C.A. 86/63

HASSAN EL-ZAFDI

v.

BARUCH BENJAMIN AND ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Civil Appeal.
[July 11, 1963]
Before Olshan P., Silberg J., Witcon J., Cohn J. and Manny J.

Inter-religious law - guardianship of child of Jewish mother and Moslem father - jurisdiction of religious courts - Palestine Order in *Council, 1922, arts. 51 and 55 - Women's Equal Rights* Law, *1951, secs. 3 and 7 - Adoption of Children Law*, *1960, sec. 11.*

The child in this case was born to a Jewish mother and a Moslem father. According to Jewish law, the child was Jewish, following the mother, and according to Moslem law it was Moslem, following the father. On the death of the mother, the child was placed with its Moslem aunt, but when the father learned that German reparations were payable to the mother he applied to the District Court for the appointment of a maternal uncle as guardian. The Court appointed an uncle as sole guardian and at the instance of the Attorney-General ordered him to place the child in a Jewish institution. The father however, applied to the Sharia Court which decided that both the father and child were Moslems and that the child should be handed over to the father. The Attorney-General and the guardian, after having unsuccessfully contested the jurisdiction of the Sharia Court, did not take part in these proceedings. For some reason, the father nevertheless did not proceed to enforce the judgment of the Sharia Court and instead applied again to the District Court to have the appointment of the guardian set aside and for an order that the child and its property be delivered up to him. His application was denied and he appealed.

Held The father was the natural guardian of the child whichever personal law applies to either of them. Such natural guardianship did not, however, relieve the court of its fundamental duty of acting always in the interests of the child alone. In a case of "mixed" parentage, the President of the Supreme Court is empowered to decide whether either of the two religious courts concerned or the District Court has jurisdiction, and no party might apply to a religious court without the President's approval; for an application to the District Court no approval is necessary. Any decision made by a religious court with approval of its jurisdiction could not

oust the jurisdiction of the District Court. Where a child's religion, as here, could not be certainly determined, the "territorial" principle applied and the child's interests were paramount. There was sufficient evidence before the District Court to show that it was in the interests of the child not to be placed under the guardianship of the father.

Israel cases referred to:

(1) H.C. 72/62 - *Oswald Rufeissen* v. *Minister of the Interior* (1962) 16 P.D. 2428; S.J. (Special volume) 1.
(2) *C.A.* 209/54 - *Franz Steiner* v. *Attorney-General* (1955) 9 P.D. 241.
(3) *Motion* 121/55 - *Orah Fruchter* v. *Bernard Fruchter* (1955) 9 P.D. 1361.

Y. *Ben-Yishai* for the appellant.
The first respondent appeared in person.
M. *Cheshin,* Deputy State Attorney, for the second respondent.

COHN J. The fate of a young child whose parents' sins are being visited on her is to be decided in this appeal. This mother was Jewish and died when the child was still in her first year. The appellant claims to be the father of the child and to evidence that has produced her official birth certificate; and if it is pleaded before us that the appellant's paternity has not been sufficiently proved, the child's birth certificate is, in my opinion, good *prima facie* evidence and, no atcempt having been made to upset it, we must presume that it is true and on the strength of it hold that the appellant is indeed the father of the child. The appellant is stated to be a Druze in the birth certificate, but he asserts that he is not a Druze but a Moslem; and for the purpose of this appeal I assume, without deciding, that he is in fact a Moslem.

2. Litigation over and concerning the child commenced in 1960 when the appellant asked the Tel Aviv District Court to appoint him and an uncle of the deceased mother, one Baruch Benjamin, as the guardians of the person and property of the child. On that application the appellant argued that he and the deceased had lived as husband and wife, although unmarried, and that the child was their daughter; and that German reparations had been received in the name of the deceased to which the child is entitled to succeed. With regard to this application, the learned judge said in his judgment

> "The applicant does not argue that he is legally the father of the child. Neither he nor his counsel says that. Clearly, had the applicant urged that he is the father, he could not have claimed to use the money for bringing up the child, since as her father it was his duty to do so. In view of this situation the court appointed only the uncle of the child as guardian and gave him leave to obtain a Succession Order to the deceased's estate. He was also given leave to use money received after the Succession Order was obtained for the maintenance and up-bringing of the child."

