Divorce, updated Israeli style

Recent amendments to Israeli divorce legislation may ease the equitable distribution of marital assets

Edwin Freedman

On 1 January 1974 a law went into effect in Israel which made the already complex divorce proceedings even more difficult. On 27 October 2008, the noisome conditions of that law were vitiated by an amendment to the law. In order to appreciate the significance of the amendment, it is necessary to understand the unusual arrangement that regulates family law matters in Israel. Matters of personal status, including marriage and divorce, are adjudicated in a dual system of religious and civil courts. The various religious courts co-exist along with a civil court system invested with concurrent jurisdiction over family law matters under Article 51 (1) of the 1922 Palestine Order-in-Council (hereinafter "the Order") legislated during the British Mandatory period and which is still in effect today. The religious communities enumerated under Article 2 of the Order are not automatically granted autonomous jurisdiction. Specific enabling legislation is required to establish and confer jurisdiction on religious courts. For example, the Rabbinical Courts Jurisdiction Law (Marriage and Divorce) 5713-1953,[1] established the legal system that has jurisdiction over Jewish family matters.

In the absence of specific legislation, until 1974 case law presumed that assets acquired during the course of the marriage were joint property. It was based on the supposition that all assets acquired during the marriage were the result of a joint effort by the parties within the marital framework. Such property was to be evenly distributed and there was no significance to the name in which ownership was registered. The interest of either party could be realized at any time by requesting distribution of assets. There was no requirement for the parties to divorce before the division of assets look place.

This may appear unusual to attorneys practicing in jurisdictions with no-fault divorce. Since religious law controls divorce in Israel, the ability to obtain court-ordered distribution of assets prior to divorce was of great significance for Israeli Jews, who constitute 80 percent of the population. Unless both parties agree, obtaining a decree dissolving the marriage (a *Get*), is often a long and difficult procedure.

The grounds for a *Get* are very narrow (e.g., adultery, abandonment, extreme physical violence) and the standards of proof are very demanding. Even with sufficient grounds and adequate evidence, the rabbinical courts will often issue decisions that do not amount to an obligation to give or accept a *Get*, such as "the parties should get divorced" or "the court recommends" that the parties divorce. That falls short of an actual obligatory order to divorce. Thus, in many instances a *Get* may take years before being issued, during which the parties no longer live together and have long ceased to function as an integrated economic unit.

As noted, prior to 1 January 1974 the division of marital assets was determined by case law as there was no statute that addressed the issue. During that period, the courts developed the doctrine of community property. Under this doctrine, all assets acquired during the course of the marriage belonged to both parties equally, unless received by inheritance or gift, under the assumption that all property acquired during the course of the marriage is the result of a joint effort by both parties. This doctrine became a legal presumption. Further, no weight was attributed to the fact that one spouse was the wage earner while the other cared for the children and tended to the household chores. Since this partnership in the property was an ongoing one, the rights vested with the acquisition of the asset. This meant that the division of assets could be demanded at any time. It did not depend upon the parties getting divorced.

Note that in most jurisdictions where the division of marital assets is predicated upon divorce, those jurisdictions are either no-fault or have far more flexible standards for divorce than Israel's rabbinical courts.

On 1 January 1974, the Spouses (Property Relations) Law[2] (hereinafter "the Law") went into effect. The Law encoded many of the principles existing under the relevant case law but introduced a significant and very problematic change. Marital property was to be distributed under the doctrine of balancing of assets.

The principle underlying this doctrine states that there is a complete separation of each spouse's property during the course of the marriage. The parties' assets, with certain specified exceptions, are considered in total at the time of divorce and divided between them. The division, however, only takes place "with the dissolution of the marriage."

Under Israel's dichotomized legal system, the consequences of this new limitation were of great significance. A spouse whose marriage had broken down was unable to liquidate his or her interests in the marital property until a *Get* was issued or at least held to be obligatory by a rabbinical court. This became a loophole for unscrupulous parties who used the *Get* as a bargaining chip. The spouse whose economic position was weaker, usually the wife, would make concessions in order to obtain the agreement of the other spouse to divorce.

The courts developed various approaches in an attempt to circumvent the untenable situation in which many spouses were placed by the adoption of the Law. One such approach, which produced a partial solution, held that the community property presumption could co-exist along with the application of the Law. Although the Supreme Court, in a split decision, ruled that the two doctrines do not exist simultaneously, the minority opinion in effect offered a partial solution.[3]

The minority held that even where the Law controls, there can be an intent to apply community property presumptions to specific property within the marital framework. Courts have held that while the community property presumption cannot form the basis for ruling that the property is not subject to the Law, they found other legal bases for their conclusions. Courts have used contract law, fiduciary law and the law of agency on which to base their conclusion that a specific property was to be divisible, even though the marriage had yet to be dissolved. The theory was that the presumption of community property could be proven to apply to a specific asset, even though the couple's assets were subject to the Law. In that event, the specific asset would be distributed prior to the divorce and the remainder of the parties' assets would be distributed after the divorce.[4]

This circuitous and contrived attempt to circumvent the Law often resulted in drawn out and unnecessary litigation whose outcome was highly unpredictable. In order to alleviate the difficulties imposed on parties seeking to dissolve their marital assets, various bills were proposed over the course of the years to amend the Law. The proposals sought in various ways to weaken the linkage between distribution of assets and the dissolution of the marriage.

