1982 August 30

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

VASSILIS PANAYIOTOU,

Appellant,

v.

MARY LYNN PANAYIOTOU,

Respondent.

(*Civil Appeal No.* 6467).

Children—Custody—Kidnapping—Removal of child from foreign jurisdiction by one parent—Application to return child to custody of parent in foreign jurisdiction—Same principles to be applied as in other cases involving children i.e that the welfare of the child is the first and paramount consideration—Child of tender years—Removed by his father from Canada and living with his paternal grandmother in Cyprus, an illiterate person, in very hard accommodation conditions—Hardly seen by the father—Mother an educated person earning an appreciable salary and a person who loved and cared for her children. Discretion of the trial Court to give custody to the wife properly exercised—Section 7(1)(f) and (2) of the Guardianship of Infants and Prodigals Law, Cap. 277.

Guardianship of Infants and Prodigals Law, Cap. 277—*Section 2 of the Law (definition of 'Court')—Jurisdiction of the Court to deal with application for custody of child which was removed from foreign jurisdiction.*

The parties to these proceedings met in Canada where they were married. The appellant was a Greek Cypriot and was working in Limassol, Cyprus. The respondent was born in Canada. There were two offsprings of the marriage, a boy named Loucas, born on 5.2.79 and a girl named Stephanie born on 9.2.81. Following the breaking down of the marriage in May, 1981 and the living apart of the couple, on the 6th July, 1981, a Judge of the Provincial Court (Family Division)

of the Judicial District of Waterloo in the Province of Ontario, in Canada, made ex parte an interim order granting custody of the minor concerned, Loucas, to the respondent. Later, on 10th August 1981 a further interim order was made by another Judge of the aforesaid Provincial Court by means of which interim custody of Loucas was granted, once again, to the respondent, with the appellant being allowed access to the child on certain terms; and it was ordered, further, that the child should not be removed away from Waterloo without the prior order of the aforesaid Canadian Court.

At the proceedings in Canada on 10th August, 1981 the appellant was present and was represented by counsel.

On 22nd August, 1981 the appellant took away his son, Loucas, and disappeared; and he, subsequently, turned up with him in Cyprus, where he placed the child in the care of his parents at Galata village.

The respondent applied to the Supreme Court of Ontario in Canada for custody of both her aforementioned children with the appellant and on 18th January 1982 she was granted an order confirming the orders which were made, as aforesaid, on 6th July and 10th August 1981 regarding the custody of her son Loucas, and was, also, granted custody, on an interim basis, of her daughter Stephanie.

After that, in May 1982, the respondent came to Cyprus to try and regain custody of Loucas and for this purpose she filed an application* in the District Court of Nicosia praying for the custody of the child Loucas.

The father, from his work in Limassol, was earning about C£300 *per month*.

The mother was employed by the Government of Canada at a salary of about 15,000 Canadian dollars per year and while she was at work her children were cared for by a baby-sitter. Her family were living quite near to her home and rendered to her such assistance as she may need.

* The application was made under section 7 (1) (f) and (2) of the Guardianship of Infants and Prodigals Law, Cap. 277 which is quoted at p. 450–451 *post*.

The trial Judge after taking into consideration that the child was living in very hard accommodation conditions, that it was mostly looked after and cared for by his grandmother, an illiterate person, who, also, spent some hours daily in the fields, that the father hardly saw the child because his working hours were such as not to allow time to him for that purpose that the mother, an educated person earning an appreciable salary has conducted herself in a proper manner which revealed that she was a mother who loved and cared for her children that the child was of tender years and should live with the mother who was emotionally more closely linked with it, reached the conclusion that it was for the best interest of the child that custody be granted to the mother Hence this appeal

Held that in kidnapping cases the same principle has to be applied as in other cases involving children, i.e that the welfare of the child is the first and paramount consideration, that in this case it cannot be held that the trial Judge in exercising his relevant discretionary powers, has erred in such a way as would entitle this Court to interfere with his decision to make the complained of custody order in favour of the mother, that the trial Judge, quite rightly, attributed paramount importance to the welfare of the infant concerned by doing so in accordance with section 7(2) of Cap 277 accordingly the appeal must fail

