RECENT CASES

DONATION—INTER VIVOS OR MORTIS CAUSA?

In a deed of donation the donor reserved to herself during her lifetime the usufruct of the property donated and provided further that without her knowledge and consent the same could not be sold, mortgaged, bartered, nor disposed of in any way possible. After considering that the most essential elements of ownership—the right to dispose of the property and the right to enjoy the products, profits, and possession thereto—remained with the donor during her lifetime, accruing to the donees only when the donor died; and duly appreciating further the circumstances surrounding the execution of the deed, the Supreme Court held that the donation was one *mortis causa.* (David v. Sison, G.R. No. 49108, March 28, 1946, 42 O.G. No. 12 p. 3153)

A donation *mortis causa* differs from a donation *inter vivos* in that former (1) is made "in consideration of death or mortal peril, without the donor's intention to lose the thing or its free disposal in case of survival" (Dec. of S. Ct. of Spain, Jan. 28, 1898 quoted with approval in Balaqui v. Dongso, 53 Phil. 673), so that "it is the donor's death that determines the acquisition of, or the right to, the property" (Zapanta v. Posadas, 52 Phil. 557). The consideration in a donation *inter vivos* is one other than the donor's death. (2) A donation *mortis causa* is revocable by the donor at any time for any cause while a donation *inter vivos* may be revoked on any of the grounds provided in Arts. 644, 647, 648 Civil Code. (3) A donation *mortis causa* must be executed with all the formalities of a will (Art. 620 C. C.; Cariño v. Abaya, 40 O.G. [8th S] 12 p. 19, where a donation *mortis causa* "was not executed in conformity with the provisions of Sec. 618 C.C.P., conspicuously for lack of attestation clause and marginal signature same cannot be accorded any force and effect.") while a donation *inter vivos* (Art. 621 Civil Code) must follow the formalities required in Arts. 632-633, Civil Code except where the donation is onerous in which case the rules on contracts apply. (Art. 622 Civil Code; Carlos v. Ramil, 20 Phil. 183; Manalo v. De Mesa, 29 Phil. 495; Tabar v. Becada, 44 Phil. 619)

But the difficulty lies when a term is fixed for the commencement of the enjoyment of the property and the term chosen be related to the donor's death, in which case it is important to determine whether the donor's act is one of disposition or of execution. (See Manresa, Comentarios al Codigo Civil Español, Madrid, Editorial Reus [S.A.], 1919, 3rd ed., Vol. V, pp. 82-86) Thus, if the property is disposed of for a cause independent of the donor's death, it is a donation *inter vivos* (Art. 623 Civil Code; Lo-

pez v. Olibes, 15 Phil. 540; Somes v. Somes, 59 Phil. 280) even if its execution—the delivery of the property—be made at or after the donor's death, since "death is named, not as the consideration or cause of the donation, but as a condition suspensive of its effect" (Joya v. Tiangco, 40 O.G. [13th S] No. 21, p. 175) and the "circumstance that the properties donated are not delivered at once, or that their delivery is reserved *post mortem,* is simply a form of the contract which does not change its nature (Balaqui v. Dongso, 53 Phil. 673). Hence, in the present case, the fact that the donor has provided that the donation should not take effect except after his death, does not argue against the nature of the donation which had for its cause not death, but the love and affection which the donor had for the donee and therefore it is a donation *inter vivos* and not *mortis causa.*" (Samboan v. Villanueva, 40 O.G. [13th S] No. 21, p. 100).

