INTERNATIONAL BEIT DIN
בית דין בינלאומי לעניני אישות

File no. 105

Beth (Plaintiff) vs. Alex (Defendant)
Names and dates have been changed to preserve anonymity of parties

Synopsis:

Our case deals with a wedding in which witnesses were not designated for kiddushin and in which only one possibly Torah observant adult Jewish witness, not halakhically related to the bride or the groom, was present under the huppah.

Summary of Facts of the Case:

In 2014, the aforementioned case was submitted for resolution to the IBD. The couple was married in March 2008. In April 2012, Beth moved out of the bedroom she and Alex had been sharing and in June 2012 she moved out of the residence they had been sharing. In early 2014, the parties executed a civil divorce and financial-settlement agreement. As of today, Alex has refused to give Beth a get.

An expanded discussion of the grounds for a heter nissuin (permission to remarry):
In an earlier psak din, we ordered Alex to give a get to his wife unconditionally.[1] To this date, however, he has refused to comply with our directive.

The question now is, are there grounds to authorize Beth a heter nissuin without her receiving a get from Alex.

Let us focus upon the wedding ceremony, which is the event that established the marriage. To understand the background and building blocks of the halakhic practice of marriage, we offer some halakhic context. Recognizing that marriage consists of two separate acts, (1)kiddushin (betrothal, i.e. halakhic engagement without cohabitation) and (2) nissu'in (marriage with

[1] Once a *beit din* obligates the giving of a *get*, the husband may not advance any preconditions before he executes the *get*. See T'shuvot ha-Rashba 4:256; Bedek ha-Bayit on Beit Yosef; Tur Hoshen Mishpat (hereafter: HM) 143; Shulhan Arukh (hereafter:SA), Even ha-Ezer (hereafter: EH) 143:21.

cohabitation), Rabbi Norman Frimer and Rabbi Dov Frimer note,[2]

"In practical terms, kiddushin as the primary state of Jewish marriage can be…normatively constituted through the presence of five halakhic elements…At the helm stands kavanah:intention. But intention for what? Two divergent directions emerge…According to one authority, the intent of the couple must be for at least the most minimal and natural characteristics of the marital experience…That decision, however, must also include the stipulation that the wife shall be exclusively related to her husband and prohibited to all others. From this intent of leshem ishut will then flow all other authority which will bestow legitimacy and direction upon the formal ceremony and simultaneously form the foundation of the kiddushin. The other view finds the natural standard utterly inadequate…What then, shall be the normative canon for kavanah? It must be lekiddushei Torah or leshem kiddushin…a conscious awareness that the ceremony must be kedin, in faithful fulfillment of the hallowed imperatives of Jewish law…

…the intention to marry must be visibly objectified, in order both to articulate as well as to inculcate the core ideas of that kavanah. Jewish tradition, therefore devised two more patterns of action to achieve tangibility. One of them was the amirah, an official verbal declaration of marital kavanah to be made directly by the groom to his bride in a formal and public style…The other act…was the netinah (giving) initiated again by the groom and complemented by the parallel kabbalah, receipt, by the bride. These sequential acts of "give and take" involve an object…traditionally a ring…

But not only must these facets of kavanah be shared between bride and groom. Normally, the halakha also demands…ratson- a fourth element, involving the couple's voluntary assent to all parts of the erusin(i.e. kiddushin)…

Finally, a Jewish marriage must be witnessed by at least two qualified eidim, whose responsibility is two-fold. When necessary, they…can help establish the facts and certify the…degree of compliance with the prerequisites of Jewish marriage law. Yet, even more critical is their role…who by their very presence and participation at the ceremony constitute the validity of the ma'aseh kiddushin (i.e. an act of halakhic engagement)."

In short, the man and the woman transform their subjective marital intentions into reality through (1) speech (i.e. harei at m'kudeshet li…) (2) concrete method of betrothal (e.g. kesef); (3) under the scrutiny of two witnesses; (4) in the presence of an officiating Orthodox rabbi and public assemblage (minimally ten adult male Orthodox Jews) for (5)the avowed purpose of establishing a consensual marital union in accordance to Halakha.

