ISRAEL: CALM BEFORE THE STORM

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I. INTRODUCTION

The developments during the year 1985 in the realm of family law were characterized by the depth of involvement of the Supreme Court in problem-solving. A substantial number of the matters dealt with touched on the issue of spousal property and extending the rights of cohabitants. For many years now the Israeli legislature has not taken the initiative in the field of family law; the sole law enacted this year was the amendment of the Succession Law which increased the spouses' share of an inheritance. In spite of the urgent necessity to adjust the law to social reality, the Ministry of Justice awaits the report of a public committee composed of judges, legal advisers, social workers and family counsellors. The committee is working on proposals for reforms in family law and its recommendations will be submitted to the Minister during the first half of 1986. The committee, however, will not submit recommendations for changes regarding the laws of marriage or divorce, which in Israel are dealt with by religious courts of the different religious communities which have been recognized by the government; these matters were expressly excluded from the committee's terms of reference. One reason for this exclusion was to avoid upsetting the delicate balance between the religious and secular public. In the field of family law the influence of religion on the State is still very great for various ideological reasons and there is no reason to assume that this situation will change in the near future. Despite the urgent necessity to adjust the law to the needs of a secular society, whose outlook diverges widely from that of the religious law, the parliamentary majority, as representative of the secular society, does not have sufficient power to contend with the ideology of the Jewish tradition which is thousands of years old.

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II. MATRIMONIAL PROPERTY

Spouses who were married before 1974 benefited this year from an appreciable extension of the effect of the co-ownership presumption. In the previous edition of the *Annual Survey of Family Law* we pointed out that the swinging pendulum of the co-ownership presumption was evidenced not only in the variation between different periods, but even within the same period where one discerned expansion and contraction of the rule regarding different matters.[1] We showed that the court had not been consistent in its approach. In certain contexts (i.e., implications on third parties) the co-ownership presumption was broadened while in others it was narrowed. This year there is a consistent and remarkable line of decisions expanding the principle of co-ownership.

This tendency is particularly noticeable in the expansion of the co-ownership presumption over different categories of property. In the past, judgments on the question of whether business assets formed part of the co-ownership were contradictory.[2] Until a year ago, there was a marked tendency in the court not to settle for the presumption of co-ownership but to require clear proof of the intent of the parties in order to include those assets in the co-ownership. The court had not been satisfied with those elements which formed the basis for applying the presumption, namely, living together in harmony and joint effort on the part of the spouses.

In a series of decisions during 1985 the court held that business assets as well as family assets were elements of the co-ownership presumption and were to be treated in the same way.[3] The court distinguished the previous contradictory decisions by saying that they were based on special facts and noted that in the previous decisions the spouses intended to exclude business assets from the co-ownership. Moreover, the court returned to the case law of the early sixties when it did not distinguish between different types of property but, rather, stated that regular family life with a joint spousal effort constituted "the source of the typical intent to include in the co-ownership both

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[1] A. Rosen-Zvi, *Israel*, 8 ANNUAL SURVEY OF FAM. L., 83, 85 (M. Freeman, ed. 1985).

[2] C. App. 630/79 Lieberman v. Lieberman 35 (IV) P.D. 359 (1981) as against the earlier case (C. App. 253/65 Briker v. Briker 20 (I) P.D. 589 (1966)).

[3] C. App. 724/83 Bar-Natan v. Bar-Natan (1985)(not yet published); C. App. 122/83 Basilian v. Basilian (1985)(not yet published). In those two cases the assets in dispute were shares in a private company.

family and business assets."[4]

There is no justification for distinguishing between these two types of property when dealing with the guiding principle which forms the basis of the rules of the co-ownership presumption. If joint effort is the basis of the co-ownership then the question, *which type of asset* results from the joint effort, is not the determining factor. Such a distinction is likely to serve as an incentive to invest the family money in a certain type of asset with the specific purpose of keeping one's options open in the event of divorce. This approach injures spouses who invest their best years in running the home and raising the children. Life insurance policies have also been included in the assets comprising the co-ownership.[5]