3. Notwithstanding the appointment of Mr. Baruch Benjamin alone as the child's guardian, the appellant was able to get the child placed under the control of a couple by the name of Saliman, by means not explained to us. By virtue of his powers under the Welfare (Procedure in Matters of Minors etc.) Law, 1955, the Attorney-General instituted further proceedings in the District Court, submitting, as the learned judge stated in his judgment

> "that the minor is now living with the Saliman family in shocking inhuman conditions and that the Saliman family looking after the child are elderly people, Mrs. Saliman suffering from trachoma, and they live in a hut open to the weather, and that the applicant ... does not visit the child nor is concerned about her ... and that for some nine months has not seen the child or at all been interested in her, and that he himself appears to be undeveloped and lives with a woman of doubtful conduct."

The Attorney-General petitioned that the appellant be denied his (natural?) guardianship and that the child be allowed to be adopted.

The learned judge heard counsel for the Attorney-General, the appellant and the guardian Mr. Baruch Benjamin and directed the guardian to take the child away from the Saliman family and take her to "the social department of Tel Aviv Municipality so that arrangements might be made for her in an institution".

We are told that the guardian did so and that the child is now in an institution.

4. Upon changing lawyers, the appellant was advised that the District Court had no jurisdiction in the matter and that exclusive jurisdiction lay with the Sharia Court since he was from birth a Moslem. The appellant did not remain idle and applied to the Yaffo Sharia Court. It appears from the decision of this court ... of October 8, 1962, filed with the District Court, that the appellant had asked three things from the Sharia Court - a declaratory judgment that he was a Moslem and not a Druze, a determination that he was the child's father and his appointment as the child's legal guardian, and the annulment of the guardianship of Mr.Baruch Benjamin (who was summoned as defendant in the Sharia Court) and an order that the latter deliver the child to him "together with all rights and property".

Both Baruch Benjamin and the Attorney-General appeared before the Sharia Court and pleaded that it had no jurisdiction in the matter. After this plea was dismissed by the court, they no longer took part in the hearings.

The Sharia Court, after hearing two witnesses (and two others regarding their credibility), held that the appellant was a Moslem "by origin" and the child his daughter. The court also held as follows:

> "Lawful marriage relations existed between the parents (of the child) since marriage is determined according to the factual situation, as laid down by the sages... . And I hereby determine that the daughter is Moslem following the religion of her father and she can be adopted in accordance with the rulings of religious scholars; and in accordance with the application ... to appoint the father the guardian of his said daughter because he is capable of bringing her up, dealing with her affairs and managing her property in the best possible manner, in addition to the provisions of the Women's Equal Rights Law 1951, section 3(a) that both the mother and the father are natural guardians of their children and where one of them dies the survivor remains the natural guardian - I hereby appoint Hassan EI-Zafdi (the present appellant) as lawful guardian of his daughter Ziva EI-Zafdi and order that she should be delivered to him by any one under whose control she

> may be together with all the property due to her, and the father shall hand her over to his aunt Muhtia Hussin EI-Dagma with whom she was previously."

5. For some reason the appellant did not execute the judgment of the Sharia Court but made a new application to the District Court asking for the cancellation of Mr. Baruch Benjamin's appointment as guardian and order against him to hand over the child and her property. The learned judge refused the application, hence the present appeal.

In a detailed and basic judgment the learned judge considered carefully Moslem, Jewish and English law, and Dr. Cheshin who represented the Attorney-General so elegantly and knowledgeably, also tilled every corner of the field of law to gather proof that this appeal should be dismissed. For myself, with all respect and esteem for the learned judge and appreciation of noted counsel, the questions which arise here are short and very simple and they need not detain us long.

