THE CIVIL CODE OF THE PHILIPPINES (REPUBLIC ACT NO. 386, AS AMENDED)

PRELIMINARY TITLE

CHAPTER 1

Effect and Application of Laws

Art. 1. This Act shall be known as the "Civil Code of the Philippines." (n)

COMMENTS:

§ 1. The Civil Code of the Philippines

[1.1] Code defined
[1.2] History of Philippine Civil Code
[1.3] Sources of Civil Code
[1.4] Physical or mechanical composition
[1.5] Effectivity of Civil Code

[1.1] Code Defined

A "code" is a collection of laws of the same kind; a body of legal provisions referring to a particular branch of law. A "civil code," therefore, is a collection of laws which regulate the private relations of the members of civil society, determining their respective rights and obligations, with reference to persons, things and civil acts.[1]

[1.2] History of Philippine Civil Code

The first civil code in force in the Philippines was the "Civil Code of Spain of 1889" extended to this country by Royal Decree of July 31,

[1] 1 Tolentino, Civil Code, 1990 ed., p. 11.

1889. It became effective on December 7, 1889. This was followed by Republic Act No. 386, which was approved by Congress on June 18, 1949. Not all our civil laws, however, are to be found in the Civil Code of the Philippines. Several civil laws are scattered in the various special laws promulgated by the legislature.

[1.3] Sources of Civil Code

The following are the sources of the present civil code: (1) the Spanish Civil Code of 1889; (2) the codes, laws, and judicial decisions, as well as the work of jurists of other countries; (3) doctrines laid down by the Supreme Court of the Philippines; (4) Filipino customs and traditions; (5) Philippine statutes; and (6) the Code Commission itself.

[1.4] Physical or Mechanical Composition

The Civil Code of the Philippines consists of 2,270 articles divided into four books. Book I deals with Persons; Book II with Property, Ownership and Its Modifications; Book III with the Different Modes of Acquiring Ownership; and Book IV with Obligations and Contracts. Take note, however, that The Family Code of the Philippines repeals Articles 52 to 304, 311 to 355, and 397 to 406 of Book I. Articles 305 to 310; 356 to 396; and 407 to 413 are not repealed.

[1.5] Effectivity of Civil Code (R.A. No. 386)

According to several cases decided by the Supreme Court, the date of effectivity of the Civil Code of the Philippines was August 30, 1950.[2] However, this date was exactly one year after the Official Gazette publishing the Code was released for "circulation," the said release having been made on August 30, 1949. This ruling with respect to the effective date seems to be contrary to the provisions of the Civil Code itself which states that "[t]his Code shall take effect one year after such publication,"[3] not after circulation.

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[2]Lara vs. Del Rosario, 94 Phil. 778; Raymundo vs. Penas, 96 Phil. 311; Camporendo vs. Aznar, 102 Phil. 1055.

[3]Art. 2, NCC prior to amendment by E.O. No. 200.

Art. 2. Laws shall take effect after fifteen days following the completion of their publication either in the Official Gazette, or in a newspaper of general circulation in the Philippines, unless it is otherwise provided. (As amended by E.O. No. 200)

COMMENTS:

§ 2. Effectivity of Laws

[2.1] In general
[2.2] Laws providing for its own effectivity
[2.3] Computation of 15-day period
[2.4] When law is silent
[2.5] Publication requirement
[2.6] Where to publish
[2.7] Publication in full
[2.8] Meaning of "newspaper of general circulation"
[2.9] Meaning of clause "unless it is otherwise provided" in Art. 2
[2.10] Effective immediately upon approval
[2.11] Reduction or extension of 15-day period
[2.12] Meaning of term "laws" in Article 2

[2.1] In General

A law may provide for its own effectivity. If the law is silent as to its own effectivity, then it shall take effect only after fifteen (15) days following its complete publication.

[2.2] Laws Providing For Its Own Effectivity

An example of a law that provides for its own effectivity is the "Family Code of the Philippines" (Executive Order No. 209). Article 257 of the Family Code provides that the Code shall take effect one (1) year after the completion of its publication in a newspaper of general circulation, as certified by the Executive Secretary, Office of the President. Its publication in the Manila Chronicle, a newspaper of general circulation, was completed on August 4, 1987. Thus, in Memorandum Circular No. 85 dated November 7, 1988, it was clarified that the Code took effect on August 3, 1988, and not on August 5, 1988.

[2.3] Computation of the 15-Day Period

The 15-day period may either be on the 15th day or on the 16th day depending on the language used by Congress in fixing the effectivity date of the statute.

[2.3.1] **15th Day:** If the law declares that it shall become effective *"15 days after its publication,"* it means that its effectivity is on the 15th day after such publication.[4]

For example:

Sec. 28 of Republic Act No. 7659 ("An Act To Impose The Death Penalty On Certain Heinous Crimes") provides:

> "Sec. 28. This Act shall take effect fifteen (15) days after its publication in two (2) national newspapers of general circulation. The publication shall not be later than seven (7) days after the approval hereof."

Thus, in **People vs. Simon**[5] and in **People vs. Godoy**,[6] the Supreme Court ruled that R.A. No. 7659 took effect on December 31, 1993, that is, fifteen days after its publication in the December 16, 1993 issues of the Manila Bulletin, Philippine Star, Malaya and Philippine Times Journal, and not on January 1, 1994 as is sometimes misinterpreted.

[2.3.2] **16th Day:** If the law declares that it shall be effective "after 15 days following its publication," its effectivity is on the 16th day thereafter.[7]

For example:

Sec. 8 of Republic Act No. 7691 ("An Act Expanding the Jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts, etc.") provides:

> "Sec. 8. This Act shall take effect fifteen (15) days FOLLOWING its publication in the Official Gazette or in two (2) national newspapers of general circulation."

In Administrative Circular No. 09-94 issued by the Supreme Court on June 14, 1994, the Court declared that R.A. No. 7691 became effective on April 15, 1994, fifteen (15) days following its publication in the Malaya and in the Times Journal on March 30, 1994.

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[4]Footnote No. 11 in People vs. Simon, 234 SCRA 555 (1994).
[5]234 SCRA 555, 569 (1994).
[6]250 SCRA 676, 732 (1995).
[7]Footnote No. 11 in People vs. Simon, 234 SCRA 555 (1994).

[2.4] When Law Is Silent

When the law is silent as to its effectivity, then it shall take effect after fifteen (15) days following the completion of its publication.[8]

For example:

In **GSIS vs. Commission on Audit**,[9] a question as to the effectivity of Executive Order No. 79 arose. The law is silent as to its effectivity. In said case, the Court ruled:

> "The question that arises is when is the executive order effective? The President issued the executive order on December 2, 1986. It was published in the Official Gazette on December 22, 1986.

Thus, E.O. No. 79 is effective fifteen (15) days following its publication in the Official Gazette, or on January 07, 1987. xxx"

[2.5] Publication Requirement

Obviously, when the law does not provide for its own effectivity then it must be published because the date of publication is material in determining the law's effectivity. If the law, however, provides for its own effectivity, may it become effective even without publication?

In previous decisions,[10] the Supreme Court ruled that publication in the Official Gazette is necessary only in those cases where the legislation itself does not provide for its effectivity date — for then the date of publication is material in determining the date of effectivity of the law, which is the 15th day following its publication — but not when the law itself provides for the date when it goes into effect.

Then came the celebrated case of **Tañada vs. Tuvera**,[11] wherein the Supreme Court abandoned the doctrine in *Askay* and related cases. In the *Tañada* case, the Court ruled that Article 2 of the Civil Code does not preclude the requirement of publication in the Official Gazette even

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[8]Art. 2, NCC.

[9]301 SCRA 731, 736 (1999).

[10]Askay vs. Cosalan, 46 Phil. 179; Balbuna vs. Sec. of Education, L-14283, Nov. 29, 1960; Camacho vs. CIR, 80 Phil. 848; Mejia vs. Balolong, 81 Phil. 486; Republic of the Phil. vs. Encarnacion, 87 Phil. 843; Phil. Blooming Mills vs. Social Security System, 17 SCRA 1077.

[11]136 SCRA 27 (1985).

if the law itself provides for the date of its effectivity since the clear object of the law is to give the general public adequate notice of the various laws which are to regulate their actions and conduct as citizens. Without such notice and publication, there would be no basis for the application of the maxim *"ignorantia legis non excusat."* It would be the height of injustice, according to the Court, to punish or otherwise burden a citizen for the transgression of a law of which he had no notice whatsoever, not even a constructive one.

The contention that only laws which are silent as to their effectivity date need be published in the Official Gazette for their effectivity is manifestly untenable. The proviso "unless it is otherwise provided" in Article 2 of the Civil Code perforce refers only to a law that has been duly published pursuant to the basic constitutional requirements of due process.[12]

[2.6] Where to Publish

In the motion for reconsideration in the *Tañada* case, a question arose as to where the publication must be made. Must the publication be effected only in the Official Gazzete? This question was answered by the Supreme Court in the resolution of the motion for reconsideration in the **Tañada vs. Tuvera** case.[13] The court resolved the issue by saying that pursuant to the Civil Code and the Revised Administrative Code, publication must be effected in the Official Gazette and not in any other medium. Because of this ruling, E.O. No. 200 was passed by President Corazon Aquino on June 18, 1987, amending Section 2 of the Civil Code. Pursuant to this amendatory law, publication of laws may now either be in the Official Gazette or in a newspaper of general circulation in the Philippines.

[2.7] Publication in Full

Publication must be in full or it is no publication at all since its purpose is to inform the public of the contents of the laws.[14]

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[12]Concurring Opinion of Justice Teehankee in Tañada vs. Tuvera, 136 SCRA 27.
[13]146 SCRA 446, promulgated on December 29, 1986.
[14]Tañada vs. Tuvera, 146 SCRA 446, 454.

[2.8] Meaning of "Newspaper of General Circulation"

To be a newspaper of general circulation, it is enough that it is published for the dissemination of local news and general information, that it has a bona fide subscription list of paying subscribers, and that it is published at regular intervals.[15] The term "newspaper of general circulation" does not mean that it is a newspaper with the largest circulation. The fact that there are other newspapers having larger circulation is unimportant.[16]

[2.9] Meaning of Clause "Unless It Is Otherwise Provided" in Article 2

The clause "unless it is otherwise provided" refers to the date of effectivity and not to the requirement of publication itself, which cannot in any event be omitted. This clause does not mean that the legislature may make the law effective upon approval, or on any other date, without its previous publication. It is not correct to say that under the disputed clause publication may be dispensed with altogether. The reason is that such omission would offend the due process insofar as it would deny the public knowledge of the laws that are supposed to govern it. Surely, if the legislature could validly provide that a law shall become effective immediately upon its approval notwithstanding the lack of publication (or after an unreasonable short period after publication), it is not unlikely that persons not aware of it would be prejudiced as a result; and they would be so not because of a failure to comply with it but simply because they did not know of its existence.[17]

[2.10] Effective Immediately Upon Approval

A statute which by its terms provides for its coming into effect immediately upon approval thereof, is properly interpreted as coming into effect immediately upon publication thereof in the Official Gazette as provided in Article 2 of the Civil Code. Such statute, in other words, should not be regarded as purporting literally to come into effect immediately upon its approval or enactment and without need of publica-

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[15] Fortune Motors (Phils.) Inc. vs. Metropolitan Bank and Trust Company, 265 SCRA 72.
[16] Basa vs. Mercado, 61 Phil. 632.
[17] Tañada vs. Tuvera, 146 SCRA 446 (1986).

tion. For so to interpret such statute would be to collide with the constitutional obstacle posed by the due process clause.[18]

[2.11] Reduction or Extension of 15-Day Period

The legislative may, in its discretion, provide that the usual 15-day period shall be shortened or extended. For example, the Civil Code did not become effective after fifteen days from its publication in the Official Gazette but "one year" after its publication.[19]

[2.12] Meaning of Term "Laws" in Article 2

The term "laws" should refer to all laws and not only to those of general application, for strictly speaking, all laws relate to the people in general albeit there are some that do not apply to them directly. All statutes, including those of local application and private laws, shall be published as a condition for their effectivity.[20]

[2.12.1] PDs and EOs, Included: Covered by these rules are presidential decrees and executive orders promulgated by the President in the exercise of legislative powers, whenever the same are validly delegated by the legislature or directly conferred by the Constitution.[21]

[2.12.2] Administrative Rules and Regulations: Administrative rules and regulations are required to be published if their purpose is to enforce or implement existing laws pursuant also to a valid delegation. But if the regulations are merely interpretative and those regulations which are merely internal, *i.e.*, those that regulate only the administrative agency's personnel and not the public, they are not required to be published. Neither is publication required of the so-called letters of instruction issued by administrative superiors concerning the rules or guidelines to be followed by their subordinates in the performance of their duties.[22]

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[18]Concurring Opinion of Justice Feliciano in Tañada vs. Tuvera, 146 SCRA 446, 458.
[19]Tañada vs. Tuvera, 146 SCRA 446.
[20]Tañada vs. Tuvera, 146 SCRA 446, 453.
[21]*Id.*
[22]*Id.*

[2.12.3] Monetary Board Circulars: Circulars issued by the Monetary Board are required to be published if they are meant not merely to interpret but to "fill in the details" of the Central Bank Act which that body is supposed to enforce.[23] As a rule, circulars which prescribe a penalty for their violation should be published before becoming effective, this on the general principle and theory that before the public is bound by its contents, especially its penal provisions, a law, regulation, or circular must first be published, and the people officially and specifically informed of said contents and the penalties for violation thereof.[24] However, circulars which are mere statements of a general policy as to how the law should be construed do not need publication in the Official Gazette for their effectivity.[25]

[2.12.4] Municipal Ordinances: Municipal ordinances are not covered by Article 2 of the Civil Code but by the Local Government Code.

[2.12.5] Supreme Court Decisions: The term "laws" do not include decisions of the Supreme Court because lawyers in the active law practice must keep abreast of decisions, particularly where issues have been clarified, consistently reiterated and published in advanced reports and the SCRA.[26]

Art. 3. Ignorance of the law excuses no one from compliance therewith. (2)

COMMENTS:

§ 3. Conclusive Presumption of Knowledge of Laws

[3.1] Presumption of knowledge of laws
[3.2] Illustration of application of principle
[3.3] Presupposes publication
[3.4] Laws covered
[3.5] Ignorance of law vs. ignorance of fact
[3.6] Difficult questions of law

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[23] *Id.*
[24] People vs. Que Po Lay, 50 O.G. 4850.
[25] Victorias Milling Co. vs. Social Security Commission, L-16704, March 17, 1962.
[26] Roy vs. CA, G.R. No. 80718, Jan. 29, 1988.

[3.1] Presumption of Knowledge of Laws

The presumption of knowledge of laws under Article 3 of the Civil Code is conclusive. Everyone is conclusively presumed to know the law. Furthermore, actual notice is not required since constructive notice is sufficient. Article 3 is based on the constructive notice that the provisions of the law are ascertainable from the public and official repository where they are duly published. While the presumption is very far from reality, the same has been established because of the obligatory force of law. Evasion of the law would be facilitated, and the administration of justice defeated, if persons could successfully plead ignorance of the law to escape the legal consequences of their acts, or to excuse non-performance of their legal duties. The rule is, therefore, dictated not only by expediency but also by necessity.

[3.2] Illustration of Application of Principle

In **Marbella-Bobis vs. Bobis**,[27] where the accused is prosecuted for the crime of bigamy for not obtaining a judicial declaration of nullity of his first marriage before entering into another marriage, the Supreme Court declared: "Ignorance of the existence of Article 40 of the Family Code cannot even be successfully invoked as an excuse. The contracting of a marriage, knowing that the requirements of the law have not been complied with or that the marriage is in disregard of a legal impediment, is an act penalized by the Revised Penal Code. The legality of a marriage is a matter of law and every person is presumed to know the law."

[3.3] Presupposes Publication

The conclusive presumption that every person knows the law presupposes that the law has been published if the presumption is to have any legal justification at all.[28] Without such notice and publication, there would be no basis for the application of the maxim *"ignorantia legis non excusat."* It would be the height of injustice to punish or otherwise burden a citizen for the transgression of a law of which he had no notice whatsoever, not even a constructive one.[29]

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[27] 336 SCRA 747, 755 (2000).

[28] Tañada vs. Tuvera, 146 SCRA 446.

[29] Tañada vs. Tuvera, 136 SCRA 27.

[3.4] Laws Covered

The laws referred to under Article 3 of the Civil Code are those of the Philippine laws.[30] Article 3 applies to all kinds of domestic laws, whether civil or penal, substantive or remedial. However, the article is limited to mandatory and prohibitory laws.[31] It does not include those which are merely permissive.

[3.4.1] Not Applicable to Foreign Laws: There is no conclusive presumption of knowledge of foreign laws. Even our courts cannot take judicial notice of them. They must be specially alleged and proved.[32] Thus, ignorance of a foreign law will not be a mistake of law but a mistake of fact.

[3.4.2] Doctrine of Processual Presumption: In a long line of decisions, the Supreme Court adopted the well-imbedded principle in our jurisdiction that there is no judicial notice of any foreign law. A foreign law must be properly pleaded and proved as a fact. Thus, if the foreign law involved is not properly pleaded and proved, our courts will presume that the foreign law is the same as our local or domestic or internal law. This is what we refer to as the *doctrine of "processual presumption."*[33]

[3.5] Ignorance of Law vs. Ignorance of Fact

While ignorance of the law is no excuse, ignorance of fact may excuse a party from the legal consequences of his conduct.

For example: "A," after the war, could not find his wife, and believing her to be dead, married a second time. The first wife turned out to be alive. Is "A" liable for bigamy? ANS: NO. "A" believed that his first wife was dead, and that was a well-founded belief, although it was subsequently proved to be erroneous. It was a mistake of fact and not of law.[34] While ignorance of the law is no excuse, ignorance of fact may excuse a party from the legal consequences of his conduct.

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[30]Bank of America, NT & SA vs. American Realty Corp., 321 SCRA 659, 674 (1999).

[31]Consunji vs. CA, G.R. No. 137873, April 20, 2001.

[32]Adong vs. Cheong, 43 Phil. 43; Sy Joc Lieng vs. Syquia, 16 Phil. 137.

[33]Bank of America, NT & SA vs. American Realty Corp., *supra*.

[34]US vs. Enriquez, 32 Phil. 202; Note, however, that under the Family Code the present spouse is required to obtain a judicial declaration of presumptive death.

[3.6] Difficult Questions of Law

In specific instances provided by law, mistake as to difficult legal questions has been given the same effect as a mistake of fact. For example, Article 526 of the Civil Code provides that *"mistake upon* a *doubtful or difficult question* of *law may be the basis* of *good faith."* In a decision of the Supreme Court, it was held that a lawyer cannot be disbarred for an honest mistake or error of law.[35]

Art. 4. Laws shall have no retroactive effect, unless the contrary is provided. (3)

COMMENTS:

§ 4. Prospective Application of Laws

[4.1] Reinstatement of principle
[4.2] Retroactive law, explained
[4.3] Purpose of the provision
[4.4] General rule: prospectivity
[4.5] Exceptions to general rule
[4.6] Law that provides for its retroactivity
[4.7] Penal laws favorable to accused
[4.8] Procedural or remedial laws
[4.9] Curative laws
[4.10] Law creating new substantive rights

[4.1] Reinstatement of Principle

Laws shall have prospective effect unless the contrary is expressly provided.[36]

[4.2] Retroactive Law, Explained

A retroactive law is one intended to affect transactions which occurred, or rights which accrued, before it became operative, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence.

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[35]In re Filart, 40 Phil. 205.
[36]Sec. 19, Chapter 5, Book I of the Administrative Code of 1987.

[4.3] Purpose of the Provision

This rule is related to Article 3. The obligatory force of law presupposes that it has been promulgated and made known to the citizen; hence, a law that has not yet become effective cannot be considered as conclusively known by the people.[37] To make the law binding even before it has taken effect may lead to arbitrary exercise of the legislative power.[38]

[4.4] General Rule: Prospectivity

In general, laws are to be construed as having only prospective operation. *Lex prospicit, non respicit.*[39]

[4.5] Exceptions to General Rule

In the following instances, laws may be given retroactive effect: (1) if the law itself provides for retroactivity; (2) penal laws favorable to the accused; (3) if the law is procedural; (4) when the law is curative; and (5) when the law creates new substantive rights.

[4.6] Law That Provides For Its Retroactivity

The law itself may provide for its retroactivity.[40] This is the meaning of the clause "unless the contrary is provided" in Article 4 of the Civil Code. The rule that a statute will be given retroactive effect, if it so expressly provides, has two exceptions with a constitutional basis: (1) when the retroactivity of a penal statute will make it an ex *post facto law*; and (2) when the retroactive effect of the statute will result in impairment of obligation of contracts.

[4.6.1] Ex-Post Facto Law: Under Sec. 22, Article III of the 1987 Philippine Constitution, Congress is prohibited from enacting *ex post facto* laws. Basically, an *ex post facto* law is one that would make a previous act criminal although it was not so at the time it was committed. To be an *ex post facto*, the law must: (1)

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[37] 1 Tolentino, Civil Code, 1990 ed., p. 23.
[38] *Id*.
[39] Ortigas & Co., Ltd. vs. CA, 346 SCRA 748 (2000).
[40] Art. 4, NCC.

refer to criminal matters; (2) be retroactive in its application; and (3) prejudicial to the accused.

[4.6.2] Non-Impairment of Obligation of Contracts: Under Sec. 10, Art. III of the 1987 Philippine Constitution, Congress is prohibited from passing laws that will impair the obligation of contracts. A law impairs an obligation of contract if it has retroactive application so as to affect existing contracts concluded before its enactment.

[4.6.2.1] Non-Impairment of Contracts, General Rule: Only laws existing at the time of the execution of the contract are applicable thereto and not later statutes, unless the latter are specifically intended to have retroactive effect. A later law which enlarges, abridges, or in any manner changes the intent of the parties to the contract necessarily impairs the contract itself and cannot be given retroactive effect without violating the constitutional prohibition against impairment of contracts.[41]

[4.6.2.2] Exercise of Police Power, Exception to Rule: The foregoing principles mentioned in *supra* §§ 4.6.2 and 4.6.2.1 admit of certain exceptions. One involves police power. A law enacted in the exercise of police power to regulate or govern certain activities or transactions could be given retroactive effect and may reasonably impair vested rights or contracts.[42] Police power legislation is applicable not only to future contracts, but equally to those already in existence.[43] Non-impairment of contracts or vested rights clauses will have to yield to the superior and legitimate exercise by the State of police power to promote the health, morals, peace, education, good order, safety, and general welfare of the people.[44] Moreover, statutes in exercise of valid police power must be read into every contract.[45]

[4.7] Penal Laws Favorable to Accused

Penal laws shall have a retroactive effect insofar as they favor the person guilty of a felony, who is not a habitual delinquent, although at

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[41]Ortigas & Co., Ltd. vs. CA, 346 SCRA 748 (2000).
[42]*Id.*
[43]*Id.*
[44]*Id.*
[45]*Id.*

the time of the publication of such laws a final sentence has been pronounced and the convict is serving the same.[46]

The case of **People vs. Valdez**[47] is a good example of the application of this principle. In this case, the accused was found guilty by the trial court of two crimes: (1) murder for which he was sentenced to suffer the death penalty; and (2) illegal possession of firearms and ammunition under P.D. No. 1866 for which he was sentenced to suffer *reclusion perpetua*. The crime was committed on October 1995. His conviction was automatically reviewed by the Supreme Court. During the pendency of the appeal, R.A. No. 8294 was enacted by Congress, which became effective on June 21, 1997. Under the amendatory law, the illegal possession or use of firearm may no longer be separately charged and only one offense should be punished, *viz.*, murder in this case, and the use of unlicensed firearm should only be considered as an aggravating circumstance. Applying Article 22 of the RPC, the Court ruled that R.A. No. 8294 should be applied retroactively in this case since it is favorable to the accused. Thus, accused was found liable only for murder and the illegal possession of firearm was merely treated as an aggravating circumstance.

[4.8] Procedural or Remedial Laws

Remedial statutes or statutes relating to remedies or modes of procedure, which do not create a new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retroactive law, or the general rule against retroactive operation of statutes. Statutes regulating the procedure of the courts will be construed as applicable to actions pending and undetermined at the time of their passage. Procedural laws are retroactive in that sense and to that extent. The retroactive application of procedural laws is not violative of any right of a person who may feel that he is adversely affected. The reason is that as a general rule, no vested right may attach nor arise from procedural laws.[48]

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[46]Art. 22, RPC.
[47]347 SCRA 594 (2000).
[48]Systems Factors Corp. vs. NLRC, 346 SCRA 149, 152 (2000).

[4.9] Curative Laws

A curative statute is enacted to cure defects in a prior law or to validate legal proceedings, instruments or acts of public authorities which would otherwise be void for want of conformity with certain existing legal requirements.[49] They are intended to supply defects, abridge superfluities and curb certain evils. They are intended to enable persons to carry into effect that which they have designed or intended, but has failed of expected legal consequence by reason of some statutory disability or irregularity in their own action. They make valid that which, before the enactment of the statute was invalid. Their purpose is to give validity to acts done that would have been invalid under existing laws, as if existing laws have been complied with. Curative statutes, therefore, by their very essence, are retroactive.[50] Nevertheless, there are limitations on the extent of the retroactivity of curative laws. Obviously, they cannot violate constitutional provisions, nor destroy vested rights of third persons. They cannot affect a judgment that has become final.

For example:

E.O. No. 111, amended Article 217 of the Labor Code to widen the worker's access to the government for redress of grievances by giving the Regional Directors and Labor Arbiters concurrent jurisdiction over cases involving money claims. This amendment, however, created a situation where the jurisdiction of the Regional Directors and the Labor Arbiters overlapped. As a remedy, R.A. No. 6715 further amended Article 217 by delineating their respective jurisdictions. Under R.A. No. 6715, the Regional Director has exclusive original jurisdiction over cases involving money claims provided: (1) the claim is presented by an employer or person employed in domestic or household service, or househelper under the Code; (2) the claimant, no longer being employed, does not seek reinstatement; and (3) the aggregate money claim of the employee or househelper does not exceed P5,000.00. All other cases are within the exclusive of the Labor Arbiter. E.O. No. 111 and R.A. No. 6715 are in the nature of curative statutes.[51]

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[49]Erectors, Inc. vs. NLRC, 256 SCRA 629, 635 (1996).
[50]Narzoles vs. NLRC, 341 SCRA 533, 538 (2000).
[51]Erectors, Inc. vs. NLRC, 256 SCRA 629, 635 (1996).

[4.10] Law Creating New Substantive Right

When the law creates new substantive rights, it may be given a retroactive effect provided it has not prejudiced another acquired right of the same origin.[52]

Art. 5. Acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity. (4a)

COMMENTS:

§ 5. Mandatory or Prohibitory Laws

[5.1] Mandatory, prohibitory, permissive laws
[5.2] General rule
[5.3] Exceptions to the rule

[5.1] Mandatory, Prohibitory and Permissive Laws

If the law commands that something be done, it is mandatory. If the law commands that something should not be done, it is prohibitory. If the law commands that what it permits to be done should be tolerated or respected, in which case, it is permissive or directory.

[5.2] General Rule

Acts executed against the provisions of mandatory or prohibitory laws are void.

[5.3] Exceptions to the rule

The rule that acts executed against the provisions of mandatory or prohibitory laws are void is subject to the following exceptions:

(1) When the law itself authorizes its validity although generally they would have been void. Example: Lotto and sweepstakes.

(2) When the law makes the act valid, but punishes the violator. Example: A widow who remarries before the lapse of 300 days after the

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[52]Bona vs. Briones, 38 Phil. 276.

death of her husband is liable to criminal prosecution but the marriage is valid.

(3) Where the law merely makes the act voidable, that is, valid unless annulled. Example: a marriage celebrated through violence or intimidation or fraud is valid until it is annulled by a competent court.

(4) Where the law declares the act void, but recognizes legal effects as arising from it. For example, in a void marriage under Articles 36 and 53 of the Family Code, the children born thereto are considered legitimate.

Art. 6. Rights may be waived, unless the waiver is contrary to law, public order, public policy, morals, or good customs, or prejudicial to a third person with a right recognized by law. (4a)

COMMENTS:

§ 6. Waiver of Rights

[6.1] Element of rights
[6.2] Kinds of rights
[6.3] Real and personal rights, distinguished
[6.4] Requisites of valid waiver

[6.1] Elements of Rights

Every right has three elements: the subject, the object, and the efficient cause. The subjects of rights are persons for rights exist only in favor of persons. There are two kinds of subject: (1) active subject, one who is entitled to demand the enforcement of the right, and (2) passive subject, one who is duty-bound to suffer its enforcement. Things and services constitute the object of rights. The efficient cause is the fact that gives rise to the legal relation.

[6.2] Kinds of Rights

Rights may be classified into civil and political. Political rights are those referring to the participation of persons in the government of the State; whereas, civil rights include all the others. Civil rights may be further classified into the rights of personality (sometimes called human

rights), family rights and patrimonial rights. The rights to personality and family rights are not subject to waiver; but patrimonial rights can generally be waived.

[6.3] Real and Personal Rights, Distinguished

Patrimonial rights are of two kinds: (1) real right or the power belonging to a person over a specific thing, without a passive subject individually determined against whom such right may be personally exercised; it is enforceable against the whole world; and (2) personal right or the power belonging to one person to demand of another, as a definite passive subject, the fulfillment of a prestation to give, to do or not to do.

[6.4] Requisites of Valid Waiver

Renunciation or waiver is defined as the relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. In order that a person may be considered to have validly renounced a right, the following requisites should be present: (1) he must actually have the right which he renounces; (2) he must have the capacity to make the renunciation; and (3) the renunciation must be made in a clear and unequivocal manner.

Art. 7. Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary.

When the courts declared a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern.

Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws or the Constitution. (5a)

COMMENTS:

§ 7. Repeal of Laws

[7.1] Ways of repealing laws
[7.2] Example of express repeal
[7.3] Implied repeal
[7.4] Conflict between general and special laws
[7.5] Effect of repeal of repealing law
[7.6] Constitution

[7.1] Ways of Repealing Laws

Laws are repealed in two ways: (1) express, or (2) implied. An express repeal is that contained in a special provision of a subsequent law. Implied repeal, on the other hand, takes place when the provisions of the subsequent law are incompatible with those of an earlier law and there is no express repeal.

[7.2] Example of Express Repeal

An example of express repeal is that provided for under the Family Code. Article 253 of the Family Code provides that "Titles III, IV, V, VI, VII, VIII, IX, XI and XV of Book 1 of Republic Act No. 386, otherwise known as the Civil Code of the Philippines, as amended, and Articles 17, 18, 19, 27, 28, 29, 30, 31, 39, 40, 41 and 42 of Presidential Decree No. 603, otherwise known as the Child and Youth Welfare Code, as amended, and all laws, decrees, executive orders, proclamations, rules and regulations, or parts thereof, inconsistent herewith are hereby repealed."

The *statement "all laws or parts thereof which are inconsistent with this Act are hereby repealed or modified accordingly,"* however, is not an express repealing clause because it fails to identify or designate the act or acts that are intended to be repealed. If repeal of particular or specific law or laws is intended, the proper step is to so express it.[53] In fact, this is an example of unnecessary statement of the principle of implied repeal.

[7.3] Implied Repeal

Implied repeals are not to be favored because they rest only on the presumption that because the old and the new laws are incompatible with each other, there is an intention to repeal the old. There must be a plain, unavoidable and irreconcilable repugnancy between the two; if both laws can by reasonable construction stand together, both will be sustained.[54]

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[53]Agujetas vs. CA, 261 SCRA 17 (1996).
[54]Lichauco vs. Apostol, 44 Phil. 138.

[7.3.1] Presumption Against Implied Repeal

It is well-settled that repeals of laws by implication are not favored and that courts must generally assume their congruent applications.[55] The two laws must be absolutely incompatible, and a clear finding thereof must surface, before the inference of implied repeal may be drawn. The rule is expressed in the maxim, *interpretare et concordare lequibus est optimus interpretendi, i.e.*, every statute must be so interpreted and brought into accord with other laws as to form a uniform system of jurisprudence. The fundament is that the legislature should be presumed to have known the existing laws on the subject and not have enacted conflicting statutes. Hence, all doubts must be resolved against any implied repeal, and all efforts should be exerted in order to harmonize and give effect to all laws on the subject.[56]

[7.3.2] Requisites of Implied Repeal

There are two requisites for implied repeals: (1) the laws cover the same subject matter, and (2) the latter is repugnant to the earlier.[57]

[7.3.3] Requirement of Repugnancy

An implied repeal predicates the intended repeal upon the condition that a substantial conflict must be found between the new and prior laws. In the absence of an express repeal, a subsequent law cannot be construed as repealing a prior law unless an irreconcilable inconsistency and repugnancy exists in the terms of the new and old laws.[58] The two laws must be absolutely incompatible.[59] There must be such a repugnancy between the laws that they cannot be made to stand together.[60]

Agujetas vs. CA
261 SCRA 17 (1996)

FACTS: Criminal charges were filed against three board members of the provincial board of canvassers for the Province of Davao Oriental for violation

[55]Republic vs. Marcopper Mining Corp., 335 SCRA 386, 408 (2000).
[56]Hagad vs. Gozo-Dadole, 251 SCRA 242, 251-252 (1995).
[57]Agujetas vs. CA, 261 SCRA 17, 34 (1996).
[58]Iloilo Palay and Corn Planters Association, Inc. vs. Feliciano, 13 SCRA 377 (1965).
[59]Compania General de Tabacos vs. Collector of Customs, 46 Phil. 8 (1924).
[60]Berceres, Jr. vs. Guingona, Jr., 241 SCRA 539, 544 (1995).

of B.P. Blg. 881 (Omnibus Election Code) and R.A. No. 6646 (The Electoral Reform Law of 1987), specifically for failure to proclaim a winning elected candidate. After preliminary investigation, criminal charges against them were filed for violation of 2nd paragraph of Sec. 231 in relation to Section 262 of the Omnibus Election Code. One of the defenses offered by the accused was that such crime no longer exists because Republic Act Nos. 6646 (the Electoral Reform Law of 1987) and 7166 (Electoral Reform Law of 1991) amended the Omnibus Election Code and that among those amended was Section 231, which was modified by Sec. 28 of R.A. No. 7166 by removing the specific manner by which the proclamation of winning candidates by the Board of Canvassers should be made and thereby, in effect, repealing the second paragraph of Section 231 of the old Omnibus Election Code. The SC ruled:

> "Sec. 231 of the Omnibus Election Code (Batas Pambansa Blg. 881) was not expressly repealed by R.A. No. 7166 because said Sec. 231 is not among the provisions repealed by Sec. 39 of R.A. No. 7166 which we quote:
>
> 'Sec. 39. *Amending and Repealing Clause*. — Sections 107, 108 and 245 of the Omnibus Election Code are hereby repealed. Likewise, the inclusion in Section 262 of the Omnibus Election Code of the violations of Sections 105, 106, 107, 108, 109, 110, 111 and 112 as among election offenses is also hereby repealed. This repeal shall have retroactive effect.
>
> 'Batas Pambansa Blg. 881, Republic Act No. 6646, Executive Order Nos. 144 and 157 all and other laws, orders, decrees, rules and regulations or other issuances, or any part thereof, inconsistent with the provisions of this Act are hereby amended or repealed accordingly.'
>
> The statement "All laws or parts thereof which are inconsistent with this Act are hereby repealed or modified accordingly," certainly is not an express repealing clause because it fails to identify or designate the act or acts that are intended to be repealed. If repeal of particular or specific law or laws is intended, the proper step is to so express it.
>
> Neither is there an implied repeal of Sec. 231 by the subsequent enactment of R.A. No. 6646 and R.A. No. 7166.
>
> While Sec. 28 of R.A. No. 7166, like Sec. 231 of the Omnibus Election Code (B.P. Blg. 881) pertains to the Canvassing by the Board of Canvassers, this fact of itself is not sufficient to cause an implied repeal of the prior act. The provision of the subject laws are quoted below for comparison:

xxx xxx xxx

While the two provisions differ in terms, neither is this fact sufficient to create repugnance. In order to effect a repeal by implication, the latter statute must be so irreconcilably inconsistent and repugnant with the existing law that they cannot be made to reconcile and stand together. The clearest case possible must be made before the inference of implied repeal may be drawn, for inconsistency is never presumed. It is necessary, says the court in a case, before such repeal is deemed to exist that it be shown that the statutes or statutory provisions deal with the same subject matter and that the latter be inconsistent with the former. There must be a showing of repugnance clear and convincing in character. The language used in the later statute must be such as to render it irreconcilable with what had been formerly enacted. An inconsistency that falls short of that standard does not suffice. For it is a well-settled rule of statutory construction that repeals of statutes by implication are not favored. The presumption is against inconsistency or repugnance and, accordingly, against implied repeal. For the legislature is presumed to know the existing laws on the subject and not to have enacted inconsistent or conflicting statutes.

In the case at bar, the needed manifestation indication of legislative purpose to repeal is not present. Neither is there any inconsistency between the two subject provisions. xxx. (pp. 31-35)

[7.4] Conflict Between General and Special Laws

When there is a conflict between a general law and a special statute, the special statute should prevail since it evinces the legislative intent more clearly than the general statute. The special law is to be taken as an exception to the general law in the absence of special circumstances forcing a contrary conclusion. This is because implied repeals are not favored and as much as possible, effect must be given to all enactments of the legislature. A special law cannot be repealed, amended or altered by a subsequent general law by mere implication.[61] It is basic in statutory construction that the enactment of a later legislation which is a general law cannot be construed to have repealed a special law. It is a well-settled rule in this jurisdiction that "a special statute, provided for

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[61]Laguna Lake Development Authority vs. CA, 251 SCRA 42, 56-57 (1995).

a particular case or class of cases, is not repealed by a subsequent statute, general in its terms, provisions and application, unless the intent to repeal or alter is manifest, although the terms of the general law are broad enough to include the cases embraced in the special law."[62]

[7.4.1] General Law Enacted Prior to Special Law: If the general law was enacted PRIOR to the special law, the latter is considered the exception to the general law. Therefore, the general law, in general remains good law, and there is no repeal,[63] except insofar as the exception or special law is concerned.

[7.4.2] General Law Enacted After Special Law: If the general law was enacted AFTER the special law, the special law remains unless:

(1) There is an express declaration to the contrary; or

(2) There is a clear, necessary and irreconcilable conflict;[64] or

(3) Unless the subsequent general law covers the whole subject and is clearly intended to replace the special law on the matter.[65]

Laguna Lake Development Authority vs. CA
251 SCRA 421 (1995)

FACTS: Section 4(k) of the charter of the Laguna Lake Development Authority, Republic Act No. 4850, the provisions of P.D. No. 813 and Sec. 2 of E.O. No. 927, specifically provide that the Laguna Lake Development Authority shall have exclusive jurisdiction to issue permits for the use of all surface water for any projects or activities in or affecting the said region, including navigation, construction, and operation of fishpens, fish enclosures, fish corrals and the like. On the other hand, Republic Act No. 7160, the Local Government Code of 1991, has granted to the municipalities the exclusive authority to grant fishery privileges in municipal waters. Now, the question is, did R.A. No. 160 repeal the aforementioned laws creating the Laguna Lake Development Authority? The Supreme Court said no. The Court explained:

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[62]*Id.*
[63]Lichauco vs. Apostol, 44 Phil. 138.
[64]Cia. General vs. Coil. of Customs, 46 Phil. 8.
[65]In re Guzman, 73 Phil. 51; Joaquin vs. Navarro, 81 Phil. 373.

"The Local Government Code of 1991 does not contain any express provision which categorically expressly repeal the charter of the Authority. It has to be conceded that there was no intent on the part of the legislature to repeal Republic Act No. 4850 and its amendments. The repeal of laws should be made clear and expressed.

It has to be conceded that the charter of the Laguna Lake Development Authority constitutes a special law. Republic Act No. 7160, the Local Government Code of 1991, is a general law. It is basic in statutory construction that the enactment of a later legislation which is a general law cannot be construed to have repealed a special law. It is a well-settled rule in this jurisdiction that "a special statute, provided for a particular case or class of cases, is not repealed by a subsequent statute, general in its terms, provisions and application, unless the intent to repeal or alter is manifest, although the terms of the general law are broad enough to include the cases embraced in the special law."

When there is a conflict between a general law and a special statute, the special statute should prevail since it evinces the legislative intent more clearly than the general statute. The special law is to be taken as an exception to the general law in the absence of special circumstances forcing a contrary conclusion. This is because implied repeals are not favored and as much as possible, effect must be given to all enactments of the legislature. A special law cannot be repealed, amended or altered by a subsequent general law by mere implication.

Thus, it has to be concluded that the charter of the Authority should prevail over the Local Government Code of 1991."

[7.5] Effect of Repeal of Repealing Law

The effect of a repeal of the repealing law shall depend on whether the previous repeal was express or implied:

[7.5.1] Express Repeal: When a law which *expressly repeals* a prior law is itself repealed, the law first repealed shall not be thereby revived *unless expressly* so *provided.*[66]

[66]Sec. 21, Chapter 5, Book I of the Administrative Code of 1987.

[7.5.2] Implied Repeal: When a law which *impliedly repeals* a prior law is itself repealed, the prior law shall thereby be revived, *unless the repealing law provides otherwise.*[67]

[7.6] Constitution

The constitution is the fundamental law of the land and all laws must bow before it. Thus, if a law, administrative or executive acts, orders and regulations are inconsistent with the Constitution, they are considered not valid.[68]

[7.6.1] Power to Declare Law Unconstitutional

It is the office and duty of the judiciary to enforce the constitution. Under the constitution, the Supreme Court may declare an act of the national legislature invalid because it is in conflict with the fundamental law. When the Supreme Court thus passes judgment upon the constitutionality of a statute or an administrative action, the Court is said to be exercising the *"power* of *judicial review."*

[7.6.2] Effect of Declaration of Unconstitutionality

Under Article 7 of the Civil Code, "when the courts declare a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern." This is the orthodox view. Our Supreme Court has already rejected the view that an unconstitutional act confers no rights, imposes no duties, and affords no protection whatsoever. Instead, the Court adopted the view that before an act is declared unconstitutional it is an "operative fact" which can be the source of rights and duties. This recognition of an unconstitutional statute as an "operative fact" before it is declared unconstitutional was applied in **De Agbayani vs. PNB**,[69] where the period before a moratorium law was declared unconstitutional was not allowed to toll the prescriptive period of the right to foreclose mortgage. A similar approach was reached in **Tan vs. Barrios**,[70] **Republic vs. Herida**,[71] and **Republic vs. CFI**.[72]

[67]Sec. 22, Chapter 5, Book I of the Administrative Code of 1987.
[68]Art. 7, NCC.
[69]38 SCRA 429.
[70]190 SCRA 686.
[71]119 SCRA 411.
[72]120 SCRA 154.

Art. 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines. (n)

COMMENTS:

§ 8. Judicial Decisions

[8.1] Judicial decision, not laws
[8.2] Refers to SC decisions
[8.3] Doctrine of *stare decisis*

[8.1] Judicial Decisions, Not Laws

Under the principle of separation of powers, the judicial department has no power to enact laws because the same is the exclusive province of the legislative department. Likewise, it is not the province of the courts to supervise legislation and keep it within the bounds of propriety and common sense, as these matters are exclusively of legislative concern. While judicial decisions form part of the legal system, judicial decisions are not laws. They are, however, evidence of what the law means, and this is why they are part of the legal system of the Philippines. The interpretation placed upon the written law by a competent court has the force of law.[73]

[8.2.] Refers to Supreme Court Decisions

The Supreme Court in **Miranda vs. Imperial**[74] categorically stated that "only the decisions of the Supreme Court establish jurisprudence or doctrines in this jurisdiction." Decisions of the Supreme Court, although in themselves not laws, are evidence of what the law means. The application or interpretation placed by the Supreme Court upon a law is part of the law as of the date of its enactment since the Court's application or interpretation merely establishes the contemporaneous legislative intent that the construed law purports to carry into effect.[75] The decisions of subordinate courts are only persuasive in nature, and can have no mandatory effect. However, this rule does not militate against the fact that a conclusion or pronouncement of the Court of Appeals which covers a

[73]People vs. Jabinal, L-30061, Feb. 27, 1974.
[74]77 Phil. 1066.
[75]Floresca vs. Philex Mining Corp., G.R. No. 30642, April 30, 1985.

point of law still undecided in the Philippines may still serve as a judicial guide to the inferior courts.

[8.3] Doctrine of Stare Decisis

The "doctrine of *stare decisis*" means that when the Court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same.[76] The doctrine of *stare decisis* enjoins adherence to judicial precedents. The doctrine is based on the principle that once a question of law has been examined and decided, it should be deemed settled and closed to further argument. The doctrine, however, does not mean blind adherence to precedents. If the doctrine is found to be contrary to law or erroneous, it should be abandoned.

[8.3.1] Doctrine Refers to SC Decisions: Note that only decisions of the Supreme Court establish jurisprudence or doctrine in this jurisdiction.[77] Hence, only decisions of the Supreme Court are considered in the application of the doctrine of *stare decisis*.

[8.3.2] Prospective Application of Doctrines: The prospective application of "judge-made" laws was underscored in **Co vs. Court of Appeals**[78] where the Court ruled that in accordance with Article 8 of the Civil Code which provides that "(j)udicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines," and Article 4 of the same Code which states that "(l)aws shall have no retroactive effect unless the contrary is provided," the principle of prospectivity of statutes, original or amendatory, shall apply to judicial decisions, which, although in themselves are not laws, are nevertheless evidence of what the law means.[79]

Filoteo, Jr. vs. Sandiganbayan
263 SCRA 222 (1996)

FACTS: The accused contends that his extrajudicial confession executed on May 30, 1982 without the assistance of counsel is inadmissible in evidence.

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[76]Government vs. Jalandoni, 44 O.G. 1840.
[77]Miranda vs. Imperial, *supra*.
[78]227 SCRA 444, 448-449 (1993).
[79]See also Filoteo, Jr. vs. Sandiganbayan, 263 SCRA 222, 260 (1996).

The Court however ruled that "although a number of cases held that extrajudicial confessions made while the 1973 Constitution was in force and effect, should have been made with the assistance of counsel, the definitive ruling was enunciated only on April 26, 1983 when this Court, through *Morales, Jr. vs. Enrile* (121 SCRA 538), issued the guidelines to be observed by law enforcers during custodial investigation. The Court specifically ruled that 'the right to counsel may be waived but the waiver shall not be valid unless made with the assistance of counsel." In *People vs. Luvendino* (211 SCRA 36), the Court ruled that the Morales doctrine, reiterated in *People vs. Galit*, has no retroactive effect and is not applicable to waivers made prior to April 26, 1983.The accused next contends that Art. III, Sec. 12 of the 1987 Constitution should be given retroactive effect for being favorable to him as an accused. In debunking the contention, the Court explained:

> "Petitioner's contention that Article III, Section 12 of the 1987 Constitution should be given retroactive effect for being favorable to him as an accused, cannot be sustained. While Article 22 of the Revised Penal Code provides that (p)enal laws shall have retroactive effect insofar as they favor the person guilty of a felony who is not a habitual criminal, what is being construed here is a constitutional provision specifically contained in the Bill of Rights which is obviously not a penal statute. A bill of rights is a declaration and enumeration of the individual rights and privileges which the Constitution is designed to protect against violations by the government, or by individual or group of individuals. It is a charter of liberties for the individual and a limitation upon the power of the state. Penal laws, on the other hand, strictly and properly are those imposing punishment for an offense committed against the state which the executive of the state has the power to pardon. In other words, a penal law denotes punishment imposed and enforced by the state for a crime or offense against its law."

