J. David Bleich

Survey of Recent Halakhic Periodical Literature

CONSTRUCTIVE AGENCY IN RELIGIOUS DIVORCE: AN EXAMINATION OF *GET ZIKKUY*

The problem of the modern-day *agunah* resulting from the refusal of the husband to cooperate in the execution of a religious divorce on behalf of his wife despite the irreversible breakdown of their marriage has long plagued, and continues to plague, rabbinic decisors. Over the years, a series of proposals for remedying the situation has been advanced, examined, debated and, for the most part, rejected because of compelling halakhic objections. Some few proposals involving antenuptual agreements of one form or another have been adopted in some circles but remain the subject of controversy. For reasons that are difficult to identify, proposals that have been advanced for antenuptual agreements to which no halakhic objections have been voiced have yet to gain universal endorsement and hence have not been implemented.

Within recent years a small number of individuals have donned the mantle of authority and have assumed upon themselves responsibility for permitting wives of recalcitrant husbands to remarry on the basis of halakhic considerations rejected as spurious by recognized halakhic authorities. The expedient of *kiddushei ta'ut*, i.e., annulment of the marriage *ab initio*, was addressed in this column in the Fall, 1998 issue of *Tradition*. Some have also sought to resolve the problem by invoking the concept of *get zikkuy*, i.e., a *get* executed by the *bet din* on its own motion, contrary to the expressed desire of the husband, on the grounds that an act performed for the benefit of another does not require that party's consent.

Unfortunately, this expedient falls far short of halakhic acceptability. The attempt to resolve the *agunah* problem in this fashion can, at best, be described as an endeavor based upon misunderstanding and misap-

---

This paper was originally presented at the Eleventh Biennial International Conference on Jewish Law, Zutphen, The Netherlands, July 25, 2000, and appears in the Proceedings of that conference.

TRADITION 35:4 / © 2001 Rabbinical Council of America

plication of halakhic concepts and precedents. Nevertheless, those who have an interest in Halakhah and in the halakhic process undoubtedly wish to understand the underlying principles and why they do or do not serve as a basis for ameliorating the plight of the *agunah*. Such an understanding requires elucidation of the difficult and complex halakhic concept of *zekhiyyah* and its ramifications.

I. THE PRINCIPLE OF *ZEKHIYYAH* IN JEWISH LAW

A. Third Party Beneficiaries

"*Zekhiyyah*" as an operative legal concept is unique to Jewish law. Translation of "*zekhiyyah*" as "constructive agency" is somewhat misleading in that the translation implies adoption of one of two competing theses advanced as descriptive hypotheses upon which the biblical institution may rest. Those competing hypotheses will be discussed at a later point. Nevertheless, putting aside the question of the legal rationale that actually serves as the formal cause of the halakhic institution of *zikkuy*, the term "constructive agency" effectively and accurately describes its *telos* or final cause, i.e., the operational effect of employing the halakhic construct known as *zekhiyyah*.[1]

The term "constructive agency" is unknown in legal parlance. Indeed, in describing the operation of other legal systems, the term would be akin to an oxymoron. Agency, in other legal systems, requires designation, or at least a presumption of actual intent, on the part of the principal. Other legal systems may indeed recognize a principle of implied agency, e.g., a situation in which an employee routinely conducts business on behalf of his employer, but that is because the circumstances give rise to the presumption that the employee acts with the knowledge and authority of the employer and hence the implication is that the employer actually intends the employee to serve as his agent. The crucial distinction between implied agency and constructive agency is that in instances of implied agency the principal is presumed to have had prior intent to create the agency whereas constructive agency implies neither intent nor prior cognition of *any* kind on the part of the principal.

The legal construct most clearly akin to that of constructive agency, and one that for certain purposes achieves the same effect, is that of a third party beneficiary. To the extent that such claims are recognized, the rights of third party beneficiaries arise as a construct of contract law.