6. Section 3 of the Women's Equal Rights Law, 1951, provides as follows:

> "(a) Both the mother and the father are the natural guardians of their children; where one parent dies, the survivor shall be the natural guardian.
>
> (b) The provisions of subsection (a) shall not derogate from the power of a competent court or tribunal to deal with matters of guardianship over the persons or property of children with the interests of the children as the sole consideration".

Under section 7 of the same Law,

> "All courts shall act in accordance with this Law; a tribunal competent to deal with matters of personal status shall likewise act in accordance therewith, unless all the parties are eighteen years of age or over and have consented before the tribunal, of their own free will, to have their case tried according to the laws of their community".

Dr. Cheshin submits that the father referred to in section 3(a) is not the natural but only the legal father. Unlike his other submissions, this one does not merit acceptance. First, the word "parent" in the second part of the subsection indicates that we are concerned with a person who played a part in the pregnancy of the child. Secondly, the word "natural" indicates that we are concerned with guardianship created naturally and not depending upon the operation of the law (other than this statute). Thirdly, the Law draws a comparison between the father and the mother: just as the mother is natural and does not require legal recognition, so also the natural father is intended. Fourthly, and this is the main point, unlike English law, Israeli law does not recognize the status of the legal father as distinct from the natural father; and the terms of a Knesset enactment are not to be interpreted according to the meaning they can possess in the laws of one or other religious community *(Rufeissen* v. *Minister of the Interior* (1)).

It follows that the appellant is the natural guardian of his daughter, whatever personal law applies to him or her;and all research into what this personal law is and its provisions is irrelevant here.

7. However, the natural guardianship of the appellant over his daughter does not by itself release the court (or any religious tribunal) from the basic absolute duty to adjudicate in guardianship matters affecting children "with the interests of the children as the sole consideration". What the Law calls "the power of a court or tribunal" is but the sacred duty which it may not disregard. I cannot express the matter more becomingly and incisively than Silberg J. when he said

> "The test of the child's interests ... cannot be otherwise than one of two things, either it is not a serious consideration at all or it alone must be deemed the decisive absolute element ousting (in the event of conflict) every other consideration. No compromise is possible here: it does not lend itself to division and it is not to be mingled and confused with any other consideration whatsoever... . The Israeli legislature was therefore justified in laying down - and this to my mind is the correct meaning of section 3(b) - that the interests of the children are to be the final determinative consideration, both when they conflict with the rights of

> guardianship provided in section 3(a) and when they conflict with the provisions of a foreign law... No happier expression of this is to be found than the formula coined by one of our great *poskim:* the rule of matter is that all depends on where the bet din sees the better interests of the child lie *(Responsa Radbaz,* Part I, 123)" *(Steiner v. Attorney-General* (2) at p. 251-52)

With regard to the child's interests here the learned judge was persuaded, both when dealing with the Attorney-General's application as above and again when dealing with the present application of the appellant, that the child should not be returned to the appellant's relatives but should remain in the institution where she is at present. The learned judge points out that the child was taken from the Saliman couple, the aunt and uncle of the appellant, because she was suffering there; and that she feels better, is developing well and receiving proper education in the institution where she is at present. Furthermore the reports of the Welfare Officer which served the Attorney-General as cause for his initiative, were not denied or controverted at all; before us as well appellant's counsel did not try to argue that these reports were incorrect or that meanwhile the situation at the Salimans has changed to the better.

8. The only submission of appellant's counsel in this regard was that the interests of the child required that she be brought up and educated in her religion, Islam, and not in a Jewish institution. I agree that generally the interests of children require that they grow up in the parents'faith; but I do not agree that every other interest must yield to this religious interest. The court facing the choice either to endanger the physical and mental health of the child by handing it over to members of its religion, if these are not fit or capable to rear and educate it, or to hand it over to teachers who, though not of its faith, will look after all its due needs - the court has the duty to be concerned with the health of the child and not its religion: the saving of endangered life displaces religion. That is simple and obvious.

