CHILD CUSTODY DETERMINATIONS: A REAPPRAISAL

HAYDEE B. YORAC *

INTRODUCTION

The Civil Code of the Philippines took effect on August 30, 1950. Largely patterned after the Spanish Civil Code of 1889, it also incorporated rules and principles that reflect the traditions of the Filipino people and a number of common law concepts.[1] Perhaps because of the stature of the members of the Code Commission which prepared its draft,[2] the Code did not elicit much critical comment as to its philosophy and structure except from former Supreme Court Justice J.B.L. Reyes. Other Filipino civilists limited themselves to piecemeal criticisms and the preparation of multi-volume commentaries.

Even Mr. Justice Reyes, however, could not singlehandedly examine all areas of the Code. One that was left largely uncommented upon is that which relates to child custody determinations. Except for the tender years rule,[3] the Code Commission itself hardly explained the scattered[4] provisions

* *Professorial Lecturer,* University of the Philippines College of Law.

[1] The Code Commission which prepared the draft stated in its report:

> It is fitting that in this formative period of the Republic of the Philippines, it should promulgate its own Civil Code. For the first time in four centuries, the Filipinos make their own laws without any foreign restraint or supervision. This untrammelled freedom to regulate the relations between individuals is of the essence of self-determination. However, it does not signify narrow and exclusive nationalism, but simply the liberty to make careful and enlightened selections from the modern unfolding of the Roman law and of the English common law as well as to transform into positive law those native customs and traditions that are worthy of perpetuation, and to derive legal solutions from the postulates of morality and justice.

See, 1 TOLENTINO, CIVIL CODE OF THE PHILIPPINES 11 (1974).

[2] Dr. Jorge Bocobo, Chairman, was former Dean of the College of Law, University of the Philippines and Justice, Supreme Court of the Philippines; Judge Guillermo B. Guevara, law reformer and criminologist; Dr. Pedro Y. Ylagan, civilist; Dr. Francisco R. Capistrano, commentator on civil law, later Justice of the Court of Appeals; and Dr. Arturo M. Tolentino, civil law specialist, commentator and national politician.

[3] The Commission said:

> The general rule is recommended in order to avoid many a tragedy where the mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age. The exception allowed by the rule has to be 'for compelling reasons' for the good of the child. Those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the (relative) divorce will ordinarily be sufficient punishment for her. Moreover, her moral dereliction will not have any effect upon the baby who is yet unable to understand the situation.

[4] CIVIL CODE, Arts. 90, 106, 311, 316, 327-355 and 363. More provisions are now included in Pres. Decree No. 603 (1975), Arts. 17-42, 149-167.

of the Civil Code on child custody. In the Philippine Congress there was also no extended discussion or debate on the provisions during the deliberations for the enactment of the Code. The lack of attention persists to this day. Notwithstanding the growing body of jurisprudence on the subject, no thorough and systematic examination of statutory or judicial policies or the procedural rules that govern such cases in light of some clearly defined and coherent philosophy has ever been made. The recent enactment of Presidential Decree No. 603, otherwise known as the Child and Youth Welfare Code, has added many provisions relating to child placement. This 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. The identification of a child's true interests, the placing of such interests at the core of all determinations relative to the child and the enunciation of clear and consistent philosophy on the same is necessary to meet such needs and interests.

This paper is no more than an initial attempt to examine broadly some identifiable trends in child custody determinations. The complexity of specific problems that arise from these cases will obviously require other, more focused and more empirically based studies in the future. This will not, however inhibit this writer from recommending reforms both in substantive and procedural rules where the present ones are perceived to fall short of meeting the best interests of the child standard. Best interests as used in this paper does not refer to the material advantages that will accrue to the child as a result of custody determinations. What is stressed here is the necessity to meet the psychological needs of the child.

Like most of the rules in family relations, Philippine rules on child custody are an amalgam of mores and traditions of the Filipinos[5] and rules and principles imposed by foreign conquerors.[6] While it has become difficult to draw a clear line to distinguish these two sources of law, it is safe to assert that the institution of close family ties and the authority and duty of parents to protect their children even beyond the age of majority[7] have deep roots in Philippine customs while those that affirm the dogma of the Catholic Church on the indissolubility of marriage[8] and impose sanctions

[5] The household was the core social organization in pre-conquest Philippines and it was around this institution that custom law revolved. See, FERNANDEZ, CUSTOM LAW IN PRE-CONQUEST PHILIPPINES 77 (1976). The Civil Code includes an unprecedented Chapter in Title VII which defines the family as a "basic social institution which public policy cherishes and protects."

[6] Marriage law, in particular, is distinctively Spanish-Roman Catholic in outlook and philosophy. Thus only relative divorce is permitted.

[7] AGONCILLO, INTRODUCTION TO PHILIPPINE HISTORY 5 (1974). See, for instance, Art. 403 of the Civil Code which provides: "Notwithstanding the provision of the preceding article, a daughter above twenty-one but below twenty-three years of age cannot leave the parental home without the consent of the father or mother in whose company she lives, except to become a wife, or when she exercises a profession or calling, or when the father or mother has contracted a subsequent marriage."

[8] In pre-conquest Philippines, absolute divorce with or without cause was recognized by custom law. FERNANDEZ, *op. cit. supra,* note 5 at 91-92. During the American occupation, a divorce law, Act No. 2710 was enacted. It allowed divorce on very strict

upon conduct considered moral transgressions of religious rules[9] are foreign in origin.

The coexistence of rules deriving from these two disparate sources; more specifically the rules that affirm the integrity of the family[10] and those that visit sanctions upon conduct transgressing moral principles has given rise to two distinctive lines of determination in child custody cases. On the one hand, there has been established a set of decisions that simply affirm parental authority regardless of the circumstances. On the other hand, child custody cases have been decided simply or largely on moral grounds; in certain cases explicitly mandated by law, in some instances consequent to policy established by court decisions. In taking these two disparate positions, the question of best interest of the child appear to be at best secondary in the balance of factors that determine judicial decisions. Compounding the problem are existing rules of procedure that allow parties to prolong cases of this nature by a system of regular or extraordinary appeals. The sheer uncertainty of the outcome over a long period of time and the consequent uncertainty that it places upon the child places in jeopardy the best interests of the child.

It is the thesis of this paper that the best interests standard must be the principal criterion in all cases in which the issue of custody of a minor child is a principal or collateral issue. Corollary to this thesis is the view that the best interests of the child are not served by a mechanical subservience to the age-old notion of *patria potestas*[11] or the infliction of punishment upon parents who are considered to have violated the moral code of society. The psychological well-being and development of the child whose custody is in question must supervene notions of parental right and power over children or the infliction of punishment upon a parent who has violated some moral rules of society. It is likewise the position of this paper that rules of procedure that render uncertain over a long period of time the final determination of custody of minor children work to undermine the best interests principle. In cases of this nature, therefore, abbreviated proceedings that shall finally determine the question as soon as possible are to be preferred.

---

grounds. In 1943, the Japanese sponsored government enacted a very liberal law allowing absolute divorce on 11 grounds, including loathsome contagious diseases and insanity of one of the spouses.

[9] See, for instance, 5 SANCHEZ ROMAN, ESTUDIOS DE DERECHO CIVIL 1186; 1210-1211.

[10] The concepts of family as social institution and parental authority over their children have found expression even in the Philippine Constitution. Thus, Art. II, Sec. 4, provides: The State shall strengthen the family as a basic social institution. The natural right and duty of parents in rearing the youth for civic efficiency and the development of moral character shall receive the aid and support of the Government. See, also, CIVIL CODE, Titles VII and XII.

[11] The notion in Roman law that the father had absolute power over his children, including the power of life and death. The present legal authority of parents over their children in the Civil Code is a vestige of this concept.

Best interest principle

Like most rules relating to child custody in the world today, Philippine law on child custody is permeated with the phrases "the best interest of the child"[12] and "the child's welfare shall be paramount."[13] As already indicated above however, two distinctive statutory and judicial policies work to undermine this principle. While in certain instances the child is given an opportunity to name the parent of his or her choice, this expression of preference is not final and may be ignored or overruled by the courts.[14] In the final analysis, it appears that the best interest test can be followed only where the cases do not involve the visitation of sanction for supposed immorality or where the authority of the parent over the child is not otherwise placed in issue by allegation of causes for deprivation of parental authority.

