

46 Phil. 843

[G.R. No. 20996. September 20, 1923]

MARIA BANCOSTA, PETITIONER AND APPELLEE, VS. JOHN DOE, RESPONDENT AND APPELLANT.

D E C I S I O N

ROMUALDEZ, J.:

On June 3, 1923, Maria Bancosta filed a petition, praying that a writ of habeas corpus be issued, and after due hearing, the girl Ina Bancosta, her daughter, be ordered delivered to her.

P. C. Due appeared, praying for the dismissal of the petition, and the return of the person of said girl to his care and custody, on the ground that she had been entrusted to him by her father Jack Hamilton.

The Court of First Instance of Cavite, which took cognizance of the case, found that the girl is the daughter of the petitioner, and the paternity of the aforesaid Jack Hamilton had not been proven. It granted the petition ordering the sheriff, who had, and still has, custody of the girl, to deliver her to the petitioner.

The respondent P. C. Due appealed from said judgment, assigning errors to the action of the trial court in not holding that Jack Hamilton is the natural father of the girl; that he, P. C. Due, had her lawfully with 'him and should not be deprived of her custody; that the respondent was entitled to be given time for taking the deposition of said Jack Hamilton, who was then sick in Baguio, and of some witnesses in the Province of Albay; that the sheriff could not lawfully retain the aforesaid girl in his custody, pending: this appeal.

After a careful examination of the proceeding, we find that while there is in the record a slight indication that Jack Hamilton might be the father of the

girl, yet it was not sufficiently shown, nor could any investigation be made in this proceeding as to who the father of the aforesaid girl is, who is named Ina Bancosta, according to the petitioner, and Ina Hamilton, according to the respondent. On the other hand, it is a fact established and not disputed by the parties that this girl is the daughter of the petitioner Maria Bancosta.

The reason given by the respondent for having the girl with him is that said Jack Hamilton had placed her in his care by virtue of the document Exhibit A, which literally says:

"To Whom It May Concern:

"This is to certify that I hereby give to the charge of Mr. P. C. Due and wife my daughter Ina Hamilton during my absence and that in case of my failing to obtain a cure or fail to return, Mr. Due will correspond with my people in America with a view to obtaining for said Ina Hamilton her inheritance that should by legal claim belong to me, James J. Van Dien, son of Mr. Garret G. Van Dien and Mrs. Jane Van Dien (nee Jane Hopper) of New Foundland, New Jersey. Since 1896, I have been known as Jack Hamilton, with the knowledge of my parents. If Mr. Due does not wish to obligate himself he is to turn the girl over to the Society for the Protection of American Mestizas together with my papers and letters from home.

"This action on my part is for the purpose of insuring my daughter a better future than she could possibly have if placed in the care of her mother.

(Sgd.) "JACK HAMILTON
"Shipkeeper
"U. S. A."

It not appearing that said Jack Hamilton had any right to exercise parental authority over this girl, and his paternity not being allowed to be investigated in this case, it cannot be held that the trust mentioned in the document above set out is legally enough for depriving Maria Bancosta of the custody of her daughter, the girl in question.

The respondent further alleges that Maria Bancosta is living maritally with

another man and has had five children begotten by different persons and her conduct is short of being exemplary. None of these allegations was sufficiently proven.

In view of the claim of the respondent that he was not given in the lower court opportunity to present the deposition of Jack Hamilton as evidence, and in order to give ample opportunity to said Hamilton to explain his attitude expressed in the document Exhibit A, who has not been a party to this proceeding, this court ordered the taking of his deposition; but the respondent informs us in a writing dated September 5, 1923, that the said Jack Hamilton is dead.

In the same writing of September 5, 1923, the respondent prayed that he be allowed to take the deposition of various witnesses in the Province of Albay about the paternity of the girl and the conduct of the applicant, short of being exemplary. This petition was denied by a resolution of September 6, 1923. The investigation of the paternity cannot legally be made in this case, for this is not any of the cases enumerated in article 140 of the Civil Code (art. 141, *Ibid.*). As to the witnesses in Albay, nothing is said, nor appears about what substantial points they were to testify.

Nor do we find any error in the ruling of the trial court denying the petition of the respondent that the custody of the aforesaid girl be returned to him. The right of the respondent to such a custody was not, and is not proven.

The judgment appealed from is affirmed, without finding as to costs, and without prejudice to the rights said girl may have to the inheritance, donation, or legacy of her father, if she is legally entitled thereto, whoever may, through legal proceeding, be shown to be her father. So ordered.

Araullo,
C.J., Street, Malcolm, Avanceña, Villamor, and Johns, JJ.,
concur.