Nonetheless, I have not at all been persuaded that the child here is a Moslem. We have two judgments before us, one by the learned judge holding that the child is Jewish, and the other of the Sharia Court holding that she is a Moslem. In this situation, and without entering into the question whether the Sharia Court had jurisdiction to decide as it did, *prima facie* doubt exists as to the religion of the child; or one may say that she is Jewish according to Jewish religious law and Moslem according to Sharia law and thus a member

of two religions, in theory if not in practice. In either event her interest alone must be decisive in respect of guardianship and her upbringing and education. Since there is doubt or conflict as to her religion, that cannot be an element, or be of importance, in finding where her interests lie.

Moreover, where a person has dual nationality, the prevailing view today is that we look to the "effective" nationality, operative, real and manifest (see M. Silberg, *Personal Status in Israel,* pp. 247-50 (in Hebrew)). Presumably the same applies to a person with dual religion, the effective operative religion is followed in case of a conflict of laws. All this applies to an adult capable of giving effectivity to one of the nationalities or religions of his by actual conduct or expression. It is otherwise with a minor whose conduct and expression does not stem from a voluntary and thought-out act from which conclusions can be drawn in law. It appears to me, and I have no doubt about it, that such effectivity as regards a child is only its interest. When in the case of a child there is a choice between the law of two religions or two nationalities, one must choose that law the operation of which will yield greater benefit to the child, not only because in any case one must place the child's interests at the head of all consideration but also because the child, had he the ability of effecting a voluntary and thought-out act, can be presumed to act and express himself, and thus give effectivity, according to that religion or nationality from which it will derive the greatest benefit. Thus, even assuming that the present child is of dual religion, her "effective" religion is Judaism because her interests lie in growing up and living as she does at present and not in the home of the Salimans or of the appellant.

9. Appellant's counsel argues, though only half-heartedly, that the child's interests were already decided upon by the Sharia Court and that is the end of the matter. It is, however, not so. Although that judgment states that the appellant "is capable of bringing her up, dealing with her affairs" etc., and two witnesses attested to that in the Sharia Court, with all deference to their credibility and knowledge, the Sharia Court did not decide that it was in the child's interests to be in the home of the appellant and be brought up there. On the contrary, the judgment ordered the appellant to hand over the child to the couple in whose home she had previously been. And the Sharia Court said nothing about the fact that the child's interests require or justify her being placed with this couple, just as it says nothing about the frightful conditions described in the Welfare Officer's reports (which apparently were not brought to its knowledge).

However, I was not in the least persuaded that the Sharia Court had jurisdiction in this matter and I am almost of the opinion, and not only for the reasons of my honourable friend, Witkon J., that it did not. Since, in any event, there is no finding in the judgment as to the needs of the child and her interests, I find no need to go into the question of jurisdiction, especially as the appellant himself turned to the District Court after the Sharia judgment had been given and undertook the burden of proving the interests of the child precisely in the District Court.

10. In one incidental matter appellant's counsel, it seems to me, was right. The learned judge stated in his judgment that as regards the possible adoption of the child he was doubtful whether in the light of section 11(1) of the Adoption of Children Law, 1960, the appellant's consent was necessary and that perhaps an adoption order might be made without his consent. Although the judge was doubtful in express terms, his observations imply that in fact he had made up his mind that the condition in section 11(1) of the said Law obtained*. The question whether the condition has been met in the case of the appellant, or whether his consent may be forgone by virtue of the existence of one of the other conditions in section 11, or whether his consent should properly be first sought since none of these conditions exist - these questions will not occur nor come up for decision so long as there is no application to court for adoption by a particular adopter. When the time arrives for such an application to be heard, the court will consider the applicability of section 11 on the evidence adduced on the hearing of the application.