And it is precisely because the concept arises in contract law that some other legal systems have had difficulty acknowledging such rights. The enforceability of a contract hinges upon privity between the contracting parties. Applying conventional legal principles, two parties cannot by contract create rights in a third person when there is no privity of contract between them and the third party. Accordingly, in some jurisdictions it became necessary to enact statutes in favor of certain classes of beneficiaries, such as beneficiaries of insurance policies or mortgages. In other jurisdictions courts give effect to such contracts by finding a fictitious "privity" or "trust" relationship or by ruling that the claim of a third party may properly be recognized in equity if not in law.[1]

The earliest recognition of the rights of a third person to sue as a beneficiary of a contract to which that person was not a party was in a 1677 decision by the King's Bench in *Dutton v. Poole*.[3] A father sought to sell wood to raise a dowry for his daughter. The elder son, who wanted to inherit the wood, promised the father to pay the daughter £1,000 if the father would refrain from selling the wood. Upon failure of the son to pay the agreed-upon sum, the daughter brought suit. The son sought to have the case dismissed on the grounds that "the action ought not to be brought by the daughter but by the father... for the promise was made to the father, and the daughter is neither privy nor interested in the consideration."[4] The Court rejected that argument but without necessarily affirming the standing of all third party beneficiaries. Instead, the Court found that consideration for a promise may be given by a third person, i.e., that a party (in this case the daughter) may be a promisee of the one who will be benefitted by dependence on the contract and yet not be the one who gave the consideration. In effect, such a promisee is not a third-party beneficiary; he or she is the direct beneficiary of the party who gave the consideration. Privity is established by the fact that the promise is directed to the promisee. Hence the only problem is whether consideration can move from a person and it was only this point that was settled in the affirmative in *Dutton*.

Even that limited recognition of the rights of third party beneficiaries was rejected in 1861 in *Tweddle v. Anthenson* with the observation that the promisee cannot bring an action unless the consideration moved from him.[5] In 1915, in denying recovery to a third party in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, one of the Lords declared the notion that "only a person who is a party to a contract can sue on it to be a fundamental principle of the law of England."[6] That principle was reaffirmed by the House of Lords as recently as 1968 in a

decision handed down in *Beswick v. Beswick.*[7] In some subsequent cases, British courts, although upholding this rule in principle, have recognized a cause of action based upon an expanded notion of the concept of trust. Thus, for example, if A promises B that he will pay a sum of money to C, the promisee, B, may be regarded as holding the claim against A, the promisor, as trustee for C.[8]

American courts, for the most part, have upheld rights of third part beneficiaries. As early as 1825, in *Farley v. Cleveland,*[9] a New York court ruled that the promisee need not himself provide consideration. Since the major case in this area, *Lawrence v. Fox,*[10] was decided by the New York Court of Appeals in 1859, two years before *Tweddle v. Anthenson*, it may be fair to say that American courts adopted the doctrine announced in *Dutton v. Poole* before its reversal in *Tweddle* and in later decisions declined to follow *Tweddle* in reversing American precedents.[11]

In *Lawrence*, the New York court went beyond the principle enunciated in *Farley* in ruling that not only may consideration be provided by the beneficiary himself, but that the beneficiary may recover even though he is not the promisee. The principle developed in *Lawrence* was gradually accepted by other states as well, although Massachusetts did not generally permit recovery by contract beneficiaries until 1979.[12] Although the pioneer in the development of this legal doctrine, New York did not explicitly abandon the requirement of a family relationship between a donee beneficiary and the promisor until 1985.[13] *Restatement Second* §302 limits the right to an "intended beneficiary"as opposed to an "incidental beneficiary" described in *Restatement Second* §315.