If we want to confirm that all the parties complied with the halakhic procedures to establish a marriage, we need to confirm that in fact two adult Jewish Torah-observant males were present under the huppah (marital canopy), who can confirm that the hatan was m'kadesh, halakhically

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[2] Norman Frimer and Dov Frimer, "Reform Marriages in Contemporary Halakhic Responsa," 21 *Tradition* **(1984), 7, 9-11.**

engaged, to his kallah. Generally speaking, notwithstanding the posture of some authorities,[3] today every adult Jewish male has a "hezkat kashrut," a presumption of being Torah observant and is therefore qualified to be a witness to the act of kiddushin.[4] That said, we are not absolved from inquiring into the Torah observance of each witness. Since according to certain Pos'kim (rabbinic authorities), the hazaka is premised on the assumption that the majority of Jews are eligible to be witnesses, we must ascertain in our case if the witness is qualified to testify.[5]

We reviewed pictures of the huppah ceremony for this couple, and based upon the wife's identification,[6] under the huppah stood the parents of the hatan and kallah, two relatives from the kallah's family, one relative from the hatan's family, a non-relative woman, an adult Jewish male who was unrelated to anyone else standing under the huppah and the rabbi who was m'sader kiddushin, and allegedly supervised the halakhic propriety of the kiddushin, as well as nissuin, which was performed under the huppah. We contacted the m'sader kiddushin and he informed us that the kiddushin was performed without the hatan designating (m'yaheid) witnesses.

All the relatives present under the huppah were b'dargat kirvah, in the class of relatives who would be invalidated to serve as witnesses for the act of kiddushin. Amongst the individuals present under the huppah during the performance of the kiddushin were relatives from the mother's family. Notwithstanding that most Pos'kim rule that such individuals are invalid me'doraita (on a biblical level),[7] in accordance with certain interpretations of Rambam's view,[8] such testimony is to be invalidated only on a rabbinic level.[9] Nevertheless, even if one rules that the individuals are invalid as witnesses on a rabbinic level, Rambam, Shulhan Aruch and Rema conclude that in the case of a divorce, a wife requires a get due to existence of a safek, a doubt that the act of kiddushin was valid.[10] Relatives by marriage (k'rovei ishut) are, rabbinically, invalid witnesses.[11]

The individuals who were invalid witnesses on a rabbinic level, however, were not only the only

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[3] Pnei Yehoshua on Gittin 17a; T'shuvot Divrei Yoel 34; T'shuvot va-Ya'an Dovid EH 175; Ettinger, T'shuvot Mahari ha-Levi 1:44; Da'at Torah, Yoreh De'ah (hereafter "YD") 1(18); T'shuvot Maharam Schick EH 48; Aruch ha- Shulhan YD 281:9.

[4] T'shuvot Maharam Schick, supra n. 3; T'shuvot Beit ha-Levi 2:4; T'shuvot Maharashdam HM 310; T'shuvot Yabia Omer 8 EH 5 (2-4).

[5] **See Pnei Yehoshua, supra n. 3; T'shuvot Maharit 1:37.**

[6] **For the grounds of relying upon her information, see Nahalat Tzvi 2, 241-242. Lest one argue that her information may be biased in terms of misrepresenting the facts in order for the *beit din* to invalidate the *kiddushin*, Rabbi Moshe Feinstein rules that if it is clear that the wife does not know the halakhot regarding the requirements of having two kosher witnesses, her information is deemed credible. See Igg'rot Moshe EH 4:83(3).**

For the viewing of pictures and videos of a *huppah* as fulfilling the requirements of submitting the testimony of two eligible witnesses, see T'shuvot Ateret Devora 1:23.

[7] **T'shuvot ha-Rivash 14 in the name of Rav Hai, Rif, Ramban and Rashba; Hayyim Medini, Ohr Lee, 70(4) cites Divrei Ribot that " *g'onei olam*" disagreed with Rambam.**

[8] Mishnah Torah, Eduth 13:1.

[9] Beit Yosef, Tur EH 42 (end) in the name of Tashbetz, Shakh, SA HM 33

[10] SA and Rema EH 42:5.

