

**ALEJANDRO B. HONTIVEROS, JR., PETITIONER, VS. THE
INTERMEDIATE APPELLATE COURT, THIRD SPECIAL CASES
DIVISION, HON. WILFREDO G. CAINGLET, IN HIS CAPACITY AS
PRESIDING JUDGE OF BR...**

G.R. No. 64982. October 23, 1984

Ponente: MAKASIAR, J.

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MAKASIAR, J.:

This petition for certiorari seeks to review the decision of the respondent Intermediate Appellate Court (hereinafter referred to as the respondent Court) dated August 5, 1983, which affirmed the order of respondent Judge Cainglet (hereinafter referred to as the respondent Judge) dated May 30, 1983. The dispositive portion of the respondent court's decision reads as follows:

"WHEREFORE, the writ prayed for is denied and the petition dismissed for lack of merit. Accordingly, the restraining order issued by this Court earlier is hereby lifted, with-out pronouncement as to costs" (p. 97, rec.).

The facts are as follows:

Petitioner Alejandro Hontiveros, Jr. and private respondent Brenda M. Hernando are the father and mother of an acknowledged natural child born on November 27, 1981 and given the name Margaux H. Hontiveros.

For the period from November 1981 to June 1982, the child had been under the care and custody of the mother. The father, petitioner herein, used to take the child out during Saturdays and return the child to private respondent's residence on Saturday evenings (p. 29, rec.).

On June 21, 1982, Alejandro Hontiveros, Jr. passed by the house of Brenda Hernando to take the child to their house for a visit, with the agreement that she will be returned by nightfall (p. 29, rec.). However, the child was never returned to the mother.

To recover the custody of her child, private respondent filed on August 24, 1982 a petition for habeas corpus in the then Court of First Instance of Rizal, Metro Manila, entitled "In the Matter of the Custody of the Minor Child Margaux H. Hontiveros, Brenda M. Hernando, Petitioner, versus Alejandro Hontiveros, Jr. and Alejandro Hontiveros, Sr., respondents," which petition was docketed as Special Proceedings No. 9784 of said court and assigned to Branch XIX thereof (p. 8, rec.).

On August 26, 1982, the petitioner filed a petition for custody of minor Margaux H. Hontiveros with the then Court of First Instance of Rizal, docketed as Special Proceedings No. 9788 with Branch XXIII of the said court. Private respondent filed a motion to dismiss the petition in Special Proceedings No. 9788 on the ground of *litis pendencia*, citing the pendency of Special Proceedings No. 9784. The motion to dismiss was denied. Subsequently, however, petitioner Alejandro Hontiveros, Jr. abandoned the prosecution of Special Proceedings No. 9788, for which reason the Hon. Judge Rizalina Bonifacio Vera dismissed said petition on October 26, 1983.

On September 9, 1982, a hearing was conducted by the Hon. Judge Santiago Rañada in connection with Special Proceedings No. 9784. The parties agreed that the minor child Margaux shall be under the custody of the petitioner for seven (7) days every other week (p. 171, rec.). Accordingly, Judge Rañada issued the following order:

"As preliminarily agreed upon by petitioner and respondent Alejandro Hontiveros, Jr., the Court hereby orders the minor child Margaux H. Hontiveros to be put under the custody of the petitioner, with the understanding that respondent Alejandro Hontiveros, Jr., will be allowed to take said minor child into his custody every other week for a period of seven (7) days with the obligation of taking said minor child from the residence of petitioner every other Friday, at 9:00 A.M., and return said child on or before the next Friday morning at 9:00 A.M. This arrangement is effective immediately, with the condition that the custody of said child is now immediately given to petitioner and respondent Alejandro Hontiveros, Jr. will be allowed to pick up said child on Friday, 17 September 1982, at about 9:00 A.M." (p. 37, rec.).

On May 24, 1983, the petitioner filed an urgent ex parte petition for issuance of a writ of preliminary injunction with the Regional Trial Court of the National Capital Judicial Region, Branch CLVIII, to which Court the aforesaid case was re-assigned following the reorganization of the inferior courts under BP 129 (p. 38, rec.). The object of the petition for pre-liminary injunction is to prevent the private respondent from bringing the minor child outside the country, specifically the United States of America, where she was allegedly bound for.

The petition was set for hearing on May 30, 1983. On said date, the counsel for private respondent moved for the withdrawal of the petition for habeas corpus on the ground that said petition has become moot and academic upon the production of the body of Margaux Hontiveros before Judge Rañada and in view of the order of September 9, 1982. Respondent Judge Wilfredo Cainglet (presiding Judge of the Regional Trial Court of the National Capital Judicial Region, Branch CLVIII) granted the motion for the withdrawal of the petition for habeas corpus. Since the petition for the issuance of a writ of preliminary injunction is but an ancillary action, the same was denied by the respondent Judge in his order dated May 30, 1983. Said order states:

"xxx xxx xxx.

