

**IN THE MATTER OF THE INTESTATE ESTATE OF VICENTE TAD-Y,
DECEASED. JOSE E. TAD-Y, REPRESENTED BY HIS GUARDIAN AD
LITEM JUAN JAMORA, APPELLANT, MARIA TAD-Y, WITH HER
HUSBAND CASIM...***G.R. No. 22104. December 02, 1924*

Ponente: AVANCEÑA, C.J.

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On December 26, 1922, Vicente Tad-Y died in the municipality of Iloilo, Province of Iloilo, leaving his widow Rosario Esler, a legitimated son Jose Tad-Y, and an acknowledged natural daughter Maria Tad-Y, who are declared in the judgment appealed from as his only legal heirs. In said judgment there was adjudicated to Rosario Esler the usufruct of the third available for betterment, to Jose Tad-Y the third, constituting the short legitime, in full ownership, and the naked ownership of the third available for betterment, and to Maria Tad-Y the free third in full ownership.

This allotment made by the lower court is against the law. The acknowledged natural child is entitled only to one-half of the portion pertaining to each of the legitimate children not bettered (art. 849, Civil Code). As in the instant case there is only one legitimate child who inherits together with the widow, he is entitled to the third constituting the short legitime in full ownership and only to the naked ownership of the third available for betterment, since the usufruct of this third belongs to the widow. According to the allotment made by the trial court, the natural child would, in this case, receive not one-half, but a portion equal to that of the legitimate child. It is true that the latter has in addition the third available for betterment, but that is only in naked ownership. The hereditary portion of the natural child, which the law fixes at one-half of the share pertaining to the legitimate child not bettered, must be one-half in quality and quantity.

The decision of this court in *Chico vs. Viola and Reyes* (40 Phil., 316), followed by the lower court, is not applicable in this case. In that case there was but one legitimate daughter and one natural son, and the daughter got in full ownership the two-thirds of the inheritance, while in the instant case there is a widow who is entitled to the usufruct of the third available for betterment, thus lessening in quality the portion that without the widow the legitimate child would get.

The attorney for the appellant Jose Tad-Y presented a tentative partition in the Court of First Instance, proposing the allotment to the legitimate son Jose Tad-Y of four-ninths (4/9) in full ownership and two-ninths (2/9) in naked ownership; to the natural daughter, Maria Tad-Y, two-ninths (2/9) in full ownership and one-ninth (1/9) in naked ownership; and to the widow Rosario Esler the usufruct of three-ninths (3/9). Apparently this tentative partition is in accordance with law, for it gives the natural daughter exactly one-half of what pertains to the legitimate son in quality and quantity. But it is still against the law in so far as it takes the usufruct of the widow from the free third, when article 835 of the Civil Code provides that it shall be taken from the third available for betterment.

Attorney Gregorio Araneta, who appeared on behalf of the appellant Jose Tad-Y at the oral argument, proposes

another way of distribution, with which we agree, finding as we do, that the same is in accordance with the law.

To determine the share that pertains to the natural child which is but one-half of the portion that in quality and quantity belongs to the legitimate child not bettered, the latter's portion must first be ascertained. If a widow shares in the inheritance, together with only one legitimate child, as in the instant case, the child gets, according to the law, the third constituting the legitime in full ownership, and the third available for betterment in naked ownership, the usufruct of which goes to the widow. Then the natural child must get one-half of the free third in full ownership and the other half of this third in naked ownership, from which third his portion must be taken, so far as possible, after deducting the funeral and burial expenses. An excess would result consisting in the usufruct of the surplus remaining of the other half of this third, which for lack of testamentary provision must go to the legitimate child. As upon the death of the widow, the usufruct of the third available for betterment will pass to the legitimate child, in order to maintain this proportion established by the law, the natural child must in turn get the usufruct of the surplus of this half of the free third. An error is assigned also to the action of the trial court in not having declared collationable the sum of P11,500 alleged to have been received by Maria Tad-Y from her deceased father in his lifetime as a gift or by lucrative title. This point, however, was not raised in the lower court, nor considered or decided at any time by the trial court; and therefore cannot be the subject of any pronouncement of this court in this appeal. This sum of P11,500 is mentioned as collationable in a tentative partition attached by the appellant to his motion for reconsideration of the judgment rendered by the trial court, but that motion has reference only to the proportionate share the heirs must have in the inheritance and the ruling of the trial court covers this point only. It is held that no pronouncement can be made on this assignment of error, without prejudice to the question being submitted for decision to the lower court upon the making of the partition in accordance herewith.

The judgment appealed from is reversed and it is adjudged that the portion to be allotted to Jose Tad-Y is the third constituting the short legitime in full ownership, and the other third available for betterment in naked ownership; to Maria Tad-Y, one-half of the free third in full ownership and the other half of this third in naked ownership, after deducting the burial and funeral expenses; to Rosario Esler, the usufruct of the third available for betterment; to Jose Tad-Y the usufruct of the remaining one-half of the free third, which upon the death of Rosario Esler shall pass to Maria Tad-Y. No special finding is made as to costs. So ordered.

Johnson, Street, Malcolm, Villamor, Ostrand, and Romualdez, JJ., concur.

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