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PRINCIPLES OF INTESTATE SUCCESSION IN ISRAELI LAW

*Ariel Rosen-Zvi and Asher Maoz**

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* Ariel Rosen-Zvi, Ph. D. (Tel Aviv University); Associate Professor, Faculty of Law, Tel Aviv University.
Asher Maoz, J.S.D. (Tel Aviv University), M.C.L. (University of Chicago); Faculty of Law, Tel Aviv Unviversity; Editor, *Tel Aviv University Law Review.*

I. *Foreword*

The principles of the law of succession of the State of Israel are assembled in the Succession Law, 1965.[1] This statute, consisting of eight chapters and 161 sections, constitutes a first attempt at codification of Israeli civil law.[2] The statute was intended to end the recourse to the conglomeration of laws previously applied to a person's succession.[3] We would emphasize in this context the provision of sec. 150 of the statute, which states: "In matters of

1 19 L.S.I. 58. It should be kept in mind, however, that the Succession Law does not cover the entire field of succession exhaustively. Questions concerning the most essential matters are not dealt with or resolved in the Succession Law. Questions as to the assets included in the estate and their scope, for example, are not settled exclusively by the Succession Law, but rather primarily by civil law in a broad context. Matters of succession and the laws relating thereto cannot be decided without examining the inter-relationship between the Succession Law, on the one hand, and civil legislation or other laws, on the other. Thus, for example, the Trust Law, 1979 (33 L.S.I. 154) and the Spouses (Property Relations) Law, 1973 (27 L.S.I. 313) affect various matters of succession, such as transactions relating to succession, the scope of the assets of the estate, administration of the estate, and so forth.

2 See U. Yadin, "The Law of Succession and Other Steps Towards a Civil Code" in *Studies in Israel Legislative Problems, Scripta Hierosolymitana,* vol. 16 (Jerusalem, 1966) 104; An updated version of the draft law appears in *A Succession Bill for Israel* (Harvard Law School Translation, 1952); Sept. 1953 revisions (Harvard Law School Translation, 1954).

3 Sec. 156(a) of the Law repealed the provisions of the Mandatory Succession Ordinance (*Laws of Palestine,* vol. II, chap. 135, p. 1378) and sec. 4 of the Women's Equal Rights Law, 1951 (5 L.S.I. 171), as well as several provisions of the Mejelle which affected matters of succession. In sec. 156(b) the Law provided that successions, wills and legacies should be deleted from the list of matters of personal status in Article 51(1) of the Palestine Order-in-Council and that the term "confirmation of wills" be deleted from Article 54(1), which deals with the jurisdiction of the Christian Religious Courts. Henceforth, sec. 148 of the Law provides that "this Law alone shall apply to rights of succession and rights to maintenance out of the estate".

succession, Article 46 of the Palestine Order-in-Council, 1922–47, shall not apply".[4]

The extensive period during which the Succession Law was drafted, as well as the identity of the jurists engaged upon that task, left their imprint on the nature and orientation of the statute. Firstly, the original draft of 1952 was prepared by a group of jurists who were educated predominately in Continental universities. This is hardly surprising, in view of the fact that the very plans for codification of the civil law were influenced by the way of thinking of the Romano-Germanic legal world.[5]

Secondly, from the outset the initiators of the statute intended not to adopt any single legal system, but rather to prepare the draft "against a wide background of comparative law".[6] While the preparatory committee placed an emphasis on sources of Jewish law,[7] the solutions put forward by that system were adopted on their merits after comparison with those of other legal

4 This provision as to "the autonomy of the statute" was subsequently enacted in other codificatory statutes as well. See sec. 160 of the Land Law, 1969 (23 L.S.I. 283); sec. 24 of the Contracts (Remedies for Breach of Contract) Law, 1970 (25 L.S.I. 11); sec. 63 of the Contracts (General Part) Law, 1973 (27 L.S.I. 117); sec. 10 of the Contract For Services Law, 1974 (28 L.S.I. 115). Concurrently, in 1972 sec. 15(c) was added to the Law and Administration Ordinance, 1948 (1 L.S.I. 1), repealing every provision in any Mandatory Ordinance requiring a reference to English law for purposes of interpreting any provision or term therein: Law and Administration Ordinance (Amendment No. 14) Law, 1972 (26 L.S.I. 52). In 1980, Article 46 of the Palestine Order-in-Council was entirely repealed: see sec. 2 of the Foundations of Law, 1980 (34 L.S.I. 181). Despite the provision of sec. 150 of the Succession Law, the courts continued to refer to English law wherever an answer to a problem which arose could not be found in the Law. See *Adler* v. *Nesher* (1972) 26(ii) *P.D.* 745, at 748; *Bin Nun* v. *Richter* (1977) 31(i) *P.D.* 372, at 376; I. Shilo, "The Succession Law as Reflected in Court Decisions" (1975) 1 T.A.U. Studies in Law 46, at 48–50; D. Friedmann, "Independent Development of Israeli Law" (1975) 10 Is. L.R. 515, at 563–564; D. Friedmann, "Problems of Codification of Civil Law in Israel" (1979) 2 Jewish Law Annual 88, at 99–104; Y. Sussmann, "A Forecast of Problems in the Law of Contracts" (1976) 2 T.A.U. Studies in Law 17; U. Yadin, "Reflection on a New Law of Succession" (1966) 1 Is. L.R. 132, at 141.

5 See G. Tedeschi & Y.S. Zemach, "Codification and Case Law in Israel" in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*, J. Dainow, ed. (Baton Rouge, Louisiana State U.P., 1974) 272, at 273. And see generally, R. David & J.E.L. Brierley, *Major Legal Systems in the World Today* (London, 1985) 221; G. Sawer, "The Western Conception of Law" in *International Encyclopaedia of Comparative Law*, vol. II: *The Legal Systems of the World: Their Comparison and Unification* (The Hague and Tübingen, 1975) 14, at 47.

6 From the explanatory note to the draft Law of 1952: see Yadin, *supra* n. 2, at 112; Friedmann, *supra* n. 4, at 543–544.

7 See explanatory note on the draft Law of 1952, and see Yadin, *supra* n. 2, at 111–112.

systems.[8] Even where a solution drawn from a particular legal system was adopted, it was not copied in all its detail but only in terms of its principles, and even then the legislator considered himself free to introduce significant changes therein.[9]

Finally, it should be emphasized that the wording of the statutory provisions is concise, dealing only with matters of principle, which leaves to the courts the task of filling the numerous gaps therein, the legislator's hope being that the statute would be interpreted "from within".

In this article we shall attempt to discuss the principles of intestate succession underlying the Succession Law. This is naturally no easy task, in view of the nature of the statute and the manner in which it was enacted. For these reasons, one cannot expect to find a uniform system of such principles and complete harmony between them.

II. *The Place of the Law of Succession within Family Law*

Succession Law has traversed a considerable distance since the time it served as a means of preserving the ties of the extended family so as to ensure economic interests. Protection of the extended family's means of production (land, cattle, stock, etc.), along with careful preservation of its structure, ensured the economic interests of that social unit as part of the larger, tribal unit. Under this arrangement, within the framework of the extended family, the children of the deceased father or the family of the deceased husband were entitled to succeed him,[10] whereas concern for the widow took the form of ensuring her subsistence.[11]

8 See U. Yadin, "The Succession Law as Part of Israeli Civil Law Legislation" (1975) 1 T.A.U. Studies in Law 36, at 41. See generally, Tedeschi & Zemach, *supra* n. 5, at 278–280 and sources referred to therein.

9 A good example of this is the topic of maintenance out of the estate, specified in Chapter Four of the Law. The legislator chose to safeguard the livelihood of the dependants of the deceased by granting them a right to maintenance out of the estate, and at the same time he rejected the alternative of reserved shares in the estate. In adopting the first alternative, the draftsmen of the bill were prompted, *inter alia*, by the desire to preserve an institution which has become an integral part of the Jewish law of succession. In doing so, however, the draftsmen were guided no less by the institution of maintenance out of the estate which has been adopted during the present century by the legal systems of New Zealand, Australia, Canada and England. Yet the scope of this institution in our Succession Law, as well as its conditions and details, differ significantly from both the corresponding provisions of Jewish Law and the example drawn from the Anglo-Saxon world. See Yadin, *supra* n. 6, at 137–138.

10 See M. Rheinstein & M.A. Glendon, "Interspousal Relations" in *International Encyclopaedia of Comparative Law*, vol. IV: *Persons and Family*, Ch. 4 (Tübingen, 1980) 180. *Cf.* Num. 36:7: "So shall no inheritance of the children of Israel remove from tribe

Over time, the extended family gave way to the nuclear family, consisting of the spouses, their children and their children's descendants. This basic group is the framework for succession in present-day legal systems. Other ties are discarded in favour of the nuclear family. The further one departs from this basic family group, the less the social interest – concerned with protecting and strengthening the smaller family unit – in allowing more distant relatives to share with the surviving spouse in the succession.[12] Exclusion of distant relatives who have survived together with the spouse from any part in intestate succession is a central feature of the modern law of succession.[13] An additional feature is an increase in the spouse's share in the

to tribe; for the children of Israel shall cleave everyone to the inheritance of the tribe of his fathers"; and see J. Weingreen, "The Case of the Daughters of Zelophechad" (1966) 16 *Vetus Testamentum* 518.

For this reason the Code Napoleon of 1804 granted the surviving spouse one-half of the couple's movables, but – in the absence of a will – he did not share in the succession to the immovable property of his deceased spouse unless the latter left no blood relations up to the 12th parentela (art. 767). Even when the law was amended in 1957 and the spouse included among the heirs on intestacy, he was deferred by the descendants of the deceased, by his brothers and sisters and by their descendants. (I *Code Civil*, art. 766, as amended by *Loi No. 72-3 Sur la Filiation* 3 Jan. 1972). Similarly, there prevailed in the German succession laws of the period of the Second World War the institution of the *Erbhofegesetz*, whereby the inheritance was bequeathed to the blood relatives of the deceased, ignoring his widow. And see W. Muller-Freienfels, "Family Law and the Law of Succession in Germany" (1967) 16 Int'l & Comp. L.Q. 409, at 413.

11 Under Jewish law, this was effected by safeguarding the right of the widow to restoration of her assets and to her *ketubah* or, alternatively to her maintenance and to her right of residence. See *Code of Maimonides, The Book of Women, Laws Concerning Marriage* 12:1; *Shulhan Arukh, Even Ha'Ezer* 69:1-2. Generally see B.Z. Shereshewsky, "Widow" in *The Principles of Jewish Law*, M. Elon, ed. (Jerusalem, 1975) 399-403. *Cf.* the right of the widow, under common law, to dower, which constituted a life interest in one-third of which her deceased husband had been seized, in fee or in tail, during the marriage. As to the institution of dower see Haskins, "The Development of Common Law Dower" (1948) 62 Harv. L.R. 42.

A parallel institution existed also in other legal systems. For German law see R. Huebner, *A History of Germanic Private Law* (Boston, 1918) 624-626. In American law the institution of "homestead" is recognized in most of the states of the United States. It protects the right of the surviving spouse to reside in the house where he or she lived with the deceased. Such protection is afforded both as against the creditors of the deceased and as against those who inherit by will. Similar to the right of residence of the widow under Jewish law, it comes to an end upon the remarriage or death of the spouse; Rheinstein & Glendon, *supra* n. 10, at 142.

12 See R. König, "Sociological Introduction", in *International Encyclopaedia of Comparative Law*, vol. V: *Persons and Family*, Ch. 1 (Tübingen, 1972) 36-37, 43-44. See also G. Tedeschi, "Comments on The Succession Bill" in *Studies in Israel Private Law* (Jerusalem, 1966) 234, at 242; Rheinstein & Glendon, *supra* n. 10, at 179-181.

13 This is the position in German Law, for example, which recognizes five parentelas but

inheritance, even when competing with heirs of the first parentela, including the children of the deceased.[14]

The Israeli legislator has amended the Succession Law of 1965 three times in order to realize this principle. The first amendment revoked the departure from the principle of parentelic hierarchy whereby the parents and children of the deceased shared in the succession.[15] This amendment restored the Succession Law to the original arrangement included in the Succession Bill of 1958, wherein no reference is made to succession by the parents of the deceased together with his children.[16] Soon afterwards, sec. 11(a) of the Succession Law was directly amended. The wording of sec. 11(a)(4), which had granted one-fifth of the inheritance to nephews and nieces, uncles and aunts and cousins inheriting with the spouse, was completely altered. The amending statute abolished their right to inherit, and conferred the whole of the estate on the spouse inheriting with them.[17] In the reasons for the amending statute it was stated:

> restricts inheritance by relatives of the deceased together with the spouse to the second parentela and to the heads of the third parentela only. Beyond that, the spouse inherits the whole estate (BGB sec. 1391). See E.J. Cohn, *Manual of German Law*, vol. 1 (London, 1968) 261. Thus, under the United States Uniform Probate Code, sec. 2-102, the spouse inherits everything following the first parentela and the heads of the second parentela only. The text has been approved by the National Conference of Commissioners on Uniform Laws and by the American Bar Association. The Code has been adopted in 14 states during the period August 1969 to February 1987. See *Uniform Probate Code* (U.L.A.) *1987 Commulative Annual Pocket Part* vol. 8 (St. Paul, Minn., 1987). English law restricts inheritance by the relatives of the deceased together with the spouse to those of the second parentela. Where only relatives of the third parentela remain, even if they are the heads of that parentela, the spouse will be entitled to the whole of the estate (Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952). Other systems go even further in protecting the spouse. Thus, for example, in New South Wales only relatives of the first parentela participate in the allocation of the estate in competition with the spouse. Beyond them, the spouse inherits alone (Wills, Probation and Administration Act, 1898; and see *infra*, n. 22).

14 Writers regard this phenomenon as a recognition of the wife's contribution to the family wealth. See J.G. Miller, *The Machinery of Succession* (Abingdon, 1977) 96. A different explanation is put forward by Muller-Freienfels, *supra* n. 10, at 430, according to whom this reflects social developments in the modern age. Preference for the spouse is a consequence of the fact that, on the one hand, parents nowadays spend large sums of money during their lifetime on the education of their children; on the other hand, the change in the law reflects the difficulty of accumulating capital during married life, whereas the children already enjoy a considerable income at an early age.

15 The Succession (Amendment No. 3) Law, 1976 (30 L.S.I. 102) repealed the last part of sec. 12 of the Succession Law, which had granted the parents of the deceased one-sixth of the estate where the deceased left children and parents. See explanatory note to the Succession (Amendment No. 4) Bill, 1975, *H.H.* 434.

16 (1958) *H.H.* 212; sec. 14 of the Bill.

17 Succession (Amendment No. 4) Law, 1976, (30 L.S.I. 152).

> A provision requiring a spouse to share with such distant relatives is not justified, nor does it conform with the present-day conception of the family.[18]

The most recent amendment to the Succession Law, enacted in 1985,[19] also increases the share of the spouse in the inheritance, even at the expense of the share of the deceased's children.[20]

III. *The Interrelation of the Law of Succession and the Law of Marriage*

A. *General*

Whereas in the past it was possible to connect the law of succession with family law, in the broad sense – in recent generations, an increasingly prominent phenomenon has been the influence of the law of marriage on the law of succession. This phenomenon constitutes a change of direction.[21] It finds expression in the safeguarding of the right of the surviving spouse and is effected in various legal systems by varied means,[22] the most important of these being:

18 Succession (Amendment No. 3) Bill, 1974, *H.H.* 248.

19 Succession (Amendment No. 7), Law, 1985 (*S.H.* no. 1140, p. 80).

20 See sec. 11(a) as amended. Indeed, in one matter the legislator did not remain faithful to this approach. Wherever there arose some apprehension as to a contradiction between various alternatives in sec. 11(a) of the Law as a result of the *prima facie* existence of heirs belonging to the various categories, the legislator chose to prevent such a contradiction. At times the contradiction was avoided by increasing the share of the spouse at the expense of the other heirs, as was done with regard to children of a previous marriage; but at times the contradiction was also avoided by increasing the share of the other heirs at the expense of the spouse, as was done by allowing for representation of deceased parents and grandparents, and even more so, by restoring to the circle of heirs, together with the spouse, those heirs who had been excluded therefrom under Amendment No. 4 of the Law. On this, see A. Rosen-Zvi and A. Maoz, "Intestate Succession" (1986) 11 *Iyunei Mishpat* 457, at 464–465. And see *infra,* chap. VIII.

21 Muller-Freienfels, *supra* n. 10, at 409, regards the separation in Germany of the law of succession from family law as "one of the great achievements of the enlightenment and the natural law school".

22 Various legal systems combine these methods, either by way of alternatives or cumulatively. An example can be found in New South Wales. Sec. 61B(3) of the Wills, Probate and Administration Act 1898, which was added to the statute in 1974, grants the spouse competing with the deceased's descendants A$100,000 out of the assets of the estate, as well as the household chattels specified in the Act. The spouse takes one-half of the remainder of the estate, while the remaining half is divided among the descendants. In 1977, sec. 61D was added, granting the spouse the right to take the "matrimonial home", within the scope of his share in the estate, even if its value exceeds the share in the inheritance to which the spouse is entitled under the provision of sec. 61B(3). See also sec. 61B(13). Independently of this statute, the Family Provi-

(a) the principle of excluding of distant relatives from the inheritance;
(b) the reserving of the spouse's share of the inheritance, or the granting of a fixed share in the inheritance;
(c) maintenance from the estate;
(d) community of property or balancing of resources between spouses;
(e) protected assets: household chattels and the residential dwelling.

A thorough discussion of each of these means would extend beyond the scope of the present article.[23] We shall confine ourselves here to examining each of them in its relation to the protection of the right of the spouse and to the links between the law of succession and the law of marriage in the context of inheritance by the spouse.

B. *Reservation of Shares in the Inheritance*

A not inconsiderable number of legal systems in the world prefer to secure the spouse's share rather than allow for autonomy of the testator, expressed in his freedom to dispose of his property by will. Reserved shares in the inheritance are not necessarily intended solely to safeguard the share of the spouse, but sometimes also that of other relatives who were dependent on the deceased in his lifetime or were especially close to him, such as descendants or parents.[24]

The choice of this mean is, on the one hand, a question of preference of interests favouring constraint of the testator's autonomy as opposed to those

sion Act 1982 (sec. 7) confers on the court the power to make adequate provision "for the maintenance, education or advancement in life" of certain relatives, including a spouse, where such needs are not provided for under the provisions of the will or the law regulating intestacy. It should be mentioned that in 1981, when the reserved share of the spouse in the estate was raised from A$50,000 to A$100,000, 86.9% of all estates in New South Wales were valued for tax purposes at less than A$50,000. *1981 New South Wales Yearbook* 590.

23 On these methods under American law, see M. Rheinstein & M.A. Glendon, *The Law of Decedents' Estates* (Mineola, 1971) 87–104. On European and English law see M. Rheinstein, "The Law of Family and Succession" in *Civil Law in the Modern World,* A.N. Yeannopoulos, ed. (Louisiana, 1965) 27, at 53–56. Generally, see R.D. Oughton, *Tyler's Family Provision* (Abingdon, 1984) 1–30.

24 On the relationship between testamentary freedom and the safeguarding of the family, see, *inter alia,* Miller, *supra* n. 14 at 4–6, 16 *et seq.*; J. Unger, "The Inheritance Act and the Family" (1942) 6 Mod. L.R. 215. On the ideology in favour of the reserved share, see W.F. Fratcher, "Toward Uniform Succession Legislation" (1966) 41 N.Y.U. L.R. 1037, at 1050–1064; Rheinstein & Glendon, *supra* n. 10, at 140. On priority of the testator's wishes and testamentary freedom, see Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem" (1966) 33 Chi. L.R. 681. And generally, see Oughton-Tyler, *supra* n. 23, at 31–36.

favouring freedom. On the other hand, it is a function of the very existence of other means of protection intended to achieve the same purpose, and the extent of their effectiveness.[25] In France and Germany, absolute freedom of testation is regarded as a threat to the family. For that reason, the rules of succession in the legal systems of these two countries recognize the reserved share of the estate, albeit generally smaller than the intestate share to which the protected relatives would be entitled, which prevails over the provisions of the will.[26] On the other hand, even the English system favours the imposition of certain restraints on the power of one spouse to totally disinherit the other; it does not, however, adopt the solution of reserving particular shares in the inheritance.[27] The American Uniform Probate Code[28] provides for the reservation of a share of the testator's estate in favour of his spouse in those states where the proprietary regime of spouses' separate property prevails.

