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## **Joint Ownership**

*Approved on November 15, 2017 by a vote of 21-0-0. Voting in favor: Rabbis Pamela Barmash, Noah Bickart, David Booth, Elliot Dorff, Baruch Frydman-Kohl, Susan Grossman, Reuven Hammer, Josh Heller, David Hoffman, Jeremy Kalmanofsky, Jane Kanarek, Jan Kaufman, Gail Labovitz, Amy Levine, Jonathan Lubliner, Daniel Nevins, Micah Peltz, Paul Plotkin, Avram Reisner, Iscah Waldman, Ellen Wolintz-Fields.*

She'elah: 1) Does halakhah recognize the modern concept of joint ownership? 2) Is there a difference between a couple who are married versus an unmarried couple who have joint accounts? 3) Can one partner act on behalf of the entire household, particularly with regard to individual mitzvah obligations? a) For example, can a couple share one lulav on the first day of Sukkot when sharing is otherwise not permitted? b) Must each separately give mishloah manot on Purim in order to fulfill their obligation, or are the manot given on behalf of the couple considered to belong in part to each? 4) May a wedding ring, which classic halakhah requires be owned by the groom, be purchased out of a joint account? Etc.

*A Disclaimer: This Teshuvah is written within the rubric of classic halakhah, which only recognizes heterosexual marriage, as indicated by the she'alah. It's conclusions are fully applicable to same-sex marriages, as is noted in the psak.*

Teshuvah:

A] There are several forms of joint ownership, ranging from a publicly held corporation which is held differentially by its shareholders in the amount of their shares, to a closely held business partnership wherein two or a few partners claim equal shares in the business entity, to a marital couple who are the joint owners of the property they share. It is clear from the she'elah that the interest of the questioner is in marital partnerships, or natural domestic partnerships, wherein there is a certain assumption of the shared mutual life of the couple. I will deal with that exclusively and leave aside matters of business partnerships, analogous though they may be in some regards.

Marital law, in the United States of America, is defined by each state and may differ from one jurisdiction to another. The recent battles surrounding same-sex marriage and the requirement that each state recognize the acts of another makes this point

abundantly clear. Thus it will be difficult to deal in this area with full clarity. The laws in Israel and other national jurisdictions may be assumed to differ as well. Thus the safest thing to say about Jewish law and the laws of marital property is that Jewish law accounts the civil law of every jurisdiction in which Jews reside as having effect under Jewish law unless it is repugnant to Jewish law. This principle is well known in the words of the third century Babylonian amora Samuel that **דִינָא דְמִלְכוֹתָא דִינָא**, that “the law of the land is the law<sup>1</sup>. ” Thus a simple preliminary answer to the lead question of the she’elah needs be that Jewish law recognizes joint ownership of marital property<sup>2</sup> insofar as that is the finding of the local court. Prior even to Samuel’s dictum, both in secular and religious matters, the Mishnah often rules **הַכָּל כְּמַנְהָגָה הַמִּדְיָנָה** / everything follows the local custom.<sup>3</sup> In an article in Techumin in 2002 entitled *Mivneh HaMishpahah HaModernit*<sup>4</sup>, Rabbi Yaakov Ariel relies heavily on describing the expectations of the couple upon contracting marriage as the halakhically significant datum that stands behind the binding nature of *minhag hamakom*. He writes: “The social-economic reality

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*The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.*

<sup>1</sup> Though ubiquitous in latter Jewish jurisprudence, this principle appears in only three locations in the Babylonian Talmud, Gittin 10b, Bava Kamma 113a-b (with a reflection of this sugya also on Nedarim 28a) and Bava Batra 54b-55a. It appears directly in the name of Samuel in Gittin as a direct comment to the Mishnah which rules that contracts adjudicated by a Gentile court with Gentile witnesses are valid. In Bava Kamma the subject is taxation and Samuel’s dictum is justified by the fourth generation amora Rava, noting that we do not consider taxes illegitimate takings. In Bava Batra the topic is land sales and contracts, and it is the third generation amora Rabbah who cites Samuel’s dictum as known to him through the exilarch Ukban bar Nehemiah, one of three dicta of Samuel -- that “the law of the land is the law,” that a standard Persian land title is impregnable after forty years, and that those who come into possession of land by paying its tax lien are considered to have proper title. The principle has been and is now used much more broadly.

<sup>2</sup> This teshuvah will go on to consider the fulfillment of certain mitzvot with jointly owned funds. Is this finding of “dina d’malkhuta dina”, that the law of the land is the law, applicable to those matters of mitzvah given the principle that “dina d’malkhuta” only applies to matters of money? The answer in this case is that it is, because the question at issue is not a question of ritual behavior per se but of the ownership of property and its effects upon subsequent fulfillment of mitzvot, and that is squarely a matter of money. Thus, for instance, the mechanism of hafka’at kiddushin, the rabbinic authority to annul marriage, is that the rabbis may declare the financial instrument used to contract the marriage as not within the ownership of the groom, which is within their purview, having the secondary effect of annulling the marriage. Similarly, we can renounce ownership of hametz we have not destroyed just before Passover [*hefker*], for the matter of ownership is subject to our declared intentions, which valid declaration then has ritual effect.

<sup>3</sup> In a ritual matter: M Sukkah 3:11. In more secular matters: M Ketubot 6:3, M Bava Metzia 7:1 and 9:1 and in M Bava Batra 1:1. This often governed matters of the Bet Din as well: M Bava Batra 10:1, T Bava Metsia 5:23.

<sup>4</sup> Techumin 22, pp. 126-147 [H]. The citation which follows is this author’s translation.

in our day has changed... In practice, the wife is a full partner of her husband in all household expenditure... It is probable that it is with that in mind that the wife brought her property and contributed her salary into the family assets, in order that she should be a full partner in the property... Her expectations have changed... It is agreed by the couple that they are, in effect, equal partners, even if those things are not specifically stipulated... Social reality has established a custom according to which all couples today marry.<sup>5</sup>"

The second question also is best addressed to the secular court, whose ruling would be fully adopted as a matter of Jewish law. Where the secular court recognizes property as jointly owned by the two individuals, that will be the starting assumption for halakhic purposes or for adjudication in a Bet Din.

