HCJ 2232/03

A

v.

1. Tel-Aviv-Jaffa Regional Rabbinical Court

2. Great Rabbinical Court of Appeals

3. B

Joined pursuant to the court's decision of 13 December 2005:

Attorney-General

The Supreme Court sitting as the High Court of Justice

[21 November 2006]

Before President Emeritus A. Barak and Justices M. Naor, E. Hayut

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The petitioner and the third respondent are Jews who are Israeli citizens and residents. Although they were competent to marry in accordance with Jewish law, they chose to marry in a civil ceremony in Cyprus. The marriage subsequently broke down and after various proceedings in the rabbinical courts, the rabbinical court dissolved the marriage by means of a divorce decree. The petitioner petitioned the High Court of Justice. In her petition she argued that the rabbinical court acted unlawfully when it dissolved the civil marriage and the grounds for the dissolution of the marriage were improper.

Held: Following the decision of the Great Rabbinical Court in this case, civil marriages of Jews contracted outside Israel are recognized by Jewish law as marriages in accordance with the 'laws of the Children of Noah,' i.e., those laws which under Jewish law govern the whole of mankind. Such marriages between Jews, while not having any 'internal' validity under Jewish law because they do not comply with the requirements of Jewish (religious) law, have 'external' validity in that they are recognized internationally and prevent parties who have contracted such a marriage from remarrying until the civil marriage is dissolved. In Israel, the rabbinical courts have sole jurisdiction to make a divorce decree that dissolves civil marriages between Jews. Such a decree need not be based on one of the grounds for divorce under Jewish (religious) law. The proper ground for dissolving such marriages is that the marriage has ended, i.e., that it has broken down irretrievably.

The divorce decree does not require the consent of both parties nor does it require the proof of any element of fault on the part of one or other party.

Petition denied.

Legislation cited:
Palestine Order in Council, 1922, arts. 46, 47.
Penal Law, 5737-1977, s. 177.
Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, ss. 1, 2, 3.
Spouses' Property Relations Law, 5733-1973.
Women's Equal Rights Law, 5711-1951.

Israeli Supreme Court cases cited:
[1] HCJ 143/62 *Funk-Schlesinger v. Minister of Interior* [1963] IsrSC 17 225.
[2] HCJ 80/63 *Garfinkel v. Minister of Interior* [1963] IsrSC 17 2048.
[3] HCJ 58/68 *Shalit v. Minister of Interior* [1969] IsrSC 23(2) 477; **IsrSJ SV 35**.
[4] HCJ 2888/92 *Goldstein v. Minister of Interior* [1996] IsrSC 50(5) 89.
[5] HCJ 51/80 *Cohen v. Rehovot Regional Rabbinical Court* [1981] IsrSC 35(2) 8.
[6] HCJ 592/83 *Fourer v. Fourer* [1984] IsrSC 38(3) 561.
[7] LCA 8256/99 *A v. B* [2004] IsrSC 58(2) 213.
[8] CA 191/51 *Skornik v. Skornik* [1954] IsrSC 8 141; **IsrSJ 2 327**.
[9] CA 373/72 *Tapper v. State of Israel* [1974] IsrSC 28(2) 7.
[10] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* **[2006] (1) IsrLR 443**.
[11] HCJ 3/73 *Kahanoff v. Tel-Aviv Regional Rabbinical Court* [1985] IsrSC 39(1) 449.
[12] HCJ 148/84 *Shemuel v. Tel-Aviv Regional Rabbinical Court* [1985] IsrSC 39(4) 393.
[13] CA 4590/92 *Kahana v. Kahana* (unreported).
[14] HCJ 301/63 *Streit v. Chief Rabbi* [1964] IsrSC 18(1) 598.
[15] HCJ 6334/96 *Eliyahu v. Tel-Aviv Regional Rabbinical Court* (unreported).
[16] HCJ 5679/03 *A v. State of Israel* (not yet reported).
[17] LCA 120/69 *Shragai v. Shragai* [1969] IsrSC 23(2) 171.
[18] CA 22/70 *Ze'ira v. Ze'ira* [1970] IsrSC 24(1) 475.
[19] CA 328/67 *Scharfsky v. Scharfsky* [1968] IsrSC 22(2) 277.
[20] CA 5258/98 *A v. B* [2004] IsrSC 58(6) 209; **[2004] IsrLR 327**.
[21] HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [1993] IsrSC 47(1) 749.

[22] HCJ 9476/96 *Sargovy v. Jerusalem Regional Rabbinical Court* (not yet reported).
[23] CA 571/69 *Kahana v. Kahana* [1970] IsrSC 24(2) 549.
[24] CA 1915/91 *Yaakovi v. Yaakovi* [1995] IsrSC 49(3) 529.

For the petitioner — M. Barshilton, Y. Barshilton.
For the first and second respondents — S. Yaacobi.
For the third respondent — G. Schneider, H. Schneider.
For the Attorney-General — Dr H. Sandberg.

JUDGMENT

President Emeritus A. Barak

A Jewish man and woman, Israeli residents and citizens, who are competent to marry according to Jewish religious law, married in a civil ceremony in Cyprus. Subsequently the relationship between the spouses broke down. The question before us is how the civil marriage of the spouses should be dissolved.

A. Background and proceedings

1. The petitioner and the third respondent (hereafter — the respondent) are Jews and residents and citizens of Israel. They are competent to marry in accordance with Jewish law. They married in a civil marriage in Cyprus in 1987. When they returned to Israel, on the basis of the Cypriot marriage certificate, they were registered at the Population Registry as married. Later they held in Israel a 'private wedding ceremony,' which was conducted by a Reform rabbi. In 1990 a daughter was born. Over the years the marriage foundered. They began proceedings with regard to separation, property matters, financial support and the custody of their daughter before the Family Court. On 20 August 2000 the wife, who is the petitioner, filed a claim for reconciliation in the Tel-Aviv Regional Rabbinical Court. A year later she filed an application to cancel the claim, because of a further deterioration in the breakdown of the relationship between the spouses. Her application was granted and on 25 July 2001 the claim for reconciliation was struck out. Within a short time, on 3 September 2001, the husband, who is the respondent, filed a claim in the Rabbinical Court for a declaratory judgment 'that the parties are not married according to Jewish law, or alternatively for

divorce.' The Rabbinical Court was also asked to declare that the respondent was not liable to support the petitioner financially under Jewish law. In his claim, the respondent argued that the dispute between the parties continued to deteriorate and that the relationship between them 'had come to an end.' He applied to divorce the petitioner. He also stated in the action that the petitioner herself 'was not prepared to be divorced from the plaintiff but was also not prepared to live with the plaintiff.'

2. The Regional Rabbinical Court granted the respondent's claim. In its judgment on 7 April 2002 it held that the spouses had married in a civil marriage with the deliberate intention of not marrying in accordance with Jewish law, and that they not be constrained to do so. In such circumstances, the Rabbinical Court held that there were no grounds for concern that the parties were married under Jewish law, and there was no need for a *Get*.[1] The 'private marriage ceremony,' which did not satisfy the requirements of Jewish law for a marriage ceremony, also led the Rabbinical Court to the conclusion that the parties had not intended to marry in accordance with Jewish law. In view of these conclusions, the Rabbinical Court said:

> 'The court holds in a declaratory judgment that the parties are not married under Jewish law.'

3. Subsequently, for the purpose of the proceedings between the spouses in the Family Court, the respondent applied to the Regional Rabbinical Court and asked for a written confirmation that pursuant to the judgment he was entitled to remarry. The following was the decision of the Rabbinical Court:

> 'In view of the aforesaid judgment, he is entitled to marry as a bachelor in accordance with Jewish law.'

The respondent applied once again to the Rabbinical Court in an application to clarify the judgment also with regard to the petitioner's status. Once again the Regional Rabbinical Court ruled:

> 'If the parties are not married to one another in accordance with Jewish law, there is no need for a clarification and the woman may marry as a spinster in the spirit of what was held in the judgment.'

4. On 30 July 2002 the petitioner appealed these clarifying decisions to the Great Rabbinical Court. In her appeal she argued that the judgment of the Regional Rabbinical Court held only that the spouses were not married in

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[1] A *Get* is a document given by a husband to his wife under Jewish law to effect a divorce.

accordance with Jewish law. This ruling did not, in her opinion, address the validity of the civil marriage. Therefore the Rabbinical Regional Court was not entitled to determine that the parties were free to marry, since the civil marriage was still valid. The petitioner further argued in her appeal that in order to bring the civil marriage to and end, a judicial act was required, and this should address whether there were any grounds for divorce and what rights were involved in the divorce. A determination that the parties were not married according to Jewish law was insufficient to dissolve the civil marriage.