The rights of third party beneficiaries do not present a similar issue in Jewish law for the simple reason that the issue is one of contract and because Jewish law, strictly speaking, does not recognize the enforceability of contracts *qua* contracts. That is to say that Jewish law does not distinguish contracts from promises. Hence, words of contract do not generate legal obligations any more so than do words of promise. Certainly, moral obligations of greater or lesser degree can arise from such undertakings but moral obligations are not enforceable in the manner of legally valid undertakings. But, of course, Jewish legal practice does employ and validate contracts. The enigma is resolved upon recognition that contracts are valid and enforceable in Jewish law only if entered into pursuant to *kinyan*, a formal act usually in the form of delivering a *suddar* or "kerchief." Technically, the purpose of *kinyan* is not to generate an obligation but to effect a conveyance. Transfer of title to any property, real or personal, requires an appropriate act of *kinyan.* The *kinyan* giving

effect to a contract also represents a conveyance, *viz.*, conveyance of a *shi'bud ha-guf*, i.e., a lien *in personam*. A personal servitude represents a circumscribed property interest just as title to a slave represents a virtually unlimited property interest. A lien against property flows from the servitude by virtue of the doctrine that a person's property serves as his surety. The conveyance of a servitude *in personam* makes it possible to seize property in the event of non-performance on the contract. Absent valid reconveyance of a lien *in personam*, no cause of action can arise. Thus, in effect, contracts are reduced to conveyances.

A contract providing for a third party beneficiary is, in effect, a conveyance by the promisor of a lien *in personam* directly to the beneficiary. There is no problem arising from lack of privity because, since the contract is not really a contract but a conveyance, there could not be a requirement of privity. Furthermore, the question of passing of consideration by the promisee, who is really a stranger to the contract *cum* conveyance, does not present the same problem as it does in other legal systems because consideration is not required to give effect to alienation of property or to generate a property interest in another party.[14] Hence, Jewish law does not require consideration in order to generate a binding contract. But it does require *kinyan*. *Kinyan* on the part of the promisee, who is really a stranger to the transaction, is efficacious on behalf of the beneficiary through operation of the principle of *zekhiyyah*, herein defined as constructive agency.

B. *Zekhiyyah* as an Operative Principle

The Gemara, *Kiddushin* 42a, derives the principle of *zekhiyyah* from the biblical verse describing the apportionment of the Land of Israel: "And you shall take one prince from each tribe to take possession of the land" (Numbers 34:18).[15] The function of the designated princes was to take title and to apportion the land among the members of each tribe. The ordinary principles of agency do not seem to provide a legal basis for effecting those ends since, even assuming that there was formal appointment by the populace of the princes as agents, there were also minors among those entitled to receive parcels of property and a minor lacks legal capacity to appoint an agent. That problem is resolved by the talmudic formulation of the notion of *zekhiyyah* as a biblical institution enabling an individual to act on behalf of another provided that the act redounds entirely to the latter's benefit.[16]

The simplest explanation of the theory underlying the principle of *zekhiyyah* is that it represents a form of agency[17] based upon the pre-

sumption that every person desires the unmitigated benefit accruing through operation of *zekhiyyah*, i.e., "we are witnesses" (*anan sahadi*) to the fact that, had the beneficiary been consulted he would happily have authorized the agent to act on his behalf[18] (and hence the principle of *zekhiyyah* may aptly be termed "constructive agency"). Alternatively, *zekhiyyah* may be understood as tantamount to agency simply by operation of law (*gezeirat ha-katuv*), i.e., the legal system itself, in appropriate circumstances, authorizes any person to act as an agent for another.[19] Among the authorities who propound a theory of agency in explaining *zekhiyyah*, some maintain that, in addition to serving as the agent of the beneficiary, the person performing the act of *zekhiyyah* also serves as an agent of the benefactor.[20] Other authorities maintain that *zekhiyyah* is a completely novel legal institution entirely distinct from the notion of agency,[21] at least in theory if not in effect.[22]

