AGENCY RELATIONS BETWEEN JEWISH SPOUSES IN ISRAEL

*By Ariel Rosen-Zvi**

I INTRODUCTION

The relationship between spouses is liable to produce agency relations between them in a way that will bear upon both their matrimonial property relations and the relations between them and third parties.

This article deals with agency in the broad sense of the term, which also includes agency by operation of law. Under which circumstances does the law recognize the relationship between the spouses as creating agency relations between them? What are the conditions required to create agency relations? What is the scope of this agency, and what are the legal consequences of this agency?

These questions will be the topic of this article. Israeli law is composed of various strata, with personal law, for example, being regulated mainly by each community's religious law. Therefore, some answers to these questions may be found not only in the general law of agency, but also in matrimonial law, primarily in the maintenance laws. Israeli law is very much attuned to the different sources for the rules of agency between spouses since a sizeable part of matrimonial law and the maintenance laws between Jewish spouses are covered by Jewish law. The implication is that in discussing the topic at hand we must examine not only the relevant Israeli legislation but also the provisions of Jewish law on the topic This article will also compare Israeli law to that prevalent in other legal systems.

Any discussion on this issue must take into account a number of considerations of judicial policy. Among these one may include the necessity to ensure that the third party is protected and that any arrangements on the domestic level of matrimonial relations should not result in injury to third parties. Secondly, as in all arrangements between spouses, the close ties between them make it necessary to arrive at accomodations that will protect family peace and that will ensure

* Lecturer, Faculty of Law, Tel Aviv University.

that any marital settlements do not disturb domestic harmony. Third, the essence of the special relationship demands the kind of arrangement that will place special emphasis on the existence of the matrimonial relationship and will allow for the comfortable and efficient functioning of the family in everyday life. Fourth, the settlement must guarantee equality between the spouses, without disregarding the need to protect the weaker of the two; this equality ought not to inhibit the mutual guarantee that marriage and the special ties that follow from it must provide. Fifth, partnership in matrimonial relations should not violate the right of either side to protect his or her freedom of individual action; marriage should not serve as an automatic base for agency relations between spouses, and thereby ensnare the more cautious, more efficient and more talented side, who will not be able to be released from it.

These fundamental considerations that form the basis of agency relations between spouses are not necessarily compatible with one another. Thus, for example, exaggerated protection of the institution of marriage may injure the rights of one of the spouses to freedom of action. We are faced, therefore, with a complex of intersecting and conflicting considerations that need to be taken into account in terms of priorities, choices and decisions, and at times require careful balancing and compromise.

Agency relations between spouses may be divided into two categories: agency in the limited sense, as accessory relief and a means to protect the existing rights of the spouses; and agency in the general sense, which is independent of any existing arrangements and is derived from the special circumstances of the *de facto* partnership in the relations between the spouses.

The first category of agency in the limited sense includes:

1. The principle in Jewish law of Borrowing for Her maintenance, whereby the wife may hold her husband responsible for money she borrows for her maintenance.
2. The purchasing of necessities and the maintenance of the household.

In this case the wife may hold her husband responsible toward a third party for payments having to do with satisfying the family's needs. Subsequently we will find that there is no separate category of this type in Jewish law.

The second category, that of agency in the general sense, includes:

1. The principle in Jewish law of The Woman Who Conducts the

Family Business, whereby the wife has the right and authority to obligate her husband in business matters, assuming that she acts as his agent.

2. Agency by conduct, in accordance with section 3(A) of the Agency Law, 5725-1965.

These categories will all be discussed below.

II AGENCY RELATIONS BETWEEN SPOUSES IN THE LIMITED SENSE

1. *The Rule of Borrowing for Her Maintenance* ("Lavta Ve'akhla") *in Jewish Law.*

According to Jewish law, the husband is obliged to maintain his wife, while there is no corresponding obligation on the part of the woman. When the husband alone carries the responsibilty of providing for the needs of the household, while the household is actually run by the wife, it is important to find a practical solution that will allow the wife to enjoy her privileges without causing the husband injury beyond that made necessary by his obligations. The rule of Borrowing for Her Maintenance provides this type of solution.

This rule is part of the maintenance laws and does not belong with the agency laws. When the husband leaves his wife without providing her with means for her subsistence, she is entitled to borrow money for this purpose and to hold her husband responsible for these debts.[1]

When the husband is present, the wife must claim her rights through the court; only when he is absent is she entitled to borrow from others and hold him responsible for returning the loan. There are a number of restrictions in this case, but we will not discuss here in detail the laws that deal with the issue of maintenance.[2] Suffice it to state that, in general, the husband's responsibility is toward his wife, and it is she who sues him in this instance. However, if the wife is absent, the creditor is entitled to sue the husband directly.[3] This possibility derives from the general laws of Jewish law, within the framework of the

1. *Ketubbot* 107b; *Rambam, Ishut,* 12:19; *Shulhan Arukh, Even ha-Ezer,* 70:8; *The Principles of Jewish Law* (M. Elon,, editor, Encyclopedia Judaica) 396.
2. *See* the sources in *supra* n. 1. For detailed discussion of the rules see B. Scherschewsky, *Family Law* (Second edition, Jerusalem, 1967), 131 et seq. I. Warhaftig, "The Husband's Liability for the Debts of -his Wife in Jewish Law", *Annual of the Institute for Research in Jewish Law,* Volume II (1975) 267-268.
3. *See Rema, Even ha-Ezer,* 70:8; C.A. 87/49 *Levin v. Levin,* 5 P.D. 921, 939.

garnishment rules that are part of the general law of obligations in the Jewish law, adapted to this specific situation.[4]

According to section 2 of the Family Law Amendment (Maintenance) Law, 5719-1959, the rules covering maintenance between spouses are subject to personal law; thus each member of a recognized religious community is obligated by the requirements of his or her own religious law. It follows that for Jews, maintenance matters between spouses are covered by Jewish law.

It is normally assumed that only those matters of Jewish law which relate specifically to matrimony are included in Israeli law, and thus obligate Jewish couples, as opposed to those matters which are derived from the general code of Jewish law. However, this is no so, as those principles of the general code which were needed to regulate family law were "absorbed" into that law, adapted to it and now form an integral part of the family law regulating Jewish couples.[5] Thus, even though the principle of Borrowing for Her Maintenance does not stem from the laws of matrimony, it has nevertheless become part of the maintenance laws, and therefore subject to personal law.

However, an obstacle to the application of this rule in the positive law of Israel is the general principle according to which, in general, personal law applies only to the relations between the spouses themselves, and not to the relations between the spouses and third parties, the reason being that the relations between a spouse and a third party are not matters of personal status that would require the application of personal law.[6] In addition the application of personal law to matters not directly related to personal status, and the widening of its scope so as to include third parties, would affect the laws of the State which form the basis for commercial and economic relations among its citizens. As a result, commercial dealings with either spouse would be marked by a great degree of danger, insecurity and uncertainty.

4. "Shi'buda de-Rabi Nathan": *garnishment* which means permitting the creditor to recover the debt directly from a third party who owes money to the principal debtor if the creditor has no other means of recovering from the latter; *see Ketubbot* 19a; *Shulhan Arukh, Hoshen Mishpat*, 86:1-2; However, according to the *Ran, Ketubbot* 107b, the wife is considered both as her husband's agent and as an independent debtor. *See* I. Warhaftig, *supra* n. 2 at 286.

