C.A. 50/55

ISIDOR (YEHEZKEL) HERSHKOVITZ

v.

I. GREENBERGER

In the Supreme Court sitting as a Court of Civil Appeal
[May 18, 1955]
Before Cheshin D.P., Goitein J., and Witkon J.

Family law - Minor - Adoption - Application by stranger - Relationship of applicant to child important but not decisive - Welfare of child the true test - Jewish law and English law.

The petitioners, into whose care an orphan child aged 5 years had been handed by the Social Welfare Authorities, applied to the District Court for an order of adoption. The application was opposed by a relative of the child who resided in the United States, and who also testified as to his willingness and ability to bring up the child whether in the United States or in Israel. The District Court, without investigating the circumstances fully, and apparently relying upon the principle that relatives of the child had a stronger right to his guardianship than strangers, dismissed the application. The petitioners appealed.

Held: allowing the appeal,

(a) whether the law applicable is English law or Jewish law the test to be applied in deciding whether an adoption order should be made or not is the same, namely whether such an order will be for the benefit of the child.

(b) the mere fact that the person seeking an order of adoption is a stranger and not a relative of the child is of some importance but is not decisive.

(c) as the matter had not been sufficiently inquired into in the court below the case should be remitted in order that a decision should be given in accordance with the principles set out above and after the matter has been fully investigated.

Israel cases referred to :

(1) *C. File* 28/49 *T.A. - Yehuda and Alisa Ben-Ezra, re adoption of minor Malka Cohen;* (1948/49) 1 *P.M.* 352.
(2) *P. File* 236/53 *Haifa - Aharon Fisher - re adoption of minor Hanna Weiss ;* (1953/54) 9 *P.M.* 292.
(3) *Files Nos.* 2496/1952: 2567/1953 - *A. v. B.;* (1954) *Rabbinical District Courts, Vol.* 1 *p.* 56.

English cases referred to:

(4) *Reg. v. Nash;* (1883) 10 *Q.B.D.* 454.
(5) *Barnardo v. McHugh* : [1891] *A.C.* 388.
(6) *Ex parte Knee* : (1804), 127 *E.R.* 416.
(7) *in re Aster;* [1955] 1 *W.L.R.* 465.

American cases referred to:

(8) *Willet v. Warren ;* (1904) 34 *Wash.* 647 *;* 20 *A.L.R.* 840.
(9) *Mahon v. People ;* (1905) 218 *Ill.* 171; 20 *A.L.R.* 842.

Cohen for the appellant.
Peled for the respondent.
Bar-Or, Deputy State Attorney, for the Attorney-General, intervening.

CHESHIN D.P. giving the judgment of the court. This is an appeal, by leave, from a decision of the District Court of Haifa dismissing an application for the adoption of a minor. The decision was given with surprising brevity. This is the judgment in full: -

> "On examining the petition of the applicants and their sworn declarations (six):
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> 2. And on examining the sworn declarations (six) of the relatives of the minor Tovril Klein and, in particular, the sworn declaration of Ignaz

Greenberger, the brother of the mother of the minor, who oppose the petition;

3. And on hearing Dr. Cohen on behalf of the applicants, Dr. Carlebach on behalf of the Attorney-General and Dr. Peled on behalf of the said Ignaz Greenberger;

4. It appears that the relatives of the child are interested in him and that he is not neglected;

5. In the circumstances, therefore, the petition of the applicants must be dismissed, and their request refused.

6. Leave to appeal is granted."

The main reason - in effect the only reason - for rejecting the application is contained in paragraph 4 of the decision which is also somewhat laconic. This states that the relatives of the child take an interest in him and that he is not neglected. But who is the child and who are the applicants? In whose custody is the child today and in whose care is he? Where do the respondents live and what is the reason for their opposing the application? What have the relatives done for the child up to now and how does their interest in him express itself? And, above all, what is better for the child, to leave him where he is, i.e. with the applicant and his wife, or to hand him over to the respondents? To these questions, and others, no answer is provided in the decision of the District Court judge, who did not consider them and did not deal with them. The serious nature of the application makes it necessary to explain the matter in greater detail and to set out the facts and the law applicable.

