

[SYLLABUS]

[G.R. No. 118870, March 29, 1996]

**NERISSA Z. PEREZ, PETITIONER, VS. THE COURT OF APPEALS
(NINTH DIVISION) AND RAY C. PEREZ, RESPONDENTS.**

D E C I S I O N

ROMERO, J.:

Parties herein would have this Court duplicate the feat of King Solomon who was hailed in Biblical times for his sagacious, if, at times unorthodox, manner of resolving conflicts, the most celebrated case being that when his authority was invoked to determine the identity of the real mother as between two women claiming the same infant. Since there could only be one[*] mother, the daunting task that confronted the king/judge was to choose the true one.

In the instant case, we are faced with the challenge of deciding, as between father and mother, who should have rightful custody of a child who bears in his person both their genes.

While there is a provision of law squarely in point, the two courts whose authority have been invoked to render a decision have arrived at diametrically opposite conclusions.

It has fallen upon us now to likewise act as judge between the trial court, on the one hand, and the appellate, on the other.

On the issue of custody over the minor Ray Perez II, respondent Court of Appeals ruled in favor of the boy's father Ray C. Perez, reversing the trial court's decision to grant custody to Nerissa Z. Perez, the child's mother.

Ray Perez, private respondent, is a doctor of medicine practicing in Cebu while Nerissa, his wife who is petitioner herein, is a registered nurse. They were married in Cebu on December 6, 1986. After six miscarriages, two operations and a high-risk pregnancy, petitioner finally gave birth to Ray Perez II in New York on July 20, 1992.

Petitioner who began working in the United States in October 1988, used part of her earnings to build a modest house in Mandaue City, Cebu. She also sought medical attention for her successive miscarriages in New York. She became a resident alien in February 1992.

Private respondent stayed with her in the U.S. twice and took care of her when she became pregnant. Unlike his wife, however, he had only a tourist visa and was not employed.

On January 17, 1993, the couple and their baby arrived in Cebu. After a few weeks, only Nerissa returned to the U.S. She alleged that they came home only for a five-week vacation and that they all had round-trip tickets. However, her husband stayed behind to take care of his sick mother and promised to follow her with the baby. According to Ray, they had agreed to reside permanently in the Philippines but once Nerissa was in New York, she changed her mind and continued working. She was supposed to come back immediately after winding up her affairs there.

When Nerissa came home a few days before Ray II's first birthday, the couple was no longer on good terms. That their love for each other was fading became apparent from their serious quarrels. Petitioner did not want to live near her in-laws and rely solely on her husband's meager income of P5,000.00.^[1] She longed to be with her only child but he was being kept away from her by her husband. Thus, she did not want to leave RJ (Ray Junior) with her husband and in-laws. She wished for her son to grow up with his mother.

On the other hand, Ray wanted to stay here, where he could raise his son even as he practiced his profession. He maintained that it would not be difficult to live here since they have their own home and a car. They could live comfortably on his P 15,000.00 monthly income^[2] as they were not burdened with having to pay any debts.

Petitioner was forced to move to her parents' home on Guizo Street in Mandaue. Despite mediation by the priest who solemnized their marriage, the couple failed to reconcile.

On July 26, 1993, Nerissa Z. Perez filed a petition for *habeas corpus*^[3] asking respondent Ray C. Perez to surrender the custody of their son, Ray Z. Perez II, to her.

On August 27, 1993, the court a quo issued an Order awarding custody of the one-year old child to his mother, Nerissa Perez, citing the second paragraph of Article 213 of the Family Code which provides that no child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise. The dispositive portion of the Order reads:

"WHEREFORE, foregoing premises considered, Order is hereby issued ordering the respondent to turn over the custody of their child Ray Cortes Perez II, his passport and roundtrip ticket to herein petitioner with a warning that if he will escape together with the child for the purpose of hiding the minor child instead of complying with this Order, that warrant for his arrest will be issued.

SO ORDERED."^[4]

Upon appeal by Ray Perez, the Court of Appeals, on September 27, 1994, reversed the trial court's order and awarded custody of the boy to his father.^[5]

Petitioner's motion for reconsideration having been denied,^[6] she filed the instant petition for review where the sole issue is the custody of Ray Perez II, now three years old.

