INTERNATIONAL BEIT DIN
בית דין בינלאומי לעניני אישות

File no. 147

Becky (Plaintiff) vs. Avner (Respondent)
Names and dates have been changed to preserve anonymity of parties

The Facts

The plaintiff, (hereinafter "Becky") appeared before us, the International Beit Din, seeking relief from the tragedy that has befallen her. She is a young woman of 25 years old who married the respondent, (hereinafter "Avner") four years ago.

1. Arguments of the Plaintiff

According to Becky, Avner displayed signs of depression already on their wedding night. When she asked about his mood, Avner answered that he was nervous and depressed. Then, in the first few weeks of their marriage, Becky noticed Avner exhibiting very strange behavior; he was also both physically and emotionally violent toward her. The strange behavior of the respondent, both before and after the wedding, included the following acts: attempted suicide in 2010; remaining at home for extended periods without working; sleeping almost the whole day long without doing anything, and the constant use of drugs. Moreover, Avner was hospitalized in a psychiatric hospital in the United States in the summer of 2010.

This situation continued for about a year after they were married, when it finally became clear to Becky that Avner's situation and all his strange behavior were the direct result of a serious psychological situation, and that she had no option but to leave him. Becky arrived at this conclusion after consulting with professionals - psychologists and psychiatrists - who explained to her that her husband's disease was not simply a passing depression, but was a very dangerous illness, which would only worsen without intensive treatment that required Avner's cooperation. Therefore, after internalizing the gravity of the situation and after several months elapsed during which they had no intimate relations, in August 2013 Becky left Avner.

Becky claims that the Avner's behavior stems from a mental illness from which he was suffering long before they were married. Avner did not tell Becky about his illness, despite the fact that he himself already knew before the marriage that he was ill and that he had been depressed for a long time; he had even been treated by psychologists and psychiatrists. Similarly, it emerged that his ongoing use of drugs began prior to the wedding.

In 2014, the Beth Din of America issued a judgment obligating Avner to give Becky a *get*. To date, Avner has adamantly refused to give his wife a *get*; it should be noted that the husband refuses to appear before the Beth Din of America (BDA) despite the fact that he signed a Pre-Nuptial Agreement. This Agreement includes an arbitration clause whereby the signatories authorize the BDA to adjudicate matters that are connected to the *get*, and every beit din has been authorized in writing by the BDA to adjudicate in this matter. This woman is an *agunah*, chained by marriage to a man who was ill long before the wedding; the plaintiff therefore has asked this International Beit Din to investigate the matter and to decide if it is possible to dissolve her marriage with the respondent on the grounds of a mistaken transaction in relation to the *kiddushin*.

2. Evidence and Additional Details concerning the Respondent's Illness

The illness from which the respondent is suffering is bipolar disorder (manic depression).

In this regard, a very important document was submitted to the International Beit Din. In 2010, the respondent saw a psychiatrist, who gave him a document noting the code of the disease, which was 301:13. According to the DSM (Diagnostic and Statistical Manual of Mental Disorders), this is a bipolar disorder of the cyclothymic type – a moderate version of bipolar disorder. According to the psychiatrist's findings, the respondent was already suffering from this disorder at least two years prior to the wedding. Checks that were made out to the psychiatrist were also submitted to us.

Moreover, one of the respondent's friends testified before this Beit Din that the respondent was not sane and had acted strangely prior to his marriage to the plaintiff. Another friend of the respondent testified that the respondent told him that he had been suffering from bipolar disorder for a long time, and he absolutely does not want to take appropriate medication.

Furthermore, one of the respondent's friends told the respondent's mother innocuously that the respondent would run about the streets of New York naked – which is one of the signs of an insane person mentioned in the Gemara (*Hagiga* 3a). Even though this account of the respondent's conduct to his mother was given after the parties had separated, it nevertheless indicates the seriousness of the respondent's illness.

In addition to the deviant and abnormal behaviors described above, the following incidents that were brought to the attention of the Beit Din in the course of its deliberations, are relevant: After the *vort* [part of the engagement celebration] in June 2011, the respondent disappeared for several weeks in order to "be alone," without informing or discussing this with his new fiancée. In addition, in July 2012, in order to prove his daring, he committed an act of fraud and stole into the home of Henry Kissinger, who was the US Secretary of State during Richard Nixon's presidency.

3. Respondent's Refusal to Give a *Get*

The details of the case may be summarized as follows:

The plaintiff claims that the respondent refuses to give her a *get* and that she is an *agunah*, bound by the chains of marriage, to a person who was suffering from a serious mental illness well before she married him. The wife knew nothing about his illness prior to the marriage.

The ramifications of the bipolar disorder from which the respondent is suffering, especially in view of the fact that he refuses to comply with doctor's orders to take medication, are very serious. An expert psychologist who occasionally advises the Beit Din told the Court that if a patient does not comply with doctors' orders to treat this type of illness, the illness is liable to grow worse, to the extent that the patient's brain will be damaged not only psychologically but physically as well. In other words, there will be a physical injury and defect, apart from the psychological ones.

The husband was summoned three times by the BDA and refused to appear before it to adjudicate the plaintiff's suit for divorce. In addition, the circumstances of the case and the legal constraints in the USA on enforcing the divorce judgments of a Beit Din leave Avner the power to refuse Becky a gett. Fortunately, we have a different halakhic solution to release Becky from her *aginut*.

In cases of agunot, we cannot simply issue a judgment to obligate a divorce and then wash our hands of the matter; rather, we must act tirelessly to find a solution to the plight of the woman who has come before us, as stated by the pupil of Bah (Rabbi Menahem Mendel Shtangi in a question to his teacher: *Resp. Bah Hahadashot* 64),[1] who wrote:

> Do not consider it conceit on my part that I have intervened in these matters, and believe me that I am truly lowly, but I would do this and more in order to effect even a minor leniency in relation to the major challenge of resolving *agunah* problems; and in this context, Solomon also said "…and behold the tears of such

[1] And see further the judgment of the Rishon LeZion and President of the Supreme Rabbinical Court, Rabbi Yitzhak Yosef in App.(Supreme Rabbinical Court) 996047/2 (25.12.2014), citing many authorities on this matter.

> as were oppressed, and they had no comforter," and whosoever releases an *agunah* is accounted as if he rebuilt one of the ruins of Jerusalem on high.

Following this reasoning, the Beit Din therefore granted the plaintiff's request to investigate the possibility of invalidating her marriage to the respondent and releasing her from the distressing *igun* which she has endured for three years.

Invalidating *Kiddushin* on Grounds of Mistake Due to a Defect in the Husband

The mishna and gemara in *Ketubot* (72b) deal with a man who married a woman thinking that she had no defects, and she was later found to have defects; they discuss the question of invalidating the *kiddushin* on grounds of mistake when a defect is found in the woman. With respect to a man, however, we do not find a similar discussion in the gemara. And indeed, Beit Meir (*Even ha-Ezer* 154:1) writes as follows:

> This is the difference between a man and a woman, for with respect to a man, we say that there is a presumption that he does not accept defects, even if he did not make a stipulation to this effect. This is not the case with a woman, who will accept any man: if she did not investigate whether he had defects and did not stipulate, then we say that she considered the situation and accepted it.

Beit Meir holds this to be the *halakhah* in practice. Accordingly, it would appear that the *kiddushin* cannot be voided when the wife seeks to have the marriage invalidated due to a defect in her husband.

Indeed, other authorities are of the same opinion. *Resp. Tashbetz* (1:1), for example, deals with the case of a wife who discovered that her husband was impotent, and some rabbis of Italy and Ashkenaz released this wife on grounds of a mistaken transaction; Tashbetz holds that this is not sufficient in order to release the woman, saying as follows:

> For it is possible that this [affliction] developed after the *kiddushin* … and…. it is possible …that he will be cured of the illness [….] And the case of the old man who married is proof. And if you were to say that in such a case the *kiddushin* are void, this would result in many women not being married to their husbands.

The reasoning behind this view is that when a wife discovers a defect in her husband, this does not indicate a mistaken transaction that invalidates *kiddushin*, due to the presumption *tav lemaitav tan du* (she prefers to be together), i.e., a woman is satisfied with any husband rather than none, as Beit Meir wrote above (and see further, *Otzar ha-Poskim, Even ha-Ezer* 39:5:16).

Among the contemporary sages supporting this view is Rabbi Y. E. Henkin in *Perushai Ivra* (p. 46) who stated unequivocally that "there is no halakhah allowing the

invalidation of *kiddushin*, for any defect whatsoever, and this has never been the practice."

