

Modern Guardianship in Historical Perspective

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ABSTRACT

Guardianship, an old institute classified in law as pertaining to persons and family, functions within and outside the family. Family which is often regarded as a «natural» phenomenon, is a social construct, contingent on time, culture, class and place. The introduction puts emphasis on historical developments that on the one hand have limited the scope of ancient guardianship by bestowing legal independence or capacity to wider categories (e.g., women), and on the other hand expanded it to new categories within modern concepts of family (e.g., de facto adopted children).

The modern concept of parenting which might be detached from coupling and biology is occasionally inter-related with de facto kinship. This trend could be traced back to old times, so that ancient guardianship might serve not only as a tool for comparison with current developments in law and society, but also as some source of insight and inspiration.

INTRODUCTION

Guardianship, an old institute classified in the law pertaining to persons and family, denotes a relation whereby a duty of care and responsibility is employed by one person, the guardian, on behalf and for the benefit of another person whose capacity is wholly or partially impaired. Guardianship functions within the family – parents are natural guardians of their children – and also outside the family.

Family is occasionally regarded as a «natural» phenomenon.¹ Yet family is a social construct, contingent on time, culture, class and place.² The following introduction will present the concept of guardianship, its inter-relation with legal capacity and with family relations. An emphasis will be laid on historical developments that on the one hand have limited the scope of ancient guardianship by bestowing legal independence or capacity to wider categories (e.g., women), and on the other hand expanded it to new categories within modern concepts of family (e.g., *de facto* adopted children).

The evolving, flexible concept of family and guardianship is apparent not only diachronically but also synchronically: it might change within the same society itself depending on culture and context. Thus, a person may be regarded as guardian with regard to maintaining a child, but the child might not be regarded as part of a family in the context of citizenship. Form and substance determine status according to policy considerations which might operate differently in the public and private spheres.

The accelerated development characterizing the law of family, persons and guardianship has its origins in new ideas about personal freedom, equality and women's right, children's and wards' rights, and advances in bio-technology and genetic science.³ Early modern family referred usually to a «nuclear household unit made up of a married heterosexual couple and their biological or adopted children».⁴ Nowadays parenting could be detached from marriage and biology, couples might be of the same gender, the couple concept is not necessarily relevant, and guardianship is inter-related with *de facto* kinship. This trend of *de facto* kinship could be traced back to old times, so that ancient guardianship might serve not only as a tool for comparison with current developments in law and society, but also as some source of insight and inspiration.

¹ ALMOND 2008.

² ALMOND 2008.

³ GLENDON 2004, sec. Introd.-1–Introd.-27; STOLJAR 2004, sec. 7.1–7.298

⁴ STACEY 1996, 38.

LEGAL PERSONALITY AND LEGAL CAPACITY

The laws of guardianship are closely related to the rules of legal capacity, a broad term encompassing first, the ability to hold rights and to be subject to duties, and second, the capacity to establish, exercise, transfer or renounce rights, namely to perform legal acts, such as contracts, wills, and claiming in courts.⁵

Though the two aspects of legal capacity are jointly presented, the first aspect, the ability to hold rights and assume duties, has been separately developed in legal systems of German origin which distinguish between **legal personality**, implying the ability of a person to hold rights and duties, and **legal capacity**, namely the competence to exercise rights or to assume duties. Common law has not dealt with the abstract notion of legal personality, but rather focuses on its outcomes, that is on legal capacity, which is more significant in practice.⁶ The development of the notion of legal personality, apart from being a logical prior step in determining the issue of legal capacity, puts emphasis on the autonomous nature of every human being and was developed by legal scholarship of 18th and 19th centuries following the emergence of individual freedom and human rights.

In the context of legal personality and capacity three basic questions arise: **the first**, what is the fundamental assumption regarding legal capacity; **second**, what categories of people do not possess legal capacity (or full legal capacity); and **third**, who should administer the legal issues relating to those incapacitated. At this last point, the issue of guardianship arises and it concerns the following problems: how is guardianship created; what are the duties and rights of the guardian; what sanctions are imposed on the guardian for breaching a duty; how is guardianship terminated; what is the role of court supervision (all these various problems are discussed by Gerhard Thür, Demokritos Kaltsas, Emmanuelle Chevreau and Amihai Radzyner). Hence, the topic strongly combines private law and public law issues.

