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[TRIANTAFYLIDIS, P., A LOIZOU, MALACHTOS, JJ]

PANAYIOTA  
KYRIACOU  
(née MITSAKI)

PANAYIOTA KYRIACOU (NÉE MITSAKI),

*Appellant,*

v.

v.

ANDREAS  
KYRIACOU

ANDREAS KYRIACOU,

*Respondent.*

(Civil Appeal No. 5236).

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*Guardianship of Infants and Prodigals Law, Cap. 277—  
"Resides" in section 2 (definition of "Court") of the  
Law—It should be interpreted in a manner consistent  
with the object of, inter alia, section 12 of the Law—  
And construed as including the notion of "ordinary  
residence" and not limited to the notion of "actual  
physical presence".*

*Jurisdiction—Children—Ordinarily resident within the juris-  
diction of the District Court of Kyrenia with both  
their parents—Removed out of the jurisdiction by mother  
without the consent or knowledge of father—Said  
District Court vested with jurisdiction to entertain pro-  
ceedings for an order directing return of their custody  
to father—There being no presumption that such an  
order will be disobeyed, factor that it may not be  
possible to enforce it abroad is not a decisive consi-  
deration—Section 2 (definition of "Court") and section  
12 of the Guardianship of Infants and Prodigals Law,  
Cap. 277.*

*Practice and Procedure—Application for return of custody  
of children—Followed by application to set aside ser-  
vice of first application on ground of lack of jurisdiction  
—Issue of jurisdiction agreed to be dealt with as a  
preliminary issue and second application adjourned sine  
die—Dismissal of second application upon the Court  
finding that it possessed jurisdiction—Whether proce-  
dure followed a correct one.*

*Statutes—Construction—"Resides" in section 2 (definition of  
"Court") of the Guardianship of Infants and Prodigals  
Law, Cap. 277.*

The parties to these proceedings are husband and wife. Their infant children are a boy, born in 1962, and a girl, born in 1963. The respondent is a Cypriot and there is no dispute that both his said children are Cypriot citizens. The appellant—his wife—is a Greek national.

Until June 28, 1972, the infants were living with both their parents in Kyrenia. On that date the appellant, without the knowledge or consent of the respondent, left Cyprus taking with her the children, and has now settled in Greece.

By an application filed on June 30, 1972, which, after the necessary leave was obtained, was served abroad on the appellant, the respondent applied, *inter alia*, for an order directing the appellant to restore to him the custody of the children.

This claim was based on s. 12 of the Guardianship of Infants and Prodigals Law, Cap. 277 which reads as follows :-

“12. Where an infant leaves, or is removed from, the custody of his guardian, the Court may order that he be returned to such custody and for the purposes of enforcing such order may direct an officer of the Court or a police officer to seize the person of the infant and deliver him into the custody of his guardian.”

Counsel for the appellant submitted that in view of the way in which section 12 is worded it should be construed as envisaging only the making of an order in respect of an infant who is, at least at the time of the filing of the relevant application, physically present in Cyprus, and that it does not apply to an infant who, at such time, is out of the jurisdiction; and referred in this respect, also, to the definition of “Court” in section 2 of Cap. 277 (quoted in full in the judgment post).

Another issue with which the Court of Appeal had to deal was whether the order under section 12 should have been made, since,—as contended by the appellant—once the infants were outside the jurisdiction of the Cyprus Courts it would not be possible to take effective measures to ensure their return into the custody of the respondent, as their guardian.

Counsel for the appellant, also, complained against the dismissal of his applications filed on July 19, 1972, whereby he was seeking to set aside the service of respondent’s appli-

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cation, and its dismissal on the ground of lack of jurisdiction. The parties having agreed that the Court should deal first with the issue of jurisdiction, as a preliminary issue, appellant's application was adjourned sine die pending the determination of the issue of jurisdiction. And when the trial Court found that it possessed jurisdiction it proceeded, also, to dismiss appellant's said application. In this respect counsel for the appellant argued that as his application was not being dealt with by the Court at the time, it could not be dismissed at that stage.

