1988 September, 9

(DEMETRIADES, STYLIANIDES, PIKIS, JJ.)

ELENI CHR. STYLIANOU,

Appellant-Applicant,

v.

CHRISTAKIS N. STYLIANOU,

Respondent.

(Civil Appeal No. 7635).

Children — Guardianship and custody of — The Guardianship of Infants and Prodigals Law, section 7 — Principles governing the exercise of the discretion of the Court — Welfare of children — The paramount consideration — What is meant by «Welfare» — Status quo — Importance of retaining it — Considerations applicable in cases of very young children.

Appeal — Discretion of the trial Court — Interference with its exercise on appeal — Principles applicable.

Civil Procedure — The Guardianship of Infants and Prodigals Rules, Rule 10(2) — In matters not dealt by them the Civil Procedure Rules apply.

Civil Procedure — The Civil Procedure Rules, 0.48, r.4 — Application — Conflict as to facts between applicant and respondent — The party, on whom the burden of proof lies, should be prepared to prove them.

The parties came from Kyrenia District. They and their newly born child were uprooted by the Turkish invasion. They went to Athens, where they both found work. In 1977 their second child was born. They were saving money for the purpose of building a house at Lakatamia. Finally they built it. This was indicative of their intention not to abandon permanently Cyprus. The father had more spare time and he was doing most of the housework and was looking after the children.

Gradually their harmonious life came to an end. They started quarrelling. In the summer of 1987 the family came to Cyprus for two

reasons: Holidays and supervision of the final stage of the building of their house at Lakatamia.

During their stay trouble again flared up. The mother left the family and went to Athens. The father' s pains for reconciliation failed.

The father and the children live ever since at the newly built house at Lakatamia. A lady from Karavas was found to look after the children, who are thus well cared. The children accepted her. They are co-operative with her.

At Lakatamia they live in a house with yard, whereas in Athens they were living in a flat in a multi-storey building. The children have the opportunity to be with the grant parents who live in Cyprus.

Finally, the mother filed an application for guardianship and custody of the children and for leave to take them out of the jurisdiction.

The trial Judge dismissed the application. The only material placed before him were the affidavits of the two opposing parties and the social welfare report. The children, when asked, did not express any wishes.

Among the complaints of the appellant are: (a) Certain of her allegations in her affidavit were ignored. However, such allegations were denied by the affidavit in opposition, (b) The trial Judge stated in his judgment that the children have in Cyprus «friends and bonds», (c) The status quo that should be taken into consideration is that prevailing in Athens until the summer of 1987.

Held, *dismissing the appeal*: (1) This Court has been invited to interfere with the exercise of the discretion of the trial Court. Such interference is governed by principles enunciated in a number of cases. This Court does not substitute its discretion for that of the trial Court. This Court interferes when the exercise of the discretion of the trial Court is clearly wrong.

(2) The matter in issue between the parties is governed by section 7 of Cap. 277. The Court has thereunder power to allow children to be taken out of the jurisdiction. Such power, however, should be sparingly exercised.

(3) The paramount consideration is the welfare of the child. The word welfare must be taken in its widest sense. It is not to be measured only by money or physical comfort. Ties of affection should not be disregarded. The moral welfare of the child must be taken into consideration.

(4) Section 7(2) of Cap. 277 connotes a process whereby, when all the relevant facts, claims and wishes of parents, rival or otherwise, relationships, risks and choices and all other circumstances taken into account and weighed, the Judge has to follow one course to find out and determine which is most in the interest of the child' s welfare.

(5) Continuity of care is, also, a most important part of the child's sense of security. The status quo should not be disturbed, unless good reason is shown.

(6) In this case the status quo is not that prevailing in Athens until the summer of 1987. The parents are no longer co-habiting and, therefore, the father would not be able to look after the children as he was doing in the past. The trial Judge rightly compared the life of the children in Lakatamia with the life they would have had in a small flat of a multi-storey building in Athens, with their mother working.