Morality test

A. *Legal Separation Cases*

Nowhere is penalty for moral transgression and its consequent effect upon child custody more evident and more decisive than in legal separation cases.[15]

The Chapter of the Civil Code on legal separation has two provisions on child custody as follows:

> Art. 105. During the pendency of legal separation proceedings the court shall make provision for the care of minor children in accordance with the circumstances... and in default thereof said minor children shall be cared for in conformity with the provisions of this Code; but the Court shall abstain from making any order in this respect in case the parents have by mutual agreement, made provisions for the care of said minor children and these are, in the judgment of the court, well cared for.
> Art. 106. The decree of legal separation shall have the following effects:
> . . . . .
> (3) The custody of the minor children shall be awarded to the innocent spouse, unless otherwise directed by the court in the interest of said minors, for whom the court may appoint a guardian;

As may be seen from the provisions above, the matter of child custody in legal separation cases is determined in two stages, namely, (a) the preliminary determination of custody pending trial of the principal case; and, (b) the award of custody to the innocent spouse upon the issuance of the decree of legal separation, if the action is successful, and the determination of custody by the court, if the action is unsuccessful.

---

[12] CIVIL CODE, Arts. 106 & 332; Child Youth and Welfare Code (Pres. Decree No. 603 [1975]), Arts. 150, 153, 156, 158 and 165; RULES OF COURT, Rule 99, sec. 6.
[13] CIVIL CODE, Art. 363.
[14] RULES OF COURT, Rule 99, sec. 6. See discussion of Slade Perkins vs. Perkins, *infra*, note 38.
[15] CIVIL CODE, Title IV.

In preliminary award of custody, the law gives highest priority to the agreement of parents as to such custody. Therefore, the spouses may agree that pending determination of the principal action, the defendant may have temporary custody of the children. This procedure will be examined again later in this paper relative to procedure. In the meantime, the morality issue will be addressed here in relation to this stage of the proceeding.

In many instances of disputed legal separation actions, the parties usually cannot and they do not agree on the matter of temporary custody of minor children pending trial. Often, the custody of the minor children *pendente lite* is a major issue between the parties, and becomes the subject of maneuvers by motions before the trial can be commenced.

Where the children are under five years of age, the law directs that they shall not be separated from the mother unless the court finds compelling reasons for such measure.[16] Even where this mandate is followed, the issue becomes a live one when such children reach the age of five pending the issuance of judgment by the trial court.[17]

Where the children are five years of age or older, their custody becomes a real battleground between the parties in contested cases. Notwithstanding the prohibition against hearing evidence on the merits of the legal separation case before the expiration of six months from the filing of the complaint, it has been decided by the Supreme Court[18] that the question of temporary custody of minor children can properly be inquired into and evidence adduced thereon during the six months cooling off period when the trial of the principal action is suspended.

Araneta v. Concepcion involved a case for legal separation filed by husband Luis Araneta against his wife Emma Benitez-Araneta on the ground of adultery. After the defendant filed her answer to the complaint, she filed through counsel an omnibus motion to secure custody of her three children, monthly support for herself and the children, the return of her passport which was allegedly forcibly taken by plaintiff from her and to enjoin plaintiff from ordering his hirelings from molesting her. Plaintiff opposed the motion alleging that defendant is not entitled to custody of the children as she had abandoned them and she had committed adultery, that by her conduct she had become unfit to educate her children, being unstable in her emotions and unable to give the children the love, respect and care of a true mother.

The trial judge resolved the motion in favor of the defendant without hearing evidence on the omnibus motion and the opposition. Plaintiff brought

[16] Originally, the tender age range was up to seven years under Art. 363. This was lowered by Art. 17, Pres. Decree No. 603 (1975), otherwise known as the Child and Youth Welfare Code, to five years.

[17] See, discussion of Lacson v. San Jose-Lacson, *infra*, note 68. But see Matute v. Macadaeg, *infra.*, note 66, where a minor child less than 7 years old was awarded to the father.

[18] Araneta v. Concepcion, 99 Phil. 709 (1956).

a petition for certiorari and mandamus to the Supreme Court to compel the trial judge to require the parties to submit evidence.

The Supreme Court held:

> It is conceded that the period of six months... is evidently intended as a cooling off period to make possible reconciliation between the spouses. The recital of their grievances against each other in court can only fan their already inflamed passions against one another, and the lawmaker has imposed the period to give them opportunity for dispassionate reflection. But this practical expedient, necessary to carry out legislative policy, does not have the effect of overriding other provisions such as the determination of the custody of the children and alimony and support *pendente lite* according to the circumstances.

Even as the Supreme Court remanded the case for the introduction of evidence on the motion, it declared:

> Take the case at bar, for instance. Why should the court ignore the claim of adultery by defendant in the face of express allegations under oath that effect supported by circumstantial evidence of the letter the authenticity of which cannot be denied. And why assume that the children are in the custody of the wife, and that the latter is living in the conjugal dwelling, when it is precisely alleged in the petition that she had abandoned the conjugal abode? Evidence of all these disputed allegations should be allowed that the discretion of the court as to the custody and alimony *pendente lite* may be lawfully exercised.

Early in the proceedings, therefore, the morality play unfolds and it would not be strange if the parties, aware as they are of the heavy if not overwhelming impact of the moral character evidence, more specifically the commission of the so-called sexual offenses, upon the decision of the court to award temporary custody, would commence producing mutually derogatory proof of each other's extra-marital activities over and above any other evidence that might be more relevant to the question of the best interests of the child, if such evidence were introduced at all.

At the trial proper, the pressure is stronger to show proof of marital infidelity and nothing more .This stems from the following circumstances: (1) most of the actions for legal separation are based upon the commission of marital offense by the defendant spouse, that is, adultery on the part of the wife, and, concubinage on the part of the husband,[19] and, (2) recrimination[20] is a defense in such actions.

Adultery is committed by any married woman who has sexual intercourse with a man not her husband and by the man who has carnal knowledge of her, knowing her to be married even if the marriage be subsequently declared void.[21]

---

[19] CIVIL CODE, Art. 97.
[20] CIVIL CODE, Art. 100.
[21] REV. PENAL CODE, Art. 333.

Every act of sexual intercourse by a married woman with a man other than her husband constitutes a separate offense of adultery.[22] In relation to actions for legal separation, therefore, a single act of marital infidelity on the part of the wife is sufficient cause for filing the action. If the adultery were established by sufficient evidence and the decree of legal separation were granted, the wife is automatically deprived of custody of her minor children.

Concubinage, on the other hand, is committed by a husband who keeps a mistress in the conjugal dwelling, or has sexual intercourse, under scandalous circumstances with a woman who is not his wife, or cohabits with such woman in any other place.[23] Infidelity alone and even repeated and persistent acts of infidelity on the part of the husband, do not constitute proper grounds for filing an action for legal separation, and even if clearly proved by evidence would not justify the issuance of a decree. It would not therefore result in the automatic loss of custody on the part of the husband.

Deplorable as the disparity in the treatment of the husband and the wife might be, the point here, however, is that the question of marital infidelity on either side ought not be the decisive factor in ascertaining the best interests of the child and should not of itself determine the right to custody.

It must be pointed out at this juncture that apart from the punitive consequences enumerated in Article 106 of the Civil Code,[24] a decree of legal separation also results in the more extensive loss of parental authority by the losing spouse.[25] While the provision of Article 330 would seem to lead to the interpretation that such loss must be expressly ordered by the court in the judgment on legal separation, a review of the history of this

---

22 People v. Zapata, 88 Phil. 688 (1951).

23 REV. PENAL CODE, Art. 334.

24 Art. 106 provides in full:

The decree of legal separation shall have the following effects:

(1) The spouses shall be entitled to live separately from each other but the marriage bonds shall not be severed;

(2) The conjugal partnership of gains or the absolute community of property shall be dissolved and liquidated but the offending spouse shall have no right to any share of the profits earned by the partnership or community, without prejudice to the provision of Art. 176;

(3) The custody of the minor children shall be awarded to the innocent spouse, unless otherwise directed by the court in the interest of said minors, for whom said court may appoint a guardian;

(4) The offending spouse shall be disqualified from inheriting from the innocent spouse by intestate succession. Moreover, the provision in favor of the offending spouse made in the will of the innocent spouse shall be revoked by operation of law.