As to whether the donor has been said to have disposed of the property during his lifetime, it is not enough to refer to what the deed states nor to the name and the donor has chosen to style his donation, if a contrary intention appears. (Laureta v. Mata, 44 Phil. 668, where a deed stating "I hereby donate '*mortis causa*'" and that "it is the condition of the donation that the donee can not take possession of the property donated before the death of the donor" was held to be *inter vivos* it being, construing the deed as a whole, a donation *in praesenti* as distinguished from one *in futuro,* the disposition and acceptance of the donation having been made at the same time although the actual conveyance was subject to the life estate of the donor). The surrounding circumstances may be loked into to determine the real character of the donor's act (Balaqui v. Dongso, *supra,* where the donor provided that the donation "does not pass title" to the donee "during my life time; but when I die, she shall be the owner." The Court took cognizance of the fact that the same was given in recompense for the donee's services and that the donor further bound herself to guarantee the right granted to the donee and her heirs, and held the donation *inter vivos* "notwithstanding the fact that the donor stated in said deed that she did not transfer the ownership of the two parcels of land donated, save upon her death, for such a statement can mean nothing else than that she only reserved to herself the possession and usufruct of said property, and because the donor could not very well guarantee the aforesaid right after death" since "from the moment Hipolita Balaqui guaranteed the right granted by her to Placida Dongso . . . she surrendered such right; otherwise there would be no need to guarantee said right." In Cariño v. Abaya, *supra,* the "grantors employed the terms 'there shall be given to,' 'shall administer,' and 'shall be administered,' which have reference to the future." These words clearly bring "forth the intention . . . to make the distribution of their estate . . . effective

after their death" as the Supreme Court properly did, and rightly so in David v. Sison, *supra,* when it took into account such circumstances: That ten months after the donor drew up her will instituting her two grandnieces as residuary heiresses, she adopted said heiresses; subsequently, she executed th donation which practically covered the same property disposed of in her will in favor of her newly adopted children, which property remained in her estate during her lifetime and were even included in the inventory made in the administration proceedings. In Guzman v. Ibea (39 O.G. p. 1835), however, although the donor enjoyed the income from the donation during her lifetime, the donation was held *inter vivos* because "The clause quoted in the decision clearly shows that the donation became effective immediately, independently of the donor's death. The properties donated were turned over to the donee for her administration and possession always and as owner. As to the naked ownership, the donation is pure, actual. It does not impose any condition, it does not fix any period for its transmission, it does not in any manner condition its effects upon death. The provision in the deed that the income of the lands be delivered to the donor for her enjoyment until she dies, does not affect the character of the donation, because the law precisely requires (Art. 634, Civil Code) for the validity of a donation, that there be reserved to the donor, in full ownership or in usufruct, an amount sufficient to support her in a manner appppropriate to her station. The donation being by its terms *inter vivos* in accordance with law, this character is not altered by the fact that the donor styles it *mortis causa.*"

Because a donation *inter vivos* markedly differs in character from one of *mortis causa,* a clear-cut distinction between them can not be over stressed. It is interesting to note in this case (David v. Sison, *supra*) that due to the adoption of the grandnieces, the inheritance tax was reduced from ₱672,000 to ₱224,000; and the heiresses thought they could have reduced the tax further had they succeeded in contending that the donation was *inter vivos* since the rate schedule for gift tax is lower than the rate for inheritance tax (Title III, C. A. No. 466, as amended; see also Tuason v. Posadas, 54 Phil. 289; Vidal de Roces v. Posadas, 58 Phil. 108). But a Court with a high regard and love for nothing so much as the law, except seeing it circumvented, frustrated such design.

LADISLAO L. REYES

PATRIA POTESTAS—MAY IT BE WAIVED?

The petitioner, a maid in the employ of the respondents, had a child by the respondent husband. By means of a private writing which petition signed in the presence of two witnesses, petitioner voluntarily renounced all her rights to the care, custody, and control of her child in favor of the respondents. In this petition for habeas corpus, she de-

manded the return into her custody of the child, alleging that patria potestas cannot be waived, there being no statutory provision allowing renunciation. Held, Patria potestas may be waived, because: (a) there is no express provision of law prohibiting renunciation of patria potestas; (b) there are laws which allow waiver owing to the blood relationship between the child and the respondent and there being no proof sufficient to show that the latter is incapable to take care, educate and keep the child, the written instrument of waiver should be given effect. Writ was denied. (Soria v. Estrera, G.R. No. L—1155, June 30, 1947)