(7) The phrase in the judgment «friends and bonds» did not tip the scales and it is not in the circumstances sufficient justification for interference by this Court.

(8) In virtue of the Guardianship of infants and Prodigals Rules, Rule 10(2) the Civil Procedure Rules are applicable, when the former rules are silent. 0.48 r.4 of the Civil Procedure Rules provides that if there is a conflict between the applicant and any person giving notice of opposition in regard to the facts, the applicant or such person must, at the hearing of the application, be prepared to prove the facts he relies upon in so far as the burden of proof lies upon him.

The burden of proof rested on the mother and she failed to adduce evidence to prove the allegations referred to by her counsel.

(9) In the case of very young children the dictates of nature are that the mother is the natural guardian, protector and comforter; but this presumption, however, is rebuttable. In this case the children are grown up.

Appeal dismissed. No order as to costs.

Cases referred to:

Skaliotou v. Pelekanos (1976) 1 C.L.R. 251;

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

Economou v. Economou (1976) 1 C.L.R. 391;

Makrides v. Makrides (1976) 1 C.L.R. 14;

Panayiotou v. Panayiotou (1983) 1 C.L.R. 446;

G. v. G. [1985] 2 All E.R. 225;

Altrans Express Ltd. v. CVA Holdings Ltd. [1984] 1 All E.R. 685;

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1947] 2 All E.R. 680;

Eagil Trust Co. Ltd. v. Piggot-Brown and Another [1985] 3 All E.R. 119;

Birkett v. James [1977] 2 All E.R. 801;

J. and Another v. C. and Others [1969] 1 All E.R. 788;

Re K (Minors) [1977] 1 All E.R. 647;

S (BD) v.S. (DJ) (Infants: Care and Consent) [1977] 1 All E.R. 656;

Re O (a Minor) [1978] 2 All E.R. 27;

Re C (Minors) [1978] 2 All E.R. 230;

Rostron v. Rostron (1982) 3 FLR 270;

Diccoco v. Milne (1983) 4 FLR 247;

Pountney v. Morris (1984) FLR 381.

Appeal.

Appeal by applicant against the judgment of the District Court of Nicosia (HjiConstantinou, S.D.J.) dated the 14th May, 1988 (Appl. No. 4/88) whereby her application by which she is seeking guardianship and custody of her two children and leave to take them outside the jurisdiction for the purpose of residing in Greece was dismissed.

G. N. Kaizer, for the appellant.

A. HadjiPanayiotou, for the respondent.

Cur. adv. vult.

DEMETRIADES J.: The Judgment of Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: This case concerns two children - Markos and Melina, fourteen and eleven years old respectively. They live presently in a house at Pano Lakatamia with their father. The appellant (hereinafter referred «the mother»), who lives in Athens, applied to the District Court of Nicosia seeking the

guardianship and custody of the children and leave to take them outside the jurisdiction for the purpose of residing in Greece.

The District Court of Nicosia dismissed her such application.

Hence this appeal.

We were invited by counsel for the mother to interfere with the exercise by the trial Court of its relevant discretionary power.

We consider, therefore, pertinent to deal first with the power of this Court to interfere on appeal with the decisions of trial Judges involving the exercise of judicial discretion. The approach adopted by the Supreme Court was expounded in a number of cases - (see, inter alia, *Yiola A. Skaliotou v. Christoforos Pelekanos* (1976) 1 C.L.R. 251; *Karydas Taxi Co. Ltd., v. Andreas Komodikis* (1975) 1 C.L.R. 321; *Loulla G. Economou (No. 2) v. George K. Economou* (1976) 1 C.L.R. 391, at pp. 401-402; *Anna Taki Makrides (Now Anna Efstratiou) v. Takis Makrides* (1976) 1 C.L.R. 14, at pp. 17-18; *Panayiotou v. Panayiotou* (1983) 1 C.L.R. 446).

The approach adopted in such cases is the one laid down by the English Case Law.