'As preliminarily agreed upon by petitioner and respondent Alejandro Hontiveros, Jr., the Court hereby orders the minor child Margaux H. Hontiveros to be put under the custody of the petitioner, with the understanding that respondent Alejandro Hontiveros, Jr. will be allowed to take said minor child into his custody every other week for a period of seven (7) days with the obligation of taking said minor child from the residence of petitioner every other Friday, at 9:00 A.M., and return said child on or before the next Friday morning at 9:00 A.M. This arrangement is effective immediately, with the condition that the custody of said child is now immediately given to petitioner and respondent Alejandro Hontiveros, Jr. will be allowed to pick up said child on Friday, 17 September 1982, at about 9:00 A.M.

'SO ORDERED.'

"When this petition was called for hearing today, petitioner's counsel, Atty. Wilfredo Chato moved for the withdrawal of this petition on the ground that the same has now become moot and academic in view of the Order of this Court aforesaid, to which motion for withdrawal, respondents' counsel, Atty. Yolanda Q. Javellana interposed her objection. The said counsel for the respondents in open Court today, admitted that the respondents have not filed a counterclaim anent the herein petition and further admitted that there is a present case involving the same parties and same subject matter filed with the Pasig Court of First Instance (now Regional Trial Court) and pending before Branch 162, pre-sided by the Executive Judge, the Hon. Rizalina Bonifacio Vera since August 26, 1982.

"The Court believes that the matter of withdrawing a case is a prerogative of plaintiff or petitioner and ordinarily could not be validly objected to by the defendant or respondent as in the present case.

"IN VIEW OF THE FOREGOING, the Court, finding the petitioner's motion to withdraw the herein petition to be justified, grants the same and hereby orders the WITHDRAWAL of the present petition for Habeas Corpus, subject to the mandate of this Court in its Order dated September 9, 1982, predicated upon the agreement of the herein petitioner and respondents.

"Anent the respondents' motion/petition for the issuance of a Writ of preliminary injunction, praying for the immediate issuance of a restraining Order against the herein petitioner, the same being merely ancillary action and now moot and academic there being no principal or main action or petition upon which respondents' motion/petition may be predicated upon for the issuance of the said restraining Order, upon motion by petitioner's counsel with objection of respondents' counsel, the same is hereby DENIED for Lack of factual and legal justification.

"xxx xxx xxx" (pp. 48-49, rec., Italics supplied).

Petitioner moved for reconsideration which was likewise denied for lack of factual and legal justification (p. 50, rec.).

On June 3, 1983, the petitioner filed a petition for certiorari with application for preliminary injunction with the Intermediate Appellate Court questioning the order of respondent Judge dated May 30, 1983 and the denial of the motion for reconsideration.

The respondent Court dismissed the petition for lack of merit in its decision dated August 5, 1983. The petitioner moved for reconsideration of the adverse ruling but the same was affirmed by respondent Court in its resolution dated August 17, 1983.

Hence, this petition.

The following issues are presented:

1. Whether or not the order of respondent Judge dated May 30, 1983 was issued with grave abuse of discretion, and
2. Whether or not petitioner is entitled to the custody of his minor child Margaux H. Hontiveros.

I

The records reveal that the original action instituted by private respondent in the then Court of First Instance was a petition for a writ of habeas corpus to recover custody of her acknowledged natural child Margaux without depriving the father of his visitorial rights. The petition was filed against the father who allegedly took the child from her mother's home and kept her indefinitely without the mother's consent.

At the hearing conducted on September 9, 1982, the minor child was "produced" before the Court and a settlement was reached upon agreement of the parties. Thus, the order of Judge Rañada was issued. Even if the order was termed "preliminary", WE take note of the fact that the private respondent's prayer in her pleading had been satisfied for her evident purpose in filing the petition for habeas corpus was to get back the custody of her child.

Because of such settlement and considering that as noted in the questioned order of May 30, 1983, the petitioner's counsel admitted that there was a pending case (Special Proceedings No. 9788) involving the same parties and same subject matter filed with another branch of the same court and the petitioner herein did not file a counterclaim, the respondent Judge allowed the withdrawal of the case for habeas corpus pending before him (pp. 48-49, rec.).

Section 2, Rule 17 of the Revised Rules of Court provides for the dismissal of an action by order of the court at plaintiff's instance (private respondent herein) upon such terms and conditions as the court deems proper. WE agree with the respondent Court that considering the circumstances obtaining in the case at bar, as earlier noted, and considering further that no real injury would result if the urgent ex parte petition could not be acted upon since it could threshed out in the coordinate branch of the Pasig Regional Trial Court, the dismissal of the petition for habeas corpus is warranted. In the case of *Duque vs. Vinarao* (63 SCRA 206), WE held that a petition for habeas corpus can be dismissed upon voluntary withdrawal of the petitioner and certification of the Judge Advocate General.

