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ISRAEL: INTER-FAMILY AGREEMENTS AND PARENT-CHILD RELATIONSHIPS: DEVELOPMENTS WITHIN AN ANACHRONISTIC SYSTEM

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I. INTRODUCTION

There have been few developments in the field of family law in Israel during the past year. This Article discusses two topics in which there have been slow but steady progress, typical of the situation in Israel but which, at the same time, bear some relation to trends in family law in the rest of the world. These topics are agreements between spouses and parent-children relationships. In both these fields, the special Israeli situation finds expression. Lawmakers have attempted to combine Israeli realities with developments in other countries.

II. AGREEMENTS BETWEEN SPOUSES

The Israeli legal system consists of both religious and secular law. Freedom of contract dominates the regulation of proprietary and monetary matters between spouses. This principle is common to religious and civil law. Religious law also recognizes divorce by consent. Thus the Israeli system allows, prima facie, broad freedom of maneuver in regulating matters of divorce between spouses and provides for divorce without fault in cases where the spouses consent to divorce.

However, in practice, the problem is more intricate. In particular, the Israeli situation combines new and old laws, thereby producing mixed arrangements. Unless the spouses consent to divorce, under Jewish religious law, applicable to the majority of people in Israel, the principle of fault in divorce prevails. The religious court does not give

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judgment dissolving the marriage, but merely supervises the private act of the husband who hands over a "get" (bill of divorce), which dissolves the marriage bond. Only rarely does the court compel the husband to give the get. The difficulty in obtaining divorce without consent turns the divorce proceeding into a test of strength in resisting pressures and a power struggle between the spouses.

Under the divorce system applicable to Jews in Israel, the spouse seeking to obtain freedom must acquire it by proprietary and financial concessions. Encouraging extortion is inherent in the system, and the conclusion to be drawn is "might is right." The power of coercion exercised by the court is relatively marginal. Moreover, the power of religious authority, under which there is compliance with the orders of the court even if there is no legal sanction, has become weakened in respect to the majority of those who have recourse to religious tribunals.

In Israeli society, equality of rights between the sexes is a cornerstone of the system of social values and as such is regarded as part of local public policy.[1] However, the domination of religious law in matters of divorce perpetuates discrimination against women.

A married man who begets a child by an unmarried woman, while living "in sin" from a religious point of view, is not regarded as having tainted his issue. On the other hand, a married woman who gives birth to a child by a man who is not her husband renders her issue a "mamzer." Severe restrictions are attached on the "mamzer's" ability to marry. Even in secular circles, where the majority does not regard religious norms as obligatory, the serious legal consequences that emerge from such a situation confer an advantage on the male.

The wife cannot divorce her husband, making the will of the husband and cooperation on his part essential. As a result, a lack of symmetry occurs in the grounds for obliging or compelling the delivery of a get as between husband and wife. This lack of symmetry operates to the detriment of the wife. In many cases, a sufficient ground to compel a wife to accept a get is not a sufficient ground to support a wife's claim to compel her husband to give her a get. There is a distinction between the grounds for obliging or compelling the husband to give a get and the position of the wife, *i.e.,* a husband is not obligated or com-

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[1] Steiner v. A.G., 9 P.D. 241 (C. App. 209/54 1955); Azugi v. Azugi, 33 P.D.(2) 1, 28 (C. App. 2/77 1979); Poraz v. The Mayor of Tel-Aviv, 42 P.D.(2) 309, 333 (H.C.J. 53/87 1988); Shakdiel v. The Minister for Religious Affairs, 42 P.D.(2) 221, 240-41, 275 (H.C.J. 153/87 1988).

pelled to give a get in cases of his "infidelity" towards his wife whereas "infidelity" on the part of the wife towards her husband amounts to adultery in the Halachic sense.

Nor can the wife, in contrast to the husband, obtain permission to remarry. A wife who is deserted by a husband who cannot be traced, or whose husband is suffering from a mental disease that deprives him of the ability to understand or to develop an independent will, remains an "aguna" (abandoned wife who cannot remarry). A husband in a corresponding situation may receive a permit to remarry. Moreover, the rabbinical courts tend to be liberal in coercing the wife by granting the husband a permit to remarry, as compared to the grounds for which the husband will be compelled to give a get.

