[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

LOULLA G. ECONOMOU (NO. 2),

Appellant,

v.

GEORGE K. ECONOMOU,

Respondent.

(*Civil Appeal No.* 5598).

Children—Custody—Access—Jurisdiction—A Cyprus Court has competence to allow minors to be taken out of the jurisdiction of the Cyprus Courts—Section 7 of the Guardianship of Infants and and Prodigals Law, Cap. 277—Sections 11 and 12 of the Law not applicable.

Guardianship of Infants and Prodigals Law, Cap. 277—Children—Custody—Taking children out of the jurisdiction—A Cyprus Court has competence to allow minors to be taken out of the jurisdiction—Section 7 of the Law—Sections 11 and 12 of the Law not applicable.

Jurisdiction—Children—Custody—Allowing children out of the jurisdiction—See, also, under "Children".

Children—Custody—Access—Mother having custody—Father having right of access—Mother living in Cyprus—Father living and working in Greece—Order allowing children to travel to Greece in order to stay with father for a period of 15–17 days during the summer month —Primary consideration the welfare of the minors—Said order will not operate to the benefit of the minors concerned at this early stage of their lives—And will not be conducive to the preservation of a proper relationship between the father and his children—Inconsistent with the proper approach to a matter of this nature and plainly wrong—Set aside—Makrides *v.* Makrides (*reported in this Part at p.* 14 ante), distinguishable *on its facts.*

Court of Appeal—Appeal—Discretion of trial Judge—Review of exercise of discretion—Circumstances in which appellate Court may interfere with exercise of discretion by trial Judge.

The parties to these proceedings were married in 1967 but

they are now separated due to their marriage having broken down; the appellant-mother is living in Nicosia; the father is, for the time being, residing and working in Greece, where he is in charge of the Piraeus branch of a Cypriot firm of advocates. He is so busy with his work in Greece, and has to travel so often to other parts of the world, that he can spare very little time for the purpose of coming to Cyprus; he can do so only for brief visits on infrequent occasions.

The mother appealed against that part of the judgment of the trial Court by means of which it has been ordered that the elder two out of the three minor children of the parties, are to be allowed to travel, in the company of their paternal grandfather or grandmother, to Greece in order to stay there with their father for a period of between fifteen to seventeen days during the summer months only.

Appellant contended (a) that the District Court did not possess jurisdiction, under s. 7(1)(f) and (2)* or sections 11 and 12** of the Guardianship of Infants and Prodigals Law, Cap. 277, to make an order allowing the two minors to be taken out of the jurisdiction of the Cyprus Courts.

(b) That the order appealed from amounts to a wrong exercise of the relevant discretionary powers of the trial Court and that it aims more at meeting the needs of the father rather than at promoting the welfare of the minors concerned.

Held, (1) a Cyprus Court has, under section 7 of Cap. 277 competence—which is to be used, of course, sparingly and in appropriate cases only—to allow minors to be taken out of the jurisdiction of the Cyprus Courts (*In Re F (a minor) (access out of jurisdiction)* [1973] 3 All E.R. 493 *followed*) (pp. 396–399 *post*).

(2) Sections 11 and 12 of Cap. 277 cannot, in any way, be construed as having as their object, directly, or indirectly, to lay down the extent of the jurisdiction of a Cyprus Court when applying a provision of Cap. 277 such as section 7; their purpose is an altogether different one and totally irrelevant to the issue of jurisdiction raised by counsel for the appellant.

(3) The primary consideration in a case of this nature is

* p. 395 *post*.
** p. 399 *post*.

the welfare of the minor (see s. 7(2) Cap. 277 and *Makrides* v. *Makrides* (reported in this Part at p. 14 *ante*)).

(4) (*After dealing with the powers of an appellate Court to interfere with the exercise of the discretion of a trial Judge*—vide pp. 400–402 *post*). The order appealed against will not operate to the benefit of the minors concerned at this early stage of their lives; consequently we regard it as being inconsistent with the proper approach to a matter of this nature and plainly wrong. It would be detrimental to the welfare of the minors to make them feel that they have to be taken every summer to Greece in order to stay with their father, because he has no time, due to his professional pre-occupations, to visit them often enough in Cyprus even though, for business purposes, he does travel abroad from Greece to other parts of the world; such an arrangement would not be conducive to the preservation of a proper relationship between the father and his children, and this is the main reason for which we set aside the complained of part of the order of the trial Court and substitute it with a new one. (*Makrides* (*supra*) *distinguished*).

Appeal allowed. No order as to costs.