[11] T'shuvot Noda be-Yehuda, Mahadura Tinyana EH 76 in the name of Mord'khai.

ones present under the huppah. Under the huppah were individuals, who were invalid me'doraita. Seemingly, their presence invalidates the testimony of the one possible Torah observant witness who was qualified me'doraita based upon the rule applied in matters of kiddushin "if any witness is a relative or invalid, the testimony of the others is null."[12] This rule is inapplicable if the hatan designated only certain eligible individuals to serve as witnesses to the exclusion of others. The presence of ineligible individuals under the huppah will not affect the eligibility of the witnesses appointed to the exclusion of others because the selection of such two witnesses, in effect, halakhically distinguishes them from the persons surrounding them during the time of the kiddushin. However, in our case, the officiating rabbi did not designate any individuals as witnesses.[13] Ostensibly, the absence of designation invalidates any qualified witness present under the huppah during the performance of the kiddushin.

Yet, the question is whether the actual presence of ineligible witnesses who have no intention to

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[12] **Makkot 6a. The assumption in invoking this rule is that it is applicable not only to criminal and monetary matters, but it is equally applicable to matters of** *kiddushin***. See T'shuvot Noda be-Yehuda , Mahadura Tinyana EH 76; T'shuvot Rabbi Akiva Eiger, Mahadura Kama 94.**
Though women are ineligible as witnesses, nonetheless the rule "If any witness is a relative or invalid, the testimony of the others is null" may apply to women. See Turei Evan, Rosh ha-Shana 22a; T'shuvot Bris Yaakov EH 43; T'shuvot Nahal Yitzhak, 35(6-7); Piskei Din Rabbanayim (hereafter:PDR) 10:229. Consequently, the presence of the woman who is a non-relative (as well as the other relatives) under the *huppah* **will invalidate the eligible witness.**
Implicit in our conclusion is that, in principle, a woman could be a witness ("*shem ed ah'laha***") but for various reasons, her testimony is invalid. See Rabbi Y.B. Soloveitchik, R'shimat Shiurim, Shavuot and Nedarim, 1-2; R'shimat Shiurim, Sukkah, 108. See also Turei Evan, op. cit.; T'shuvot Yabia Omer 6, EH 6. For those** *Pos'kim* **such as Hiddushei Rabbi Akiva Eiger YD 228:3, T'shuvot Rabbi Akiva Eiger 1:73 (***hashmatot***); T'shuvot Noda be-Yehuda, Mahadura Tinyana HM 8; Urim v'Tumim HM 36:11 Netivot ha-Mishpat HM 36:10, and For those** *Pos'kim* **such as Hiddushei Rabbi Akiva Eiger YD 228:3, T'shuvot Rabbi Akiva Eiger 1:73 (***hashmatot***); T'shuvot Noda be-Yehuda, Mahadura Tinyana HM 8; Urim v'Tumim HM 36:11 Netivot ha-Mishpat HM 36:10, and T'shuvot Shem Aryeh , HM 13(end) who contend that, in principle a woman cannot be a witness, the rule "if any witness is a relative or invalid, the testimony of the others is null," implies that the presence of a woman who is not related to the couple under the** *huppah* **would not invalidate the eligible witnesses.**
[13]Clearly, there is no requirement to designate individuals as *eidei kiddushin***. See SA EH 42:4. Even if the witnesses observed the act of** *kiddushin,* **assuming no other halakhic issues arise, their testimony is valid. See Pithei T'shuvah SA EH 42:11 in the name of Beit Meir and Hatam Sofer; T'shuvot Bikkurei Asher 1:12. Cf. T'shuvot Panim M'irot 3:25.**
Nevertheless, the practice in many communities is to designate them. See Hagahot ha-S'mag, mitzvah 183(7); K'tzot ha-Hoshen 36:1; T'shuvot ha-Radvaz 2:707; Beit Meir 42:4; Shakh SA HM 36:8; T'shuvot Maharam Schick HM 57 in the name of Hatam Sofer. Among the reasons that the practice is to designate witnesses is our concern for Ritva's view (see infra text accompanying note 15) that ineligible witnesses may invalidate an eligible witness. See Radvaz, op. cit.; Shakh, op. cit.; Avnei Miluim 42:6; K'tzot ha-Hoshen HM 36; T'shuvot Beit Yitzhak EH 99:8. Moreover, it may occur that relatives are standing next to the *hatan* **and** *kallah* **and other nonrelatives stand at a distance from the prospective couple. Therefore, we designate witnesses in order that the eligible witnesses move forward and stand near the prospective couple to be able to testify to the act of** *kiddushin***. See K'tzot ha-Hoshen, op. cit.**

testify to the act of kiddushin will invalidate an eligible witness? According to many Pos'kim who contend that the rule "if any witness is a relative or invalid, the testimony of the others is null," is in effect only if the ineligible witness intended to be a witness to the kiddushin.[14] In our scenario, it is clear that the presence of the family members under the huppah stood there only as onlookers rather than as witnesses.