Divorce proceedings, in the courts, tend to be protracted. Moreover, a power struggle surfaces between the religious and civil courts. Such features have the effect of prolonging the proceedings, leaving the weak and vulnerable party, who is more dependent economically, usually the wife, more exposed to pressure and extortion. The prolonged proceedings also confer an economic and psychological advantage on the stronger party and harm even further the party whose bargaining power is already inferior at the outset. Thus, defective proceedings, though affecting all litigants, usually cause more harm to the wife.

Negotiations are conducted under the influence of legal arrangements inherent in the system.[2] The message derived from the system, the means of defense granted to each party, as well as the extent of their vulnerability affect, *a priori*, the opening positions of the parties, their bargaining power, and their willingness to agree to terms and to pay the price for a get. When such inequality exists between the spouses, the power of the husband exceeds that of the wife. Even if provisions of the proprietary settlement or the laws of maintenance are egalitarian or even if they protect the wife, they cannot affect the outcome. In the end, the wife, by paying the price for obtaining a get, loses all the advantages she has gained by the arrangements calculated to give her equal rights. Indeed, a study of claims for divorce brought by wives shows that women are exposed more to extortion than men.[3]

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[2] Mnookin & Kornhouser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 960, 964, 967 (1979).

[3] Z.W. FALK, *Religious Law and the Modern Family in Israel* in FAMILY LAW IN ASIA AND AFRICA 235, 248-49.

In two respects, however, a partial adjustment of the balance of bargaining power takes place. In the overwhelming majority of cases the wife gains the right of custody of the children, and in Israel, as in other countries, custody has an effect on negotiations regarding finances and property. Moreover, the wife is entitled to maintenance as long as she is married to the husband, but the husband has no such obligation after divorce. In contrast, the wife is not required to maintain her husband. However, these partial adjustments do not overcome the significant inferiority of the wife in divorce proceedings.

The Israeli system faces a problem which is not straightforward. On one hand, the system has to encourage spousal freedom in money or property arrangements to allow for dissolution of marriage in those cases where the marriage has irretrievably broken down. To this end the parties must be given extensive freedom to act without external interference.[4] On the other hand, in view of the inequality between the spouses, a certain degree of intervention from outside is necessary to prevent harm to weaker parties, usually the children, and frequently, the wife. Neither the legislature nor the courts in Israel are invariably aware of the function which commentators consider they should fulfill in view of this situation.

Not only does the legislature avoid equalizing the bargaining power of the spouses, it even goes so far to increase the inequality to the detriment of the wife. An example is the Spouses Property Relations Law, 1973, under which balancing of resources is not permitted until dissolution of the marriage. Now the husband can prevent, or postpone, dissolution of the marriage by refusing to give the wife a get. Such refusal enables the husband at the same time to deny the right to balancing of resources. Since in most Israeli families the major part of the property is accumulated by the husband, the husband gains economically as well by his refusal to give a get, weakening the wife's bargaining power still further. The secular legislature thus confers a negative incentive on the husband to accelerate the dissolution proceedings.

Like the legislature, the courts are unaware of the civil responsibility placed on the system through them. A recent judgment makes the position of the wife even more difficult. This judgment may also affect the possibility of the spouses reaching a divorce settlement. Some back-

[4] Kot v. Kot, 38 P.D.(3) 197, 222-23 (F.D. 4/82 1984).

ground to the judgment is necessary. Within the scope of divorce agreements, the spouses normally make arrangements for custody of the children and their maintenance, the husband usually undertaking to maintain the children at a fixed amount. The agreement generally does not bind the children, who are thus free to sue their father (the husband). To secure the husband against breach of the agreement, the wife agrees to indemnify the husband for any maintenance obligation he may incur if the sum awarded against him exceeds that provided under the agreement. The court already had solved those cases where the indemnity would prejudice the children, leaving them only limited means of support. In those cases indemnity should be postponed until the wife has the means to pay without affecting the children's means of support.[5] In extreme cases, if the agreement substantially affects the right of the children to be maintained by the father, the indemnity agreement is void as contrary to public policy.[6] In order to overcome these difficulties, husbands have demanded guarantors to support the indemnity.