25 On method of reservation of shares, as compared with maintenance out of the estate, see Miller, *supra* n. 14, at 18–19. He criticizes the method of a fixed reserved share, arguing that it lacks flexibility, failing to distinguish between rich and poor, strong and weak or young and old, whereas maintenance out of the estate involves discretion, taking into account the circumstances of each case. Maintenance out of the estate relates to the needs of the surviving heir, whereas the reserved share is concerned with how the property of the estate is to be divided. On this method of the reserved share together with maintenance out of the estate, see Tedeschi, *supra* n. 12, at 231–236. Prof. Tedeschi favours of providing for a reserved share even if maintenance out of the estate is also provided for, together therewith, since in his view the latter institution does not meet the interests protected by the provision of a reserved share. See also Shilo, *supra* n. 6, at 54–55. As to the hesitations which accompanied the enactment of the Succession Law in this context of the reserved share, see the Succession Bill, 1952, pp. 59–63, 99–104.

26 In Germany, secs. 2303–2305 of the BGB provide that heirs entitled to a reserved share (the descendants, parents and spouse of the deceased) have a claim against the heirs. This is not a direct grant out of the estate, but, as it were, an *in personam* action for a debt against the heirs. The reserved share is one-half of the share provided in the Code as the intestate share of that relative or spouse. This is the institution known as *Pflichtteil;* and see Muller-Freienfels, *supra* n. 10, at 419–420. In France, on the other hand, the reserved share consists of participation in the inheritance itself and in the distribution of the estate. However, in France this right is afforded to the deceased's descendants and ancestors, but not to his spouse. See Miller, *supra* n. 14, at 6, 10; Rheinstein & Glendon, *supra* n. 10, at 89, 180.

27 Miller, *supra* n. 14 at 18–41. South Africa has also abolished the reserved share. South African law used to recognize the reserved share of children and other relatives, within the framework of its Roman-Dutch legal heritage. See A.J. Oosthuizen, *The Law of Succession* (Capetown, 1982) 81. It should be mentioned that in South Africa the spouse is granted a choice between a proportional share of the inheritance of the deceased (which changes according to the degree of relationship of the heirs who inherit together with the spouse) and a lump sum fixed by statute. The spouse is entitled to receive the higher of the amounts yielded by these two alternatives.

28 Sec. 2–201.

This is in order to prevent the testator from depriving his spouse of a fair share of his estate. However, the final version of the Code omitted provisions for adoption of such entrenchment in states where the regime of community of property prevails. Such hesitations on the part of the draftsmen of the Code[29] also testify to the connection that exists between the various means for protecting the interest of the surviving spouse.[30] One can also conclude from this solution that if the spouse's interest is appropriately secured, the interest of freedom of testation will be given preference. Proper expression is thus accorded to both interests – that of fulfilling the testator's wishes and that of protecting the spouse – without one interest coming at the expense of the other.

It is not always possible to assess precisely the extent to which a particular method confers security on the surviving spouse, and to discover proper criteria for choosing among various methods. An intermediate method, similar to some extent to that of the protected assets,[31] is the conferral of a fixed share of the inheritance on the spouse. The amount of this share, usually reckoned as a specific sum, depends on the parentela of the relatives of the deceased who inherit together with the spouse, and it is added to the proportional share which the spouse takes from the estate.[32] In legal systems which do not reserve any fixed share against contrary provisions in the deceased's will, this method helps to increase the spouse's intestate share and sometimes even safeguards such a share, conferring upon it the status of a preferred debt against the estate after "external" debts have been paid off.

The Succession Law refrains from establishing reserved shares. It prefers to uphold in full the wishes of the deceased, i.e., absolute freedom of testation, the limits of which are to be found in the rights of the spouse under the presumption of community of assets or under a resources balanc-

29 See *Uniform Probate Code* (U.L.A.) vol. 8 at 73.

30 It is interesting that studies have proven that the existence of a community of property regime does not affect the extent to which property is left to the spouse by will in the United States. See J.R. Price, "The Transmission of Wealth at the Death in a Community Property Jurisdiction" (1975) 50 Wash. L.R. 277, at 283–284.

31 See *infra,* chap. III(F).

32 Thus in England the spouse, under intestate succession, takes a certain sum of money in addition to his share in the estate, which constitutes a statutory legacy. And see the Administration of Estates Act 1925 as amended by the Intestates' Estates Act 1952 and subsequently by the Family Provision Act 1966. The latter enactment granted the power to increase the said sum by order, as was indeed done in 1972, 1977 and 1981. In this context see Family Provision (Intestate Succession) Orders 1972. And see J.B. Clarck, *Parry & Clarck on the Law of Succession* (London, 8th ed., 1983) 83.

ing arrangement – provided for by the Spouses (Property Relations) Law, 1973[33] – in the rights of the spouse deriving from the marital relationship and in the obligation of maintenance out of the estate.

An attempt was made to alter this approach during the debate in the Constitution, Law and Justice Committee of the Knesset on the draft of Amendment No. 7 to the statute, but it failed.[34]

C. *Maintenance out of the Estate*

Whereas protection by means of a reserved portion is closer to the law of succession as a means of transfer of assets or, according to one view, as a preferred debt owing to the estate,[35] maintenance out of the estate represents the law of family support as a function of the law of maintenance. Death of itself does not diminish the need to ensure the subsistence of the surviving spouse. It would not be right to allow the public, or the State, to bear the burden of maintaining that spouse, while the other heirs divide up the estate between them. Primary responsibility should fall on the estate which, as it were, takes the place of the deceased breadwinner.[36] It is no wonder that legal systems that do not recognize the right of the widow to inherit, grant her maintenance out of the estate.[37] The widow's daily needs

33 On the view that resources balancing between spouses on the death of one of them introduces through the back door the principle of a reserved share, and is intended to fulfil the function of a reserved share in the estate, see P. Shifman, "Property Relations between Spouses" (1976) 11 Is. L.R. 98, at 104.

34 At the session of the Constitution, Law and Justice Committee held on 12 June 1984, Prof. Shifman put forward a proposal that all assets common to both spouses, whether by virtue of the ordinary laws of property or under the presumption as to community of property, as well as all assets subject to balancing under the Spouses (Property Relations) Law, 1973 should on the death of one spouse be vested in the surviving spouse. This proposal, as well as that of determining a fixed and uniform share for the spouse, whether or not safeguarded wholly or in part against the provisions of a will, were not accepted by the Committee.

35 See Tedeschi, *supra* n. 12, at 231, and see sec. 2303 of the BGB, *supra* n. 26; Shilo, *supra* n. 4, at 54.

36 The justification for the law's intervention in such a case was explained by the Law Reform Commission of New South Wales, as "to remedy a breach by a person of his moral duty as a wise and just husband or father to make proper provision, having regard to his property, for the maintenance, education and advancement of his family". *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974) 22.

37 This is the position under Jewish Law: *Code of Maimonides, The Book of Judgments, Laws of Inheritance*, 1:8 ("the wife does not inherit her husband at all"). As to maintenance out of the estate, see A. Karlin, *The Law of Even Ha'ezer, Laws of Ketubot*, (Jeru-

are thereby ensured, despite the inheritance denied her; furthermore, this right of hers is not a right of succession but is classified as part of the law of marriage, which constitutes the legal source for conferral of the right.[38]

It thus becomes apparent why the reserved share allotted to certain heirs is not affected by the neediness of the spouse, by his or her conduct or even by the size of the estate, whereas maintenance out of the estate is dependent on the existence of a duty to maintain under the law of marriage,[39] is determined in accordance with criteria which are applied under those laws and is influenced by considerations accepted thereunder (neediness of the maintenance creditor, extent of the estate, standard of living of the spouse prior to the death, etc.).[40]

salem, 1950, in Hebrew) 133ff.; B. Z. Shereshewsky, *Family Law* (3rd ed., 1984, in Hebrew) 318ff.; B. Zolti, "Maintenance of a Widow" (1970) 12 *Torah Shebe'al Peh* 26; see also *Sayag* v. *Azulai* (1971) 25(ii) *P.D.* 62, at 66: "The right . . . to receive maintenance out of the estate, which is granted to her by virtue of Jewish law precisely because she is not an heir".

38 Karlin, *ibid.*, at 133 and 138; Shereshewsky, *ibid.*, at 308–312. Until the Succession Law was enacted, the right of a Jewish widow to maintenance out of her husband's estate was classified in Israeli law as "a matter of marriage": see *Alpert* v. *Chief Execution Officer* (1934) 1 P.L.R. 395; *Miller* v. *Miller* (1950) 5 *P.D.* 1301; *Rosenbaum* v. *Rosenbaum* (1949–50) 2 *P.D.* 235; *Sidis* v. *Chief Execution Officer, Jerusalem* (1954) 8 *P.D.* 1020, at 1023–1026. There are those who take the view that already when sec. 4 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953 (7 L.S.I. 139) was enacted, the topic of maintenance of the widow out of the estate dropped from the category of "matters of marriage". See *Goldman* v. *Goldman* 3 S.J. 313, 318–319. Though the matter continued to be dealt with under religious law, similarly to the law of maintenance of a wife. See *Shefi* v. *Shpitz* (1955) 9 *P.D.* 1077; *Levitsky* v. *Estate of Levitsky* (1961) 15 *P.D.* 85, at 87; *Khalifa* v. *Khalifa* (1965) 19(ii) *P.D.* 338. Since the enactment of sec. 148 of the Succession Law, which provides that ". . . this Law alone shall apply to rights of succession and rights to maintenance out of the estate", the territorial civil law applies to maintenance out of the estate. If the parties express their consent thereto in writing, then the Religious Court has jurisdiction under sec. 155 of the Law to deal with the matter according to the religious law applied therein, provided that the rights of a minor or legally disqualified person should not be less than what they would be entitled to under the Succession Law.

39 Sec. 57(b) of the Succession Law; see *Levi* v. *Estate of Levi* (1970) 24(ii) *P.D.* 720.

40 Sec. 59 of the Succession Law. See *Doron* v. *Estate of Doron* (1978) 32(iii) *P.D.* 533; *Shahar* v. *Shahar* (1982) 36(ii) *P.D.* 281. In the *Shahar* case the court held that sec. 59 of the Succession Law does not relate only to the amount of maintenance payable out of the estate, but also to the determination of the actual right thereto. In English law, the court was given discretion to grant maintenance out of the estate by the Inheritance (Family Provision) Act 1938. The powers of the court were extended by the Inheritance (Provisions for Family and Dependents) Act 1975. On the new statute, see Oughton & Taylor, *supra* n. 23, at 84 *et seq.*; Miller, *supra* n. 14, at 19 *et seq.*; A.R. Mellows, *The Law of Succession* (London, 4th ed., 1983) 183 *et seq.* Compare Family Provision Act, 1982 (N.S.W.) and see I. Hardingham, M.A. Neave & H.A.J. Ford, *The Law of Wills* (Sydney, 1977) 268–269.

The flexibility that is characteristic of this method is entirely absent in legal systems which prefer to establish a reserved share for the spouse's inheritance. Indeed, as to the reasons for the adoption of maintenance out of the estate and the rejection of the idea of reserving shares in the inheritance under the Succession Bill of 1952, Prof. Yadin writes as follows:

> On principle, family provision seems to us superior to reserved portion, because in the latter there is much formalistic, arithmetical rigidity and little leeway for the special merits of each case, while in the former these merits may be given their full weight and there is much more flexibility. Moreover, for family provision the present and future needs of the persons concerned are the determining consideration, and in case of dispute the court is given wide discretion, whereas reserved portions are fixed by law once and for all and can be modified only by what the testator has done in the past ("advancement", etc.): the former approach appeals to us much more than the latter.[41]

The common feature of both these institutions – maintenance out of the estate and the reserved share – is that neither is subject to a contrary provision in a will; indeed, the testator has no control over entitlement or over the extent or amount of maintenance, except insofar as he controls the extent of the estate he leaves and the couple's standard of living during the marriage.[42]

41 U. Yadin, "The Proposed Law of Succession for Israel" (1953) 2 Am.J. Comp. L. 143, at 153–154.

42 Sec. 65(a) of the Succession Law reads as follows: "An agreement relating to maintenance under this Chapter or a waiver thereof, if made in the lifetime of the deceased, is void and if made after his death, requires approval of the Court"; and sec. 65(b): "A testamentary provision which denies or limits the right to maintenance under this Chapter is void". The size of the estate and the standard of living of the deceased and of the maintenance creditor are among the factors the court will take into account in determining the right to maintenance and the amount thereof, as specified in sec. 59 of the Succession Law.

An additional advantage of maintenance out of the estate ought to be mentioned, namely, that it takes precedence over distribution of the assets of the estate. It is only after the maintenance has been discharged that the remainder of the estate is to be distributed (sec. 107 of the Succession Law). Moreover, for purposes of payment of maintenance out of the estate the court may widen the scope of the assets of the estate and "may treat as part of the estate anything disposed of by the deceased without adequate consideration within two years prior to his death, excluding gifts and donations which are usual in the circumstances" (sec. 63 of the Succession Law). And see text *infra* at nn. 97–98.

Prof. Tedeschi is correct in his view[43] that maintenance out of the estate provides a solution for the hardest cases from a social point of view, where the arbitrary provisions of the testator would leave the family destitute. Nevertheless, maintenance out of the estate cannot provide relief for all cases where society regards provisions made by the testator as being unjust, arbitrary or a breach of his moral obligations. A partial solution to this problem will be found in the establishment of a proprietary regime of community of property, in the resources balancing arrangement between the spouses or in the conferral of judicial discretion to allow transfer of property from the testator's estate to the spouse.

D. *Rights Deriving from the Marital Bond*

The opening provision of sec. 148 of the Succession Law states: "This law shall not affect the financial relations between spouses or rights arising from the marital bond". This provision is necessary because there is no justification for the Succession Law affecting acquired rights of the spouse or obligations which the deceased took upon himself by virtue of the marriage.[44] Moreover, the personal law of a considerable part of the population of Israel is the religious law.[45] The secular legislator, true to his own system, has sought not to interfere with that law. Thus, a Jewish woman is entitled to recover her *ketubah* (marriage portion) from her husband's estate. The legislator has also sought to co-ordinate the two sets of laws. For this purpose he has provided that anything due to the spouse on a claim arising out of the marital bond should be deducted from his share of the estate.[46] The advantage of this right is manifested in the following:

a) It in effect confers on the wife a right to receive her intestate share, or the *ketubah,* whichever is greater.[47]

43 *Supra* n. 12, at 224.

44 See Succession Bill, 1952, at 62.

45 M. Shava, *Personal Law in Israel* (2nd ed., 1983, in Hebrew) 131–134.

46 Sec. 11(c) of the Succession Law. As to statutory and case law adjustment where religious law is superimposed on the civil law, see I. Englard, *Religious Law in the Israeli Legal System* (Jerusalem, 1975) 201–208.

47 This is an interesting point of similarity between Israeli law, concerning the rights of the Jewish wife after her husband's death, on the one hand, and South African law which provides the surviving spouse with a right to choose between two alternatives, on the other hand. See *supra* n. 27. German law, which recognizes the regime of community of surplus – "*Zugewinngemeinschaft*" (sec. 1363 of the BGB) – enables a spouse on termination of the marriage to claim one-half of the difference between his surplus

b) It gives the wife an advantage in a case where the estate has incurred considerable debts. The wife can then waive her share in the estate, thereby ridding herself of the estate's debts,[48] and make do with the *ketubah.*

c) It confers on the wife a "reserved share" (not otherwise enshrined in our legal system) which is not subject to contrary provision in a will or to the principle of freedom of testation.[49] The testator is not allowed to abrogate the wife's right to her *ketubah,* whether by will or by any other means, except in accordance with the provisions of the religious law.

d) the *ketubah* is a preferred debt of the estate and the wife has priority as against its other debts.[50] The wife will recover the principal sum of the *ketubah* as well as the supplement thereto if the estate is sufficient to cover it, even if the remainder is not sufficient for division of the estate among the heirs.

e) In the past, the *ketubah* constituted a debt deductible from that part of the estate upon which estate tax was imposed.[51]

At the same time, it can be said that the preservation of rights under the law of marriage, dictated in our system by the relevant religious law, constitutes a forced method which the system is compelled to accept, rather than a systematic method, resulting from free choice, for the protection of the surviving spouse's interests. In this sense, it is largely an exceptional method within the overall framework of the law of succession.

and that of his spouse from the date of the marriage (secs. 1373–1378). Moreover, when the marriage comes to an end on the death of one of the spouses, the surviving spouse is given the alternative of receiving, in addition to his share of the inheritance, one-quarter of the estate in place of the right of balancing, whichever he chooses (sec. 1371 *et seq.*); see Muller-Freienfels, *supra* n. 10, at 426–430; Cohn, *supra* n. 13, at 261.

48 Sec. 6(b) of the Succession Law; see Tedeschi, "Debts and Liabilities of a Deceased's Estate" (1976) 5 *Iyunei Mishpat* 14, at 15; on sec. 6(b) see *Dekalo* v. *Munitz* (1975) 29(i) *P.D.* 464; *Munitz* v. *Dekalo* (1976) 30(i) *P.D.* 242; *Zik* v. *State of Israel* (1978) 32(i) *P.D.* 662.

49 *Philosof* v. *"Taoz," Provident Fund for Employees Ltd.* (1973) 27(ii) *P.D.* 535; *Kipper* v. *Rabstein* (1978) (2) *P.M.* 3.

50 Sec. 104(a)(3) of the Succession Law; this is the case to the extent that the *ketubah* does not exceed a reasonable amount; see Rosen-Zvi, *Spouses' Property Relations* (Jerusalem, 1982, in Hebrew) 325.

51 Sec. 4(a)(2) of the Estate Duty Law, 1949 (3 L.S.I. 95). The Estate Duty Law was repealed in respect of all persons who died after 31 March 1981 by the Estate Duty (Repeal) Law, 1981 (35 L.S.I. 178).

E. *Community of Property and the Balancing of Resources Arrangement*

The dissolution of a marriage upon the death of a spouse constitutes a cause for dissolution of community of assets by virtue of the presumption of community,[52] or for realization of the right to balance resources.[53] The allocation of assets or payment of the sum resulting from balancing of resources, both derived from the idea of unification of resources, their ideological basis being the shared existence of spouses which extends to the economic sphere as much as to the personal, ultimately afford protection to the weaker spouse. This means the spouse who, although not having acquired assets and accumulated property of his or her own during the marriage, always stood behind the scenes, and through concern for the household and the family, made his or her contribution to its economic stability.[54] Upon dissolution of the marriage, the property accumulated during the marriage is allocated equally. As the Biblical verse puts it: "For as is the share of him that goeth down to the battle, so shall be the share of him that tarrieth by the baggage; they shall share alike".[55]

This share belonging to the spouse, despite the fact that it is realizable only after the death of the other spouse, is nevertheless a proprietary right, constituting a debt to which the surviving spouse is entitled as a creditor of the estate.[56] The spouse cannot therefore be deprived of this share by a will. The testator is only free to dispose of what is his, whereas this share belongs to the testator's spouse. The laws of succession and freedom of testation have no control over such assets or payments. Thus marital property relations within the scope of the laws of marriage impose limitations on the laws of succession, and restrict the scope of their application. They thereby protect family law, removing the threat it faces from freedom of testation, and safeguard the interests of the spouse who is liable to find

52 Although it is also possible to dissolve the community of assets created by virtue of presumption during the subsistence of the marriage subject to certain conditions; see Rosen-Zvi, *supra* n. 50 at 284–285.

53 Sec. 5(a) of the Spouses (Property Relations) Law, 1973. And see D. Friedmann, "Matrimonial Property in Israel" (1977) 41 *Rabels Z.* 112, at 136. This is also the position under German Law: see sec. 1373 of the BGB and see *supra* n. 47.

54 *Cf.* Muller-Freienfels, *supra* n. 10, at 423 *et seq.*, especially at 426.

