

**MAXIMINO A. GARCIA, PETITIONER AND APPELLANT, VS.
PATROCINIO PONGAN, RESPONDENT AND APPELLEE***G. R. No. L-4362. August 31, 1951*

Ponente: FERIA, J.

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A petition for habeas corpus was originally filed in the Court of First Instance of Cebu by the petitioner against the respondent Patrocinio Pongan, to recover the custody of Teonila Garcia born on November 18, 1938, who is a natural child of both the petitioner and respondent because they were free to marry at the time of the conception of said child.

After the hearing, the lower court rendered judgment denying the appellant's petition, and awarding to the respondent the rightful custody of said Teonila Garcia; and the petitioner appealed from said judgment.

Section 311 of the new Civil Code provides that "The father and mother jointly exercise parental authority over their legitimate children who are not emancipated," and that "the recognized natural and adopted children who are under age are under the parental authority of the father or mother recognizing or adopting them."

Under article 316 of the same code the effects of parental authority of the legitimate father and mother upon their unemancipated legitimate children, and of the father or mother over their minor recognized natural children are, among others, the duty to support them and keep them in their company. The parents' duty of keeping their legitimate and recognized minor children in their company or giving them a place wherein to live, is a part of the care due to them; but this duty is at the same time a right which is incumbent upon them to facilitate compliance with their duties imposed upon the parents by said article 316.

If only one of the parents, for instance the father, has recognized a natural child, there would be no question or doubt that in the exercise of his parental authority, he has the right to keep the recognized child in his company or to have it under his custody, and he can not be deprived of such right and may not even renounce or transfer it "except in cases of guardianship or adoption approved by the court, or emancipation by concession," according to article 313 of the same Code.

But in the present case, not only the appellant father, but also the respondent mother have recognized the minor child Teonila Garcia, the former by judgment of the court, and the latter by voluntarily testifying or stating under oath before the Court of First Instance in this case, that said Teonila is her natural child, which is a new means of voluntary recognition of a natural child by his father or mother under article 278 of the new Civil Code, which says that "Recognition shall be made in the record of birth, a will, a statement before a court of record or in any authentic writing." Such voluntary recognition does not require judicial approval according to article 281 of the same Code, which provides that only "when the recognition of a minor does not take place in a record of birth or in a will judicial approval shall be necessary." And as the minor Teonila Garcia is over ten years and prefers to live with her mother, the court did not err in awarding to the appellee the care, custody, and control of said minor, there being no showing that she is unfit to take charge of the child by reason of moral depravity, habitual

drunkenness, incapacity or poverty, in accordance with the provision of section 6, Rule 100 of the Rules of Court, which reads as follows:

"Sec. 6. Proceedings as to child whose parents are separated. Appeal.—When husband and wife are divorced or living separately and apart from each other, and the question as to the care, custody, and control of a child or children of their marriage is brought before a Court of First Instance by petition or as an incident to any other proceeding, the court, upon hearing the testimony of either or both parents, and such other testimony as may be pertinent, shall award the care, custody, and control of each such child as will be for its best interest, permitting the child to choose which parent it prefers to live with if it be over ten years of age, unless the parent so chosen be unfit to take charge of the child by reason of moral depravity, habitual drunkenness, incapacity, or poverty.

* * *"

It is true that the above-quoted provisions refer to legitimate minor children whose parents are divorced or living separately and apart from each other, but it is not less true that they are also applicable to the present case by analogy. The law confers upon the courts the power to award the care, custody and control of the minor child to either of the parents whom the child prefers to live with if it is over ten years unless the parent so chosen be unfit, because either the father or the mother has a preferred right to such care, custody and control in the exercise of parental authority they have over the person of their unemancipated legitimate children. In the present case, the minor Teonila Garcia having been legally recognized by both the appellant and appellee as their natural child, either one of them has the right to have the care, control and custody of said minor by virtue of their parental authority over her.

Wherefore the order appealed from is affirmed with costs against the appellant. So ordered.
Paras, C. J., Pablo, Bengzon, Padilla, Tuason, Reyes, Jugo and Bautista Angelo, JJ., concur.

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