Recently, the court held that such a guarantee is valid. The husband can claim the indemnity from the guarantor. On the other hand, the previous rule has been applied to the guarantor, which means that he cannot obtain restitution from the wife of the sum he paid to the husband except to the extent that she has sufficient means and the children will not be prejudiced.[7]

This decision prejudices the means of support of the children, weakens the wife's bargaining power, and diminishes the prospect of reaching a fair divorce settlement. The guarantors which a wife can obtain are usually relatives or close friends. If they might be liable to pay the husband, the wife refrains from claiming an increase of maintenance on behalf of the children, causing the children to suffer. The court thus has secured freedom of contract at a double price: Prejudice to the children and harm to the wife by exposing her to extortion in obtaining a divorce. The court did not make the requisite balancing of interests. It should have left itself the discretion to consider individual cases, enabling it to strike a balance between the various interests as

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[5] Gold v. Gold, 9 P.D. 1456, 1470-71 (C. App. 310/54 1955); Natovitz v. Natovitz, 25 P.D.(1) 603 (C. App. 508/70 1971); Amzaleg v. Amzaleg, 27 P.D.(1) 582 (C. App. 162/72 1973); Hatav v. Hatav, 32 P.D.(2) 470 (C. App. 1978).

[6] A v. B, 31 P.D.(3) 85 (C. App. 614/76 1977); Bar-Or v. Bar-Or, 35 P.D.(4) 231 (C. App. 51/81 1981); Sahar v. Sahar, 36 P.D.(3) 207 (C. App. 17/81 1982).

[7] *Kot*, 38 P.D.(3) at 197; Barak v. Barak, 38 P.D.(4) 626 (C. App. 573/82 1984).

required in each case. The court has the power to do so in accordance with the overriding principle of the best interest of the child. Such would allow the court freedom to maneuver as well as support freedom of contract.

The court already has held that a substantial change of circumstances would enable the court to accede to an application by one party to alter certain arrangements where such alteration is appropriate, for example, maintenance and custody of children.[8] The court read into every agreement an implied term permitting that, upon a substantial change of circumstances, a party may apply to the court to alter a maintenance agreement made between the spouses even if the agreement had been previously confirmed by the court. This opened up a possibility of amending the balance of bargaining power. However the term *substantial change* was not construed sufficiently to achieve this aim in appropriate cases.[9] Recently that term was narrowly construed,[10] harming the interests of the children as well as those of the wife.

The court also has reduced to a minimum the possibility of interfering with divorce agreements on grounds of oppression, coercion, or undue influence.[11] Only in one very extreme case was a plea of coercion entertained, annulling a divorce agreement *a postiori* after the get was given.[12] The circumstances were so exceptional that the consent of the wife to the husband's terms was undoubtedly the result of coercion. The wife was abandoned by her husband during the last months of her pregnancy. He absconded to the United States without leaving an address, making her an "aguna" with a young child. The court held that an agreement made in such a situation, the husband in the United States and the wife in Israel with the aim of the agreement to prevent the wife from becoming an "aguna," was tainted by coercion. The reason those doctrines are rarely used in order to intervene ex post factum in divorce agreements is the apprehension that, owing to special circumstances, like those detailed above, a considerable number of divorce agreements would be declared invalid after being made, and would

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[8] *Bar-Or*, 35 P.D.(4) at 231; A v. B, 33 P.D.(2) 505 (C. App. 496/78 1979).

[9] Feige v. Feige, 36 P.D.(3) 187 (C. App. 363/81 1982); Gilladi v. Gilladi, 36 P.D.(3) 179 (C. App. 177/81 1982).

[10] Perri v. Perri, 42 P.D.(3) 289 (C. App. 149/88 1988).

[11] Amzaleg v. Amzaleg, 27 P.D.(1) 582; Barak v. Barak, 38 P.D.(4) at 632-33; Rodan v. Rodan, 39 P.D.(3) 186, 191-92 (C. App. 151/85 1985).

