

**REYNALDO ESPIRITU AND GUILLERMA LAYUG, PETITIONERS, VS.
COURT OF APPEALS, AND TERESITA MASAUDING, RESPONDENTS.***G.R. No. 115640. March 15, 1995*

Ponente: MELO, J.

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This case concerns a seemingly void marriage and a relationship which went sour. The innocent victims are two children born out of the same union. Upon this Court now falls the not too welcome task of deciding the issue of who, between the father and mother, is more suitable and better qualified in helping the children to grow into responsible, well-adjusted, and happy young adulthood.

Petitioner Reynaldo Espiritu and respondent Teresita Masauding first met sometime in 1976 in Iligan City where Reynaldo was employed by the National Steel Corporation and Teresita was employed as a nurse in a local hospital. In 1977, Teresita left for Los Angeles, California to work as a nurse. She was able to acquire immigrant status sometime later. In 1984, Reynaldo was sent by his employer, the National Steel Corporation, to Pittsburgh, Pennsylvania as its liaison officer and Reynaldo and Teresita then began to maintain a common law relationship of husband and wife. On August 16, 1986, their daughter, Rosalind Therese, was born. On October 7, 1987, while they were on a brief vacation in the Philippines, Reynaldo and Teresita got married, and upon their return to the United States, their second child, a son, this time, and given the name Reginald Vince, was born on January 12, 1988.

The relationship of the couple deteriorated until they decided to separate sometime in 1990. Teresita blamed Reynaldo for the break-up, stating he was always nagging her about money matters. Reynaldo, on the other hand, contended that Teresita was a spendthrift, buying expensive jewelry and antique furniture instead of attending to household expenses.

Instead of giving their marriage a second chance as allegedly pleaded by Reynaldo, Teresita left Reynaldo and the children and went back to California. She claims, however, that she spent a lot of money on long distance telephone calls to keep in constant touch with her children.

Reynaldo brought his children home to the Philippines, but because his assignment in Pittsburgh was not yet completed, he was sent back by his company to Pittsburgh. He had to leave his children with his sister, co-petitioner Guillerma Layug and her family.

Teresita claims that she did not immediately follow her children because Reynaldo had filed a criminal case for bigamy against her and she was afraid of being arrested. The judgment of conviction in the bigamy case was actually rendered only on September 29, 1994. (Per Judge Harriet O. Demetriou, Branch 70, RTC, Pasig, pp. 210-222, Rollo). Teresita, meanwhile, decided to return to the Philippines and on December 8, 1992 and filed the petition for a writ of habeas corpus against herein two petitioners to gain custody over the children, thus starting the whole proceedings now reaching this Court.

On June 30, 1993, the trial court dismissed the petition for habeas corpus. It suspended Teresita's parental authority over Rosalind and Reginald and declared Reynaldo to have sole parental authority over them but with rights of visitation to be agreed upon by the parties and to be approved by the Court.

On February 16, 1994, the Court of Appeals per Justice Isnani, with Justices de Pano and Ibay-Somera concurring, reversed the trial court's decision. It gave custody to Teresita and visitation rights on weekends to Reynaldo.

Petitioners now come to this Court on a petition for review, in the main contending that the Court of Appeals disregarded the factual findings of the trial court; that the Court of Appeals further engaged in speculations and conjectures, resulting in its erroneous conclusion that custody of the children should be given to respondent Teresita.

We believe that respondent court resolved the question of custody over the children through an automatic and blind application of the age proviso of Article 363 of the Civil Code which reads:

Art. 363. In all questions on the care, custody, education and property of the children, the latter's welfare shall be paramount. No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure.

and of Article 213 of the Family Code which in turn provides:

Art. 213. In case of separation of the parents, parental authority shall be exercised by the parent designated by the Court. The Court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit.

The decision under review is based on the report of the Code Commission which drafted Article 213 that a child below seven years still needs the loving, tender care that only a mother can give and which, presumably, a father cannot give in equal measure. The commentaries of a member of the Code Commission, former Court of Appeals Justice Alicia Sempio-Diy, in a textbook on the Family Code, were also taken into account. Justice Diy believes that a child below seven years should still be awarded to her mother even if the latter is a prostitute or is unfaithful to her husband. This is on the theory that moral dereliction has no effect on a baby unable to understand such action. (Handbook on the Family Code of the Philippines, 1988 Ed., p. 297.)