There exists, however the minority opinion of Ritva, in the name of his teacher Ra'ah, which is agreed upon by some other rishonim (early authorities), Rabbi Akiva Eiger and/or authoritatively cited as a senif (lit. an appendage- loosely translated a supporting argument) by some contemporary dayanim that in the absence of witness designation, if there are present both eligible and ineligible witnesses under the huppah that the testimony is invalid.[15] In contemporary times, various Pos'kim and Israeli dayanim have ruled on the propriety of a particular act of kiddushin, by factoring into consideration Ritva's view along with other factors in voiding a marriage under various circumstances.[16] Disqualification of eligible witnesses is contingent upon the fact that all or at least one of the ineligible witnesses saw the eligible witness(es).[17]

Given that that Ritva's opinion reflects a minority position, why would we cite it as one of the bases of arriving at our judgment? Clearly there is an acute need to distinguish between what transpires in the portals of the beit medrash (study hall) and the world of psak. As Rabbi Aharon Lichtenstein astutely observes,[18]

"Hora'ah [halakhic decisonmaking] is comprised of two elements; psak and pesikah, respectively. The former refers to codification, the formulation of the law pertinent to a given area…of one position in preference to others. As such, it is essentially the concluding phase of the learning process proper…and its locus is the beit midrash. Pesikah, by contrast, denominates implementation. It bespeaks the application of what has already been forged in the crucible of the learning to a particular situation…Its venue, is publicly, the beit din, or, privately, the meeting of the inquirer and respondent…Its challenge lies in the need to harness knowledge and

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[14]Consequently, if the eligible witnesses intended to testify and the invalid witnesses did not intend to testify, the testimony of two eligible witnesses is valid. See SA HM 36:1.

[15] **Hiddushei ha-Ritva Kiddushin 43a; Shakh SA HM 36:8 in the name of ha-Gahot S'mak 183; Tosafot Y'shanim in the name of Rashbam, Bava Batra 113a; T'shuvot Zihron Yehuda 81; Rabbeinu Y'ruham, Sefer Meisharim 7; T'shuvot Rabbi Akiva Eiger, Mahadura Tinyana 56 (28b); T'shuvot Shemesh u-Magen 2 EH 10, 3 EH 53; T'shuvot Tzit Eliezer 8:37(9) in the name of Ritva "and many uphold him"; T'shuvot Ateret Devora, 1, EH 25.**

Some *pos'kim* **argue that in fact Ritva's view emerges as the anonymous ruling found in SA HM 36:1. See T'shuvot Ein Yitzhak 2:64; Ateret D'vora, op. cit.**

[16] **T'shuvot Maharsham 2:111, 3:50; Igg'rot Moshe EH 4:13; Tzitz Eliezer, supra n. 15 at section 9; T'shuvot Yabia Omer 8, EH 3(5); T'shuvot Sha'arei Tzion EH 2:10-11; T'shuvot Sh'ma Sh'lomo, vo. 4, EH 1(5).**

[17] **Shakh, SA HM 36:6, 7, Ritva, supra n.15, Netivot ha-Mishpat 36:4. Others contend that if the eligible witnesses saw the invalid witnesses the testimony of the former is invalid. See N'tivot ha-Mishpat, Hiddushin 36:6; Sma, SA HM 36:5**

[18] A. Lichtenstein, Leaves of Faith, vol. 1, 162-163.

responsibility at the interface of reality and Halakha…"

Our psak's reliance, in part, on Ritva's position belies Rabbi Lichtenstein's understanding of what the process of psak entails for a dayan. Addressing the situation of the classical agunah where the husband has disappeared and his whereabouts are unknown and noting the uniqueness of each agunah case, Rabbi Ya'akov Reicher rules the following,[19]

"In the situation of an elderly woman who is not desperate to remarry, there is no need to act leniently and rely on a minority opinion, in particular where we are hoping that other witnesses will appear soon so that she may remarry…

However, there are instances when the agunah is young and anxious to remarry, and one is worried that she may become promiscuous. And if we are lenient in accordance with the minority opinion, there will be no comfort to her quandary through the assistance of witnesses, and this to be viewed to be a time of emergency."