55 I. Samuel 30:24.

56 German law does not recognize a regime of community of assets proper. The spouses do not have a proprietary right *in rem* in the assets themselves. The *Zugewinngemeinschaft* regime partakes of the nature of a mere monetary claim in respect of the difference created by increase in value of the separate property of the spouse: Muller-Freienfels, *supra* n. 10, at 427.

himself or herself in the no-man's land between the law of succession, which do not recognize the reserved share, and family law, which maintains the separation of property and refuses to recognize the effect of marriage on marital property.[57] In such a case, the court will be allowed to examine the special circumstances of the spouses, to the extent that the law or statutory provisions make this possible,[58] with a view to determining the share of the surviving spouse in the property.

The discretion conferred on the court renders this method similar in nature to the institution of maintenance out of the estate. However, the discretion conferred by the Spouses (Property Relations) Law in the event of termination of the marriage by the death of one of the spouses is more restricted – in terms of the grounds for invoking it, as well as in terms of the kind of circumstances to be taken into account and the extent of the relevant considerations – than the discretion in the event of a claim for maintenance out of the estate. Where the spouses are subject to the proprietary regime of community of property, the discretion of the court is a relatively minor one, devoid of real significance. At any rate, we have here institutions which, although originating from the laws of marriage, directly affect the laws of succession.

In legal systems that advocate judicial discretion for matrimonial property arrangements, ("equitable distribution of property"), the demarcation between matrimonial property relations and maintenance out of the estate largely loses its significance.[59] There exists a real difference, in this respect,

57 Indeed, as we have already seen *supra*, in text at n. 28, the Uniform Probate Code provides that when the proprietary regime of community of assets applies to the spouses, there is no place for protection of the surviving spouse by means of a reserved share. On the other hand, under a legal system that adopts the regime of separate property, it is proposed to protect the interest of the surviving spouse by means of a reserved share of the inheritance. Under German Law the claim for *Zugewinngemeinschaft* is additional to the reserved share of the surviving spouse in the estate; see *supra* nn. 26 and 27.

58 Sec. 8 of the Spouses (Property Relations) Law, 1973.

59 English law, which favours judicial discretion with regard to marital property relations draws a close analogy between maintenance out of the estate and distribution of assets on termination of marriage on the death of a spouse. This follows from the affinity of the institution of maintenance out of the estate after divorce with distribution of assets on termination of marriage following divorce. See K.J. Gray, *Reallocation of Property on Divorce* (Abingdon, 1977) 342 *et seq.* See also The Law Commission (England) (No. 103) Family Law, *The Financial Consequences of Divorce: The Basic Policy* (A Discussion Paper) (1980) 31–34.

Since this system leaves the court wide discretion to determine the mode of distribution of the couple's assets or the payments to be made at the time of dissolution of the marital tie in the event of divorce (see Matrimonial Causes Act, 1973, secs. 24, 25),

between spouses who married before 1 January 1974, to whom the presumption of community of property applies, and those who married after that date, who are subject to the resources balancing arrangement.[60] Those who live under the property regime of community of property are entitled to one-half of the common assets, as their own property for all purposes. Their assets are not reckoned as part of the inheritance for any purpose whatsoever, be it for settlement of the debts of the estate (apart from debts in common, which are charged on the property) or for any other purpose.[61] On the other hand, balancing of resources constitutes a debt of the estate, the spouse being the creditor. In terms of order of priorities, this debt is the last one to be paid off out of the assets of the estate.[62] Thus, spouses living under the community of property regime are clearly better off than those subject to the resources balancing arrangement.

Aware of their interrelation, the Israeli legislator has sought in the past to harmonize matrimonial property relations and the laws of succession, but his actions were contradictory. Sec. 11(b) of the Succession Law, in its

serious injustice is brought about in cases where the marriage tie is dissolved on death of one of the spouses. As early as 1973, the Law Commission (No. 52), Family Law, *First Report on Family Property: A New Approach* (1973) 31–33, 44, recommended that this incongruity be removed by allowing the court a similar degree of discretion in the event of the death of a spouse as on divorce. A special opinion devoted entirely to this matter was given in mid-1974: The Law Commission (No. 61), Family Law, *Second Report on Family Property: Family Provision on Death* (1974). On the basis thereof the Inheritance (Provision for Family and Dependents) Act, 1975 was enacted, replacing the Inheritance (Family Provision) Act, 1938. The new statute widened the powers of the court to grant maintenance out of the estate and the scope of the considerations that it may take into account.

Similarly, the statute conferred on the court for the first time additional powers of transferring property from the estate to the surviving spouse or of granting a one-time payment to the spouse (sec. 2 of the Act), whereas the following considerations were added to the already varied list: contribution to the family well-being and to the household, duration of the marriage, behaviour during marriage, etc. These considerations are almost exactly identical with those that the court may take into account in an action for divorce. See Miller, *supra* n. 14, at 19 *et seq.*

Report No. 52 of 1973 recommends that if its conclusions be adopted and provisions for the family and the spouse are increased and put on a wide basis, there will be no need nor will it be desirable to provide a reserved share of the inheritance for the spouse. The report deals at length with the connection between the various methods: maintenance out of the estate, community of assets and a reserved share of the inheritance, and any combination thereof. See p. 35 *et seq.* of the Report.

60 See *Berger* v. *Director of Estate Duty* (1965) 19(ii) *P.D.* 240; *Bareli* v. *Director of Estate Duty* (1969) 23(i) *P.D.* 393; see also *Levi* v. *Goldenberg* (1970) 24(i) *P.D.* 813; Rosen-Zvi, *supra* n. 50, at 262 *et seq.*

61 Rosen-Zvi, *ibid.*, at 275 *et seq.*

62 Sec. 104(a)(4) of the Succession Law.

original form, had the effect of reducing by half (from one-half to one-quarter) the share of a spouse who inherits together with his or her children or their descendants or with the parents of the deceased, where on the death of the deceased "the whole or the larger part in value of the property of the spouses was in their common ownership" or where on the death of one of them the survivor was entitled to half the value of all their assets or the larger part in value, whether on intestacy or by agreement between them.

This provision meant that it was enough that over one-half of the couple's total assets be held in common – and the share in the inheritance of the spouse who inherits together with his or her children or their descendants or with the parents of the deceased was reduced from one-half to one-quarter. Since for most couples in Israel the residence constitutes the major part of their property and is generally owned by the spouses in common, this provision was to the detriment of the surviving spouse.

Indeed, the Knesset eventually decided to delete entirely the original sec. 11(b). The overall share of the spouse in the assets of the estate was thereby significantly increased, and the solution adopted was similar to that of German law, whereby the spouse is granted his share in the estate in addition to his claim for balancing of resources under the laws of marriage.[63]

F. *Protected assets*

1. *General*

A possible intermediate solution between reserving a certain *share* of the inheritance for the spouse (or for other relatives) and recognizing complete freedom of testation is that of reserving certain *assets* of the inheritance and granting them to the spouse. Possible assets in this context would be household chattels, including a motor vehicle, and a residence. Possible types of reservation would be: (1) the absolute grant of such assets, or some of them, thus removing them beyond the pale of assets capable of being disposed of by will; (2) the inclusion of such assets, or some of them, in the inheritance of the spouse, but contrary provisions of the testator's will take precedence over it.

63 See *supra* n. 57. This approach has been criticized on the ground that it is over-generous to spouses at the expense of the other heirs whose interests are sacrificed in favour of those of the spouse. See Muller-Freienfels, *supra* n. 10, at 430; Rheinstein & Glendon, *supra* n. 10, at 180.

2. *Household chattels*

The reason for devoting special attention to a particular type of asset – i.e., household chattels – lies in the special tie between the utilization of such assets and the daily life of the spouses during their marriage, as well as in the special difficulties which the survivor may incur if required to share them with other heirs of whatever degree of relationship, including children common to both spouses. These assets are usually of value to the user but often lose their value when put up for sale. Moreover, for the average Israeli couple these assets are from the outset the common property of the spouses, so that the value of the share likely to be included in the estate is reduced still further. Some of the said chattels are vital to the continued functioning of the surviving spouse and are of use in the course of the spouse's daily routine. If such assets were made part of the estate, the spouse would be forced to bargain over their allocation and utilization, despite the assets' relatively small value to the other heirs.[64] This category of assets is liable to create a source of contention, with the disputes inflamed by emotional arguments on each side, and the value of the assets is not worth the damage of undermining personal relationships.[65]

Sec. 11(a) of the Succession Law in its original form provided that the spouse takes as a fixed share of his or her intestate succession those chattels

64 Most legal systems endow the spouse, in different ways and subject to certain limitations, with the personal and household chattels as part of the intestate estate. This is the position under English law (Administration of Estates Act, 1925). In American law, the Uniform Probate Code provides in sec. 2–402 that the spouse should take the personal and household chattels at a value which is not to exceed a certain fixed sum. The surplus is added to the overall estate and is divided among the heirs according to their shares in the inheritance. Under German law, the spouse is entitled to the household chattels and the wedding gifts where he inherits together with relatives of the second parentela, or those more remote. On the other hand, where the spouse inherits together with descendants of the deceased, he is entitled to those household chattels required for running an appropriate household, and only to the extent that they are indeed required for that purpose (sec. 1932 of the BGB).

65 The arrangements under Scandinavian legal systems are also relevant here. Under those systems, generally speaking, the regime of community of assets applies by way of resources balancing upon the dissolution of the marriage. At the same time, each spouse is given full liberty to manage his own property as he sees fit, until the event which brings the balancing into effect occurs, provided he does not diminish its value in a way that will harm the other spouse. Exceptions to this rule are immovables and chattels intended for the common use of the spouses, as well as assets vital for the spouse's employment, or for the personal use of the children – here the consent of the other spouse is required for effecting any transaction. See GB 6:4, 6:5; H.S. Sussman, "Spouses and their Property under Swedish Law" (1963) 12 Am.J. Comp. L. 553, at 560–561.

"which in the ordinary course and according to the circumstances belong to the common household". This definition does not apparently include special collections (such as stamps, books, valuables) or investments in chattels of considerable value, such as art collections, even if these belonged to the household during the marriage, provided that given the circumstances of the spouses' lives and the lifestyle of the deceased they were acquired for purposes of investment, not for ordinary household use. Thus, household chattels may be reckoned either among assets included in the estate at the disposal of the heirs or among those taken by the spouse. The criterion for allocation of such assets is a combined test – objective ("the ordinary course") and subjective ("the circumstances").[66] It would seem that the starting point will generally be objective, i.e., what is customary among couples in Israel, or more precisely, what is usual among spouses of the class and standard of the particular spouses concerned. Such a starting point is necessitated by the nature of the allocation of the inheritance in Israeli law, the basis of which consists of objective criteria and precise tests which can be objectively ascertained and are not usually dependent on the discretion of the court. If it is proven, however, that the circumstances of the couple's lives warrant a departure from the norm, then the surviving spouse's entitlement as against the other heirs will be a function of the proof of such circumstances and their significance in respect of one chattel or another or in respect of a particular type of chattels.

66 For a combined objective and subjective test within the Succession Law, see the case law on sec. 23(a), which deals with a will made by a person facing death. The Supreme Court has held that the test of the sense of impending death, which creates the circumstances justifying the granting of efficacy to an oral will, is both objective and subjective; see *Rosenthal* v. *Tomashevski* (1971) 25(i) *P.D.* 488; *Omer* v. *Kogut* (1975) 29(i) *P.D.* 107.

On a combined objective and subjective test in the field of contracts, see interpretation of sec. 14(a) of the Contracts (General Part) Law, 1973 concerning mistake as a ground for rescission. In the opinion of scholars, this ground includes an objective element alongside a subjective one. The subjective element is the casual connection between the mistake and the contractual bond; whereas the objective element lies in the fundamental nature of the mistake being determined according to the "reasonable person" test. See G. Shalev, *Defects in the Formation of Contract,* in *Commentary on Laws Relating to Contracts,* G. Tedeschi, ed. (Jerusalem, 1981, in Hebrew) 39–40. On a "mixed" test combining objective and subjective elements, see the recent case law regarding interpretation of the terms "good faith" and "customary manner" in secs. 12 and 39 of the Contracts (General Part) Law: *Public Transport Services, Beer-Sheva Ltd.,* v. *National Labour Court* (1981) 35(i) *P.D.* 828 (re sec. 39); *Raviv Moshe and Co. Ltd.* v. *Beit Yulas Ltd.* (1983) 37(i) *P.D.* 533 (re sec. 12); and see G. Shalev, *Formation of Contract,* in *Commentary on Laws Relating to Contracts,* G. Tedeschi, ed. (supplement) (Jerusalem, 1983, in Hebrew) 7.

At a later stage, the Succession Law was amended so as to include among protected assets a motor vehicle which, according to customary practice, and in the circumstances, belongs to the common household.[67]

Logic may have required that the safeguarding of protected assets under Israeli law be absolute, and not subject to alternative arrangement by will. On the other hand, the inclusion of this provision in the chapter dealing with distribution of the intestate succession indicates the contrary. The provisions of this chapter as a whole are residuary, and conditional on the absence of a contrary provision of a valid will, since "succession is intestate except in so far as it is under will".[68] Had the legislator wished to safeguard these assets entirely, he should have so provided in explicit language, such as that used in respect of maintenance out of the estate.[69]

The cumulative weight of the reasons that set apart the household chattels indeed warrants such a legislative measure. In our opinion, the legislator should reserve such chattels absolutely and negate the freedom of testation of the deceased in respect thereof. This is the case at least with regard to those assets without which it would not be possible to continue to manage a household in a suitable and customary manner. Since only a small proportion of written wills make provision for household chattels, such a statutory amendment would conform to the wishes of most people in Israel.

3. *The residence*

a. General

Some legal systems confer upon the residence a status different from that of other assets of the spouses, in a way similar to the treatment of the household chattels – both during the marriage[70] and with the dissolution

67 Succession (Amendment No. 4) Law, 1976, *supra* n. 17, under which sec. 11(a) of the Succession Law was amended. In the explanatory note to the Bill amending the Succession Law on the subject of motor vehicles, presented by M.K. Arbeli-Almozlino, (1975) 73 *Divrei HaKanesset* 2614–2615, it was stressed that the amendment was intended to apply to "a motor vehicle used by the spouses". This definition was not included in the Law itself. In a reservation put forward by M.K.s Warhaftig and Gross, they sought to prevent the application of the first part of sec. 11(a) to a motor vehicle for three reasons: First, because "a motor vehicle represents a considerable asset. It can sometimes be the principal part of the deceased's property". Secondly, "this may be a second marriage", and it would not be just to deprive the deceased's children of the main part of his estate in favour of his second wife. And thirdly, because the surviving spouse may marry again and thereby deprive the other heirs of the motor vehicle in favour of his new spouse: (1976) 76 *Divrei HaKnesset* 2404.

68 Sec. 2 of the Succession Law.

69 Sec. 65(b) of the Succession Law.

70 Rosen-Zvi, *supra* n. 50, at 167 and references therein.

by divorce or death.[71] The Succession Law does not assimilate the legal status of the residence to that of the household effects.[72] The legal implication of the couple's special tie to the residence finds expression in the right of the spouse (as well as his children and parents), who lived there with the deceased immediately prior to the latter's death, to continue to use it. The statutory arrangement provides that the spouse may continue to live in the residence of which the deceased was owner immediately prior to his death and in which he resided with his spouse, as the lessee of the heirs who inherit the residence. The extent of such right and the conditions thereof are to be determined in an arrangement between the spouse and the heirs, and failing agreement, will be determined by the court.[73]

71 In England, a proposal was made for common ownership by the spouses of their residence during the subsistence of the marriage: see The Law Commission (No. 86), Family Law, *Third Report on Family Property: The Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods* (London, 1978). No proposal was put forward for vesting in the surviving spouse the one-half belonging to the deceased on his death, in addition to the spouse's share of the inheritance. The committee appointed for the purpose of instituting reform of the law of succession, The Committee of Intestate Succession (CMND 8310), some of the recommendations of which were implemented and enacted in the Intestates' Act, 1952, also did not see fit to confer the residence left by the deceased on the surviving spouse in addition to the latter's share of the inheritance. The committee viewed such conferral as unjust towards the children. The spouse was granted the option of acquiring the residence in exchange for what he has inherited from the deceased's estate, wholly or in part, according to the circumstances (sec. 5 and schedule 2 of the Act).

72 In the Succession Bill of 1952, the rule regarding household chattels is assimilated to that regarding the residence. The arrangement as to these two categories of property in sec. 116 of the Bill is not to grant them to the spouse as part of the intestacy. Instead, sub-section (a) provides that "an heir who was living with the deceased immediately prior to his death may demand that the division of the deceased's residence and household effects be postponed". The duration of such postponement, and which assets form part of the deceased's residence and household effects, are left to the discretion of the court (sub-sec.(b)).

In the explanatory note (*ibid.*, at 140–141) the authors of the Bill assert that "the very idea that the deceased's spouse should receive the effects belonging to their common residence apart from his or her share of the estate appeals to us", but they refrain from making such a proposal so long as no arrangement is proposed concerning spouses' property relations as well. As far as the residence is concerned, the authors of the Bill do not raise the idea of vesting it in the spouse in addition to his share in the estate. In the Succession Bill, 1958 (*supra* n. 16), the arrangement concerning the household chattels (sec. 20(a)) is similar to that which was finally passed into law in the Succession Law. With regard to the residence, sec. 115 of the 1958 Bill repeats the wording of sec. 116 of the 1952 Bill, but limits the period of postponement "to no more than six months from the death of the deceased".

73 Sec. 115 of the Succession Law. This section appears in Article D of Chapter 6 of the Law, which deals with distribution of the estate. The right of the spouse based on this

b. The statutory arrangement

The most recent amendment to the Succession Law provides, *inter alia,* that if the deceased leaves brothers or sisters, descendants or grandparents, then the spouse who had been married to the deceased prior to his death "for three years or more and resided with him at that time in a residence included wholly or in part in the estate" shall be entitled to take "the whole of the deceased's share in such residence".

The statutory amendment lays down a number of conditions for the spouse to inherit the whole of the deceased's rights in the residence:

1) the heirs inheriting together with the spouse are brothers or sisters, their descendants or grandparents;
2) the residence is included, in whole or in part, in the estate;
3) the duration of the marriage of the deceased to the spouse, prior to the former's death, was at least three years;
4) the spouse was residing with the deceased in the residence immediately prior to his death.

If these conditions are fulfilled, the spouse will take the whole of the deceased's share in the residence.[74]

The time element has various implications in other statutory provisions in which the legislator has provided the surviving spouse with rights in the deceased's residence. The time element has no significance for the pur-

provision does not create a protected tenancy. See *Sayag* v. *Azulai* (1971) 25(ii) *P.D.* 63; *Litman* v. *Bar-Or* (1974) 28(ii) *P.D.* 104.

A distinction should be made between the right to use the residence under sec. 115 of the Succession Law and the right of residence as part of the right to maintenance out of the estate, although at times there are reciprocal relations between these provisions (see *Sayag,* at 66). Until the Succession Law came into force, the topic of the right of the widow to residence from the estate was dealt with according to religious law and it was held that her right to residence is determined by religious law and in conformity therewith. See *Rubenenko* v. *Rubenenko* (1963) 17 *P.D.* 1883; *Khalifa* v. *Khalifa, supra* n. 38; *Aharonov* v. *Eisen* (1966) 20(iii) *P.D.* 440.

The right to residence is part of the right to maintenance out of the estate: *Sayag,* at 65; *Litman,* at 107; *Widow of Deceased* v. *Nephew of Deceased* 2 *P.D.R.* 278, at 281.

Case law has held that with the entry into force of the Succession Law, the right of residence is regulated exclusively by the provisions of that Law. The Court, in *Sayag,* at 65, and in *Litman,* at 107, construed sec. 148 of the Succession Law, whereby "this Law alone shall apply to . . . rights of maintenance out of the estate", as applying also to the right of residence which, as already mentioned, is part of the right to maintenance out of the estate. For a differing view see M. Corinaldi, "The Relationship of the Israeli Law of Inheritance, Para. 115, to the Widow's Residential Rights under Jewish Law" (1975) 6 *Diné Israel* 139. See also N. Shahar, "Widow's Residence in Her Husband's House" (1985) 4 *Mehkarei Mishpat* 204.

