BEYOND BEST INTERESTS: THE COURT'S ROLE IN INSULATING THE CHILD DURING "DIVORCE" PROCEEDINGS*

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ABSTRACT

This Note examines the unique position of the Filipino child in legal proceedings involving the dissolution of his parents' marriage, and identifies the rights of the child in such proceedings. It also examines the consequences of intentional and unintentional gaps in related legislation, as well as the efficacy of existing mechanisms for ensuring the well-being of the child during and after divorce. As recommendation, it makes the argument for legal representation for the child, given that the existing support mechanisms may be inadequate to meet his needs.

INTRODUCTION

Oftentimes in "divorce"[1] proceedings, the focus is likely to be away from the minor child rather than on him. However, it is his psychological and emotional health that is most vulnerable in the course of the proceedings, and as a result, the well-being of the child becomes collateral damage.

In the Philippines, there is a dearth of statutory standards in relation to such divorce proceedings. While this may translate to giving the courts much-needed flexibility to determine the best course of action and ascertain the rights of the parties, this may also result in neglect and inconsistencies when it comes to protecting the child's best interests in the course of the proceedings.

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[1] For purposes of this Note, *"divorce"* refers to the following proceedings that affect the status of the marriage: petition for annulment of voidable marriages, legal separation, and petition for declaration of nullity under Art. 36 of the Family Code.

The reality is that, while the child is an active participant in the marriage and in family life, the child does not have a true voice in the resulting legal proceedings if the marriage breaks down and his parents resort to the courts. This Note identifies the rights of the child in such proceedings, as well as the third parties whose responsibility it is to ensure that such rights are being protected. It also examines the consequences of intentional and unintentional gaps in related legislation, as well as the efficacy of existing mechanisms for ensuring the well-being of the child during and after divorce. Not only are these gaps a result of the pressures of society and the church on the Legislature, but they also translate to a lack of procedural standards in the Judiciary, and this stands in the way of properly applying the principle of "best interest" in the Court's decisions involving the child in proceedings that primarily concern their parents. And finally, this Note makes an argument for independent legal representation for the child, given that the existing support mechanisms may be inadequate to meet his needs.

PART I. RELATED LEGISLATION AND RELEVANT DOCTRINES

A. Rights of the Child

The Philippines is a signatory to the UN Convention on the Rights of the Child ("UN CRC"), Article 3 of which provides:

> 1. *In all actions concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*
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> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
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> 3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities*, particularly in the areas of safety, health, in the number and suitability of their staff, as

well as competent supervision.[2]

Additionally, Article 12 states:

> 1. States Parties shall assure to the *child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
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> 2. For this purpose, *the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child*, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[3]

The Child and Youth Welfare Code (P.D. No. 603) pre-dates the UN CRC.[4] Its Declaration of Policy states that "[t]he Child is one of the most important aspects of the nation", and that "...every member of the family should strive to make the home a wholesome and harmonious place as its atmosphere and conditions will greatly influence the child's development".[5]

Consequently, Article 3 of the same provides for Rights of the Child. Below are selected rights relevant to the discussion in this Note:

> Article 3. Rights of the Child. - All children shall be entitled to the rights herein set forth without distinction as to legitimacy or illegitimacy, sex, social status, religion, political antecedents, and other factors.
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> (2) Every child has the right to a wholesome family life that will provide him with love, care and understanding, guidance and counseling, and moral and material security.
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[2] United Nations Convention of the Rights of the Child [hereinafter "UN CRC"] art. 3, Nov. 20, 1989. (Emphasis supplied.) The UN CRC came into force in 1990.

[3] *Id.* at art. 12. (Emphasis supplied.)

[4] The UN CRC was ratified on January 26, 1990, while Pres. Dec. No. 603 was enacted some time in December 1974. Pres. Dec. No. 603 (1974).

[5] CHILD & YOUTH WELFARE CODE, art. 1.

> (5) Every child has the right to be brought up in an atmosphere of morality and rectitude for the enrichment and the strengthening of his character.
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> (8) Every child has the right to protection against exploitation, improper influences, hazards, and other conditions or circumstances prejudicial to his physical, mental, emotional, social and moral development.
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> (10) Every child has the right to the care, assistance, and protection of the State, particularly when his parents or guardians fail or are unable to provide him with his fundamental needs for growth, development, and improvement.[6]

B. The Doctrine of Best Interests as Applied to Divorce Proceedings

In the Philippines, any case involving or affecting the status and rights of minors are decided based on the "principle of best interest of the child".[7] P.D. No. 603 provides in Article 8: "In all questions regarding the care, custody, education and property of the child, his welfare shall be the paramount consideration."[8] The Family Code affirms this in Article 49, wherein the Court is mandated to "give paramount consideration to the moral and material welfare" of the children in the issuance of orders providing for the custody and support of minor children during the pendency of an action for annulment, or for the declaration of absolute nullity of a marriage.[9]

The Supreme Court reiterated this in the case of *Perez v. Court of Appeals*,[10] where it stated that in all actions concerning children, courts take into consideration several relevant factors presented by the parents. Examples given in *Perez* are: "material resources, social and moral

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[6] CHILD & YOUTH WELFARE CODE, art. 3.

[7] These include "cases involving adoption, guardianship, support, personal status, minors in conflict with the law, and child custody". Gualberto v. Gualberto, G.R. No. 154994, 461 SCRA 459, June 28, 2005.

[8] CHILD & YOUTH WELFARE CODE, art. 8.

[9] FAM. CODE, art. 49.

[10] Hereinafter "Perez", G.R. No. 118870, 255 SCRA 661, Mar. 29, 1996.

situations".[11] In a later case, *Gualberto v. Gualberto*,[12] the Court provided additional factors, such as "the previous care and devotion shown by each of the parents; their religious background, moral uprightness, home environment and time availability; as well as the children's emotional and educational needs".[13] Both *Perez* and *Gualberto* cite the mandate under Article 3 of the UN CRC.

Professor Haydee Yorac, in her article on child custody determinations, lamented the lack of attention to child custody provisions in the Civil Code.[14] She criticizes the provisions as scattered, and thus creating an absence of any real "systematic examination of statutory or judicial policies or the procedural rules that govern such cases".[15] Her article, written soon after the enactment of P.D. No. 603, states that the passing of such law "renders more imperative the search for policy and philosophy—after all, the concerns of the child cannot be truly served and advanced by random rules".[16] Surely, these random, scattered rules cannot truly and efficiently meet the needs and interests of the child.

Though not a recent publication, Prof. Yorac's article remains relevant as she criticizes the application itself of the doctrine by the Supreme Court. While she agrees that the best interest of the child should be the principal consideration in child custody proceedings, she asserts that the Supreme Court applies the doctrine incorrectly by equating the best interest of the child with the moral uprightness of his or her parent. She also observes that the termination or suspension of parental authority is usually a consequence of the immorality of the parent.

The task of the Judiciary, consequently, becomes a balancing act between the best interest of the child against the right of parents to exercise authority over their unemancipated children.