The more the scope of assets included in the co-ownership was broadened, the more difficult it became to rebut the co-ownership presumption. Thus, for example, it has been determined that even though certain assets are registered in the name of one of the spouses and others are registered in the names of both spouses, this alone will not be sufficient to rebut the co-ownership presumption.[6] In one instance, a husband who concealed substantial assets from his wife and never involved her in the management of those assets, with the express intent of keeping her from any contact with his business, failed in his attempt to rebut the presumption that those assets formed part of the co-ownership.[7] Also, regarding the ownership of a corporation, the fact that very few shares were registered in the name of the wife while a substantial number were registered in the name of the husband would not be considered as proof of the intent of the spouses to divide the shares unequally between them. In the past, such an unequal registration was accepted as sufficient proof to rebut the co-ownership presumption[8] and the court determined that this registration was substantive (not merely a formal registration) and made pursuant to an arrangement between the spouses. In the present situation the registration was considered purely formal.[9]

These decisions weaken the contractual source (concentrating in-

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[4] *Id.* at C. App. 122/83.
[5] C. App. 724/83, *supra* note 3.
[6] C. App. 122/83, *supra* note 3.
[7] C. App. 724/83, *supra* note 3.
[8] C. App. 780/80 Goldberg v. Goldberg 37 (II) P.D. 757, 760 (1983).
[9] C. App. 724/83, *supra* note 3.

stead on the intent of the parties) which served previously as the formal basis for the creation and development of the co-ownership presumption, which in fact was a legal fiction. Gradually the co-ownership presumption is becoming entrenched as an independent, matrimonial property regime as if it were a statutory regime. The notion of using the laws of contract as a formal basis, which enabled the court to create the rules of co-ownership presumption, has been obscured. The laws of contract have been left in the background and the court's attribution of the intentions of reasonable and normal spouses is the most decisive. The law today is anchored in family law as an inseparable part of the general law.

With respect to couples married after the beginning of 1974 the law which applies is Chapter 2 of the Spouses (Property Relations) Law 5733-1973 which determines a matrimonial property regime of deferred balancing of resources (community of surplus principle) upon the termination of the marriage in consequence of divorce or of the death of one spouse. In a previous survey[10] we stressed the weak point of such a statutory regime in a legal system where, for the majority of the population (the Jewish public), it is difficult to obtain dissolution of the marriage without the agreement of the parties.[11] On this point serious criticism was levelled by the Supreme Court and various scholars.

Regarding such a property regime, the major part of this discussion will concentrate on the property agreement allowing the spouses to arrange their affairs in a way that is different from the arrangement stipulated in the law. In order for this property agreement to be legally binding it must be in written form and be confirmed by the District Court or a Religious Court. The function of the court in confirming the agreement is limited: it is passive and formal.[12] Although the court cannot delve into the contents of the agreement, its function is to find out whether it was signed without any mistake, misunderstanding, false representation, duress or undue influence.[13] Also, the court is obliged to ascertain whether the spouses understand the meaning and conse-

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[10] A. Rosen-Zvi, *supra* note 1, at 83-84.

[11] On the Act, see D. Friedmann, *Matrimonial Property in Israel*, 41 RABELS ZEITSCHRIFT 112 (1977); J. Sussman, *Matrimonial Property Relations in Israel*, BEITRAGE ZUM DEUTCHEN UND ISRAELICHEN PRIVATREHT 165 (1977).

[12] C. App. 543/82 Shtern v. Shtern 36 (IV) P.D. 752 (1982).

[13] The Court should not confirm an agreement between two males or between people who are married to another man or woman. Such an agreement is considered to be against public policy; *see* C. App. 640/82 Cohen v. Attorney General 39 (I) P.D. 673, 680 (1985).

quences of the agreement. As to the content of the agreement, the governing principle is the spouses' autonomy of the will.[14]

A property agreement may serve as a general means to overcome the weak points in the law. Thus, for instance, it is possible to stipulate conditions as to time of realization of the balancing; one may determine an earlier period for the balancing of resources, for example, after the parties have been separated for a certain period of time.