Perhaps the most obvious application of the principle of *zekhiyyah* is with regard to taking title to abandoned property on behalf of another individual. For example, a man may chance upon an abandoned piece of jewelry that he deems to be appropriate for his wife. If, while picking up the jewelry, the husband declares, "I take title to this jewelry on behalf of my wife," title immediately vests in his wife and the husband cannot subsequently claim title for himself, as would be the case in other legal systems. Title vests in the wife immediately despite the fact that at no time did the wife appoint her husband as an agent to act on her behalf in taking title to chance findings and at no time did the husband enter into a contract with his wife to do so. Historically, a concept essentially analogous to *zekhiyyah* appears in the principle of international law that provided that a subject may seize newly discovered territory in the name of his sovereign. Thus, for example, Sir Walter Raleigh laid claim to what was to become Virginia in the name of Queen Elizabeth I of England and the Queen thereby acquired sovereign rights. Sovereignty, however, is not to be equated with ordinary property interests. No concept analogous to *zekhiyyah* is found in any area of domestic common law.

II. *ZEKHIYYAH* OF A *GET* ON BEHALF OF A WIFE

The principle of *zekhiyyah* is operative only when the act redounds to the unmitigated benefit of the beneficiary, e.g., acquisition of property that is *res nullius* or performance of *kinyan* in property that is to vest as a gift.[23] Thus, in ordinary circumstances, *zekhiyyah* is of no avail in accept-

ance of a bill of divorce on behalf of a wife because, although delivery of the bill of divorce effects a release from marital bonds and engenders capacity to contract another marriage, divorce also serves to extinguish the husband's marital obligations with the result that the wife no longer has a claim for support and maintenance and loses other marital benefits as well.[24] Even if it is known that the wife despises her husband, the benefit to her is not unmitigated. Hence no unauthorized person is empowered to accept a bill of divorce on her behalf.

The Gemara, *Yevamot* 118b, questions whether *zekhiyyah* may effectively be employed in executing a divorce in situations of marital discord in which the wife has actively sought a divorce. The Gemara's conclusion is apparently in the negative. However, some authorities[25] maintain that the Gemara leaves the question unresolved. Accordingly, those authorities rule that, if a divorce is executed on the basis of *zekhiyyah* in instances of marital discord in which the wife has demanded a divorce, it serves to engender a state of doubt, i.e., the validity of the divorce is doubtful, and hence the wife finds herself having the indeterminate status of a woman who is "doubtfully married, doubtfully divorced."

A wife's announced desire, or even persistent demand, that the husband grant her a divorce does not suffice to render the divorce an unmitigated benefit or an absolute *zekhut*. The Palestinian Talmud, *Gittin* 6:1, explains that the principle of *zekhiyyah* cannot be invoked in such cases because the *get* must be a benefit to the wife at the moment of its acceptance on her behalf. Thus, even if the wife had previously demanded a *get*, she may have undergone a change of heart and have been in a different frame of mind at the time of its delivery. Subsequent reiteration of her earlier expressed desire to be divorced is not sufficient to establish that her frame of mind was constant throughout the intervening period.

The Gemara, *Yevamot* 118b, similarly questions whether a divorce executed on the basis of *zekhiyyah* is valid when it is motivated by the husband's desire to release his wife from the requirement of levirate marriage (*yibbum*). The situation discussed involved a childless and gravely ill husband. Since there always exists a possibility of recovery, and recognizing that in the event of the husband's recovery the divorce would not be to the wife's benefit, the Gemara outlines a procedure that calls for a conditional divorce to be effective only retroactively upon the death of the husband. The issue, according to Rashi, *ad locum*, and Rabbenu Nissim, *Gittin* 11b, is whether or not a woman might prefer levirate marriage to widowhood or, according to *Tosafot Yeshanim*, *ad locum*, whether the wife, in some particular situations,

may not actually desire her brother-in-law as a marriage partner. If she does prefer marriage to her brother-in-law to widowhood, the divorce is not at all to her benefit. The Gemara leaves the matter unresolved. Accordingly, Rambam, *Hilkhot Geirushin* 9:21, and *Shulhan Arukh, Even ha-Ezer* 145:10, rule that the *get* is of questionable validity. Consequently, in such situations, marriage to the brother-in-law is forbidden because marriage between a woman and her former husband's brother is biblically prohibited other than in the presence of an unequivocal levirate obligation but the wife nevertheless requires *halizah* in order to be free to contract a marriage with some other man. However, in our day, since levirate marriage is no longer practiced, many latter-day decisors rule that divorce under such circumstances is an unmitigated benefit.[26] That line of reasoning is particularly cogent if the brother-in-law is married since, subsequent to the edicts of Rabbenu Gershom, he can neither divorce his own wife against her will nor, according to many authorities, take a second wife even in fulfillment of the *mizvah* of *yibbum*.[27]