I shall address the three questions regarding capacity and guardianship, with special reference to Israeli law. As to the **first one**: Israeli law has adopted the fundamental assumption prevailing in Western civilization regarding legal capacity, by which every person holds a full legal personality from birth until death.⁷

⁵ HELDRICH & STEINER 2004, sec. 2.1–2.10; 2.11–2.40.

⁶ HELDRICH & STEINER 2004, sec. 2.1; 2.11–2.40.

⁷ HELDRICH & STEINER 2004, sec. 2.2; 2.8.

Israeli Law, oscillating between common law historical imprint and continental-civil law later impact, adhered in this context to the German idea and created a distinction between legal personality and legal capacity.⁸ Section 1 of Capacity and Guardianship Law, 1962, constitutes the principle of legal personality by stating as follows:

Every person shall be capable of having rights and obligations from the completion of his birth until his death.

Section 2 relates to capacity and its limits in the following words:

Every person shall be capable of performing legal acts, unless he has been deprived of this capacity or it has been restricted by Law or by the judgment of a court of law.

This overall recognition in everyone's legal personality demonstrates a sharp contrast between modern society and ancient, and even pre-modern societies: whereas today (and I refer to Western traditions) every person is fully entitled to rights and duties, this was not the case in the past (even near-past) where large portion, and at times the vast majority, of the population, were not considered as holding a legal personality and did not possess full capacity.

As mentioned earlier this conceptual shift towards universal legal personality is an off-spring of the emergence of human rights theories and notions of equality and human dignity; today, the principle of equality and the elevated position of personal autonomy are in fact regulating society altogether.

Autonomy means the capability to exercise one's own discretion in leading one's life and affairs. Autonomy produces capacity. «In modern legal systems 'capacity' is the principal juridical mechanism by which individuals and entities are empowered to... arrange their affairs using the instruments of private law».⁹ Obviously if autonomy is lacking – wholly, partially or temporarily – capacity is impaired. The person who suffers this shortcoming should be taken care of usually by a guardian. But the concept of guardianship was shaped in the past not only according to the nature of mental ability one had, but also by the patriarchic societal structure governing in the past (as explained by Paul du Plessis) and given the fact that capacity to rights was, in some societies, rather limited from the outset.

⁸ ENGLARD 1995, 17.

⁹ DEAKIN 2009, 2.

LACK OF CAPACITY

The **second question** revolving capacity concerns the categories of people not possessing legal capacity. Generally speaking, the main categories discussed herewith are the following: children under age; mentally and physically challenged; women; slaves (a special category which caused problems, and as shown by Edward Cohen, Greek law employed the institute of representation to overcome the incapacity). Another relevant group (not discussed herewith) concerns aliens.¹⁰

Regarding women: As demonstrated by Mark Depauw and Lorenzo Gagliardi in ancient Egypt women did not need a male guardian (actually the whole subject of guardianship was hardly mentioned), a necessity that only arose under the impact of Greek and Roman law. Ancient Egypt should be, therefore, hailed with reservation: along the history of Ancient Egypt there were some women Pharaohs, possibly ruling independently not as regents, the most famous of whom was Hatshepsut, described as a beautiful woman. However, when depicted as Pharaoh she used to bear an artificial beard to conform to patriarchic tradition¹¹ (this resonates with Lena Fijałkowska's description: a wife could become head of the family, if the former-head was ready to make her "father and mother" of the estate; a daughter could become guardian by being declared "male and female").

Obviously, the most radical current change with regard to guardianship relates to women: families in western traditions can be characterized by a decline in patriarchic authority or its total absence, marital instability, and a different division of labor at home and outside. Though socially, and in some jurisdictions also legally, equality has not been fully attained, in principle women are entitled to the same rights and are loaded with the same duties as men. They are in no need of being guarded and can serve as guardians themselves.

What categories lack legal capacity and are in need of guardians nowadays? Under Israeli Law which reflects universal modern western perceptions two major categories of incapacity exist: **First** (section 3), natural incapacity, which under Israeli law applies to children under 18 (they gradually acquire capacity by the age of 18) (from Eva Jakab we learn that under Roman Law – the age for male was 14; women, however, did not mature ever...); **second** type of incapacity is created by virtue of law or court declaration (section 8), and it applies to people who are mentally ill or those with a defective mind.