According to Rabbi Reicher as well as Rabbi Hayyim Pelagi and Rabbi O. Yosef dealing with the matter of igun (get recalcitrance) involves a sha'at ha'd'hak, an hour of emergency.[20] Therefore, under certain conditions, we are permitted to rely upon a minority opinion.[21] In particular, given that in our case we are dealing with a young woman who has no children and lives a non-Orthodox Jewish lifestyle, we are apprehensive that she may become promiscuous and therefore we wanted to prevent the possibility of mamzerut (halakhic bastardy) should she remarry without rabbinic approval.[22] Consequently, despite the fact that the majority of Pos'kim

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[19] **T'shuvot Sh'vut Ya'akov, EH 110. Lest one challenge our readiness to employ Rabbi Reicher's view in light of the fact that his ruling is** *l'halakha ve'lo l'ma'aseh* **(in theory rather than in practice), nothing could be farther from halakhic truth. Invoking these types of theoretical rulings as practical judgments in other contexts is not unusual. See S'dei Hemmed ha-Shalem, K'lalei ha-Pos'kim, Siman 16(47); T'shuvot Yabia Omer, 3, EH 18. Consequently, in voiding a marriage where a husband prior to the marriage fails to disclose a** *mum gadol***, a latent defect, an arbiter will in part rely upon a theoretical decision handed down by Havot Yair. See T'shuvot Devar Eliyahu 48; T'shuvot Emunat Shmuel 34; T'shuvot Even Shoham 56.**

In fact, implicitly following Mishnah Eduyot 1:5, others have relied upon a minority opinion in a matter of *igun***. See T'shuvot Hayyim Veshalom 2:35; T'shuvot Yabia Omer, 9, EH 36(10). Seemingly, relying upon a minority opinion is in conflict with the basic principle of halakhic decision-making, "***aharei rabbim le-hatot***," the rule to follow the majority. However, as various** *Pos'kim* **note, the application of this rule is limited to resolving issues within the confines of a** *beit din* **proceeding. See Get Pashut, Kelalim, kelal 1,5; T'shuvot Maharlbah 147. Since the question of whether** *Pos'kim* **endorse the minority view of Ritva is a resolution which takes place among authorities who live in different places and in different times rather than within the confines of a** *beit din***, the directive to follow majority rule is inapplicable. Consequently, assuming certain conditions are met, a** *posek* **may choose to rely upon a minority opinion in matters such as** *igun.* **See T'shuvot Seredei Eish 3:25.**

[20] T'shuvot Agudat Ezov Midbari, EH 9:2; Rabbi Sternfeld, T'shuvot Sha'arei Tziyon, vol. 3, 14:21-22.
[21] See supra n. 19.
[22] **In contrast to Rabbi Reicher's view,supra n. 19, Rabbi Moshe Taubes and Rabbi O. Yosef argue that**

reject the Ritva's position,[23] one of the bases of our psak din hinged upon the acceptance of his position, albeit a minority view.

In our case, there was, other than the m'sader kiddushin, an adult Jewish male who was unrelated to the couple who stood under the huppah. We were unable to ascertain whether in fact he was a Torah observant Jew at the time of the kiddushin or afterwards.[24] Even if he was committed to a Torah lifestyle, according to Ritva and others his testimony is invalid because he was not designated to serve as an eid. Nonetheless, the officiating rabbi may serve as one witness[25] and in pursuance to R'ma's opinion we must be concerned that one can consummate kiddushin with the presence of one witness accompanied by the m'sader kiddushin.[26] Numerous rishonim, however, subscribe to Shulhan Arukh's position that one cannot execute kiddushin with only one witness. [27] Moreover, R'ma rules that in a situation of igun we may be lenient, and therefore, one witness will not establish the act of kiddushin.[28] Furthermore, the officiating rabbi's testimony as well as the possible eligible witness may be invalid in light of Ritva's position.