The appeals in custody cases, or in any other cases concerning the welfare of children, are not subject to special rules of their own, although, the jurisdiction in such cases is one of great difficutly - G. v. G. [1985] 2 All E.R. 225, at p. 228.

In *Altrans Express Ltd. v. CVA Holdings Ltd.* [1984] 1 All E.R. 685, at p. 690 it was said by Stephenson, LJ.:-

> «We must be very careful not to interfere with the judge' s exercise of the discretion which has been entrusted to him. We can only do so if he has erred in law or in principle, or if he has taken into accout some matter which he should not have taken into account or has left out of account some matter which he should have taken into account, or, and this is an extension of the law which is now I think well recognised, if the Court of Appeal is of opinion that his decision is plainly wrong and therefore must have been reached by a faulty assessment of the weights of the different factors which he has had to take into account.»

In *G. v. G.* (supra) it was held that the test which the Court applies in deciding whether it is entitled to exercise judicial control

over the exercise of discretion of an administrative body, is not the appropriate test for deciding whether the Court of Appeal is entitled to interfere with the decision made by a Judge in the exercise of his discretion. See, also, in this respect, the case of *Associated Provincial Picture Houses Ltd., v. Wednesbury Corporation* [1947] 2 All E.R. 680.

In the rather recent case of *Eagil Trust Co. Ltd., v. Pigott-Brown and another* [1985] 3 All E.R. 119, it was said that the functions of the Court of appeal is to review the exercise of the Judge' s discretion and not to entertain an appeal from it in the sense of being invited to substitute its own discretion for that of the Judge. The Court of Appeal interferes when the discretion was clearly wrongly exercised. (See, also, *Birkett v. James* [1977] 2 All E.R. 801, speech of Lord Diplock.)

The application of the mother is governed by the provision of section 7.(1)(f) and (2) of the Guardianship of Infants and Prodigals Law, Cap. 277, which reads 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.»

This statutory provision of ours was apparently modelled on the corresponding provisions of section 5 of the Guardianship of Infants Act 1886. It is, however, analogous to section 9(1) of the Guardianship of Minors Act 1971, which was enacted after our Cap. 277. Under section 7 the District Court has competence to allow minors to be taken out of the jurisdiction of the Cyprus Courts, a power, however, which should be sparingly exercised.

The primary matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money, only, nor by physical comfort only. The word welfare must be taken in its widest sense. Ties of affection should not be disregarded. The moral welfare of the child must be considered as well as its physical well-being.

The locus classicus in the recent English Law on the matter is the Judgment of Lord MacDermott in *J. and Another v. C. and Others* [1969] 1 All E.R. 788, at pp. 820-821, which was followed and applied invariably. (See *Re K. (Minors)* [1977] 1 All E.R. 647; *S. (BD) v. S. (DJ) (Infants: Care and Consent)* [1977] 1 All E.R. 656; *In Re O (a Minor)* [1978] 2 All E.R. 27; *In Re C. (Minors)* [1978] 2 All E.R. 230. See, also, Cyprus cases *Anna Taki Makrides (Now Anna Efstratiou) v. Takis Makrides* and *Loulla G. Economou (No. 2) v. George K. Economou* (supra)).

Sub-section 2 of section 7 connotes a process whereby, when all the relevant facts, claims and wishes of parents, rival or otherwise, relationships, risks and choices and all other circumstances taken into account and weighed, the Judge has to follow one course to find out and determine which is most in the interest of the child' s welfare. 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.

Another principle developed by the Courts is that, in determining a dispute as to the custody of a child, the wishes and choices of the child should be taken into consideration.

Continuity of care is, also, a most important part of the child' s sense of security.

If the child is happy and well settled and he gets on well, there must be shown a good and strong reason militating in further welfare of the child for a Judge to disturb the life of the child by re-ordering change of the custody. The status quo should not be disturbed, unless good reason is shown.