Art. 9. No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws. (6)

COMMENTS:

§ 9. Silence, Obscurity or Insufficiency of Laws

[9.1] Applicability to criminal prosecutions
[9.2] What must judge do

[9.1] Applicability to Criminal Prosecutions

Article 9 of the Civil Code is applicable to criminal prosecutions. The judge may not decline to render a judgment. Instead, the judge must dismiss the criminal action. Applying the rule *"nullum crimen, nulla poena sine lege"* (there is no crime when there is no law punishing it) the judge must dismiss the case if somebody is accused of a non-existent crime.

[9.2] What Must Judge Do

If the law be silent, obscure or insufficient, what should the judge apply in deciding the case? Under the old Civil Code, it was expressly stated that *"when there is no statute exactly applicable to the point in controversy, the custom* of *the place shall be applied, and, in default thereof, the general principles* of *law."* This rule was modified by the Code Commission in the original project of the Civil Code when it provided that, in default of customs, the judge shall apply that rule which he believes the law-making body should lay down guided by the general principles of law and justice. Believing that this change would result in an undue delegation of legislative power, Congress deleted the entire provision. As it stands now, the Civil Code of the Philippines is silent with respect to this point. It is, however, submitted that we can still apply the old rule considering the provisions of Arts. 10, 11 and 12 of the present Civil Code. In other words, if the law is silent, or is obscure or insufficient with respect to a particular controversy, the judge shall apply the custom of the place, and in default thereof, the general principles of law and justice.

Art. 10. In case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail. (n)

COMMENTS:

§ 10. Doubt in Interpretation or Application of Laws

[10.1] When to apply Article 10
[10.2] Illustration
[10.3] Resort to equity

[10.1] When to Apply Article 10

The rule expressed in Article 10 of the Civil Code is to be applied only in case of doubt. Thus, the law may be hard, but it is still the law ("*dura lex sed lex*"). The first duty of the judge is to apply the law — whether it be wise or not, whether unjust — provided that the law is clear, and there is no doubt. It is the sworn duty of the judge to apply the law without fear or favor, to follow its mandate, not to temper with it. What the law grants, the court cannot deny.[80]

[10.2] Illustration

In **People vs. Amigo**,[81] the accused claims that the penalty of *reclusion perpetua* is too cruel and harsh a penalty and pleads for sympathy. The Court replied: "Courts are not the forum to plead for sympathy. The duty of courts is to apply the law, disregarding their feeling of sympathy or pity for the accused. DURA LEX SED LEX. The remedy is elsewhere — clemency from the executive or an amendment of the law by the legislative, but surely, at this point, this Court cannot but apply the law."

[10.3] Resort to Equity

The Supreme Court has always held that equity, which has been described as "justice outside legality," is applied only in the absence of, and never against, statutory law or judicial rules of procedure.[82] Judicial hands cannot, on the pretext of showing concern for the welfare of government employees, for example, bestow equity contrary to the clear provisions of the law.[83]

Art. 11. Customs which are contrary to law, public order or public policy shall not be countenanced. (n)

Art. 12. A custom must be proved as a fact, according to the rules of evidence. (n)

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[80]Jose Go vs. Anti Chinese League of the Philippines and Fernandez, 47 O.G. 716; Gonzales vs. Gonzales, 58 Phil. 67.

[81]252 SCRA 43, 53-54 (1996).

[82]Mendiola vs. CA, 258 SCRA 492.

[83]Conte vs. COA, 264 SCRA 19.

COMMENTS:

§ 11. Customs

[11.1] Custom, defined
[11.2] Requisites in application of customs
[11.3] Not subject to judicial notice

[11.1] Custom, Defined

Custom is a "rule of conduct formed by repetition of acts, uniformly observed as a social rule, legally binding and obligatory."[84]

[11.2] Requisites in Application of Customs

The following are the requisites before a custom may have the force of suppletory rule:

(1) Plurality of acts, or various resolutions of a juridical question raised repeatedly in life;

(2) Uniformity, or identity of acts or various solutions to the juridical question;

(3) General practice by the great mass of the social group;

(4) Continued performance of these acts for a long period of time;

(5) General conviction that the practice corresponds to a juridical necessity or that it is obligatory; and

(6) The practice must not be contrary to law, morals or public order.

[11.3] Not Subject to Judicial Notice

Customs are not subject to judicial notice because they must be proven as a fact, according to the rules of evidence.[85]

Art. 13. When the laws speak of years, months, days or nights, it shall be understood that years are of three hundred sixty-five days each; months, of thirty days; days, of twenty-four hours; and nights from sunset to sunrise.

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[84] In re: Authority to Continue Use of Firm Name, 92 SCRA 12.
[85] Art. 12, NCC.

If months are designated by their name, they shall be computed by the number of days which they respectively have.

In computing a period, the first day shall be excluded, and the last day included. (7a)

COMMENTS:

§ 12. Computation of Period

[12.1] Illustration
[12.2] Computing period
[12.3] If last day falls on Saturday, Sunday or legal holiday

[12.1] Illustration

Under the 1964 Rules of Court, *"the judgment debtor, or redemptioner, may redeem the property from the purchaser within twelve* (12) *months after the sale."*[86] Thus, under the 1964 Rules, the 12-month period of redemption under Rule 39, Section 30 is equivalent to 360 days counted from the registration of the certificate of sale.[87] Rule 39, Section 28 of the 1997 Rules of Civil Procedure now provides that the period of redemption shall be *"at any time within one* (1) *year from the date* of *the registration* of *the certificate* of *sale,"* so that the period is now to be understood as composed of 365 days.[88]

[12.2] Computing Period

In computing a period, the first day is excluded while the last day is included.

For example, a defendant in an ordinary civil case is given, under the rules, a period of fifteen days to file his Answer to a Complaint counted from the receipt of the summons. If the summons is received by defendant on March 1, the day of the receipt of the summons being excluded in the counting of the fifteen-day period, the fifteen-day period will therefore expire on March 16.

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[86] Sec. 30, Rule 39, 1964 Rules of Court.
[87] Ysmael vs. CA, 318 SCRA 215 (1999).
[88] *Id.*

[12.3] If Last Day Falls On Saturday, Sunday or Legal Holiday

If the last day is a Saturday, Sunday or a Legal Holiday, whether the act is due that day or the following day will depend on the following:

[12.3.1] In an Ordinary Contract: In an ordinary contract, the agreement of the parties prevails. This is because obligations arising from contracts have the force of law between the contracting parties.[89]

[12.3.2] Under the Rules of Court: When the time refers to a period prescribed or allowed by the Rules of Court, or by order of the court, or by any applicable statute, if the last day of the period falls on a Saturday, a Sunday or a legal holiday in the place where the court sits, the time shall not run until the next working day.[90]

Art. 14. Penal laws and those of public security and safety shall be obligatory upon all who live or sojourn in Philippine territory, subject to the principles of public international law and to treaty stipulations. (8a)

COMMENTS:

§ 13. General Applicability of Penal Laws

[13.1] Illustration of principle in Article 14
[13.2] Principle of generality
[13.3] Exceptions to the rule

[13.1] Illustration of Principle in Article 14

Joe, an American citizen residing in the Philippines, killed a Filipino in Manila. Prosecuted for the crime of homicide, Joe interposed the defense that being an American citizen he is not bound by Philippine law. Is his contention correct? Answer: No. Penal laws and those of public security and safety shall be obligatory upon all who live or sojourn in Philippine territory, subject to the principles of public international law and to treaty stipulations.[91]

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[89]Art. 1159, NCC.
[90]Sec. 1, Rule 22, 1997 Revised Rules of Civil Procedure.
[91]Art. 14, NCC.

[13.2] Principle of Generality

Article 14 of the Civil Code embodies one of the three main characteristics of our Criminal Law — which is GENERALITY. As a rule, our criminal law is binding on all persons who live or sojourn in Philippine territory.[92]

[13.3] Exceptions to the Rule

The following are the exceptions to the general application of our criminal laws:

[13.3.1] Treaty Stipulations: An example of this is the Military Bases Agreement between the Republic of the Philippines and the United States of America in 1947. Under this agreement, the Philippine courts have no jurisdiction over felonies committed within the Philippines: (1) when the offense is committed within a military base, unless both the offender and the offended are Filipino civilians or the offense is against the security of the Philippines; (2) when the offense is committed outside of the bases, but both the offender and the offended are U.S. military personnel; and (3) when the offense is committed by a member of the U.S. armed forces against the security of the United States.

[13.3.2] Laws of Preferential Application: An example of this is Republic Act No. 75. This law prohibits the issuance of any warrant of arrest against any ambassador or public minister of any foreign state, authorized and received as such by the President, including their domestics or domestic servants registered in the Department of Foreign Affairs.

[13.3.3] Principles of Public International Law: It is a well-established principle of international law that diplomatic representatives, such as ambassadors or public ministers and their official retinue, possess immunity from the criminal jurisdiction of the country of their sojourn, and cannot be sued, arrested or punished by the law of that country.[93] Heads of state likewise possess immunity from the criminal jurisdiction of our country.[94] However, a

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[92]*Id.*
[93]Hyde, International Law, Vol. II, 2nd Ed., p. 1266.

consul is not entitled to the privileges and immunities of an ambassador or minister, but is subject to the laws and regulations of the country to which he is accredited. He is not exempt from criminal prosecution for violations of the laws of the country where he resides.[95]

Art. 15. Laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad. (9a)

COMMENTS:

§ 14. Nationality Principle

[14.1] Family rights and duties
[14.2] Status and condition
[14.3] Legal capacity

[14.1] Family Rights and Duties

Philippine laws relating to family rights and duties are binding upon citizens of the Philippines, even though living abroad.[96] For example, Article 68 of the Family Code provides that *"the husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support."* Suppose, Maria and Jose, Filipino couple, are residing in Switzerland. Assuming that under Swiss laws, the spouses are not obliged to support each other, may Jose refuse to support Maria? ANSWER: NO. Since they are Filipino citizens, they are still governed by the Family Code even though they are living abroad. Under the Family Code, the spouses are obliged to support each other.

[14.2] Status and Condition

Philippine laws relating to status and condition are binding upon citizens of the Philippines, even though living abroad.[97]

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[94] People vs. Galacgac, C.A., 54 O.G. 1027.
[95] Schneckenburger vs. Moran, 63 Phil. 249.
[96] Art. 15, NCC.
[97] *Id.*

[14.2.1] Divorce Between Filipinos, Not Valid: Philippine law does not provide for absolute divorce; hence, our courts cannot grant it. A marriage between two Filipinos cannot be dissolved even by a divorce obtained abroad, because of Articles 15 and 17 of the Civil Code.[98]

Tenchavez vs. Escano
15 SCRA 355 (1965)

FACTS: On February 28, 1948, Vicenta Escario and Pastor Tenchavez got married in Cebu City before a Catholic chaplain. They did not, however, live under the same roof after their marriage. On June 24, 1950, Vicenta went to the United States and obtained a decree of divorce in Nevada on October 21, 1950. On September 13, 1954, Vicenta married an American and thereafter acquired American citizenship. On July 30, 1955, Pastor filed a complaint for legal separation and damages. Vicenta claimed a valid divorce from plaintiff and an equally valid marriage with her American husband. On the question of the validity of the decree of absolute divorce obtained by Vicenta, the Supreme Court ruled:

> "It is equally clear from the record that the valid marriage between Pastor. Tenchavez and Vicenta Escario remained subsisting and undissolved under Philippine law, notwithstanding the decree of absolute divorce that the wife sought and obtained on 21 October 1950 from the Second Judicial District Court of Washoe County, State of Nevada, on grounds of "extreme cruelty, entirely mental in character." At the time the divorce decree was issued, Vicenta Escario, like her husband, was still a Filipino citizen. She was then subject to Philippine law, and Article 15 of the Civil Code of the Philippines (Rep. Act-No. 386), already in force at the time, expressly provided:
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> 'Laws relating to family rights and duties or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad.'
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> The Civil Code of the Philippines, now in force, does not admit absolute divorce, quo ad vinculo matrimonii; and in fact does not even use that term, to further emphasize its restrictive policy on the matter, in contrast to the preceding legislation that admitted

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[98]Garcia vs. Recio, 366 SCRA 437 (2001).

absolute divorce on grounds of adultery of the wife or concubinage of the husband (Act 2710). Instead of divorce, the present Civil Code only provides for legal separation (Title IV, Book I, Arts. 97 to 108), and, even in that case, it expressly prescribes that 'the marriage bonds shall not be severed' (Art. 106, subpar. 1).

For the Philippine courts to recognize and give recognition or effect to a foreign decree of absolute divorce between Filipino citizens would be a patent violation of the declared public policy of the state, especially in view of the third paragraph of Article 17 of the Civil Code that prescribes the following:

'Prohibitive laws cornering persons, their acts or property, and those which have for their object public order, policy and good customs, shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country.'

Even more, the grant of effectivity in this jurisdiction to such foreign divorce decrees would, in effect, give rise to an irritating and scandalous discrimination in favor of wealthy citizens, to the detriment of those members of our polity whose means do not permit them to sojourn abroad and obtain absolute divorces outside the Philippines."[99]

[14.2.2] Divorces Obtained by Foreigners: It is true that owing to the nationality principle embodied in Article 15 of the Civil Code, only Philippine nationals are covered by the policy against absolute divorces, the same being considered contrary to our concept of public policy and morality. However, aliens may obtain divorces abroad, which may be recognized in the Philippines, provided they are valid according to their national law.[100]

Van Dorn vs. Romillo, Jr.
139 SCRA 139 (1985)

FACTS: Alice Reyes, a Filipino citizen was married in Hongkong to Richard Upton, a U.S. citizen, but established their residence in the Philippines

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[99] At pp. 361-62.
[100] Van Dorn vs. Romillo, Jr., 139 SCRA 139, 143 (1985).

and begot two children. The couple acquired conjugal properties in the Philippines. The couple went to Nevada to obtain a divorce. Thereafter, Alice Reyes remarried with Theodore Van Dorn. Richard Upton filed a suit against Alice Reyes Van Dorn for an accounting of their conjugal property and for a declaration that he should manage said property. Alice Van Dorn moved to dismiss the suit on the ground that the cause of action was barred by the judgment in the divorce proceedings in Nevada. In said divorce proceeding, Upton acknowledged that he and Alice had no community property. Upton contended that the divorce decree issued by the Nevada Court is contrary to the public policy and has no legal validity in the Philippines because the Nevada Court proceedings divested the jurisdiction of the Philippine courts. The Supreme Court ruled that the divorce decree is valid insofar as Upton is concerned. The Court explained:

> "There is no question as to the validity of that Nevada divorce in any of the States of the United States. The decree is binding on private respondent as an American citizen. For instance, private respondent cannot sue petitioner, as her husband, in any State of the Union. What he is contending in this case is that the divorce is not valid and binding in this jurisdiction, the same being contrary to local law and public policy.
>
> It is true that owing to the nationality principle embodied in Article 15 of the Civil Code, only Philippine nationals are covered by the policy against absolute divorces the same being considered contrary to our concept of public policy and morality. However, aliens may obtain divorces abroad, which may be recognized in the Philippines, provided they are valid according to their national law. In this case, the divorce in Nevada released private respondent from the marriage from the standards of American law, under which divorces dissolves the marriage. xxx
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> xxx xxx xxx
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> Thus, pursuant to his national law, private respondent is no longer the husband of petitioner. He would have no standing to sue in the case below as petitioner's husband entitled to exercise control over conjugal assets. As he is bound by the Decision of his own country's Court, which validly exercise jurisdiction over him, and whose decision he does not repudiate, he is estopped by his own representation before said Court from asserting his right over the alleged conjugal property.
>
> To maintain, as private respondent does, that, under our laws, petitioner has to be considered still married to private respondent and still subject to a wife's obligations under Article 109, et. seq. of

the Civil Code cannot be just. Petitioner should not be obliged to live together with, observe respect and fidelity, and render support to private respondent. The latter should not continue to be one of the heirs with possible rights to conjugal property. She should not be discriminated against in her own country if the ends of justice are to be served.[101]

[14.2.3] Legal Standing of Divorced Persons to Sue for Adultery: When a foreigner, married to a Filipino citizen, obtained a decree of divorce abroad, he is no longer the husband of the Filipino citizen and therefore losses the standing to sue for adultery.[102]

Pilapil vs. Ibay-Somera
174 SCRA 653 (1989)

FACTS: Imelda Pilapil, a Filipino citizen, was married to Erich Geiling, a German national, in Germany in 1979. The couple resided in the Philippines. In 1986, the German husband secured a divorce in a German court. After more than five months after the divorce decree, Erich, the former husband, filed two complaints for adultery before the City Fiscal of Manila. RULING: The Supreme Court ruled that since Erich was no longer the husband of Pilapil, he no longer had the legal standing to sue for adultery. Under Article 344 of the Revised Penal Code, the crime of adultery, as well as other crimes against chastity, can be prosecuted only upon the complaint of the offended spouse.

[14.2.4] Partial Divorce under Article 26, Family Code: In mixed marriages involving a Filipino and a foreigner, Article 26 of the Family Code allows the former to contract a subsequent marriage in case the divorce is "validly obtained abroad by the alien spouse capacitating him or her to remarry." Usually, foreigners divorce their Filipino spouses. Since the divorce is valid under the national law of the alien, he or she can remarry. Without the second paragraph of Article 26 of the Family Code, the Filipino spouse remains married to the divorced foreign spouse. To remedy the situation, Article 26 of the Family Code now allows the Filipino spouse

[101] At pp. 143-144.
[102] Pilapil vs. Ibay-Somera, 174 SCRA 653 (1989).

to remarry if, pursuant to a divorce validly obtained by his alien spouse, the latter is already capacitated to remarry. This law, however, applies only when it is the foreign spouse who obtains the divorce and not if the decree of divorce is obtained by the Filipino spouse.

[14.3] Legal Capacity

Laws relating to legal capacity of persons are binding upon citizens of the Philippines, even though living abroad.[103] With respect to aliens, their national law shall govern with respect to their legal capacity, following the "nationality principle" embodied in Article 15.

Insular Government vs. Frank
13 Phil. 236

FACTS: Frank, an American citizen from Illinois, U.S.A. entered into a contract with the Philippine Government to serve as a stenographer for a period of two years. He served for only six months, and therefore the government sued for damages. Frank presented minority as a defense. The contract was entered into in Illinois and in said state, Frank was considered an adult. Under Philippine laws, however, Frank was still a minor. RULING: The contract is valid because at the time and place of the making of the contract (lex loci celebrationis), Frank was of age and fully capacitated. Therefore, Frank can be held liable for damages.

[OBSERVATION: The Court should have applied the "nationality principle" following Art. 15 of the Civil Code. In the instant case, whether to apply the national law or the law of the place where the contract was celebrated is immaterial since they happen to be the same. However, if the contract happened to be made in the Philippines; the result would have been different.]

Art. 16. Real property as well as personal property is subject to the law of the country where it is situated.

However, intestate and testamentary successions, both with respect to the order of succession and to the amount of successional rights and to

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[103]Art. 15, NCC.

the intrinsic validity of testamentary provisions, shall be regulated by the national law of the person whose succession is under consideration, whatever may be the nature of the property and regardless of the country wherein said property may be found. (10a)

COMMENTS:

§ 15. Principle of Lex Rei Sitae

[15.1] Principle of lex rei sitae
[15.2] Exceptions to lex rei sitae
[15.3] Renvoi doctrine
[15.4] Illustrative problem

[15.1] Principle of Lex Rei Sitae

Under the first paragraph of Article 16 of the Civil Code, real and personal properties are subject to the law of the country in which they are situated.

[15.2] Exceptions to Lex Rei Sitae

The second paragraph of Article 16 of the Civil Code renders inapplicable the principle of *lex rei sitae*, even if real and personal properties are involved, in the matter of the intestate and testate succession of a decedent. Instead, what is applicable is the national law of the decedent, with respect to the following aspects of intestate or testamentary succession: (1) the order of succession; (b) the amount of successional rights; and (c) the intrinsic validity of the provisions of the will. In addition, the national law of the decedent likewise governs the capacity of the heir to succeed.[104]

Testate Estate of Bohanan vs. Bohanan
106 Phil. 997

FACTS: The testator was born in Nebraska, had properties in California, and had a temporary, although long, residence in the Philippines. In his will executed in Manila, he stated that he had selected as his domicile and permanent residence, the State of Nevada, and therefore at the time of his death, he was a citizen of that state. In his will, he disposed so much of his properties in

[104]Art. 1039, NCC.

favor of his grandson, his brother and his sister leaving only a small amount of legacy to his children and none to his wife. The same was questioned by the surviving wife and the surviving children regarding the validity of the testamentary provisions disposing of the estate claiming that they have been deprived of their legitime under Philippine law, which is the law of the forum. With respect to his wife, a decree of divorce was issued between the testator and the wife after being married for 13 years; thereafter, the wife married another man whereby this marriage was subsisting at the time of the death of the testator.

RULING: Article 10 of the Civil Code (now Art. 16) provides that the validity of testamentary dispositions is to be governed by the national law of the person whose succession in question. In the case at bar, the testator was a citizen of the State of Nevada. Since the laws of said state allow the testator to dispose of all his property according to his will, his testamentary dispositions depriving his wife and children of what should be their legitimes under the laws of the Philippines, should be respected and the project of partition made in accordance with his testamentary dispositions should be approved.

Bellis vs. Bellis
20 SCRA 358

FACTS: Amos G. Bellis was a citizen and resident of Texas at the time of his death. Before he died, he had made two wills, one disposing of his Texas properties, the other disposing of his Philippine properties. In both wills, his recognized illegitimate children were not given anything. Texas has no conflict rules governing successional rights. Furthermore, under Texas law, there are no compulsory heirs and therefore no legitimes. The illegitimate children opposed the wills on the ground that they have been deprived of their legitimes to which they should be entitled, if Philippine law were to apply.

RULING: Said children are not entitled to their legitimes for under Texas Law (which is the national law of the deceased), there are no legitimes. The renvoi doctrine cannot be applied. Said doctrine is usually pertinent where the decedent is a national of one country, and a domiciliary of another. A provision in a foreigner's will to the effect that his properties shall be distributed in accordance with Philippine law and not with his national law, is illegal and void for his national law, in this regard, cannot be ignored.

[15.3] Renvoi Doctrine

Renvoi literally means referring back; the problem arises when there is a doubt as to whether a reference to a foreign law is a reference

to the internal law of said foreign law; or a reference to the whole of the foreign law, including its conflict rules.

In the Matter of Testate Estate of the Deceased
Edward E. Christensen
G.R. No. L-16759, January 31, 1963

FACTS: Edward Christensen, born in New York, migrated to California, where he resided for a period of nine years. In 1913 he came to the Philippines where he became a domiciliary till the time of his death. However, during the entire period of his residence in this country he had always considered himself a citizen of California. In his will executed in the Philippines, he instituted an acknowledged natural daughter, Maria Lucy Christensen, as his only heir, but left a legacy of a sum of money in favor of Helen Christensen Garcia (who in a decision rendered by the SC was declared another acknowledged daughter of his). Counsel for Helen claims that under Art. 16, par. 2 of the Civil Code, California law should be applied; that under California law, the matter is referred back to the law of the domicile; that therefore Philippine law is ultimately applicable; that finally, the share of Helen must be increased in view of the successional rights of illegitimate children under Philippine law. On the other hand, counsel for the child Mary Lucy contends that inasmuch as it is clear that under Art. 16, par. 2 of our Civil Code, the national law of the deceased must apply, our courts must immediately apply the internal law of California on the matter; that under California law there are no compulsory heirs and consequently a testator could dispose off any property possessed by him in absolute dominion and that finally, illegitimate children not being entitled to anything under California law, the will of the deceased giving the bulk of the property to Maria Lucy must remain undisturbed.,

RULING: Since the conflicts rule of California refers back the matter to the Philippines (the place of domicile), our courts have no alternative but to accept the referring back to us. If our courts will to do otherwise and throw back the matter to California, the problem would be tossed back and forth between states concerned, resulting in "international football."

[15.4] Illustrative Problem

"A," an American citizen, executed a will in Canada leaving his property located in the Philippines to "B," his friend. What law shall govern (1) "A's" capacity to execute the will, (2) the formality of execution, (3) the capacity of "B" to inherit from "A," (4) the intrinsic validity of the testamentary provision?

ANSWER:

(1) A's capacity to execute the will is governed by his national law.[105]

(2) The laws of Canada shall govern the formalities of the execution of the will.[106]

(3) The national law of the decedent (A) shall govern B's capacity to succeed.[107]

(4) The national law of the decedent (A) shall govern the intrinsic validity of the testamentary provisions.[108]

Art. 17. The forms and solemnities of contracts, wills, and other public instruments shall be governed by the laws of the country in which they are executed.

When the acts referred to are executed before the diplomatic or consular officials of the Republic of the Philippines in a foreign country, the solemnities established by Philippine laws shall be observed in their execution.

Prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country. (11a)

COMMENTS:

§ 16. Principle of Lex Loci Celebrationis

[16.1] Formalities or extrinsic validity
[16.2] Intrinsic validity of contracts
[16.3] Intrinsic validity of wills
[16.4] Illustrative problem
[16.5] Acts executed before diplomatic or consular officials
[16.6] Prohibitory laws

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[105]Art. 15, NCC.
[106]Art. 17, 1st par., NCC.
[107]Art. 1039, NCC.
[108]Art. 16, 2nd par., NCC.

[16.1] Formalities or Extrinsic Validity

Under the first paragraph of Article 17, the forms and solemnities of contracts, wills and other public instruments are governed by the laws of the country in which they are executed under the principle of *"lex loci celebrationis."*

[16.2] Intrinsic Validity of Contracts

The intrinsic validity of a contract is governed by the proper law of the contract or *"lex contractus,"* which may either be the law of the place voluntarily agreed upon by the contracting parties *("lex loci voluntatis")* or the law of the place intended by them expressly or impliedly *("lex loci intentionis").*

[16.3] Intrinsic Validity of Wills

The intrinsic validity of the provisions of a will, however, shall be governed by the national law of the decedent.[109]

[16.4] Illustrative Problem

Juan, a Filipino citizen, enters into an ordinary contract with Joe, an American citizen. The contract was executed in Canada. What law shall govern: (1) formal validity of the contract? (2) the legal capacities of the parties to enter into such contract? (3) the intrinsic validity of the contract?

ANSWER:

(1) Canadian law, under the principle of *lex loci celebrationis*.[110]

(2) Their respective national laws.[111]

(3) The proper law of the contract (*lex contractus*), which may either be the law of the place voluntarily agreed upon by the contracting parties (*lex loci voluntatis*) or the law of the place intended by them expressly or impliedly (*lex loci intentionis*).

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[109] *Id*.
[110] Art. 17, 1st par., NCC.
[111] Art. 15, NCC.

[16.5] Acts Executed Before Diplomatic and Consular Officials

When the acts referred to in the first paragraph of Article 17 are executed before the diplomatic or consular officials of the Republic of the Philippines in a foreign country, the solemnities established by Philippine laws shall be observed in their execution.[112]

[16.6] Prohibitive Laws

Prohibitive laws concerning persons, their acts or property and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country.[113]

Art. 18. In matters which are governed by the Code of Commerce and special laws, their deficiency shall be supplied by the provisions of this Code. (16a)

COMMENTS:

§ 17. Suppletory Application of the Civil Code

The provisions of the Civil Code are applicable to matters governed by the Code of Commerce and special laws in a suppletory character.[114] Hence, where there is no deficiency in the special law or Code of Commerce, the provisions of the Civil Code cannot be applied.

CHAPTER 2

Human Relations

Art. 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give every one his due, and observe honesty and good faith.

Art. 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.

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[112]Art. 17, 2nd par., NCC.
[113]Art. 17, 3rd par., NCC.
[114]Art. 18, NCC.

Art. 21. Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

COMMENTS:

§ 18. Human Relations

[18.1] In general
[18.2] Principle of *damnum absque injuria*
[18.3] Principle of abuse of rights
[18.4] Elements of abuse of rights
[18.5] Article 19, explained
[18.6] Articles 19, 20 & 21, compared

[18.1] In General

Articles 19 to 36 are devoted to the regulation of human relations. In these articles are formulated some basic principles that are to be observed for the rightful relationship between human beings and for the stability of the social order.

[18.2] Principle of *Damnum Absque Injuria*

Well-settled is the maxim that damage resulting from the legitimate exercise of a person's rights is a loss without injury — *damnum absque injuria* — for which the law gives no remedy. In other words, one who merely exercises one's rights does no actionable injury and cannot be held liable for damages.[115] This principle, however, is premised on the valid exercise of a right.[116] Under this principle, the legitimate exercise of a person's rights, even if it causes loss to another, does not automatically result in an actionable injury. The law does not prescribe a remedy for the loss. This principle does not, however, apply when there is an abuse of a person's rights, or when the exercise of this right is suspended or extinguished pursuant to a court order. Indeed, in the availment of one's rights, one must act with justice, give others their due, and observe honesty and good faith.[117]

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[115]Amonoy vs. Gutierrez, 351 SCRA 731, 736 (2001).
[116]*Id.*
[117]*Id.*

Amonoy vs. Gutierrez
351 SCRA 731 (2001)

FACTS: Petitioner in this case commenced the demolition of respondents' house on May 30, 1986 under the authority of a Writ of Demolition issued by the RTC. The records, however, show that a Temporary Restraining Order, enjoining the demolition of respondents' house, was issued by the Supreme Court on June 2, 1986. It was also found that based on the Certificate of Service of the SC process server a copy of the TRO was served on petitioner himself on June 4, 1986. Petitioner, however, did not heed the TRO and he pursued the demolition of respondents' house until the middle of 1987. In holding the petitioner responsible for damages, the Supreme Court ruled:

> "Although the acts of petitioner may have been legally justified at the outset, their continuation after the issuance of the TRO amounted to an insidious abuse of right. Indubitably, his actions were tainted with bad faith. Had he not insisted on completing the demolition, respondents would not have suffered the loss that engendered the suit before the RTC. Verily, his acts constituted not only an abuse of a right, but also an invalid exercise of a right that had been suspended when he received the TRO from this Court in June 4, 1986. By then, he was no longer entitled to proceed with the demolition.
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> xxx xxx
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> Clearly then, the demolition of respondents' house by petitioner, despite his receipt of the TRO, was not only an abuse of right but also an unlawful exercise of such right. In insisting on his alleged right, he wantonly violated this Court's Order and wittingly caused the destruction of respondents' house.
>
> Obviously, petitioner cannot invoke *damnum absque injuria*, a principle premised on the valid exercise of a right. Anything less or beyond such exercise will not give rise to the legal protection that the principle accords. And when damage or prejudice to another is occasioned thereby, liability cannot be obscured, much less abated.
>
> In the ultimate analysis, petitioner's liability is premised on the obligation to repair or to make whole the damage caused to another by reason of one's act or omission, whether done intentionally or negligently and whether or not punishable by law." (at pp. 737-739)

Pro Line Sports Center, Inc. vs. CA
281 SCRA 162 (1997)

[**FACTS:** By virtue of its merger with A.G. Spalding Bros., Inc., QUESTOR, a US-based corporation, became the owner of the trademark "spalding." Its exclusive distributor in the Philippines is Pro Line Sports Center, Inc. (Pro Line). Pro Line filed a complaint with the NBI regarding the alleged manufacturer of fake "spalding" balls by UNIVERSAL. When the NBI conducted a search on the premises of UNIVERSAL, some 1,200 basketballs and volleyballs marked "spalding" were found in the premises of UNIVERSAL. Three days after, on motion of the NBI, the court ordered to seal and padlock the instruments at UNIVERSAL's factory. Pro Line and QESTOR filed a criminal complaint for unfair competition against Monico Sehwani, the President of UNIVERSAL. The criminal complaint against Sehwani was eventually dismissed. Upon dismissal of the criminal case, UNIVERSAL and Sehwani filed a civil case for damages against Pro Line and QUESTOR for allegedly filing an unfounded suit.

RULING: Pro Line and QUESTOR could not have been moved by legal malice in instituting the criminal complaint for unfair competition which led to the filing of the Information against Sehwani. Said the Court "We are more disposed, under the circumstances, to hold that PRO LINE as the authorized agent of QUESTOR exercised sound judgment in taking the necessary legal steps to safeguard the interest of its principal with respect to the trademark in question. If the process resulted in the closure and padlocking of UNIVERSAL's factory and the cessation of its business operations, these were unavoidable consequences of petitioner's valid and lawful exercise of their right. One who makes use of his own right does no injury. *Qui jure suo utitur nullum damnum facit.* If damage results from a person's exercising his legal rights, it is *damnum absque injuria.* (p. 172)]

Albenson Enterprises Corp. vs. Court of Appeals
217 SCRA 16 (1993)

FACTS: Albenson Enterprises Corporation (AEC) delivered to Guaranteed Industries, Inc. (GII) mild steel plates and as part payment thereof, AEC was given a check drawn against the account of E.L. Woodworks. The check bounced for the reason "account closed." Upon inquiry with the SEC, AEC discovered that the President of GII was one "Eugenio S. Baltao." Upon further inquiry, AEC learned that E.L. Woodworks was registered in the name of one "Eugenio Baltao." In addition, upon verification with Pacific Banking Corp., AEC was advised that the signature appearing on the bounced check belonged to one "Eugenio Baltao." Thereafter, AEC made an extrajudicial demand upon

Eugenio S. Baltao for the payment/replacement of the dishonoured check. Eugenio S. Baltao denied issuing the check and further claimed that Guaranteed was a defunct entity and could not have transacted business with AEC. Hence, AEC filed a complaint against Eugenio S. Baltao for violation of BP 22. It turned out, however, that Eugenio S. Baltao has a namesake, in the person of his son, Eugenio Baltao III, who manages E.L. Woodworks. In the meantime, the Assistant Fiscal of Rizal filed the information against Eugenio S. Baltao. Eugenio S. Baltao immediately filed a motion for reinvestigation with the Provincial Fiscal of Rizal, who reversed the finding of the Assistant Fiscal. Because of the alleged unjust filing of the criminal case against him for a measly amount of P2,575, Eugenio S. Baltao filed before the RTC of Quezon City a complaint for damages against AEC, its owner and one of its employees. AEC contended that the civil case against them was one for malicious prosecution. They asserted that the absence of malice on their part absolved them from any liability for malicious prosecution. Eugenio S. Baltao, on the other hand, anchored his complaint for damages on Articles 19, 20 and 21 of the Civil Code. Can Eugenio S. Baltao recover damages based on Articles 19, 20 and 21 of the Civil Code?

RULING: NO. AEC, et. al. could not be said to have violated the principle of abuse of rights for the following reasons:

(1) What prompted AEC to file the case for violation of B.P. Blg. 22 against Eugenio S. Baltao was their failure to collect the amount of P2,575 due on a bounced check which they honestly believed was issued to them by Eugenio S. Baltao.

(2) When AEC made an extrajudicial demand upon Eugenio S. Baltao, the latter did nothing to clarify the case of mistaken identity at first hand. Instead, he waited in ambush and thereafter pounced on the hapless AEC at a time he thought was propitious by filing an action for damages.

(3) The criminal complaint filed against Eugenio S. Baltao was a sincere attempt on the part of AEC to find the best possible means to collect the sum due to it.

(4) Considering that GII, which received the goods in payment of which the bouncing check was issued is owned by Eugenio S. Baltao, AEC acted in good faith in filing the complaint before the provincial fiscal.

(5) A civil action for damages for malicious prosecution is allowed under the New Civil Code, more specifically Articles 19, 20, 26, 29, 32, 33, 35 and 2219(8) thereof. In order that such can prosper, however, the following elements must be present, to wit: (1) the

fact of the prosecution and the further fact that the defendant was himself the prosecutor, and that the action was finally terminated with an acquittal; (2) That in bringing the action, the prosecutor acted without probable cause; (3) The prosecutor was actuated or impelled by legal malice. In the case at bar, the second and third elements were not shown to exist. The presence of probable cause signifies, as a legal consequence, the absence of malice. In the instant case, it is evidence that AEC, *et. al*., were not motivated by malicious intent or by sinister design to unduly harass Eugenio S. Balao, but only by a well-founded anxiety to protect their rights when they filed the criminal complaint against Eugenio S. Baltao. In the case at bar, there is no proof of a sinister design on the part of AEC to vex or humiliate Eugenio S. Baltao by instituting the criminal case against him. While AEC may have been negligent to some extent in determining the liability of Eugenio S. Baltao for the dishonoured check, the same is not so gross as to amount to bad faith in warranting an award for damages.

(6) Their error in proceeding against the wrong individual was obviously in the nature of an innocent mistake, and cannot be characterized as having been committed in bad faith.

Thus, an award of damages and attorney's fees is unwarranted where the action was filed in good faith. If damage results from a person's exercising his legal rights, it is *damnum absque injuria*. In the final analysis, there is no proof or showing that AEC *et. al*. acted maliciously or in bad faith in the filing of the case against Eugenio S. Baltao. Consequently, in the absence of proof of fraud and bad faith committed by AEC *et. al*, they cannot be held liable for damages. No damages can be awarded in the instant case, whether based on the principle of abuse of rights, or for malicious prosecution.

Garciano vs. Court of Appeals
212 SCRA 436 (1992)

FACTS: Garciano was hired by Immaculate Concepcion Institute to teach during the 1981-82 school year. On January 13, 1982, or before the school year ended, she applied for an indefinite leave of absence because her daughter was taking her to Austria. The President of the school approved the application. On June 1, 1982, the school advised her, thru her husband, that her services were being terminated since there was no written contract of employment between her and the school. Upon her return from Austria and upon her inquiries as to her status, the Board of Directors of the school reinstated her and the Board likewise declared the notice of termination as null and void. Instead of reporting back for work, Garciano filed a complaint for illegal dismissal against some

of the school officials and faculty members for discrimination and unjust and illegal dismissal.

RULING: The Supreme Court ruled that she was not entitled to damages. The Court explained:

> "Garciano's discontinuance from teaching was her own choice. While some school officials and faculty members wanted her services terminated, they actually did nothing to physically prevent her from reassuming her post. That the school principal disagreed with the board of Director's decision to retain her, and some teachers allegedly threatened to resign en masse, even if true, did not make them liable to her for damages. They were simply exercising their right of free speech or their right to dissent from the Board's decision. Their acts were not contrary to law, morals, good customs or public policy. They did not 'illegally dismiss' her for the Board's decision to retain her prevailed. She was ordered to report for work on July 5, 1982, but she did not comply with that order. Consequently, whatever loss she may have incurred in the form of lost earning was self-inflicted. *Volenti non fit injuria*.
>
> With respect to Garciano's claim for moral damages, the right to recover them under Article 21 is based on equity, and he who comes to court to demand equity, must come with clean hands. Article 21 should be construed as granting the right to recover damages to injured persons who are not themselves at fault. Moral damages are recoverable only if the case falls under Article 2219 in relation to Article 21. In the case at bar, Garciano is not without fault. Firstly, she went on indefinite leave of absence and failed to report back in time for the regular opening of classes. Secondly, for reasons known to herself alone, she refused to sign a written contract of employment. Lastly, she ignored the Board of Director's order for her to report on July 5, 1982."

[18.3] Principle of Abuse of Rights

The principle of abuse of rights stated in Article 19 of the Civil Code departs from the classical theory that "he who uses a right injures no one." The modern tendency is to depart from the classical and traditional theory, and to grant indemnity for damages in cases where there is an abuse of rights, even when the act is not illicit.[118] Article 19 sets

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[118]Sea Commercial Company, Inc. vs. CA, 319 SCRA 210, 218 (1999).

certain standards which may be observed not only in the exercise of one's rights but also in the performance of one's duties. These standards are the following: to act with justice; to give everyone his due; and to observe honesty and good faith. The law, therefore, recognizes the primordial limitation on all rights: that in their exercise, the norms of human conduct set forth in Article 19 must be observed. A right, though by itself legal because recognized or granted by law as such, may nevertheless become the source of some illegality. When a right is exercised in a manner which does not conform with the norms enshrined in Article 19 and results in damage to another, a legal wrong is thereby committed for which the wrongdoer must be held responsible.[119] Article 19 was intended to expand the concept of torts by granting adequate legal remedy for the untold number of moral wrongs which is impossible for human foresight to provide specifically in statutory law. If mere fault or negligence in one's acts can make him liable for damages for injury caused thereby, with more reason should abuse or bad faith make him liable. The absence of good faith is essential to abuse of right. Good faith is an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of the law, together with an absence of all information or belief of fact which would render the transaction unconscientious. In business relations, it means good faith as understood by men of affairs.[120]

[18.4] Elements of Abuse of Rights

The elements of an abuse of right under Article 19 are the following: (1) There is a legal right or duty; (2) which is exercised in bad faith; (3) for the sole intent of prejudicing or injuring another.[121] There is however, no hard and fast rule which can be applied to determine whether or not the principle of abuse of rights may be invoked. The question of whether or not the principle of abuse of rights has been violated, resulting in damages under Articles 20 and 21 (of the Civil Code) or other applicable provision of law, depends on the circumstances of each case.[122] The absence of good faith, however, is essential to abuse of right.[123]

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[119]Albenson Enterpises Corp. vs. CA, 217 SCRA 18, 24-25 (1993).
[120]Sea Commercial Company, Inc. vs. CA, *supra*, at p. 218.
[121]Albenson Enterpises Corp. vs. CA, *supra*, at p. 217.
[122]Globe Mackay Cable and Radio Corporation vs. CA, 176 SCRA 778 (1989).
[123]Sea Commercial Company, Inc. vs. CA, *supra*.

[18.5] Article 19, Explained

While Article 19 may have been intended as a mere declaration of principle, the "cardinal law on human conduct" expressed in said article has given rise to certain rules, *e.g.*, that where a person exercises his rights but does so arbitrarily or unjustly or performs his duties in a manner that is not in keeping with honesty and good faith, he opens himself to liability. The elements of an abuse of rights under Article 19 are: (1) there is a legal right or duty; (2) which is exercised in bad faith; (3) for the sole intent of prejudicing or injuring another.[124] This provision, together with the succeeding article on human relation, was intended to embody certain basic principles "that are to be observed for the rightful relationship between human beings and for the stability of the social order." What is sought to be written into the law is the pervading principle of equity and justice above strict legalism.[125]

[18.6] Articles 19, 20 & 21, Compared

Although the requirements of each provision are different, these three (3) articles are all related to each other.[126] But while Article 19 lays down the rule of conduct for the government of human relations and for the maintenance of social order, it does not provide a remedy for its violation. Generally, an action for damages under either Article 20 or Article 21 would be proper.[127] Article 20 speaks of the general sanction for all other provisions of law which do not especially provide for their own sanction. Thus, anyone who, whether willfully or negligently, in the exercise of his legal right or duty, causes damage to another, shall indemnify his victim for injuries suffered thereby. Article 21 deals with acts *contra bonus mores*, and has the following elements: (1) There is an act which is legal; (2) but which is contrary to morals, good customs, public order, or public policy; and (3) and it is done with intent to injure. There is a common element under Articles 19 and 21, and that is, the act must be intentional. However, Article 20 does not distinguish; the act may be done either "willfully" or "negligently." Thus, under any of these three provisions of law, an act which causes injury to another may be made the basis for an award of damages.[128]

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[124]Sea Commercial Company, Inc. vs. CA, *supra.*, at pp. 218-219.

[125]*Ibid.*, at pp. 221-222.

[126]Albenson Enterprises Corp. vs. CA, *supra*, p. 25.

[127]Globe Mackay Cable and Radio Corporation vs. CA, *supra*, p. 784.

[128]Albenson Enterpises Corp. vs. CA, *supra*.

Velayo vs. Shell Co. of the Phil.
100 Phil. 186 (1956)

FACTS: The Commercial Air Lines, Inc. (CALI), on the verge of bankruptcy, met with all his creditors. It was agreed that CALI's assets, including a C-54 plane that was still in California, would be sold and the proceeds distributed to the creditors. Right after the meeting, Shell Co. shrewdly made a telegraphic assignment of its credit to a sister corporation in the US, which immediately secured attachment and sale of CALI's plane in California, the proceeds of which were totally applied to the satisfaction of its claim. Can the Shell Co. in the Philippines be made to pay for damages to the other creditors of CALI?

RULING: The case at bar falls squarely within the purview of the principle of abuse of rights embodied in Art. 19 of the Civil Code. True, this article contains essentially a mere declaration of principles, yet such declaration is implemented by Art. 21, a sequent of Art. 19, which declares that "any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for damages. Shell Co. is liable for damages because it did not show good faith and honesty.

Globe Mackay Cable & Radio Corp. vs. CA
176 SCRA 778 (1989)

FACTS: Restituto Tobias was employed by Globe Mackay as purchasing agent and administrative assistant the engineering operations manager. Fictitious purchases and other fraudulent transactions were discovered and the same were attributed to Tobias, who ironically was the one who actually discovered and reported the anomalies. One day after Tobias made the report, Herbert Hendry, the EVP and GM of Globe, confronted him by stating that he was the number one suspect and ordered him to take a one week forced leave, not to communicate with the office, to leave his table drawers open, and to leave the office keys.

When Tobias returned to work after his forced leave, Hendry again went to him and called him a "crook" and a "swindler." He was then ordered to take a lie detector test. He was also instructed to submit specimen signatures of his handwriting, signature and initials for examination by the police investigators to determine his complicity in the anomalies. The Manila police investigators submitted a laboratory crime report clearing Tobias of participation in the anomalies. Not satisfied with the police report, Hendry hired a private investigator who submitted a report finding Tobias guilty. This report however expressly stated that further investigation was still to be conducted. Nevertheless, Hendry issued a memo suspending Tobias from work preparatory to the filing of criminal charges against him.

Thereafter, the Metro Manila Police Chief Document Examiner, after investigating other documents, reiterated his previous finding that the handwritings, signatures and initials appearing in the checks and other documents involved in the fraudulent transactions were not those of Tobias. The lie detector test conducted on Tobias also yielded negative results. Notwithstanding the two police reports exculpating Tobias, Hendry filed several complaints of estafa against Tobias, all of which were dismissed. In the meantime, Tobias received a notice from Globe Mackay that his employment has been terminated. Tobias filed a complaint for illegal dismissal, which case was settled amicably.

Unemployed, Tobias sought employment with Republic Telephone Company (RETELCO). However, Hendry without being asked by Retelco, wrote a letter to the latter stating that Tobias was dismissed by Globe Mackay due to dishonesty.