In another case (Strong v. Beishir, 53 Phil. 331, 333) the mother of two minors subscribed to a document in favor of a charitable institution "voluntarily and unconditionally surrendering them to the care and custody of the Amercian Guardian Association in accordance with the provisions of Act No. 3094" and pledging "not to interfere with the custody and management of the said children in any way." Thereafter, she instituted habeas corpus proceedings to recover custody of her children. It was held that by virtue of the instrument, the applicant's rights to the custody of the minors ceased and passed to the American Guardian Association.

In an early case (Reyes v. Alvarez, 8 Phil. 723, 725), the Supreme Court held that there can be no waiver, under any consideration, of the duty to support, educate and keep the minor children. The facts of the case are entirely different from and bear no analogy with the aforementioned cases. The father left the child in the custody of sisters of charity. For thirteen years, the child lived in the convent and was treated well, being allowed once or twice a month to spend a day with her parents. There was no agreement nor any evidence of a clear intention on the part of the parents to relinquish, nor of the sisters to retain, her permanently. Subsequently, the father filed habeas corpus proceedings to regain custody of the child because the child refused to live with her parents. It was held that lack of compliance on the part of the father with the duties the law imposed on him, could not be construed as a waiver of paternal authority; nor could it be understood that paternal authority ceased except as provided in Chapter IV, Title VII of Book I of the Civil Code.

The purpose of patria potestas is not only the physical preservation and development of the children but also the cultivation of their intellect and education of their hearts and senses. (Reyes v. Alvarez, *supra*) For such purposes, parents are entitled to control their children and keep them in their company in order to properly comply with their paternal obligations. (Reyes v. Alvarez, *supra*) These rights are a result of correlative dutiess, partly in recompense for those duties and partly to aid them in fulfilling those duties. (American and English Cyclopedia of Law, Vol. 17, p. 362)

Inasmuch as the interest and welfare of the child are normally the controlling considerations in the matter of its custody (Perkins v. Perkins, 57 Phil. 217) patria potestas may be waived and such waiver is valid. Both under the Civil Code and the Code of Civil Procedure, as in adoption, as well as under Act No. 3094, patria potestas may be renounced. Under Article 169 of the Civil Code, the parent may lose parental authority over his minor child by final judgment in a criminal case and by final judgment in a divorce case. Under Article 171, the courts may deprive parents of their authority or suspend the exercise thereof, if they treat their child with excessive cruelty or if they give them corrupting orders or examples. (Strong v. Beishir, *supra*) Section 3, Rule 100 of the Rules of Court also authorizes renunciation of patria potestas and the rights to the care and custody of minors. (Moran, Comments on Rules of Court, Vol. II, page 309, 1940 ed.)

The right of a parent to the custody and control of his child may be lost or forfeited by his own agreement. (Strong v. Beishir, supra; 46 Corpus Juris 1268), by misconduct or unfitness, (Cortes v. Castillo & Herrera, 41 Phil. 466; Perkins v. Perkins, *supra;* Fanlo de Peyer v. Peyer, G.R. No. L-145, September 7, 1946) or even by misfortune, as where the father, through gross immorality, became so habituated to intoxicants as to lose his position and means, rendering him unfit to have custody of the child. (Lally v. Fitz Henry, 51 NW 1155)