However, there are some authorities who learned from the passage in *Ketubot* discussing coercion of a husband to divorce on grounds of defects (*Ketubot* 77a-b), that a woman, too, can invalidate *kiddushin* on grounds of a defect in the husband, and the discussion of this point amongst the authorities begins with an explanation of the words of Beit Shmuel who wrote as follows (*Shulhan Aruch, Even HaEzer. Beit Shmuel* 154:2):

> We learned in the mishna that we compel a husband to divorce whether the defects existed before the marriage or whether they only developed thereafter. Bah explains that the reference to premarital conditions is to cases in which she had no knowledge of the defect. However, the previous mishna also discusses defects that existed before the marriage, and of which his wife had no knowledge, for which we compel him to divorce her. According to Bah, the difference between the two mishnayot is in relation to defects that developed after the marriage. If the defect is bad breath, then we compel him to divorce her, but we do not compel in relation to other defects. However, in any case in which she did not know, it is a mistaken transaction and we compel him to divorce her.

Bayit Hadash (*ibid.*, 2) and Beit Shmuel explain that according to Ramah (*Tur, ibid.*; Ran, *Ketubot* 36a on *Rif*, s.v. *mipnei*, Meiri, *Sefer HaBehirah Ketubot*, 77a) and Maimonides (*Mishneh Torah, Ishut* 25:11, as his view was understood by Ran *ibid.*; Maggid Mishneh, *ibid.*; Gra, *Even ha-Ezer* 154:4), the Sages (*mKetubot* 7:10) are of the opinion that even if the wife knew about the defect and merely did not make a stipulation in relation thereto, the husband is not compelled to divorce her, because the wife considered and accepted the situation. It must be explained that the beginning of the mishna whereby the husband is compelled to divorce her for major defects, whether they existed prior to the marriage or arose after the marriage, is according to the opinion of the Sages, and the case is one in which the woman did not know about the flaws; even according to them, therefore, the husband is to be compelled to divorce her. Beit Shmuel adds that this laws also applies to other defects with which the previous mishna deals (ibid., 9), for the halakhic principle is that of mistaken transaction due to the woman's lack of knowledge, and as such, the particular nature of the flaw is immaterial, for had she known about it she would not have married this husband.

According to Beit Shmuel, the dispute between Rav Yehuda and Hiya Bar Abba (*Ketubot* 77a) about whether the first mishna (*ibid.*, 9) turns on defects that existed prior to the marriage where the wife knew about them, or defects that came about after the marriage, does not concern defects that were present before the marriage of

which the wife was unaware, for Rabbi Yehuda and Hiya Bar Abba did not disagree about those:

> And you should not ask why they did not formulate the question as follows: that one view is that the defects existed but she did not know, and how much more if they developed after the marriage. And the one who says they developed [after the marriage] rules that it is a mistaken transaction. Hence we may conclude that it is unanimously accepted that in such a case, the marriage is a mistaken transaction.

However, Beit Shmuel offers an alternative explanation:

> And Bah explains [the above gemara] and in his view, Ramah's opinion is that we do not compel him to divorce her for defects, even if they existed and she did not know, and this is definitely the case according to the other authorities, all of whom maintain that all references to pre-existing conditions are to be understood as defects of which she was aware.

Nevertheless, he concludes that according to all authorities, the husband is compelled to divorce the wife even in respect of defects that are not major, if the wife did not know about them.

In all events, from Beit Shmuel's explanation of the talmudic discussion it emerges clearly that the wife's lack of knowledge about the husband's defects at the time of the marriage is defined as a mistaken transaction, and the law applying in that case is the same as the law applying to a man who did not know about the wife's defects.

The authorities in recent generations questioned Beit Shmuel's position, for if there is a claim of mistaken transaction, why is it necessary to compel the *get*? In this regard, Rabbi Tzvi P. Frank (*Resp. Har Tzvi*, *Even HaEzer 2:*181) wrote that Beit Shmuel holds that this is a case of doubtful mistaken transaction, and therefore a *get* is necessary, but only in relation to moderate defects; in relation to major defects, Beit Shmuel too believes that a *get* is not necessary. Rabbi Frank wrote as follows:

> From here on one must say that according to Beit Shmuel as well, who in discussing a person who had defects said this was a mistaken transaction and he is compelled to release her, that this means that she requires a *get*, that is, in relation to moderate defects, about which the rabbi had doubts, for maybe she was reconciled to the situation, as we ruled in relation to her defects; but in relation to a major defect [in the husband], it is a proven assessment [*umdena de-mukhah*] that she would not have given herself in marriage with this in mind (*ad'atah dehakhi*), and one can very well conclude that she is released without a *get*, for the *kiddushin* are invalidated retroactively.

As a matter of practical *halakhah*, the opinion of Beit Shmuel can be relied upon in this matter, and the dayanim of the Supreme Rabbinical Court (the Rishon LeZion and President of the Supreme Rabbinical Court, Rabbi Yitzhak Yosef; the Ashkenazi

Chief Rabbi, Rabbi David Baruch Lau, and Rabbi Zion Elgrabli, in App. [Supreme Rabbinical Court] 996047/2 (25.12.2014)), as well as the dayanim of the Haifa Regional Rabbinical Court (Rabbi Maimon Nahari, Rabbi Yosef Yagoda and Rabbi Itzhak Rappaport, in File (Haifa Region) 870175/4 (29.12.2014)), did so in dealing with the invalidation of *kiddushin* on the grounds of the defect – mental illness (schizophrenia) – of the husband.

True, Hazon Ish (*Even ha-Ezer* 69:23) questioned Beit Shmuel: "One must ask why he should be compelled by virtue of the doubt: if there was *kiddushin* then he is not required to divorce her, and if she is not married she does not require a *get*, and since he wants her why should he be compelled to release her?" for this related to other defects which in themselves do not constitute grounds for compelling divorce. He arrives at his conclusion on the basis of the discussion in *Bava Kamma* (110b) and *Resp. Maharam of Rothenburg* (pt. 4, Prague Edition, 1000:22, as quoted in Mordekhai, *Yevamot* 4:29-30) that the *kiddushin* are certainly valid (cf. what he says in 118:3). Indeed, his view brings us back to the fundamental question: whether, and to what extent, must it be said that the wife is prepared in advance to accept and reconcile herself to the possibility of a married life of suffering with a man who has a defect. Therefore we must review the discussion in *Bava Kamma* and determine whether there is an explicit, clear halakhic source for invalidating the *kiddushin* due to a defect in the man.

4. The Presumption *Tav Lemeitav Tan Du*

The mishna (*Bava Kamma* 9:12) states: "If [however] he gave the money to the men of the *mishmar* and died [without offering his *asham* sacrifice], his heirs cannot exact [the money] from their possession." The gemara says as follows (*Bava Kamma* 110b):

> Abaye said, Learn from this that [the return of] the [robbed] money provides half the atonement [for the robber's sin]. For if it would not atone [at all], I would say [that since the robber did not ultimately offer his *asham* [the money] returns to his heirs. What is the reason? He did not give it to [the Kohanim] with this in mind. … But [if Abaye's argument is correct] then a *yevamah* who falls 'for *yibum* consideration] before her brother-in-law' who is afflicted with boils [and as a result is physically repulsive to her] should go out without *halitzah*, for she did not give herself in marriage [to his brother] with this in mind. [The gemara answers] There, we [ourselves can] bear witness that she is content with [marrying her husband in] any [event, even though she might ultimately become bound to his repulsive brother] in accordance with [a teaching of] Reish Lakish. For Reish Lakish said, "It is better to live as two together than to live alone."

Rashi, s.v. *deminah*, explains, "She is content – to marry the first one who had no defects, despite the chance that if he should die she would have to marry his brother."

In other words, *tav lemeitav tan du* does not apply to the connection with the *yavam*, but only with the husband. She married her husband who did not have a defect or a disease, and assumed the risk that she might be required to marry a husband stricken with boils. However, the presumption *tav lemeitav tan du* was clearly not referring to a case in which the first husband himself was afflicted with boils; according to several of the later authorities (see, e.g., *Resp. Beit Halevi,* pt. 3:3), this latter is a case of a mistaken transaction and the *kiddushin* are null and void, and she is released from the marriage without requiring a *get*.

The reason for the difference between a husband and a *yavam* is that with respect to the former, the *kiddushin* takes place with the consent of the wife and the husband, and therefore an analogy can be drawn between the laws of *kiddushin* and civil law in which case, too, transactions take place with the consent of the two parties, and it is possible to claim mistake or *umdena demukhah* (proven assessment) and to void the *kiddushin*, as we will elucidate below. This was the explanation given in *Resp. Mahari Kitzbi* (no. 10), the pupil of Maharit. He states as follows:

> And you can infer from there, that as far as the wife of the apostate himself is concerned, were it not for the fact that divorce does not depend upon her, one would have been able to argue that she should have her marriage declared a mistaken one purely because of the fact that her husband has become a voluntary apostate and did not give her a get. Clearly she would never have given herself in marriage with this in mind, since no one can live with an apostate.