A word is in order about secular jurisdictions with regard to marital property. In the past there were two differing types of jurisdiction in the United States, community property states and common law states. As a rule community property states (primarily those in the West) treated as the separate property of each spouse any property they brought into their marriage and any property acquired thereafter as a gift or inheritance given to that spouse alone, but considered jointly owned in equal measure any property acquired during the marriage by the efforts of either party. As against this, common law states put their primary emphasis on the nature of the recorded title to any property, whenever and however acquired<sup>6</sup>. However, in a review article in *Family Law Quarterly* in 2008,<sup>7</sup> J. Thomas Oldham noted that that has substantially changed in recent years and that all states now lean toward a concept of marital property that approaches that of the community property states. He writes, as follows:

In the last few decades, it became accepted in all states that a divorce court has the power to divide some or all of the spouses' property, and this routinely occurs in divorces today... [In] the 1970s and 1980s... a majority of noncommunity property states enacted equitable distribution statutes or confirmed... via judicial opinion that divorce

<sup>5</sup> This language is Rabbi Ariel's description of social reality today. He finds it compelling halakhically in some regards, but not so in others, where he argues that the traditional requirements of the halakhah supersede. This teshuvah is not aligned with Rabbi Ariel's specific conclusions, but wishes only to incorporate this overarching perception.

<sup>6</sup> See on-line [en.wikipedia.org/wiki/community\\_property](http://en.wikipedia.org/wiki/community_property) and [www.nolo.com/legal-encyclopedia/marriage-property-ownership-who-owns-what-29841.html](http://www.nolo.com/legal-encyclopedia/marriage-property-ownership-who-owns-what-29841.html)

<sup>7</sup> J. Thomas Oldham, "Changes in the Economic Consequences of Divorces, 1958-2008," *Family Law Quarterly*, Volume 42, Number 3, Fall 2008, 419-447. [J. Thomas Oldham is the John Freeman Professor of Law at the University of Houston Law School.]

courts had this power.... [E]quitable distribution practice today... largely ignores title and considers most acquisitions during marriage by either spouse as divisible upon divorce....Today, all US states accept some version of a... community property system.<sup>8</sup>

Note, however, that while distribution of marital assets in divorce is done by equitable principles that resemble joint ownership or community property, that does not prejudice the personal ownership of those assets, as in a personal bank account that is not held jointly, but titled to one spouse, during the life of the marriage<sup>9</sup>. Thus there are two related questions: does the halakhah recognize joint ownership during the marriage of assets so designated, and does it recognize the joint ownership of marital property as a matter of equity upon divorce. In both cases, the secular law will determine ownership before the application of any principle of Jewish law that may be relevant. As this determination is strictly dependent on local legal norms, it may differ in different jurisdictions.

Counter to this egalitarian social arrangement, traditional Jewish law was patriarchal, recognizing the household as a unit, but granting *prima facie* ownership to the patriarch exclusively. Thus property acquired during the marriage would reasonably belong to the husband alone, and only through special arrangement could the wife maintain personal control of property during the life of the marriage. Even that which entered the marriage as her property, or which she acquired alone by gift, inheritance or happenstance (*מצוותה* – that which she found), fell under his control during the course of the marriage, and any profit during that time was his to keep, although he was required to return the property to her upon divorce and if he predeceased her it returned to her and was not included in his estate. He was granted ownership even of

<sup>8</sup> 427-431. Separate property brought into a marriage can be transformed into marital or community property by processes defined within each jurisdiction. To forestall that eventuality is the primary reason for ante-nuptial agreements. A special type of joint ownership reserved for married couples entitled “tenancy-by-the-entirety” is available in most states. It offers protection of a jointly owned asset from a creditor of only one spouse ([www.law.cornell.edu/wex/tenancy-by-the-entirety](http://www.law.cornell.edu/wex/tenancy-by-the-entirety)) with implications for disposing of said property, for bankruptcy proceedings and estate distribution, among other things (B.M. Arnold, *Tenancy by the Entireties and Creditors Rights in Maryland*). For our purposes, concerning the observance of mitzvot, this constitutes a form of joint ownership. Indeed, the notion of “tenancy-by-the-entirety” seems to have a Biblical basis in Genesis 2:24 -- *וְהִי לְבָשָׂר אַחֵד* -- “and they shall become one flesh,” as reflected by Blackstone, “husband and wife [are] considered as one person in law” [as cited by Arnold, op cit.]

<sup>9</sup> My understanding following conversation with several attorneys.

the products of her labor (*מעשה ידיה*). Against this initial assumption, Jewish law emplaced certain rights of the wife. Notably, in the economic sphere, she could expect to be fully supported (food, clothing, lodging and health care).<sup>10</sup> Thus, without reference to secular law, Jewish law itself made the assertion that upon marriage the two parties became as one for the purposes of their joint household—only not as a consequence of joint ownership, but rather through the absorption by the husband of control over the wife's property. While the property was nominally under the control of the husband, within broad parameters the wife was assumed to be functioning in matters of the household with her husband's consent.<sup>11</sup> Given the current understanding, this is no longer the case.

<sup>10</sup> See Encyclopedia Judaica (1972), Vol. 8, p. 1120, "Husband and Wife," M Ketubot 6:1, Maimonides, Hilkhot Ishut 12:1-5, Shulhan Arukh, Even haEzer 69:1-4 and 85:1-7. As summarized by Rava on Yevamot 39a / כולםعلماء לא פלייג' דיזו עדיפא מידה", In *Ma'amad Halshah*, p.246, Menahem Elon is able to cite a categorical pronouncement by an Israeli rabbinic court to this effect: "לפי ההלכה היהודית... לא קיים מושג של שיתוף בנכסיים / According to the halakha, there exists no notion of joint property." In Rabbi Ariel's article (see note 3), he offers this summary: "כל רכוש הבית כולל רווחה של האשה שייכים בלבד לבעל, ואין לאשה סמכות להתערב בניהולו / All the property of the household, including the wife's income, belong exclusively to the husband, and the wife has no right to participate in their management."

Note, however, in Even haEzer 85:7 and 11, that a wife could have independent ownership of assets if given them on condition that the assets be held independently. That was possible also by prenuptial agreement between husband and wife concerning property already in her possession, that it would not fall to the husband's control. Similarly, since her income (*מעשה ידיה*) was considered a perq received by the husband in return for his basic support (מזונות), it was possible for a woman to reject support and choose instead to keep her own income (Ketubot 58b, Maimonides, Hilkhot Ishut 12.4). The rabbis could even conceive of a situation where they held equal ownership in their estate (see *Hoshen Mishpat* 247 5 and *Hagahot Maimoniyot* 4 to *Rambam*, Hilkhot Zehiyah 11). But this needed to be stipulated. Even where a wife held some personal property, it was assumed that even property titled in her name belonged to her husband unless she could prove otherwise (see *Hoshen Mishpat* 62).

<sup>11</sup> A clear example of this is in Mordecai, Bava Kama 87: "Ra'avan [R. Eliezer ben Natan, Germany, 12<sup>th</sup> c.] ruled that since women regularly conduct business in our day it is as if their husbands have appointed them agents, and if there is testimony [of the agreement] the husband is obligated to pay due to an enactment regulating markets [תקנת השוק] such that people will do business with them." The same assumption is found throughout Shulhan Arukh, lying behind *Hoshen Mishpat* 62:1, that a woman may conduct household business (but not claim that the assets are her own), Shulhan Arukh, Yoreh Deah 248:5, that a woman might hire a tutor for her son as long as her husband does not vocally object, and Shulhan Arukh, Even haEzer 28:19 in Isserles, that a marriage is valid if conducted with a ring borrowed from a man's wife (without his permission), among countless other places.