¹⁰ WIJFFELS 2009, 59. Other categories of incapable persons discussed on a later stage were members of religious orders and illegitimate children: WIJFFELS 2009, 59.

¹¹ TYLDESLEY 1998, 130-131.

Does it mean that legal acts concluded with persons having full capacity are totally protected? The answer is negative. Modern contract law distinguishes between capacity and capability. New protected interests have emerged. In consumer transactions and actually in cases where parties are not on the same footing due to imbalance in bargaining power the court has discretion to annul or change the transaction and in this way to protect those who lack capability. One can say that the rigid, egalitarian rules of incapacity have been transformed to flexible rules examining capability and applied on an *ad hoc* basis.¹²

INCAPACITATED AND GUARDIANS

The **third question**, namely who should take care and administer the legal affairs of those incapacitated, is the core problem of the discussion. The guardians of children are their biological parents (section 14 – the parents are the natural guardians of their minor children) or their adopting parents (adoption is a formal procedure requiring a court decree, as specified in section 1 of The Adoption of Children Law, 1981) or guardians appointed by court (if orphaned); the guardians of mentally ill are appointed by court (often relatives, but not necessarily so).

What are the duties of the guardians? They have to take care of the wards' needs (in a case of a child to rear, to educate), to manage their property, and to represent them (sections 15, 38) and this has not been construed as *numerus clausus* of duties.¹³ The parental guardianship is to be equally exercised by both parents (section 18). Adopting parents are subject to the same duties of biological parents (section 16 of the Adoption Law, states in addition that the adoption cuts the links with the biological parents but the court is empowered to limit this effect).

If guardians do not fulfill their duties towards their wards the court can limit the guardianship or cancel it (even with regard to biological or adopting parents) (section 60).

GUARDIANS AND DUTIES

The special relations where life and property of one person are controlled by another who is bound to act solely for the benefit of the other raises a char-

¹² WIJFFELS 2009, 61-62.

¹³ See CA 2266/93 Ploni v Ploni (22.2.95) page 241 (Judge Shamgar).

acteristic problem, termed in modern terminology as «the agency problem».¹⁴ This problem is rooted in the inherent conflict of interests involved: it stems from the apprehension that the guardian, having full control of the ward's life and property, may abuse his or her power and instead of acting for the benefit of the ward, he or she will seek to further their own interest. The case of a regent who seeks to become the king or queen is a conspicuous example, as reflected in Kostas Buraselis paper (the regent problem is also discussed by Aram Mardirossian). The aim of the regulating law of guardianship is to minimize the incentives of the guardian to breach the duty towards the ward.

Ancient systems such as classical Athens and Roman-Egypt employed administrative control over guardians (as presented by Alberto Maffi, Gerhard Thür and Thomas Kruse), and this applies also nowadays: there are strict rules designated to avoid the inherent conflict of interests embedded in such relationship. Many situations might raise a conflict of interests, and modern statutory law dealing with the matter, assume the existence of such conflict and refers to the most common, prevalent situations within it. Israeli law specifies that when parents wish to make transactions with their own children, they need to obtain court approval. Court supervision is also imposed on serious transactions with third parties, like selling real estate of the children (section 20), and all this applies *mutatis mutandis* with regard to any guardian (sections 47, 48). Under Israeli Law reflecting current modern legislation parents and guardians should act in the best interests of the ward. In recent years, this term has been replaced with the concept of the child's or ward's rights. The conceptual shift is meant to put emphasis on the legal constitutional status of the child or ward as an autonomous personality, a status lacking in ancient systems.¹⁵

It should be noted that management of property of incapacitated can be done through the device of trust, a common law institute, which separates between formal ownership and beneficial (or equitable) ownership.¹⁶ In the regular guardian-ward relations, the ward is the owner of the property and the guardian administers it. The trust arrangement preserves the unity of the holding of the right and its exercise by one person (the trustee), yet the ben-

¹⁴ ROSS 1973.