Tobias filed a civil case for damages against Globe Mackay and Hendry (Petitioners for short). Petitioners contend that they could not be made liable for damages in the lawful exercise of their right to dismiss Tobias. Tobias, on the other hand, contends that because of petitioners' abusive manner in dismissing him as well as for the inhuman treatment he got from them, the petitioners must indemnify him for the damage that he had suffered.

ISSUE: Whether or not petitioners are liable for damages.

RULING: Petitioners have indeed abused the right that they invoke, causing damage to Tobias and for which the latter must be indemnified. Even granting that petitioners might have had the right to dismiss Tobias from work, the abusive manner in which that right was exercised amounted to a legal wrong for which petitioners must now be held liable. Moreover, the damage incurred by Tobias was not only in connection with the abusive manner in which he was dismissed but was also the result of several other quasi-delictual acts committed by petitioners. The following reasons convinced the court to award damages:

(1) Upon reporting for work, Tobias was confronted by Hendry who said "Tobby, you are a crook and a swindler in the company." Considering that the first report made by the police investigators was yet to be submitted, the statement made by Hendry was baseless. The imputation of guilt without basis and the pattern of harassment during the investigations of Tobias transgress the standards of human conduct set forth in Article 19 of the Civil Code. The Court has already ruled that the right of the employer to dismiss an employee should not be confused with the manner in which the right is exercised and the effects flowing therefrom. If the dismissal is done abusively, then the employer is liable for damages to the employee. Under the circumstances of this case, the petitioners clearly failed

to exercise in a legitimate manner their right to dismiss Tobias, giving the latter the right to recover damages under Article 19 in relation to Article 21 of the Civil Code.

(2) Several other tortuous acts were committed by petitioners against Tobias after the latter's termination from work. After the filing of the criminal complaints, Tobias talked to Hendry to protest the actions taken against him. In response, Hendry cut short Tobias' protestations by telling him to just confess or else the company would file a hundred more cases against him until he landed in jail. Hendry added, "You Filipinos cannot be trusted." The threat unmasked pettioner's bad faith in the various actions taken against Tobias. On the other hand, the scornful remark about Filipinos as well as Hendry's earlier statements about Tobias being a "crook" and "swindler" are clear violations of Tobias' personal dignity. (see Art. 26, Civil Code)

(3) The next tortious act committed by petitioners was the writing of a letter to RETELCO stating that Tobias had been dismissed by Globe Mackay due to dishonesty. Because of the letter, Tobias failed to gain employment with Retelco and as result of which, Tobias remained unemployed for a longer period of time. For this further damage suffered by Tobias, petitioners must likewise be held liable for damages consistent with Article 2176 of the Civil Code.

(4) Finally, there is the matter of the filing by petitioners of six criminal complaints against Tobias. In the instant case, the petitioners acted in bad faith in filing the criminal complaints. Considering the haste in which the criminal complaints were filed, the fact that they were filed during the pendency of the illegal dismissal case against petitioners, the threat made by Hendry the fact that the cases were filed notwithstanding the two police reports exculpating Tobias from involvement in the anomalies committed against Globe Mackay, coupled by the eventual dismissal of all the cases, the Court is led into no other conclusion than that petitioners were motivated by malicious intent in filing the six criminal complaints against Tobias.

RCPI vs. CA
143 SCRA 657 (1986)

FACTS: RCPI sent a telegram through its Manila Office to Loreto Dionela, reading as follows:

"LORETO DIONELA – CABANGAN – WIRE ARRIVAL OF CHECK PER

115 PM

SA IYO WALANG PAKINABANG DUMATING – KA DIYAN – WALA KANG PADALA DITO – KAHIT BULBUL MO"

Dionela filed a complaint for damages against RCPI alleging that the defamatory words on the telegram sent to him not only wounded his feelings but also caused him undue embarrassment and affected his business as well as because other people have come to know of said defamatory words.

RCPI alleges, as its defense, that the additional words in Tagalog was a private joke between the sending and receiving operators and that they were not addressed to or intended for plaintiff and therefore did not form part of the telegram and that the Tagalog words are not defamatory. The telegram sent through its facilities was received in its station at Legaspi City. Nobody other than the operator manned the teletype machine which automatically receives the telegrams being transmitted. The said telegram was detached from the machine and placed inside a sealed envelope and delivered to Dionela, obviously as is. The additional words in Tagalog were never noticed and were included in the telegram when delivered.

The lower court held RCPI directly and primarily liable for damages to Dionela. The Court of Appeals sustained the lower courts decision but reduced the award for damages. RCPI appealed to the SC alleging that the CA erred in holding that RCPI should answer directly and primarily for the civil liability arising from the criminal action of its employees.

ISSUE: Is RCPI directly and primarily liable to Dionela for damages?

RULING: YES. The action for damages was filed directly against RCPI not as an employer subsidiarily liable under the provisions of Article 1161 of the New Civil Code in relation to Article 103 of the Revised Penal Code. The cause of action of Diolenela is based on Articles 19 and 20 of the New Civil Code as well as on petitioner's breach of contract thru the negligence of its own employees.

RCPI is a domestic corporation engaged in the business of receiving and transmitting messages. Every time a person transmits a message through the facilities of RCPI, a contract is entered into. Upon receipt of the rate or fee fixed, the petitioner undertakes to transmit the message accurately. There is no question that in the case at bar, libelous matters were included in the message transmitted, without the consent or knowledge of the sender. There is a clear case of breach of contract by the petitioner in adding extraneous and libellous matters in the message sent to Dionela. As a corporation, the petitioner can act only through its employees. Hence, the acts of its employees in receiving and transmitting messages are the acts of RCPI. To hold that RCPI is not liable

directly for the acts of its employees in the pursuit of RCPI's business is to deprive the general public availing of the services of RCPI of an effective and adequate remedy. In most cases, negligence must be proved in order that plaintiff may recover. However, since negligence may be hard to substantiate in some cases, we may apply the doctrine of RES IPSA LOQUITUR (the thing speaks for itself), by considering the presence of facts or circumstances surrounding the injury.

§ 19. Breach Of Promise To Marry

[19.1] Breach of promise to marry, generally not actionable
[19.2] Breach of promise to marry, when actionable

[19.1] Breach of Promise to Marry, Generally Not Actionable

The existing rule is that a breach of promise to marry per se is not an actionable wrong.[129] Congress deliberately eliminated from the draft of the New Civil Code the provisions that would have made it so. The reason therefore is set forth in the report of the Senate Committees on the Proposed Civil Code, *viz.*:

"The elimination of this chapter is proposed. That breach of promise to marry is not actionable has been definitely decided in the case of **De Jesus vs. Syquia** (58 Phil. 866 [1933]). The history of breach of promise suits in the United States and in England has shown that no other action lends itself more readily to abuse by designing women and unscrupulous men. It is this experience which has led to the abolition of rights of action in the so-called Heart Balm suits in many of the American states. . . ."

Tanjanco vs. Court of Appeals
18 SCRA 994 (1966)

FACTS: From December 1957, Apolonio Tanjanco courted Araceli Santos, both being of adult age. Tanjanco expressed and professed his undying love and affection for Santos who also in due time reciprocated the tender feelings. In consideration of Tanjanco's promise of marriage, Santos consented and acceded to Tanjanco's request for carnal knowledge. That regularly until

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[129]Gashem Shookat Baksh vs. CA, 219 SCRA 115 (1993); citing Hermosisima vs. CA, 109 Phil. 629 (1960); Estopa vs. Piansay, 109 Phil. 640 (1960).

December 1959, through his protestations of love and promises of marriage, Tanjanco succeeded in having carnal access to Santos, as a result of which the latter conceived a child. Due to her pregnant condition and to avoid embarrassment and social humiliation, Santos had to resign her job and thereafter she became unable to support herself and her baby. Because of Tanjanco's refusal to marry Santos, the latter filed a complaint against the former for recovery of damages.

RULING: Santos is not entitled to damages. The facts stand that for one whole year, from 1958 to 1959, Santos, a woman of adult age, maintained intimate sexual relations with Tanjanco, with repeated acts of intercourse. Such conduct is incompatible with the idea of seduction. Plainly there is here voluntariness and mutual passion; for had Santos been deceived, had she surrendered exclusively because of the deceit, artful persuasions and wiles of Tanjanco, she would not have again yielded to his embraces, much less for one year, without exalting early fulfilment of the alleged promises of marriage, and would have cut short all sexual relations upon finding that Tanjanco did not intend to fulfill his promises. Hence, no case is made under Article 21 of the Civil Code.

Constantino vs. Mendez
209 SCRA 18 (1992)

FACTS: Amelita met Ivan at Tony's Restaurant where she worked as a waitress. The day following their first meeting, Ivan invited Amelita to dine with him at Hotel Enrico where he was billeted and while dining, Ivan professed his love and courted Amelita. In that same evening, Ivan brought Amelita inside his hotel room and through promise of marriage succeeded in having sexual intercourse with the latter. After the sexual act, Ivan confessed to Amelita that he was a married man. They repeated their sexual contacts in the months of September and November 1974, as a result of which Amelita got pregnant. The latter's plea for help and support fell on deaf ears. Amelita thus filed an action for acknowledgment, support and damages against Ivan.

RULING: Mere sexual intercourse is not by itself a basis for recovery. Damages could only be awarded if sexual intercourse is not a product of voluntariness and mutual desire. At the time she met Ivan at Tony's Restaurant, Amelita was already 28 years old and she admitted that she was attracted to Ivan. Her attraction to Ivan is the reason why she surrendered her womanhood. Had she been induced or deceived because of a promise of marriage, she could have immediately severed her relation with Ivan when she was informed after their first sexual contact sometime in August 1974, that he was a married man. Her declaration that in the months of September, October and November 1974, they repeated their sexual intercourse only indicates that passion and not the alleged promise of marriage was the moving force that made her submit herself to Ivan.

[19.2] Breach of Promise to Marry, When Actionable

To be actionable, there must be some act independent of the breach of promise to marry such as:

> [19.2.1] <u>If There Is Fraud or Deceit</u>: Where a man's promise to marry is in fact the proximate cause of the acceptance of his love by a woman and his representation to fulfil that promise thereafter becomes the proximate cause of the giving of herself unto him in a sexual congress, proof that he had, in reality, no intention of marrying her and that the promise was only a subtle scheme or deceptive device to entice or inveigle her to accept him and to obtain her consent to the sexual act, could justify the award of damages pursuant to Article 21, not because of such promise to marry, but because of the fraud and deceit behind it and the wilful injury to her honor and reputation which followed thereafter. It is essential, however, that such injury should have been committed in a manner contrary to morals, good customs or public policy.[130]

Pe vs. Pe
5 SCRA 200 (1962)

FACTS: Alfonso Pe, a married man, was an adopted son of a Chinaman named Pe Becco, a collateral relative of Lolita Pe's father. Because of such fact and the similarity in their family name, Alfonso became close to Lolita's family who regarded him as a member of their family. Sometime in 1952, Alfonso frequented the house of Lolita on the pretext that he wanted her to teach him how to pray the rosary. The two eventually fell in love with each other and conducted clandestine trysts not only in the town of Gasan but also in Boac where Lolita used to teach in a barrio school. They exchanged love notes with each other. The rumors about their love affair reached the ears of Lolita's parents sometime in 1955, and since then Alfonso was forbidden from going to their house and from further seeing Lolita. The affair continued nonetheless. On day in 1957, Alfonso wrote Lolita a note asking her to have a date with him. When Lolita went to see him, the two decided to elope and Lolita never returned home. The parents, brothers and sisters of Lolita sued Alfonso for damages under Article 21 of the Civil Code.

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[130]Gashem Shookat Baksh vs. CA, *supra*, at p. 128.

RULING: Alfonso is liable for damages. The circumstances under which Alfonso tried to win Lolita's affection cannot lead to any other conclusion than that it was he who, thru an ingenious scheme or trickery, seduced the latter to the extent of making her fall in love with him. No other conclusion can be drawn from the chain of events than that defendant not only deliberately, but through a clever strategy, succeeded in winning the affection and love of Lolita to the extent of having illicit relations with her. The wrong he has caused her and her family is indeed immeasurable considering the fact that he is a married man. Verily, he has committed an injury to Lolita's family in a manner contrary to morals, good customs and public policy as contemplated in Article 21 of the new Civil Code.

Gashem Shookat Baksh vs. Court of Appeals
219 SCRA 115 (1993)

FACTS: Gashem is an Iranian citizen and an exchange student taking a medical course at Lyceum Northwestern Colleges in Dagupan City. Sometime in 1987, Gashem courted Marilou Gonzales and proposed to marry her. Marilou accepted his love on the condition that they would get married and they agreed to get married after the end of the school semester, which was in October 1987. Gashem then visited Marilou's parents in Bañaga, Bugallon, Pangasinan to secure their approval to the marriage. Sometime in August 1987, Gashem forced Marilou to live with him in the Lozano Apartments. She was a virgin before she began living with him. Soon, Gashem's attitude towards Marilou started to change. He maltreated and threatened to kill her and as a result of such maltreatment, she sustained injuries. At the confrontation before the representative of the barangay captain of Guilig, Gashem repudiated their marriage agreement because he was already married to someone living in Bacolod. Marilou thus filed a complaint for damages against Gashem.

RULING: Gashem is liable for damages. The Supreme Court ruled that where a man's promise to marry is in fact the proximate cause of the acceptance of his love by a woman and his representation to fulfil that promise thereafter becomes the proximate cause of the giving of herself unto him in a sexual congress, proof that he had, in reality, no intention of marrying her and that the promise was only a subtle scheme or deceptive device to entice or inveigle her to accept him and to obtain her consent to the sexual act, could justify the award of damages pursuant to Article 21 not because of such promise to marry but because of the fraud and deceit behind it and the wilful injury to her honor and reputation which followed thereafter. It is essential, however, that such injury should have been committed in a manner contrary to morals, good customs or public policy. In the instant case, it was Gashem's "fraudulent and deceptive

protestations of love for and promise to marry Marilou that made her surrender her virtue and womanhood to him and to live with him on the honest and sincere belief that he would keep said promise, and it was likewise these fraud and deception on Gashem's part that made Marilou's parents agree to their daughter's living-in with him preparatory to their supposed marriage." In short, Marilou surrendered her virginity, the cherished possession of every single Filipina, not because of lust but because of moral seduction.

[19.2.2] If Expenses Are Actually Incurred: Where the plaintiff has actually incurred expenses for the wedding and the necessary incidents thereof,[131] the plaintiff has the right to recover money or property advanced by him upon the faith of such promise.[132]

Wassmer vs. Velez
12 SCRA 648 (1964)

FACTS: Francisco Veles and Beatriz Wassmer, following their mutual promise of love, decided to get married and set September 4, 1954 as the big day. On September 2, 1954, Velez left a note for his bride-to-be, which reads:

"Dear Bet,

We will have to postpone wedding — My mother opposes it. Am leaving on the Convair today."

"Please do not ask too many people about the reason why — That would only create a scandal.

Pacquing."

Thereafter, Velez did not appear nor was he heard from again. Wassmer sued Velez for damages. Velez contended that "there is no provision of the Civil Code authorizing" an action for breach of promise to marry. The records reveal, however, that on August 23, 1954 Wassmer and Velez applied for marriage license, which was subsequently issued. Their wedding was set for September 4, 1954. Invitations were printed and distributed to relatives, friends and acquaintances. The bride-to-be's trousseau, party dresses and other apparel for the important occasion were purchased. Dresses for the maid of honor and the flower girl were prepared. A matrimonial bed, with accessories was bought.

[131]Buñag, Jr. vs. CA, 211 SCRA 440, 448 (1992).
[132]De Jesus vs. Syquia, 58 Phil. 866 (1933).

And then, with but two days before the wedding, Velez simply called off the wedding, went to Mindanao and never returned and was never heard from again.

RULING: This is not a case of mere breach of promise to marry. Mere breach of promise to marry is not an actionable wrong. But to formally set a wedding and go through all the above-described preparation and publication, only to walk out of it when the matrimony is about to be solemnized is quite different. This is palpably and unjustifiably contrary to good customs for which defendant must be held answerable in damages in accordance with Article 21 of the Civil Code.

[19.2.3] When Woman Was Forcibly Abducted And Raped: Where the man forcibly abducted a woman and had carnal knowledge with her against her will, and thereafter promised to marry her in order to escape criminal liability, only to thereafter reneged on such promise after cohabiting with her for twenty-one days, such acts irremissibly constitute acts contrary to morals and good customs. These are grossly insensate and reprehensible transgressions which indisputably warrant and abundantly justify the award of moral and exemplary damages, pursuant to Article 21 in relation to paragraphs 3 and 10, Article 2219, and Articles 2229 and 2234 of the Civil Code.[133]

Buñag, Jr. vs. Court of Appeals
211 SCRA 440 (1992)

FACTS: On the afternoon of September 8, 1973, while Zenaida Cirilo was on her way to school, she was invited by Conrado Buñag, a former boyfriend, for a merienda at Aristocrat Restaurant. Instead of having merienda at Aristocrat Restaurant, Buñag brought her to a motel where he raped her. Thereafter, Buñag brought Cirilo to the house of his grandmother in Parañaque, where they lived for 21 days as husband and wife. On the night of September 8, 1973, the father of Buñag arrived and assured Cirilo that the following day, she and Buñag would go to Bacoor, Cavite to apply for a marriage license. Indeed, the two applied for a marriage license. On September 29, 1973, Buñag left and never returned, humiliating Cirilo and compelled her to go back to her parents on October 1973. Cirilo filed a complaint for damages for alleged breach of promise to marry against Buñag and his father.

[133]Buñag, Jr. vs. CA, 211 SCRA 440 (1992).

RULING: It is true that in this jurisdiction, we adhere to the time-honored rule that an action for breach of promise to marry has no standing in the civil law, apart from the right to recover money or property advanced by the plaintiff upon the faith of such promise. Generally, therefore, a breach of promise to marry per se is not actionable, except where the plaintiff has actually incurred expenses for the wedding and the necessary incidents thereof.

Under the circumstances obtaining in the case at bar, the acts of Buñag in forcibly abducting Cirilo and having carnal knowledge with her against her will, and thereafter promising to marry her in order to escape criminal liability, only to thereafter renege on such promise after cohabiting with her for 21 days, irremissibly constitute acts contrary to law and good customs. These are grossly insensate and reprehensible transgressions which indisputably warrant and abundantly justify the award of moral and exemplary damages, pursuant to Article 21 in relations to paragraphs 3 and 10, Article 2219, and Articles 2229 and 2234 of the Civil Code.

§ 20. Malicious Prosecution

[20.1] Basis of action
[20.2] Requisites of malicious prosecution

[20.1] Basis of Action

An action for damages arising from malicious prosecution is anchored on the provisions of Articles 21, 2217 and 2219(8) of the New Civil Code.[134] One cannot be held liable in damages for maliciously instituting a prosecution where he acted with probable cause.[135] Malice and want of probable cause must both exist in order to justify a suit for malicious prosecution.[136]

[20.2] Requisites of Malicious Prosecution

In order for the malicious prosecution suit to prosper, the plaintiff must prove: (1) the fact of the prosecution and the further fact that the defendant himself was the prosecutor, and that the action was finally terminated with an acquittal; (2) that in bringing the action the prosecu-

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[134]Ponce vs. Legaspi, 208 SCRA 377 (1992).
[135]*Id.*
[136]*Id.*

tor acted without probable cause; and (3) that the prosecutor was actuated or impelled by legal malice that is improper or sinister motive.[137]

Art. 22. Every person who through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same to him.

Art. 23. Even when an act or event causing damage to another's property was not due to the fault or negligence of the defendant, the latter shall be liable for indemnity if through the act or event he was benefited.

COMMENTS:

§ 21. Accion In Rem Verso

[21.1] *Accion in rem verso*, explained
[21.2] Distinguish from *solutio indebiti*
[21.3] Requisites of *accion in rem verso*

[21.1] Accion In Rem Verso

Under Article 22 of the Civil Code, if a person acquires or comes into possession of something at the expense of another without just or legal ground through an act or of performance by another or any other means has the obligation to return the same. An action for recovery of what has been paid or delivered without just cause or legal ground is called an *accion in rem verso.*

[21.2] Distinguished From Solutio Indebiti

The quasi-contract of *solutio indebiti* is one of the concrete manifestations of the principle that "no one shall enrich himself at the expense of another." *Solutio indebiti* is provided for in Article 2154 of the Civil Code as follows: "If something is received when there is no right to demand it, and it was unduly delivered through mistake, the obligation to return it arises." The doctrine in this article is applied only when (1) a payment is made when there exists no binding relation between the payor, who has no duty to pay, and the person who received the payment; and (2) the payment is made through mistake and not through

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[137] *Id.*

liberality or some other cause. Mistake, therefore, is an essential element in *solutio indebiti*. But in the *accion in rem verso*, it is not necessary that there should have been mistake in the payment.

[21.3] Requisites of Accion In Rem Verso

In order that an action under Article 22 of the Civil Code, on unjust enrichment, may prosper, the following conditions must concur: (1) that the defendant has been enriched; (2) that the plaintiff has suffered a loss; (3) that the enrichment of the defendant is without just or legal ground; and (4) that the plaintiff has no other action based on contract, quasi-contract, crime or quasi-delict.[138]

Obaña vs. Court of Appeals
135 SCRA 557 (1985)

FACTS: Chan Lin offered to purchase from Sandoval 170 cavans of clean rice at a price of P37.35 per cavan, delivery to be made at the store of Obaña in San Fernando, La Union, with payment to be made thereat to Sandoval's representative. As agreed, Sandoval made the delivery to Obaña's store and Chan Lin accompanied the shipment. Upon reaching the place of delivery, the goods were unloaded but when the truck driver attempted to collect the purchase price from Chan Lin, the latter was nowhere to be found. The driver tried to collect from Obaña, but the latter refused stating that he had purchased the goods from Chan Lin at P33.00 per cavan and that the price therefore had already been paid to Chan Lin. Further demands having been met with refusal, Sandoval filed suit for replevin against Obaña in the MTC, which ordered the latter to pay to the former one-half of the cost of the rice. On appeal by Obaña to the CFI, judgment was rendered dismissing the complaint. On appeal to the CA, Sandoval obtained a reversal in his favor. The CA ordered Obaña to return the 170 cavans of rice or pay its value. On appeal to the SC, Obaña argued that as owner of the goods, he could not be deprived of its ownership without the corresponding payment.

RULING: From Obaña's own testimony, he admitted that Chan Lin repaid him the sum of P5,600 and yet he still refused to return the 170 cavans of rice. Having been repaid the purchase price by Chan Lin, Obaña was thereby divested of any claim to the rice. It follows that he should return the rice to Sandoval. Obaña cannot be allowed to unjustly enrich himself at the expense of

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[138] 1 Tolentino 76, Civil Code of the Philippines, 1990 ed.

another by holding on to the property no longer belonging to him. In law and equity, therefore, Sandoval is entitled to recover the rice, or the value thereof since he was not paid the price therefore.

§ 22. Liability Without Fault Or Negligence

[22.1] Liability without fault or negligence
[22.2] Illustration
[22.3] Basis of liability under Article 23

[22.1] Liability Without Fault or Negligence

Can there be liability without fault or negligence? This is answered by Article 23 of the Civil Code. Our Civil Code now recognizes liability without fault or negligence, even when the event producing loss to others may be accidental or fortuitous, so long as another person is benefited through such event or act.[139]

[22.2] Illustration

The Code Commission gives this example: Without A's knowledge, a flood drives his cattle to the cultivated highland of B. A's cattle are saved, but B's crop is destroyed. True, A was not at fault, but he was benefited. It is but right and equitable that he should indemnify B.

[22.3] Basis of Liability under Article 23

Article 23 likewise seeks to prevent unjust enrichment. What is contemplated by Article 23 is an involuntary act or an act which though foreseen could not have been avoided. An involuntary act, because of its character cannot generally create an obligation; but when by such act its author has been enriched, it is only just that he should indemnify for the damages caused, to the extent of his enrichment.[140]

Art. 24. In all contractual, property or other relations, when one of the parties is at a disadvantage on account of his moral dependence, ignorance, indigence, mental weakness, tender age or other handicap, the courts must be vigilant for his protection.

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[139] 1 Tolentino, Civil Code, 1990 ed., p. 86.
[140] *Id.*, citing 2 Salvat 127.

Art. 25. Thoughtless extravagance in expenses for pleasure or display during a period of acute public want or emergency may be stopped by the order of the courts at the instance of any government or private charitable institution.

COMMENTS:

§ 23. Protection of the Disadvantaged

[23.1] Court's duty of protecting the disadvantaged
[23.2] Legislative intent of Article 24

[23.1] Court's Duty of Protecting the Disadvantaged

Article 24 of the Civil Code calls on the court to be vigilant in the protection of the rights of those who are disadvantaged in life. It is supplemented by Article 1332 of the Civil Code which provides: *"When one of the parties is unable to read, or if the contract is in a language not understood by him, and mistake or fraud is alleged, the person enforcing the contract must show that the terms thereof have been fully explained to the former."*

[23.2] Legislative Intent of Article 24

The law intended to protect both those who are found weak and uneducated who may have been taken advantage of by unscrupulous persons or those who may have used undue influence in entering into agreements.

Valenzuela vs. Court of Appeals
168 SCRA 623 (1988)

FACTS: Carlos Telosa, a fisherman and farmer with a very limited education, obtained a loan from the Rural Bank of Lucena sometime in 1960. The loan was secured by a real estate mortgage over a parcel of land with an area of 50,000 square meters. When the Monetary Board placed the Rural Bank of Lucena under liquidation, the account of Telosa was found in the inventory. Per the Bank's records, the principal amount of the loan of Telosa was P5,000.00. Demand was made upon Telosa to pay. Because Telosa knew that his obligation to the rural bank was only P300.00, he executed an affidavit protesting the demand. Telosa paid a total of P411.25. Claiming that the payments made did not satisfy the whole amount due because the record still showed a balance of P9,032.22, the Central Bank caused the foreclosure of the mortgage. To restrain

the foreclosure, the heirs of Telosa (who died earlier) filed a complaint seeking the nullification of the mortgage and/or its reformation to state the real intention of the parties. The heirs invoked the provisions of Article 24 of the Civil Code.

RULING: The heirs are entitled to the relief prayed for. This was one of the fraudulent and anomalous transactions involving the officers of the Rural Bank of Lucena, Inc. The latter took advantage of the very limited education of Carlos Telosa.

Rongavilla vs. Court of Appeals
294 SCRA 289 (1998)

FACTS: The complainants in this case were two aging spinsters, uneducated in English and knew only Tagalog and earned their livelihood as embroiders (mambuburda) they obtained a loan of P2,000 from defendants, their nephews and nieces, for the repair of the roof of their old house. The complainants then were living in a house constructed in a parcel of land consisting of 131 square meters. A month later, one of the defendants, visited her aunts and asked them to sign a document written in English. Complainants inquired what the document was all about and the defendant replied that it was just a document admitting their debt of P2,000.00, hence, the complainants signed it. Four years later, defendants asked the complainants to vacate the land as they were already the owners of the land. In fact, the property was already registered in the names of the defendants. It was only then that the poor spinsters learned that what they signed four years ago was a deed of sale of their property to the defendants. The complainants then filed a complaint to declare the sale as null and void.

RULING: In declaring the contract of sale to be void, the Supreme Court declared that "[p]ublic policy is also well served in defending the rights of the aged to legal protection, including their right to property that is their home, as against fraud, misrepresentation, chicanery and abuse of trust and confidence by those who owed them candor and respect."

Lim vs. Court of Appeals
229 SCRA 616 (1994)

FACTS: The spouses Tan Quico and Josefa Oraa, who both died intestate, left some ninety six hectares of land located in the municipality of Guinobatan and Camalig, Albay. The late spouses were survived by four children: Cresencia, Lorenzo, Hermogenes and Elias. Elias died without an issue while Cresencia died leaving her spouse and nine children as her heirs. Since the demise of the spouses Tan Quico and Josefa Oraa, the subject properties had

been administered by Lorenzo. The late Cresencia and Lorenzo had contrasting educational background. Cresencia only reached the second grade of elementary school. On the other hand, Lorenzo was a lawyer and a CPA. Cresencia was close to Lorenzo and always sought the latter's advice. Upon Cresencia's death, her heirs demanded for the partition of the properties left by the spouses Tan Quico and Josefa Oraa. When their efforts proved fruitless, they filed an action for the partition of the properties. Lorenzo and Hermogenes opposed the petition claiming that Cresencia, during her lifetime, had sold and conveyed all her interests in said properties to Lorenzo. They cited as evidence the "deed of confirmation of extra-judicial settlement." The deed, which was written entirely in English, was not notarized. The heirs of Cresencia countered, however, that the deed was procured through fraud, mistake or undue influence. During the trial, Lorenzo testified that he and Hermogenes explained in Bicolano the meaning of the deed to the late Cresencia. Hermogenes, however, gave a different story. He declared it was Lorenzo alone who read the text of the deed in Bicolano to the late Cresencia. Likewise, none of the alleged witnesses to the deed was presented to testify. The trial court decided in favor of the heirs of Cresencia and voided the deed on the ground that it was not understood by the late Cresencia when she signed it. On appeal, the Court of Appeals reversed the decision. It ruled that Lorenzo was not shown to have exercised any undue influence over the late Cresencia when she signed the said deed. When the case was elevated to the Supreme Court, it reversed and set aside the decision of the Court of Appeals, citing the provisions of Articles 24 and 1332 of the Civil Code.

RULING: The Supreme Court reversed the decision of the Court of Appeals. The Court explained that Lorenzo and Hermogenes failed to discharge their burden of proving that the content of the Deed of Sale was explained to the illiterate Cresencia before she signed it .The Court invoked the provisions of Articles 24 and 1332 of the Civil Code.

Cayabyab vs. Court of Appeals
232 SCRA 1 (1994)

FACTS: The spouses Agapita Ferrer and Faustino Landingin, both illiterates and could speak and understand only the Pangasinense and Ilocano dialects, had three children namely, Gabriel, Soledad and Francisca. Agapita likewise had a son by previous marriage, Policarpio Cayabyab. Sometime in 1973 and 1977, the spouses Agapita and Faustino allegedly executed three deeds of sale in favor of Policarpio covering three parcels of land owned by the spouses. All the deeds were written in English. Anita appeared to have thumbmarked her signature on all the deeds, while Faustino appeared to have fixed his signature to the deeds of sale, although he could neither read nor write and actually lost

the use of his right arm to paralysis in 1971. When two of the deeds were executed in 1977, the spouses Agapita and Faustino were both 81 years old. Upon the death of Agapita, Faustino and his three children learned of the said sales. They, together with the niece of Policarpio, filed an action for the annulment of all the deeds of sale. They alleged that Policarpio was able to obtain the signatures of Agapita and Faustino in the deeds of sale through fraud, undue influence and abuse of confidence. Policarpio, on the other hand, claimed that the sale of the lots to him was valid and binding was clearly evidenced by the deeds of sale, which were public documents. After trial, the trial court rendered judgment dismissing the complaint. On appeal, the Intermediate Appellate Court reversed the decision of the trial court and ordered the annulment of the deeds of sale. Policarpio appealed to the Supreme Court contending that the allegations of fraud, deceit and undue influence, have not been established sufficiently and completely to rebut the presumption of regularity and due execution of the deeds of sale.

RULING: The Supreme Court affirmed the decision of the Intermediate Appellate Court by applying the provisions of Article 1332. The Court explained that the defendants failed to discharge their burden of proving that the content of the Deed of Sale was explained to the illiterates Faustino and Agapita. The Court invoked the provisions of Articles 24 and 1332 of the Civil Code.

§ 24. Thoughtless Extravagance

Before thoughtless extravagance may be prevented, the following requisites must be present: (1) there must be an acute public want or emergency; and (2) the person seeking to stop it must be a government or private charitable institutions.

Art. 26. Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

(1) Prying into the privacy of another's residence;

(2) Meddling with or disturbing the private life or family relations of another;

(3) Intriguing to cause another to be alienated from his friends;

(4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.

COMMENTS:

§ 25. Protection of Human Dignity

[25.1] Philosophy behind Article 26
[25.2] Enumeration, not exclusive

[25.1] Philosophy Behind Article 26

The philosophy behind Article 26 underscores the necessity for its inclusion in our civil law. The Code Commission stressed in no uncertain terms that the human personality must be exalted. The sacredness of human personality is a concomitant consideration of every plan for human amelioration. The touchstone of every system of law, of the culture and civilization of every country, is how far it dignifies man. If the statutes insufficiently protect a person from being unjustly humiliated, in short, if human personality is not exalted — then the laws are indeed defective. Thus, under this article, the rights of persons are amply protected, and damages are provided for violations of a person's dignity, personality, privacy and peace of mind.[141]

[25.2] Enumeration, Not Exclusive

The violations mentioned in Article 26 are not exclusive but are merely examples and do not preclude other similar or analogous acts. Damages therefore are allowable for actions against a person's dignity, such as profane, insulting, humiliating, scandalous or abusive language.[142]

Concepcion vs. CA
324 SCRA 85 (2000)

FACTS: The spouses Nestor Nicolas and Allem Nicolas resided in an apartment owned by Florence "Bing" Concepcion, who also resided in the same compound. Florence joined the business venture of the spouses by contributing capital. Sometime in the second week of July 1985, Rodrigo Concepcion, brother of the deceased husband of Florence, angrily accosted Nestor at the latter's apartment and accused him of conducting an adulterous relationship with Florence. He shouted, "Hoy Nestor, kabit ka ni Bing! xxx Binigyan ka pa pala ni

[141]Concepcion vs. CA, 324 SCRA 85, 94 (2000).
[142]Concepcion vs. CA, *supra*, p. 94.

Bing Concepcion ng P100,000.00 para umakyat ng Baguio. Pagkaakyat mo at ng asawa mo doon ay baba ka uli para magkasarilinan kayo ni Bing." To clarify the matters, Nestor and Florence both denied the accusation. Rodrigo persisted in making accusations against Nestor. As a result of this incident, Nestor felt extreme embarrassment and shame to the extent that he could no longer face his neighbors. Florence also ceased to do business with him by not contributing capital anymore. This hurted Nestor's business. To make matters worse, Allem Nicolas started to doubt Nestor's fidelity resulting in frequent bickerings and quarrels during which Allem even expressed her desire to leave her husband. Consequently, Nestor was forced to write Rodrigo demanding public apology and payment of damages. Rodrigo pointedly ignored the demand, for which reason the Nicolas spouses filed a civil suit against him for damages. Rodrigo argues that there was no legal basis for an award of damages since the alleged act imputed to him does not fall under Arts. 26 and 2219 of the Civil Code. In finding him liable for damages, the Court ruled:

> "xxx We reject petitioner's posture that no legal provision supports such award, the incident complained of neither falling under Article 2219 nor Art. 26 of the Civil Code. It does not need further elucidation that the incident charged of petitioner was no less than an invasion on the right of respondent Nestor as a person. The philosophy behind Art. 26 underscores the necessity for its inclusion in our civil law. The Code Commission stressed in no uncertain terms that the human personality must be exalted. The sacredness of human personality is a concomitant consideration of every plan for human amelioration. The touchstone of every system of law, of the culture and civilization of every country, is how far it dignifies man. If the statutes insufficiently protect a person from being unjustly humiliated, in short, if human personality is not exalted — then the laws are indeed defective. Thus, under this article, the rights of persons are amply protected, and damages are provided for violations of a person's dignity, personality, privacy and peace of mind.
>
> It is petitioner's position that the act imputed to him does not constitute any of those enumerated in Arts. 26 and 2219. In this respect, the law is clear. The violations mentioned in the codal provisions are not exclusive but are merely examples and do not preclude other similar or analogous acts. Damages therefore are allowable for actions against a person's dignity, such as profane, insulting, humiliating, scandalous or abusive language. Under Article 2217 of the Civil Code, moral damages which include physical suffering, mental anguish, fright, serious anxiety, besmirched reputa-

tion, wounded feelings, moral shock, social humiliation, and similar injury, although incapacable of pecuniary computation, may be recovered if they are the proximate result of the defendant's wrongful act or omission. (pp. 94-95)

St. Louis Realty Corporation vs. Court of Appeals
133 SCRA 179 (1984)

FACTS: St. Louis Realty Corporation (SLRC) published an advertisement in the Sunday Times of December 15, 1968, with a heading "WHERE THE HEART IS," whereby the residence of a doctor was erroneously depicted as the residence of a family (different from that of the doctor's) that had recently moved into the Brookside Hills community. Noticing the mistake, the doctor called the attention of the advertiser whose officer subsequently offered his apologies but without however rectifying the published item. However, when the lawyer of the doctor demanded actual, moral and exemplary damages from the advertiser on account of the erroneous publication, the advertiser published a new advertisement, in the Manila Times of March 18, 1969, wherein the same family as in the original advertisement was depicted with its real house but no apology to the doctor or an explanation of the error in the original advertisement was made. Moreover, after the doctor had filed a complaint for damages, the advertiser published a "Notice of Rectification" in a space 4 by 3 inches, claiming that its print ad "Where the Heart Is" which appeared in the Manila Times issue of March 18, 1969 was a rectification of the same ad that appeared in the Manila Times (Sunday Times) issue of December 15, 1968 and January 5, 1969, wherein a photo of the house of another Brookside homeowner was mistakenly used as a background for the featured homeowner. In the lower court, the judge ruled that the advertiser committed a mistake which violated the complainant's right to privacy and should have immediately published a rectification and apology, but because of its mistake and utter lack of sincerity, defendant had caused complainant to suffer mental anguish in addition to actual damages resulting from reduced income.

RULING: When the matter was elevated to the Supreme Court after the appellate court had affirmed the lower court's decision, the Supreme Court declared that the St. Louis Realty's employee was grossly negligent in mixing up the residences in a widely circulated publication like the Sunday Times and it never made any written apology and explanation of the mix-up but just contended itself with a cavalier "rectification." As a result of the mi-xup, the private life of complainant was mistakenly and unnecessarily exposed causing him to suffer diminution of income and mental anguish. According to the Court, the acts and omissions of St. Louis Realty fall under Article 26.

Art. 27. Any person suffering material or moral loss because a public servant or employee refuses or neglects, without just cause, to perform his official duty may file an action for damages and other relief against the latter, without prejudice to any disciplinary administrative action that may be taken.

Art. 28. Unfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machination or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damages.

COMMENTS:

§ 26. Liability of Public Servants or Employees

[26.1] General rule
[26.2] Scope of Article 27
[26.3] Requisites of action under Article 27
[26.4] Requirement of malice or inexcusable negligence

[26.1] General Rule

As a rule, a public officer, whether judicial, quasi-judicial or executive, is not personally liable to one injured in consequence of an act performed within the scope of his official authority, and in line of his official duty.[143] However, "any person suffering material or moral loss because a public servant or employee refuses or neglects, without just cause, to perform his official duty may file an action for damages and other relief against the latter, without prejudice to any disciplinary administrative action that may be taken."[144]

[26.2] Scope of Article 27

Article 27 does not cover all cases of official wrongs. It is limited to refusal or neglect to perform official duties. This article does not cover malfeasance and misfeasance, but only nonfeasance.

[26.3] Requisites of Action under Article 27

There are four requisites in order that an action may prosper under this article: (1) That the defendant be a public official charged with the

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[143] 63 Am Jur 2nd 798, 799 cited in Philippine Match Co., Ltd. vs. City of Cebu, 81 SCRA 99 (1978).

[144] Art. 27, NCC.

performance of official duties; (2) That there be a violation of an official duty in favor of an individual; (3) That there be wilfulness or negligence in the violation of such official duty; and (4) That there be an injury to the individual.[145]

[26.4] Malice or Inexcusable Negligence

Article 27 presupposes that the refusal or omission of a public official is attributable to malice or inexcusable negligence.[146]

Ledesma vs. Court of Appeals
160 SCRA 449 (1988)

FACTS: Some students of a state college formed an organization named Student Leadership Club. Delmo was elected treasurer. In that capacity, she extended loans from the club funds to some students. The college president, claiming that extending loans was against school rules, wrote Delmo informing her that she was being dropped from the membership of the club and that she would not be a candidate for any award from the school. Delmo appealed to the Bureau of Public Schools. The Bureau directed the college president not to deprive Delmo of any award if she is entitled to it. On April 27, 1966, the President received the Director's decision. On the same day he received a telegram "airmail records Delmo missent that office." The Bureau Director asked for the return only of the records but the President allegedly mistook the telegram as ordering him to also send the decision back. So he returned by mail all the records plus the decision to the Director. The next day the President received from the Bureau Director a telegram telling him to give a copy of the decision to Delmo. The President in turn sent a telegram to the Bureau Director telling him that he had returned the decision and that he had not retained a copy. On May 3, the day of graduation, the President again received another telegram from the Director ordering him not to deprive Delmo of any honors due her. As it was impossible by this time to include Delmo's name in the program as one of the honor students, the President let her graduate as a plain student instead of being awarded the latin honor magna cum laude.

RULING: The President of the state college was held liable for damages under Article 27 of the Civil Code for failure to graduate a student with honors, on account of said official's neglect of duty and callousness. Undoubtedly, Delmo

[145] 1 Tolentino p. 113, Civil Code of the Philippines, 1990 ed.

[146] Philippine Match Co., Ltd. vs. City of Cebu, 81 SCRA 99 (1978); Also in Tuzon vs. CA, 212 SCRA 739 (1992).

went though a painful ordeal brought about by the president's neglect of duty and callousness. Thus, moral and exemplary damages under Article 27 of the Civil Code are but proper.

§27. Unfair Competition

Unfair competition is the employment of deception or any other means contrary to good faith by which he shall pass off the goods manufactured by him or in which he deals, or his business, or services for those of the one having established such goodwill, or who shall commit any acts calculated to produce said result.[147] The law further enumerates the more common ways of committing unfair competition, thus:

> "Sec. 168.3. In particular, and without in any way limiting the scope of protection against unfair competition, the following shall be deemed guilty of unfair competition:
>
> (a) Any person, who is selling his goods and gives them the general appearance of goods of another manufacturer or dealer, either as to the goods themselves or in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other feature of their appearance, which would be likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer, other than the actual manufacturer or dealer, or who otherwise clothes the goods with such appearance as shall deceive the public and defraud another of his legitimate trade, or any subsequent vendor of such goods or any agent of any vendor engaged in selling such goods with a like purpose;
>
> (b) Any person who by any artifice, or device, or who employs any other means calculated to induce the false belief that such person is offering the service of another who has identified such services in the mind of the public; or
>
> (c) Any person who shall make any false statement in the course of trade or who shall commit any other act contrary to good faith of a nature calculated to discredit the goods, business or services of another."

[147]Sec. 168.2, Republic Act No. 8293.

Art. 29. When the accused in a criminal prosecution is acquitted on the ground that his guilt has not been proved beyond reasonable doubt, a civil action for damages for the same act or omission may be instituted. Such action requires only a preponderance of evidence. Upon motion of the defendant, the court may require the plaintiff to file a bond to answer for damages in case the complaint should be found to be malicious.

If in a criminal case the judgment of acquittal is based upon reasonable doubt, the court shall so declare. In the absence of any declaration to that effect, it may be inferred from the text of the decision whether or not the acquittal is due to that ground.

COMMENTS:

§28. Civil Liability Arising From Criminal Offenses

[28.1] Delict as source of civil liability
[28.2] Basis of civil liability arising from crime
[28.3] Acquittal of the accused
[28.4] Acquittal based on reasonable doubt
[28.5] Reason for the rule in Article 29
[28.6] Article 29, explained
[28.7] No need for separate action

[28.1] Delict as Source of Civil Liability

Under Article 1157(4) of the Civil Code, *delict* or crime is one of the sources of obligations. The general rule is that "every person criminally liable for a felony is also civilly liable."[148]

[28.2] Basis of Civil Liability Arising From Crime

Generally, the basis of civil liability arising from the crime is the fundamental postulate of our law that "[e]very man criminally liable is also civilly liable."[149] Underlying this legal principle is the traditional theory that when a person commits a crime he offends two entities namely (1) the society in which he lives in or the political entity called the State whose law he had violated; and (2) the individual member of that society whose person, right, honor, chastity or property was actually or directly injured or damaged by the same punishable act or omission.

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[148] Art. 100, RPC.
[149] *Id.*

However, this rather broad and general provision is among the most complex and controversial topics in criminal procedure. It can be misleading in its implications especially where the same act or omission may be treated as a crime in one instance and as tort in another or where the law allows a separate civil action to proceed independently of the course of the criminal prosecution with which it is intimately intertwined. Many legal scholars treat as a misconception or fallacy the generally accepted notion that the civil liability actually arises from the crime when, in the ultimate analysis, it does not. While an act or omission is felonious because it is punishable by law, it gives rise to civil liability not so much because it is a crime but because it caused damage to another. Viewing things pragmatically, we can readily see that what gives rise to the civil liability is really the obligation and the moral duty of everyone to repair or make whole the damage caused to another by reason of his own act or omission, done intentionally or negligently, whether or not the same be punishable by law. In other words, criminal liability will give rise to civil liability only if the same felonious act or omission results in damage or injury to another and is the direct and proximate cause thereof. Damage or injury to another is evidently the foundation of the civil action. Such is not the case in criminal actions for, to be criminally liable, it is enough that the act or omission complained of is punishable, regardless of whether or not it also causes material damage to another.[150]

[28.3] Acquittal of the Accused

Since a person criminally liable is also civilly liable, does his acquittal in a criminal case mean extinction of his civil liability? The penultimate paragraph of Section 2 of Rule 111 of the Revised Rules of Criminal Procedure emphatically provides:

> "The extinction of the penal action does not carry with it extinction of the civil action. However, the civil action based on delict shall be deemed extinguished if there is a finding in a judgment in the criminal action that the act or omission from which the civil liability may arise did not exist."

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[150]Banal vs. Tadeo, Jr., 156 SCRA 325, 329-330 (1987).

Caiña vs. People
213 SCRA 309 (1992)

FACTS: Merlin Caiña, accused of reckless imprudence resulting in serious physical injuries, was acquitted of the criminal charge against him in a decision rendered by the MTC of Cagayan de Oro City. However, Caiña was ordered to pay the private complainant the sum of P2,893.40 representing actual damages. The award of damages was initially deleted on appeal but was later on reinstated by the RTC upon a motion for reconsideration. Caiña, however, alleges that the decision of the trial court clearly shows that the fact from which the civil liability might arise does not exist.