5. Exceptions to the Presumption *tav lemeitav*

The Opinion of Rabbi Joseph Baer Soloveitchik

We can already see that the presumption *tav lemeitav* is not without bounds, and that there are exceptions to it. We will proceed to discuss other exceptions, cases in which this presumption is not followed. We would like to cite other examples from the great authorities underlying the assertion that the presumption *tav lemeitav* has exceptions.

Rabbi Moshe Feinstein, in the above-cited responsum, concludes his responsum by stating:

> But there are concerns, even if there is a major defect, for Reish Lakish said of a woman, *tav lemeitav tan du* etc., and see *Biur Halakhah* 3, and *Ein Yitzhak* 1:24 and *Be'er Yithak* 4, who elaborated on the dictum *tav lemeitav tan du* etc., and said that there is concern about violating a rabbinic prohibition. But in one responsum, I discussed the case of the defect of impotence, and said that the woman does not need a *get* if she did not know of the situation; even in relation to a *derabbanan* law this is clear and correct. And the same must be ruled in relation to the defect of insanity: if it is not possible to obtain a *get* she should be released by virtue of mistaken *kiddushin*.

In fact, in the present case the plaintiff actually fled from the house because she was frightened of her husband, and it was impossible for her to live in such fear all her life; with respect to this wife there is a contrary presumption, and the reality is that she preferred to flee rather than to live with him in the same house.

And see below where we quote *Resp. Maharsham* 61, that if the couple is not actually living together, one does not say *tav lemeitav tan du*.

Furthermore, the basis for saying that the *halakha* is decided according to *tav lemeitav* is that Reish Lakish said that a woman preferred to live together etc., i.e., that in her heart she does not want to be divorced but rather to continue living with her husband even though he is ill. But today, we see with our own eyes that nature has changed (in the words of Tosafot, *Mo'ed Katan* 11a, s.v. *kavra*) and we know that many women do not wish to live with a sick husband, and that in fact, the presumption *tav lemeitav tan du* has been refuted (and see *Resp. Hashavit*, Rabbi Shmuel Tuvia Stern, 7:20, who advances a similar point).

However, because my rabbi and my teacher Rabbi J. B. Soloveitchik, made public statements which appear to contradict the above, we ought to examine what he said before proceeding.

In an address in 1975 to the Convention of the Rabbinical Council of America, Rabbi Soloveitchik said[2] that the halakhic presumptions cannot be rebutted, including the presumption *tav lemeitav*, which is an "existential *chazakah* (presumption)." This presumption is so entrenched and strong that it cannot change. I was present when the Rav said these things, and I, in my humbleness, did not understand the basis for what Rabbi Soloveitchik was saying, for there are quite a number of presumptions that are liable to change, and this is adopted as practical *halakhah*. For example, the presumption that "a person does not have intercourse as an act of fornication" and others.

From the above-cited words of Meiri in *Yevamot* (108b), "I would say that in the case of the wife of an apostate, it is to her benefit to be divorced …," too, it appears clear that the presumption *tav lemeitav* is not an "existential presumption" as Rabbi Soloveitchik asserted.[3] And my mind was not at rest until I saw the following in Rabbi Aharon Lichtenstein's work (*Shi'urei Harav Aharon Lichtenstein*, *Gittin*, 5769, p. 338, and see the complete discussion there, pp. 333-347):

> Rabbi J. B. Soloveitchik proceeded in a different direction from these Rishonim. In his opinion, the presumption *tav lemeitav tan du* is not only an assessment

[2] Rabbi Joseph Baer Soloveitchik, *"Talmud Torah and Kabalas Ol Malchus Shamayim,"* (Partial transcript of an address of Rabbi Joseph Baer Soloveitchik zt"l to the RCA Convention, 1975, on the topic of Gerut, Transcribed by Eitan Fiorino, INTERNET PARSHA SHEET ON VAESCHANAN, 5766, 11TH CYCLE, www.parsha.net/pdf/Devarim/Vaeschanan66.pdf

[3] See further: Rabbi Shmuel Tuvia Stern, Resp. Hashavit 7:20; Rabbi Moshe Be'eri, *Is the Presumption* 'Tav Lemeitav Tan Du' *Liable to Change*? 28 TEHUMIN 64 (5768).

concerning the state of mind of the wife, but it is a fixed, solid halakhic principle. The *halakhah* determines that the state of marriage is the best state for the woman. This principle does not change in accordance with the opinion of some woman or another, and not even in accordance with the changing moods of society.

It is possible to draw a distinction in this context between different areas in which the principle *tav lemeitav tan du* appears in the *halakhah*. The gemara in *Kiddushin* (41a) deals with a woman who became betrothed to a certain man without seeing him. There is a concern that when she sees him she will find him repulsive, and will regret the marriage. However, the gemara states that there is no need for this concern, for *tav lemeitav tan du milemeitav armelu*. Obviously the woman prefers in any case to be married, notwithstanding the repulsive thing she discovered in her husband, and there is no mistaken transaction here.

It is reasonable to assume that in this case, Rabbi Soloveitchik too would agree that there is no unchangeable halakhic determination here, but only an assessment of the woman's state of mind; we assess that the woman in fact prefers to be married despite what she has discovered and therefore the *kiddushin* are not void. If we were to be convinced with absolute certainty that the woman in question did indeed regret her marriage to this man, we would not say *tav lemeitav tan du*, and the *kiddushin* would be invalidated retroactively.

6. The Presumption *Tav Lemeitav* in the Absence of Knowledge of the Defect Prior to the *Kiddushin*

However, there is a problem with the above-mentioned mishna in *Ketubot* (7:10), for as stated, it refers only to compelling the divorce; there is no mention of invalidating the *kiddushin*:

> And these [are the cases in which] they compel him to divorce [his wife]: one stricken with leprosy; or one afflicted with polypus; or one who gathers dogs' dung; or a copper-smelter; or a tanner, whether [these circumstances] existed before they were married or after they were married. And with regard to them all, Rabbi Meir said, "Even though he stipulated with her [in advance], she may say, 'I thought I could accept it, but now [I realize that] I cannot.'" But the Sages say, "She must accept it against her will, except for one smitten with leprosy, because [intercourse will] enervate him."

It may be said simply that the mishna in *Ketubot* deals with a wife who knew about her husband's defect before they were married, but she thought to herself that she could live with this man; after they were married, she found she could no longer tolerate it and she could no longer live with him, and the Sages therefore compelled him to divorce her. In *Bava Kamma*, however, the discussion relates to a case in

which she did not know about the defect, and in such a case we do not say *tav lemeitav.*

In truth, the answer depends on the dispute among the Rishonim and the Aharonim mentioned above in their discussion of the Beit Shmuel (104:2). Bayit Hadash (subsec. 2) and Beit Shmuel explain that according to the Rishonim (Ramah and his followers) who hold that the Sages disagreed with R. Meir that neither is the husband compelled to divorce her in the case that she knew about the defects, the first part of the mishna deals with a wife who did not know, and Bah understands this to refer only to a case of compelling the husband, but not of mistaken transaction, and Beit Shmuel understands it as a case of erroneous transaction as we have said. Based on the opinion of the Rishonim (Rashba, *Ketubot* 77a, s.v. *ve'elu*; Ritba, *ad loc.*, s.v. *gemara kesevura*; Tur, *Even ha-Ezer*, 104), who hold that the Sages disagreed only when he made a stipulation about her, Beit Shmuel explains that the beginning of the discussion deals with a woman who knew according to the Sages. But we do not learn what law applies to a woman who did not know, and we can say that the law is that this woman may claim that the *kiddushin* were mistaken. A similar conclusion may be arrived at on the basis of the approaches of Or Hagadol (*Responsa* 1:5), and Hazon Ish (*Even ha-Ezer*, 69:23), in their understanding of Ramah and his school. And this is also a way of understanding Meiri, i.e., that the beginning of the discussion in the mishna is the opinion of R. Meir, and it is confined to the issue of compelling the husband to give a *get* in the case in which the wife knew about the defects, but the opinion of the Sages is unknown where the wife did is unaware of the defects.

We see, therefore, that there is a basis for explaining the discussions in a manner in which they will not be contradictory. In *Ketubot*, the discussion concerns the wife who knew of the defects, and the issue, therefore, is that of compelling the husband to give a *get*, whereas in *Bava Kamma* the discussion focuses upon the wife who did not know of the defects, and the issue, therefore is that of invalidating the *kiddushin*. Such an explanation was offered by Rabbi Benjamin Arieh HaCohen Weiss in *Resp. Even Yekara* (3rd ed., no. 53) and other Aharonim, but despite the fact that he is of the opinion that according to the fundamental law, it is possible to void the *kiddushin* on grounds of mistake, he was wary of doing so in practice, and limited his opinion to theory only.

Rejecting Even Yekara's conclusion, in *Resp. Iggrot Moshe* (*Even ha-Ezer* 1:89), Rabbi Moshe Feinstein also cites this explanation, and goes even one step further, releasing the married woman by invalidating the *kiddushin* in practice.

