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

TAKIS MAKRIDES,

Appellant,

v.

ANNA EFSTRATIOU
(FORMERLY ANNA TAKI MAKRIDES),

Respondent.

(*Civil Appeal No.* 5543).

Children—Custody—Division of custody rights—Meaning of the word custody in s. 7(1)(f) of the Guardianship of Infants and Prodigals Law, Cap. 277—It might be treated, in certain circumstances, as including matters pertaining to the education of an infant—Custody order in favour of mother—Varied by inserting a term to the effect that arrangements regarding education of the infants are to be made by her but, always, with consent of father. 5

Guardianship of Infants and Prodigals Law, Cap. 277—Custody in s. 7(1)(f) of the Law—Meaning.

Custody—Custody rights—Division of. 10

The point in issue in this appeal was whether the notion of "custody" might be treated as including matters pertaining to the education of an infant; it has arisen in an appeal by the father against the refusal of the Court below to grant custody to him of his children. Before the trial Court the appellant 15 stated that he was prepared to accept that the respondent mother should continue to have custody of the children on the terms of previous Court orders; but he insisted that, in any event, he wished to have defined his rights with regard to the education and general upbringing of the children. 20

The trial Court took the view that the rights of the father, as regards the education of the children, were amply protected inasmuch as under the relevant legislation he is the guardian of the children. The legislation in question is the Guardianship of Infants and Prodigals Law, Cap. 277 sections 3, 4, 6 and 25 7(1)(f)(2).

Section 7(1)(f) 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".

5 *Held,* (1) the notion of "custody" might be treated, in certain circumstances, as including matters pertaining to the education of an infant (see *Re W. (J.C.) (an infant)*, [1963] 3 All E.R. 459 at pp. 464, 465 and *Jussa* v. *Jussa* [1972] 2 All E.R. 600, 604).

10 (2) Consequently, though we are of the view that in the present case it would not be proper for us to interfere with the discretion of the trial Judge, and that we should not, therefore, rescind the order of custody made in favour of the respondent mother, we have decided, nevertheless, that, in order to put 15 the matter beyond doubt, we should insert in such order an express term to the effect that any arrangements with regard to the education of the infants are to be made by the respondent (so long as she has the custody of the children) but, always, with the consent of the appellant.

20 *Appeal allowed.*

Cases referred to:

Re W. (J.C.) (an infant) [1963] 3 All E.R. 459 at pp. 464, 465;

Jussa v. *Jussa* [1972] 2 All E.R. 600 at p. 604.

25 **Appeal.**

Appeal by applicant against the judgment of the District Court of Limassol (Anastassiou, D.J.) dated the 31st January, 1975, (Application No. 59/71) whereby his application for the grant to him of the custody of the two minor children of the 30 parties was dismissed.

Gl. Talianos, for the appellant.

R. Stavrinidou (Miss) with *D. Savvidou (Mrs.)*, for the respondent.

Cur. adv. vult.

35 The judgment of the Court was delivered by:–

TRIANTAFYLLIDES, P.: This is an appeal against the refusal of a Judge of the District Court of Limassol to grant the custody

of the two minor children of the parties to the appellant, who is their father.

The parties were married on December 30, 1967, and their marriage was dissolved on February 28, 1972. They have two children, both boys, seven and five years old, respectively, at the time of the trial. The respondent mother has two other minor children, both daughters, from a previous marriage; they are living with her.

By an order made, by consent, on November 12, 1971, the respondent was granted custody of the two children of the parties; the relevant record of the Court reads as follows:-

> "*COURT:* Having carefully considered the Welfare Report which shows that the mother is a fit and proper person to have custody of the 2 children on the one hand and the age of the 2 infant children on the other hand, I feel that the agreement reached by the 2 counsel is in the interest of the infants which is the paramount consideration of the Court in granting custody to either of the parties.
>
> In the result there will be the following order:-
>
> (a) Applicant is hereby granted custody of the 2 infant children Yiannos and Yiotis Makrides as from today.
>
> (b) Respondent is hereby ordered to hand over the 2 infant children to the applicant forthwith.
>
> (c) Respondent is granted reasonable access to the 2 children and furthermore has the following rights:-
>
> (1) To take the children for walks.
>
> (2) To have the children staying with him for one weekend per month.
>
> (3) To have the children staying with him for part of their holidays (Christmas, Easter and Summer).
>
> Not however on the Christmas or Easter days.
>
> (d) Children are not to leave Cyprus without the consent of the father which should not be unreasonably withheld.
>
> (e) Each party to pay his own costs."

The above order was varied, as a result of further proceedings, on February 13, 1973, as follows (see the report of the proceedings in (1974) 3 J.S.C. 411, 415):-

"The father will have the children with him twice a month that is every alternative Sunday from 9 a.m. until 7 p.m. As regards the stay of the children with their father during Christmas, Easter and Summer Holidays, I Order that they should stay continuously with their father for 4 days on Christmas, 4 days at Easter and 14 days during the Summer Holidays, on days decided by the Welfare Officer."

The present application by the appellant was filed on October 7, 1975, but, before its filing, there was filed another application, by the respondent, on August 28, 1975, by means of which she is seeking, in effect, the leave of the Court (through a variation of the aforesaid order of November 12, 1971) for the purpose of taking the children out of the jurisdiction, so that they may reside with her in Athens. That application was refused and an appeal (C.A. 5513) was made against it; a separate judgment* will be delivered in relation to such appeal immediately after the present judgment.

In the case with which we are now concerned the appellant father has stated, in giving evidence before the trial Court, that if the children are not to leave Cyprus he is prepared to accept that things should remain as they are at present, namely that the respondent mother should continue to have custody of the children on the terms of the order made on November 12, 1971 (as varied subsequently on February 13, 1973); but he insisted that, in any event, he wishes to have defined his rights with regard to the education and general upbringing of the children.