Held, (1) *On the issue of jurisdiction :*

- (1) In our view section 12 consists of two distinctly severable parts :— The first part enables the Court to make an order for the return of an infant to the custody of the guardian, and the second part relates to the matter of what order the Court may make for the enforcement of an order made under the first part.
- (2) As regards the question of the meaning to be given to the term "resides" in section 2 of Cap. 277 (which regulates, actually, the question of the territorial jurisdictions of the District Courts), we are of the view that it should be interpreted in a manner consistent with the object of, *inter alia*, section 12, and, consequently, such term should be construed as including the notion of "ordinary residence", because if it were to be limited to the notion of "actual physical presence" then this would result in a grave inroad upon the nature of the powers vested in a Court under section 12.
- (3) Since the infants were ordinarily resident in Kyrenia, Cyprus, at the time when they were taken by their mother to Greece and away from the custody of their father, the District Court of Kyrenia has jurisdiction in the matter (see, too, *Re P. (G.E.) (an infant)* [1964] 3 All E.R. 977, at pp. 980 - 982, 984).
- (4) There is, indeed, no presumption that an order for the return to the custody of a guardian here of infants who are abroad will be disobeyed, and,

therefore, the factor that it may not be possible to enforce it abroad is not a decisive consideration. (See, *inter alia*, *Hope v. Hope* [1843 - 1860] All E.R. Rep. 441 and *Fabbri v. Fabbri* [1962] 1 All E.R. 35). *R. v. Pinckney* [1904] 2 K.B. 84 distinguished.

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Held, (II). *With regard to the procedural issue :*

From a strictly formal point of view appellant's contention might be correct, but the decision of the trial Court that it possessed jurisdiction to deal with the application of the respondent entailed, inevitably, the destruction of the basis of appellant's application. So no real injustice was done by dismissing the later application, even though, at the time, it stood adjourned sine die.

*Appeal dismissed.*

Cases referred to :

*Re P. (G.E.) (an infant)* [1964] 3 All E.R. 977, at pp. 980 - 982, 984;

*Hope v. Hope* [1843 - 1860] All E.R. Rep. 441;

*In Re Willoughby (an infant)* [1885] 30 Ch. D. 324;

*Re Liddell's Settlement Trusts* [1936] 1 All E.R. 239 at pp. 247, 248;

*Rex v. Sandbach Justices. Ex parte Smith* [1950] 2 All E.R. 781 at p. 783;

*Harben v. Harben* [1957] 1 All E.R. 379 at p. 381;

*Fabbri v. Fabbri* [1962] 1 All E.R. 35;

*R. v. Pinckney* [1904] 2 K.B. 84.

**Appeal.**

Appeal by respondent against the order of the District Court of Kyrenia (Pitsillides, S.D.J.) dated the 30th August, 1973, (Appl. No. 5/72) whereby it was decided that the Court had jurisdiction to hear Applicant's application for, *inter alia*, an order restoring to him the

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custody of his two infant children which had been taken abroad by their mother.

*L. Papaphilippou*, for the appellant.

*A. Dikigoropoulos*, for the respondent.

*Cur. adv. vult.*

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

ΤΡΙΑΝΤΑΦΥΛΛΙΔΗΣ, P. : This is an appeal from a decision of the District Court of Kyrenia on a preliminary issue concerning the jurisdiction of such Court to entertain an application by the respondent under the Guardianship of Infants and Prodigals Law, Cap. 277, by means of which he was seeking :-

- (a) An order granting him the custody of his two infant children;
- (b) an order granting him the guardianship of such children; and
- (c) an order directing the appellant--who is his wife and the mother of the infants--to restore to him the custody of their children.

It is common ground that by virtue of the provisions of the said Law the respondent, being the father of the infants, is entitled both to the guardianship and to the custody of the infants and, therefore, the first two parts of the relief claimed by his application appear to seek nothing more than confirmation of the legal situation as it exists at present.

The third claim for relief is based on section 12 of Cap. 277 which reads as follows :-

“12. Where an infant leaves, or is removed from, the custody of his guardian, the Court may order that he be returned to such custody and for the purposes of enforcing such order may direct an officer of the Court or a police officer to seize the person of the infant and deliver him into the custody of his guardian.”

The facts of this case are briefly as follows :-

The parties celebrated their marriage in Nicosia on November 5, 1961, and their infant children are a boy, born on August 13, 1962, and a girl, born on December 27, 1963.

The respondent is a Cypriot and there is no dispute that both his said children are Cypriot citizens. The appellant—his wife—is a Greek national.

Until June 28, 1972, the infants were living with both their parents in Kyrenia. On that date the appellant, without the knowledge or consent of the respondent, left Cyprus taking with her the children, and has now settled in Greece. It appears that the cause of the departure were marital problems between the parties and that she has no intention to return.

The application in the present case was filed on June 30, 1972, and after the necessary leave was obtained, it was served abroad on the appellant.