25 CIVIL CODE, Art. 330. Parental authority is the mass of rights and obligations which the parents have in relation to the persons and property of their children until their age of majority or emancipation. The rights include custody, the right to represent them in actions for their benefit, the right to correct them or punish them in moderation, the right to require respect and obedience, the right to administer their property, the right to give consent to their marriage. TOLENTINO, *op. cit. supra*, note 1 at 612. CIVIL CODE, Arts. 120, 316 and 320.

provision shows that the intention is really to effect such loss automatically upon the issuance of the decree.[26]

In this respect the consequences of committing adultery appear to be harsher when considered in a civil case for legal separation than in a criminal prosecution for the same offense. The criminal statute mitigates the liability

---

[26] It appears that there was a mistranslation of the provision of the Spanish Civil Code in the Title on Legal Separation of the Civil Code. While Art. 73 of the Spanish Civil Code read "20. *Quedar o ser puestos los hijos bajo la potestad y protección del cónyuge inocente,*" the Civil Code refers only to the lesser right of custody in Art. 106. Tolentino believes that the decree of legal separation must expressly provide for loss of parental authority in order to have such effect, 1 TOLENTINO, *op. cit. supra,* note 1 at 642; SANCHEZ ROMAN, *op. cit. supra,* note 9 at 1210-1211 states:

> 25f. *El divorcio — Dados los términos en que esta concebido el num. 2o del art. 169, al decir cuándo per sentencia firme, en pleito de divorcio, así se declara el padre, y en su caso la madre, pierden la potestad sobre sus hijos mientras duren los efectos de la misma, parece indispensable que la sentencia de divorcio haya de contener esas expresas declaraciones de pérdida de la patria potestad. Sin embargo, no debe entenderse así, principalmente por tres razones, a saber:*
>
> *1o. Porque no concuerda con el núm. 2o del art. 73 (1) que declara ministerio ex lege, ser uno de los efectos civiles de la sentencia de divorcio "el quedar o ser puestos los hijos bajo la patria potestad y proteccion del cónyuge inocente sin hacer depender esta consequencia legal del divorcio, de que se declare óno en la sentencia en que se decrete, y es desde luego dicho textò legal del núm. 2o del art. 73 más fundamental y comprensivo de esta doctrina que el miramente enunciativo de la causa del divorcio, que es el carácter de aquel num. 2o del art. 169.*
>
> *2o. Porque la pérdida de la patria potestad, si no fuera efecto civil que el divorcio produce de Derecho y tuviera que ser objeto de declaración especial en la sentencia para que se originase este resultado, es lógico que no tendría el divorcio tal consequencia de la pérdida de la patria potestad, si en la sentencia no se hubiera declarado así, ólo que es lo mismo, que dependería de este declaración judicial, y no de la ley, semejante resultado; sentido que no es admisible en buena doctrina, por cuya razon hay que subordinar, cualquiera que sea su contexto, este num. 2o del art. 169 áigual numero del 73.*
>
> *3o. Porque teniendo idénticos efectos legales las dos formas matrimoniales, canónica y civil, admitidas por el Código, y siendo esto de la pérdida de la patria potestad un efecto puramente civil, los Tribunales eclesiásticos, que son los competentes para decretar el divorcio en el matrimonio canócico (art. 80), carecen de competencia para resolver acerca de los efectos civiles de la nulidad del matrimonio y del divorcio, que solo pueden obtenerse ante los Tribunales ordinarios (art. 67); lo cual comprueba que no es necesario, ni siquiera posible, cuando del matrimonio canóico se trata, la observancia literal del num. 2o del art. 169, haciendo depender, en los casos de divorcio, la pérdida de la patria potestad, de que así se declare en la sentencia firme que lo decrete.*
>
> *Entiéndase completada la explicación de este texto y doctrina del Código con lo dicho en otro lugar (I) pudiendo concluir con la observación de que el divorcio cabe de sea considerado, respeto de la patria potestad: ya como causa de extinción, y en caso de divorcio decretado por culpabilidad común de ambos cónyuges, en el cual la muerte de uno no hace que renazca la patria potestad en el otro, sino que se extingue para los dos, sindo provistos los hijos del correspondiente tutor; ya como causa de suspensión, en el supuesto de divorcio decretado por culpa de uno solo de los cónyuges, en cuyo caso el inocente ejerce todos los derechos de patria potestad, pero a su muerte la recobra el culpable, si fuese el marido, y la adquiere en su condición subsidaria la mujer, no obstante haber estado la culpa de parte de ésta; ya como causa de recuperación, en el propio sentido de haberla pérdido el cónyuge culpable que la ejerciera — generalmente el marido — y recobrarla á la muerte del cónyuge inocente, o sea de ordinario, la mujer.*

of the accused when it appears that the offended party had abandoned her without legal justification.[27]

But evidence of circumstances of this nature is not admissible in legal separation proceedings. It does not matter that the husband had continually abused and maltreated his wife. Nor would it matter that he had abandoned her and failed to support her. All these might give rise to the right to bring an action for support,[28] for the dissolution of the conjugal partnership[29] or for the recovery of damages for deprivation of consortium,[30] but a single fact of demonstrable adultery would justify an action for legal separation and will visit upon the wife all the punitive affects that the decree automatically entails, including loss of custody and parental authority over minor children.

The same mechanical result takes place when the situation is reversed, that is, when the wife brings a successful action for legal separation on the ground of her husband's concubinage.

The crucial question is never articulated, namely, where is the child in all these and how are his or her interests ascertained and protected. The solution that the law offers implies either of two things: the best interests of the child is irrelevant in the consideration of legal separation cases or the best interests of the child are identical with his or her assignment to the plaintiff.

The parenthetical question may be raised whether or not this mechanistic resolution of conflict of interests between the spouses corresponds with a value that is shared by the community.

Reading the Chapter of the Civil Code on legal separation gives the cursory impression that its provisions are new and that the rules that are included in it had been the handiwork of the Code Commission that prepared its initial draft. This is at best only technically correct. When the Spanish Civil Code of 1889 was extended to the Philippines, the applicability of some of its parts was suspended by a *cumplase* of the then Spanish Governor-General Weyler,[31] and by judicial construction, the same were held to be the rules on divorce and the civil register.[32] The present chapter on legal separation is in fact a modified version of that chapter on divorce:[33] The assignment of the children to the innocent spouse was reflected in the divorce law passed during the American occupation of the Philippines.[34] Seen in this light, it becomes possible to understand that the rule on custody

[27] REV. PENAL CODE, Art. 333, par. 2.
[28] Goitia v. Campos Rueda, 35 Phil. 252 (1916).
[29] CIVIL CODE, Art. 191.
[30] Tenchavez v. Escaño, G.R. No. 19671, November 29, 1965, 15 SCRA 355 (1965); July 26, 1966, 17 SCRA 674 (1966).
[31] Benedicto v. de la Rama, 3 Phil. 34 (1903).
[32] *Id.* at 37.
[33] The Spanish Civil Code provided for both civil and ecclesiastical relative divorces.
[34] Act No. 2710 (1917).

of children in cases for legal separation does not necessarily represent the outcome of search for the consensus of the community. The rule therefore appears to represent an inertia of thinking, and not a conscious effort to reflect in policy the shared values of the society.[35]

The notion of penalty upon a party who is found guilty of committing a marital offense by, among other things, depriving such party of the custody of minor children is made more evident by the text of Article 73 of the Spanish Civil Code of 1889 which reads:

> Article 73. *La sentencia de divorcio producirá los siguientes efectos:*
>
> 1. *La separación de los cónyuges.*
>
> 2. *Quedar o ser puestos los hijos bajo la potestad y protección del cónyuge inocente.*
>
> *Si ambos fueron culpables, se proveerá de tutor a los hijos conforme de las disposiciones de este Código.*

The provision of Article 106 of the present Civil Code which also makes an automatic disqualification of the guilty spouse with respect to custody of minor children is almost identical with the above provision. It is clear that there had been a wholesale adoption of policy and philosophy.