I would affirm the judgment of the District Court, though not for the reasons therein set out, and dismiss the appeal.

SILBERG J The story of the child in dispute exposes the fact that we do not possess either the system or machinery for a fundamental solution of the problems of inter-religion law. We wait for that in vain. For while in the area of conflict of private international law we are more or less sustained by the Common law and domestic case law, in the

* Under section 11(1) a parent's consent is unnecessary where it has been satisfactorily proved that the parent has abandoned the child or has constantly failed to fulfill his duty towards it (Ed.).

exclusively Israeli field of conflict of religious laws we have a single provision in the Palestine Order in Council which skirts in a most superficial manner the edges of the problem.

2. Were I therefore called upon to decide the basic question of the "quality" of this child, whether she is Moslem according to the personal religious law of the father or Jewish according to the personal religious law of the mother, I would openly confess that I do not know. The religious laws contradict one another and the civil law is silent. The Common law does not deal with such conflicts and Palestine or Israeli case law has not yet said its piece on this complex subject. Elsewhere *(Personal Status in Israel,* p. 355) I have recommended that when a civil court had to deal with such "dual religion" it should adopt as a principle of interreligion choice the test of effectiveness customary under the Hague Convention relating to nationality of 1930. I am happy to confirm that my learned friend, Cohn J., agrees. This test, however, has manifestly no place in the case of a child of four and a half years. My learned friend's suggestion in paragraph 8 of his judgment that in this situation the court should deduce the effective religion in the light of the child's interests does not, with all respect, commend itself to me. Religious belonging may obviously affect the question of the child's interests and in any event the child's interests cannot determine its religious belonging, for the "effect" cannot be its own "cause".

3. We are, nevertheless, fortunate in the case of the present child and it is not upon us to resolve the basic insoluble problem of her religious affiliation. The present matter can, in my opinion, be decided directly or analogously under article 55 of the Order in Council which states that

> "Where any action of personal status involves persons of different religious communities, application may be made by any party to the Chief Justice, who shall ... decide which Court shall have jurisdiction."

The reason for this provision is absolutely clear: where two different religious laws are likely one way or another to affect the determination of a dispute between parties, it is proper that another instance, superior and "neutral", should decide which judicial tribunal is to go into the matter.

4. I was originally inclined to say that since the child here was of "dual religion"; she is herself a person belonging to two different religious communities; and because - even without having recourse to the Interpretation Ordinance - the plural nearly always includes the singular, the phrase "persons of different religious communities" includes "a person of different religious communities", from which it would follow that article 55 applies directly to the child in dispute.

5. Afterwards, however, I decided not to lay down any hard and fast rule about this extreme idea. It could be urged against me that the child in all truth does not belong to two different religions since each of these religions claims that the child is entirely its and its alone. That would be like a glass concave on one side and convex on the other, not concave and convex together but all depending from which side it is viewed.

6. In spite, however, of this precise conceptual distinction, the ratio of article 55 applies with equal logic both to two people who truly belong to different religious communities and to one person whom two religious communities claim. The ultimate object of article 55 is to find a "third address" which can decide, and that is essential to an even larger extent when the source of the inter-religious dispute dwells within the very person himself. Hence - at least analogously - the provisions of article 55 are applicable here.

7. Article 55, it will be recalled, provides that the President of the Supreme Court (who now stands in the shoes of the Mandatory Chief Justice) can decide which court shall have jurisdiction in the matter and that means that he can decide that the competent court is one of the religious courts of the communities concerned or the District Court. A party cannot go to a religious court of one of the communities without first arming himself with the consent of the President of the Supreme Court; a party may turn to a District Court even without jurisdiction first being vested in that court under article 55 *(Fruchter* v. *Fruchter* (3) at p. 1365-66).

