

THIRD DIVISION

[G.R. NO. 123450, August 31, 2005]

**GERARDO B. CONCEPCION, PETITIONER, VS. COURT OF APPEALS
AND MA. THERESA ALMONTE, RESPONDENTS.**

DECISION

CORONA, J.:

The child, by reason of his mental and physical immaturity, needs special safeguard and care, including appropriate legal protection before as well as after birth.^[1] In case of assault on his rights by those who take advantage of his innocence and vulnerability, the law will rise in his defense with the single-minded purpose of upholding only his best interests.

This is the story of petitioner Gerardo B. Concepcion and private respondent Ma. Theresa Almonte, and a child named Jose Gerardo. Gerardo and Ma. Theresa were married on December 29, 1989.^[2] After their marriage, they lived with Ma. Theresa's parents in Fairview, Quezon City.^[3] Almost a year later, on December 8, 1990, Ma. Theresa gave birth to Jose Gerardo.^[4]

Gerardo and Ma. Theresa's relationship turned out to be short-lived, however. On December 19, 1991, Gerardo filed a petition to have his marriage to Ma. Theresa annulled on the ground of bigamy.^[5] He alleged that nine years before he married Ma. Theresa on December 10, 1980, she had married one Mario Gopiao, which marriage was never annulled.^[6] Gerardo also found out that Mario was still alive and was residing in Loyola Heights, Quezon City.^[7]

Ma. Theresa did not deny marrying Mario when she was twenty years old. She, however, averred that the marriage was a sham and that she never lived with Mario at all.^[8]

The trial court ruled that Ma. Theresa's marriage to Mario was valid and subsisting when she married Gerardo and annulled her marriage to the latter for being bigamous. It declared Jose Gerardo to be an illegitimate child as a result. The custody of the child was awarded to Ma. Theresa while Gerardo was granted visitation rights.^[9]

Ma. Theresa felt betrayed and humiliated when Gerardo had their marriage annulled. She held him responsible for the "bastardization" of Gerardo. She moved for the reconsideration of the above decision "INSOFAR ONLY as that portion of the ... decision which grant(ed) to the petitioner so-called 'visitation rights'... between the hours of 8 in the morning to 12:00 p.m. of any Sunday."^[10] She argued that there was nothing in the law granting "visitation rights in favor of the putative father

of an illegitimate child."^[11] She further maintained that Jose Gerardo's surname should be changed from Concepcion to Almonte, her maiden name, following the rule that an illegitimate child shall use the mother's surname.

Gerardo opposed the motion. He insisted on his visitation rights and the retention of "Concepcion" as Jose Gerardo's surname.

Applying the "best interest of the child" principle, the trial court denied Ma. Theresa's motion and made the following observations:

It is a pity that the parties herein seem to be using their son to get at or to hurt the other, something they should never do if they want to assure the normal development and well-being of the boy.

The Court allowed visitorial rights to the father knowing that the minor needs a father, especially as he is a boy, who must have a father figure to recognize - something that the mother alone cannot give. Moreover, the Court believes that the emotional and psychological well-being of the boy would be better served if he were allowed to maintain relationships with his father.

There being no law which compels the Court to act one way or the other on this matter, the Court invokes the provision of Art. 8, PD 603 as amended, otherwise known as the Child and Youth Welfare Code, to wit:

"In all questions regarding the care, custody, education and property of the child, his welfare shall be the paramount consideration."