B. *Non-legal separation cases*

Apart from legal separation proceedings, custody disputes may also arise when the parents are in fact separated, or when the child is in the custody of a third person and a parent wishes to recover custody.

While the best interest principle is repeatedly cited by court decisions, the morality test continue to be the predominating criterion in determining such interest. To a large extent, this is sanctioned by statutory and procedural rules.

Article 332 of the Civil Code provides:

> The courts may deprive parents of their authority or suspend the exercise of the same if they should treat their children with excessive harshness or should give them corrupting orders, counsels or examples, or should make them beg or abandon them.

---

[35] This is not the sole instance in which the Code Commission transferred wholesale to the Civil Code values of the Spanish Civil Code. Thus, in establishing conjugal partnership of gains to be the normal regime of property relations between spouses, it ignored a practice widespread in the Philippines of following absolute community of property, although in its own report, the Commission noted:

> According to established custom in the majority of Filipino families, the husband and wife consider themselves co-owners of all the property brought into and acquired during the marriage. Therefore, there is in fact an absolute community of property between the spouses in the Philippines.

TOLENTINO, *op. cit. supra,* note 1 at 471.

The Rules of Court states:

> Rule 99, Sec. 6. *Proceedings as to child whose parents are separated. Appeal.* — When husband and wife are divorced [36] or living separately and apart from each other and the question as to the care, custody and control of the child or children of their marriage is brought before a Court of First Instance[37] by petition or as an incident to any other proceedings, the court, upon hearing the testimony as may be pertinent, shall award the care, custody and control of each child as will be for its best interest, permitting the child to choose which parent it prefers to live with, if it be over ten years of age, unless the parent so chosen be unfit to take charge of the child *by reason of moral depravity, habitual drunkenness, incapacity, or poverty.* If, upon such hearing, it appears that both parents are improper persons to have the care, custody and control of the child, the court may either designate the paternal or maternal grandparent of the child, or his oldest brother or sister, or some reputable and discreet person to take charge of such child, or commit it to any suitable asylum, children's home or benevolent society. . . . Either parent may appeal from an order made in accordance with the provision of this section. (Emphasis added)

The use of the morality standard is best illustrated by the case of *Slade Perkins v. Perkins*.[38]

Idonah Slade Perkins and Eugene Arthur Perkins were married in Manila on January 3, 1914. From the marriage was born one daughter, Dora Perkins.

The parties lived together "in happiness and comity until the latter part of the year 1929 when family disputes originating from money destroyed the peace of the home." Attempts to negotiate the differences between them failed, upon which the wife filed an action against her husband. Several other suits followed, including that for separate maintenance and for the custody of her daughter Dora.

At the hearing, the child who was then sixteen years old expressed a preference to live with her mother. It appears, however, that upon the commencement of the various suits, the husband discovered a bundle of old letters written to the wife by a young man named Chambers in 1921.

The trial court held that these letters showed that the wife had been guilty of infidelity to her husband and awarded custody of the child to the latter.

The Supreme Court said:

> An act of infidelity so many years ago would not be conclusive at this time as to the moral fitness of the mother to the custody of a minor

[36] The reference to divorce here covers divorces of persons whose national laws permit divorce, or those who before the Civil Code took effect, validly obtained divorce either under the Japanese divorce law or Act No. 2710 (1917).

[37] In the chartered cities of Manila (Rep. Act No. 1401 [1955]), Iloilo (Rep. Act No. 4834 [1966]) and Quezon City (Rep. Act No. 4836 [1966]), Juvenile and Domestic Relations Courts have been established. Where these courts are operating, they have exclusive jurisdiction to try custody cases.

[38] 57 Phil. 217 (1932).

daughter. *The treasuring of such erotic letters does, however, throw some light upon the mental and moral state of the appellant.*

. . . . . .

It also appears in evidence that the appellant (wife) over the objection of the father, removed Dora from school and took her daily to court where she could listen to charges and countercharges that her parents were making against each other. The father desired the custody primarily to remove her from such atmosphere and place her in a young ladies' school in Switzerland, which school had tentatively been selected by the parents while living in a state of domestic tranquility. There is no question in the mind of this Court that the welfare of this child will be served by this action.

Two justices dissented on the ground that the moral depravity of the mother had not been duly established, and that, when the question of custody arises between the father and the mother, and the minor is of an age to make an intelligent and discreet choice, the courts must respect the minor's election.[39]

Cortes v. Castillo[40] goes very much the same way. A petition for *habeas corpus* was filed by the mother for the return of her children Arcadio and Bernardo, aged 4 and 6, who were in the custody of their paternal grandparents. Petitioner was married to Alejandro Herrera. On the complaint of her husband, she was criminally charged with the crime of adultery and was found guilty and given a jail sentence. The husband later on forgave her, secured her a pardon and lived with her a second time. Not long after the reconciliation, the husband again became suspicious of the conduct of his wife, and taking their two children with him, he went to live in the house of his mother. An action for divorce[41] was commenced by the husband but before judgment he died "an untimely and heroic death in the performance of his duties as a member of the police force of the City of Manila."[42]

The Supreme Court held:

The instant action may have been begun by the mother because of maternal affection for the children, and again, it may have been begun,

---

[39] The dissenters stated:

The trial court found marital infidelity and unscrupulous disregard for truth to attain the plaintiff's end. The holding of infidelity of the plaintiff to her husband is partly rejected here; and we think should be entirely disregarded, considering the lack of basis in certain letters written over ten years ago to establish the present unfitness of the mother for the duties of motherhood.

x x x x x x x x x

x x x considering plaintiff's frame of mind in a case of this character. . . .

x x x we very doubt if exaggerated testimony of the plaintiff establishes that moral depravity which the law requires before nullifying the choice of the child in choosing its custodian.

[40] 41 Phil. 466 ( ).

[41] Under Act No. 2710 (1917).

[42] The punitive character of the judgment is underscored by reference to the heroism of the husband as against the infidelity of the wife.

> as insinuated by counsel for the respondent, because of the sum of money gathered for the support of the children. Certain testimony was introduced intended to show that Maria Cortes had insufficient means to support the children. Ineffectual attempts to prove the continued immoral conduct of the mother were also made. *However, all of this may be, one fact remains and this is, that the mother had been found guilty of adultery.*
>
> Art. 171 of the Civil Code, . . . provides that parents who, by example set by them tend to corrupt their offspring, may be deprived by the courts of their parental authority. . . . This provision of law imposes a discretionary power on the courts, which should be made use of, with primary regard for the welfare of the minor. Both under the civil law and the common law the best interest of the child is the paramount consideration.

In *Mauricio v. Social Welfare Administration*,[43] where the conflict of custody was between a mother and a government agency, the Court of Appeals held:

> A mother who lives in a state of adultery with a man not her husband dismally lacks the basic moral qualifications that would entitle her to the custody of her child; it is too patent that she would be setting a corrupt example to the child.

Even in the recent case of *Medina v. Makabali*,[44] with which this writer agrees the Supreme Court felt impelled to justify its decision to sustain custody by a person to whom the mother left the child for seven years by noting:

> It may well be doubted what advantage the child could derive from being coerced to abandon respondent's care and love to stay with his mother and witness her irregular menage a trois with Casero and the latter's legitimate wife.

Effects of morality test

It is clear that the moral standard test established by the rules on legal separation and the jurisprudence in other custody cases equates marital infidelity or any conduct that casts doubt on the virtue of chastity of a party with unfitness to exercise custody. It also equates deprivation of custody for such reason with the best interests and welfare of the child.