Furthermore, the property agreement may fulfill an important and creative function in Israeli family law. It may serve an additional purpose by helping to overcome the difficulties encountered in the dissolution of the marriage. For example, an incentive for the dissolution of marriage, when it has broken down irretrievably, can be created by stipulating at the outset of the marriage that the spouse who refuses to grant a divorce in certain delineated circumstances will be subject to certain obligations. Toward the end of 1985 a suggestion was made in this direction in the context of research which I conducted and published.[15] This research occupied a central position in the public debate. The religious groups argued that placing an obligation on a spouse as an incentive to divorce was contrary to the religious law which governed the spouses.[16] The argument continues but it appears that it may be possible to set up an agreement in such a manner that it will be accepted as legally binding in the District Court. The religious law will be influenced indirectly, but will not be asked to intervene in this matter.

In the absence of a mutual agreement to adjudicate before the Religious Court, that court lacks jurisdiction to make any decision regarding the property agreement. As a result of the binding force of the agreement, the parties will probably come to the religious court with a mutual agreement to dissolve the marriage. If the obstinate spouse still does not agree to the divorce he will be subject to a payment by virtue of the judgment of the District Court based upon the property agreement which cannot be annulled by the religious court. Spouses may, by contract, in a "do-it-yourself" manner, insert *indirectly* grounds for divorce based on no-fault and thus circumvent the rigidity of the religious law in the field.

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[14] C. App. 543/82, *supra* note 12.

[15] A. ROSEN-ZVI, TOWARDS SOLUTIONS OF FAMILY PROBLEMS (1985).

[16] Resolution of the Chief Rabbinate of Israel, published by the daily *Hatzofe*, Mar. 3, 1986.

It is expected that in the light of the aforementioned legal difficulties, the court's decision would serve as an impetus to utilize property agreements as a way of overcoming weak points in the Property Relations Law. In contrast to the decisions dealing with the co-ownership presumption, the decisions dealing with Property Relations Law were not, in my opinion, helpful in arriving at an appropriate property arrangement for those couples subject to the Property Relations Law.

This was demonstrated by a number of decisions rendered in the last year. It was determined that a mutual agreement signed by the parties but not confirmed by the court was invalid. The time for examining the consent of the parties was when the agreement was confirmed by the court and not at the time of signing. In the court's opinion the process of confirmation did not permit deliberation on the questions in dispute between the parties. Even if it were proved to the court that there was mutual agreement at the time of signing, with no dispute between the parties on this issue, the agreement would not be confirmed nor would it have any legal validity.[17] Such a court decision encourages non-compliance with agreements. It allows the spouse less interested in divorce to extort gradually greater benefits by exhausting the other spouse, which results in spousal suffering and harm to the children.

The court also broadened the term "property agreement" in the Property Relations Law which requires compliance with formalities. It restricted the possibility of reaching an agreement in writing or finding an implied contract in accordance with the intention of the parties manifested by their behavior, even when dealing with specific assets. The court determined that any agreement between the spouses, even with respect to a specific asset, relating to an arrangement upon termination of the marriage due to divorce or death of one spouse, was to be considered a property agreement.[18] As a result of this decision the right of a wife to one-half of the ownership in a dwelling which her husband had undertaken, in writing, to transfer to her was not recognized. The agreement provided, inter alia, that certain arrangements regarding the dwelling were to apply upon termination of the marriage. The court held that since the agreement was not valid and the husband had changed his mind, he was therefore free from the obligation he had taken upon himself. In the opinion of the court, only an agreement re-

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[17] C. App. 4/80 Munk v. Munk 36 (III) P.D. 421 (1982).

