LCA 8791/00

Anita Shalem

v.

1. Twenco Ltd

2. Twenco Trading Ltd

3. Menasheh Shalem

The Supreme Court sitting as the Court of Civil Appeals

[13 December 2006]

Before President (Emeritus) A. Barak, Vice-President E. Rivlin and Justice M. Naor

Appeal by leave of the judgment of the Tel-Aviv-Jaffa District Court (Vice-President H. Porat) on 31 October 2000 in FA 1017/00.

Facts: The third respondent, in the course of his business, drew a cheque in favour of the first and second respondents. The cheque was dishonoured. The first and second respondents applied to the Enforcement Office and attached the residential apartment that was registered solely in the name of the third respondent. The appellant subsequently filed an action for a declaration that she was entitled to half the apartment by virtue of the joint ownership rule. The first and second respondents counterclaimed, arguing that if the appellant was entitled to half the apartment, she was also liable under the joint ownership rule for half the debts of the third respondent. Both the Family Court, in the first instance, and the District Court, on appeal, held that the appellant was entitled to half the apartment by virtue of the joint ownership rule, but she was also liable for half the third respondent's debts by virtue of the same rule. The appellant sought leave to appeal to the Supreme Court, and leave was granted.

Held: The joint ownership rule distinguishes between purely family assets (and especially the residential apartment), and other assets. With regard to purely family assets and liabilities, the joint ownership crystallizes when the conditions for joint ownership — a sound relationship and uniting their efforts — are satisfied. With regard to all other (not purely family) assets and liabilities, the joint ownership crystallizes only when there is a 'critical event' in the marriage, such as the death of one of the parties or a crisis in the marriage that significantly endangers the relationship between the spouses. In this case, the marriage between the appellant and the third respondent had not reached a critical event. Therefore although the

appellant was entitled to half the apartment under the joint ownership rule, she was not responsible for half of the third respondent's business debts since no critical event in the marriage had occurred.

Appeal allowed.

Legislation cited:
Agency Law, 5725-1965.
Assignment of Obligations Law, 5729-1969, ss. 1, 1(a), 2, 6.
Land Law, 5729-1969, ss. 7, 9, 10.
Partnerships Ordinance [New Version], 5735-1975, s. 14.
Sale Law, 5728-1968, s. 34.
Spouses' Property Relations Law, 5733-1973.

Israeli Supreme Court cases cited:
[1] HCJ 1000/92 *Bavli v. Great Rabbinical Court* [1994] IsrSC 48(2) 221.
[2] CA 1915/91 *Yaakobi v. Yaakobi* [1995] IsrSC 49(3) 529.
[3] CA 3002/93 *Ben-Zvi v. Sittin* [1995] IsrSC 49(3) 5
[4] CA 806/93 *Hadari v. Hadari* [1994] IsrSC 48(3) 685.
[5] CA 300/64 *Berger v. Estate Tax Director* [1965] IsrSC 19(2) 240.
[6] CA 630/79 *Lieberman v. Lieberman* [1981] IsrSC 35(4) 359.
[7] CA 4374/98 *Atzmon v. Rapp* [2003] IsrSC 57(3) 433.
[8] CA 253/65 *Bricker v. Bricker* [1966] IsrSC 20(1) 589.
[9] CA 135/58 *Barali v. Estate Tax Director* [1969] IsrSC 23(1) 393.
[10] CA 595/69 *Apta v. Apta* [1971] IsrSC 25(1) 561.
[11] CA 3563/92 *Estate of Gitler v. Gitler* [1994] IsrSC 48(5) 489.
[12] LCA 964/92 *Oron v. Oron* [1993] IsrSC 47(3) 758.
[13] CA 841/87 *Ron v. Ron* [1991] IsrSC 45(3) 793.
[14] CA 122/83 *Basilian v. Basilian* [1986] IsrSC 40(1) 287.
[15] CA 370/87 *Estate of Madjer v. Estate of Madjer* [1990] IsrSC 44(1) 99.
[16] CA 2280/91 *Abulof v. Abulof* [1993] IsrSC 47(5) 596.
[17] CA 724/83 *Bar-Natan v. Bar-Natan* [1985] IsrSC 39(3) 551.
[18] CA 4151/99 *Brill v. Brill* [2001] IsrSC 55(4) 709.
[19] CA 1880/95 *Durham v. Durham* [1996] IsrSC 50(4) 865.
[20] CA 633/71 *Mastof v. Estate of Mastof* [1972] IsrSC 26(2) 569.
[21] CA 446/69 *Levy v. Goldberg* [1970] IsrSC 24(1) 813.
[22] CA 1967/90 *Gibberstein v. Gibberstein* [1992] IsrSC 46(5) 661.
[23] CA 677/71 *David v. David* [1972] IsrSC 26(2) 457.
[24] CA 6557/95 *Avneri v. Avneri* [1997] IsrSC 51(3) 541.

[25] CA 7442/97 *Amit v. Amit* [2000] IsrSC 54(4) 625.
[26] CA 627/70 *Zeevi v. Zeevi* [1972] IsrSC 26(2) 445.
[27] CA 592/79 *Shatzky v. Said* [1981] IsrSC 35(4) 402.
[28] CA 29/86 *A.T.S. Drive Yourself Ltd v. Carroll* [1990] IsrSC 44(1) 864.
[29] CA 541/74 *Parminsky v. Senderov* [1975] IsrSC 29(2) 253.
[30] CA 2328/97 *Kochavi v. Arenfeld* [1999] IsrSC 53(2) 353.
[31] CA 189/95 *Otzar HaHayal Bank Ltd v. Aharonov* [1999] IsrSC 53(4) 199.
[32] LCA 8672/00 *Abu-Rumi v. Abu-Rumi* [2002] IsrSC 175.
[33] CA 790/97 *United Mizrahi Bank Ltd v. Avraham* [2005] IsrSC 59(3) 697.

For the appellant — E. Pelles, Y. Shemesh.
For the first and second respondents — D. Chelouche.

JUDGMENT

President (Emeritus) A. Barak

A married man runs a business. In the course of his business, he draws two cheques. They are not honoured. His creditors initiate enforcement proceedings against him. In these, an attachment is placed on the residential apartment of the man and his wife, which is registered in the name of the husband. The joint ownership rule applies to all of the couple's property. By virtue of this the wife owns a half of the rights in the residential apartment. Is the wife also liable directly to the creditors for half of the husband's debt?

A. The facts and the legal proceedings

1. The appellant and her husband (hereafter — the third respondent) were married in 1970. The couple have a residential apartment, which they bought in 1990 (hereafter — the apartment). The apartment is registered in the name of the third respondent only. The third respondent worked as an agent for the distribution of products imported by the first and second respondents (hereafter — the respondents). In the course of his business, the third respondent drew cheques to the order of the respondents, but these were dishonoured by him and were not paid. These cheques were submitted for enforcement at the Enforcement Office in 1994. In the enforcement proceedings, an attachment was registered (on 27 April 1995) at the land registry on the rights of the third respondent in the apartment for a debt

amounting today to more than NIS 900,000. The appellant was not a party to the proceedings that took place at the Enforcement Office.