The effects of this balancing act become even more evident when the "Tender Age Presumption" under Article 213 of the Family Code is examined.[17] The Court explains this in *Espiritu v. Court of Appeals*,[18] where it

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[11] *Id.* at 669.
[12] 461 SCRA 450
[13] *Id.* at 454.
[14] Haydee Yorac, *Child Custody Determinations: A Reappraisal*, 56 PHIL L.J. 367 (1981).
[15] *Id.* at 368.
[16] *Id.*
[17] FAM. CODE, art. 213.
[18] Hereinafter "Espiritu", G.R. No. 115640, 242 SCRA 362, Mar. 15, 1995.

stated that if the child is under seven years of age, the mother is presumed *by law* to be the best custodian. Such presumption was characterized as "strong", and therefore can only be overcome by a "compelling reason".[19] Once the child is over the age of seven, his choice of parent is paramount. However, it is still the Court that ultimately makes the decision awarding custody.[20]

In *Espiritu*, the Supreme Court admonished the Court of Appeals for mechanically applying the statutory presumption instead of properly scrutinizing the records of the case. In deciding to deprive the petitioner-parent, who is the mother, of parental custody over her child, the Supreme Court sustained the decision of the Regional Trial Court, and noted that this sustention was because the lower court "gave greater attention to the choice of Rosalind and considered in detail all the relevant factors bearing on the issue of custody".[21] *Espiritu* is an illustrative case because it showcases the importance of the child's choice of custodial parent, but at the same time justifies its decision on the alleged immorality of the petitioner-parent. One of the experts presented concluded that "the child was found suffering from emotional shock caused by her mother's infidelity".[22]

Espiritu thus becomes an imperfect example because while it is laudable for extensively detailing the steps taken in order to ascertain the psychological well-being of the child before a custody determination is made, it may inadvertently constitute precedence for later decisions to automatically assume that marital infidelity categorically makes one unfit to exercise custody over his or her children. While coincidentally, the choice of the child was taken into consideration, the Court's decision was also based on the idea that the children, at the time of the decision, were already old enough to tell right from wrong, and are capable of recognizing "ethical behavior and deviant immorality".[23] If the children were still of a tender age, and thus unable to understand that their mother's activities were immoral, the Court would still refrain from applying the Tender Years Presumption *because* of the immorality of the mother. Thus, it is arguable that the child's material and moral welfare was not exactly the paramount consideration; rather, instead a standard of morality was applied as to the child's parents.

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[19] *Id.* at 368.

[20] *Id.* "In its discretion, the court may find the chosen parent unfit and award custody to the other parent, or even to a third party as it deems fit under the circumstances."

[21] *Id.*

[22] *Id.* at 369.

[23] *Id.* at 373.

Conflicts like these are arguably created by gaps in the law and a lack of any clear standard or guide for courts in what truly constitutes the "best interest" of the child. Referring to suits for legal separation whose cause of action is infidelity, Prof. Yorac asks, "where is the child in all these and how are his or her interests ascertained and protected"?[24] Though Prof. Yorac admits that the commission of sexual offenses must not be "altogether ignored in deciding child custody cases", she asserts that "the law falls short of the mandate that the best interests of the child should be the paramount consideration in these cases when sexual offenses alone and regardless of other circumstances determine the right to custody".[25] And perhaps *Espiritu* is the best and most illustrative example of Prof. Yorac's sentiment.

As Prof. Yorac eloquently writes:

> Certainly, the preference of the child, its psychological affinity with one parent, its prolonged stay in the company of and prolonged separation from one parent, are relevant to the determination of who is the psychological parent and must share equal if not weightier consideration than the supposed moral flaws of either parent. This becomes additionally persuasive when a society's cultural patterns are changing and the moral attitudes of the people are undergoing important modifications.[26]

The Rule on Custody of Minors and Writ of *Habeas Corpus* in Relation to Custody of Minors provides that the best interests of the minor shall be considered by the court in awarding custody, and that paramount consideration shall be given to his material and moral welfare.[27] The best interests of the minor refer to "the totality of the circumstances and conditions as are most congenial to the survival, protection, and feelings of security of the minor encouraging to his physical, psychological and emotional development. It also means the least detrimental available alternative for safeguarding the growth and development of the minor."[28] The said rule also provides that:

> The court shall also consider the following:
> a. Any extrajudicial agreement which the parties may have bound themselves to comply with respecting the rights of the

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[24] Yorac, *supra* note 14, at 375.

[25] *Id.* at 380.

[26] *Id.*

[27] Adm. Matter No. 03-04-04-SC (2003), § 14. Rule on Custody of Minors and Writ of *Habeas Corpus* in Relation to Custody of Minors.

[28] § 14.

> minor to maintain direct contact with the non custodial parent on a regular basis, except when there is an existing threat or danger of physical, mental, sexual or emotional violence which endangers the safety and best interests of the minor;
> b. The desire and ability of one parent to foster an open and loving relationship between the minor and the other parent;
> c. The health, safety and welfare of the minor;
> d. Any history of child or spousal abuse by the person seeking custody or who has had any filial relationship with the minor, including anyone courting the parent;
> e. The nature and frequency of contact with both parents;
> f. Habitual use of alcohol, dangerous drugs or regulated substances;
> g. Marital misconduct;
> h. The most suitable physical, emotional, spiritual, psychological and educational environment for the holistic development and growth of the minor; and
> i. The preference of the minor over seven years of age and of sufficient discernment, unless the parent chosen is unfit.[29]

As can be seen in the above procedural rule, morality of the parent plays a large role in the determination of his or her fitness to be the custodial parent.

Additionally, the custody of children is also provided under the Anti-Violence Against Women and Children Act:

> The woman victim of violence shall be entitled to the custody and support of her child/children. Children below seven (7) years old older but with mental or physical disabilities shall automatically be given to the mother, with right to support, unless the court finds compelling reasons to order otherwise. A victim who is suffering from battered woman syndrome shall not be disqualified from having custody of her children. In no case shall custody of minor children be given to the perpetrator of a woman who is suffering from Battered woman syndrome.[30]

C. The State as *Parens Patriae*

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[29] § 14.

[30] Rep. Act No. 9262 (2004), § 28. Anti-Violence Against Women and Their Children Act of 2004.

In *Concepcion v. Court of Appeals*,[31] the Supreme Court stated:

> 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.-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.[32]

The well-known doctrine of the State as *parens patriae*, as applied to cases involving minors, is predicated on the idea that minors are unable to take care of themselves fully, and are in need of protection from the State.[33] Through the laws of the State, those of tender age are protected from "abuse, exploitation and other conditions prejudicial to their development", not only by strangers but also their own parents. The end-goal of such protection is their "eventual development as responsible citizens and members of society shall not be impeded, distracted or impaired by family acrimony".[34] Following such principle, minors are considered as possessing a disability because of their tender age, therefore legally unable to act in their own behalf. Thus, the State assumes ultimate guardianship over them.

In the case of *Luna v. Intermediate Appellate Court*,[35] decided prior to the enactment of the Family Code, the child expressed that she desired to be under the custody of her grandparents, and that she would kill herself or run away from home should the court decide to place her under the custody of her parents. A child psychologist was introduced in the course of the trial, who opined that the cruelty of her biological parents had caused the child to become embittered; therefore, she cannot thrive in such a traumatic environment. In reversing the Court of Appeals, the Supreme Court ratiocinated:

> Article 363 of the Civil Code provides that in all questions relating to the care, custody, education and property of the children, the latter's welfare is paramount. This means that *the best interest of the minor can override procedural rules and even the rights of parents to the custody of their children.*[36]

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[31] G.R. No. 123450, 468 SCRA 438, Aug. 31, 2005.
[32] *Id.* at 442.
[33] Caballo v. People, G.R. No. 198732, 698 SCRA 227, June 10, 2013.
[34] Concepcion v. Ct. of Appeals, 468 SCRA 438.
[35] G.R. No. L-68374, 137 SCRA 7, June 18, 1985.
[36] *Id.* at 16. (Emphasis supplied.)