DECISION:

Since Ritva's posture is rejected by numerous decisors, some Pos'kim argue that his view may be utilized only as a senif to invalidate a kiddushin.[29] Therefore, as we did in the text and alluded to in the notes to our original psak din, we will elaborate here in our extended discussion upon the halakhic as well as factual doubts that support Beth's right to remarry without a get. First, pursuant to Rabbi Algazi and Rabbi Yosef there is the possibility that the halakha is in pursuance to the Rif who contends that a kiddushin consummated with rabbinically invalid witnesses is invalid.[30] Secondly, Rabbis Algazi and Yosef argue that the testimony of relatives or those related by marriage are invalid mid'oraita and therefore the kiddushin is null and void, at least after the fact.[31] As we alluded to in our citation of Rabbi Yosef in our original psak din, these

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concerns for licentiousness equally apply to elderly women. See T'shuvot Hayyim v'Shalom 2:35; T'shuvot Yabia Omer, 7, EH 17(8), 19(7).

[23] **T'shuvot Avir Ya'akov 24; Rabbi Amarilio, T'shuvot Kerem Shlomo 21. Cf. Tzit Eliezer, supra n. 12. The question is whether one can ever assume that one has identified the entire spectrum of views and determined a particular opinion is representative of the majority. See T'shuvot Shei'lat Ya'avetz 157.**

[24] **For the retroactive validation of an ineligible witness due to the fact that he became repentant subsequent to the *kiddushin*, see Teshuvot Zihron Yehuda 82 in the name of the Scholars of Toledo; T'shuvot Maharik , shoresh 85; SA EH 42:5 cited as "*yesh omrim*."**

[25] **T'shuvot Binyan Tzion 157; T'shuvot Mahari Asad 40; Avraham Shag, T'shuvot Ohel Avraham 59.**

[26] **Rema SA EH 42:2.**

[27] **Piskei ha-Rosh, Kiddushin 13; Mord'khai Kiddushin 531-534; T'shuvot ha-Ran 30; T'shuvot ha-Rivash 266; Hiddushei ha-Rashba Gitin 81b; SA EH 42:2.**

[28] **Rema, supra n. 26.**

[29] **T'shuvot Malbushei Yom Tov 2:5; T'shuvot Birkat Kohen 42; T'shuvot Ein Yitzhak EH 2:64; Maharsham, supra n. 13; T'shuvot Shema Shlomo, 1, EH 6(8), vol. 4, EH 2; Sha'arei Tzion, supra n.12; Tzit Eliezer, supra n. 12; File no. 92507/1, Be'air Sheva Regional Beit Din, March 29, 2009.**

[30] **Beit Yosef Tur EH 42 (end) in the name of Rif. See T'shuvot Simhat Yom Tov 75; T'shuvot Yabia Omer 6, EH 10.**

[31] **Simhat Yom Tov, supra n. 30; T'shuvot Yabia Omer, supra n. 30.**

two doubts, accompanied by the doubt that possibly Rambam agrees that we are not concerned with a kiddushin performed in the presence of one witness (and his opinion that such kiddushin would be valid in accordance with divrei soferim was linked only to minyan ha-mitzvot, counting the mitzvot), were raised as affording leniency for an agunah to be freed without a get in a situation dealing with a m'sader kiddushin who did not designate witnesses.[32] In other words, we are dealing with a s'fek s'feka (a double doubt) which entails a series of two doubts that together establish a progressive weakening that the halakha exists for which the prohibition applies.

Alternatively, as propounded by Rabbi Asher Weiss, in a situation such as ours where we are relying in part upon a minority opinion, if the case also features a s'fek s'feka that is grounded in rishonim of stature and their views have been memorialized in the works of aharonim (later authorities), we are permitted, assuming the husband refuses to give a get, to free her based upon the combination of a minority opinion and a s'fek s'feka.[33] In our scenario, the s'fek s'feka is linked to Rif and Rambam who are eminent rishonim of Torah scholarship and their views are considered by aharonim such as Beit Yosef, Rabbi Algazi and Rabbi Yosef (as we mentioned in the original psak din), therefore the s'fek s'feka ought to be recognized.[34]

In short, we may rely upon a s'fek s'feka either (1) when it is a matter of igun or (2) we also rely upon the minority view of Ritva.

