

WILSON SY, PETITIONER, VS. COURT OF APPEALS, REGIONAL TRIAL COURT OF MANILA, BRANCH 48, AND MERCEDES TAN UY-SY, RESPONDENTS.

G.R. No. 124518. December 27, 2007

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TINGA, J.:

In this Petition for Review on Certiorari[1] under Rule 45 of the 1997 Rules of Civil Procedure, petitioner Wilson Sy assails the Decision[2] dated 29 February 1996 of the Court of Appeals in C.A. G.R. SP No. 38936 and its Resolution [3] dated 15 April 1996 denying his motion for reconsideration.

The following are the antecedents:

On 19 January 1994, respondent Mercedes Tan Uy-Sy filed a petition for habeas corpus against petitioner Wilson Sy before the Regional Trial Court of Manila, Branch 48, docketed as Special Proceeding No. 94-69002. Respondent prayed that said writ be issued ordering petitioner to produce their minor children Vanessa and Jeremiah before the court and that after hearing, their care and custody be awarded to her as their mother.[4]

In his answer, petitioner prayed that the custody of the minors be awarded to him instead. Petitioner maintained that respondent was unfit to take custody of the minors. He adduced the following reasons: firstly, respondent abandoned her family in 1992; secondly, she is mentally unstable; and thirdly, she cannot provide proper care to the children.[5]

After trial, the trial court caused the issuance of a writ of habeas corpus and awarded custody of the children to respondent, to wit:

WHEREFORE, judgment is hereby rendered maintaining to the petitioner the custody of the minors Vanessa and Jeremiah, all surnamed Uy-Sy, without, however, prejudice to the visitatorial rights of the father, herein respondent, and the temporary arrangement of the custody made by the parties during pendency of this proceeding is hereby revoked, and without any further effect. The Court further orders the respondent to pay by way of monthly support for the minors, the amount of P50,000.00 payable to petitioner from [the] date of judgment for failure on the part of respondent to show by preponderance of evidence that the petitioner is unfit to the custody of the minor children who are only 6 and 4 years old.[6]

Petitioner appealed the order of the trial court to the Court of Appeals. Before the appellate court, he alleged that the trial court erred: (1) in awarding the custody of the minor children solely to respondent; and (2) in ordering him to provide respondent support in the amount of P50,000.00 per month.[7]

The Court of Appeals found no merit in the appeal and affirmed the decision of the trial court. The Court of Appeals did not find any reason to disturb the conclusions of the trial court, particularly petitioner's failure to prove by preponderance of evidence that respondent was unfit to take custody over the minor children.

The Court of Appeals held that petitioner was not able to substantiate his contention that respondent was unfit to have custody of the children. On respondent's supposed abandonment of the family, the appellate court found

instead that respondent had been driven away by petitioner's family because of religious differences. Respondent's stay in Taiwan likewise could hardly be called abandonment as she had gone there to earn enough money to reclaim her children. Neither could respondent's act of praying outdoors in the rain be considered as evidence of insanity as it may simply be an expression of one's faith. Regarding the allegation that respondent was unable to provide for a decent dwelling for the minors, to the contrary, the appellate court was satisfied with respondent's proof of her financial ability to provide her children with the necessities of life.[8]

As to the second assignment of error, the Court of Appeals held that questions as to care and custody of children may be properly raised in a petition for writ of habeas corpus. Moreover, petitioner was properly heard on the matter relative to the issue of support. He was questioned about his sources of income for the purpose of determining his ability to give support. As to the propriety of the amount awarded, the appellate court was unwilling to alter the trial court's conclusion for petitioner did not forthrightly testify on his actual income. Neither did he produce income tax returns or other competent evidence, although within his power to do so, to provide a fair indication of his resources. At any rate, the appellate court declared that a judgment of support is never final and petitioner is not precluded at any time from seeking a modification of the same and produce evidence of his claim.[9]