Cases referred to:

In re E. (*an Infant*) [1956] Ch. 23;

Re F (*a minor*) (*access out of jurisdiction*) [1973] 3 *All E.R.* 493;

In re A and B (*Infants*) [1897] 1 Ch. 786;

Makrides v. *Makrides* (reported in this Part at p. 14 *ante*);

Re F (*a minor*) [1976] 1 All E.R. 417;

Beck and Others v. *Value Capital Ltd., and Others* (*No.* 2) [1976] 2 All E.R. 102, at pp. 108–109;

Skaliotou v. *Pelekanos* (reported in this Part at p. 251 *ante*);

Karydas Taxi Co. Ltd., v. *Komodikis* (1975) 1 C.L.R. 321.

Appeal.

Appeal by the mother against that part of the judgment of the District Court of Nicosia (Papadopoulos, S.D.J.) dated the 12th June, 1976, (Application No. 14/76) by means of which it has been ordered that the elder two out of the three minor children of the parties are to be allowed to travel to Greece in order to stay there with their father (respondent in this appeal)

for a period of fifteen to seventeen days during the summer months.

G. Ladas with *G. Cacoyiannis*, for the appellant.

Chr. Demetriades, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES, P.: The appellant (to be referred to hereinafter as "the mother") appeals against that part of a judgment of the District Court of Nicosia, dated June 12, 1976, by means of which it has been ordered that the elder two out of the three minor children of the parties, namely Constantinos and Alexis, are to be allowed to travel, in the company of their paternal grandfather or grandmother, to Greece in order to stay there with the respondent (to be referred to hereinafter as "the father") for a period of between fifteen to seventeen days during the summer months only; the third and youngest child of the parties is not affected by the complained of part of the judgment of the Court below.

The remaining parts of the order, which are not challenged in this appeal, and which were made by consent, are as follows:-

"(1) The names of the children to be placed on the stop list of the Migration Department. The children will not travel abroad without the consent of both parents or with a Court's order.

(2) Custody of children with the mother. Guardianship with the father.

(3) Father will have regularly access to the children when he is in Cyprus. Parents of the father of the children will have access to the children for one weekend every month."

The parties were married in 1967, but they are now separated due to their marriage having broken down; the mother of the minors is living in Nicosia; the father is, for the time being, residing and working in Greece, where he is in charge of the Piraeus branch of a Cypriot firm of advocates.

As it appears from evidence which was placed before the trial Court, by means of an affidavit, the father is so busy with his work in Greece, and has to travel so often to other parts of the world, that he can spare very little time for the purpose of

coming to Cyprus; he can do so only for brief visits on infrequent occasions.

The two minors with whom we are concerned in the present case were born on February 18, 1971 (Constantinos) and on March 28, 1972 (Alexis); the third child, a daughter, Marinella, is about one and a half years old.

The first issue that was raised by counsel for the appellant is that the District Court did not possess jurisdiction, under the Guardianship of Infants and Prodigals Law, Cap. 277, to make an order allowing the two minors to be taken to Greece, out of the jurisdiction of the Cyprus Courts.

The relevant provisions of Cap. 277 are subsections (1)(f) and (2) of section 7 and read as follows:–

"7. (1) The Court may at any time, on good cause shown–

.....

(f) make such order as it thinks fit regarding the custody of the infant and the right of access thereto of either parent;

.....

(2) In exercising the powers conferred by this section in regard to infants, the Court shall have regard primarily to the welfare of the infant but shall, where the infant has a parent or parents, take into consideration the wishes of such parent or both of them".

It has been contended by counsel for the appellant that as Cap. 277 was apparently modelled on the corresponding provisions of the Guardianship of Infants Act, 1886, the Custody of Children Act, 1891, and the Guardianship of Infants Act, 1925, in England, the case-law in England, concerning the mode of the application of the provisions of the said statutes should govern the mode of the application of the provisions of Cap. 277, too, and that such application should not be affected by any judicial pronouncements in England in relation to the provisions of the Guardianship of Minors Act, 1971, which was enacted after our Cap. 277.

Reference was made, also, to *In re E. (an Infant)*, [1956] Ch. 23, where it was held that the High Court in England did not possess jurisdiction, under the Guardianship of Infants Acts, 1886 to 1925, to allow a child to be taken out of the jurisdiction.

