

1981 January 23

[MALACHTOS, DEMETRIADES AND SAVVIDES, JJ.]

GEORGE C. ECONOMOU,

Appellant.

v.

LOULLA G. ECONOMOU,

Respondent

(Civil Appeal No. 5876).

Jurisdiction—Children—Custody—Whether District Court has jurisdiction to vary custody order as varied by Supreme Court on appeal—Section 24 of the Guardianship of Infants and Prodigals Law, Cap. 277.

Children—Custody—Access—Paramount consideration the welfare of the children—Very young children aged six and seven—Mother having custody—Father right of access—Father residing and working in Greece—Application to allow children to travel to Greece in order to stay with their father for a period of 21 days during the summer rightly refused by trial Court in the circumstances of this case. 5 10

The appellant and the respondent were the parents of three minor children who were born on the 18th February, 1971, 28th March, 1972 and 12th February, 1974. Since the year 1976 the parents were living apart and on June 12, 1976 the District Court of Nicosia, on the application of the father who was living and working in Athens, made an order* partly by consent and partly after hearing the matter giving custody of the children to the mother and, further ordered that “the two older children Constantinos and Alexis in the company of their paternal father or paternal mother be allowed to travel to Greece and stay with their father for a period of between 15–17 days during the summer months only”. 15 20

The mother appealed against the last part of the above order,

* See the whole of this order at p. 51 *post*.

which was not made by consent, and the Supreme Court, having held*, *inter alia*, that such order will not operate to the benefit of the minors concerned at this early stage of their lives, set it aside

5 On June 5, 1978, the father filed an application, based on section 24 of the Guardianship of Infants and Prodigals Law, Cap 277 claiming, *inter alia*, a variation of that part of the order of the District Court, not made by consent, as substituted by the order of the Supreme Court, so that the two eldest
10 children may be allowed for a period of 21 days during the school holidays of the summer months of 1978 to travel abroad to Greece and stay with their father in Athens. This application was supported by an affidavit of the father to the effect that the two children who were aged seven and six were
15 in a position to appreciate the excitement of travelling and the idea of a holiday with their father in Greece, and by an affidavit** of a psychiatrist to the effect, *inter alia*, that it is essential for psychological reasons that a visit to and stay of the two children with their father should be made

20 The trial Judge having held that he had jurisdiction to try the application proceeded to dismiss same having come to the conclusion*** that no new facts were put before him sufficient to justify the variation of the order as applied for and that the minors were still at the early stage of their lives and the considerations that existed at the time the order was made still existed and
25 continued to have the same application and effect on the issue

Upon appeal by the father

30 *Held*, (1) that the District Court had jurisdiction to deal with the above application and it is immaterial whether the order was made by the District Court or the Supreme Court, and that if the facts put forward in the affidavit in support of the application do not amount to new facts militating to the variation of the original order, this does not go to the jurisdiction of the Court but to the merits of the case.

35 (2) That in cases of this sort the paramount consideration is the welfare of the infants, that every matter

* See the relevant part of its judgment at p 52 *post*

** The main parts of this affidavit are quoted at p 54 *post*

*** See the judgment of the trial Court at p 56 *post*

having relevance to the welfare of the child should be taken into account and placed in the balance; that other matters, which may not directly relate to the child's welfare but are relevant to the situation, may be taken into account and given such weight as the Court may think fit subject, always, to the welfare of the child being treated as paramount (see *Anna Taki Makrides now Anna Efstratiou v. Takis Makrides* (1976) 1 C.L.R. 14); that, therefore, this Court fully agrees with the reasons given by the trial Judge in dismissing the application of the father: accordingly the appeal must be dismissed.

Held, further, that the reasoning of the above judgment of the Supreme Court between the same parties has been misconceived on the part of the appellant; that the age of the children is only one factor which was taken into account and it does not necessarily mean that when the children grow old enough automatically they may be allowed by a Court to be taken by the father outside the jurisdiction, even for a short period; that it appears that in this case the application for variation of the order was made for the convenience of the father rather than the benefit of the children, who, although he is travelling all over the world for business purposes, he has not got, as he alleges, some time to spend on holiday in Cyprus for visiting his children so as to strengthen the ties of affection and create healthy emotional relationship with them, according to the affidavit of the specialist Psychiatrist.

Appeal dismissed.

Cases referred to:

Economou (No. 2) v. Economou (1976) 1 C.L.R. 391;

Makrides v. Makrides (1976) 1 C.L.R. 147.

Appeal.

Appeal by applicant against the judgment of the District Court of Nicosia (Orphanides, S.D.J.) dated the 10th August, 1978 (Appl. No. 14/76) whereby his application for the variation of the order of the Court in respect of the custody of the three children of the marriage was dismissed.

St. Mc Bride, for the appellant.