Held further that having in mind the definition of "Court" in section 2 of Cap 277, as well as the approach to such definition which was adopted by this Court in *Kyriacou v Kyriacou*, (1974) 1 C L R 82 at p 88, there is no merit in the submission that the District Court of Nicosia lacked jurisdiction in the matter

Appeal dismissed

Cases referred to

Re L (Minors) [1974] 1 All E R 913 at pp. 925, 926,

Re O (a minor) [1978] 2 *All E R* 27,

Re C (minors) [1978] 2 All E R 230 at p 234, 235

Makrides v Makrides (1967) 1 C L.R 14 at pp 17, 18,

Economou (No. 2) v. Economou (1976) 1 C.L.R. 391 at pp. 400-402;

Re F (a minor) [1976] 1 All E.R. 417 at pp. 439-440;

Re K (minors) [1977] 1 All E.R. 647 at pp. 648-649;

S(BD) v. S(DJ) [1977] 1 All E.R. 656 at p. 660;

Kyriacou v. Kyriacou (1974) 1 C.L.R. 82 at p. 88.

Appeal

Appeal by respondent against the order of the District Court of Nicosia (Laoutas, S.D.J.) dated the 16th July, 1982 (Appl. No. 54/82) granting the custody of the minor child Loucas to the applicant.

L. Clerides with A. Spyridakis, for the appellant.

A. Georghiades with Th. Montis, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. By this appeal the appellant complains against an order of custody made by a Senior District Court Judge of the District Court of Nicosia, under the relevant provisions of the Guardianship of Infants and Prodigals Law, Cap. 277, and, in particular, under section 7 of such Law.

The appellant is a Greek Cypriot born in Galata village and at present working in Limassol.

The respondent was born in Canada; and the parties met in Canada where they were married on 17th September 1977 in the City of Kitchener according to the rites of the Greek Orthodox Church.

There are two offsprings of such marriage. A boy named Loucas, who was born on 5th February 1979, and a girl named Stephanie, who was born on 9th December 1981. Stephanie is at present in Canada and the custody order, which is the subject of this appeal, relates only to Loucas.

It appears that the marriage of the parties broke down in May 1981 and since then they live apart; and the respondent

has stated before the trial Court that she will remarry when she is divorced from the appellant.

On 6th July 1981 a Judge of the Provincial Court (Family Division) of the Judicial District of Waterloo in the Province of Ontario, in Canada, made ex parte an interim order granting custody of the minor concerned, Loucas, to the respondent. Later, on 10th August 1981 a further interim order was made by another Judge of the aforesaid Provincial Court by means of which interim custody of Loucas was granted, once again, to the respondent, with the appellant being allowed access to the child on certain terms; and it was ordered, further, that the child should not be removed away from Waterloo without the prior order of the aforesaid Canadian Court.

At the proceedings in Canada on 10th August 1981 the appellant was present and was represented by counsel.

On 22nd August 1981 the appellant took away his son, Loucas, and disappeared; and he, subsequently, turned up with him in Cyprus, where he placed the child in the care of his parents at Galata village.

The respondent applied to the Supreme Court of Ontario in Canada for custody of both her aforementioned children with the appellant and on 18th January 1982 she was granted an order confirming the orders which were made, as aforesaid, on 6th July and 10th August 1981 regarding the custody of her son Loucas, and was, also, granted custody, on an interim basis, of her daughter Stephanie.

After that, in May 1982, the respondent came to Cyprus to try and regain custody of Loucas and for this purpose she filed the application in the District Court of Nicosia in which the order which is the subject of this appeal was given.

As it appears on the face of such application it is based on subsection 1(f) and on subsetion (2) of section 7 of Cap 277.

The said provisions read as follows:

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

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

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

(g) .....

(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 consideretion the wishes of such parent or both of them".

The child in question is now over three years old and has been baptized in a Greek Orthodox church in Canada.

The appellant, from his work in Limassol, is earning about C£300 per month.

The respondent is employed by the Government of Canada at a salary of about 15,000 Canadian dollars per year and while she is at work her children are cared for by a baby-sitter. Her family are living quite near to her home and render to her such assistance as she may need.