The Court of Appeals was unduly swayed by an abstract presumption of law rather than an appreciation or relevant facts and the law which should apply to those facts. The task of choosing the parent to whom custody shall be awarded is not a ministerial function to be determined by a simple determination of the age of a minor child. Whether a child is under or over seven years of age, the paramount criterion must always be the child's interests. Discretion is given to the court to decide who can best assure the welfare of the child, and award the custody on the basis of that consideration. In *Unson III vs. Navarro* (101 SCRA 183 [1980]), we laid down the rule that "in all controversies regarding the custody of minors, the sole and foremost consideration is the physical, education, social and moral welfare of the child concerned, taking into account the respective resources and social and moral situations of the contending parents" and in *Medina vs. Makabali* (27 SCRA 502 [1969]), where custody of the minor was given to a non-relative as against the mother, then the country's leading civilist, Justice J.B.L. Reyes, explained its basis in this manner:

... While our law recognizes the right of a parent to the custody of her child. Courts must not lose sight of the basic principle that "in all questions on the care, custody, education and property of children, the latter's welfare shall be paramount" (Civil Code of the Philippines, Art. 363), and that for compelling reasons, even a child under seven may be ordered separated from the mother (do.). This is as it should be, for in the continual evolution of

legal institutions, the patria potestas has been transformed from the jus vitae ac necis (right of life and death) of the Roman law, under which the offspring was virtually a chattel of his parents, into a radically different institution, due to the influence of Christian faith and doctrines. The obligational aspect is now supreme. As pointed out by Puig Pena, now "there is no power, but a task; no complex of rights (of parents) but a sum of duties; no sovereignty, but a sacred trust for the welfare of the minor."

As a result, the right of parents to the company and custody of their children is but ancillary to the proper discharge of parental duties to provide the children with adequate support, education, moral, intellectual and civic training and development (Civil Code, Art. 356).

(pp. 504-505.)

In ascertaining the welfare and best interests of the child, courts are mandated by the Family Code to take into account all relevant considerations. If a child is under seven years of age, the law presumes that the mother is the best custodian. The presumption is strong but it is not conclusive. It can be overcome by "compelling reasons". If a child is over seven, his choice is paramount but, again, the court is not bound by that choice. In its discretion, the court may find the chosen parent unfit and award custody to the other parent, or even to a third party as it deems fit under the circumstances.

In the present case, both Rosalind and Reginald are now over seven years of age. Rosalind celebrated her seventh birthday on August 16, 1993 while Reginald reached the same age on January 12, 1995. Both are studying in reputable schools and appear to be fairly intelligent children, quite capable of thoughtfully determining the parent with whom they would want to live. Once the choice has been made, the burden returns to the court to investigate if the parent thus chosen is unfit to assume parental authority and custodial responsibility.

Herein lies the error of the Court of Appeals. Instead of scrutinizing the records to discover the choice of the children and rather than verifying whether that parent is fit or unfit, respondent court simply followed statutory presumptions and general propositions applicable to ordinary or common situations. The seven-year age limit was mechanically treated as an arbitrary cut off period and not a guide based on a strong presumption.

A scrutiny of the pleadings in this case indicates that Teresita, or at least, her counsel are more intent on emphasizing the "torture and agony" of a mother separated from her children and the humiliation she suffered as a result of her character being made a key issue in court rather than the feelings and future, the best interests and welfare of her children. While the bonds between a mother and her small child are special in nature, either parent, whether father or mother, is bound to suffer agony and pain if deprived of custody. One cannot say that his or her suffering is greater than that of the other parent. It is not so much the suffering, pride, and other feelings of either parent but the welfare of the child which is the paramount consideration.

We are inclined to sustain the findings and conclusions of the regional trial court because it gave greater attention to the choice of Rosalind and considered in detail all the relevant factors bearing on the issue of custody.

When she was a little over 5 years old, Rosalind was referred to a child psychologist, Rita Flores Macabulos, to determine the effects of uprooting her from the Assumption College where she was studying. Four different tests were administered. The results of the tests are quite revealing. The responses of Rosalind about her mother were very negative, causing the psychologist to delve deeper into the child's anxiety. Among the things revealed by Rosalind was an incident where she saw her mother hugging and kissing a "bad" man who lived in their house and worked for her father. Rosalind refused to talk to her mother even on the telephone. She tended to be emotionally embled because of constant fears that she may have to leave school and her aunt's family to go back to the United States to live with her mother. The 5-1/2 page report deals at length with feelings of insecurity and anxiety

arising from strong conflict with the mother. The child tried to compensate by having fantasy activities. All of the 8 recommendations of the child psychologist show that Rosalind chooses petitioners over the private respondent and that her welfare will be best served by staying with them (pp. 199-205, Rollo).

