing presentation, Bella is free to remarry without a *get* even a *kohen*.

¹¹ Though if a wife requests (or possibly sets a condition) before the marriage (or possibly during the marriage) that her husband refrain from performing *onah*, assuming the husband has fulfilled the mitzvah of having children, there are authorities who will validate this arrangement (see *Mishneh Torah*, *Ishut* 15:1, SA EH 76:6; *Mishneh le-Melech*, *Ishut* 6:10, *Perishah*, *Tur* EH 76:17; *Hagahot R. Akiva Eiger*, SA EH 76:1; *Teshuvot Shoel u-Meishiv* 3:108), clearly in our case no such arrangement was advanced by Bella.