[12] Grin v. Grin, 16 P.D. 318 (C. App. 457/61 1962).

have retrospective effect. Seemingly the court takes a lenient view of extortion.

Other decisions give some prospect of intervention post factum in divorce agreements and allow the unequal bargaining power to be rectified. First, the court, in *Kam v. Kam*,[13] has hinted that an agreement which denies the possibility of intervention in the agreement between spouses in the event of a change of circumstances is not binding. However, concurrently with this development, the court has continued, at least in one case, to construe the term *change of circumstances* in a narrow and technical manner.[14] In that case the parties drew up an agreement for custody of a minor, allowing the father visitation rights. The father did not utilize his visitation rights for a long time, imposing on the mother extra expenses and making her daily existence difficult. The mother requested that the court regard this fact as a change of circumstances and make the father liable for the obligations deriving from an actual alteration of the agreement. The district court acceded to her request, but the Supreme Court reversed the decision. The Supreme Court held that visitation rights do not impose a duty on the parent entitled to them, so that if they are not utilized that cannot be regarded as a change of circumstances. This is the result of regarding family law within rigid and technical categories and of an exaggerated sense of legalism. The relevant question which the Court should have posed was whether the factual change of circumstances had any implications for the course of life of the mother who was in charge of the child or for that of the child. If the answer was in the affirmative, which would seem to be the case, the decision of the Court was erroneous.

Second, the Court apparently realized that the consequences of its decision in *Kam*[15] were likely to be detrimental. In a 1988 judgment, the Court refrained from applying the *Kam* rule where a connection between the guarantor and the child existed and indemnity on the part of the guarantor was likely eventually to harm the child.[16] This represents to a certain extent a reversal of the rule that was in effect before the ruling in *Kam*. True, under this latest ruling the causal connection between payment of the indemnity and harm to the child must be

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[13] 38 P.D.(1) 767, 770, 773 (C. App. 442/83 1984).
[14] *Perri*, 42 P.D.(3) at 289.
[15] *Kam*, 38 P.D.(1) at 767.
[16] Milner v. Milner, 42 P.D.(3) 414, 417-18 (C. App. 806/86 1988).

proved. However, it would seem possible to extend the exception to cases where, taking into account who the guarantor is, the wife in effect would be prevented from claiming the indemnity, thereby prejudicing the rights of the child.

Third, courts have shown a more lenient attitude towards "breach" of a divorce agreement on the part of the weaker spouse. In *Menashe v. Menashe*,[17] the court refused to accede to the claim of a spouse who had fulfilled the agreement and refrained from annulling parts of a divorce agreement not fully implemented by the "weaker" spouse. The weaker spouse acted as she did with the aim of minimizing harm to herself from the agreement and freeing herself from the restraints imposed on her by the agreement. The *Menashe* court held that the divorce agreement was not divisible into parts and that it was not capable of being only partially annulled.[18] By using this technique the spouse "in breach" of the agreement was not deprived of her rights thereunder.

In *Menashe* special circumstances existed. The husband attempted to evade his obligation of maintaining the children, as provided in the agreement, on the basis of nonfulfillment by the wife of another provision of the agreement. Fulfillment of the agreement in its entirety as required by the husband would have prejudiced the children's welfare. The court analyzed the circumstances and, by applying the law of contracts to the special exigencies of interspousal relations, brought about a just solution. In this case it seems as though the party fulfilling the contract was the loser, whereas the party in breach of contract won the action. However, the Court in fact examined the parties' intentions and the circumstances and struck a balance between the interests of the parties so as to reach a just outcome.

Commentators regard this as the appropriate and correct approach. The court indeed should refrain from providing incentives to those in breach of agreements. However, the court must take into account the exigencies of the system and the lack of equilibrium in bargaining power of the wife as against that of the husband. A balance must be found between the duty to honor agreements and the need to protect the vulnerable party who is compelled to agree to a defective agreement because of pressure upon her and her exploitation by the other party. In the meantime, there is a lack of adequate case law in

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[17] 38 P.D.(4) 635 (C. App. 105/83 1984).