2. Against the background of the enforcement proceedings to sell the apartment, the appellant filed (on 27 July 1996) an action by way of an originating motion for a declaration that she is the owner of half of the rights in the apartment by virtue of the joint ownership rule (FC 19570/97). The respondents filed a defence and a counter-claim, which was directed against both spouses. They claimed that should the appellant be entitled to the relief sought by her, then by virtue of the joint ownership rule she was also liable for the husband's debts. They were therefore entitled to realize the appellant's rights in the residential apartment by virtue of the attachment registered on the apartment or by virtue of the presumption of joint debts. Pursuant to the decision of the Magistrates Court, the proceeding was transferred to the Family Court. At the beginning of the hearing (on 3 December 1998) it was agreed that a declaration would be made that the wife was entitled to be registered as the owner of half of the rights in the apartment by virtue of the joint ownership rule and that the legal proceedings would be restricted to the question whether there was a presumption of joint ownership with regard to the husband's debts and whether it was possible to recover from the appellant's share in the apartment.

B. The judgment of the Family Court

3. In its judgment (of 5 December 1999) the Family Court (the honourable Justice Z. Zfat) held that the case before it, which was not subject to the pooling of resources rule provided in the Spouses' Property Relations Law, 5733-1973 (hereafter: the Spouses' Property Relations Law), required a decision on three questions. The *first* concerned the scope of the joint ownership of the rights in the assets. In answering this question, the court held that the property of the spouses should be governed by the general joint ownership rule, which is based on a complete unification of resources and applied to everything that belonged to them. The appellant's attempt to limit the joint ownership rule to the apartment alone was rejected. It was held that all the elements required for the purpose of applying the general and complete presumption of joint ownership of the assets, without any distinction between the residential apartment and business property, were satisfied. The *second* question that was considered was whether the joint ownership applied to debts, and on what scale. It was held that as a consequence of the presumption concerning the general joint ownership of assets, there also existed a presumption concerning a corresponding joint

liability for debts that were incurred in the normal manner during the period of the joint ownership, with various exceptions such as an expense that was incurred in breach of trust. The court added that where the marriage is stable, every expense incurred by one spouse in managing the family assets or for the purposes of the home and family may be regarded as a joint expense. The burden of proof for excluding the debt from the scope of the joint debts rests on the party making such a claim. In the present case, the debts were incurred in the normal course of the third respondent's business, in a business that was the source of livelihood for the whole family. The appellant did not discharge the burden of proving that the business debt should be excluded from the joint debts. The *third* question decided by the court concerned the rights of a third party to recover from joint property. It was held that the application of the joint ownership presumption could not prevent the creditors from collecting the debt by realizing the assets on which the attachment had been imposed. Their right derived from two sources, the first being the appellant's joint liability for debts, and the second being the attachment that had been imposed on the property and registered at the land registry. The court held that the joint liability for debts applied also to the 'external' relationship between the spouses (the joint owners) and a third party. In its opinion, it was possible to recover from both spouses, who were subject to the joint ownership rule, a debt that was incurred only by one of them to a third party. Consequently the court concluded that the creditors were entitled to recover from the appellant's share in the apartment. *Finally*, the appellant's procedural claims that were directed against her not being a party to the proceeding in which the attachment was registered on the residential apartment were rejected. The court held that the proceeding was not begun as an ordinary claim but began with enforcement proceedings to recover for cheques that were signed and dishonoured by the husband only. There was no reason, at that stage, to start a proceeding against the wife. Moreover, the appellant was entitled to raise any valid defence argument against the debt and the attachment within the framework of the counterclaim.

C. The judgment of the District Court

4. The appellant filed an appeal on the judgment of the Family Court in the Tel-Aviv-Jaffa District Court. In its judgment (of 31 October 2000) the court (the honourable Vice-President H. Porat) denied the appeal. The court approved the judgment of the Family Court and the reasoning in it. It was held that there was no longer any doubt that the joint ownership rule could apply also to business assets as well as to debts. Notwithstanding, with regard to debts it was possible to prove that the specific debt under consideration

was not incurred in the joint business but that it was a debt of a purely personal nature. The burden of proof for this rested with the person claiming not to be jointly liable for the debt. In the case before it, it was held that the debt to the respondents derived directly from the business and it was not an external, private, personal debt of the third respondent. The court added that a debt for which the spouse is jointly liable by virtue of the joint ownership rule may be recovered not only from the property from which the debt was created but also from other property that is included among the jointly-owned assets. In this regard, the court held that it made no difference whether the other property was an apartment or other business property. Therefore, just as the third respondent's share in the apartment was not immune to his creditors for the business debts, neither was the appellant's share. The court distinguished between a situation in which the right of the wife in the apartment derived from the joint ownership rule and a situation in which she was registered as the owner of half the rights in the apartment in the property register. It was possible that in the latter case she could not be made liable for a debt without joining her in the proceeding in which the debt was created, but this was not the position in the present case. The court added that although the appellant was not a party to the legal proceedings in which the third respondent's debt was determined, she had had every opportunity of denying that debt in the proceedings that took place. The court rejected the appellant's claim that the joint ownership of the property did not derive from the marriage but from her investment in financing the purchase of the property. It was held that this had no importance within the framework of the joint ownership of property rule.

D. The arguments in the appeal

5. An application for leave to appeal the judgment of the District Court was filed in this court. It was decided (on 23 December 2001) to grant leave to appeal and to regard the case as if an appeal had been filed in accordance with the leave that was granted. The appellant claims that she is not a partner in the debt of the third respondent (the husband) to the respondents (the creditors). According to her, there is no basis for determining a general joint 'ownership' rule for debts. Even if a joint 'ownership' rule for debts is determined, it is possible that a specific debt is not included in the joint 'ownership.' This is the case here. There is no basis for the determination of the Family Court that we are dealing with an ordinary business debt, since she claimed throughout the proceedings that this was a private dealing of her husband. The appellant's position is, therefore, that she was not a party to her husband's debt. In view of this, her position is that her right in the apartment,

which derives from the joint ownership of property rule, takes precedence over the creditors' right of attachment which arose at a later date. The appellant also raises procedural arguments against her not being joined as a party in the enforcement proceedings against the husband. Her claim is that her right to present her case was violated. This is because she was not given an opportunity to prove that the transaction was an exceptional one, which did not take place in the ordinary course of the third respondent's business, and therefore she was not a party to the debt that was created as a result.

6. The respondents rely on the judgments of the Family Court and the District Court. According to them, the appellant's claim that it was not proved that the debt was created in the normal court of the third respondent's business is being raised by her for the first time in this proceeding. It conflicts with the claims that were raised by her until now. There is no dispute that the debt derives directly from the husband's business which provided the family's livelihood. Moreover, the joint liability rule for debts is a corollary of the joint ownership rule for rights, and the appellant did not discharge the burden of proving that the debt in question is not a joint one. With regard to the fact that the appellant was not joined as a party to the proceeding in which the attachment was imposed, the respondents argue that the appellant was given every opportunity of denying the debt, but she did not do so. The respondents say that the appellants' arguments concerning their lack of good faith are also being raised for the first time. Moreover, the question in dispute is not whether the right of the appellant under the joint ownership rule takes precedence over the right of the respondents who imposed the attachment. This is because the scope of the dispute in this case, according to the consent of the parties that was given the force of a decision, is whether the appellant's right in the apartment is countered by her liability under the joint ownership rule and whether it is possible to set off the right against the liability. For this reason the respondents did not raise in the Family Court any claims that testify to their good faith.