It has been submitted by counsel for the appellant that in view of the way in which section 12 is worded it should be construed as envisaging only the making of an order in respect of an infant who is, at least at the time of the filing of the relevant application, physically present in Cyprus, and that it does not apply to an infant who, at such time, is out of the jurisdiction. In this respect reference has been made, also, to section 2 of Cap. 277, which reads as follows :-

“2. In this Law —  
‘Court’ means

- (a) in proceedings for the appointment or removal of a guardian, and the custody of, and right of access to, an infant, the President of the District Court or a District judge of the District Court within the jurisdiction of which an infant or prodigal resides; and
- (b) in all other cases, a member of the District Court within the jurisdiction of which an infant or prodigal resides.”

In our view section 12 consists of two distinctly se-

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verable parts : The first part enables the Court to make an order for the return of an infant to the custody of the guardian, and the second part relates to the matter of what order the Court may make for the enforcement of an order made under the first part.

As regards the question of the meaning to be given to the term "resides" in section 2 of Cap. 277 (which regulates, actually, the question of the territorial jurisdictions of the District Courts), we are of the view that it should be interpreted in a manner consistent with the object of, *inter alia*, section 12, and, consequently, such term should be construed as including the notion of "ordinary residence", because if it were to be limited to the notion of "actual physical presence" then this would result in a grave inroad upon the nature of the powers vested in a Court under section 12; the latter view would entail, by way of an inevitable corollary, that when a parent, or even a third person, takes infants abroad by kidnapping them unlawfully out of the custody of their guardian the Cyprus Courts are rendered powerless to grant any redress under section 12 of Cap. 277.

In our view since the infants involved in the present proceedings were ordinarily resident in Kyrenia, Cyprus, at the time when they were taken by their mother to Greece and away from the custody of their father, the District Court of Kyrenia has jurisdiction in the matter (see, too, *Re P. (G.E.) (an infant)* [1964] 3 All E R 977, 980 - 982, 984).

Another issue with which we had to deal was whether the order under section 12, which was being sought by the respondent, should have been made, since—as contended by the appellant—once the infants were outside the jurisdiction of the Cyprus Courts it would not be possible to take effective measures to ensure their return into the custody of the respondent, as their guardian.

There is, indeed, no presumption that an order for the return to the custody of a guardian here of infants who are abroad will be disobeyed, and, therefore, the factor that it may not be possible to enforce it abroad is not a decisive consideration; useful reference, in this respect, may be made to *Hope v. Hope* [1843 - 1860] All E.R. Rep. 441, *In Re Willoughby (an infant)* [1885]

30 Ch. D. 324, *Re Liddell's Settlement Trusts* [1936] 1 All E.R. 239, 247, 248, *Rex v. Sandbach Justices, Ex parte Smith* [1950] 2 All E.R. 781, 783, *Harben v. Harben* [1957] 1 All E.R. 379, 381, *Fabbri v. Fabbri* [1962] 1 All E.R. 35, and *In Re P. (G.E.)* (an infant), *supra*. On the other hand, the case of *R. v. Pinckney* [1904] 2 K.B. 84, in which there was, also, involved the matter of the custody of infants who were abroad, is distinguishable from the present case because it was decided in relation to the power to grant an order of habeas corpus regarding children and it appears that different considerations apply in such a case.

For all the foregoing reasons we have to dismiss the present appeal. Before, however, we conclude this judgment we have to deal, also, with the following procedural matter:

— After the application of the respondent had been filed on June 30, 1972, the appellant filed on July 19, 1972, an application seeking to set aside the service of the said earlier application, and its dismissal, on the ground of lack of jurisdiction. On September 28, 1972, counsel for the parties agreed that the trial Court should deal first with the issue of jurisdiction, as a preliminary issue, and that the second application of July 19, 1972, should be adjourned, in the meantime, sine die, pending the determination of the issue of jurisdiction. When later the trial Court found, as aforesaid, that it possessed jurisdiction it proceeded, also, to dismiss the application of July 19, 1972, which, at the time, stood adjourned sine die; and counsel for the appellant has complained to us that, in the circumstances, as such application was not being dealt with by the Court at the time, it could not be dismissed at that stage.

From a strictly formal point of view this might be correct; but the decision of the trial Court that it possessed jurisdiction to deal with the application of the respondent of June 30, 1972, entailed, inevitably, the destruction of the basis of the said application of July 19, 1972, by means of which it was sought to set aside the service of, and dismiss, the earlier application of June 30, 1972, for lack of jurisdiction. So, no real injustice was done by dismissing the later application, even though,

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at the time, it stood adjourned sine die, awaiting the outcome of the proceedings on the issue of jurisdiction.

As already indicated this appeal has to be dismissed; and the appellant is ordered to pay the costs of the respondent.

*Appeal dismissed with costs.*