WHEREFORE, the respondent's Motion for Reconsideration has to be, as it is hereby DENIED.^[12]

Ma. Theresa elevated the case to the Court of Appeals, assigning as error the ruling of the trial court granting visitation rights to Gerardo. She likewise opposed the continued use of Gerardo's surname (Concepcion) despite the fact that Jose Gerardo had already been declared illegitimate and should therefore use her surname (Almonte). The appellate court denied the petition and affirmed *in toto* the decision of the trial court.^[13]

On the issue raised by Ma. Theresa that there was nothing in the law that granted a putative father visitation rights over his illegitimate child, the appellate court affirmed the "best interest of the child" policy invoked by the court *a quo*. It ruled that "[a]t bottom, it (was) the child's welfare and not the convenience of the parents which (was) the primary consideration in granting visitation rights a few hours once a week."^[14]

The appellate court likewise held that an illegitimate child cannot use the mother's surname *motu proprio*. The child, represented by the mother, should file a separate proceeding for a change of name under Rule 103 of the Rules of Court to effect the correction in the civil registry.^[15]

Undaunted, Ma. Theresa moved for the reconsideration of the adverse decision of

the appellate court. She also filed a motion to set the case for oral arguments so that she could better ventilate the issues involved in the controversy.

After hearing the oral arguments of the respective counsels of the parties, the appellate court resolved the motion for reconsideration. It reversed its earlier ruling and held that Jose Gerardo was not the son of Ma. Theresa by Gerardo but by Mario during her first marriage:

It is, therefore, undeniable - established by the evidence in this case - that the appellant [Ma. Theresa] was married to Mario Gopiao, and that she had never entered into a lawful marriage with the appellee [Gerardo] since the so-called "marriage" with the latter was void ab initio. It was [Gerardo] himself who had established these facts. In other words, [Ma. Theresa] was legitimately married to Mario Gopiao when the child Jose Gerardo was born on December 8, 1990. Therefore, the child Jose Gerardo - under the law - is the legitimate child of the legal and subsisting marriage between [Ma. Theresa] and Mario Gopiao; he cannot be deemed to be the illegitimate child of the void and non-existent "marriage" between [Ma. Theresa] and [Gerardo], but is said by the law to be the child of the legitimate and existing marriage between [Ma. Theresa] and Mario Gopiao (Art. 164, Family Code). Consequently, [she] is right in firmly saying that [Gerardo] can claim neither custody nor visitorial rights over the child Jose Gerardo. Further, [Gerardo] cannot impose his name upon the child. Not only is it without legal basis (even supposing the child to be his illegitimate child [Art. 146, The Family Code]); it would tend to destroy the existing marriage between [Ma. Theresa] and Gopiao, would prevent any possible rapprochement between the married couple, and would mean a judicial seal upon an illegitimate relationship.^[16]

The appellate court brushed aside the common admission of Gerardo and Ma. Theresa that Jose Gerardo was their son. It gave little weight to Jose Gerardo's birth certificate showing that he was born a little less than a year after Gerardo and Ma. Theresa were married:

We are not unaware of the movant's argument that various evidence exist that appellee and the appellant have judicially admitted that the minor is their natural child. But, in the same vein, We cannot overlook the fact that Article 167 of the Family Code mandates:

"The child shall be considered legitimate although the mother may have declared against its legitimacy or may have been sentenced as an adulteress." (underscoring ours)

Thus, implicit from the above provision is the fact that a minor cannot be deprived of his/her legitimate status on the bare declaration of the mother and/or even much less, the supposed father. In fine, **the law and only the law determines who are the legitimate or illegitimate children for one's legitimacy or illegitimacy cannot ever be compromised**. Not even the birth certificate of the minor can change his status for the information contained therein are merely supplied by the mother and/or the supposed father. **It should be what**

the law says and not what a parent says it is.^[17] (Emphasis supplied)

Shocked and stunned, Gerardo moved for a reconsideration of the above decision but the same was denied.^[18] Hence, this appeal.

The status and filiation of a child cannot be compromised.^[19] Article 164 of the Family Code is clear. A child who is conceived or born during the marriage of his parents is legitimate.^[20]

As a guaranty in favor of the child^[21] and to protect his status of legitimacy, Article 167 of the Family Code provides:

Article 167. The child shall be considered legitimate although the mother may have declared against its legitimacy or may have been sentenced as an adulteress.