Notably, Justice Makasiar dissented to the decision in *Luna* by criticizing how the majority opinion ignored the legal precepts of Parental Authority, and dismissing the child's choice as merely "brainwashed by the material luxury as well as constant attention showered on her by doting grandparents".[37] Makasiar opined that the child "cannot possibility appreciate the incomparable love and solicitude her natural parents have for her". He further writes:

> The majority opinion has been focused more on the personal assessment of the child rather than on the general and specific laws and jurisprudence that should govern this case.
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> The determination, therefore, as to whose custody the child belongs must necessarily and initially involve the question of parental authority. it appears that the law on parental authority has been conveniently side tracked by petitioners.
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> Parental authority, known in Roman law as patria potestas, is defined as "the mass of rights and obligations which parents have in relation to the person and property of their children until their majority age or emancipation, and even after this under certain circumstances."[38]

Even in a case where the child is no longer covered by the Tender Years Presumption, "once the choice has been made, the burden returns to the court to investigate if the parent thus chosen is unfit to assume parental authority and custodial responsibility".[39] The conflict between parental authority and the best interest of the child thus becomes very real in such cases, because in addition to the danger of unwittingly giving more weight to the parents' right of parental authority, the Court has within its authority the broad power to set its own standards of what constitutes "best interest", and this does not always necessarily include seriously taking into consideration the choice of the child.

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[37] *Id.* at 17 (Makasiar, *J.*, *dissenting*).

[38] *Id.* at 18.

[39] *Espiritu*, G.R. No. 115640, 242 SCRA 362, 368.

PART II. COURT PROCEEDINGS

A. Filing the Case

Legal separation, annulment, or declaration of absolute nullity proceedings begin with the filing of the petition in the family court. The petitioner may only be either husband or the wife.[40] The law requires that there must be no collusion between the spouses.[41]

If the action is based on the psychological incapacity of one of or both of the spouses,[42] the petition is required to specifically allege facts showing his or their psychological incapacity in relation to performing the essential marital obligations. Expert opinion need not be alleged,[43] because ultimately, it is the totality of evidence that will be considered by the courts in deciding whether or not to give due course to the petition.[44] However, expert opinion is still typically utilized to bolster the case, because a medical or similar link must be shown to exist "between the acts that manifest psychological incapacity and psychological disorder itself".[45] Given the very nature of a case anchored on psychological incapacity, courts still tend to accept the opinion of a psychological expert as decisive evidence.[46]

B. Raffling-off of the Case

Pursuant to the State's responsibility under the UN CRC, as well as by the declared policy of the 1987 Constitution recognizing the sanctity of family life, as well as the mandate to protect and strengthen the family,[47] family courts were established under Republic Act No. 8369.

Family courts have exclusive original jurisdiction over petitions for guardianship, support, custody of children, *habeas corpus* in relation to children, as well as complaints for annulment of marriage, declaration of nullity of marriage and those relating to marital status and property relations

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[40] Adm. Matter No. 02-11-10-SC (2003), § 2 (a). Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages; Adm. Matter No. 02-11-11-SC (2003), § 2 (a) (1). Rule on Legal Separation.

[41] FAM. CODE, art. 48.

[42] FAM. CODE, art. 36.

[43] Adm. Matter No. 02-11-10-SC (2003), § 2 (d).

[44] Kalaw v. Fernandez, G.R. No. 166357, 745 SCRA 512, Jan. 14, 2015.

[45] *Id.* at 531.

[46] *Id.* at 530.

[47] CONST. art. II, § 12.

of husband and wife.[48] Family courts may likewise issue provisional orders for the temporary custody of children in civil actions for their custody, as well as support *pendente lite*.[49]

Once the petition is filed, the same is raffled to a judge, a summons is served, and the respondent-spouse is mandated to file his/her answer within 15 days upon service. If there is failure to file an answer, or if such answer tenders no issue, the court shall order the public prosecutor to investigate whether collusion exists between the parties.[50] In petitions for annulment or for declaration of absolute nullity, Article 48 of the Family Code prevents such collusion by ordering a prosecutor to take steps to prevent collusion and to ensure that evidence is not fabricated or suppressed. Thus, a judgment based upon a stipulation of facts or confession of judgment is proscribed.[51]

The Family Code also reiterates the same rule on collusion, as applied to petitions for legal separation.[52] Trials for such cases, however, may only proceed after the lapse of six months from the time of filing of the petition, otherwise known as the cooling-off period.[53]

For the petitions above, the prosecuting attorney or fiscal and the Solicitor General are ordered to intervene in behalf of the State, to perform the constitutional duty of protecting marriage. This requires "vigilant and zealous participation and not mere pro-forma compliance".[54] According to the Supreme Court, if the marriage is valid, it must be defended; and if the marriage is invalid, it must be exposed.[55]

The "Molina Doctrine"[56] further sets down guidelines in relation to Article 48 of the Family Code:

> (8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the

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[48] Rep. Act No. 8369 (1997), § 5. Family Courts Act of 1997.

[49] § 7.

[50] Adm. Matter No. 02-11-11-SC (2003), § 5 (b)-(c); Adm. Matter No. 02-11-10-SC (2003), § 8 (2)-(3).

[51] FAM. CODE, art. 48.

[52] Art. 60.

[53] Art. 58.

[54] Malcampo-Sin v. Sin, G.R. No. 137590, 355 SCRA 285, Mar. 26, 2001, 288.

[55] Ancheta v. Ancheta, G.R. No. 145370, 424 SCRA 725, Mar. 4, 2004.

[56] *See* Republic v. Ct. of Appeals, G.R. No. 108763, 268 SCRA 198, Feb 13, 1997.

> state. No decision shall be handed down unless the Solicitor General issues a certification, which will be quoted in the decision, briefly stating therein his reasons for his agreement or opposition, as the case may be, to the petition. The Solicitor General, along with the prosecuting attorney, shall submit to the court such certification within fifteen (15) days from the date the case is deemed submitted for resolution of the court. The Solicitor General shall discharge the equivalent function of the *defensor vinculi* contemplated under Canon 1095.[57]

Collusion in matrimonial cases is "the act of married persons in procuring a divorce *by mutual consent*, whether by preconcerted commission by one of a matrimonial offense, or by *failure*, in pursuance of agreement *to defend divorce proceedings*".[58] In *Brown vs. Yambao*,[59] the Court expounded on the role of the prosecutor:

> The policy of Article 101 of the new Civil Code, calling for the intervention of the state attorneys in case of uncontested proceedings for legal separation (and of annulment of marriages, under Article 88), is to emphasize that marriage is more than a mere contract; that it is a social institution in which the state is vitally interested, so that its continuation or interruption cannot be made depend upon the parties themselves. It is consonant with this policy that the injury by the Fiscal should be allowed to focus upon any relevant matter that may indicate whether the proceedings for separation or annulment are fully justified or not.[60]

C. Referring the Case to Auxiliary Services, Guardians *Ad Litem*, and Expert Witnesses

Under both the Rule on Legal Separation, and the Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages, courts may require social workers to conduct a case study and submit a report at least three days before pre-trial, but the same may be ordered at any stage of the case, whenever necessary.[61]

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[57] *Id.* at 213.