5. The Great Rabbinical Court allowed the petitioner's appeal. In its judgment on 5 February 2003 it held that the Rabbinical Court was competent to dissolve the marriages of Jewish couples in Israel, whether by means of a *Get* or, when Jewish law does not require a *Get*, by means of a divorce decree. For this purpose a positive act of the Rabbinical Court was required to dissolve the marriage. The judgment of the Regional Rabbinical Court did not constitute such an act. The Great Rabbinical Court said:

> 'In this case, the Rabbinical Court chose to give a declaratory judgment only, without adding to it a decree dissolving the marriage… The Regional Rabbinical Court satisfied itself with the first part of the claim, and gave a declaratory judgment that the parties were not married in accordance with Jewish law. The problem, however, is that from the viewpoint of civil law the parties married in a civil ceremony and they are considered married throughout the world, including in the State of Israel. There is a simple remedy to this. The Regional Rabbinical Court could have added one line to its judgment and said in it that the Rabbinical Court hereby dissolves the marriage. This single line is sufficient to make the parties unmarried even in accordance with civil law. The Regional Rabbinical Court chose to ignore the operative decision to dissolve the marriage and satisfied itself with a declaratory judgment in accordance with Jewish law, which gives rise to an intolerable result. The parties are not considered married under Jewish law, but their civil marriage has not been dissolved. This is the outcome that confronts the parties. Therefore we have no alternative other than to allow the appeal. The way to resolve the matter is to apply once again to the Regional Rabbinical Court in an application to dissolve the parties' civil marriage.'

6. When the judgment of the Great Rabbinical Court was brought before it, the Regional Rabbinical Court gave an additional judgment on 12 February 2003. In this judgment the Regional Rabbinical Court did what it needed to do according to the judgment in the appeal, and made the following decision:

> 'In the appeal to the Great Rabbinical Court the court was required to add to the judgment that the court hereby dissolves the marriage, and therefore the court reiterates the judgment "that the parties did not marry one another in accordance with Jewish law and the court hereby dissolves the marriage and the parties may marry in accordance with Jewish law as unmarried persons.'

7. Following the additional judgment of the Regional Rabbinical Court, the petitioner filed the petition in this court. In her petition she requested that we order the judgment of the Regional Rabbinical Court of 12 February 2003 to be set aside, and we also set aside the guideline appearing in the judgment of the Great Rabbinical Court according to which adding the missing line was sufficient to dissolve the marriage. The petitioner focused on the argument that without the consent of both parties, the mere fact that a Jewish couple married in a civil marriage that took place outside Israel and did not marry in accordance with Jewish law cannot in itself constitute grounds for dissolving the civil marriage. It follows that the decision to dissolve the marriage without consent, which is based on the actual civil marriage, is unlawful and should be set aside. We heard the petition on 9 July 2003. At the end of the hearing, in accordance with the proposal of Advocate S. Yaacobi, the legal adviser to the Rabbinical Courts, we referred a request to the Great Rabbinical Court to set out in full the reasoning underlying its judgment, before we continued to hear the petition. The following is what we said in our decision:

> 'Before we continue to hear the petition, and in accordance with the proposal of Advocate S. Yaacobi, we would ask the Great Rabbinical Court to set out in full the reasoning for its judgment in so far as its remarks at the end of the judgment are concerned… according to which "the way to resolve the matter is to apply once again to the Regional Rabbinical Court in an application to dissolve the parties' civil marriage." In the course of reading the petition and the reply to it — which were also sent to the Great Rabbinical Court — several questions arose,

> such as: according to which law was the marriage dissolved? What are the grounds for this? Is the application of one party sufficient? When we receive the supplementary decision of the Great Rabbinical Court we will continue to hear the petition.'

B. The supplementary judgment of the Great Rabbinical Court

8. The Great Rabbinical Court (Rabbis S. Dichovsky, S. Ben-Shimon and A. Sherman) responded to our request. On 11 November 2003 it gave a supplementary judgment, *per* Rabbi S. Dichovsky, in which it addressed our questions (hereafter — the supplementary judgment of the Great Rabbinical Court). The *first question* addressed was: according to what law was the civil marriage dissolved? In the course of answering this question, the Great Rabbinical Court addressed the question of the validity of a civil marriage between an Israeli Jewish couple. The following is what it said:

> 'The question of the validity of a civil marriage between an Israeli Jewish couple has, in essence, two aspects. One aspect concerns the reciprocal obligations of the parties. Does the law in the State of Israel recognize this marriage as creating an ordinary set of obligations of "status"? Does an obligation of financial support arise? Does the spouse have a right to inheritance? The other aspect concerns the ramifications of this marriage vis-à-vis third parties: does this marriage prevent the parties from marrying third parties until the marriage is ended, or in our expression "dissolved" (from the expression "to dissolve a union"), according to law? The first aspect, the validity of a civil marriage that took place abroad between Jews who are citizens of Israel vis-à-vis the reciprocal obligations of the parties, was thoroughly, analytically and profoundly considered by the late Prof. Menashe Shava… Prof. Shava's conclusion is:
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> > "When the civil court considers the validity of a civil marriage that took place abroad between a Jewish couple who are citizens of Israel, it is required to examine its validity under Jewish law, as the 'personal law' of the spouses within the meaning thereof in art. 47 of the Palestine Order in Council, without taking into account the law of the place where the marriage took place."

> This conclusion has been adopted, *inter alia*, by the Tel-Aviv District Court… In that case, a claim for financial support that was filed by a wife who marriage her husband in a "Paraguayan marriage" was denied. The court held that at the time of the marriage, the couple were both residents and citizens of the State of Israel, and therefore their personal law at the time of the marriage was Jewish religious (Torah) law. Since they did not marry in accordance with Torah law, it was not possible to recognize the woman as married for the purpose of an obligation of financial support.
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> Indeed, we agree with Prof. Shava's opinion, that it is necessary under Israeli law to examine the validity of the marriage under Jewish law. We also agree with the position of the District Court with regard to the husband not being liable to support the wife financially. In our opinion, the same law ought to apply with regard to the spouse's statutory right of inheritance, but of course that is not the issue in this appeal' (p. 3 of the supplementary judgment of the Great Rabbinical Court).

9. The main issue that was addressed by the Great Rabbinical Court was the ramifications of the marriage on third parties. In this regard, the Great Rabbinical Court held, with regard to the offence of 'bigamy' in the Penal Law, the following:

> '… It is sufficient that a civil marriage is valid under the internal law that prevails in the place where it is contracted — in our case, in Cyprus — in order that this should prevent a Jew who is an Israeli citizen, as long as the marriage has not been dissolved, from marrying another person. … In view of the position that was described above, we held that a positive order should be added to the effect that the rabbinical court "dissolves the marriage." Thereby the rabbinical court terminates in Israel the legal validity of the civil marriage with regard to the criminal aspect of bigamy, and each of the parties may marry another person… Under section [177 of the Penal Law, 5737-1977], a judgment of the competent religious court that cancels or terminates the marriage changes the spouses into unmarried persons, from the time when the judgment is given' (pp. 4-5 of the supplementary judgment of the Great Rabbinical Court.

10. The Great Rabbinical Court emphasized that the only competent court to dissolve the marriage is the rabbinical court (s. 1 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953). The law that the rabbinical courts will apply is Torah law. Therefore the Great Rabbinical Court was required to examine the position of Jewish religious law with regard to civil marriages and the means of dissolving them. The Great Rabbinical court said that there is a long-standing difference of opinion between the arbiters of Jewish law with regard to the validity of civil marriages under Jewish law. The accepted approach in the Rabbinical Court is that a civil marriage that takes place where there is no alternative is treated strictly from the viewpoint of Jewish religious law. The assumption is that the couple wish to marry lawfully and they are living like a husband and wife in order to conduct a family life in accordance with Jewish law. The significance is that should they wish to continue their marriage, a Jewish religious marriage ceremony should be arranged for them. If one of the parties wishes to end the marriage, it is possible to allow them to separate with some degree of leniency. On rare occasions it is even possible to dissolve the marriage without a *Get*.

11. By contrast, a civil marriage that is contracted by choice and out of a desire to marry other than in accordance with Jewish religious law is regarded as a marriage that is contrary to Jewish law. Since such a couple reject Jewish law, the marital relations between them are intended to create a family other than in accordance with Jewish law. In such a situation, a husband is not required to give his wife a *Get*. The marriage may be dissolved by making a divorce decree. The Rabbinical Court clarified that there is a possibility in Jewish law of dissolving a marriage without a *Get*. It reviewed the Jewish law sources, in which Jewish law recognized the possibility of dissolving a marriage union without a *Get*. These also mention the custom in the rabbinical courts of dissolving civil marriages by way of a decree. The court said:

> 'Jewish law requires a *Get* to dissolve a marriage. As we have said, Jewish law allows a marriage to be dissolved in another way in the case stated above. The rabbinical courts have also added to this list cases of civil marriages that were contracted in a manner that is not according to Jewish law, as stated above. The marriage is dissolved by means of a divorce decree, according to the accepted practice of civil law in many countries. The dissolution of the marriage has the same significance as a divorce in every respect, without a need to use

> a *Get*. It is hard to say when the rabbinical courts began to dissolve civil marriages by making divorce decrees, but today this is a widespread practice of the rabbinical courts' (p. 8 of the supplementary judgment of the Great Rabbinical Court).

The Great Rabbinical Court further said that in such a situation where it is the rabbinical court that dissolves the marriage by means of a decree, the consent of the husband, which is required for a *Get*, is also not needed:

> 'These divorces are effected by the rabbinical court by means of a divorce decree. Therefore the rabbinical court is its own master and can dissolve the marriage without consent' (p. 9 of the supplementary judgment of the Great Rabbinical Court).