2. From the petition of the appellant and the sworn declarations attached thereto, the following facts emerge: the minor Tovril Klein was born in Rumania in 1948. His father died whilst abroad and in 1951 the mother, together with the minor, immigrated to Israel. The mother died in September, 1953, after having lived in an immigrants' camp in Naharia for some two and a half years. The local welfare officer then placed the minor with a family by the name of Fischer, with whom the child stayed for some two weeks. Later, on

September 21, 1953, the welfare officer handed him over to the appellant and his wife. Since then he has been in their home and they have taken care of him. They have shown affection for him as if he were their own son and, it would appear, their hope is that this child will fill the void left by the loss of their only son, a boy of 5, who was murdered by the Nazis. The appellant is ready to assume responsibility for the maintenance of the child and to ensure the boy's rights of succession to his estate.

3. The boy, it seems, belongs to a large family and has several relatives both in Israel and abroad. Some of these relatives have submitted affidavits, in all of which the handing over of the child for adoption is vehemently opposed. Each relative claims the right to express his opinion on the child's future, and most of them are even prepared to take him to their own homes and to care for him themselves. The principal opponent of the adoption, however, is Ignaz Greenberger, a resident of the United States and the uncle of the minor's mother, and in this he is supported by the rest of the relatives.

Mr. Greenberger states in his affidavit, sworn in New York, that he had been in correspondence with the parents of the child while they were still in Rumania. He had assisted them from time to time and had sent them money. In 1948 he was desirous of bringing them to the United States and even sent them the necessary papers, but the Rumanian authorities refused to give them travel documents. He continued to interest himself in their fate even after they immigrated to Israel and sent them gifts of food and clothing. The mother's letters to him are full of love and gratitude. Immediately he heard of the mother's death he sent money for her burial and for paying her debts. He communicated, both personally and through his lawyer in New York, with his relatives in Israel, as well as with the family of the appellant, and begged of them to see to it that the boy be sent to him in the United States as it was his wish to adopt him as a son. For this purpose he instructed his attorney to obtain from the American authorities an entry visa for the child and the application for this visa is still pending. Mr. Greenberger has permanent work carrying a salary of $ 433 net per month. He is 57 years of age and his wife is 51, and they have no children. He concludes his affidavit as follows:

> "It is my wish, and I have the means, to care for the boy either in the United States or in Israel to the extent required for his welfare, and to

incur the expenses necessary for his upkeep, and I am ready and willing to adopt him."

4. Before we begin to consider and answer the questions raised, we shall note briefly what took place in the court below. The appellant and the respondent Greenberger were both represented. The Attorney-General, moreover, thought it necessary to be represented because the matter was one of public importance. Some of the deponents were examined on their affidavits and produced additional documents. A doctor of psychology also gave evidence on behalf of the respondent, and she was examined at length on the intricate and complicated problems usually involved in cases of adoption. Counsel for the respondent requested that the doctor be allowed to visit the home of the appellant in order to talk with and observe the child to find out whether the appellant and his wife were suitable persons to adopt him, to see what influence the neighbourhood had on him, and to what extent he felt at home. This request was not agreed to by counsel for the appellant, and the court made no comment and expressed no view on the matter.

5. These were the circumstances under which the application for adoption was made, and this was the background of the hearing in the court below. As already mentioned, the decision of the District Court reflects neither the facts nor the complicated questions requiring solution, nor the legal grounds for the decision itself. Furthermore we do not know - for the court has not given a ruling on the question - what will happen to the child now that the application for adoption has been refused, and with which party he will live from now on. It is not surprising therefore that counsel for all the parties - the appellant, the Attorney-General, and the respondent, have found it necessary to deal with the facts in full and to suggest solutions to the problems each in his own way and from the point of view of his own client. I propose to deal with these suggestions one by one.

6. The first question which arises is what law applies to the case. As I have already mentioned, the matter came before the court by way of an application for adoption. Adoption of minors is one of the matters of personal status mentioned in Article 51(1)[1)] of

[1)] The Palestine Order in Council, 1922, Article 51:
Religious Courts. Jurisdiction of Religious Courts, Definition of personal status (as amended in 1939):
(1) Subject to the provisions of Articles 64 to 67 inclusive, jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this part by the Courts of the religious communities. For the purpose of these provisions matters of

the Palestine Order in Council, 1922, and in accordance with Article 47[2)] of the same Order in Council the personal law of the person concerned applies in these cases. In adoption cases the question arises who is the person concerned: the minor or the applicant? Whose personal law applies - that of the minor or of the applicant? These questions have been raised in the District Court, and have found various and conflicting answers (see for instance *In re Ben-Ezra* (1)[1)]. In the case before us, however, we are not obliged to deal with this question at all, for both the appellant and the minor are citizens of Israel, and the personal law applicable to both of them is Jewish law.