In *Rostron v. Rostron* (1982) 3 FLR 270, Oliver, L.J., said:-

> «.....the conclusion which I reach ..... is that the status quo should not be distrurbed with the upheaval, the unsettlement, the emotional disquiet which that will bring, if taking a risk, and a risk which I am not persuaded ..... that it is essential in the children' s interests should be run.»

In *Diccoco v. Milne* (1983) 4 FLR 247, Ormerod, L.J., said:-

> «... it is generally accepted by those who are professionally concerned with children that, particularly in the early years, continuity of care is a most important part of the child' s sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so.»

In *Pountney v. Morris* (1984) FLR 381, Dunn, L.J., said:-

«This is a case in which the children have now been with their father for over two years. They are absolutely happy and well settled with him, and they get on well with their step-mother. It seems to me that there is a risk that if they were moved to their mother, leaving aside the material difference that there would be in their lives, there might be difficulties with the step-father.»

With the afore principles in mind, we turn to the facts of this case.

The trial Court had before it the affidavit of the mother, sworn in support of her application, the affidavit sworn by the respondent in opposition and the report of the Welfare Officer, who was appointed by the Court for the purpose under the Guardianship of Infants and Prodigals Rules (see subsidiary Legislation of Cyprus, Volume 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 6.10.1972).

No other evidence was adduced and counsel for the parties made a joint statement that they would accept the contents of the Report of the Welfare Officer, except any statements expressing a final opinion with regard to the case.

The affidavit of the mother contained certain allegations of fact, which were denied by the father in his own affidavit.

Counsel for the mother complained in this appeal and argued that we have to interfere with the Judgment of the Court, because it disregarded completely material evidence, that is the aforesaid allegations.

By Order 48, rule 4 of the Civil Procedure Rules, Cap. 12, which are applicable to matters not provided by the Guardianship of Infants and Prodigals Rules (see Order 10, rule 2), if there is a conflict between the applicant and any person giving notice of opposition in regard to the facts, the applicant or such person must, at the hearing of the application, be prepared to prove the facts he relies upon in so far as the burden of proof lies upon him.

The burden of proof rested on the mother and she failed to adduce evidence to prove the said allegations and, therefore, she cannot validly complain that the Court disregarded material which

was not proved before it. The Court has not erred on this matter. On the contrary, it would have had, had the Judge gone the other direction.

The facts, as found by the trial Court and as emerging from the acceptable evidence before it - the undisputed parts of the two affidavits and the Report of the Welfare Officer - the parties come from Kyrenia District, Cyprus. Their marriage was celebrated in the Kyrenia district (Ayios Georghios), where Markos, the elder child was born on 10th March, 1974 at Ayios Georghios, Kyrenia.

This young couple, with the newly born child, were uprooted from their home by the Turkish invading forces in July 1974. They were deprived of all the means of livelihood and in despair they left their native island and went to Athens in search of work hoping for better life. Naturally, they had hard days during the first period of their stay in Athens. The wife, ultimately, took up employment with the Electricity Authority of Greece, a post she continues to hold. The father originally worked at a furniture showroom. He abandoned that employment, however, and indulged in the sale of small jewellery. In the meantime, on 2nd June, 1977, Melina- the second child - was born. They were living a happy life. They were saving money to build a house, which they actually did, at Lakatamia, a suburb of Nicosia. This was indicative of their intention not to abandon permanently Cyprus. Their stay in Athens was at least animus temporary.

The father was behaving as a good husband. Due to the nature of his work, he had more spare time than the wife and even he was doing most of the housework including cooking and he was looking after the children. The harmonious life, however, came gradually to an end.

The wife alleged that he was over jealous and stingy. He was taking the salary of the wife and was giving to her pocket money daily. They had altercations, conjugal squabbles, even in the presence of the children. On occasions the neighbours and the police had to intervene.

The husband admitted to the Welfare Officer that trouble started and that on some occasions he beat the wife because she stayed late out of the house without any reasonable or satisfactory explanation; her own attitude, behaviour and conduct, created strong suspicions that she developed extra marital relation.