RULING: It is clear from the decision of the Municipal Trial Court that there was no finding of recklessness, negligence and imprudence on the part of the accused. We quote:

> "With respect to the evidence presented by the prosecution, it is the thinking of the court that the most important or paramount factor in cases of this nature, is to evidently prove the recklessness, negligence and imprudence of the accused. The prosecution failed to show a clear and convincing evidence of such recklessness, negligence and imprudence. Prosecution witness Rene Abas stated that the speed of the jeep of the accused was on a regular speed or not so fast or just the very speed the jeep can run. (Decision, p. 5, Records, p. 447, Italics supplied)
>
> It can be gleaned therefore from the decision that the act from which the civil liability might arise does not exist.
>
> It is noted by the Court that in the dispositive portion of the decision of the Municipal Trial Court, the accused's (petitioner in this case) acquittal was based on the ground that his guilt was not proved beyond reasonable doubt making it possible for Dolores Perez to prove and recover damages. (Article 29, Civil Code) However, from a reading of the decision of the Municipal Trial Court, there is a clear showing that the act from which the civil liability might arise does not exist. Civil Liability is then extinguished. (see Padilla vs. Court of Appeals, 129 SCRA 558, 570 [1984])

[28.4] Acquittal Based On Reasonable Doubt

The judgment of acquittal extinguishes the liability of the accused for damages only when it includes a declaration that the facts from which the civil liability might arise did not exist. Thus, the civil liability is not

extinguished by acquittal where the acquittal is based on reasonable doubt as only preponderance of evidence is required in civil cases; where the court expressly declares that the liability of the accused is not criminal but only civil in nature as, for instance, in the felonies of estafa, theft and malicious mischief committed by certain relatives who thereby incur only civil liability; and, where the civil liability does not arise from or is not based upon the criminal act of which the accused was acquitted.[151] The acquittal of the defendant in the criminal case would not constitute an obstacle to the filing of a civil case based on the same acts which led to the criminal prosecution.[152]

[28.5] Reason For the Rule in Article 29

The reason for the provisions of Article 29 of the Civil Code, which provides that the acquittal of the accused on the ground that his guilt has not been proved beyond reasonable doubt does not necessarily exempt him from civil liability for the same act or omission, has been explained by the Code Commission as follows:

> "The old rule that the acquittal of the accused in a criminal case also releases him from civil liability is one of the most serious flaws in the Philippine legal system. It has given rise to numberless instances of miscarriage of justice, where the acquittal was due to a reasonable doubt in the mind of the court as to the guilt of the accused. The reasoning followed is that inasmuch as the civil responsibility is derived from the criminal offense, when the latter is not proved, civil liability cannot be demanded.
>
> This is one of those causes where confused thinking leads to unfortunate and deplorable consequences. Such reasoning fails to draw a clear line or demarcation between criminal liability and civil responsibility, and to determine the logical result of the distinction. The two liabilities are separate and distinct from each other. One affects the social order and the other, private rights. One is for the punishment or correction of the offender while the other is for reparation of dam-

[151] Padilla vs. CA, 129 SCRA 558, 565-566 (1984).
[152] *Id.*

ages suffered by the aggrieved party. The two responsibilities are so different from each other that article 1813 of the present (Spanish) Civil Code reads thus: 'There may be a compromise upon the civil action arising from a crime; but the public action for the imposition of the legal penalty shall not thereby be extinguished.' It is just and proper that, for the purposes of the imprisonment of or fine upon the accused, the offense should be proved beyond reasonable doubt. But for the purpose of indemnifying the complaining party, why should the offense also be proved beyond reasonable doubt? Is not the invasion or violation of every private right to be proved only by a preponderance of evidence? Is the right of the aggrieved person any less private because the wrongful act is also punishable by the criminal law?

For these reasons, the Commission recommends the adoption of the reform under discussion. It will correct a serious defect in our law. It will close up an inexhaustible source of injustice — a cause for disillusionment on the part of the innumerable persons injured or wronged."[153]

Llorente vs. Sandiganbayan
202 SCRA 309 (1991)

FACTS: As a result of a massive reorganization in 1981, hundreds of PCA employees resigned. Among them were Curio, Perez, Azucena and Javier. They were all required to apply for PCA clearances in support of their gratuity benefits. Condition (a) of the clearance provided: "The clearance shall be signed by the PCA officers concerned only when there is no item appearing under "Pending Accountability" or after every item previously entered thereunder is fully settled. Settlement thereof shall be written in red." Notwithstanding Condition (a) just quoted, the clearances of Perez and Azucena were favorably acted upon by the PCA officers concerned, including Atty. Llorente. The clearance of Javier was likewise favorably acted upon. But with respect to the clearance of Curio, Atty. Llorente refused to approve it because Curio had accountabilities. To justify his stand, Atty. Llorente invoked Condition (a) of the clearance which he said was "very stringent" and could not be interpreted in

[153]People vs. Ligon, G.R. No. 74041, July 29, 1987; Cited in Urbano vs. Intermediate Appellate Court, 157 SCRA 1, 11-12 (1988).

any other way. Between December 1981 and December 1986, Curio failed to get gainful employment because he had no clearance yet. Thus, Curio filed a complaint against Atty. Llorente for violation of Section 3(e) of the Anti-Graft and Corrupt Practices Act. The Sandiganbayan, however, acquitted Atty. Llorente in the absence of any evidence that he acted in bad faith but held him civilly liable. Atty. Llorene questioned the decision of the Sandiganbayan holding him civilly liable in spite of an acquittal.

RULING: In justifying the award of civil liability, the Supreme Court declared —

> "Under the 1985 Rules of Criminal procedure, amending Rules 110 through 127 of the Rules of Court, the judgment of the court shall include, in case of acquittal, and unless there is a clear showing that the act from which the civil liability might arise did not exist, "a finding on the civil liability of the accused in favor of the offended party." The rule is based on the provisions of substantive law, that if acquittal proceeds from reasonable doubt, a civil action lies nonetheless.
>
> The challenged judgment found that the petition, in refusing to issue a certificate of clearance in favor of the private offended party, Herminigildo Curio, did not act with "evident bad faith," one of the elements of Section 3(e) of Republic Act No. 3819. We agree with the judgment, insofar as it found lack of evident bad faith by the petitioner, for the reasons cited therein, basically, because the petitioner was acting within the bounds of law in refusing to clear Curio although "[t]he practice was that the clearance was nevertheless approved, and then the amount of the unsettled obligation was deducted from the gratuity benefits of the employee."
>
> We also agree with the Sandiganbayan (although the Sandiganbayan did not say it) that although the petitioner did not act with evident bad faith, he acted with bad faith nevertheless, for which he should respond for damages."

[28.6] Article 29, Explained

Article 29 presupposes that: (1) the private offended party opted to recover his damages on the basis of the offender's civil liability arising from the crime he committed under Article 100 of the Revised Penal Code; (2) he also opted to institute his civil action based thereon, expressly or impliedly with the criminal action; (3) the accused was acquitted in the criminal action on reasonable doubt as to his guilt; and (4)

the said ground of acquittal was declared by the court in its judgment or is clearly inferable from the text thereof. Where all of the aforementioned assumptions are present, Article 29 automatically reserves for the private offended party the right to institute an independent civil action for damages based on the same act or omission and prove it by a preponderance of evidence despite the fact that the offender was held not to be criminally liable; and that the injured party has previously opted to recover his damages *ex delicto* under Article 100 of the Revised Penal Code.

[28.7] No Need For Separate Action

Must the recovery of the civil liability based on Article 29 be made on a separate civil action? Otherwise stated, may the court render a judgment on the civil liability of the accused in the same criminal case where he was acquitted on reasonable doubt? This issue was addressed by the Supreme Court in the case of **Padilla, et. al. vs. Court of Appeals**,[154] where the Court ruled:

> "There appear to be no sound reasons to require a separate civil action to still be filed considering that the facts to be proved in the civil case have already been established in the criminal proceedings where the accused is acquitted. Due process has been accorded the accused. He was, in fact, exonerated of the criminal charge. The constitutional presumption of innocence called for more vigilant efforts on the part of prosecuting attorneys and defense counsel, a keener awareness by all witnesses of the serious implications of perjury, and a more studied consideration by the judge of the entire records and of the applicable statutes and precedents. To require a separate civil action simply because the accused was acquitted would mean needless clogging of courts dockets and unnecessary duplication of litigation with all its attendant loss of time, effort and money on the part of all concerned.
>
> xxx xxx xxx

[154] 129 SCRA 558; Reiterated in People vs. Jalandoni, 131 SCRA 454; Belen vs. Batoy, 182 SCRA 549.

We see no need to amend Article 29 of the Civil Code in order to allow a court to grant damages despite a judgment of acquittal based on reasonable doubt. What Article 29 clearly and expressly provides is a remedy for the plaintiff in case the defendant has been acquitted in a criminal prosecution on the ground that his guilt has not been proved beyond reasonable doubt. It merely emphasizes that a civil action for damages is not precluded by an acquittal of the same criminal act or omission. The Civil Code provision does not state that the remedy can be availed of only in a separate civil action. A separate civil case may be filed but there is no statement that such separate filing is the only and exclusive permissible mode of recovering damages.

There is nothing contrary to the Civil Code provision in the rendition of a judgment of acquittal and a judgment awarding damages in the same criminal action. The two can stand side by side. A judgment of acquittal operates to extinguish the criminal liability. It does not, however, extinguish the civil liability unless there is a clear showing that the act from which the civil liability might arise did not exist.

xxx xxx xxx

A separate civil action may be warranted where additional facts have to be established or more evidence must be adduced or where the criminal case has been fully terminated and a separate complaint would be just as efficacious or even more expedient than a timely remand to the trial court where the criminal action was decided for further hearings on the civil aspects of the case. The offended party may, of course, choose to file a separate action. These do not exist in this case. Considering moreover the delays suffered by the case in the trial, appellate and review stages, it would be unjust to the complainants in this case to require at this time a separate civil action to be filed."[155]

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[155]At pp. 567-571.

Art. 30. When a separate civil action is brought to demand civil liability arising from a criminal offense, and no criminal proceedings are instituted during the pendency of the civil case, a preponderance of evidence shall likewise be sufficient to prove the act complained of.

Art. 31. When the civil action is based on an obligation not arising from the act or omission complained of as a felony, such civil action may proceed independently of the criminal proceedings and regardless of the result of the latter.

COMMENTS:

§ 29. Institution of Civil Action *Ex Delicto*

[29.1] Rule of implied institution
[29.2] When civil action is reserved
[29.3] When civil action is instituted prior to criminal action
[29.4] When civil action is instituted, but no criminal action
[29.5] Article 31, explained.
[29.6] Quasi-delict as separate source of obligation
[29.7] Acquittal of accused, irrelevant in quasi-delict
[29.8] Same negligent act may produce two kinds of civil liabilities
[29.9] Quasi-delict covers acts criminal in character

[29.1] Rule of Implied Institution

When a criminal action is instituted, the civil action for the recovery of civil liability *arising from the offense charged* shall be deemed instituted with the criminal action unless the offended party waives the civil action, reserves the right to institute it separately or institutes the civil action prior to the criminal action.[156] Note that what is impliedly instituted with the criminal action is the civil action for the recovery of civil liability based on *delict.*

[29.2] When Civil Action Is Reserved

The reservation of the right to institute separately the civil action shall be made before the prosecution starts presenting its evidence and under circumstances affording the offended party a reasonable opportunity to make such reservation.[157] The separate civil action cannot be instituted until final judgment has been entered in the criminal action.[158]

[156]Sec. 1, 1st par., Rule 111, The Revised Rules of Criminal Procedure.
[157]Sec. 1, 2nd par., Rule 111.
[158]Sec. 2, 1st par., Rule 111.

[29.3] When Civil Action Is Instituted Prior To Criminal Action

If the criminal action is instituted after the said civil action has already been instituted, the latter shall be suspended in whatever stage it may be found before judgment on the merits. The suspension shall last until final judgment is rendered in the criminal action. Nevertheless, before judgment on the merits is rendered in the civil action, the same may, upon motion of the offended party, be consolidated with the criminal action.[159]

[29.4] When Civil Action Is Instituted, But No Criminal Action

When a separate civil action is brought to demand civil liability arising from a criminal offense, and no criminal proceedings are instituted during the pendency of the civil case, a preponderance of evidence shall be sufficient to prove the act complained of.[160]

[29.5] Article 31, Explained

According to Justice Capistrano, Article 31 of the Civil Code does not provide for an independent action. An independent civil action is an action that is based upon the same criminal act as in the case of Articles 32, 33 and 34. When the civil action not arising from the act or omission complained of as a felony, such civil action being based upon an obligation not arising from the criminal act but from a different source, is not an independent civil action within the meaning of Articles 32, 33 and 34.[161] Justice Capistrano gave the following example: A is prosecuted for the crime of reckless imprudence resulting in homicide. The heirs of the deceased institute a civil action for damages against him based upon quasi-delict, under Article 2177 of the Civil Code, which is separate and distinct from criminal negligence punished as a crime or delict under the Revised Penal Code. Quasi-delict is *culpa aquiliana* and is separate and distinct from criminal negligence, which is a delict. In accordance with Article 31, the civil action for damages based upon quasi-delict may

[159]Sec. 2, 2nd par., Rule 111.
[160]Art. 30, NCC.
[161]Justice Capistrano, in Corpuz vs. Paje, 28 SCRA 1072 (1969).

proceed independently of the criminal proceeding for criminal negligence and regardless of the result of the latter. Hence, even if the defendant is acquitted in the criminal action of the charge of reckless imprudence resulting in homicide, the civil action for damages for the death of the deceased based upon quasi-delict may proceed to judgment.[162]

[29.6] Quasi-Delict As Separate Source Of Obligation

A *quasi-delict* or *culpa aquiliana* is a separate legal institution under the Civil Code, with a substantivity all its own, and individuality that is entirely apart and independent from delict or crime. A distinction exists between the civil liability arising from a crime and the responsibility for quasi-delicts or culpa extra-contractual. The same negligence causing damages may produce civil liability arising from a crime under the Penal Code, or create an action for *quasi-delictos* or *culpa extra-contractual* under the Civil Code. Therefore, the acquittal or conviction in the criminal case is entirely irrelevant in the civil case.[163]

[29.7] Acquittal of Accused, Irrelevant in Quasi-Delict

It is now settled that acquittal of the accused, does not carry with it the extinction of the civil liability based on quasi-delict. Thus, in **Tayag vs. Alcantara**,[164] it was held:

> "xxx a separate civil action lies against the offender in a criminal act, whether or not he is criminally prosecuted and found guilty or acquitted, provided that the offended party is not allowed, if he is actually charged also criminally, to recover damages on both scores, and would be entitled in such eventuality only to the bigger award of the two, assuming the awards made in the two cases vary. In other words, the extinction of civil liability referred to in Par. (c), Section 3, Rule 111 [now Rule 111, Sec. 2(b)], refers exclusively to civil liability founded on Article 100 of the Revised Penal Code, whereas the civil liability for the same act considered as a quasi-delict only and not as a crime is not extinguished even

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[162] *Id*.
[163] Castillo vs. Court of Appeals, 176 SCRA 591, 598 (1989).
[164] 98 SCRA 723, 728 (1980).

by a declaration in the criminal case that the criminal act charged has not happened or has not been committed by the accused xxx."[165]

[29.8] Same Negligent Act May Produce Two Kinds Of Civil Liabilities

The same negligent act causing damages may produce a civil liability arising from a crime under Art. 100 of the Revised Penal Code or create an action for quasi-delict or *culpa extra-contractual* under Articles 2176 to 2194 of the New Civil Code.[166] The former is a violation of the criminal law, while the latter is a distinct and independent negligence, having always had its own foundation and individuality. Some legal writers are of the view that in accordance with Article 31, the civil action based upon quasi-delict may proceed independently of the criminal proceeding for criminal negligence and regardless of the result of the latter.[167] Indeed, under the Revised Rules of Criminal Procedure, the civil action based on Article 2176 (or quasi-delict) may proceed independently of the criminal action and shall require only a preponderance of evidence.[168] Since the same negligence can give rise either to a delict or crime or to a quasi-delict or tort, either of these two types of civil liability may be enforced against the culprit, subject to the caveat under Article 2177 of the Civil Code that the offended party cannot recover damages under both types of liability.[169]

[29.9] Quasi-Delict Covers Acts Criminal In Character

Article 2176, whenever it refers to "fault or negligence," covers not only acts "not punishable by law" but also acts criminal in character, whether intentional and voluntary or negligent.[170] Briefly stated, *culpa aquiliana* includes voluntary and negligent acts which may be punishable by law.[171]

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[165]Heirs of the late Teodoro Guaring, Jr. vs. Court of Appeals, 269 SCRA 283, 288 (1997).
[166]Garcia vs. Florido, 52 SCRA 420, 425 (1973); Citing Barredo vs. Garcia, 73 Phil. 607.
[167]*Id.*, at p. 428.
[168]See Sec. 3, Rule 111, Rules of Criminal Procedure.
[169]Jarantilla vs. Court of Appeals, 171 SCRA 429, 436 (1989).
[170]Andamo vs. Intermediate Appellate Court, 191 SCRA 195, 202 (1990).
[171]Elcano vs. Hill, 77 SCRA 98 (1977).

Art. 32. Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:

(1) Freedom of religion;

(2) Freedom of speech;

(3) Freedom to write for the press or to maintain a periodical publication;

(4) Freedom from arbitrary or illegal detention;

(5) Freedom of suffrage;

(6) The right against deprivation of property without due process of law;

(7) The right to a just compensation when private property is taken for public use;

(8) The right to the equal protection of the laws;

(9) The right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures;

(10) The liberty of abode and of changing the same;

(11) The privacy of communication and correspondence;

(12) The right to become a member of associations or societies for purposes not contrary to law;

(13) The right to take part in a peaceable assembly to petition the Government for redress of grievances;

(14) The right to be free from involuntary servitude in any form;

(15) The right of the accused against excessive bail;

(16) The right of the accused to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses in his behalf;

(17) Freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, or from being induced by a promise of immunity or reward to make such confession, except when the person confessing becomes a State witness;

(18) Freedom from excessive fines, or cruel and unusual punishment, unless the same is imposed or inflicted in accordance with a statute which has not been judicially declared unconstitutional; and

(19) Freedom of access to the courts.

In any of the cases referred to in this article, whether or not the defendant's act or omission constitute a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief. Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence.

The indemnity shall include moral damages. Exemplary damages may also be adjudicated.

The responsibility herein set forth is not demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other penal statute.

Art. 33. In cases of defamation, fraud, and physical injuries, a civil action for damages, entirely separate and distinct from the criminal action, may be brought by the injured party. Such civil action shall proceed independently of the criminal prosecution, and shall require only a preponderance of evidence.

Art. 34. When a member of a city or municipal police force refuses or fails to render aid or protection to any person in case of danger to life or property, such peace officer shall be primarily liable for damages, and the city or municipality shall be subsidiarily responsible therefor. The civil action herein recognized shall be independent of any criminal proceedings, and a preponderance of evidence shall suffice to support such action.

COMMENTS:

§ 30. Independent Civil Actions

[30.1] Independent civil actions, explained
[30.2] Civil damages for violation of constitutional liberties under Article 32
[30.3] Good faith, not a defense
[30.4] Article 33, explained
[30.5] Civil action allowed to be instituted is *ex-delicto*
[30.6] Term "physical injuries," explained
[30.7] Criminal negligence, included in Article 33

[30.1] Independent Civil Actions, Explained

In the cases provided in Articles 32, 33, 34 and 2176 of the Civil Code of the Philippines, an independent civil action may be brought by the offended party. It shall proceed independently of the criminal action and shall require only a preponderance of evidence. In no case, how-

ever, may the offended party recover damages twice for the same act or omission charged in the criminal action.[172]

[30.2] Civil Damages For Violation Of Constitutional Liberties Under Article 32

Article 32 is an implementation of the civil rights guaranteed under the Philippine Constitution. Giving the reasons for the provision, the Code Commission reported: (1) In most cases, the threat to freedom originates from abuses of power by government officials and peace officers. Heretofore, the citizens have had to depend upon the prosecuting attorney for the institution of criminal proceedings, in order that the wrongful act be punished under the Penal Code and the civil liability exacted. But not infrequently, because the Fiscal was burdened with too many cases or because he believed the evidence was insufficient, or as to a few fiscals, on account of a disinclination to prosecute a fellow public official, especially when he is of high rank, no criminal action was filed by the prosecuting attorney. The aggrieved citizen was thus left without redress. In this way, many individuals, whose freedom had been tampered with, have been unable to reach the courts, which are the bulwark of liberty. (2) Even when the prosecuting attorney filed a criminal action, the requirement of proof beyond reasonable doubt often prevented the appropriate punishment. On the other hand, an independent civil action as proposed in the new Civil Code, would afford the proper remedy by a preponderance of evidence. (3) Direct and open violation of the Penal Code trampling upon the freedoms named are not so frequent as those subtle, clever and indirect ways which do not come within the pale of the penal law. It is in these cunning devices of suppressing or curtailing freedom, which are not criminally punishable, where the greatest danger to democracy lies. The injured citizen will always have, under the new Civil Code, adequate civil remedies before the courts because of the independent civil action, even in those instances where the act or omission complained of does not constitute a criminal offense.

[30.3] Good Faith, Not A Defense

It is not necessary that the defendant under Article 32 should have acted with malice or bad faith. To make such a requisite would defeat

[172]Sec. 3, Rule 111, The Revised Rules of Criminal Procedure.

the main purpose of said article, which is effective protection of individual rights. Public officials in the past have abused their powers on the pretext of justifiable motives or good faith in the performance of their duties. Precisely, the object of the article is to put an end to official abuse by the plea of good faith.[173]

[30.4] Article 33, Explained

To hold a person liable for damages under Article 33, only a preponderance of evidence is required. An acquittal in a criminal case is not a bar to the filing of an action for civil damages, for one may not be criminally liable and still be civilly liable. Thus, the outcome or result of the criminal case, whether of an acquittal or conviction is really inconsequential and will be of no moment in the civil action. To subordinate the result of the civil action contemplated in Article 33 to the result of the criminal prosecution would render meaningless the independent character of the civil action when, on the contrary, the law provides that such civil action "may proceed independently of the criminal proceeding and regardless of the result of the latter." Article 33 of the Civil Code contemplates a civil action for recovery of damages that is entirely unrelated to the purely criminal aspect of the case. This is the reason why only a preponderance of evidence and not proof beyond reasonable doubt is deemed sufficient in such civil action.[174]

[30.5] Civil Action Allowed To Be Instituted Is *Ex-Delicto*

The civil action for damages which Article 33 allows to be instituted is *ex delicto*. This is manifest from the provision which uses the expressions "criminal action" and "criminal prosecution." This conclusion is supported by the comment of the Code Commission, thus:

> "The underlying purpose of the principle under consideration is to allow the citizen to enforce his rights in a private action brought by him, regardless of the action of the State attorney. It is not conducive to civic spirit and to individual self-reliance and initiative to habituate the citizens to depend

[173]Memorandum of Dr. Jorge Bocobo, as chairman of the Code Commission, dated July 22, 1950 submitted to the Joint Committee on Codification of the Congress of the Philippines.

[174]Diong Bi Chu vs. Court of Appeals, 192 SCRA 554 (1990).

upon the government for the vindication of their own private rights. It is true that in many of the cases referred to in the provision cited, a criminal prosecution is proper, but it should be remembered that while the State is the complainant in the criminal case, the injured individual is the one most concerned because it is he who has suffered directly. He should be permitted to demand reparation for the wrong which peculiarly affects him."[175]

[30.6] Term "Physical Injuries," Explained

The term "physical injuries" in Article 33 is used in a generic sense. It is not the crime of physical injuries defined in the Revised Penal Code. It includes not only physical injuries but consummated, frustrated and attempted homicide.[176] In **Carandang vs. Santiago**,[177] the Supreme Court explained further:

"The Article in question uses the words 'defamation,' 'fraud' and 'physical injuries.' Defamation and fraud are used in their ordinary sense because there are no specific provisions in the Revised Penal Code using these terms as means of offenses defined therein, so that these two terms defamation and fraud must have been used not to impart to them any technical meaning in the laws of the Philippines, but in their generic sense. With this apparent circumstance in mind, it is evident that the term 'physical injuries' could not have been used in its specific sense as a crime defined in the Revised Penal Code, for it is difficult to believe that the Code Commission would have used terms in the same article — some in their general and another in its technical sense. In other words, the term 'physical injuries' should be understood to mean bodily injury, not the crime of physical injuries, because the terms used with the latter are general terms. In any case the Code Commission recommended that the civil action for physical injuries be similar to the civil action for assault and battery in American law, and this recommendation must

[175]Madeja vs. Caro, 126 SCRA 293, 296.
[176]Madeja vs. Caro, *supra*, at p. 297; Also in Jervoso vs. People, 189 SCRA 523 (1990).
[177]97 Phil. 94, 96-97 (1955).

have been accepted by the Legislature when it approved the article intact as recommended. If the intent has been to establish a civil action for the bodily harm received by the complainant similar to the civil action for assault and battery, as the Code Commission states, the civil action should lie whether the offense committed is that of physical injuries or frustrated homicide, or attempted homicide, or even death."

[30.7] Criminal Negligence, Included In Article 33

In **Corpuz vs. Paje**,[178] the Supreme Court ruled that "criminal negligence, that is, reckless imprudence, is not one of the three crimes mentioned in Article 33 of the Civil Code." This ruling was followed in **Marcia vs. Court of Appeals**.[179] In **Madeja vs. Caro**, *supra*, the Supreme Court explained that **Corpuz vs. Paje**, *supra*, is not authoritative. It was pointed that of eleven justices only nine took part in the decision and four of them merely concurred in the result. In **Madeja vs. Caro**, the Court ruled that the civil action may proceed independently of the criminal proceeding even if the crime charged is "homicide thru reckless imprudence."

Art. 35. When a person, claiming to be injured by a criminal offense, charges another with the same, for which no independent civil action is granted in this Code or any special law, but the justice of the peace finds no reasonable grounds to believe that a crime has been committed, or the prosecuting attorney refuses or fails to institute criminal proceedings, the complainant may bring a civil action for damages against the alleged offender. Such civil action may be supported by a preponderance of evidence. Upon the defendant's motion, the court may require the plaintiff to file a bond to indemnify the defendant in case the complaint should be found to be malicious.

If during the pendency of the civil action, an information should be presented by the prosecuting attorney, the civil action shall be suspended until the termination of the criminal proceedings.

Art. 36. Prejudicial questions, which must be decided before any criminal prosecution may be instituted or may proceed, shall be governed by rules of court which the Supreme Court shall promulgate and which shall not be in conflict with the provisions of this Code.

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[178] 28 SCRA 1062 (1969).
[179] 120 SCRA 193 (1983).

COMMENTS:

§ 31. Prejudicial Question

[31.1] Prejudicial question, explained
[31.2] Elements of prejudicial question
[31.3] Suspension of proceedings
[31.4] When doctrine of prejudicial question comes into play

[31.1] Prejudicial Question, Explained

A prejudicial question has been defined to be one which arises in a case, the resolution of which question is logical antecedent of the issue involved in said case. I t is one based on a fact distinct and separate from the crime but so intimately connected with it that it determines the guilt or innocence of the accused, and for it to suspend the criminal action, it must appear not only that said case involves facts intimately related to those upon which the criminal prosecution would be based but also that in the resolution of the issue or issues raised in the civil case, the guilt or innocence of the accused would necessary be determined. A prejudicial question usually comes into play in a situation where a civil action and a criminal action both pend and there exists in the former an issue which must be preemptively resolved before the criminal action may proceed, because howsoever the issue raised in the civil action is resolved would be determinative *juris et de jure* of the guilt or innocence of the accused in a criminal case.[180]

[31.2] Elements of Prejudicial Question

The elements of prejudicial question are: (a) the previously instituted civil action involves an issue similarly or intimately related to the issue raised in the subsequent criminal action, and (b) the resolution of such issue determines whether or not the criminal action may proceed.[181] Note that it is the issue in the civil action that is prejudicial to the continuation of the criminal action, and not vice-versa.[182]

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[180]Donato vs. Luna, 160 SCRA 441, 445 (1988).
[181]Sec. 7, Rule 111, The Revised Rules of Criminal Procedure.
[182]Yap vs. Paras, 205 SCRA 625, 630 (1992).

Ras vs. Rasul
100 SCRA 125 (1980)

FACTS: Alejandro Ras was defendant in a civil case over a property allegedly sold twice. As a defendant in the civil case, Ras alleged that he never sold the property in question to the complainant and that the signatures appearing on the document were forgeries. However, while the civil case was pending, the Provincial Fiscal filed an information for estafa in the same court against Ras arising from the same alleged double sale subject matter of the civil case. Correspondingly, a motion for suspension of the criminal case was filed in the lower court on the ground that the resolution of the issues on the civil case would necessarily be determinative of the guilt or innocence of the accused. When the motion was denied, the matter was eventually elevated to the Supreme Court.

RULING: The defense of the nullity and forgery of the alleged prior deed of sale in the civil case was based on the very same facts which would be necessarily determinative of the accused's guilt or innocence as an accused in the criminal case, because if the alleged prior sale in favor of complainant void or fictitious then there would be no double sale and petitioner would be innocent of the offense charged. It would therefore be necessary that the truth or falsity of the accused's claim that his signature in the alleged prior sale was a forgery be first determined. While the question of the nullity of sale is distinct and separate from the crime of estafa resulting from the alleged double sale, it is however, so intimately connected with it that it determines the guilt or innocence of the accused in the criminal action. Therefore, according to the Supreme Court, there indeed appeared to be a prejudicial question.

Yap vs. Paras,
205 SCRA 625 (1992)

FACTS: On Oct. 31, 1971, according to Yap, Paras sold to her his share in the intestate estate of their parents for P300.00. The sale was evidenced by a private document. Nineteen years later, Paras sold the same property to Santiago Saya-ang for P5,000.00. This was evidenced by a notarized Deed of Absolute Sale. When Yap learned of the second sale, she filed a complaint for estafa against Paras and Saya-ang with the Office of the Provincial Prosecutor of General Santos City. On the same date, she filed a complaint for the nullification of the said sale with the RTC of General Santos City. The criminal case was eventually filed in court. Before arraignment, the trial judge *motu proprio* issued an order dismissing the criminal case on the ground that there is a prejudicial question, citing the case of *Ras vs. Rasul*, 100 SCRA 125. Yap elevated the matter to the Supreme Court.

RULING: In the Ras case, there was a motion to suspend the criminal action on the ground that the defense in the civil case — forgery of his signature in the first deed of sale — had to be threshed out first. Resolution of that question would necessarily resolve the guilt or innocence of the accused in the criminal case. By contracts, there was no motion for suspension in the case at bar; and no less importantly, the respondent judge had not been informed of the defense Paras was raising in the civil action. It is worth remarking that not every defense raised in the civil action will raise a prejudicial question to justify suspension of the criminal action. The defense must involve an issue similar or intimately related to the same issue raised in the criminal action and its resolution should determine whether or not the latter action may proceed.

Balgos, Jr. vs. Sandiganbayan
176 SCRA 287 (1989)

FACTS: In 1984, a criminal information for violation of Section 3(c) of R.A. 3019 was filed against Balgos, Jr. and others. The information alleged that Balgos, Jr., being the acting Clerk of Court of the RTC in Bayombong, Nueva Vizcaya and also the Ex-Officio provincial sheriff of the said province, together with his co-accused, acted with evident bad faith and manifest partiality in enforcing a Writ of execution against a Mustang car registered in the name of Leticia Acosta-Ang, despite their knowledge that the registered owner was not the judgment debtor in Civil Case No. 4047. In 1987, the plaintiff in Civil Case No. 4047 filed a complaint for rescission of the sale of the car by Juanito Ang, the judgment debtor, to Leticia Acosta-Ang for being allegedly in fraud of creditors. Thereafter, the accused filed a motion to suspend proceedings in the criminal case against them on the ground of existence of a prejudicial question. When the Sandiganbayan denied the motion, the matter was elevated to the Supreme Court.

RULING: The pending civil case for the annulment of the sale of the car to Leticia is not determinative of the guilt or innocence of the accused for the acts allegedly committed by them in seizing the car. Even if in the civil action it is ultimately resolved that the sale was null and void, it does not necessarily follow that the seizure of the car was rightfully undertaken. The car was registered in the name of Leticia Ang six (6) months before the seizure. Until the nullity of the sale is declared by the courts, the same is presumptively valid. Thus, the accused must demonstrate that the seizure was not attended by manifest bad faith in order to clear themselves of the charge in the criminal action.

[31.3] Suspension of Proceedings

A petition for suspension of the criminal action based upon the pendency of a prejudicial question in a civil action may be filed in the

office of the prosecutor or the court conducting the preliminary investigation. When the criminal action has been filed in court for trial, the petition to suspend shall be filed in the same criminal action at any time before the prosecution rests.[183] The rule authorizes only the suspension of the criminal action and not its dismissal by reason of a prejudicial question.[184]

[31.4] When Doctrine Comes Into Play

The doctrine of prejudicial question comes into play generally in a situation where a civil action and a criminal action both pend and there exists in the former an issue which must be preemptively resolved before the criminal action may proceed, because howsoever the issue raised in the civil action is resolved would be determinative *juris et de jure* of the guilt or innocence of the accused in the criminal case.[185] Thus:

[31.4.1] When Cases Involved Are Civil And Administrative

In **Ocampo vs. Buenaventura**,[186] the doctrine of prejudicial question was held inapplicable because no criminal case but merely an administrative case and a civil suit were involved. In **Quiambao vs. Osorio**,[187] since the actions involved were civil and administrative in character, it was held that there was no prejudicial question to speak of.

[31.4.2] Administrative Case, Does Not Constitute Prejudicial Question To Criminal Prosecution

In **La Chemise Lacoste, S.A. vs. Fernandez**,[188] La Chemise Lacoste filed with the NBI a letter complaint alleging therein the acts of unfair competition being committed by Hemandas & Co, owned by Gobindram Hemandas Sujanani. The NBI conducted an investigation and thereafter filed with the court two applications for the issuance of search warrants. The court issued the search warrants. Hemandas filed, however, a motion to quash the search warrants alleging that the trademark used by him ("Chemise Lacoste & Crocodile Device") was differ-

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[183]Sec. 6, Rule 111.
[184]Yap vs. Paras, *supra*.
[185]Flordelis vs. Castillo, 58 SCRA 301.
[186]55 SCRA 267 (1974).
[187]158 SCRA 674 (1988).
[188]129 SCRA 373 (1984).

ent from La Chemise Lacoste's trademark and that the pendency of his application for the registration of his trademark with the Patent Office renders premature any criminal or civil action on the same subject matter and between the same parties. On the issue of prejudicial question, the Supreme Court ruled:

> "By the same token, the argument that the application was premature in view of the pending case before the patent Office is likewise without legal basis.
>
> The proceedings pending before the Patent Office involving PIC Co. 1658 do not partake of the nature of a prejudicial question which must first be definitely resolved.
>
> Section 5 of Rule 111 of the Rules of Court provides that:
>
> 'A petition for the suspension of the criminal action based upon the pendency of a prejudicial question in a civil case, may only be presented by any party before or during the trial of the criminal action.'
>
> The case which suspends the criminal prosecution must be a civil case which is determinative of the innocence or, subject to the availability of other defenses, the guilt of the accused. The pending case before the Patent Office is an administrative proceeding and not a civil case. The decision of the Patent Office cannot be finally determinative of the private respondent's innocence of the charges against him."[189]

[31.4.3] Criminal Prosecution Does Not Constitute Prejudicial Question To Administrative Proceeding For Disbarment Or Suspension Of A Lawyer

A criminal prosecution will not constitute prejudicial question even if the same facts and circumstances are attendant in the administrative proceedings for the disbarment or suspension of a member of the bar because administrative cases against lawyers belong to a class of their own. They are distinct from and they may proceed independently of civil and criminal cases.[190]

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[189] At p. 394.

[190] Gatchalian Promotions Talents Pool, Inc. vs. Naldoza, 315 SCRA 406 (1999).

BOOK I
PERSONS

Title I
CIVIL PERSONALITY

CHAPTER 1
General Provisions

Art. 37. Juridical capacity, which is the fitness to be the subject of legal relations, is inherent in every natural person and is lost only through death. Capacity to act, which is the power to do acts with legal effects, is acquired and may be lost. (n)

COMMENTS:

§ 32. Persons

[32.1] Concept of person and personality
[32.2] Kinds of persons
[32.3] Juridical capacity and capacity to act
[32.4] Distinctions between juridical capacity and capacity to act

[32.1] Concept of Person and Personality

A person is any being susceptible of rights and obligations[1] or more specifically, it is every physical or moral, real or juridical and legal being susceptible of rights and obligations or being the subject of legal relations.[2] Personality, on the other hand, is the aptitude to be the sub-

[1]I-II Castan, 8th ed., 95.
[2]2 Sanchez Roman, 110.

ject, active or passive, of juridicial relations.[3] One is a person, while one has personality.[4]

[32.2] Kinds of Persons

There are two kinds of persons: natural or physical persons and juridical or artificial persons.[5] Natural persons are human beings while juridical or artificial persons are artificial beings susceptible of rights and obligations or of being the subject of legal relations.[6]

[32.3] Juridical Capacity and Capacity to Act

Capacity is synonymous with personality because it implies aptitude to be the subject of rights and obligations, that is, juridical relations.[7] But this aptitude may manifest in two ways; *first*, as aptitude of the subject for the mere holding or enjoyment of rights, and *second*, aptitude for the exercise of such rights and to consummate juridical acts.[8] The first is called *"juridical capacity"* or *personality* and is defined by the Civil Code as the fitness to be the subject of legal relations. The latter is called *"capacity to act"* and is defined in the Code as the power to do acts with legal effect.[9] The union of both juridical capacity and capacity to act constitutes full civil capacity.[10]

[32.4] Distinctions between Juridical Capacity and Capacity to Act

Juridical Capacity (JC) may be distinguished from Capacity to Act (CA), as follows:

(1) Juridical Capacity is a static condition of the subject while Capacity to Act is dynamic;

(2) Juridical Capacity is the aptitude to be the subject of rights and obligations, the abstract possibility of receiving legal effects while

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[3] I-II Castan, 8th ed., 95.
[4] I Caguioa, Civil Code, 1967 ed., p. 73.
[5] Trattato, Vol. I, 445.
[6] 2 Sanchez Roman, 119; Cited in I Caguioa, Civil Code, 1967 ed., p. 74.
[7] I Caguioa, Civil Code, 1967 ed., p. 74.
[8] *Id.*, citing I-II Castan, 8th ed., 125-126.
[9] *Id.*
[10] 2 Sanchez Roman, 112-114.

Capacity to Act is the power to give life to juridical acts, to execute acts with legal effect;

(3) Juridical Capacity is one, indivisible, irreducible and essentially the same always and for all men while Capacity to Act does not exist in all men nor does it exist to the same extent;

(4) For the former it is enough that the person exists, *i.e.*, it is inherent and ineffaceable attribute, but for the latter intelligence and volition is required and since these do not exist in all men nor to the same extent, the law denies capacity to act absolutely to some and limits it with regard to others;[11]

(5) Juridical Capacity is lost only through death while Capacity to Act may be lost through other means or circumstances; and

(6) Juridical Capacity cannot be limited or restricted while Capacity to Act can be limited or restricted by certain circumstances.

Art. 38. Minority, insanity or imbecility, the state of being a deaf-mute, prodigality and civil interdiction are mere restrictions on capacity to act, and do not exempt the incapacitated person from certain obligations, as when the latter arise from his acts or from property relations, such as easements. (32a)

Art. 39. The following circumstances, among others, modify or limit the capacity to act: age, insanity, imbecility, the state of being a deaf-mute, penalty, prodigality, family relations, alienage, absence, insolvency and trusteeship. The consequences of these circumstances are governed in this Code, other codes, the Rules of Court, and in special laws. Capacity to act is not limited on account of religious belief or political opinion.

A married woman, twenty-one years of age or over, is qualified for all acts of civil life, except in cases specified by law. (n)

COMMENTS:

§ 33. Restrictions and Modifications on Capacity To Act

[33.1] Restrictions and modifications on capacity to act
[33.2] Incapacities to act and special disqualifications, distinguished
[33.3] Liability of incapacitated persons

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[11] I-II Castan, 8th ed., 126-127; Cited in I Caguioa, Civil Code, 1967 ed., pp. 74-75.

[33.4] Minority
[33.5] Effect of minor's misrepresentation
[33.6] Insanity and imbecility, distinguished
[33.7] Deaf-mutism, its effects
[33.8] Civil interdiction, concept and effects
[33.9] Prodigality, its effects

[33.1] Restrictions and Modifications on Capacity to Act

Article 38 enumerates some of the restrictions on one's capacity to act. Since these are mere restrictions, it does not mean that the person suffering therefrom is not possessed of capacity to act. A minor, for example, possesses capacity to act, although his capacity to act is restricted. Article 39, on the other hand, enumerates circumstances which modify one's capacity to act. Although the above articles enumerate some of the causes of incapacity or limitations on capacity to act, said enumeration is not exclusive as the Rules of Court under Rule 92 provide for other limitations.

[33.2] Incapacities to Act and Special Disqualifications, Distinguished

The incapacities mentioned in Articles 38 and 39 are limitations or restrictions on capacity to act. They are based on subjective circumstances of certain persons which compel the law to withhold or suspend for a certain time the capacity to perform certain juridical acts.[12] Disqualifications or prohibitions, on the other hand, are based on reasons of morality.[13] Incapacities to act restrict the exercise of the right. Disqualifications or prohibitions restrict the enjoyment of the right itself.[14] Examples of the latter are prohibition against the spouses from donating to each other[15] or selling to each other[16] or those mentioned in Article 1491.

[33.3] Liability of Incapacitated Persons

Although the capacity to act of incapacitated persons are restricted or limited, they are not, however, exempt from certain obligations, as

[12]I Caguioa, Civil Code, 1967 ed., p. 76.
[13]*Id.*
[14]I-II Castan, 8th ed., 130; Cited in I Caguioa, Civil Code, 1967 ed., p. 76.
[15]Art. 87, FC.
[16]Art. 1490, NCC.

when these obligations arise from his acts or from property relations, such as easements.[17] For example, while an insane person or a child under nine years of age is exempt from criminal liability, his civil liability shall devolve upon his parent or guardian, if there was fault or negligence on their part and if none, then the civil liability shall devolve upon the property of the insane or the minor. [18]

[33.4] Minority

Minority is defined as the state of a person who is under the age of legal majority and a minor is a person below eighteen years of age since majority commences upon attaining the age of 18.[19] A minor is limited in his capacity to act.[20] He may not enter into a contract as a general rule. According to Article 1327 of the Civil Code, the following cannot give their consent to a contract: (1) unemancipated minor; (2) insane or demented persons; and (3) deaf-mutes who do not know how to write. Note, however, that all minors are unemancipated. Prior to R.A. 6809, emancipation of a minor can take place by marriage and recorded agreement.[21] After the amendment of Article 234 of the Family Code by R.A. 6809, emancipation can take place only by the attainment of majority.

A contract entered into by a minor, without the consent or assistance of a guardian, is either voidable or unenforceable. A contract is voidable or annullable where one of the parties is incapable of giving consent thereto.[22] Where both parties are incapable of giving consent to a contract, the same is unenforceable.[23] If the contract is voidable because one of the contracting parties thereto is a minor, the same nonetheless may be ratified by the guardian of the minor.[24] If the contract, however, is unenforceable because both the contracting parties are still minors, the ratification by the parent or guardian of one of the contracting parties has the effect of converting the contract to a voidable one.[25]

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[17]Art. 38, NCC,
[18]Art. 101, RPC, in relation to Art. 12(1)(2), RPC.
[19]R.A. No. 6809.
[20]Art. 38, NCC.
[21]Art. 397, NCC; And Article 234, Family Code (prior to amendment by R.A. No. 6809).
[22]Art. 1390(1), NCC.
[23]Art. 1403(3), NCC.
[24]Art. 1394, NCC.
[25]Art. 1407, par. 1, NCC.

If the ratification, however, is made by the parents or guardians of both the contracting parties, the contract shall be validated from the inception.[26]

If the contract is voidable on the ground of minority, an action for annulment of such contract must be commenced within a period of four years counted from the time the guardianship ceases,[27] that is, when the minor reaches the age of majority. If the action is not commenced within such period, the right of the party to institute the action shall prescribe.[28]

[33.5] Effect of Minor's Misrepresentation

Supposing a minor misrepresents his age when he enters into a contract, can he be declared in estoppel? Can he be prevented from annulling the contract upon reaching the age of majority? In the case of **Sia Suan vs. Alcantara**,[29] reiterating an earlier doctrine laid down in **Mercado vs. Espiritu**,[30] the Supreme Court ruled that when a minor misrepresents his age and his physical features are such as to mislead the other party into believing that he is of age, the minor on reaching the age of majority can no longer annul the contract on the ground of estoppel. In a subsequent case,[31] however, the Court made a distinction between passive or constructive misrepresentation and active misrepresentation. The Court held that if the minor is guilty only of passive or constructive misrepresentation and not active misrepresentation, he can still be allowed to annul the contract upon attaining the age of majority.

Sia Suan vs. Alcantara
85 Phil. 669

PARAS, J.:

On August 3, 1931, a deed of sale was executed by Rufino Alcantara and his sons Damaso Alcantara and Ramon Alcantara conveying to Sia Suan five parcels of land. Ramon Alcantara was then 17 years, 10 months and 22 days

[26] Art. 1407, par. 2, NCC.
[27] Art. 1391, NCC.
[28] Naval vs. Enriquez, 3 Phil. 699; Ullman vs. Hernaez, 30 Phil. 69; Villanueva vs. Villanueva, 91 Phil. 43.
[29] 85 Phil. 669.
[30] 37 Phil. 215.
[31] Braganza vs. Villa-Abrille, 105 Phil. 456.

old. On August 27, 1931, Gaw Chiao (husband of Sia Suan) received a letter from Francisco Alfonso, attorney of Ramon Alcantara, informing Gaw Chiao that Ramon Alcantara was a minor and accordingly disavowing the contract. After being contacted by Gaw Chiao, however, Ramon Alcantara executed an affidavit in the office of Jose Gomez, attorney of Gaw Chiao, wherein Ramon Alcantara ratified the deed of sale. On said occasion Ramon Alcantara received from Gaw Chiao the sum of P500. In the meantime, Sia Suan sold one of the lots to Nicolas Azores from whom Antonio Azores inherited the same.

On August 8, 1940, an action was instituted by Ramon Alcantara in the Court of First Instance of Laguna for the annulment of the deed of sale as regards his undivided share in the two parcels of land covered by certificates of title Nos. 751 and 752 of Laguna. Said action was against Sia Suan and her husband Gaw Chiao, Antonio, Azores, Damaso Alcantara and Rufino Alcantara (the latter two being, respectively, the brother and father of Ramon Alcantara appealed to the Court of Appealed which reversed the decision of the trial court, on the ground that the deed of sale is not binding against Ramon Alcantara in view of his minority on the date of its execution, and accordingly sentenced Sia Suan to pay to Ramon Alcantara the sum of P1,750, with legal interest from December 17, 1931, in lieu of his share in the lot sold to Antonio Azores (who was absolved from the complaint), and to reconvey to Ramon Alcantara an undivided one-fourth interest in the lot originally covered by certificate of title NO. 752 of Laguna plus the cost of the suit. From this judgment Sia Suan and Gaw Chiao have come to us on appeal by *certiorari*.