7. The adoption of children as a legal institution, giving a permanent and lasting status, was not known to Jewish law either in Biblical or in talmudic times. Only children who are actually born to their parents are regarded as children in every sense as regards their rights and duties. Unlike Roman law, Jewish law did not allow the widening of the family and the creation of a parent-child relationship by an artificial legal fiction. Hence the Roman concept of "adoptio" (or the Engish "adoption") is unknown to our ancient legal literature and the Hebrew term "imutz" (adoption) is of modern vintage.

8. Counsel for the Attorney-General, who supports the appeal, agrees that there is no authority in Jewish substantive law to support an application for adoption, but contends that the court has to consider the application of the appellant as if it were one for the appointment of a guardian over a minor. As such, he submits, it is one of the matters of personal status mentioned in Article 51(1) of the Order in Council, and there are many rules and regulations in Jewish law dealing with the appointment of guardians. Counsel for the respondent on the other hand, contends that an application for adoption is to be

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personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

2) The palestine Order in Council, 1922, Article 47:

Jurisdiction in personal status:

The Civil Courts further have jurisdiction, subject to the provisions contained in this Order, in matters of personal status as defined in Article 51 of persons in Palestine. Such jurisdiction shall be exercised in conformity with any law, Ordinance or Regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable.

Where in any civil or criminal case brought before the Civil Court a question of personal status incidentally arises, the determination of which is necessary for the purpose of the case, the Civil Court may determine the question, and may to that end take the opinion, by such means as may seem most convenient, of a competent jurist having knowledge of the personal law applicable.

1) The learned judge also referred to the following unreported cases, Civil Files 207/48 and 257/58, Haifa, and Personal Files 32/50 and 917/51, Tel Aviv.

considered as one for the handing over of the minor to the custody and supervision of the applicant. Inasmuch as custody of minors is not a matter of personal status according to Article 51(1) of the Order in Council, Jewish law does not apply, and the case is to be decided according to the English doctrines of equity under which the claims of a relative are preferred to those of a stranger.

9. The truth of the matter is that according to Jewish law the term gnardian is used especially in connection with the property of another, particularly that of an orphan. In Gittin[1)], 52[a], reference is made to "a father who appoints a guardian for his children.. ." and Rashi explains the words "King's guardian" in Shabbath, 121a, as meaning "Controller of his property", (ibid.).

The basic principle is this:

> "He who dies and leaves heirs both old and young should appoint a guardian to take care of that part of the property that belongs to the minors. until they grow up. And if he did not do so the Court should, so long as they are not grown up." (Maimonides, Halachot Nahaloth, 10 Halacha 5.)

As the main duty of the guardian is to protect the property entrusted to his care it follows that when a court wishes to appoint a guardian over the property of an orphan it has to choose "one who is trustworthy and an honourable man who would know how to deal with the orphan's property and to fight their fight; a man who has the means to preserve the property and to make it yield profits" (Maimonides, ibid. Halacha 6).

Further, in order to preserve the property of minors it was ruled that

> "a court should replace a guardian which it appointed where it is reported that he is extravagant and lives above his means lest perhaps he is himself using the minors' property" (Maimonides ibid. Halacha 7).

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1) Tractate on Divorce.

In other words if a guardian is suspected of misusing, in his own interest, the property of the orphan entrusted to his care, it is the duty of the court to dismiss him, for he is no longer worthy of holding the office of guardian.

10. Moreover it is not essential that the guardian of the property of minors should be appointed guardian of their persons as well. On the contrary, the interest of the parties sometimes requires separation of the two functions.

> "With regard to the question with whom should the daughter live, with her father or with the guardian, in this case her maternal grandfather? This should be decided according to the evidence of a witness who knows them both: but prima facie it would seem that the daughter would be better off with her father. Her property, however, should be under the control of her maternal grandfather as guardian provided that the court considers it safe in his hands." (The Rosh, Responsa 82, paragraph 2.)

11. It is evident that when the draftsman of the laws came to define the jurisdiction of the Rabbinical Courts, he was well aware that this was the main function of a guardian according to Jewish law, for according to Rule 6(2) of the Jewish Community Rules: -

> "Every such court shall have power to appoint... guardians of the property of minor orphans....."