[18] C. App. 169/83 Shay v.Shay (1985)(not yet published).

lating to current matters, to the course of the marriage or to a regular transaction, not in any way connected with an arrangement upon termination of the marriage, was an ordinary agreement which did not require that the spouses take any formal proceedings.[19]

Such decisions inject an excessive level of formality into family life and put the party who is financially weaker, and therefore in a poorer bargaining position, at a disadvantage. Since her power to fulfill a formal agreement is restricted, the wife is put in an unfavorable position if she is the one wishing to dissolve the marriage. Consequently, her ability to dissolve the marriage is influenced by considerations which are irrelevant and undesirable. The parties might have relied on an agreement they considered binding and in the course of the marriage may have made certain financial and property arrangements which were irrevocable. The spouse who changed his mind is thus able to escape his undertakings while making a double profit at the other's expense. On one hand he has benefited from the arrangements already made, and on the other hand he is exempt from the obligations he himself has undertaken. The tendency to excessive formality has gone so far that a change in a property agreement between the spouses after divorce (if they signed the agreement during the course of the marriage or for the purposes of divorce) also required, in the opinion of the court, the complete fulfillment of all the formalities.[20]

Also the court determined that one cannot even obtain a declaratory judgment on the right to a balancing of resources prior to the time stipulated for the realization of the right, namely, dissolution of the marriage or the death of one spouse.[21] Notwithstanding this narrow interpretation by the court, there are three factors which help to overcome the weakness in the law. One, which is limited and stems from the provision in the law, entitles the court to take measures to protect any future right of a spouse under a property agreement or resources-balancing arrangement.[22]

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[19] C. App. 490/77 Natzia v. Natzia 32 (II) P.D. 621 (1979).
[20] C. App. 419/84 Tuchmintz v. Carmel 39 (I) P.D. 287 (1985).
[21] R. App. 421/85 Haddad v. Haddad (1985)(not yet published).
[22] The Law, § 11:

> Where one of the spouses has done or may reasonably be feared to be about to do an act calculated to defeat any right or future right of the other under a property agreement or resources-balancing arrangement, the civil or religious court may, on the application of the other, take measures to protect that right.

The second factor has arisen from the decisions of the Supreme Court. The court deviated from the strict formality required for confirmation of the property agreement where the agreement had already been executed. In such an instance, the court held that both parties were estopped from raising the lack of formality as a means of placing themselves in their respective positions before the agreement was executed. The court relied on section 39 of the Contracts (General Part) Law 5733-1973, which provides that a right shall be fulfilled and exercised in good faith. The claim of a lack of formality at such a late stage would not be heard since such a claim was contrary to the obligation of fulfillment in good faith.

The third factor was developed by the District Courts. These courts decided that where assets were registered jointly in the names of both spouses, they would be divided in accordance with the laws of property.[23] Consequently, it was not necessary to wait for the termination of the marriage to divide these joint assets. With respect to part of the property, at least the party who refused to divorce his spouse could not profit from the consequences of his own refusal.

III. COHABITANTS

Beyond rights conferred by legislation, the tendency has continued among the judiciary to increase the rights of cohabitants. For many years there has been a determined effort by the courts to improve the legal situation of cohabitants. This has been manifested in two ways: granting to cohabitants rights similar to those granted to spouses and a less restricted interpretation of the qualifications required to be considered a cohabitant. In the previous survey[24] I pointed out that the Supreme Court had determined that the co-ownership presumption applied in the case of cohabitants.

It was determined recently, however, that cohabitants were not included in the term "spouse" in the Spouses (Property Relations) Law. Consequently, cohabitants are not entitled to the rights granted to spouses by the Law. But these decisions do not really diminish their rights. The property arrangement which applies to cohabitants, even those who commenced cohabiting after 1974, is the co-ownership presumption. Commenting on the defects under the arrangements provided

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[23] R. App. (T.A.) 1809/82 Peperman v. Peperman (1983) 2 P.M. 338; C. App. (Ha.) 222/84 Eilon v. Eilon (1985) 1 P.M. 406.