5. *See* my article, "Courts Jurisdiction in Matters of Matrimonial Property: The Interrelationship Between the Rules of Jurisdiction and Substantive Law", 6 *Iyunei Mishpat* (1978) 595, 599.

6. *See* C.A. 16/49 *Elbranes v. Shmeterling*, 4 P.D. 573.

Nevertheless, we believe that the rule of Borrowing for Her Maintenance, despite the fact that it oversteps the boundaries of domestic relations between spouses, is applicable in the positive law of Israel as far as Jewish women are concerned. While it is true that the application of the rule may result in the husband being forced to repay debts to a third party which were contracted by his wife, this in no way adversely affects the third party. The right of the third party to collect his debt directly from the husband is established directly within the relationship between the spouses, and the relationship with the third party is only needed to execute it. In sum, the liability is created and imposed on the *husband*, within the framework of the domestic relationship between the spouses, and the third party is only exercising an existing right.

Moreover, this rule is compatible with the agency laws in the Israeli law. This is a *sui generis* agency which serves as a complementary law and does not contradict the paragraphs of the civil law. Section 19 of the Agency Law, 5725-1965, determines explicity that "this law shall not derogate from the provisions of any law regulating a particular category of agency relations."

2. *Purchasing of Necessities and Providing for the Household*

a. *Jewish law*

There is no special, independent category in Jewish law regarding the obligation of the husband toward third parties with respect to the provision of the family's needs, unlike other legal systems. This obligation usually derives from the husband's responsibility to provide for the maintenance of his wife and of the household. In Jewish law, the legal basis for this obligation is not independent, and belongs either within the narrow framework of Borrowing for Her Maintenance, or in the framework of the larger principle of The Woman Who Conducts the Family Business.[7] In Israeli law, it is also in the framework of the Agency Law. The general agency laws of Jewish law are not applicable as such in Israeli law. The fact that this issue arises as part of the domestic relationship between the spouses is not sufficient to make the entire set of laws valid in the positive law of Israel. This is true for property rights (within the framework of the general property law of the religious law) and for agency laws within the Jewish law.

7. "Isha ha-Noset veha-Notenet be-Toh ha-Bait", However, *see* a B. Scherschewsky, *supra* n. 2 at 213, who refers to *Knneset ha-Gedolah, Tur, Hoshen Mishpat*, 62.

b. *Other Legal Systems*

A number of legal systems recognize the wife's right to "Pledge the Husband's Credit". In our opinion, this right is dependent upon the extent to which the husband is responsible to provide for the needs of his household.

b1. *English Law*

In the past, in the English common law there were two known legal sources regarding the liability of the husband for necessities purchased by his wife. The first source dealt with the responsibility that arises by the operation of law, in other words, agency by operation of law. According to it, a woman who lived separately from her husband could hold him responsible for purchasing necessities by virtue of the *agency of necessity.*

An agency of this type can be created without the husband's agreement, and even despite his opposition to it. The source of this agency is the maintenance laws, and this is the counterpart of the Borrowing for Her Maintenance law in the Jewish law. This type of agency was recently abolished by section 41 of the Matrimonial Proceedings and Property Act, 1970.[8] The second source, however, that of presumed agency, which is still recognized in the English common law, was not affected by the abolition. The essence of this law is based on the woman's right to hold her husband liable, for the purchasing of necessities, and is inferred from their *cohabitation* and from *her conducting the affairs of the household.* If these two elements are present the wife is considered to have the presumed authority to act in her husband's name and on his behalf for the limited purpose of purchasing household items and necessities. This authority is not inferred from the mere fact of marriage. As oppossed to the relations between partners, as spelled out by the law of partnership, marital relations do not create ostensive authority. The authority follows from the wife's function as a housewife, from which it is inferred that she is representing her husband as his agent for certain purposes. This is a rebuttable presumption of fact

8. The provisions of Section 41 were abolished in Section 54(1) of the Matrimonial Causes Act, 1973, and the third supplement to this law, as a result of the special provisions that were established specifically by the said enactment. The abolision follows from the fact that this rule was based on a flaw in the wife's legal capacity, which has since been corrected.

based on a combination of facts, namely cohabitation and partnership in life. If the husband explicitly forbids the mortgaging of his credit, or if circumstances are proven that will rebut the presumption of fact, the presumed agency is invalidated.[9] Marital status is not an indispensable condition for the creation of such an agency. Circumstances that lead those in the area to believe that a certain man and woman function as spouses for all purposes are sufficient to create such a presumption of fact.[10] It is not marriage itself that creates the agency, but the factual situation that establishes the presumption of fact. The obligation in principle of the man to provide for the maintenance of the woman, or the ostensive obligation (that is, from the point of view of those in the area), are the factual basis for the creation of the agency. From this point of view, it makes no difference whether the man and the woman are spouses, or are merely perceived as such by third parties. This presumed agency, although based on the general agency laws of the English law, is, in our opinion, also based on the principle of the husband's obligation to provide for his wife's maintenance. Nevertheless, the legal basis for this presumption of fact in the English law is not clear. Is this a regular agency or an ostensive agency? Is it a regular presumption of fact or it is a presumption of law, founded on factual bases that bring it closer, from this point of view, to agency by operation of law?[11] It is possible that the English law created an intermediate situation, between the two possibilities mentioned above.

The legal basis is clearer in other judicial systems. In these systems, which we are going to review below, specific enactments bestow agency by operation of law specifically to the relationship between spouses, correlative to the man's responsibility to provide for the needs of the household, and apart from the general agency law.

9. *See* J.G. Miller, *Family Property and Financial Provision* (London, 1972) 105-106. Included in this category are the purchasing of food, clothing, household items and basic furniture, as well as agreements regarding domestic help and help with infants and the education of the children. *See also* P.M. Bromley, *Family Law* (London, 5th ed., 1976) 147. About the limited scope of the presumption of agency for purchases of household goods in England, *see* G.H.L. Fridman, *The Law of Agency* (London, 4th ed., 1976) 80-82. *See also* R. Powell, *The Law of Agency* (London, 2nd ed., 1961) 400, which explicity emphasizes the fact that marriage in itself does not create agency relations between the spouses. *See also Restatement, Agency, Second* (1968) §22 p. 94, comment B, which states: "Neither husband nor wife by virtue of the relation has power to act as agent for the other".
10. *See* G.H.L. Fridman, *ibid.* 84.
11. *See* R. Powell, *supra* n. 9 at 400; G.H.L. Fridman, *ibid.* 80-82, 120-121.

b2. *German Law*

The German law used to award the wife agency by operation of law — statutory power of attorney — to act in the name of her husband and to hold him responsible for transactions having to do with the running of the household. This provision, included in section 1357 of the B.G.B., is called *Schlusselgewalt.*[12] In cases tried under the German law difficulties arose with respect to the extent of the wife's rights, namely, in interpreting the term "transactions having to do with the household." A great measure of uncertainty persisted despite the criteria that were introduced.[13] When the husband was not solvent, the wife was jointly responsible with her husband. The husband was entitled to limit this right of his wife's, but it was possible to invalidate unreasonable limitations in court. The limitation of this power of attorney by mutual agreement needed to be registered to be valid vis-à-vis third parties. But actual knowledge regarding such limitations was sufficient to exempt the husband from responsibility toward his wife or toward a third party.[14] These laws derived from the wife's responsibility for conducting the household[15] and from the husband's parallel responsibility to provide for the needs of the household.[16]