Nothing is said in these Rules concerning the appointment of guardians of the person of minor orphans.

12. From what has been said it is clear that according to Jewish law a guardian is not appointed over the person of a minor but over his property. In the case before us, inasmuch as the minor is without means, the question of the care and management of his property does not arise. Hence from this aspect it is not possible to consider the application for adoption as one for the appointment of a guardian. but one for the determination of the question in whose custody he should be and who should have the right - or the duty - of his supervision. I shall now deal therefore with the question whether an application of this

nature - that is for supervision and custody - is one of the matters that can be classified as one of personal status. But I need not go deeply into this, for it makes no difference to the final result whether the question is a matter of personal status or not. For in either case, that is to say whether Jewish law or whether English equitable principles apply, the court has to consider the same factors when deciding the fate of this application and give judgment accordingly. I shall deal then with what has to be considered under both systems before deciding who is qualified to have the custody of a minor, and to whom it is advisable to hand him over for supervision and control. Beginning with Jewish law it should be noted at once that here there is no difference in effect between what has to be considered by the court when appointing a guardian (over property) and what has to be weighed before the court decides to whom to entrust the care and custody of a minor.

13. The maxim that the "court is the father of orphans" is at the root and core of that part of Jewish law which deals with minors. For this principle has been applied no less to minors than to orphans (see Uziel - Shaarei Uziel, 1, 2, 1.). It is equally the duty of the court to appoint a guardian of the property of minors as it is to appoint some one to have charge and control of their persons. If necessary the court has to do this unasked, and sometimes even while the parents are still living. The charge and control of minors is first and foremost the task of the court, but it may appoint another person to act under its directions. It has accordingy been said that:

> "When a court appoints a guardian it does so merely for the sake of convenience so that it should not be constantly troubled in protecting the minor's interests. But should the court decide not to appoint anyone and itself undertake the protection of the minor's interests - this is the ideal solution, as there can be no better guardian". (Rashba: Responsa 974; Hoshen Mishpat 110. 11.)

The appointment of a guardian of a minor and the exercise of his functions are not rights vested in the parents or relatives, and consequently they cannot claim to be so appointed as of right either in law or in equity. Hence, for example, if it is apparent to the court that the father is an evil man, it should appoint a guardian to protect the interests of his young children, so that their property should not be wasted. This principle was laid down by one of the greatest jurists in a responsum which is as short as it is crystal clear:

"You ask regarding the case of Reuven[1], whose wife died, leaving an unweaned and sickly infant son who was being looked after by the maternal grandmother. Reuven desired to take back the child although he would have to leave him with the neighbours when he left home as he had not remarried and was very poor - the question is whether it is better for the child to remain with his grandmother. or with his father?

Answer: The saying that a child should be with its mother clearly does not mean that it should be with its grandmother. But if the court is of opinion that it would be better for the child with his grandmother because she would be likely to show it more loving care than others. then the child should be left with his grandmother. And Reuven's plea - 'give me my son and I will care for him the way I like and if he dies, he dies' - must be rejected. For the first consideration of the court is the welfare of the child and if that requires that he should be with his grandmother let him be with her. The father must be a fool to want him to perish .....The guiding rule of the court must be - that which it considers best for the child." (Radbaz, Responsa, Part I, Article 123; quoted also in Rabbi Mordechai Levi's "Darchei Noam" Commentaries on Even Ha-Ezer, Resp. 38 and Pithei Teshuba Commentaries on Even Ha-Ezer 82, 7.)

In short - the welfare of the child and its needs - these are the matters which influence the court in deciding to whom the child should be entrusted.

14. Counsel for the respondent has stressed the fact that on the one hand we have the application of absolute strangers and on the other the opposition of the mother's uncle. He submits that we must not ignore the rights of blood relatives. The call of blood must certainly not be left unheeded, and one cannot lightly reject family relationship. But, as we have seen, the natural and family rights of relatives are not decisive, and the welfare of the

[1] The names Reuven and Shimon are used in Jewish legal literature to denote hypothetical litigants.

child sometimes requires that he should be entrusted to distant rather than to near relatives, and even to strangers.

> "Neither the mother nor her relatives nor the father's relatives can hinder the court from appointing as guardian any one whom it considers fit." (Beit Yoseph Commentaries on Hoshen Mishpat in Rashba's name, Article 290 s. 3.)