G. Cacoyannis, for the respondent.

Cur. adv. vult.

MALACHTOS J. read the following judgment of the Court. The appellant and the respondent in this appeal, are the parents

of three minor children, namely, Constantinos, Alexis and Mari-
nella, who were born on 18th February, 1971, 28th March,
1972 and 12th February, 1974, respectively.

5 Since the year 1976 the relationship of the parents is far from
being harmonious and the children by order of the District
Court of Nicosia, were placed in the custody of the mother,
but the father who presently resides and works in Athens,
has a right of access to them.

The facts which gave rise to this appeal are the following:-

10 On the 2nd day of March, 1976, the appellant, hereinafter
referred to as the "father", applied to the District Court of
Nicosia under the Infants and Prodigals Law, Cap. 277, for
an Order, *inter alia*, to have the older two out of the three minor
15 children aged 5 and 4 respectively, for 15 to 17 days during
the summer months with him in Greece. The respondent,
hereinafter referred to as the "mother", opposed the said applica-
tion and on the 12th June, 1976, the District Court of Nicosia,
made partly by consent and partly after hearing the matter,
the following Order:

20 "(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.

25 (2) Custody of children with the mother. Guardian-
ship 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.

30 All the above are made by consent.

The Court further orders:-

35 (4) The two older children Constantinos and Alexis
in the company of their paternal father or paternal mother
be allowed to travel to Greece and stay with their father
for a period of between 15-17 days during the summer
months only".

As against the last part of the Order which was not made

by consent, the mother appealed successfully and this Court on 17th November, 1976, set it aside and made the following Order in its stead:

“1. The father (the respondent) is entitled to have all his three children staying with him in Cyprus up to six weeks in every calendar year, but not for any period exceeding two weeks on any particular occasion. 5

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). 10

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”.

The appeal is reported in (1976) 1 C.L.R. 391 and the reasoning of the Court appears at pages 402–403 and is the following: 15

“Having all the foregoing in mind we have given anxious consideration to the present case and, in the end, without disregarding 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. 20
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”. 25
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On the 5th day of June, 1978, the father filed an application, the subject matter of the present appeal, based on section 24 of the Infants and Prodigals Law, Cap. 277, claiming, as stated therein,

5 “(a) a variation of that part of the Order of this Court not made by consent on 12.6.76 as substituted by the Order of the Supreme Court on 17.11.76 as follows:

10 “The two eldest children Constantinos and Alexis in the company of their father or other responsible and trust-worthy person such as one of his partners or parents be allowed to travel to Greece and stay with their father for a period not exceeding 21 days (or such other period as the Court shall think fit) during the school summer holidays each year but only after 14 days notice has been given to
15 the mother and upon their father giving such security (if any) for the return of the said children to within the jurisdiction as the Registrar of the District Court of Nicosia shall determine and in the event that the father shall not for any reason take his two oldest children to Greece as
20 aforesaid his rights of access to remain as determined by the Supreme Court on 17.11.76’.

25 (b) alternative to (a) above for leave of the Court for a period of 21 days (or such other period as the Court shall think fit) during the school holidays of the summer months of 1978 for the two children Constantinos and Alexis to travel abroad to Greece to stay with their father in Athens’.

The application was supported by two affidavits, one sworn by the father and the other by a specialist psychiatrist.

30 The only alleged new facts in the affidavit of the father are contained in paragraph 8 thereof, which reads:

35 “My two children Constantinos and Alexis are however now aged seven and six and pupils of the second and first forms of the Elementary school respectively. They are therefore in a position to appreciate the excitement of travelling and the idea of a holiday with their father in Greece which will be, not only a pleasant experience for them, but an educational one as well’.

The substantial part of the affidavit of the psychiatrist is contained in paragraphs 2, 4 and 5, which read as follows:-

“2 In the case of Constantinos Economou aged 7 and of Alexis Economou aged 6, not only is it not harmful from the psychological point of view but it is very essential for those same psychological reasons that such a visit to and a stay with their father abroad should be made. It is only by staying with a person that strong ties of affection and a healthy emotional relationship are created with that person and the longer the stay the better.

4. I consider it to have been a great pity that the trial Court did not have the assistance of a medical or other expert who could have spoken as to the effect it has on children whose parents are divorced or live apart. However that may be, I would like to say with great respect that I do not agree fully with the reasoning of the Appeal Court.

5. The two eldest children are old enough to realise that their father lives and works abroad and are not allowed to go to their father out of Cyprus. In my opinion, also, this may well cause them to develop peculiar ideas as to why they are not allowed to stay with their father in Greece and it can only adversely affect the natural and close relationship they ought to have with both parents”.