74 Sec. 11(a)(2) as amended (30 L.S.I. 152).

poses of secs. 108 and 115 of the Succession Law, which deal with a limited right of residence for anyone who lived in the residence together with the deceased[75] or for a spouse, children and parents who lived with the deceased in an apartment which he owned.[76] On the other hand, in respect of leased premises protected under the Tenants' Protection Law (Consolidated Version), 1972,[77] the time element is of significance, both with regard to the marriage and to the joint residence. With regard to a protected residence, the spouse must have resided therein, together with the deceased, during the subsistence of their marriage, for at least six months.[77a] The origin of the period of three years of marriage, provided for in the most recent amendment to the Succession Law, apparently lies in the assumption of the legislator that this reflects the desire of the average testator to confer on his spouse full rights over the residence and to exclude therefrom relatives of the degree of the descendants of his parents and of his grandparents and their descendants.[78]

The question of whether succession to the residence should be left outside the normal process of allocation of the estate is a difficult one, and arguments can be adduced for each of the possible arrangements in respect thereof. There is no doubt, however, that the remoter the relationship to the deceased of the heirs who inherit together with the spouse, the stronger the argument for sparing the spouse the need to share the residence with such relatives. The time element concerning the duration of the marriage as a condition for inheriting is also a complex one. Still, it would seem that the duration of the marriage reflects the minimum period of partnership which in the view of the legislator would justify a departure from the ordinary rules of succession in respect of a particular type of assets. Any criterion as to a period of time is bound to be arbitrary and open to criticism from one direction or another. The period of three years' marriage constitutes an attempt to strike a balance between the desire to benefit the surviv-

75 Sec. 108.

76 Sec. 115.

77 26 L.S.I. 204.

77a Sec. 20 of the Tenants' Protection Law. In respect of business premises as well, it is sufficient that the spouses were married and lived together for six months prior to the death of the deceased.

78 *Cf.* the remarks of the Minister of Justice with regard to sec. 11(a)(2) as it appeared in the Amendment Bill. (1984) 98 *Divrei HaKnesset* 740. The period of three years was proposed in the Constitution, Law and Justice Committee by M.K.s Aloni and Virshubsky, and was accepted, apparently, as a compromise. The Chairman of that Committee himself expressed doubt "whether three years is a sufficient period". ((1985) 101 *Divrei HaKnesset* 2183, 2184).

ing spouse in respect of such a vital asset as a residence and the desire to prevent the inheritance falling in the future into the hands of the surviving spouse's family where the couple had not yet managed to establish a durable relationship between themselves, and their joint effort to provide an economic basis for themselves was only in its early stages.

It should be emphasized, nonetheless, that the duration of the marriage does not necessarily give an indication of the nature of the relationship between the spouses. The years of marriage may be long and hard, whereas a short-lived marriage may be harmonious and successful. This is particularly true in view of the legal situation in Israel, between Jews, which impedes the dissolution of a marriage without consent.[79]

The legislator apparently assumes that the requirement that the spouses must have resided together immediately prior to the death of one of them expresses a minimal positive connection which would justify the vesting of the residence in the surviving spouse. The legislator does not enter into the nature of the relationship between the spouses, since he assumes that in the event of a strained relationship the spouses will not live together, or that the deceased will make a will, thereby giving precise expression to his wishes. Such would also be the case if he wishes to confer the residence on the spouse even though they had been married less than three years. This applies in respect of inheritance by the spouse as a whole, as well as in respect of the residence. We do not think it justified to create an exception concerning the examination of the relationship between the spouses as far as the residence is concerned, thereby disrupting established principles of the Law of Succession.[80]

The joint residency of the surviving spouse together with the deceased in the same residence, further indicates the connection of the surviving spouse to that particular property, namely the family residence. As the

79 See Maoz and Rosen-Zvi, "The Inheritance of the Spouse" (1984) 36 *HaPraklit* 15, at 47; and see M. Shava, "Comments on Succession Bill (Amendment No. 7) 1983 – Succession Rights Between Spouses" (1984) 10 *Iyunei Mishpat* 387, at 401.

80 It would have perhaps been appropriate to grant the court discretion to examine the relationship between the deceased and the surviving spouse for purposes of determining the right of succession to the residence. The external test of joint residence is likely to be an arbitrary one, and may award the spouse succession to the residence despite serious disputes between the spouses, which in ordinary circumstances would have caused them to live separately. However, the implementation of such a solution raises complex problems, which would complicate the proceedings leading to the succession order. In addition, it may be asked why the court should not be permitted to take into account such circumstances in relation to the share of the surviving spouse in the other assets of the estate as well.

result of this condition, two types of cases are likely to be excluded. The first consists of cases where the residence belonging to the estate was indeed intended to be the couple's residence and was acquired by the deceased, or by both spouses jointly, but immediately prior to the death of the deceased they had not yet managed to actually occupy it as their residence. It could even happen that prior to the death of the deceased the spouses were living in a rented apartment, or that they had already sold the apartment in which they were living at the time of the death. In such cases the surviving spouse is left unprovided for by the law.

The second type of cases which may fall outside the said condition is where "at that time" i.e., "prior to the death of the deceased", in the words of sec. 11(a)(2), the couple were for various reasons not residing in their residence. Thus, for example, at the time of the death the couple may have been serving as emissaries abroad or residing in another town for business reasons, or they may have preferred to rent out their own apartment and live in another one, whether they rented it or were allowed to reside therein without charge. Should the surviving spouse in such cases, too, be left unprovided for, without entitlement to the full rights that the deceased had in the residence?

There is no justification for the restrictive definition of the link between the spouse and the residence. It would have been preferable to phrase the condition for the application of this clause of sec. 11(a)(2) in such a way as to avoid the injustice which may arise by the spouse being deprived of the right of succession to the residence in such circumstances. The answer to at least some of the difficulties must be to afford a broad interpretation to the expression "and was at that time residing with him in the residence". Flexible interpretation of the term "residing",[81] or even of the words "at

81 On the term "residing", in the context of right to the residence after the death of the deceased within the provisions of sec. 115 of the Succession Law, see *Rousseau* v. *Rousseau* (1970) 24(i) *P.D.* 657; *Sielenfreud* v. *Green* (1977) 31(i) *P.D.* 813. In the *Rousseau* case the court held that the term should be understood in its ordinary, plain meaning, and not as a technical legal concept. At the same time attention should be paid to the legislative intent and the protection which the section seeks to confer in the particular case – *which persons* does the legislator wish to protect, and in our case, what is the *scope* of the protection sought? The Court also held (at 660) that "a person temporarily absent from his residence even for quite a lengthy period, owing to his work or for another reason, can still be regarded as residing in that residence". In our context, the question may well arise not only with regard to one of the spouses, but even with regard to both of them. In the same spirit, see also, on a different matter, *Moussa* v. *Minister of the Interior* (1962) 16 *P.D.* 69, at 76: "Domicile or residence in a particular place do not require frequent, uninterrupted physical presence therein".

that time" or "immediately prior to the death of the deceased", come to mind. A broad interpretation, fulfilling the legislative purpose, could decide the matter in favour of the surviving spouse, at least in the second type of cases described above.[82]

The definition of the conditions for conferring the right of succession of the whole of the deceased spouse's share in the residence is, as we have shown, too narrow in one respect – but at the same time, too wide in

The *Sielenfreud* case was similar to the first category of cases described earlier in the text of this article. The spouses were about to move into a new residence that was already in their possession, but had not yet moved in when the wife died. The question was whether they could be regarded as having resided in that residence for purposes of sec. 115 of the Succession Law. The court answered this in the negative: "One can speak of a person as residing in a residence where he genuinely and in good faith makes his home and dwelling therein, whereas possession of a residence, even if it is equipped with all the requisite furniture and equipment, is not sufficient. A person can possess numerous apartments in such a way, but he only resides in the one where he has actually set up his home. In the case before us, it is not disputed that until the day of her death the deceased resided together with her husband (i.e., the widower) in the parents' house, and they resided there only because their prospective apartment was not yet ready to be lived in. That being the situation, it cannot be said that the spouses resided in the apartment, in the sense of sec. 115 of the Succession Law" (at 820).

The distinguishing factor between these two cases (*Sielenfreud* and *Rousseau*) is that in the *Rousseau* case, the Court may have referred to a situation where the spouses actually resided in the apartment and were absent therefrom temporarily, for various reasons, with intent to return there. In such a case they should be regarded as having continued to reside in the apartment. On the other hand, in the *Sielenfreud* case the apartment had never been used for the residence of the spouses. These authorities may assist the surviving spouse in the second category of cases described in the text of the article, but they do not support the right of such a spouse in the first such category. In fact, *Sielenfreud* may be cited *against* the surviving spouse's right to the residence in the framework of sec. 11(a)(2) in the first category of cases. At the same time, as far as the amendment of sec. 11(a)(2) is concerned, we consider that *Sielenfreud* construes the term "residing" too literally and narrowly. Our inclination is to rely on *Rousseau* and to decide that one can infer from the legislative intent in this matter a goal of protecting the residence of the surviving spouse where he competes over the inheritance with distant relatives, even where it was only his intended residence, provided that intention to reside there was a perfected one. In such a case, constructive residence should be sufficient so as to vest all the rights in the residence in the surviving spouse, with a view to realizing the interest which the legislator sought to protect.

82 The District Court in Tel-Aviv-Jaffa construed narrowly the provision of para. (2) regarding the right of the spouse to the residence. In *Re Estate of Isaac Schwartz, decd.* (not published), Judge Zamir held that the 1985 Amendment No. 7 to the Succession Law, and sec. 14 thereof (transitional provision) apply – for purposes of implementing sec. 11(a)(2) of the Law – only *to the surviving spouse* (emphasis in original). The same was held in *Estate of Levitt* v. *A.G.* (1986) 3 *P.M.* 106, but was refuted on appeal: *Estate of Levitt* v. *Kamerski* (1986) 40(iii) *P.D.* 670. For criticism of the District Court decisions, see Rosen-Zvi and Maoz, *supra* n. 20, at 496–497, n. 170.

another respect. The definition includes no condition concerning the absence of another residence fully or partially owned by the surviving spouse. Where the dwelling is the sole residence, it is only right to spare the surviving spouse the dissensions likely to arise from the imposed common ownership with other relatives of the deceased.[83] But where the surviving spouse has another residence likely to be at his disposal, then the residence remaining as part of the estate ought to be treated as an ordinary asset of the estate to be divided among the heirs in the same way as the estate generally. This type of phenomenon would naturally be more likely where the marriage is not the first for the surviving spouse, and he brings with him to this marriage a residence of his own of which he remains the owner, but moves into his spouse's home or into a residence acquired by both of them in contemplation of the marriage or in the course thereof. However, the legislator did not see fit to impose such limitations in sec. 11(a)(2).

The question may arise, in this context, as to the legal position where the couple were residing in more than one residence at various times. Should all the residences be included under this clause of sec. 11(a)(2),[84] or should the surviving spouse obtain the full rights of the deceased over one residence only?

It is the latter alternative that follows logically from the legislative intent, which is to confer a benefit on the surviving spouse or to enlarge his share in the inheritance at the expense of the other heirs. The value of the residence may be small within the estate as a whole, yet it is not its value which counts but rather the special significance attached to that asset. Therefore that residence should be singled out among all others in which it can be said that the deceased did indeed live with his spouse. In this case, the context indicates, in our view, that the singular used by the legislator reflects his intention.[85]

83 In respect of such a case as well, the Minister of Justice raised the question, whether the provisions relating to the right of the spouse to the residence should not apply "only to a residence which is not a luxury residence": (1984) 98 *Divrei HaKnesset* 740. In this context it should be noted that the right of homestead granted to the surviving spouse under American law (see *supra* n. 11) is restricted in terms of the value of the house by amounts which vary from state to state.

84 See sec. 5 of the Interpretation Law, 1981 (35 L.S.I. 370): "Words in the singular include the plural, and *vice versa*".

85 See sec. 1 of the Interpretation Law: "This Law shall apply to every enactment . . . save in so far as otherwise provided with regard to the subject-matter or as anything in the subject-matter or context is inconsistent with this Law".

The question as to which of the residences should be preferred depends not on the choice of the surviving spouse but rather on the answer to the question, which residence has the closest tie to the joint lives of the couple, and in respect of which of the residences did the couple maintain the most links.[86] Nevertheless, a different interpretation is possible, whereby the result provided for under the last clause of sec. 11(a)(2) should apply to every residence in respect of which the conditions laid down in that provision are fulfilled, however many residences there may be.

It seems to us that the intention of the Constitution, Law and Justice Committee of the Knesset was correct, but the time pressure that led to the inclusion of this amendment just prior to the second and third reading of the Bill resulted in hasty drafting, bringing about greater obscurities than clarity. The outcome causes us to wonder whether the Minister of Justice was not right in stating that it would have been preferable to allow this topic to be settled systematically and exhaustively within the comprehensive regime of the rights of spouses in residences, whether *inter vivos* or *post mortem*.[87]

4. *The safeguarding of reserved shares*

This chapter heading would appear to be tautologous: what need is there to safeguard a share that is reserved anyway? The answer is to be found on the temporal level. The reservation of a share with which we have dealt so far, and which is the most common in the law of succession, concerns the reservation of a particular share in the inheritance or the safeguarding of certain assets of the estate against claims of heirs and inheritors. However, these provisions do not prevent a deceased person from emptying his estate of all content prior to his death by conferring his assets *inter vivos* on whomever he wishes to enrich – be it a philanthropic society, his children from a previous marriage or his mistress. This can be accomplished in various countries even by means of a contract for the transfer of property upon death.[88] In the United States the practice has developed of creating

86 *Cf.* Wills, Probate and Administration Act, 1898 (N.S.W.) §61D. This section provides that the spouse will inherit the rights of the deceased in the matrimonial home if it served him as a "principal residence".

87 (1984) 98 *Divrei HaKnesset* 740.

88 See G. Gardiner & Martin (ed.) *Law Reform Now* (London, 1964) 147. In Israel such a transaction is likely to be declared invalid in view of the provision of sec. 8(b) of the Succession Law whereby: "A gift made by a person which is intended to vest in the donee only upon the death of the donor is not valid unless it was made by will in accordance with the provisions of this Law". The same applies to an agreement regarding the

trusts to which a person transfers all his property with the aim of depriving his spouse of the latter's reserved share in the inheritance, while preserving the right to supervise the trust and the right to enjoy the income of the trust until his death.[89] The generosity shown towards the surviving spouse by legislators in various states of the United States has resulted in a host of subterfuges intended to siphon the assets of the future estate from the surviving spouse.[90]

In legal systems in which the regime of community of assets between spouses prevails, protection of the couple's interest in these assets may be provided within the framework of the rules relating to such community.[91] These, however, would not protect the spouse in a system where the regime of separate property prevails, nor would they avail in respect of an interest which a spouse may have in a share exceeding his share in the common assets. Even in respect of the common assets the legitimate share of the spouse is not adequately protected in all legal systems of the first type.

Consequently, European continental legal systems have developed the idea of controlling gifts *inter vivos,* in so far as the estate is insufficient to satisfy the reserved share due to heirs. This idea, developed at different levels in different countries, originates in Roman law, which recognized the right of the deceased's relatives who were deprived of their inheritance to receive a reserved share, known as the remedy of *querela inofficiosi testamenti.*[92]

This right was developed in the Code of Justinian as a means of contesting extravagent gifts granted by the deceased in his lifetime.[93] Such gifts were annulled and the proceeds were made use of, to the extent necessary, to satisfy the reserved share of relatives.[94] From the Code of Justinian this

inheritance of a person "made during the lifetime of that person", according to sec. 8(a).

89 See *Newman* v. *Dore*, 275 N.Y. 371, 9 N.E. 2d 966 (1937). And see *Report of the Commission on Revision of the Laws of North Carolina relating to Estates*, comment to sec. 5 (1939). *Cf.* Gardiner & Martin, *supra* n. 88, at 147.

90 For an exhaustive survey of these methods see W.D. MacDonald, *Fraud on the Widow's Share* (Ann Arbor, 1960).

91 On this see Rosen-Zvi, *supra* n. 50, at 247–248, 341–342; and see *supra* n. 76. See also Maoz and Rosen-Zvi, *supra* n. 79, at 21–22.

92 R. Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law* (Oxford, 3rd ed., 1907) 556–560; A.M. Prichard, *Leage's Roman Private Law, Founded on the Institutes of Gaius and Justinian* (London, 3rd ed., 1961) 252–254.

93 *Querela Inofficiosae Datis* and *Querela Inofficiosae Donationis.*

94 Sohm, *supra* n. 92, at 558.

institution was received, in different variations, into the Romano-Germanic legal systems.[95]

In the United States, as well, efforts have been made by the courts in various states to reduce the extent of the extraction of estate assets from the grasp of intestate heirs who are forced upon the estate. An example of this can be found in a 1973 judgment of the Supreme Court of Illinois. The Court extended the protection afforded to the reserved share in the inheritance, to which the spouse is entitled against bequest and provision by will, also against banking accounts opened by the deceased during his lifetime in trust so that their content could be paid on his death to his children from a former marriage.[96] Eventually the Uniform Probate Code of 1969 provided for the protection of the widow against *inter vivos* transactions.[97]

The issue of protecting the spouse's expectation of inheriting reserved shares in the estate would not initially appear to be relevant to a discussion of the Israeli Succession Law, which does not recognize such reserved shares. The issue is relevant as regards safeguarding the right to maintenance out of the estate, which is provided for in our law. In contrast with the institution of maintenance in Commonwealth Statutes, which influenced the Israeli legislator, the latter nevertheless chose to safeguard this right against certain transactions effected in the period preceding the deceased's death. Such safeguarding, which is limited, is subject to the discretion of the court, as is the actual determination of maintenance. Sec. 63 of the Law, the heading of which is "Enlargement of estate for purposes of maintenance", provides as follows:

> a) Where the estate is insufficient to provide maintenance for all persons entitled thereto, the Court may treat as part of the estate anything disposed of by the deceased without adequate consideration within two years prior to his death, excluding gifts and donations which are usual in the circumstances.
>
> b) The Court may require the recipient to reimburse the estate or to pay maintenance up to the value of what remained in his possession at the time of the death of the deceased and if he received the same otherwise than in good faith, up to the value of what he received.

95 In Germany, see sec. 2325 of the G.C.C. which restricts cancellation of gifts to a period of 10 years; in Switzerland, sec. 527 of the S.C.C. which restricts the scope of voidable gifts. And see the institution of "legitime" in Louisiana: La. Civil Code, secs. 1194, 1493 *et seq.*

96 *Montgomery* v. *Michaels,* 54 Ill. 2d 532; 301 N.E. 2d 465 (1973).

97 Art. II, Part 2.

c) The recipient may deduct the consideration he gave or its value from what he has to restore or to pay.

It should be mentioned that following a comprehensive survey of the law prevailing in the different states of the United States, MacDonald recommends that the system of reserved shares in the estate for the spouse be replaced by the institution of maintenance out of the estate. In this context he praises "the flexibility and simplicity of the Israeli anti-evasion provisions",[98] and formulates a similar proposal in the suggested Model Decedent's Family Maintenance Act.[99]

IV. *The Law of Succession in the Narrow Sense*

Up to now we have dealt primarily with the position of the surviving spouse in relation to the estate of the deceased spouse. We have thus illustrated what we have termed "the excessive influence of the laws of marriage on the laws of succession", a feature which more than any other characterizes the development of the laws of succession in recent decades. In this chapter we seek to complete the circle and revert to the laws of succession themselves.

Despite the erosion of the laws of succession in favour of the laws of marriage, one should not ignore the narrow sense of succession or its basic aim, which is to divide the inheritance left by the deceased and direct it to his family. We have pointed out various means for protecting the spouse of the deceased, which cannot be classified within the laws of succession in the narrow sense, although their influence on those laws – be it direct or indirect – is not inconsiderable. The multiplicity of such means, which serve as tools in the hands of the law for safeguarding the interest of a widow or widower whose spouse has passed away, does not derive from

98 *Supra* n. 90, at 298.