In another responsum (*Iggrot Moshe, Even ha-Ezer* 1:80), in the matter of a husband who was insane – which is a major defect – and his wife did not know about it, Rabbi Feinstein held that in such a case, the *kiddushin* can be invalidated.

Since we are dealing with the decisions of the author of *Iggrot Moshe*, we should look at a case which remained unpublished for a lengthy period, and from which one may

learn about Rabbi Feinstein's approach to invalidating *kiddushin* on grounds of mistaken transaction (*Iggrot Moshe*, *Even ha-Ezer* 3:48). The details of the case are as follows: A woman married a man, and it transpired with certainty that he was impotent. The woman asked for a divorce, and the husband refused. After almost a year, the husband committed suicide; he was survived by brothers, the oldest of whom was then around five years old. The parents of this *yavam* (the oldest surviving brother) would not allow him to perform *halitzah* (even upon attaining majority), and the wife appealed to the Beit Din to release her from her *igun*, on the grounds of mistaken transaction. The Rabbis of Eretz Israel sent the question to Rabbi Feinstein, who ruled that the woman was to be released from the marriage:

> In the matter of a husband who was impotent, and it was impossible to obtain a *get* from him: if this is established, it is certainly a major defect, of the type in relation to which the law requires that the *kiddushin* be voided even though he is alive, as I explained at length in *Resp. Iggrot Moshe Even ha-Ezer* 49; and in view of the fact that the husband died, and we are dealing only with a matter of *halitzah*, and the *yavam* is a five-year old child, and the parents of the husband – due to their anger at her, for they say that it was because she left her husband that he became so depressed as not to be able to bear his pain and therefore hung himself – will not allow their son, the brother of the deceased, to release the widow even when he grows up, and she will remain an *agunah* forever, your Honors also concluded that she can be released.
>
> I see no reason to cast any doubt on this …

It should be added that subsequent to Rabbi Feinstein's ruling, the Supreme Rabbinical Court, comprising Rabbi Y. S. Elyashiv (presiding), Rabbi B. Zolti and Rabbi E. Goldschmidt, adopted the ruling of Rabbi Feinstein, and ordered another Rabbinical Court to comply with this ruling (for details of this case and its development, see Rabbi David Bass, *Voiding of Marriage on Grounds of Erroneous Transaction,* 31 TEHUMIN 291 (5771-2011)(Heb.), and see there the debate with Rabbi Eitam Henkin z"l).

Therefore, after examining the discussions in *Ketubot* and in *Bava Kamma* as they were understood by the leading authorities, one may conclude that there is a solid basis for invalidating the *kiddushin* on the grounds of mistake on the part of the wife as to the husband's defects. The Supreme Rabbinical Court ruled accordingly a little over a year ago in App. 996047/2, and it wrote to the Regional Rabbinical Court that it may rule that the *kiddushin* are void in practice on the basis of the circumstances that were established; this was also the practical ruling of the dayanim of the Haifa Regional Rabbinical Court in File 87-175/4, where in a long, reasoned judgment they demonstrated that there is a clear basis in the gemara and amongst the authorities, both Rishonim and Aharonim, to invalidate the *kiddushin* on grounds of mistake due to the husband's mental illness. The Regional Rabbinical Court even asked additional

leading dayanim to express their opinions on their judgment, and five leading judges added their affirmation to the judgment; these were (in the order of signature on the judgment): Rabbi Benjamin Be'eri (retired dayan of the Supreme Rabbinical Court); Rabbi Haggai Iserer (retired dayan of the Supreme Rabbinical Court); Rabbi Abraham Sherman (retired dayan of the Supreme Rabbinical Court); Rabbi Shlomo Fisher (retired President of the Jerusalem Rabbinical Court), and Rabbi Hayyim Gedalia Cymbalist (retired dayan of the Supreme Rabbinical Court).

7. Presumption of *Tav Lemeitav* in Relation to a Mentally Ill Husband

In *Resp. Har Zvi* (*Even HaEze*r 2:133), Rabbi Tz. P. Frank cites *Resp. Hessed le-Avraham* (Rabbi Abraham Hirsch Te'umim) on the question of the apostate, and draws an analogy from that to mental illness. He states:

> I have seen in *Hessed LeAvraham* (2nd vol., end of no. 55) in relation to our matter, that in the case of a husband who became an apostate, how much more must one say that she did not give herself in marriage with this in mind. It appears in the present matter that he became insane, and a person is not required to live together with a snake, for this is worse than a person stricken with boils, and we say that she did not give herself in marriage with this in mind, and one must rule that the *kiddushin* are void retroactively.

A closer look at what Rabbi Frank writes reveals, in my opinion, that he has said something novel.

When he says that "he became insane" means that there is a defect, he is not referring to insanity according to the standard halakhic definitions, namely, that the husband sleeps in the cemetery, loses what he is given, goes about naked etc.; rather, what defines mental illness or strange behavior as a defect is that it is impossible to live a normal life. We say that a "no-one is expected to live in a snake's pit," and in this sense the insane person is worse than a person stricken with boils, for the very essence of "insanity" is that it is impossible to make plans and to conduct life in a way that is stable, foreseeable and organized, and this is a major defect. The impossibility of communication between the couple that is caused by the "insanity" of one of the spouses causes a total upheaval in their lives.

In my humble opinion, it is important to comment on the understanding of Rabbi Frank's opinion. Hessed Abraham's responsum deals with a husband who has become an apostate, and in his opinion, from an *a fortiori* argument from a *yavam* who has become an apostate, one must say of a husband who became an apostate that *ad'atah dehakhi* – she did not give herself in marriage with this in mind. Rabbi Frank extends this *halakhah* to the case of a person who became insane, as an *a fortiori* argument from the person who was stricken with boils, for "no-one is expected to live in a snake's pit." The meaning of this with respect to a husband who is mentally ill is that

the *kiddushin* is void retroactively, not because he is deemed to be an unhealthy person, but because it is impossible to live together with him since his conduct resulting from his illness has an extremely destructive effect on his household, on his wife and his children, to the extent that life together with him is no life, and it is impossible to live together: in such a case the *kiddushin* are void, for "she was given [in marriage] to live but not for misery."

Support for this opinion is found in the approach of Rabbi Feinstein in *Resp. Iggrot Moshe* (*Even ha-Ezer* 4:113), in which he deals with a husband who, after the marriage, was found to be homosexual, and the wife wanted to invalidate the *kiddushin*. Rabbi Feinstein writes that if the husband acted thus due to his evil nature, then the case is one of mistaken *kiddushin,* since no woman would wish to be married to a person who is so repulsive and despicable. It may be that he does these things because he is classified as being ill, i.e., that he has abnormal drives, and Rabbi Feinstein wrote that "if this is due to insanity, since he does not act in the natural way, this is certainly a defect, because an abnormal person is liable to act abnormally in other ways too."

This is not a case of an insane person according to the standard halakhic definition of insanity (*Hagigah* 3b), i.e., he loses what he is given, sleeps in the cemetery or goes about naked etc., Rather, it is a person who does things that are abnormal, and they have become part of his character and his essence. In that case, even without a diagnosis of "insanity" it is possible to invalidate the *kiddushin*, because it is a matter of a major defect due to the fact that people can observe his abnormal behavior.

In other words, it is not the insane act that a person may commit once in a long while that renders him an insane person, but "insanities" that have become routine in his everyday life, and as a result of which life together with him has become impossible. Insanity has become part of this person's normal routine, his self and his essence, and he has no regular order and routine.

Rabbi Feinstein stated explicitly in the case of a husband who was mentally ill (*ibid.*, 80), that the main point of the argument is that it is impossible to live together with him. This is reiterated with even greater force in *Iggrot Moshe, Even ha-Ezer* 3, where he wrote as follows:

> And insanity is certainly a major defect, for he is not fit for married life at all, as it says explicitly in *Yevamot* 112 that the rabbis did not institute marriage for an insane person, since "no-one is expected to live in a snake's pit." The reason is clear: a person who became mentally ill after the marriage, if he were able to divorce, would be compelled to divorce, for it says explicitly in *Ketubot* 77 that when the dictum that "no-one is expected to live in a snake's pit" is pertinent, he is compelled to release her.

Rabbi Feinstein continues:

> Because this is a defect of the type that renders him totally unfit for married life … making him impossible to live with, therefore he would be compelled to release her. Consequently, in the case of a woman who did not know that he was mentally ill, or even if she knew but thought he was totally cured, and the disease returned and he became even more ill and totally insane after the marriage, this must be treated as a mistaken transaction that invalidates the *kiddushin*.

And see the distinction he makes between mental illness and the case discussed by Rosh (*Resp. Rosh*, 43:3, as cited in Tur, *Even ha-Ezer* 154), namely, an irascible person, who is defined as a person with bad traits but not as insane.