Essentially the principle is this:

> "The court which is the father of orphans has to seek until it finds a solution to the question what is best for the child's welfare." (Rashba, Responsa according to Maimonides Article 38.)

It is necessary to point out that this principle has also been accepted in modern times and that the rabbis in Israel have applied it in ruling as to the place where a minor should stay (see for instance *A.V.B.* (3)).

15. And what of the English doctrines of equity on this subject? Counsel for the respondent relies on two English cases - *R. v. Nash* (4) and *Bernardo v. McHugh* (5) - and submits that in accordance with the doctrines of equity in force in England the relatives of the mother are to be preferred to strangers, when the court comes to determine into whose custody to hand over the minor. In our opinion these judgments are not relevant to the present case. In any event they do not add much weight to the submission of counsel for the respondents, even though they speak of the rights of the relatives and in particular of the rights of the mother and of the mother's relatives to the child. In the case of *Nash* (4), for example, the question whether the mother or her relatives had the absolute right to obtain custody of the child was not decided. All that the court held was that where there was an illegitimate child and the mother or one of her relatives applied for his custody then the blood-relationship in such a case was only one of the considerations - and a most important one - that the court had to take into account when deciding the question before it, and that it was wrong to consider the mother as being a stranger to her own illegitimate child. As Jessel, M.R. said, at p. 456: -

> "In many cases the law recognizes the right of a mother to the custody of her illegitimate child. In the case of *Ex parte Knee* (6) before Sir James Mansfield, it was held that she had such a right unless ground was shewn for displacing it... Natural relationship was thus looked to with a view to the benefit of the child... Here the mother does not wish the child to be with her, but to be placed with her sister, a respectable married woman with one child ...in a station superior to that of the appellants, and how it can be contended that it is for the benefit of the child to remain with the appellants I do not see."

In the same case, Bowen, L.J. added briefly: -

> ".....The question is whether in considering what is for the benefit of the child the Court will have regard to natural relationship. When we consider what is for the child's benefit, the scale is turned by the respectability of the persons with whom she is to be placed."

16. From what is said above it is clear that according to English law the natural right of the mother and the relatives has to be taken into account by the court, but it is not the only consideration nor indeed is it the decisive one. The welfare of the child is the paramount consideration, and the court must reach its decision only after weighing all the factors. Amongst the first of these, family relationship and the call of blood will naturally be found. Is not this principle the same as that contained in the rulings on Jewish law quoted above?

17. The case of *Bernardo v. McHugh* (5) is to the same effect. This case also concerned an illegitimate child whose natural mother demanded his return from strangers. The House of Lords quoted with approval the words of Jessel, M.R. in the case of *Nash* (4), and held, as it is expressed in the headnote to that case :-

> "In determining who is to have the custody of and control over an illegitimate child, the Court in exercising its jurisdiction with a view to the benefit of the child will primarily consider the wishes of the mother."

Even here the decision was not that the mother's right to custody was conclusive and absolute. And if it was correct to say that the right of the mother was only one of the elements - although a most important element - that the court had to consider, how much more correct would it be to say the same regarding the mother's uncle ? (and see in this connection Halsbury, Hailsham edition. Vol. 17, p. 699, paras. 1443-1444, and the comments of Evershed M.R. in *re Aster* (7) on the cases of *Nash* (4) and *Bernardo* (5)).

18. To remove all doubts regarding what should be considered by the court when deciding the question of the care and control of young children, special legislation was passed in England. The Custody of Children Act, 1891, limited the rights of parents over their children in certain circumstances which are enumerated in the statute. This made a considerable breach in British conservatism regarding the problem of adoption of children when in effect it gave - indirectly - the right to strangers to adopt children. This Act also provided that the welfare of the child was to be the first consideration, and regarded its welfare as taking priority over the natural rights of relatives.

19. To sum up: we consider an application for adoption as an application to decide who should have the custody of the child and under whose care and control he should be. In this connection the child's welfare is the decisive consideration under both Jewish and English law. But even supposing that an application for adoption is to be regarded as an application for the appointment of a guardian of the person of the child, this will make no difference to the legal position in this country, for it is provided in section 3 of the Women's Equal Rights Law, 1951[1)], that in such a case the court must regard the welfare of the child as the first consideration.