99 Sec. 5; *ibid.*, at 310–311. The period during which transactions may be reopened is extended in MacDonald's proposal to three years, as against two years under Israeli law, where the deceased has not retained himself any substantial right in the property; and to ten years in cases where the deceased did retain such a right. Sec. 8; *ibid.*, at 313–314. For the way in which MacDonald reached these periods, see *ibid.*, at 153–154. Some ten years after the enactment of the Israeli Succession Law, a similar provision was established in the English Law of Succession. See Inheritance (Provision for Family and Dependants) Act, 1975, sec. 10. This provision was enacted in conformity with the recommendations of the Law Commission, *Second Report on Family Property: Family Provision on Death:* Law Com. No. 61, Paras. 190–196. *Cf.* Family Provision Act, 1982 (N.S.W.), Pt. II, Div. Z.

the laws of succession in the narrow sense. Hence, it is necessary to also examine the other interests involved in determining intestate succession, and one must beware of reversing the order of things. In this context, we would make two remarks.

The first concerns succession by the spouse. The allocation of the inheritance on intestate succession is unequivocal and precise. The determination of the spouse's share in the inheritance disregards behavioural considerations, nor is it influenced by the nature of the relationship between the spouses.[100] The link between the laws of marriage and the heart of the laws of succession, i.e., intestate succession, is in this context confined to determination of the status.[101] Nor is there in this framework any room for discretion. The nature of the laws of succession as a method of acquisition of property, requiring certainty and security, overshadows the method of the laws of the marriage, strewn as they are with discretion and a wide range of circumstances which alter the legal outcome.[102]

Our second remark concerns succession by members of the family. The laws of succession are not intended to safeguard only the spouse or the children of the deceased. They are concerned, *inter alia,* with the just division of wealth which has accumulated during a person's lifetime among those whose ties with the deceased or whose connection – usually indirect – to the accumulation of the assets renders them deserving thereof. Similarly, these laws are an expression of the presumed wishes of most members of a particular society at a given period. Even in our time it cannot be said that family ties of the second degree – parents and their descendants – have become so weakened as to allow absolute priority to the spouse, in addition

100 This, as opposed to the institution of maintenance out of the estate. The provisions of sec. 5(a) of the Succession Law, which disqualify a person from inheriting on the basis of his behaviour, are exceptional in this respect. This sub-section refers to a person convicted of intentionally causing or attempting to cause the death of the deceased or a person convicted of concealing, destroying or forging the last will of the deceased, or of claiming under a forged will.

101 On the connection between religious law, which controls the determination of status, and the Succession Law, and on the test to be applied in determining the status of a spouse in the sense of the Succession Law and in the matter of his right to inherit the deceased, see *Feldman* v. *Feldman* (1966) 20(ii) *P.D.* 465; *Feldman* v. *Feldman* (1966) 20(iv) *P.D.* 693; Englard, *supra* n. 46, at 204–206; P. Shifman, "The Status of Doubt" (1967) 33 *Deot* 153, at 163–165; A. Maoz, "Jurisdiction Depending on Doubt" (1976) 4 *Iyunei Mishpat* 598.

102 *Cf.* criticism of the vesting of the first slice from the estate in the spouse under the Intestates' Estates Act, 1952 without paying attention to the relationship which prevailed between the spouse and the deceased immediately prior to the latter's death: Gardiner & Martin, *supra* n. 88, at 146–147.

to other economic protection afforded the latter. As we have already seen, the spouse's contribution towards the accumulation of assets has already been taken into account and credited to him in other respects.

This does not mean that the spouse's contribution should not be taken into consideration in the context of the desired policy for dividing the inheritance – on the contrary. Nevertheless, due significance should be attributed to each interest. One cannot ignore the fact that in some cases the deceased's family of origin is the source of the assets that have accumulated in his possession, some of them reaching him by way of gift or succession. Such assets are generally not subject to the presumption of community of property, nor are they included among the assets to be balanced.[103] There is, therefore, no justification to completely deprive the deceased's relatives of the inheritance where the latter left a spouse but no children. In such a case, the real heart of the discussion is not priority of the spouse over the deceased's family, but rather, ultimately, priority of the deceased's family over the surviving spouse's family, and at times even over the surviving spouse's new spouse.

Furthermore, the deceased may have provided for his spouse's future through a number of extra-testamentary arrangements, such as generous gifts *inter vivos,* or by granting a right to enjoy his property during the lifetime of the spouse – for example, by creating a trust or by ensuring a lump sum or periodical income for the spouse by making the latter a beneficiary under insurance policies or various funds.[104] Gross injustice may be caused to the other heirs should the spouse acquire portions of the inheritance in addition to these generous arrangements, at times thereby frustrating the wishes of the deceased, who established these heirs in his will. This is primarily true under a regime of reserving shares in the inheritance for the spouse.[105]

We see, therefore, that the laws of marriage, on the one hand, and the laws of succession in the narrow sense, on the other, raise a series of interests of differing kinds and on different levels of treatment, some of which are mutually inconsistent. The Succession Law must strike a balance between the varying interests and find the golden path, the presumed

103 Sec. 5(a)(1) of the Spouses (Property Relations) Law. And see Rosen-Zvi, *supra* n. 50, at 236–239.

104 This income is not included in the estate. See sec. 147 of the Succession Law.

105 See Rheinstein & Glendon, *supra* n. 10, at 141–142. The authors there express the opinion that just as the courts will ignore gifts *inter vivos* intended to deprive the spouse of his reserved share in the inheritance, so will they offset the benefits to the spouse from his imposed share in the inheritance in the latter examples.

desire of the majority of the community, which would also be the presumed desire of the deceased. The remaining minority would have the option of making a will.[106] A succession statute which ignores this presumed desire and seeks to enhance the spouse's share in the estate at the expense of other heirs will ultimately encourage legal subterfuges directed towards circumventing this intent.[107]

V. *The System of Succession and the Spouse's Place Among the Heirs*

A. *The System of Succession*

In principle, two systems for determining the identity of the heirs on intestate succession can be distinguished.[108] Common to both systems is the attempt to identify those blood relatives that are closest to the deceased so that they should displace, either absolutely or partially, more distant relatives.

One system is the parentelic system. As is implied by its name, this system identifies the heirs of the deceased by their relationship to him through a common parent. The rule is that the closer the common parent to the deceased, the greater the priority that descendants of that parent will be afforded as against heirs born to a more remote common parent. The other system, the "gradualist" system, examines the actual relationship between each potential heir and the deceased.

Whereas the first system counts the intermediate links which separate the deceased from the common parent, the second system adds thereto the intermediate links connecting the heir to the common parent. Under the "gradualist" system there is seemingly greater precision in determining the distance between the various blood relations and the deceased, and consequently in placing them on the "map" of succession. However, it would appear that the parentelic system does greater justice to the wishes of the deceased.

A person will generally harbour greater concern for ensuring the needs of his own descendants than for ensuring those of his parents' descendants, even if the connecting links between himself and the former are more numerous. It may similarly be assumed that a person would prefer to leave

106 See *infra*, text at nn. 177–180.

107 See *supra*, text to n. 90. And see MacDonald, *supra* n. 90, at xi.

108 Generally, see M. Silberg, *Personal Status in Israel* (Jerusalem, 4th ed., 1965, in Hebrew) 183 *et seq.*

his estate to his parents' descendants rather than to his grandparents' descendants. And indeed, most of the legal systems in the world have adopted the parentelic system for determining the intestate heirs.

In our Succession Law, the parentelic chain of succession is established in sec. 10(2),[109] and sec. 12 provides that preference be given to the degree of relationship closest to the deceased over that which is more remote from him.[110] The chain of succession is limited to three parentelas;[111] in the absence of such relatives, or a spouse, the State inherits on intestacy.[112] Heirs of a common parentela yet of different degrees share equally in the estate.[113]

The Succession Law establishes the principle of representation or substitution. Sec. 14(a) provides:

> Where a child of the deceased predeceased him and left children, the children succeed in place of such child, and the children of each of the relatives of the deceased who predeceased him succeed in like manner. . . [114]

109 "On intestacy the heirs are:
(1) . . .
(2) the children of the deceased and their issue, his parents and their issue, his grandparents and their issue".

110 "The children of the deceased take precedence over his parents; his parents take precedence over his grandparents". On the division of the inheritance under the parentelic principle, see *Sinidovska* v. *Administrator General* (1975) 29(ii) *P.D.* 81.

111 See sec. 10(2), *supra* n. 109.

112 See sec. 17(a) of the Law. Sub-sec.(b) restricts the use that the State can make of what it inherits in this way to purposes of social welfare. In England, where there is a similar provision, the estate passes to the Crown as *bona vacantia* in the absence of a spouse or relative in any one of the three parentelas. See Administration of Estates Act, 1925, sec. 46(1)(vi).

Under Jewish law, there is no limit to the parentelas that participate in the inheritance, and they are even to be sought among the issue of the forefathers of the tribes of Israel, the sons of the patriarch Jacob: see Mishna, *Baba Bathra* 8:2; Babylonian Talmud, *Baba Bathra* 115a,b; and see M. Silberg, *supra* n. 108, at 185–186. Similar to Jewish law is the provision of German law in sec. 1930 of the BGB. However, there also, in the absence of blood relations of the deceased, the State inherits as intestate heir (see sec. 1936). The Israeli Bill of 1952 adopted three parentelas as a "compromise position" between the liberal systems, such as Jewish law and German law, and systems which have limited even further the relatives who deserve to inherit on intestacy, as "the family circle among whose members there exists a substantial bond and to which the presumed duty of the deceased is devoted": The Succession Bill of 1952, at 51.

113 Sec. 13 of the Law.

114 On the principle of representation, see Silberg, *supra* n. 108, at 190 *et seq.*

B. *Succession by the Spouse Together with the Other Heirs*

1. *The principle of the variable share*

What distinguishes the spouse from the other heirs is his being an exception to the parentelic principle constituting the backbone of intestate succession under Israeli law. The other heirs are related to the deceased by blood relationship and inherit him according to the order of the parentelic relationship to him; the spouse, however, is related to the deceased by marriage and stands outside the parentelic hierarchy.

Sec. 11 of the Succession Law incorporates the spouse of the deceased into the succession together with the other intestate heirs. This combination creates both theoretical and practical difficulties in that it necessarily generates a confrontation between incompatible principles.[115]

As in most legal systems of the world,[116] the Israeli legislator too

115 A relatively smooth combination of inheritance by the spouse with the principles of inheritance by blood relationship may be found in Jewish law, where the husband takes precedence over the other heirs with regard to his wife's estate, and he inherits the whole of the estate: see *Shulhan Arukh, Even Ha'Ezer* 90:1; S. Shilo, "Succession" in *The Principles of Jewish Law*, M. Elon, ed., (Jerusalem, 1975, in Hebrew) 446, at 447–449.

116 In German law, sec. 1931 of the BGB provides that the spouse's share shall be proportional to the degree of kinship of the relatives who inherit him: one-quarter where heirs of the first parentela (i.e., descendants of the deceased) inherit with him; one-half where heirs of the second parentela (parents or their descendants) or heads of the third parentela (grandparents) inherit with him; the whole where other heirs inherit with him.

Under the American Uniform Probate Code (sec. 2–102) the same principle is applied, except that the Code favours the spouse. He inherits a fixed sum together with one-half of the estate where only descendants who are common to him and the deceased or parents of the deceased inherit with him; he inherits only the one-half (and will not be entitled to the fixed sum) where a child not common to them both is included among the descendants of the deceased; the spouse already takes the whole inheritance where his co-heirs are descendants of the parents, i.e., heirs within the second parentela.

Under South African law (Succession Act 13 of 1934, sec. 1) the spouse takes the same share as that which all descendants of the deceased take (i.e., the spouse is considered for purposes of dividing the inheritance as a child of the deceased) or a sum fixed by statute, whichever is greater; where the spouse has to compete in the inheritance with the parents of the deceased or their descendants, he takes one-half of the estate or the sum fixed by statute, whichever is the greater. In any other case, the spouse is entitled to the whole estate.

Under English law the spouse who inherits together with the descendants of the deceased receives a fixed sum together with a life interest in half the estate; where the parents of the deceased or their descendants inherit with the spouse, the latter is entitled to a fixed sum (which is greater by more than threefold than in the case where he inherits together with the deceased's descendants) along with one-half of the estate. In any other case, the spouse inherits the whole estate. See Administration of Estate Act, 1925, sec. 46, as amended by sec. 1 of the Intestates' Estates Act, 1952, and later by the Family Provision Act, 1966.

adopted, on the question of succession by the spouse, the principle of the variable share, dependent on the parentelas of the other heirs to the deceased, rather than determining a uniform, fixed share for the inheritance of the spouse in every case. The logic of this basic format, on which sec. 11(a) of the Succession Law is founded, is the creation of a balance between protection of the spouse's interest and allocation of the inheritance among the family of the deceased. The closer the relationship between the deceased and the heir on intestacy, the smaller the share of the spouse in the estate. The legislator assumes that the objective degree of relationship between the deceased and the heir is also an expression of the size of the share which such heir deserves in competition with the spouse. This assumption is based on the presumed desire of a reasonable testator, who is willing to leave his spouse a larger share in the estate if the latter competes with more remote relatives.[117] On the other hand, the deceased would wish to confer a greater share in his inheritance on closer relatives who inherit together with the spouse.

One may, of course, disagree with the logic of this and argue that a testator may wish to protect his spouse and provide a fixed and uniform share regardless of which relatives inherit with him. Yet, in addition to the fact that the vast majority of legal systems in the world have adopted the arrangement of the variable share, thus indicating a basic universal recognition of it, this solution also expresses more equitable principles of allocation. An allocation of the inheritance that is based on the relevance of the unique aspects of each of the various situations, and on the relativity of each of the alternatives, is preferable to an allocation based on an initial arbitrary and inflexible decision that takes into account only one guiding principle.

Where the children of the deceased inherit together with the spouse, the children are accorded at least the same "weight" as the spouse.[118] This is not the case where the co-heirs are brothers or sisters of the deceased or their children, instead of the children of the deceased. Sec. 11 gives expression to these orders of priority. The difficulty lies in working out the details of these principles and translating them into numbers: how far should one

117 *Cf.* remarks of the Minister of Justice when introducing the Bill of Amendment No. 7 to the Succession Law for a first reading: (1984) 98 *Divrei HaKnesset* 740.

118 Full realization of the idea of equality between the spouse and the children of the deceased is effected under South African law, which places the spouse together with the children of the deceased and divides the estate into equal shares in such a way that the spouse and each of the children receive the same share of the inheritance. See *supra* n. 116.

go in designating the relatives who are to inherit with the spouse, what should be their different status vis-à-vis the spouse, and how should one translate this into different shares in the estate? The solutions to such questions are difficult to assess, and they tend to be arbitrary to a certain extent.

2. *The circle of relatives who inherit together with the spouse*

Logically speaking, it is not essential that, corresponding to the principle of the variable share of the spouse in the inheritance, the list of the relatives designated as inheriting with the spouse should be identical to the list of heirs on intestacy. The legislator could conceivably decide that the spouse ought to override completely any of those relatives in the contest over the deceased's estate.

The Succession Bill and the Law itself have gone through four fundamental stages on this question. The main objective of the amendments was to increase the spouse's share in the inheritance at the expense of the deceased's relatives. At the first stage, two draft Laws – the unofficial 1952 Bill, drafted by the Ministry of Justice, and the official 1958 Bill – both proposed that the third parentela of grandparents and their descendents should be excluded altogether and should not inherit together with the spouse, although included among the heirs of the deceased in intestacy.[119] The Knesset did not accept this proposal. The Succession Law itself, at the second stage, extended the circle of those who inherit together with the spouse to include the third parentela. However, it created greater variety, namely four categories, with regard to the proportional share which the spouse receives when inheriting together with other heirs on intestacy, as against only two categories in the drafts which preceded the Law itself. At the third stage, in 1976, under Amendment No. 4 to the Succession Law,[120] the legislator reduced the number of such heirs within the third parentela by eliminating succession by the grandparents' descendents together with the spouse, and also, within the second parentela, by eliminating succession by descendents of brothers or sisters together with the spouse.

Amendment No. 7 to the Succession Law constitutes the fourth stage in the enumeration of heirs. This stage is the most radical of all, but achieves the opposite of its declared aim. The amendment is a retrograde step as far as the widow's share in the estate is concerned, since it restores the descendents of the deceased's brothers and sisters to the circle of heirs who share the estate together with the surviving spouse.

119 Sec. 18 of the Succession Bill of 1952; sec. 20(a) of the 1958 Bill.
120 Succession (Amendment No. 4) Law, 1976, *supra* n. 17.

3. *Division of the inheritance between the spouse and the relatives of the deceased*

In determining the spouse's share in the inheritance together with other heirs, the legislator saw fit to also take into account, among other things, the "gradualist" relationship between the other heirs on intestacy and the deceased. For this purpose the legislator departed in a number of instances both from the usual parentelic principle and from the principle of representation.

The breach in the principle of parentelic relationship and the departure from the principle of representation were effected with the aim of increasing the spouse's share in the estate wherever he is required to inherit together with other relatives of the deceased, even if they belong to the same parentela. The legislator was not satisfied with increasing the proportional share of the spouse as the relationship between the deceased and the head of the particular parentela was more remote, and took a further step in the direction of the spouse by conferring upon him a greater share according to the remoteness of relationship between the deceased and the specific relative who inherits.

The legislator has thereby breached, in favour of the spouse, the framework of principles underlying the rules of intestate succession and the relative simplicity of their implementation.

This method is not inevitable, nor was it incorporated into any of the drafts which preceded the enactment of the Succession Law. In some of these drafts, as we have noted, the spouse's share in the succession varied only according to the proximity of relationship between the deceased and the head of the parentela. The method is, however, consistent with the trend towards safeguarding the nucleus of the family at the expense of the wider family circle and of giving preference to the spouse over the other heirs.

The central question which sec. 11(a) of the Succession Law presented to the interpreter concerned the status of an estate in which a conflict exists between the various sub-sections of sec. 11(a), as the spouse competes with heirs of different categories.

In the *Finkelstein* case,[121] the Supreme Court held that in such an event, the distribution of the estate should be effected by a two-fold procedure. First, the inheritance should be divided notionally between the various heirs, ignoring the existence of the spouse. Then, the spouse comes and takes – from the notional share to which each of the heirs was entitled –

121 *Finkelstein* v. *Finkelstein* (1968) 22(i) *P.D.* 618.

the share to which he, the spouse, would be entitled according to the appropriate subsection of sec. 11(a).

The decision in *Finkelstein* thereby sought to effectuate the legislative purpose underlying sec. 11(a) – namely, to achieve a proper balance between protection of the spouse and division of the inheritance among the relatives of the deceased on the basis of the personal relationship of each of the heirs to the deceased.[122]

It is interesting to note that German law lays down, in a particular situation, a provision similar to the principle underlying the *Finkelstein* ruling. Where the spouse inherits together with one of the grandparents and with the descendents of the others – namely the uncles or aunts of the deceased – then the spouse will take not only the half to which he is entitled when he inherits with heirs of the third parentela, but will also take over the share that the uncles or aunts of the deceased would inherit if the principle of representation were applied to this situation.[123] The idea behind this provision as well is to create a distinction between the heads of the parentela and the other heirs who are part of that group, with a view to benefiting the spouse competing with a particular heir, according to the proximity of the gradualistic relationship between that heir and the deceased.

Sec. 11(a) of the Succession Law has been the subject of more discussion in the legal literature than any other section in that statute, and probably in most other statutes.[124] Both in the literature and in the case law, a call for amendment of the section has been put forward more than once,[125] and indeed Amendment No. 7 to the Succession Law has recently amended that section.

The policy of infringement of the parentelic principle with regard to the division of the inheritance between the spouse and other heirs is retained in the legal situation following Amendment No. 7. The spouse's share continues to be a function of the "gradualistic" relationship between the

122 *Cf.* dictum of Elon J. in the case of *Marjia* v. *Jubran* (1979) 33(ii) *P.D.* 34, at 39. For this reason, the court rejected proposals put forward in case law and legal literature to determine the share of the spouse by reference to the most or least preferable among the other heirs. For the reasons behind the *Finkelstein* rule and its justification, see Maoz and Rosen-Zvi, *supra* n. 79, at 40–43. The *Finkelstein* rule was characterized by the President of the Supreme Court, Y. Kahan, as "a brilliant idea". See *Muller* v. *Raber* (1982) 36(iii) *P.D.* 584, at 587.