It is useful, in order to understand the approach adopted by Roxburgh J. in the above case, to quote the following passage from his judgment (at pp. 25-26):-

"In my view such an order cannot be obtained under the Guardianship of Infants Acts, and that is the importance of this matter. First of all, I should hardly have thought that it could possibly be brought within the words 'right of access' on any construction, because what is really in issue is not the right of access, but the country in which the infant is to be for the time being; in other words, whether she is to remain in London or to go to Israel. Secondly, a little regard to the normal practice of the Courts would show how inconvenient any other construction would be. In this particular case the infant is a Canadian infant and therefore the normal considerations do not apply; but it is well known that the Court practically never allows any English infant to leave the jurisdiction without undertakings by some person that the child shall be returned within the jurisdiction. Of course, the High Court has machinery which enables it to accept undertakings and to enforce them; but the words 'in this Act' must have the same meaning whether the Act is being applied by the magistrates or by the county Court or by the High Court, and neither the magistrates nor the county Court have any machinery for accepting or enforcing undertakings. Therefore, I do not think that it is a mere accident that the powers conferred under the Guardianship of Infants Acts are less extensive than the powers which the Chancery Division of the High Court of Justice enjoys by virtue of its inherent jurisdiction over infants".

In the later case, however, of *Re F (a minor) (access out of jurisdiction)*, [1973] 3 All E.R. 493, which was cited by counsel on both sides, but which we were invited by counsel for the appellant not to follow, because it was decided in relation to the Guardianship of Minors Act, 1971, it was held that the High Court in England did possess jurisdiction to allow a minor to leave the jurisdiction and go abroad; and the earlier case of *In re E, supra*, was not followed.

Sir George Baker P. stated the following (at pp. 495-496):-

"Section 9(1) of the Guardianship of Minors Act, 1971 provides:

'The Court may, on the application of the mother or father of a minor ... make such order regarding– (a) the custody of the minor; and (b) the right of access to the minor of his mother or father, as the Court thinks fit ...'.

This section substantially re-enacts s. 5 of the Guardianship of Infants Act 1886. In *Re E (an infant)** the facts were, to my mind, indistinguishable from those of the present case. A Canadian infant was the subject-matter of an order of a Canadian Court which gave custody to the mother, but certain rights of access to the father. The child was by consent brought to London by the mother, who married an Englishman and became domiciled in England. The father, stationed in Israel with the United Nations organisation, applied to the Court under the Guardianship of Infants Acts 1886–1925 for an order on the mother allowing the child to spend a holiday with him in Israel. Roxburgh J. dismissed the application, holding, first, that there was no jurisdiction under the Guardianship of Infants Acts to make the order sought. He concluded that it was not an application with regard to custody (as it clearly was not) and continued**:

'If it is anything, it is an application in regard to the right of access; but there is no dispute as to the right of access. There are provisions in the Canadian order with regard to the right of access. True, they are somewhat vague, but there is no dispute that the father may have access to the child in any event for periods which no doubt could be agreed if the father were in England during the summer holidays; but the father is not...'.

If the learned Judge had said no more, it might be possible to conclude that he was basing his decision on the fact that there was the Canadian order which governed the whole matter and that the Court could not go behind it. But that does not seem to be the ratio decidendi, for he continued**:

'First of all, I would hardly have thought that it could

* [1956] Ch. 23.
** [1956] Ch. at 25.

possibly be brought within the words 'right of access' on any construction, because what is really in issue is not the right of access, but the country in which the infant is to be for the time being, in other words, whether she is to remain in London or whether she is to go to Israel'.

Then he went on to consider the inconvenience of any other construction, because magistrates' Courts and county Courts had (and have, by s. 15 of the Guardianship of Minors Act 1971), concurrent jurisdiction with the High Court but did not have the means for accepting or enforcing undertakings to return the child.

With great respect to the learned Judge, I cannot follow his reasoning. This question seems to me to be clearly within the works 'right of access', for the issue is shall the father have access to the child in Switzerland, i.e. can the child be allowed to go to spend a holiday with his father in Switzerland? The increase in the number of cases concerning that robust youngster the 'international child' and the growth of air travel result in this question coming constantly before the Courts in matrimonial cases. Section 18(1) of the Matrimonial Proceedings and Property Act 1970 provides:

> 'The Court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen...'.

Custody includes access: see s. 27(1). This substantially re-enacts s. 34(1) of the Matrimonial Causes Act 1965, which itself re-enacts the provisions of a series of earlier Acts, and for many years the High Court has made orders regulating access out of the jurisdiction, either by permitting the child to go abroad or by preventing the child from going abroad, or by requiring undertakings before the child can leave the country. I do not think that the words in the Guardianship of Minors Act 1971, s. 9(1), 'make such order regarding... (b) the right of access...' can have any different meaning from the words 'may make such order... for the (access)' in the Matrimonial Proceedings and Property Act 1970, s. 18(1). In exercising its guardianship jurisdiction as well as in the exercise of its matrimonial jurisdiction, the Court is laying down, regulating, defining

what access the parent who does not have the custody of the child shall be allowed. It would, I think, be quite unworkable if in the guardianship jurisdiction the Court were limited to orders about access in this country alone. Such a result could, as in the present case, be contrary to the best interests of the child."