Petitioner filed a motion for reconsideration of the Court of Appeals' decision but the same was denied.[10] Hence, this appeal by certiorari wherein petitioner asserts that: (1) the Court of Appeals erred in awarding the custody of the minor children solely to respondent; (2) the Court of Appeals had no jurisdiction to award support in a habeas corpus case as: (a) support was neither alleged nor prayed for in the petition; (b) there was no express or implied consent on the part of the parties to litigate the issue; and (c) Section 6, Rule 99 of the Rules of Court does not apply because the trial court failed to consider the Civil Code provisions on support; and (3) the award of P50,000.00 as support is arbitrary, unjust, unreasonable and tantamount to a clear deprivation of property without due process of law.[11]

For her part, respondent claims that petitioner had lost his privilege to raise the first issue, having failed to raise it before the appellate court. Anent the second issue, respondent takes refuge in the appellate court's statement that the questions regarding the care and custody of children may properly be adjudicated in a habeas corpus case. Regarding the third issue, respondent maintains that the amount of support awarded is correct and proper.[12]

There is no merit in the petition regarding the question of care and custody of the children.

The applicable provision is Section 213 of the Family Code which states that:

Section 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 is unfit.

No child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise.

In case of legal separation of the parents, the custody of the minor children shall be awarded to the innocent spouse, unless otherwise directed by the court in the interest of the minor children.[13] But when the husband and wife are living separately and apart from each other, without decree of the court, the court shall award the care, custody, and control of each child as will be for his best interest, permitting the child to choose which parent he prefers to live with if he is over seven (7) years of age unless the parent so chosen be unfit to take charge of the child by reason of moral depravity, habitual drunkenness or poverty.[14]

In all controversies regarding the custody of minors, the sole and foremost consideration is the physical,

educational, social and moral welfare of the child concerned, taking into account the respective resources and social and moral situations of the contending parents.[15]

However, the law favors the mother if she is a fit and proper person to have custody of her children so that they may not only receive her attention, care, supervision but also have the advantage and benefit of a mother's love and devotion for which there is no substitute.[16] Generally, the love, solicitude and devotion of a mother cannot be replaced by another and are worth more to a child of tender years than all other things combined.[17] The Civil Code Commission, in recommending the preference for the mother, explained, thus:

The general rule is recommended in order to avoid many a tragedy where a mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age. The exception allowed by the rule has to be for "compelling reasons" for the good of the child: those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the (relative) divorce decree will ordinarily be sufficient punishment for her. Moreover, her moral dereliction will not have any effect upon the baby who is as yet unable to understand the situation.[18]

This preference favoring the mother over the father is even reiterated in Section 6, Rule 99 of the Rules of Court (the Rule on Adoption and Custody of Minors) underscoring its significance, to wit:

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 Regional Trial Court by petition or as an incident to any other proceeding, the court, upon hearing the 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. If upon such hearing, it appears that both parents are improper persons to have the care, custody, and control of the child, the court may either designate the paternal or maternal grandparent of the child, or his oldest brother or sister, or some reputable and discreet person to take charge of such child, or commit it to any suitable asylum, children's home, or benevolent society. The court may in conformity with the provisions of the Civil Code order either or both parents to support or help support said child, irrespective of who may be its custodian, and may make any order that is just and reasonable permitting the parent who is deprived of its care and custody to visit the child or have temporary custody thereof. Either parent may appeal from an order made in accordance with the provisions of this section. No child under seven years of age shall be separated from its mother, unless the court finds there are compelling reasons therefor. (Emphasis supplied)

The above-quoted provision expressly acknowledges and authorizes that the matter of care and custody of the children may be raised and adjudicated as an incident to any proceeding, such as a case for habeas corpus.

Evidently, absent any compelling reason to the contrary, the trial court was correct in restoring the custody of the children to the mother, herein respondent, the children being less than seven years of age, at least at the time the case was decided. Moreover, petitioner's contention that respondent is unfit to have custody over the minor children has not been substantiated as found by both courts below. Thus, it is already too late for petitioner to reiterate the assertion for only questions of law may be raised before this Court. Furthermore, the determination of whether the mother is fit or unfit to have custody over the children is a matter well within the sound discretion of the trial court, and unless it is shown that said discretion has been abused the selection will not be interfered with.[19]

Consequently, the Court affirms the award of custody in respondent's favor.

