

IDONAH SLADE PERKINS, PLAINTIFF AND APPELLANT, VS. EUGENE ARTHUR PERKINS, DEFENDANT AND APPELLEE.

G. R. No. 35698. September 12, 1932

Ponente: HULL, J.

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HULL, J.:

Untitled DocumentThe parties of this case are husband and wife, duly married in the Philippines on January 3, 1914, and the dispute occurs over the custody of the one child of that marriage, a daughter who was born on the 16th of October, 1914. Appellant amended her suit for separate maintenance and other relief by asking that the daughter, Dora, be placed in her custody.

A separate hearing¹ was had without delay as to the custody of the minor child, and the trial court awarded the custody to the father. Section 771 of the Code of Civil Procedure among other things, provides as follows:

"SEC. 771. * * * 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 minor child has expressed a preference to live with her mother. There is no question of habitual drunkenness or poverty. After the marital difficulties had resulted in litigation, the husband discovered a bundle of old letters written to appellant by a young man, named Chambers, during the summer of 1921. The trial court held that these letters show that appellant was guilty of infidelity to her husband. This finding of the court is denied and fiercely attacked in the brief of the appellant. We think it is not necessary to express opinion at this time, whether such a finding is correct or not. An act of infidelity so many years ago would not be conclusive at this time as to the moral fitness of a mother to the custody of a minor daughter. The treasuring of such erotic letters does, however, throw some light upon the mental and moral state of mind of appellant. The trial court also said in its decision:

"* * * in order to attain her own ends she went as far as to make statements absolutely contrary to the truth; and while testifying before this court on the trial of this incident she could not but reveal how unscrupulous she is by stating one thing for another notwithstanding the fact that she was then testifying under an oath to tell the truth and nothing but the truth. She said for example, under oath, in order to succeed in her desire to obtain an allowance for support from the defendant, that the latter had abandoned her and had gone to live at the Army and Navy Club, when in truth and in fact that never happened; that the defendant had abandoned her in the months of May, June, July, and August, in Europe and in America, without having written to her even once, when the truth is that her very letters written to the defendant during that time (Exhibits 52, 52-A et seq.), which show that said defendant had been writing to her almost daily, with the exception of the time when he was on his journey from Europe to America; that said defendant had authorized her to engage in stock speculations in the New York market, when she knew that the contrary was true as she herself stated in her diary attached to this record as Exhibit 24. The plaintiff attempted to take advantage of the innocence and youth of her daughter Dora to attain her own ends by inducing the latter to think ill of her own father and to testify against him. These facts are shown by documentary evidence for the defendant marked Exhibits 53, 54,

and 56. It may well be said that she considered any means tending to the attainment of her own ends as good and proper."

It also appears in evidence that the appellant, over the objection of the father, removed Dora from school and took her daily to the court where she could listen to the charges and counter charges that her parents were making against each other. The father desired the custody primarily to remove her from such atmosphere and place her in a young ladies' school in Switzerland, which school had tentatively been selected by the parents while living in the state of domestic tranquillity. There is no question in the mind of this court that the welfare of the child will be served by this action. The welfare of the minor is normally the controlling consideration in the matter of its custody, and where the evidence, as it does in this case, shows that the exception set forth in section 771 in the Code of Civil Procedure exists, the court will look for the future welfare of the minor. In our opinion this has been done by the trial judge.

This case was submitted to this court by stipulation of the attorneys on January 23, 1932. Two days thereafter appellant requested leave to file an additional memorandum which was denied by the court. On March 14, 1932, appellant filed a motion for new trial on the grounds of newly discovered evidence, and attached to said motion certain affidavits which show on their face that they were made on the 26th day of May, 1931. They related to matters of no consequence, are not newly discovered evidence, and the motion was not filed at a proper time. The motion for new trial is therefore not entitled to serious consideration. The order appealed from is affirmed with costs against appellant. So ordered.