¹⁵ CA 2266/93, Ploni v Ploni (22.2.95) (elaboration of the concept of child's rights, with some doubts as regarding the difference between the principle of the child's best interests and the concept of child's rights); CFa 0491230/03 Ploni v Almoni (19.11.2006, Judge Geifman) (the concept of child's rights is based on a recognition of the autonomy of a child given the circumstances to understand and determine decisions regarding her or his life). Israeli law fortifies the ward's autonomous status by empowering her or him to file an independent claim in the case of an infringement of rights: Section 3(d) of the Family Court Law, 1995.

¹⁶ For the argument that the trust device has its counterparts in Civil Law systems: BECKNER, DEVAUX & RYZNAR 2014.

efits are available only to the incapacitated protected person (the beneficiary).¹⁷ Obviously, also in this case the problem of agency and the inherent conflict of interests are conspicuous, and the trustee is subject to strict fiduciary duties and to public supervision.¹⁸

What is the position of a guardian who breaks his or her fiduciary duties towards the ward? Under Israeli Capacity and Guardianship Law the guardian is subject to sanctions, and the guardianship, even parental one, could be terminated (section 26). The child in this case will be taken care of by another guardian or in severe case might be totally disconnected from his biological parents and adopted by others who become parents for any matter. All these decisions are made following a court order.¹⁹

Generally speaking, both the Law of Capacity and Guardianship and the Law of Adoption are very formal: they provide for clear, definite rules regarding the **creation** of the status of guardians, their **contents** (rights and duties of the guardian and custodian), and their **termination**.

FORMAL AND INFORMAL GUARDIANSHIP

In light of the law's formal approach to such a complicated and delicate situation, it is worthwhile to address the very relation between formal rules of guardianship and informal dynamics of life and reality. In other words, could guardianship be created even in the absence of kinship or without any court decree of adoption?

This resonates in Amihai Radzyner's paper which deals with creating a *de facto* guardianship according to Talmudic law based on child support. This has ancient roots as apparent in Solomon Judgment, where the conflict was between two women claiming biological motherhood.²⁰ Some modern reflection is presented in Brecht's play *The Caucasian Chalk Circle* (Bertolt Brecht, Heinemann edition, 1960), where the competition was between the biological mother who deserted the child and the maid who rescued and raised him. In both cases the caring woman is regarded the legal mother. The criterion is not a formal one, but rather a substantive one: caring and concern are the core elements of parenthood.

¹⁷ HELDRICH & STEINER 2004, sec. 2.1.

¹⁸ Israeli Trust Law, 1979, sections 10-15.

¹⁹ Adoption Law, sections 16, 19, & 20.

²⁰ *Kings A*, 4.16-28.

In a more complex way it also applies to the case of Moses. Yocheved, Moses' mother, did not willingly abandon the child; she put him in the ark on the Nile in order to rescue him from the murderous command of Pharaoh; she also sent his sister, Miriam, to keep an eye on him. Pharaoh's daughter finds the boy, and Miriam offers her a nurse for the boy, without disclosing that the candidate, Yocheved, is in fact Moses' biological mother. Pharaoh's daughter accepts the offer and is willing to give the nurse wages for that task. After being nursed by Yocheved, Moses was returned by Yocheved to Pharaoh's daughter "and he became her son".²¹

In principle, adoption cuts the connection with the biological parent, and the adoptive parent replaces the biological parent. This is typically specified also in section 16 of the Israeli Adoption Law. Along the years, it has been found that the rigid closure of adoption has proved itself as unsatisfactory and harmful.²² The result is that nowadays a prevalent form of adoption is that of «open adoption» whereby the biological and adoptive family enter into enforceable agreements for on-going contact after the adoption.²³ In the story of Moses there was some kind of an open adoption, with the adoptive mother not being aware to the fact that the nurse is the biological mother.

Moses' case does not reveal a competition between the biological mother and his adoptive mother, because Yocheved was willing to give up the child in order to save his life. Seemingly, a formal procedure of adoption, whereby an official approved it, was not needed. A *de facto* adoption by which the adoptive mother takes the boy and raises him, sufficed.

Nowadays adoption is mostly governed by statutory law. These laws are relatively modern. For example American law did not inherit adoption laws from England for the simple reason that there were not any. Adoption was «a new edition to the Anglo-American lexicon» by statutory laws starting from the 1850s.²⁴ The hallmark of adoption is a judicial termination of one family and creation of another, attributes which need to conform to rigid formal requirements. With the development of new families, *de facto* adoptions have become very common. Such adoptions stand in a sharp contrast to the formal approach of statutory adoption laws, Israeli Law notwithstanding. Is *de facto* adoption still viable in the light of the current statutory law?