Due to Israel's fractious political system, any statutory change which is seen as weakening the status of the rabbinical courts is met with immediate opposition by some of the religious parties. During the 17th Knesset, several members, including religious MKs, submitted a proposed amendment to the Law which had failed to pass in various versions during previous legislative sessions. The bill proposed that the division of marital assets could occur after a certain period of time, without the prerequisite of a *Get*.

The proposal, which was supported by the Israel Bar Association and several women's organizations, earned the immediate and determined opposition of the ultra-Orthodox parties. Their opposition was formulated as being based on the protecting of women's rights. They argued that the equitable division of marital assets takes into account the needs of the custodial parent. In order to gain an advantage in dividing the assets, the amendment will encourage husbands to wage custody battles instead of agreeing that the mother be the primary custodial parent.

The proposal that was finally brought to a vote contained several amendments. The primary change was the addition of Paragraph 5a to the Law, which states that the rights to equitable distribution will be vested in either spouse even before the dissolution of the marriage if a petition for dissolution is filed and certain conditions are met. The conditions are as follows:

1. A year has passed since one of the following actions was filed:

a. An action for dissolution of the marriage

b. An action for the equitable distribution of property between spouses in all its various permutations

2. There are irreconcilable differences between the parties, or the parties are living apart, even if under the same roof, for a period of at least nine months within a consecutive period of a year. This period can be shortened by the court if a judicial ruling has been made regarding irreconcilable differences.

The court is authorized to shorten the above periods if it determines the existence of one of the following circumstances:

a. An order of protection was issued after a hearing in the presence of both parties

b. An indictment was filed for violence against the other spouse or against their children

c. The court has ordered the arrest of the petitioner's spouse after being convinced that he/she constitutes a danger to the petitioner or their children.

The courts are given additional authority to prevent a spouse from exploiting this amendment to perpetuate

the "chained-spouse" phenomenon (*Aguna*). The distribution of assets can be made contingent by the court upon depositing a written consent to give or receive a *Get*. The purpose of this provision is to prevent a party from obtaining his or her demand to divide marital assets while refusing to dissolve the marriage. A signed consent to grant or receive a *Get* is not binding under Jewish Law. However the breach of good faith in not following through on such an undertaking can be grounds for staying the execution of the order to distribute marital assets.

Those opposing the changes raised two main objections:

1. Custody battles will increase
2. A proliferation of unfounded requests for orders of protection will result.

The first is not a very compelling argument and did not succeed in deterring the broad support the amendment received both within the Knesset and from the many non-profit organizations that worked for its passage. Custody battles are still determined for the most part by court appointed professionals. Husbands who are motivated by financial considerations are highly unlikely to be successful in convincing court-appointed psychologists that they are the preferable custodial parent.

As to the second argument, while there may be an increase in such allegations, false allegations of family violence are possibilities regardless of the impact on the distribution of marital assets. The increase in unfounded accusations of family violence in order to bring forward the date of equitable distribution does not appear to be a serious concern. As pointed out, an ex parte order is not sufficient to trigger this condition. Furthermore, the court still has discretion in applying this option. Finally, the actual difference in the date of distribution in the event an order of protection is issued will not be significant enough to encourage a flood of unfounded allegations.

In addition to uncoupling the distribution of assets from the issuance of a *Get*, the recent amendment to the Law contains another revision. Under Paragraph 8 of the previous version, the courts were authorized to order that the division of family assets was not to be made on an equal basis. The court had discretion to distribute the assets according to its interpretation of what is equitable under the circumstances. The Law did not specify any guidelines for the court's implementation of its discretion.

The revision of Paragraph 8 (2) of the Law adds a specific dimension to this formula. The court is now authorized, when balancing the assets, to consider "future assets, including the earning capacity of each spouse." The issue of future earnings, which is related to reputation, has been addressed by the courts in Israel with much hesitation and lack of clarity. Courts have generally rejected the concept of future earnings as a divisible family asset. The rare decisions that were willing to recognize this concept would only do so where the gap between the assets and abilities of the parties was extremely pronounced.

One of the most significant decisions regarding future earning capacity as an asset was made in 2004 by Supreme Court Justice Elyakim Rubinstein on a motion for leave to appeal.[5] Justice Rubinstein rejected the wife's claim that her husband's reputation as a lawyer is a distributable asset. He did hold, however, that it is possible in certain circumstances to consider reputation as a distributable marital asset. Israeli courts have not developed this possibility. There has been a handful of cases where consideration was given to the discrepancy in potential earnings between the spouses. Unfortunately, this asset has been recognized more in theory than implemented in fact.

