

To my dearly beloved in-laws, Nehemiah and Rachel Stern

”פי בי ירבו ימיה ויוסיפו לך שנות חיים.” (משלי ט, יא)

Contents

Acknowledgments	xiii
Introduction	1
Chapter 1: Issues Subject to Modification in Family Law	9
I. Introduction	9
II. Issues Subject to Modification in Family Law	10
III. Bargaining and Indemnification in Divorce Agreements	15
IV. Issues Subject to Modification—A New Model	19
A. Argument I: Broadening Issues Subject to Modification	19
1. A Theoretical View	19
2. A Practical View	23
B. Argument II: Eliminating Modification in Divorce Settlements	27
1. The Perspective of Contractual Obligations: Breach of Agreements	29
2. The Perspective of Public Policy: The Ongoing Destructive Relationship	31
3. The Perspective of Normative Harmony: Monetary Claims	33
4. The Limitations of Modifying Judicial Decisions	35
C. An Intermediate Path—Comprehensive Legislative Rules for Modification	37
1. Defining the Changed Circumstances Standard through Fixed Rules	38
2. The Effective Support Approach	45
3. The Tort Model	49
V. Conclusion	52

Chapter 2: The Right of a Minor to Independent Status	54
I. Introduction	54
II. Importance of the Minor's Right to Independent Status	55
A. Finality of Judgment	55
B. Natural Guardianship	57
C. The Right of the Minor to Independent Status	58
III. Exclusion of Other Interests in Family Law	61
A. Res Judicata and the Burden of Proof	61
B. Contractual Certainty, Rehabilitation, and Motivation to Settle	64
IV. Three Models for Balancing the Competing Interests	68
Model A: Consideration of the Interest of the Minor by the Court	68
Model B: Clear Legislative Guidelines	71
Model C: Independent Representation for the Minor	75
V. Conclusion	81
Chapter 3: Extramarital Relationships and the Theoretical Rationales for the Joint Property Rules	84
I. Introduction	84
II. Property Distribution and Extramarital Relationships—The Laws in the United States	86
A. The System of Family Property Distribution	86
B. The No-Fault Divorce Revolution	89
C. The No-Fault Divorce Revolution—The Shattered Dream	92
D. Fault in Property Distribution—The Laws in the United States	93
III. Extramarital Relationships and Property Distribution— The Normative View	100
A. The Moral Argument	100
B. A Dilemma Facing the Moral Argument	103
C. A Lack of Guidelines Leads to Judicial Arbitrariness	105
D. Which Field of Law Should Deal with Extramarital Relationships?	107
IV. Israeli law—Extramarital Relationships	109
A. Extramarital Relationships under a Joint Property Regime	109

B. Balancing of Resources—The Property Relations Law	111
C. Jewish Religious Law	113
V. The Modern Theoretical Rationales for Joint Property	114
A. The Joint Property Principles	114
B. Different Fields of Law and Extramarital Relationships	124
C. The Moral Argument—The Approach of Society	125
D. A Proposal for a New Model—The Dominant Cause Model	126
VI. Conclusion	128
Chapter 4: Property Sharing Arrangements in Israeli Family Law	131
I. Introduction	131
II. The Property Relations Law—The Theoretical and Normative Framework	133
III. The <i>Knobler</i> Case—A Solution with Endless Difficulty	136
IV. The Case Law That Followed the <i>Knobler</i> Case	139
A. The <i>Abu Romi</i> Case—An Obiter Dictum Becomes Precedent	139
B. An Asset Registered in the Name of One Spouse Is Held to Be a Shared Asset	140
C. The <i>Simchoni</i> Case—A Separate Asset Registered in the Name of Its Owner and Held by Creditors	142
D. The <i>Ben Giat</i> Case—Reinstatement of the Presumption of Sharing	143
E. Family Court Case Law	146
V. The Law in the United Kingdom	146
VI. The Law in the United States	152
VII. A New Model in Light of Amendment 4	158
A. Amendment 4—A Significant Change	158
B. A Desirable Normative Arrangement in Light of Amendment 4	160
C. The Normative Arrangement Concerning the Residential Apartment	162
VIII. Conclusion	164
Chapter 5: Recognition of Foreign Civil Marriages	166
I. Introduction	166
II. The <i>Schlesinger</i> Case—A Marriage between a Jew and a Non-Jew	169