Recently, the family laws of the German law were reformed.[17] At the core of this reform is the principle that the spouses are mutually responsible for running the household. All the above-mentioned paragraphs and sections were abolished and were replaced by the spouses' mutual responsibility, based on full equality, for the running of the household and for the provision of the family's needs.[18] By a certain analogy with partnership laws, this mutual responsibility results in

12. *See* E.D. Graue, "German Law", in *Comparative Law of Matrimonial Property* (A. Kiralfy, ed., Leiden, 1972) 114, 154-155.
13. The courts determined that the decisive factor is not the nature of the expenditure but the correlation between the amount for which the wife obligated her husband and the latter's financial and social situation. The extent of the husband's liability is determined in accordance with the specific circumstances of each case. In any event, it appears that long term credit transactions, renting and life insurance are not included among the activities related to the household. *See* E.D. Graue, *supra* n. 12 at 156.
14. Section 1412 of the B.G.B.
15. Section 1356(1) of the B.G.B.
16. Section 1360a of the B.G.B.
17. Erstes Gesetz zur Reform des Ehe und Familienrechts vom 14.6.76 (B.G.B. 1 1421). This law, in effect since July 1, 1977, alters part of the instructions of the B.G.B.
18. Sections 1360, 1360a, 1356 of the B.G.B., as amended.

mutual agency by operation of law. Each spouse is entitled to hold the other responsible for reasonable expenses incurred in providing the current necessities of the family. The parties' responsibility is joint and separate,[19] unless any other conclusions may be drawn from the circumstances. The amended law still allows the parties to restrict their responsibility by instructions that limit the right of one of the spouses to hold the other responsible for the other's debts. However, unreasonable or unjustified restrictions may be invalidated by the courts.

b3. *Other Countries*

In countries such as Sweden,[20] France[21] and Holland[22] and in Quebec, Canada,[23] whose matrimonial property regimes are different from one another — and where the burden of household expenses is divided more or less according to the principle of equality between the spouses — mutual statutory agency is in effect with regard to the running of the household and the purchasing of essential goods for this purpose. However, despite the principle of equality, the laws of these countries

19. Section 1357 of the B.G.B., as amended.
20. In Swedish law the spouses bear joint responsibility for household related expenses. Within the framework of this statutory agency there is mutual agency and joint and separate responsibility for debts incurred by either spouse, although the wife enjoys a privileged status with respect to these debts. *See* H.M. Sussman, "Spouses and Their Property Under Swedish Law", *Am.J. of Com.L.* (1963) 553, 562, 565-6, 567.
21. In French law each spouse's contribution to the household is proportionate to his or her relative means, yet the burden of the expenses is placed on the husband, as the "principal carrier of liability" (Section 214 of the C.C.). Each of the spouses may obligate the other with regard to expenses related to maintenance of the household and education of the children (Section 220(3) of the C.C.). *See also* A. Colomer, "The Modern French Law", in A. Kiralfy, *supra* n. 12 at 86-88.
22. In Dutch law as well the spouses' contribution to the household expenses is proportionate to their income and capital, and each of them has the authority to create an obligation, jointly and separately, and to obligate the other. *See Study Preparted by the Family Law Project, Ontario Law Reform Commission,* Vol. II, 281.
23. The principle of proportionate contribution is espoused by the law of Quebec as well (Section 1266q of the C.C. of Quebec). Nevertheless, despite the principle of equality, section 180 of the C.C. establishes agency by operation of law whereby only the wife is entitled to obligate her husband for current expenses of the household and of the children, according to various criteria. In other words, there is a separation between the domestic relations between the spouses and the responsibility toward creditors. In the latter case, the husband may demand the wife's participation. The scholars are critical toward such unilateral agency under a regime whose fundamental principle is that of equality. *See, Studies on Family Property Law, Law Reform Commission of Canada* (1975) 88; 89, 93.

recognize, with slight variations, the supremacy of the wife's right to hold her husband responsible over the husband's right to do the same, in this type of agency.

c. *Conclusions of the Comparative Study*

The foregoing comparative discussions suggests the following conclusions:

(1) Agency by operation of law (statutory agency) limited to the needs of the household is usually contingent upon the responsibility for meeting these needs and constitutes part of it. It appears to us that in common law as well, the source of this rule is in the fundamental obligation as found in family law, even though agency by operation of law is not recognized today unless betowed by virtue of the general agency laws.[24]

(2) Agency by operation of law is recognized by all legal systems regardless of what property regime is in effect. There is no direct relationship between a given property regime and the manner in which the responsibility for the needs of the household is determined. Here we witness a common denominator among various systems, with different property regimes.

(3) Agency by operation of law of such a scope is an institution which serves as a means for taking into account the special relationship between spouses. This is a special rule of agency within family law which, within the narrow realm of running a household, brings marriage closer to a partnership where we also find a statutory agency between the partners for the purpose of running the partnership.[25]

Partnerships, however, which are by nature devoted to conducting business for profit, are provided with wider agency relations to permit the running of the business and "all affairs connected with the partnership". On the other hand, only a narrow agency is recognized, by virtue of marriage, this being restricted to running a household. The agency does not extend to the running of the spouses' businesses or to all matters of the marriage.

24. About the distinction between *operation of law* — which is an authority created by law in order to protect a person who is not an agent by virtue of the ordinary agency laws — and *implied agency* from within the realm of agency law, *see* A. Barak, *Agency Law, 1965*, in *Commentary on Laws Relating to Contracts* (G. Tedeschi, ed., Jerusalem, 1975) §3.

25. Section 14 of the Partnerships Ordinance (New Version) 5735-1975.

(4) Marriage in itself does not create a system of agency relations between the spouses. The responsibility for running the household generates a limited and restricted agency, needed only to allow the spouses to lead an orderly life together.

d. *Section 3(A) of the Agency Law*

In Jewish law there is no general rule whereby marriage creates general agency relations between the spouses. Neither is there a specific rule as to the husband's general responsibility for household goods purchased by the wife, except for the rule of Borrowing for Her Maintenance, and, according to our approach, the principle of The Woman Who Conducts the Family Business.[26] A number of times provisions were suggested whereby, as with the legal systems of other countries, Israeli law would establish agency by operation of law between the spouses. All these proposals were rejected.[27]

The Agency Law, 5725-1965, affects only ordinary agency relations

26. We will examine below the rule of The Woman Who Conducts the Family Business, and its relevance in Israeli law today.

