[GRIFFITH WILLIAMS, J., AND ZEKIA, J.]

(March 6, 1953)

SALIH ZEKI OF NICOSIA, AS NATURAL GUARDIAN OF MINOR SEVIL SALIH, *Appellant*,

v.

FAIKA MEHMED OF NICOSIA, *Respondent*.

(*T.F.C. Appeal No.* 3).

Turkish Family (Marriage and Divorce) Law, 1951, sections 33 & 34—*Order as to custody of children—Where parents divorced under "Sheri" Law.*

The powers conferred on the Turkish Family Court by sections 33 and 34 of the Turkish Family (Marriage and Divorce) Law, 1951, to make orders regarding the custody of children can be exercised in the case of the children of parents divorced under the "Sheri" Law.

Appeal dismissed.

Appeal by plaintiff from the judgment of the Turkish Family Court of Nicosia—Famagusta—Kyrenia (No. 41/51).

Fadil Korkut for the appellant.

Umit Suleyman for the respondent.

The facts of the case sufficiently appear in the judgment of the Court which was delivered by :

GRIFFITH WILLIAMS, J. : This is an appeal from a judgment of the Turkish Family Court dismissing the claim by the appellant for the custody of the child the fruit of his marriage with respondent. The appellant and respondent who had been married under the old Sheri Law were orally divorced in 1947 when the child Sevil the subject of this litigation was about one year old. About three months after the divorce the respondent married again, but retained custody of the child and has retained it until now. About three years later the appellant also remarried. Both appellant and respondent have children by their second marriages.

In April 1951 the respondent brought action No. 24/51 in the Sheri Court of Nicosia—Kyrenia, against the appellant claiming maintenance for the said child—and on the 13th June, 1951, the appellant brought an action 41/51 in the Turkish Family Court of Nicosia—Famagusta—Kyrenia, claiming custody of the said child.

These two actions were consolidated and were tried together on the 6th November, 1951. The Turkish Family Judge dismissed the claim of the appellant to custody and made an order against him that he should pay to respondent maintenance of £2 per month towards the expenses of the upbringing of the child. From this judgment the appellant has appealed to this Court.

It has been argued before us that the Turkish Family Judge had acted under the provisions of the Turkish Family (Marriage and Divorce) Law, 4/1951, particularly section 33, and that he had thereby misdirected himself as to the law applicable to this case. The advocate for appellant argued that section 33 only applied when the Court itself granted a divorce, and that as in this case the parties were divorced before this Law was passed, the provisions of the Sheri Law made applicable by section 9 of Law 3/1951 in cases in which no other provision had been made should be applied.

According to Sheri Law the custody of infant children—of boys up to 7 and of girls up to 9 years—is in the mother unless she is for some reason disqualified. One disqualification is remarriage to anyone not related to the child within the prohibited degrees. In this case it is admitted that the respondent's second husband is not so related and that consequently under Sheri Law respondent is disqualified. We were referred to Ameer Ali Mahommedan Law, p. 295 and to Wilson's Digest of Anglo-Muhammadan Law, 3rd Edition, p. 180 ; also to *Hedaya*, p. 138. Counsel also argued that section 34 must be read in conjunction with section 33 and can only be applied when there has already been a Court order for custody.

It seems that according to Sheri Law the appellant might be entitled to custody ; the case therefore rests on whether we can hold the Turkish Family (Marriage and Divorce) Law, 1951, applies in the circumstances of the case.

The object of that Law as regards the custody of children was to give the greatest discretion to the Court in making orders for their benefit. There is nothing in the Law to suggest that the infant children of divorced persons already in being when that Law came into force were to be excluded from its operation. The proper provision for the custody of children was one of the paramount objects of the Law—as can be seen from the Law itself. And section 49 (1) shows that the intention of the Law was to exclude the intrusion of any other laws into any matters dealt with therein. As regards section 34 I see no reason to think that it should be coupled or read in conjunction with section 33 and I think that the Court had power under this section to act.

With regard to the word " petition " occurring in that section, I do not think that it refers necessarily to procedure by petition, it merely might be substituted by words such as " prayer " or " claim ".

In the circumstances I am inclined to agree with the judgment of the learned Turkish Family Judge that the Turkish Family (Marriage and Divorce) Law 4/1951 applies to this case.

The appeal is therefore dismissed with costs.

ZEKIA, J. : I agree with the judgment just delivered. Two are the cardinal underlying principles of the Turkish Family Law relating to the custody of the children : one is the welfare of the child, the other is the unfettered judicial discretion of the Judge.

In reading sections 33, 34 and also other sections in the said Law relating to the custody of the children one is bound to agree that this is so. It would, indeed, lead to absurdity and it would be contrary to the spirit of the Law if we restricted the meaning and the scope of sections 33 and 34 to cases only where the custody of the children comes up incidentally in an action for a judicial divorce before the Turkish Family Court.

In such a case the custody of children of divorced couples prior to the enactment of the Turkish Family Law, 1951, will have to be governed by the old antiquated rules of the Sheri Law. In other words, two altogether different sets of Law will have to be applied in this Island for several years to come, according to whether the parents of the minors were judicially or non-judicially divorced. Such a distinction can never have been intended by the legislature. Section 49 and the saving clause of the Law lead us to the contrary rather than to a distinction being contemplated.

As to the old Law there is no doubt that the marriage of a mother to a stranger disqualifies her from having the custody of the person of the child ; but from this it does not follow that upon the disqualification of the mother the father automatically steps in. There are at least another ten classes of persons who have priority over the father's claim for the custody of the child, and there is no evidence whatsoever in these proceedings that any of these persons have been either consulted or called to take care of the child and that they refused to do so or that none of these is alive.

Under the circumstances I agree that the appeal should be dismissed with costs.