12. The Great Rabbinical Court found the basis in Jewish law for giving a divorce judgment in the 'Noahide laws.'[2] This relies on the approach that even though when the Torah was given special laws of marriage and divorce were imposed on the Jewish people, they were not exempted from the Noahide laws of marriage and divorce. According to Jewish law, the Children of Noah also have their own laws of marriage and divorce. The Children of Noah do not have a law of the sanctity of marriage (*kiddushin*) but they do have a law of marriage (*insulin*). The Great Rabbinical Court said:

> 'The concept of the sanctity of marriage (*kiddushin*) is unique to the Jewish people, whereas the concept of marriage (*insulin*) is universal (and see Avudraham's Prayer Book on the betrothal blessing). The "divorce" of a Jew is associated with the sanctity of marriage (*kiddushin*), so that anyone who is not subject to the laws of *kiddushin* that are unique to the Jewish people is not subject to the Jewish laws of divorce. In other words, he is not subject to the special Jewish laws of divorce' (p. 9 of the supplementary judgment of the Great Rabbinical Court).

The original position of Jewish law was that couples who married in accordance with the Noahide laws could divorce without any grounds whatsoever; it was sufficient for one to leave the other in order that both should be permitted to remarry. But over the years a custom of registering marriage and divorce arose also among the Children of Noah, and with it a

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[2] The laws which, according to Torah law, govern all the Children of Noah, i.e., all human beings.

requirement for a formal process of divorce. This requirement is recognized today by Jewish law. Thus the Great Rabbinical Court held:

> 'Over the years all civilized countries have introduced marriage and divorce procedures, which involve a government authority. It can be said that in principle Jewish law also recognizes the binding validity of these procedures. With regard to divorce, the universal custom today is that the competent court in each country is the body that decrees parties to be divorced, and a physical separation between the spouses is insufficient. According to the approach of Maimonides it can therefore be said that divorces of the Children of Noah are today effected, in accordance with the custom of the nations of the world, by means of a decree of the competent religious or secular court that the parties have parted from one another. This custom has binding validity under Jewish law' (p. 11 of the supplementary judgment of the Great Rabbinical Court).

The Great Rabbinical Court went on to hold that:

> 'Jewish law admittedly refuses to give full recognition to "civil marriages," and it requires Jewish couples to complete the relationship between them by means of a marriage in accordance with Jewish law. At the same time, Jewish law recognizes these marriages as Noahide marriages' (p. 11 of the supplementary judgment of the Great Rabbinical Court).

These civil marriages of Jewish are, according to Jewish law, 'marriages for the purpose of divorce according to the Noahide law.' Since Jewish law recognizes civil marriages of Jews as 'Noahide marriages,' it should also follow the rules concerning the divorces of such couples. In order for them to divorce, in accordance with the universal custom of the Children of Noah, a decree of the rabbinical court is required:

> 'According to the original law of the Children of Noah, a physical separation between the couple was sufficient in order that the law should regard them as divorced from one another. Today, in accordance with the universal custom of all the Children of Noah, there is a need for the court to make a decree to this effect. Especially with regard to Jews this is not an insignificant matter. According to the practice of the rabbinical courts, the court examines in each case of a couple who entered into a civil marriage whether the specific couple can be regarded

> as married in accordance with the Jewish laws of marriage (and not merely as "Children of Noah"). This examination is made in order that couple may not become available to remarry unlawfully, with all of the serious ramifications that this entails under Jewish law. Indeed, once the rabbinical court has arrived at the conclusion that the parties are not married in accordance with Jewish law, the court has not completed its task. Since the parties are prohibited from remarrying until their civil marriage has been cancelled or annulled, the court decrees the "dissolution" of the civil marriage' (pp. 11-12 of the supplementary judgment of the Great Rabbinical Court).

The Great Rabbinical Court clarified that this decree does not annul the marriage *ab initio*. The termination of the marriage has prospective effect:

> 'By doing this, the rabbinical court does not decree that the marriage was void *ab initio*… These marriages are valid like all marriages of the Children of Noah, and the Jewish people are also a part of the Children of Noah. By decreeing the dissolution of the marriage, the rabbinical court terminates the civil marriage from that moment onward' (p. 12 of the supplementary judgment of the Great Rabbinical Court).

13. Thus the Great Rabbinical Court arrived at the *second question* addressed to it, namely the question of the grounds for dissolving the civil marriage. The Great Rabbinical Court held that in a divorce not requiring a *Get*, there is no need for any Jewish law grounds for compelling a *Get*. The court need only examine the circumstances and the absence of any chance of a reconciliation between the parties:

> 'When the court finds that there is no possibility of a reconciliation between the couple, then the court can arrive at the conclusion that they should separate, and the divorce is effected by means of a divorce decree. Even in these marriages[3] the rabbinical court makes efforts to reconcile the parties and to persuade them to marry in accordance with Jewish law' (p. 12 of the supplementary judgment of the Great Rabbinical Court).

With regard to the *third* question — whether an application of one party is sufficient in order to dissolve the civil marriage — the Great Rabbinical answers that it is. It holds that the rabbinical court may decree the dissolution

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[3] I.e., civil marriages between Jews.

of the marriage without consent, when it transpires that there is no possibility of the parties living in harmony, even if there are no grounds for divorce under Jewish law.

14. With regard to the specific case, the Great Rabbinical Court said that the parties deliberately chose not to be bound by Jewish law, and they contracted a civil marriage in Cyprus. It became clear to the court that the couple could not be reconciled. The husband strongly objected to continue the formal state of marriage, and there was no reason why the parties should continue to be related on paper only. The ground for determining that the parties should divorce was 'the end of the marriage.' The marriage had ended and their relationship was far from harmonious. In such circumstances, since there was no chance of a reconciliation, the marriage was dissolved by the rabbinical court. The court went on to say that even in a case of a Jewish law marriage, a situation of an absolute separation and the absence of any chance of a change constitutes a ground for ordering a divorce.

15. In summary, the Great Rabbinical Court set out its specific answers to our questions as follows:

> 'a. The civil marriage was dissolved in accordance with Jewish (Torah) law, by means of a decree that dissolves the marriage of the parties.
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> b. A decree that dissolves a civil marriage will be made when there are substantial reasons why it is not possible for the parties to live harmoniously. The rabbinical court will consider these reasons, and after it reaches a conclusion that there is no hope of a reconciliation and that there is no alternative to terminating the marriage, then a decree will be made to dissolve the marriage.
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> c. The rabbinical court will examine the possibility of arranging a *Get* both from the viewpoint of Jewish law and from a practical viewpoint. Should it not be possible to arrange a *Get* from these viewpoints, then the marriage will be dissolved by means of a decree.
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> d. There is no need for the consent of the two parties to dissolve the marriage; only one of them need apply for divorce, stating the appropriate grounds as aforesaid.'

C. The positions of the parties

16. At our request, the parties stated their positions with regard to the supplementary judgment of the Great Rabbinical Court. The petitioner

remained unchanged in her position that the ruling of the rabbinical court and the divorce decree should be set aside. The supplementary judgment of the Great Rabbinical Court shows, in her opinion, that civil marriage is considered 'inferior' by the rabbinical court and it will dissolve it without hesitation, even without any objective reason, as soon as it is asked to do so by one of the parties. The petitioner further argues that the supplementary judgment of the Great Rabbinical Court has no basis in the facts of the case. Before the Great Rabbinical Court and the Regional Rabbinical Court there was no factual basis concerning the nature of the parties' married life and concerning the 'end of the marriage.' No investigation was made, in practice, with regard to any substantial reasons why a reconciliation could not be made between the parties. The Regional Rabbinical Court heard evidence solely on the question of which marriage ceremony the parties originally underwent. It is therefore unclear how the Great Rabbinical Court reached the conclusion that the parties should divorce immediately. The petitioner deduces from this that we are dealing merely with a concealment of the fundamental position of the rabbinical court with regard to civil marriages. From a factual viewpoint, the petitioner claims that recently the parties have actually become closer and the chance of a reconciliation has increased.

17. The petitioner also attacks the legal rulings in the supplementary judgment of the Great Rabbinical Court. She complains that although the rabbinical court regards the marriage as a 'marriage of the Children of Noah,' the criteria that are used to dissolve it are not the criteria of the 'Children of Noah.' The rabbinical court examines the marriage with Jewish law parameters and has a tendency to dissolve it easily. The petitioner argues that one cannot adopt the criteria of the 'Children of Noah' solely for the purpose of separating the spouses. One should adopt the whole legal framework, including the right to financial support after the divorce (alimony). The petitioner raises the possibility that the rabbinical court might apply to the couple the laws of divorce in the place where the marriage took place. Alternatively, Jewish law should be applied to the whole framework of the divorce, including to the question of the existence of a Jewish law ground for divorce. Otherwise any husband who contracts a civil marriage may apply to the rabbinical court in a divorce claim and automatically obtain a decree that divorces the wife and abandons her to the ignominy of starvation, without a proper economic arrangement between the spouses. This constitutes a serious violation of the wife's dignity, her rights under the Women's Equal Rights Law and her right to live with dignity.