As noted by *Bet Yosef, Even ha-Ezer* 140, and *Shulhan Arukh, Even ha-Ezer* 140:5, some authorities maintain that *zekhiyyah* is operative with regard to a wife who has committed adultery. An adulteress is forbidden to consort with her husband, who does not have the option of condoning the adultery, and also forfeits any and all claims for further support and maintenance. Accordingly, those authorities regard divorce on behalf of an adulteress to be an unmitigated benefit. Other authorities, whose position is accepted by Rema, *ad locum*, maintain that *zekhiyyah* is of no avail even in such instances on the grounds that, although the divorce does not prejudice the wife's interests, it does not necessarily provide any benefit, particularly since she may have no desire to enter into another marital relationship. *Noda bi-Yehuda, Even ha-Ezer, Mahadura Kamma*, nos. 70 and 92, asserts that even in the case of an adulteress, divorce may be prejudicial to her interests since as a feme sole she may become subject to sexual harassment.

Nevertheless, Rema agrees that *zekhiyyah* may be employed to give effect to a divorce on behalf of a woman who has become an apostate and who "lives among the gentiles." In such a case it is presumed that the woman engages in adulterous sexual activity on an ongoing basis. Divorce, then, serves to rescue her from ongoing violations of the prohibition against adultery and, since she enjoys none of the legal or actual benefits of marriage, divorce, for such a woman, represents an absolute and unmitigated benefit.[28]

III. *ZEKHIYYAH* ON BEHALF OF A HUSBAND IN EXECUTING A *GET*

A. *ZAKHIN ME-ADAM*

Invocation of the principle of constructive agency in situations in which divorce is an unmitigated benefit for the husband is far more complex and of far more recent origin. The classic case involves a husband whose wife is mentally incompetent and hence cannot presently be divorced. The husband is prevented from marrying another woman by virtue of the edict of Rabbenu Gershom banning polygamy. The standard procedure in such cases is to grant a *hetter me'ah rabbanim*, i.e., dispensation to take a second wife, on the condition that the husband place the value of his mentally incompetent wife's *ketubah* in escrow, draft a bill of divorce and appoint an agent to deliver the instrument to his wife when and if she regains the requisite mental capacity to accept delivery of the *get*.[29]

In the eighteenth century, the scholars of Lissa, citing *Mishneh le-Melekh*, *Hilkhot Geirushin* 6:3, raised an objection to the validity of such divorces. *Mishneh le-Melekh* rules that a divorce effected by an agent designated under such circumstances is invalid because of the principle governing agency formulated by the Gemara, *Nazir* 12b, declaring that an agent can be designated to perform only such acts as the principal himself has the capacity to perform at the time of designation. In effect, the halakhic rules governing agency stipulate that the power of an agent can be no greater than that enjoyed by the principal at the inception of the agency. Put somewhat differently, a principal can authorize an agent to act in his stead, but only to perform an act that the principal might himself validly perform at the time that he grants authority to the agent to do so. Thus, declares the Gemara, an agent cannot be designated for the purpose of contracting a marriage with a woman who is already married at the time of the inception of the agency with the result that even if the woman subsequently became widowed or divorced the agent lacks capacity to act on behalf of the principal. Although some authorities disagree, *Mishneh le-Melekh* asserts that the agent has no authority to act on behalf of the principal even if the principal expressly stipulates that the agency is to become effective only upon the woman's attainment of capacity to contract a valid marriage. The husband could not himself execute a divorce of his mentally incompetent wife; hence, argued the scholars of Lissa, the husband has no power to appoint an agent to act on his behalf until such time as his wife's mental health is restored.