It is undeniable that the deed of sale signed by the appellee, Ramon Alcantara, on August 3, 1931, showed that he, like his co-signers (father and brother), was then of legal age. It is not pretend and there is nothing to indicate that the appellants did not believe and rely on such recital of fact. This conclusion is decisive and very obvious in the decision of the Court of Appeals. It is true that in the resolution on the motion for reconsideration, the Court of Appeals remarked that "The fact that when informed of appellant's minority, the appellees too no steps for nine years to protect their interest beyond requiring the appellant to execute a ratification of the sale while still a minor, strongly indicates that the appellees knew of his minority when the deed of sale was executed." But the feeble insinuation is sufficiently negative by the following positive pronouncements of the Court of Appeals as well in said resolution as in the decision.

> As to the complaint that the defendant is guilty of laches, suffice it to say that *the appellees were informed of his minority within one (1) month after the transaction was completed*. (Resolution.)

> Finally, the appellees were equally negligent in not taking any action to protect their interest *from and after August 27, 1931, when they were notified in writing of appellant's minority*. (Resolution.)
>
> . . . The fact remains that *the appellees were advised within the month that appellant was a minor, through the letter of Attorney Alfonso (Exhibit 1)* informing appellees of his client's desire to disaffirm the contract . . . (Decision.)
>
> *The purchaser having been apprised of incapacity of his vendor shortly after the contract was made*, the delay in bringing the action of annulment will not serve to bar it unless the period fixed by the statute of limitations expired before the filing of the complaint. . . . (Decision.)

In support of the contend that the deed of sale is binding on the appellee, counsel for the appellants invokes the decision in *Mercado and Mercado vs. Espiritu* (37 Phil., 215), wherein this court held:

> The courts, in their interpretation of the law, have laid down the rule that the sale of real estate, made by minors who pretend to be of legal age, when in fact they are not, is valid, and they will not be permitted to excuse themselves from the fulfillment of the obligations contracted by them, or to have them annulled in pursuance of the provisions of Law 6 title 19, of the 6th Partida; and the judgment that holds such a sale to valid and absolves the purchaser from the complaint filed against him does not violate the laws relative to the sale of minors' property, nor the juridical rules established in consonance therewith. (Decisions of the Supreme Court of Spain, of April 27, 1840, July 11, 1868, and March 1, 1875.)

The Court of Appeals has refused to apply this doctrine on the ground that the appellants did not actually pay any amount in cash to the appellee and therefore did not suffer any detriment by reason of the deed of sale, it being stipulated that the consideration therefore was a pre-existing indebtedness of appellee's father, Rufino Alcantara. We are of the opinion that the Court of Appeals erred. In the first place, in the case cited, the consideration for sale consisted in greater part of pre-existing obligation. In the second place, under the doctrine, to bind a minor who represents himself to be of legal age, it is not necessary for his vendee to actually part with cash, as long as the contract is supported by a valid consideration. Since appellee's conveyance to the appellants was admittedly for and in virtue of a pre-existing indebtedness (unquestionably a valid consideration), it should produce its full force and effect in the absence of any other vice that may legally invalidate the same. It is not here

claimed that the deed of sale is null and void on any ground other than the appellee's minority. Appellee's contract has become fully efficacious as a contract executed by parties with full legal capacity.

The circumstance that, about one month after the date of the conveyance, the appellee informed the appellants of his minority, is of no moment, because appellee's previous misrepresentation had already estopped him from disavowing the contract. Said belated information merely leads to the inference that the appellants in fact did not know that the appellee was a minor on the date of the contract, and somewhat emphasizes appellee's bad faith, when it is borne in mind that no sooner had he given said information than he ratified his deed of sale upon receiving from the appellants the sum of P500.

Counsel for the appellees argues that the appellants could not have been misled as to the real age of the appellee because they were free to make the necessary investigation. The suggestion, while perhaps practicable, is conspicuously unbusinesslike and beside the point, because the findings of the Court of Appeals do not show that the appellants knew or could have suspected appellee's minority.

The Court of Appeals seems to be of the opinion that the letter written by the appellee informing the appellants of his minority constituted an effective disaffirmance of the sale, and that although the choice to disaffirm will not by itself avoid the contract until the courts adjudge the agreement to be invalid, said notice shielded the appellee from laches and consequent estoppel. This position is untenable since the effect of estoppel in proper cases is unaffected by the promptness with which a notice to disaffirm is made.

The appealed decision of the Court of Appeals is hereby reversed and the appellants absolved from the complaint, with costs against the appellee, Ramon Alcantara. So ordered.

Braganza vs. Villa-Abrille
105 Phil. 456

BENGZON, J.:

Rosario L. de Braganza and her sons Rodolfo and Guillermo petition for review of the Court of Appeal's decision whereby they were required solidarily to pay Fernando F. de Villa Abrille the sum of P10,000 plus 2% interest from October 30, 1944.

The above petitioners, it appears, received from Villa Abrille, as a loan, on October 30, 1944 P70,000 in Japanese war notes and in consideration thereof, promised in writing (Exhibit A) to pay him P10,000 "in legal currency of the

P.I. two years after the cessation of the present hostilities or as soon as International Exchange has been established in the Philippines," plus 2 % *per annum*.

Because payment had not been made, Villa Abrille sued them in March 1949.

In their answer before the Manila Court of First Instance, defendants claimed to have received P40,000 only — instead of P70,000 as plaintiff asserted. They also averred that Guillermo and Rodolfo were minors when they signed the promissory note Exhibit A. After hearing the parties and their evidence, said court rendered judgment, which the appellate court affirmed, in the terms above described.

There can be no question about the responsibility of Mrs. Rosario L. Braganza because the minority of her consigners note release her from liability; since it is a personal defense of the minors. However, such defense will benefit her to the extent of the shares for which such minors may be responsible, (Art. 1148, Civil Code). It is not denied that at the time of signing Exhibit A, Guillermo and Rodolfo Braganza were minors-16 and 18 respectively. However, the Court of Appeals found them liable pursuant to the following reasoning:

> . . . . These two appellants *did not make it appear in the promissory note that they were not yet of legal age*. If they were really fair to their creditor, *they should have appraised him on their incapacity*, and if the former, in spite of the information relative to their age, parted with his money, then he should be contended with the consequence of his act. But, that was not the case. Perhaps defendants in their desire to acquire much needed money, they readily and willingly signed the promissory note, without disclosing the legal impediment with respect to Guillermo and Rodolfo. When minor, like in the instant case, *pretended to be of legal age, in fact they were not*, they will not later on be permitted to excuse themselves from the fulfillment of the obligation contracted by them or to have it annulled. (Mercado, et al. vs. Espiritu, 37 Phil., 215.) [Emphasis Ours.]

We cannot agree to above conclusion. From the minors' failure to disclose their minority *in the same promissory note they signed*, it does not follow as a legal proposition, that they will not be permitted thereafter to assert it. They had no juridical duty to disclose their inability. In fact, according to Corpuz Juris Secundum, 43 p. 206;

> . . . . Some authorities consider that a false representation as to age including a contract as part of the contract and accordingly hold that it cannot be the basis of an action in tort. Other authorities

> hold that such misrepresentation may be the basis of such an action, on the theory that such misrepresentation is not a part of, and does not grow out of, the contract, or that the enforcement of liability for such misrepresentation as tort does not constitute an indirect of enforcing liability on the contract. *In order to hold infant liable, however, the fraud must be actual and not constructure. It has been held that his mere silence when making a contract as to age does not constitute a fraud which can be made the basis of an action of decit*. (Emphasis Ours.)
>
> The fraud of which an infant may be held liable to one who contracts with him in the belief that he is of full age must be actual not constructive, and mere failure of the infant to disclose his age is not sufficient. (27 American Jurisprudence, p. 819.)

The Mercado case cited in the decision under review is different because the document signed therein by the minor *specifically stated he was of age*; here Exhibit A contained no such statement. In other words, in the Mercado case, the minor was guilty of active misrepresentation; whereas in this case, if the minors were guilty at all, which we doubt it is of *passive* (or constructive) misrepresentation. Indeed, there is a growing sentiment in favor of limiting the scope of the application of the Mercado ruling, what with the consideration that the very minority which incapacitated from contracting should likewise exempt them from the results of misrepresentation.

We hold, on this point, that being minors, Rodolfo and Guillermo Braganza could not be legally bound by their signatures in Exhibit A.

It is argued, nevertheless, by respondent that inasmuch as this defense was interposed only in 1951, and inasmuch as Rodolfo reached the age of majority in 1947, it was too late to invoke it because more than 4 years had elapsed after he had become emancipated upon reaching the age of majority. The provisions of Article 1301 of the Civil Code are quoted to the effect that "an action to annul a contract by reason of majority must be filed within 4 years" after the minor has reached majority age. The parties do not specify the exact date of Rodolfo's birth. It is undenied, however, that in October 1944, he was 18 years old. On the basis of such datum, it should be held that in October 1947, he was 21 years old, and in October 1951, he was 25 years old. So that when this defense was interposed in June 1951, four years had not yet completely elapsed from October 1947.

Furthermore, there is reason to doubt the pertinency of the 4-years period fixed by Article 1301 of the Civil Code where minority is set up only *as a defense* to an action, without the minors asking for any positive relief from the

contract. For one thing, they have not filed in this case *an action* for annulment. They merely interposed an excuse from liability.

Upon the other hand, these minors may not be entirely absolved from monetary responsibility. In accordance with the provisions of Civil Code, even if their written contact is unenforceable because of non-age, they shall make restitution to the extent that they have profited by the money they received. (Art. 1340) There is testimony that the funds delivered to them by Villa Abrille *were used for their support* during the Japanese occupation. Such being the case, it is but fair to hold that they had profited to the extent of the value of such money, which value has been authoritatively established in the so-called Ballantine Schedule: in October 1944, P40.00 Japanese notes were equivalent to P1 of current Philippine money.

Wherefore, as the share of these minors was 2/3 of P70,000 of P46,666.66, they should now return P1,166.67. Their promise to pay P10,000 in Philippine currency, (Exhibit A) can not be enforced, as already stated, since they were minors incapable of binding themselves. Their liability, to repeat, is presently declared without regard of said Exhibit A, but solely in pursuance of Article 1304 of the Civil Code.

Accordingly, the appealed decision should be modified in the sense that Rosario Braganza shall pay 1/3 of P10,000 *i.e.*, P3,333.33[4] plus 2% interest from October 1944; and Rodolfo and Guillermo Braganza shall pay jointly[5] to the same creditor the total amount of P1,166.67 plus 6% interest beginning March 7, 1949, when the complaint was filed. No costs in this instance.

Bambalan vs. Maramba
51 Phil. 417

ROMUALDEZ, J.:

The defendants admit in their amended answer those paragraphs of the complaint wherein it is alleged that Isidro Bambalan y Colcotura was the owner, with Torrens title, of the land here in question and that the plaintiff is the sole and universal heir of the said deceased Isidro Bambalan y Colcotura, as regards the said land. This being so, the fundamental question to be resolved in this case is whether or not the plaintiff sold the land in question to the defendants.

The defendants affirm they did and as proof of such transfer present document Exhibit 1, dated July 17, 1922. The plaintiff asserts that while it is true that he signed said document, yet he did so by intimidation made upon his mother Paula Prado by the defendant Genoveva Muerong, who threatened the former with imprisonment. While the evidence on this particular point does not decisively support the plaintiff's allegation, this document, however, is vitiated

to the extent of being void as regards the said plaintiff, for the reason that the latter, at the time he signed it, was a minor, which is clearly shown by the record and it does not appear that it was his real intention to sell the land in question.

What is deduced from the record is, that his mother Paula Prado and the latter's second husband Vicente Lagera, having received a certain sum of money by way of a loan from Genoveva Muerong in 1915 which, according to Exhibit 3, was P200 and according to the testimony of Paula Prado, was P150, and Genoveva Muerong having learned later that the land within which was included that described in said Exhibit 3, had a Torrens title issued in favor of the plaintiff's father, of which the latter is the only heir and caused the plaintiff to sign a conveyance of the land.

At any rate, even supposing that the document in question, Exhibit 1, embodies all of the requisites prescribed by law for its efficacy, yet it does not, according to the provisions of section 50 of Act No. 496, bind the land and would only be a valid contract between the parties and as evidence of authority to the register of deeds to make the proper registration, inasmuch as it is the registration that gives validity to the transfer. Therefore, the defendants, by virtue of the document Exhibit 1 alone, did not acquire any right to the property sold as much less, if it is taken into consideration, the vendor Isidro Bambalan y Prado, the herein plaintiff, was a minor.

As regards this minority, the doctrine laid down in the case of *Mercado and Mercado vs. Espiritu* (37 Phil., 215), wherein the minor was held to be estopped from contesting the contract executed by him pretending to be of age, is not applicable herein. In the case now before us the plaintiff did not pretend to be of age; his minority was well known to the purchaser, the defendant, who was the one who purchased the plaintiff's first cedula used in the acknowledgment of the document.

In regard to the amount of money that the defendants allege to have given the plaintiff and her son in 1992 as the price of the land, the preponderance of evidence shows that no amount was given by the defendants to the alleged vendors in said year, but that the sum of P663.40, which appears in the document Exhibit 1, is arrived at, approximately, by taking the P150 received by Paula Prado and her husband in 1915 and adding thereto interest at the rate of 50 per cent *per annum*, then agreed upon, or P75 a year for seven years up to July 31, 1922, the date of Exhibit 1.

The damages claimed by the plaintiff have not been sufficiently proven, because the witness Paula Prado was the only one who testified thereto, whose testimony was contradicted by that of the defendant Genoveva Muerong who, moreover, asserts that she possesses about half of the land in question. There are, therefore, not sufficient data in the record to award the damages claimed by the plaintiff.

In view of the foregoing, the dispositive part of the decision appealed from is hereby affirmed, without any express findings as to the costs in this instance. So ordered.

[33.6] Insanity and Imbecility, Distinguished

An imbecile is a person who while advanced in age has the mental capacity comparable to that of a child between two and seven years of age while an insane person is one whose mental faculties are diseased. In criminal law, the imbecile is exempt in all cases from criminal liability, while the insane is not so exempt if it can be shown that he acted during a lucid interval.[32] During lucid interval,[33] the insane acts with intelligence. Hence, contracts entered into during a lucid interval are valid,[34] but the lucid interval must be proven as a matter of fact.

Under Article 1327, paragraph no. 2, insane or demented persons cannot give their consent to a contract. Likewise, an insane person cannot make a valid will or testament.[35] Contracts entered into by an imbecile, insane or demented person are voidable.[36]

However, not every kind of insanity will annul consent. It is only that insanity which prevents a person from knowing the character of the act that he is performing as well as its legal effects which will be ground for annulment.[37] Monomania, for example, which is insanity on a certain point does not necessarily annul a contract except when the contract refers to that precise point where the person concerned is insane.

Consequently, mental incapacity to enter into a contract is a question of fact which must be decided by the courts. There is, however, a presumption that every person is of sound mind, in the absence of proof to the contrary.[38] Thus, the mere fact that a person, nine days after the execution of a contract, was declared mentally incapacitated by a com-

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[32]Article 12, par. 1, RPC.

[33]Intervals occurring in the mental life of an insane person during which he is temporarily but completely restored to the use of his reason, or so far restored that he has sufficient intelligence, judgment, and will to enter into contractual relations, or perform other legal acts, without disqualification by reason of his disease. (Black's Law Dictionary)

[34]Art. 1328, NCC.

[35]Art. 798, NCC.

[36]Art. 1390(1), NCC.

[37]I Caguioa, Civil Code, 1967 ed., pp. 79-80.

[38]Art. 800, NCC.

petent court, does not mean that she was incapacitated at the time of the execution of the contract. The burden of proving such incapacity at the time of the execution rests upon he who alleges it; if no sufficient proof to this effect is presented, his capacity will be presumed.[39]

[33.7] Deaf-Mutism, Its Effects

Being a deaf-mute is not by itself a disqualification for giving consent. Only deaf-mutes who do not know how to write are declared by law incapable of giving consent.[40] Contract entered into by a deaf-mute who knows how to write is perfectly valid, while a contract entered into by a deaf-mute who does not know how to write is either voidable or unenforceable, depending on whether one or both of the parties are incapacitated.

[33.8] Civil Interdiction, Concept and Effects

Civil interdiction is an accessory penalty imposed upon an accused who is sentenced to a principal penalty not lower than *reclusion temporal*[41] which is a penalty ranging from twelve years and one day to twenty years. Civil interdiction produces the following effects during the time of the sentence: (1) deprivation of the rights of parental authority or guardianship; (2) deprivation of marital authority; (3) deprivation of the right to manage his property; and (4) deprivation of the right to dispose of his property by any act or any conveyance *inter vivos*.[42]

[33.9] Prodigality, Its Effects

Prodigality in itself does not limit the capacity of a person to act. He may enter into contracts and make wills disposing of his property. There is no specific provision which incapacitates him for any particular act. But he may be placed under guardianship as an incompetent under the provisions of Rule 93, Section 2, of the Rules of Court. The moment he is under guardianship, his capacity to act then becomes restricted because he can only bind himself in a contract through his guardian.

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[39]Carillo vs. Jaoco, 46 Phil. 597.
[40]Art. 1327(2), NCC.
[41]Art. 41, RPC.
[42]Art. 34, RPC.

CHAPTER 2

Natural Persons

Art. 40. Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided it be born later with the conditions specified in the following article. (29a)

Art. 41. For civil purposes, the foetus is considered born if it is alive at the time it is completely delivered from the mother's womb. However, if the foetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb. (30a)

COMMENTS:

§ 34. Civil Personality

[34.1] What determines personality
[34.2] When is a person deemed "born"
[34.3] Provisional personality of conceived child
[34.4] Rights of a conceived child

[34.1] What Determines Personality

The existence of personality on the part of natural persons depends on whether he is born with the requisites required by law. According to the Civil Code, it is birth that gives personality in the case of human beings and unless a being is born he is not considered a person.[43] However, for civil purposes which are favorable to it, the foetus although not born but already conceived may be considered a person if he is born subsequently with the requisites required by law.[44]

Geluz vs. CA
G.R. No. L-16439, July 20, 1961

REYES, J.B.L., J.:

This petition for *certiorari* brings up for review question whether the husband of a woman, who voluntarily procured her abortion, could recover damages from physician who caused the same.

[43] Art. 40, NCC.
[44] *Id.*

The litigation was commenced in the Court of First Instance of Manila by respondent Oscar Lazo, the husband of Nita Villanueva, against petitioner Antonio Geluz, a physician. Convinced of the merits of the complaint upon the evidence adduced, the trial court rendered judgment in favor of plaintiff Lazo and against defendant Geluz, ordering the latter to pay P3,000.00 as damages, P700.00 attorney's fees and the costs of the suit. On appeal, Court of Appeals, in a special division of five, sustained the award by a majority vote of three justices as against two, who rendered a separate dissenting opinion.

The facts are set forth in the majority opinion as follows:

> Nita Villanueva came to know the defendant (Antonio Geluz) for the first time in 1948 — through her aunt Paula Yambot. In 1950 she became pregnant by her present husband before they were legally married. Desiring to conceal her pregnancy from her parent, and acting on the advice of her aunt, she had herself aborted by the defendant. After her marriage with the plaintiff, she again became pregnant. As she was then employed in the Commission on Elections and her pregnancy proved to be inconvenient, she had herself aborted again by the defendant in October 1953. Less than two years later, she again became pregnant. On February 21, 1955, accompanied by her sister Purificacion and the latter's daughter Lucida, she again repaired to the defendant's clinic on Carriedo and P. Gomez streets in Manila, where the three met the defendant and his wife. Nita was again aborted, of a two-month old foetus, in consideration of the sum of fifty pesos, Philippine currency. The plaintiff was at this time in the province of Cagayan, campaigning for his election to the provincial board; he did not know of, nor gave his consent, to the abortion.

It is the third and last abortion that constitutes plaintiff's basis in filing this action and award of damages. Upon application of the defendant Geluz we granted *certiorari*.

The Court of Appeals and the trial court predicated the award of damages in the sum of P3,000.00 upon the provisions of the initial paragraph of Article 2206 of the Civil Code of the Philippines. This we believe to be error, for the said article, in fixing a minimum award of P3,000.00 for the death of a person, does not cover the case of an unborn foetus that is not endowed with personality. Under the system of our Civil Code, "la criatura abortiva no alcanza la categoria de persona natural y en consecuencia es un ser no nacido a la vida del Derecho" (Casso-Cervera, "Diccionario de Derecho Privado," Vol. 1, p. 49), being incapable of having rights and obligations.

Since an action for pecuniary damages on account of personal injury or death pertains primarily to the one injured, it is easy to see that if no action for such damages could be instituted on behalf of the unborn child on account of the injuries it received, no such right of action could derivatively accrue to its parents or heirs. In fact, even if a cause of action did accrue on behalf of the unborn child, the same was extinguished by its pre-natal death, since no transmission to anyone can take place from on that lacked juridical personality (or juridical capacity as distinguished from capacity to act). It is no answer to invoke the provisional personality of a conceived child (*conceptus pro nato habetur*) under Article 40 of the Civil Code, because that same article expressly limits such provisional personality by imposing the condition that the child should be subsequently born alive: "provided it be born later with the condition specified in the following article." In the present case, there is no dispute that the child was dead when separated from its mother's womb.

The prevailing American jurisprudence is to the same effect; and it is generally held that recovery can not had for the death of an unborn child (Stafford vs. Roadway Transit Co., 70 F. Supp. 555; Dietrich vs. Northampton, 52 Am. Rep. 242; and numerous cases collated in the editorial note, 10 ALR, [2d] 639).

This is not to say that the parents are not entitled to collect any damages at all. But such damages must be those inflicted directly upon them, as distinguished from the injury or violation of the rights of the deceased, his right to life and physical integrity. Because the parents can not expect either help, support or services from an unborn child, they would normally be limited to moral damages for the illegal arrest of the normal development of the *spes hominis* that was the foetus, *i.e.*, on account of distress and anguish attendant to its loss, and the disappointment of their parental expectations (Civ. Code Art. 2217), as well as to exemplary damages, if the circumstances should warrant them (Art. 2230). But in the case before us, both the trial court and the Court of Appeals have not found any basis for an award of moral damages, evidently because the appellee's indifference to the previous abortions of his wife, also caused by the appellant herein, clearly indicates that he was unconcerned with the frustration of his parental hopes and affections. The lower court expressly found, and the majority opinion of the Court of Appeals did not contradict it, that the appellee was aware of the second abortion; and the probabilities are that he was likewise aware of the first. Yet despite the suspicious repetition of the event, he appeared to have taken no steps to investigate or pinpoint the causes thereof, and secure the punishment of the responsible practitioner. Even after learning of the third abortion, the appellee does not seem to have taken interest in the administrative and criminal cases against the appellant. His only concern appears to have been directed at obtaining from the doctor a large money payment, since he sued for

P50,000.00 damages and P3,000.00 attorney's fees, an "indemnity" claim that, under the circumstances of record, was clearly exaggerated.

The dissenting Justices of the Court of Appeals have aptly remarked that:

> It seems to us that the normal reaction of a husband who righteously feels outraged by the abortion which his wife has deliberately sought at the hands of a physician would be highminded rather than mercenary; and that his primary concern would be to see to it that the medical profession was purged of an unworthy member rather than turn his wife's indiscretion to personal profit, and with that idea in mind to press either the administrative or the criminal cases he had filed, or both, instead of abandoning them in favor of a civil action for damages of which not only he, but also his wife, would be the beneficiaries.

It is unquestionable that the appellant's act in provoking the abortion of appellee's wife, without medical necessity to warrant it, was a criminal and morally reprehensible act, that can not be too severely condemned; and the consent of the woman or that of her husband does not excuse it. But the immorality or illegality of the act does not justify an award of damage that, under the circumstances on record, have no factual or legal basis.

The decision appealed from is reversed, and the complaint ordered dismissed. Without costs.

Let a copy of this decision be furnished to the Department of Justice and the Board of Medical Examiners for their information and such investigation and action against the appellee Antonio Geluz as the facts may warrant.

[34.2] When is a Person Deemed "Born"

For civil purposes, the foetus is considered born if it is alive at the time it is completely delivered from the mother's womb.[45] Complete delivery means the cutting of the umbilical cord so that if after the cutting of the umbilical cord the child is alive, even only for a few hours, it is considered a person.[46] This rule applies only if the foetus had an intra-uterine life of at least seven months. If the foetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb.[47]

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[45]Art. 41, 1st sentence, NCC.
[46]I Caguioa, Civil Code, 1967 ed., p. 82.
[47]Art. 41, 2nd sentence, NCC.

Exceptionally, however, a conceived child which is still inside the mother's womb is deemed "born," hence, considered a person, but subject to the following conditions: (1) it is deemed born only for purposes that are favorable to it; and (2) it must be born later under the conditions specified in Article 41 of the Civil Code.[48]

[34.3] Provisional Personality of Conceived Child

A conceived child, although as yet unborn, is given by law a provisional personality of its own for all purposes favorable to it, as explicitly provided in Article 40 of the Civil Code of the Philippines.[49] The law considers the conceived child as born for all civil purposes favourable to it, if it is later born alive. Its personality, therefore, has two characteristics: (1) it is essentially limited, because it is only for purposes favorable to the child, and (2) it is provisional or conditional, because it depends upon the child being born alive later, such that if it is not born alive, its personality disappears as if it had never existed. The requirement, however, that the conceived child must be "born later with the conditions specified in (Article 41)" is not a condition precedent to the right of the conceived child; for if it were, the first part of Article 40 would become entirely useless and ineffective.[50]

[34.4] Rights of A Conceived Child

Since a conceived child has a provisional personality even while inside the mother's womb, it is entitled to the following rights: (1) the unborn child has a right to support from its progenitors, even if said child is only *"en ventre de sa mere;"* (2) it may receive donations as prescribed by Article 742 of the Civil Code; and (3) it may not be ignored by the parent in his testament; otherwise, it may result in preterition of a forced heir that annuls the institution of the testamentary heir, even if such child should be born after the death of the testator.[51]

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[48] Art. 40.

[49] Quimiguing vs. Icao, 34 SCRA 132 (1970).

[50] Quimiguing vs. Icao, 34 SCRA 132, 135.

[51] *Id.*, at p. 134.

Quimiguing vs. Icao
34 SCRA 132 (1970)

REYES, J.B.L., J.:

Appeal on points of law from an order of the Court of First Instance of Zamboanga del Norte (Judge Onofre Sison Abalos, presiding), in its Civil Case No. 1590, dismissing a complaint for support and damages, and another order denying amendment of the same pleading.

The events in the court of origin can be summarized as follows:

Appellant, Carmen Quimiguing, assisted by her parents, sued Felix Icao in the court below. In her complaint it was averred that the parties were neighbors in Dapitan City, and had close and confidential relations; that defendant Icao, although married, succeeded in having carnal intercourse with plaintiff several times by force and intimidation, and without her consent; that as a result she became pregnant, despite efforts and drugs supplied by defendant, and plaintiff had to stop studying. Hence, she claimed support at P120.00 per month, damages and attorney's fees.

Duly summoned, defendant Icao moved to dismiss for lack of cause of action since the complaint did not allege that the child had been born; and after hearing arguments, the trial judge sustained defendant's motion and dismissed the complaint.

Thereafter, plaintiff moved to amend the complaint to allege that as a result of the intercourse, plaintiff had later given birth to a baby girl; but the court, sustaining defendant's objection, ruled that no amendment was allowable, since the original complaint averred no cause of action. Wherefore, the plaintiff appealed directly to this Court.

We find the appealed orders of the court below to be untenable. A conceived child, although as yet unborn, is given by law a provisional personality of its own for all purposes favorable to it, as explicitly provided in Article 40 of the Civil Code of the Philippines. The unborn child, therefore, has a right to support from its progenitors, particularly of the defendant-appellee (whose paternity is deemed admitted for the purpose of the motion to dismiss), even if the said child is only "*en ventre de sa mere*;" just as a conceived child, even if as yet unborn, may receive donations as prescribed by Article 742 of the same Code, and its being ignored by the parent in his testament may result in preterition of a forced heir that annuls the institution of the testamentary heir, even if such child should be born after the death of the testator Article 854, Civil Code).

> ART. 742. Donations made to conceived and unborn children may be accepted by those persons who would legally represent them if they were already born.

ART. 854. The preterition or omission of one, some, or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death of the testator, shall annul the institution of heir; but the devises and legacies shall be valid insofar as they are not inofficious.

If the omitted compulsory heirs should die before the testator, the institution shall be effectual, without prejudice to the right of representation.

It is thus clear that the lower court's theory that Article 291 of the Civil Code declaring that support is an obligation of parents and illegitimate children "does not contemplate support to children as yet unborn," violates Article 40 aforesaid, besides imposing a condition that nowhere appears in the text of Article 291. It is true that Article 40 prescribing that "the conceived child shall be considered born for all purposes that are favorable to it" adds further "provided it be born later with the conditions specified in the following article" (*i.e.*, that the foetus be alive at the time it is completely delivered from the mother's womb). This proviso, however, is not a condition precedent to the right of the conceived child; for if it were, the first part of Article 40 would become entirely useless and ineffective. Manresa, in his Commentaries (5th Ed.) to the corresponding Article 29 of the Spanish Civil Code, clearly points this out:

> Los derechos atribuidos al *nasciturus* no son simples *expectativas*, ni aun en el sentido tecnico que la moderna doctrina da a esta figura juridica sino que constituyen un caso de los propiamente Ilamados 'derechos *en estado de pendenci';* el nacimiento del sujeto en las condiciones previstas por el art. 30, no determina el nacimiento de aquellos derechos (que ya existian de antemano), sino que se trata de un hecho que tiene efectos *declarativos*. (1 Manresa, Op. cit., page 271)

A second reason for reversing the orders appealed from is that for a married man to force a woman not his wife to yield to his lust (as averred in the original complaint in this case) constitutes a clear violation of the rights of his victim that entitles her to claim compensation for the damage caused. Says Article 21 of the Civil Code of the Philippines:

> ART. 21. Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

The rule of Article 21 is supported by Article 2219 of the same Code:

> ART. 2219. Moral damages may be recovered in the following and analogous cases:

(3) Seduction, abduction, rape or other lascivious acts:

xxx xxx xxx

(10) Acts and actions referred to in Articles *21*, 26, 27, 28 ....

Thus, independently of the right to Support of the child she was carrying, plaintiff herself had a cause of action for damages under the terms of the complaint; and the order dismissing it for failure to state a cause of action was doubly in error.

WHEREFORE, the orders under appeal are reversed and set aside. Let the case be remanded to the court of origin for further proceedings conformable to this decision. Costs against appellee Felix Icao. So ordered.

De Jesus vs. Syquia
58 Phil. 866

STREET, J.:

This action was instituted in the Court of First Instance of Manila by Antonia Loanco de Jesus in her own right and by her mother, Pilar Marquez, as next friend and representative of Ismael and Pacita Loanco, infants, children of the first-named plaintiff, for the purpose of recovering from the defendant, Cesar Syquia, the sum of thirty thousand pesos as damages resulting to the first-named plaintiff from breach of a marriage promise, to compel the defendant to recognize Ismael and Pacita as natural children begotten by him with Antonia, and to pay for the maintenance of the three the amount of five hundred pesos per month, together with costs. Upon hearing the cause, after answer of the defendant, the trial court erred a decree requiring the defendant to recognize Ismael Loanco as his natural child and to pay maintenance for him at the rate of fifty pesos per month, with costs, dismissing the action in other respects. From this judgment both parties appealed, the plaintiffs from so much of the decision as denied part of the relief sought by them, and the defendant from that feature of the decision which required him to recognize Ismael Loanco and to pay for his maintenance.

At the time with which we are here concerned, the defendant, Cesar Syquia was of the age of twenty-three years, and an unmarried scion of the prominent family in Manila, being possessed of a considerable property in his own right. His brother-in-law, Vicente Mendoza is the owner of a barber shop in Tondo, where the defendant was accustomed to go for tonsorial attention. In the month of June Antonia Loanco, a likely unmarried girl of the age of twenty years, was taken on as cashier in this barber shop. Syquia was not long in making her acquaintance and amorous relations resulted, as a consequence of which Antonia

was gotten with child and a baby boy was born on June 17, 1931. The defendant was a constant visitor at the home of Antonia in the early months of her pregnancy, and in February, 1931, he wrote and placed in her hands a note directed to the *padre* who has expected to christen the baby. This note was as follows:

Saturday, 1:30 p. m.
February 14, 1931

Rev. FATHER,

The baby due in June is mine and I should like for my name to be given to it.

CESAR SYQUIA

The occasion for writing this note was that the defendant was on the eve of his departure on a trip to China and Japan; and while he was abroad on this visit he wrote several letters to Antonia showing a paternal interest in the situation that had developed with her, and cautioning her to keep in good condition in order that *"junior"* (meaning the baby to be, "Syquia, Jr.") might be strong, and promising to return to them soon. The baby arrived at the time expected, and all necessary anticipatory preparations were made by the defendant. To this he employed his friend Dr. Crescenciano Talavera to attend at the birth, and made arrangements for the hospitalization of the mother in Saint Joseph's Hospital of the City of Manila, where she was cared for during confinement.

When Antonio was able to leave the hospital, Syquia took her, with her mother and the baby, to a house at No. 551 Camarines Street, Manila, where they lived together for about a year in regular family style, all household expenses, including gas and electric light, being defrayed by Syquia. In course of time, however, the defendant's ardor abated and, when Antonia began to show signs of a second pregnancy the defendant decamped, and he is now married to another woman. A point that should here be noted is that when the time came for christening the child, the defendant, who had charge of the arrangement for this ceremony, caused the name Ismael Loanco to be given to him, instead of Cesar Syquia, Jr., as was at first planned.

The first question that is presented in the case is whether the note to the *padre*, quoted above, in connection with the letters written by the defendant to the mother during pregnancy, proves an acknowledgment of paternity, within the meaning of subsection 1 of article 135 of the Civil Code. Upon this point we have no hesitancy in holding that the acknowledgment thus shown is sufficient. It is a universal rule of jurisprudence that a child, upon being conceived, becomes a bearer of legal rights and capable of being dealt with as a living person. The fact that it is yet unborn is no impediment to the acquisition of rights. The problem here presented of the recognition of unborn child is really not different

from that presented in the ordinary case of the recognition of a child already born and bearing a specific name. Only the means and resources of identification are different. Even a bequest to a living child requires oral evidence to connect the particular individual intended with the name used.

It is contended however, in the present case that the words of description used in the writings before us are not legally sufficient to indemnify the child now suing as Ismael Loanco. This contention is not, in our opinion, well founded. The words of recognition contained in the note to the *padre* are not capable of two constructions. They refer to a baby then conceived which was expected to be born in June and which would thereafter be presented for christening. The baby came, and though it was in the end given the name of Ismael Loanco instead of Cesar Syquia, Jr., its identity as the child which the defendant intended to acknowledge is clear. Any doubt that might arise on this point is removed by the letters Exhibit F, G, H, and J. In these letters the defendant makes repeated reference to *junior* as the baby which Antonia, to whom the letters were addressed, was then carrying in her womb, and the writer urged Antonia to eat with good appetite in order that *junior* might be vigorous. In the last letter (Exhibit J) written only a few days before the birth of the child, the defendant urged her to take good care of herself and of *junior* also.

It seems to us that the only legal question that can here arise as to the sufficiency of acknowledgment is whether the acknowledgment contemplated in subsection 1 of article 135 of the Civil Code must be made in a single document or may be made in more than one document, of indubitable authenticity, written by the recognizing father. Upon this point we are of the opinion that the recognition can be made out by putting together the admissions of more than one document, supplementing the admission made in one letter by an admission or admissions made in another. In the case before us the admission of paternity is contained in the note to the *padre* and the other letters suffice to connect that admission with the child then being carried by Antonia L. de Jesus. There is no requirement in the law that the writing shall be addressed to *one*, or any particular individual. It is merely required that the writing shall be indubitable.

The second question that presents itself in this case is whether the trial court erred in holding that Ismael Loanco had been in the uninterrupted possession of the status of a natural child, justified by the conduct of the father himself, and that as a consequence, the defendant in this case should be compelled to acknowledge the said Ismael Loanco, under No. 2 of article 135 of the Civil Code. The facts already stated are sufficient, in our opinion, to justify the conclusion of the trial court on this point, and we may add here that our conclusion upon the first branch of the case that the defendant had acknowledged this child in writings above referred to must be taken in connection with the facts found by the court upon the second point. It is undeniable that from the birth of this

child the defendant supplied a home for it and the mother, in which they lived together with the defendant. This situation continued for about a year, and until Antonia became *enciente* a second time, when the idea entered the defendant's head of abandoning her. The law fixes no period during which a child must be in the continuous possession of the status of a natural child; and the period in this case was long enough to evince the father's resolution to concede the status. The circumstance that he abandoned the mother and child shortly before this action was started is unimportant. The word "continuous" in subsection 2 of article 135 of the Civil Code does not mean that the concession of status shall continue forever, but only that it shall not be of an intermittent character while it continues.

What has been said disposes of the principal feature of the defendant's appeal. With respect to the appeal of the plaintiffs, we are of the opinion that the trial court was right in refusing to give damages to the plaintiff, Antonia Loanco, for supposed breach of promise to marry. Such promise is not satisfactorily proved, and we may add that the action for breach of promise to marry has no standing in the civil law, apart from the right to recover money or property advanced by the plaintiff upon the faith of such promise. This case exhibits none of the features necessary to maintain such an action. Furthermore, there is no proof upon which a judgment could be based requiring the defendant to recognize the second baby, Pacita Loanco.

Finally, we see no necessity or propriety in modifying the judgment as to the amount of the maintenance which the trial court allowed to Ismael Loanco. And in this connection we merely point out that, as conditions change, the Court of First Instance will have jurisdiction to modify the order as to the amount of the pension as circumstances will require.

The judgment appealed from is in all respects affirmed, without costs. So ordered.

Art. 42. Civil personality is extinguished by death.

The effect of death upon the rights and obligations of the deceased is determined by law, by contract and by will. (32a)

COMMENTS:

§ 35. Extinction of Civil Personality

Civil personality of a natural person is extinguished by death.[52] As earlier stated, juridical capacity or civil personality is not limited. It is

[52]Art. 42, NCC.

acquired through birth and is only extinguished by death. In certain cases, however, the personality of a person may be extended even beyond his death and in this case his estate is considered an extension of his personality. In this jurisdiction, the estate of a deceased person is also considered as having legal personality independent of the heirs.[53]

Art. 43. If there is a doubt, as between two or more persons who are called to succeed each other, as to which of them died first, whoever alleges the death of one prior to the other, shall prove the same; in the absence of proof, it is presumed that they died at the same time and there shall be no transmission of rights from one to the other. (33)

COMMENTS:

§ 36. Rule on Survivorship

[36.1] Application of Article 43
[36.2] Application of rule on survivorship under the Rules of Court

[36.1] Application of Article 43

Article 43 applies only when the question of survivorship involves persons "*who are called upon to succeed each other*" and is not applicable where there is no question of succession. For example, father and son died on the same day but the exact hours of their death cannot be determined, it is presumed that they died at the same time and there shall be no transmission of rights from one to the other.

[36.2] Application of Rule on Survivorship Under The Rules Of Court

If the question of survivorship involves persons who are not called upon to succeed each other, it is the rule on survivorship under the Rules of Court that shall govern and not Article 43 of the Civil Code. Thus, when two persons perish in the same calamity, such as wreck, battle or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, the survivorship is determined from the probabilities resulting from the strength and age of the sexes, according to the following rules:

[53]Estate of Mota vs. Concepcion, 56 Phil. 172.

(1) If both were under the age of 15 years, the older is deemed to have survived;

(2) If both were above the age of 60, the younger is deemed to have survived;

(3) If one is under 15 and the other above 60, the former is deemed to have survived;

(4) If both be over 15 and under 60, and the sex be different, the male is deemed to have survived; if the sex be the same, the older; and

(5) If one be under 15 or over 60, and the other between those ages, the latter is deemed to have survived.[54]

CHAPTER 3

Juridical Persons

Art. 44. The following are juridical persons:

(1) The State and its political subdivisions;

(2) Other corporations, institutions and entities for public interest or purpose, created by law; their personality begins as soon as they have been constituted according to law;

(3) Corporations, partnerships and associations for private interest or purpose to which the law grants a juridical personality, separate and distinct from that of each shareholder, partner or member. (35a)

Art. 45. Juridical persons mentioned in Nos. 1 and 2 of the preceding article are governed by the laws creating or recognizing them.

Private corporations are regulated by laws of general application on the subject.

Partnerships and associations for private interest or purpose are governed by the provisions of this Code concerning partnerships. (36 and 37a)

Art. 46. Juridical persons may acquire and possess property of all kinds, as well as incur obligations and bring civil or criminal actions, in conformity with the laws and regulations of their organization. (38a)

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[54]Rule 131, Sec. 3(jj), Rules of Court.

Art. 47. Upon the dissolution of corporations, institutions and other entities for public interest or purpose mentioned in No. 2 of Article 44, their property and other assets shall be disposed of in pursuance of law or the charter creating them. If nothing has been specified on this point, the property and other assets shall be applied to similar purposes for the benefit of the region, province, city or municipality which during the existence of the institution derived the principal benefits from the same. (39a)

COMMENTS:

§ 37. Juridical Persons

[37.1] In general
[37.2] Corporations
[37.3] Partnerships
[37.4] Sole proprietorships

[37.1] In General

Juridical persons are artificial beings to which the law grants a personality distinct and separate from each individual member composing it and susceptible of rights and obligations, or of being the subject of legal relations. Their personality begins from the moment the law recognizes them or creates them unless the law provides otherwise and such personality is extinguished only in accordance with law.

[37.2] Corporations

A corporation is a juridical person. It may acquire and possess property of all kinds, as well as incur obligations and bring civil or criminal actions, in conformity with laws and regulations of their organization.[55] A corporation formed or organized under the Corporation Code commences to have corporate existence and juridical personality and is deemed incorporated from the date the Securities and Exchange Commission issues a certificate of incorporation under its official seal.[56]

[37.3] Partnership

A contract of partnership is defined by law as one where two or more persons bind themselves to contribute money, property, or indus-

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[55]Art. 46, NCC.
[56]Sec. 19, Corporation Code.

try to a common fund, with the intention of dividing the profits among themselves.[57]

Thus, in order to constitute a partnership, it must be established that: (1) two or more persons bound themselves to contribute money, property, or industry to a common fund, and (2) they intend to divide the profits among themselves.[58] The agreement need not be formally reduced into writing, since statute allows the oral constitution of a partnership, save in two instances: (1) when immovable property or real rights are contributed,[59] and (2) when the partnership has a capital of three thousand pesos or more.[60] In both cases, a public instrument is required. Note, however, Article 1768 of the Civil Code which provides: "The partnership has a juridical personality separate and distinct from that of each of the partners, even in case of failure to comply with the requirements of Article 1772, first paragraph." An inventory to be signed by the parties and attached to the public instrument is also indispensable to the validity of the partnership whenever immovable property is contributed to the partnership.[61]

To be considered a juridical personality, a partnership must fulfill these requisites: (1) two or more persons bind themselves to contribute money, property or industry to a common fund; and (2) intention on the part of the partners to divide the profits among themselves.[62] It may be constituted in any form; a public instrument is necessary only where immovable property or real rights are contributed thereto.[63] This implies that since a contract of partnership is consensual, an oral contract of partnership is as good as a written one. Where no immovable property or real rights are involved, what matters is that the parties have complied with the requisites of a partnership.[64] The fact that there appears to be no record in the Securities and Exchange Commission of a

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[57]Art. 1767, NCC. See also Heirs of Tan Eng Kee vs. CA, 341 SCRA 740 (2000).

[58]Heirs of Tan Eng Kee vs. CA, *supra*, citing Yulo vs. Yang Chiao Seng, 106 Phil. 110, 116 (1959).

[59]*Id.*, citing Art. 1771, NCC.

[60]*Id.*, citing Art. 1772, NCC.

[61]Art. 1773, NCC.

[62]Tocao vs. CA, 342 SCRA 20, 30 (2000); citing Civil Code, Art. 1767; Fue Leung vs. Intermediate Appellate Court, 169 SCRA 746, 754 (1989); citing Yulo vs. Yang Chiao Cheng, 106 Phil. 110 (1959).

[63]*Id.*, citing Civil Code, Art. 1771; Agad vs. Mabato, 132 Phil. 634, 636 (1968).

[64]*Id.*, at p. 31.

public instrument embodying the partnership agreement pursuant to Article 1772 of the Civil Code did not cause the nullification of the partnership.[65] The pertinent provision of the Civil Code on the matter states:

> "Art. 1768. The partnership has a juridical personality separate and distinct from that of each of the partners, even in case of failure to comply with the requirements of article 1772, first paragraph."

[37.4] Sole Proprietorship

A sole proprietorship does not possess a juridical personality separate and distinct from the personality of the owner of the enterprise.[66] The law merely recognizes the existence of a sole proprietorship as a form of business organization conducted for profit by a single individual and requires its proprietor or owner to secure licenses and permits, register its business name, and pay taxes to the national government.[67] The law does not vest a separate legal personality on the sole proprietorship or empower it to file or defend an action in court.[68]

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[65]*Id.*

[66]Juasing Hardware vs. Hon. Mendoza, 201 Phil. 369 (1982), also cited in Yao Ka Sin Trading vs. Court of Appeals, 209 SCRA 763 (1992).

[67]*Id.*

[68]Mangila vs. CA, 387 SCRA 162 (2002), cited in Berman Memorial Park, Inc. vs. Cheng, G.R. No. 154630, May 6, 2005.

TITLE II

CITIZENSHIP AND DOMICILE

Art. 48. The following are citizens of the Philippines:

(1) Those who were citizens of the Philippines at the time of the adoption of the Constitution of the Philippines;

(2) Those born in the Philippines of foreign parents who, before the adoption of said Constitution, had been elected to public office in the Philippines;

(3) Those whose fathers are citizens of the Philippines;

(4) Those whose mothers are citizens of the Philippines and, upon reaching the age of majority, elect Philippine citizenship;

(5) Those who are naturalized in accordance with law. (n)

Art. 49. Naturalization and the loss and reacquisition of citizenship of the Philippines are governed by special laws. (n)

Art. 50. For the exercise of civil rights and the fulfillment of civil obligations, the domicile of natural persons is the place of their habitual residence. (40a)

Art. 51. When the law creating or recognizing them, or any other provision does not fix the domicile of juridical persons, the same shall be understood to be the place where their legal representation is established or where they exercise their principal functions. (41a)

EXECUTIVE ORDER NO. 209
THE FAMILY CODE OF THE PHILIPPINES

TITLE I

MARRIAGE

Chapter 1

Requisites of Marriage

Art. 1. Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code. (52a)

COMMENTS:

§ 38. Marriage as Contract and Social Institution

[38.1] Marriage as special contract
[38.2] Distinguished from ordinary contract
[38.3] Duration of contractual relationship
[38.4] Marriage as social institution
[38.5] Nature, consequence and incidents of marriage
[38.6] Presumption of marriage
[38.7] Proof of marriage
[38.8] Law favors validity of marriage

[38.1] Marriage as Special Contract

It is generally considered that marriage is a civil contract,[1] at least in the sense that it is entered into by agreement of the parties.[2] However,

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[1]U.S. — Franzen vs. E.I. Du Pont Nemours & Co., D.C.N.J., 51 F. Supp. 578; Petition of Peterson, D.C. Wash., 33 F. Supp. 615.

