

SEBASTIAN LOZANO, PLAINTIFF AND APPELLANT, VS. CARMEN MARTINEZ AND JOSE DE VEGA, DEFENDANTS. CARMEN MARTINEZ, APPELLEE.

G.R. No. 12834. October 10, 1917

Ponente: JOHNSON, J.

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JOHNSON, J.:

This was a petition for the writ of habeas corpus presented in the Court of First Instance of the City of Manila on the 2d day of February, 1917. Its purpose was to obtain the possession of a child of six and one-half years old.

The record shows that the plaintiff Sebastian Lozano and the defendant Carmen Martinez were husband and wife; that the child in question was their child; that they were living separate; that sometime before the commencement of the present action the plaintiff had commenced a criminal action against the defendant and the said Jose de Vega for the crime of adultery; that said criminal action had been dismissed; that there was still pending an action by the defendant Carmen Martinez against the plaintiff Sebastian Lozano for the crime of libel; that the defendant Carmen Martinez had obtained possession of the child in question and had refused to deliver it to its father. The mother, Carmen Martinez, alleges and attempted to prove that prior to the time she took possession of said child, it was in the possession of its father; that its father was not able to give it the care and attention which a child of tender years should have; that its father was not financially able to give the child the care and attention which it requires; that she was amply able to take care of the child, to furnish it food and clothing, and such other necessities which a child requires.

After hearing the evidence adduced during the hearing on the petition for the writ of habeas corpus the Hon. James A. Ostrand, judge, in his decision, made the following statement:

"The respondent, Carmen Martinez, is the mother of the child, and pending divorce proceedings is living separate from her husband. While the proceedings adopted by the respondent mother to obtain possession of the child may be open to criticism, the court is nevertheless of the opinion that she is in a much better position to take care of the child than is the petitioner; and as the welfare of the child is the ruling consideration in providing for its custody, the discretion vested in the court by section 771 of the Code of Civil Procedure will in this instance be exercised in favor of the respondent."

Said section 771 provides, among other things, that, "When husband and wife are living separate and apart from each other, or are divorced, and the question as to the care, custody and control of the offspring of their marriage, is brought before a Court of First Instance, by petition or otherwise, or rises as an incident to any other proceeding, the father and mother of such offspring shall stand upon an equality before the court as to the care, custody and control of the offspring so far as it relates to their being either father or mother of the children. The court, upon hearing the testimony of either or both of said parents and such other testimony as the court deems pertinent, shall decide which one of them shall have the care, custody and control of such offspring, taking into account that which will be for the best interest of the children. * * *"

Said section gives the court the right to decide which of the parents, when they are living separate, is entitled to the care and custody of their offspring when such offspring is under ten years of age. There is nothing in the record which shows that the lower court abused the discretion conferred upon it by said section 771. The evidence clearly shows that it is for the best interest of the child to allow the mother for the present to have the control over it.

Therefore, the judgment of the lower court is hereby affirmed, with costs. So ordered.

Arellano, C. J., Carson, Araullo, Street, and Malcolm, JJ., concur.

Judgment affirmed.

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