[18] *Id.* at 640.

Israel to implement this approach. It is difficult to predict whether the court will utilize the *Menashe* case as a stimulus for departing from the technical, legalistic approach which has characterized its attitude.

The steps taken by the court to fulfill its civil responsibility in family matters are, as commentators understand them, still too limited and dilatory.

III. Parents and Children

In recent years a considerable body of case law has developed on matters concerning parents and children. This case law has been concerned with the relationship between the rights of parents regarding their children and the intervention of the state in that relationship, as well as with settlement of disputes between parents themselves on questions of custody of children.

The removal of a child from the authority of his or her natural parents can be justified only on exceptional grounds. The best interest of a child as such cannot serve as a ground for removing the child from his natural parents. The court first must determine that the parents are incapable of fulfilling their duties towards the child and must make a determination as to the lack of parental competence. Only when such determination has been made can the best interest of the child be considered.[19] The court must establish the grounds for interfering in the autonomy and privacy of the family unit. Only in the second stage, after proving the presence of a ground for removing a minor, can the child's best interest serve as the principal consideration in determining his placement. The child's best interest is a consideration within the scope of an existing ground, but not a consideration creating a ground of itself. The grounds are laid down by statute, but in certain cases they can be derived by way of interpretation. Thus, for example, the Adoption of Children Law 1981 enables an adoption to be effected on the basis of parental consent. On the other hand, the court may, for special reasons, allow a parent to retract his consent.[20] However, a parent who so retracts does not remove the ground for proceeding to the second stage. In such a case, the court will consider whether the child's

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[19] A.G. v. A., 38 P.D.(1) 461, 468 (C. App. 577/83 1984); A. v. B., 39 P.D.(1) 1 (C. App. 783/81 1985); A. v. B., 39 P.D.(4) 309 (C. App. 212/85 1985); A. v. A.G., 40 P.D.(1) 1 (C. App. 232/85 1986); A. v. A.G., 41 P.D.(4) 436, 440 (C. App. 522/87 1987); A. v. A.G., 42 P.D.(1) 848, 855 (C. App. 325/87 1988).

[20] Adoption of Children Law, 1981, § 10.

best interest requires him to remain with his parents or whether the adoption proceedings should continue.[21]

The Adoption of Children Law 1981, extended the grounds for allowing the court to intervene in the family and to declare a child to be adoptable. The central focus is the objective or subjective inability of the child to grow and develop with his natural parents. Among the grounds included are the following: death of the parents; abandonment or neglect of the child; non-fulfillment of duties towards the child on the part of his parents; custody of the child outside the parental home which commenced before he reached the age of six years; or refusal to receive him into the parents' home.[22] Failure to rehabilitate a child within his natural family is also one of the grounds.[23] This concerns cases where the parent is not capable, for objective or subjective reasons, of caring for the child owing to his behavior or his situation. In this latter case, the welfare authorities should take measures to rehabilitate the natural family as well as economic and social measures, before putting into effect the final and painful process of depriving the parents of their rights over the child. However, a certain lack of clarity exists, both as to the relationship between priority for the natural parents as against interference in the family unit and removal of the child from that unit, and as to the content and the scope of the concept of the best interest of the child.

Courts sometimes make decisions in which the application of general criteria is not consistent, but rather reflect the varying attitudes and preferences of different judges. For example, in one case a natural mother not functioning as such was given preference in view of the fact that she had not descended to the level of overall inability to look after the child's needs. This was a case of severe neglect, ill-treatment of a minor child in the past, and maintaining a hostile relationship. Previous attempts to restore the relationship with the mother had failed. In spite of all this, on the basis of a single social worker's opinion and although another opinion was diametrically opposed to it, the court gave the mother another chance.[24] The child at the time of the proceedings was three and one-half years old. The court, with reference to the time factor, argued that a further attempt at rehabilitation within the natural

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[21] *A.G. v. A.*, 38 P.D.(1) at 461.
[22] Adoption of Children Law, 1981, § 13, (1)-(6).
[23] *Id.* at § 13(7).
[24] *A. v. A.G.*, 42 P.D.(1) at 856.

family would not cause irretrievable damage. However, that age is already too late for such further experiments. Not only would these significantly reduce the prospects for adoption in the future, but also the damage caused by such experiments to a child at such an age could not be repaired easily.