The law requires that every reasonable presumption be made in favor of legitimacy.^[22] We explained the rationale of this rule in the recent case of *Cabatania v. Court of Appeals*^[23]:

The presumption of legitimacy does not only flow out of a declaration in the statute but is based on the broad principles of natural justice and the supposed virtue of the mother. It is grounded on the policy to protect the innocent offspring from the odium of illegitimacy.

Gerardo invokes Article 166 (1)(b)^[24] of the Family Code. He cannot. He has no standing in law to dispute the status of Jose Gerardo. Only Ma. Theresa's husband Mario or, in a proper case,^[25] his heirs, who can contest the legitimacy of the child Jose Gerardo born to his wife.^[26] Impugning the legitimacy of a child is a strictly personal right of the husband or, in exceptional cases, his heirs.^[27] *Since the marriage of Gerardo and Ma. Theresa was void from the very beginning, he never became her husband and thus never acquired any right to impugn the legitimacy of her child.*

The presumption of legitimacy proceeds from the sexual union in marriage, particularly during the period of conception.^[28] To overthrow this presumption on the basis of Article 166 (1)(b) of the Family Code, it must be shown *beyond reasonable doubt* that there was no access that could have enabled the husband to father the child.^[29] Sexual intercourse is to be presumed where personal access is not disproved, unless such presumption is rebutted by evidence to the contrary.^[30]

The presumption is quasi-conclusive and may be refuted only by the evidence of physical impossibility of coitus between husband and wife within the first 120 days of the 300 days which immediately preceded the birth of the child.^[31]

To rebut the presumption, the separation between the spouses must be such as to make marital intimacy impossible.^[32] This may take place, for instance, when they reside in different countries or provinces and they were never together during the period of conception.^[33] Or, the husband was in prison during the period of

conception, unless it appears that sexual union took place through the violation of prison regulations.^[34]

Here, during the period that Gerardo and Ma. Theresa were living together in Fairview, Quezon City, Mario was living in Loyola Heights which is also in Quezon City. Fairview and Loyola Heights are only a scant four kilometers apart.

Not only did both Ma. Theresa and Mario reside in the same city but also that no evidence at all was presented to disprove personal access between them. Considering these circumstances, the separation between Ma. Theresa and her lawful husband, Mario, was certainly not such as to make it physically impossible for them to engage in the marital act.

Sexual union between spouses is assumed. Evidence sufficient to defeat the assumption should be presented by him who asserts the contrary. There is no such evidence here. Thus, the presumption of legitimacy in favor of Jose Gerardo, as the issue of the marriage between Ma. Theresa and Mario, stands.

Gerardo relies on Ma. Theresa's statement in her answer^[35] to the petition for annulment of marriage^[36] that she never lived with Mario. He claims this was an admission that there was never any sexual relation between her and Mario, an admission that was binding on her.

Gerardo's argument is without merit.

First, the import of Ma. Theresa's statement is that Jose Gerardo is not her legitimate son with Mario but her illegitimate son with Gerardo. This declaration \perp an avowal by the mother that her child is illegitimate \perp is the very declaration that is proscribed by Article 167 of the Family Code.

The language of the law is unmistakable. An assertion by the mother against the legitimacy of her child cannot affect the legitimacy of a child born or conceived within a valid marriage.

Second, even assuming the truth of her statement, it does not mean that there was never an instance where Ma. Theresa could have been together with Mario or that there occurred absolutely no intercourse between them. All she said was that she never lived with Mario. She never claimed that nothing ever happened between them.

Telling is the fact that both of them were living in Quezon City during the time material to Jose Gerardo's conception and birth. Far from foreclosing the possibility of marital intimacy, their proximity to each other only serves to reinforce such possibility. Thus, the impossibility of physical access was never established beyond reasonable doubt.

Third, to give credence to Ma. Theresa's statement is to allow her to arrogate unto herself a right exclusively lodged in the husband, or in a proper case, his heirs.^[37] A mother has no right to disavow a child because maternity is never uncertain.^[38] Hence, Ma. Theresa is not permitted by law to question Jose Gerardo's legitimacy.