III. The Validity of Civil Marriage	172
A. The <i>Skornik</i> Case—The Validity of a Marriage with Regard to Maintenance	172
B. Three Approaches for Examining the Validity of a Marriage	174
C. The <i>Anonymous</i> Case—The English Approach	175
IV. The <i>Ben Ari</i> Case—Registration of Same-Sex Civil Marriage	178
V. Conclusion	181
Chapter 6: The Issue of Document Disclosure in General Court and in Family Court	183
I. Introduction	183
II. The Unique Nature of the Family Court	185
A. Establishment of the Family Court—Historical Background	185
B. The Release from Procedural Rules—Analysis and Review	187
III. Document Disclosure	190
A. Document Disclosure in the General Courts	190
B. Document Disclosure in Family Court	192
C. Does General Document Disclosure Apply in Family Court?	193
IV. The Response of the Family Court—A Critical Review	196
A. The “Pre-Trial” Rules as Authority for Document Disclosure	197
B. The Sanction for Noncompliance with Document Disclosure Orders	199
C. Rejection of the Constructions by the Courts of Appeal	200
D. Partial Adoption of the General Procedure: A Critical Review	201
V. The Legal Systems in Several Other Countries	203
A. The Australian Legal System	203
B. The Legal Systems in Canada	206
C. The Legal System in Several States within the United States	207

D. Adoption of the Process Used by the Labor Court in Israel	211
E. The Israel Supreme Court Approved an Order to Disclose a Document	213
VI. Conclusion	214
Glossary of Technical and Foreign-Language Terms	217
Index of Terms, Figures, and Sources	219
Legislation Index	227
Index of Cases	233

Acknowledgments

I wish to take this opportunity to thank several of my teachers and mentors. First, I must express my profound gratitude to Professor Berachyahu Lifshitz, who supervised my doctoral dissertation and advised me on the articles that followed it.

I am grateful to my mentors at the Institute for Advanced Torah Studies, Bar-Ilan University, and to my rabbi, Rabbi Aaron Katz. For many years I was privileged to study with Rabbi Katz and learn from his leadership skills. I must also gratefully acknowledge my rabbis and teachers at Yeshivat Shaalvim who first introduced me to high-level Torah study and taught me to love the Torah.

For approximately fifteen years, I have been a faculty member at Ono Academic College, an institute that has become a warm and supportive home for me. I thank Mr. Ranan Hartman, founder and chairman of Ono Academic College, for his personal guidance; Professor Dudi Schwartz, to whom I owe most of my academic development; and Dr. Rivi Cohen, the vice president, whose administrative talents have enabled me to dedicate a significant amount of my time to research.

I am grateful to Rabbi Dr. Michael A. Shmidman, dean and professor of medieval Jewish history and editor in chief of Touro University Press, for his very significant assistance and wise advice during our work together on both this book and my previous publication *The Unique Judicial Vision of Rabbi Meir Simcha of Dvinsk: Selected Discourses in Meshekh Hokhmah and Or Sameah* (2016).

I wish to sincerely thank Alisa Shilor, the translator of this book, for her professional, dedicated, diligent work, and especially for her patience and warm welcome throughout the years of working together. I also thank Mr. Stuart Allen for his professional and dedicated editing work.