18. The respondent for his part raises a host of arguments. In the procedural sphere the respondent argues that the proper way to challenge a decision of the Regional Rabbinical Court is to appeal to the Great Rabbinical Court, before applying to the High Court of Justice. The respondent adds that the petitioner has violated the procedural arrangement that was made in the Regional Rabbinical Court, according to which the hearing of the claim would be split into two parts and it was agreed that 'if the rabbinical court would decide that the parties were not married in accordance with Jewish law, the case would be closed with the consent of both parties.' The petitioner's revised position is in fact tantamount to a change of direction in the petition from a petition that argues a lack of jurisdiction to a petition that argues a lack of a sufficient factual basis. On the merits, the respondent says that there is no doubt that the parties' life together ended a long time ago and there is no chance of a reconciliation. The parties live apart. Their joint apartment was sold within the framework of a receivership that was ordered by the Family Court. The true purpose of the petition is to obligate the respondent to pay financial support for as long a time as possible. In any case, in so far as the petitioner has any arguments against the application of the law to the facts of the case, these should be pleaded in the Great Rabbinical Court in an appeal. Moreover, the factual basis before the Regional Rabbinical Court was that there was no chance of a reconciliation. What was before the rabbinical court was the petitioner's application to cancel the reconciliation claim, the reconciliation claim itself with its contents and the respondent's divorce claim, in which it was made clear that he was no longer interested in the marriage. There are also welfare reports (which were filed in the Family Court in the custody proceedings) according to which there was no chance of rehabilitating the relationship and it was important to bring about a quick separation of the couple.

D. The Attorney-General's position

19. After we received the supplementary judgment of the Great Rabbinical Court, we were of the opinion that the petition before us *prima facie* raises important questions with regard to which we ought to hear the Attorney-General's position. We therefore directed the attention of the Attorney-General to the petition, in order that he might consider whether he wished to attend and address, *inter alia*, the question of the legal validity of 'Cypriot marriages' that are contracted by Jews who are citizens and residents of Israel, and the laws that apply to a divorce claim in such circumstances (our decision of 13 December 2005).

20. The Attorney-General decided to join the proceeding. In his notice (on 20 March 2006) he set out his position on the question of what should be the law that governs the dissolution of a marriage in the rabbinical court with regard to a Jewish couple who are citizens and residents of Israel and contracted a civil marriage in Cyprus. In this matter the Attorney-General supports what is stated in the supplementary judgment of the Great Rabbinical Court, in every respect. The Attorney-General does not accept the petitioner's argument that because the marriage was valid in the place where it was contracted (Cyprus) and was registered at the Ministry of the Interior in Israel, the rabbinical court should apply to it the strict laws of divorce that apply to parties that married in accordance with Jewish religious law. The Attorney-General did not express any opinion on the question whether the civil marriage in Cyprus is a valid marriage. He merely states the fact that the registration of the marriage (at the Israeli Ministry of the Interior) does not constitute evidence that what is stated in the registration is correct. The Attorney-General focuses on substantive reasons why the approach of the rabbinical court to the dissolution of the marriage on the ground that 'the marriage has ended' is a proper one, even in the absence of consent and in the absence of any ground for divorce under Jewish (religious) law. According to him, the approach of the Great Rabbinical Court gives the rabbinical court or the civil court tools to dissolve the marriage and thereby stop one party from 'imposing a veto' on the divorce and preventing the other party from remarrying. The ground for divorce used by the rabbinical court — the ground that 'the marriage has ended' — is today an accepted and proper ground in many countries where civil divorces are practised. An 'irreversible breakdown of the relationship' between the couple is an objective and recognized ground for divorce. The approach of the Great Rabbinical Court is consistent with accepted liberal positions, while adopting a cautious approach to them. The Attorney-General adds, however, that the relative simplicity with which civil marriages that were contracted outside Israel are dissolved does not necessarily mean that the property rights of either of the spouses are violated. It is certainly possible that the parties will be entitled to property rights, usually on the basis of contractual constructions.

E. The questions to be decided

21. What lies at the heart of the petition is the legal question concerning the dissolution of civil marriages between Jews who are Israeli residents and citizens, who, although they were Israeli citizens or residents, married outside Israel, even though they were competent to marry in accordance with Jewish law. In order to arrive at a solution to this question, we need to consider four

issues. The *first* issue concerns the validity of the civil marriage under Israeli law. The question here is whether marriages between Jews who are citizens or residents of Israel, who are competent to marry under Jewish law and who marry outside Israel in a ceremony that is recognized in the country where it took place, are valid in Israel. If it is found that the marriage is valid, a *second* issue arises; this concerns the jurisdiction to dissolve the civil marriage. The question here is which court (the rabbinical court or the civil court) should try the question of the divorce. The *third* issue concerns the grounds for dissolving the civil marriage. The question here is on what grounds should a court bring the marriage to an end. A *fourth* issue concerns the reciprocal rights of the couple that entered into a civil marriage. The question here is whether the spouses have rights against one another, and if so what is their source and content. Let us consider these four issues in order.

F. The validity of civil marriages

22. The petitioner and the respondent — Jews who are residents and citizens of Israel — married in a civil ceremony outside Israel. They were competent to marry in accordance with Jewish law. They were registered at the Population Registry in Israel as married. The registration of the marriage was made on the basis of the well-established case law ruling that the Ministry of the Interior is obliged to register a marriage that appears to be valid in the absence of any evidence to the contrary (HCJ 143/62 *Funk-Schlesinger v. Minister of Interior* [1]; HCJ 80/63 *Garfinkel v. Minister of Interior* [2]; HCJ 58/68 *Shalit v. Minister of Interior* [3]). Since the decision in *Funk-Schlesinger v. Minister of Interior* [1], the registration official at the Population Registry registers civil marriages on the basis of a public certificate attesting the marriage that is submitted to him (HCJ 2888/92 *Goldstein v. Minister of Interior* [4]). The registration does not attest to the substantive validity of the marriage. The registration is for statistical purposes only. The question whether a civil marriage that took place abroad between Jews who are Israeli residents and citizens gives the couple a personal status of being married has arisen from time to time in the case law of this court. Although it has been discussed in several *obiter* statements, it has not been decided (HCJ 51/80 *Cohen v. Rehovot Regional Rabbinical Court* [5]; HCJ 592/83 *Fourer v. Fourer* [6]; LCA 8256/99 *A v. B* [7]). The question of the validity of the marriage arises once again in the petition before us.

23. 'Marriages and divorces of Jews shall take place in Israel in accordance with Torah law' (s. 2 of Rabbinical Courts Jurisdiction (Marriage

and Divorce) Law, 5713-1953). But what is the law concerning marriages between Jews that take place outside Israel? It is universally agreed that if the marriage outside Israel is in accordance with Jewish law, it is valid in Israel (CA 191/51 *Skornik v. Skornik* [8]; A. Levontin, *On Marriages and Divorces that are Contracted Outside Israel* (1957), at p. 18; M. Silberg, *Personal Status in Israel* (1965), at p. 251). But what is the law if the marriage that took place outside Israel is not a marriage in accordance with Jewish law? No problem arises, from the viewpoint of civil law and the civil courts, if at the time of the marriage the spouses were not Israeli citizens or residents. In such a case, the validity of the marriage is determined in accordance with the rules of Israeli private international law. According to these, if the personal law of the couple at the time when the marriage was contracted recognizes the validity of the marriage, Israeli civil law also recognizes the marriage (*Skornik v. Skornik* [8], at pp. 167-168 {360-361}). 'The law at the time of the act is what determines the validity or the invalidity of the act' (Silberg, *Personal Status in Israel*, *supra*, at p. 222). 'When the parties have acquired, for example, a status of a married couple under their national law, any change that will occur in their personal law subsequently as a result of a change in their nationality is incapable of denying them the status of a married couple' (M. Shava, *Personal Law in Israel* (vol. 1, fourth expanded edition, 2001), at p. 80).

24. But what is the law if at the time of the civil marriage outside Israel both spouses were Israeli citizens or residents? In this matter it was possible in the past to identify two possible approaches. According to *one* approach, when examining the validity of a marriage that contains a foreign element we should refer to the rules of private international law (Justice Witkon in *Skornik v. Skornik* [8], at p. 179 {376-377}; cf. the position of Justice Olshan, *ibid.* [8], at pp. 159-161 {351-353}). The rules of English private international law, which were absorbed into Israeli law by means of art. 46 of the Palestine Order in Council, 1922, distinguish between the formal validity of a marriage, which concerns the propriety of the marriage ceremony, and the essential validity of a marriage, which concerns the competence of the parties to marry. Questions concerning formal validity are governed by the law of the place where the marriage was contracted (*lex loci celebrationis*). The question of the competence of the parties is governed by the law of their domicile at the time of contracting the marriage (*lex domicilii*) or the law of the place where the marriage is intended to be realized (Dicey & Morris, *Conflict of Laws* (thirteenth edition, 2000), at pp. 651, 675). When we are dealing with a civil marriage between Jews who are competent to marry one

another, the formal validity of the marriage (the civil ceremony) will be examined in accordance with the law of the place where the marriage was contracted. Assuming that the civil marriage ceremony is a valid form of marriage in the place where the marriage was contracted, the marriage is recognized by Israeli law, since the couple are competent to marry under their personal law. It should be noted that we are speaking of a civil marriage at which the parties are present in person. We are expressing no position with regard to marriage by proxy (such as 'Paraguayan marriages' or 'Mexican marriages').