[2]U.S. — Setevens vs. U.S., C.C.A. Okl. 146 F. 2d 120.

while marriage is a contract and purely civil, it is also and specially a status[3] or personal relation,[4] founded on contract and established by law, under which certain rights and duties incident to the relationship come into being,[5] irrespective of the wishes of the parties.[6] Marriage is also a social institution regulated and controlled by the State.

[38.2] Distinguished From Ordinary Contract

Marriage is a contract *sui generis*, differing in notable respects from ordinary contracts. It is a contract of peculiar character and subject to peculiar principles, being usually accorded more dignity than ordinary contracts, and the rules applicable to ordinary contracts are not ordinarily applicable to marriage contracts because of the nature of marriage relation and for reasons of public policy. The following are the distinctions between marriage and an ordinary contract:

(a) The marriage contract cannot be revoked, dissolved or otherwise terminated by the parties, but only by the sovereign power of the state;[7]

(b) The nature, consequences and incidents of marriage are governed by law and not subject to agreement;[8] while in ordinary contract, the parties are free to establish such clauses, terms and conditions provided the same are not contrary to law, morals, good customs, public order or public policy;[9]

(c) Only two persons of opposite sex may enter into a contract of marriage, and but one such contract may exist at the same time; while ordinary contracts may be entered into by any number of persons, whether of the same or different sex;

(d) Marriage is not just a contract; it is likewise a social institution.

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[3]U.S. — Graham vs. Graham, D.C. Mich., 33 F. Supp. 936.
[4]U.S. — Petition of Peterson, D.C. Wash., 33 F. Supp. 615.
[5]U.S. — Graham vs. Graham, D.C. Mich., 33 F. Supp. 936.
[6]*Id.*
[7]Cal. — Vaughn vs. Vaughn, 144 P. 2d 658, 62 Cal. App. 2d 260.
[8]Art. 1, FC.
[9]Art. 1306, NCC.

[38.3] Duration of Contractual Relationship

Marriage is a special contract of permanent union between a man and a woman.[10] Thus, the marriage status once coming into existence remains in force until it is dissolved by the courts in accordance with law or by the death of a spouse. In other words, the status of marriage ordinarily continues during the joint lives of the parties or until annulment or declaration of nullity of such marriage.

[38.4] Marriage as Social Institution

Jimenez vs. Republic[11] underscores the importance of marriage as a social institution, thus:

> "Marriage in this country is an institution in which the community is deeply interested. The state has surrounded it with safeguards to maintain its purity, continuity and permanence. The security and stability of the state are largely dependent upon it. It is the interest and duty of each and every member of the community to prevent the bringing about of a condition that would shake its foundation and ultimately lead to its destruction."[12]

Our family law is based on the policy that marriage is not a mere contract, but a social institution in which the State is vitally interested.[13] Marriage in this jurisdiction is not only a civil contract, but it is a new relation, an institution in the maintenance of which the public is deeply interested.[14] This interest proceeds from the constitutional mandate that the State recognizes the sanctity of family life and of affording protection to the family as a basic "autonomous social institution."[15] Specifically, the Constitution considers marriage as an "inviolable social institution," and is "the foundation of family life which shall be protected by the State."[16] Our Constitution is so committed to the policy of strength-

[10]Art. 1, FC.

[11]109 Phil. 273 (1960).

[12]Cited in Beso vs. Daguman, 323 SCRA 566, 573 (2000).

[13]Tuazon vs. CA, 256 SCRA 158, 169 (1996).

[14]Adong vs. Cheong Seng Gee, 43 Phil. 43, 56 (1922); Cited in Perido vs. Perido, 63 SCRA 97.

[15]Section 12, Article II, 1987 Constitution; Hernandez vs. CA, 320 SCRA 76. See also Tuazon vs. CA, *supra*.

[16]Section 2, Article XV (The Family), 1987 Constitution.

ening the family as a basic social institution because the state can find no stronger anchor than on good, solid and happy families. The break up of families weakens our social and moral fabric and, hence, their preservation is not the concern alone of the family members.[17]

[38.5] Nature, Consequences and Incidents of Marriage

The State is a party at interest to the marriage, together with the husband and wife, and that the relationship is one in which the State is deeply concerned, and over which the State exercises a jealous and exclusive dominion.[18] Thus, the law declares that the nature, consequences and incidents of marriage are to be governed by law and cannot be subject to stipulations.[19] There is only one aspect of marriage that can be the subject of an agreement between the parties and that is, the marriage settlements may fix the property relations of the spouses during the marriage. But even this freedom "to fix the property relations during the marriage" is not absolute as the same must be exercised "within the limits provided by (the Family) Code."[20]

In one case,[21] the process server of the Municipal Trial Court of Brooke's Point, Palawan was charged in an administrative case for immorality. The complainant alleged that the process server was having an affair with his wife. The process server admitted the affair but justified his having a relationship with complainant's wife solely on the written agreement entered into by complainant and his wife consenting to and giving freedom to either of them to seek any partner and to live with him or her. The Court held that such justification must necessarily fail. The Court reasoned: "Being an employee of the judiciary, respondent ought to have known that the Kasunduan had absolutely no force and effect on the validity of the marriage between complainant and his wife. Article 1 of the Family Code provides that marriage is 'an inviolable social institution whose nature, consequences and incidents are governed by law and not subject to stipulation.' It is an institution of public order or policy, governed by rules established by law which cannot be made inoperative

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[17]Tuazon vs. CA, *supra*, at p. 169.
[18]55 C.J.S. 808
[19]Art. 1, FC.
[20]*Id.*
[21]Acebedo vs. Arquero, 399 SCRA 10 (2003).

by the stipulation of the parties." The process server was suspended for six months and 1 day without pay.

[38.6] Presumption of Marriage

Section 3(aa) of Rule 131 of the New Rules on Evidence provides, as follows:

> "Sec. 3. *Disputable presumptions.* — The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:
>
> x x x
>
> (aa) That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.
>
> x x x."

Courts look upon this presumption with great favor and it could not be lightly repelled. It may be rebutted only by cogent proof to the contrary or by evidence of a higher than ordinary quality. The rationale behind this presumption could be found in the case of **Adong vs. Cheong Seng Gee**,[22] which runs this wise —

> "The basis of human society throughout the civilized world is that of marriage. Marriage in this jurisdiction is not only a civil contract, but it is a new relation, an institution in the maintenance of which the public is deeply interested. Consequently, every intendment of the law leans towards legalizing matrimony. Persons dwelling together in apparent matrimony are presumed, in the absence of counter-presumption or evidence special to the case, to be in fact married. The reason is that such is the common order of society, and if the parties were not what they thus hold themselves out as being, they would be living in the constant violation of decency and of law. A presumption established by our Code of Civil Procedure is 'that a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage.' (Sec. 334, No. 28) *Semper praesumitur pro matrimonio* — Always presume marriage."

[22]*Supra.*

So much so that once a man and a woman have lived as husband and wife and such relationship is not denied nor contradicted, the presumption of their being married must be admitted as a fact.[23]

In **People vs. Borromeo**,[24] the Supreme Court declared:

> "Persons living together in apparent matrimony are presumed, in the absence of any counter-presumption or evidence special to the case, to be in fact married. The reason is that such is the common order of society, and if the parties were not what they thus hold themselves out as being, they would be living in the constant violation of decency and of law. The presumption in favor of matrimony is one of the strongest known in law. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. There is the presumption that persons living together as husband and wife are married to each other."

[38.7] Proof of Marriage

The best documentary evidence of a marriage is the marriage contract.[25] A marriage contract renders unnecessary the presumption that "a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage."[26] Although a marriage contract is considered primary evidence of marriage, the failure to present it is not, however, proof that no marriage took place,[27] as other evidence may be presented to prove marriage.[28]

Indeed, as early as **Pugeda vs. Trias**,[29] the Supreme Court had already held that marriage may be proven by any competent and relevant evidence. In that case, the Court said:

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[23]Alavado vs. City Government of Tacloban, 139 SCRA 230. See also US vs. Villafuerte, 4 Phil. 476; People vs. Borromeo, 133 SCRA 106; Labuca vs. WCC, 77 SCRA 331; Perido vs. Perido, 63 SCRA 97.

[24]133 SCRA 106, 109 (1984).

[25]Villanueva vs. CA, 198 SCRA 472 (1991).

[26]*Id.*

[27]Balogbog vs. CA, 269 SCRA 259, 266 (1997).

[28]*Id.*

[29]4 SCRA 849, 855 (1962).

"Testimony by one of the parties to the marriage, or by one of the witnesses to the marriage, has been held to be admissible to prove the fact of marriage. The person who officiated at the solemnization is also competent to testify as an eyewitness to the fact of marriage."

In the *Pugeda* case, the defendants, who questioned the marriage of the plaintiffs produced a photostatic copy of the record of marriages of the Municipality of Rosario, Cavite for the month of January, 1916, to show that there was no record of the alleged marriage. Nonetheless, evidence consisting of the testimonies of witnesses was held competent to prove the marriage.

In **Trinidad vs. Court of Appeals, et. al.**,[30] the Supreme Court held that the following may be presented as proof of marriage: (a) testimony of a witness to the matrimony; (b) the couple's public and open cohabitation as husband and wife after the alleged wedlock; (c) the birth and baptismal certificate of children born during such union; and (d) the mention of such nuptial in subsequent documents.

[38.8] Law Favors Validity of Marriage

The law favors the validity of marriage because the State is interested in the preservation of the family and sanctity of the family is a matter of constitutional concern.[31] The burden of proof to show the nullity of the marriage rests upon the party seeking its nullity.[32] In **Hernandez vs. Court of Appeals**,[33] the Court declared:

"The Court is mindful of the policy of the 1987 Constitution to protect and strengthen the family as the basic autonomous social institution and marriage as the foundation of the family. Thus, any doubt should be resolved in favor of the validity of the marriage."

Indeed, every presumption is in favor of the validity and good faith of Philippine marriage, and sound reason requires that it be not impugned

[30]289 SCRA 188 (1998); cited in Sarmiento vs. CA, 305 SCRA 138, 145 (1999).
[31]Balogbog vs. CA, 269 SCRA 269, 267 (1997).
[32]Hernandez vs. CA, 320 SCRA 76.
[33]*Supra*.

and discredited by an alleged prior marriage save upon proof so clear, strong and unequivocal as to produce a moral conviction of the existence of that impediment.[34]

Art. 2. No marriage shall be valid, unless these essential requisites are present:

(1) Legal capacity of the contracting parties who must be a male and a female; and

(2) Consent freely given in the presence of the solemnizing officer.

Art. 3. The formal requisites of marriage are:

(1) Authority of the solemnizing officer;

(2) A valid marriage license except in the cases provided for in Chapter 2 of this Title; and

(3) A marriage ceremony which takes place with the appearance of the contracting parties before the solemnizing officer and their personal declaration that they take each other as husband and wife in the presence of not less than two witnesses of legal age. (53a, 55a)

COMMENTS:

§ 39. Requisites of Marriage

[39.1] Essential and formal requisites
[39.2] Legal capacity
[39.3] Consent
[39.4] Authority of the solemnizing officer
[39.5] Valid Marriage License
[39.6] Marriage Ceremony

[39.1] Essential and Formal Requisites

The requisites of marriage are classified into essential and formal. Under Article 2 of this Code, the essential requisites of marriage are: (1) legal capacity, and (2) consent. Under Article 3 of the same Code, the formal requisites of marriage are: (1) authority of the solemnizing officer; (2) valid marriage license; and (3) marriage ceremony.

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[34]Ching Huan vs. Cheng, L-3018, July 18, 1951.

[39.2] Legal Capacity

For purposes of contracting marriage, the term "legal capacity" has a technical meaning. Under Article 5 of the Family Code, *"any male or female of the age of eighteen years or upwards not under any of the impediments mentioned in Articles 37 and 38, may contract marriage."* Thus, under the Code, legal capacity for purposes of contracting marriage has three components: (1) age requirement; (2) sex of the parties; (3) and absence of legal impediments mentioned in Articles 37 and 38 of the Family Code.

[39.2.1] Age Requirement

Under Article 5 of the Family Code, both the contracting parties must be at least eighteen (18) years of age, otherwise, he or she is not legally capacitated to contract marriage. A marriage contracted by any party below eighteen years of age is void from the beginning, even if such marriage is with the consent of the parents or guardians of the minor.[35]

The age requirement in Article 5 is, however, qualified by Article 14 of the Family Code. While a person at least eighteen years of age is legally capacitated to contract marriage, Article 14 imposes a further requirement of obtaining "parental consent" if he or she is "below twenty-one." In the absence of such parental consent, the marriage is considered voidable and may be annulled pursuant to Article 45(1) of the Family Code.

When is the minimum age for marriage required? Is it on the date of filing of the application for issuance of the marriage license or on the date of the marriage?

The attainment of the required minimum age for marriage should be reckoned, not on the date of filing of the application for issuance of a marriage license, but on the date of the marriage.[36] It bears emphasis that Article 5 of the Family Code categorically states that "[a]ny male or female of the age of eighteen years or upwards xxx may *contract marriage*." Pursuant to Article 6 of the same Code, parties contract marriage

[35]See Art. 35(1), FC.
[36]D.O.J. Opinion No. 146, S. 1991.

on the date of the solemnization of the marriage, *i.e.*, when they appear personally before the solemnizing officer and declare in the presence of not less than two witnesses of legal age that they take each other as husband and wife. The language of these provisions is clear and need no interpretation.[37]

[39.2.2] Parties Must Be of Opposite Sex

Before the contracting parties can be considered legally capacitated to contract marriage, it is indispensable that they must be of opposite sex. Note that Article 5 of the Code uses the phrase "any male or female." In addition, the very definition of marriage in Article 1 of the Family Code says that it is a "special contract of permanent union between a man and a woman. . ."

[39.2.3] Absence of Impediments

Note that the impediments which may affect legal capacity are those mentioned in Articles 37 and 38 of the Code. Thus, the contracting parties in the following marriages are not legally capacitated to marry each other:

(1) Between ascendants and descendants of any degree, whether the relationship between the parties be legitimate or illegitimate;[38]

(2) Between brothers and sisters, whether of the full or half blood, and whether the relationship between the parties be legitimate or illegitimate;[39]

(3) Between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree;[40]

(4) Between step-parents and step-children;[41]

(5) Between parents-in-law and children-in-law;[42]

[37]D.O.J. Opinion No. 90, S. 1992.
[38]Art. 37(1), FC.
[39]Art. 37(2), FC.
[40]Art. 38(1), FC.
[41]Art. 38(2), FC.
[42]Art. 38(3), FC.

(6) Between the adopting parent and the adopted child;[43]

(7) Between the surviving spouse of the adopting parent and the adopted child;[44]

(8) Between the surviving spouse of the adopted child and the adopter;[45]

(9) Between an adopted child and a legitimate child of the adopter;[46]

(10) Between adopted children of the same adopter;[47] and

(11) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.[48]

[39.3] Consent

Consent of the parties is an essential requisite of a valid marriage. The marriage relation or status is founded on the consent of the parties. Accordingly, consent is necessary in order to create a valid marriage, and without consent the purported marriage is a mere nullity.[49] Likewise, the consent of the parties must be mutual, where one party alone consents to the contract there is no marriage.[50] However, the mere fact that the marriage is bogus and fraudulent on the part of one party will not render the same invalid where the other party is deceived and believed it to be a valid marriage. This is especially true where one party was aware that the solemnizer had no legal authority to solemnize a marriage but the other party believed in good faith that the solemnizer had the legal authority to do so.[51]

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[43]Art. 38(4), FC.
[44]Art. 38(5), FC.
[45]Art. 38(6), FC.
[46]Art. 38(7), FC.
[47]Art. 38(8), FC.
[48]Art. 38(9), FC.
[49]55 C.J.S. 839.
[50]55 C.J.S. 840.
[51]See Art. 35(2), FC.

[39.3.1] Manifestation of Consent

The parties must in fact consent, and, there must be physical assent to the contract.[52] Under our law,[53] there is only one way of manifesting consent to the contract of marriage, *i.e.,* the contracting parties must *"appear personally before the solemnizing officer and declare in the presence of not less than two witnesses of legal age that they take each other as husband and wife."*

[39.3.2] Intent or Motive

As a general rule, the law will not look behind the appearance of a consent which was clearly manifested to determine its reality.[54] Secret mental reservations of a party will not be inquired into, nor will the motives inducing the apparent consent ordinarily be examined.[55] By way of exception, however, the subsequent marriage referred to in Article 41 of the Family Code is considered *void ab initio* if both spouses acted in bad faith.[56]

[39.3.3] Consent Must Be Free or Voluntary

The consent must be given freely, voluntarily and intelligently. When consent is obtained through mistake, fraud, force, intimidation or undue influence, the marriage is annullable.[57] If either of the contracting party is of unsound mind at the time of the celebration of the marriage, the marriage is likewise annullable.[58]

[39.4] Authority of the Solemnizing Officer

The authority of the solemnizing officer is one of the formal requisites of marriage.[59] If the solemnizing officer is not authorized under the law to celebrate marriage, the same is ordinarily considered *void ab initio*.[60] However, if either or both parties believed in good faith that the

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[52] 55 C.J.S. 840.
[53] Art. 6, FC.
[54] 55 C.J.S. 840.
[55] *Id.*
[56] See Art. 44, FC.
[57] See Art. 45, FC.
[58] See. Art. 45, FC.
[59] Art. 3(1), FC.
[60] Art. 35(2), in relation to Art. 4, FC.

solemnizer had the legal authority to do so, then the marriage shall remain valid despite the solemnizer's lack of authority.[61] This is an exception to the rule that the *"absence of any of the essential or formal requisites shall render the marriage void ab initio."*[62]

Under existing laws,[63] only the following persons are authorized to solemnize marriages:

(1) Incumbent members of the judiciary within the court's jurisdiction;

(2) Priest, rabbi, imam or minister of any church or religious sect duly authorized by his church or religious sect;

(3) Ship captain or airplane chief, in cases of *articulo mortis*;

(4) Military commanders of a unit, in cases of *articulo mortis*;

(5) Consul-general, consul or vice-consul, in limited cases.

(6) Mayors.

[39.5] Valid Marriage License

A valid marriage license is another formal requisite of marriage under Article 3(2) of the Family Code, the absence of which renders the marriage void *ab initio* pursuant to Article 35(3) in relation to Article 4 of the Family Code.

A marriage license is required in order to notify the public that two persons are about to be united in matrimony and that anyone who is aware or has knowledge of any impediment to the union of the two shall make it known to the local civil registrar.[64]

The requirement and issuance of marriage license is the State's demonstration of its involvement and participation in every marriage.[65] However, there are instances recognized by the Family Code wherein a marriage license is dispensed with, to wit:

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[61] Art. 35(2), FC.
[62] Art. 4, FC.
[63] Art. 7, FC and Sec. 444(xviii), Local Government Code.
[64] Niñal vs. Bayadog, 328 SCRA 122, 131 (2000).
[65] *Id.*, at p. 128.

(1) In case either or both of the contracting parties are at the point of death;[66]

(2) If the residence of either party is so located that there is no means of transportation to enable such party to appear personally before the local civil registrar;[67]

(3) Marriages among Muslims or among members of the ethnic communities, provided these are solemnized in accordance with their customs, rites or practices;[68]

(4) Ratification of marital cohabitation between a man and a woman who have lived together as husband and wife for at least five years and without any legal impediment to marry each other.[69]

[39.6] Marriage Ceremony

The solemnization of a marriage is a prerequisite to its validity[70] because in this jurisdiction informal or common-law marriages are not recognized. Solemnization of a marriage comprehends a personal appearance together by the contracting parties before one authorized by law to solemnize marriages, and that the ceremony be entered into and performed by the parties together with a person authorized to perform such in the presence of at least two witnesses.

[39.6.1] Common-Law Marriage

It may be briefly described as a marriage without formal solemnization or without formalities. It is sometimes termed as "consensual marriage" or "marriage in fact." It is an agreement between a man and a woman who are legally competent to contract a marriage, that they take each other as husband and wife, and such a marriage differs from a ceremonial marriage only in the respect that the agreement does not have to be in the presence of witnesses or pronounced by an official having legal

[66]Art. 27, FC.
[67]Art. 28, FC.
[68]Art. 33, FC.
[69]Art. 34, FC.
[70]Art. 3(3) in relation to Art. 4, FC.

authority to perform marriage ceremonies.[71] A common-law marriage is not recognized as valid in the Philippines because marriage ceremony is a requisite for the validity of Philippine marriages.

[39.6.2] Marriage by Proxy

The personal appearance of the bride and the groom at the marriage ceremony is essential to a valid marriage;[72] hence, a marriage by proxy in the Philippines is not recognized as valid. Article 6 of the Family Code requires the contracting parties to "appear personally before the solemnizing officer and declare in the presence of not less than two witnesses of legal age that they take each other as husband and wife." Failure to comply with this requirement shall render the marriage void *ab initio* pursuant to Article 4 of the Family Code.

[39.6.3] Witnesses

Article 6 of the Family Code requires the contracting parties to declare that they take each other as husband and wife "in the presence of at least two witnesses of legal age." The requirement of at least two witnesses of legal age is, however, merely directory so that a failure to comply therewith does not invalidate the marriage.

Art. 4. The absence of any of the essential or formal requisites shall render the marriage void *ab initio*, except as stated in Article 35(2).

A defect in any of the essential requisites shall render the marriage voidable as provided in Article 45.

An irregularity in the formal requisites shall not affect the validity of the marriage but the party or parties responsible for the irregularity shall be civilly, criminally and administratively liable.

COMMENTS:

§ 40. Absence of, Defect or Irregularity in Requisites

[40.1] Effect of absence of any requisite
[40.2] Effect of defect or irregularity in the requisites
[40.3] Legal capacity

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[71] Taegen vs. Taegen, 61 N.Y.S. 2d 869.
[72] Art. 6, FC.

[40.4] Consent
[40.5] Authority of the solemnizing officer
[40.6] Marriage license
[40.7] Marriage ceremony

[40.1] Effect of Absence of Any Requisite

The absence of any of the essential or formal requisites shall render the marriage void *ab initio*.[73] By way of exception, however, marriages that are solemnized by any person not authorized to perform marriages shall remain valid if either or both parties believed in good faith that the solemnizing officer had the legal authority to do so.[74] This is the only exception to the rule expressed in the first paragraph of Article 4 of the Family Code. Thus, the following marriages are void *ab initio*:

(1) Those marriages contracted by any party who is not legally capacitated;

(2) Those marriages where consent is lacking;

(3) Those solemnized by any person not authorized to perform marriages, except when the marriage will fall under the exception mentioned in Article 35(2) of the Family Code;

(4) Those solemnized without a valid marriage license, except those marriages exempt from the license requirement; and

(5) Common-law marriages and marriages by proxy.

[40.2] Effect of Defect or Irregularity in the Requisites

If any of the essential requisites is defective, the marriage is not void *ab initio* but merely voidable.[75] The differences between a void *ab initio* marriage and a voidable marriage are discussed under *infra* § 56.1.

If there is an irregularity in any of the formal requisites, the validity of the marriage is not affected but the party or parties responsible for such irregularity shall be civilly, criminally or administratively liable.[76]

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[73] Art. 4, 1st par, FC.
[74] Art. 35(2), FC.
[75] Art. 4, 2nd par., FC.
[76] Art. 4, 3rd par., FC.

[40.3] Legal Capacity

Legal capacity to contract marriage is defined in Article 5 as "any male or female of the age of eighteen years or upwards not under any of the impediments mentioned in Articles 37 and 38." As discussed in *supra* § 39.2, legal capacity, for purposes of contracting marriage, has three components: (1) age requirement; (2) sexes of the contracting parties; and (3) absence of legal impediments mentioned in articles 37 and 38 of the Family Code.

[40.3.1] Age Requirement

Under the Code, both the contracting parties must be at least eighteen years of age.[77] If any of the contracting parties is below eighteen years of age, the marriage is void *ab initio* even if the marriage is with the consent of the parents or guardians.[78] This is a case of absence of legal capacity, which is an essential requisite of marriage.

[40.3.2] Sexes of the Parties

The contracting parties must be of opposite sex. Thus, a marriage of parties from the same sex is considered void *ab initio* in the Philippines because the parties are incapacitated to contract marriage. This is considered as an absence of legal capacity.

[40.3.3] Absence of Impediments

The impediments referred to are those enumerated under articles 37 and 38 of the Family Code. The presence of any of those impediments shall render the marriage void *ab initio* because of the absence of an essential requisite of marriage, which is the legal capacity of the contracting parties to contract marriage.

[40.4] Consent

The marriage is void *ab initio* where consent is totally lacking, as in the case of a bogus or simulated marriage. However, consent must be lacking from both the contracting parties. The fact that a marriage is

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[77] Art. 5, FC.
[78] Art. 35(1), FC.

bogus and fraudulent on the part of one party will not render it void where the other party is deceived and believed it to be a valid marriage. This may be inferred from the provisions of Article 44 of the Family Code which declares a subsequent marriage as void *ab initio* only if both the spouses acted in bad faith.

As a general rule, however, the law will not look behind the appearance of a consent which was clearly manifested to determine its reality.[79] Secret mental reservations of a party will not be inquired into, nor will the motives inducing the apparent consent ordinarily be examined.[80] By way of exception, however, the subsequent marriage referred to in Article 41 of the Family Code is considered *void ab initio* if both spouses acted in bad faith.[81]

Likewise, marriages that are *"contracted through mistake of one contracting party as to the identity of the other"* are considered void *ab initio*.[82] For here, there is no real consent.

However, where there is consent but the same is vitiated by reason of fraud, force, intimidation or undue influence, or either party is of unsound mind, the marriage is not void *ab initio* but merely voidable.[83] In such cases, the consent is "defective" but present.

Under the law, if a party to a marriage is already eighteen years old but below twenty-one, his or her consent is not sufficient; the parents or guardians must, in addition, give their consent.[84] In the absence of such parental consent, the consent given by a party to a marriage whose age is 18 but below 21 is considered defective. Hence, the marriage is voidable[85] . For a perfect consent that would result in a perfectly valid marriage, the parties should be 21 years of age.

[40.5] Authority of the Solemnizing Officer

See discussions under *infra* § 43.

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[79]55 C.J.S. 840.
[80]*Id.*
[81]See Art. 44, FC.
[82]See Art. 35(5), FC.
[83]See Art. 45(2), (3) & (4), FC.
[84]See Art. 14, FC.
[85]See Art. 45(1), FC.

[40.6] Marriage License

If the marriage is celebrated without a valid marriage license, the marriage is void *ab initio*[86] because of the absence of a formal requisite of marriage. Thus, a marriage which preceded the issuance of the marriage license is void, and the subsequent issuance of such license cannot render valid or even add an iota of validity to the marriage.[87] However, if there is a license but it is wrongfully or fraudulently obtained[88] or there is an irregularity in its issuance, the validity of the marriage is not affected.[89] Note that the solemnizing officer does not even have to investigate whether or not the license has properly been issued.[90] According to Article 4 of the Family Code, any irregularity in the formal requisites shall not affect the validity of the marriage. However, the party or parties responsible for the irregularity shall be civilly, criminally and administratively liable. In the following instances, the validity of the marriage is not affected because these are considered as mere irregularities:

(1) The fact that the application for marriage license was not under oath;

(2) The fact that the marriage license was issued in violation of the three-month suspension period under Articles 15 and 16 of the Family Code;

(3) The fact that the marriage license was issued prior to the completion of the period of publication; or that it was issued in the absence of the required publication;

(4) The fact that a marriage license was issued without the submission of certificate of legal capacity under Article 21 of the Family Code;

(5) The fact that the license was obtained in the locality where neither of the contracting parties resides.

However, a marriage celebrated 120 days after the issuance of the marriage license is void *ab initio*. Under Article 20 of the Family Code,

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[86]Art. 35(3), FC.
[87]People vs. Lara, C.A. O.G. 4070; cited in Arañez vs. Occiano, 380 SCRA 402, 407 (2002).
[88]People vs. Belen, 45 O.G. Supp. No. 5, p. 88
[89]Art. 4, 3rd par., FC.
[90]People vs. Janson, 54 Phil. 176.

a marriage license is effective only for a period of one hundred twenty (120) days counted from the date of issue and the same *"shall be deemed automatically cancelled at the expiration of said period."* Thus, a marriage which takes place using the cancelled license is void *ab initio* because it is solemnized without a marriage license.

[40.7] Marriage Ceremony

The ceremony being referred to under the law is simply the appearance of the contracting parties before the solemnizing officer and their personal declaration that they take each other as husband and wife. Thus, common-law marriages and marriages by proxy are not sanctioned in the Philippines because of their failure to comply with the requirement of a marriage ceremony.

The absence of witnesses or the fact that the witnesses are not of legal age shall not affect the validity of the marriage because these are mere irregularities. As discussed in *supra* § 39.6.3, the requirement of witnesses is merely directory.

The failure of the parties to sign the marriage certificate will not likewise affect the validity of the marriage. The purpose of the certificate is to serve as evidence of the marriage. The absence of the marriage certificate is not, however, proof that no marriage took place because other evidence may be presented to prove the marriage.[91] Thus, the mere fact that no record of the marriage exists in the registry of marriage does not invalidate said marriage, as long as in the celebration thereof, all requisites for its validity are present.[92] The forwarding of a copy of the marriage certificate to the registry is not one of said requisite.[93]

Art. 5. Any male or female of the age of eighteen years or upwards not under any of the impediments mentioned in Articles 37 and 38, may contract marriage. (54a)

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[91]Balogbog vs. CA, 269 SCRA 259
[92]People vs. Borromeo, 133 SCRA 106, 100 (1984); citing Pugeda vs. Trias, 4 SCRA 849.
[93]*Id.*

COMMENTS:

§ 41. Legal Capacity

See discussions under *supra* §§ 39.2 and 40.3.

Art. 6. No prescribed form or religious rite for the solemnization of the marriage is required. It shall be necessary, however, for the contracting parties to appear personally before the solemnizing officer and declare in the presence of not less than two witnesses of legal age that they take each other as husband and wife. This declaration shall be contained in the marriage certificate which shall be signed by the contracting parties and their witnesses and attested by the solemnizing officer.

In case of a marriage in *articulo mortis*, when the party at the point of death is unable to sign the marriage certificate, it shall be sufficient for one of the witnesses to the marriage to write the name of said party, which fact shall be attested by the solemnizing officer. (55a)

COMMENTS:

§ 42. Marriage Ceremony

[42.1] Ceremonial marriage
[42.2] No form or religious rite required
[42.3] Presence of witnesses

[42.1] Ceremonial Marriage

Our laws require a ceremonial marriage as *contra* distinguished from a "common-law" marriage or "consensual" marriage. It is not sufficient that the parties enter into an agreement "that they take each other as husband and wife" or that consent be given. Article 2(2) of the Family Code requires that such consent must be given *"in the presence of the solemnizing officer."* The same requirement is repeated in this article, *i.e.*, that the contracting parties must appear personally before the solemnizing officer and declare in the presence of not less than two witnesses of legal age that they take each other as husband and wife.

[42.2] No Form or Religious Rite Required

No prescribed form or religious rite for the solemnization of the marriage is required.[94] There is nothing in the law which says that the

[94] Art. 6, FC.

declaration of the parties be made by word of mouth or that it may not be expressed in a mode other than in written form.[95] Consent to marry may, therefore, be given by sign, *e.g*. nod of the head, etc.[96] In the same vein, no particular form of words is essential to a ceremonial marriage so long as the words employed are to the effect that the groom and the bride are taking each other as husband and wife. Thus, the failure of the solemnizing officer to ask the parties whether they take each other as husband and wife cannot be regarded as a fatal omission if the parties nonetheless signed the marriage contract in the presence of the solemnizing officer.[97] A declaration by word of mouth of what the parties had already stated in writing would be a mere repetition, so that its omission should not be regarded as a fatal defect.[98] For a marriage to exist, however, it is essential that the contracting parties must appear personally before the solemnizing officer and that their consent to the contract of marriage be given in the latter's presence.[99] Consequently, if what transpired was a mere signing of the marriage contract by the parties, without the presence of the solemnizing officer, there is no marriage to speak of since there is no actual marriage ceremony performed between the parties by a solemnizing officer.[100] In other words, the mere private act of signing a marriage contract, without the presence of a solemnizing officer, does not amount to a marriage ceremony.

Morigo vs. People
422 SCRA 376 (2004)

FACTS: In this case, Lucio Morigo and Lucia Barrete were boardmates while they were studying. After the school year 1977-78, they lost contact with each other. In 1984, Lucio was surprised to receive a card from Lucia from Singapore. The former replied and after an exchange of letters, they became sweethearts. In 1986, Lucia returned to the Philippines but left again for Canada to work there. While in Canada, they maintained constant communication. In 1990, Lucia came back to the Philippines and proposed to petition Lucio to join her in Canada. Both agreed to get married, thus they were married on August

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[95]Karganilla vs. Familiar, 1 O.G. 345 (1942).
[96]Capistrano, Civil Code Annotated, 1950 ed., p. 81.
[97]Infante vs. Arenas, CA-GR. No. 5278-R, June 29, 1951.
[98]*Id*.
[99]Art. 6, FC.
[100]Morigo vs. People, 422 SCRA 376 (2004).

30, 1990 at the *Iglesia de Filipina Nacional* at Catagdaan, Pilar, Bohol. On September 8, 1990, Lucia reported back to her work in Canada leaving Lucio behind. On August 19, 1991, Lucia filed with the Ontario Court (General Division) a petition for divorce against Lucio which was granted by the court on January 17, 1992 and to take effect on February 17, 1992. On October 4, 1992, Lucio Morigo married Maria Jececha Lumbago at the *Virgen sa Barangay* Parish, Tagbilaran City, Bohol. On September 21, 1993, Lucio filed a complaint for judicial declaration of nullity of his marriage to Lucia. The complaint seeks, among others, the declaration of nullity of his marriage with Lucia, on the ground that no marriage ceremony actually took place. On October 19, 1993, Lucio was charged with Bigamy in an Information filed by the City Prosecutor of Tagbilaran [City], with the Regional Trial Court of Bohol. Lucio then moved for suspension of the arraignment on the ground that the civil case for judicial nullification of his marriage with Lucia posed a prejudicial question in the bigamy case. His motion was granted, but subsequently denied upon motion for reconsideration by the prosecution. On August 5, 1996, the RTC of Bohol handed down its judgment in the criminal case finding Lucio guilty of bigamy. Lucio appealed the judgment of conviction to the Court of Appeals. During the pendency of the appeal, the trial court handling the civil case rendered a decision declaring the marriage between Lucio and Lucia void ab initio on the ground that no marriage ceremony actually took place. The trial court found that there was no actual marriage ceremony performed between Lucia and Lucia by a solemnizing officer. Instead, what transpired was a mere signing of the marriage contract by the two, without the presence of a solemnizing officer. The trial court thus held that the marriage is void ab initio, in accordance with Articles 3 and 4 of the Family Code. Said judgment became final and executory. But nonetheless, the Court of Appeals affirmed the judgment of conviction. In reversing the decision of the Court of Appeals, the Supreme Court explained —

> Before we delve into petitioner's defense of good faith and lack of criminal intent, we must first determine whether all the elements of bigamy are present in this case. In *Marbella-Bobis vs. Bobis*, we laid down the elements of bigamy thus:
>
> (1) the offender has been legally married;
>
> (2) the first marriage has not been legally dissolved, or in case his or her spouse is absent, the absent spouse has not been judicially declared presumptively dead;
>
> (3) he contracts a subsequent marriage; and
>
> (4) the subsequent marriage would have been valid had it not been for the existence of the first.

Applying the foregoing test to the instant case, we note that during the pendency of CA-G.R. CR No. 20700, the RTC of Bohol Branch 1, handed down the following decision in Civil Case No. 6020, to wit:

WHEREFORE, premises considered, judgment is hereby rendered decreeing the annulment of the marriage entered into by petitioner Lucio Morigo and Lucia Barrete on August 23, 1990 in Pilar, Bohol and further directing the Local Civil Registrar of Pilar, Bohol to effect the cancellation of the marriage contract.

SO ORDERED.

The trial court found that there was no actual marriage ceremony performed between Lucio and Lucia by a solemnizing officer. Instead, what transpired was a mere signing of the marriage contract by the two, without the presence of a solemnizing officer. The trial court thus held that the marriage is void *ab initio*, in accordance with Articles 3 and 4 of the Family Code. As the dissenting opinion in CA-G.R. CR No. 20700, correctly puts it, "This simply means that there was no marriage to begin with; and that such declaration of nullity retroacts to the date of the first marriage. In other words, for all intents and purposes, reckoned from the date of the declaration of the first marriage as void *ab initio* to the date of the celebration of the first marriage, the accused was, under the eyes of the law, never married." The records show that no appeal was taken from the decision of the trial court in Civil Case No. 6020, hence, the decision had long become final and executory.

The first element of bigamy as a crime requires that the accused must have been legally married. But in this case, legally speaking, the petitioner was never married to Lucia Barrete. Thus, there is no first marriage to speak of. Under the principle of retroactivity of a marriage being declared void *ab initio*, the two were never married "from the beginning." The contract of marriage is null; it bears no legal effect. Taking this argument to its logical conclusion, for legal purposes, petitioner was not married to Lucia at the time he contracted the marriage with Maria Jececha. The existence and the validity of the first marriage being an essential element of the crime of bigamy, it is but logical that a conviction for said offense cannot be sustained where there is no first marriage to speak of. The petitioner, must, perforce be acquitted of the instant charge.

The present case is analogous to, but must be distinguished from *Mercado vs. Tan.* In the latter case, the judicial declaration of

nullity of the first marriage was likewise obtained *after* the second marriage was already celebrated. We held therein that:

A judicial declaration of nullity of a previous marriage is necessary before a subsequent one can be legally contracted. One who enters into a subsequent marriage without first obtaining such judicial declaration is guilty of bigamy. This principle applies even if the earlier union is characterized by statutes as "void."

It bears stressing though that in *Mercado,* the first marriage was actually solemnized not just once, but twice: first before a judge where a marriage certificate was duly issued and then again six months later before a priest in religious rites. Ostensibly, at least, the first marriage appeared to have transpired, although later declared void *ab initio*.

In the instant case, however, no marriage ceremony at all was performed by a duly authorized solemnizing officer. Petitioner and Lucia Barrete merely signed a marriage contract on their own. The mere private act of signing a marriage contract bears no semblance to a valid marriage and thus, needs no judicial declaration of nullity. Such act alone, without more, cannot be deemed to constitute an ostensibly valid marriage for which petitioner might be held liable for bigamy unless he first secures a judicial declaration of nullity before he contracts a subsequent marriage.

The law abhors an injustice and the Court is mandated to liberally construe a penal statute in favor of an accused and weigh every circumstance in favor of the presumption of innocence to ensure that justice is done. Under the circumstances of the present case, we held that petitioner has not committed bigamy. Further, we also find that we need not tarry on the issue of the validity of his defense of good faith or lack of criminal intent, which is now moot and academic.

[42.3] Presence of Witnesses

From the provisions of Articles 3(3) and 6 of the Family Code, it may be said that three things are required in a marriage ceremony: (1) the personal appearance of the contracting parties before the solemnizing officer; (2) their personal declaration that they take each other as husband and wife; and (3) that such declaration be done in the presence of the solemnizing officer and at least two witnesses of legal age.

Are the foregoing requirements mandatory? If Articles 3(3) and 6 are read in conjunction with Article 2(2), it can be inferred that the

essence of a marriage ceremony is the personal declaration by the contracting parties before a solemnizing officer that they are taking each other as husband and wife. No more, no less. Thus, the requirements of personal appearance and personal declaration before the solemnizing officer are mandatory. With respect to the requirement of witnesses, however, it appears that such requirement is merely directory. It bears emphasis that Article 2(2) of the Family Code categorically states that the consent must be given *"in the presence of the solemnizing officer"* only.

Art. 7. Marriage may be solemnized by:

(1) Any incumbent member of the judiciary within the court's jurisdiction;

(2) Any priest, rabbi, imam, or minister of any church or religious sect duly authorized by his church or religious sect and registered with the civil registrar general, acting within the limits of the written authority granted him by his church or religious sect and provided that at least one of the contracting parties belongs to the solemnizing officer's church or religious sect;

(3) Any ship captain or airplane chief only in the cases mentioned in Article 31;

(4) Any military commander of a unit to which a chaplain is assigned, in the absence of the latter, during a military operation, likewise only in the cases mentioned in Article 32; or

(5) Any consul-general, consul or vice-consul in the case provided in Article 10. (56a)

COMMENTS:

§ 43. Persons Who May Solemnize Marriages

[43.1] Persons authorized to solemnize marriages
[43.2] Members of the judiciary
[43.3] Priest, rabbi, imam or minister
[43.4] Ship captain or airplane chief
[43.5] Military commanders
[43.6] Consul-general, consul and vice-consul
[43.7] Mayors

[43.1] Persons Authorized to Solemnize Marriages

Under existing laws, the following persons are authorized to solemnize marriages: (1) incumbent members of the judiciary within the

court's jurisdiction;[101] (2) priest, rabbi, imam or minister of any church or religious sect duly authorized by his church or religious sect;[102] (3) ship captain or airplane chief, in cases of *articulo mortis*;[103] (4) military commanders of a unit, in cases of *articulo mortis*;[104] (5) consul-general, consul or vice-consul, in limited cases;[105] and (6) mayors.[106]

[43.2] Members of the Judiciary

The authority of the members of the judiciary to solemnize marriages is subject to the following requisites: (1) they must be incumbent members; and (2) they must solemnize the marriage within their court's jurisdiction.

[43.2.1] Who Are Members of the Judiciary

The following are members of the judiciary: (1) the Chief Justice and Associate Justices of the Supreme Court; (2) the Presiding Justice and the Justices of the Court of Appeals; (3) the Presiding Justice and Justices of the Sandiganbayan; (4) judges of the Regional Trial Courts; (5) judges of the Court of Tax Appeals; and (6) the judges of Metropolitan, Municipal or Municipal Circuit Trial Courts.

Note that Justices of the Supreme Court, the Court of Appeals and Sandiganbayan have national jurisdiction while judges of the Regional Trial Courts and Metropolitan, Municipal or Municipal Circuit Trial Courts exercise jurisdiction within a limited territory designated by law.

[43.2.2] Marriages Outside of Court's Jurisdiction

The authority of the judges of the RTCs and MTCs to solemnize marriages is confined within their respective territorial jurisdiction. *Afortiori*, outside of their court's jurisdiction, they are not clothed with authority to solemnize marriages. Logically, therefore, if a marriage is solemnized by a judge of the Regional Trial Court, Metropolitan or Municipal Trial Courts outside of their court's jurisdiction, there is an

[101] Art. 7(1), FC.
[102] Art. 7(2), FC.
[103] Art. 7(3), in relation to Art. 31, FC.
[104] Art. 7(4), in relation to Art. 32, FC.
[105] Art. 7(5), in relation to Art. 10, FC.
[106] Sec. 444(b)(1)(xviii), R.A. 7160.

absence of a formal requisite in such marriage, namely the authority of the solemnizing officer.[107] Thus, the marriage will be considered void ab initio following the provisions of Article 4 of the Family Code which says that *"the absence of any of the essential or formal requisites shall render the marriage void xxx."*

However, in the case of **Navarro vs. Dumagtoy**,[108] the Supreme Court held —

> "A priest who is commissioned and allowed by his local ordinary to marry the faithful, is authorized to do so only within the area of the diocese or place allowed by his Bishop. An appellate court Justice or a Justice of this Court has jurisdiction over the entire Philippines to solemnize marriages, regardless of the venue, so long as the requisites of law are complied with. However, judges who are appointed to specific jurisdictions may officiate in weddings only within said areas and not beyond. Where a judge solemnize a marriage outside his court's jurisdiction, there is a resultant irregularity in the formal requisite laid down in Article 3, which while it may not affect the validity of the marriage, may subject the officiating official to administrative liability. (Article 4, F.C.)" (Underscoring supplied)

The *Navarro* case, however, is an administrative case against an erring judge. Hence, the statements made by the Supreme Court in said case on the issue of the validity of the marriage may be considered merely as *obiter dicta* and do not set a binding precedent.[109] Interestingly, the Court also made the following remarks in said case, to wit:

> "Inasmuch as respondent judge's jurisdiction covers the municipalities of Sta. Monica and Burgos, he was not clothed with authority to solemnize a marriage in the Municipality of Dapa, Surigao del Norte. xxx"[110]

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[107]See Art. 3(1), FC.

[108]259 SCRA 129 (1996).

[109]Although the ruling of the Court is reiterated in Beso vs. Daguman, 323 SCRA 566 (2000) and Arañez vs. Occiano, 380 SCRA 402 (2002).

[110]*Supra* at p. 136.

In another administrative case[111] where a judge solemnized a marriage in Calbayog City, Samar, outside of his territorial jurisdiction as municipal judge of Sta. Margarita, Samar, the Court likewise made the following remarks:

> "Considering that respondent Judge's jurisdiction covers the municipality of Sta. Margarita-Tarangan-Pagsanjan, Samar only, he was not clothed with authority to solemnize a marriage in the City of Calbayog."[112]

Note that if the judge is not clothed with authority to solemnize a marriage outside of his territorial jurisdiction, as declared by the Court in the above-mentioned cases, this is not a mere irregularity in the formal requisite laid down in Article 3 but a total absence of a formal requisite, which will render the marriage void *ab initio*.

The confusion may have arisen because of the change in the phraseology of the law. Under the New Civil Code,[113] the authority of the judges of the Courts of First Instance (now Regional Trial Courts), Municipal judges and justices of the peace courts (now the MTCs) to solemnize a marriage is not limited by law to their specific territorial jurisdictions. Under the Family Code, however, these judges have the authority to solemnize marriages only *"within the court's jurisdiction."*[114]

[43.2.3] Marriage in Good Faith

The absence of any of the essential or formal requisites shall render the marriage void *ab initio* except as stated in Article 35(2).[115] Under Article 35(2), the absence of authority of the solemnizing officer shall render the marriage void from the beginning except if the marriage is contracted *"with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so."* Now, it may be asked, if a judge solemnized a marriage outside of his territorial jurisdiction, may the marriage be nonetheless considered as valid because

[111]Beso vs. Daguman, *supra*.
[112]*Id*., at p. 575.
[113]Art. 56(3) & (5), NCC.
[114]Art. 7(1), FC.
[115]Art. 4, 1st par., FC.

either or both of the contracting parties believed in good faith that the judge had the legal authority to solemnize the marriage?