²¹ Exodus 2.10.

²² CARP 1998, 196-222.

²³ APPELL 2010, 90-93.

²⁴ APPELL 2010, 87-88.

FORMAL AND SUBSTANTIAL GUARDIANSHIP UNDER ISRAELI LAW

PARENTAL DUTIES AND RIGHTS

The problem raised by the inter-relations between formal adoption and *de facto* adoption reflects one common legal thread: what are the relations between form and substance? Could substantive considerations overcome ceremonial procedure? Is co-existence between the two possible? In modern terms, could guardianship be created deviating from the formal procedure specified by law? Some papers refer to the gap between formal rules and law in practice. This gap is probably eternal and in modern times it is described as the conflict between the law in the book and the law in action.²⁵ It is especially challenging with regard to family relations where on the one hand status requires clear definition and on the other hand statutory law cannot adequately respond to the rapidly changing models of family. This will be demonstrated by several cases decided by Israeli courts.

In one case two women, unmarried-partners, agreed to have a child, following which one of them gave birth to a baby. The other woman did not adopt the baby. After a while they separated. The biological mother filed a claim against her ex-partner for maintenance (same sex marriage is not recognized if taken place in Israel, but if made abroad, it is validated here). The court ruled that there was a contract (not necessarily formal) between the two women whereby the other woman committed herself to maintaining the child, and she was liable by virtue of it.²⁶

A similar case concerned a non-married straight couple who decided to adopt twins. Only the mother was recorded as the adoptive parent. Her partner signed an undertaking saying that if the mother would not be able to take care of the twins, he would be ready to act as their guardian. After the couple's separation the mother filed a claim against her ex-partner asking for a declaration that he was the twins' adoptive father. This was rejected: parental relations may be established either by biology or formal adoption (through a court decree). Adoption *de facto* is not enough. But the court imposed on the ex-partner a duty (albeit minimal) to pay for the twins' support as a result of the fact that he acted as their father, and as such could be considered as a psychological father (a notion developed in American case law to which I shall shortly refer). Status of fatherhood was not recognized, but its monetary

²⁵ POUND 1910.

²⁶ FC 21910-02-10 S' v M' (13/8/2013) (family court, Judge Rakover).

effects were partially imposed on the non-father by virtue of the agreement and his actual conduct.²⁷

This raises a series of questions: parents may be subject to liability for neglecting their children. Their liability might be based on their parental duties, on tort law and also on criminal law.²⁸ Are *de facto* parents exposed to such liability? And more generally: If *de facto* parents are liable to duties and obligations of parents, are they also liable for damages caused by their *de facto* children (who as minors are exempt from liability) to third parties? Are *de facto* parents entitled to parental rights such as visitation? Will the child when becoming a grown-up assume responsibility towards such a father? In an *obiter dictum* one of the judges indeed pointed at the problem and mentioned that the father is likely to enjoy rights of visitation.²⁹

In the above cases conduct coupled with promise (not necessarily formal) led to the imposition of parental monetary obligation on the *de facto* parent. The question of parental duties remained obscure. The following case demonstrates the creative power of technology and of an explicit contract, which tries to overcome the formal legal limitation of parental and guardianship status. This time the contract involved three parties: two women and a man, all of whom wished to become common parents of twins. All were involved in the birth process: one woman gave birth following an artificial insemination; the second woman contributed eggs; the man was the sperm's donor. In the official state registration the biological parents were the woman who gave birth and the man. The three parties concluded a formal agreement stating that they wished to create a common parenthood whereby they would jointly take care of the twins, and were bound to any rights and duties emanating from that position. A provision in the contract stated that the parties regarded this agreement as valid and binding contract for any matter. After being separated from the mother who gave birth, the other woman filed a claim against the registered parents who wished to exclude her from the family circle claiming

²⁷ AFC 22050-06-11 R.S. v A.R. (13.5.12), approved by the Supreme Court in FC 4751/12 Almoni v Almonit (29.8.2013).