Now, the issue of support.

Article 203 of the Family Code states that the obligation to give support is demandable from the time the person who has a right to receive the same needs it for maintenance, but it shall not be paid except from the date of judicial or extrajudicial demand. The case of *Jocson v. The Empire Ins. Co. and Jocson Lagniton*[20] explains the rationale for this rule:

x x x Support does include what is necessary for the education and clothing of the person entitled thereto (Art. 290, New Civil Code). But support must be demanded and the right to it established before it becomes payable (Art. 298, New Civil Code; *Marcelo v. Estacio*, 70 Phil. 215). For the right to support does not arise from the mere fact of relationship, even from the relationship of parents and children, but “from imperative necessity without which it cannot be demanded, and the law presumes that such necessity does not exist unless support is demanded (Civil Code of the Philippines, Annotated, Tolentino, Vol. 1, p. 181, citing 8 Manresa 685). In the present case, it does not appear that support for the minors, be it only for their education and clothing, was ever demanded from their father and the need for it duly established. The need for support, as already stated, cannot be presumed, and especially must this be true in the present case where it appears that the minors had means of their own.[21]

As intimated earlier, the Court agrees with the courts below that Section 6, Rule 99[22] of the Rules of Court permits the ventilation of the question regarding the care and custody of the children as an incident to any proceeding, even a habeas corpus proceeding. Petitioner would have us believe, however, that since respondent’s petition did not include a prayer[23] for support of the children in accordance with the above-quoted Family Code provision, the trial court was not justified in awarding support in respondent’s favor. In addition, petitioner claims that he did not give consent to the trial and the threshing out of the issue as it was not raised in the pleadings. [24] He claims that in fact, he testified on his financial status only to prove that he is financially able to provide for his children and not for the purpose of determining the amount of support.[25] Besides, he contends that the trial court did not order the amendment of the pleadings to conform to the evidence presented pursuant to Section 5 [26] Rule 10 of the 1997 Rules of Civil Procedure, an aspect that supports his contention that the parties never consented, expressly or impliedly, to try the issue of support. [27]

The Court is not convinced. Contrary to petitioner’s assertions, respondent testified during trial, without any objection on petitioner’s part, regarding the need for support for the children’s education and other necessities, viz:

ADD’L DIRECT EXAMINATION OF THE WITNESS

MERCEDES TAN UY-SY

Q:

With the kind permission of this Honorable Court.

Q:

Ms. Sy, the custody of the two minors[,] of course[,] require some expenses on your part notwithstanding that you said you have savings intended for them, is it not?

A:

Yes, sir.

Q:

And what is the nature of these expenses that you expect to disburse for the children?

A:

For the medicine or health care.

Q:

What else?

A:

For education, for emergency expenses, for basically for food.

Q:

In your estimate, how much would these expenses be per month?

A:

Well, I think, perhaps P50,000.00, sir.

Q:

Which the respondent should furnish?

A:

Yes, sir.

ATTY. CORTEZ

That is all for the witness, Your Honor.[28]

Moreover, based on the transcript of stenographic notes, petitioner was clearly made aware that the issue of support was being deliberated upon, to wit:

WITNESS:

WILSON SY: will be testifying under the same oath.[29]

x x x x

ATTY. ALBON:

Q:

In the hearing of July 23, 1994 as appearing on page 3, Mercedes Sy testified that she would be needing P50,000.00 a month expenses for her children, what can you say about that?

A:

That is a dillusion [sic] on her part.[30]

The trial court judge even propounded questions to petitioner regarding his sources of income for the purpose of determining the amount of support to be given to the children:

COURT:

I want to find out how much his income now for the purposes of giving support to the children. Please answer the question.

WITNESS:

A:

Shares of stocks.

ATTY. CORTEZ:

Q:

A shares [sic] of stock is the evidence of your investment in the corporation. My question is: What investment did you put in to enable you to get a share, was it money or property?