The gratitude that I owe my parents and parents-in-law is immeasurable. With genuine love, I wish to bless my parents, Mordecai and Esther, for their boundless dedication and self-sacrifice that instilled in me a love of learning and

awe of Heaven. Likewise, I wish to offer my heartfelt blessings to my in-laws, Nehemiah and Rachel Stern, and I wish to thank them for their assistance and for remaining by our side throughout the years. May the Lord grant my parents and in-laws many years of health and happiness.

Last, but not least, I must thank my own family: to my wife Shuli, my earthly partner, for her great faith in me, her never-ending encouragement, and her tireless devotion to the education of our children—Efrat, Tamar, Naama, Gilad, Ariel, and Hila; and to my children, who gave up their time with me so that I could devote it to the publication of this book.

Words cannot express my gratitude to the Creator of the World for all the goodness that He has bestowed upon me. I humbly ask that He continue to enable me to study His Torah and to lead our family on the path of righteousness, and that He bestow upon myself and my family His grace and blessings. May the Torah remain in my mouth and in the mouths of my offspring in perpetuity. “May the words of my mouth and the meditation of my heart be acceptable in Thy sight” (Psalms 19:15).

Introduction

This book is as relevant to the general public as it is to family law practitioners, since divorce has not only negative consequences for the spouse and his or her family unit but also ripple effects on society as a whole.

Divorce matters affect everyone and determine the quality of life of an individual, a family, and a nation. In the State of Israel, the unique family law derives from ancient Jewish law, different *halakhic* traditions, and an extensive legal tradition spanning many centuries and geographic locations. It will be emphasized on the background of a comparison with the corresponding law in the United States and other countries around the world. This analysis is intended to illuminate some issues in legal systems worldwide.

First, it is important to indicate that Israeli family law is substantially different from other legal systems. The Israeli system is primarily controlled by the religious law of the parties. Thus religious courts were also established and granted enforcement powers equivalent to those of the civil courts. This is a complex situation because the religious law applied in these courts is not always consistent with gender equality and civil rights practiced in civil court. In contrast, the various state legal systems in the United States and the legal systems in other Western countries separate between religion and state. They provide for family law matters exclusively through secular law. Although rabbinical courts have also been established in different countries, they lack enforcement and execution powers. Their authority is contingent upon the consent of both spouses. Nevertheless, there are many similarities between the systems that can also contribute to one another. The real issues are not simply religion as opposed to secularism, but those defining personhood and rights.

In its legislation promoted by the deputy minister of religion, the Israeli Knesset granted the religious courts exclusive jurisdiction over matters of marriage and divorce for the members of the religion associated with each such court. However, the religious courts and civil courts have concurrent jurisdiction in other matters of personal status that accompany divorce, such as child

support, custody, and the division of property. This creates significant tension between the legal systems as applied in religious and civil courts. This book seeks to clarify that tension and offers the solutions suggested in each of its chapters. Spouses who are unaffiliated with any religion or are members of different religions will not be under the exclusive jurisdiction of a religious court. All of their matters will be brought before the civil court. With respect to spouses of different religions, the civil court will request from the head of each relevant religious court an opinion as to annulment of the marriage and whether religious law requires a divorce.

The book also examines comparative legal systems. It seeks to provide the Israeli legal system as well as legal systems worldwide with additional tools for resolving a family dispute. The comprehensive analysis in this book may serve as a guide for those interested in family law both in Israel and in other countries. In divorce disputes this may include civil court judges and rabbinical court judges lawyers, mediators, arbitrators, and the couples themselves. This book deals with general matters applicable worldwide and not only in Israel. Included among them are issues subject to modification, the right of a minor to independent status, extramarital relationships and joint property. This book may also facilitate the divorce process and thus reduce the suffering of a couple and their children. The following is a brief description of its chapters.