²⁸ MAHONEY 1994, 75-86, 200-208. CA 2034/98 Amin v Amin, PD 53(5) 69 (1999): tort liability imposed on a father who caused emotional damage to children as a result of neglect.

²⁹ TROILO 2011; SCHARF 2012; APPLETON 2014, 1481-1490. See FC 4751/12, where Justice Amit mentioned that had the *de facto* father sued for custody or visitation rights he could not have been treated as alien to the girls.

See also FC 1180-08 Plonit v Ploni (27.4.2011) section 92-94, relying on Middleton v. Johnson, 633 S.E.2d 162, 595 et seq. (S.C. Ct. App. 2006); In Re Parental Responsibilities of A.D., 09CA0756 (Colo. app. 4-1-2010). See also In re Clifford K., 217 W.Va. 625, 619 S.E.2d 138, 157-158 (2005) (noting that in «exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding... when such intervention is likely to serve the best interest of the child(ren)...»).

she did not have any standing and the contract was against public policy. The court rejected these arguments, taking into consideration the twins' best interests, and enforced the agreement.³⁰

Duties of guardians are hence imposed by choice and conduct: autonomy and reliance replace formality dictated by law. Formal contracts and promises coupled with conduct embedded in self-preference and mutual reliance creates a deviating road to the public-formal channels of kinship shaped by the state.

CITIZENSHIP

Another case which this time reflected a limitation on the *de facto* parenthood was tried recently by Israeli Supreme Court involving the application of the Law of Return, 1950, which gives an automatic citizenship to a Jew, or to a son (or grandson) of one Jewish parent (or grandparent). A claimant wanted to have his right of return following these facts: His parents were non-Jewish, but his non-Jewish mother married a Jew who raised him. Had he adopted him, the son would have been entitled to citizenship. It transpired there was no formal adoption. The core of the petition related to the formal adoption that was made abroad, but actually no such adoption was made and some of the documents were not authentic. Pursuing a formal approach, the court in a majority opinion rejected the claim, expressing the view that in these circumstances adoption *de facto* did not suffice. The minority opinion was ready to adopt a substantive approach – open to further scrutiny - relying on the actual relations of parenthood between the claimant and his mother's husband.³¹

Could we trace a trend in this case law and extract any guidelines? It appears that with regard to inter-family relations in the private sphere the court is more ready to employ flexible concepts of family kinship. When it comes to public rights the position is less tolerant, in particular where some suspicions of fraud are raised, yet the minority approach signals a more lenient tendency even with regard to the public sphere.

To conclude: Israeli law has developed the notion of *de facto* marriage to respond to the problems raised by harsh marriage rules dominated by religious law (no civil marriage in Israel; no same sex marriage either).³² Following this line case-law paves a parallel path to respond to the growing needs and

³⁰ FC 37745-03-14 Nili v Orit and Alon (27.4.2014) (Judge Shaked).

³¹ HC 5020/08 Poltoretzky v State of Israel (12.9.2013) (majority: judges Rubinstein, Naor; minority: Barak-Erez).

³² LIFSHITZ 2008.

number of children in non-formal families. The same device to circumvent the formal rules in marriage, namely the *de facto* conduct of being married, is being employed in the context of parental guardianship: the *de facto* parenthood is a substitute for adoption. Agreement and its implementation replace formal status.

Do we trace here norms which were prevalent in some ancient societies, where marriage was consummated by living as husband and wife in the same household,³³ and guardianship by rearing and upbringing the child, without the need of any special formal ceremony?³⁴

CONCLUSION – BACK TO PAST WITH CONTEXTUAL INTERPRETATION

I related earlier to the fluid borders of guardianship. Large categories of guardianship have been cancelled: no woman as such needs nowadays a guardian. Guardianship is applied to those incapacitated either because of age or because of mental defects. But the question who is to become a guardian still retains its fluidity due to the evolvement of new categories of intimacy, kinship and family.

Research on family meanings and practices in late modernity underlines the continued importance of the bonds of affection and support in families, but it also reveals changing sets of close relatives and a blurring between kin, non-kin and ex-kin in family networks. Personal relationships are today less dependent on marriage and blood ties, with family bonds and commitments going far beyond the nuclear co-resident family and extending across households linked by friendship, vicinity, dissolved marriages, step-parenting and care arrangements.³⁵

The move of modernity or post-modernity families from «status to contract»,³⁶ from the «natural» to the «chosen», raises non-trivial problems, and casts a shadow on the clarity and certainty of legal rules in the family circle. Are the problems involving formal and informal families likely to create a chaotic situation eventually leading back, in a pendulum motion, to formality?