The degree of unfitness which will deprive a parent of the natural right to the custody of his children must be considered in relation to the attending circumstances, such as the concern he has shown for the child in the past and the question of his general welfare. (Clarke v. Lyon, 118 NW 472) Each case must be decided on its peculiar facts. (Risting v. Sparboe, 162 NW 592; Pierce v. Jeffries, 137 SE 651) Parents whose example tend to corrupt the morals of their offspring may be deprived by courts of their parental authority, as where the mother was convicted of adultery (Cortez v. Castillo & Herrera, *supra*), or where unfitness is predicated on moral depravity (Perkins v. Perkins, *supra*) or on an attempt by the wife on the life of the husband. (Fanlo de Peyer v. Peyer, *supra*). When the means employed by parents to make their unemancipated minor children marry against their will are such as to bring about moral or physical sufferings, the intervention of the court to deprive parents of patria potestas will be justified. (Salvaña v. Gaela, 55 Phil. 680) The most striking demonstration of the supremacy of the guardianship of the State over that of the parent is furnished by statutes under which children cruelly treated, abandoned, or being brought up in ways of vice, are taken from their parents by judicial or administrative proceedings at the instance of the State and committed to public or charitable institutions. (Rule 100, Section 7, Rules of Court; 20 R.C.L. 600; Whalen v. Olmstead, 23 Atl.

964) In such cases, the State has the right and it is its duty to take the child from its parents in order that it may have a chance to grow up as a law-abiding citizen. (In re Brown, 117 Ill. App. 332) It may be said that the misconduct or unfitness sufficient to justify deprivation of custody must be of a positive kind, such that provisions for the child's ordinary comfort, its moral and intellectual development, cannot be reasonably expected at the parent's hands. (Risting v. Sparboe, *supra;* Penney v. Sulzen, 91 Kan. 407; Ex parte Reynolds, 53 SE 490; Jamison v. Gilbert, 135, p. 342)

There is conflict of opinion as to the validity of aggrements whereby parents or one of them has placed the child in the custody of some other person with an agreement or informal understanding that the parent will not reclaim the child. (39 Am. Jur. 616) There is much authority in support of the view that, in the absence of express statutory provision, such as those relating to adoption and apprenticeship, an agreement by a parent permanently transferring the custody of a child is invalid as being contrary to public policy. (Montgomery v. Hughe, 58 So 113; Clark v. White, 143 SW 587) Inasmuch as the right of the parent is in the nature of a trust, the parent will not be allowed to divest himself of such custody, it being imposed upon him by law, not for his gratification, but on account of his duties. (Brook v. Indiana, 112 Ind. 183)

In later American decisions, however, it has been held that a parent can, by agreement, surrender the custody of the child so as to make the custody of the person to whom it is surrendered legal. (Miller v. Miller, 98 NW 631; State v. Bryant, 145 NW 266; Smidt v. Benenga, 118 NW 439; Bedford v. Hamilton, 153 SW 1128) Such agreements are enforcible where it appears to the advantage of the child. (Ex parte Swall, 134 Pac. 96) This latter view seems supported by better reason and justice. It recognizes the superior right of parents, but places the interest of the child as the first and paramount consideration. (46 C.J. 1269) It is, therefore, a well established rule that the welfare and best interest of the child are the controlling elements in the determination of all conflicts as to its custody. (Wahleigh v. Newhall, 91 Fed. 490; State v. Stanga, 109 So 783; Ex parte Ryan, 52 So 573); and statutes recognizing a right to the custody of the child in either the father or the mother must give way when recognition of such a right would materially interfere with the paramount welfare of the child. (Bores Guardianship, 174 NW 906)

Agreements between parents as to the custody of their children are valid subject to the court's supervision. (Tiffany v. Spreckels, 262 Pac. 742; Edleson v. Edleson, 200 SW 625) Where the father relinquished his rights to the custody to the mother, the latter's rights will be enforced if for the good of the child (Edleson v. Edleson, *supra;* Lee v. Lee, 93 Mis C 677) but will not be carried out

when it is to the child's detriment. (Carpenter v. Carpenter, 112 NW 748) And where a wife lives separate and apart from her husband, she is entitled to the custody of the minor children as against the husband, where no explanations has been given by the husband of his inaction to deprive his wife of said custody for almost four years. (Fanlo de Peyer v. Peyer, *supra*) Likewise, in divorce proceedings the mother is entitled to the custody of the child when the father is not financially able to give proper care and attention to the child. (Lozano v. Martinez, 36 Phil. 976)