E. The spouses' joint ownership rule

7. The joint ownership rule that was developed in Israeli law infers a partnership between the spouses in their rights and debts. The main question before us is whether the spouses' joint ownership rule imposes on one spouse liability to third parties for a debt of the other spouse. The answer to this question is found within the framework of the spouses' joint ownership laws that have been formulated in Israeli law. The joint ownership rule in Israel is the creation of case law. It is a clear expression of Israeli-style 'common law'

(see HCJ 1000/92 *Bavli v. Great Rabbinical Court* [1]). The joint ownership rule creates a special set of laws that govern property relations between spouses. The content of this relationship is derived from various sources. It is the creation of the court, by means of a hybridization of family law with existing civil law to create new laws. The joint ownership rule takes account of the special principles underlying family law and the elements that are unique to the relationship between spouses. It creates a restrictive and special arrangement that in certain respects is identical to property relations between unrelated persons and in other respects differs from them because of the family relationship. Naturally the integration of this arrangement in property law and civil law as a whole gives rise to difficulties. These difficulties are especially significant with regard to the effect of the joint ownership rule on third parties (see CA 1915/91 *Yaakobi v. Yaakobi* [2]; CA 3002/93 *Ben-Zvi v. Sittin* [3], at p. 16). These difficulties are natural. The existence of a judicial rule that creates a special arrangement leads to a natural friction. We are required to contend with some of the difficulties in this appeal. The joint ownership rule operates at the crossroads between private law and family law. When implementing the joint ownership rule we should consider not only the general purposes of private law but also the special purposes from the field of family law. Let us discuss these briefly.

F. The purposes of the joint ownership rule

8. The joint ownership rule is a legal tool that is intended to realize a social purpose. It is nourished by a social perception of the institution of marriage as a voluntary relationship between two individuals that is based on equality, cooperation and mutual support. It is intended to achieve social justice. The joint ownership law is intended to promote several important social purposes. *One* purpose is the recognition of marriage as a partnership. A marriage is based on a continuing relationship of love and faithfulness, mutual trust, cooperation and mutual support. Marriage is not merely a partnership in the personal sphere, but also an economic partnership of different skills and contributions, which belong to both spouses. The joint ownership rule also gives full effect to the partnership in the spouses' property relations. It allows a joint enjoyment of the advantages of living together, as well as a joint sharing of the difficulties. 'Joint ownership requires spouses to share costs and rights while refraining from a exact calculation based on the claims of individual rights made by one spouse against the other' (H. Dagan and C.J. Frantz, 'Marital property,' *Menashe Shava Book: Legal Research in His Memory* (A. Barak and D. Friedmann, eds., 2006) 249, at p. 256; S. Lifschitz, 'On Past Property, Future Property

and the Philosophy of the Presumption of Joint Ownership,' 32(3) *Hebrew Univ. L. Rev. (Mishpatim)* 627 (2005), at pp. 701-720). As President M. Shamgar said:

> 'The presumption of joint ownership is an expression of the interpersonal way of life that is created according to our outlook in the relationship between spouses who maintain a joint household and unite their efforts as one coordinated unit…. Over the years the separate spheres and assets — whatever their source — become "one flesh"' (CA 806/93 *Hadari v. Hadari* [4], at pp. 694-695).

9. The *second* purpose is the advancement of equality between the spouses. The legal arrangement of joint ownership and the equal division of property between the spouses at the end of the marriage are based upon and realize equality between the spouses. The joint ownership rule is derived from the outlook that the spouses contribute equally to the welfare of the family (see *Bavli v. Great Rabbinical Court* [1], at p. 229). It reflects the recognition that the two spouses contribute, each in his own way, to the existence, stability, success and development of the marriage. This is the case even if only one of the spouses works and earns money outside the home, whereas the other spouse nurtures the family life from within. The joint ownership rule ascribes an equal value to the different roles carried out by the spouses. It reflects a recognition of the economic contribution of the housewife to the welfare of the family and the accumulation of its property, which is identical to the economic contribution of the husband from his work (see CA 300/64 *Berger v. Estate Tax Director* [5], at p. 246; CA 630/79 *Lieberman v. Lieberman* [6], at p. 365).

10. *Third*, the joint ownership rule seeks to preserve the autonomy and the independent identity of each of the spouses. The institution of marriage is regarded as a voluntary relationship between two individuals, while maintaining their separate identity and developing their independent personality. The marriage reflects cooperation and joint interests, while maintaining the autonomy of each of the spouses. The joint ownership rule was not intended to negate the independent identity of the spouses within the marriage. It does not seek to turn the relationship into a kind of legal personality, which incorporates all of the rights and liabilities of the spouses together. Admittedly, a marriage is a life of sharing. But it is the sharing of two individuals. The separate personality of the spouses is not cancelled by the institution of marriage, nor is it swallowed up in it. Therefore, even

within the framework of the joint ownership rule separate spheres of activity are recognized, in which the spouses maintain and realize their independent will and their personal autonomy (see Dagan and Frantz, 'Marital property,' *supra*, at pp. 294-295). Therefore the joint ownership rule does not negate the freedom of the spouses to agree upon the property arrangement that will govern them. Indeed —

> 'Recognition of the sovereignty of the spouses to make agreements with regard to the property arrangement between them is consistent with the approach that regards marriage as a voluntary relationship between two individuals, which leaves them the option of maintaining their independent identity' (*per* Justice E. Rivlin in CA 4374/98 *Atzmon v. Rapp* [7], at p. 444).

11. *Last*, the main effect of the joint ownership rule is felt when the marriage ends. The joint ownership rule seeks to provide economic security for the spouses after the relationship ends and to allow each of them to be independent (see A. Rosen-Zvi, *Spouses' Property Relations* (1982), at p. 21); U. Reichman, 'The Property Consequences of the Joint Ownership Rule between Spouses after the Commencement of the Land Law, 5729-1969,' 6 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 289 (1978), at p. 319). Admittedly, the joint ownership rule also has ramifications during the marriage. Guaranteeing the property rights of the spouses reduces tensions in family life on these subjects. The joint ownership rule provides a feeling of economic security, which contributes to a strengthening of the marriage relationship. Notwithstanding, the joint ownership rule was not intended to be applied on a daily basis, as long as the marriage is intact and there is trust and cooperation between the spouses. Settling accounts in property matters in the course of a functioning marriage is usually regarded as undesirable. Certainly there is no basis for terminating the joint ownership while the marital relationship lasts (cf. G. Tedeschi, *Further Essays in Law* (1992), at pp. 135-136). The joint ownership rule is intended to protect one spouse against the opportunism of an abandoning spouse. It is intended to compensate for vulnerability resulting from the end of a long relationship of trust and cooperation. It thereby preserves the freedom of each of the spouses to leave a failed marriage, including the spouse who is economically dependent on the other. The aspiration to realize the different purposes, which require a delicate internal balance, led to the creation of a complex property regime between spouses, which is reflected in the joint ownership rule. Let us consider its main aspects.