As recorded by *Markevet ha-Mishneh* (Frankfurt am Oder, 5611), *Hilkhot Geirushin* 6:3, the practice of appointing an agent to effect a divorce of this nature was defended by a certain scholar described as the aged chief rabbi of Krotoszyn. That authority advanced an argument asserting that the normative rule is that designation of an agent is valid even if the agency cannot be carried out at the time of designation. Moreover, he contended that, even if it is conceded that a bill of divorce executed under such circumstances could not be regarded as valid on the basis of the rules of agency, it would nevertheless be valid by operation of the principle of *zekhiyyah*. He argued that, in designating an agent, the husband has signified his desire to be divorced and has indicated that he regards severance of the marital bonds to be beneficial to him. Thus, designation of an agent, although ineffective in accomplishing its avowed purpose, is nevertheless evidence of a mental state that enables the agent to act, not on the basis of his designation as an agent, but on the basis of the principle of *zekhiyyah*. Moreover, the divorce is objectively beneficial to the husband since the *hetter me'ah rabbanim* is valid only during the period of his wife's mental incompetence. Thus, with the recovery of mental capacity by the first wife, the husband, in the absence of a divorce, would be in transgression of the ban of Rabbenu Gershom.

Markevet ha-Mishneh dismisses this view with the argument that *zekhiyyah* operates only as a principle of vesture of title (*zakhin le-adam*) but is of no avail as a means of giving effect to an attempt to divest an individual of property or of a privilege (*zakhin me-adam lo amrinan*). Probably the most obvious rationale underlying that distinction is that loss of any kind is, by definition, a disadvantage. On balance, the benefit of divestiture may outweigh the gain of continued possession; *zekhiyyah*, however, is operative only in situations of unmitigated benefit. *Teshuvot Hatam Sofer*, *Even ha-Ezer*, I, no. 11, s.v. *nahzor*, dismisses that contention with the observation that it is common practice[30] to invoke the principle of *zekhiyyah* in selling *hamez* belonging to others at the appropriate hour on the eve of Passover.

An alternative rationale for this distinction lies in the fact that although transfer of title does require *da'at* or intent, it does not always require the *da'at* or intent of the individual in whom title is vested. Thus, a minor, who by statute is regarded as lacking *da'at* or intellectual capacity for the requisite mental determination, can nevertheless be the beneficiary of a gratuitous transfer. In such instances the *da'at* or intent of the adult conveying title suffices (*da'at aheret makneh*).

Similarly, in cases of *zakhin le-adam*, the self-appointed agent need perform only the physical act of *kinyan*; the requisite mental act is supplied by the person conveying title. In contradistinction, divesture of title always requires *da'at* or intent on the part of the person transfering title. Accordingly, it has been argued that *zekhiyyah*, since it involves a self-designated agent, is available for physical acts but is not operative with regard to any act that requires a determinant mental state, e.g., conveyance of property or the granting of a *get*. This distinction is reflected in the comments of *Kezot he-Hoshen* 105:1.

The issue of whether the principle of *zekhiyyah* is operative only for the purpose of vesting title or whether it is applicable to alienation of title (*zakhin me-adam*) as well and the circumstances in which it may be invoked in order to do so is a matter of considerable controversy among latter-day authorities.[31] A number of latter-day authorities maintain that resolution of that question is directly contingent upon the nature of the principle of *zekhiyyah*. They assert that, if the principle of *zakhin me-adam* is tantamount to constructive agency, it is available in all instances of benefit in which explicit agency itself is operative. If, on the other hand, *zekhiyyah* is a novel legal construct, it may be regarded as limited to matters similar to the biblical paradigm of "each prince," i.e., to acquisition of title as was the case with regard to division and apportionment of the Land of Israel.[32]

R. Isaac Elchanan Spektor, in both his *Be'er Yizhak, Orah Hayyim*, no. 1 and his *Ein Yizhak, Even ha-Ezer*, no. 2, sec. 4 and no. 51, sec. 10, asserts that *zakhin me-adam* cannot serve to remedy defective agency. Thus, for example, if agency fails because of the principal's own lack of capacity to effect the desired end, the "agent" cannot give effect to his act on the basis of *zakhin me-adam*. R. Isaac Elchanan Spektor asserts that explicit appointment of an agent is tantamount to a declaration that the principal wishes to give effect to the specified act only through the instrumentality of agency and hence appointment of an agent constitutes a renunciation of any advantage that might accrue on the basis of *zakhin me-adam*.

