

MARIA CORTES, PETITIONER AND APPELLANT, VS. CANDIDA CASTILLO AND ADRIANO HERRERA, RESPONDENTS AND APPELLEES.

G. R .No. 16903. March 18, 1921

Ponente: MALCOLM, J.

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MALCOLM, J.:

By means of these proceedings in habeas corpus, the petitioner Maria Cortes, widow of the deceased sergeant Alejandro Herrera, seeks to obtain the return of her children, Acardio and Bernardo, aged 6 and 4, respectively, now under the control of their grandmother, Candida Castillo. The trial judge, the Honorable Pedro Conception, in his decision, dismissed the petition without special findings as to costs, and named the grandmother Candida Castillo as the guardian of the minors. It is from this judgment that the petitioner has appealed.

Maria Cortes and Alejandro Herrera were legally married. On the complaint, however, of the husband, action was brought against the wife for adultery and she was found guilty and sentenced to three years six months and twenty-one days of imprisonment. The husband later condoned the guilty spouse, secured her a pardon, and went to live with her a second time. Not long thereafter, the husband again became suspicious of the conduct of his wife and taking the two elder children, Arcadio and Bernardo, went to live in the house of his mother. Action for divorce was begun by the husband, Alejandro Herrera, but this was not terminated at the time of his untimely and heroic death, while in the performance of his duties as a member of the police force of the city of Manila.

The instant action may have been begun by the mother because of maternal affection for her children, and again it may have been begun, as insinuated by counsel for the respondents, because of the sum of money gathered for the support of the children. Certain testimony was introduced intended to show that Maria Cortes had insufficient means to support the children. Ineffectual attempts to prove the continued immoral conduct of the mother were also made. However all of this may be, one fact remains and this is, that the mother has been found guilty of adultery.

As suggested in the decision of the trial court, and by counsel on appeal, the questions reduce themselves to these: Has the mother uncontrollable authority over her children? Or is there a discretionary power in the courts by means of which the mother can be deprived of such authority?

Article 171 of the Civil Code, presumably still in force, because of continued judicial construction and enforcement, provides that parents who, by the example set by them, tend to corrupt their offspring, may be deprived by the courts of their parental authority. (There can also be noted sections 770 and 771 of the Code of Civil Procedure.) This provision of the law imposes a discretionary power on the courts, which should be made use of, with a primary regard for the welfare of the minor. (See 2 Manresa, *Codigo Civil*, pp. 63, et seq.; decision of the supreme court of Spain, June 23, 1905.) Both under the civil law and the common law, the best interests of the child is the paramount consideration.

In this instance, we are of the opinion that such unfitness on the part of the mother has been shown as warranted

the trial court, in the exercise of a sound judicial discretion, in leaving the children in the custody of their grandmother.

Judgment is affirmed with costs against the appellant. So ordered.

Mapa, C. J., Araullo, Street, and Villamor, JJ., concur.

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