27. In section 20 of the proposed Agency Law, 5725-1964, it was stated that anyone entitled to maintenance by a certain person would be considered as that person's agent as far as the purchasing of necessities was concerned, provided the purchases did not exceed the amount to which the person receiving the maintenance was entitled. Yet this type of authorization, which, according to the proposed legislation, could not be annulled, was rejected.
Also, in the proposed Spouses (Property Relations) Law, 5729-1969, (Section 14) it was submitted that "a debt incurred by one of the spouses in order to meet reasonable needs of the common household is the joint and separate responsibility of both spouses." This section was also rejected.
This last section is similar to the provisions of section 51 of the proposed Law of the Individual and the Family (Published by the Ministry of Justice, 1955). However, section 51 was preceded by the provisions of section 50 which divided the burden of the family's needs between the two spouses according to the principle of equality, based on the spouses' relative means. Section 14 of the proposed Law of Property Relations was not preceded by such provisions. Section 14, which was intended to settle the responsibility toward third parties and to establish mutual agency by operation of law, was not compatible with the way in which religious law places the responsibility for the needs of the family mainly on the husband. Mutual agency on the one hand, together with the unilateral responsibility of the one party toward the other, are indeed inconceivable. About the aim of the section as protecting third parties *see* M.K. I. Klinghoffer, *Divrei HaKnesset* 68 (1973) 4255. The omission of the section was justified by the chairman of the Legal and Legislative Committee, M.K. I. Goldsmith, by the argument that the section did not relate to the domestic relations between the spouses, but to relations between them and third parties, *Divrei HaKnesset* 68 (1973) 4262.

and not agency by operation of law,[28] which is the basis for the rule of Borrowing for Her Maintenance. As mentioned above, the main difference is that agency by operation of law may be activated without the person's knoweldge, and even against his will, while implied agency is a factual inferrence from circumstances according to which a person's will is inferred.

Marriage itself does not create relations of agency by operation of law, nor a legal presumption for the creation of such relations. On the other hand, within the framework of the Agency Law, it is possible to regard marriage as a special datum and to examine the behavior of the spouses with special emphasis on, and in the light of, the special relationship between them.

Section 3(A) of the Agency Law regulates the creation of agency by conduct. The section states that "agency is conferred by the conduct of the principal towards one of [the spouses]". The conduct must be that of an overt act[29] such as *expressing the will* to create the agency. The existence of marriage is not sufficient. The expression of will, by one's conduct, may be directed either toward the agent spouse or toward the third party.[30] Conduct creates agency because it represents the expression of the principal's will to create the agency with respect to the agent or to the third party.[31]

The expression of such will between the spouses must be viewed according to criteria that regard marriage as a special element in such an examination, for it widely known that even though conduct must be overt, it changes with every situation and depends on the different circumstances.

To create an agency for the purpose of purchasing household goods, we propose that we limit ourselves to the elements recognized by the

28. This is the opinion of A. Barak, *supra* n. 24.

29. A. Barak, *supra* n. 24 at §121.

30. *Ibid.* §103. It must be noted here that A. Barak is critical of the ruling of C.A. 721/66 *Mizrahi v. Hussein*, 23(2) P.D. 206, (henceforth referred to as the *Mizrahi* case), among others because H. Cohen J. finds the spouse conduct toward everybody to be sufficient for the creation of agency between them and a third party. A. Barak, on the other hand, maintains that it is not sufficient to express will toward everybody. The expression of one's will must be directed toward the third party with respect to whom the agent carried out a legal act on behalf of the principal. This opinion is derived from the view that agency by conduct is the same as an announcement that needs to be received by the third party. *See ibid.* §141.

31. G. Procaccia, *The Agency Law, 5725-1965*, Part A (Tel-Aviv, 1975) 136.

English common law for the creation of a similar agency. In other words, when the spouses live *together* and one of the spouses has been running the household for an extended period of time with the other's consent, their conduct indicates that the one acts as the other's agent in paying for reasonable expenses related to the household.[32] Conduct such as this is an expression of will toward the other spouse and is sufficient to create the agency. When the third party knows the facts and they are also reflected in actions taken by the couple in connection with that party, this becomes an expression of will toward the third party as well.[33] For this purpose, it is possible that the spouses' partnership in life may be recognized as conduct that confers on one of them the power to change the other's legal status toward a third party, unless it has been agreed otherwise between the parties or unless certain circumstances are present to indicate a different intention.[34] [35]

For the creation of such an agency we propose to take into account,

32. This is also Procaccia's opinion, *ibid.* 138, concerning living together and raising and educating the children.
What is the scope of the agency? The authorization must be interpreted according to the purposes and business circumstances of the agency. *See* Barak, *supra* n. 24 at §115. Therefore, the issue of what are the reasonable needs of the household depends on the special circumstances of each case. In light of their special character, the agency relations we are dealing with are also dependent on *the standard of living and the needs of the family.* Concerning the extent of presumed agency in English law *see also supra* n. 9.
33. About the need for "reception", in other words the need for the conduct to be known to the third party, see A. Barak, *supra* n. 24 at §141, and also *supra* n. 30.
34. The issue of when agency relations are not created even if the conditions mentioned are fulfiled, depends on the circumstances that are revealed in light of the character of his implied agency. Such is the case, for example, when the wife spends money beyond what is necessary to meet her needs, or when the husband's obligation for his wife's maintenance expires. In these cases we must discriminate between agency that is created by the expression of the husband's will toward his wife, and between the agency created by the expression of such will toward a third party. Here it is possible for the agency to continue toward a third party that is unaware of these circumstances and with regard of whom the conditions for the creation of the agency are fulfiled (Section 15(A) of the Agency Law, 5725-1965).
35. Thus we bring the interpretation of section 3(A) closer to the rules of the English common law, as represented above (*see* G.H.L. Fridman, *supra* n. 9 at 79-84). It seems to us that this approach is not unfounded. The rule of the English common law does not create an agency by operation of law, but creates a presumption of fact, derived from the reality of partnership in life and the running of the household by the wife (as opposed to presumption of law). As we have indicated before, the legal basis for the creation of the said authorization in the English common law is not clear, and some perceive this basis in a presumption of law, in other words, in a presumption of agency.

among other circumstances, and in order to determine the legal relevance of the conduct, the element of the parties' responsibility for meeting the needs of the household. Although the proposed agency relations are derived from the agency laws, they do not stem from the maintenance laws and are not legally recognized as agency by operation of law. Nevertheless, in our view, the correlation between the basis for the responsibiilty and the *creation* of agency relations needs to be recognized. The legal status of the obligation to provide for the needs of the household is highly relevant to the conclusions that may be drawn from the spouses' conduct, as far as the creation of agency relations is concerned. This conduct must always be examined against the background and in the light of the existing legal situation, so that the conclusions may be compatible with the instructions of the law as adapted to the specific situation. If the obligation is placed entirely on one party, why should we infer, based on the running of the household, agency relations that hold the other party, or both together, responsible toward a third party? The domestic relationship between the spouses and their outside relations with third parties are interrelated, and this must be taken into account in this regard.[36]

The comparative analysis we performed supports our position. One of our conclusions was that the granting of agency to the spouses is, usually, contingent upon the responsibility for meeting the expenses of the household and providing for the family's needs. The relationship between the creation of the agency and the obligation to provide the needs of the family is especially valid with respect to the possibility that in light of the Agency Law, and unlike the rule of the Woman Who Conducts the Family Business, section 3(A) of the law may also be used by the husband to obligate the wife. There is no doubt that the trend toward equality between the spouses, which is gaining increasing support in Israeli legislation, occasionally justifies such a conclusion. However, among other circumstances, the fact must be considered that in Israeli law (most of which, in this area, is religious law), the wife is not held responsible for expenses of the household and of the family. In order to infer an agency relation tha would hold the woman responsible by her husband toward a third party, as her agent, additional facts are needed, that would indicate such an agency; mere cohabitation and the running of a common household would not be sufficient.