At about the same time, a social welfare case study was conducted for the purpose of securing the travel clearance required before minors may go abroad. Social Welfare Officer Emma D. Estrada Lopez, stated that the child Rosalind refused to go back to the United States and be reunited with her mother. She felt unloved and uncared for. Rosalind was more attached to her Yaya who did everything for her and Reginald. The child was found suffering from emotional shock caused by her mother's infidelity. The application for travel clearance was recommended for denial (pp. 206-209, Rollo).

Respondent Teresita, for her part, argues that the 7-year age reference in the law applies to the date when the petition for a writ of habeas corpus is filed, not to the date when a decision is rendered. This argument is flawed. Considerations involving the choice made by a child must be ascertained at the time that either parent is given custody over the child. The matter of custody is not permanent and unalterable. If the parent who was given custody suffers a future character change and becomes unfit, the matter of custody can always be re-examined and adjusted (*Unson III v. Navarro supra*, at p. 189). To be sure, the welfare, the best interests, the benefit, and the good of the child must be determined as of the time that either parent is chosen to be the custodian. At the present time, both children are over 7 years of age and are thus perfectly capable of making a fairly intelligent choice.

According to respondent Teresita, she and her children had a tearful reunion in the trial court, with the children crying, grabbing, and embracing her to prevent the father from taking them away from her. We are more inclined to believe the father's contention that the children ignored Teresita in court because such an emotional display as described by Teresita in her pleadings could not have been missed by the trial court. Unlike the Justices of the Court of Appeals Fourth Division, Judge Lucas P. Bersamin personally observed the children and their mother in the courtroom. What the Judge found is diametrically opposed to the contentions of respondent Teresita. The Judge had this to say on the matter:

And, lastly, the Court cannot look at petitioner [Teresita] in similar light, or with more understanding, especially as her conduct and demeanor in the courtroom (during most of the proceedings) or elsewhere (but in the presence of the undersigned presiding judge) demonstrated her ebullient temper that tended to corroborate the alleged violence of her physical punishment of the children (even if only for ordinary disciplinary purposes) and emotional instability, typified by her failure (or refusal ?) to show deference and respect to the Court and the other parties (pp. 12-13, RTC Decision)

Respondent Teresita also questions the competence and impartiality of the expert witnesses. Respondent court, in turn, states that the trial court should have considered the fact that Reynaldo and his sister, herein petitioner Guillerma Layug, hired the two expert witnesses. Actually, this was taken into account by the trial court which stated that the allegations of bias and unfairness made by Teresita against the psychologist and social worker were not substantiated.

The trial court stated that the professional integrity and competence of the expert witnesses and the objectivity of the interviews were unshaken and unimpeached. We might add that their testimony remain uncontroverted. We also note that the examinations made by the experts were conducted in late 1991, well over a year before the filing by Teresita of the habeas corpus petition in December, 1992. Thus, the examinations were at that time not intended to support petitioners' position in litigation, because there was then not even an impending possibility of one. That they were subsequently utilized in the case *a quo* when it did materialize does not change the tenor in which they were first obtained.

Furthermore, such examinations, when presented to the court must be construed to have been presented not to sway the court in favor of any of the parties, but to assist the court in the determination of the issue before it. The persons who effected such examinations were presented in the capacity of expert witnesses testifying on matters within their respective knowledge and expertise. On this matter, this Court had occasion to rule in the case of *Sali vs. Abukakar et. al* (17 SCRA 988 [1966]).

The fact that, in a particular litigation, an NBI expert examines certain contested documents, at the request, not of a public officer or agency of the Government, but of a private litigant, does not necessarily nullify the examination thus made. Its purpose, presumably, to assist the court having jurisdiction over said litigation, in the performance of its duty to settle correctly the issues relative to said documents. Even a non-expert private individual may examine the same, if there are facts within his knowledge which may help the court in the determination of said issue. Such examination, which may properly be undertaken by a non-expert private individual, does not, certainly become null and void when the examiner is an expert and/or an officer of the NBI.