B] The third question is not technically about joint ownership at all. It goes beyond the question of marital property to question of the extent to which the household, not just the marital couple who have become one flesh, is treated as a unit in the matter of fulfilling mitzvot.

Indeed, certain mitzvot were taken to be mitzvot of the household, to be fulfilled by only one on behalf of the household, even where these were formally personal mitzvot.<sup>12</sup> An archetypical example would be candle lighting.

a) Contrary to what we tend to assume, candle lighting for Shabbat and holidays appears to have followed upon the earlier custom / mitzvah of candle lighting for Hanukkah.<sup>13</sup> About Hanukkah candles the text is potentially inconsistent. On the one hand: מצוות חנוכה -- נר, איש וביתו / “the mitzvah of Hanukkah is one candle for a man and his household” and yet

אשר ודאי מדליקה, דא"ר יהושע בן לוי: נשים חייבות בנר חנוכה, שאף הן היו באותו הנס  
 Certainly women light [Hanukkah candles], for R. Joshua ben Levi said: Women are obligated with regard to the Hanukkah candle, for they, too, were part of that miracle.<sup>14</sup>

Although the woman has a clear individual obligation to light the Hanukkah candles, yet she is included in and fulfills her mitzvah as part of the household. Although it is not clearly stated, I assume that normally it would be the pater familias lighting the Hanukkah candles and saying the primary blessings and his wife and post-Bar Mitzvah children still in the home would fulfill their obligation thereby. But it need not be anyone in particular of the family who lights for the family. Indeed, one who travels may rely on the candle lighting being done by his wife or family at home.<sup>15</sup> Thus this

<sup>12</sup> This matter is considered by Judith Hauptman in her Hebrew language essay, “Hadavar Masur L’nashim: Nashim v’tiksei dat baitiyim,” Sidra 24-25 (2010), pp. 83-109.

<sup>13</sup> The requirement to light a candle on Hanukkah appears in the name of the first generation amora Rav, and the blessings are attested in the next generation, on Shabbat 23a. Although a contemporaneous amoraic source on Shabbat 25b speaks about whether lighting a Shabbat candle is required (חוּבָה) the commentators seem reasonably clear that the question is not the ritual of candle lighting, but the question of whether it was permissible to eat one’s Shabbat meal in the dark (see Rashi and Tosafot, there) and reference to a blessing over candle lighting on Shabbat is not found prior to the writings of the Geonim.

<sup>14</sup> Shabbat 21b and 23a.

<sup>15</sup> Shabbat 23a אמר ר' זира: מריש כי הוינא בי רב משתתפנא בפרייטי בהדי אשפיזא. בתר דנסיב איתמא אמינה השטה  
 ודאי לא צריכנא דקא מדליק עלי בגו ביתו.

“R. Zera said: When I was [a student] at Rav’s academy, I would contribute a few coins to the innkeeper [toward the cost of the Hanukkah candles]. After I married I said: ‘Now I don’t have to, because they are

appears to be a personal mitzvah in that it falls on every member of the household, but a joint mitzvah in that it needs be fulfilled only once on behalf of the household.<sup>16</sup>

Nevertheless, one will often see each member of the family light their own hanukiyah as a hiddur, an adornment, asserting the desire of each individual to fulfill the mitzvah.

The same seems to be true of candle lighting on Shabbat, as well. Customarily this was undertaken by the woman for the whole household, but it was equally the obligation of both men and women, so that students away from home (at very least those who were post-Bar Mitzvah and unmarried) were required to either light their own Shabbat candles or buy into the candle lighting of the host.<sup>17</sup> In such a regime of household fulfillment of the mitzvah, it matters not at all who formally has control of the assets.

lighting for me in my home'." This position is codified at Shulhan Arukh, Orah Hayim 677.1 as "A visitor who does not have someone lighting for him at home must contribute to the homeowner [where he is staying] in order to participate." Comments Mishnah Berurah (#2): "According to the law, when his wife lights the Hanukkah candle in his home he has fulfilled his obligation by her lighting" (Israel Meir haKohen Kagan, known by his first book as Hafetz Hayim, Poland, late 19<sup>th</sup>, early 20<sup>th</sup> century). And Terumat haDesheh 61 says: "The mitzvah falls upon whomever is at home" (Israel ben Petahiah Isserlein, Germany, 15<sup>th</sup> c.).

<sup>16</sup> Anticipating the next paragraph, this point is made clearly in Arukha Shulhan, Orah Hayim 263:5 נר שבת כנר חנוכה שהוא וחובה על כל אחד להדליקו, והיינו שכל משפחה חייבת בהדלקת הנר ולכן האיש ב ביתו כשאשתו מדלקת... אין צורך להדליק בברכה שאשתו מברכת עליון / The Shabbat candle, like that of Hanukkah, is a mitzvah and obligation on every one to light, which is to say, that every family is obligated to light the candle. Therefore, when a man is at home, when his wife lights... he does not have to light with a blessing for his wife says the blessing including him. (Yechiel Michel Epstein, Belorussia, 19<sup>th</sup> c.). This notion of a household commune, with the action of one redounding to the benefit of the others, has an analog in the law that allows any homemaker in town to establish eruv tavshilin for all those in town (Shulhan Arukh, Orah Hayim 527:7-8, and in Mishnah Berurah, there, Shaar haTziyun 31). Note also that the cost need not be equally shared -- thus a traveler needs only pitch in a minimal amount, not his proper share of the costs calculated by how many are participating. This is not seen as a proper partnership, but precisely as some sort of household commons.

<sup>17</sup> Shulhan Arukh, Orah Hayim 263. אחד האנשים ואחד הנשים חייבם להיות בביתיהם נר דולק בשבת... הנשים מוזהרות בו יותר מפני שמצוות בבית ועוסקות בצריכי הבית. --

"Both men and women are required to have a lit candle in their home on Shabbat... Women are primarily charged with this since they are found at home and they care for the affairs of the house." In further commenting on this, Magen Avraham (Abraham Abele Gombiner, Poland, 17<sup>th</sup> c.) insists that should a husband prefer to light himself, she nevertheless has precedence (but, adds Mishnah Berurah, if there are many candles, he may go ahead and light). Magen Avraham also reports that it was the custom to relieve the woman of candle lighting the first Shabbat after she gives birth, with the husband lighting in her stead. Further along in this paragraph the matter of students away from home is addressed, and, whereas the text of the Shulhan Arukh appears to emplace the same rules as apply to Hanukkah candles, that a married student may rely on his wife, as does Arukha Shulhan here in paragraph 5, Mishnah Berurah appears to require the student to light for himself even if married.

b) Similar to these mitzvot would be the home rituals: Kiddush and Havdalah.