On the other hand, in another case the mother was suffering from a severe mental disease and was being cared for by the father. For this reason the child could not remain permanently at home. However, the child had a good relationship with the father, and emotional ties were established between father and daughter. Despite this the court made an adoption order.[25] The discretion exercised in this case was not unreasonable but the outcome is totally unclear when compared with that of the previous case. True, exercise of discretion in this kind of case requires an individual approach to each case but there also exists a certain lack of consistency. A comparison between the cases also shows a certain degree of bias in the system as regards the relationship between the mother and father. It is easier to recognize a one-parent family headed by a mother as competent than it is when such a family is headed by a father. This is, to a certain extent, inherent in the system in the form of the presumption laid down in the Capacity and Guardianship Law, 1962. According to this presumption, a minor up to the age of six years is to be with his mother if there are no special reasons for providing otherwise.[26]

The lack of consistency in the decisions and the varying preferences of the judges also show that the question of the order of priorities between the various possible alternatives is not sufficiently clarified. Even if the lack of parental competence is the decisive factor, the order of priorities is still not clear. Is it preferable to assist the parents to improve their parenting skills and to attempt to rehabilitate the parental family even to an extent beyond that required by law? Should the extended family be preferred (*i.e.*, grandparents, brothers and sisters, uncles and aunts) or should preference be given to removing the child from the family unit?

On this matter, professionals have differing opinions. Some prefer removing the child from the wider family circle to avoid embarrassment and confusion which would endanger the child's best interest. Others prefer a solution within the wider family, arguing that the fam-

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[25] *A. v. A.G.*, 41 P.D.(4) at 436.

[26] Capacity and Guardianship Law, 1962, § 25.

ily circle is preferable to any external arrangement. In any case, the time factor in these instances is critical. Repeated attempts to re-establish the family may end in failure, with the child falling between two stools. His mental and emotional situation will be seriously impaired but it will be too late to resettle him through adoption.

This is especially so when a parent seeks to raise his child outside the home at the public expense, in order not to remove him from his parent's authority by being adopted. The court has refused attempts like this by parents and as a rule has declared the children concerned as adoptable. In one case, the court turned down the request of a mother to raise her child in an institution, despite the fact that the mother's problem was an objective one (she was slightly retarded mentally and suffered from behavioral disturbance), rather than one derived from subjective, intentional behavior.[27] In another case, the request of a mother who had given birth extramaritally to give the child temporarily to a foster mother or to an institution until she should marry was rejected.[28]

Israeli law does not regulate these priorities. The court, with discretion in the matter, has its doubts as to the order of priority and decides each case according to the circumstances. This may be the right approach on principle. However, it seems that every judge bases his decisions on a particular inarticulate assumption. Different viewpoints have varying effects on the implementation of principles in the circumstances of each case. When the viewpoint is not clear on the surface, but concealed below it, undesirable consequences may emerge in individual cases as well as erroneous conclusions as to its implementation in the future.

The concept of the child's best interest is not uniform, but varies for different purposes and in different contexts. The content of the concept when the parents compete with each other, *i.e.*, in the context of inter-parental relations, is not the same as it is in the relationship between the family unit, *i.e.*, the parents and the state.[29] The concept of the child's best interest is also a relative one, embracing various values

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[27] A. v. A.G., 42 P.D.(2) 350 (C. App. 334/88 1988).

[28] A. v. A.G., 41 P.D.(3) 544, 549-52 (C. App. 316/86 1987).

[29] *A.G. v. A.*, 38 P.D.(1) at 472; *A. v. A.G.*, 40 P.D.(1) at 1.

and outlooks which affect its content and the way it actually is implemented.[30]

As an example, an unusual case has gained publicity in recent years. The High Court of Justice decided to return a child, who was adopted in Brazil by an Israeli family when she was only a few months old, to her natural mother from whom she had been kidnapped. The court acted on the assumption that the adopting parents were in no way parties to the crime and knew nothing about it. The documents relating to the adoption were forged. The child remained in the adopting parents' home for eighteen months.