G. Joint ownership of rights and the scope thereof

12. According to the joint ownership of rights rule, spouses who have a sound relationship and who unite their efforts are presumed to own jointly the property that is accumulated (see, *inter alia*, *Berger v. Estate Tax Director* [5], at pp. 245-246; CA 253/65 *Bricker v. Bricker* [8], at p. 597; CA 135/58 *Barali v. Estate Tax Director* [9], at pp. 395-396; CA 595/69 *Apta v. Apta* [10], at p. 566; CA 3563/92 *Estate of Gitler v. Gitler* [11], at pp. 494-495). This is the case even if the assets are registered in the name of one spouse or are in his sole possession. The presumption of the joint ownership of rights is derived from the character of the marriage. Notwithstanding, this presumption, which is based on the express or implied consent of the spouses, can be rebutted. In order to rebut the presumption and exclude certain assets from the scope of the joint ownership presumption, weighty evidence is required. The burden rests with the person claiming that the presumption does not apply (see *Yaakobi v. Yaakobi* [2], at p. 579; LCA 964/92 *Oron v. Oron* [12], at p. 763; Rosen-Zvi, *Spouses' Property Relations*, *supra*, at pp. 224-233).

13. The joint ownership of rights rule has been applied to all of the spouses' assets. Thus it is not limited solely to 'family' assets (such as the residential apartment, furniture, household chattels and the family car). It also applies to social rights such as severance pay, pension rights, savings in managers' life insurance policies and the like (CA 841/87 *Ron v. Ron* [13]). It also includes business assets (see *Bricker v. Bricker* [8]; CA 122/83 *Basilian v. Basilian* [14], at pp. 294 and 297; CA 370/87 *Estate of Madjer v. Estate of Madjer* [15], at p. 101; CA 2280/91 *Abulof v. Abulof* [16], at pp. 600-601; *Bavli v. Great Rabbinical Court* [1], at pp. 228-229). The joint ownership of business assets also applies when the husband does not include his wife in his businesses and does not even tell her about them (see *Basilian v. Basilian* [14], at p. 298, *Estate of Gitler v. Gitler* [11], at pp. 495-496; CA 724/83 *Bar-Natan v. Bar-Natan* [17]). Sometimes it also includes assets from before the marriage or assets that were given to or inherited by one of the spouses after the marriage (see CA 4151/99 *Brill v. Brill* [18], at pp. 715-717; CA 1880/95 *Durham v. Durham* [19], at p. 877; *Hadari v. Hadari* [4], at p. 704; *Yaakobi v. Yaakobi* [2], at p. 579; CA 633/71 *Mastof v. Estate of Mastof* [20], at p. 571; *Abulof v. Abulof* [16], at pp. 602-603). The joint ownership rule may be general, limited or restricted. It is general when it applies to all the assets. It is limited when it applies to a certain type of assets, such as assets that were acquired in the course of the marriage, and it excludes assets from before the marriage. It is restricted when it applies only to one or more specific assets,

such as the family home (J. Weisman, *Law of Property: Ownership and Concurrent Ownership* (1997), at p. 197).

H. Joint liability for debts and the scope thereof

14. Together with the joint ownership of rights rule there is also a joint liability for debts. With regard to debts that have already been realized, these determine the substance of the 'assets' that are subject to the joint ownership rule and therefore they are shared by the spouses. But what is the law regarding debts that have not yet been realized? This court has recognized the existence of a presumption concerning joint liability of the parties for debts that were accumulated from joint property, whether from 'personal' property or from 'business' property, which were incurred in the normal manner by one of the spouses during the period when they were living together. The remarks of Justice Z. Berinson are relevant to this issue:

> 'It seems to me that justice demands and logic dictates that one spouse cannot and should not be only the beneficiary from the partnership with the other spouse in the family assets, without also bearing the burden of the debts that were incurred in producing or acquiring the assets, or the running expenses of the family' (CA 446/69 *Levy v. Goldberg* [21], at p. 820).

This was also discussed by Justice E. Goldberg:

> 'It may be argued that whenever one of the spouses benefits from the work of the other spouse, why should he be a partner only in profits, while the other spouse is solely liable for losses and expenses? If one spouse benefits together with the second spouse from what he profits in his business, because he contributed to the "joint effort" in the family sphere, why should he not share also in the liabilities that the other spouse incurred in the pursuit of that "joint effort"?' (CA 1967/90 *Gibberstein v. Gibberstein* [22], at p. 665).

The principles of the rule were discussed by President M. Shamgar:

> 'The presumption of joint liability for debts supplements the presumption of joint ownership of assets. The spouse who benefits from the profits of the partnership with his spouse should be liable for the debts that were created while they were living together. These two presumptions reflect the essence of the common household — benefiting from the profits of the partnership while being jointly liable for expenses and losses' (*Ben-Zvi v. Sittin* [3], at p. 16).

15. Thus we see that the presumption of joint liability for debts is a corresponding and supplementary presumption to the presumption of joint ownership of rights (see also, *inter alia*, *Mastof v. Estate of Mastof* [20], at p. 571; CA 677/71 *David v. David* [23], at pp. 460-461 and 463-464; CA 6557/95 *Avneri v. Avneri* [24], at pp. 544-545; CA 7442/97 *Amit v. Amit* [25], at p. 629; B. Shereshevsky, *Family Law* (fourth extended edition, 1993), at p. 161; M. Shava, *Personal Law in Israel* (fourth extended edition, 2001), at p. 195; S. Levin and A. Grunis, *Bankruptcy* (second edition, 2000), at p. 293). The joint liability for debts supplements the joint ownership of rights and reflects the approach that the family partnership exists not only when there is plenty but also when there are shortages; the spouses are partners not only in profits and rights, but also in losses and debts. This arises from the presumed intentions of the spouses, just as it arises from their living together and from their combined efforts to maintain and advance the family unit. It is also dictated by considerations of justice. Indeed, just as the main purpose of the joint ownership of rights rule is to ensure a just and equal distribution of the rights that were accumulated during the time that the spouses lived together, so the main purpose of the joint liability for debts rule is to ensure an equal and just distribution of the debts that were accumulated during the time that the spouses lived together.

16. The presumption of joint liability for debts is rebuttable. The spouses can agree between them that one of them will buy an asset or manage a business in such a way that it will be his exclusive property and his risk only (see CA 627/70 *Zeevi v. Zeevi* [26], at p. 452; *Atzmon v. Rapp* [7], at p. 448). Moreover, several exceptions have been formulated in case law that mitigate the strictness of the rule of joint liability for debts, including debts of a purely personal nature, debts that were created from expenses on separate property; expenses that were incurred as a result of a breach of faith, such as, for example, the expenses of keeping a lover or mistress (see *Levy v. Goldberg* [21], at p. 820; *David v. David* [23], at p. 461; *Ben-Zvi v. Sittin* [3], at pp. 7-16; CA 592/79 *Shatzky v. Said* [27], at p. 414). Against this background, a debt resulting from an unusual transaction, which was defined as a 'financial manipulation,' of one of the spouses was not recognized as a joint liability (see *Gibberstein v. Gibberstein* [22], at p. 666). The position regarding the joint ownership of rights rule applies also to the joint liability for debts rule: the burden of proof that a certain debt is not subject to the application of the joint liability for debts rule rests with the person claiming this (see *David v. David* [23], at p. 461).