[58] Brown v. Yambao, G.R. No. L-10699, 102 Phil. 168, Oct. 18, 1957. (Emphasis supplied.)

[59] *Id.*

[60] *Id.* at 172.

[61] Adm. Matter No. 02-11-11-SC (2003), § 7; Adm. Matter No. 02-11-10-SC (2003), § 10.

Republic Act No. 8369 establishes in each judicial region a Social Services and Counseling Division ("SSCD"), which shall be placed under the guidance of the Department of Social Welfare and Development ("DSWD"). The SSCD has a staff composed of qualified social workers and other personnel with academic preparation in behavioral sciences to carry out the duties of conducting intake assessment, social case studies, casework and counseling, and other social services that may be needed in connection with the cases. Among its main objectives are providing appropriate social services to all juvenile and family cases and recommending the proper social action; developing programs; formulating uniform policies and procedures; and providing technical supervision and monitoring of all SSCD in coordination with the judge.

When warranted, the SSCD shall recommend that the court avail itself of consultative services of psychiatrists, psychologists, and other qualified specialists presently employed in other departments of the government in connection with its cases.[62]

The DSWD, in 2005, issued Administrative Order No. 7 ("A.O. No. 7"), which provides for the Rules and Responsibilities of Social Workers in Handling Cases on Annulment, Nullity of Marriage, and Custody of Children.[63] In its General Policies, the social worker assigned to handle such cases are guided by the directive that "all shall be done to preserve and strengthen marriage as mandated" and by the policy that "marriage is the foundation of the family".[64] A.O. No. 7 is quite enlightening as it outlines the role of the social worker in each "phase of management".[65] The role of the social worker is both an advocate and a mediator. During court proceedings, he or she is an enabler, that is, one that helps clients cope and ultimately supports and empowers them to accept the change brought about by such proceedings. And upon judgment, his or her role is as a counselor or therapist, and as a social broker—one who helps connect the client with different resources and services in the community. These roles may be flexible and interchangeable. Nevertheless, A.O. No. 7 again makes clear that the priority of the social worker is the "preservation and strengthening of marriage and the best welfare and interest of the child"; it may be gleaned that efforts should first be directed at preventing the separation, and once these efforts have failed, the social worker shall then focus on tempering the

[62] Rep. Act No. 8369 (1997), § 10.
[63] Dep't of Social Work & Development (DSWD) Adm. Order No. 7 (2005).
[64] § IV (2).
[65] § V (A).

blow, or cushioning the effects on the children.[66]

On the other hand, the role of the guardian *ad litem* ("GAL") is expounded in the Rule on Examination of a Child Witness.[67] The appointment of the GAL is at the discretion of the court, who shall "consider the background of the GAL and his familiarity with the judicial process, social service programs, and child development".[68] Under the same section, preference shall be given to the parents. Likewise, the Rule enumerates the duties of the GAL, who may or may not be a member of the Philippine Bar.[69] Though the GAL may not participate in the trial, he may file certain motions pursuant to certain enumerated sections in the same Rule, such as appointing an interpreter or facilitator for the child. Notably, however, *if* the GAL is indeed a member of the Philippine Bar, he may object during trial to questions (asked of the child) that "are not appropriate to his developmental level".[70]

The Rule on Examination of a Child Witness also provides for the right of a child to be accompanied by a "support person", that is, one or two persons of his own choosing to provide him emotional support.[71]

D. Pre-Trial and Mediation

As for pre-trial and the succeeding stages, the Rule on Legal Separation, and the Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages provide for a similar procedure.

At the pre-trial conference, the court may refer the issues to a mediator who shall assist the parties in reaching an agreement on matters not prohibited by law.[72] These prohibited matters are the following: (1) the civil status of persons; (2) the validity of a marriage or of a legal separation; (3) any ground for legal separation; (4) future support; (5) the jurisdiction of

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[66] § V (A).

[67] Adm. Matter No. 004-07-SC (2000), § 5. Rule on Examination of a Child Witness.

[68] § 5 (a).

[69] § 5 (b).

[70] § 5 (c).

[71] § 11.

[72] Adm. Matter No. 02-11-11-SC (2003), § 11; Adm. Matter No. 02-11-10-SC (2003), § 14.

courts; and (6) future legitime.[73]

It must be noted that the first objective of the court is conciliation. The judge acts first and foremost in the interest of mediating between the spouses, and exploring the possibility of reconciliation. In family mediation, the parties include the spouses and age-appropriate children, meaning children over 7 years who, through discernment on their part, may choose their custodial parent. But other parties may be former spouses, new partners, parents, and even grandparents.[74] Between the parties is the family mediator, who undergoes 40 hours of specialized training, and who must have knowledge of child development, among other things. He or she is ideally a lawyer, former judge, law professor, psychologist, psychiatrist, religious leaders, or social worker. For better results, he or she has a co-mediator of the opposite sex, in order to provide balance and avoid intimidation. Aside from the parties and the mediators, also in attendance are the following: "lawyers to assist parties as to legalities or to draft a compromise agreement (lawyer participation is encouraged as to property division or amount of support but need not be present as regards parenting issues); child development experts; assigned case worker, service providers for children and families; accountants; property evaluators; and interpreters. For moral support, the persons allowed in mediation proceedings are parents; guardians; other relatives with legal standing to the case; friends, colleagues; counselors; and other support persons."[75] Notably, the parties may be mediated "before they separate or after; before conclusion of an agreement or after; before litigation; before pre-trial conference; during litigation; and after litigation particularly to deal with changed situations or to clarify court orders".[76]

If mediation fails, the case will proceed to pre-trial.

Upon conclusion of the pre-trial conference, under both Rules, the pre-trial order shall contain a directive to the public prosecutor to appear for the State and to take steps to prevent collusion between the parties at any stage of the proceedings and fabrication or suppression of evidence during

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[73] Adm. Matter No. 02-11-11-SC (2003), § 13; Adm. Matter No. 02-11-10-SC (2003), § 16.

[74] Nimfa Cuesta-Vilches, *Mediation: Reaching Its Potential in Family Law Cases,* mediate.com, Jan. 2006, *at* http://www.mediate.com/articles/vilchesn1.cfm.

[75] *Id.*

[76] *Id.*

the trial on the merits.[77]

E. Trial and Provisional Orders

The Rule on Provisional Orders[78] provides that upon receipt of a verified petition and at any time during the proceeding, the court, *motu proprio* or upon application under oath of any of the parties, guardian or designated custodian, may issue provisional orders and protection orders with or without a hearing. These orders may be enforced immediately, with or without a bond, and for such period and under such terms and conditions as the court may deem necessary.

Such orders include spousal support, child support, child custody, visitation rights, hold departure orders, order of protection, and administration of common property. In Section 4 of the said Rule, the court, in awarding custody while the petition is pending, is specifically directed to consider the best interests of the child and to give paramount consideration to the material and moral welfare of the child.[79] The following guidelines are also provided for:

> The court may likewise consider the following factors: (a) the agreement of the parties; (b) the desire and ability of each parent to foster an open and loving relationship between the child and the other parent; (c) the child's health, safety, and welfare; (d) any history of child or spousal abase by the person seeking custody or who has had any filial relationship with the child, including anyone courting the parent; (e) the nature and frequency of contact with both parents; (f) habitual use of alcohol or regulated substances; (g) marital misconduct; (h) the most suitable physical, emotional, spiritual, psychological and educational environment; and (i) the preference of the child, if over seven years of age and of sufficient discernment, unless the parent chosen is unfit.
>
> The court may award provisional custody in the following order of preference: (1) to both parents jointly; (2) to either parent taking into account all relevant considerations under the foregoing paragraph, especially the choice of the child over seven years of age, unless the parent chosen is unfit; (3} to the

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[77] Adm. Matter No. 02-11-11-SC (2003), § 12; Adm. Matter No. 02-11-10-SC (2003), § 15.