25. The *second* approach to examining a civil marriage rejects the application of the rules of English private international law (with their distinction between content and form) in favour of personal law. With regard to Israeli residents and citizens, the validity of the marriage will be determined by applying their personal laws at the time when the marriage was contracted (Shava, *Personal Law in Israel*, *supra*, at p. 554); see also Levontin, *On Marriages and Divorces that are Contracted Outside Israel*, *supra*, at p. 17; cf. P. Shifman, *Family Law in Israel* (vol. 1, second edition, 1995), at p. 352). Those who espouse this approach regard the provisions of art. 47 of the Palestine Order in Council as requiring the civil courts to apply the personal law of the parties. With regard to Israeli citizens, this is their religious law, even if a foreign element is involved in the marriage (Shava, *Personal Law in Israel*, *supra*, at p. 131; see also Silberg, *Personal Status in Israel*, *supra*, at p. 212). Those who support this approach add that in so far as Jews are concerned, their personal law, which is Jewish religious law, does not distinguish between the content and the form of the marriage, so there is no basis for the distinction that exists in the rules of English private international law (see Levontin, *On Marriages and Divorces that are Contracted Outside Israel*, *supra*, at pp. 34-36; Shava, *Personal Law in Israel*, *supra*, at p. 558). According to this approach, the validity of the marriage of an Israeli citizen that took place outside Israel will be determined in accordance with the religious law of the Israeli citizen, precisely as if the marriage had taken place in Israel. If the religious law does not recognize the marriage, then it has no validity under Israeli law.

26. Deciding between these two approaches is difficult (see LCA 8256/99 *A v. B* [7], at p. 230). But we cannot avoid adopting a position on this question. The Great Rabbinical Court adopted a position when it held that:

> '… from the viewpoint of civil law the parties married in a civil ceremony and they are considered married throughout the world,

> including in the State of Israel' (the decision of 5 February 2003).

I agree with this. The recognition of the validity of the marriage is required under the rules of private international law, which constitute an integral part of Israeli law. They were absorbed in the past from English law. Now they are independent. They develop as Israeli law develops. They therefore constitute an integral part of Israeli common law. According to these rules of private international law, when there is a foreign element in a marriage, it should be taken into account. The provisions of the Palestine Order in Council, which apply religious law as the personal law of a local citizen, are subject to the rules of private international law. Indeed, 'the rules of private international law take precedence in their application to any law that is merely municipal or internal' (*per* Justice Witkon in *Skornik v. Skornik* [8], at p. 179 {376-377}). Even the provisions of art. 47 of the Palestine Order in Council, which applies religious law as the personal law of a local citizen, is a 'merely municipal or internal' law. The provisions of the article are subject to the rules of private international law. It follows that the validity of a marriage that was contracted by a Jewish couple outside Israel, even if the two spouses were at that time residents and citizens of Israel, will be determined while taking into account the rules of the conflict of laws as practised in Israel. According to these, the marriage has formal validity (under the foreign law) and it has essential validity (under Jewish law), and therefore the marriage is valid in Israel (both from the viewpoint of the external aspect and from the viewpoint of the internal aspect). This result is also required in view of the reality of life in Israel. Thousands of Jews who are citizens and residents of Israel wish to marry by means of a civil marriage that takes place outside Israel. This is a social phenomenon that the law should take into account. This was discussed by Justices Sussman and Witkon in the past, when they expressed the opinion in *obiter* remarks that with regard to the validity of marriages that take place outside Israel between Israeli citizens or residents, it is sufficient that they are valid according to the law of the place where they were contracted, even if the spouses are not competent to marry under their personal law (see *Funk-Schlesinger v. Minister of Interior* [1], at pp. 253-254; CA 373/72 *Tapper v. State of Israel* [9], at p. 9). Within the framework of the petition before us, we do not need to make a decision with regard to this position, and we need only adopt the more moderate position that the marriage is valid if the couple are competent to marry under their personal law and the marriage ceremony took place within the framework of a foreign legal system that recognizes it. This

conclusion is strengthened by our outlook on the human dignity of each of the spouses. The willingness to recognize the validity of a status acquired by Jews who are Israeli citizens or residents by virtue of a foreign law which is not contrary to public policy in Israel is strengthened in view of the recognition of the status of the right to marry and to have a family life and in view of the duty to respect the family unit. Indeed, 'One of the most basic elements of human dignity is the ability of a person to shape his family life in accordance with the autonomy of his free will… The family unit is a clear expression of a person's self-realization' (HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [10], at para. 32 of my opinion; see also P. Shifman, 'On Divorce Substitutes Created by the Civil Court,' *Landau Book* (vol. 3, 1995) 1607, at p. 1608).

27. The rabbinical court recognized a civil marriage between Jews, who are Israeli citizens or residents, that was contracted outside Israel — a civil marriage that is not in accordance with Jewish law — in its external aspect. The supplementary judgment of the Great Rabbinical Court distinguishes between a 'marriage in accordance with Jewish law' and a 'marriage of the Children of Noah.' It classifies the civil marriage as a 'marriage of the Children of Noah.' It does not deny their validity. Admittedly, the rabbinical court emphasizes that Jewish law does not regard the couple as married in accordance with Jewish law. Notwithstanding, Jewish law recognizes the marriage as a 'marriage of the Children of Noah.' The marriage is not null and void *ab initio* even from the viewpoint of Jewish law. From the viewpoint of status vis-à-vis the whole world, the civil marriage has far-reaching ramifications. The spouses are not considered unmarried. Without a dissolution of the marriage, the couple are not permitted to remarry, and if they remarry, this constitutes bigamy which is prohibited by the law (see p. 4 of the supplementary judgment of the Great Rabbinical Court). This civil marriage between Jews is, according to Jewish law, 'a marriage for the purpose of divorce according to the law of the Children of Noah.' Moreover, a dissolution of the marriage also does not annul the marriage *ab initio* but merely terminates it from that time onward. The Great Rabbinical Court does not deny the existence of the marriage. It considers whether to dissolve it. The marriage exists, in its opinion, in the sense that it has legal ramifications under Jewish law with regard to its external aspect.

28. I agree with this. I regard the supplementary judgment of the Great Rabbinical Court as an important contribution to the development of matrimonial law in Israel. The supplementary judgment reduces the conflict between the two approaches for examining the validity of a civil marriage

outside Israel between Jews who are citizens and residents of Israel. According to both approaches, such a marriage is recognized in Israel, and it is necessary for an act of divorce in order to sever the bond of marriage. The difference between the two approaches concerns the internal relations between the spouses. In this matter, the Great Rabbinical Court held that for the purpose of 'the validity of a civil marriage that took place abroad between Jews who are Israeli citizens with regard to the reciprocal obligations between the parties… it is necessary under the law in Israel to examine the validity of the marriage in accordance with Jewish law' (p. 3 of the supplementary judgment of the Great Rabbinical Court). This does not rule out the existence of a civil relationship between the parties by virtue of the application of private international law. According to this, the civil marriage that took place outside Israel between a Jewish couple who are Israeli residents or citizens is recognized as creating a status of marriage in Israel.

G. The jurisdiction to dissolve a civil marriage

29. How does an Israeli couple, who are Jews and citizens or residents of Israel and contracted a civil marriage outside Israel, become divorced? The answer to this question can be found in s. 1 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, which provides that 'Matters of marriage and divorce of Jews in Israel who are citizens or residents of the state shall be in the sole jurisdiction of rabbinical courts.' 'Matters of divorce' of Jews also includes divorces other than by way of a *Get*. This was discussed by Rabbi S. Dichovsky in the Great Rabbinical Court, where he said:

> 'The dissolution of the marriage is effected by way of a decree of divorce, as customary in the civil law of many countries. The significance of the dissolution of the marriage is a divorce in every respect, without any need to use a *Get*' (p. 8 of the supplementary judgment of the Great Rabbinical Court).

Indeed —

> 'When we are speaking of a Jewish couple in Israel who are residents or citizens of Israel, whether they married in Israel or abroad, and whether they married in a religious or civil marriage, the jurisdiction in a divorce claim between them in Israel lies solely with the rabbinical court. This jurisdiction extends to a certain class of litigants, as defined in the law — Jews, citizens or residents of the state, who are present in Israel — and it is not affected by what the couple have done or

> have not done previously outside Israel' (*per* Justice Z. Berinson in HCJ 3/73 *Kahanoff v. Tel-Aviv Regional Rabbinical Court* [11], at p. 452; see also *Cohen v. Rehovot Regional Rabbinical Court* [5]; *Fourer v. Fourer* [6]).