I. The construction underlying the joint ownership rule

(1) Various constructions

17. It seems to me that everyone agrees that the joint ownership rule is based on an agreement between the spouses. Sometimes the agreement between them is an express one. Usually it is implied (see *Bricker v. Bricker* [8]; *Apta v. Apta* [10], at p. 566). According to this agreement, the spouses are equal partners in the family assets. This partnership extends to all the types of asset as agreed by the parties. How does this agreement operate in the world of private law? The answer to this question is not simple. Take a real estate asset that is registered in the name of one of the spouses. What is the right of the other spouse? Some authorities suggest that the right of the spouse should be regarded as an obligatory right to receive half of the asset from the registered spouse (see Reichman, 'The Property Consequences of the Joint Ownership Rule between Spouses after the Commencement of the Land Law, 5729-1969,' *supra*, at p. 305; Rosen-Zvi, *Spouses' Property Relations*, *supra*, at pp. 263-264). Others regard the registered spouse as a trustee of the non-registered spouse, who is a beneficiary (Weisman, *Law of Property: Ownership and Concurrent Ownership*, *supra*, at p. 197). Some think that the implied content of the joint ownership agreement is that one of the spouses gives the other a power of attorney. The legal act of the one binds and entitles the other with respect to the third party (see CA 29/86 *A.T.S. Drive Yourself Ltd v. Carroll* [28], at p. 880; *Estate of Gitler v. Gitler* [11], at p. 498). It is also possible to suggest the implementation of the partnership laws provided in the Partnerships Ordinance [New Version], 5735-1975 (hereafter: the Partnerships Ordinance). It need not be said that these and other constructions sometimes overlap and sometimes conflict with one another.

(2) Rejection of agency and the commercial partnership

18. The basic approach regarding the joint ownership rule is that it is based on an (express or implied) agreement between the parties. The content of this agreement is that they share rights and obligations. The theory of this sharing is put into practice by means of the rules of private law. It is of course possible to regard each of the spouses as the agent of the other. For this there needs to be a special agreement. Living together does not in itself create an agency, within the meaning of this concept in the Agency Law, 5725-1965 (see A. Barak, *The Agency Law* (vol. 1, 1996), at p. 64); CA 541/74 *Parminsky v. Senderov* [29]; Reichman, 'The Property Consequences of the Joint Ownership Rule between Spouses after the Commencement of the Land Law, 5729-1969,' *supra*, at p. 292; D. Friedmann, 'The Obligation of Someone Who is not a Party to the Contract,' 13(2) *Tel-Aviv University Law*

Review (Iyyunei Mishpat) (1988) 387, at p. 395)). Similarly, living together does not create a partnership between the spouses, within the meaning of this concept in the Partnerships Ordinance, but only a sharing of rights and obligations. The difference between the two is clear. In a partnership each partner is an agent of the partnership and the other partners. Each partner entitles and binds the partnership and each partner is liable jointly and severally with the other partners for all the obligations for which the partnership is liable (s. 14 of the Partnerships Ordinance; see also M. Deutch, *Property* (vol. 1, 1997), at p. 484; Friedmann, 'The Obligation of Someone Who is not a Party to the Contract,' *supra*, at p. 393). This set of laws does not apply to the sharing of rights and obligations which is not a commercial partnership (Deutch, *Property*, *ibid*.). Spouses can of course create a commercial partnership, but to do this requires more than simply living together. The rule of joint ownership does not mean the creation of a commercial partnership between the spouses under the provisions of the Partnerships Ordinance. The partnership under the Partnerships Ordinance is a commercial institution, which is set up and run for the purpose of profit. For spouses, the property relations are one aspect of a whole relationship, which is a social institution that has very different functions. The purposes of the joint ownership rule are completely different from the purposes of the ordinary commercial law (*Atzmon v. Rapp* [7], at p. 447). The joint ownership rule does not need, therefore, to impose on the spouses a forced commercial quasi-partnership as a result of their marriage. What, therefore, is the proper construction? I will now turn to examine this question.

(3) The proper construction

19. How is the theory of the joint ownership agreement between the spouses implemented in practice? As we have seen, the content of the agreement is one of a joint ownership between the parties. How does this joint ownership agreement operate in private law? How is the special character of the joint ownership agreement given expression as an agreement between spouses who live together? How are the rules of private law integrated with the rules of family law? In order to answer these questions, we should examine two sub-questions: *first*, what are the provisions of the general law that are implemented in the case of an (express or implied) joint ownership agreement between spouses? This sub-question addresses private law. It assumes that there is an agreement between the parties, according to which every right or obligation that one of them has (vis-à-vis the whole world or vis-à-vis a third party) is also shared by the other spouse. The first sub-question tries to determine how the theory of the intention of the parties

to share rights and obligations is put into practice. The *second* sub-question is: what is the date on which the sharing of rights and obligations crystallizes? Certainly this date is not the date of creating the matrimonial relationship. The joint ownership rule does not exist unless the parties have a sound relationship and unite their efforts. But is the date on which the joint ownership crystallizes the date on which the conditions for the joint ownership rule come into existence, or is it perhaps a later date? This sub-question takes into account the special family relationship between the spouses. It seeks to examine how the theory of this special relationship is put into practice within the framework of private law. Let us consider each of these two questions separately.

J. The joint ownership agreement and how it operates in private law

(1) General

20. The premise is that an (express or implied) joint ownership agreement exists between the parties. This agreement should not be regarded as a gift agreement. The spouses do not give gifts to one another. Each of them contributes to the joint effort. We are therefore dealing with an agreement for consideration. A right or an obligation which under the general law is enjoyed or owed by one spouse — such as land, movable property or rights that he bought from a third party — is transferred in part (one half) to the other spouse. This transfer is effected by means of the normal processes of the general law. The way in which this transfer happens varies, of course, according to the type of right or obligation that was acquired by the first spouse. Let us demonstrate this by means of several common examples.

(2) A spouse that acquires movable property from a third party

21. A spouse buys movable property from a third party while the spouses are living together, and in appropriate cases even before that. We assume that, according to the agreement between the spouse and the third party, the spouse becomes the owner of the movable property. On the date on which the joint ownership is created by virtue of the joint ownership agreement between the spouses, the ownership of half of the movable property passes to the other spouse. This transfer is effected under the provisions of the Sale Law, 5728-1968 (hereafter — the Sale Law). After the date on which the joint ownership is created by virtue of the agreement, the first spouse does not have the power to carry out a transaction in the right of the other spouse in the movable property with a third party without the consent of the other spouse. The right of the other spouse in the movable property will be lost only if the movable property is sold in market overt, as stated in s. 34 of the Sale Law. The same

principle will also apply to rights in movable property that are not rights of ownership.