[78] Adm. Matter No. 02-11-12-SC (2003).

[79] § 4.

> surviving grandparent, or if there are several of them, to the grandparent chosen by the child over seven years of age and of sufficient discernment, unless the grandparent is unfit or disqualified; (4) to the eldest brother or sister over twenty-one years of age, unless he or she is unfit or disqualified; (5) to the child's actual custodian over twenty-one years of age, unless unfit or disqualified; or (6) to any other person deemed by the court suitable to provide proper care and guidance for the child."[80]

Because of its provisional nature, a court does not need to delve fully into the merits of the case before it can settle an application for this relief.[81]

More importantly, the matter of custody "is not permanent and unalterable and can always be re-examined and adjusted."[82] This is because the situation of the parents and even of the child can change, such that sticking to the agreed arrangement would no longer be to the latter's best interest. Therefore, a judgment involving the custody of a minor child cannot be accorded the force and effect of *res judicata*.[83]

F. Examination and Testimony of the Child

According to the Rule on Examination of the Child Witness,[84] as a general rule, the examination of a child witness presented in a hearing or any proceeding shall be done in open court, but the party who presents a child witness or the GAL may move the court to allow him to testify in the manner provided in this Rule.[85] However, the decision to ask the court to conduct the examination by live link television, as provided for in the same rule, is deferred by the GAL to the prosecutor or counsel. In other words, the Rule provides that the GAL may only apply for such on his own accord, if he is convinced that the decision of the prosecutor or counsel not to apply will cause the child serious emotional trauma.[86] In any case, the court may *motu proprio* hear and determine the need for taking the testimony through live link television.[87]

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[80] *Id.*

[81] Lim-Lua v. Lua, G.R. Nos. 175279-80, 697 SCRA 235, June 5, 2013.

[82] *Id.*

[83] Beckett v. Sarmiento, A.M. No. RTJ-12-2326, 689 SCRA 494, Jan. 30, 2013.

[84] Adm. Matter No. 004-07-SC (2000).

[85] § 8.

[86] § 25 (a)

[87] § 25 (b)

Additionally, the judge has the prerogative to question the child in chambers, or in some comfortable place other than the courtroom, in the presence of the support person, GAL, prosecutor, and counsel for the parties. More importantly, the questions of the judge shall not be related to the issues at trial but to the feelings of the child about testifying in the courtroom.[88]

G. The Decision

After trial, and upon entry of judgment granting the petition, the family court, on motion of either party, shall proceed with the liquidation, partition and distribution of the properties of the spouses, as well as the delivery of the presumptive legitimes of their children pursuant to Articles 50 and 51 of the Family Code.[89]

PART III. CRITICISM

A. Sufficiency of Existing Legal Mechanisms

Following the above overview of proceedings, it becomes imperative to examine the efficacy of mechanisms available throughout the procedures that are in place specifically for the child's best interest. The first question is *what* is "best interest"?

Although the concept of best interest was elaborated on earlier in this Note's discussion, it is easier said than done to arrive at a disposition of a divorce case based on the best interest principle. This is because the child's best interest is not the *only* interest. Indeed, the Working Group of the UN CRC makes a distinction—best interest as *a* primary consideration, but not *the* primary consideration. The Group also decided against making it the *paramount* consideration.[90] Notably, Philippine jurisprudence uses these terms interchangeably. And even more disconcerting is that the camps on either side of the divorce debate may use "best interest" as an argument for

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[88] § 25 (c)

[89] § 21.

[90] Ruth Farrugia, *Challenges in Balancing Parental Rights and the Child's Best Interests: A Preliminary Analysis of the Malta Divorce Referendum*, 2 INTL. J. JURISPRUDENCE FAM. 377, 381 (2011).

or against divorce.[91]

Secondly, *when* should best interest be determined? As seen above, the myriad of actors in a divorce proceeding—the State, the judge, the prosecutor, as well as the assigned social worker and other auxiliary services—first concentrate their efforts on the conciliation of the spouses. The policies of preserving marriage and of protecting the child are two separate policies that often work in tandem. It is important, however, to recognize situations where these two policies are actually in conflict. An obvious example is a case of domestic abuse. In this case, it is clear that the continuation of the marriage is in no one's best interest. But where there is no abuse amidst clear marital conflict, it creates a gray area. Furthermore, when efforts are being exerted toward conciliation, these efforts are directed towards the spouses. Where, then, does the welfare of the child become paramount consideration? It would seem that it is only considered once the focus is taken away from the initial efforts for conciliation.

Lastly, *who* determines what this "best interest" is?

> The evaluation of what constitutes the best interests of the child remains subjective and dependent on the personal baggage of the person making the assessment. Some jurisdictions have introduced the notion of a checklist system in the attempt to standardize the criteria that should contribute towards determining best interests. However, a number of States rely heavily on judicial discretion and professional judgment, which may at times be influenced by personal considerations of a possibly biased nature.[92]

Although the lack of statutory standards in proceedings effectively grants more discretion and flexibility to the Court, it may be countered that "a judge's legal training does not prepare him to make the psychological and medical judgments which are necessary to ensure the future well-being of the child".[93] In the Philippines, family court judges must have experience and demonstrated ability in dealing with child and family cases. They are required to undergo training through a continuing educational program provided by

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[91] *Id.* at 377.

[92] *Id.* at 384.

[93] Norman Singer & Edward Shipper, *The Child's Right to Independent Counsel in Custody Hearings*, 5 LAW & PSYCHOL. REV. 51, 55 (1979).

the Supreme Court on family law and related disciplines.[94] However, it must be noted that to date, the implementation of the law providing for family courts is still in its transition stages, since its promulgation in 1997.

Indeed, there has been a recent shift in the perception that a child is considered an "object of the law". Rather, children are "increasingly considered as subjects in the determination of decisions made on their behalf".[95] Consequently, the level of participation that a child is entitled to in proceedings that affect their rights and status should be reevaluated. "Participation" is conceptualized in the UN CRC as a "procedural right through which children can act to protect and promote the realization of other rights".[96] For example, normal growth and a stable family unit arguably constitute a cognizable liberty interest, while a basic required level of financial support is a cognizable property interest.[97]

The idea of "participation", however, may be regarded with greater importance in other proceedings involving the child, especially proceedings in which the child is at the forefront—adoption, abuse cases, juvenile delinquency. In every case where the child is involved, the court is directed to decide for the child's best interest. However, where the child is not one of the primary parties, such as in "divorce" proceedings, the adjudication of "best interest" is often left to the parents themselves. Thus, although the child stands to be benefited or injured just as much as either parent, he is not really considered a "true participant in the process".[98]

Although there are many non-custodial aspects of a "divorce" proceeding where the child's welfare is involved, it is the issue of custody that is often contentious between parents in the course of the proceeding.

> Unfortunately, the motivations behind the custody demands of the parents are often ambivalent. Mothers may seek custody of the children though antipathetic to them in order to

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[94] Elizabeth Pangalangan, *Family Courts and Negotiated Justice, available at* https://archivos.juridicas.unam.mx/www/bjv/libros/4/1652/22.pdf (last accessed October 1, 2018).

