AGNES GAMBOA-HIRSCH PETITIONER, VS. HON. COURT OF APPEALS AND FRANKLIN HARVEY HIRSCH, RESPONDENTS.

G.R. NO. 174485. July 11, 2007

Ponente: VELASCO, JR., J.

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VELASCO, JR., J.:

This is a petition for certiorari[1] under Rule 65 which seeks to set aside the June 8, 2006 Decision[2] of the Court of Appeals (CA) in CA-G.R. SP No. 94329, which granted private respondent Franklin Harvey Hirsch (Franklin) joint custody with petitioner Agnes Gamboa-Hirsch (Agnes) of their minor daughter Simone Noelle Hirsch (Simone); and the August 3, 2006 CA Resolution[3] denying petitioner's Motion for Reconsideration for lack of merit. Petitioner also prays for the issuance of a temporary restraining order/injunction preventing the execution and implementation of the assailed June 8, 2006 CA Decision.

Franklin and Agnes were married on December 23, 2000 in the City of Bacolod, and established their conjugal dwelling in Diniwid, Boracay Island, Malay, Aklan. On December 21, 2002, a child was born to them and was named Simone. In 2005, the couple started to have marital problems as Agnes wanted to stay in Makati City, while Franklin insisted that they stay in Boracay Island. On March 23, 2006, Agnes came to their conjugal home in Boracay, and asked for money and for Franklin's permission for her to bring their daughter to Makati City for a brief vacation. Franklin readily agreed, but soon thereafter discovered that neither Agnes nor their daughter Simone would be coming back to Boracay.

Franklin then filed a petition for habeas corpus before the CA for Agnes to produce Simone in court. On May 19, 2006, the CA issued a Resolution which ordered that a writ of habeas corpus be issued ordering that Simone be brought before said court on May 26, 2006. After a series of hearings and presentation of evidence, the CA, on June 8, 2006, promulgated the assailed Decision granting Franklin joint custody with Agnes of their minor child. Agnes filed a Motion for Reconsideration of this Decision, which was denied in the CA's August 3, 2006 Resolution for lack of merit.

Petitioner now comes before this Court praying that we set aside the June 8, 2006 Decision and August 3, 2006 Resolution of the CA, and that we issue a temporary restraining order/injunction on the execution and implementation of the assailed rulings of the CA based on the following grounds:

> (A)
>
> The Court of Appeals seriously erred and acted with grave abuse of discretion amounting to lack or excess of jurisdiction when it ruled upon, granted, and decided the matter of custody x x x during the May 26, 2006 hearing conducted on the petition for writ of habeas corpus in relation to and with custody of a minor under A.M. No. 03-03-04-SC, C.A.-GR SP. No. 94329, as no reception of evidence to support said decision was had thereon, and the honorable court merely based its decision on mere conjectures and presumptions.
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> (B)

> The Court of Appeals seriously erred and acted with grave abuse of discretion amounting to lack or excess of jurisdiction when it denied the motion for reconsideration filed by [petitioner Agnes] and only made addendums thereon appertaining to the custody aspect in its Decision that the same is deemed necessary for the protection of the interest of the child and a mere temporary arrangement while the case involving the herein parties are pending before the Regional Trial Court x x x quite contrary to its pronouncements during the May 26, 2006 hearing when the matter of custody was insisted upon by [respondent Franklin].
>
> (C)
>
> The Court of Appeals seriously erred and acted with grave abuse of discretion amounting to lack or excess of jurisdiction when it granted joint custody in utter disregard of the provisions of the Family Code, as to minors seven (7) years of age and below, in relation to the jurisprudence and pronouncements laid down by the Honorable Supreme Court on the matter of the said provision.[4]

Acting on the petition, this Court issued its October 2, 2006 Resolution denying petitioner's prayer for the issuance of a temporary restraining order. Petitioner then filed a Motion for Reconsideration of this Resolution, and on April 11, 2007, this Court granted petitioner's Motion for Reconsideration, issued a temporary restraining order, and awarded the sole custody of the minor, Simone, to petitioner.

This petition has merit.

The CA committed grave abuse of discretion when it granted joint custody of the minor child to both parents.

The Convention on the Rights of the Child provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (emphasis supplied)."[5] The Child and Youth Welfare Code, in the same way, unequivocally provides that in all questions regarding the care and custody, among others, of the child, his/her welfare shall be the paramount consideration.[6]

The so-called "tender-age presumption" under Article 213 of the Family Code may be overcome only by compelling evidence of the mother's unfitness. The mother is declared unsuitable to have custody of her children in one or more of the following instances: neglect, abandonment, unemployment, immorality, habitual drunkenness, drug addiction, maltreatment of the child, insanity, or affliction with a communicable disease.[7] Here, the mother was not shown to be unsuitable or grossly incapable of caring for her minor child. All told, no compelling reason has been adduced to wrench the child from the mother's custody.

WHEREFORE, premises considered, the petition is GIVEN DUE COURSE. The June 8, 2006 Decision and August 3, 2006 Resolution of the CA are hereby SET ASIDE. Sole custody over Simone Noelle Hirsch is hereby AWARDED to the mother, petitioner Agnes Gamboa-Hirsch.

SO ORDERED.

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

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[1] Rollo, pp. 3-51.

[2] Id. at 56-63. The Decision was penned by Associate Justice Remedios A. Salazar-Fernando and concurred in by Associate Justices Noel G. Tijam and Mariflor P. Punzalan Castillo.

[3] Id. at 65-66.

[4] Supra note 1, at 18-19.

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[5] CONVENTION ON THE RIGHTS OF THE CHILD, Art. 31, Sec. 1; cited in Pablo-Gualberto v. Gualberto, G.R. No. 154994, June 28, 2005, 461 SCRA 450, 475.

[6] Presidential Decree No. 603, as amended, Art. 8; cited in Salientes v. Abanilla, G.R. No. 162734, August 29, 2006, 500 SCRA 128, 134.

[7] Supra note 5, at 476.

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