As stated, the Supreme Rabbinical Court too, in App. 996047/2, and the Haifa Regional Rabbinical Court, in File 870175/4, accepted as a matter of halakhic practice the position that defines a mental illness as a major defect that justifies invalidating the *kiddushin*, and as the Regional Rabbinical Court said with respect to the illness of the husband (schizophrenia):

> This affliction is deemed to be a major defect. It is impossible to conduct a normal life with a person suffering from the illness. And the most serious problem is the psychotic attacks that are part of the illness.

8. The Novel Idea of the Author of *Helkat Yoav* in Defining the Insane Person

One branch of this line of thought in defining an insane person is expressed by the author of *Helkat Yoav*. In defining the insane person, the great sage of Kinsk proposes an important new idea (*Helkat Yoav, Even ha-Ezer* 24). *Inter alia* he writes as follows:

> But in my opinion, I found an explanation for this in the responsum of Maharik, that even if she is not insane, and simply does not know how to behave and conduct herself in the home due to her silliness and naiveté, this is considered a great, major defect and he is permitted to marry another, because a woman must be a helpmate for her husband, as it is written, "I will make him a helpmate for him," and if she is not so, this is a major defect, as discussed in *Resp. Maharik* 101. The case was thus: the betrothed one lost her mind and could not be a help in any way in establishing a household, but would only wreck it in her helplessness. And for this reason Maharik cancelled the betrothal, even though the defect developed thereafter. Towards the end of the responsum he writes that even had she been properly married, the ban of Rabbenu Gershom would not apply. In that particular case, you must say that Maharik was dealing with someone who was not legally insane. For otherwise, why did he concern himself with the question of whether the prospective husband had to marry her, since an insane person is not marriageable? You

> must say that we are dealing with someone who was not halakhically insane. In any case, he wrote finally that the ban of Rabbenu Gershom does not apply. And this has already been printed in my name …
>
> But if the Beit Din sees that no man can live with her, and the household cannot function under her control, then this is surely a great defect, and the proof is not based on the [halakhic definition of] insanity, as explained in the responsum of Rosh cited in *Shulhan Arukh* 154:5….

The author of *Helkat Yaakov*, too, is of the opinion that the term "insane" does not refer only to an insane person according to the definition of the Sages, namely, a person who sleeps in the cemetery, loses what he is given, etc.; rather, "insane" means that a person is not able to function as a normal man or woman; this is also the explanation of Rabbi Tz. P. Frank. The husband has no grounds for disputing this and saying that what we are dealing with a husband who is insane, whereas *Helkat Yoav* is dealing with a woman who is insane. For we are dealing with the definition of "defect," and in the definition of "defect" the man and the woman are equal. See *Resp. Rosh* 48, *Resp. Harav Zvi*, *Even ha-Ezer* 2:181, and *Resp. Yabia Omer*, *Even ha-Ezer* 8:3.

Although I thought that what appears in *Helkat Yoav* was most original, for the author defines "insane" in a new way, I found that the author of *Divrei Hayyim*, too, believes that the definition of an insane person is not "frozen," but that it is possible to develop this idea. He says as follows (*Divrei Hayyim*, *Even ha-Ezer* 2:41):

> Concerning the permit to Mr. Abraham Moshe of Bendin to divorce his wife who has become insane and is not fit to live with her husband according to the testimony of the Rabbi, the President of the Beit Din of Bendin, may the Lord protect him, and the husband of the woman obtained a permit from a number of authorities: I too agree to a permit from one hundred rabbis.
>
> Although I saw that one rabbi disagreed, because in his opinion the woman is not insane according to the laws of the insane person as laid out in the *Shulhan Arukh* (*Yoreh Deah* 1:4), in truth, in my humble opinion, there is no need to take this into account; it is sufficient that she is not fit to live with the husband in the normal way and she acts contrary to the normal conduct of people; one hundred rabbis have the power to release him, not only in relation to an insane woman [according to the strict halakhic criteria] as I saw that some rabbis say. This is not the case, as explained in the *takkanah* that is copied in the *Resp. Maharam* [of Rothenburg, Prague edition, no. 922], and as we see in *Shev Yaakov, Even ha-Ezer* 42 and in *Resp. Bah* 93.

I am well aware that the above authorities were writing about the ban of Rabbenu Gershom; nevertheless, they define the meaning of "defect." And because they have

provided such a definition we can invoke and apply their definition of "defect" in other cases.

In all events, even if we do not say that this husband fits the halakhic definition of an insane person, but he disrupts in a serious and extreme manner the life of anyone who lives with him, it can also be said of him, clearly, that because it is impossible to live together with him, *ad'atah dehakhi* – she did not give herself in marriage with this in mind.

The ruling of Rabbi Asher Weiss

In *Resp. Minhat Asher* (1:81), Rabbi Asher Weiss discussed the case of a woman who married a man suffering from borderline personality disorder (BPD); Rabbi Weiss found grounds to release the woman, based on the opinion of Rabbi Feinstein as mentioned above.

This responsum in *Minhat Asher* contains a discussion of some of the fundamental issues with which we are concerned. I believe it would be extremely enlightening and of great utility to examine Rabbi Weiss's illuminating responsum, to discuss it and to learn its lessons.

9. Opinions Allowing Invalidation of *Kiddushin* in Cases of a Husband's Mental Illness:

a) The author of *Minhat Asher* begins his responsum by citing the dispute of the Rishonim in *Ketubot* 73a, concerning the question of whether a woman requires a *get* when the man betrothed her with a stipulation but married her without reiterating the stipulation. He cites the strict view of Rambam; but he also cites the view of Tosafot relating to the discussion in *Ketubot*, whereby major defects can be grounds for claiming mistaken *kiddushin*, "and she does not need a *get*, even *derabbanan* [emphasis in the original]."

b) He proceeds to discuss the dispute amongst the Aharonim whether "insanity" constitutes a "major defect," and he cites Maharam Schick and Malbushei Yom Tov that indeed, "insanity" is a major defect for the purpose of invalidating *kiddushin* (and as we said, we too produced a great deal of proof, particularly from the responsum of Rabbi Feinstein who ruled thus repeatedly).

c) Rabbi Weiss delved deeply into the question of whether a wife's *kiddushin* can be invalidated because her husband has a major defect, and he mentioned a dispute regarding this question: there are indeed many authorities who hold that a wife's *kiddushin* cannot be invalidated on the grounds of her husband's defect, for *tav lemeitav tan du milemeitav armelu*. Here, as we showed at the beginning of our responsum based on Rabbi Yitzhak Izik Halevy and others, the author of *Minhat*

Asher cited a collection of Aharonim who hold the contrary view, as all who read this will see, and he ends this section with the words: "Indeed those who wish to rely on these [lenient] authorities have a basis for doing so."

10. The Distinction Between the Case Discussed in *Minhat Asher* and Our Case

As Rabbi Weiss himself said, he refrained from relying on doctors and psychologists, because in the case he was discussing no actual clinical examination had been made by the psychiatrist herself; rather, she relied on one conversation that she had with the husband who suffered from a mental disorder.

In our case, the expert doctors were the doctors of the defendant; he went to them for consultation and to receive medication and treatment for his illness. It was these doctors who determined that the defendant is suffering from bipolar disorder of a particular type, and gave him instructions for treatment of the illness. Unfortunately, the defendant did not follow the doctors' orders and decided that he would cure his illness himself.

What is interesting is that Rabbi Weiss, who seems to hesitate on the question of whether mental illnesses constitute a major defect that could invalidate *kiddushin*, includes bipolar disorder as "a difficult illness with which to be afflicted." Rabbi Weiss is absolutely correct regarding this illness.

It is psychiatrists and psychologists – whose expertise is mental illness – who are able by means of purely clinical testing to determine clearly and with certainty if a person is suffering from a particular mental illness, what is its exact definition, its severity and its symptoms, and as we elucidated at the beginning of this judgment, we examined medical documents and heard testimony about the defendant's illness. There is no doubt that the defendant suffers from bipolar disorder.

It should be noted that even though the psychologist's precise diagnosis in the document submitted to this Beit Din was bipolar cyclothymic disorder which, as we have said, is a milder form of bipolar disorder, the expert psychologist testified that a person who refuses treatment for this disorder and does not take the medications prescribed by the doctors will certainly bring on not only a psychological deterioration but also a physical one. In fact, the plaintiff inhaled and smoked marijuana which is counter productive to taking care of himself.

In addition to the formal medical definition, the Beit Din heard testimony about the strange, extremely irregular conduct of the defendant: running naked in the streets of New York, disappearing from the house without telling his wife, sneaking into Henry Kissinger's house, being violent towards the plaintiff and hospitalization in a psychiatric facility. All of these episodes are weighty evidence that this is a matter of

a serious mental disturbance constituting a major defect, such that *ad'atah dehakhi* – she did not give herself in marriage with this in mind.