A:

There is no money but it was given by my father.

COURT:

Q:

Upon the death of your father you just inherited it?

A:

Before.

Q:

After the death, did you not acquire some of the shares of your father?

A:

No, your Honor.

Q:

What happened to the shares of your father?

A:

It is with my mother.

x x x x

COURT:

Never mind the share of the mother. What is material is his share.

ATTY. CORTEZ:

Q:

How many shares do you have in the corporation?

A:

Right now I have only ten (10) shares.

Q:

What is the value of that [sic] shares?

A:

I [do not] give any importance.

COURT

Q:

For purposes of this case, the Court is asking you how much is your share?

A:

I [do not] how to appraise.

Q:

More or less, how much? Use the word more or less, is that one million more or less, 2 million, more or less, 10 million, more or less? Anyway, this is not a BIR proceeding, this is a Court proceeding?

A:

I want to speak the truth but I [do not] know. I did not even see the account.

COURT:

Proceed.

ATTY. CORTEZ

x x x x

Q:

At that time of your father's death[,] you were [sic]already holding ten (10) shares or was it less?

A:

More.

Q:

More than ten (10) shares?

A:

Yes, sir.

COURT

Q:

What is the par value of that one (1) share?

A:

I [do not] know, your Honor.

x x x x

COURT:

Let it remain that he owns ten (10) shares.

ATTY. CORTEZ:

A:

Yes, 10 shares. The other shares I already sold it.

Q:

How many shares did you sell?

A:

I only have 10 shares now. I don't know how many shares that I have left. I only know the 20 shares.[31]

Applying Section 5,[32] Rule 10 of the 1997 Rules of Civil Procedure, since the issue of support was tried with the implied consent of the parties, it should be treated in all respects as if it had been raised in the pleadings. And since there was implied consent, even if no motion had been filed and no amendment had been ordered, the Court holds that the trial court validly rendered a judgment on the issue.[33] Significantly, in the case of *Bank of America v. American Realty Corporation*,[34] the Court stated:

There have been instances where the Court has held that even without the necessary amendment, the amount proved at the trial may be validly awarded, as in *Tuazon v. Bolanos* (95 Phil. 106), where we said that if the

facts shown entitled plaintiff to relief other than that asked for, no amendment to the complaint was necessary, especially where defendant had himself raised the point on which recovery was based. The appellate court could treat the pleading as amended to conform to the evidence although the pleadings were actually not amended. Amendment is also unnecessary when only clerical error or non substantial matters are involved, as we held in *Bank of the Philippine Islands vs. Laguna* (48 Phil. 5). In *Co Tiamco v. Diaz* (75 Phil. 672), we stressed that the rule on amendment need not be applied rigidly, particularly where no surprise or prejudice is caused the objecting party. And in the recent case of *National Power Corporation v. Court of Appeals* (113 SCRA 556), we held that where there is a variance in the defendant's pleadings and the evidence adduced by it at the trial, the Court may treat the pleading as amended to conform with the evidence.[35]

The Court likewise affirms the award of P50,000.00 as support for the minor children. As found by both courts, petitioner's representations regarding his family's wealth and his capability to provide for his family more than provided a fair indication of his financial standing even though he proved to be less than forthright on the matter.[36] In any event, this award of support is merely provisional as the amount may be modified or altered in accordance with the increased or decreased needs of the needy party and with the means of the giver.[37]

WHEREFORE, the Decision dated 29 February 1996 of the Eleventh Division of the Court of Appeals in C.A. G.R. SP No. 38936 and its Resolution[38] dated 15 April 1996 are AFFIRMED. Costs against petitioner.

SO ORDERED.

Quisumbing, (Chairperson), Carpio, Carpio Morales, Tinga, and Velasco, Jr., JJ., concur.

[1] Rollo, pp. 27-52; dated 24 May 1996.

[2] Id. at 7-20; penned by Associate Justice Minerva P. Gonzaga-Reyes with the concurrence of Associate Justices Buenaventura J. Guerrero and Romeo A. Brawner.