Re Kiddush one might expect that the pater familias would perform this ritual for his family, and that indeed became the prevalent custom. But surprisingly, the text of *Shulhan Arukh*<sup>18</sup> insists that it remains an individual obligation. Caro begins his discussion of Kiddush in the home with this:

נשים חייבות בקידוש אף על פי שהוא מצות עשה שהזמן גרמא משום דאיתקש זכור לשמור. והני נשי, הואיל ואיתנהו בשמירה איתנהו בזכירה. ומוציאות את האנשים הואיל וחיבותם מן התורה כמותם.

"Women are obligated to say Kiddush even though it is a time bound commandment because Zakhor ('Remember' -- the Shabbat commandment in Exodus 20) is associated with Shamor ('Observe' -- the Shabbat commandment as reported in Deuteronomy 5). Women, since they are included in those who must observe are also included in those who must remember (or mention, the Biblical source for the concept of Kiddush). And they fulfill the obligation for men since they are equally obligated by the Torah".<sup>19</sup>

It officially remained a personal mitzvah that every member of the family must fulfill, but it was assumed that one person would recite Kiddush for the others. Custom, more than anything else, seems to have militated toward seeing Kiddush as a family ritual, whoever may have been leading. And the same, then, applies to the other end of

<sup>18</sup> *Shulhan Arukh, Orah Hayim* 271 citing *Berakhot* 20b.

<sup>19</sup> There is lively debate whether the actual Kiddush on a cup of wine is done in fulfillment of the Biblical commandment, or whether sanctification in prayer actually does so, such that Kiddush when recited after prayer is actually only a rabbinic enactment -- though if that is the case, what about those who say Kiddush over the cup but do not say Maariv? See *Arukha Shulhan*'s discussion at the top of *Orah Hayim* 271. Among other things he raises the intriguing question (par. 6) that if the Biblical obligation is fulfilled by one who says Maariv, but remains to be fulfilled by Kiddush for one who has not said Maariv, would it follow that when a man came home from services that his wife and post-Bar mitzvah children had not attended, he could not recite Kiddush for them, in fulfillment of what is, for them, a Biblical obligation, since he is no longer under obligation; but rather the wife should properly recite kiddush. How could that be, he asks. We would not know what to say to all those families wherein the husband returns from shul and says Kiddush for his family. He concludes that with regard to Kiddush even a person of lowered obligation can fulfill the obligation for another -- then, studiously egalitarian even as he is offering this to justify a patriarchal practice -- he writes: **ולכן, איש ואשה יכולין להוציא זה את זה בכל גוון:** ... *במה שהיא מחייבת, שווה היא לגמרי לאיש* / Therefore, a man or a woman may fulfill the obligation one for the other in any case [=no matter the level of their obligation]... Where she is obligated, she is fully equal to the man.

Shabbat, to Havdalah, which, too, had become a joint family rite, although it maintained its status as an individual obligation.<sup>20, 21</sup>

C] The practical question that remains is then, what halakhic changes might be suggested by this change in the ownership of marital property?

a) The next question (3a) assumes knowledge of the halakhic fact that shaking lulav is a personal mitzvah that may be performed on the first day of Sukkot only with a lulav that is personally owned. On the first day of Sukkot the midrash on Leviticus 23:9 requires that, on that day only, the lulav be owned and not borrowed.<sup>22</sup> It is clear that a wife might buy the lulav that her husband would use to fulfill his mitzvah for him,

<sup>20</sup> Shulhan Arukh, Orah Hayim 296. On its face it would seem that a woman's obligation to Havdalah should mirror her obligation to Kiddush, and that is the primary position of Shulhan Arukh. But there are voices that seek to limit women's status re Havdalah. Caro notes that as a minority position, but Isserles and Ashkenazi practice prefer to honor that position and ask women to hear Havdalah from a man. See the commentaries, there. This is a relatively easy position to take given that Havdalah was generally done as a family rite, but the same could have been said of Kiddush, and was not. Shulhan Arukh is concerned that, if everyone in the family had been in synagogue to hear Havdalah, it is perhaps no longer necessary to repeat it at home. Caro hints that the proper procedure would be to condition one's hearing Havdalah at shul on its not being the name event, so that it may then be repeated at home. Arukh haShulhan dismisses this concern, averring that in any case, even without such a condition, "it is good for a householder to say Havdalah in his home."

<sup>21</sup> Birkat haMazon [the Blessing After Meals] might logically have been considered a family rite, but this obligation moved into the category of public prayer for which a quorum is sought. In the first instance, Deuteronomy 8:10, "You shall eat, be satisfied and bless" clearly establishes a personal obligation for Birkat haMazon (see Berakhot 48b). And there remain vestiges of Birkat haMazon being treated as a family ritual, as in the Baraita on BeraKhot 20b that would allow a child or a wife (or a servant) to lead the family Birkat haMazon, or the proviso in Shulhan Arukh, Orah Hayim 195:3 that insists on a family saying Birkat haMazon together aloud. But the quorum of three for zimmun [a formal invitation to communal prayer] was instituted early on. It is known that the precursors of the rabbis, the Pharisees, who emerged as a dominant religious party shortly after the Maccabean revolts in the mid-second century BCE, focused heavily on the communal meal. (See Jacob Neusner, From Politics to Piety: The Emergence of Pharisaic Judaism). The Talmud reports of Shimon ben Shetah, one of the sages functioning in the early decades of the first century BCE, that he was conversant with a formal Blessing After Meals (Berakhot 48a, Yerushalmi Berakhot 7:2). The Book of Jubilees, from the last decades of the second century, also appears to refer to a Blessing After Meals (ch. 22). The provenance of Zimmun per se is unknown, but the Mishnah assumes it and legislates accordingly. Henceforth focus was on the communal nature of the Blessing After Meals and the requirement to seek a quorum. In fact, the push to seek a communal blessing with a quorum took the bizarre form of prohibiting two individuals from saying the Blessing After Meals together, as would have been permitted of any other mitzvah (see Berakhot 45a and Shulhan Arukh, Orah Hayim 293).