123 Sec. 1931 of the BGB.

124 No less than 20 articles have been published on sec. 11(a) of the Law. For a reference to some of them, see Maoz and Rosen-Zvi, *supra* n. 79, at 33, n. 86.

125 See remarks of the President of the Supreme Court, Y. Kahan, in the case of *Marjia* v. *Jubran*, *supra* n. 122 at 37, and in the case of *Muller* v. *Raber*, *supra* n. 122, at 587.

deceased and his blood relations, and not merely an expression of the distance between the deceased and the common parent, which embodies the pure parentelic principle. Thus, for example, failing heirs from the first parentela, the heads of the second parentela who inherit together with the spouse will take a share identical to that which the descendents of the deceased, had there been any, would have taken. However, other heirs who belong to the second parentela – brothers and sisters or their descendents – will take a smaller share of the inheritance if they inherit together with the spouse. Similarly, failing heirs from the first two parentelas, the heads of the third parentela will take a share identical to that which the brothers and sisters and their descendents, had there been any, would have taken, even though other heirs belonging to this parentela – namely, the uncles and aunts of the deceased and their descendents – would not take anything when competing with the spouse.

At the same time, the amendment obviates the need for recourse to the *Finkelstein* ruling, in that the various paragraphs of sec. 11(a) have been re-arranged so as to avoid any conflict between them. Under the new version of sec. 11(a), the succession of heirs together with the spouse is determined in the context of a single provision of sub-sec. (a). The heirs' share as against the spouse will from now on be determined in a clear and simple manner.

This result is achieved in a number of ways:

a) The spouse first takes his share, and only thereafter is the remainder of the estate divided between the other heirs.
b) The lack of uniformity as to the share which the children of the deceased take together with the spouse has been averted. It is now provided that children of the deceased – no matter of what category – inherit in common and equally, not only in the relations among themselves,[126] but also in their relations with the spouse of the deceased.[127]

126 See sec. 13 of the Law.

127 See sec. 11(a)(1). The distinction between different classes of the deceased's children was abolished in the text brought for a second reading by the Constitution, Law and Justice Committee, on the proposal of Prof. P. Shifman at the Session of the Committee on 12 June 1984. The Bill itself had preserved the distinction between "children common to him and his spouse only, or their issue" – who would have to allocate one-half of the estate in favour of the spouse (see sec. 11(a)(1) of the Bill) and "children who are not common to him and the spouse, or their issue" – who would have to allocate only one-quarter of the estate to the spouse (para. (2)). At the same time, a conflict between the two paragraphs was avoided by the provision that where the deceased

c) The principle of representation is suspended where the deceased left "a spouse as well as parents or grandparents as provided in sec. 11(a), or one of these".[128]

The section's provisions have been given two different interpretations. The first that in such a case the brothers and sisters of the deceased will not succeed to the share of their parents, nor will the uncles and aunts of the deceased take the place of the grandparents where the latter have died before the deceased. The share of the deceased parent will go to the surviving parent, whereas the share of the deceased grandparent will go to the surviving grandparents.[129] The second interpretation is that the suspension of the principle of representation is limited only to the determination of the spouse's share. Conflict between the sub-sections of sec. 11 is thereby avoided, so that in any case there is no need for the *Finkelstein* rule. On the other hand, the remainder of the estate (after deduction of the spouse's share) will be divided between the heirs on intestacy under the principle of representation.[130] Under both interpretations, the share of the more distant relative does not go to the spouse; rather, that relative receives his share, or the share is transferred to the relative preceding him (from a "gradualistic" point of view) in the parentela.

d) The descendents of the brothers and sisters of the deceased have been restored as heirs competing with the spouse – a group from which they were excluded by Amendment No. 4 to the Succession Law[131] – and they have even been advanced to that alternative in which the deceased's brothers and sisters are themselves to be found.

As a result of this amendment, all the potential heirs who are likely to compete with the spouse at any one time have been gathered in a single alternative in sub-sec. 11(a). Thus the necessity which produced the *Finkelstein* ruling has been removed. The relatively complex system of

leaves children of both categories, or their descendants, the provision of para. 2 should apply and the spouse would inherit only one-quarter of the estate. For an analysis of this provision and criticism thereof, see Maoz and Rosen-Zvi, *supra* n. 79, at 43–44.

128 Sec. 14(a).

129 This outcome does not entirely follow from the wording of the amendment. At the same time, this is a possible result thereof. See Rosen-Zvi and Maoz, *supra* n. 20, at 467–470. For criticism of this provision, see *ibid.*, at 470–473.

130 See M. Shava, "Brother's Right to Inherit with a Spouse and a Parent of the Deceased" (1987) 37 *HaPraklit* 486.

131 See *supra*, text to nn. 17 and 120.

division in *Finkelstein* has been replaced by a simple and clear single-stage system.[132]

VI. *The Reputed Spouse*

Sec. 55 of the Succession Law provides as follows:

> Where a man and woman though not being married to one another, have lived together as husband and wife in a common household, then, upon the death of one of them, neither being then married to another person, the deceased is deemed, subject to any contrary direction expressed or implied in the will of the deceased, to have bequeathed to the survivor what the survivor would have inherited on intestacy if they had been married to one another.

Behind the fictitious notion of a "quasi-will" created by this section and beyond the intellectual effort to refrain from "calling a spade a spade", the section does no more than confirm once again the institution of "the reputed spouse" which has become rooted in the legislation and case law of Israel.[133]

Similarly, sec. 57(c) of the same Law provides:

> Where a man and woman, though not being married to one another, have lived together as husband and wife in a common household, then, upon the death of one of them, neither being then married to

132 For discussion of the possibility that the *Finkelstein* case (*supra* n. 121) has not at all been superseded by the amendment to the Law, see Rosen-Zvi and Maoz, *supra* n. 20, at 480–481.

133 *Cf. Nassis* v. *Juster* (1970) 24(i) *P.D.* 617, at 621; Shilo, *supra* n. 4, at 57. For an analysis of the institution of reputed spouses in Israeli law see: E. Malchi, "'The Quasi-Wife': On the Status of Reputed Wife in General and Israeli Law" (1957) 13 *HaPraklit* 234; H.M. Basok, "An Institution Competing with that of the Family" (1957) 2 *Gevilin* 30; Y.S. Ben-Meir, "The Reputed Wife, in Legislation and Case Law" (1965) 20 *Gevilin* 19; P. Farber (ed.), *The Reputed Wife* (Tel-Aviv, 1965, in Hebrew); M. Elon, *Religious Legislation in the Laws of the State of Israel and the Adjudication of the Civil and Rabbinical Courts* (Tel-Aviv, 1968, in Hebrew) 119 *et seq.*; D. Friedmann, "The 'Unmarried Wife' in Israeli Law" (1972) 2 Israel Yrbk. Human Rights 287; A. Maza, "Common Knowledge and the Common Law Wife" (1972) 2 *Iyunei Mishpat* 230; M. Shava, "The 'Unmarried Wife'" (1973) 3 *Iyunei Mishpat* 484; H.P. Shelah, "The Reputed Spouse" (1975) 6 *Mishpatim* 119; P. Shifman, "Marriage and Cohabitation in Israeli Law" (1981) 16 Is. L.R. 439; M. Shava, "The Property Rights of Spouses Cohabiting without Marriage in Israel – a Comparative Commentary" (1983) 13 Ga. J. Int'l & Comp. L. 465.

another person, the survivor is entitled to maintenance out of the estate as if they had been married to each other.

It is apparent that, with regard to intestate succession and maintenance out of the estate, the legislator has sought to confer absolute equality of rights on couples reputed to be married and on those who actually are married. The above legislative provisions deviate from the usual legislation in this field, the main provisions of which consist in granting social rights to those who live as husband and wife without having undergone a ceremony of marriage. The provisions of the Succession Law, especially that which grants rights of succession to the reputed spouse as if he were a real spouse, go even further than this in conferring substantive rights which are normally derived only from the legal status of marriage.[134] This is an exceptional provision even in relation to the usual practice in the world at large in this field, certainly in relation to the statutes which were in force in 1965.[135]

134 See Shava's article in *Iyunei Mishpat, ibid.*, at 120–128; and in Ga. J. Int'l & Comp. L., *ibid.*, at 469.

135 See E.O. Pfaff, "Death is Not the Great Equalizer: Division of Non-marital Property" (1980) 14 U.S.F.L.R. 157, at 159–161; C.S. Bruch, "Non-marital Cohabitation in the Common Law Countries: A Study in Judicial Legislative Interaction" (1981) 29 Am. J. Comp. L. 217, at 229–232.

The Yugoslavian Federal Supreme Court, in a directive from March 1954, expressly provided that unmarried cohabiting parties have no rights of inheritance: P. Sarcevic, "Cohabitation without Marriage: The Yugoslavian Experience" (1981) 29 Am. J. Comp. L. 315, at 319.

On the other hand, in a number of countries the right of the reputed spouse to claim provision out of the estate is recognized, whether explicitly (see Ontario: Succession Law Reform Act, 1975, sec. 64(b), 65(1)) or as a dependant of the deceased at the time of the latter's death. See for United Kingdom: Inheritance (Provision for Family and Dependants) Act, 1975, sec. 1(1)(c) and (3), *cf. Malon* v. *Harrison* (1979) 1 W.L.R. 1353; C.E. Cadwallader, "A Mistresses' Charter?" (1980) Conv. 46; M.D.A. Freeman & C.M. Lyon, *Cohabitation without Marriage* (Alderslont, Hants, 1983) 79–83.

Similar legislation has been introduced in the Commonwealth. See for Australia: *New South Wales*: Family Provisions Act, 1982, sec. 6(1)(a)(II)(III); *Queensland*: Succession Act, 1981, sec. 40–41; *South Australia*: Inheritance (Family and Dependants Provision) Act, 1972, sec. 4(2); *Western Australia*: Inheritance (Family and Dependants Provision Act, 1972, sec. 7(1)(F). *Cf.* Tasmania Law Reform Commission, *Report on Obligations Arising from de facto Relationship* (1977).

In New Zealand, the reputed spouse cannot claim maintenance out of the estate for himself, but in a claim of a child born out of wedlock, the needs of his mother may also be taken into consideration. See Vaver, "The Legal Effects of *de facto* Relationship" (1976) New Zealand Recent Law (N.S.) 161.

The rights of reputed spouses protected in the event of death may well include ancillary rights, such as the right to homestead in various states of the United States. See G. Douthwaite, *Unmarried Couples and the Law* (Indianapolis, Indiana, 1979) 48–49.

This provision induced one writer to suggest that "the reputed wife has acquired some of the most conspicuous attributes of status".[136]

It should be nevertheless emphasized that wherever the Succession Law resorts to the term "spouse" as such, this term does not include the reputed spouse. Not only is this conclusion in accordance with the customary attitude in case law of the Supreme Court, whereby, in the absence of an explicit definition in the Law of the term "spouse", this term covers only "a spouse who is married to the other spouse",[137] but it also follows of

On the right to extension of a contract of lease in Sweden, see A. Agell, "The Swedish Legislation on Marriage and Cohabitation: A Journey without a Destination" (1981) 29 Am. J. Comp. L. 285, at 294. This right, granted to the spouse under a statute of 1959, was extended in 1973 so as to cover certain cases of cohabitation.

A comprehensive reform in the legal status of reputed spouses took place in 1985 in New South Wales, following the recommendations of the N.S.W. Law Reform Commission, *Report on de facto Relationships* (1983). See *De Facto* Relationships Act, 1984, *inter alia*, the Wills, Probate and Administration (*De Facto* Relationships) Amendment Act, 1984, was enacted amending the intestacy provisions of the Wills, Probate and Administration Act, 1898. The amendment granted the reputed spouse the same share to which the married spouse of the deceased is entitled by statute (sec. 61(b)(3b)), and further provided that whenever the statute refers to "husband or wife" this term should include "the *de facto* husband or *de facto* wife". The statute goes as far as to provide that where the deceased does not live with his lawful spouse in the two years prior to his death, then his reputed spouse for the same period will inherit the share granted by statute to the spouse (sec. 61b(3a)(a)). It is interesting to note that the statute provides, as a condition for recognition of the status of reputed spouses, that the two spouses should have been, at the time of the death of the deceased, "sole partner(s) in a *de facto* relationship" (sec. 32G), and this despite the fact that their status as reputed spouses is not affected if at the same time they were married to others.

A qualifying period for acquiring rights in the estate through the status of reputed spouse – such as the period of two years in the New South Wales legislation – is usual in legislation of this kind. An example which is outstanding for its rigidity is sec. 20 of the Law of Inheritance of the Sap of Kovno (Yugoslavia). The section granted rights of inheritance to one who cohabited with the deceased for 15 years. This period is shortened to five years if the couple had children in common.

136 Friedmann, *supra* n. 133, at 303–304.

137 *Levi* v. *Director of Courts* (1982) 36(iv) *P.D.* 123, at 128; see also judgment of Etzioni J. in *A.B.* v. *Attorney-General* (1968) 59 *P.M.* 270, at 274, by which the term "spouse", which appeared in sec. 3(1) of the Adoption of Children Law, 1960 (14 L.S.I. 93), is not to be applied to one who was a reputed spouse. *Cf.* remarks of Behor J. in *Steinitz* v. *Pension Fund of Members of Egged Ltd.* (1979) 33(iii) *P.D.* 556, at 558. In respect of the Spouses (Property Relations) Law, 1973, as well, the term "spouse" does not include reputed spouses: see *Cohen* v. *A.G.* (1985) 39(i) *P.D.* 673. See also Shava in Ga. J. Int'l & Comp. L., *supra* n. 133, at 468, as well as in *Iyunei Mishpat, supra* n. 133, at 510. See, on the other hand, Friedmann, *supra* n. 133, at 303–304, 314–315, and *cf. Habib* v. *Kardosh* (1966) 52 *P.M.* 213, at 216. In discussing the term "surviving spouse", in succession statutes of common law countries, Bruch writes that "the term is unlikely to be expended by judicial interpretation to include *de facto* spouses". Bruch, *supra* n. 135, at 230.

necessity from the fact that the legislator chose to explicitly treat reputed spouses as spouses in the above-mentioned sections of the Succession Law. Furthermore, it is apparent from the legal construction used by the legislator in sec. 55, i.e., that of a "quasi-will", that he did not regard the reputed spouse as a real "spouse" as the term is understood in that Law.[138]

The question-mark which hovers over the right of reputed spouses to inherit the residence in its entirety, in cases where the deceased has left brothers or sisters or their descendents or grandparents,[139] derives both from the manner in which the legislator established the right of reputed spouses and from the condition for succession to the entire share of the deceased in the residence, namely, that "immediately prior to the death of the deceased the spouse was married to him three years or more".

Does the condition of having been "married to him three years or more" – which is in addition to the requirement that "he resided with him at that time in the residence" – not automatically exclude reputed spouses from those entitled to inherit, thereby confirming succession to full rights in the residence to the married spouse exclusively? Is it possible despite the wording of sec. 11(a)(2) to realize the legislative intent as expressed by the chairman of the Constitution, Law and Justice Committee, that reputed spouses are also entitled to benefit from a right of succession in the residence within the scope of sec. 11(a)(2)?[140]

138 According to this approach, reputed spouses will not have any rights, for example, in respect of sec. 115 of the Law; see M. Shava in *Iyunei Mishpat, supra* n. 133, at 491. In other statutes, rights have been conferred on reputed spouses by means of defining the term "spouse" in the statute as including reputed spouses – for example, in sec. 1 of the Tenants' Protection Law (*supra* n. 77). It should be noted that at the time of the enactment of the Succession Law, M.K.s Nir and Kushnir proposed that a definition of the term "spouse" in sec. 11 be added, and that it include also "a person reputed to be the spouse of the deceased". The Knesset, however, preferred the existing arrangement.

139 See *supra*, chap. III(F)(3).

140 (1985) 101 *Divrei HaKnesset* 2184: "wherever 'spouse' is mentioned, the reference is also to a reputed husband or wife". As to *Divrei HaKnesset* as a source for uncovering the legislative intent, see *Savitsky* v. *Minister of Finance* (1965) 19(ii) *P.D.* 369, at 379; *Danker & Sons Ltd.* v. *Fast and Mitrani* (1976) 30(ii) *P.D.* 796, at 801; *HaMeretz Ltd.* v. *Greiev* (1973) 27(i) *P.D.* 423, at 431; *Assessing Officer* v. *Arisson* (1974) 28(i) *P.D.* 789, at 794; *Estate of Freidmann, decd.* v. *Eilat-Ashkelon Oil Pipeline Co. Ltd.* (1982) 36(ii) *P.D.* 578, at 590; *Bar Ilan* v. *Director of Land Settlement Tax* (1982) 36(iv) *P.D.* 654, at 659. And see A. Barak, "The Intention of the Legislature: Reality or Fiction?" (1985) 36 *HaPraklit* 165, at 181: "The remarks of the chairman of the Knesset committee that dealt with the Bill, who presents the Law for its second reading, where it is passed without alteration on the third reading, are, on the normative plane, to be regarded as the intention of the legislator". See also *"Isras" Israel-Rassco Ltd.* v. *Toledano* (1969) 23(i) *P.D.* 533, at 539; *Moch* v. *Assessing Officer* (1974) 28(i) *P.D.* 414,

We are inclined to answer this question in the affirmative. The provisions of sec. 11 of the Law as a whole – which deal with the order of intestate succession – also regulate, by virtue of sec. 55 of the Law, succession of reputed spouses. The latest amendment was not intended to affect this general provision, nor to exclude reputed spouses from those entitled to inherit, neither generally nor in respect of any particular share of the estate or with regard to a specific asset included therein. On the contrary, as becomes clear from the Knesset record, the legislative intent was to preserve the reputed spouses' right on intestate succession. Hence the wording chosen by the legislator should not be interpreted in a narrow, literal sense, but rather in its overall context, and within the framework which confers on reputed spouses the right of succession.[141]

There is no doubt that the purpose of sec. 55 of the Law was to place the status of reputed spouses on a par with that of duly married spouses to the maximum extent possible within the context of the right to intestate succession. This legislative intent can be realized through a broad interpretation of the term "married three years" in the last phrase of sec. 11(a)(2): this term should be interpreted, in view of sec. 55 of the Succession Law, as fulfilling the conditions required by sec. 55, which serve as a substitute for the marital status, during a period of three years.

Sec. 55 interprets, in effect, the term "spouse" with regard to intestate succession (and the same applies to sec. 57(c) with respect to the right to maintenance out of the estate) as the family life of a man and woman in a common household. This transposition also applies to the term "married" just as it applies to the term "spouse", since they are, in this context, synonymous. Any other interpretation would frustrate the legislative intent inherent in sec. 55.

This conclusion, however, leads to practical difficulties. Application of the condition of three years of marriage to a reputed spouse may prove to be problematical, in view of the nature of the institution of reputed spouses. As distinct from the institution of marriage, where marital status is conferred on spouses following an objective and clearly defined legal act, the position of reputed spouses amounts to a legal conclusion from a fac-

at 420; *Lipavski-Halifi* v. *Minister of Justice* (1973) 27(i) *P.D.* 719, at 723. *Cf.* A. Maoz, "Who is a Jew? – Much Ado About Nothing" (1977) 31 *HaPraklit* 271, at 274–275.

141 On the context as a guide to the purpose of legislation, see Barak, *supra* n. 140 at 185. And see *Alonzo* v. *Ben-Dror* (1956) 10 *P.D.* 97, at 104; *Zafran* v. *Moser* (1980) 34(iv) *P.D.* 831, at 835; *Bader* v. *Minister of Interior* (1953) 7 *P.D.* 366, at 395. See also A. Barak, "Interpretation and Adjudication: Elements of an Israeli Theory of Statutory Interpretation" (1984) 10 *Iyunei Mishpat* 467, at 486.

tual set of relations existing between spouses. The determination of the existence of such a set of relations may in itself be complex and difficult.[142] And yet, from now on it will not be sufficient for the courts merely to determine the existence of such relations. Where the deceased is survived by a reputed spouse together with one of the heirs enumerated in sec. 11(a)(2) of the Law, the court will also have to determine when those relations commenced, in order to decide whether the condition of three years, which entitles the survivor to the spouse's residence, has been fulfilled. Such a determination is by its very nature not an easy one.