The appellant, who first emigrated to Canada in 1973, went abroad again, this time to New York in the United States of America, after he had brought his son, Loucas, to Cyprus in August 1981; and he returned to Cyprus after he had learned that his estranged wife, the respondent, was in Cyprus.

The trial Judge, after reviewing all the material that had been placed before him, stated the following in making the appealed from custody order:

"I have scrutinised deeply every aspect of the present application and the conditions prevailing at the time of the trial. I have reached the conclusion that it is for the best interest of the child that custody be granted to the applicant-mother. In reaching my above conclusion I have paid particular heed, inter alia, to the following:

The child is now living in very hard accommodation conditions. This is apparent from the contents of the

Social Investigation report. It is mostly looked after and cared for by his grand-mother an illiterate person who also spends some hours daily in the fields. One cannot expect an old woman, no mater how affectionate may be, to upbring a child in the way it should have been.

The respondent-father hardly sees his child because his working hours are such as not to allow time to him for that purpose. I do not accept his evidence on this point i.e. that he visits his village 3-4 times a week. It is not easy to do such a thing, regard being had to the distance and working hours. So he is most of the time away from his child. On the other hand I believe that the applicant cares more for the welfare of her child. This is obvious from the way she has struggled in her country and here to obtain orders for the custody of young Loucas. She is an educated person earning an appreciable salary and she can live on it comfortably even if she has to support her children. The State also renders assistance to her.

I believe that the applicant has conducted herself in a proper manner in which reveals that she is a mother who loves and cares for her children.

Lastly, I have taken into account the tender years of the child. It is an undisputed fact that the child of this age should live with the mother who is emotionally more closely linked with it. I am of the opinion that the love affection and care of the mother cannot easily be substituted to that of another person be that a grand-mother or a relative.

For all the above reasons I find that the application succeeds. There will be an order that the custody of Loucas Josif Panayiotou be given to his mother. "

In making the above order the trial Judge had, also, before him two social investigation reports which were prepared in respect of the appellant, the respondent and the circumstances in which the child concerned is living for the time being in Cyprus.

We think that the trial judge rightly took into account such reports in view of the Guardianship of Infants and Prodigals

Rules (see Subsidiary Legislation of Cyprus, vol. II, p. 422) as amended by the Guardianship of Infants and Prodigals (Amendment) Rules of Court 1972 (see No. 1, Second Supplement to the Official Gazette of the Republic of 6th October 1972).

Because of the nature of this case it is useful to quote from the judment of Buckley LJ in *RE L (minors)*, [1974] 1 All E.R. 913, 925, 926, the following:

> " Where, as in the present case and in *J v C*[1], no order has been made by a foreign court relating to the custody or upbringing of the child, no question of comity arises. Even if an order has been made by a foreign court, an English court is nonetheless bound in duty to protect the child's welfare without being bound to enforce the foreign order or to follow it (*J v C* per Lord Guest[2], Lord MacDermott[3] and Lord Upjohn[4]).
>
> How, then, do the kidnapping cases fit these principles? Where the court has embarked on a fullscale investigation of the facts, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, and may be a circumstance of great weight; the weight to be attributed to it must depend in the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the 'kidnapper' the child should remain in his or her care (*McKee v McKee*[5], *Re E (an infant)*[6] and *Re T A (infants)*[7], where the order was merely interim); or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed (*Re T (infants)*[8]). Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment, apply, but the decision must be justified in somewhat different grounds.

1 [1969] 1 All ER 788.
2 [1969] 1 All ER at 812.
3 [1969] 1 All ER at 824.
4 [1969] 1 All ER at 828.
5 [1951] 1 All ER 942.
6 [1967] 2 All ER 881.
7 [1972] 116 Sol Jo 78.
8 [1968] 3 All ER 411.

To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elaspe before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child. In my judgment, the decision of this court in *Re H (infants)*[1] was based on considerations of this kind.

As citations which I have already made disclose, judges have more than once reprobated the acts of 'Kidnappers' in cases of this kind. I do not in any way dissent from those strictures, but it would, in my judgment, be wrong to suppose that in making orders in relation to children in this jurisdiction the court is in any way concerned

1 [1966] 1 All ER 886.

with penalising any adult for his conduct. That conduct may well be a consideration to be taken into account, but, whether the court makes a summary order or an order after investigating the merits, the cardinal rule applies that the welfare of the infant must always be the paramount consideration".