[95] Nicola Taylor, et. al., *International Models of Child Participation in Family Law Proceedings following Parental Separation / Divorce*, 20 INTL. J. CHILD. RTS. 645, 647 (2012).

[96] *Id.* at 648.

[97] Singer & Shipper, *supra* note 93, at 54.

[98] Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 254 (1975).

> exert influence over their former spouses who seek visitation arrangements. Fathers may seek custody as a bargaining tool to lower the mother's child support and alimony demands, or may fail to seek custody despite their fitness, because of the realization that mothers obtain custody in most cases. Finally, many parents seek custody as vindication of their innocence in the break-up rather than to provide the best home for the child.[99]

Thus, the issue of what is best for the child may get sidetracked by other issues such as the morality of a spouse and who the guilty spouse is. Additionally, in such cases, custody is rarely awarded to a non-biological parent. Consequently, in custody disputes children are less likely to be considered as "detached individuals" and more likely to be considered in the context of a "family unit from the standpoint of the parent".[100] Indeed, although the legal relationship between spouses may be severed, social and psychological relationships continue.[101]

Harvard Law Professor Lon Fuller makes the argument for "person-oriented" determinations, as opposed to "act-oriented" determinations. Such "person-oriented" determinations involve the evaluation of "attitudes, dispositions, capacities, and shortcomings" in relation to the application of the "best interest" standard.[102] Arguably, social workers, psychologists, or psychiatrists are better equipped to make such determinations,[103] especially because judges perform "act-oriented" determinations in most other types of proceedings.

In Philippine jurisdiction, the decision-making process is ideally a shared responsibility between the judge and the available auxiliary services; however, the judge is the only authority who can ultimately elevate the decision to a legal status. He is also the only authority who can decide if the decision-making process should be shared or not. For example, even when a judge recognizes that a child has a separate interest at stake, the child may still be inadequately represented because the court may believe that "such

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[99] James Kenneth Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial* Proceedings, 11 HARV. C.R.-C.L. L. REV. 565, 573 (1976).

[100] Joseph Landisman, *Custody of Children: Best Interests of Child vs. Rights of Parents*, 33 CAL. L. R. 306, 310 (1945).

[101] Mnookin, *supra* note 98, at 252.

[102] *Id.* at 250-51.

[103] *Id.* at 228.

interests will be protected by a party to the action" despite the rarity of "absolute congruity of interest between any named party and the child".[104]

Given the above factual and social milieu, and given that the legislature has indeed made several auxiliary services available to the courts, perhaps the issue is not the *lack* of representation. Rather, the issue may be *inadequacy* of representation.

B. The Argument for Independent Legal Representation

The court is said to perform two distinct functions in the resolution of custody disputes, the first being *private dispute settlement* and the second, *child protection*.[105] The private dispute settlement function involves choosing between the mother and the father, each claiming an interest in the child. The dispute is between the spouses, but undoubtedly an adjudication of such issue directly affects the child—the interest considered is not only that of the child alone, but also those of his parents. To emphasize, these may or may not be identical. The child-protection function, on the other hand, "involves the judicial enforcement of standards of parental behavior believed necessary to protect the child".[106]

It may be argued that custody disputes are by their nature not appropriate for resolution in adversary proceedings because they may "distort the fact-finding process".[107] In the disposition of special proceedings involving children, such as adoption or guardianship, the principle of "best interest" is likewise applied.

Many legal writers make the case for the provision of independent legal representation for the child. This argument stems from the idea that the child's interests and the parents' interests are not necessarily identical.[108] Corollarily, "the attorney for a parent owes his primary allegiance to his client".[109] To illustrate, in the US case of *Crary vs. Curtis*,[110] a fifteen-year old boy argued that he had a due process right to be joined as a party in the

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[104] Genden, *supra* note 99, at 567.
[105] Mnookin, *supra* note 98, at 229.
[106] *Id.*
[107] *Id.* at 228.
[108] Singer & Shipper, *supra* note 93, at 54.
[109] *Id.* at 56.
[110] 199 N.W.2d 319 (1972).

custody dispute and to have independent counsel, on the ground that "neither parent was capable of adequately representing his interests". This was granted by the California court despite the lack of statutory authority and previous case law.[111]

One concern against independent representation for the child as well as against bringing the child into the proceedings as an active participant is the idea of "exacerbation of the trauma of litigation".[112] This conclusion is speculative, given that the possibility of such varies with the circumstances of each case. While there is the possibility that introducing another stranger to the proceedings may make matters worse, the opposite is also very much a possibility— "forcing" the child to articulate his needs and desires may prove to be very beneficial to him, and supports the position that a child should no longer be a mere "object" of the law. Besides, shielding a child completely from the proceedings may not be a wise choice given that whatever the result of the proceedings will steer the direction of his relationships with his parents long after proceedings will have come to a close.[113]

Again, it is important to keep in mind that children are both interested and affected parties; therefore, their rights should be kept in mind throughout the "divorce" procedure.[114] An Independent Children's Lawyer (ICL) may give life to the Right to Participation by representing the child through a mix of two models—the first being autonomy, the second being beneficence.[115] In other words, the ideal situation should be a happy medium between the child's expressed wishes and his best interests.[116] In Australia, family court ICLs, as may be gleaned from the relevant statutes, are meant to follow the beneficence model. However, their guidelines emphasize the *independence* of the ICL, as well as give the child a right to establish a professional relationship with the ICL. The idea is that, where a child is able to express, communicate, and provide instructions, he should be allowed to

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111 Singer & Shipper, *supra* note 93, at 62.

112 Genden, *supra* note 99, at 592.

113 *Id.* at 592-93.

114 Shreya Atrey, *Divorcing Parents, Alienating Children: Devising a Constructive Theory of Child Rights in Case of Divorce*, 10 WHITTIER J. CHILD. & FAM. ADVOC. 181, 185 (2010-2011).

115 Geoff Monahan, *Autonomy vs. Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings*, 8 QUEENSLAND U. TECH. L. & JUST. J. 392, 393 (2008).

116 *Id.* at 399.

direct litigation "as an adult client would".[117] This "capacity to give instructions" takes into account only communication skills, and not maturity level.[118]

While a similar policy may be a stretch in the Philippine setting, perhaps the idea of "independence" may be noted, and it may be considered applying to the appropriate cases of custodial determination. Nevertheless, assuming that the Philippine courts are also mandated to follow the beneficence model, the question still arises as to who is best-suited to determine whether or not this model is ultimately adhered to. At the end of the day, representation plays a crucial part in whether or not the child's best interests are truly reflected by the decision of the court. While the law undoubtedly provides for auxiliary services, this comes with its caveats. First, the appointment of such services is discretionary on the part of the judge. Secondly, the function of these guardians, psychiatrists, or social workers is merely recommendatory. Their expert opinions are still at the mercy of the prosecutor, the parents' legal counsel, and the judge.

In considering the child's right to counsel, the following positions may be considered: (1) counsel is not allowed; (2) counsel may be appointed at the court or parents' request; (3) counsel is required in all cases; (4) counsel is required in contested cases, and optional in uncontested ones.[119]

C. Existing Legislation and the Related Social Stigma

Many divorce proceedings can be combative and can create a hostile environment for a child. In some cases, a child may suffer from emotional abuse, although this may be unintentional on the part of his parents. This kind of abuse has been termed "divorce abuse" by some authors, and may involve, among others, the following acts: putting the child in the middle of the conflict, making negative comments about the other parent, using the child to manipulate the other parent, neglecting the child's physical or emotional needs while over-focused on the legal battle.[120] In turn, these acts

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[117] *Id.*

[118] *Id.* at 408.