The custody of a child can be transferred to another by the parents by deed and not by parole. (Hodgon v. Libbey, 82 Am. Dec. 223; McGarr v. National & Worsted Mills, 60 L. R. A. 122; Hussey v. Whiting, 44 NE 639; Weir v. Morlley, 12 SW 840). This rule applies in this jurisdiction. (Strong v. Beishir, *supra*) The mere placing of the child in the custody of another without clear intention of parting with patria potestas does not deprive parents of their right to the custody of the child even if the child should prefer to live with the transferee. (Reyes v. Alvarez, *supra*) Courts should not deprive parents of their custody unless the contract is so definite and certain that the intention to renounce the custody is clearly established (Wilkinson v. Lee, 75 SE 477; Miller v. Wallace, 76 Ga 479) and waiver will not ordinarily be implied from the mere placing of the child in another's custody. (Miller v. Wallace, *supra*); Kearney v. Steele, 48 So 215; Reyes v. Alvares, *supra*).

Inasmuch as patria potestas involves social and public interest (I Castan, p. 268; III Scaevola, p. 510), in determining disputes as to the custody of the children, the court acts as "parens patriae" and regards the welfare of the child as the principal element. (Kelsey v. Green, 37 Atl. 679) When the interest of the child will best be promoted by leaving it with its foster parent, the father will not be allowed to take it back. (Reese v. Gellerman, 110 SW 196) When it is best for the child to have its father's care, his agreement to give the custody to another will not deprive him of the right to resume possession. (Wood v. Shaw, 139 Pac. 1165)

From the foregoing authorities, we conclude that patria potestas may be waived by parents by any of the following means:

(1) By express provision of law, as by adoption.

(2) By forfeiture through judicial proceedings, on the ground of misconduct or unfitness; and

(3) By written agreement, voluntarily entered into, with the clear intention of transferring the rights to the custody and control of the child to another.

In all these cases, the welfare of the child is the controlling consideration.

JOSE C. CAMPOS, JR.

CONFESSION—MUST IT BE UNDER OATH?

The defendant was charged in the Court of First Instance of Zam-

boanga with double murder. His extra-judicial confession was presented at the trial and objected to on the ground that it was not sworn to. The objection was overruled and, the confession having been corroborated by other evidence, the defendant was convicted. Hence, he appealed to the Supreme Court claiming, among other things, that the lower court erred in admitting the unsworn confession. *Held,* That the confession not being sworn to did not make it incompetent. (People v. Pardo G.R. No. L—562, November 19, 1947)

The foregoing decision is a reiteration of the principle laid down in U. S. v. Corrales (28 Phil. 362), wherein the court said: "There is no provision of law which prescribes that either confessions or admissions are not competent evidence unless made under oath. It is the fact that they are made by the accused against his own interest which gives them their evidentiary value, and provided the fact is established it does not matter whether they are made under oath or not." If a confession is free and voluntary—the deliberate act of the accused with a full comprehension of its significance—there is no impediment to its admission as evidence (U. S. v. De los Santos, 24 Phil. 329). A sstatement which, although unsworn amounts to a confession of crime, may be received in evidence. (22 C. J. Sec. 260).

A confession may be in the form of or contained in a letter (U. S. v. Asensi, 24 Phil. 671; U. S. v. Valdellon, 46 Phil. 245; Oakley v. State 135 Ala. 15; Edens v. State 43 SW 89), and may even be made orally to the offended party. (U.S. v. Sotelo, 1 Phil. 544; U.S. v. de Leon, 27 Phil. 510)

In the nature of things, a person will not make a statement against himself unless it is true; and where such a statement is voluntarily made, the element of truth exists, whether or not it is made under oath. The fact that it is made under oath would most probably increase its weight and probative value—but aside from this, there seems to be no other difference in effect. To sustain that a confession not under oath is inadmissible, would lay undue stress on form and render incompetent countless of statements, which would otherwise be strong and convincing evidence of the guilt of the accused.

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