The case of *Re L (Minors)*, supra, was followed in the cases of *Re O (a minor)*, [1978] 2 All E.R. 27, and *In re C (minors)*, [1978] 2 All E.R. 230, where (at p. 234) Ormrod LJ described it as the locus classicus for all problems relating to how the courts should deal with situations in which children have been unilaterally taken from one jurisdiction to another and where the aforequoted part of the judgment of Buckley LJ was referred to with approval (at pp. 234, 235).

We have examined in the light of the above principles the correctness of the exercise of the discretion in the present instance of the trial Judge, bearing in mind the extent to which such exercise may be interfered with by us on appeal in a case of this nature (see, in this respect, inter alia, *Makrides v. Makrides*, (1976) 1 C.L.R. 14, 17, 18, and *Economou (No. 2) v. Economou*, (1976) 1 C.L.R. 391, 400-402). Also, in *Re F (a minor)*, [1976] 1 All E.R. 417, Bridge L.J. stated, in this connection, the following (at pp. 439-440):

"The learned judge was exercising a discretion. He saw and heard the witnesses. It is impossible to say that he considered any irrelevant matter, left out of account any relevant matter, erred in law, or applied any wrong principle. On the view I take, his error was in the balancing exercise. He either gave too little weight to the factors favourable, or too much weight to the factors adverse, to the father's claim that he should retain care and control of the child.

The general principle is clear. If this were a discretion not depending on the judge having seen and heard the witnesses, an error in the balancing exercise, if I may adopt that phrase for short, would entitle the appellate court to reverse his decision: *Evans v Bartlam*[1], *Charles Osenton & Co v Johnston*[2], *Ward v James*[3].

1 [1937] 2 All ER 646
2 [1941] 2 All ER 245
3 [1965] 1 All ER 563

> The reason for a practical limitation on the scope of that principle where the discretion exercised depends on seeing and hearing witnesses is obvious. The appellate court cannot interfere if it lacks the essential material on which the balancing exercise depended. But the importance of seeing and hearing witnesses may vary very greatly according to the circumstances of individual cases. If in any discretion case concerning children the appellate court can clearly detect that a conclusion, which is neither dependent on nor justified by the trial judge's advantage in seeing and hearing witnesses, is vitiated by an error in the balancing exercise, I should be very reluctant to hold that it is powerless to interfere.
>
> The full and careful analysis of the authorities in the judgment of Browne LJ demonstrates, I think, that the power of the court is not so limited. "

On the present accasion we cannot hold that the trial judge, in exercising his relevant discretionary powers, has erred in such a way as would entitle us to interfere with his decision to make the complained of custody order in favour of the respondent.

The trial judge, quite rightly, attributed paramount importance to the welfare of the infant concerned. He did so in accordance with section 7(2) of cap. 277, which is similar, in this respect, to section 1 of the Guardianship of Minors Act, 1971, in England and in relation to the proper application of which useful reference may be made, inter alia, to the judgments given in the cases of *Re K (minors)*, [1977] 1 All E.R. 647, and *S (BD) v S (DJ)*, [1977] 1 All E.R. 656. In the latter case Ormrod LJ stated the following (at p. 660):

> "The question is not what the essential justice of the case requires but what the best interest of the children requires. For my part I do not think it is necessary to go back into the authorities any further than the well-known case of *J v C*[1] in the House of Lords. The matter was dealt with at great length by their Lordships, particularly by Lord MacDermott, who reviewed all the relevant cases in detail.

1 [1969] 1 All ER 788.

Before his review he summarised his own conclusions. Dealing with s. 1 of the Guardianship of Infants Act 1925 and referring to the words of s 1 he said[1] :

> 'I think they connote a proccess whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term had now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed.'