Moreover, in addition to the first s'fek s'feka, there is a second one. In our case, we mentioned in our original ruling, we have such a double doubt. It is possible that the halakha follows the Shulhan Aruch and numerous Poskim that would invalidate a kiddushin performed in the presence of one qualified witness.[35] And if we concur with Rema's posture and Rabbi Spektor's ruling that in a situation of an agunah the kiddushin is invalid if it has been performed in the presence of one witness,[36] we may invoke a lenient view of nullifying (bitul) the kiddushin.

Furthermore, as we know, a s'fek s'feka is defined in the Talmud as a series of two doubts that together establish a progressive weakening of the probability that the facts exist for which the prohibition applies.[37] In our scenario, there is a s'fek s'feka which entails a factual uncertainty. There is a doubt whether the one witness to the act of kiddushin is Torah observant. And, even if he is a qualified witness, there exists the husband's claim that he is non-Jewish which raises an additional factual doubt regarding the kiddushin's validity. Since we were unable to determine

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[32] T'shuvot Yabia Omer, supra n. 30 at subsection 7.

[33] T'shuvot Minhat Asher 2: 95.

[34] **Please note that in our *psak* we advanced a *s'fek s'feka* and here we advanced a *third s'fek* in order to give a full presentation of R. Yosef's view. Our conclusion is the same regardless if we advance two or three doubts.**

[35] SA EH 42:2; Otzar ha-Pos'kim EH 42:2(18).

[36] **Rema, SA EH 42:2; Ein Yitzhak, supra n. 29. And according to numerous *Pos'kim*, where there is a *s'fek s'feka*, there would be no grounds to endorse Rema's position. Perhaps the execution of *kiddushin* in the presence of one witness is invalid and given that that there are doubts for other reasons regarding the validity of the *kiddushin* one may rule leniently. See Otzar ha-Pos'kim EH 42:21(4).**

[37] Ketubot 9a; Niddah 33a.

the husband's personal status from a third party and as he was untrustworthy because he reneged on the divorce agreement which transferred to him marital assets in exchange for giving a get, we considered his statement of being non-Jewish as "a s'fek."

Moreover, even in the absence of two eligible witnesses, seemingly in our case we should adopt Havot Yair's and Hatam Sofer's ruling that Torah committed Jews who were sitting in the audience and observed the kiddushin ceremony without either hearing the "harei at" or observing the transference of the ring from the hatan to the kallah may serve as "anan sahadei," namely we are the witnesses for the kiddushin. Had we have been dealing with a kiddushin that was invalid due to an ineligible witness, and our intent was to validate the marriage via the avenue of the onlookers in the audience to the kiddushin ceremony, we would have considered invoking the views of Havot Yair and Hatam Sofer.[38] However, in our case, we are attempting to find a means to invalidate the kiddushin due to the matter of igun! Even though many contend that there is a m'sorah, a tradition in de'var ervah, in matters of sexuality, we must factor into consideration the entire spectrum of strict views.[39] In a situation of igun, numerous Pos'kim contend that one is to rule leniently.[40] As Rabbi Sinai Sapir stresses,[41]

"In matters such as those of involving agunot, it is improper to collect stringencies…In this situation, 'the strength of leniency is more powerful,' since we are concerned with halakhot involving lives…"

Consequently, our panel refrained from aligning ourselves with Havot Yair's and Hatam Sofer's views.

Moreover, many Pos'kim reject their approach.[42] Among the authorities in contemporary times who align themselves with opposing their position is Rabbi Elyashiv, Rabbi Yosef, Rabbi A. Weiss and Rabbi Tzion Boaron.[43] Moreover, invoking "anan sahadi" is contingent upon the fact that the m'sader kiddushin is Torah-observant and proficient in the halakhot of seder kiddushin v'nissuin in particular.[44] The fact that in our case there possibly was only one qualified witness under the huppah and the unawareness of the halakhic prudence of following the practice of designating witnesses, is testimony to the m'sader's lack of halakhic expertise. (In facts, months subsequent to rendering our psak din, we were informed that his kiddushin are not recognized by the Israeli rabbanut, Israel's Chief Rabbinate).