(3) A spouse acquires a right or obligation from a third party

22. A spouse acquires rights or obligations vis-à-vis a third party. Thus, for example, it is possible that he made a loan to a third party or took a loan from him. When the joint ownership is created by virtue of the joint ownership agreement, the rights and obligations pass to the other spouse. This transfer is effected under the provisions of the Assignment of Obligations Law, 5729-1969. In this regard, a distinction should be made between the assignment of a right and the assignment of an obligation. With regard to the assignment of a right, this takes place in accordance with what is stated in section 1 of the Assignment of Obligations Law. The assignment of a right between the spouses is possible 'unless its transferability is denied or restricted by law, by the nature of the right or by agreement between the debtor and the creditor' (s. 1(a) of the law). By virtue of the assignment, the other spouse will have a (direct) rights vis-à-vis the debtor. The assignment of the right is not conditional upon the consent of the debtor, but it is subject to the defences available to the debtor under s. 2 of the law. The transfer of the right takes place at the time of the assignment agreement (S. Lerner, *Assignment of Rights* (2002), at p. 149). The assignment agreement itself is what transfers the right from the assignor to the assignee (CA 2328/97 *Kochavi v. Arenfeld* [30]). With regard to an assignment of a liability, this takes place under s. 6 of the Assignment of Obligations Law, which provides that 'the liability of a debtor may be assigned, in whole or in part, in an agreement between the debtor and the assignee which has the consent of the debtor, unless its transferability is denied or restricted by law.' Admittedly, under the general law of contracts, someone who enters into a contract can as a rule claim what he is entitled to under the contract only from the person who made an undertaking to him. 'Imposing such an obligation upon someone who did not agree to it is contrary to the basic idea of the freedom of contracts. Someone who did not agree to take upon himself an undertaking is not liable in the law of contracts, even if he benefits from the contract that was made between other parties' (Friedmann, 'The Obligation of Someone Who is not a Party to the Contract,' *supra*, at p. 390). But like the assignment of a right, the assignment of a liability is based on an agreement between the spouses, i.e. between the original debtor (the assignor) and the assignee. But whereas the assignment of a right does not require the consent of the debtor, the assignment of a liability is not valid vis-à-vis the creditor without the consent of the creditor. This means that the creditor still has a right to sue the

original debtor for the debt, but conversely he cannot sue the assignee to carry out the obligation (Lerner, *Assignment of Rights*, at p. 111). Notwithstanding, in the relationship between the debtor and the assignee an (obligatory) undertaking is made by one spouse to the other to take upon himself a part of the liability. If the third party sues the other spouse, it is possible to regard this, in certain conditions, as consent to the assignment of the liability.

(4) A spouse acquires land from a third party

23. One spouse buys land from a third party. As long as this purchase is not registered at the land registry, the relationship between the purchaser spouse and the other spouse will be subject to the laws that we have discussed. What is the law if the property is registered in the name of the spouse who bought it and not in the name of both spouses? The creation of the joint ownership arrangement between the spouses by virtue of the agreement cannot make the other spouse the owner of the property. This requires registration of his name in the register (s. 7 of the Land Law, 5729-1969). What, then, is his right? The answer to this question is provided by land law. It is a quasi-property right (see CA 189/95 *Otzar HaHayal Bank Ltd v. Aharonov* [31]). A creditor of the non-registered spouse cannot attach the property. If the registered spouse carries out a transaction concerning the property with a third party, the right of the third party conflicts with the right of the non-registered spouse. The solution to this conflict is found in the laws of conflicting transactions (see *Ben-Zvi v. Sittin* [3]).

K. The date on which the joint ownership between the spouses is created

(1) Possible dates

24. What is the date on which the joint ownership of rights and obligations is created between the parties? What is the date from which a third party is given a right against the other spouse, and on which the other spouse is given a right against the third party? In this regard three approaches are possible. *One* approach is that the joint ownership is created when the parties begin to live together and unite their efforts. From that date, as long as the joint ownership exists, it implements the rules of private law in an ongoing and continuous manner. According to this approach, when the parties live together and make a joint effort, every right and obligation that one spouse acquires, during the relationship between them, against a third party or against the whole world is immediately transferred to the other spouse. A *second* approach holds that the joint ownership between the spouses does not accompany them during their life together on a continuous basis. According

to this approach, the joint ownership comes into existence only when the relationship between the spouses suffers a critical event that leads to a breakdown of the relationship or the end of their living together, and it is only for the purpose of realizing the rules of private law concerning the joint ownership. Such a critical event is the death of one of the spouses, a divorce or another event that significantly endangers the relationship between the spouses. As long as such an event does not occur, the rights and the liabilities vis-à-vis a third party or vis-à-vis the whole world are those of the spouse who acted in order to acquire them, and they are not transferred to the second spouse. When the critical event occurs, the joint ownership is created and the consequences that we have discussed come into effect. A *third* approach — an intermediate approach — holds that we should distinguish between assets of a purely family character, especially the residential apartment, and other assets. With regard to family assets, the joint ownership comes into existence when the spouses begin to live together — i.e., when they begun to have a sound relationship and to unite their efforts — and it accompanies the spouses on an ongoing and continuing basis. Thus with regard to purely family assets, the first approach will apply. With regard to the other assets, the joint ownership comes into existence, as stated in the second approach, only when a critical event occurs. What are the criteria for choosing which of these possibilities is the most ideal?

(2) The criteria for choosing the ideal date

25. Each of the approaches realizes in a different way the purposes underlying the joint ownership rule. Each approach also has ramifications, in a different way, on commercial effectiveness and the interests of third parties. The *first* approach (the joint ownership of rights and liabilities comes into existence throughout the joint lifestyle) realizes the joint ownership in the fullest manner. It gives full effect to the existence of the joint ownership throughout the whole time that the spouses are living together. It increases the feeling of economic security of the two spouses throughout the marriage. It strengthens the status of the spouse who is not registered or who does not have possession of the assets and rights. Thus it also realizes in full the equality between the two spouses. On the other hand, the first approach to a large extent weakens the separate identity of the spouses. It requires the creation of a regime whereby there is a joint management of the jointly owned assets. It severely curtails the ability of the spouses to manage their property and their affairs. The complete joint ownership and joint management may become a source of disputes and undermine commercial efficiency, and it may lead to uncertainty and harm third parties. This is

because the rights arising from the joint ownership rule are usually not obvious or known to third parties. Making the validity of every transaction of a married man conditional upon the consent of his wife will undermine economic certainty. This was discussed by Justice T. Strasberg-Cohen, who said:

> '… The realization of the joint ownership in practice involves considerable difficulties and because of some of these the court has mitigated the force of the joint ownership, especially in order to protect third parties… The difficulties arise, *inter alia*, from the joint management of the property, which is implied by the immediate joint ownership thereof, which can become a source for disputes and undermine commercial efficiency, and it may lead to uncertainty and commercial stagnation and harm third parties… In addition to this, the complete form of joint ownership of property violates the property rights of the individual and his personal autonomy' (*Yaakobi v. Yaakobi* [2], at pp. 615-616).

A waiver of a demand for joint management, while leaving the management in the hands of the spouse who is active in the 'business world,' also has obvious disadvantages. It results in the spouse that is not active in the 'business world' being bound by all the actions of the other spouse. The autonomy of that spouse is thereby weakened and substantive equality is also undermined.