As it appears from the above passage, section 9(1) of the 1971 Act, in England, re-enacted, substantially, section 5 of the 1886 Act, and, therefore, it cannot be said that *Re F, supra*, is a new decision by the High Court on the basis of a statutory provision different from the one that was in force before; all that happened is that an older case *In re E, supra*, was not followed, because of a new judicial approach in the context of modern day life; and, as section 9(1) of the 1971 Act, as well as section 5 of the 1886 Act, are closely analogous to the corresponding provisions of Cap. 277, we see no reason why not to follow the modern trend adopted in *Re F, supra*, and to hold that a Cyprus Court has, under section 7 of Cap. 277, competence—which is to be used, of course, sparingly and in appropriate cases only—to allow minors to be taken out of the jurisdiction of the Cyprus Courts.

It has been argued, also, in relation to the issue of jurisdiction, that sections 11 and 12 of Cap. 277 show clearly that it was never intended to allow a minor to be taken out of the jurisdiction; the said sections read as follows:-

"11. The Court may, for the purpose of any proceedings under this Law, direct that any person appearing to have the custody of an infant shall produce the infant in Chambers or at such other place as the Court may appoint, and the Court may make such order for the temporary custody and protection of the infant as it thinks fit.

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".

In our opinion the above sections cannot, in any way, be construed as having as their object, directly or indirectly, to lay down the extent of the jurisdiction of a Cyprus Court when applying a provision of Cap. 177 such as section 7; their purpose

is an altogether different one and totally irrelevant to the issue of jurisdiction raised by counsel for the appellant.

Having decided that there was jurisdiction to make the disputed part of the custody order in question, we have to decide, next, whether we should interfere with such part on the ground that it amounts, according to counsel for the appellant, to a wrong exercise of the relevant discretionary powers of the trial Court; it has been submitted, in this connection, that this part of the custody order aims more at meeting the needs of the father rather than at promoting the welfare of the minors concerned.

There can be no doubt that the primary consideration in a case of this nature is the welfare of the minor; this is expressly stated in section 7(2) of Cap. 277, which, as already stated, is analogous to, *inter alia*, section 5 of the 1886 Act in England; and that the primary consideration, under a provision of this nature, is the welfare of the minor has been expounded in, *inter alia*, In *re A and B (Infants)*, [1897] 1 Ch. 786. The same approach was recently adopted by our own Supreme Court in *Makrides v. Makrides* (reported in this Part at p. 14 *ante*), where relevant English case-law has been cited.

In considering the question of our powers to interfere with the exercise of the discretion of the trial Judge in this particular matter, we have been guided, *inter alia*, by the case of in *Re F (a minor)*, [1976] 1 All E.R. 417, to which we referred in the *Makrides* case, *supra* (at that time we had available only the report published in the London Times on November 18, 1975); it was held in the *Re F* case that an appellate Court can set aside the decision of a trial Judge who has actually seen the parties and their witnesses, and has taken all relevant factors into consideration, if the appellate Court is satisfied that the trial Judge's decision is wrong in that he has given insufficient weight, or too much weight, to certain of those factors.

A more recent case, regarding the powers of an appellate Court to interfere with the exercise of the discretion of a trial Judge is that of *Beck and others* v. *Value Capital Ltd. and others (No. 2)*, [1976] 2 All E.R. 102, where it was held that, where a Judge is not shown to have erred in principle, his exercise of a discretionary power is not to be interfered with unless the appellate Court is of the opinion that his conclusion is one which involves injustice, or unless the appellate Court is clearly satisfied that the Judge's decision is wrong. Buckley L.J. stated the following (at pp. 108–109):–

"We were referred to what was said by Davies L.J. in *Re O*[1]. Davies L.J. stated the law relating to an appeal from an exercise of a judicial discretion to be as follows:

> 'In my considered opinion the law now is that if an appellate Court is satisfied that the decision of the Court below is wrong it is its duty to say so and to act accordingly'.