The first chapter discusses the issues subject to modification in family law. The state legal systems in the United States have accepted that issues of child support, custody, and alimony may be modified, even after final judgment or agreement between parties. The standard for when modification is appropriate is the occurrence of a “substantial change in circumstances.” This unclear standard contributes to prolonged litigation, causes family disputes to remain open, and violates the fundamental principles of finality and *res judicata*. The discrepancy between the decisions of the rabbinical court and those of the civil court in the State of Israel also contributes to the standard’s lack of clarity. It urges spouses to repeatedly sue in one of the courts in an attempt to alter a previous ruling given in the other court. Yet when two courts make different determinations, it is difficult to identify the correct standard, the appropriate amount of child support to be determined in each case, and whether the change in circumstances is substantial enough to justify new litigation. This therefore leads to an overabundance of reopened cases. Although the issue of property distribution is very much interrelated with matters subject to modification, it cannot be relitigated along with them. The first chapter challenges both aspects of the current practice.

The first chapter presents two opposing arguments as a basis for a new model that attempts to achieve a good, fair, and efficient balance of competing interests. One argument suggests broadening the application of issues subject to modification and applying it to the distribution of property as well. The second argument, on the other hand, suggests eliminating relitigation and applying, instead, the principle used for the legal system in general: *res judicata*. This principle of the finality of judgment means that it is not possible to relitigate a matter that has already been determined by the court. These two contrasting arguments brought about the present suggestion of a third model.

A new model suggests both following an intermediate path and adopting the system of periodic payments from tort law, with its accompanying fixed legislative rules providing clear guidelines for relitigation and modification. The model proposes defining the present substantial change in circumstances standard through clear guidelines for modification, such as a time period before allowing relitigation and a fixed percent above or below the support payment determined in the original decree. The chapter further suggests enhancing this model with an innovative approach called “effective support.” This approach ensures the consideration of property matters that are involved in issues subject to modification, while also preventing their relitigation. In other words, property matters will not be relitigated between spouses, and the judicial decision in their matter will be final. Relitigation for a modification will take place only regarding the amount of the spousal support payment, as customary in all legal systems worldwide.

Any modification of support will relate to all the effective support and not only to the amount of an actual monetary payment. The new model is fairer from the perspective of tax considerations, avoids the need for indemnification stipulations, and prevents the court from selling family property. Such a proceeding usually takes place when the individual that pays support does not have available cash. The spouses will not, for example, have to sell their house against their will, but will be able to transfer portions of their property to one another instead of the payment of support in cash. This is consistent with the principle of “clean break,” and assists both the couple and the legal system in delineating a clear and stable roadmap with respect to disputes following divorce.

The second chapter examines a minor’s right to independent status in matters of family law, the importance and benefits of that right, the interests it competes with, and possible new approaches for the future. The right of a minor to independent status was intended to resolve a concern that parents, while undergoing divorce proceedings and focused on their own interests, might compromise the interests of their children. This concern has developed into

a legal presumption that parents compromise the interest of minors in divorce proceedings. However, this presumption contradicts the assumption, fundamental to every legal system, that parents are natural guardians who safeguard the interests of their children in every decision involving the welfare, education, and health of the child. The best interest of the child does not assume joint custody unless shown otherwise, but depends upon the particular circumstances in each case. The best interest is a judge's finding and might ignore religious or cultural preferences of the parents where safety or health issues are involved—plus psychological assessments and educational attitudes. It is also important to remember that while the principle of the best interests of the child is the determining factor in all legal systems worldwide, both under religious law and under secular law, each court interprets it differently. It is certainly possible that a religious court might determine a place of religious education is better for the child, in contrast to the determination of a civil court. In addition, the development of a minor's right to independent status has several negative impacts on divorce proceedings, including among them contractual uncertainty, lack of finality of judgment, waste of judicial resources, and prolonged divorce proceedings between parents.