The court has not yet given the grounds for its decision but clearly the principle of continuity would support the child remaining with the adopting parents. The circumstances and objective conditions, from the point of view of the objective best interest of the child, indicate a preference for the adopting parents. However, the court decided otherwise.

The decision illustrates the social and legal order of priorities, comparing parental rights as against the child's best interest. It also indicates the relativity of the child's best interest in the process of choosing between parental rights and intervention by the state. In this case the principle of the child's best interest had a smaller role to play than expected in proportion to the rhetoric employed regarding that principle. The court gave priority to the rights of the parents at the expense of a certain degree of harm to the child. One should remember that the question occurred not at the stage of primary choice, but after another couple had begun raising the child and had custody of her for a year and a half as parents in every respect. This favored the adopting parents also with regard to the best interest of the child. In other cases, albeit less tragic or difficult, the court, in examining the child's best interest, attributes great importance to the actual situation as it exists, even if such situation was brought about unlawfully. For example, a child kidnapped from one of his parents and brought to Israel will not be returned to the parent from whom he was kidnapped if in the situation which has been created the balance of the child's best interest leans towards leaving him in Israel.[31] In matters of adoption, the court

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[30] Nagar v. Nagar, 38 P.D.(1) 365, 408-09 (S.T. 1/81 1984); *A.G. v. A.*, 38 P.D.(1) at 472-73.

[31] Kabali v. Kabali, 37 P.D.(4) 705 (H.C.J. 405/83 1983); Zaluk v. Zaluk, 40 P.D.(1) 516, 520-27 (H.C.J. 446/85 1986); Bachar v. Geilli, 41 P.D.(3) 701 (H.C.J. 836/86 1987).

also takes account of the situation which has been created as one of the considerations relating to the child's best interest.[32]

One can appreciate the relevance of the concept and of differing values inherent in it by considering variations of the last case mentioned above. Undoubtedly, a difference occurs in implementing the rule as to the child's best interest between the case of a child kidnapped from Israel and one kidnapped and brought to Israel. If a kidnapped child is from Israel, an order for his return to Israel usually will be given as a matter of routine.[33] On the other hand, in a case where the child is kidnapped and brought to Israel, the circumstances as to his return will be examined scrupulously. The court declared once again that Israeli law will not encourage instances of kidnapping children and bringing them to Israel and will therefore order the child to be returned to the country from which he came. However, in this category of cases the court examines with particular care the best interest of the child at the time of the hearing. In quite a few cases the court has refrained from issuing an order for return of the child when it was clear that the child had become accustomed to his Israeli surroundings.[34]

The court provided a further example of the relevance of the principle of the child's best interest when dealing with the right of a parent to withdraw his consent to adoption. The court held that, within the scope of its discretion, it would strike a balance between differing considerations, of which the child's best interest is the dominant one. The court also considers the rights of parents and the expectations of potential adoptees.[35]

Case law provides proof of the relevance of the concept of the child's best interest and of the different values which in reality are inherent in it and which struggle for priority (parental rights, discouragement of kidnapping, connection with the local jurisdiction, order of priorities within the family, and the extent of risk involved in rehabilitation as against relative security in the place of adoption). Despite constantly repeated judicial rhetoric to the effect that the child's best interest is a permanent and unique principle, reality shows, that

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[32] A. v. A.G., 39 P.D.(3) 631 (C. App. 138/85 1985).

[33] Fhadida v. Fhadida, 39 P.D.(3) 578 (C. App. 493/85 1985); Duer v. Duer, 43 P.D.(3) 553 (H.C.J. 142/87 1987).

[34] *Kabali*, 37 P.D.(4) at 705; *Zaluk*, 40 P.D.(1) at 516; *Bachar*, 41 P.D.(3) at 701.