20. We should like to say in passing that this principle which lays so much weight and emphasis on the welfare of the child is practically universal. I may, perhaps, cite two American cases which in certain particulars are similar to the one before us. The first is *Willet v. Warren* (8). In this case each of the two persons claimed the right to be appointed as guardian of a minor. One was a blood relative who lived abroad and the other was a stranger in whose home the child was living. The court chose the stranger in preference to

1) The text of this section is set out infra p. 429.

the relative, and held that the welfare of the minor was the primary and decisive consideration when choosing a guardian.

In that case the child was already attached to the stranger, and was attending school in the neighbourhood to which he had become accustomed. It was held that he should not be taken abroad.

21. The second is *Mahon v. People* (9). An American jurist, commenting on this case, says:-

> "In modern times it has come to be the established rule that, in awarding the care and custody of children to other persons, the welfare and interest of the child is the paramount consideration, and to it all others must yield. That rule has governed in many cases in which was involved the question of residence of the proposed custodian. The rule was applied to deny to an aunt domiciled abroad the custody of a girl in her early teens whom it was proposed to take away, whereas the child was living in the home of worthy people who had been kind to her and were capable of caring properly for her, and whom she had loved from her infancy."

22. We must now return to our case and to the problems that need consideration before deciding the question of what is best for the welfare of the child.

A. The place where the child is living today. The appellant and his wife took the boy from the home of the family of Fisher to which he had been taken on the death of his mother. There was evidence that at the home of that family the boy was almost starved, that he became weak and was covered with bruises and scars. We do not know to what extent he has become accustomed to his new surroundings, but there was evidence that in the appellant's home his condition has improved. He has become healthier and has begun going to school. The court below was mistaken in not calling for a detailed report from the welfare officer. In cases of this kind the court cannot rely on the evidence of the parties alone, and it is unfair to the boy to decide finally on the question without going thoroughly into all the circumstances, merely because the

parties did not choose to bring their evidence at the right time. Applications of this kind, upon which the whole future of the minor sometimes depends, cannot be treated like the ordinary disputes of litigants which require the decision of the court. They cannot be decided this way or that according to the amount and weight of the evidence which either party is sufficiently alert to produce. This is not a race, and it is not the function of the court to punish one side or to reward the other. Through no fault of his, the child has lost the care and attention that he would have received from his parents. In this respect he becomes the ward of the court. Certain obligations are due from the State to these unfortunate children, and it discharges these obligations by imposing the duties of guardianship upon the court. The court is "the father of orphans".

This is the lofty principle laid down by our jurists of old. The court therefore must always be jealous of the welfare of the child, and it may and sometimes should call witnesses and procure evidence of his own motion.

B. Is it desirable to remove the boy from where he is now and to place him somewhere else? We must not forget that the boy was born abroad and was brought to the country while still an infant. For some years he was in an immigrants' camp, without a father. After that he was taken to the home of the Fisher family, and from there to the appellant and his wife. It would seem that this was the first home where the child found some warmth and a normal, peaceful family life. Will it be to his advantage to uproot him once more, for the fourth time, and to bring him up in a fifth home? Especially as the home in question is in a foreign land the language of which he does not understand and the customs of which he does not know. A change of life is bound to follow the change of surroundings. He will have to forget the old and get used to the new. He will have to be re-educated, which will be difficult and painful. Of course if the boy were not happy and at home with the appellant and his wife, he would have to do this, it being the lesser evil. Here too the court below erred in not obliging the appellant to agree to allow the doctor of psychology chosen by the respondent, or some other neutral doctor, to visit the home of the appellant, to talk with him, with his wife and with the boy; to determine how they get on together and whether they are suitable and suited to each other both physically and mentally; and whether the appellant and his wife are emotionally suited to be adoptive parents. It is a pity that the judge did not avail himself of the help and advice of the officers of the Ministry of

Social Welfare, for as experts in the problem they could have rendered a service of great importance.

C. The qualifications of the respondent and his family, and their fitness for the task. We have already mentioned that we must not be deaf to the call of blood. Without any hesitation we say that, all other things being equal, the right of family relatives must prevail. In the case before us it takes little to show that apart from Mr. Ignaz Greenberger of New York, the other relatives cannot be taken into account either for appointment as guardians or to be put in charge and control of the child. Although the uncle and aunt are living in Rumania they wish to leave the child here. They issue instructions what to do with the boy, but they do not wish to have him themselves, and their affidavit does not show how the child's future is to be secured. The relatives in Israel are not in a position to give the boy a home and a warm family circle, either because of their poverty or because of the great number of their own children. The respondent Greenberger, therefore, is the only one who remains. His financial position, it seems, is sound, but it is necessary to consider other factors such as age, state of health, character and social standing to see if he is suitable and has the necessary qualifications to be put in charge of the child. Furthermore, Mr. Greenberger lives abroad and it may be necessary to send the boy to him. But the very fact of sending the child away from the country and thus beyond the jurisdiction of the court, requires serious consideration.