Such an approach necessarily gives rise to a tendency on the part of the parties to concentrate on the production of evidence that relates mainly if not solely to their sexual and amorous activities and proclivities. In legal separation cases where recrimination is a defense, this tendency is aggravated, for proof of recrimination will result in the dismissal of the action and throw wide open the question of child custody. The result will be a moral weigh-in where the virtues and the vices of the parties will be pitted against each other. Custody therefore becomes the reward of righteousness and

---

[43] 4 C.A. Rep. 2d 85 (1963).
[44] G.R. No. 26953, March 28, 1969, 27 SCRA 502 (1969).

deprivation the sanction of evil or the relative weight of the two factors in the contest.

This writer is not prepared to assert that the commission of sexual offenses must altogether be ignored in deciding child custody cases. But certainly, 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. 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.[45]

Strict patria potestas rule

It is sound legal policy to create the strongest presumption in favor of parental authority of natural or blood parents over their minor children.[46] It is, however, questionable when the issue of child custody is resolved by the legalistic and mechanical application of the age-old principle of *patria potestas*.[47]

The precursor of decisions of this type is the case of *Reyes v. Alvarez*,[48] which continues to be cited to support decisions in custody cases.

Valentina Reyes was left by her parents in a convent run by nuns when she was two and a half years old. She remained there for thirteen years and there she received both her subsistence and education. She visited her parents each month and sometimes every two months for a day. In the thirteenth year, her parents wanted her to return to them permanently but Valentina did not want to leave the convent. Her parents, therefore, filed a petition for habeas corpus against the mother superior of the convent, who manifested that she had no interest in keeping the girl.

The Supreme Court held:

> They (the parents) cannot be denied the right to recover their daughter, and with greater reason, when it appears that the mother superior of said convent has not shown her intention to retain the girl.

---

[45] In recent years a television celebrity openly admitted to having given birth to a son without getting married. Two years ago, a movie actress issued a press release which landed in the front pages of Manila newspapers that she had given birth to a child with a person with whom she was not married. In urban areas where most of the legal disputes arise, there has been a perceptible change in people's attitudes towards sexual relations and illegitimate children but so far no empirical study has been made on the same.

[46] See CONST., Art. II, sec. 4.

[47] Flores v. Cruz, G.R. No. 8622, August 15, 1956, 52 O.G. 5112 (1956).

[48] 8 Phil. 723 (1907).

The doctrine was confirmed in the case of Asuncion Cruz who did not want to return to her mother from the custody of grandmother because the mother wanted to employ her as a housemaid,[49] a case where the mother entrusted her child to a guardian and in fact agreed at the time the child was delivered that the same be adopted by the guardian,[50] and where the child was delivered by the mother to another person for the purpose of assuring the child of support and education.[51]

The full import of the doctrine was articulated in the case of *Bacayo v. Calum*,[52] where the Supreme Court held:

> The dispute over the custody of the minor child is between her legitimate father and her legitimate grandparents, two parties who do not stand in the same degree of relationship with the minor, the former being closer to her than the latter. It should therefore be decided strictly on its legal merits, with complete disregard of sentimental reasons and conditions of affluence or poverty of the parties. Under the law, parental authority over unemancipated legitimate children is conferred upon the father and the mother. This authority is both a right and a duty. As a duty it cannot be waived. As a right it may be transferred to another or lost in the cases provided for by law.
>
> In the instant case, there is no showing that the petitioner has lost his parental authority over his daughter... by any of the causes provided for in the law. It is not claimed either that he is so totally destitute so as to be absolutely incapable of supporting said minor.... Respondents' only contention is that because of the tender years of the child, they could better take care of her than her father particularly because the latter has work and would only confide the care of the child to the aunt and a cousin. Such considerations in our opinion are insufficient to defeat the parental right of the petitioner to the custody of the minor.
>
> . . . . . .
>
> It is also possible that the minor would be much better taken care of if she were to stay in the possession of the respondents. *But, as stated elsewhere in this opinion, sentimental reasons and material and spiritual welfare of an unemancipated child are not decisive in the determination of the question who has the right to custody.*

Rounding up the cases that affirm parental authority over all factors is the case of *Olivia Samson*,[53] a battered child, who nevertheless was returned to her parents.

Olivia Samson, three and one-half years of age, was the legitimate daughter of Petronilo and Marina Samson. On April 12, 1951 she was living with her parents and three sisters at the family residence in Pasay City. At about 7:00 p.m. of that day, several Pasay City policemen, accompanied by the former housemaid of the Samsons, entered the premises of the resi-

---

[49] See note 47.

[50] Chu Tian v. Tian Nin, 95 Phil. 927 (1954).

[51] De la Cruz v. Lim Chai, C.A.-G.R. No. 14080-R, August 15, 1955, 51 O.G. 6327 (1955).

[52] G.R. No. 15273, August 20, 1957, 53 O.G. 8607 (1957).

[53] 48 O.G. 5368 (1952).

dence, searched the premises and found the child nude, tied with a rope to a water pipe at the toilet-bathroom of the house. The father was not at home but he arrived shortly afterwards. The policemen took away the child, brought her to the Pasay City Hall where she spent the night. The father followed her to the City Hall but could not bring Olivia back home as he himself was arrested and detained.

The next day, Olivia was taken to the National Bureau of Investigation where she was examined by the bureau doctors. She was found to be pale, with sunken eyes, emaciated and with high fever. Also found were pigmentations and cornifications on a portion of the left wrist and abrasions on her left forearm and the back of her thighs. She has some scars in the head. At the instance of the Pasay City Attorney, Olivia was brought to the University of the Philippines-Philippine General Hospital for treatment. She was discharged on April 24, 1951, when she was transferred to the Welfareville, an institution run by the Social Welfare Commission.

Petition for *habeas corpus* was filed by the father to compel the Social Welfare Administrator to deliver custody of the child to him.

The trial judge found that Mrs. Samson treated her child with excessive harshness on April 12, 1951. However, it ordered the Social Welfare Administrator to return the child to the custody of the father.

The Supreme Court held:

> In determining who should have custody of the child, various interests should be considered: those of the parents, of the persons to whom the custody of the child is entrusted, of the State, and of the child. Of these, the most important and controlling is that of the child for by the proper decision as to that, the other interests are best subserved. As to the State, there is clearly, a point beyond which it might not constitutionally go in interfering with the natural liberty of parents to direct the upbringing of their children.
>
> Again, may the welfare of the child be best served if she were to remain with the Social Welfare Commission? Mrs. Gertrudes Cabangan, chief of the children's ward, admitted that there are only about 60 nurses for the 1,200 children and that the children in the care of the commission have only wooden shoes. On the other hand, Olivia Samson is one of only four children of petitioner. The children are studying in schools of good standing. In case of doubt all presumptions favor the solidarity of the family. (Art. 220, Civil Code of the Philippines.) ... It has not been satisfactorily shown that Petronilo Samson was aware of, or tolerated the acts imputed to his wife, while there is good and competent evidence on record that the Samsons are financially able to care for and educate their children.

The Court then ruled that the custody of the child belongs to the father subject to visitation at reasonable hours of day by the respondent for a period not exceeding one year.