[35] A.G. v. A., 38 P.D.(1) at 478; A. v. A.G., 42 P.D.(1) 624, 633 (C. App. 622/87 1988).

within the scope of that principle other wider considerations, expressing other interests, are also inherent.[36]

In the context of deciding between parents with regard to custody of minors, the problem of duplication between the civil and religious courts comes to the fore. Religious courts in certain instances have jurisdiction over matters of custody. The principle of the child's best interest is binding on the religious courts also. But since the principle is dependent on the legal context in which it arises and since it expresses social values, the outcome in the religious court may be completely different from that in the civil court. Religious law has its own presumptions which give general expression to the child's best interest within the current social concepts. The religious judge will give greater weight to components of a religious nature or to considerations of religion. Thus, for example, a religious court prefers religious education to secular education, since this expresses the best interest of every child according to the outlook of the religious court. Likewise, a religious court prefers those values reflecting a religious outlook as a part of the fundamental aspect of the child's best interest.

Actually, the High Court has intervened in decisions of religious courts in matters of custody of minors, showing preference for secular values over religious ones within the scope of the principle of the child's best interest. The High Court refused to apply the presumptions under religious law to the extent they do not give expression to individual and concrete circumstances or obscure individual considerations.[37] The High Court also has intervened whenever it found that the religious court had given preference to considerations based on religious outlooks and preferences, adjusting them to the principle of the child's best interest. Thus, the High Court annulled a decision of the religious court to transfer a child from the custody of his mother to that of his father because the mother was cohabiting with a non-Jew.[38] Likewise, the High Court annulled the decision of the religious court that preferred religious education for the child contrary to the view of the father who preferred secular education, because the religious court had not given sufficient weight to other aspects which might have affected the child's best interest.[39] The High Court has intervened whenever it was appar-

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[36] P. SHIFMAN, FAMILY LAW IN ISRAEL, PART TWO (1989).
[37] Natzer v. Supreme Rabbinical Appeal Court, 26 P.D.(2) 403 (H.C.J. 128/72 1972).
[38] Biyares v. District Rabbinical Court of Haifa, 38 P.D.(1) 673 (H.C.J. 7/83 1984).
[39] Shani v. Shani, 39 P.D.(2) 444 (C. App. 680/84 1985).

ent that the religious court had given undue weight to religious considerations.[40]

The religious court is still left with considerable freedom of maneuver. First, the High Court will not intervene in the application of principles in individual cases. Thus, for example, the Court was prepared to allow religious courts the benefit of the doubt that legitimate considerations of the child's best interest had influenced their decisions even when the religious court had resorted to presumptions but had considered the individual circumstances.[41] Second, the way the religious court provides the reasoning for its decision and the formulation of the reasoning may in practice limit intervention on the part of the High Court.

At the same time, some people take the view that it is unacceptable to deprive the religious court of its discretion in shaping the principle of the child's best interest and the practical application of that principle. This opinion results in limited intervention in decisions of religious courts.[42] Commentators view decisions of the High Court on this matter as well-founded. The High Court does not deprive religious courts of their discretion, neither on the fundamental level of shaping the concept of the child's best interest nor on the individual level of applying the rules to the circumstances of each case. On the other hand, the discretion of the religious court is confined to the legitimate area of the concept of the child's best interest as the Supreme Court understands it. The aim of applying the same principle in religious and civil jurisdictions is to establish at least a minimum of uniformity in certain matters of special importance. Moreover, whenever the discretion of the religious court goes beyond reasonable bounds, the High Court should intervene. When the religious courts give too much weight to religious considerations at the expense of other considerations, the religious courts remove the concept of the child's best interest from reasonable bounds. In such cases the religious court in effect ignores the provisions of the law which oblige it to take account of the child's best interest. Thus intervention from outside, in decisions of the religious courts, in these matters is required by law.

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[40] Moore v. District Rabbinical Court of Haifa, 37 P.D.(3) 94 (H.C.J. 181/81 1983).

[41] *Natzer*, 26 P.D.(2) at 410.

[42] *See, e.g.*, P. SHIFMAN, *supra* note 35; Nagar v. Nagar, 38 P.D.(1) 365, 408-09 (S.T. 1/81 1984)(Elon, J.).