And what arrangements does Mr. Greenberger propose to make for the boy to travel to him? Who will take him and with whom will he travel? Moreover, we have heard that Mr. Greenberger has not as yet succeeded in obtaining a visa to enable the child to enter the United States. And what will happen to the child if the application for adoption is refused ? Will he remain in the home of the applicant without his legal status being determined or will he have to sleep in the street without a roof over his head? Mr. Greenberger says in his affidavit that he is willing to care for the child in this country. But we have heard nothing of how he proposes to bring up the child in Israel. Will he be kept in a public institution or will he be placed with a private family? Will he perhaps have to wander about once more from one relative to another? And what money will be devoted to his upkeep? These questions and many others will have to be answered first before one can decide what is advisable for the

welfare of the child and for his good: whether an order for adoption should be made or refused. But we have heard nothing at all regarding any of these questions. For this very reason it will be necessary to remit to the lower court the hearing of this case to enable the parties and the court itself to call additional evidence and to produce further witnesses so as to make it easier to decide what is best for the welfare of the child.

23. Finally we are bound in all conscience to make one general observation. No chapter in our law is so incomplete and fragmentary as that concerning children, and especially their adoption, and no other subject is in such urgent need of amendment by legislation.

In an unreported judgment given in 1949[1)], Landau J. said:

> "The law dealing with the adoption of children is most obscure because neither clear legislation nor legal precedents are available to guide the court. The lack of these is already beginning to be felt and will continue to be felt more and more in the future. For with the immigration that is coming to the country from the diaspora there are many orphans and many more will continue to come. More and more applications for adoption must therefore be expected. We should encourage this trend and must make it easier for those wishing to adopt these orphans to do so. But everything that faces them in this field is uncertain and ambiguous and nothing is so urgently required as firm and clear guidance."

Citing the above remarks with approval, Ezioni J. said four and a half years later:

> "Although some years have passed since judgment was given in that case, to my regret I cannot say that the uncertainties in this connection have been removed. The legislator has taken no initiative in clearing up the questions relating to adoption, in defining the rights of the parties and in regulating the procedure to be employed when applications for adoption are made. Most of these matters remain as obscure as they

1) Civil File 257/48, Haifa.

> were in the past. It is true that the judges are trying to fill the void but it is obvious that in the absence of appropriate laws their work cannot be complete and the courts should not be called upon to do the work of the legislator." (See *Fisher's* case (2), at p. 294.)

Still more time has elapsed and the remedy for this state of affairs still lies in the future. The District Court judges are groping in the dark, searching for the way, perplexed as to what to do. Different views are held and different solutions are suggested. Each judge has to produce his own solution to the problem in accordance with his own particular understanding. ("Trying to fill the void" as Ezioni, J. said in *Fisher's* case (2).) Doubt and confusion abound. Instead of one rule there are many, and no one knows what the law is on the subject. To increase the confusion, orders for adoption and for guardianship are issued every week and every day by way of legal fictions and ingenious devices, by inference from statutes, by strained interpretations, by hairsplitting and casuistry. In the place of authority we have obiter dicta and the citation of great names, and the subject is confused, bringing little honour either to the law or to the lawyers. The Rabbinical authorities too have begun issuing orders for adoption - adoption pure and simple, not orders for guardianship or custody - although it is not clear from what source they derive their jurisdiction nor what law they purport to apply. They have gone even further. Without any substantive legal basis they have promulgated a special rule regulating the procedure to be followed in applications for the adoption of children. (See Procedural Regulations of the Rabbinical Courts of Palestine, 1943, Regulation 189.)

There is a crying need to regulate the whole problem by special legislation. The State owes this to the orphans of those killed during the Nazi regime, to the children of those killed in the War of Liberation, to the children without a home and to the families not blessed with children. And the sooner the legislator fills the gap the better will it be for all.

For the above reasons the appeal is allowed, the order of the lower court set aside, and the case remitted to be reheard in the light of the ruling set out above.

Appeal allowed, and case remitted.

Judgment given on May 18, 1955.