36. For another example, in a different context, of the consideration of an obligation for maintenance as intepreting the conduct needed to interpret a document, *see* C.A. 138/74 *Chaskin v. Chaskin*, 30(2) P.D. 365, 370. This judgment indicates an

There is, then, an additional possible legal source that would grant limited agency related to household expenses. Yet it is neither an agency by operation of law nor an irrebuttable authorization, as is the case in the rule of Borrowing for Her Maintenance or in the various legal systems in other countries. It is an arrangement similar in its approach and results to that part of the English common law — which is still in effect today — that combines elements from agency laws and from family laws.

The proposed arrangement cannot be classified as an ostensive agency or as a presumption of agency between the spouses. This is an implied agency based on the provisions of the law, which expresses the explicit will of the principal spouse and reflects that will; the will is expressed by conduct.

While there are those who speak of a lacuna in Israeli law[37] with respect to the husband's responsibility toward his wife's obligations regarding the needs of their common household, or with respect to mutual responsibility, the arguments submitted above contest this, and even beyond the narrow rule of Borrowing for Her Maintenance which is part of the positive Israeli law.

III REPUTED SPOUSES

As we have seen above, according to English law, common living creates an implied agency as far as household expenses are concerned, even if the man and the woman are not married. In our opinion this may be true in Israel as well. The source of the rule may be found in the general agency law which does not regard mere matrimony as relevant in any way. It is possible, therefore, that for the given purpose implied agency by conduct may be created between a man and a woman who are not married but are reputed to be such, in the sense that the public assumes mistakenly that they are married.[38]

This is not to grant reputed spouses special status, similar to that of married couples, for the purposes of maintenance, since the source of

approach to the examination of relevant conduct, and its evaluation in the light of and against the background of the existence of a legal obligation. It is interesting to note that section 20 of the proposed Agency Law, 5725-1964 — which was rejected — that was meant to settle the matter of agency for the purpose of purchasing necessities, did take into account the question of obligation for maintenance.

37. As indicated by M.K. Goldsmith, *Divrei HaKnesset* 68 (1973) 4262; also I. Warhaftig, *supra* n. 2 at 291.

38. *See G. Procaccia,* supra n. 31 at 142.

the rule is in the general agency law, and in this respect spouses are treated the same way as strangers are. A consistent approach in this matter would require even further-reaching conclusions whereby an implied agency of this sort would also apply in situations in which two persons, whether related or not, live together and conduct a common household. Therefore, as far as the agency relations between them are concerned, the status of reputed spouses is not better than that of other people in similar circumstances.

It is possible to argue that for the granting of implied agency the position of reputed spouses need not be identical to that of two strangers. We may adopt this conclusion if we consider the additional element we proposed, namely, the correlation between the obligation to provide for the needs of the household and the granting of implied agency in the said circumstances. In all the cases described above, there is no obligation of this sort on either side. Apparently, therefore, according to our approach, implied agency ought not to be inferred in circumstances such as these. Nevertheless, it seems to us that it is possible to make an analogy between a married couple and reputed spouses. From the point of view of third parties, reputed spouses are ostensively responsible for meeting the expenses of the household, which places them in a situation similar to that of married couples regarding the granting of implied agency. According to this approach, there is a difference between inferring agency relations between married couples and reputed spouses on the one hand, and two strangers on the other. Nevertheless, there is yet another possibility, and it is possible to qualify the element we proposed and to argue that there is a difference between the lack of mutual liability and the placing of the obligation on one party while releasing the other of all responsibility.

In our opinion, only marriage requires that the conduct of the parties in the special circumstances of cohabitation and the running of a common household (from which it is possible to infer implied agency with respect to household expenses), should be considered in light of the husband's obligation. Such a unilateral obligation confers a special meaning upon the conduct of the parties and requires the creation of a unilateral agency for the given purpose. On the other hand, in the case of reputed spouses, there is no legal necessity to infer the denial of implied agency. In the absence of a mutual obligation between people in such circumstances, their conduct alone testifies as to their position, without this being influenced by any other fatcor. The special circumstances in this case may create such a mutual implied agency toward third parties.

IV AGENCY RELATIONS BETWEEN SPOUSES IN THE GENERAL SENSE

1. *The Woman Who Conducts the Family Business*

In the 12th and 13th centuries the woman's status in the Jewish community began to change and she began playing an increasingly important role in social and economic life, and to participate in running her husband's business affairs.[39] The Talmudic concept of The Woman Who Conducts the Family Business[40] received new meaning and was extended also to include the relations between the wife and third parties. Since that period the wife has been given the right and the authority to obligate her husband in business matters, assuming that she acted as his agent. This legal situation came as an answer to a new reality, and was intended to allow for the orderly conduct of business affairs. This rule, which was renewed by Raban,[41] contains another factual assumption according to which every wife is in fact presumed to be conducting the family business. The consequence of this presumption was a further extension of the rule. By this means, a new source was created regarding the husband's responsibility for his wife's debts,[42] and it was made possible for women to actively participate in the earning of the family income. Not all rabbinical authorities (*Poskim*) agreed with this presumpton of law. Some of them restricted the innovation in this rule to a specifically defined type of business woman.[43] Nevertheless, despite this difference, it is agreed by all the *Poskim* that with regard to certain types of expenditures, namely those having to do with the maintenance of the household and of everyday living, all wives are to be considered as their husbands' agents.[44] This rule therefore provides a possible legal source for the husband's responsibility for his wife's debts related to the maintenance of the household and the family's current living expenses. In order to realize these limited obligations of the husband, it is possible to our day to regard the vast majority of wives as conducting the family business. This last conclusion is valid even if one were to

39. Z. Falk, "On Matrimonial Property in Jewish and Germanic Laws", *Revue d'historie du droit* XXVII (1960) 70, 76-78; Z. Falk, "The Status of the Woman in German and French Communities in the Middle Ages," 48 *Sinai* (1961) 361-365; E.E. Urbach, *The Tosaphists, their History, Writings and Methods* (Jerusalem, 1955) 151; *see* I. Warhaftig, *supra* n. 2 at 264.
40. *Bava Batra* 52b.
41. Rabbi Eliezer Ben Nathan.
42. The Book of *Raban, Even ha-Ezer,* 115; *see* I. Warhaftig, *supra* n. 2 at 263-264.
43. *Rema, Darkei Moshe, Tur, Even ha-Ezer,* 86:4; *Rema, Shulhan Arukh, Hoshen Mishpat,* 62:1; *see* I. Warhaftig, *supra* n. 2 at 270-271.
44. I. Warhaftig, *supra* n. 2 at 280-281.

argue that "in our time, in our country, and particularly with the background of the merging of exiles we have experienced, it appears that one may not establish a generalized assumption whereby every wife conducts the family business, but it is necessary to examine the conduct of each woman within the framework of her married life."[45] In our opinion, the rule of The Woman Who Conducts the Family Business, in the narrow sense in which it is accepted by the *Poskim*, is part and parcel of the positive Israeli law. This rule is unique to the relations between the spouses within their common, family life, and is derived from their matrimonial status and the matrimonial relations between them. For this reason, the rule is included in the term "matters of marriage" (to which religious law is applicable according to section 1 of the Law of Rabbinical Courts Jurisdiction (Marriage and Divorce) 5713-1953, and according to article 47 of the Palestine Order in Council, 1922-1948) in accordance with all the criteria established in the courts and which were listed by us elsewhere.[46] We have already discussed the difficulties of applying the term "matters of marriage" to a situation such as this one, dealing with the relations between spouses and third parties, when we discussed the issue of Borrowing for Her Maintenance. The rule of The Woman Who Conducts the Family Business, as the previous one, is a case in which personal law, as a "matter of marriage", also applies to the relations between the spouses and third parties.