[119] Sharon Alexander, *Protecting the Child's Rights in Custody Cases,* 26 THE FAMILY COORDINATOR 377, 381 (1977).

[120] Susan Boyan & Ann Marie Termini, *What is Divorce Abuse?,* THE COOPERATIVE PARENTING INSTITUTE WEBSITE, *at* http://www.cooperativeparenting.com/documents/WhatisDivorceAbuseArticle.pdf (last accessed May 10, 2018).

may result in negative effects such as poor self-esteem, increased anxiety or anger, depression, and difficulties in future or present relationships.[121] While abuse is a strong word, and while many of these negative effects may be unavoidable, they can still be minimized. Since the court, and in effect the State, plays a big role in family relations, it is arguable that efforts should be made to mitigate these results.

A problem arises in the context of Philippine society. Professor Pangalangan, in her concise yet illuminating article "Family Courts and Negotiated Justice", states:

> The contemporary Filipino family is witness to the tension between the respect for the principle of privacy, on one hand, and the protection of the varied interests of the individuals who comprise the family.[122]

True enough, the sanctity of the Filipino family and the position it holds in Filipino society as a whole, makes it resistant to the kind of change that may invite scandal and rumor in the community. Matters such as separation or annulment are considered very private if not intimate, and are treated as topics to be discussed in hushed tones, away from the public sphere. Even a court mandated to be impartial may be afflicted by the hesitance to intrude into the intimate workings of a marriage. However, the truth is that even the most conservative of Filipino spouses are not immune to marital problems, and even the most well-adjusted of children are not immune to the trauma that may be brought on by the separation of his parents. Therefore, it is important to look at how these cultural patterns and stereotypes impact the well-being of the child, coupled with the already daunting task of properly coping with the separation of his parents.

For example, as discussed, the role of the judge is conciliatory, and mediation is highly encouraged, as the interest of the State is in the unity of the Filipino family. However, from case to case, it must be asked if reconciliation is even in the best interest of the child. At the end of the day, after the conclusion of divorce proceedings, save in exceptional circumstances, a goal of the court should be the survival of the parent-child relationships. We may even consider the possibility that the State's interest in keeping the family together is in conflict with the mandate to consider the best interest of the child.

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[121] *Id.*

[122] Pangalangan, *supra* note 94, at 349.

More importantly, the Philippines is a predominantly Catholic country, and one where the constitutionally mandated separation of church and state is, at best, questionable. The Catholic Church is on a campaign against the legalization of absolute divorce, and has fought long and hard to keep the Philippines as the only state (besides The Vatican) that does not have absolute divorce. The stigma brought about by the divorce ban may affect a child whose parents have decided to terminate their marriage—he may even be a child out of wedlock, because one parent may have decided to remain with a partner other than his or her spouse, despite the marriage being legally intact, or the parents might have decided not to get married at all despite the absence of an impediment to do so, due to the costs of a possible future annulment.

Many influential figures from the Catholic Church have spoken out against the passage of an absolute divorce law. For example, Mgr. Juan De Dios Pueblos, Bishop of Bataan, said, "Divorce law would bring immorality to the country."[123] Mgr. Oscar Cruz, Archbishop emeritus of Lingayen-Dagupan, also stated that "[b]eing a country where divorce is not legal is an honor that every Filipino should be proud of. Love for the family is the heart of Filipino cultural identity and cannot be destroyed by divorce."[124] Another cleric, Mgr. Ramon Arguelles, Archbishop of Lipa, said that "[e]veryone should now understand that the deception is not over. The devil is at work [...] those who pass this law will face the judgment of God."[125]

The above statements thus make it easy to see why the common Filipino may be conflicted or misguided in his views on absolute divorce, given the pervasive message that it is either immoral at worst, or inappropriate at best. Moreover, even legislators have been constrained to bend down to the will of the Church as "[i]t's easier for ordinary citizens to support divorce in anonymous surveys than for lawmakers to do so openly and risk the clergy's wrath".[126]

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[123] Agenzia Fides, *The Church says no to the Legalization of Divorce*, AGENZIA FIDES WEBSITE, *available at* http://www.fides.org/en/news/29175-ASIA_PHILIPPINES_The_Church_says_no_to_the_legalization_of_divorce#.WOX0PTZq7X_ (last accessed May 10, 2018).

[124] *Id.*

[125] Gin de Mesa Laranas, *Will the Philippines Finally Legalize Divorce*, NEW YORK TIMES, *at* https://www.nytimes.com/2016/07/29/opinion/will-the-philippines-finally-legalize-divorce.html (last accessed May 10, 2018).

[126] *Id.*

D. Pending Bills for Absolute Divorce

As of publication of this Note, there are two divorce bills pending in Congress. The first is House Bill No. 116 (H.B. No. 116), filed by Rep. Edcel Lagman. In his explanatory note, he argues against the idea that divorce will have negative effects on children, which he says is the reason used by politicians "playing to the gallery". He states that studies in the US have shown that these negative effects appear pre-divorce—children end up with depression and conduct disorders because their home life is unstable albeit within the legal walls of a marriage.[127] However, the contents of the bill itself, aside from extensively adding grounds for the grant of absolute divorce, do not do much to safeguard children's rights. The bill provides that the courts shall follow existing judicial procedure.[128] As for the effects of divorce, H.B. No. 116 merely gives the Court discretion in the grant of alimony, support, and custody,[129] as well as gives legitimate and adopted children the right to retain their status as such.[130]

House Bill No. 2380 (H.B. No. 2380), on the other hand, is spearheaded by the Gabriela Women's party Representatives Emmi De Jesus and Arlene Brosas, and was drafted with the furtherance of women's rights in mind. Admirable as it is, the proposed bill does not make new provisions for the custody of children, except in that it refers to the 'best interests' principle in accordance with Article 213 of the Family Code.[131]

Notably, both bills, in their respective explanatory notes, make mention of the role of religion in marriage, with H.B. No. 2380 stating that the drafters of the bill kept in mind "the differing religious beliefs in the Philippines", and thus the bill is structured such that a couple may choose their remedy based on their "situation, religious beliefs, cultural sensitivities, needs, and emotional state".[132] On the other hand, H.B. No. 116 focuses on

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[127] H. No. 0116, 17th Cong., 1st Sess. (2016). *See* p.3 of "Explanatory Note".

[128] H. No. 0116, 17th Cong., 1st Sess., § 5 (2016). An Act Instituting Absolute Divorce in the Philippines and For Other Purposes.

[129] § 6 (c)

[130] § 6 (e)

[131] H. No. 2380, 17th Cong., 1st Sess., § 2 (2016). An Act Introducing Divorce in the Philippines, Amending for the Purpose Articles 26, 55 to 66, and Repealing Article 36 Under Title II of Executive Order 209, as Amended, Otherwise Known as the Family Code of the Philippines, and for Other Purposes.