It is submitted that the marriage is void *ab initio* if the good faith of the parties consists in their mistaken belief that a judge has the authority to solemnize marriages outside of his court's jurisdiction. This is clearly a case of ignorance of law for which the parties may not be excused following the rule in Article 3 of the New Civil Code *that "ignorance of the law excuses no one from compliance therewith."* If their good faith, however, consists in their mistaken belief that the solemnizer is a judge of the locality where the marriage is celebrated, then good faith may be invoked in this case since this is a clear case of ignorance of fact and can, therefore, be a basis of good faith.

[43.3] Priest, Rabbi, Imam or Minister

Pursuant to Article 7(2) of the Family Code, a religious solemnizer can solemnize marriages if the following requisites are present: (1) the priest, rabbi, imam or minister of any church or religious sect must be duly authorized by his respective church or sect; (2) he must be duly registered with the Civil Registrar General; (3) he must act within the limits of his written authority; and (4) at least one of the contracting parties must belong to the solemnizing officer's church or sect. Short of these requirements, a religious solemnizer cannot solemnize a marriage.

[43.3.1] Effect of Failure to Comply with the Foregoing Requirements

As earlier stated, if any of the foregoing requisites is not present, the religious solemnizer is not clothed with authority to solemnize a marriage. Consequently, any marriage solemnized by said religious solemnizer is void *ab initio*. May the parties nonetheless invoke "good faith" pursuant to the provisions of Article 35(2) of the Family Code? It is submitted that if the reason or reasons for the absence of authority on the part of the religious solemnizer is any of the first three (3) requisites, then good faith may be invoked by either or both parties to the marriage. In these situations, there is merely ignorance of fact and not ignorance of law. However, if none of the parties belonged to the solemnizing officer's church or sect, it is submitted that good faith may not be invoked for this is a clear case of ignorance of law and not of facts.

[43.3.2] Civil Registrar General

Under Article 95 of the New Civil Code, it is provided that the "director of the proper government office" shall register and issue the authorization to solemnize marriage to every priest, minister or rabbi authorized by his denomination, church, sect, or religion to solemnize marriage. The official referred to under this article is the Director of the National Library. However, the said registration has been transferred to the Civil Registrar General pursuant to the provisions of Article 7(2) of the Family Code.

Is the issuance of authorization to solemnize marriage by the Civil Registrar General a ministerial or discretionary duty? It is the opinion of the Secretary of Justice[116] that the issuance by the Civil Registrar General of the authorization is purely a ministerial duty, to wit:

> "A cursory reading of Article 7(2) of the Family Code reveals that no discretion or personal judgment is exercised by the Civil Registrar General in the issuance of the aforesaid authorization. What is merely required of him is to ascertain the existence of a specified state of fact, that is, that the priest, rabbi, imam or minister is duly authorized by his church or religious sect."

In the case of **Jamias vs. Rodriguez**,[117] the Supreme Court ruled that the issuance of an authorization to solemnize marriage by the then Director of Bureau of Public Libraries is a ministerial duty for reasons of public policy, thus:

> "Until the pending litigation is finally decided, respondent Director of Public Libraries has a ministerial duty to issue authorization to solemnize marriages to the bishops and priests of the group headed by Bishop Juan Jamias as bishop and priests of the Philippine Independent Church. The followers of said faction, in the meantime, should not be deprived of the means of satisfying one of their fundamental necessities, that their marriage be solemnized by bishops and priest they recognize as true representatives of their religion

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[116]D.O.J. Opinion No. 105, S. 1989.
[117]81 Phil. 303.

in whom they have faith. To compel them against their conviction to have their marriages solemnized by the bishops and priests of the opposing faction or of other religions is to violate their freedom of worship. There is a strong reason of public policy why the bishops and priests under petitioner Juan Jamias should be granted immediately the corresponding authorizations to solemnize marriage. The members of said religious group who want to be married should be avoided. It is not easy to keep under control for a long time natural impulses, such as the sexual urge."

[43.3.3] Marriages Among Muslims or Members of Ethnic Communities

Pursuant to Article 33 of the Family Code, marriages among Muslims or members of the ethnic cultural communities may be solemnized without need of securing a marriage license. Article 33 does not, however, dispense with the requirement of registration of the solemnizing officer under Section 7(2) of the Family Code. Thus, marriages among Muslims or among members of the ethnic cultural communities may be solemnized only by those solemnizing officers enumerated in Article 7 of the Family Code and duly registered with the Civil Registrar General.[118]

"Imam" is a Muslim priest, and interpreting Article 7(2) in relation to Article 33, the logical conclusion to follow would be that marriages among Muslims must be celebrated by an "imam" who has been duly registered with the Civil Registrar General, and this holds true with marriages among members of the ethnic cultural communities, if these marriages are to be celebrated by their religious head.[119]

Are tribal heads or chieftains of ethnic cultural communities authorized to solemnize marriages? As to whether tribal heads or chieftains should be allowed to register as solemnizing officers would depend on whether, aside from being the social or political leader of their respective tribes, they also stand as their priest or religious head.[120]

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[118]D.O.J. Opinion No. 179, S. 1993.
[119]*Id.*
[120]*Id.*

[43.4] Ship Captain or Airplane Chief

See discussions under *infra* § 52.

[43.5] Military Commanders

See discussions under *infra* § 53.

[43.6] Consul-General, Consul and Vice-Consul

See discussions under *infra* § 46.

[43.7] Mayors

The authority of mayors to solemnize marriages under the Civil Code was taken away from them by the Family Code, which became effective on August 3, 1988. Such authority, however, was restored to them by the Local Government Code of 1991 or Republic Act 7160,[121] which took effect on January 1, 1992. As such, mayors of cities and municipalities are again authorized to solemnize marriages.

[43.7.1] Effect of Marriages Solemnized by Mayors Outside of their Territorial Jurisdiction:

Ordinarily, the powers of a mayor are confined only within his territorial jurisdiction. But the fact that a mayor had solemnized a marriage outside of his territorial jurisdiction will not affect the validity of the marriage. This is a mere irregularity in the exercise of his authority to solemnize marriages. The authority of the mayors to solemnize marriages under the Local Government Code must be distinguished from the authority of the members of the judiciary under the Family Code. While the authority of the members of the judiciary to solemnize marriages is confined by law to their court's jurisdiction,[122] the authority of mayors to solemnize marriages is not confined by law to his territorial jurisdiction. The Local Government Code simply states that mayors are authorized to solemnize marriages without limiting the exercise of such authority to their territorial jurisdiction.

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[121] Sec. 444(b)(1)(xviii).
[122] See Art. 7(1), FC.

Art. 8. The marriage shall be solemnized publicly in the chambers of the judge or in open court, in the church, chapel or temple, or in the office of the consul-general, consul or vice-consul, as the case may be, and not elsewhere, except in cases of marriages contracted at the point of death or in remote places in accordance with Article 29 of this Code, or where both of the parties request the solemnizing officer in writing in which case the marriage may be solemnized at a house or place designated by them in a sworn statement to that effect. (57a)

COMMENTS:

§ 44. Place of Marriage

[44.1] Venue or place of marriage
[44.2] When the foregoing rule does not apply
[44.3] Effect of violation of Article 8

[44.1] Venue or Place of Marriage

The venue or place of marriage shall be the following: (1) if the marriage is to be solemnized by a member of the judiciary, the marriage must be held in the chamber of the judge or in his sala in open court;[123] (2) if the marriage is to be solemnized by a religious solemnizer, the marriage must be held in the church, chapel or temple of the religious solemnizer concerned;[124] (3) if the marriage is to be solemnized by the consul-general, consul or vice-consul, the marriage must be celebrated in his office.[125]

[44.2] When the Foregoing Rule Does Not Apply

In the following cases, the marriage may be celebrated elsewhere: (1) in cases of marriage contracted at the point of death; (2) in cases of marriage contracted in remote places in accordance with the provisions of Article 29 of the Family Code; and (3) in cases where both of the parties to the marriage requested the solemnizing officer in writing and under oath to solemnize the marriage elsewhere.[126]

[123] Art. 8, FC.
[124] *Id.*
[125] *Id.*
[126] *Id.*

[44.3] Effect of Violation of Article 8

Article 8, which is merely directory, refers only to the venue of the marriage and does not alter or qualify the authority of the solemnizing officer.[127] Non-compliance therewith will not affect the validity of the marriage since this is a mere irregularity.[128] However, if the judge will solemnize a marriage outside of his territorial jurisdiction, the marriage will be void *ab initio* since he is not clothed with authority to solemnize marriages outside of his territorial jurisdiction.[129]

Art. 9. A marriage license shall be issued by the local civil registrar of the city or municipality where either contracting party habitually resides, except in marriages where no license is required in accordance with Chapter 2 of this Title. (58a)

Art. 10. Marriages between Filipino citizens abroad may be solemnized by a consul-general, consul or vice-consul of the Republic of the Philippines. The issuance of the marriage license and the duties of the local civil registrar and of the solemnizing officer with regard to the celebration of marriage shall be performed by said consular official. (75a)

COMMENTS:

§ 45. Issuance of License

[45.1] Who must issue license
[45.2] Effect if license is obtained elsewhere

[45.1] Who Must Issue License

The marriage license must be issued by the local civil registrar of the city or municipality where either contracting party habitually resides.[130] However, if the marriage is to be celebrated abroad between Filipino citizens, the marriage license may be issued by the consul-general, consul or vice-consul of the Republic of the Philippines of the place where the marriage is to be celebrated.[131]

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[127]Navarro vs. Domagtoy, *supra*., at p. 135.
[128]Art. 4, 3rd par., FC.; Navarro vs. Domagtoy, *supra*., at p. 135.
[129]See discussions under Article 7.
[130]Art. 9, FC.
[131]Art. 10, FC.

[45.2] Effect if License is Obtained Elsewhere

Even if the license is obtained elsewhere, not in the local civil registrar of the city or municipality where either contracting party habitually resides, the validity of the marriage is not affected since this is a mere irregularity in the issuance of the said license. Note that a marriage license so issued shall be valid in any part of the Philippines.[132]

§ 46. Authority of Consuls to Solemnize Marriages

Under Article 10 of the Family Code, the authority of a consul-general, consul or vice-consul to solemnize marriages extends only to *"marriages between Filipino citizens abroad."* As such, if the marriage is between a Filipino citizen and an alien, it appears that our consular officials are not clothed with authority to solemnize such marriage. Likewise, they have no authority to solemnize marriages outside of the country where they hold office.

Art. 11. Where a marriage license is required, each of the contracting parties shall file separately a sworn application for such license with the proper local civil registrar which shall specify the following:

(1) Full name of the contracting party;

(2) Place of birth;

(3) Age and date of birth;

(4) Civil status;

(5) If previously married, how, when and where the previous marriage was dissolved or annulled;

(6) Present residence and citizenship;

(7) Degree of relationship of the contracting parties;

(8) Full name, residence and citizenship of the father;

(9) Full name, residence and citizenship of the mother; and

(10) Full name, residence and citizenship of the guardian or person having charge, in case the contracting party has neither father nor mother and is under the age of twenty-one years.

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[132] Art. 20, FC.

The applicants, their parents or guardians shall not be required to exhibit their residence certificates in any formality in connection with the securing of the marriage license. (59a)

Art. 12. The local civil registrar, upon receiving such application, shall require the presentation of the original birth certificates or, in default thereof, the baptismal certificates of the contracting parties or copies of such documents duly attested by the persons having custody of the originals. These certificates or certified copies of the documents required by this Article need not be sworn to and shall be exempt from the documentary stamp tax. The signature and official title of the person issuing the certificate shall be sufficient proof of its authenticity.

If either of the contracting parties is unable to produce his birth or baptismal certificate or a certified copy of either because of the destruction or loss of the original, or if it is shown by an affidavit of such party or of any other person that such birth or baptismal certificate has not yet been received though the same has been required of the person having custody thereof at least fifteen days prior to the date of the application, such party may furnish in lieu thereof his current residence certificate or an instrument drawn up and sworn to before the local civil registrar concerned or any public official authorized to administer oaths. Such instrument shall contain the sworn declaration of two witnesses of lawful age, setting forth the full name, residence and citizenship of such contracting party and of his or her parents, if known, and the place and date of birth of such party. The nearest of kin of the contracting parties shall be preferred as witnesses, or, in their default, persons of good reputation in the province or the locality.

The presentation of birth or baptismal certificate shall not be required if the parents of the contracting parties appear personally before the local civil registrar concerned and swear to the correctness of the lawful age of said parties, as stated in the application, or when the local civil registrar shall, by merely looking at the applicants upon their personally appearing before him, be convinced that either or both of them have the required age. (60a)

Art. 13. In case either of the contracting parties has been previously married, the applicant shall be required to furnish, instead of the birth or baptismal certificate required in the last preceding article, the death certificate of the deceased spouse or the judicial decree of the absolute divorce, or the judicial decree of annulment or declaration of nullity of his or her previous marriage. In case the death certificate cannot be secured, the party shall make an affidavit setting forth this circumstance and his or her actual civil status and the name and date of death of the deceased spouse. (61a)

Art. 14. In case either or both of the contracting parties, not having been emancipated by a previous marriage, are between the ages of eight-

een and twenty-one, they shall, in addition to the requirements of the preceding articles, exhibit to the local civil registrar, the consent to their marriage of their father, mother, surviving parent or guardian, or persons having legal charge of them, in the order mentioned. Such consent shall be manifested in writing by the interested party, who personally appears before the proper local civil registrar, or in the form of an affidavit made in the presence of two witnesses and attested before any official authorized by law to administer oaths. The personal manifestation shall be recorded in both applications for marriage license, and the affidavit, if one is executed instead, shall be attached to said applications. (61a)

Art. 15. Any contracting party between the ages of twenty-one and twenty-five shall be obliged to ask their parents or guardian for advice upon the intended marriage. If they do not obtain such advice, or if it be unfavorable, the marriage license shall not be issued till after three months following the completion of the publication of the application therefor. A sworn statement by the contracting parties to the effect that such advice has been sought, together with the written advice given, if any, shall be attached to the application for marriage license. Should the parents or guardian refuse to give any advice, this fact shall be stated in the sworn statement. (62a)

Art. 16. In the cases where parental consent or parental advice is needed, the party or parties concerned shall, in addition to the requirements of the preceding articles, attach a certificate issued by a priest, imam or minister authorized to solemnize marriage under Article 7 of this Code or a marriage counsellor duly accredited by the proper government agency to the effect that the contracting parties have undergone marriage counselling. Failure to attach said certificate of marriage counselling shall suspend the issuance of the marriage license for a period of three months from the completion of the publication of the application. Issuance of the marriage license within the prohibited period shall subject the issuing officer to administrative sanctions but shall not affect the validity of the marriage.

Should only one of the contracting parties need parental consent or parental advice, the other party must be present at the counselling referred to in the preceding paragraph. (n)

Art. 17. The local civil registrar shall prepare a notice which shall contain the full names and residences of the applicants for a marriage license and other data given in the applications. The notice shall be posted for ten consecutive days on a bulletin board outside the office of the local civil registrar located in a conspicous place within the building and accessible to the general public. This notice shall request all persons having knowledge of any impediment to the marriage to advise the local civil registrar thereof. The marriage license shall be issued after the completion of the period of publication. (63a)

Art. 18. In case of any impediment known to the local civil registrar or brought to his attention, he shall note down the particulars thereof and his findings thereon in the application for marriage license, but shall nonetheless issue said license after the completion of the period of publication, unless ordered otherwise by a competent court at his own instance or that of any interest party. No filing fee shall be charged for the petition nor a corresponding bond required for the issuances of the order. (64a)

Art. 19. The local civil registrar shall require the payment of the fees prescribed by law or regulations before the issuance of the marriage license. No other sum shall be collected in the nature of a fee or tax of any kind for the issuance of said license. It shall, however, be issued free of charge to indigent parties, that is, those who have no visible means of income or whose income is insufficient for their subsistence, a fact established by their affidavit, or by their oath before the local civil registrar. (65a)

Art. 20. The license shall be valid in any part of the Philippines for a period of one hundred twenty days from the date of issue, and shall be deemed automatically cancelled at the expiration of the said period if the contracting parties have not made use of it. The expiry date shall be stamped in bold characters on the face of every license issued. (65a)

Art. 21. When either or both of the contracting parties are citizens of a foreign country, it shall be necessary for them before a marriage license can be obtained, to submit a certificate of legal capacity to contract marriage, issued by their respective diplomatic or consular officials.

Stateless persons or refugees from other countries shall, in lieu of the certificate of legal capacity herein required, submit an affidavit stating the circumstances showing such capacity to contract marriage. (66a)

COMMENTS:

§ 47. Procedure in Procuring Marriage License

[47.1] Where to apply for issuance of marriage license
[47.2] What must be specified in the application
[47.3] Documents accompanying the application
  (1) Birth certificate or baptismal certificate
  (2) Death certificate of spouse, divorce decree, etc.
  (3) Parental consent
  (4) Parental advice
  (5) Certificate of marriage counselling
  (6) Certificate of legal capacity
[47.4] Notice and publication of application
[47.5] Issuance of license is a ministerial duty of the local civil registrar
[47.6] Validity of marriage license

[47.1] Where to Apply for Issuance of Marriage License

The application for issuance of marriage license must be filed in the local civil registrar of the city or municipality where either contracting party habitually resides,[133] although a license obtained elsewhere shall not affect the validity of the marriage.

[47.2] What Must Be Specified in the Application

Each of the contracting parties is required to file a sworn application for the issuance of the marriage license, specifying the following: (1) full name of the contracting party; (2) place of birth; (3) age and date of birth; (4) civil status; (5) if previously married, how, when and where the previous marriage was dissolved or annulled; (6) present residence and citizenship; (7) degree of relationship of the contracting parties; (8) full name, residence and citizenship of the father; (9) full name, residence and citizenship of the mother; and (10) full name, residence and citizenship of the guardian or person having charge, in case the contracting party has neither father nor mother and is under the age of twenty-one years.[134]

[47.3] Documents Accompanying the Application

The following documents are required to be submitted, together with the sworn application for the issuance of the license:

(1) Birth Certificate or Baptismal Certificate

The original birth certificates of the contracting parties, or copies of such documents duly attested by the person having custody of the originals, are required to be submitted to the local civil registrar.[135] In default thereof, the contracting parties may submit their original baptismal certificates or copies of such documents duly attested by the person having custody of the originals.[136] The presentation of birth or baptismal certificate shall not be required if the parents of the contracting parties appear personally before the local civil registrar concerned and swear

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[133] Art. 9, FC.
[134] Art. 11, FC.
[135] Art. 12, FC.
[136] *Id.*

to the correctness of the lawful age of said parties, as stated in the application, or when the local civil registrar shall, by merely looking at the applicants upon their personally appearing before him, be convinced that either or both of them have the required age.[137] If either of the contracting parties is unable to produce his birth or baptismal certificate or a certified copy of either because of the destruction or loss of the original or if it is shown by an affidavit of such party or of any other person that such birth or baptismal certificate has not yet been received though the same has been required of the person having custody thereof at least fifteen days prior to the date of the application, such party may furnish in lieu thereof his current residence certificate or an instrument drawn up and sworn to before the local civil registrar concerned or any public official authorized to administer oaths. Such instrument shall contain the sworn declaration of two witnesses of lawful age, setting forth the full name, residence and citizenship of such contracting party and of his or her parents, if known, and the place and date of birth of such party. The nearest of kin of the contracting parties shall be preferred as witnesses, or, in their default, persons of good reputation in the province or the locality.[138]

(2) Death Certificate of Spouse, Divorce Decree, etc.

In case either of the contracting parties has been previously married, the applicant shall be required to furnish, instead of the birth or baptismal certificate, the death certificate of the deceased spouse or the judicial decree of the absolute divorce, or the judicial decree of annulment or declaration of nullity of his or her previous marriage.[139] In case the death certificate cannot be secured, the party shall make an affidavit setting forth this circumstance and his or her actual civil status and the name and date of death of the deceased spouse.[140]

(3) Parental Consent

In case either or both of the contracting parties are between the ages of eighteen and twenty-one, they shall, in addition to the foregoing

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[137]*Id.*
[138]*Id.*
[139]Art. 13, FC
[140]*Id.*

requirements, exhibit to the local civil registrar, the consent to their marriage of their father, mother, surviving parent or guardian, or persons having legal charge of them, in the order mentioned.[141] Such consent shall be manifested in writing by the interested party, who personally appears before the proper local civil registrar, or in the form of an affidavit made in the presence of two witnesses and attested before any official authorized by law to administer oaths.[142] The personal manifestation shall be recorded in both applications for marriage license, and the affidavit, if one is executed instead, shall be attached to such applications.[143] If the marriage license is issued notwithstanding the absence of such parental consent, the same shall not affect the validity of the license so issued. Note, however, that the absence of such parental consent is a ground to annul the marriage pursuant to Article 45(1) of the Family Code.[144]

(4) Parental Advice

Any contracting party between the age of twenty-one and twenty-five shall be obliged to ask their parents or guardian for advice upon the intended marriage.[145] If they do not obtain such advice, or if it be unfavorable, the marriage license shall not be issued till after three months following the completion of the publication of the application therefor.[146] A sworn statement by the contracting parties to the effect that such advice has been sought, together with the written advice given, if any, shall be attached to the application for marriage license. Should the parents or guardian refuse to give any advice, this fact shall be stated in the sworn statement.[147] If a marriage license is issued notwithstanding the absence of such parental advice or prior to the three-month suspension period under Article 15 of the Family Code, the same shall be considered as mere irregularity in the issuance of the license and shall not affect the validity of the marriage.

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[141] Art. 14, FC.
[142] *Id.*
[143] *Id.*
[144] See discussions under Article 45, FC.
[145] Art. 15, FC.
[146] *Id.*
[147] *Id.*

(5) Certificate of Marriage Counselling

A certificate of marriage counselling issued by a religious solemnizer or a marriage counsellor duly accredited by the government is required in cases where parental consent or parental advice is needed.[148] In other words, a certificate of marriage counselling is required if either or both of the contracting parties are between the ages of 18 and 25. Failure to attach said certificate in the application shall suspend the issuance of the marriage license for a period of three months from the completion of the publication of the application.[149] If the license is issued within the three-month suspension period, such irregularity shall subject the issuing officer to administrative sanctions but shall not affect the validity of the marriage.[150]

(6) Certificate of Legal Capacity

The legal capacity to contract marriage is determined by the national law of the party concerned.[151] In cases where either or both the contracting parties are citizens of a foreign country, it shall be necessary for them before a marriage license can be obtained in the Philippines, to submit a certificate of legal capacity to contract marriage, issued by their respective diplomatic or consular officials.[152] This certificate is sufficient to establish the legal capacity of the foreigner to contract marriage in the Philippines.[153]

If the marriage contracted in the Philippines is without a certificate of legal capacity but with a marriage license, is such marriage valid or not? The absence of a certificate of legal capacity is merely an irregularity in complying with the formal requirement for procuring a marriage license.[154] Under Article 4 of the Family Code, an irregularity will not affect the validity of a marriage celebrated on the basis of a marriage license issued without that certificate.[155] It is worth observing that the

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[148]Art. 16, FC.
[149]*Id*.
[150]*Id*.
[151]Garcia vs. Recio, 366 SCRA 437 (2001).
[152]Art. 21, FC.
[153]Garcia vs. Recio, *supra*.
[154]*Id*.
[155]*Id*.

law specifies what marriages are void from the beginning and the absence of a certificate of legal capacity to marry is not one of those enumerated.[156]

[47.4] Notice and Publication of Application

The local civil registrar shall prepare a notice which shall contain the full names and residences of the applicants for a marriage license and other data given in the applications.[157] The notice shall be posted for ten consecutive days on a bulletin board outside the office of the local civil registrar located in a conspicuous place within the building and accessible to the general public.[158] This notice shall request all persons having knowledge of any impediment to the marriage to advise the local civil registrar thereof. The marriage license shall be issued after the completion of the period of publication.[159] Note that if the license is issued prior to the lapse of the ten-day period of publication or issued in the absence of such requisite publication, these irregularities will not affect validity of the marriage celebrated on the basis of the license so issued.

[47.5] Issuance of License: Ministerial Duty of Civil Registrar

In case of any impediment known to the local civil registrar or brought to his attention, he shall note down the particulars thereof and his findings thereon in the application for marriage license, but shall nonetheless issue said license after the completion of the period of publication, unless ordered otherwise by a competent court at his own instance or that of any interest party.[160]

[47.6] Validity of Marriage License

A marriage license shall be valid in any part of the Philippines for a period of one hundred twenty days from the date of issue.[161] The expiry date of the license is required to be stamped in bold characters on

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[156]D.O.J Opinion No. 50, S. 1991.
[157]Art. 17, FC.
[158]*Id.*
[159]*Id.*
[160]Art. 18, FC.
[161]Art. 20, FC.

the face of every license issued.[162] After the expiration of the said period, the license is deemed automatically cancelled.[163] Hence, a marriage celebrated on the basis of such cancelled license is void *ab initio* for want of a formal requisite of marriage.

Art. 22. The marriage certificate, in which the parties shall declare that they take each other as husband and wife, shall also state:

(1) The full name, sex and age of each contracting party;

(2) Their citizenship, religion and habitual residence;

(3) The date and precise time of the celebration of the marriage;

(4) That the proper marriage license has been issued according to law, except in marriage provided for in Chapter 2 of this Title;

(5) That either or both of the contracting parties have secured the parental consent in appropriate cases;

(6) That either or both of the contracting parties have complied with the legal requirement regarding parental advice in appropriate cases; and

(7) That the parties have entered into marriage settlement, if any, attaching a copy thereof. (67a)

Art. 23. It shall be the duty of the person solemnizing the marriage to furnish either of the contracting parties the original of the marriage certificate referred to in Article 6 and to send the duplicate and triplicate copies of the certificate not later than fifteen days after the marriage, to the local civil registrar of the place where the marriage was solemnized. Proper receipts shall be issued by the local civil registrar to the solemnizing officer transmitting copies of the marriage certificate. The solemnizing officer shall retain in his file the quadruplicate copy of the marriage certificate, the original of the marriage license and, in proper cases, the affidavit of the contracting party regarding the solemnization of the marriage in a place other than those mentioned in Article 8. (68a)

Art. 24. It shall be the duty of the local civil registrar to prepare the documents required by this Title, and to administer oaths to all interested parties without any charge in both cases. The documents and affidavits filed in connection with applications for marriage licenses shall be exempt from documentary stamp tax. (n)

Art. 25. The local civil registrar concerned shall enter all applications for marriage licenses filed with him in a registry book strictly in the order

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[162] *Id.*
[163] *Id.*

in which the same are received. He shall record in said book the names of the applicants, the date on which the marriage license was issued, and such other data as may be necessary. (n)

COMMENTS:

§ 48. Marriage Certificate

[48.1] In general
[48.2] Contents
[48.3] Distribution of copies
[48.4] Effect of non-recording

[48.1] In General

The marriage certificate (or marriage contract) is the best documentary evidence of a marriage.[164] However, the absence thereof is not proof that no marriage took place since other evidence may be presented to prove the existence of marriage.[165]

[48.2] Contents

The marriage certificate, in which the parties shall declare that they take each other as husband and wife, shall also state: (1) the full name, sex and age of each contracting party; (2) their citizenship, religion and habitual residence; (3) the date and precise time of the celebration of the marriage; (4) that the proper marriage license has been issued according to law, except in marriage provided for in Chapter 2 of this Title; (5) that either or both of the contracting parties have secured the parental consent in appropriate cases; (6) that either or both of the contracting parties have complied with the legal requirement regarding parental advice in appropriate cases; and (7) that the parties have entered into marriage settlement, if any, attaching a copy thereof.[166]

[48.3] Distribution of Copies

The marriage certificate shall be accomplished by the person solemnizing the marriage in quadruplicate copies and each copy shall be

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[164]Villanueva vs. CA, 198 SCRA 472 (1991).
[165]Balogbog vs. CA, 269 SCRA 259 (1997).
[166]Art. 22, FC.

distributed, as follows: (a) the original copy shall be given to either of the contracting parties; (b) the duplicate and triplicate copies shall then be sent to the local civil registrar of the place where the marriage was solemnized; and (c) the quadruplicate copy shall be retained by the solemnizing officer, together with the original of the marriage license and, in proper cases, the affidavit of the contracting party regarding the solemnization of the marriage in a place other than those mentioned in Article 8.[167]

[48.4] Effect of Non-recording

The mere fact that no record of the marriage exists in the registry of marriage does not invalidate said marriage, as long as in the celebration thereof, all requisites for its validity are present.[168] The forwarding of a copy of the marriage certificate to the registry is not one of said requisites.[169]

Art. 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35(1), (4), (5) and (6), 36, 37 and 38. (17a)

Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law. (As amended by Executive Order 227)

COMMENTS:

§ 49. Validity of Marriages Celebrated Abroad

Following the principle of *lex loci celebrationis*, "all marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country."[170] This rule, however, does not apply to marriages that are prohibited under Articles 35(1), (4), (5) and (6), 36,

[167]Art. 23, FC.
[168]People vs. Borromeo, 133 SCRA 106, 110 (1984); citing Pugeda vs. Trias, 4 SCRA 849.
[169]*Id.*
[170]Art. 26, 1st par., FC.

37 and 38 of the Code.[171] Hence, the following marriages are void *ab initio* even if valid in the place where it was celebrated:

(1) If both parties are Filipinos and either one or both of them is below 18;[172]

(2) If one of the parties to a marriage is a citizen of the Philippines and he or she is below 18;[173]

(3) If the marriage is bigamous or polygamous;[174]

(4) If the marriage is contracted through mistake of one contracting party as to the identity of the other;[175]

(5) If one of the parties in a subsequent marriage is a party to a prior marriage which has been annulled or judicially declared void but fails to comply with the requirement of article 52 of the Code;[176]

(6) If one of the parties to a marriage, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage;[177]

(7) If the marriage is incestuous;[178]

(8) If the marriage is void by reason of public policy.[179]

The following marriages between Filipinos celebrated abroad, on the other hand, are exceptionally considered as valid in the Philippines, if valid in the place where it was celebrated pursuant to the rule enunciated in the first paragraph of article 26 of the Code.

(a) A marriage celebrated without a marriage license if such is not a requirement in the place where the marriage was celebrated. However, if the marriage is celebrated before the Philippine consular officials under article 10 of the Code, the

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[171]*Id.*
[172]Art. 35(1), in relation to Art. 26, FC.
[173]*Id.*
[174]Art. 35(4), in relation to Art. 26, FC.
[175]Art. 35(5), in relation to Art. 26, FC.
[176]Art. 35(6), in relation to Arts. 53 and 26, FC.
[177]Art. 36, in relation to Art. 26, FC.
[178]Art. 37, in relation to Art. 26, FC.
[179]Art. 38, in relation to Art. 26, FC.

requirement of a valid marriage license cannot be dispensed with and the absence of which shall render the marriage void.

(b) A marriage celebrated by a person not included in the enumeration in article 7 of the Code if, under the laws of the place where the marriage is celebrated, he has the authority to solemnize marriages.

(c) A proxy marriage.

§ 50. Validity of Divorce in the Philippines

[50.1] Historical background
[50.2] Article 26, second paragraph
[50.3] Applicability of second paragraph of article 26

[50.1] Historical Background

During the Spanish Occupation, only relative divorce (*a mensa et thoro*) was allowed in the Philippines under the *Las Siete Partidas* on any of the following grounds: (1) the desire of one of the spouses to enter a religious order, provided that the other granted permission to do so; (2) adultery committed by either; or (3) the fact that either had become a heretic.

During the American Occupation, Act No. 2710, otherwise known as the Divorce Law, was enacted by the Philippine Legislature on March 11, 1917. This Act repealed the provisions of the *Las Siete Partidas* by providing for absolute divorce (*a vinculo matrimonii*) on the grounds of adultery on the part of the wife or concubinage on the part of the husband. Act No. 2710 continued to be in force until the Japanese Occupation when the Philippine Executive Commission issued Executive Order No. 141 in 1943. This E.O. repealed Act No. 2710 and the same permitted absolute divorce on eleven liberal grounds. Upon the liberation of the Philippines, however, Gen. Douglas McArthur, as commander-in-chief of the Phil-American Army of liberation, issued a proclamation on October 23, 1944 to the effect that all laws of any government in the Philippines other than that of the Commonwealth of the Philippines, were null and void and without legal effect in areas free from enemy occupation. Under this proclamation, E.O. No. 141 ceased to take effect and Act No. 2710 was revived.

The draft of the new Civil Code submitted by the Code Commission provided for both absolute and relative divorce. During the discussion of the Code in the Congress, absolute divorce was eventually eliminated and the phrase "relative divorce" was changed to "legal separation."

On July 17, 1987, or prior to the effectivity of the Family Code, Article 26 of the Family Code was amended by inserting therein a second paragraph which recognizes partial divorce in the Philippines.

Under existing laws, therefore, the rule is that divorce is not recognized as valid in the Philippines. However, in the situation contemplated in Article 26 of the Family Code, and only in that instance, the effect of divorce, which is the severance of the marriage ties, is allowed to benefit the Filipino spouse who is thereby given capacity to remarry under Philippine law.[180]

[50.2] Article 26, Second Paragraph

In the 1985 case of **Van Dorn vs. Romillo, Jr.**,[181] it was held that owing to the nationality principle embodied in Article 15 of the Civil Code, only Philippine nationals are covered by the policy against absolute divorces. In the same case, it was held that aliens may obtain divorces abroad, provided they are valid according to their national law. Such being the case, if a Filipino citizen was married to a foreigner and the latter obtained a decree of divorce capacitating him or her to remarry, the Filipino spouse, owing to the nationality principle, could not as yet re-marry because absolute divorce is considered contrary to our public policy and morality. This situation, however, was already addressed by the second paragraph of article 26 of the Family Code, which reads:

> "Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law."

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[180] See DOJ Opinion No. 10, S. 1989.

[181] See *supra* §14.2.2.

Under the aforequoted provisions, in mixed marriages involving a Filipino and a foreigner, it now allows the former to contract a subsequent marriage in case the divorce is *"validly obtained abroad by the alien spouse capacitating him or her to remarry."*[182] In other words, it is a condition *sine qua non* for the operation of the second paragraph of article 26 that the divorce must have been obtained by the alien spouse and not by the Filipino spouse. The provisions will not therefore apply if it is the Filipino spouse who obtains the decree of divorce.[183] In such a situation, it is article 15 of the new Civil Code, in relation to article 17, which will govern and not article 26 of the Family Code.

[50.3] Applicability of Second Paragraph of Article 26

Given a valid marriage between two Filipino citizens, where one party is later naturalized as a foreign citizen and obtains a valid divorce decree capacitating him or her to remarry, can the Filipino spouse likewise remarry under Philippine law? In this situation, may the second paragraph of Article 26 be applicable?

This question was answered in the affirmative by the Supreme Court in the recent case of **Republic vs. Orbecido III**.[184] In this case, the Supreme Court held that taking into consideration the legislative intent and applying the rule of reason, paragraph 2 of Article 26 should be interpreted to include cases involving parties who at the time of the celebration of the marriage were Filipino citizens, but later on, one of them becomes naturalized as a foreign citizen and obtains a divorce decree. In such a case, the Filipino spouse should likewise be allowed to remarry as if the other party were a foreigner at the time of the solemnization of the marriage, for to rule otherwise would be to sanction absurdity and injustice. The reckoning point is not the citizenship of the parties at the time of the celebration of the marriage, but their citizenship at the time a valid divorce is obtained abroad by the alien spouse capacitating the latter to remarry.[185]

[182]Garcia vs. Recio, 366 SCRA 437, 447 (2001).
[183]See DOJ Opinion No. 32, S. 1991.
[184]472 SCRA 114, October 5, 2005.
[185]*Id.*, at p. 122.

Republic vs. Orbecido III
472 SCRA 114 (2005)

FACTS: In 1981, Cipriano Orbecido III married Lady Myros M. Villanueva in Ozamiz City. In 1986, Lady Myros left for the United States and a few years later, she had been naturalized as an American citizen. After she was naturalized, she obtained a divorce decree in the United States and then married an American citizen. Cipriano then filed with the trial court a petition for authority to remarry invoking paragraph 2 of Article 26 of the Family Code. Finding merit in the petition, the trial court granted the same. The Republic, through the Office of the Solicitor General sought reconsideration but it was denied. Hence, the OSG raised the case to the Supreme Court on a pure question of law.

The OSG contends that paragraph 2 of Article 26 of the Family Code is not applicable in this case because it only applies to a valid mixed marriage; that is, a marriage celebrated between a Filipino citizen and an alien. On the question of whether or not paragraph 2 of Article 26 of the Family Code applies to the given case, the Supreme Court ruled —

> Coming now to the substantive issue, does Paragraph 2 of Article 26 of the Family Code apply to the case of respondent? Necessarily, we must dwell on how this provision had come about in the first place, and what was the intent of the legislators in its enactment?
>
> **Brief Historical Background**
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> On July 6, 1987, then President Corazon Aquino signed into law Executive Order No. 209, otherwise known as the "Family Code," which took effect on August 3, 1988. Article 26 thereof states:
>
> All marriages solemnized outside the Philippines in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35, 37, and 38.
>
> On July 17, 1987, shortly after the signing of the original Family Code, Executive Order No. 227 was likewise signed into law, amending Articles 26, 36, and 39 of the Family Code. A second paragraph was added to Article 26. As so amended, it now provides:
>
> ART. 26. All marriages solemnized outside the Philippines in accordance with the laws in force in the country where they were

solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35(1), (4), (5) and (6), 36, 37 and 38.

Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law. (Emphasis supplied)

On its face, the foregoing provision does not appear to govern the situation presented by the case at hand. It seems to apply only to cases where at the time of the celebration of the marriage, the parties are a Filipino citizen and a foreigner. The instant case is one where at the time the marriage was solemnized, the parties were two Filipino citizens, but later on, the wife was naturalized as an American citizen and subsequently obtained a divorce granting her capacity to remarry, and indeed she remarried an American citizen while residing in the U.S.A.

Noteworthy, in the Report of the Public Hearings on the Family Code, the Catholic Bishops' Conference of the Philippines (CBCP) registered the following objections to Paragraph 2 of Article 26:

1. *The rule is discriminatory. It discriminates against those whose spouses are Filipinos who divorce them abroad. These spouses who are divorced will not be able to re-marry, while the spouses of foreigners who validly divorce them abroad can.*

2. This is the beginning of the recognition of the validity of divorce even for Filipino citizens. For those whose foreign spouses validly divorce them abroad will also be considered to be validly divorced here and can re-marry. We propose that this be deleted and made into law only after more widespread consultation. (Emphasis supplied.)

Legislative Intent

Records of the proceedings of the Family Code deliberations showed that the intent of Paragraph 2 of Article 26, according to Judge Alicia Sempio-Diy, a member of the Civil Code Revision Committee, is to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after obtaining a divorce, is no longer married to the Filipino spouse.

Interestingly, Paragraph 2 of Article 26 traces its origin to the 1985 case of *Van Dorn vs. Romillo, Jr*. The *Van Dorn* case involved a marriage between a Filipino citizen and a foreigner. The Court held therein that a divorce decree validly obtained by the alien spouse is valid in the Philippines, and consequently, the Filipino spouse is capacitated to remarry under Philippine law.

Does the same principle apply to a case where at the time of the celebration of the marriage, the parties were Filipino citizens, but later on, one of them obtains a foreign citizenship by naturalization?

The jurisprudential answer lies latent in the 1998 case of *Quita vs. Court of Appeals.* In *Quita*, the parties were, as in this case, Filipino citizens when they got married. The wife became a naturalized American citizen in 1954 and obtained a divorce in the same year. The Court therein hinted, by way of *obiter dictum*, that a Filipino divorced by his naturalized foreign spouse is no longer married under Philippine law and can thus remarry.

Thus, taking into consideration the legislative intent and applying the rule of reason, we hold that Paragraph 2 of Article 26 should be interpreted to include cases involving parties who, at the time of the celebration of the marriage were Filipino citizens, but later on, one of them becomes naturalized as a foreign citizen and obtains a divorce decree. The Filipino spouse should likewise be allowed to remarry as if the other party were a foreigner at the time of the solemnization of the marriage. To rule otherwise would be to sanction absurdity and injustice. Where the interpretation of a statute according to its exact and literal import would lead to mischievous results or contravene the clear purpose of the legislature, it should be construed according to its spirit and reason, disregarding as far as necessary the letter of the law. A statute may therefore be extended to cases not within the literal meaning of its terms, so long as they come within its spirit or intent.

If we are to give meaning to the legislative intent to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after obtaining a divorce is no longer married to the Filipino spouse, then the instant case must be deemed as coming within the contemplation of Paragraph 2 of Article 26.

In view of the foregoing, we state the twin elements for the application of Paragraph 2 of Article 26 as follows:

1. There is a valid marriage that has been celebrated between a Filipino citizen and a foreigner; and

2. A valid divorce is obtained abroad by the alien spouse capacitating him or her to remarry.

The reckoning point is not the citizenship of the parties at the time of the celebration of the marriage, but their citizenship *at the time a valid divorce is obtained abroad* by the alien spouse capacitating the latter to remarry.

In this case, when Cipriano's wife was naturalized as an American citizen, there was still a valid marriage that has been celebrated between her and Cipriano. As fate would have it, the naturalized alien wife subsequently obtained a valid divorce capacitating her to remarry. Clearly, the twin requisites for the application of Paragraph 2 of Article 26 are both present in this case. Thus Cipriano, the "divorced" Filipino spouse, should be allowed to remarry.

Chapter 2

Marriages Exempted from the License Requirement

Art. 27. In case either or both of the contracting parties are at the point of death, the marriage may be solemnized without necessity of a marriage license and shall remain valid even if the ailing party subsequently survives. (72a)

Art. 28. If the residence of either party is so located that there is no means of transportation to enable such party to appear personally before the local civil registrar, the marriage may be solemnized without the necessity of a marriage license. (72a)

Art. 29. In the cases provided for in the two preceding articles, the solemnizing officer shall state in an affidavit executed before the local civil registrar or any other person legally authorized to administer oaths that the marriage was performed in *articulo mortis* or that the residence of either party, specifying the barrio or barangay, is so located that there is no means of transportation to enable such party to appear personally before the local civil registrar and that the officer took the necessary steps to ascertain the ages and relationship of the contracting parties and the absence of a legal impediment to the marriage. (72a)

Art. 30. The original of the affidavit required in the last preceding article, together with a legible copy of the marriage contract, shall be sent by the person solemnizing the marriage to the local civil registrar of the municipality where it was performed within the period of thirty days after the performance of the marriage. (73a)

COMMENTS:

§ 51. Marriages Exempt from License Requirement

[51.1] Requisites of marriage must be strictly construed
[51.2] Marriages exempt from the license requirement
[51.3] Marriages in *articulo mortis*
[51.4] Marriages in remote places

[51.1] Requisites of Marriage Must Be Strictly Observed

There should be no exemption from securing a marriage license unless the circumstances clearly fall within the ambit of the exception[186] because marriage being a special relationship must be respected as such and its requirements must be strictly observed.[187] The parties should not be afforded any excuse to not comply with every single requirement and later use the same missing element as a preconceived escape ground to nullify their marriage.[188]

[51.2] Marriages Exempt From the License Requirement

The following marriages are exempt from the requirement of procuring a marriage license: (1) in cases where either or both of the contracting parties are at the point of death;[189] (2) if the residence of either party is so located that there is no means of transportation to enable such party to appear personally before the local civil registrar;[190] (3) marriages among Muslims or among members of ethnic cultural communities provided the same are solemnized according to their customs, rites or practices;[191] and (4) marriages of a man and a woman who have lived together as husband and wife for at least five years and without any legal impediment to marry each other.[192]

[51.3] Marriages in *Articulo Mortis*

In case either or both of the contracting parties are at the point of death, the marriage may be solemnized without the necessity of a mar-

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[186] Niñal vs. Bayadog, 328 SCRA 122, 131 (2000).
[187] *Id.*
[188] *Id.*
[189] Art. 27, FC.
[190] Art. 28, FC.
[191] Art. 33, FC.
[192] Art. 34, FC.

riage license and such marriage shall remain valid even if the ailing party subsequently survives.[193] In this kind of marriage celebrated without a marriage license, the solemnizing officer is required to execute an affidavit stating that the marriage was performed in *articulo mortis* and that he took the necessary steps to ascertain the ages and relationship of the contracting parties and the absence of legal impediment to the marriage.[194] The absence of this affidavit will not, however, affect the validity of the marriage.

[51.4] Marriages in Remote Places

If the residence of either party is so located that there is no means of transportation to enable such party to appear personally before the local civil registrar, the marriage may be solemnized without the necessity of a marriage license.[195] In this kind of marriage celebrated without a marriage license, the solemnizing officer is likewise required to execute an affidavit stating that the residence of either party is so located that there is no means of transportation to enable such party to appear personally before the local civil registrar and that he took the necessary steps to ascertain the ages and relationship of the contracting parties and the absence of legal impediment to the marriage.[196] As in the case of marriages in *articulo mortis*, the absence of this affidavit will not affect the validity of the marriage.

Art. 31. A marriage in *articulo mortis* between passengers or crew members may also be solemnized by a ship captain or by an airplane pilot not only while the ship is at sea or the plane is in flight, but also during stopovers at ports of call. (74a)

Art. 32. A military commander of a unit, who is a commissioned officer, shall likewise have authority to solemnize marriages in *articulo mortis* between persons within the zone of military operation, whether members of the armed forces or civilians. (74a)

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[193]Art. 27, FC.
[194]Art. 29, FC.
[195]Art. 28, FC.
[196]Art. 29, FC.

COMMENTS:

§ 52. Authority of Ship Captain or Airplane Chief to Solemnize Marriages

The authority of the ship captain or airplane chief to solemnize marriages is subject to the following conditions and/or requisites: (1) the marriage must be in *articulo mortis*; and (2) the marriage must be between passengers or crew members.[197] Such authority may be exercised not only while the ship is at sea or the plane is in flight but also during stopovers at ports of call.[198] While this article refers to an "airplane pilot" as authorized to solemnize marriages, it must be interpreted in conjunction with article 7(3) of the Family Code which refers to an "airplane chief." Hence, the authority to solemnize marriages in *articulo mortis* must be limited to "airplane chief," who is the head of the crew, in the same way that the same authority is granted only to the ship captain.

§ 53. Authority of Military Commander to Solemnize Marriages

A military commander of a unit has the authority to solemnize marriage if the following conditions and/or requisites are present: (1) he must be a commissioned officer, or an officer in the armed forces holding rank by virtue of a commission from the President;[199] (2) the assigned chaplain to his unit must be absent;[200] (3) the marriage must be in *articulo mortis;*[201] and (4) the marriage must be solemnized within the zone of military operations.[202] The contracting parties may either be members of the armed forces or civilians.[203]

Art. 33. Marriages among Muslims or among members of the ethnic cultural communities may be performed validly without the necessity of a marriage license, provided they are solemnized in accordance with their customs, rites or practices. (78a)

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[197] Art. 31, FC.
[198] *Id.*
[199] Art. 32, FC.
[200] Art. 7(4), FC.
[201] Art. 32, FC.
[202] *Id.*
[203] *Id.*

Art. 34. No license shall be necessary for the marriage of a man and a woman who have lived together as husband and wife for at least five years and without any legal impediment to marry each other. The contracting parties shall state the foregoing facts in an affidavit before any person authorized by law to administer oaths. The solemnizing officer shall also state under oath that he ascertained the qualifications of the contracting parties are found no legal impediment to the marriage. (76a)

COMMENTS:

§ 54. Marriages Among Muslims or Ethnic Cultural Communities.