The amendment to Paragraph 8 (2) of the Law now removes any hesitations that the courts have had in considering future earnings as a distributable asset. It still remains to be seen how the courts will implement this amendment. Will it be based on the current difference between the parties' earnings and extrapolate as to the future? Will it use average income statistics for those of similar age and profession? How far into the future will the parties' earnings be considered? Will it be an amortized lump sum or linked to actual future income? These questions have been addressed in other jurisdictions and hopefully the courts in Israel can learn from them and avoid some of the pitfalls in making their determinations.

The recent amendment to the Law is the most significant legislative change in Israeli marital law in the past 35 years. It is now up to the courts to implement those changes in a way that will correct some of the inequities that have made divorce in Israel a highly complex and unnecessarily burdensome process.

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See **Divorce, updated Israeli style**, page 46

Gaza and proportionality
from page 5

it would be illusory to believe that the most difficult moral decisions lend themselves to clear guidance. "Do not imagine," he wrote, "that these most difficult problems can be understood by any of us. This is not the case."[14] The warning is particularly apt when it comes to decisions on the battlefield in urban areas like Gaza where Hamas makes a habit of using human shields and fails to discriminate between combatants and civilians. To be sure, moral issues are posed by the Israeli entry into Gaza. And, they may translate into legal issues. But, it would be a mistake of historic proportions to treat these very difficult issues as if ripe for international adjudication by judges capable of divorcing themselves from the sway and pull of international politics and emotions that surround these issues.

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Notes:

1. Leon Wieseltier, *Washington Diarist: Changes Arrives*, The New Republic, 4 Feb. 2009, www.tnr.com/politics/story.html?id=b88b8198-e8cb-4e50-96c2-34f35d67d126 (last visited 19 Feb. 2009).

2. The 1977 Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Art. 51:5:b, 1125 U.N.T.S. 609.

3. Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 International Review of the Red Cross 445, 462 (2005).

4. Yoram Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflicts*, Israel Yearbook on Human Rights 38 (2008). See also T. Franck, On Proportionality of Countermeasures in International Law, 102 AJIL 715 (2008).

5. Jim Clancy, *interview with the Palestinian Authority's Ambassador to the United Nations, Riyan Mansour*, CNN Newsroom, 3 Jan. 2009, (http://edition.cnn.com/TRANSCRIPTS/0901/03/cnr.07.html) (last accessed 19 Feb. 2009).

6. 1945 Charter of the United Nations, *in* The United Nations and Human Rights 1945-1995. Department of Public Information, United Nations, New York 10017 (1995).

7. Even if one were to assume, as Hamas contends, that Gaza remains under Israeli occupation, the same restriction on the use of force would certainly apply insofar as the laws of belligerent occupation require that the occupied population respect the authority of the governing power until such time as a peaceful resolution of the dispute is possible.

8. *See* Allan Gerson, *Privatizing Justice*, 45 Justice 36 (2008) citing Almog v. Arab Bank PLC, 04-CV-5564 E.D.N.Y. (2007).

9. Jimmy Carter, *An Unnecessary War*, The Washington Post, Op-Ed, 8 Jan. 2009. *See generally* the critique of proportionality as invoked by Carter and others: Ruth Wisse, *Now, About that 'Proportionality'* Commentary 27 (Mar. 2009).

10. Marlise Simons, *Palestinians Press for War Crimes Inquiry on Gaza*, New York Times, 11 Feb. 2009, www.nytimes.com/2009/02/11/world/middleeast/11hague.html (last visited 19 Feb. 2009).

11. Clancy, *supra* note 5.

12. *See, for example,* HCJ (Israel High Court of Justice) 769/02 *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, para. 30 (Not Published, 14 Dec 2006).

13. The record, for example, of the International Court of Justice in handling cases involving the use of force – the Nicaragua Harbor case, the Mine Platform case (U.S.-Iran), and the more recent Israel Wall decision – speaks badly of the role of international courts in freeing themselves from politics when examining use of force issues.

14. Moses Maimonides, The Guide for the Perplexed 6 (2000).

Divorce, updated Israeli style
from page 41

Notes:

1. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953, 7 *Laws of the State of Israel* (hereinafter: LSI) 139 (1953-4) (Isr.).

2. Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1973-4) (Isr.).

3. C.A. (Civil Appeal) 1915/91 Yacobi-Knobler v. Yacobi-Knobler 39 (3) *Piskei-Din* (Reports of the Supreme Court of Israel; hereinafter: *"P.D."*) 529, 607-623 (1995) (opinion of Justice Tova Strassbourg-Cohen).

4. See C.A. 8672/00 Abu-Romi v. Abu-Romi, 46 (6) P.D. 175 (2002); C.A. 4358/01 Bar-El v. Bar-El, 55 (5) P.D. 856 (2001); C.A. 7687/04 Sasson v. Sasson, 49 (5) P.D. 596 (2005).

5. F.M.A. (Family Motion to Appeal) 5879/04 Anonymous v. Anonymous, 59 (1) P.D. 193 (2004).