[132] H. No. 0116, 17th Cong., 1st Sess. (2016). *See* p.4 of "Explanatory Note".

divorce in the Christian setting, and goes so far as to quote passages from the Bible which makes mention of divorce.[133] Additionally, there are other two pending bills, House Bill No. 3075 (H.B. No. 3075) and House Bill No. 1629 (H.B. No. 1629) that seek to give civil and legal effect to a decree of dissolution of marriage by the Church.[134] Clearly, the passage of an absolute divorce bill might not be possible without some kind of benediction from the Church.

It is well-known in the Philippine legal community that the inclusion of the additional ground of psychological incapacity was a roundabout way to meet both the practical need to allow the dissolution of marriage and the wishes of the church. However, a side effect of treating Article 36 as a back-door remedy is that an annulment is a notoriously costly and lengthy procedure. Also, the fact that it is adversarial by nature could lead to unnecessary negative psychological effects, some of which may carry over to parent-child relationships.

> Trying to show psychological incapacity is an adversarial process in civil court, aimed at proving beyond a reasonable doubt that one spouse was exhibiting behavior indicating an inability to take on the responsibilities of marriage. It means stating in public court all the reasons—both trivial and consequential—why you cannot stay married to your spouse. It involves psychological tests and, in some cases, witnesses. It's a game of mud-slinging and one-upmanship that makes breaking up that much harder and uglier. It encourages a petitioner to exaggerate problems—to declare a once-loved partner an alcoholic as opposed to someone who occasionally came home drunk, or a chronic womanizer as opposed to someone who once had an affair.[135]

Furthermore, it would also seem that Philippine legislators are averse to the idea of a no-fault divorce, one which would allow a divorce without blame or fault on either of the spouses. While H.B. No. 116 adds as a ground "irreconcilable marital differences and conflicts which have resulted in the

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[133] H. No. 0116, 17th Cong., 1st Sess. (2016). *See* p.4 of "Explanatory Note".

[134] H. No. 1629, 17th Cong., 1st Sess. (2016). An Act Legalizing Church Annulment or Dissolution of Certain Marriages and for Other Purposes; H. No. 3705, 17th Cong., 1st Sess. (2016). An Act Recognizing the Civil Effects of Church Declaration of Nullity, Annulment, and Dissolution of Marriages and for Other Purposes.

[135] Ana Santos, *Ending My Marriage in the Only Country that Bans Divorce,* THE ATLANTIC, *available at* https://www.theatlantic.com/international/archive/2015/06/divorce-philippines-annulment/396449/ (last accessed May 10, 2018).

breakdown of the marriage beyond repair, despite earnest and repeated efforts at reconciliation", which shall entitle either spouse to file a petition for absolute divorce, it remains to be seen whether or not this foregoes the need for the prosecutor to investigate for collusion.[136] On the other hand, H.B. No. 2380 explicitly states that divorce may not be granted based upon a stipulation of facts or confession of judgment, and the prevention of collusion is still directed.[137]

E. Other Jurisdictions

As seen above, the state of current and pending legislation is far from perfect. It may thus be helpful to look at how other jurisdictions have addressed these issues. In an international survey on legislative mechanisms allowing for child participation in family law disputes, it can be seen that there is a growing trend towards "greater recognition of children's participation rights, including in the weight given to children's views".[138] However, while many countries provide legal mechanisms in adversarial disputes, only a couple provide for disputes that are by nature non-adversarial.[139] Moreover, most countries reported little structure regarding the timing of participation. Usually, participation occurred whenever it was considered appropriate; often, the propriety was determined by a judge.[140] Child participation was reported to have been enhanced by "legislation requiring child participation; proactive judges encouraging and/or seeking children's views in their own courts; the UN CRC and other human rights conventions; and supportive research, reviews and/or academic debate".[141] On the other hand, commonly-cited barriers to child participation were "the considerable variation (between judges, courts, states and/or other jurisdictions) in availability of the factors that enhance children's participation; that child participation is discretionary, rather than a right; resistance from some judges, lawyers and/or families; and limited acknowledgment of the UN CRC."[142]

In Australia, for example, there is no express right to independent

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[136] H. No. 0116, 17th Cong., 1st Sess., § 4 (g) (2016).
[137] H. No. 0280, 17th Cong., 1st Sess., § 2 (2016).
[138] Taylor, et. al., *supra* note 95, at 651.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 652.
[142] *Id.*

representation in the law, but it is common to appoint a lawyer for the child in "complex cases". The courts are also directed to give weight to the child's views. However, the ascertainment of such views is only an "additional" consideration, and not "primary". Moreover, the legislation is inapplicable in cases were matters are non-contested, such as when the parents enter into agreements privately.[143] Meanwhile, in New Zealand, a judicial decision has pronounced that it is a mandatory obligation to give the child an opportunity to express his or her views, but the child himself is not bound to do so.[144]

Ultimately, the proponents of the survey noted "an evident gap between principle and practice"; there is thus a difficulty in putting in place opportunities to give life to the right of participation. Fortunately, progress is being made across countries, whether or not the UN CRC is cited as a motivation for doing so.[145]

It may be gleaned, however, that legislation is the first step. While the Philippine Congress has been generous in legislation in relation to children's rights, it may be helpful to explicitly acknowledge and safeguard the rights of the child in the event of his parents' legal separation or annulment. For example, the 1979 Divorce Act of South Africa states:

> (1) A decree of divorce shall not be granted until the court—
>
> (a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances[146]

CONCLUSION

In order to remedy these problems, it is important to examine how Philippine society treats matters of marriage and family; and secondly, how both legislation and jurisprudence reflect this mindset. For the Legislature, the desire to appease the Church may result in hurried and half-baked legislation that is designed to pander to the clergy, but is unmindful of the very real consequences to the emotional and physical well-being of the child

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[143] *Id.* at 655.
[144] *Id.* at 667.
[145] *Id.* at 669-70.
[146] Act No. 70, South African Divorce Act 70 (1979).

involved, given that "[l]ong term effects on children [...] primarily depend upon success of the custodial arrangement adjudicated by the courts."[147] For the Judiciary, it is important to make determinations as to the degree to which these matters such as custody are discretionary upon the judge, who may or may not be sufficiently trained to handle such matters—the judge's own personal biases may either pit a standard of morality as against a standard of best interests, or may not differentiate between the two at all.

While this Note makes the argument for independent legal representation, the author would like to point out that adequate representation does not always translate into a lawyer. Independent representation is by no means a panacea—it may be costly and in practice it is in danger of being regarded as merely *pro forma*—but is the "procedural choice that seems to offer the best opportunity for protecting the rights of the child".[148] Considering the limited resources of the Philippine courts, it may be a good starting point to require independent counsel only in contested cases.

It is important to keep in mind that "[Family Law] is not simply a set of rules but a shifting cultural and social text sustaining existing understandings, assumptions and practices concerning children and young people".[149] In this jurisdiction, the social stigma attached to the process of dissolving a marriage translates to problems both in procedure and in practice. The law itself not only limits the grounds for which to obtain a "divorce", but it is also procedurally tedious, its adversary nature being an obstacle to avoiding conflict. In practice, annulments are costly and lengthy—the law does not make it easy for the spouses, and ultimately for the child. The challenge is to slowly shift what is fundamentally the focus of these proceedings. Protecting the rights of the child would require a shift from the perception that the marriage is unsuccessful and the spouses are immoral, towards successfully providing for post-proceedings, so that the State may protect the rights of all parties, especially those of the child.

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147 Atrey, *supra* note 114, at 181.
148 Alexander, *supra* note 119, at 382.
149 Taylor, et. al., *supra* note 95, at 645.