In all the foregoing cases, there existed peculiar circumstances that cast doubt on whether the best interests of the child would be met if it

continued living with blood parents. In a number of them, the children were separated for some length of time from such parents and have in fact manifested a desire to stay with persons in whose custody they have been left by the latter. In other words, whatever bonds of affection with and psychological dependence upon the blood parents might have existed appeared to have been lost and transferred to another or others with whom the child now identified. While the last cited case made grandiloquent reference to the best interests of the child, the court did not examine deeply the implication of the physical harm inflicted upon the child. It was too concerned to protect the notion of *patria potestas.*

Procedural delays

Original jurisdiction over child custody cases pertain to the Juvenile and Domestic Relations Courts in cities and provinces where such courts have been established and organized[54] and in other districts, to Courts of First Instance.[55]

Where the question of custody arises as an incident of legal separation proceedings, it is subject to the rule that trial of the principal case on the merits cannot commence until after the expiration of six months from the date of the filing of the petition.[56]

If the case is intensely contested, it may stay in the trial court for at least one year.[57] As Rule 99, Section 6 of the Rules of Court provides, the decision of the trial court is subject to appeal. Regular appeal passes through the Court of Appeals which reviews both questions of law and fact.[58] Appeal by certiorari on pure questions of law[59] goes directly to the Supreme Court. Appeals may also be taken from the Court of Appeals to the Supreme Court.[60] While no empirical studies have been made on the length of time that a case stays in courts of different jurisdiction, in recent years there has been growing expression of concern about the clogged dockets of the courts and the slowness with which the machinery of justice grinds in the Philippines.[61] Even habeas corpus cases[62] and criminal cases where the death penalty is imposed by the trial courts which are expressly ordained to enjoy precedence over other cases in the consideration of the courts are

54 See note 37.

55 RULES OF COURT, Rule 99, sec. 1.

56 CIVIL CODE, Art. 103.

57 While there has been no empirical study made of the length of time the cases pended in the trial court, the dates of filing and the dates of decisions of cases that reach the Supreme Court shows that one year is a conservative estimate. Thus, the case of Araneta v. Benitez-Araneta, which precipitated the case of Araneta v. Concepcion, *supra,* note 18, was filed in 1956 and was closed only in 1963.

58 RULES OF COURT, Rule 41.

59 RULES OF COURT, Rule 42.

60 RULES OF COURT, Rule 45.

61 Puno, *Innovations and Reforms in the Judicial System,* 6 J. INTEG. BAR PHIL. 203, 204 (1978).

62 For instance the case of Lacson v. San Jose Lacson, G.R. No. 23482, August 30, 1968, 24 SCRA 837 (1968), which was a *habeas corpus,* was initiated in 1963 and was decided only in 1968.

known to have suffered protracted delays even in the Supreme Court for one reason or another.[63] Except for habeas corpus proceedings to assert right to custody, therefore, other custody cases cannot claim a special right to preferential consideration by the courts.

While the earlier cases on child custody were decided by the Supreme Court almost within the same year that the cases were filed,[64] the periods of other cases have become much longer between filing and disposition.

Thus, the case of *Flores v. Cruz*,[65] which was a *habeas corpus* case originally brought on October 1954 was finally decided only on August 15, 1956.

Two recent cases dramatically illustrate the increasingly lengthier period for resolving the issue of custody.

In *Matute v. Macadaeg*,[66] an action for legal separation was brought by Armando Medel against Rosario Matute on the ground of the latter's adultery committed with his brother. On November 6, 1952 judgment granting legal separation was rendered awarding to Medel the custody of their four children Florencia, 12 years; Manuel, 10 years; Carmelita, 8 years; and Benito, 4 years.[67] Soon after the issuance of the decree, Armando went to the United States leaving the care of the children to his sister who was residing in Davao City. Rosario Matute subsequently lived there in order to be with her children. Armando returned to the Philippines late in 1954. In March 1955, the children joined their father in Cebu City. With his permission, Rosario brought the children to Manila in April 1955 to attend the funeral of her father. Armando alleged that he consented to the trip on condition that Rosario would return the children within two weeks. Rosario did not do so. Instead, on June 10, 1955, she filed in the civil case relating to the original action for legal separation, a motion praying that an order be issued awarding custody to her, in deference to the preference expressed by the children, on the ground that the three children who were then already 16, 14 and 12 years of age did not want to go back to their father because he was living with a woman other than their mother.

The judge denied the motion for custody and directed Rosario to deliver the children to Armando. From this order, Rosario went directly to the Supreme Court, invoking expressed preference of the children and the fact that her husband was living maritally with another woman.

---

[63] A number of death row prisoners did not have their cases resolved within ten years of submission of their cases to the Supreme Court.

[64] The case of Reyes v. Alvarez, *op. cit. supra*, note 48, for instance, was resolved both by the Court of First Instance and the Supreme Court in only six months.

[65] G.R. No. 8622, August 15, 1956, 52 O.G. 5112 (Aug., 1956).

[66] 99 Phil. 340 (1956).

[67] This is one of those cases where the tender age rule was not followed, but see, Lacson v. San Jose Lacson, *op. cit. supra*, note 60, where the Supreme Court insisted upon the tender age rule.

While conceding that insofar as it refers to the custody of the children, the decision is never final in the sense that it is subject to review at any time that the court deems it best for the interest of the minors, it was nevertheless the rule that until the judgment is reviewed and modified, the said award must stand. Using the technical argument that since the petition brought before the Supreme Court was one for certiorari, it was incumbent upon the petitioner to show abuse of discretion. Since there was no clear showing of that, the petition was dismissed, and the petitioner was ordered to return the children to their father without prejudice to filing the proper action to regain custody.

The significant facts here are that since the issuance of the decree of legal separation, the father had lived with his children for very brief periods of time while they stayed extensively in the company of their mother. Also, from April 1955, when the mother took the children to Manila until the case was decided in May 1956, the children were all along in the custody of the mother and they had expressed their preference to live with her. Since the petition was dismissed without prejudice to her filing the proper action, it is conceivable that upon compliance with the order of the Supreme Court, she would again initiate a new suit for custody in the Court of First Instance which would go through the whole route of appeals if either of the parties were dissatisfied with the judgments rendered by courts of different jurisdictions.

In *Lacson v. San Jose-Lacson*,[69] Alfonso Lacson and Carmen San Jose-Lacson were married on February 14, 1953. Out of the marriage were born four children.

On January 14, 1963 Carmen San Jose-Lacson left the conjugal home in Bacolod City and commenced to reside in Manila. On March 12, 1963 she filed a complaint in the Juvenile and Domestic Relations Court of Manila for custody of all her children as well as support.

However, the spouses succeeded in reaching amicable settlement with the assistance of their attorneys. On April 21, 1963 they filed a joint petition in the Court of First Instance of Negros Occidental which stipulated, among others:

> (c) The custody of the two older children named Enrique and Maria Teresa shall be awarded to petitioner Alfonso Lacson and the custody of the younger children named Gerrard and Ramon shall be awarded to petitioner Carmen San José-Lacson.

The judge rendered judgment in accordance with the compromise agreement.

On May 7, 1963, Carmen San José-Lacson filed a motion in the Juvenile and Domestic Relations Court of Manila alleging that she "entered

[68] G.R. No. 23482, August 30, 1968, 24 SCRA 834 (1968).
[69] G.R. No. 26953, March 28, 1969, 27 SCRA 502 (1969).

into and signed ... Joint Petition as the only means by which she could have immediate custody of the minor children ... and since all the children are now in her custody, the said custody in her favor be confirmed *pendente lite.*" On May 24, 1963 petitioner spouse opposed the said motion and moved to dismiss the complaint on the ground of *lis pendens* and *res judicata.* On May 28, 1963, the Juvenile and Domestic Relations Court issued an order sustaining petitioner's contention and dismissing the case. After denial of her motion for reconsideration, respondent spouse filed an appeal with the Court of Appeals where she raised, among other things, the issue of the validity of the compromise agreement. On October 14, 1964 the Court of Appeals certified the appeal to the Supreme Court since no hearing on the facts were held in the trial court and only questions of law pended on appeal.

In the meanwhile, respondent filed a motion for reconsideration of the judgment of the Court of First Instance on May 15, 1963. Petitioner filed opposition and asked for immediate execution of the judgment. The judge of first instance issued an order of execution of judgment on June 22, 1963. Respondent also filed an appeal from this order. The Court of Appeals certified the appeal to the Supreme Court on February 11, 1965.

On June 27, 1963, respondent also instituted certiorari proceedings before the Court of Appeals. She alleged that the Court of First Instance committed grave abuse of discretion in ordering immediate execution of the compromise judgment. She prayed for the issuance of injunction enjoining the respondents from enforcing the writ of execution, setting aside the compromise judgment of April 27, 1963, and awarding the custody of her two elder children to her. The Court of Appeals issued injunction. After hearing on certiorari, the Court of Appeals on May 11, 1964 promulgated a decision (1) declaring null and void the compromise agreement and judgment based thereon insofar as they related to custody of children Enrique and Teresa, (2) nullifying the order of execution. Petitioner appealed to the Supreme Court.

