

ANTONINO PELAYO, PETITIONER AND APPELLEE, VS. AURORA LAVIN AEDO, RESPONDENT AND APPELLANT.*G.R. No. 15953. November 15, 1919*

Ponente: JOHNSON, J.

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The petitioner, Antonino Pelayo, presented a petition for the writ of habeas corpus in the Court of First Instance of the city of Manila on the 21st day of October, 1919. Its purpose was to recover from the respondent the possession of Belen Pelayo, Lidia Pelayo, Bernardo Pelayo, Antonino Pelayo, Blanca Pelayo, and Aurora Pelayo, who are his children. The respondent Aurora Lavin Aedo is the wife of Antonino Pelayo and the mother of said children.

It appears from the record that Antonino Pelayo and Aurora Lavin Aedo were husband and wife; that they had been married for a period of about twenty years; that there were born to them eight children, whose names and ages are as follows:

Capitalina Pelayo, 19 years of age; Belen Pelayo, 17 years of age; Lidia Pelayo, 14 years of age; Joaquin Pelayo, 12 years of age; Bernardo Pelayo, 10 years of age; Antonino Pelayo, 7 years of age; Blanca Pelayo, 5 years of age; Aurora Pelayo, between 2 and 3 years of age.

During the existence of the married life of the petitioner and the respondent, they had lived in different provinces of the Philippine Islands. In the month of September, 1919, some difference of opinion concerning certain matters, which it is unnecessary here to state, arose between them and, as a result of said trouble, the respondent, Aurora Lavin Aedo, left the home of her husband in the municipality of Matnog, of the Province of Sorsogon, and came to Manila, bringing all of the children except Joaquin; that when they arrived at Manila they went to the La Palma de Mallorca Hotel and are still living there.

The petitioner now seeks to get possession of his children in order that he may care for and support them under his own roof, and claims that he has ample means so to do. He attempts to show that his wife, the mother of the children, has no means nor income with which she can adequately support and educate the children.

The principal defense presented by the respondent is that, at the time she left the municipality of Matnog, she had an agreement with her husband that they were thereafter to live separate.

Upon the issue presented to the lower court, and after hearing the evidence, the Honorable Simplicio del Rosario, judge, in a very carefully prepared opinion, and following the provisions of section 771 of the Code of Civil Procedure, rendered judgment the dispositive part of which is as follows:

"The respondent Aurora Lavin y Aedo is hereby ordered, within 48 hours from the time that her attorney shall have been notified of this decision, to place her children Lidia, Bernardo, Antonino, Blanca, and Aurdra in the custody and care of her husband, the petitioner Antonino Pelayo. Her daughters Capitalina and Belen are allowed— who so chose—to live with their mother."

From that judgment the respondent appealed to this court.

Section 771 of the Code of Procedure in civil actions provides 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 the 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: Provided, That if such offspring be ten years of age or more they be allowed to choose which parent they prefer to live with, unless the parent so selected by said child be unfitted to take charge of such child by reason of moral depravity, habitual drunkenness, incapacity, or poverty, in which case the court shall determine the custodian of such child. * * * The court shall have full power and authority to make any order or decree that is just and reasonable, permitting the parent who is deprived of such care and custody of said child to visit it and to have temporary custody thereof."

The lower court, after considering the evidence adduced during the trial of the cause with special reference to the ability of each of the spouses for the care, custody and control of the children, arrived at the conclusion that it was better for the interest of the children to put all of them who are now in the custody of the mother, except Capitalina and Belen, under the care, custody and control of the father.

The evidence adduced during the trial of the cause fully justifies the conclusions of the lower court. The defense which was presented by the respondent, that she and her husband had agreed to live separate, is not fully supported by the record. And even granting that it was supported, that agreement cannot affect the question as to the care, custody and control of their children, when that question is brought before the Court of First Instance. Section 771 of the Code of Procedure in civil actions expressly provides that when husband and wife are living separate and apart and the question as to the care, custody and control of their children is brought before the Court of First Instance, said court, upon hearing the testimony of either or both of said parents, shall decide which one of them shall have the care, custody and control of their offspring, taking into account the particular conditions mentioned in said section.

In the case of *Lozano vs. Martinez and De Vega* (36 Phil., 976), we held that "where a husband and wife are living separate, the question *which one of them is entitled to the possession of their children is a matter within the sound discretion of the court' and that the exercise of the discretion conferred under section 771 of Act No. 190 will not be interfered with until it is shown that said discretion has been abused. There is no allegation nor intimation that the discretion conferred upon the lower court has been, in any way whatsoever, abused.

Upon a consideration of the record brought to this court we are of the opinion and so decide that the judgment of the lower court should be and is hereby affirmed; and, without any finding as to costs, it is so ordered.

Arellano, C.J., Torres, Araullo, Street, Malcolm, and Avanceña, JJ., concur.

Judgment affirmed.

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