Before proceeding, I would like to make one comment.

One may say that the author of *Minhat Asher* would agree that the case he discussed is different from our case.

In our case, the defendant suffers from several problems:
1. He has a mental illness;
2. He is insane, as defined halakhically – for he runs naked in the marketplace, and other aberrations;
3. He is a drug user.

As we said, the Beit Din has testimony and documents about all of this. In any case, it is possible that the author of *Minhat Asher* has doubts about whether one mental illness can be defined as insanity. But in the case of three defects – about which there is testimony and documents – i.e., a case of a person who is insane, who is a drug user, and who abuses his wife – these are the signs of a major defect, and it is possible that the *Minhat Asher* too would admit that *ad'atah dehakhi* – the wife did not give herself in marriage with this in mind, and the *kiddushin* may be invalidated.

11. Distinction between a Mistake about the Factual Situation and Assessment – *Umdena*

From the abovementioned discussion of the issue in *Bava Kamma* it would appear that not only is it possible to invalidate the *kiddushin* on grounds of mistaken transaction, but that this device should be expanded. Examination of the issue reveals that there is a stronger reason than simple error – a proven assessment (*umdena demukhah*) that had the wife known that her husband would develop such a defect she would not have married him.

The gemara tells us something new: that a woman will give herself in marriage when the fear that she might be required to marry her husband's sick brother hovers over the marriage. On the other hand, the gemara concludes that there is a different consideration: a woman will prefer to live with a healthy husband rather than remain in a single state despite this concern about the leprous brother (*tav lemeitav tan du*). And indeed, some of the great Aharonim understood that this issue was a matter of an assessment (*umdena*), such as *Resp. Radakh* (9), *Resp. Noda Beyehuda* (1st ed., *Yoreh Deah* 69).

The difference between "mistake" and "assessment"?

In order to invalidate *kiddushin* on grounds of mistake as to the factual situation, two fundamental conditions must be met: that the defect must have been a major defect,

and that the spouse who is claiming mistake was not aware of it prior to the marriage. Thus, in the case of a defect that afflicted the man prior to the *kiddushin* and the woman was not aware of it, the *kiddushin* may be invalidated on grounds of defect. However, if the defect developed subsequent to the *kiddushin*, we cannot say that now, the *kiddushin* are invalid due to a mistaken transaction.

On the other hand, in relation to an assessment that she did not give herself in marriage with that in mind, it is possible to invalidate the *kiddushin* even if we say that the defect was discovered after the marriage. This is what Rabbi Meir Simcha, Head of the Beit Din in Dvinsk, wrote in *Resp. Ohr Sameah* 2:29 (Machon Yerushalayim edition.): "There are situations in which we say that there is an *umdena* even in relation to something that comes into being later … that with this in mind she did not give herself in marriage." (Subsequently, my colleague Rabbi Warburg, Director of the Beit Din, showed me that The same appeared in *Resp. She'ilot Moshe*, written by Rabbi Moshe Razin, *Even ha-Ezer* 2). And in fact, this can be explored a little more deeply. We need a somewhat better understanding of the matter of invalidating the transaction and of the relationship between mistake, *umdena* and condition.

In the *halakha* of Sale and Acquisition, we find several cases in which the transaction is voided. One possibility is that of mistaken transaction, and that occurs when the purchased item was defined by agreement, and it transpires that the item sold did not meet that definition. Another possibility of cancelling the sale is when sale was effected subject to a certain condition; if the condition is not met, the sale is void. *Shulhan Arukh* (*Hoshen Mishpat* 207:4) also mentions a case in which the transaction is not void:

> But a person who sells without a condition even though his inner thought was that he is selling subject to this and that, and even though it appears that he sold only for the purpose of doing some particular thing, and it was not done, he cannot rescind, for he did not stipulate, and *devarim shebalev einam devarim* – mere thoughts have no legal validity. And even though he said, prior to the sale, that he is selling with the intention of doing a particular thing, nevertheless, because at the time of the sale he did not say so expressly, he cannot rescind.

Rema wrote on this: "In the case where there is a proven assessment – *umdena demukhah* – the transaction is void." It must be stressed that Rema did not write this as a dispute framed in terms of "there are those who say," as he does in almost every case in which he disagrees with or wishes to cite an opinion contrary to that of the *Shulhan Arukh.* The reason would appear to be that according to Rema, the *Shulhan Arukh*, too, would concede this, and indeed Gra comments there that Rema relies on cases cited by the *Shulhan Arukh* itself elsewhere (in the case of a person who heard that his son had died overseas and gave away his property as a present; a document

fraudulently transferring property). Accordingly, this *halakhah* does not appear, fundamentally, to be in dispute, and we decide according to the *umdena demukhah*.

One of the differences between a mistaken transaction and a condition is that a condition may be made in relation to something that may or may not eventuate in the future, and the sale may then apply or be invalidated retroactively accordingly. Therefore one must establish whether the *umdena* is like a mistaken transaction, which requires the defect in the transaction to have existed at the time of the transaction, and the import of the *umdena* would be that even if the person did not explicitly state that he was buying the item for a particular reason, nevertheless it is clear that he bought it for that reason; or whether the *umdena* is like a condition, and the transaction can be rescinded by virtue of the *umdena* even when the defect develops subsequently. It would appear from Rambam (who laid down these *halakhoth* in *Mishneh Torah, Sale,* 11:9) and Shulhan Arukh themselves, that it is similar to a condition, for they cited this law in the context of the laws of conditions and not in the context of laws of mistaken sale and fraud; and from the order in which the matter is presented it can be proven that the ground for rescinding the transaction does not need to be evident at the time of the transaction. For those authorities who dealt with *umdena* it seems to be immaterial if the defect was pre-existing but discovered only after the marriage, or whether it only developed after the marriage. In either case it appears that from this aspect, *umdena demukhah* is similar to a condition (and see further in *Otzar ha-Poskim, Even ha-Ezer* 44:9).

From a responsum of Maharam of Rothenberg (*Resp. Maharam*, pt. 4, Prague edition, 1000:22, cited in *Mordekhai*, *Yevamot*, 4:29-30), which shall be discussed below, it transpires that there are instances in which we can clearly state that *ad'atah dehakhi* she did not give herself in marriage with this in mind. For example, in the case of an apostate.

And Meiri (*Yevamot* 118b, s.v. *kvar yadata*), who wrote that although it states in the Jerusalem Talmud that even if she was the wife of a rogue stricken with boils, it is still to her benefit not to be divorced due to the presumption *tav lemeitav*, nevertheless, in the case of an apostate it is to her benefit to be divorced from him. He writes as follows:

> And if my colleagues were to support me I would say that in the case of the wife of an apostate, it is to her benefit to be divorced immediately and we can do this through the agency of another, where he is in a place from which he is unable to return.

In other words, Meiri holds that there are times when it is to the woman's benefit to be divorced, and we do not say in relation to her that it is better to be married; rather we say that *ad'atah dehakhi* - she did not give herself in marriage with this in mind.

Mention should be made here of those who hold that in relation to a woman, the *umdena* that she would not contract a marital bond with a husband who has a defect is

even stronger, for the reason that she cannot bring about her own divorce against the will of the husband if it emerges that she cannot live with him. Therefore, if she can avail herself of the claim of invalid *kiddushin* in the case of a husband in relation to whom such a possibility exists, *a fortiori* in the case of a woman (see *Hokhmat Shlomo, Ketubot* 75a; *Resp. Noda Beyehuda*, 2nd edition, 80; *Resp. Ahiezer, Even ha-Ezer* 27:4; *Resp. Iggrot Moshe*, *Even ha-Ezer* 1:79; *Resp. Minhat Avraham* 2:10. Rabbi Nehari elaborated this view in the above-mentioned File 87-175/4). Noda Beyehuda (*ibid.*), in discussing the invalidation of *kiddushin* in the case of an apostate husband, writes as follows:

> There are grounds for saying that in the case of a man, we do not say that *ad'atah dehakhi* he did not marry her, for there is no great loss involved for him since he has the power to divorce her when he wants or to marry a second wife; this is not the case with a woman, who does not have the power to bring about her own divorce and cannot marry another man, so we rightly say that *ad'atah dehakhi* - she did not give herself in marriage with this in mind.

It must be added that *Noda Beyehuda* wrote these words as theory, not practice. In *Sde Hemed Hashalem, K'lalei ha-Poskim* 16:47 and *Yabia Omer* pt. 3, *Even ha-Ezer* 18, it is already noted that Aharonim rely on authorities who decide only in theory and not for practical purposes. Rabbi Avraham Shapira, who was Chief Rabbi of Israel, issued a ruling in theory and in practice in this vein in *Minhat Avraham* 2:10.