26. The *second* approach (in which the joint ownership of rights and liabilities comes into existence at a critical event after the joint lifestyle began) preserves the autonomy and the separate identity of each of the spouses during the marriage. It does so without undermining the economic security given to the spouses when a critical event such as the dissolution of the relationship occurs. The second approach does not interfere in the daily lives of the spouses. It does not require consent on the part of one spouse to every action of the other. It distances the spouses from a continual accounting and an excessive involvement of the legal system in their property affairs during the marriage. This approach serves the interests of commercial efficiency and is consistent with the expectations of third parties, who usually have contact with only one of the spouses, both with regard to the rights and with regard to the liabilities, and sometimes they do not even know of the existence of the other spouse. It does not lead to litigation with third parties over the joint ownership rule during the lifetime of the marriage. On the other

hand, the second approach exposes the second spouse to a unilateral reduction of the assets, in a way that is likely to affect the scope of his rights when the joint ownership crystallizes on the 'critical date.' It exposes him to irreversible actions of the other spouse, which may have significant ramifications on his welfare and his economic future.

27. The *third* approach is an intermediate approach. In my opinion, it is the proper approach. It seeks to delineate a middle path that delicately balances all of the criteria and purposes. The intermediate approach seeks to balance the protection of the spouses' rights in the family assets again the protection of autonomy, commercial efficiency and the rights of third parties. It aspires to a property regime that strikes a balance between the concept of marriage as a life of sharing and preserving the separate identity of the individual within the marriage. As a rule, the joint ownership rule according to this approach is expressed mainly when a dramatic event occurs, such as when the marriage reaches a crisis. It seeks to grant economic security to the spouses in the event that the marriage is dissolved. It does not attempt to regulate everyday property matters during the course of the marriage. It distances itself from a daily accounting of profits and losses and from intensive judicial intervention in the affairs of the spouses. During the marriage, in the sphere of the everyday and normal management of assets and the sphere of the business activity of the spouses, it recognizes an area of separate activity (see H. Dagan, *Property at the Crossroads* (2005), at pp. 507-510). This preserves the ability of each of the spouses to act in the world as an individual, even when he is married. At the same time, the intermediate approach takes into account the special character of the family relationship. It protects the rights of the spouses in purely family assets, and especially the residential apartment. It thereby safeguards, in most cases, the spouse's main property haven. This is achieved without creating a significant imposition on the rules of commerce, since transactions in real estate in any case involve lengthy and complex proceedings and both spouses should therefore be involved when such transactions are made. It cannot be denied that the intermediate approach creates a complex property regime. It requires distinctions between types of assets and spheres of activity and between different periods of time. This cannot be avoided. The realization of the various purposes of the joint ownership rule in Israeli life cannot be expressed in a simple one-dimensional joint ownership regime. Let us discuss the aspects of this joint ownership regime.

(3) The effect of the intermediate approach

28. According to the intermediate approach, the date on which the joint ownership comes into existence is not a uniform one. The intermediate approach distinguishes between two different dates. *One* date is the date on which the spouses satisfy the conditions for the joint ownership rule, i.e., having a sound relationship and uniting their efforts. This date is the relevant date for the joint ownership of purely family assets, and especially the residential apartment. The *other* date is a 'critical date' in the marriage, such as the death of one of the parties or the date on which the marriage faces a real danger to its continuation, because of a serious crisis between the spouses. Unusual economic events, such as the 'liquidation' of the assets of one of the parties, an unusual economic action in breach of the duty of faith to the other spouse or one of the spouses being declared bankrupt may also constitute a 'critical date.' The 'critical date' needs to be determined on a case by case basis, according to its circumstances, and the aforesaid are merely examples of possible situations of 'critical dates.' The joint ownership of the other assets crystallizes on the 'critical date.' Until the 'critical date' the joint ownership rule admittedly 'hovers' over all of the rights and liabilities, like a king of floating charge, but it only crystallizes on the 'critical date.'

29. According to the intermediate approach, the joint ownership of all the rights and liabilities (with the exception of the family assets) constitutes a deferred joint ownership, which crystallizes only on a 'critical date.' There is no immediate acquisition of the rights of one spouse by the other spouse. The joint ownership rule, according to the intermediate approach, does not mean a joint ownership that is immediate and complete and relates specifically to each individual asset throughout the marriage. It also does not mean joint management, on an everyday basis, of all the joint ownership assets. The joint ownership of all the rights and liabilities crystallizes on the 'critical date.' It entitles each of the spouses to half of the rights that are subject to the joint ownership, after payment of the liabilities. The joint ownership relates to the sum total of all of the assets. As President M. Shamgar said:

> 'Even in the joint ownership of assets doctrine, the right of the spouses to the joint ownership is general and not specific, and it arises only when an event occurs that has the character of a dissolution and that crystallizes according to the grounds recognized by the law or in accordance with the facts, as applicable. The normal property laws do not apply to the property relations between spouses in a simple sense, as if they were an ordinary partnership. There are two main grounds for dissolution… a formal termination of the status of marriage

> because of a divorce or the death of one of the spouses… and an "early" termination, i.e., a termination of the economic relationship between the spouses while the marriage status continues… The early termination is based on various grounds, which mostly concern the protection of the interests of the spouse who is likely to be harmed by the conduct of the other spouse and granting relief to one spouse against the conduct of the other spouse' (*Yaakobi v. Yaakobi* [2], at pp. 548-549).

Indeed, the crystallization of the joint ownership and its severance occur at one time when the critical event occurs. On this date private law is activated, and by virtue thereof the second spouse becomes the owner of assets or rights, as applicable.

30. According to the intermediate approach, the joint ownership of purely family assets, and particularly the residential apartment, crystallizes on the date on which the conditions of the joint ownership rule, namely having a sound relationship and uniting efforts, are satisfied. It is not deferred to the 'critical date' of a crisis in the marriage. Indeed, the joint residential apartment of the spouses requires a different treatment from the treatment of all the rights and liabilities of the spouses. The residential apartment has a special status in the law. The residential apartment is a property that is directly related to the marriage of the parties. The rights therein closely affect the welfare of the whole family — the spouses as well as the children. The family residential apartment is, usually, a significant part of the spouses' property. It is the place where the marriage is realized. It will stand at the heart of a divorce dispute, if one occurs. Indeed, 'the residential apartment is a purely family asset, sometimes the most significant asset of the spouses and sometimes the only one' (*per* Justice T. Strasberg-Cohen in LCA 8672/00 *Abu-Rumi v. Abu-Rumi* [32]; see also Rosen-Zvi, *Spouses' Property Relations*, *supra*, at pp. 167; M. Drori, 'The Spouses' Home in the Case Law of the Rabbinical Courts and the Civil Courts,' 16-17 *Jewish Law Annual* (1990), 89). The residential apartment usually constitutes the main property haven of the weaker party (Rosen-Zvi, *Family Law in Israel — Between Holy and Profane* (1990), at p. 453). Every transaction in the residential apartment may have significant economic and emotional repercussions for the spouses.