The elements which must be shown to exist for the reputed spouse to have recourse to the "quasi-will" under sec. 55 of the Succession Law were specified by Berinson J. in the case of *Nassis* v. *Juster*:[143]

> There are two elements here – a matrimonial lifestyle similar to that of husband and wife, and management of a common household. The first element consists of intimate relations as between husband and wife, based on the same relationship of love, devotion and loyalty, showing that they have cast in their lot together. . . The second element is management of a common household. Not just a common household due to personal necessity, convenience, financial expediency or practical arrangement, but as a natural result of shared family life as is accepted and customary between a husband and wife bound to one another by a tie of lifelong destiny, with the woman fulfilling the role of housewife.[144]

It appears from this that sec. 55 is concerned with relations that have an element of permanency about them, as distinct from temporary, fleeting relations between a man and woman which do not amount to "a matrimonial lifestyle similar to that of husband and wife" and "managing a household together".[145]

142 See remarks of H. Cohn J. in *State of Israel* v. *Pessler* (1962) 16 *P.D.* 102, at 104. Silberg J. wrote that the definition of the "reputed wife" was "as difficult as parting the Red Sea or as impossible as squaring the circle": *Daradian* v. *Amidar* (1965) 19(iii) *P.D.* 259, at 261.

143 *Supra* n. 133, at 619.

144 In a reservation to secs. 55 and 57(c) of the Law, which was rejected, Meridor, M.K., proposed that it be expressly stated that the "common household" referred to in those sections should be that of "spouses", thus ensuring that it should not apply to other relatives, such as father and daughter or a brother and sister, conducting a common household: (1965) 42 *Divrei HaKnesset* 1004, 1008.

145 In this sense the institution of the reputed wife as spouse is similar to that of concubinage as recognized in Jewish law. "Concubine" has been defined by Prof. Falk as "a

In the *Nassis* case, Berinson J. pointed out the difficulty of proving the existence of these conditions, since "it is a matter. . . of intimate relations between a man and woman, carried out in private", with the court having to rely primarily on the surviving spouse who is an interested party.[146] The difficulty in establishing findings with regard to fulfillment of the conditions of sec. 55 becomes even more complex in view of the determination of D. Levin J., whereby "one should not lay down strict, objective criteria as to the expression 'who have lived together as husband and wife', appearing in sec. 55, or as to the expression 'a common household' in that same section". He goes on to say:

> When examining the relationship between such non-married spouses, and its implications, such examination ought to be based on subjective criteria, in other words, how did the spouses, the man and

woman living permanently with one man without being lawfully married to him": *Encyclopaedia Biblica* (Jerusalem, 1971, in Hebrew) vol. 6, p. 456. Indeed, Nachmonides (*Ramban*), held that "if an unmarried man cohabits with an unmarried woman, with the intention of concubinage, i.e., that she should be devoted to one man, then this is permitted": *Reservation to the Book of Commands,* Root E. Such a concubine differs from a "*kedesha*", i.e., a woman with whom the relationship is one of prostitution: Code of Maimonides, *Book of Women, Laws Concerning Marriage,* 1, 4. *Ra'abad,* whose opinion is the same as that of Nachmonides, defined a concubine by using the word in a way that contains the two elements which the Supreme Court attributed to the reputed spouse: "linguists explain the word '*pilegesh*' (concubine) as a word which is made up of two parts, the second of which is reversed – '*pi-shagal*', which means that she is sometimes available for carnal knowledge, ('*shegal*'), but also to serve the household": Reservation to Maimonides, *Laws Concerning Marriage,* 1, 4. Indeed, following a comprehensive study of the question of concubinage, Dr. Ellinson asserts that "the halakhic status of concubinage can be conferred on the relationship of 'the reputed wife'": G. Ellinson, *Non-Halakhic Marriage = A Study of the Rabbinic Sources* (Tel Aviv, 1975, in Hebrew) 96. Kister J. compares the concubine with the reputed wife in *Zemulun* v. *Minister of the Interior* (1966) 20(iv) *P.D.* 645, at 660. Etzioni J. has reservations about this comparison in *Rosenberg* v. *Shtesl* (1975) 29(i) *P.D.* 505, at 510, although he accepts Kister J.'s definition of the reputed wife, which is drawn, *inter alia,* from the content of concubinage. Berinson J. also dissents from this comparison, and distinguishes between the reputed wife and concubinage. See the *Nassis* case, *supra* n. 133, at 619. It would seem that these are reservations with regard to the popular concept of concubinage, which identifies it with prostitution, not with regard to the halakhic concept thereof. For differing views as to permitting concubinage, see *Otzar Haposkin* on *Shulhan Arukh, Even Ha'ezer,* 26, 1.

146 *Supra* n. 133, at 621. On the difficulties of proving the relationship of reputed spouses in other legal systems see: J. Eekelaar, *Family Law and Social Policy* (London, 1978) 254–255; R. Deech, "A Case Against Legal Recognition of Cohabitation" in *Marriage & Cohabitation in Contemporary Societies,* J.M. Eekelaar & S.N. Katz, eds. (Toronto, 1980) 300.

> woman concerned, view the relationship between them: can it be said that the deceased regarded the woman as his heir after his death?[147]

Any attempt to establish the intention of the deceased in this regard will obviously meet with formidable evidentiary difficulties.[148] This is even more the case with regard to determination of the exact moment at which the said relationship began or when the relationship changed its nature from mere common dwelling to relations of reputed spouses.[149] Such a determination is necessary in order to apply to a man or woman who come within sec. 55 the limitation concerning the residence.

The unique legal situation that has developed raises a host of interesting possibilities. What is the rule where a man and woman, in respect of whom the conditions specified in sec. 55 are fulfilled for a period of three years, marry one another, but at the time of the death of one of them, three years have not elapsed since their marriage? And what if the two of them were married for three years or more and were subsequently divorced but continued to live together, for less than three years, until the death of one of them, in such a way that the conditions of sec. 55 were fulfilled? Are the two periods, in each of these cases, cumulative or is each period reckoned separately? *Prima facie,* the provisions of the Law are not literally complied with in either of these situations.[150] In the first case, the survivor was not married to the deceased for three years. On the other hand, he cannot be regarded as the reputed spouse of the deceased, within sec. 55 of the Law, since he and the deceased do not meet the condition "though not being married".[151] In the second case, the couple were not married on the day of

147 *A.G.* v. *Shukran* (1985) 39(ii) *P.D.* 690, at 693–694.

148 Klinghoffer, M.K., urged that sec. 55 of the Law include a requirement that the relationship of reputed spouses should have been a continuous one for at least two years before the death of the deceased, so as to prevent "provisional and transient, perhaps even involuntary, relations between non-married persons turning into a marital relationship for purposes of the Succession Law". (1965) 42 *Divrei HaKnesset* 1011–1012.

149 *Cf.* remarks of Kister J. in *Birnbaum* v. *Levine* (1973) 27(i) *P.D.* 645, at 648.

150 For this reason, Prof. M. Shava, *supra* n. 79, at 402, is of the opinion that in such a case the condition entitling the surviving spouse to the inheritance is not fulfilled, in spite of the fact that even in his opinion this is an "undesirable" situation (*ibid.*, at 401). His remarks are directed to the Bill under which the duration of the marriage settled the fate of the whole inheritance where the deceased's spouse had to compete with grandparents or with brothers or sisters or their descendants. Our view, as we will show below, is different. We think that one can indeed reach a satisfactory interpretation of the provision.

151 The surviving partner will not discharge his duty by relying on the period in the past, during which he was the reputed spouse of the deceased prior to their marriage, even if that period lasted for more than 3 years. The condition that "at the time of the death"

the death, nor did they fulfil the conditions of sec. 55 for the requisite period of three years.

Can we say that the time periods ought to be cumulative so that in each of the two situations the spouse, or the surviving party, would be entitled to inherit the apartment if he fulfils the remaining conditions of sec. 11(a)(2)? This question must be addressed with reference to those principles of interpretation which conform to the legislative intent underlying the relevant statutory provisions. If the interpretation we have put forward is accepted, then, in this context, reputed spouses will be on an equal footing with properly married spouses. If this is so, then it would appear that the parties, in each of the periods concerned, have complied with the requisite conditions for inheriting the residence, in terms of the nature of the relations between them. The marriage in the first case, as well as the situation of reputed spouses in the second, do not, from the point of view of the relationship between the parties, affect the legal outcome. Legal logic would thus seem to require that the periods be combined so as to afford the survivor the right to the residence, in each of the two cases described above. And yet a distinction between the two cases is called for.

As for the reputed spouses who subsequently married, it is inconceivable that their right to inherit should deteriorate as compared with the situation they were in when they were mere reputed spouses. Were it not for the fact that they had married, the residence would have passed in its entirety by succession to the survivor. This, because for purposes of the laws of succession they are regarded as if "they had been married to each other". Is it conceivable that due to the fact that they have actually become married their position should worsen? This is an absurd result that any worthy interpretation must avoid.

With regard to the other case, where married spouses have become reputed spouses after being divorced, it might also be argued that the change of status ought not to affect the legal outcome. The new situation in which the parties find themselves as reputed spouses entitles them to the same right they had previously when married to one another. Why then should a formal change have the power to reverse a legal result, when the law attributes to the new situation precisely the same result as it does to

of the deceased, neither of them was married to another person has been construed in the case law as applying to the whole of their relationship. In Kister J.'s words: "In order that a person receive a share of the inheritance under sec. 55 of the Succession Law, what is required is the existence of family life in a common household immediately prior to the death of the deceased and even a connection with family life that existed in the past is not sufficient for this purpose". *Supra* n. 149, at 649.

the previous situation? The essence of this argument is that as long as each relationship is, in terms of its nature, sufficient to afford the right to inherit the residence in its entirety – any combination of uninterrupted periods of different relationships that add up to the minimum period specified in one of the alternatives in sec. 11(a)(2) fulfils the condition required by that alternative, even if with regard to neither of the sets of relationships *separately* has the said minimum period been completed.

However, a significant factor distinguishes this case from the previous one. It is not just a matter of reverse order of relationships – the difference between the two cases is more fundamental than that. Reputed spouses who marry one another thereby strengthen the bonds between them and advance their status from that of being similar to spouses to that of being actual spouses, without there having been a break in the two sets of relationships between them. However, where married spouses are divorced, it is questionable whether the act of divorce should not be regarded as severing the period of their marriage from the later period, even though they continued to live together as reputed spouses without any real interruption. The divorce can be regarded as an act which seals off the previous period, and does not allow it to be added to the subsequent period.

The problems relating to reputed spouses originate in the sensitivities of the legislator, expressed both in the evasive form in which sec. 55 itself was drafted and in the fact that there is no explicit reference to reputed spouses in the amendment dealing with the rights of the spouses in the residence in the case specified in sec. 11(a)(3) of the amended Law. In view of the prevalence of the institution of reputed spouses,[152] we have no doubt that the problems we have dealt with above will arise in the courts before long.

VII. *The Principle of the "Falling-In" of the Inheritance and the Heir's Right of Renunciation*

Sec. 1 of the Succession law states: "Upon the death of a person his estate passes to his heirs".[153] This section embodies the principle of "universal

152 *Cf.* Shava, in Ga. J. Int'l & Comp. L., *supra* n. 133, at 467. See generally, P. Festy, "Aspects demographiques de la formation de la famille en europe occidentale" in *Marriage and Cohabitation in Contemporary Societies, supra* n. 146, at 6–8; A. Skolnick, "The Social Contents of Cohabitation" (1981) 29 Am. J. Comp. L. 339, at 340–344; N.S.W. Law Reform Commission, *Report on de facto Relationships* (1983) 41 *et seq.*, 97–98.

153 Sec. 3 of the Law provides that such people include "Anyone who was living at the time

succession". The significance of this principle – known also as the principle of automatic "falling-in" of the inheritance – is that "[o]n the death of a person, his or her entire property passes immediately and automatically to his or her heirs".[154]

From a legal point of view, this system provides for no intermediate period between the death of a person and the transfer of his estate to those who inherit him on intestacy or by will, and in principle they are responsible for the liquidation of the estate and settlement of its debts.[155]

This system, common in the Continental countries,[156] differs radically from the system of administration of the estate under English law. In England, the estate passes to the deceased's personal representative, the executor, who is appointed either under the deceased's will or by the court, and whose function is to receive the assets of the estate, attend to them, settle the deceased's debts and divide the remainder among the heirs.[157]

In a system of automatic succession, like ours, "the succession order is... declarative, and its absence... does not impair [the right of the heir]".[158]

Nevertheless, most systems that have adopted the principle of automatic succession allow the heirs, to some extent or other, to renounce their share in the estate.[159]

Israeli law is extremely liberal in allowing the heirs to renounce their share in the estate. This right is granted to them "so long as the estate has not been distributed", and it applies to "the whole or part" of their share in the estate. Moreover, the heir may renounce his share in the estate by general renunciation or he can do so in favour of one of three categories

when the deceased died", as well as "A person who was born within 300 days after the death of the deceased".

154 See Cohn, *supra* n. 13, at 257.

155 This is the institution of "Saisine" known to French law. See F.H. Lawson & A.E. Anton, *Amos and Walton's Introduction to French Law* (3rd ed., 1966) 305; Cohn, *supra* n. 13, at 257–258; *Cf.* Muller-Freienfels, *supra* n. 10, at 443–444. And see Chap. Six of the Succession Law. See, extensively, Silberg, *supra* n. 108, at 269–284.

156 See sec. 1922 of the BGB and the sources mentioned in n. 155 *supra*.

157 See Miller, *supra* n. 14, at 71 *et seq.* Other legal systems adopt intermediate methods between the two approaches. Thus, for example, there are states of the United States in which the principle of automatic succession applies to land but not to movables; see Rheinstein & Glendon, *supra* n. 23, at 482 *et seq.*

158 *Feig* v. *Spitzkofetz* (1973) 27(i) *P.D.* 355, at 388; see also *Director of Estate Duty* v. *Gottlieb* (1955) 9 *P.D.* 347; *Wolfsohn* v. *Ramigolski* (1956) 10 *P.D.* 1020, at 1024; *Biederman* v. *Superintendent of Land Registration* (1971) 25(ii) *P.D.* 204; *Chai* v. *Cohen* (1971) 25(ii) *P.D.* 339, at 346.

159 See Muller-Freienfels, *supra* n. 10, at 444; BGB, sec. 1945.

of relatives – the spouse, the children or the brothers and sisters of the deceased.[160]

The consequences of a general renunciation of the inheritance have gone through a number of changes.

Under the Succession Bill of 1952, the principle of representation was applied in such a case, so that the children of a renouncing heir would take his share.[161]

The Government-sponsored Bill of 1958 altered this provision, and proposed instead that the renouncing heir should be regarded as not being included among the heirs *ab initio,* his share being divided among the other heirs according to their shares in the inheritance.[162] The Law, as eventually passed, provided that the principle of representation should apply both to an heir who makes a general renunciation and to one who is disqualified from inheriting,[163] so that their children will inherit in their stead.[164]

The legislator has altered the consequences of general renunciation – i.e., not in favour of one of a list of beneficiaries in whose favour renunciation of an inheritance is possible. Sec. 15, as amended, provides that the share of such a renouncing heir reverts to the estate and "is added to the shares of the remaining heirs". The legislator thus reverted to the original draft of the Succession Law as placed on the table of the Knesset.[165]

The said amendment brings the legal consequences of renunciation of intestate succession into line with those of renunciation by a beneficiary under a will of his share of the estate. Sec. 50 of the Law provides that where a beneficiary under a will renounces his share otherwise than in favour of a beneficiary in whose favour the Law allows for renunciation then "the testamentary provision in favour [of such person] becomes void".[166]

160 Sec. 6 of the Succession Law.

161 Sec. 15 of the Bill. This arrangement was laid down in the wake of that provided for in the legal systems of various continental countries such as Switzerland, Germany, Italy, Sweden and Greece, and even England, and in contrast to the provision in French law. See explanatory note to sec. 15, *ibid.*

162 Sec. 21 of the Bill.

163 The list of those who are incapable of succeeding is specified in sec. 5 of the Law, and includes a person who has been convicted of intentionally causing or attempting to cause the death of the deceased, unless the deceased forgave him this "in writing or by the making of a will in his favour"; as well as a person who has been convicted of concealing, destroying or forging a will, or of claiming under a forged will.

164 Sec. 14, last part, of the original Law.

165 See *supra* n. 162, and see (1984) 98 *Divrei HaKnesset* 741 and explanatory note to sec. 6(b) of the 1983 Bill (*H.H.* no. 1653, p. 90).

166 This also applies to a beneficiary under a will who is found disqualified from inheriting. Sec. 41 enables a testator to "make a bequest to two persons to the effect that the

The principle that a renouncing heir is considered as not having been an heir *ab initio* has thus been preserved. The amendment whereby the share of an heir who makes a general renunciation reverts to the estate and is divided among the other heirs in equal proportion to their shares in the estate even serves as a basis *a priori* for this principle. The amendment with regard to general renunciation had the effect of harmonizing sec. 6(b) and sec. 14 of the Law, inasmuch as previously the share of the renouncing heir went to *his* heirs, whereas henceforth, following the amendment, he has, as it were, been entirely deleted from the list of heirs.[167]

The question of the legal classification of renunciation – general renunciation and, in particular, renunciation in favour of a certain person – has much occupied the attention of scholars and the courts.[168] Renunciation is not an act of assignment.[169] It amounts to an unilateral act on the part of the person renouncing, and "the person in whose favour the renunciation was effected will obtain his right as the result of the waiver but not from the person who made it. Indeed he will obtain it directly from the deceased and will acquire it upon the latter's death".[170] The possibility of renunciation in favour of a particular person together with the rule as to expiration of the renouncing heir's right of succession retroactively as if he "never had been an heir",[171] create a theoretical difficulty. How can a

second shall take if the first does not". In such a case the second beneficiary takes the place of the one who has been found disqualified to succeed or who has renounced in a general way his share of the estate.

167 On renunciation before the law was amended, see E. Wolf, "Renunciation by an Heir of his Share in the Estate" (1974) 5 *Mishpatim* 466.

168 On the legal position prior to the enactment of the Succession Law, see P.H. Strauss, *Laws of Succession in Israel* (Tel Aviv, 1970, in Hebrew) 33; Silberg, *supra* n. 131, at 281 *et seq.*; G. Tedeschi, "Heir's Renunciation and Representation" (1981) 34 *HaPraklit* 5; P.S. Perles, "Notes on the Succession Law, 1965 (Sections 6 & 7)" (1967) 23 *HaPraklit* 258, at 259; Wolf, *supra* n. 167. See also the following cases: *Berniker* v *Burstein* (1951) 5 *P.D.* 306; *Gutwether* v. *Friedman* (1953) 7 *P.D.* 746; *Director of Estate Duty* v. *Gottlieb, supra* n. 158; *Chai* v. *Cohen, supra* n. 158; *Director of Estate* v. *Dickermann* (1958) 12 *P.D.* 869.

169 The assignment is regulated by sec. 7 of the Succession Law. On the difference between renunciation and assignment, see *Dekalo* v. *Munitz* (1975) 29(i) *P.D.* 464; *Munitz* v. *Dekalo* (1976) 30(i) *P.D.* 242; see also *Schlechter* v. *Harash* (1970) 24(ii) *P.D.* 138. See also remarks of M.K. Una, (1965) 42 *Divrei HaKnesset* 961.

170 Tedeschi, *supra* n. 168, at 9. On the view that the inheritance of the beneficiary derives directly from the deceased, see also Silberg, *supra* n. 108, at 283. Despite the fact that Silberg deals there with the legal position prior to the Succession Law, his remarks can be referred to since they are based on the immediate "falling in" of the inheritance, a principle which is also a basis of the Succession Law. See also the *Gutwether* rule, *supra* n. 168, at 752.