The Agency Law, 5725-1965, does not affect the application of the rule of The Woman Who Conducts the Family Business as part of positive Israeli law. Even if it were found that this law represents a separate and idependent source for the complex of agency relations between husband and wife, this would be only an additional, alternative source, and would not affect the applicability of the said rule.

A rule such as this, subject to extension and restriction according to the specific conditions prevailing in each society at a given time, brings us closer to the criteria of section 3(A) of the Agency Law, though the rule we are discussing is not absorbed in the above law. Here again we find support to include the rule in positive Israeli law by virtue of section 19 of the Agency Law which retains various special categories of agency,[47] even when they are not rooted in an enactment but in the

45. *ibid.* 281.

46. *See* my article, supra n. 5 at 599-600, 606. It is beyond the scope of the present article to discuss which legal instance has jurisdiction to discuss these matters.

47. *See* A. Barak, *supra* n. 24 at §578 pp. 592-593.
It seems to us that in any case we are faced with a special category of agency relations, included in the domain of section 19 of the law according to each one the possibilities raised there by Barak.

law.[48] This rule of the Jewish law may be adopted by the positive Israeli law provided that there is a legal basis for its adoption, beyond the framework of the Agency Law. The term "matters of marriage" to which the personal law applies is an appropriate basis for the adoption of the rule. This rule will prevail in each case in which it is used to regulate agency relations differently than the Agency Law, and even when it is in contradiction with it.[49]

Is the rule of The Woman Who Conducts the Family Business compatible with section 4 of the Spouses (Property Relations) law, 5733-1973? The section determines explicitly that the contract of marriage or the matrimonial state are not in themselves sufficient to place responsibility for the debts of one of the spouses on the other. This section has no bearing on the rule of the Jewish law which we are discussing here. Agency is not created by the mere fact of marriage or matrimony, but it is the actions of the spouses in managing their mutual relations and in their specific conduct that create a presumed agency of sorts. This rule, therefore, can accomodate the above-mentioned section 4. This view is further buttressed by the regulation that limits the applicability of the rule where there are explicit instructions to this effect by the husband, or when it is possible to infer from his conduct that he does not agree to assume the responsibility of his wife's debts. The agency is not created by the act of marriage but by the special reality and specific conditions of the spouses' conduct.

Thus, while it appears that Israeli legislation does not provide an *explicit and detailed* solution for the problem of a spouse's responsibility for the debts of the other in general, and for the issue of a spouse's responsibility for debts incurred by the other to cover household and comon living expenses, in particular, in our opinion, there is no lacuna in this area.[50] We have attempted to point out the solution to this specific issue both in the Jewish law, which is part of the positive law in Israel,[51] and in the provisions of section 3(A) of the Agency

48. Included in the term "law" (din). *See* a definition of the term "law" (din) in the Interpretation Ordinance (New Version). *See* the definition now in section 3 of the Interpretation Law, 5741-1981.

49. *See* A. Barak, *supra* n. 24 at §576 p. 591.

50. *See supra* n. 37.

51. See the *Mizrahi* case, *supra* n. 30 at 208-209. It appears that H. Cohen J. based his decision both on the instruction of section 3(A) of the Agency Law and on the rule of The Woman Who Conducts the Family Business, as two independent legal sources that establish the husband's responsibility for his wife's obligations. However, *see* I. Warhaftig, *supra* n. 2 at 288, who argues that this rule is mentioned only incidentally in Judge Cohen's decision.

Law. The regulations of the Jewish law are restricted to the husband's responsibility, which is not the case as far as the Agency Law is concerned.

The effect of the rule of The Woman Who Conducts the Family Business in Jewish law extends beyond the narrow area of responsibility for reasonable debts of the household found in the various other legal systems. This rule, as it has been interpreted, allows the operation of agency relations between husband and wife merely by virtue of their matrimonial relations.[52] Does this rule provide a source for creating general agency relations by virtue of marriage in Israeli law as well? It appears to us that Israeli reality has narrowed the field and restricted the applicability of this rule in its wide sense. The scope of the agency is weakened not only by the merging of the exiles from various countries, but paradoxically, also by the strengthening of the trend for equality between the spouses in all matters having to do with conducting their business and managing their property, a consequence of the denial of most of the husband's rights to deal in his wife's property, and of the principle of separation of property. The more women become independent, with their property no longer subject to their husbands' control, and the more women are involved in the economic life and thus less dependent on their husbands' income, the more limited becomes the assumption that the husband intends to regard the wife as his agent for the purpose of conducting his business.[53] The importance of this rule *in its wide sense*, rooted in different social conditions and in the factual basis of each individual case, is constantly decreasing.[54]

52. What is meant, naturally, is the husband's obligation — in business and property matters — through his wife, and not the reverse situation.

53. The English law also established implied agency whereby the husband was responsible for his wife's actions in all matters having to do with business conducted by her. With the granting of full legal capacity to women and the establishment of their independent legal status with respect to the purchasing of property and control over it, the scholars believe that this special implied agency now remains without a basis. *See* G.H.L. Fridman, *supra* n. 9 at 80. It seems to me that this approach is also correct in regard to the rule of the Women Who Conducts the Family Business, which originated under different social conditions and under a property regime where the woman, in fact, had no property whatsoever, since her entire property passed on to the husband's control with marriage. In such a case, all of the wife's transactions could in any event be regarded as agency on behalf of her husband, and not as the conducting of an independent business of her own.

54. I. Warhaftig, *supra* n. 2 at 290.

2. *Section* 3(A) *of the Agency Law*

Another possible source for the creation of agency relations between spouses is the Agency Law itself. Is it possible to find, within the framework of the Agency Law, a legal source for general agency relations between a husband and his wife?

Here too, the relevant section is 3(A) of the Agency Law.

In the *Mizrahi* case,[55] H. Cohen J. determined that "the mere matrimonial state and cohabitation in one apartment are considered as 'conduct' in the sense defined by section 3(A) of the Agency Law, 5725-1965, which creates an implied agency toward the entire public — at least for those matters and purposes for which a wife is normally and usually accustomed to represent her husband."

In that particular case, Cohen J. recognized, based on this rule, the wife's right to lease an apartment owned jointly by the spouses to a third party during her husband's absence from the country.

It is possible to interpret the judge's decision in the widest sense: that mere matrimony and cohabitation create agency relations between the spouses. We cannot share this interpretation. We have already shown that there is almost no legal system which is willing to recognize the status of marriage *per se* as creating a general agency relationship between the spouses. The granting of agency relations of this type between the spouses is within the realm of family law and personal status. It is not possible to attribute to the Israeli legislator the intention of arriving at such specific results by indirect means, or by interpreting a general agency in a general law dealing with agency. The recognition of general agency by virtue of matrimonial status is not an adaptation of doctrines derived from the agency laws to family laws, but the creation of a new law in family law on the basis of a general instruction in the Agency Law. We do not believe that the Agency Law can provide a legal foundation for creating agency relations between the spouses merely by virtue of mere matrimonial status. General agency relations by virtue of matrimonial status are tantamount to agency by operation of law and require a separate and specific instruction for this area.[56] As we saw above, the strengthening of the trend for equality between the spouses also supports this view.[57]

55. *Supra* n. 30.