31. The approach of this court with regard to the residential apartment, as it has been expressed in a whole host of judgments, is that each of the spouses should already be regarded as the owner of half the rights in the home during the marriage (*Hadari v. Hadari* [4], at p. 690; *Ben-Zvi v. Sittin*

[3]). The accepted approach is that the spouse who is not registered should not be exposed to the loss of his rights in the residential apartment by an act of the other spouse (see CA 541/74 *Parminsky v. Senderov* [29]; *Shatzky v. Said* [27], at p. 418; *A.T.S. Drive Yourself Ltd v. Carroll* [28]; Weisman, *Law of Property: Ownership and Concurrent Ownership*, *supra*, at p. 187). A disposition of this asset should be done on the basis of mutual consent. It is possible that a similar rule should apply to the other main assets of the spouses, which have significant economic and emotional ramifications on the marriage and on each spouse. The question does not arise in the appeal before us, and so we are not required to decide it.

32. The determination concerning the immediate joint ownership of rights in the residential apartment during the marriage gives rise also to an immediate joint liability for debts that relate directly to the residential apartment. The joint ownership of the apartment gives rise to joint responsibility of the parties for a liability that was created with regard to the joint property. Each spouse does not only benefit from the joint ownership of the residential apartment. He also shares the burden of debts that were created with regard to the purchase or lease of the home, its maintenance, its fixtures and the regular expenses relating to it. Thus, for example, each of the spouses has liability for undertakings and loans relating to the actual purchase or lease of the residential apartment, even if the undertaking was made by the other spouse. He is equally liable for the undertakings that were made. Indeed, this is dictated by considerations of justice. This is also implied by the presumed intentions of the spouses who jointly own the residential apartment. The enjoyment of the joint ownership of the residential apartment requires an equal and just division of the undertakings and the liabilities that are created and accumulated directly with regard to the home.

L. Summary of the effect of the joint ownership in private law according to the intermediate approach

(1) General

33. The premise for considering the effect of the construction of joint ownership in private law is that there is a presumption of joint ownership between the spouses, i.e., that they have a sound relationship and unite their efforts. When this condition is satisfied, we should distinguish purely family assets, and especially the residential apartment, from the other assets. With regard to purely family assets the joint ownership crystallizes when the conditions of having a sound relationship and uniting efforts are satisfied. With regard to all the other rights and liabilities (apart from the purely family

assets), the joint ownership crystallizes 'on a critical date' in the marriage. From these dates onward, the joint ownership construction is implemented in private law. The effect of the joint ownership that has crystallized by virtue of the agreement between the parties varies, as we have said, according to the nature of the right or the liability for which the joint ownership has crystallized.

(2) Movable property and rights

34. When the joint ownership crystallizes, half of the right passes to the other spouse. For movable property, the transfer is effected by virtue of the Sale Law. The two spouses are equal partners in the rights in the movable property. With regard to rights, the transfer is effected by means of an assignment of the rights. The two spouses are entitled to receive the right from the debtor.

(3) Debts

35. When the joint ownership crystallizes, half of the debt passes to the second spouse, subject to the consent of the creditor. The joint liability gives rise to a direct legal relationship between both spouses and the creditor. In the absence of the creditor's consent, the assignment of the liability is not valid against him and the creditor has a right against the spouse who made the undertaking directly to him. He is not entitled to sue the other spouse. Notwithstanding, in the internal relationship between the spouses, an (obligatory) undertaking is created whereby one spouse undertakes to the other spouse to take upon himself a half of the liability.

(4) Real estate property

36. From the date on which the joint ownership of the real estate property crystallizes, the right of the spouse who is not registered in the register is an equitable property tight (*Otzar HaHayal Bank Ltd v. Aharonov* [31]). This right is valid against everyone except someone who acquired a right in land for consideration while relying in good faith on the registration (s. 10 of the Land Law) or someone who is the owner of a conflicting right that acted in good faith and for consideration and the transaction in his favour was registered while he was still in good faith (s. 9 of the Land Law). The rights of the spouse who is not registered are protected both against a later undertaking and against a pecuniary creditor of the registered spouse. The creditors of the registered spouse cannot attach the half of the property in which the second spouse has an equitable property right. It should be noted that at least in so far as the residential apartment is concerned, a third party cannot act in good faith if he knows or should have known that the property

was a residential property that was subject to the joint ownership rule. A third party should assume that the spouses are partners in the residential apartment. It is possible, however, that in exceptional cases an insistence by the non-registered spouse upon his right in the property will conflict with the principle of good faith (see CA 790/97 *United Mizrahi Bank Ltd v. Avraham* [33]). The question of these exceptions — as well as additional questions that may arise in this context — does not arise in the circumstances of the case before us and we can leave them to be considered at another time.

M. From general principles to the specific case

37. The appellant and the third respondent have been married since 1970. According to the findings of the Family Court, they satisfy the conditions for applying the joint ownership rule. In other words, the spouses have a sound relationship and unite their efforts. According to the evidence before us, the marriage of the spouses is continuing and there is no claim that the marriage has reached a crisis or is in danger. It follows that the marriage of the appellant and the third respondent has not reached a 'critical date' on which joint ownership crystallizes with regard to all the rights and liabilities that are subject to the joint ownership rule. The relationship between the appellant and the third respondent is at the stage where joint ownership has crystallized with regard to assets of a purely family nature, and especially the residential apartment, and liabilities that are related to these assets.

38. The debt to the respondents is a debt that the third respondent undertook in the course of his business. The debt is unrelated to the purely family assets of the appellant and the third respondent. The source of the debt lies in the business relationship between the third respondent and the respondents. The business relationship will entitle the appellant to rights and impose liabilities on her only when the general joint ownership between the spouses crystallizes, on a 'critical date' in the marriage. Before the 'critical date' arrives, the rights by virtue of the relationship between the respondents and the third respondent are not rights that are jointly owned by the third respondent and the appellant and the debt is not a joint debt of the two spouses. The debt is owed by the third respondent alone. The appellant has no right against, nor has she any obligation to, the respondents. The respondents have no cause of action against her and as long as a 'critical date' on which joint ownership will crystallize with regard to all the rights and debts has not arrived, they cannot seize the assets that belong to her.

39. Indeed, among the appellant's assets is a right to half of the spouses' residential apartment. The residential apartment is a purely family asset and

the joint ownership therein crystallized when the conditions of having a sound relationship and uniting their efforts were satisfied. The right of the appellant in half of the residential apartment is an equitable property right. The creditors of the third respondent, the owner of the legal property right, are not entitled to collect the debt from the half of the apartment in which the appellant has an equitable property right. The rights of the appellant in the residential apartment are protected against an attachment from her husband's pecuniary creditors. It follows that the attachment that was imposed on the residential apartment cannot apply to the half of the apartment that belongs to the appellant by virtue of her equitable property right.

The result is that the appeal is allowed. The attachment that was imposed by the creditors on the residential apartment is restricted to the third respondent's half of the apartment. The first and second respondents will pay the legal fees of the appellant's lawyer in a total amount of NIS 10,000.

Vice-President E. Rivlin

I agree.

Justice N. Naor

1. I agree with the opinion of my colleague President (Emeritus) A. Barak.

2. Sometimes, in concrete circumstances, the combination of the rules of civil law and the rules of the joint ownership of assets which my colleague has discussed may lead us to different results from the result that we have reached in this case. We shall cross those bridges when we come to them.

Appeal allowed.

22 Kislev 5767.

13 December 2006.