Application of the Presumption to a Betrothed Woman and to a Married Woman

Commentators were divided on the question of whether the discussion in *Bava Kamma* (*ibid*.) also applied to a married woman. From Rashi's commentary (s.v. *d'meinah niha lei*), it is not clear that there is a distinction between a married woman and a betrothed woman, but Tosafot (ibid., s.v. *de-ad'atah*) wrote that the whole discussion concerns a betrothed woman, but in the case of a married woman, it is absolutely clear that she married with this in mind, and she does not refrain from getting married because of what might happen after her husband's death.

Mordekhai (*Yevamot* 29-30) cites a dispute about a woman who required *halitzah* from a *yavam* who was an apostate. According to *Teshuvat ha-Geonim*, a woman whose *yavam* was an apostate does not require *halitzah*; as opposed to this, Rashi (*Resp. Rashi* 173, cited in Mordekhai, *ibid*.) says that one cannot rely on this responsum, since "a Jew who has sinned [become an apostate] remains a Jew." Mordekhai elaborates on the words of Maharam of Rothenberg, who brings proof for the opinion of the Geonim from our talmudic discussion:

> And it appeared to Maharam that one could bring a proof for the words of the Geonim from the fact that in *Bava Kamma, perek Hagozel*, the Talmud suggests

> that *halitzah* ought not to be required if a woman finds herself needing *halitzah* from a person stricken with boils, since had she known it would come to this she would not have married him in the first place. To this suggestion the Talmud replies that she is content because *tav lemeitav tan du milemeitav armelu*, meaning that she is satisfied with any husband. However, this cannot be said in the case of an apostate, since *anan sahdi* [we are witness, i.e., it is obvious] that she would never be reconciled to be married to him in a levirate marriage, for he would compel her to cohabit with him sinfully on various counts, and therefore she is released from the marriage and is not even required to obtain *halitzah* from the absentee *yavam*.

We find that in interpreting the matter, Maharam adopted the simple view that no distinction should be made between a married woman and a betrothed woman: the discussion also applies to a married woman.

An Apostate Yavam and a Yavam Stricken with Boils

The Rishonim also discuss the question of whether the law applying to an apostate *yavam* is different from that applying to a *yavam* who is stricken with boils, from the point of view of the principle of *tav lemeitav tan du,* and whether the conclusion of the gemara also applies in former case. On this point, Maharam's view comports with that of the position of the Geonim, because it is not possible to live with such a husband in accordance with the precepts of Judaism, and it is not relevant to say *tav lemeitav*. It is true that Maharam did not rule thus as a matter of practical *halakhah* in the case of that particular apostate, because Rashi was in disagreement with the Geonim, but several authorities relied, as a matter of halakhic practice, on his distinction whereby the gemara was referring only to a case in which the presumption *tav lemeitav* is relevant, but not to cases in which such an argument is inappropriate.

As such, *tav lemeitav* is a principle to which there are exceptions – and see Rabbi Moshe Feinstein (*Resp. Iggrot Moshe*, *Even ha-Ezer* 4:121), who ruled accordingly in the case of an apostate *yavam* who was causing the woman's *igun*, and the response of Rabbi Moshe Razin (*Resp. She'ilot Moshe*, *Even ha-Ezer* 2, *ibid*.). And on the view of Rashi, who disagreed with the Geonim, see *Resp. Radakh* (9), whereby if the widow's *yavam* has made her an *agunah* and she is prohibited from living with him, Rashi concedes that *ad'atah dehaki* - she did not give herself in marriage with this in mind:

> Even though Rashi does not agree with Maharam's opinion, but maintains that even if the *yavam* is an apostate, she nevertheless would have agreed to the original marriage, on the grounds that we cited in *perek hagozel*…, in the present case, however, there are two factors mitigating against the presumption [*tav lemeitav* ...]: first, that he is an apostate and secondly, his personal freedom has not been curtailed as is clearly indicated in the question, but he deliberately

> chooses to remain in his apostasy, saying, What profit is there for me to cleave to the abused and pursued Israelite nation; it is better for me to cleave to those who are in power. From this it is clear that he has no intention of returning to his people … and she will remain an *agunah* all her life, and this is not a case of *tan du* ["being together"] for it is therefore clear and obvious that *ad'atah dehakhi* she would not have married. The fundamental idea of *tan du* is that the woman is prepared to accept a less than satisfactory husband. This is definitely not the case in the apostate *yavam* situation, and in my humble opinion, this is sufficiently clear so that it does not even need to be stated, and is to be understood as an explicit condition for the contraction of the marriage.

Rabbi Tzvi Pesach Frank (*Resp. Har Tzvi, Even ha-Ezer* 2:133) also cited the above opinion of Radakh as support for his ruling. Radakh adds there that clearly, Tosafot would also concede the point in this case.

Support for the fact that there are exceptions to the presumption of *tav lemeitav* is also found amongst additional authorities, e.g. *Resp. Sho'el u-Meshiv* in several places (*Resp. Sho'el u-Meshiv*, 3rd ed., 1:14 and others) who says as follows (*ibid*., 61):

> According to this, it said in *Bava Kamma* 106, that from now a woman whose *yavam* is stricken with boils is to be released without *halitzah*, for *ad'atah dehakhi* - she did not give herself in marriage with this in mind, and the gemara responds there that we are witness – *anan sahdi* – that she is content with any man, for Reish Lakish said *tav lemeitav tan du milemeitav armelu*. And according to this, in my view there is an *a fortiori* argument here, that the *yevamah* contracted a perfectly valid marriage with her husband. The problem only arises in relation to her *yavam* who is stricken with boils. And we would have released her without *halitzah* were it not for the presumption of *tav lemeitav tan du.* In the present case, where her husband has already spent many years in prison and is wanted by the State, and his future is entirely uncertain, then *tav lemeitav tan du* definitely does not apply, for it is impossible for her to have a married life with him. Clearly she did not give herself in marriage with this in mind and there is no greater defect than that, and it certainly did not occur to her that she would be married in these circumstances, and the *kiddushin* are not valid in any way, and in my humble opinion it is clear that there is no suspicion of *kiddushin*.

The Gaon of Reisha (Galicia), Rabbi Aharon Lewin wrote incisively and clearly on this matter in *Resp. Avnei Hefetz* 30:

> Concerning our question: because it later emerged that the man who married was one of those criminals and crooks who is involved in human trafficking, it must be said that even if there were proper *kiddushin*, they have no substance, for there is no greater presumption than to say that *ad'atah dehakhi* - the woman would not have given herself in marriage with this in mind. When *Bava Kamma* (106b) discusses a woman whose *yavam* was stricken with boils, it should have said that

she is released without *halitzah*, for she did not give herself in marriage with this in mind, and it is only that *anan sahdi* that she is content with any man, as Reish Lakish said *tav lemeitav tan du mileitav armelu*; but that reason is not relevant in the case before us, for the husband is one of those criminals whose lives are in constant danger and in any case she cannot live with him, and which woman would want to live with a crook and an evildoer such as this? Surely she did not give herself in marriage with this in mind, and there is no greater *umdan da'at* than this – that if she had known about it she would not have married. And even though *Resp. Hatam Sofer*, *Even ha-Ezer* 82 contains a negative response to the person who wished to invalidate *kiddushin* on the basis of *umdena*, this was only a minor *umdena*, e.g. that the husband said that he was rich and it emerged that he was not rich, or he said he was a scholar and he was not a scholar. In these cases there are no grounds for invalidating the *kiddushin*, for here the *umdena* is not a strong one, for who knows if he is really not rich? A person may appear poor but is actually extremely wealthy, and the same applies to his claim to be learned, and therefore in any case, there is a doubtful *kiddushin*, which is not so in the case before us, in which the *umdena* is solid and strong, and there is absolutely no doubt that she would not have married had she known about it, one must say, that she would not have given herself in marriage with this in mind.

It may therefore be said that according to all opinions on this matter, it is possible to invalidate *kiddushin* on the basis of a major assessment (*umdena gedola*) or a proven assessment (*umdena demukhah*); indeed, a major authority of the previous generation, Rabbi Tz. P. Frank (*ibid*.) issued a ruling to invalidate *kiddushin* by virtue of an *umdena demukhah*.

Invalidation of *Kiddushin* Due to Mental Illness

Amongst existing mental illnesses, there are serious ones which have absolutely devastating ramifications for married life, to the extent that it is impossible to live together with a person suffering from one of those afflictions. The case at hand involves the illness known in the professional jargon as bipolar disorder (manic depression). We must therefore determine whether such a mental illness is defined as a major defect that is deemed to constitute grounds for invalidating *kiddushin*.