Then he said[2] that it remains to be seen how that preliminary view of his stands up in the light of authority, and having reviewed the cases, he repeats in a rather different form a summary of his views. He said[3]:

> '1. Section 1 of the Act of 1925 applies to disputes not only between parents, but between parents and strangers and strangers and strangers. 2. In applying s. 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue. 3. While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation, the broad nature of which is still as described in the fourth of the principles enunciated by FITZGIBBON, L.J., in *Re O' Hara*[4].

1 [1969] 1 All ER 788 at 820, 821.
2 [1969] 1 All ER 788 at 821.
3 [1969] 1 All ER 788 at 824.
4 [1900] 2 IR 232 at 240.

It is not necessary to read the fourth head which refers to the views of certain judges that moving children from one parent to another does not or may not cause a good deal of upset.

That, in my judgment, is the current state of the law on this aspect of the jurisdiction relating to children; all the authorities and all the dicta which are to be found in earlier cases have to be read in the light of that summary of the law. It follows, in my judgment, that cases such as *Re L (infants)*[1] are not now to be regarded as authoritative in any sense of the word. There is much in the judgment of this court in *Re L*[1] which cannot be reconciled or only reconciled with great difficulty with what Lord MacDermott said in the passages I have already quoted, and it would be desirable that we should hear less of the'unimpeachable parent' in these cases in future. "

Also, in the *Re K (minors)* case, supra, Stamp L.J. said (at pp. 648-649):

"Before turning to the facts of the case, I would make some introductory observations. In the first place the law which is to be applied is not in doubt. It is that the welfare of the children is, in the words of the statute, the first and paramount consideration. It was stated with clarity and precision by Lord MacDermott in *J v C*[2] in a passage in his speech which should be in the mind of every judge who tries an infant case, and which was indeed in the mind of Reeve J. in the instant case. Lord MacDermott said[3]:

> 'The second question of construction is as to the scope and meaning of the words' '..... shall regard the welfare of the infant as the first and paramount consideration'. Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in the list of items relevant to the matter in question. I think they

1 [1962] 3 All ER 1.
2 [1969] 1 All ER 788.
3 [1969] 1 All ER 788 at 820, 821.

connote a process whereby, when all the relevant facts relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed.'

Applying the law so stated, this court in *S (BD) v S (DJ) (Infants: care and consent)*[1] held that the earlier case of *Re L (infants)*[2], where this court appears to have balanced the welfare of the child against the wishes of an unimpeachable parent or the justice of the case as between the parties, was no longer to be regarded as good law. I think it is a most unfortunate fact that *S (BD) v. S (DJ) (Infants: care and consent)*[1] has never been reported in the Law Reports, as it should have been, with the result that we have more than once, notwithstanding that case, had *Re L*[2] cited to us as being still of binding authority.

The second thing I would say at the outset is, I think, also implicit in the law as stated in *J v C*[3] in the passage to which I have referred; it is that although one may of course be assisted by the wisdom of remarks made in earlier cases, the circumstances in infant cases and the personalities of the parties concerned being infinitely variable, the conclusions of the court as to the course which should be followed in one case are of little assistance in guiding one to the course which ought to be followed in another case.

Thirdly I would emphasise that where a judge has seen the parties concerned, has had the assistance of a good welfare officer's report and has correctly applied the law, an appellate court ought not to disturb his decision unless it appears that he has failed to take into account something which he ought to have taken into account or has taken into account something which he ought not to have taken

1 Page 656, *post*, [1977] 2 WLR 44.
2 [1962] 3 All ER 1.
3 [1969] 1 All ER 788.

into account, or the appellate court is satisfied that his decision was wrong; it is not enough that a judge of the appellate court should think, on reading the papers, that he himself would on the whole have come to a different conclusion. With those preliminary remarks, I turn to set out the facts of this case."

In the light of all the foregoing we are of the view that the complained of order of the trial judge has to be upheld and, consequently, this appeal fails.

Before concluding this judgment we would like to state that, having in mind the definition of "Court" in section 2 of Cap. 277, as well as the approach to such definition which was adopted by this Court in *Kyriacou v. Kyriacou,* (1974) 1 C.L.R. 82, 88, we have found no merit in the submission that the District Court of Nicosia lacked jurisdiction in the matter.

In the result this appeal is dismissed with costs.

Appeal dismissed with costs.