Many latter-day scholars have refused to accept the concept of *zakhin me-adam* and to employ it in cases of divorce. In part, their position is based upon the comments of a highly respected authority, *Kezot he-Hoshen* 243:8, who completely dismisses the application of *zekhiyyah* in matters requiring a determinate mental state. Thus, for example, the editors of *Ozar ha-Poskim* (Jerusalem, 5707), *Even ha-Ezer* 1:10, sec. 70:31, cite *Kezot ha-Hoshen* as well as others who accepted his view and,

although declining to formulate a definitive position, conclude that one should not act in a manner contrary to that view.

That attitude notwithstanding, in the modern era the principle of *zakhin me-adam* was applied in the area of divorce by a noted scholar, R. Eliyahu Klatzkin of Lublin. In 1922, in the aftermath of World War I, Rabbi Klatzkin received a plea for help from R. Mordechai Horowitz of Zamosc in alleviating the plight of an *agunah*, a woman whose husband did not return from the war and was presumed to be dead but who lacked actual proof of his death. Mobilization of the Polish army took place in 1914. Conscripts from the surrounding area were brought to Zamosc. Recognizing the likelihood that not all of the soldiers would survive the armed conflict and concerned for the plight of their wives, Rabbi Horowitz, in accordance with sound halakhic practice, encouraged each of the soldiers to designate a scribe as his agent to draft a bill of divorce, witnesses to sign the instrument and yet another individual to serve as his agent for the delivery of the *get* to his wife. The purpose of that procedure was to make it possible to draft a bill of divorce at some future time in the unfortunate eventuality that the husband would fail to return from battle but that no satisfactory evidence that he was killed in action would be forthcoming. It subsequently transpired that one of the soldiers who followed the instructions of Rabbi Horowitz, a resident of Traningrad, failed to return and was presumed to have perished but there was no evidence substantiating his death. Unfortunately, the person designated by that soldier as his agent for the delivery of the *get* had also died in the early days of the war.[33]

R. Eliyahu Klatzkin, *Dvar Halakhah*, *milu'im*, no. 93, accepts the notion that in instances of a *hetter me'ah rabbanim* involving a mentally incompetent wife, a *get* can be drafted for the woman upon her recovery in reliance upon the principle of *zakhin me-adam*.[34] The problem is that, unlike instances involving a husband of a mentally incapacitated wife who has remarried on the basis of a *hetter me'ah rabbanim*, it is not immediately clear that, in the case confronting Rabbi Klatzkin, divorce would have been a benefit to the husband. Assuming that the husband was still alive—and, if not, the *get* would have been entirely superfluous—he might well still have anticipated and desired resumption of the marital relationship at some point. Rabbi Klatzkin counters that argument by developing a novel thesis to the effect that, since the husband failed to return to his wife for a period of several years after cessation of hostilities and had provided no information with regard to his whereabouts, the husband thereby forfeited his right to demand that his wife

fulfill any of her wifely duties and indeed he might be compelled by her to execute a *get*. In such circumstances, argues Rabbi Klatzkin, the marriage no longer represents a benefit of any kind to the husband and hence the divorce represents an unmitigated benefit.