The second chapter offers the following three models for protecting the interests of the minor: (i) requiring the court to comprehensively determine the best interests of the child, using expert opinion in rabbinical courts as well, and then granting a presumption of validity to the court's determination. That determination should also serve as binding precedent for a subsequent court in accordance with the principal of finality of judgment, unless there would be a change in circumstances; (ii) legislating clear considerations and guidelines for defining the best interests of the child and thereby reducing future relitigation. Without guidelines, each court sees the best interests of the child differently, although the same factual reality is presented before all of them; and (iii) appointing independent representation for the minor. The chapter discusses the age at which such representation is suitable and appropriate. These models may serve to create a more appropriate formula for balancing the competing interests in family law proceedings.

The third chapter examines whether extramarital relationships should be taken into consideration in determining the distribution of family property. Under the state legal systems within the United States, opinions differ as to whether this fault should be a factor in distribution of family property. The controversy is influenced by and arises from an earlier disagreement that followed the "no-fault" revolution of the 1970s, which focused on the role of fault

in divorce proceedings. The discussion of fault with regard to property distribution took place without in-depth consideration of the underlying basis and rationales for the principles of joint property and, even more importantly, without relating to their modern, theoretical and current bases. The third chapter fills this void, clarifies the modern bases for the principles of joint property, and through them sheds new light on the role of fault. An example is the question of whether a person, who had an extramarital relationship which brought about the end of the marriage, should receive a smaller portion in the distribution of family property. This analysis produces a new model for examining the relevance of fault in property distribution. Although the model does not answer all the questions, it certainly offers a more accurate and fairer formula for dealing with the issue of extramarital relations and the sanction for them.

In order to clearly and precisely focus on the theoretical rationales for joint family property and the establishment of a new model, this chapter also examines the Israeli legal system. It is important to mention that in Israel the religious law applies to matters of marriage and divorce, but not to the distribution of property. With regard to matters of property distribution, regular civil law applies in accordance with the civil principles that are also customary throughout the world. Therefore, the Israeli case law in this matter can both benefit from and provide a new balance to that which is customary in the world. At the end of the 1970s, one court decision determined, without explanation, that extramarital relationships are not a relevant consideration in property distribution. The third chapter analyzes the theoretical bases of property distribution principles under both Israeli law and Jewish religious law, including the ways in which these legal systems each relate to extramarital relationships.

The fourth chapter discusses the arrangement for balancing marital resources. This arrangement was established to replace the presumption of sharing that had applied in Israel until 1973. The presumption of sharing allowed claims for unregistered rights in family assets, failed to maintain certainty of property ownership and value, and did not protect the interests of third parties. Under the presumption of sharing, the spouse whose property is not registered in his or her name may claim ownership of half of the registered property, although there is no evidence of his or her right in the Land Registry. As a result of this claim, a third party that purchases the property in reliance upon the Land Registry loses half of the property for the benefit of the spouse whose ownership was not registered at all.

However, the arrangement for the balancing of resources addresses all of these concerns. The difficulty is that a failure in the structure of the

Property Relations Law prevented implementation of the legislature's intent. The Supreme Court tried to remedy this flaw based on a flexible application of general property law. The chapter argues that the flexible interpretation of the general property law is relevant only before Amendment 4 to the Property Relations Law was enacted. After the amendment, which allowed for property distribution prior to divorce, this construction was no longer justified.

The fourth chapter analyzes and is inspired by legal systems worldwide. It proposes a new model, suggesting the return to the basic requirements of the Property Relations Law as designed by the legislature. This model will provide for protection of property, clarity among creditors, increase in the family's property value, and relief to engaged or married individuals who are concerned about their separate assets.

The fifth chapter discusses the recognition of foreign civil marriages. The State of Israel has no separation of religion and state in matters of divorce and marriage. Religion is the only determining factor in these matters. Thus, marriages prohibited by religious law do not formally take place in all four major religions in Israel: Christianity, Islam, the Druze religion, and Judaism. Two examples of such marriages are a marriage between spouses of different religions which is prohibited by Jewish law, or a marriage between same-sex spouses which is prohibited by all religions. However, an individual who enters a marriage prohibited by religious law can be married in countries outside of Israel. Upon presentation of an official public record from those countries, that individual is entitled to be registered in the Population Registry as married. If the spouses have no religion, there are no religious restrictions but only civil restrictions for their marriage. Included among them are bigamy and the prohibition of the marriage of minors.