56. *See* A. Barak's comment, *supra* n. 24 at 6 n. 22. In his opinion, the *Mizrahi* case brings agency by conduct closer to agency by operation of law as far as the spouses are concerned.

57. *See supra* text accompanying n. 53.

Based on the above, the *Mizrahi* case needs to be narrowed and placed on a legal basis that accords with agency laws, for there is no legal source to be found within the Agency Law regarding general agency relations between spouses. And indeed, later decisions did not adopt Judge Cohen's criterion and did not apply it in the wide sense that may be imputed to his decision. In all subsequent cases that were judged, the Court did not recognize matrimonial status of itself, and not even cohabitation of itself as granting agency for the purpose of carrying out business in real estate by one of the spouses in property registered under the other spouse's name.[58]

The Supreme Court has lately specifically addressed Judge Cohen's decision and explained that his statement must not be interpreted as a recognition of "quasi agency relations", created, as it were, by virtue of matrimonly or living together.[59]

The Spouses (Property Relations) Law, 5733-1973, eliminated all doubts as to the manner in which section 3(A) of the Agency Law must be interpreted. Section 4 of the Property Relations Law denies the possibility of placing obligations on a spouse by virtue of marriage or of its existence. The establishing of agency creates dependency and grants authority, and implies placing responsibility on one party for the debts of the other. As a principle, therefore, agency relations between spouses are based, as in the case of strangers, on their actual conduct and not by operation of law. We subscribe to the opinion that not only marriage but even cohabitation, in themselves, are not instances of conduct that warrant the granting of general agency beyond the restricted area of running the household.[60] The scope of the agency

58. *See* C.A. 541/74 *Perminski v. Sandrov*, 29(2) P.D. 253. However, see Judge Berinson's minority opinion on p. 255. We must note that the point of disagreement between the judges of the majority and of the minority was not whether mere common living is an indication of agency, but the manner in which the complexity of facts must be interpreted in this specific case. It follows that all the judges agreed that the said doctrine does not apply. *See also* C.A. 422/75 *Mizaki v. Hadad*, 30(1) P.D. 525, 527-528, 531-532; C.A. 225/78 *Tshuva v. Freig*, 33(1) P.D. 218. In none of these cases were special rules of agency applied. The Court examined whether the facts in each case contained sufficient evidence to establish the existence of authorization given in advance. A narrow interpretation of the decision of H. Cohen J. in the *Mizrahi* case (*supra* n. 30) can also be seen in C.C.(T.A.)3226/71 *Muhamad v. Liebhardt*, (1976) 2 P.M. 123, 132. About the scope of agency between spouses according to section 3(A), *see supra* at p.

59. See C.A. 409/79 *Tirer v. Rejuan*, 35(1) P.D. 458, 460.

60. G. Procaccia, *supra* n. 31 at 139-141.
In C.A. 409/79, *ibid.* 460, the Court stated that "Marriage and life in common could be, under certain circumstances, an indication of the fact that the spouse

relations between spouses depends on conduct or action that is above and beyond mere cohabitation and that would indicate, as in the case of strangers, an intention to create a wider agency so that it may represent an expression of will on the part of the principal spouse. Accordingly, we do not agree with the ruling in the *Mizrahi* case, whereby living together creates an agency for leasing an apartment, registered under the name of both spouses, in the name of the other spouse as well.

V AGENCY RELATIONS BY VIRTUE OF THE CO-OWNERSHIP PRESUMPTION

The reasons spelled out above should be sufficient to reject judge Berinson's attempt to find in section 3(A) of the Agency Law a source for attributing wider agency relations to spouses by virtue of the matrimonial status and of cohabitation with respect to co-ownership presumption.[61] A discussion of the issue of agency by virtue of co-ownership presumption, as treated by the Supreme Court, is beyond the scope of this discussion, but we cannot dismiss it without giving it some consideration. The co-ownership presumption states that "in the

who acts as an agent is indeed in the agency of the other spouse. But this is the case only in matters that are by their nature related to and indissolubly involved in married life and in living together." In that particular case, the husband's order for airplane tickets for his wife, for a joint trip abroad, was not considered an act of agency that would place responsibility on the wife toward a third party, the travel agent.

61. The wide interpretation of section 3(A), with which Berinson J. agrees, gains expression in C.A.595/69 *Afta v. Afta*, 25(1) P.D.561, 566, where he states that "When the spouses live in harmony and the wife agrees to have joint property registered under her husband's name, she presents him as her agent in the sense of section 3(A) of the Agency Law". Even before that, Berinson J. narrowed the rule of the co-ownership presumption in property in the sense that toward a third party the decisive factor is registered ownership or possession. Therefore, the spouse who is not registered but who has rights by virtue of the co-ownership presumption cannot annul a transaction with a third party carried out without his or her knowledge by the spouse who is registered as owner or who has possession of the property. Thus the Court declined to recognize the full legal results of the co-ownership presumption toward third parties, thereby preventing the widening of the co-ownership presumption to third parties as well, as would have followed from the presumption. *See* C.A. 135/68 *Bareli v. Director of Estate Duty Jerusalem*, 23(1) P.D. 393, 396; C.A. 446/69 *Yuval Levi v. Goldberg*, 24(1), P.D. 813, 819.
Berinson J. still did not base his judgments on the Agency Law in these judgments. It is worth noting that in the *Afta* case, at 572, I. Cohen J. objected to applying the Agency Law in this case. He repeated his objection, more forcefully, in C.A. 388/76 *Kivshani v. Director of Land Appreciation Tax*, 31(3) P.D. 253.

absence of other intentions to be inferred from the spouses' marital life and from their general conduct with regard to financial and material matters it is presumed that spouses who live together peacefully over a long period of time intend to be equal partners in all their property."[62] The married life style of the spouses creates an *a priori* presumption (which is seen as being the parties' intention) of full partnership in the property acquired by each spouse, in a common effort, during the marriage.[63]

The co-ownership presumption is supplemented by the presumption of liability for debts: "In each kind of partnership, the joint liability for the family debts is a natural consequence of the partnership in property, and goes together with it."[64]

Is liability for debts limited to the realm of domestic relations between the spouses, or is it a direct liability of both spouses, together and separately, allowing the third party to claim the entire amount of the debt even from the spouse that is not obligated?

The latter possibility depends upon whether one regards one of the spouses as the other's agent under the co-ownership presumption.