³³ On the concept of marriage in Roman law see STOCQUART 1907, 304. Yet also this non-ceremonial form of marriage needed to be accompanied by the intention of the husband to have a legal wife. On this concept in Jewish Law see SHOCHETMAN 1993.

³⁴ As demonstrated by Moses and Pharaoh's daughter, discussed earlier.

³⁵ WALL & GOUVEIA 2014, 352.

³⁶ MAINE 1861, 170 («the movement of the progressive societies has hitherto been a movement from status to contract»).

Could we trace past-analogues which might shed light on prospective possible developments?

The need for clarity is crucial in property matters, such as the case where an informal daughter claims her share in the estate of her deceased quasi-parents.³⁷ Indeed under American law there is a controversy whether to stick to the formal inheritance statutes or make changes through judicial interpretation.³⁸ Some American courts adopted the doctrine of informal adoption in order to enable non-adopted children to inherit. This doctrine is based upon either an intention or agreement to adopt, and some courts put emphasis in addition on reliance on the intention to adopt and the ensuing detriment.³⁹ This somewhat rigid requirement is justified as preventive fraud machinery and it is clearly applicable to nuclear families.⁴⁰ But it might cause difficulties in communities where the concept of extended families prevails and where no formal adoption has been ever considered, or in families with cultural pre-disposition against formal adoption. Modern Intestacy Law which applies absent a will might be under-inclusive as it usually refers to formal families⁴¹ or over-inclusive as it occasionally benefits undeserving heirs.⁴² With regard to the under-inclusiveness the proposal is to replace the contractual rigid doctrine with the doctrine of holding out parental relations, namely where «... the proponent and decedent held themselves out as parent and child for a substantial period of time...».⁴³ Also in order to help limit meritless claims, «courts should continue to require that a proponent prove his claim».⁴⁴ Naturally a statutory reform is needed to officially implement this change in all jurisdictions.⁴⁵

Guardianship is closely related to the general question of identity. Identity might relate to guardianship, family membership, citizenship, race or gender. Should it be determined according to substantive or formal criteria?⁴⁶ With regard to parenthood substantive criteria might include DNA, commitment,

³⁷ HIGDON 2008.

³⁸ REEVES 2001; DRAKE 2005, 681-692.

³⁹ HIGDON 2008, 257-266.

⁴⁰ HIGDON 2008, 271-272.

⁴¹ HIGDON 2008. In Israel a non-married spouse is entitled to inherit if both the deceased and the survivor have lived together as husband and wife in a common household, neither of them married to another person: section 55 to the Succession Law, 1965.

⁴² COHEN 2012, 803-804.

⁴³ HIGDON 2008, 274.

⁴⁴ HIGDON 2008, 275.

⁴⁵ HIGDON 2008, 275-278.

⁴⁶ CLARKE 2015. The article relates in addition to formal and substantive criteria to a third criterion entitled «elective». In parenthood it consists of intention.

love, attachment, caretaking or support; formal ones include birth certificates, voluntary acknowledgement of paternity, adoption papers. Determination of parenthood is crucial not only to the parents' identity, but also to the children's. Formal tests of identity provide safeguards against inauthentic claims and secure stability and equality in norm-application. But formality is confining when applied to cases where there was no awareness to formal requirements and where it is too costly to be accessible.⁴⁷

The balance between form or substance and proper application of either is one of the most intriguing problems of current legal systems. But the struggle is eternal. Present problems reflecting modern or post-modern law of guardianship drive us back as if in a time machine to the pre-modern era of extended family, even tribal communities, where the *de facto* care was considered superior to formal kinship. The challenge facing current legal systems is to adjust legal rules to the rapidly changing family-notions. The rules and principles reflected in ancient times, borrowing from care, affection, proximity, intimacy, might serve not only as reminiscences of a by-gone past, but also as an inspiration for fresh ideas to regulate a new, revolutionary reality.

⁴⁷ For a thorough analysis advocating the application of the relevant criteria according to context and policy, see CLARKE 2015.

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