The life in Athens for the children, according to the mother, was happy and harmonious. The mother stated that the father was well behaving to the children; he was accompanying them to the school; he was making their food; he never assaulted them and the children had a good physical and mental development.

In the summer of 1987 the family came to Cyprus for two reasons: Holidays and supervision of the final stage of the building of their house at Lakatamia.

During their stay trouble flared up between the parents. The mother left for Athens leaving the father and the children in Cyprus.

The father took pains for reconciliation. To that end he invoked the assistance of relatives and friends. He applied to the Archbishopric. He travelled to Athens, but with no success.

The father and the children live ever since at the newly built house at Lakatamia. A lady from Karavas was found to look after the children, who are thus well cared. The children accepted her. They are co-operative with her and this was even admitted by the mother to the Welfare Officer.

At Lakatamia they live in a house with yard, whereas in Athens they were living in a flat in a multi-storey building. The children have the opportunity to be with the grand parents who live in Cyprus. They are well looked up and they are clean and tidy. They attend the school regularly with pleasure. According to their teacher, who was invited by the Welfare Officer, they look happy. Their physical and mental development is normal. They love their parents.

The Judge making a comparison stated, on the evidence before him, that if the children were removed to Athens, they would stay in an apartment of a multi-storey building. Their mother is working for long hours and has no time to look after them.

Objection was taken in this appeal to a phrase used in the Judgment, that the children have in Cyprus «friends and bonds». This is not stated expressly in any of the documents before the Judge. Though it is more favourable to the respondent, it would not by itself tip the scales to either direction. Even if this could not be deduced as a reasonable inference from the whole picture depicted in the Welfare Report, having regard to the fact that the

children attended the school for a whole school year, again the use by the trial Judge of this phrase and/or factor would not, in all the circumstances, suffice for this Court to interfere with the Judgment.

The Judge made a comparison between the life the children would have had in Athens, if custody were given to the mother and leave to take them out of the jurisdiction, and their present condition in Cyprus.

Learned counsel for the appellant argued that the status quo which should be retained was the one prevailing prior to the summer of 1987, when the family had not broken down and the children were living in Athens with both parents; the comparison should be made between that period and the present one.

With respect, without being necessary to say which of the parents is the impeachable, or if both are impeachable for the break down of the family, the family situation pre-existing the summer of 1987 came to an end and cannot be taken as a basis for the determination of this case. There is no cohabitation between the parents. It is not possible for the parents to cohabit in Athens and the father to be there to look after the children, as he was doing in the past. Certainly the family condition and the ties of the family during the life in Athens helped in the development of the children. Such a situation would be more favourable to them. The Judge rightly made the comparison between the life of the children with their father at Lakatamia, as described earlier, and the envisaged condition of life of the children in Athens in a small apartment with the mother out of doors for long hours, with nobody there to look after them. The status quo which should not be disturbed without good reason is the present one.

It was argued, further, by counsel for the mother that the custody should be given to her, she being the mother.

A Judge, when deciding what is best for the welfare of a child, must take into account all the particular circumstances relevant to that child. In the case of very young children the dictates of nature are that the mother is the natural guardian, protector and comforter of very young children, but this presumption, however, is rebuttable.

Markos and Melina in the present case are aged fourteen and eleven. They are grown up.

The wishes of the children are a factor to be taken into consideration when they are grown up. In the present case they stated that they love both their parents, but they are neutral to their quarrel and expressed no preference.

The Judge, having taken into consideration only the evidence before him and applying properly the law to the facts of the case, reached the conclusion that the children should continue to stay in the house which was built for the family, in the custody of their father, as, otherwise, the change sought by the mother would bring physical, psychological and emotional disturbance and might create confusion, insecurity and uncertainty to them. He dismissed the application.

We are unable to conclude that the Judge came to a wrong conclusion and we see no reason to interfere with the Judgment.

We dismiss the appeal, but in all the circumstances of the case, we make no order as to costs.

Appeal dismissed. No order as to costs.