<sup>22</sup> Sukkah 41b. *ולקחותם לכם -- משליכם*

since she is recognized as his agent in all business transactions.<sup>23</sup> It is also the case that while women are classically exempt from mitzvah of lulav since it is considered to be a time-bound mitzvah<sup>24</sup>, it is long established Ashkenazic practice, considered required by some, for a woman to fulfill the mitzvah of lulav<sup>25</sup>. Thus it would be appropriate for her to purchase her own lulav. But if they are considered joint owners of the lulav that might pose an impediment to either husband or wife fulfilling the mitzvah, for the halakhah is explicit that a lulav owned by partners cannot be used to fulfill the mitzvah on the first day.<sup>26</sup>

Now it is well known that there is a common work-around for those who do not own a lulav in order to deal with the requirement of a personally owned lulav (for it is common that not everyone has purchased their own lulav). That work-around is to give the lulav as a no-restrictions gift, so that the recipient may fulfill the mitzvah with **their own** lulav, then for the recipient to give it in turn to the original owner. Indeed, R. Moshe Isserles argues<sup>27</sup> that it may be assumed that that is what was in mind when the lulav was bought. It is clear that under traditional halakhah, wherein the husband is sole owner of the lulav, that the wife may fulfill her mitzvah with it on the first day because it may be assumed that the husband wishes to facilitate his wife's fulfillment of the mitzvah, therefore when she takes the lulav it is **as if** he gave it to her as a perfect

<sup>23</sup> See footnote 7.

<sup>24</sup> Maimonides, *Hilkhot Lulav* 6:19 (referencing sukkah – *Hilkhot Sukkah* 6:1, and shofar – *Hilkhot Shofar* 2:1).

<sup>25</sup> Ashkenazim followed Isserles that women may recite a blessing even while performing a mitzvah act from which they are exempt (*Shulhan Arukh, Orah Hayim* 17:2, a position attributed to Rabbenu Tam on *Kiddushin* 31a). But Magen Avraham 1 to *Shulhan Arukh* 489 set the stage for the further legal development of considering women obligated. Speaking about counting the Omer, another of the positive time-bound commandment from which women are exempt, he writes: “nevertheless, they have accounted it an obligation on themselves.” See the sources in Getsel Ellinson, *Woman and the Mitzvot*, pp. 73-76. He cites a responsum by R. Akiva Eger that “These precepts (n.b. such as Lulav) thus have attained obligatory status for women” (Germany, late 18<sup>th</sup>-early 19<sup>th</sup> c.). I have been unable to find that text. All of this is reviewed by Eliezer Waldenberg, *Tzitz Eliezer* 9:2 and by Joel Roth in his responsum on women’s ordination, *On the Ordination of Women as Rabbis*, Section One (CJLS 1984). In re Sepharadim, they did not develop a notion of acquired obligation, and generally forbade women reciting the berachot, but see Ellinson, pp. 92-93 who cites some conflicting positions among Sepharadim. And now see the recent teshuvah on women and mitzvot by Rabbi Pamela Barmash, “Women and Mitzvot,” (YD 246.6.2014a).

<sup>26</sup> *Shulhan Arukh, Orah Hayim* 658:7

<sup>27</sup> Ibid.

gift, and when she puts it down it is **as if** she is giving it to him.<sup>28</sup> In the situation of joint ownership it would simply be necessary to note that that same assumption applies to each member of the couple who gifts his or her portion to the other in order to permit the fulfillment of the mitzvah. Nothing about fulfillment of the mitzvah need change.

There is, however, an interesting side-note to be made here. In discussing the funding mechanism for a town-wide shared etrog,<sup>29</sup> Isserles comments that since a woman is exempt from the mitzvah she is exempt from contributing to the etrog fund. This comment affords Magen Avraham and Taz / Magen David (Abraham Gombiner and David ben Samuel haLevi, both Poland, 17<sup>th</sup> c.) opportunity to argue that women who use the etrog should contribute. Magen David's language is the more trenchant:

נראה לי דעתינו שנשים שלנו מברכין גם כן על האטרוג... חיבים ליתן לזה לפי מומנו.

"It seems to me that now that our women also say the blessing on the etrog... they are required to contribute according to their means."

The clear assumption here is that she has some funds under her own control<sup>30</sup>, and this would clearly be true given joint ownership of property. In our day, when women do have control over their own funds as well as an interest in the marital property, and when women do participate in the mitzvah of lulav, it is clear that they would be required to participate in such a fund<sup>31</sup>.

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<sup>28</sup> See Arukh HaShulhan, Orah Hayim 658:7 who, having stated the simple proposition that a perfect gift must be made, then adds a long excursus on the validity of a gift on condition of return.

<sup>29</sup> Shulhan Arukh, Orah Hayim 658:9. Isserles's comments are based on a responsum by Maharil (R. Jacob ben Moses haLevi Moellin, Germany, late 14<sup>th</sup> and early 15<sup>th</sup> c / Responsum 107 -- unlike varying print texts that have incorrect numbers).

<sup>30</sup> See footnote 9, that this was possible, and perhaps more normative in 17<sup>th</sup> century Poland than it had been previously. Nevertheless, Mishnah Berurah, here, was not happy with the assumption of wives controlling an independent source of wealth. He comments "This is only if she is a widow or if her husband is out of town. But if her husband were in town, he alone should give. But if there is a custom that whoever uses the etrog should contribute, then both should give."

<sup>31</sup> As even Mishnah Berurah would concede (see prior note).

b) A second set of halakhot in which one is required to act with one's own personal property is the Purim doublet of *mishloah manot* and *matanot la'evyonim*.<sup>32</sup> Did these mitzvot apply to women, and if they did, how were they discharged? It is stated by R. Moses Isserles אשה חי'ת במתנות לאביו'נים ומשלוח מנות כאיש / "A woman is obligated with regard to alms for the poor and sending food baskets [to friends], just like a man." But Magen Avraham comments:

לא ראיתי נזהרים בזה. ואפשר דדוקא באלמנה, אבל אשה שיש לה בעל, בעל משלח בשביבה  
I have not seen people who are meticulous about this. Maybe it applies specifically to widows. But [as to] a woman who has a husband, her husband sends [gifts] for her.

Not surprisingly, this too was treated as a household obligation,<sup>33</sup> and a single gift from the family was understood to be from both husband and wife. Whereas previously this was seen as yet another extension of the husband's obligation of *mezonot* (sustenance), we should now require a double portion which we would see as representing the gift of each from shared assets.<sup>34</sup>

c) Along these lines we should look at the mitzvah of *Tzedakah*, or charitable giving. This requires giving of one's own funds, and is a widely distributed obligation, as per the well known proviso that even a person on the dole should give *tzedakah*.<sup>35</sup> Here, in *Shulhan Arukh*, *Yoreh Deah* 248:4, the text is crystal clear, though:

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<sup>32</sup> *Shulhan Arukh, Orah Hayim* 694-695.

<sup>33</sup> Baer Heiteiv implies that the contributions on behalf of the wife might ultimately not be fully obligatory. As he says: נרא לי דמי שאוכל על שלחן חבירו ולא הכנ לו כלום, פטור מלשלוח מנות: "It seems to me that one who eats at his friend's table, [viz. a dependent] and [his friend] did not provide anything for him [to gift to others], is exempt from sending food baskets." But this again assumes that she has no assets under her control.