In a subsequent case reported in his *Milu'ei Even*, no. 29, Rabbi Klatzkin went far beyond his original position.[35] The latter situation involved a woman abandoned by her husband immediately after their wedding and whose subsequent whereabouts were unknown. Two years after her husband's disappearance the woman entered into a second marriage. Unbeknown to the wife, prior to the marriage the young man had, on occasion, behaved in a deranged manner. The possibility existed that the groom's mental illness was of sufficient gravity to constitute an undisclosed "grave defect" that would serve to void the marriage. Hence, the validity of the marriage was a matter of doubt. If the first marriage was a nullity, no *get* would have been required. If, however, the first marriage was indeed valid, the second marriage was a nullity and constituted an adulterous relationship. Hence, as an adulteress, the woman was precluded from resuming a marital relationship with her first husband. Accordingly, argued Rabbi Klatzkin, the marital state no longer represented a benefit of any kind to the first husband. Consequently, Rabbi Klatzkin ruled that the principle of *zakhin me-adam* might be invoked in drafting and executing a *get* to ameliorate the plight of the *agunah*.

B. The Requirement that the Scribe and Witnesses Be Personally Instructed by the Husband

The additional barrier to be surmounted in this case lies in the fact that not only had the husband failed to designate an agent for delivery of the *get*, but unlike the earlier case in which only the agent for delivery of the *get* had died, the husband had not issued a face-to-face directive to the scribe to write the instrument on his behalf. The rule, as recorded in *Shulhan Arukh*, *Even ha-Ezer* 120:4, is that the scribe and witnesses must hear directly from the husband that he instructs them to draft and sign the *get*.[36] That provision reflects the requirement that a bill of divorce be written specifically on behalf of a particular husband and a particular wife. The halakhic presumption is that the requisite intent cannot be evoked unless the scribe and the witnesses actually hear the voice of the husband.[37] In the case of a husband who has absconded without issuing such instructions, it is of course impossible for the scribe or the witnesses to hear those instructions from the husband.

In deflecting that objection, Rabbi Klatzkin relies upon a previous ruling of an earlier scholar, R. Israel Hapstein, popularly known as the *Maggid* of Koznitz (Kozienice) recorded in the latter's *Bet Yisra'el.* A young man, a native of Chmielnik, married and established residence in Staszow. A year later the husband left home, apparently to seek his fortune, and was not heard from for a period of twelve years. Some eight years after his departure, a contingent of Prussian soldiers were quartered in Jewish homes in Staszow for a period of time. A number of soldiers were quartered in the home of the wife and during their stay the soldiers became aware of the husband's disappearance. Some time later, one of the soldiers who was then stationed in Warsaw wrote that he had identified the husband as one of a group of prisoners under his supervision. The wife sent her brother to Warsaw to search for her husband but to no avail. Later, the same soldier wrote once again to inform the wife that her husband had escaped and crossed over to the foreign army.

Shortly afterwards foreign soldiers passed through Staszow and remained in that city for a period of time. One of the soldiers conversed with the townspeople in Yiddish, a phenomenon that aroused a measure of curiosity. Upon closer scrutiny, one of the townspeople recognized the Yiddish-speaking soldier as a friend of his youth and as none other than the missing husband. Subsequently, other people, including his wife, claimed to recognize him. When confronted, he admitted only that he was a former resident of the area. As a test, some of the townspeople pointed to various women and asked with regard to each one whether the woman was his wife. Each time the soldier answered in the negative. Finally, they brought the abandoned wife and asked the same question. The soldier averted his face and refused to converse further in Yiddish but inquired in a foreign language after the welfare of the woman's sister. The matter was reported to the foreign officer in command of the soldiers who ordered two of his soldiers to examine the man in question in order to ascertain whether he was circumcised. Those soldiers claimed that he was not. Nevertheless, the townspeople persisted in demanding that the gentleman reveal the truth. Finally, on *Shabbat, erev Shevu'ot* 5559, shortly before leaving the city, the soldier acknowledged his identity and gave assurances that, if his wife would follow him to the next encampment, he would execute a *get.*

Toward the end of that summer a letter addressed to the rabbi and officers of the community was received from the earlier-mentioned foreign officer. In that letter the officer identified the missing husband and described him as a "Jewish apostate." The officer indicated that he was