It appears to us that the presumption of liability for debts within the framework of the co-ownership presumption is not a ground for making an exception to the basic rule that denies recognition of each spouse's responsibility for the other's debts. A deviation from this rule is possible only in the presence of some other instruction of the personal law, or when it is possible to place such mutual liability within the framework of the provisions of the general law, as we saw above. As opposed to this view, if one follows Judge Berinson's idea concerning the presumption of agency that accompanies transactions between one of the spouses and third parties,[65] it would also be possible to state that a spouse who creates a debt in connection with a property that is owned jointly by virtue of the co-ownership presumption, may at the

62. The *Afta case*, ibid. 566.

63. About the rule of co-ownership presumption *see*, among others, C.A. 300/64 *Berger v. Director of Estate Duty*, 19(2) P.D. 240; C.A. 253/65 *Briker v. Briker*, 20(1) P.D. 589; C.A. 135/68, *suspra* n. 61; the *Afta* case, *ibid.* For additional material on this issue *see* D. Friedmann, "Matrimonial Property in Israel," 41 *Rabels Z* (1977) 111; J. Sussman, "Matrimonial Property Relations in Israel," *Beiträge Zum Deutschen und Israelischen Privatrecht* (1977) 165; J. Weisman, "Can a Spouse Confer a Better Title than he Possesses?" 7 *Isr. L. Rev.* (1972) 302.

64. C. A. 633/71 *Mastoff v. Mastoff*, 26(2) P.D. 569, 571. For this issue *see also* C.A. 677/71 *David v. David*, 26(2) P.D. 457.

65. *See supra* n. 61.

same time obligate the other spouse directly toward the claimant of the debt he incurred in connection with the said property. Following the partnership laws may yield similar results, as partners are liable together and separately.[66] Moreover, the principle of symmetry — presumption of liability for debts along with the application of the co-ownership presumption — logically requires direct liability toward third parties.

These arguments are opposed by a long list of counter-arguments. The restriction of legal consequences of the co-ownership presumption in the case of a voluntary transaction with the spouse who is the registered owner or the possessor of the property for the purpose of protecting third parties,[67] indicates a tendency to restrict the co-ownership presumption to domestic relations between the spouses and not to widen its scope beyond that. The rules concerning the restriction of the effect of the co-ownership presumption on third parties also indicate that the partnership does not operate directly in relations between a spouse and third party.[68]

In such cases the court refrains from relying on the principle of ostensive authority of section 14 of the Partnership Ordinance (New Version) 5735-1975. This abstention indicates a tendency not to rely on doctrines of partnership laws in cases of this type,[69] and an intention

66. Section 20(A) of the Partnerships Ordinance (New Version), 5735-1975.

67. *See supra* n. 61.

68. It is important to examine the legal results obtained following the ruling by which a voluntary transaction between the registered or possessor spouse will obligate the other spouse as well, in order to draw the right conclusions. The objective of the ruling, and its subsequent result, are a narrowing of the effect of the co-ownership presumption on third parties. The realization of this objective and the logical continuation of this ruling indicate that a spouse ought not to be obligated to assume direct responsibility toward a third party for an action by the other spouse taken without the first spouse's knowledge and agreement. Only this conclusion is compatible with the restriction of the co-ownership presumption to the domestic relations between the spouses. It is true, however, that the legal way by which Berinson J. arrives at the said ruling - section 3(A) of the Agency Law, 5725-1965 - may lead to the opposite conclusion, whereby it would be possible to obligate the other spouse directly. Yet despite the fact that in general legal method may not be divided, we are faced here with an instance when this is possible. The co-ownership presumption relies on the special intention of the parties, and therefore it is possible to examine the parties' intentions separately for each situation and to direct it according to the desired result, since such a result is important for the decision.

69. The court avoided applying section 20 of the Partnership Ordinance, which establishes joint and separate obligation of the partners toward third parties in matters related to affairs of the partnership.

to restrict the co-ownership presumption to the domestic relations between the spouses. Moreover, the privity between the debtor and the third party is usually decided by the regular rules of the law. It is not possible to place the direct liability for payment of the entire debt or of a part of it on another party without an explicit provision by enactment. In the rules that were established by judge-made law within the framework of the relations between spouses in regard to joint liability that follows from joint rights, one cannot find any reason or legal source that would justify the widening of this liability beyond the system of family laws, and the imposition of such direct liability. The spouse, who according to the argument will be fully or partially liable for the debts, was not asked as to his or her wish to obligate him or herself for such debts in return for the right to enjoy the benefits of partnership in the property. The spouse is also unaware of the extent of the liability assumed by the other spouse with whom he or she must *ex post facto* share the debt. The rationale behind the co-ownership presumption is rooted in the relations between the spouses, and there is no justification for extending it beyond that.

The judgments on this issue do not provide explicit answers to this problem, but we may perhaps find a few clues in them. From the manner in which accounts are settled between spouses when the partnership is dissolved, as established in the *David*[70] and *Mastoff*[71] cases, it is apparent that the principle of liability for debts is set down for the purpose of settling the spouses' accounts and is limited to this purpose. In other words, this applies to the settling of accounts between the spouses, and no more. There is no personal, direct liability, either together or separately, of one spouse for the other's debts toward a third party, the creditor, pending during the course of marital life. Determining the liability for debts is, therefore, merely a means of computing the balance of credit over debt in order to allow the co-ownership presumption to materialize. The court did not go beyond this.[72] Moreover, the accounts of the spouses are settled only at the

70. *See supra* n. 64.

71. *See supra* n. 64.

72. From C.A. 409/79 *supra* n. 59, it may be inferred that in certain cases the co-ownership presumption could directly obligate the spouse toward the third party. In an *obiter dictum* the Court stated that had the spouses' journey abroad been undertaken for their common purpose, it might have been possible to establish that the wife (the appellant) owed a direct debt to the travel agent for the ticket that was purchased for her use by her husband, by virtue of the co-ownership presumption. In the Court's opinion, in a circumstance such as this, the co-ownership

time when the partnership is dissolved, which must be done as one whole.[73] Therefore, there can be no question here of the placing of direct liability toward any third party before the rights and debts of the parties between themseves have been determined, that is, before their partnership has been dissolved. Before that it is impossible to determine the debits and credits and it is altogether unknown whether any debts exist at all on the part of any of the spouses, and, if so, what their extent may be.

We may now answer the question of direct liability of one spouse for the debts of the other, toward third parties, incurred in purchasing property included in the partnership in the negative. This conclusion is supported both on considerations of principle and by hints deduced from judgments.

VI SUMMARY

The discussion of the issue of agency relations between spouses pointed out the various legal sources that form the basis for the different arrangements related to agency relations of this sort: religious law, within the framework of maintenance law and of "matters of marriage", and the provisions of civil law, within the framework of general agency laws, although these agency relations are essentially limited.

In the course of the discussion we found it difficult to integrate the family laws with the general laws, which are not equipped to solve situations of this sort.

The superimposition of family laws on the civil law is not a proper way of reaching desirable results in family law. It runs the danger of providing partial instead of complete solution, of creating duplications and a lack of clarity in the law, and of undesirable innovations in the area of civil law in an attempt to achieve results in narrow and restricted sections. The layer system that characterizes Israeli law in the area of personal status is especially susceptible to these dangers.

presumption would have acted to the appellant's detriment. It must be noted that this was an unexplained *obiter dictum*, and it is doubtful whether by "co-ownership presumption" the Court meant the conventional term. Therefore, it is preferable to interpret this comment as referring to the domestic relations between the spouses and not to the consquences of the co-owenrship presumption in obligating the spouse toward a third party.

73. *See* the *David* case, *supra* n. 64; the *Mastoff* case, *supra* n. 64, as well as C.A. 264/77 *Dror v. Dror*, 32(1) P.D. 829.