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[38] T'shuvot Havot Yair 19; T'shuvot Hatam Sofer EH 1:100 which is cited by Pithei Teshuva, SA EH 42:11

[39] **T'shuvot Kiddushat Yom Tov 9; Aruch ha-Shulhan EH 42:2; T'shuvot Sha'arei Rahamim Franco EH 19; T'shuvot Pnei Yitzhak 1:10,13**

[40] T'shuvot Simhat Yom Tov 12; T'shuvot Hayyim ve-Shalom 2:110; T'shuvot Yabia Omeir 7, EH 8(19)

[41] T'shuvot Minhat Ani 51.

[42] See T'shuvot Mahari Weil 7; T'shuvot Mishpetei Shmuel 20; T'shuvot Shem Arye 1:31; T'shuvot Tzit Eliezer 8:37 in the name of Maharil, Maharshach and Emunat Shmuel; T'shuvot Ohr Lee 73b; T'shuvot Ein Yitzhak 2:64

[43] **Rabbi Yosef Elyashiv ("** *me-pe ha-shemuah*"**-oral tradition); T'shuvot Yabia Omer 8, EH 3, 8(5);T'shuvot Minhat Asher 2: 83;T'shuvot Sha'arei Tzion 2:11, 3:22**

[44] Shem Arye, supra n. 41; Iggerot Moshe EH 1:76-77; T'shuvot Tzit Eliezer 8:37.

Despite the halakhic shortcoming regarding the presence required presence of two qualified witnesses, nevertheless may one invoke the rule of "ein adam oseh b'ilato b'ilat z'nuit," a Jew does not engage in sexual relations as an act of fornification? Consequently, after the kiddushin, the act of biah, sexual intercourse would consummate the marriage. Applying this rule presumes that the couple were religiously committed to a Torah way of life including compliance with the halakhot of family purity at the time of the marriage.[45] The mere living together as a husband and wife l'shem ishut of kiddushin, to be conscious that the couple is living together to the exclusion of others based upon a halakhic imperative rather than cohabitating with each other devoid of halakhic intent is the desirandum.[46] We understand that at the inception of the marriage the couple was not Torah observant and therefore the rule of "ein adam oseh b'ilato b'ilat z'nuit" cannot be applied.

Moreover, since the marriage was performed in a public setting and the couple lived together for a few years there is a "kol kiddushin" (loosely translated- a rumor of marriage). Lest the community assume that a wife can remarry without the issuance of a get [47]should the kol trump the fact that there was one witness, albeit invalid, under the huppah during the time of kiddushin and the couple should be halakhically married and a get ought to be required?[48] Following in the footsteps of other Pos'kim, we may, in the wake of p'sulei eduth, (invalid witnesses), we may nullify the kol kiddushin.[49] Furthermore, even those authorities who contend that the kol outweighs the formal impropriety of the kiddushin,[50] in the situation of igun, the marriage may be voided.[51] Finally, the plaintiff's plea that her husband was a non-Jew, a plea which we could not collaborate, raises a doubt regarding the validity of the kiddushin.

Based upon the foregoing, in the light of the absence of witness designation at the kiddushin, in accordance with Ritva and others, as well as various doubts regarding the effectiveness of this kiddushin, the act never transpired. Therefore, the panel concluded that Beth is free to marry without a get.

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[45] **Mishnah Torah, Gerushin 10:19; T'shuvot ha-Rivash 6; T'shuvot Terumat ha-Deshen 209; T'shuvot ha-Radvaz 1:351; SA, EH 26:1, 33:1**

[46] Iggerot Moshe EH 1: 74-77.

[47] Rashi, Gittin 89a, s.v. meimar amrei; Nimukei Yosef, Gittin 89a.

[48] **Yevamot 52a, 94a; Gittin 84a; SA EH 6:10, 46:1-7.Even in the wake of two invalid witnesses and in the case of *igun* for eight years, Rabbi A. Walkin refused to free the *agunah* without a *get*. See T'shuvot Zekan Aharon 1:81.**

[49]T'shuvot Beit Yosef 2; T'shuvot Maharhash 76; T'shuvot Rabbi Akiva Eiger, Mahadura Tinyana, 45, page 19(a).

[50] T'shuvot Maharik, shoresh 87 (110); T'shuvot Maharashdam EH 33, 120.

[51] **Beit Meir, EH 46; T'shuvot Tzemach Tzedek (Lubavitch) 91(9); T'shuvot Noda be-Yehuda, Mahadura Kama 65; Pithei Teshuva, SA EH 43: 2.**