8. The conclusion that arises from the foregoing is very briefly and simply that guardianship is a matter of personal status under article 51 of the Order in Council; it is a matter of personal status where a child's religious affiliation is "claimed" by two different communities, the Jewish and the Moslem, and obviously the Sharia Court could not deal with the matter without first obtaining the consent of the President of the Supreme Court in

accordance with article 55; such consent was neither asked for nor obtained; the District Court on the other hand was competent to deal with the guardianship at all stages even without a prior application to the President of the Supreme Court and the decision of the Sharia Court of 8 October 1962 made without such authority as aforesaid could not serve as a bar to that; the Court took evidence about the place where the child had previously been, the absence of being cared for, the uncleanliness, the eye disease, the father's relation to the child and his relations with another woman which were said to be immoral and abnormal; if after all this the court decided by virtue of section 3(b) of the Women's Equal Rights Law, 1951, that the child's interests required that she should not be given into the father's guardianship, we may not go against this conclusion even if it be said - for the reasons explained in paragraph 2 above - that here it is impossible to determine the child's religion. "The interests of the child" is a territorial principle applicable to members of all religions.

I do not agree with the argument of counsel for the Attorney-General that article 52 of the Order in Council denies in its very terms jurisdiction to the Sharia Court to deal with the present guardianship. In my view, the Sharia Court's lack of jurisdiction stems only from article 55 as 1 have explained above.

For these reasons I join in the opinion of my learned friend, Cohn J., that the appeal should be dismissed. I will not express my opinion or indicate my hesitations about the child's adoption since the time for that has not yet been reached.

Finally, I find it a pleasant duty to note the high standard of argument of counsel for the Attorney-General, Dr. Michah Cheshin.

MANNY J. I concur in the judgment of my honourable friend, Silberg J..

WITKON J. This tragic and complex case can, in my opinion, be decided on the single point put to us by counsel for the Attorney-General, and 1 would be satisfied with that. The point was that the Sharia Court cannot have jurisdiction unless the matter lay in its exclusive jurisdiction under article 52 of the Palestine Order in Council, and that jurisdiction depends on the child, a "party" thereto, being of the Moslem religion and no other. The jurisdiction test is both positive and negative at the same time. Here a person is

involved which each of the two said religions claims as belonging to it, and the laws and rules of each of them merit our recognition.

In parenthesis I would observe that the concept, 'dual religion, creates a difficult dialectic problem when we speak as here of two religions each of which says to a person "You are entirely mine" and does not admit the possibility of the person belonging also to another religion. By regarding a person as a member of two religions we at once lend force to the claim of each of the religions and ignore the exclusiveness of the claim. But from the viewpoint of the religions the "coexistence" of the two claims has no place and in their contemplation the reverse is the situation. May it be said, with the same logic, that since each of the two religions denies the possibility of the person belonging to the other of them as well, it is as if it refuses to accept him into its ranks if it cannot have him completely and exclusively, and thus he falls between two stools and becomes one of those spirits that dwell in limbo.

In any event, I think that as regards the child here the condition which gives exclusive jurisdiction to the Sharia Court - that she is a Moslem and not of any other religion - does not exist here. *Ipso facto* the matter comes within the jurisdiction of the District Court and that court has exercised in is an unexceptional manner.

OLSHAN P. I also am of the opinion that the religious court had no jurisdiction to deal with the child's case. Therefore the situation is as it was before appellant's counsel applied to the religious court.

There remains the fact that the appellant himself, who purports to be the child's father, brought the matter before the District Court. There is no disputing that in the absence of jurisdiction in any other court, it is the District Court which alone is competent.

The District Court's decision was based on the child's interests and this consideration is determinative in accordance with the Women's Equal Rights Law.

The frightful conditions in which the child was kept when she was with the appellant certainly justify that decision.

The appeal should be denied.

Appeal dismissed.

Judgment given on July 11, 1963.