[3] Id. at 70-72.

[4] Id. at 8.

[5] Id. at 9-10, 31.

[6] Id. at 7; dispositive portion of the Decision dated 14 December 1994 penned by Hon. Demetrio M. Batario, Jr.

[7] Id. at 8

[8] Id. at 15-16.

[9] Id. at 17-19.

[10] Id. at 21-23; in a Resolution dated 15 April 1996.

[11] Id. at 37.

[12] Id. at 88-90; Comment dated 7 October 1996.

[13] FAMILY CODE, Art. 63; TOLENTINO, CIVIL CODE OF THE PHILIPPINES, Vol. 1, p. 609.

[14] Id. at 610.

[15] *Unson III v. Navarro*, No. 52242, 17 November 1980, 101 SCRA 183, 189.

[16] STA. MARIA, JR., PERSONS AND FAMILY RELATIONS, p. 697, citing *Peavey v. Peavey*, 85 Nev. 571, 460 P2d 110.

[17] *Id.* at 698, citing *Horst v. McLain*, 466 Sw2d 187.

[18] *Lacson v. San Jose-Lacson*, 133 Phil. 884, 894-895 (1968).

[19] *Pelayo v. Lavin Aedo*, 40 Phil. 501, 504 (1919).

[20] 103 Phil. 580 (1958).

[21] *Id.* at 582-583.

[22] 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 Regional Trial Court by petition or as an incident to any other proceeding, the court, upon hearing the 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. If upon such hearing, it appears that both parents are improper persons to have the care, custody, and control of the child, the court may either designate the paternal or maternal grandparent of the child, or his oldest brother or sister, or some reputable and discreet person to take charge of such child, or commit it to any suitable asylum, children's home, or benevolent society. The court may in conformity with the provisions of the Civil Code order either or both parents to support or help support said child, irrespective of who may be its custodian, and may make any order that is just and reasonable permitting the parent who is deprived of its care and custody to visit the child or have temporary custody thereof. Either parent may appeal from an order made in accordance with the provisions of this section. No child under seven years of age shall be separated from its mother, unless the court finds there are compelling reasons therefor. (Emphasis supplied)

[23] Records, Vol. 1, p. 3.

WHEREFORE, it is most respectfully prayed that a [W]rit of Habeas Corpus be issued by this Honorable Court, commanding Wilson L. Sy to produce the bodies of Vanessa and Jeremiah Uy Sy before this court at the time and place specified, and to summon the respondent then and there to appear and to show cause for their detention; and that, after hearing, said minors be turned over to the care and custody of their mother Mercedes Uy Sy.

[24] CA rollo, pp. 16-17.

[25] *Id.* at 19 of Petitioner's Memorandum.

[26] SEC. 5. Amendment to conform to or authorize presentation of evidence. lauren — When issues not raised by the pleadings are tried with the express or implied consent of the parties, they shall be treated in all respects, as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so with liberality if the presentation of the merits of the action and the ends of substantial justice will be subserved thereby. The court may grant a continuance to enable the amendment to be made.

[27] Rollo, p. 17.

[28] Records, Vol. 1; TSN, dated 25 July 1994, p. 3.

[29] Id. at 547; TSN, dated 4 November 1994, p. 6.

[30] Id. at 552; TSN, 4 November 1994, p. 11.

[31] Id. at 563-566, TSN, 4 November 1994, pp. 22-25.

[32] SEC. 5. Amendment to conform to or authorize presentation of evidence. – When issues not raised by the pleadings are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so with liberality if the presentation of the merits of the action and the ends of substantial justice will be subserved thereby. The court may grant a continuance to enable the amendment to be made.

[33] HERRERA, REMEDIAL LAW, Vol.1, p. 598.

[34] 378 Phil. 1279 (1999).

[35] Id. at 1301-1302.

[36] Rollo, pp. 18-19.

[37] Advincula v. Advincula, 119 Phil. 448, 451 (1964).

[38] Supra note 3.

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