<sup>34</sup> Since the minimum to be sent to the poor is two cents (*פרוטה*), to each of two poor people, and two items to one friend (*Shulhan Arukh, Orah Hayim* 694.1 with Mishnah Berura 2, there, and *Shulhan Arukh, Orah Hayim* 695.4 with Mishnah Berura 19), to fulfill the implications of the singular and plural terms in the verse – [*Esther 9:22*] “sending food baskets (2) to one another (1), and alms (2) to the poor (2)” -- a couple should give at least four cents to each poor person, and four items to one friend, or two to two, in order to fulfill the mitzvah for both members of the couple.

<sup>35</sup> *Shulhan Arukh, Yoreh Deah* 248:1.

גבאי צדקה אין מקבלין מהנשים ומהעבדים ומהתינוקות אלא דבר מועט, אבל לא דבר גדול -- שחזקתו גזול או גנוב مثل אחרים. וכמה הוא דבר מועט? הכל לפי עשר הבעלים ועניותם. והני מי' בסתמא. אבל אם הבעל מוחה, אפילו כל שהוא אסור לקבל מהם.

Collectors of charitable gifts do not accept [funds] from women, servants or children, except a small amount, but not a large one -- for the assumption [about a large gift] is that it was stolen or misappropriated from others. How much is a small amount? It all depends on the wealth or poverty of the head of household [= husband, master, father]. This refers to the general situation. But if the head of household objects, even any amount is prohibited.

The assumption here was clearly that women, children, and servants may have a small allowance, or an informal agreement with the head of household to spend small amounts on daily needs, but any substantive spending on their part is suspicious and requires the approval of the owner of the household funds. This provision cannot stand with regard to women today who have their own or joint funds.

d) Another mitzvah to consider is that of biur hametz. This requires that one remove hametz that one owns from the whole of one's property, as understood from the verses in Exodus 12:15, 12:19 and 13:7 and derived on Pesahim 5b. Thus while the prohibition is about place (your house - *bateikhem*, your settlement - *moshvoteikhem*, your borders – *g'veulekha*), this limitation to what one personally owns is what allows the sale of hametz to a non-Jew and retaining it on one's premises. This applies to both men and women, so a Jewish couple must get rid of their hametz whether severally or jointly owned. Joint ownership, in this case, would imply, in addition, that in an intermarriage, although Jewish law does not recognize the marriage, husband and wife are joint owners of their property and the non-Jewish partner may not serve as the non-Jew to whom the Jewish partner's hametz is sold.

Thus each provision of the classical laws needs be rethought in light of the fact of women's financial empowerment in our day. In reaching a halakhic conclusion for the modern day, we need look at the nature of the current situation and apply the halakhah appropriately, not simply to accept on their face the assumptions that the rabbis made about their own situation. With regard to family rituals, matters have not changed. But with regard to the questions that relate to ownership, they have. As we said at the outset, the legal fact controlling who owns any marital property is determined not by

the assumptions of the sages, in our day, but by the overriding consideration of **דינא דמלכותא דינא**. Thus marital property is in fact jointly owned, and halakhah today must consider that fact in determining a ruling. Furthermore, since the couple may be assumed to enter into the marriage upon that assumption, the force of their assumption rests also behind that finding.<sup>36</sup> Perhaps this point requires underlining: Behind the principle of the binding nature of custom [**הכל כמנהג המדינה**] lies the force of expectations which define the terms of a contract. If each of the parties to a contract are agreed on the terms, that contract is recognized by the halakhah<sup>37</sup>.

D] The last question concerning the ownership of a wedding ring, on its face seems to be irrelevant to the issue of marital property, since the couple is not yet married. But it is not unusual in our day for a couple to be living together before marriage, and, whatever we may wish to say about that arrangement, their funds might well be comingled when they seek to purchase their wedding rings. The questioner wonders, cogently, if that partnership might be a bar to the proper ownership of a wedding ring which, in its traditional function, must be owned by the groom. For a marriage ring must belong to the groom in order that in giving it to the bride he may acquire her in

<sup>36</sup> See the discussion of **אומדנא** (*umdena*, the court's judgment regarding the couple's assumptions) in the appendix. A responsum of Joseph ibn Lev (vol. II, #23, Turkey, 16th c. -- cited by Rabbi Ariel, op. cit. in n. 3 above) seems to be dispositive. "Question: Would the rabbi please teach us -- in the kingdom of Portugal there is a law and custom that a widow receives half the estate left by her husband, whether she brought in a substantial dowry or a small one. There is reason to wonder [if this should be so]... even though they have written documents in the gentile court and it is a fixed normative custom... Answer: It appears to me from all sides, without any doubt, that the widow should receive half the assets... and even if [his] heirs had already taken the property, that one removes it from them and gives half the assets to the widow as is the custom in that kingdom. Such matters have come before us in Salonika many times and we have not seen anyone question this at all... By force of the custom that they have been accustomed to, that when one marries a woman without condition, she shares the estate with the [husband's] heirs equally -- this is an obvious matter [**חייבת דפסיטה**] that all agree about, that the widow receives half of the estate."

<sup>37</sup> This principle is derived from the talmud's discussion on Bava Metzia 74a of **סיטומתא** (*situmta*). It is unclear precisely what this mark of agreement is – Rashi sees it as some form of marking on wine barrels, Rabbenu Hananel as a handshake – but an agreement is considered binding thereby, despite the fact that it does not fit extant models of acquisition. In his commentary there Rashba (R. Solomon ben Avraham Ad[e]ret, 13<sup>th</sup> c. Spain) writes: "We learn from this that custom overrides law (*minhag m'vatel halakhah*)... because everything dealing with finances we buy and sell according to custom." In a work on the laws of the marketplace called Ma'arekhet haKinyanim, R. Samuel Strasson (19<sup>th</sup> c. Belarus) explains that: "the very nature of a transfer of ownership is the final agreement of buyer and seller... therefore if the parties to the sale have set the terms of the deed, the deed is valid also according to the Torah." [I have not seen the original, but cite this in the form it is cited in Piskei Din Yerushalayim, Dinei Mammonot u-Veirurei Yohasin, Ch. 11, p. 556].

marriage thereby.<sup>38</sup> What then of a ring owned only partly by the groom? In the event, however, the law of ownership is much attenuated with regard to the marriage ring, I imagine on account of the desire of the sages to find marriages valid after the fact. Thus *Shulhan Arukh* 28:2 rules explicitly that "if one stole from a woman... and married her with that stolen property of hers... if they were previously engaged to be married (internal gloss: that is that she had agreed to marry him) ... or even were they not previously engaged to be married, but when he said to her 'be my wife through this' and gave it to her, and she said 'yes' -- she is married (internal gloss: but he must repay what he stole)."<sup>39</sup> This law is regarding stolen property which should clearly be invalid, yet the sages accepted it as valid when between the couple. With regard to a wedding ring purchased from their joint property, in a context of a planned event wherein she indicates her consent, there can be no doubt that a ceremony utilizing such a ring would be valid.<sup>40</sup>