[24] A. Rosen Zvi, *supra* note 1, at 89.

in the Spouses (Property Relations) Law the court stated that "the situation of a female cohabitant under the co-ownership presumption is better than that of a married woman under the Spouses (Property Relations) Law."[25]

These court decisions, holding the term "spouse" not to include a cohabitant unless an express provision indicates otherwise,[26] appear to diminish the cohabitants' rights. Though the details of the arrangements and the extent of the rights of spouses and cohabitants are not identical, there is a fundamental sameness in the *kind* of rights granted. Even here, however, the identity is not absolute. Thus, for example, the approach maintaining that neither of the cohabitants is entitled to alimony when the relationship is severed still governs, save in the case of an express agreement. But the court expressed a willingness to re-examine this rule in the future and indicated that in order to impose such an obligation upon one cohabitant toward his companion the theory of implied contract would be sufficient.

With respect to the Succession Law, 5725-1965, the Supreme Court decisively extended the scope for determining those who are entitled to be considered cohabitants. The Succession Law granted to cohabitants the right of succession according to law and a right to maintenance out of the estate. In the past the conditions necessary to be considered a cohabitant were determined on an *objective* basis. Two principal elements were required, (1) living together as husband and wife (2) in a common household.[27] Recently, the Supreme Court determined that one should not seek and concretize strict objective criteria in order to establish the required conditions.[28] In each instance, the Court noted, it is necessary to examine the circumstances in terms of the overall relationship and to determine, in the course of this examination, the different components and characteristics. In addition, the court stated that an examination "of the relationship between those parties who are not married must be determined according to subjective criteria, namely: how did the man and the woman view their overall relationship; can one say that the deceased considered the woman who survived him to be his heir."[29] Such a wide interpretation is com-

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[25] C. App. 640/82, *supra* note 13, at 686.

[26] C. App. 640/82, *supra* note 13; H.C.J. 89/83 Levi v. Chairman of the Knesset Finance Committee 38 (II) P.D. 488 (1984).

[27] C. App. 621/69 Nissim v. Yuster 24 (I) P.D. 617 (1970).

[28] C. App. 79/83 Attorney General v. Shukrun 39 (II) P.D. 690 (1985).

[29] *Id.* at 694.

bined with a previous interpretation, where it was held that it was not necessary that the public should consider cohabitants to be a married couple in order for them to be granted the legal rights of cohabitants.[30]

Recently the Succession Law was amended and the right of succession of a spouse was increased. In addition to his increased share of the succession, the spouse is now entitled to the deceased's interest in the spousal residence if they have been married at least three years prior to the death.[31] Although the matter has not yet been judicially decided, it has been pointed out that this three-year stipulation excludes cohabitants from those entitled to inherit the dwelling. It seems to me, however, that cohabitants must be entitled to this portion of the inheritance since the intent of the legislature was to equate the rights of a cohabitant to inherit by law with the rights of a spouse.

The legislature's goal can only be realized if the term "married for three years," with respect to cohabitants, is interpreted to mean that they have fulfilled the conditions necessary to be considered cohabitants for three years. Since the basis on which parties are considered to be cohabitants is subjective, defining the exact period during which this condition has been fulfilled is likely to become problematic. However, such a difficulty with proof will not be sufficient to influence the interpretation of the law and thus deprive cohabitants of their rights. In my opinion, an interpretation which excludes cohabitants from those entitled to inherit the dwelling contradicts the intent of the legislature. Indeed, the chairman of the Constitutional and Legislative Committee of the Knesset explicitly emphasized that the intent was to enable cohabitants, as well as spouses, to inherit the dwelling.

In Israel, increasing the rights of cohabitants is one of the ways in which the legal system contends with the deviations from freedom of marriage which the religious law has imposed on Family Law. This contention is also manifested in the recognition, for certain purposes, of private marriages[32] between persons who, according to the religious law, are forbidden to marry. Since there is no legal way for such persons to marry, the civil-secular law grants recognition of the marriage on the condition that, despite the religious *prohibition,* the marriage was considered valid according to religious law. In the past, Adminis-

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[30] C. App. 481/73 Rosenberg v. Shtasel 29 (I) P.D. 505 (1975).