The trial Judge, after hearing arguments of counsel for the parties, and upon considering the affidavits in support of the application and the opposition, held that he had jurisdiction to try the application, but as no new facts were put before him by the father, sufficient to justify the variation of the order as applied for, dismissed the application and made no order as to costs

The question of jurisdiction was raised by counsel for the mother who submitted that the father by his application was in reality attacking the wisdom of the Supreme Court and was inviting the District Court to rule that the Supreme Court was wrong in its decision. His argument was, that this is borne out from the affidavits in support of the application which in effect are criticising the judgment of the Supreme Court and contain no new facts militating to the variation of the order.

We must say from the outset that the trial Judge was right in deciding that he had jurisdiction to try the application.

The application, subject matter of the present appeal, was based, as stated therein, on section 24 of the Guardianship of
5 Infants and Prodigals Law, Cap. 277 which provides that the Court may at any time vary or rescind any order made under the provisions of this law.

The original order was made under section 7(1)(f) and (2) of the said Law, which reads as follows:—

10 “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.

15 (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”.

20 It is clear from the above that the District Court has jurisdiction to deal with such application and it is immaterial whether the order is made by the District Court or the Supreme Court.

If the facts put forward in the affidavit in support of the application do not amount to new facts militating to the variation of the original order, this does not go to the jurisdiction
25 of the Court but to the merits of the case.

Counsel for the appellant in arguing this appeal repeated the same arguments put forward before the trial Court. He submitted that the Order was given when the children were two years younger and this was a new fact which the Court
30 ought to have taken into consideration as sufficient to justify the variation of such order. He further submitted that the trial Court did not give proper weight to the opinion of the specialist Psychiatrist.

35 At page 28 of the record of proceedings before the trial Court the following reasons are given by the trial Judge in dismissing the application of the father:—

“The main part of the affidavits filed in support of the

application deals practically with all those matters which the Supreme Court had taken into consideration and in respect of which both affiants expressed their disagreement and disapproval. It has been stressed that the opinion of Dr. Evdhokas supplies the missing elements for a broader consideration of the issue in hand, because at the time the decision was made the Court was not guided by an expert opinion regarding the relationship between the minors and their father when living apart. I do not share this view. In my opinion, every Court making an order of this nature, has always in mind the relationship between child and parent. What is important in this connection, is not the personal circumstances of the parent but the welfare of the minor, and in this respect, it must be admitted that the order was made under anxious consideration of the effect 'the proposed trip of the minors every summer to Greece at this early stage of their lives' would have, not only on their feelings but also on the preservation of a proper relationship between the father and the children. I do not think that the opinion of Dr. Evdhokas or the allegation that the children have grown older since the making of the order have re-stocked the armoury of the applicant with new elements or have placed before the Court new facts sufficient to tip the scale in favour of the applicant.

There is no doubt that the age of the minors is very material to the issue in hand and no one can deny that the minors have grown older since the making of the order in November, 1976, until this summer. I do not think, however, that the growing of the children by a few months is sufficient. I do not share the view that this is such a radical change in the circumstances or that the children have reached such a mature age as to justify the Court to depart from the opinion of the Supreme Court on the matter and to rule that the minors are no longer in the early stage of their lives. I am rather in agreement in this respect with the arguments advanced by counsel for the respondent, that the youngest of the two minors (Alexis) is today in the same age as his brother Constantinos was at the date the decision was taken by the Supreme Court. In my opinion, the minors are still at the early stage of their lives and the considerations that existed at the time

the order was made, still exist today and continue to have the same application and effect on the issue with unvaried force”.

5 We must say that we fully agree with the above reasons given by the trial Judge in dismissing the application of the father. We should once again reiterate that in cases of this sort the paramount consideration is, of course, the welfare of the infants. Every matter having relevance to the welfare of the child should be taken into account and placed in the balance. Other matters, 10 which may not directly relate to the child's welfare but are relevant to the situation, may be taken into account and given such weight as the Court may think fit subject, always, to the welfare of the child being treated as paramount. (*Anna Taki Makrides now Anna Efstratiou v. Takis Makrides* (1976) 1 C.L.R. 15 14).

Finally, we must say that the reasoning of the judgment of the Supreme Court between the same parties reported in (1976) 1 C.L.R. 391 at pages 402 to 403, has been misconceived on the part of the appellant. The age of the children is only one 20 factor which was taken into account and it does not necessarily mean that when the children grow old enough automatically they may be allowed by a Court to be taken by the father outside the jurisdiction, even for a short period. It appears that in this case the application for variation of the order was made 25 for the convenience of the father rather than the benefit of the children, who, although he is travelling all over the world for business purposes, he has not got, as he alleges, some time to spend on holiday in Cyprus for visiting his children so as to strengthen the ties of affection and create healthy emotional relationship with them, according to the affidavit of the specialist 30 Psychiatrist.

For the above reasons we dismiss the appeal with costs.

Appeal dismissed with costs.