'There is no dispute on this matter; everyone agrees that wherever the marriage was contracted, the rabbinical court is competent to consider the question of the divorce' (my opinion in HCJ 148/84 *Shemuel v. Tel-Aviv Regional Rabbinical Court* [12], at p. 398). In *Cohen v. Rehovot Regional Rabbinical Court* [5] it was argued that the rabbinical court is not competent to try a divorce claim between Jewish spouses (a *kohen*[4] and a divorcee) who married outside Israel in a civil marriage, since the rabbinical court does not recognize the civil marriage. President M. Landau rejected this argument because of 'the possibility that a rabbinical court will decide in such a case that a *Get* is required as a stringency because the parties might be married… Even a *Get* required as a stringency is a *Get* and therefore it is a matter of divorce within the scope of s. 1 of the law' (*ibid*. [5], at pp. 11, 12). Does it not follow from this that where a Jewish couple does not need a *Get* even as a stringency, as in the case before us, the rabbinical court does not have jurisdiction to consider their divorce? In the past, this question was a difficult one. Now, in view of the position of the Great Rabbinical Court that a Jewish couple who married outside Israel, are considered married (from an external viewpoint) under Jewish law, it does not give rise to any difficulty at all. Such couples are admittedly not married in accordance with Jewish law and they do not require a *Get*. Notwithstanding, they are married under the laws of the Children of Noah, which are a part of Torah law, and they require a divorce decree. A *Get* and a divorce are not the same. For this reason there is also no basis to the argument that an application to the rabbinical court in a divorce action, which is based on the claim that the civil marriage is null and void under Jewish law is '*prima facie* lacking in good faith and sincerity' (CA 4590/92 *Kahana v. Kahana* [13]; see also HCJ 301/63 *Streit v. Chief Rabbi* [14], at p. 630).

30. It should be noted that recognition of the jurisdiction of the rabbinical court in 'matters of divorce' ensures the effectiveness of the dissolution of marriages. The decision on the question of the validity of the marriage and the need for a *Get* as a stringency depends upon the circumstances of each

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[4] A *kohen*, a member of the priestly family descended patrilineally from Aaron, is prohibited under Jewish law from marrying a divorcee (see Leviticus 21, 7).

case. A *Get* or a divorce decree from the rabbinical court ensures that the Jewish couple '… may not become available to remarry unlawfully, with all of the serious ramifications that this entails under Jewish law' (p. 11 of the supplementary judgment of the Great Rabbinical Court). The decision of the rabbinical court also ensures that the parties can remarry in the future in accordance with Jewish law, if they so wish. The civil court system has no good and effective civil alternative for dissolving a marriage between a Jewish couple. In view of the individual examination that is required in each case with regard to the validity of the civil marriage under Jewish law, giving the rabbinical court sole jurisdiction ensures that as a result of the divorce decree each of the parties will be regarded as single under his personal law.

31. Does the jurisdiction of the rabbinical courts to decide divorce cases of Israeli Jews who married outside Israel in a civil marriage extend also to the property aspects of the divorce? The answer to this question is no. The jurisdiction of the rabbinical courts to decide property matters relating to the divorce claim is set out in s. 3 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law. According to this:

> '… the rabbinical court shall have sole jurisdiction with regard to any matter that is included in the divorce claim, including financial support for the wife and the children of the couple.'

In order for an inclusion of an ancillary matter in a divorce claim to exclude the jurisdiction of the civil matter over that included matter, the litigant who relies on the inclusion must satisfy three conditions (HCJ 6334/96 *Eliyahu v. Tel-Aviv Regional Rabbinical Court* [15]): he must sincerely petition for divorce; he must lawfully include the ancillary matter; and he must sincerely include the ancillary matter. The three tests were intended to prevent an abuse of the inclusion arrangement by one of the spouses. 'Their purpose is to prevent an abuse of the inclusions section by establishing an artificial impediment to an application to the civil court' (HCJ 5679/03 *A v. State of Israel* [16]). It has been held in a whole host of judgments that the inclusion must be 'sincere' (see, *inter alia*, LCA 120/69 *Shragai v. Shragai* [17]; CA 22/70 *Ze'ira v. Ze'ira* [18]; CA 328/67 *Scharfsky v. Scharfsky* [19]). According to the supplementary judgment of the Great Rabbinical Court, the recognition of a marriage under the laws of the Children of Noah refers only to the 'external aspect' of the marriage that concerns the ramifications of the marriage on third parties. It does not refer to the 'internal aspect,' which concerns the reciprocal obligations between the spouses. In this spirit it was held in the supplementary judgment of the Great

Rabbinical Court that the marriage does not create an obligation to provide financial support. In such circumstances, including property matters in a divorce claim is not a 'sincere inclusion'; it is an inclusion whose whole purpose is merely to negate the existence of a property obligation. A Jewish spouse who chose to marry in a civil ceremony outside Israel and applies to the rabbinical court that does not recognize aspects of the marital status that concern the obligations between the parties does not act 'sincerely' if he also seeks to bring the financial and property matters before the rabbinical court. In such circumstances, including property matters involves an abuse of the legal tool of 'inclusion.' The spouse who includes property matters cannot sincerely intend to litigate before the rabbinical court on a matter that the rabbinical court does not recognize at all. Compelling the other spouse to litigate in a forum that does not recognize the property aspects of the marital status is contrary to the principles of justice. In such circumstances, an inclusion which has the purpose of giving the rabbinical court sole jurisdiction cannot be considered a 'sincere' inclusion. Moreover, since the Great Rabbinical Court limited its recognition of a civil marriage between Jews who are citizens and residents of Israel solely to the external aspect, it should be considered whether the issue of custody of the spouses' children — which is a purely 'internal' matter — should also fall within the jurisdiction of the civil courts, and whether there should be no basis for including them 'inherently and naturally' with the divorce, which is only intended to regulate the external aspect of the parties' relationship.

H. The grounds for dissolving the marriage

(1) Possible grounds

32. What are the grounds according to which the rabbinical court will decide an action for a divorce or for the dissolution of a civil marriage? There are several possibilities with regard to the grounds for the divorce. *One* possibility is that the mere fact that the marriage was not contracted in accordance with Jewish law gives rise to a ground to dissolve the marriage. A *second* possibility is that a Jewish law ground for a *Get* is required, as if the parties were married in accordance with Jewish law. A *third* possibility is that the rabbinical court will only decide upon a divorce in accordance with the grounds for divorce that exist in the law of the place where the marriage ceremony took place. According to a *fourth* approach, the ground for divorce is based on the realities of the actual relationship between the parties. The ground for divorce, according to this last approach, is mainly the fact of an irretrievable breakdown of the relationship between the parties, which has *de*

facto brought the marriage to an end. Let us briefly discuss each of the possibilities.

(2) Civil marriage as a ground for divorce?

33. Does the mere fact that the marriage was not contracted in accordance with Jewish law give rise to a ground to dissolve the marriage? The answer is no. The fact that the marriage is a civil one cannot in itself constitute a ground for divorce. This is inconsistent with the recognition of the validity of the marriage in Israeli law and with respect for the right to family life. The negative attitude of the religious law to civil marriages cannot lead to a dissolution of a marriage that took place under the auspices of civil law. A recognition of such a ground for divorce does not properly take into account the law under whose auspices the civil marriage was contracted. Moreover, a civil marriage should not be regarded, simply because of the manner in which it is contracted, as a framework that gives each of the parties an immediate and automatic right to dissolve it. It would appear that this is also the approach of the rabbinical court. In the supplementary judgment of the Great Rabbinical Court, it is expressly stated that the mere fact that the marriage is a civil one is not a ground for divorce. Indeed, the rabbinical court should make an effort to reconcile the parties. A civil marriage should not be regarded merely as a marriage for the sake of divorce. Therefore the fact that a marriage is a 'civil' one and was not contracted in accordance with Jewish law is not a ground for divorce.

(3) Divorce in accordance with Jewish law grounds?

34. The petitioner argues that the divorce decree of the rabbinical court should be based on the grounds for divorce in Jewish religious law, just like the law of divorce that applies to spouses who married in accordance with Jewish law. According to her, reference should be made to the grounds of divorce under Jewish law, on the basis of the assumption that the spouses married in accordance with Jewish law. This position is unacceptable to the rabbinical court. It was emphasized that 'When according to the rules of Jewish law there is no basis for requiring a *Get* because of a doubt or as a stringency, it is not right to arrange a *Get* in accordance with Jewish law in order to dissolve such a marriage… In the case of a divorce not requiring a *Get*, there is no need for any Jewish law grounds for compelling a *Get'* (pp. 8, 12 of the supplementary judgment of the Great Rabbinical Court). I agree with the Great Rabbinical Court. There is no reason why the divorce laws for someone who married in accordance with Jewish law should be imported and applied to someone who of his own free will contracted a civil marriage and

is not married in accordance with Jewish law. An argument that Jewish law should be imported in this way sounds strange when it is made by someone who did not want to marry in accordance with Jewish law, even though he could have done so, and it is an argument that is not made in good faith. Moreover, in a marriage in accordance with Jewish law, the rabbinical court is bound by the restrictions of religious law. The grounds for divorce under Jewish law are limited. Sometimes these requirements give rise to great difficulties, create an inequality and cause serious distress to spouses and their children (see A. Rosen-Zvi, *Family Law in Israel — Between Holy and Profane* (1990), at p. 136 *et seq.*; S. Lifschitz, 'I Want a Divorce Now! On the Civil Regulation of Divorce,' 28 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (2005) 671, at p. 678). By contrast, dissolving a civil marriage by means of a divorce decree, and not by means of a *Get*, is done by the rabbinical court itself, which can make a divorce decree — in accordance with its judicial discretion — without finding 'fault' and even without the consent of the non-consenting spouse. No-one is required to buy his freedom by waiving property or other rights. Of course, the discretion of the rabbinical court, like any judicial discretion, is never absolute. It is exercised within the framework of the purposes that the law is designed to realize.