To review with regard to the other mitzvot we have discussed: There is no doubt that a lulav purchased from jointly owned funds would be acceptable even on the first day of Sukkot under the assumed rules of sharing developed for a communal etrog. A family gift on Purim to a friend and to the poor would again not be problematic as long as it exceeded the minimum for two -- as will always be the case given the extremely small minimum. As the wife may be assumed to act on behalf of her husband in fulfilling

<sup>38</sup> *Arba'ah Turim*, Even haEzer 28. This traditional assumption is being challenged in a halakhic paper by Gail Labovitz as I write this. Furthermore, it might cogently be argued that in an age accustomed to double ring ceremonies, we have long abandoned the symbolism of purchase inherent in the transfer of the ring, rendering it, in fact, ineffective for that purpose. Nevertheless, this remains the halakhic demand at this moment.

<sup>39</sup> I do not identify this internal gloss as the opinion of Moses Isserles, for his comments typically come at the end of paragraphs, introduced by the term *nan* / note. These internal glosses are infixes without that mark. Without careful manuscript study, it is impossible to know who is responsible for these comments. As to the latter comment that he is obliged to repay the debt, *Pithei Teshuvah* 11, there (Abraham Tzvi Hirsh Eisenstadt, Russia, 19<sup>th</sup> c.), notes that "Rashba (Solomon ben Abraham Adret, Spain, 13<sup>th</sup> c.) and other early sources" disagree, arguing that since she had agreed to the marriage, she certainly forgave the debt altogether.

<sup>40</sup> It is also the case that in paragraph 28:20, another leniency would apply here: that if a gift that is given with the explicit condition that it should be returned is then used to effect a marriage, the marriage is valid, since such gifts are treated in Jewish law as valid gifts, and the gift belongs to the groom at the time of the marriage (see above footnote 27). In his discussion of such gifts, *Arukha Shulhan to Orah Hayim* 649:4 mentions, inter alia, that "with regard to a marriage ring, wherein we do not marry except with a ring belonging to the groom, nevertheless, were he to borrow [a ring] we say that the intent was to be a gift conditioned on return" and the marriage would be valid.

normal household duties<sup>41</sup>, so either party may be assumed to act on behalf of his or her partner in fulfilling their obligations which involve the disbursement of funds. With regard to the mitzvah of tzedakah, when a wife has command of her own of funds, whether by virtue of joint ownership of marital property or other legal arrangements that give her clear title to her own property, collectors of charity are correct to collect charitable donations from women as well as men, as Federations have moved to do, and no longer to maintain the strictures cited above.<sup>42</sup>

Psak:

- 1) While the sages did not assume the ownership of property by a married woman, let alone joint ownership, with her husband, of all their marital property, such an arrangement is not inimical to rabbinic law and is the case today under the rules of secular law (*דינה דמלכותא דינא*) and local custom (*מנהג המדינה*).
- 2) With regard to unmarried couples living together, where the secular court is prepared to consider their assets jointly held, so would halakhah.
- 3) All mitzvot that are obligatory on men or on women may be fulfilled by either party to a marriage using jointly owned funds, that being the understood context of sharing of a married couple who have established a joint household. Some mitzvot, such as candlelighting, Kiddush and Havdalah are generally fulfilled for the household as a whole. Others, such as mishloah manot and charity apply to every individual, yet it would be standard and acceptable for one member of the couple to fulfill the mitzvah

<sup>41</sup> See footnote 9.

<sup>42</sup> There is a caveat here, that if either a man or woman is donating from commingled household funds, care should be taken by the collectors of charity that if a gift seems out of the ordinary, it should be clarified that both parties are in agreement about said gift. That seems obvious as a matter of etiquette, but also follows from some of the legislation surrounding the institution of *תפיסת הבית* [a commingled household fund]. *תפיסת הבית* is understood to be a specific institution regarding an inheritance that has not yet been subdivided between the heirs (Mishnah Bekhorot 9:3, Maimonides, Hilkhot Nahalot 9:1). The Mishnah specifically distinguishes between such a commingled fund and a general partnership between the brothers, in that it is not pursuant upon an agreement to share, but has come upon them unbidden (though that distinction is lost in later sources, see Sefer Meirat Einayim to *Hoshen Mishpat* 176:9 / Joshua ben Alexander haKohen Falk, Poland, late 16<sup>th</sup>-early 17<sup>th</sup> c.). As such it is not a perfect model of marital property -- nevertheless, some of the principles that apply to it would seem to apply to a marital joint household. Specifically, a brother may withdraw funds for his own use only insofar as that use redounds to the benefit of his brothers (Maimonides Hilkhot Nahalot 9:16). But if they object to his use, he must do that from other funds (*Shulhan Arukh*, *Hoshen Mishpat* 176:9). These are complicated rulings, but the principle suggests some amount of caution when dealing with commingled funds.

for the other, for each would be recognized as acting as the representative of the other. Lulav remains an individual mitzvah which must be fulfilled by each, but they may do so with a single lulav acquired from joint funds.

4) In the special case of the wedding ring, the consent of the parties to the wedding includes consent by the bride to permit the groom to utilize a ring purchased from their joint assets, even where such a consideration should be deemed relevant in a heterosexual wedding.

This more egalitarian structure in the current day, in which each party owns an equal portion of the household assets, would, of course, apply equally to same-sex couples who formalize a household in common, as per the forms approved by CJLS<sup>43</sup> which is the essential definition of a marriage. Both parties to such a union, regardless of gender, commit to sharing obligations and acting each on behalf of the other. That notion of a household commons, always true in some measure in Jewish law in the notion of a *בֵּית בְּיִשְׂרָאֵל*, is today enhanced by the principle of the joint ownership of marital property.

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<sup>43</sup> Rituals and Documents of Marriage and Divorce for Same-Sex Couples, CJLS 2012 (Rabbi Dorff, Nevins, Reisner). <http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf>

## Appendix: On the Halakhic Status of Joint Marital Property in Israel

Menahem Elon, in his Hebrew language book *Ma'amad HaIshah* (TA:HaKibbutz HaMeuhad 2005), addresses the question of the legal status of joint property in marriage in Israel on pages 237-254 (Chapter 5, section 3, entitled “**חזקת שיתוף נכסים**” - The presumption of joint ownership of assets”). He begins by bemoaning the fact that, whereas in other areas of the treatment of women in Israel by the rabbinic courts there have been creative attempts to address modern life, there has not been any attempt to recognize joint marital property, as there has been in the Israeli secular courts, while those rabbinic courts continue to have jurisdiction in matters of divorce and the dividing of marital property,. On page 246 he cites a ruling of a rabbinic court in 1994, facing a demand by a petitioner to apply the principle of joint ownership in determining a divorce settlement, as the (secular) High Court had held.