(pp. 991-992.)

In regard to testimony of expert witnesses it was held in *Salomon et. al. vs Intermediate Appellate Court et. al.* (185 SCRA 352 [1990]):

... Although courts are not ordinarily bound by expert testimonies, they may place whatever weight they choose upon such testimonies in accordance with the facts of the case. The relative weight and sufficiency of expert testimony is peculiarly within the province of the trial court to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion, his possible bias in favor of the side for whom he testifies, the fact that he is a paid witness, the relative opportunities for study and observation of the matters about which he testifies, and any other matters which reserve to illuminate his statements. The opinion of the expert may not be arbitrarily rejected; it is to be considered by the court in view of all the facts and circumstances in the case and when common knowledge utterly fails, the expert opinion may be given controlling effect (20 Am. Jur., 1056-1058). The problem of the credibility of the expert witness and the evaluation of his testimony is left to the discretion of the trial court whose ruling thereupon is not reviewable in the absence of an abuse of that discretion.

(p. 359.)

It was in the exercise of this discretion, coupled with the opportunity to assess the witnesses' character and to observe their respective demeanor that the trial court opted to rely on their testimony, and we believe that the trial court was correct in its action.

Under direct examination on February 4, 1993, Social Worker Lopez stated that Rosalind and her aunt were about to board a plane when they were off-loaded because there was no required clearance. They were referred to her office, at which time Reginald was also brought along and interviewed. One of the regular duties of Social Worker Lopez in her job appears to be the interview of minors who leave for abroad with their parents or other persons. The interview was for purposes of foreign travel by a 5-year old child and had nothing to do with any pending litigation. On cross-examination, Social Worker Lopez stated that her assessment of the minor's hatred for her mother was based on the disclosures of the minor. It is inconceivable, much less presumable that Ms. Lopez would compromise her position, ethics, and the public trust reposed on a person of her position in the course of doing her job by falsely testifying just to support the position of any litigant.

The psychologist, Ms. Macabulos, is a B.S. magna cum laude graduate in Psychology and an M.A. degree holder also in Psychology with her thesis graded "Excellent". She was a candidate for a doctoral degree at the time of the

interview. Petitioner Reynaldo may have shouldered the cost of the interview but Ms. Macabulos' services were secured because Assumption College wanted an examination of the child for school purposes and not because of any litigation. She may have been paid to examine the child and to render a finding based on her examination, but she was not paid to fabricate such findings in favor of the party who retained her services. In this instance it was not even petitioner Reynaldo but the school authorities who initiated the same. It cannot be presumed that a professional of her potential and stature would compromise her professional standing.

Teresita questions the findings of the trial court that:

- Her morality is questionable as shown by her marrying Reynaldo at the time she had a subsisting marriage with another man.
- She is guilty of grave indiscretion in carrying on a love affair with one of the Reynaldo's fellow NSC employees.
- She is incapable of providing the children with necessities and conveniences commensurate to their social standing because she does not even own any home in the Philippines.
- She is emotionally unstable with ebullient temper.

It is contended that the above findings do not constitute the compelling reasons under the law which would justify depriving her of custody over the children; worse, she claims, these findings are non-existent and have not been proved by clear and convincing evidence.

Public and private respondents give undue weight to the matter of a child under 7 years of age not to be separated from the mother, without considering what the law itself denominates as compelling reasons or relevant considerations to otherwise decree. In the Unson III case, earlier mentioned, this Court stated that it found no difficulty in not awarding custody to the mother, it being in the best interest of the child "to be freed from the obviously unwholesome, not to say immoral influence, that the situation where [the mother] had placed herself ...might create in the moral and social outlook of [the child] who was in her formative and most impressionable stage ..."

Then too, it must be noted that both Rosalind and Reginald are now over 7 years of age. They understand the difference between right and wrong, ethical behavior and deviant immorality. Their best interests would be better served in an environment characterized by emotional stability and a certain degree of material sufficiency. There is nothing in the records to show that Reynaldo is an "unfit" person under Article 213 of the Family Code. In fact, he has been trying his best to give the children the kind of attention and care which the mother is not in a position to extend.

The argument that the charges against the mother are false is not supported by the records. The findings of the trial court are based on evidence.