(4) Divorce in accordance with the place where the marriage ceremony was held?

35. Another possibility proposed by the petitioner is that the rabbinical court is limited to the grounds for divorce recognized under the law of the place where the civil marriage ceremony took place. I cannot accept this position either. The rules of private international law oblige us to respect a foreign status, but they do not direct us to recognize all the aspects of that status under the foreign law (Shifman, *Family Law in Israel*, *supra*, at p. 373). The recognition of the status that the civil marriage creates does not mean that the court is bound by the attitudes of the foreign law with regard to the right to divorce (P. Shifman, 'On the Right to Convert, on the Right to Divorce and on the Duty to Decide,' 16 *Hebrew Univ. L. Rev. (Mishpatim)* (1986) 212, at p. 241). The recognition of the foreign status means, for the purpose of its legal aspects, that it is as if it were a local status (A.V. Levontin, *Choice of Law and Conflict of Laws* (1976), at pp. 26-27, 31). If the centre of the spouses' lives is in Israel, there is nothing wrong in their being subjected to the outlooks of Israeli society with regard to the right to divorce and the manner of effecting it in practice.

(5) Divorce because of the breakdown of the marital relationship

36. The supplementary judgment of the Great Rabbinical Court adopts a position whereby the ground for divorce is the 'end of the marriage.' This ground is based on the realities of the relationship that exists *de facto* between the parties. The rabbinical court saw fit to decree the divorce after it realized that there was no possibility of reconciling the spouses and they would not live together in harmony. The supplementary judgment of the Great Rabbinical Court held:

> 'In a divorce without a *Get*, there is no need for Jewish law grounds for compelling a *Get*. The rabbinical court satisfies itself by examining the position, and the absence of any chance for harmony between the parties. When the court finds that there is no possibility of a reconciliation between the couple, then the court can arrive at the conclusion that they should separate, and the divorce is effected by means of a divorce decree. Even in these marriages the rabbinical court makes efforts to reconcile the parties and to persuade them to marry in accordance with Jewish law. The RaMA in the *Shulhan Aruch, Even HaEzer* (chapter 177, para. 5) holds that it is a meritorious deed to marry a couple who have had sexual relations consensually. When it transpires that there is no possibility of living harmoniously, even if there are no Jewish law grounds for divorce, the religious court is likely to reach the conclusion that there is no reason to keep the parties within a formal civil framework, and the rabbinical court decrees the dissolution of the marriage, even without consent' (p. 12 of the supplementary judgment of the Great Rabbinical Court).

The 'ground of divorce' on which the rabbinical court relied is based on an irretrievable breakdown of the marriage. I agree with this approach. It is consistent with modern approaches with regard to the grounds for divorce, which are not based solely on fault nor are they limited to cases where there is consent (see Shifman, 'On the Right to Convert, on the Right to Divorce and on the Duty to Decide,' *supra*, at p. 225; Shifman, *Family Law in Israel*, *supra*, at p. 374; S. Lifschitz, *Recognized Cohabitees in Light of the Civil Theory of Matrimonial Law* (2005), at pp. 303-313; Lifschitz, 'I Want a Divorce Now! On the Civil Regulation of Divorce,' *supra*, at pp. 680 *et seq.*). The approach of the Great Rabbinical Court does not make a civil marriage in itself a tool to obtain an immediate and automatic divorce. The breakdown of the marriage is a 'ground for divorce' that stands on its own. It does not derive its force from the civil marriage ceremony. It is not the civil character

of the marriage that is the ground for the divorce, but the relationship of the spouses that has irretrievably broken down. The ground for the divorce is based on the realities of the spouses' lives. Indeed, we agree in principle with the outlook that when a relationship between a couple has broken down, the parties should be allowed to escape from the bonds of a failed marriage. A person who has lived for a long time apart from his or her spouse, after the relationship broke down, should be allowed to leave the framework of the marriage. At the same time, a just and fair arrangement should be ensured with regard to the division of property and financial support between the spouses. This was discussed by Prof. Shifman, who said:

> '… The actual idea of no-fault divorce, which is conquering the western world more and more, lies in an outlook that gives preference to the realistic side of marriage over the symbolic side of marriage, since according to this approach, when the marriage has irretrievably broken down, it is better to make a divorce decree because the court does not have the power to change the fact that the spouses *de facto* live apart. The approach that makes a right to divorce conditional upon the existence of an irretrievable breakdown of the marriage irrespective of the relative fault of the parties in the failure of the marriage is therefore characterized by a functional approach that seeks to reduce the gaps between reality and legal norms' (P. Shifman, 'On the New Family: Subjects for Discussion,' 28 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (2005) 643, at p. 655).

37. The petitioner expresses a concern that this policy will lead to a perfunctory dissolution of the marital relationship. Indeed, a practice whereby the relationship is dissolved immediately, without any examination of the relationship and without trying to reconcile the spouses, is unacceptable. It is not sufficient merely to try and persuade the parties to marry in accordance with Jewish law. We cannot accept the approach that a civil marriage is merely a marriage for the sake of divorce. Every attempt should be made to continue the civil marriage between the parties. The marriage enjoys legal support whose purpose is to protect the stability of the marriage. This is clearly expressed in divorce law. A civil marriage *de facto* creates a family unit that deserves the support and protection of the legal system. 'Social interests support stable marriages. The institution of marriage is central to our society' (CA 5258/98 *A v. B* [20], at p. 223 {340}; see also HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior*

[21], at p. 783). Indeed, the social and public interest requires protection of the family unit, and this includes a unit that is based on a civil marriage between Jewish spouses. Efforts should also be made in divorce proceedings to restore harmony, reconcile the parties and rehabilitate the family unit. An immediate dissolution of the family unit, without any attempt to effect a reconciliation, is usually inconsistent with the best interests of the children (see HCJ 9476/96 *Sargovy v. Jerusalem Regional Rabbinical Court* [22], at para. 30).

38. A liberal divorce regime also seeks to prevent perfunctory and hasty divorces (Shifman, *Family Law in Israel*, *supra*, at p. 161). The relationship between spouses is a complex and sensitive matter. It is characterized by ups and downs. Passing ill winds may assault it. Crises in family life may lead the spouses to initiate legal proceedings against one another. These do not always indicate a final and absolute breakdown of the marriage. Care should be taken not to exacerbate the crisis. Not every deterioration in a marital relationship leads necessarily to a breakdown of the family unit. It would appear that the need for the participation of the state, through the courts, in the dissolution of a marriage acts as a check or restraint upon hasty and rash decisions. But this is not enough. Dissolving the marriage cannot be done as a matter of course, immediately and automatically. It is the nature of disputes between spouses that they are for the most part hidden and only the surface is visible. The rabbinical court should make an effort to discover the details of the case. It should obtain a full picture of the family relationship. It should examine whether the breakdown between the spouses is indeed irretrievable, to the point where the marriage has come to an end. The seriousness of the crisis should be examined. The parties should not simply be directed towards a dissolution of the marriage. The possibilities of reconciling the spouses should be exhausted, in the manner accepted in divorce claims between spouses who married in accordance with Jewish law. The interim period during which the rabbinical court examines the case may in itself, in certain cases, cool the temper of the spouse seeking a dissolution of the marriage. The interim period may also allow the spouse who opposes the divorce a period to recover and adapt to the new situation.

39. Ultimately, the institution of marriage will not be protected by anchoring spouses to a marriage that in practice has broken down. Justice Kister rightly said that:

> ‘The modern approach is based on the fact that if a marriage of a certain couple has in practice broken down, either of the spouses

> who so desires should be allowed to remarry lawfully and raise a family. Admittedly, the courts and public institutions should aim to preserve the stability of the family, but when this is impossible, one or both of the spouses should not be anchored to it' (CA 571/69 *Kahana v. Kahana* [23], at p. 556).

These remarks, which were made with regard to marriage in accordance with Jewish law, apply also to civil marriage. It is not the civil marriage that leads to the divorce claim but the deterioration in the marital relationship that leads to the divorce claim. Usually a refusal to grant a relief of divorce does not reconcile the spouses. Parties should be allowed to escape relationships that have broken down. An 'irretrievable breakdown of a marriage' should be regarded as a situation in which the marriage has *de facto* come to an end (*per* Justice T. Strasberg-Cohen in CA 1915/91 *Yaakovi v. Yaakovi* [24], at p. 628). A divorce at the request of one of the spouses should not be regarded as wrong when the family unit has *de facto* broken down and the marriage has become an empty shell. This approach properly balances the need to protect the stability of the marriage on the one hand and the freedom of the individual to shape his personal life on the other.