WE agree with the respondent Judge that the petition for habeas corpus has been rendered moot and academic with the issuance of the order dated September 9, 1982, which was predicated upon the agree-ment of the parties. In *Pestraño vs. Corvista* (81 Phil. 53), WE held that where the subject person had already been released from the custody complained of, the petition for habeas corpus then still pending was considered already moot and academic and should be dismissed. In the case at bar, the minor child Margaux H. Hontiveros was in fact produced in court. By virtue of the order of Judge Rañada, she was released to the custody of her mother with the father having the right to take her in his custody every other week.

WE believe that the respondent Judge merely exercised his sound discretion in allowing the with-drawal of the case in his branch. "Grave abuse of discretion" means such capricious and arbitrary exercise of judgment as is equivalent, in the eyes of the law, to lack of jurisdiction (*Vda. de Bacaling vs. Laguda*, 54 SCRA 243). In the case at bar, there was no abuse of discretion by the respondent Judge. He acted within the ambit of judicial discretion allotted to Judges of inferior courts, to wit:

"The court may, subject to the requirement of due process, give all such directions and orders as it may deem necessary or expedient in the determination of the dispute before it. It may refrain from hearing the dispute or part thereof, or dismiss any matter or part of any matter, where further proceedings are not necessary or desirable. Certainly, it may also defer the hearing of any motion or hear one motion in preference to others, when its judgment such is necessary x x x. The discretion granted by law is not interfered with unless it is gravely abused" (*Maritime Company of the Philippines, et al. vs. Paredes, et al.* 19 SCRA 569, 580).

Petitioner is of the theory that he was deprived of due process because the respondent Judge dismissed his urgent ex parte petition for preliminary injunction without hearing.

WE cannot sustain the stand of the petitioner.

It should be borne in mind that petitioner filed a petition for custody of minor Margaux H. Hontiveros with the then Court of First Instance of Rizal, docketed as Special Proceedings No. 9788. The respondent Judge knew of the existence of Special Proceedings No. 9788 because this fact was admitted by the counsel of the petitioner himself. All that the petitioner must do then is to file the petition for preliminary injunction in Branch XXIII of the then Court of First Instance of Rizal where Special Proceedings No. 9788 is assigned. The issue as to whether he can be granted a preliminary injunction could have properly been ventilated below. Unfortunately, petitioner chose to appeal by way of certiorari, a remedy which WE cannot grant because the respondent Judge acted within the parameters of judi-cial discretion.

What is more, petitioner himself did not pursue his action for custody of the minor Margaux H. Hontiveros. Worse, he abandoned the case and Special Proceedings No. 9788 was dismissed by Judge Vera on October 26, 1983 for lack of interest on the part of the petitioner to prosecute (p. 208, rec.). If at all, petitioner can only blame himself if he feels that he was deprived of due process.

II

The second issue is whether or not petitioner is entitled to the custody of the minor child Margaux H. Hontiveros. Once more, WE are asked to arbitrate between the rights and duties of parents and children.

Article 363 of the Civil Code provides:

"In all questions on the care, custody, education and property of children, the latter's welfare shall be paramount. No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure."

The Code Commission observed that the rule in Article 363 of the Civil Code is necessary "in order to avoid many a tragedy when a mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age." (Report of the Code Commission, p. 12).

Finding the above rationale beyond question, Presidential Decree No. 603 (Child and Youth Welfare Code) provides the following:

"Article 17 - x x x.

"In case of separation of his parents, no child under five years of age shall be separated from his mother, unless the court finds compelling reasons to do so" (P.D. 603, dated December 10, 1974, 70 O.G. 10774).

While the petitioner would have US believe in his reply that the private respondent is unfit to take care of his child, it is too late in the day to do so because under Rule 45 of the Rules of Court, only questions of law may be raised in this Tribunal. What the petitioner should have done is to bring out the questions of fact in Special Proceedings No. 9788. It is just too bad that the case for custody was dismissed for lack of interest on the part of the petitioner.

Clearly, the private respondent has a clear legal right under Article 17 of P.D. 603 to the custody of her minor child, there being no compelling reason to the contrary.

WHEREFORE, THE PETITION IS HEREBY DENIED. WITH COSTS AGAINST PETITIONER.

SO ORDERED.

Aquino, Guerrero, Abad Santos, and Cuevas, JJ., concur.

Concepcion, Jr., and Escolin, JJ., no part.

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