The trial Judge reached the conclusion that any alteration of the status quo would not serve the welfare of the children and has, consequently, refused to grant their custody to the father, or to vary the existing custody order in any way. He took the view that the rights of the father, as regards the education of the children, were amply protected inasmuch as under the relevant legislation he is the guardian of the children.

The legislation in question is the Guardianship of Infants and Prodigals Law, Cap. 277, and from a reading together of its sections 6, 3 and 4 it becomes quite clear that the appellant,

* Vide p. 14 *post*.

being the lawful father of his two infant children, and consequently their guardian, is entitled to the custody of the children, unless a Court otherwise orders under section 7(1)(f) of Cap. 277; and, in fact, such an order has, as already stated, been made, granting the custody to the respondent mother. 5

Section 7(1)(f), above, 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". 10

Also, subsection (2) of section 7 reads as follows:-

"(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 15 of such parent or both of them".

The wording of our section 7(1)(f), as well as that of subsection (2) of the same section, is similar to that of section 5 of the Guardianship of Infants Act, 1886, in England.

In relation to the meaning of the word "custody" in section 20 5 of the English Act reference may be made to the case of *Re W. (J.C.) (an infant)*, [1963] 3 All E.R. 549, where Upjohn L.J. said the following (at pp. 464, 465):-

"I turn then to s. 5 of the Act of 1886, for the problem is really entirely one of the construction of that section. 25 It is quite true that the word 'custody' throughout the relevant statutes is sometimes used in one sense and sometimes in another (see, for example, s. 7(5) of the Guardianship of Infants Act, 1925, where there are references both to 'legal custody' and to 'actual custody'). I agree with 30 the learned judge to this extent, but in s. 5 of the Act of 1886 'custody' has its wide legal meaning. If an order is made granting custody to parent A without more, it would include care and control of the infant or, if he does not want care and control, power to direct with whom the 35 infant shall reside; it also gives that parent the right to organise the infant's religious and general education and his general upbringing. On the other hand, corresponding

duties devolve on parent A. He has the duty of looking after and maintaining the child and giving proper thought to his religious and general education and upbringing generally. So far I agree with the learned Judge, but s. 5 as construed by the learned Judge in effect means this, that the Court can commit custody and all that it entails either to parent A or to parent B or no doubt in a proper case to some third party, but the section is not framed in this limited way. If that was all that was intended by the section, it would have been quite sufficient to say that the Court may commit custody of the infant to one parent or to the other or to a third party. But look in fact how wide the wording is:

> 'The Court may, upon the application of the mother of the infant, make such order as it thinks fit regarding the custody of such infant and the right of access thereto of either parent'.

Further, the Court must have

> 'regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father and may alter, vary or discharge such order on the application of either parent'.

I think that the words 'may alter, vary or discharge' are quite important, because on the learned Judge's view there is little one could do to vary an order which has got to grant custody either to parent A or parent B. One could discharge it and one could appoint B instead of A, but there is very little one could do to alter or vary it. I think, having regard to the words 'such order as it thinks fit regarding the custody', that the section necessarily implies the right to deal only with some aspect of custody if necessary. Again having regard to all the matters which have to be taken into account, it seems to me that it was contemplated that the Court would go into the matter in great detail and make such order regarding the custody as was appropriate to each case.

Take this very case as a perfectly sound example. If the learned Judge is right, as I have pointed out already, the stipendiary magistrate will have an impossible task to perform. Either he now has to give custody and care and control to the father, which no doubt will be excellent

from the point of view of the education of the boy hereafter but to his disadvantage now, or he now has to give custody and care and control to the mother, in which case the boy will now be better looked after almost certainly than if he is with the father but he may lose the 5 interest of his father and the preparation for attending the school later; in other words, the stipendiary magistrate in making his decision cannot make the order which really has regard to the welfare of the infant. It seems to me in those circumstances quite impossible to construe this 10 section as giving this very emasculated jurisdiction. The section plainly gives power to deal with custody not indivisibly but divisibly, that is to say in this sense, that the Court can deal with each and every aspect of the constituent elements of custody. It can give care and control to one 15 parent with access to the other and can vest the remaining constituents of custody in the other, as the stipendiary magistrate did in this case. Take another example, which does not arise here but which I have no doubt frequently does arise. Parents may be of different religious beliefs 20 and I can see nothing whatever to prevent care and control and charge of religious upbringing being committed to one parent and all the other constituents of custody vested in the other. That is a question of discretion in each case".

The case of *Re W. (J.C.)*, *supra*, was followed in *Jussa* v. 25 *Jussa*, [1972] 2 All E.R. 600, 604; it was stressed therein that though, in the meantime, there intervened in England the enactment of the Guardianship of Minors Act, 1971 (where the relevant provision is section 9) the notion of "custody" as explained in *Re W. (J.C.)* had remained unaffected. 30

From the interpretation given in the above case-law to the notion of "custody" it seems that it might be treated, in certain circumstances, as including matters pertaining to the education of an infant; consequently, though we are of the view that in the present case it would not be proper for us to interfere with 35 the discretion of the trial Judge, and that we should not, therefore, rescind the order of custody made in favour of the respondent mother, we have decided, nevertheless, that, in order to put the matter beyond doubt, we should insert in such order an express term to the effect that any arrangements with regard 40 to the education of the infants are to be made by the respondent (so long as she has the custody of the children) but, always, with the consent of the appellant.

In the result this appeal is allowed only to the extent of inserting a new clause, regarding the education of the children, as aforesaid, in the in force custody order; and each party is to bear its own costs.

5 *Appeal partly allowed. Each party to bear its own costs.*