The Supreme Court rendered judgment on August 30, 1968.

With respect to the question of custody of the children, it ruled:

> It is not disputed that it was the JDRC which first acquired jurisdiction over the matter of custody and support of the children.... However, when the respondent spouse signed the joint petition on the same matter of custody and support of the children and filed the same with the CFI of Negros Occidental, she in effect abandoned her action in the JDRC. The petitioner spouse who could have raised the issue of *lis pendens* in abatement of the case filed in the CFI, but did not do so, had the right, therefore to cite the decision of the CFI and to ask for the dismissal of the action filed by respondent spouse in the JDRC, on the ground of *res judicata* and *lis pendens.* The JDRC acted correctly...in dismissing the case for custody and support....

We agree with the Court of Appeals, however, that the CFI erred in depriving the mother, the respondent spouse, of the custody of the two older children (both then below the age of seven.)

The Civil Code specifically commands in the second sentence of its Article 363 that "No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure."

. . . . . .

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

. . . . . .

The order dated April 27, 1963 of the CFI insofar as it awarded custody of the two older children who were six and five years old, respectively, to the father, in effect sought to separate them from the other. To that extent, therefore, it was null and void because clearly violative of Article 363 of the Civil Code.

. . . . . .

It might be argued — and correctly — that since five years have elapsed since the filing of these cases in 1963, the ages of the four children should now be as follows: Enrique — 11, Maria Teresa — 10, Gerrard — 9, and Ramon — 5. Therefore, the issue regarding the award of the custody of Enrique and Maria Teresa to petitioner spouse has become moot and academic. The passage of time has removed the prop which supports the respondent spouse's position.

Nonetheless, this court is loath to uphold the couple's agreement regarding the custody of the children.

Article 356 of the new Civil Code provides:

Every child:

(1) Is entitled to parental care;

(2) Shall receive at least elementary education;

(3) Shall be given moral and civic training by the parents or guardian;

(4) Has a right to live in an atmosphere conducive to his physical, moral and intellectual development.

It is clear that the above quoted legal provision grants to every child rights which are not and should not be dependent solely on the wishes, much less the whims and caprices of his parents. His welfare should not be subject to the parents' say so or mutual agreement alone. Where, as in this case, the parents are already separated in fact, the courts must step in to determine in whose custody the child can better be assured the rights granted to him by law. The need, therefore, to present evidence regarding this matter, becomes imperative. A careful scrutiny of the records reveals that no such evidence was introduced in the CFI. The latter court relied merely on the mutual agreement of the spouses-parents. To be sure, this was not a sufficient basis to determine the fitness of each parent to be the custodian of the children.

Besides, at least one of the children — Enrique, the eldest — is now eleven years of age and should be given the choice of the parent he wishes to live with.

. . . . . .

Accordingly, the decision dated May 11, 1964 and the resolution dated July 31, 1964 of the Court of Appeals in CA-G.R. 32384 (subject matter

> of G.R. L-23482), and the orders dated May 28, 1963 and June 24, 1963 of the Juvenile and Domestic Relations Court... are affirmed.
>
> G.R. L-23767 is hereby remanded to the Court of First Instance of Negros Occidental for further proceedings in accordance with this decision.

The significant aspects of the case are as follows:

1. The parties entered into an agreement respecting custody of their children the substance of which was never enforced by virtue of legal maneuvering with the result that the basic questions between the parties were not resolved until five years afterwards;

2. The Court of Appeals, following a strictly legalistic approach, voided the assignment of the two older children on the basis of the provision that the mother shall not be separated from her children below seven years of age, when at the time of the issuance of its decision, one of the children Enrique, was already eight years of age;

3. During all the time that the parties were engaging in various litigations the children were continuously in the custody of the mother;

4. After five years of litigation, the tender years principle was rendered moot and academic, and with respect to the two older children, the question of custody was back to square one, with the parties having all the right to a step-by-step appeal procedures in case they are dissatisfied by the judgments in the different levels of the judicial hierarchy.

5. The decision of the Supreme Court clearly indicates that the parties cannot enter into an agreement regarding the custody of their children but are compelled to present evidence as to who should have a better right to such custody for the guidance of the trial court who has the better right to determine such question.

Finally, attention must be drawn again to the provision of Art. 105 which gives the parents involved in legal separation proceedings the right to initially determine custody *pendente lite*. It can be assumed that if there were such an agreement, the parties would not adduce evidence on the question of custody at this stage. If one, however, considers the protracted maneuverings and the complex procedural alternatives open to the parties, the application of the tender age rule and the passing of such age by children in the meantime that courts of different jurisdictions consider the dispute as to proof and counterproof of marital infidelity, it is well to wonder at the wisdom of allowing the spouses to determine custody *pendente lite*. It is possible that the children would stay temporarily with the defendant spouse who stands to lose custody in the long run. The effects of prolonged stay in the company of one parent, only to be separated from such parent and the transfer of custody of a long separated and perhaps unfamiliar parent places in serious question the psychological effects of such process upon the child.

Recent decisions

Two relatively recent decisions of the Supreme Court on custody cases came to the same result while using radically different approaches to the question of custody. The first openly rejected the mechanical application of the mandatory rule on tender years and the supremacy of the doctrine of *patria potestas* and expressly declared the interest and welfare of the child as the paramount consideration in custody cases. The second rejected the notion that the child's welfare are proper grounds to deprive a mother of her "inherent right to parental authority," but nevertheless confirmed the custody of the foster parents on the ground of abandonment.

In *Medina v. Makabali*,[70] Zenaida Medina gave birth to an illegitimate son at the hospital owned by respondent Dr. Venancia Makabali on February 4, 1961. She left the child with the latter and never visited her son until August 1966 when she demanded custody of the child. Upon refusal by the foster mother, she filed a petition for *habeas corpus*.

The trial court called the boy, now five years old, to the witness stand. He did not recognize his blood mother and called his foster mother Mommy. When asked directly by the court who he preferred to stay with, the boy pointed to Dr. Makabali. On this basis, the trial court held that the best interests of the child demanded that he be left with his foster mother.

Appeal was taken to the Supreme Court which held:

> We see no reason to disturb the order appealed from. While our law recognizes the right of a parent to the custody of her child, courts must not lose sight of the basic principle that "in all questions on the care, custody, education, and property of the children, the latter's welfare shall be paramount. (Civil Code of the Philippines, Art. 363), and that for compelling reasons, even a child under seven may be ordered separated from the mother. (Do) This is as it should be, for in the continual evolution of legal institutions, the *patria potestas* has been transformed from the *jus vitae ac necis* (right of life and death) of the Roman law, under which the offspring was virtually a chattel of his parents, into a radically different institution, due to the influence of Christian faith and doctrines. The obligational aspect is now supreme. As pointed out by Puig Pena, now "there is no power, but a task; no sovereignty, but a sacred trust for the welfare of the minor."

While the decision did not elucidate the circumstances that led it to conclude that the best interests of the child were served by his remaining with the foster mother, the references to the evidence that the boy did not recognize his real mother and to his expressed preference to stay with the latter notwithstanding the fact that he was only five years old at the time is a watershed in the interpretation of the best interest principle.

Chua v. Cabangbang,[71] decided on the same day shows similar factual situation. Betty Chua Sy was one of several illegitimate children of Pacita

[70] G.R. No. 23253, March 28, 1969, 27 SCRA 791 (1969).

Chua by different men. It appears that she was given to Bartolome Cabangbang and his wife by one of the lovers of Pacita Chua with the latter's consent when she was four months old.

On June 6, 1967, when the child was five and a half years old, Pacita Chua, through a lawyer, sent a letter to the Cabangbangs demanding custody of the child. Failing to obtain custody, she filed a petition for *habeas corpus*.

The trial court found that the welfare of the child demanded that she remain in the custody of the Cabangbangs. On appeal the Supreme Court ruled:

> The petitioner correctly argues, however, that the reasons relied upon by the lower court — i.e., "petitioner is not exactly an upright woman" and "it will not be for the welfare of the child" — are not, strictly speaking, proper grounds in law to deprive a mother of her inherent right to parental authority over her child. It must be conceded that minor children — be they legitimate, recognized natural, adopted, natural by legal fiction or illegitimate, other than natural as specified in Art. 269 of the Civil Code — are by law under parental authority of both the father and the mother, or either the father or the mother, as the case may be. But we take the view that on the basis of the aforecited seemingly unpersuasive factual premises, the petitioner can be deprived of her parental authority.