[31] When the spouse inherits together with brothers of the deceased and their descendents or with the grandparents of the deceased.

[32] Marriage celebrated unofficially at a private ceremony.

trative Law was used to force the Ministry of the Interior to register such persons, who had celebrated a private marriage, as persons legally married.[33] By registration as married in the registration of inhabitants they effectively benefited from most of the rights which are obtainable on presentation of an official certificate of marriage. The Supreme Court indirectly extended the recognition of this status for such couples.[34] By using in this instance the Laws of Evidence, the Supreme Court determined that such a couple may, even before being registered as married, enter into a property agreement pursuant to the Spouses (Property Relations) Law. They will be considered as "spouses" as that term is defined in the law. The Court left open the question of whether other provisions of the law, such as balancing of resources, would apply to such a couple.

IV. The Spouse's Inheritance

In the last year, the Succession Law[35] was amended with the declared intent of improving the benefits of the surviving spouse. By virtue of the amendment the share of the spouse will never be less than half the estate. Before the amendment, however, the spouse's share was reduced to one quarter in two instances: (1) when the spouse inherited together with the deceased's children of a previous marriage and (2) when *either* the whole or majority property value of the spouses was in their common ownership *or* if upon the death of one of them, the survivor was entitled to half of the combined value of the whole or majority of property value, whether by operation of law or agreement between them, *and* the spouse inherited together with the children of the deceased or his parents. These provisions have been changed.

The amendment provides that the spouse's share of the succession will not be diminished even if the spouse is entitled to half of the deceased's property by virtue of the laws of marriage and is worthy of special mention. With the adoption of this amendment the spouse is entitled to both rights in a cumulative manner; there are no adjustments between a marital property arrangement and the rights under the Succession Law. This situation remains problematic: where the surviving spouse has an obligation to transfer money or property to the

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[33] H.C.J. 80/63 Gurfinkel v. Minister of the Interior 17 P.D. 2048 (1965); H.C.J. 51/69 Rodnitzki v. The High Rabbinical Court of Appeal P.D. 24 (I) 704 (1971).

[34] C. App. 640/82, *supra* note 13.

[35] Succession Law (Amendment No. 7) 5745-1985.

deceased pursuant to a matrimonial property regime, death does not cancel this obligation. Furthermore, the estate is entitled to collect the debt from the surviving spouse, and the spouse also receives his share of the succession from this portion. In addition, the spouse is entitled to the full share in the dwelling of the deceased provided that certain conditions are fulfilled. This arrangement was also included in the recent amendments to the Succession Law.

The interrelationship between the laws of succession and the laws of matrimonial property is problematic in another sense. According to section eight of the Succession Law an agreement regarding the succession of a person made during the lifetime of that person is void. The interests protected here are freedom of testation and the right of the testator, at any time, to alter or revoke a will. Despite this, spouses are permitted to enter into property agreements which cannot be changed except by mutual consent and in accordance with the formalities required by law. The provisions of the matrimonial property regime set out in the Property Relations Law include arrangements upon termination of the marriage in consequence of the death of one spouse. Do these provisions regarding property agreements supersede the parallel provisions of the laws of succession or is it the reverse? In my book[36] I suggested a compromise between the two extreme positions. According to my suggestion, a property agreement would be valid that had identical provisions in the event of divorce and in the event of death. In contrast to the foregoing, a special arrangement between the spouses solely in the event of death would be void. This approach, one that seeks to achieve harmony between various protected interests, those of marriage and those arising from the laws of succession, was recently adopted by the District Court of Tel Aviv.[37]

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[36] A. ROSEN-ZVI, MATRIMONIAL PROPERTY 305-06 (Tel Aviv, 1982).

[37] P.D. 5489/81 Re the Deceased Abraham (1985)(not yet published).