Respondent court differed in opinion from the trial court and ruled that there were enough reasons to deny Nerissa Perez custody over Ray II even if the child is under seven years old. It held that granting custody to the boy's father would be for the child's best interest and welfare.^[7]

Before us is the unedifying situation of a husband and wife in marital discord, struggling for custody of their only child. It is sad that petitioner and private respondent have not found it in their hearts to understand each other and live together once again as a family. Separated in fact, they now seek the Court's assistance in the matter of custody or parental authority over the child.

The wisdom and necessity for the exercise of joint parental authority need not be belabored. The father and the mother complement each other in giving nurture and providing that holistic care which takes into account the physical, emotional, psychological, mental, social and spiritual needs of the child. By precept and example, they mold his character during his crucial formative years.

However, the Court's intervention is sought in order that a decision may be made as to which parent shall be given custody over the young boy. The Court's duty is to determine whether Ray Perez II will be better off with petitioner or with private respondent. We are not called upon to declare which party committed the greater fault in their domestic quarrel.

When the parents of the child are separated, Article 213 of the Family Code is the applicable law. It provides:

"ART. 213. In case of separation of the parents, parental authority shall be exercised by the parent designated by the Court. The Court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit.

No child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise." (Italics supplied)

Since the Code does not qualify the word "separation" to mean "legal separation" decreed by a court, couples who are separated in fact, such as petitioner and private respondent, are covered within its terms.^[8]

The Revised Rules of Court also contains a similar provision. Rule 99, Section 6 (Adoption and Custody of Minors) provides:

"SEC. 6. Proceedings as to child whose parents are separated. Appeal. - When husband and wife are divorced or living separately and apart from each other, and the questions as to the care, custody, and control of a child or children of their marriage is brought before a Court of First Instance by petition or as an incident to any other proceeding, the court, upon hearing the testimony as may be pertinent, shall award the care, custody, and control of each such child as will be for its best interest, permitting the child to choose which parent it prefers to live with if it be over ten years of age, unless the parent chosen be unfit to take charge of

the child by reason of moral depravity, habitual drunkenness, incapacity, or poverty x x x. No child under seven years of age shall be separated from its mother, unless the court finds there are compelling reasons therefor." (Italics supplied)

The provisions of law quoted above clearly mandate that a child under seven years of age shall not be separated from his mother unless the court finds compelling reasons to order otherwise. The use of the word "shall" in Article 213 of the Family Code and Rule 99, Section 6 of the Revised Rules of Court connotes a mandatory character. In the case of Lacson v. San Jose-Lacson,^[9] the Court declared:

"The use of the word shall in Article 363^[10] of the Civil Code, coupled with the observations made by the Code Commission in respect to the said legal provision, underscores its mandatory character. It prohibits in no uncertain terms the separation of a mother and her child below seven years, unless such separation is grounded upon compelling reasons as determined by a court."^[11]

The rationale for awarding the custody of children younger than seven years of age to their mother was explained by the Code Commission:

"The general rule is recommended in order to avoid many a tragedy where 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. The exception allowed by the rule has to be for 'compelling reasons' for the good of the child; those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the divorce decree (relative divorce) will ordinarily be sufficient punishment for her. Moreover, moral dereliction will not have any effect upon the baby who is as yet unable to understand her situation." (Report of the Code Commission, p. 12)^[12]

The Family Code, in reverting to the provision of the Civil Code that a child below seven years old should not be separated from the mother (Article 363), has expressly repealed the earlier Article 17, paragraph three of the Child and Youth Welfare Code (Presidential Decree No. 603) which reduced the child's age to five years.^[13]

The general rule that a child under seven years of age shall not be separated from his mother finds its raison d'être in the basic need of a child for his mother's loving care.^[14] Only the most compelling of reasons shall justify the court's awarding the custody of such a child to someone other than his mother, such as her unfitness to exercise sole parental authority. In the past the following grounds have been considered ample justification to deprive a mother of custody and parental authority: neglect, abandonment,^[15] unemployment and immorality,^[16] habitual drunkenness,^[17] drug addiction, maltreatment of the child, insanity and being sick with a communicable disease.^[18]

It has long been settled that in custody cases,^[19] the foremost consideration is always the Welfare and best interest of the child. In fact, no less than an international instrument, the Convention on the Rights of the Child provides: "In all