The Court went on to state that abandonment constitutes a ground for deprivation of authority, and concluded that on the basis of the facts, it had been satisfactorily established that petitioner had abandoned her daughter.

Having laid down the legal premises for its decision to sustain the ruling of the lower court, the Supreme Court surprisingly continued:

> For, by her own admission, the petitioner has no regular source of income, and it is doubtful to say the very least, that she can provide the child with the barest necessities of life, let alone send her to school. There is no assurance at all that the alleged father, Sy Sia Lay — an unknown quantity as far as the record goes — would resume giving the petitioner support once she and the child are reunited. What would prevent the petitioner from doing again what she did before, i.e., give her away? These are of course conjectural, but when the welfare of a helpless child is at stake, it is the bounden duty of the courts — which they cannot shirk — to respect, enforce and give meaning and substance to a child's natural and legal right to live and grow in proper physical, moral and intellectual environment.

The inference that may be drawn from this paragraph is that it could have made a difference if the mother could prove income adequate to support the child. That petitioner could have introduced evidence that she would not again give her child away. That the provision of an environment considered by the court to be adequate to provide physical, moral and intellectual environment could have turned the decision around.

The inconsistency of the legal reasoning notwithstanding, the two cases at least constitute precedents to confirm custody in foster parents who have

cared for a child over a period of time as against a long absent parent who has no psychological bonds with such child.

The Cabangbang case with its multidirectional approach (in the paragraph quoted above it is possible to identify at least three criteria for determining custody, not necessarily consistent with each other) encapsulates the unsettled and volatile state of child custody law and may be invoked to use on an *ad hoc* basis the traditional approaches to resolve custody disputes.

Alternative policy approaches

The present state of laws and jurisprudence on child custody thus lays emphasis on a number of considerations, some openly indifferent to the question of best interests of the child, some paying lip service to it without establishing concrete criteria for determining the same. Significantly, the psychological needs of the child have been altogether ignored in these determinations.

Goldstein, Freud and Solnit propose on the basis of psychoanalytic theory that family integrity (and this writer understands this to include the upholding of *patria potestas* in the normal course of things), deserves recognition and protection because it is only in this way that a child's psychological ties with parents can be developed and maintained.[71]

The principle precludes intrusion into an ongoing family relationship except on the most serious grounds.[72] Family relationship includes not only that which exists between blood or legal families, but between persons who function as such even if no kinship or legal ties exist. Poverty[73] or illicit sexual relations alone should not justify the separation of a child from its psychological parents.[74]

Where separating parents can agree on child custody, the courts must not review their decision.[75]

Where there is a dispute between parents who are separated or who are in the process of separating, or custody, is contested by any other party the child must be assigned to the person who holds the most promise of meeting the child's psychological needs.[76]

While the law must accord high respect for biological and legal parent-child relationship, it is possible that those who possess parental rights as a

---

[71] GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 9-10 (1978).

[72] *Id.*, Chapter 5.

[73] If the poverty test is strictly used, 60-70% of the Filipinos will be disqualified from the right to custody. Poverty, alone, in fact need not be the decisive factor in the determination of child custody cases. A child's right to continued support from other parent should secure the material needs of the child even if custody were awarded to an impoverished parent.

[74] GOLDSTEIN, FREUD & SOLNIT, *op. cit. supra*, note 71 at 33.

[75] *Id.* at 6.

[76] *Id.* at 10.

consequence thereof will not be able to establish or may lose psychological ties with the child. This happens when parents abandon their children or are absent "too long."[77] In these instances, it is possible that the child may establish psychological bonds with a foster parent, the disruption of which will have adverse consequences on the child's emotional, psychological and social development.[78] It is therefore important that the law extend protection to this relationship even as against the assertion of the traditional doctrine of *patria potestas.*

Where dispute over custody of a child must be resolved, it must be done in an expeditious manner and with the most immediate finality.

Recommendations

The highest value in the consideration of the question of child custody must be the best interest of the child. The best interests of the child are such conditions as are most congenial to its feelings of security and most promotive of its psychological and emotional development. In undertaking to reform the law in this particular area, therefore, the rules or policies that ignore this value or subordinate it to tradition must be discarded or modified.

To this end, and in accordance with the above guidelines, the following specific proposals are made:

1. Amend Article 106(3) of the Civil Code to read:

> (3) Custody of the minor children shall be determined in the first instance by the spouses whose agreement shall be final.
>
> Whenever the spouses cannot agree on the custody of minor children, the award shall be made on the basis of the children's best interests.
>
> In determining the best interests of the child, the court shall endeavor to determine who between the two parents is the psychological parent of the child. For this purpose, the court shall ask the child its parent of preference.
>
> When both parents are psychological parents and the child does not indicate any preference, the parent who holds the most promise to meet the child's psychological needs shall have custody.

2. Article 330(2) should be amended to read as follows:

> (2) When final judgment in a legal separation case confirms the agreement of the spouses to assign the child to the other spouse or when such judgment determines such other spouse to be the psychological parent of the child.
>
> (3) When he or she should abandon the child and does not establish or loses any psychological bond with such child. A parent who abandons the child for a period of eighteen months or longer shall

---

[77] GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 18 (1980).

[78] *Id.* at 37.

> be presumed to have lost his or her psychological bonds with such child.

Article 332 should be amended to delete abandonment as a ground for filing a judicial action to terminate parental authority because under Article 330, it becomes an automatic ground for losing such custody.

A new article should be included in Title IX on Parental Authority of the Civil Code to read as follows:

Article ..... . Parental authority shall also be exercised by persons who have become the psychological parents of the child by virtue of the child's extended stay in their company either by reason of the prolonged absence of the child's blood or legal parents or by the latter's abandonment of their child.

Rule 99, Sec. 6 of the Rules of Court should be amended to read as follows:

> When the husband and wife are divorced or living separately, and the question as to the care, custody, and control of the children is brought before a Court of First Instance or Juvenile and Domestic Relations Court by petition or as an incident to any other proceedings, the court, upon hearing the testimony as may be pertinent, shall award the care, custody and control of each child as will be for its best interest, permitting the child to choose which parent it prefers, as long as the child is able to express such choice.

The above provision deletes the phrases "if it be over ten years of age" and "unless the parent so chosen be unfit to take charge of the child by reason of moral depravity, habitual drunkenness, incapacity or poverty."

The new provision would allow the child to choose its parent of preference as long as it can express a preference, thus assuring that if a choice were made, it would more or less assure that a child is with a psychological parent. The deletion of the grounds for ignoring the selection of the child will remove vague and broad grounds for disrupting an ongoing psychological relationship. Such interference, while generally rationalized under the best interest clause, mostly represent the peculiar preferences of a judge or a small group of people in the community and have no or remote relation with the best interest of the child.

The same section should also be amended to read:

The decision of the Court of First Instance or the Juvenile and Domestic Relations Court shall be appealable by certiorari to the Supreme Court. (Or Court of Appeals for Domestic Relations).

This provision is intended to limit the time within which the question of child custody pends determination. Since the Supreme Court itself is overloaded with unresolved cases, perhaps it is a better alternative to organize a specialized court of appeals to handle appeals of this nature.

Much remains to be done. The cases reviewed in this paper constitute mostly decisions of the Supreme Court and some decisions of the Court of Appeals. A larger empirically based study is clearly needed. But no systematic effort has so far been made to study and analyze determinations made by Courts of First Instance and Juvenile and Domestic Relations Court, where most of the cases end. No follow-up studies have been made on the effects of adjudication on children subject to these decisions. The proposals here are but a small beginning in the way of changing the most patently objectionable features of law and court decisions. More extensive and more focused examinations of the problems relating to child custody will have to be made to come closer to the goal of maximum protection of the child's best interests.