Counsel are sometimes inclined, it seems to me, to treat this as meaning that, where a discretionary jurisdiction is involved, an appellate Court is entitled to substitute its own exercise of the discretion for that of the Judge of first instance, unfettered by any regard for the view he took, and that if, so exercising its discretion, the appellate Court arrives at a conclusion differing in some respects from the conclusion of the trial Judge, the appellate Court is entitled to treat the trial Judge as having been wrong to that extent and to vary his order accordingly. In my opinion, this is an erroneous view and one which is likely to encourage unmeritorious appeals. Davies L.J. was founding his statement of the law on a consideration of what had been said by Lord Wright in *Evans v. Bartlam*[2] and what Harman L.J. had said in *Re Thornley*[3]. Lord Wright said[2]: 'It is clear that the Court of Appeal should not interfere with the discretion of a Judge acting within his jurisdiction, unless the Court is clearly satisfied that he was wrong'. Harman L.J. said[3]:

> 'But, although I quite agree that the Court would never interfere if it merely thought that there was some slight excess or deficiency, if it comes to the conclusion that the Judge was quite wrong in the view that he took and that it ought to have been much more or much less, then I think the Court is entitled to interfere....'.

In such a case it is not necessary for an appellant to be able to point to some matter which the Judge ought to have taken into account and failed to take into account, or to something which he did take into account but should not have taken into account, or to some other error in principle.

1. [1971] 2 All E.R. 744 at 748.
2. [1937] 2 All E.R. 646 at 654.
3. [1969] 3 All E.R. 31 at 33.

It is sufficient if the appellate Court is satisfied that the Judge, having taken all the proper circumstances into consideration, has arrived at a decision that is so clearly wrong that he must have misappreciated the weight to be given to some aspect of the case.

In *G. L. Baker Ltd.* v. *Medway Building and Supplies Ltd.*[1], in an Appeal from a refusal of leave to amend a defence, Jenkins L.J. said[2]:

> 'I should next make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the learned Judge with which this Court should not in ordinary circumstances interfere unless satisfied that the Judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties'.

The Court of Appeal in that case held that the Judge of first instance had in fact erred in principle in refusing to grant leave to amend. I do not think that Davies L.J. in *Re O*[3] was intending to lay down a different test. Where a trial Judge is not shown to have erred in principle, his exercise of a discretionary power should not be interfered with unless the appellate Court is of opinion that his conclusion is one that involves injustice, or, to use the language of Lord Wright, the appellate Court is clearly satisfied that the Judge of first instance was wrong".

Two recent cases in which we have dealt with the powers of our Supreme Court to interfere on Appeal with decisions of trial Judges involving the exercise of judicial discretion are *Skaliotou* v. *Pelekanos*, (reported in this Part at p. 251 *ante*) and *Karydas Taxi Co. Ltd.*, v. *Komodikis*, (1975) 1 C.L.R. 321; and the approach adopted in such cases is in line with that which has been laid down by the just cited relevant case-law in England.

Having all the foregoing in mind we have given anxious consideration to the present case and, in the end, without disregar-

1. [1958] 3 All E.R. 540.
2. [1958] 3 All E.R. at 546.
3. [1971] 2 All E.R. at 748.

ding the position of the father and without doubting that it is difficult for him to come to Cyprus as often as he wishes in order to see his children, we have decided to interfere with the disputed part of the order of the trial Judge, because we do believe that it will not operate to the benefit of the minors concerned at this early stage of their lives; consequently, we regard such part of the order of the Court below as being inconsistent with the proper approach to a matter of this nature and plainly wrong. We do think that it would be detrimental to the welfare of the minors to make them feel that they have to be taken every summer to Greece in order to stay with their father, because he has no time, due to his professional pre-occupations, to visit them often enough in Cyprus even though, for business purposes, he does travel abroad from Greece to other parts of the world; such an arrangement would not be conducive to the preservation of a proper relationship between the father and his children, and this is the main reason for which we have decided to set aside the complained of part of the order of the trial Court.

The present case is plainly distinguishable, on its facts, from the case of *Makrides, supra*, in which we allowed a mother to take her minor children out of the jurisdiction so that they could stay with her in Greece where she was going to settle; in that case it was the mother, with whom the children had to stay for the sake of their welfare, that had to leave Cyprus in order to earn her living in Greece.

We have decided that in the place of the appealed from part of the order of the trial Court there should be made the following order:-

1. The father (the respondent) is entitled to have all his three children staying with him in Cyprus for up to six weeks in every calendar year, but not for any period exceeding two weeks on any particular occasion.

2. He will be entitled to enjoy the above right by giving reasonable notice, of not less than three days, to that effect to the mother (the appellant).

3. If his visits to Cyprus do not take place during school holidays he will make such arrangements for staying with his children so as not to interfere with the education of any one of the children.

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In the result this appeal is allowed accordingly; but we are not prepared to make any order as to its costs.

Appeal allowed. No order as to its costs.