12. Types of Defects that Refute the Presumption of *Tav Lemeitav*

Resp. Or Zarua (1:760-761) records that Rabbenu Simcha was asked about the case of a person who was blind in both eyes, and the wife found out about this defect only after she had married him; he ruled that she would not have even needed a *get* if she did not know about the disability prior to the marriage, and it is a mistaken marriage even though it was not a case of conditional *kiddushin*. These words are like "the

opening of the portal," as Rabbi Tz. P. Frank says (*Resp. Har Zvi*, 181) in his discussion of the invalidation of *kiddushin* on grounds of a mistaken transaction in relation to a person who is impotent. *Resp. Or Zaruah* quotes Rabbenu Simcha as follows:

> My recommendation to compel the divorce was merely a prophylactic, since in my humble opinion, a *get* was not necessary if she did not know about this defect in the boy. They are mistaken *kiddushin* even though they were not conditional *kiddushin*, and my opinion is well based in halakhic sources.

In reference to the question asked in the previous responsum (*Resp. Or Zarua*, *ibid*., 760), that "to marry her to a blind person is not making her an *agunah*, because he can have intimate relations, and we find women who love their blind husbands, like the ex-wife of R. Yose Hagalili," Rabbenu Simcha replied (*ibid*., 761):

> You said there is no *igun* here – there is no greater *igun*, for she might have preferred to remain all her life without a husband than to be married to a blind person.

This is certainly the case in the matter discussed by Rabbi Z. P. Frank (*ibid.*), for it is clear that the defect of impotence is greater than that of blindness, since a blind man is capable of fulfilling his obligation to have sexual relations with his wife and to bring children into the world, which is not the case with an impotent man, who can do neither.

Maharsham, too, in his discussion of exempting a woman from *halitzah* after she was married to a husband who suffered from a major defect, referred to *Resp. Or Zarua* (1:14) and added in another responsum (3:16) that since the husband carried the signs of castration, he is not fit to have sexual relations, so how can she be married?

Beit Shmuel wrote in a similar vein (*Shukhan Aruch, Even HaEzer,* 154:2):

> We learnt in the mishna that we compel a husband to divorce whether the defects existed before the marriage or whether they only developed thereafter. Bah explains that the reference to premarital conditions is to cases in which she had no knowledge of the defect. However, the previous mishna also discusses defects that existed before the marriage, and of which his wife had no knowledge, for which we compel him to divorce her. According to Bah, the difference between the two mishnayot is in relation to defects that developed after the marriage. If the defect is bad breath, then we compel him to divorce her, but we do not compel in relation to other defects. However, in every case in which she did not know [of the defect], it is a mistaken transaction and we compel him to divorce her.

And if this is the law regarding halitosis, how much more so with impotence!

We must add the words of Rabbi Moshe Feinstein as mentioned above (*Resp. Iggrot Moshe*, *Even ha-Ezer* 1:79, pt. 3:48), who ruled unequivocally that the *kiddushin* were

to be invalidated in a case in which the husband was impotent, for this is a major defect. On this matter of invalidation of *kiddushin* due to a defect of the husband rendering him incapable of sexual relations, see at length in *Otzar ha-Poskim* (*Even ha-Ezer* 39:5:17). Indeed, it appears that most of the responsa that dealt with the invalidation of *kiddushin* due to a major defect involved this particular defect (see the abovementioned article of Rabbi Henkin in TEHUMIN).

However, the question of invalidation of *kiddushin* is discussed in relation to other defects as well. Rabbi Feinstein ruled according to the same principle in other responsa, concerning other major defects (some of which were mentioned above, see: *Even ha-Ezer* 1:79 – impotence; *ibid*., 80 – insanity; *ibid*., 4:83 – apostasy; *ibid*., 103 – homosexuality).

DELAY IN SUING FOR DIVORCE

The last point that must be considered in our case is why the plaintiff waited for a year before she finally left her husband and sought a divorce. Failure to file for divorce for a year, when marital life is unbearable due to the husband's insanity, is somewhat surprising, and the concern arises that the woman considered the situation and accepted it. The author of *Minhat Asher* made a similar comment (*ibid*.)

However, after hearing the arguments of the wife and the testimony, one cannot say that the woman considered and accepted the situation, notwithstanding that a year had passed since the wedding and the defect had already been discovered and was known to her. There are several reasons for this:

1. In fact, much less than a year passed before the parties stopped having sexual relations, due to the severe disruption caused by the husband's illness to marital life; after several months they separated completely. As I wrote at the beginning of this judgment, as soon as she realized the ramifications of her husband's illness, the plaintiff fled from the house immediately.

2. Mental illnesses, for all that they are severe, are not as prominent and noticeable as physical defects. They are like hidden defects, the signs of which appear very slowly over time, and only the accumulation of all the signs and the behaviors over time are liable to lead to a belated understanding of the disease from the point of view of the average person who is not in the field of mental health. A period of around one year at the beginning of the marriage in which the spouses get to know one another is certainly a very short time in order to conclude unequivocally that there is a serious mental illness rather than a passing depression.

3. There is a willingness of the plaintiff to absorb the difficulties and the insults and to aspire to reconciliation at almost any price, even when the husband acts in a violent, strange and abnormal fashion, driven by constant hope – even if the

chances are non-existent – that the husband might agree to receive and persist in treatment and that the situation will finally improve.

4. One very important point pertaining to our case must be understood. The husband apparently succeeded in concealing not only his illness but also his whole personality and nature. He misled not only his wife, but all his friends as well. When his friends testified or sent documents to the Beit Din, they said, almost unanimously, that they were surprised at what they discovered after the wedding. From what they said in court it became evident that the plaintiff's husband was a genius at deception. He deceived his wife, her parents, his friends, most of his wife's family, and everyone who knew him. It took a long time before they understood who her husband really was.

The above are extremely solid grounds for saying that the wife had "a good reason to stay with him after she became aware" of her husband's severe problem, in the words and according to the ruling of Rabbi Feinstein (*Resp. Iggrot Moshe*, *Even ha-Ezer* 3:45).

Along with all of these arguments and proofs, we found, with the help of the Almighty, that Rabbi Tzion Boaron, too, concurred with us (*Resp. Shaarei Zion* 3, *Even ha-Ezer* 4), writing as follows:

> With respect to the defect of insanity (or what is today called mental illness), in a situation such as that before us, it appears that this is certainly a case of mistaken transaction, for there is a strong presumption that no person will be reconciled to living his whole life, and to his children living their whole lives, in suffering and in fear, every day and every hour (as described above briefly).
>
> And one cannot say that because she stayed with him for seven years and bore two children, that she saw the defect, and became reconciled to it. It is not so, for in such things a person does not clearly understand the nature of the illness until a substantial period of time has passed, for sometimes, out of love for him, she attributes his anger and his rage to tension and a passing state of nervousness, and she hopes and prays that the situation will improve. This is particularly so in relation to a person who is taking medication on a permanent basis, for then there are situations in which he is calm and quiet. And particularly, as the woman herself said, when he calmed down after each outburst, he would beg her to forgive him.
>
> It transpires that in this case the *kiddushin* are precarious, both from the aspect of the presumption that a person does not become reconciled to such a defect, and that when the wife became aware of the true mental state of her husband she was not reconciled and the *kiddushin* are void, and also for the reason that even if she became reconciled when she became aware, according to all the above authorities, even though she was reconciled, the *kiddushin* are already void. Because the act was mistaken at the time of the *kiddushin* – for there is a clear

umdena that if she had known about the illness prior to the marriage, she certainly would not have been content to marry him – then at very least the *kiddushin* are "reduced" to the level of doubtful *kiddushin*.

After having said all the above, Rabbi Boaron ruled that because the particular case dealt with a matter of doubtful *kiddushin* (according to Ran, *Kiddushin*, *perek* 1, and *Pri Hadash, Yoreh Deah* end of no. 110 of *Klalei ha-Shas*), the wife is deemed to be unmarried.

And, in fact, the basic elements of Rabbi Boaron's ruling, both in his observation of human nature and in his halakhic approach to the matter of invalidation of *kiddushin*, were intimated by several Aharonim. A fortiori in our case, when most of the family, the plaintiff's father, and the defendant's friends, did not at first understand that the defendant was suffering from a mental illness!

The Conclusion

In our case, the wife's life with her husband is intolerable due to his mental illness. She has experienced humiliation and violence which erupted with no forewarning as a result of his abnormal, deviant behavior. She has no stable married life from psychological and emotional points of view. It is clear that it is impossible to live together with such a husband, as defined by Rabbi Tz. P. Frank and Rabbi M. Feinstein. Therefore, in view of all that we have said, and in view of the wife's claims, the testimony and the psychiatric opinions, this Beit Din has arrived at the conclusion that the plaintiff would not have married with this in mind – *ad'atah dehakhi*.

Based upon our foregoing presentation, in the absence of the possibility to compel him to give a *get*, we invalidate the *kiddushin* of the plaintiff M.P. who was married to the defendant B.R., and the plaintiff M.P. is permitted to marry any man she wishes, in accordance with *halakha*.

We have therefore signed this day, 6 Nissan 5776 (14 April 2016).