Teresita does not deny that she was legally married to Roberto Lustado on December 17, 1984 in California (p. 13, Respondent's Memorandum; p. 238, Rollo ; pp. 11, RTC Decision). Less than a year later, she had already driven across the continental United States to commence living with another man, petitioner Reynaldo, in Pittsburgh. The two were married on October 7, 1987. Of course, to dilute this disadvantage on her part, this matter of her having contracted a bigamous marriage later with Reynaldo, Teresita tried to picture Reynaldo as a rapist, alleging further that she told Reynaldo about her marriage to Lustado on the occasion when she was raped by Reynaldo. Expectedly, Judge Harriet Demetriou of the Pasig RTC lent no weight to such tale. And even if this story were given credence, it adds to and not subtracts from the conviction of this Court about Teresita's values. Rape is an insidious crime against privacy. Confiding to one's potential rapist about a prior marriage is not a very

convincing indication that the potential victim is averse to the act. The implication created is that the act would be acceptable if not for the prior marriage.

More likely is Reynaldo's story that he learned of the prior marriage only much later. In fact, the rape incident itself is unlikely against a woman who had driven three days and three nights from California, who went straight to the house of Reynaldo in Pittsburgh and upon arriving went to bed and, who immediately thereafter started to live with him in a relationship which is marital in nature if not in fact.

Judge Bersamin of the court a quo believed the testimony of the various witnesses that while married to Reynaldo, Teresita entered into an illicit relationship with Perdencio Gonzales right there in the house of petitioner Reynaldo and respondent Teresita. Perdencio had been assigned by the National Steel Corporation to assist in the project in Pittsburgh and was staying with Reynaldo, his co-employee, in the latter's house. The record shows that the daughter Rosalind suffered emotional disturbance caused by the traumatic effect of seeing her mother hugging and kissing a boarder in their house. The record also shows that it was Teresita who left the conjugal home and the children, bound for California. When Perdencio Gonzales was reassigned to the Philippines, Teresita followed him and was seen in his company in a Cebu hotel, staying in one room and taking breakfast together. More significant is that letters and written messages from Teresita to Perdencio were submitted in evidence (p. 12, RTC Decision).

The argument that moral laxity or the habit of flirting from one man to another does not fall under "compelling reasons" is neither meritorious nor applicable in this case. Not only are the children over seven years old and their clear choice is the father, but the illicit or immoral activities of the mother had already caused emotional disturbances, personality conflicts, and exposure to conflicting moral values, at least in Rosalind. This is not to mention her conviction for the crime of bigamy, which from the records appears to have become final (pp. 210-222, Rollo).

Respondent court's finding that the father could not very well perform the role of a sole parent and substitute mother because his job is in the United States while the children will be left behind with their aunt in the Philippines is misplaced. The assignment of Reynaldo in Pittsburgh is or was a temporary one. He was sent there to oversee the purchase of a steel mill component and various equipment needed by the National Steel Corporation in the Philippines. Once the purchases are completed, there is nothing to keep him there anymore. In fact, in a letter dated January 30, 1995, Reynaldo informs this Court of the completion of his assignment abroad and of his permanent return to the Philippines (ff. p 263, Rollo).

The law is more than satisfied by the judgment of the trial court. The children are now both over seven years old. Their choice of the parent with whom they prefer to stay is clear from the record. From all indications, Reynaldo is a fit person, thus meeting the two requirements found in the first paragraph of Article 213 of the Family Code. The presumption under the second paragraph of said article no longer applies as the children are over seven years. Assuming that the presumption should have persuasive value for children only one or two years beyond the age of seven years mentioned in the statute, there are compelling reasons and relevant considerations not to grant custody to the mother. The children understand the unfortunate shortcomings of their mother and have been affected in their emotional growth by her behavior.

WHEREFORE, the petition is hereby GRANTED. The decision of the Court of Appeals is reversed and set aside, and the decision of Branch 96 of the Regional Trial Court of the National Capital Judicial Region stationed in Quezon City and presided over by the Honorable Lucas P. Bersamin in its Civil Case No. Q-92-14206 awarding custody of the minors Rosalind and Reginald Espiritu to their father, Reynaldo Espiritu, is reinstated. No special pronouncement is made as to costs.

SO ORDERED.

Feliciano, (Chairman), Romero, Vitug, and Francisco, JJ., concur.

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