40. The petitioner further argues that the policy of the rabbinical courts with regard to the dissolution of civil marriages results in an infringement of economic rights. Her concern is that a hasty dissolution of the marriage, upon an application of one party and without the consent of the other party, may have serious results. Indeed, often the argument is made that in the prevailing socio-economic climate, the system of 'no-fault divorces' that allows divorces without consent may cause serious economic harm to the spouse who is economically weaker, which is usually the wife (see, for example, E. Shochetman, 'Women's Status in Matrimonial and Divorce Law,' *Women's Status in Society and Law* (F. Raday, ed., 1995) 380, at p. 434). The argument is that a divorce regime that allows each of the spouses to be released from the marriage unilaterally, without any grounds and without any continuing financial commitment exposes the weaker spouse to abandonment and gives rise to a serious concern of opportunistic conduct (Lifschitz, *Publically Recognized Partners in Light of the Civil Theory of Matrimonial Law*, *supra*, at p. 334). Remarks in this vein were also uttered by Prof. Shifman:

> '… A civil marriage has a huge advantage. The fact that no marriage was contracted by the parties in accordance with Jewish law gives each of the parties a right to request a divorce

without providing special grounds that are founded on the traditional concepts of fault. A person does not need to buy his freedom to remarry by means of financial and other waivers. There is no possibility of obtaining advantages with regard to the terms of the divorce by opposing it. On the other hand, it is precisely this desirable and praiseworthy phenomenon that exposes a serious legal problem which is diminished in divorces that are the result of an agreement between the parties. I am referring to the need to compensate fairly the party who suffers financially as a result of the termination of the marriage that is forced on him and who does not have any say in the terms of the divorce. As we said, this need is more pronounced in those cases in which the property rights that are given to that party are not sufficient to allow him to change over from financial dependence to complete independence' (Shifman, *Family Law in Israel*, *supra*, at p. 381).

Prof. Rosen-Zvi said in this regard:

'In recent years it has been proved that in the no-fault divorce system the bargaining power of a wife who, in the style of years past could be said to be innocent of any fault, has decreased. The husband does not need to make economic concessions in return for his freedom to remarry at will' (Rosen-Zvi, *Family Law in Israel — Between Holy and Profane*, *supra*, at p. 148).

Dr Lifschitz has also addressed this issue:

'… It would appear that even in the modern world the basic weakness at the heart of married life arises: the concern that the party who has invested in the family at the expense of his personal development will be exposes to the abandonment of the other spouse, when his talents are no longer required. The economic analysis in this regard shows therefore that because of the distribution of roles between the parties and its timing, the model of marriage as a contract that can be dissolved immediately, as is customary in modern matrimonial law, gives rise to a serious concern of opportunistic conduct. By contrast, and in accordance with the above analysis, establishing restrictions and determining a price for divorce may contend better with the concern of opportunism' (Lifschitz, *Publically*

Recognized Partners in Light of the Civil Theory of Matrimonial Law, *supra*, at p. 334).

41. In so far as 'no-fault divorce' laws can be criticized for leaving the 'weaker' spouse without economic protection after divorce, this does not necessarily lead to a conclusion that these laws should be rejected. The financial interests of the weaker spouse should be protected in other ways. Protection of the 'weaker party' in a marriage does not need to be effected by means of anchoring the spouse to a formal marriage that has broken down *de facto*. If one spouse has become financially or socially dependent on the other, the solution is not to anchor the 'strong' spouse to the marriage. The solution to problems of this kind will be found in the sphere of the financial arrangements between the spouses and not in restricting the actual possibility of divorcing (Shifman, *Family Law in Israel*, *supra*, at p. 382; Lifschitz, *Publically Recognized Partners in Light of the Civil Theory of Matrimonial Law*, *supra*, at p. 336). Indeed, the rabbinical court's decree that divorces the parties does not end the relationship between them. What is this relationship?

I. The reciprocal rights of the spouses

42. The reciprocal rights of the parties — the internal status of the marriage — are decided by the civil court. What is the law according to which the civil court will decide these? The answer to this question is complex. The civil courts will need to develop this civil family law. The problem does not arise in our case. It is sufficient if we say that civil law in Israel has legal tools that can be used to develop this law. The main tool is that of contracts in general, and the principle of good faith in particular. In LCA 8256/99 *A v. B* [7] I said:

> '… where one party needs the support of the other — whether in financial support or in other ways — he is entitled to receive this support. The spouses are not passers-by who were brought together by a road accident. The spouses wanted to live their lives together. The requirements of equity, the considerations of fairness and the sentiments of justice in Israeli society lead to a conclusion that there should be a duty to pay financial support' (*ibid*. [7], at pp. 233-234).

The payment of civil financial support will safeguard the lifestyle of the 'weaker' spouse and allow his rehabilitation after the divorce. The presumption of joint ownership — in so far as it applies in a marriage in accordance with Jewish law — will also apply, of course, according to its conditions, to someone who contracted a civil marriage, and it, together with

the provisions of the Spouses' Property Relations Law, 5733-1973, will contribute to the protection of the weaker party in the life of the family, promote equality between the spouses and ensure financial independence after the divorce.

J. From general principles to the specific case

43. The petitioner and the respondent, who are Jews and citizens and residents of Israel, contracted a civil marriage in Cyprus. The husband applied to the rabbinical court after the petitioner cancelled her action for a reconciliation, a claim that was tried in the rabbinical court for approximately a year. He sought to divorce the petitioner since, according to him, the conflict between the parties was becoming worse and the relationship between them had come to an end. The rabbinical court granted the husband's claim and declared that the parties were not married in accordance with Jewish law. Subsequently, in view of the guidelines of the Great Rabbinical Court, a supplementary decree was made in which the Regional Rabbinical Court dissolved the marriage, notwithstanding the petitioner's objections. We have seen that the rabbinical court was of the opinion that there remained no hope of a reconciliation between the parties and it arrived at the conclusion that there was no reason to leave the parties within the framework of a civil marriage. In the proceedings that took place before the rabbinical court there is no defect that justifies our intervention. The difficult relationship of the spouses was brought before the rabbinical court. It transpired that the relationship had irretrievably broken down. The life of the family had been undermined irreparably. The petitioner herself had lost hope that the parties would once again have a proper marital relationship. These circumstances of a prolonged separation that was clear to everyone require a legal arrangement that is consistent with the realities of the relationship between the parties — a situation of profound conflict and a breakdown of the family framework. In order to make such a legal arrangement, the rabbinical court acted by way of dissolving the civil marriage. The proceedings in the rabbinical court were limited to the question of the divorce. Against this background, we are of the opinion that the rabbinical court acted within the scope of its jurisdiction and properly exercised its discretion.

Conclusion

44. The recognition in Israel of civil marriages between Jews who are Israeli citizens or residents, which were contracted under the auspices of a foreign law, gives rise to serious problems. A situation in which thousands of

Jewish couples who are citizens or residents of the state do not marry in Israel in accordance with Jewish law but contract civil marriages outside Israel creates a reality with which Israeli law is obliged to contend. The matter lies mainly within the province of the legislature. It is without doubt a very heavy burden. Notwithstanding, the supplementary judgment of the Great Rabbinical Court and our judgment, which reflect the prevailing law, can form a normative basis on which the Knesset can establish the proper solution to these civil marriages, which are contracted by Israeli Jews outside Israel. As long as the legislature has not had its say, there is no alternative to a judicial solution of the problems that life presents. I regard the supplementary judgment of the Great Rabbinical Court as a proper premise for formulating judicial law in this sphere. The 'external' recognition that the Great Rabbinical Court affords civil marriages between Jews from the viewpoint of Jewish law itself is of great importance. Even though it does not involve a recognition of a full status of civil marriage, it make a contribution to preventing a rift between civil law and religious law; it allows civil law to recognize the jurisdiction of the rabbinical courts to determine the question of divorces of Jewish couples who contracted civil marriages outside Israel; it guarantees that the dissolution of the relationship between Jewish couples who married outside Israel will release each of them, both under Jewish law and under civil law —whether by means of a *Get* (where a *Get* is required) or by means of a divorce decree that is not a *Get* (where a *Get* is not required) — from the matrimonial relationship where there is a proper justification for doing so. Thereby each of the spouses, the husband and the wife, obtains the possibility of remarrying, if they so wish, without there being any problem that they may not be competent to remarry under Jewish law. But notwithstanding the importance of the supplementary judgment of the Great Rabbinical Court, it cannot be denied that it is limited to the 'external' aspect of the marriage. It does not recognize reciprocal obligations and rights of the spouses *inter se*. The solution to these will be found in the civil court, which recognizes civil marriages that took place outside Israel between Jewish spouses who are Israeli citizens or residents as creating a full status of marriage. This recognition — in so far as it concerns the internal relationship between the spouses — supplements the religious law.

The petition is therefore denied. In the circumstances of the case, there is no order for costs.

Justice E. Hayut

I agree.

Justice M. Naor

1. My colleague President Emeritus A. Barak has presented a wide-ranging analysis, and I agree with his opinion in every respect.

2. With regard to the couple before us, from the oral hearing it has become clear that the real question in dispute concerns the *grounds* on which the rabbinical court may dissolve the marriage of the parties. The petitioner and the respondent, for their own reasons, chose to contract a civil marriage. There was nothing to prevent them from marrying in accordance with Jewish law. As my colleague showed, the law respects their choice. The parties' marriage has broken down. It is not possible, at this stage, to turn back the clock and request that the marriage should be dissolved 'as if' it were a marriage in accordance with Jewish law. This request is inconsistent with the joint intentions of the parties when they contracted the marriage. The different ways in which a couple may live together — marriage in accordance with Jewish law, civil marriage, recognized cohabitees — are likely to have different results in the event of a separation. Those who choose to live together in a particular way should reflect upon this.

Petition denied.

30 Heshvan 5767.

21 November 2006.