171 To use the terminology of sec. 6(b) of the Succession Law.

person who has ceased retroactively to have a right of succession determine who is entitled to share in the deceased's inheritance?[172] The answer to this difficulty is that the renouncing heir became an heir upon the death of the deceased by virtue of the principle of immediate "falling-in" of the inheritance, as specified in sec. 1 of the Law.[173] The legal act of renunciation removes the renouncing heir retroactively from the circle of heirs, for most purposes connected with the Succession Law, but it cannot have the power to erase the fact that there was an interim period during which he was regarded as an heir. During that period the law invested him with certain powers, by exercising which he managed to alter certain defined legal rights. The Law itself uses careful language in providing that he "*is deemed* never to have been an heir".[174]

The legislator has created a fictitious assumption which carries with it a train of legal consequences that retroactively oust the renouncing heir from the circle of heirs. This fictitious assumption does not however, impair the renouncing heir's powers in respect of the said interim period. His ability to determine who is entitled to the share which he has renounced is among these powers. It is doubtful whether one can make a preliminary classification of renunciation or fit it into a recognized legal transaction. Renunciation is an institution unique to our laws of succession, though it is alike in certain of its characteristics to similar institutions in other legal spheres or even in the sphere of the laws of succession.[175] Whatever the precise classification of renunciation, one of its features is that it confers on the renouncing heir the power to determine one or more out of a number of possible beneficiaries who will receive his share of the inheritance. This power remains effectual in spite of the fact that immediately after making such choice the renouncing heir will be regarded as never

172 And indeed, before the Succession Law expressly provided for renunciation of an inheritance in favour of specific beneficiaries rather than merely renunciation in general terms, the case law had held that renunciation of part of the estate in favour of another person amounts to an assignment and not an act of renunciation which excludes the person renouncing from the list of heirs retroactively; see the *Gottlieb* rule, *supra* n. 158, at 350, 357; see also *Zik* v. *State of Israel* (1978) 32(i) *P.D.* 662, at 665.

173 See Tedeschi, *supra* n. 168, at 10; see also Silberg, *supra* n. 108, at 283.

174 Sec. 6(b) of the Succession Law (emphasis added).,

175 In the words of Prof. Tedeschi *supra* n. 168, at 8: "That does not mean that we have to discount . . . the possibility that the Israeli legislator has added a dimension of his own to legal phenomenology, which legal theory has to take into consideration and find the right definition".

having been an heir *ab initio*. This is not a regular legal transaction, and the search for its legal classification has no effect on the content thereof.[176]

VIII. *Critical Remarks*

> When a man dies without a will the law should try to provide so far as possible for the distribution of his estate in a manner he would most likely have given effect to himself if he had made a will.[177]

And indeed under a legal system such as ours, which advocates full testamentary freedom – with the exception of the right of the deceased's relatives of the first degree (spouse, children and parents) to maintenance out of the estate, and with the exception of a limited right of residence – the

176 The power given to an heir to renounce his share of the estate raises an interesting question: does the beneficiary in whose favour the renunciation is made take the place of the renouncing heir in the table of heirs competing with the spouse over the estate, or does the beneficiary take his place in the appropriate alternative within sec. 11(a) as if he were an heir *ab initio*? This possibility is, *prima facie*, feasible in view of the fact that once the renunciation has been effected, the renouncing heir is regarded "never to have been an heir" and the share of the beneficiary comes to him, so to say, directly from the deceased. If this is indeed the outcome, then a conflict may develop anew between the various alternatives of sec. 11(a) of the Law, as for example, where one of the parents inheriting their son renounces in favour of the deceased's brother. In such a case the need would arise to settle the conflict in a way similar to that laid down in the *Finkelstein* case, *supra* n. 121, whereas, and in order to obviate such a need, Amendment No. 7 of the Succession Law was enacted. We consider such a conflict to be neither inevitable nor even likely. Renunciation in favour of another person concerns the defined share of the renouncing heir in the estate, in its entirety or in part. We consider that a person becoming an heir by virtue of renunciation, i.e., by virtue of the renouncing heir's exercising his right of choice, does not inherit in his own right but rather by virtue of the choice made by the renouncing heir. This choice relates, in the words of the Law, to the "share" of the renouncing heir, not to the independent share of the beneficiary as if he were an heir *ab initio*. The fact that from a legal point of view the renouncing heir is considered not to have been an heir *ab initio* does not necessarily mean that one who becomes an heir by virtue of renunciation becomes an independent heir who stands, in his own right, in his appropriate alternative.

The fictitious assumption laid down in the Law, whereby the renouncing heir is to be "deemed never to have been an heir", operates on the fundamental level of the consequences of renunciation in respect of the renouncing heir and as regards the rights and obligations of the beneficiary in the estate. It does not create an additional source for granting succession, nor does it replace the intestacy provisions; *cf.* Tedeschi, *supra* n. 168, at 9. We therefore consider that the heir, by virtue of the choice made by a renouncing heir, should fall into that category under sec. 11(a) to which the renouncing heir belonged. See also Rosen-Zvi and Maoz, *supra* n. 20, at 477–481.

177 D.H. Parry, *The Law of Succession Testate and Intestate* (London, 2nd ed., 1947) 158.

intestate succession regime ought to be such as is appropriate for the widest common denominator among the population.[178]

Under such a system the dispositive provisions of intestate succession constitute a quasi-will, which, it may be assumed, is appropriate to the wishes of "the reasonable testator".[179]

It is not merely that there is no point or logic in providing a dispositive arrangement which would cause most people to avoid it by making a will. In the State of Israel, where there is no tradition of will-making,[180] and where it is doubtful whether most people are aware of the provisions of the Succession Law, such an arrangement would also be in the nature of an obstacle in the path of the unwary.

Intestate succession arrangements should be just and appropriate in the view of the majority of the population, whereas the remaining minority have the option of making a will.

It appears to us that if we take this as our starting point in examining the provisions of the Succession Law of 1965, we shall find that these are generally in line with this recommended approach. The Succession Bill was formulated after careful study of the prevailing rules of succession and profound consideration was devoted to their implications. The commentary on the government Bill of 1952 indicates that the proponents thereof were

178 See, for England, *Committee on the Laws of Intestate Succession,* Cmnd. No. 8310 (1957) 3–7. In drawing up its recommendations for intestacy, the Committee examined a selection of wills so as to learn from them the most desirable arrangement for deceased persons who did not trouble to write out a will. Prof. Dunham writes: "This is a unique area in which quantitative research based on experience can be useful in the legislative process": A. Dunham, "The Method, Process and Frequency of Wealth Transmission at Death" (1962–63) 20 Ch.U.L.R. 141.

179 "This rule we must hold by; that when there are no more express indications of will, it must be supposed that every one intended, with respect to his own succession, that which the law or custom of the people directs": Hugonis Grotti, *De Jure Belli et Pacis,* Vol. 1 (Cambridge, 1853) 369–370. *Cf.* A.R. Mellows, *The Law of Succession* (London, 1970) 217.

Similar logic guided the legislator in enacting the Spouses (Property Relations) Law, 1973, sec. 3(a) of which provides: "Where the spouses have not made a property agreement or, where they have made such an agreement, in so far as it does not otherwise provide, they shall be regarded as having agreed to a resources-balancing arrangement in accordance with this chapter . . .". The same applies to the rules regulating co-operative houses, under the provisions of sec. 64 of the Land Law, 1969.

180 Unlike percentages of those making wills in countries that have such a tradition. Thus, only 8–9% of all succession files dealt with by the Probate court of New South Wales are cases of intestacy. In the remaining 91–92% of cases, wills exist. See N.S.W. Law Reform Commission, *Report on de facto Relationships* (1983) 237–238, n. 1; *Cf.* N.S.W. Law Reform Commission, *Working Papers on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974) 164.

guided by broad considerations of appropriate policy and the goals which the Law ought to advance. The Bill was translated into English and served as a basis for discussions between the heads of the legal profession in Israel and prominent experts in the United States.[181] In its wake, the government Bill of 1958 was drawn up. The statute that was finally passed meets, in the main, the requirements of an enlightened and progressive society and strikes a proper balance between testamentary freedom and protection of the interests of the next of kin of the deceased, as well as a balance between the rights of his spouse and those of his blood relations. In several matters the Succession Law laid down provisions that anticipated by many years similar legislation in enlightened countries abroad.[182]

The amendments introduced into the Law after its enactment have also proceeded in the same direction. They have strengthened and broadened the protection of the nuclear family which has been developed in the world at large, while providing a suitable response to the local problems which have arisen in the wake of various events in Israel.

We find it difficult to heap similar praise upon the latest amendment of the Succession Law, that of 1985. True, this amendment too was presented as extending the protection of the spouse in a spirit similar to that which found expression in previous amendments.[183] However, essentially it was not this factor that lay at the basis of the latest amendment to the Law.

The commentary on the Bill made no secret of the fact that the complication introduced by the *Finkelstein* ruling and the two-tier system of distribution derived therefrom spurred the proposed amendment.[184]

We share the aspiration, expressed by the Minister of Justice, that legislation be worded "in a lucid manner", though we have reservations as to the argument that the laws of succession in particular "must be clear and simple even to those without a legal education".[185]

181 See J. Laufer, "Conference on Proposed Israeli Succession Law" (1953) 2 Am. J. Comp. L. 136. See also *supra* n. 2.

182 For example, the provision of sec. 63 as to reconsideration of *inter vivos* transactions effected by the deceased, so as to allow satisfaction of the right to maintenance out of the estate; see *supra*, text at nn. 97–98. Only in 1975 was a parallel provision enacted in English law; see Inheritance (Provision for Family and Dependants) Act, 1975, sec. 10. See *supra* n. 99.

183 See explanatory note to Amendment Bill of 1983, *supra* n. 165, at 93. See also *supra*, text at n. 20, and sec. 11(a)(3), last para., of the Law. See also *supra* n. 20.

184 *H.H.*, *supra* n. 165, at 91.

185 Shilo, *supra* n. 4, at 52.

Despite our support for the effort to simplify the law, we do not consider this to be the primary aim. This aspiration, legitimate though it is, cannot come at the expense of other important considerations, the chief one being the principle of doing justice. It seems to us that this is indeed the price which the legislator has paid, in the most recent amendment of the Succession Law, in exchange for relative clarity of the statutory language.

We have already noted that in this amendment too the legislator has favoured the trend, prominent in the original statute and in its previous amendments, towards supporting the spouse and fostering the core family, and we have discussed in this article the development of these two trends in various legal systems. However, the legislator chose this course only in so far as it did not affect his primary purpose of simplifying the language of the Succession Law, particularly the method of dividing the estate between the spouse and the relatives of the deceased. Whenever a contradiction arose between these trends, the latter prevailed. Thus considerations of justice and proper social policy were overriden by technical issues, largely concerning form, with fear of the complications of the *Finkelstein* rule spoiling things.

This phenomenon is apparent primarily in three matters:

a) restoration of the descendants of the heirs' brothers and sisters to the circle of those heirs who compete with the spouse over the estate;
b) abolition of the principle of representation in connection with the heads of the second and third parentelas; and
c) reduction of the spouse's share in the inheritance versus other relatives of the deceased, as compared with the situation prior to the amendment.

The restoration of the heirs belonging to the second parentela and the increase of their share of the estate when competing with the spouse to one-third, is particularly striking in view of the fact that less than a decade earlier their participation in the inheritance in such circumstances was cancelled entirely, and even before that their share did not exceed one-sixth. This sharp regression in the status of the spouse is even more striking in view of the fact that it was effected simultaneously with an enhancement of the spouse's status in this very same amendment. By conceding that in principle members of the same parentela may be treated differently with a view to benefitting the spouse as well as the core family, but at the same time granting a share in the estate to remote relatives at the expense of the

spouse, the legislator has attained contradictory results, and this merely for the sake of simplicity in working out the allocation of the estate.

This factor is prominent also in the matter of substitution of heirs. The legislator has recognized the importance of this factor, but despite this has ignored it where one of the parents or grandparents of the deceased died before him and the survivors participate in the inheritance together with the spouse.

Here too the simple solution would have been to grant the parent his share – in this case a quarter of the estate, i.e., a half of one-half – and the brother (or sister) his (or her) share as substitute for the deceased parent – one-sixth of the estate, i.e., a third of one-half. In this manner justice would have been done to all the heirs by means of a proper allocation, without abandoning any of the interests which the legislator seeks to preserve, these being: increasing the share of the spouse as compared with other remoter relatives; applying the principle of representation with regard to a deceased heir; attaining a just allocation of the estate among the heirs, in accordance with their "gradualistic" relationship to the deceased whenever they inherit together with the spouse; and fitting the overall arrangement to the conception of the nuclear family.

In the legal situation created in the wake of the amendment, the surviving parent (or, according to a different interpretation, the brother or sister) of the deceased[186] will receive the share of the deceased parent so that the share of the spouse will be significantly reduced – from 59% to 50% – as compared to the legal situation that preceded the amendment, this being explicitly contrary to the declared intent of the amendment's proponents.

A similar result existed prior to the amendment of the Law, where the deceased's parent and nephew or niece inherited him, together with his spouse, and the deceased's other parent predeceased him, leaving no children but only grandchildren. The grandchild of the deceased parent – who is the nephew or niece of the deceased – inherited the share of the deceased parent as his substitute, and the spouse took over his entire share from him. Henceforth, the deceased's spouse will be deprived even of this share, which will pass to the surviving parent or, according to another interpretation, to the nephew or niece. In this case too, following the amendment of

186 See Shava, *supra* n. 130, according to whom the principle of representation continues to apply as between the heirs but not in respect of the share of the spouse. Even given this view, our criticism remains relevant. Under his interpretation, the brother or sister would be entitled to the preferential share of the spouse, whereas under our interpretation it is the surviving parent who is entitled to that share. Both outcomes are unjustifiable.

the Law the spouse's share will be reduced as compared with what it was previously.

The heads of the third parentela will receive one-third of the inheritance where they succeed together with the spouse, whereas their descendants, who also belong to this group, will inherit nothing. If these descendants were the sole heirs together with the spouse, the entire estate would go to the spouse. Sec. 14 as amended has abrogated the principle of representation even with respect to grandparents. As a result, the share of the grandparent who dies before the deceased passes to the surviving grandparent(s). In effect, the surviving grandparents thus become substitutes for those who died before the deceased. Thus the amendment has the effect of enriching the grandparents at the expense of the spouse. Were it not for the amendment, the spouse would take the share of the deceased grandparents, whereas henceforth the surviving grandparents will inherit the share of those that have died.

The abrogation of the rule of representation prejudices both the spouse and the substitutes of the deceased parent,[187] and it has the effect of frustrating the presumed wishes both of the deceased and of the deceased heir, all for the sake of simplicity and clarity.

The departures from the general policy guiding the laws of succession with regard to succession by distant relatives in competition with the spouse, and with regard to the classification of the representation principle, not only bring about injustice but also amount to inconsistency and even complete contradiction on the part of the legislator.

Thus, for example, according to one interpretation, brothers and sisters of the deceased are excluded from the inheritance where one of the parents of the deceased predeceased him, whereas the descendants of the brothers or sisters are restored to the circle of heirs and the status of such descendants is put on a par with that of the brothers and sisters themselves. Similarly, the legislator – while seeing fit to apply the principle of substitution between spouses (namely the deceased's parents) and even between relatives by marriage (namely the deceased's grandparents) – himself abrogated such a limited form of substitution. Sec. 49 in its original form provided that the spouse and descendant of a beneficiary under a will who died before the deceased should inherit his share "in accordance with the rules of distribution applying to intestate succession". Amendment No. 7 deleted the spouse from the list of substitutes, on the ground that "this pro-

187 Under Shava's interpretation (*supra* n. 130, at 493, n. 24) the descendants of the grandparents would inherit the share. At any rate, the spouse will not be entitled to the share even in a situation where he inherits together with a more distant relative.

vision is exceptional in respect of substitutes (who are invariably descendants only)".[188]

Moreover, numerous alterations, within a relatively short period of time, in the list of intestate heirs – reflecting the swing of a pendulum rather than a consistent and uniform trend – would seem to indicate changing views within the legislative body. They indicate that the demarcation between just and unjust in the allocation of the estate in this context is not clear to the legislator, or, at any rate, does not guide him in his activity.

Experiments with prototypes of inheritance that lack a pre-determined purpose and where the language of the proposed legislation does not express worthy principles, result inevitably in frequent alterations motivated by momentary considerations in a field of law in which stability is of no small importance.[189]

Despite these remarks, we allow ourselves to propose that the Succession Law be amended once again in such a way that the *Finkelstein* rule be reinstated legislatively, devoid of the shortcomings previously attached to it.

We propose that section 11(a) of the Succession Law be replaced by the following:

(a) The spouse of the deceased takes the chattels, including a passenger car, which in the ordinary course and according to the circumstances belong to the common household, and from the remainder of the estate –

(1) where the deceased leaves children common to the deceased and the surviving spouse, or their issue, or parents – one half;

(2) where the deceased leaves children not common to the deceased and the surviving spouse, or their issue – one quarter;[190]

(3) where the deceased leaves siblings, whether alone or with descendants of siblings, or leaves grandparents – two thirds;

(4) where the deceased leaves only descendants of siblings or a relative not included in one of the above subsections – the whole.

188 Explanatory note to the Succession (Amendment No. 7) Bill, 1983 *supra* n. 165, at 93.

189 It is not surprising in view of the legislator's approach, that even before the ink was dry on Amendment No. 7 to the Succession Law, the Ministry of Justice initiated further amendments to the Law, including amendments to those introduced by Amendment No. 7; see Memorandum of Succession (Amendment No. 8) Bill, 1985.

190 The question whether there should be any difference between children common to the deceased and the surviving spouse and those not common to them, is one of legal policy, and was not dealt with in this article. This difference basically existed prior to the enactment of the last amendment to the Succession Law (Amendment No. 7 of 1985),

(a1) Where the deceased leaves heirs of a number of different types listed in paragraphs (1)–(3) of subsection (a) above, entitled to inherit, the spouse takes from the inheritance the sum total arrived at by applying the relevant paragraph, as regards each heir, to the portion that that heir would have taken absent the spouse.

In making our proposals, we are guided by the logic and justice of the *Finkelstein* rule, and by the fact that throughout all the criticism levelled against it, the rule's logic and justice as distinct from its complexity and unwieldiness have never been assailed.[191]

which abolished this difference not because of policy considerations but rather because of technical difficulties. In the proposal presented in this article, a suggestion is given how to overcome these technical difficulties. This is in keeping with our approach that matters of policy should not be overshadowed by technical considerations.

191 A further provision which deserves severe criticism is that of para. 14 of the amending Law. This section provides that the substantive provisions of the Law "shall apply also to the succession of a person who died before the publication of this Law, provided that on the day of publication a succession order had not yet been issued". This provision contradicts one of the fundamental principles of the Israeli system of succession, whereby a person disposing of his estate prior to death has the full freedom to depart from any statutory provision as to succession of which he does not approve. This principle guided the initiators of the latest amendment to the Law, too; see remarks of the Minister of Justice ((1984) 98 *Divrei HaKnesset* 740) and of the Chairman of the Constitution, Law and Justice Committee ((1985) 101 *Divrei HaKnesset* 2184). Obviously, a person who died before the amendments to the Law were passed or even proposed is deprived of this freedom, and in respect of such a person the amending provisions become binding. This outcome is particularly serious given the universal system of succession prevailing under the Succession Law. In this system, the estate passes to the heirs on the death of the deceased without it being necessary that there exist a succession order. See *supra*, text at nn. 153–158. The retroactive denial of succession rights unjustifiably prejudices the original heirs and confiscate proprietary rights duly acquired; and this, by means of retroactive legislation that is inconsistent with substantive principles of the rule of law. *Cf. Rimon* v. *Trustee of the Assets of Shpesels* (1966) 20(i) *P.D.* 401; *Director of Land Appreciation Tax* v. *Alkoni* (1985) 39(iii) *P.D.* 169, at 176. And see the guiding remarks of Chase J. in the case of *Calder* v. *Bull*, 3 Dall (U.S.) 386, at 391; 1 L.Ed. 648, at 650 (1978).

The retroactive application of the provisions of the Amendment, without any time constraint, also introduces an element of uncertainty as to assets transferred to heirs otherwise than under a succession order and which are no longer *in specie* in the hands of those heirs; moreover, it encourages the reconsideration of matters of succession which have already been settled, and the inundation of the courts with new-old disputes. For examples of the serious problems created by retroactive application of laws, see the *Levitt* and *Schwartz* cases, *supra* n. 82, and see *Glazevski* v. *A.G.* (1985) 39(ii) *P.D.* 551, at 554.

We would add that most of the above criticism is also applicable to the provision which retroactively applies the provision as to declaring a defective will to be valid (para. 4 of the 1985 Law), although this does not amount to frustration of the deceased's wishes.