בֵּית הָדָין קֹבוּעַ בְּבִירּוֹ כִּי פָסִיקָת בֵּית הַמִּשְׁפְּט אַינָה מְחַיַּבָת כָּל וְכָל אֶת בֵּית הָדָין  
הָרַבִּנִי. וּבֵית הָדָין פָּוִיךְ רַק לְפִי הַהֲלָכָה הַיְהוּדִית שֶׁבָה לֹא קִיְם מַושָׁג שֶׁל שִׁיתּוֹף בְּנַכְסִים,  
רַק זְכִיּוֹת שְׁמָגִיעֹת לְאִישָׁה מִכָּח תְּנָאי כְּתוּבָה וְהַהֲלָכָה.

The (rabbinic) court finds clearly that the rulings of the (secular) Court do not obligate the (rabbinic) Court in any way. The (rabbinic) Court rules exclusively on the basis of Jewish Law which does not have the concept of joint ownership, rather the rights that a woman has come from the conditions of the Ketubah and Jewish Law.

This failure, Elon argues, has led to difference in this area between the rulings of the secular courts and those of the rabbinic courts, which ultimately have led the High Court to limit the jurisdiction of the rabbinic courts unnecessarily. While the rabbinic courts did begin to grant substantial alimony beyond the stipulations of the Ketubah, in recognition, according to Elon, of modern conditions, they stopped short of granting “half the assets, as one would split assets with a partner equally.” Elon and others argued in the (secular) High Court that we should recognize joint ownership of marital property since that is the operant assumption of marrying couples today, and Jewish law recognizes the weight of custom in contracts. But the rabbinic courts did not accept that contention.

Consequently, when the divorce settlement granted in that 1994 case was appealed to the (secular) High Court, it was overturned, and the rabbinic court was instructed to

divide the assets on the basis of joint ownership. Chief Justice Aaron Barak ruled that while the jurisdiction of the rabbinic court is over the whole divorce proceeding, they were only empowered to use halakhah in matters of personal status, whereas the monetary settlement must be in accord with the law of the state. Justice Shamgar concurred with this ruling but for a different reason. He argued that when the assets were collected, it was under the assumption of joint ownership, therefore that status of the assets cannot be changed.

This harm to the sweep of the authority of the rabbinic courts, argues Elon, could have been avoided had the rabbinic court concluded that joint ownership was called for under Jewish law due to reasons of custom, as stated before, or because society decrees the equality of men and women, wherefore an unequal distribution of assets would cause strife, which we are in turn called on to prevent by equal distribution or simply as a takkanah, a rabbinic enactment recognizing the superiority of the principle of joint marital property and enacting it as a development of Jewish law.

In a footnote<sup>44</sup>, Elon refers to a series of articles in *Techumin*, a halakhic periodical, in the years 1998-2002 that were penned in the wake of that decision, and argued both sides of whether there was a reasonable argument in Jewish Law to accept the rule of marital joint ownership. Elon concludes that “Unfortunately, these lone voices that sought a solution in the Rabbinic court were not heard.”

Arguing in favor of a principle of joint ownership, Rabbi Shlomo Daichovsky<sup>45</sup>, a member of the Supreme Rabbinic Court, suggested a Jewish source for that conclusion. There is a purely ceremonial set of vows of the bride’s and groom’s families, ceremonially marked by the breaking of a plate by the mothers of each, enacted just before the huppah. The traditional text of those vows, known as *Tennaim*, he notes, reads (this is the version he cites, though versions differ):

וישלטו בנכסיהם שווה בשווה, ואל יבריחו ואל יעלימו לא זה מזו ולא זו מזו שם הברחת  
ממון, כי אם ידרו באהבה וחיבת

They will control their assets equally, neither shall hide from the other any monetary asset, but rather they shall live in love and harmony...

<sup>44</sup> Elon, *Ma’amad HaIshah*, p. 238, n. 29.

<sup>45</sup> S. Daichovsky, *Techumin* 18 (1998), 18-31; *Techumin* 19 (1999), 216-219, 220 n. 7.

While he recognizes that this is not a legal ruling, he suggests that the expectation of the couple is based upon this, and our assessment (אומדן) must take that expectation into account<sup>46</sup>. "Therefore, if the assessment in our day is broader and grants the woman substantive part in her husband's assets, that is not contrary to the halakhah." He further made the claim that Jewish legal practice had changed in other areas, notably re inheritance, to take into account general practice, and could do so here, as well.

כבר רבותינו אחרונים ז"ל מזכירים שהותרה הרצואה שהבת תירש בשווה אם  
האחים יין שכן הוא בנסיבותיה

Already the latest of our sages mention that the door is open (lit. the strap has unraveled) and a girl inherits with her brothers, for thus was 'their' custom.

Indeed, Rabbi Daichovsky insists that this is a change that has already penetrated the Haredi community. "In reality, the custom is, even in Haredi families, including the families of great Torah sages, to view the wife as equal to her husband with regard to family possessions. This is expressed in joint registry of an apartment, in the purchase or sale of merchandise with joint agreement, and in the transfer of the property to the wife after the passing of her husband of long standing" though none of these is in concert with Torah law.

Responding to Rabbi Daichovsky, Rabbi Avraham Sherman<sup>47</sup>, Chief Rabbi of the Supreme Rabbinic Court argued that the court should not be subservient to the secular court and that no "law of the land" or "custom" or "expectation" can be said to have taken hold when the item at dispute was a new dictum, and, citing a responsum by Solomon Adret, that to honor such expectation is to strengthen the hegemony of the laws of the gentiles. Specifically to Rabbi Daichovsky's source in *Tennaim*, Rabbi

<sup>46</sup> The specific argument based upon the signed *Tennaim* could not be applied as such to a community like ours wherein *Tennaim* are often not performed, therefore cannot to be assumed, and even when performed are taken as ceremonial and not binding (see *infra*, the argument that *Tennaim* language should be seen as שופרא דשטרא, as simply beautifying language without legal status). But the general argument of the binding nature of the couple's assumptions is a powerful one.

<sup>47</sup> A. Sherman, *Techumin* 18 (1998), 32-40, *Techumin* 19 (1999), 205-216, 219-220.

Sherman spoke of that language as שופרא דשטרא -- beautifying language that has no legal status and cited a responsum to that effect.

Rabbi Ariel's article, referred to in the body of this teshuvah, attempts to steer a course between Rabbis Sherman and Daichovsky and allow for joint ownership arguments in some cases but not in others. These discussions continue, but, by their nature, they are of limited value for a determination of Jewish law as it applies in America.