Avanceña, C. J., Street, Villamor, Ostrcmd, Villa-Real, and Abad Santos, JJ., concur.

Butte, J., concurs in the result.

DISSENTING

MALCOLM and IMPERIAL, JJ,

According to section 771 of the Code of Civil Procedure, when husband and wife are living separate and apart from each other, and the question as to the care, custody, and control of the offspring of their marriage is brought before a Court of First Instance, the father and 'mother of such offspring shall stand upon an equality. In this case, therefore, the plaintiff and the defendant have no advantage over the other. The codal section then provides for the submission of testimony before the court and for a decision by the court, taking into account the best interest of the child. In this instance, if there was simply conflicting- evidence and no abuse of judicial discretion in the appreciation of the evidence, it would be incumbent upon the appellate court to sustain the lower court in choosing which of the two parents should have the custody of the child. But following the opening sentences of the cited section of the Code, there comes an important proviso reading: "Provided, That if such offspring be ten years of age or more they be allowed to choose which parent they prefer to live with, * * *." Here the child, a daughter sixteen years of age, it is admitted, has expressed a preference to be with her mother. We would not go so far as to state that the provision of law is absolutely mandatory in nature, but certainly, as held in Ohio from which State the section of the Philippine Code was derived, "When the question of -custody prises between the father and mother * * *, and the minor is of an age to make an intelligent and discreet choice* courts will respect

the minor's election." (Clark vs. Bayer [1877], 32 Ohio St., 299.) Thus far, therefore, in our analysis of the law, we have the father and the mother standing upon an equality, the court finding that the best interest of the child would be subserved by awarding her to her father, but this finding nullified by the preference of the child for her mother. Continuing with the law, the proviso further states: "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." It is conceded that there is no question of habitual drunkenness or poverty, and we would further presume, of incapacity. The unfitness of the mother, notwithstanding the choice of the child, must, therefore, be predicated on a finding of "moral depravity".

The trial court found marital infidelity and unscrupulous disregard for the truth to attain plaintiff's end. The holding of infidelity of the plaintiff to her husband is partly rejected here, and we think should be entirely disregarded, considering the lack of basis in certain letters written over ten years ago to establish the present unfitness of the mother for the duties of motherhood. As held by the Court of Appeals of Texas in a suit by a mother for the custody of her daughter, evidence that the mother had written and received, from a man other than her husband, erotic letters would not authorize the court to declare that, as a matter of law, the mother was unfit to retain custody of the child. (Greenlaw vs. Dilworth [1927], 299 S. W., 875.) Also, as held in Missouri, "A person is depraved when he is generally bad, is wicked -in mind and heart, loves evil rather than good, and, though a single act of adultery may be considered strong evidence of depravity, it is not conclusive." (Knepper vs. Knepper [1909], 122 S. W., 1117.)

The only remaining fact supporting the finding of moral depravity relates to the alleged perjury committed by the plaintiff. But considering the plaintiff's frame of mind in a case of this character, and considering the explanation proffered of the statements attributed to the plaintiff, we very much doubt if exaggerated testimony of the plaintiff establishes that moral depravity which the law requires before nullifying the choice of the child in choosing its custodian. Moreover, there were presented various reputable witnesses who testified to the excellent reputation as to morality of the plaintiff.

With all due respect to the findings of the trial court, and with all due respect to the opinion of the majority, we yet feel that not enough emphasis has been placed on the choice of the daughter which is not only entitled to much weight under Philippine law, but, where the dispute is between the parents, is nearly controlling; and that overly much emphasis has been placed on the alleged moral depravity of the mother, this depravity being attempted to be established by deductions which, in our opinion, are improper and illogical. There may be something finer and nobler than a mother's love for her only child, but we cannot conceive of it. Accordingly, we must note our dissent and must express our opinion as in favor of reversal to the end that the mother may be given the care, custody, and control of the daughter, permitting the father thus deprived of such care and custody to visit her and to have temporary-custody thereof as is expressly authorized by law.

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