The discussion under Israeli law should have ended here with regard to civil marriage performed in a foreign country, especially marriage prohibited by Jewish law such as marriage between spouses only one of whom is Jewish. Prohibited marriage has no place in a state in which religious law prevails in matters of status.

However, the Israeli courts, unlike the legislature, have more of a civil orientation than a religious one. They look for ways to bridge the gap between religious law and the rules of private international law that seek to recognize or respect civil legal actions carried out in a foreign country. In some cases, the courts have recognized the status of civil marriages even when such marriages are prohibited by state law. In order to avoid the serious conflict between religious law and the domestic rules of private international law, the court has

explained that this is not a matter of personal status, but rather an administrative question which purely concerns the Population Registry.

The decisions made in these matters are greatly disputed and reflect the constant prevailing tensions regarding Israel not only as a Jewish state (characterized by religious law) but also as a democratic state (characterized, among other factors, by recognition of the rules of private international law). Although the Basic Laws stipulate that Israel is both, in practice these values conflict and often collide. This tension is clearly reflected in and may be analyzed through the issue of civil marriages performed in a foreign country and prohibited by religious law in Israel. This issue also illustrates the uniqueness of the book that tells the Israeli story which combines civil secular law with religious law. While some matters are determined by religious law and others by civil law, the Supreme Court frequently tries to balance between them.

The sixth chapter deals with the issue of document disclosure in family courts. In 1995 the Family Court Law established family courts in Israel. The law determined that various family matters, previously under the separate jurisdictions of different courts, would all be brought before one judicial authority. For example, before the family court was established, the issue of alimony was determined by the district court, while the dissolution of couple's apartment was brought before the magistrates' court. In contrast, child custody was in the jurisdiction of the juvenile court. The establishment of the family court concentrated all these issues under its authority.

Together with the establishment of the family courts, the need arose to determine their applicable procedures. The rules of procedure that apply to general proceedings were not fitting for sensitive family disputes. Therefore, a unique section of family court procedures was incorporated into the general rules of procedure in order to address the special needs of the family dispute. The seventh chapter analyzes the tension between the general rules of procedure and those of the family court, especially with regard to mandatory disclosure.

The restrictive family court procedural rule that prohibits courts from ordering disclosure of documents between the couple prevents the courts from ascertaining the truth for efficient and just conflict resolution. It is also inconsistent with the family court's purpose of achieving speedy and effective dispute resolution with the consent of the parties. When one party is unable to see the documents of the other, each one strongly maintains his or her position, is unwilling to compromise, and refuses to personally come to terms with a judicial decision given on the basis of an incomplete picture. The chapter argues that the family courts should be granted even broader authority for

issuing document disclosure orders than is customary in the general courts. Such authority could also prevent suspicions and concerns between married spouses with respect to the preservation of documents. They will be assured that the legal system will protect them should the need arise. This suggestion is also inspired by other legal systems around the world.

The first chapter is based on an article that was published in 2014 in the *Drake Law Review* (volume 62, p. 313). The second chapter is based on an article that was published in 2015 in the *Northwestern Journal of Law and Social Policy* (volume 9, issue 2). The third chapter is based on an article that was published in 2015 in the *Missouri Law Review*. The fourth chapter is based on an article that was published in 2017 in the *International Journal of the Jurisprudence of the Family*. The fifth chapter is based on an article that was published in 2017 in the *Yearbook of Private International Law*. The sixth chapter is based on an article that was published in 2014 in the *Houston Journal of International Law*.

Конец ознакомительного фрагмента.

Приобрести книгу можно

в интернет-магазине

«Электронный универс»

e-Univers.ru