See discussions under *supra* § 43.3.3.

§ 55. Legal Ratification of Marital Cohabitation

[55.1] Rationale behind article 34
[55.2] Requisites
[55.3] Nature of cohabitation

[55.1] Rationale Behind Article 34

The rationale why no license is required in such case is to avoid exposing the parties to humiliation, shame and embarrassment concomitant with the scandalous cohabitation of persons outside a valid marriage due to the publication of every applicant's name for a marriage license.[204] The publicity attending the marriage license may discourage such persons from legitimizing their status.[205] To preserve peace in the family, avoid the peeping and suspicious eye of public exposure and contain the source of gossip arising from the publication of their names, the law deemed it wise to preserve their privacy and exempt them from that requirement.[206]

[55.2] Requisites

For this provision on legal ratification of marital cohabitation to apply, the following requisites must concur: (1) The man and woman must have been living together as husband and wife for at least five

[204]Niñal vs. Bayadog, *supra*, at p. 129.
[205]*Id.*
[206]*Id.*

years before the marriage; (2) The parties must have no legal impediment to marry each other; (3) The fact of absence of legal impediment between the parties must be present at the time of marriage; (4) The parties must execute an affidavit stating that they have lived together for at least five years [and are without legal impediment to marry each other]; and (5) The solemnizing officer must execute a sworn statement that he had ascertained the qualifications of the parties and that he had found no legal impediment to their marriage.[207]

[55.3] Nature of "Cohabitation"

What should be the nature of cohabitation contemplated under article 34 of the Family Code to warrant the counting of the five year period in order to exempt the future spouses from securing a marriage license? Should it be a cohabitation wherein both parties are capacitated to marry each other during the entire five-year continuous period or should it be a cohabitation wherein both parties have lived together and exclusively with each other as husband and wife during the entire five-year continuous period regardless of whether there is a legal impediment to their being lawfully married, which impediment may have either disappeared or intervened sometime during the cohabitation period?

There are others who are of the belief that the fact of absence of legal impediment between the parties is required only during the celebration of the marriage, although such impediment may have intervened during the cohabitation period. This interpretation is not, however, in accord with the State's policies on marriage, as well as the basic principles governing Philippine marriages.

The following reasons may be adduced to bolster the contention that the requirement of absence of legal impediment should also apply during the entire five-year cohabitation:

1. Marriage being a special relationship must be respected as such and its requirements must be strictly observed. The presumption that a man and a woman deporting themselves as husband and wife is based on the approximation of the requirements of the law. The parties should not be afforded any

[207]Borja-Manzano vs. Sanchez, 354 SCRA 1, 5 (2001).

excuse to not comply with every single requirement and later use the same missing element as a pre-conceived escape ground to nullify their marriage. There should be no exemption from securing a marriage license unless the circumstances clearly fall within the ambit of the exception.[208]

2. Our law sanctions monogamy. Our civil laws, past or present, absolutely prohibited the concurrence of multiple marriages by the same person during the same period. Thus, any marriage subsequently contracted during the lifetime of the first spouse is considered illegal and void, subject only to the exception in cases of absence or where the prior marriage was dissolved or annulled. The Revised Penal Code complements the civil law in that the contracting of two or more marriages and the having of extramarital affairs are considered felonies, *i.e*., bigamy and concubinage and adultery.[209] Now, if the law will exempt the parties who were cohabiting under a state of adultery from the marriage license requirement simply because the impediment no longer exists at the time of their marriage, the law will, in effect, sanction and give premium to the parties' immorality.

3. The inclusion in article 34 of the phrase "and without any legal impediment to marry each other", which was not present in the counterpart provisions under the New Civil Code,[210] is intended to qualify the clause "who have lived together as husband and wife for at least five years." Meaning, the present law now clarifies that the five-year period of cohabitation must be free from any legal impediment. If the interpretation is otherwise, *i.e*. that the clause "and without any legal impediment to marry each other" applies only at the time of the celebration of the marriage, then the inclusion of said clause in the present law will be a mere surplusage since it is quite obvious that the requirement of absence of legal impediment must always be present in all marriages, not only in legal ratification of a marital cohabitation.

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[208]Niñal vs. Bayadog, *supra*.
[209]Niñal vs. Bayadog, *supra*, at p. 132.
[210]Art. 76, NCC.

4. In the case of **Niñal vs. Bayadog**,[211] wherein the Supreme Court had the occasion to interpret article 76 of the New Civil Code (which is the counterpart provisions of the present article 34 of the Family Code), the Court ruled that the cohabitation contemplated under said provisions must be in the *"nature of a perfect union that is valid under the law but rendered imperfect only by the absence of the marriage contract"*[212] and *"characterized by exclusivity — meaning no third party was involved at anytime within the 5 years and continuity — that is unbroken."*[213] Otherwise, the Court explained, *"if that continuous 5-year cohabitation is computed without any distinction as to whether the parties were capacitated to marry each other during the entire five years, then the law would be sanctioning immorality and encouraging parties to have common law relationships and placing them on the same footing with those who lived faithfully with their spouse."*[214] It is submitted that the rationale cited by the Court in the Niñal case in explaining the nature of cohabitation contemplated under article 76 of the New Civil Code still holds true under the Family Code.

In view of the foregoing, it is submitted that the ruling of the Supreme Court in the Niñal case interpreting article 76 of the Civil Code is likewise applicable to article 34 of the Family Code. In other words, the five-year common-law cohabitation period, which is counted back from the date of celebration of marriage, should be a period of legal union had it not been for the absence of the marriage.[215] It should be in the nature of a perfect union that is valid under the law but rendered imperfect only by the absence of the marriage contract[216] and characterized by exclusivity — meaning no third party was involved at any time within five years and continuity — that is unbroken.[217]

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[211]*Supra*.
[212]Niñal vs. Bayadog, *supra*, at p. 133.
[213]*Id.*, pp. 130-131.
[214]*Id.*, p. 131.
[215]*Id.*, p. 130.
[216]*Id.*, p. 133.
[217]*Id.*, p. 131.

Niñal vs. Bayadog
328 SCRA 122, March 14, 2000

YNARES-SANTIAGO, *J.*:

May the heirs of a deceased person file a petition for the declaration of nullity of his marriage after his death?

Pepito Niñal was married to Teodulfa Bellones on September 26, 1974. Out of their marriage were born herein petitioners. Teodulfa was shot by Pepito resulting in her death on April 24, 1985. One year and 8 months thereafter or on December 11, 1986, Pepito and respondent Norma Badayog got married without any marriage license. In lieu thereof, Pepito and Norma executed an affidavit dated December 11, 1986 stating that they had lived together as husband and wife for at least five years and were thus exempt from securing a marriage license. On February 19, 1997, Pepito died in a car accident. After their father's death, petitioners filed a petition for declaration of nullity of the marriage of Pepito to Norma alleging that the said marriage was void for lack of a marriage license. The case was filed under the assumption that the validity or invalidity of the second marriage would affect petitioner's successional rights. Norma filed a motion to dismiss on the ground that petitioners have no cause of action since they are not among the persons who could file an action for "annulment of marriage" under Article 47 of the Family Code.

Judge Ferdinand J. Marcos of the Regional Trial Court of Toledo City, Cebu, Branch 59, dismissed the petition after finding that the Family Code is "rather silent, obscure, insufficient" to resolve the following issues:

(1) Whether or not plaintiffs have a cause of action against defendant in asking for the declaration of the nullity of marriage of their deceased father, Pepito G. NiÒal, with her specially so when at the time of the filing of this instant suit, their father Pepito G. NiÒal is already dead;

(2) Whether or not the second marriage of plaintiffs' deceased father with defendant is null and void *ab initio*;

(3) Whether or not plaintiffs are estopped from assailing the validity of the second marriage after it was dissolved due to their father's death.

Thus, the lower court ruled that petitioners should have filed the action to declare null and void their father's marriage to respondent before his death, applying by analogy Article 47 of the Family Code which enumerates the time and the persons who could initiate an action for annulment of marriage. Hence, this petition for review with this Court grounded on a pure question of law.

This petition was originally dismissed for non-compliance with Section 11, Rule 13 of the 1997 Rules of Civil Procedure, and because "the verification failed to state the basis of petitioner's averment that the allegations in the petition are 'true and correct.'" It was thus treated as an unsigned pleading which produces no legal effect under Section 3, Rule 7, of the 1997 Rules. However, upon motion of petitioners, this Court reconsidered the dismissal and reinstated the petition for review.

The two marriages involved herein having been solemnized prior to the effectivity of the Family Code (FC), the applicable law to determine their validity is the Civil Code which was the law in effect at the time of their celebration. A valid marriage license is a requisite of marriage under Article 53 of the Civil Code, the absence of which renders the marriage *void ab initio* pursuant to Article 80(3) in relation to Article 58. The requirement and issuance of marriage license is the State's demonstration of its involvement and participation in every marriage, in the maintenance of which the general public is interested. This interest proceeds from the constitutional mandate that the State recognizes the sanctity of family life and of affording protection to the family as a basic "autonomous social institution." Specifically, the Constitution considers marriage as an "inviolable social institution," and is the foundation of family life which shall be protected by the State. This is why the Family Code considers marriage as "a special contract of permanent union" and case law considers it "not just an adventure but a lifetime commitment."

However, there are several instances recognized by the Civil Code wherein a marriage license is dispensed with, one of which is that provided in Article 76, referring to the marriage of a man and a woman who have lived together and exclusively with each other as husband and wife for a continuous and unbroken period of at least five years before the marriage. The rationale why no license is required in such case is to avoid exposing the parties to humiliation, shame and embarrassment concomitant with the scandalous cohabitation of persons outside a valid marriage due to the publication of every applicant's name for a marriage license. The publicity attending the marriage license may discourage such persons from legitimizing their status. To preserve peace in the family, avoid the peeping and suspicious eye of public exposure and contain the source of gossip arising from the publication of their names, the law deemed it wise to preserve their privacy and exempt them from that requirement.

There is no dispute that the marriage of petitioners' father to respondent Norma was celebrated without any marriage license. In lieu thereof, they executed an affidavit stating that "they have attained the age of majority, and, being unmarried, have lived together as husband and wife for at least five years, and that we now desire to marry each other." The only issue that needs to be resolved pertains to what nature of cohabitation is contemplated under Article

76 of the Civil Code to warrant the counting of the five year period in order to exempt the future spouses from securing a marriage license. Should it be a cohabitation wherein both parties are capacitated to marry each other during the entire five-year continuous period or should it be a cohabitation wherein both parties have lived together and exclusively with each other as husband and wife during the entire five-year continuous period regardless of whether there is a legal impediment to their being lawfully married, which impediment may have either disappeared or intervened sometime during the cohabitation period?

Working on the assumption that Pepito and Norma have lived together as husband and wife for five years without the benefit of marriage, that five-year period should be computed on the basis of a cohabitation as "husband and wife" where the only missing factor is the special contract of marriage to validate the union. In other words, the five-year common-law cohabitation period, which is counted back from the date of celebration of marriage, should be a period of legal union had it not been for the absence of the marriage. This 5-year period should be the years immediately before the day of the marriage and it should be a period of cohabitation characterized by exclusivity — meaning no third party was involved at any time within the 5 years and continuity — that is unbroken. Otherwise, if that continuous 5-year cohabitation is computed without any distinction as to whether the parties were capacitated to marry each other during the entire five years, then the law would be sanctioning immorality and encouraging parties to have common law relationships and placing them on the same footing with those who lived faithfully with their spouse. Marriage being a special relationship must be respected as such and its requirements must be strictly observed. The presumption that a man and a woman deporting themselves as husband and wife is based on the approximation of the requirements of the law. The parties should not be afforded any excuse to not comply with every single requirement and later use the same missing element as a pre-conceived escape ground to nullify their marriage. There should be no exemption from securing a marriage license unless the circumstances clearly fall within the ambit of the exception. It should be noted that a license is required in order to notify the public that two persons are about to be united in matrimony and that anyone who is aware or has knowledge of any impediment to the union of the two shall make it known to the local civil registrar. The Civil Code provides:

> *Article 63*: "x x x. This notice shall request all persons having knowledge of any impediment to the marriage to advice the local civil registrar thereof. x x x."
>
> *Article 64*: "Upon being advised of any alleged impediment to the marriage, the local civil registrar shall forthwith make an investigation, examining persons under oath. x x x"

This is reiterated in the Family Code thus:

> *Article 17* provides in part: "x x x. This notice shall request all persons having knowledge of any impediment to the marriage to advise the local civil registrar thereof. x x x."
>
> *Article 18* reads in part: "x x x. In case of any impediment known to the local civil registrar or brought to his attention, he shall note down the particulars thereof and his findings thereon in the application for a marriage license. x x x."

This is the same reason why our civil laws, past or present, absolutely prohibited the concurrence of multiple marriages by the same person during the same period. Thus, any marriage subsequently contracted during the lifetime of the first spouse shall be illegal and void, subject only to the exception in cases of absence or where the prior marriage was dissolved or annulled. The Revised Penal Code complements the civil law in that the contracting of two or more marriages and the having of extramarital affairs are considered felonies, *i.e.*, bigamy and concubinage and adultery. The law sanctions monogamy.

In this case, at the time of Pepito and respondent's marriage, it cannot be said that they have lived with each other as husband and wife for at least five years prior to their wedding day. From the time Pepito's first marriage was dissolved to the time of his marriage with respondent, only about twenty months had elapsed. Even assuming that Pepito and his first wife had separated in fact, and thereafter both Pepito and respondent had started living with each other that has already lasted for five years, the fact remains that their five-year period cohabitation was not the cohabitation contemplated by law. It should be in the nature of a perfect union that is valid under the law but rendered imperfect only by the absence of the marriage contract. Pepito had a subsisting marriage at the time when he started cohabiting with respondent. It is immaterial that when they lived with each other, Pepito had already been separated in fact from his lawful spouse. The subsistence of the marriage even where there was actual severance of the filial companionship between the spouses cannot make any cohabitation by either spouse with any third party as being one as "husband and wife".

Having determined that the second marriage involved in this case is not covered by the exception to the requirement of a marriage license, it is void *ab initio* because of the absence of such element.

The next issue to be resolved is: do petitioners have the personality to file a petition to declare their father's marriage void after his death?

Contrary to respondent judge's ruling, Article 47 of the Family Code cannot be applied even by analogy to petitions for declaration of nullity of mar-

riage. The second ground for annulment of marriage relied upon by the trial court, which allows "the sane spouse" to file an annulment suit "at any time before the death of either party" is inapplicable. Article 47 pertains to the grounds, periods and persons who can file an annulment suit, not a suit for declaration of nullity of marriage. The Code is silent as to who can file a petition to declare the nullity of a marriage. Voidable and void marriages are not identical. A marriage that is annulable is valid until otherwise declared by the court; whereas a marriage that is void *ab initio* is considered as having never to have taken place and cannot be the source of rights. The first can be generally ratified or confirmed by free cohabitation or prescription while the other can never be ratified. A voidable marriage cannot be assailed collaterally except in a direct proceeding while a void marriage can be attacked collaterally. Consequently, void marriages can be questioned even after the death of either party but voidable marriages can be assailed only during the lifetime of the parties and not after death of either, in which case the parties and their offspring will be left as if the marriage had been perfectly valid. That is why the action or defense for nullity is imprescriptible, unlike voidable marriages where the action prescribes. Only the parties to a voidable marriage can assail it but any proper interested party may attack a void marriage. Void marriages have no legal effects except those declared by law concerning the properties of the alleged spouses, regarding co-ownership or ownership through actual joint contribution, and its effect on the children born to such void marriages as provided in Article 50 in relation to Articles 43 and 44 as well as Articles 51, 53 and 54 of the Family Code. On the contrary, the property regime governing voidable marriages is generally conjugal partnership and the children conceived before its annulment are legitimate.

Contrary to the trial court's ruling, the death of petitioner's father extinguished the alleged marital bond between him and respondent. The conclusion is erroneous and proceeds from a wrong premise that there was a marriage bond that was dissolved between the two. It should be noted that their marriage was void hence it is deemed as if it never existed at all and the death of either extinguished nothing.

Jurisprudence under the Civil Code states that no judicial decree is necessary in order to establish the nullity of a marriage. "A void marriage does not require a judicial decree to restore the parties to their original rights or to make the marriage void but though no sentence of avoidance be absolutely necessary, yet as well for the sake of good order of society as for the peace of mind of all concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction." "Under ordinary circumstances, the effect of a void marriage, so far as concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place. And therefore, being good for no legal purpose, its invalidity can be maintained in any proceeding in which the fact of marriage may be material,

either direct or collateral, in any civil court between any parties at any time, whether before or after the death of either or both the husband and the wife, and upon mere proof of the facts rendering such marriage void, it will be disregarded or treated as non-existent by the courts." It is not like a voidable marriage which cannot be collaterally attacked except in direct proceeding instituted during the lifetime of the parties so that on the death of either, the marriage cannot be impeached, and is made good *ab initio*. But Article 40 of the Family Code expressly provides that there must be a judicial declaration of the nullity of a previous marriage, though void, before a party can enter into a second marriage and such absolute nullity can be based only on a final judgment to that effect. For the same reason, the law makes either the action or defense for the declaration of absolute nullity of marriage imprescriptible. Corollarily, if the death of either party would extinguish the cause of action or the ground for defense, then the same cannot be considered imprescriptible.

However, other than for purposes of remarriage, no judicial action is necessary to declare a marriage an absolute nullity. For other purposes, such as but not limited to determination of heirship, legitimacy or illegitimacy of a child, settlement of estate, dissolution of property regime, or a criminal case for that matter, the court may pass upon the validity of marriage even in a suit not directly instituted to question the same so long as it is essential to the determination of the case. This is without prejudice to any issue that may arise in the case. When such need arises, a final judgment of declaration of nullity is necessary even if the purpose is other than to remarry. The clause "on the basis of a final judgment declaring such previous marriage void" in Article 40 of the Family Code connotes that such final judgment need not be obtained only for purpose of remarriage.

WHEREFORE, the petition is GRANTED. The assailed Order of the Regional Trial Court, Toledo City, Cebu, Branch 59, dismissing Civil Case No. T-639, is REVERSED and SET ASIDE. The said case is ordered REINSTATED.

SO ORDERED.

Chapter 3

Void and Voidable Marriages

§ 56. Void Marriages

[56.1] Distinguished from voidable marriages
[56.2] Who can file petition for declaration of nullity
[56.3] Marriages expressly declared void under the Code
[56.4] Other void marriages

[56.1] Distinguished From Voidable Marriages

Voidable and void marriages are not identical.[218] The fundamental distinction between void and voidable marriages is that a void marriage is deemed never to have taken place at all[219] and cannot be the source of rights.[220] On the other hand, a voidable marriage, is considered valid and produces all its civil effects, until it is set aside by final judgment of a competent court in an action for annulment.[221] A voidable marriage can be generally ratified or confirmed by free cohabitation or prescription while a void marriage can never be ratified[222] and is not subject to prescription.[223] A voidable marriage can be assailed only in a direct proceeding for that purpose and not collaterally while a void marriage can be attacked collaterally.[224] Consequently, void marriages can be questioned even after the death of either party but voidable marriages can be assailed only during the lifetime of the parties and not after death of either, in which case the parties and their offspring will be left as if the marriage had been perfectly valid.[225] That is why the action or defense for nullity is imprescriptible,[226] unlike voidable marriages where the action prescribes.[227] Only the parties to a voidable marriage can assail it but any proper interested party may attack a void marriage.[228] Void marriages have no legal effects except those declared by law concerning the properties of the alleged spouses, regarding co-ownership or ownership through actual joint contribution,[229] and its effect on the children born to such void marriages as provided in Article 50 in relation to Articles 43 and 44 as well as Articles 51, 53 and 54 of the Family Code.[230] On the contrary, the property regime governing voidable marriages is generally absolute community or conjugal partnership and the children conceived before its annulment are legitimate.[231]

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[218]Niñal vs. Bayadog, *supra*, at p. 134.
[219]Suntay vs. Conjuangco-Suntay, 300 SCRA 760, 770 (1998).
[220]Niñal vs. Bayadog, *supra*, at p. 134.
[221]Suntay vs. Conjuangco-Suntay, *supra*, at p. 771.
[222]Niñal vs. Bayadog, *supra*, at p. 134.
[223]Art. 39, FC.
[224]Niñal vs. Bayadog, *supra*, at p. 134.
[225]*Id*; citing I Tolentino, Civil Code, 1990 ed., p. 271.
[226]Art. 39, FC; Niñal vs. Bayadog, *supra*, at p. 134.
[227]Art. 47, FC; Niñal vs. Bayadog, *supra*, at p. 134.
[228]Niñal vs. Bayadog, *supra*, at p. 134.
[229]Niñal vs. Bayadog, *supra*, at pp. 134-135; citing Arts. 147-148, FC.
[230]Niñal vs. Bayadog, *supra*, at p. 135.
[231]Art. 50, in relation to Art. 43, FC.

[56.2] Who Can File Petition for Declaration of Nullity

The Family Code is silent as to who can file a petition to declare the nullity of a void marriage.[232] AM. No. 02-11-10-SC or the Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages, which became effective on March 15, 2003, however, now explicitly states that a petition for declaration of absolute nullity of void marriage may be filed solely by the husband or the wife.[233] In effect, AM. No. 02-11-10-SC has modified the ruling of the Supreme Court in **Niñal vs. Bayadog**,[234] which allowed the heirs of a deceased person to file the petition for declaration of nullity of the deceased person's marriage to a third party. This does not mean, however, that other interested parties (persons other than the husband or the wife) may no longer attack a void marriage. A void marriage is still subject to a collateral attack. For purposes other than remarriage, such as but not limited to determination of heirship, legitimacy or illegitimacy of a child, settlement of estate, dissolution of property regime, or a criminal case for that matter, the court may pass upon the validity of marriage even in a suit not directly instituted to question the same so long as it is essential to the determination of the case.[235] It will thus appear that Sec. 2(a) of AM. No. 02-11-10-SC applies only if the attack on a void marriage is to be done in a direct proceeding for declaration of nullity of a void marriage.

[56.3] Marriages Expressly Declared Void under the Code

The following marriages are expressly declared to be void from the beginning under the Family Code:

(1) Those contracted by any party below eighteen years of age;[236]

(2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so;[237]

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[232] Niñal vs. Bayadog, *supra*, at p. 134.
[233] Sec. 2(a), A.M. No. 02-11-10-SC.
[234] *Supra*.
[235] Niñal vs. Bayadog, *supra*, at p. 136; Cariño vs. Cariño, 351 SCRA 127, 132 (2001).
[236] Art. 35(1), FC.
[237] Art. 35(2), FC.

(3) Those solemnized without license;[238]

(4) Those bigamous or polygamous marriages;[239]

(5) Those contracted through mistake of one contracting party as to the identity of the other;[240]

(6) Where either of the parties to a subsequent marriage is also a party to a previous marriage which has been annulled or declared a nullity but fails to record the judgment of annulment or of absolute nullity of the marriage, the partition and distribution of the properties of the spouses (to a previous marriage) and the delivery of the children's presumptive legitimes, in the appropriate civil registry and registries of property;[241]

(7) Those contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage;[242]

(8) Those marriages between ascendants and descendants of any degree, whether the relationship between the parties be legitimate or illegitimate;[243]

(9) Those marriages between brothers and sisters, whether of the full or half blood and whether the relationship between the parties be legitimate or illegitimate;[244]

(10) Those marriages between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree;[245]

(11) Those marriages between step-parents and step-children;[246]

(12) Those marriages between parents-in-law and children-in-law;[247]

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[238] Art. 35(3), FC.
[239] Art. 35(4), FC.
[240] Art. 35(5), FC.
[241] Art. 35(6), in relation to Arts. 52 and 53, FC.
[242] Art. 36, FC.
[243] Art. 37(1), FC.
[244] Art. 37(2), FC.
[245] Art. 38(1), FC.
[246] Art. 38(2), FC.
[247] Art. 38(3), FC.

(13) Those marriages between the adopting parent and the adopted child;[248]

(14) Those marriages between the surviving spouse of the adopting parent and the adopted child;[249]

(15) Those marriages between the surviving spouse of the adopted child and the adopter;[250]

(16) Those marriages between an adopted child and a legitimate child of the adopter;[251]

(17) Those marriages between adopted children of the same adopter;[252]

(18) Those marriages between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse;[253]

(19) Where either of the parties to a subsequent marriage is also a party to a prior marriage which is void *ab initio* but has not been declared as such in a final judgment by the court;[254]

(20) Those subsequent bigamous marriage under Article 41 of the Family Code if both parties therein acted in bad faith.[255]

[56.4] Other Void Marriages

Aside from those expressly enumerated under the Family Code, there are other marriages which are void from the beginning even if they have not been included in the enumerations. Recall that the absence of any of the essential or formal requisites renders the marriage void *ab initio*.[256] Hence, the following marriages are void from the beginning even if not included in the enumeration contained in articles 35, 36, 37, 38 and 44 of the Family Code: (1) marriages between persons of the

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[248] Art. 38(4), FC.
[249] Art. 38(5), FC.
[250] Art. 38(6), FC.
[251] Art. 38(7), FC.
[252] Art. 38(8), FC.
[253] Art. 38(9), FC.
[254] Art. 40, FC, in relation to Art. 50, FC.
[255] Art. 44, FC.
[256] Art. 4, 1st par., FC.

same sex if celebrated in the Philippines since the parties are not capacitated to contract marriage to each other; (2) marriages where consent is totally lacking, as in the case of a bogus or simulated marriage; (3) common-law marriages and marriages by proxy; (4) marriages where the exchange of vows was not done personally by the contracting parties in the presence of the solemnizing officer.

Art. 35. The following marriages shall be void from the beginning:

(1) Those contracted by any party below eighteen years of age even with the consent of parents or guardians;

(2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so;

(3) Those solemnized without license, except those covered by the preceding Chapter;

(4) Those bigamous or polygamous marriages not failing under Article 41;

(5) Those contracted through mistake of one contracting party as to the identity of the other; and

(6) Those subsequent marriages that are void under Article 53.

COMMENTS:

§ 57. Void Marriages under Article 35

[57.1] Any party is below 18
[57.2] Solemnizer has no authority to perform marriages
[57.3] Lack of marriage license
[57.4] Bigamous and polygamous marriages
[57.5] Mistake in identity
[57.6] Non-compliance with the procedure under article 52

[57.1] Void Marriage under Article 35(1); Any Party Is Below 18

Under Article 5 of the Family Code, it is required that both the contracting parties must be at least 18 years of age. A marriage contracted by any party below 18 years of age is void from the beginning.[257]

[257]Art. 35(1), FC.

This rule is absolute and does not admit of any exception. As such, even if the marriage is with the consent of the parents or guardians, the same is still void *ab initio*.[258] There is here an absence of legal capacity, which is an essential requisite of marriage. See also discussions under *supra* §§ 39.2.1 and 40.3.1.

[57.2] Void Marriage under Article 35(2); Solemnizer Has No Authority to Perform Marriages

Marriages solemnized by any person not authorized to perform marriages are generally void *ab initio*.[259] Under existing laws, only the following persons are authorized to solemnize marriages: (1) incumbent members of the judiciary within the court's jurisdiction; (2) priest, rabbi, imam or minister of a church or sect subject to the conditions laid down in article 7(2); (3) ship captain or airplane chief in cases mentioned in article 31; (4) military commander of a unit subject to the conditions mentioned in articles 7(4) and 32; (5) consul-general, consul or vice-consul in the cases provided in article 10; and (6) mayors. If a person is not among those enumerated, or if he is among those enumerated but does not comply with the specific requirements for his authority to vest on him as provided by law, he has no authority to solemnize marriages. Any such marriage solemnized by him is generally void *ab initio*. The rule, however, is not absolute. Even if a solemnizer has no legal authority to solemnize marriages so long as either or both contracting parties believed in good faith that he had the legal authority to do so, the marriage is still valid,[260] not only with respect to the parties to such marriage but also with respect to third persons and the State.

[57.2.1] Concept of Good Faith Marriages

The good faith referred to in article 35(2) must necessarily be one that is based on a mistake or ignorance of facts and not based on ignorance of law, following the principle enunciated in article 3 of the New Civil Code that *"ignorance of the law excuses no one from compliance therewith."* Consequently, if the contracting parties will go before a per-

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[258] Art. 35(1), FC.
[259] Art. 35(2), FC.
[260] *Id.*

son not specifically mentioned by law as having the authority to solemnize marriages, a notary public for example, in view of their mistaken belief that he has the authority to solemnize marriages, the exception in article 35(2) does not apply since this is a clear case of ignorance of law and cannot, therefore, serve as a basis of good faith. However, if the parties will go before a person enumerated in article 7 but who, in fact, is not authorized to perform marriages for failing to comply with the requirements laid down by law, the marriage will still be valid if either or both contracting parties relied in good faith in his apparent authority. This is clearly a case of ignorance of facts that can serve as a basis of good faith.

In the following marriages, the exception in article 35(2) will not apply since these cases involve ignorance of law: (1) if the judge solemnized the marriage outside of the court's jurisdiction, even if the parties believed in good faith that he is authorized to perform marriages outside of the court's jurisdiction; (2) if none of the parties to a marriage solemnized by a religious solemnizer belong to the solemnizer's church or sect; (3) if the marriage solemnized by a ship captain or airplane chief is not between passengers or crew members, even if the marriage is in articulo mortis; (4) a marriage solemnized by a military commander of a unit if the chaplain is not absent, even if the marriage is in articulo mortis; (5) a marriage solemnized by a military commander of a unit outside of the zone of military operations, even if the chaplain is absent and the marriage is in *articulo mortis*; and (6) a marriage solemnized by a consul-general, consul or vice-consul between Filipinos if the marriage is celebrated in the Philippines.

In the following marriages, on the other hand, the exception in article 35(2) applies since these cases involve ignorance of facts: (1) where a person posed as a priest and either or both of the parties are not aware of the deception; (2) where a religious solemnizer is not duly authorized by his church or sect to perform marriages but either or both parties are not aware of such fact; (3) where a religious solemnizer is not duly registered with the Civil Registrar General but either or both parties are not aware of such fact; and (4) where the religious solemnizer acted beyond the limits of his written authority but either or both parties are not aware of such fact.

[57.3] Void Marriage under Article 35(3); Lack of Marriage License

A marriage license is a formal requirement; its absence renders the marriage *void ab initio*.[261]

In **Sy vs. Court of Appeals**,[262] the wife filed a petition for declaration of nullity of her marriage to her husband on the ground of psychological incapacity. The petition was denied by the trial court, which decision was affirmed by the Court of Appeals. When petitioner elevated the case to the Supreme Court, she raised for the first time the issue of the marriage being void for lack of a valid marriage license at the time of its celebration. It appears from the evidence on record that the date of issue of the marriage license, as contained in the marriage contract, was September 17, 1974, while the parties both admitted that the date of the celebration of the marriage was November 15, 1973, which date also appears as the date of the marriage of the parents in their children's birth certificates. Considering that the marriage license was issued almost one year after the marriage ceremony, the Court concluded that the marriage was indeed contracted without a marriage license. Thus, the Court declared the marriage between the parties void *ab initio* for lack of a marriage license at the time of its celebration.

In **Republic vs. Court Appeals**,[263] Angelina Castro offered in evidence a certification from the Civil Register of Pasig City to prove that her marriage to her husband was void for lack of a marriage license at the time of its celebration. The certification reads, as follows:

> *"TO WHOM IT MAY CONCERN"*
>
> "This is to certify that the names Edwin F. Cardenas and Angelina M. Castro who were allegedly married in the Pasay City Court on June 21, 1970 under an alleged(s) appropriate marriage license no. 3196182 allegedly issued in the municipality on June 20, 1970 cannot be located or said license no. 3196182 does not appear from our records."

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[261] Arts. 3 & 4, FC; Sy vs. CA, 330 SCRA 550, 558 (2000).

[262] *Supra*.

[263] 236 SCRA 257.

The Republic of the Philippines, through the Solicitor General, posited that the certification of the local civil registrar of due search and inability to find a record or entry of the marriage license issued to the parties was not adequate to prove its non-issuance.

The Supreme Court ruled in favor of Angelina Castro. The Court explained —

> "We hold otherwise. The presentation of such certification in court is sanctioned by Section 29, Rule 132 of the Rules of Court.
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> xxx
>
> It is noteworthy to mention that the finding of the appellate court that the marriage between the contracting parties is null and void for lack of a marriage license does not discount the fact that indeed, a spurious marriage license, purporting to be issued by the civil registrar of Pasig, may have been presented by Cardenas to the solemnizing officer."

In **Cariño vs. Cariño**,[264] the certification issued by the Local Civil Registrar of San Juan, Metro Manila was likewise presented to prove the absence of a marriage license at the time of the celebration of the marriage. The certification reads, as follows:

> This is to certify that this Office has no record of marriage license of the spouses SANTIAGO CARINO (sic) and SUSAN NICDAO, who are married in this municipality on June 20, 1969. Hence, we cannot issue as requested a true copy or transcription of Marriage License number from the records of this archives.
>
> *This certification is issued upon the request of Mrs. Susan Yee Cariño for whatever legal purpose it may serve.*
>
> In declaring the marriage as void, the Supreme Court explained —
>
> "In the case at bar, there is no question that the marriage of petitioner and the deceased does not fall within the mar-

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[264]351 SCRA 127 (2001).

riages exempt from the license requirement. A marriage license, therefore, was indispensable to the validity of their marriage. This notwithstanding, the records reveal that the marriage contract of petitioner and the deceased bears no marriage license number and, as certified by the Local Civil Registrar of San Juan, Metro Manila, their office has no record of such marriage license. In **Republic vs. Court of Appeals**, the Court held that such a certification is adequate to prove the non-issuance of a marriage license. Absent any circumstance of suspicion, as in the present case, the certification issued by the local civil registrar enjoys probative value, he being the officer charged under the law to keep a record of all data relative to the issuance of a marriage license.

Such being the case, the presumed validity of the marriage of petitioner and the deceased has been sufficiently overcome. It then became the burden of petitioner to prove that their marriage is valid and that they secured the required marriage license. Although she was declared in default before the trial court, petitioner could have squarely met the issue and explained the absence of a marriage license in her pleadings before the Court of Appeals and this Court. But petitioner conveniently avoided the issue and chose to refrain from pursuing an argument that will put her case in jeopardy. Hence, the presumed validity of their marriage cannot stand."

[57.4] Void Marriage under Article 35(4); Bigamous and Polygamous Marriages

Bigamy is a crime punishable under article 349 of the Revised Penal Code and it is committed when a person contracts a second or subsequent marriage before the former marriage has been legally dissolved, or before the absent spouse has been declared presumptively dead by means of a judgment rendered in the proper proceedings.[265] Such second or subsequent marriage is void *ab initio* for being bigamous, even if the other party had acted in good faith and was not aware

[265] Art. 349, RPC.

of the existence of the previous marriage at the time of the celebration of the subsequent marriage. The rule, however, is not absolute. In Article 41 of the Code, a subsequent bigamous marriage may be considered valid if all the requisites required under said article are present.

[57.5] Void Marriage under Article 35(5); Mistake in Identity

A marriage contracted through mistake of one contracting party as to the identity of the other is void from the beginning.[266] For the marriage to be rendered void, it is important that the mistake in identity must be with reference to the actual physical identity of the other party, not merely a mistake in the name, personal qualifications, character, social standing, etc. There is here an absence of real consent, which is an essential requisite of a valid marriage, thereby rendering the marriage void *ab initio*.[267]

[57.6] Void Marriage under Article 35(6); Non-compliance with Procedure under Article 52

If a previous marriage has been annulled or declared a nullity in a final judgment, the effects thereof includes liquidation, partition and distribution of their properties, if any, and, in proper cases, the delivery of the children's presumptive legitimes. The law further requires the recording and registration of the following in the appropriate civil registry and registries of property: (1) the judgment of annulment or of absolute nullity of the marriage; (2) the partition and distribution of the properties of the spouses; and (3) the delivery of the children's presumptive legitimes.[268] Only after complying with the foregoing requirements may either of the former spouses be allowed to contract another marriage.[269] If these requirements are not complied with and either of the former spouses contracts another marriage, the subsequent marriage is void *ab initio*.[270]

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[266]Art. 35(5), FC.
[267]Art. 4, 1st par., FC.
[268]Art. 52, FC.
[269]Art. 53, FC.
[270]Art. 35(6), in relation to Arts. 52 and 53, FC.

Art. 36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization. (As amended by Executive Order 227)

COMMENTS:

§ 58. Psychological Incapacity

[58.1] Source of article 36
[58.2] No precise definition of "psychological incapacity"
[58.3] Characteristics of psychological incapacity
[58.4] Guidelines in the interpretation and application of Article 36
[58.5] Essential marital obligations
[58.6] Evidentiary requirements
[58.7] No award of damages in psychological incapacity
[58.8] Distinguish from divorce and legal separation
[58.9] Not subject to prescription

[58.1] Source of Article 36

Article 36 of the Family Code provides for an entirely new ground to assail the validity of a marriage. It was taken by the Family Code Revision Committee from Canon 1095 of the New Code of Canon Law, which reads:

> "Canon 1095. They are incapable of contracting marriage;
>
> 1. who lack sufficient use of reason;
>
> 2. who suffer from a grave defect of discretion of judgment concerning essential matrimonial rights and duties, to be given and accepted mutually;
>
> 3. *who for causes of psychological nature are unable to assume the essential obligations of marriage."* (Italics supplied)

Accordingly, interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect by our courts.[271]

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[271] Republic vs. CA, 268 SCRA 198, 212 (1997).

Since the purpose of including such provision in our Family Code is to harmonize our civil laws with the religious faith of our people, it stands to reason that to achieve such harmonization, great persuasive weight should be given to decisions of such appellate tribunal.[272]

[58.2] No Precise Definition of "Psychological Incapacity"

The Family Code did not define the term "psychological incapacity." It could well be that, in sum, the Family Code Revision Committee in ultimately deciding to adopt the provision with less specificity than expected, has, in fact so designed the law as to allow some resiliency in its application. Mme. Justice Alicia V. Sempio-Diy, a member of the Code Committee, was quoted by Mr. Justice Josue N. Bellosillo in **Salita vs. Hon. Magtolis**,[273] thus:

> "The Committee did not give any examples of psychological incapacity for fear that the giving of examples would limit the applicability of the provision under the principle of *ejusdem generis.* Rather, the Committee would like the judge to interpret the provision on a case-to-case basis, guided by experience, the findings of experts and researchers in psychological disciplines, and by decisions of church tribunals which, although not binding on the civil courts, may be given persuasive effect since the provision was taken from Canon Law."[274]

Whether or not psychological incapacity exists in a given case calling for a declaration of the nullity of the marriage, depends crucially, more than in any field of law, on the facts of the case. Each case must be judged, not on the basis of a *priori* assumptions, predilections or generalizations but according to its own facts. In regard to psychological incapacity as a ground for declaration of nullity of the marriage, it is trite to say that no case is on "all fours" with another case. The trial judge must take pains in examining the factual milieu and the appellate court must, as much as possible, avoid substituting its own judgment for that of the trial court.[275]

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[272]*Id.*

[273]G.R. No. 106429, 13 June 1994, 233 SCRA 100, 107-108.

[274]Cited in Santos vs. CA, 240 SCRA 20, 31 (1995).

[275]Republic vs. Dagdag, 351 SCRA 425, 431 (2001); citing the Separate Statement of Justice Padilla in Republic vs. CA, 268 SCRA 198, 214 (1997).

The use of the phrase "psychological incapacity" under Article 36 of the Code has not been meant to comprehend all such possible cases of psychoses as, likewise mentioned by some ecclesiastical authorities, such as extremely low intelligence, immaturity, and like circumstances.[276] Article 36 of the Family Code cannot be taken and construed independently of, but must stand in conjunction with, existing precepts in our law on marriage. Thus correlated, "psychological incapacity" should refer to no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage which, as so expressed by Article 68 of the Family Code, include their mutual obligations to live together, observe love, respect and fidelity and render help and support. There is hardly any doubt that the intendment of the law has been to confine the meaning of "psychological incapacity" to the most serious cases of personality disorders clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage. This psychologic condition must exist at the time the marriage is celebrated.[277]

[58.3] Characteristics of Psychological Incapacity

In **Santos v. Court of Appeals**,[278] the Supreme Court enumerated the three basic requirements of "psychological incapacity" as a ground for declaration of nullity of the marriage: (a) gravity; (b) juridical antecedence; and (c) incurability.

[58.3.1] Gravity

The incapacity must be grave or serious that the party would be incapable of carrying out the ordinary duties required in marriage.[279] Such illness must be grave enough to bring about the disability of the party to assume the essential obligations of marriage. Thus, "mild characteriological peculiarities, mood changes, occasional emotional outbursts" cannot be accepted as root causes. The illness must be shown as downright incapacity or inability, not a refusal, neglect or difficulty,

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[276]*Id.*, at p. 34.
[277]*Id.*
[278]*Supra.*
[279]Santos vs. CA, *supra*, at p. 33.

much less ill will. In other words, there is a natal or supervening disabling factor in the person, an adverse integral element in the personality structure that effectively incapacitates the person from really appreciating and thereby complying with the obligations essential to marriage.[280] Thus, mere showing of "irreconcilable differences" and "conflicting personalities" in no wise constitutes psychological incapacity.[281]

[58.3.2] Juridical Antecedence

The incapacity must be rooted in the history of the party antedating the marriage, although the overt manifestations may emerge only after the marriage.[282] The incapacity must be proven to be existing at the time of the marriage. The evidence must show that the illness was existing when the parties exchanged their "I do's." The manifestation of the illness need not be perceivable at such time, but the illness itself must have attached at such moment, or prior thereto.[283]

[58.3.3] Incurable

The incapacity must be incurable or, even if it were otherwise, the cure would be beyond the means of the party involved.[284] Such incapacity must also be shown to be medically or clinically permanent or incurable. Such incurability may be absolute or even relative only in regards to the other spouse, not necessarily absolutely against everyone of the same sex. Furthermore, such incapacity must be relevant to the assumption of marriage obligations, not necessarily to those not related to marriage, like the exercise of profession or employment in a job. Hence, a pediatrician may be effective in diagnosing illnesses of children and prescribing medicine to cure them but may not be psychologically capacitated to procreate, bear and raise his/her own children as an essential obligation of marriage.[285]

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[280]Republic vs. CA, *supra*, at pp. 211-212.
[281]*Id*.
[282]Santos vs. CA, *supra*, at p. 34.
[283]Republic vs. CA, *supra*, at p. 211.
[284]Santos vs. CA, *supra*, at p. 34.
[285]Republic vs. CA, *supra*, at p. 211.

Leouel Santos vs. Court of Appeals
240 SCRA 20 (1995) (En Banc)

FACTS: Leouel and Julia got married in 1986 before the Municipal Trial Court Judge of Iloilo City. They also had a church wedding. The couple lived with Julia's parents in La Paz, Iloilo City. In 1987, Julia gave birth to a baby boy. Soon thereafter, the couple started quarrelling over a number of things. In 1988, Julia finally left for the United States of America to work as a nurse despite Leouel's pleas to so dissuade her. Seven months after her departure, Julia called Leouel for the first time by long distance telephone. She promised to return home upon the expiration of her contract in July 1989. She never did. When Leouel got a chance to visit the United States, where he underwent a training program under the auspices of the Armed Forces of the Philippines sometime in 1990, he desperately tried to locate, or to somehow get in touch with Julia but all his efforts were of no avail. Having failed to get Julia to somehow come home, Leouel filed with the Regional Trial Court of Negros Oriental a complaint for "Voiding of marriage Under Art. 36 of the Family Code." Summons was served by publication in a newspaper of general circulation in Negros Oriental. Julia opposed the complaint claiming that it was the petitioner who had, in fact, been irresponsible and incompetent. After the pre-trial conferences had repeatedly been set, albeit unsuccessfully, by the court, Julia ultimately filed a manifestation, stating hat she would neither appear nor submit evidence. The trial court eventually dismissed the complaint for lack *of* merit. Leouel appealed to the Court *of* Appeals which affirmed the lower court's decision. Hence, Leouel elevated the matter to the Supreme Court.]

Mr. Justice Jose C. Vitug, ***ponente:***

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> Justice Sempio-Diy cites with approval the work of Dr. Gerardo Veloso, a former Presiding Judge of the Metropolitan marriage Tribunal of the Catholic Archdiocese of Manila (Branch I), who opines that psychological incapacity must be characterized by (a) gravity (b) juridical antecedence, and (c) incurability. The incapacity must be grave or serious such that the party would be incapable of carrying out the ordinary duties required in marriage; it must be rooted in the history of the party antedating the marriage, although the overt manifestations may emerge only after the marriage; and it must be incurable or, even if it were otherwise, the cure would be beyond the means of the party involved.
>
> It should be, looking at all the foregoing disquisitions, including, and most importantly, the deliberations of the Family Code Revision Committee itself, that the use of the phrase "psychologi-

cal incapacity" under Article 36 of the Code has not been meant to comprehend all such possible cases of psychoses as, likewise mentioned by some ecclesiastical authorities, extremely low intelligence, immaturity, and like circumstances (cited in Fr: Artemio Balumad's 'Void and Voidable Marriages in the Family Code and their Parallels in Canon Law,' quoting from the Diagnostic Statistical Manual of the Mental Disorder by the American Psychiatric Association; Edward Hudson's "Handbook II for Marriage Nullity Cases"). Article 36 of the Family Code cannot be taken and construed independently of, but must stand in conjunction with, existing precepts in our law on marriage. Thus correlated, "psychological incapacity" should refer to no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage which, as so expressed by Article 68 of the Family Code, include their mutual obligations to live together, observe love, respect and fidelity and render help and support. There is hardly any doubt that the intendment of the law has been to confine the meaning of "psychological incapacity" to the most serious cases of personality disorders clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage. This psychologic condition must exist at the time the marriage is celebrated. The law does not evidently envision, upon the other hand, an inability of the spouse to have sexual relations with the other. This conclusion is implicit under Article 54 of the Family Code which considers children conceived prior to the judicial declaration of nullity of the void marriage to be 'legitimate.'

The other forms of psychoses, if existing at the inception of marriage, like the state of a party being of unsound mind or concealment of drug addiction, habitual alcoholism, homosexuality or lesbianism, merely renders the marriage contract *voidable* pursuant to Article 46, Family Code. If drug addiction, habitual alcoholism, lesbianism or homosexuality should occur only during the marriage, they become mere grounds for legal separation under Article 55 of the family Code. These provisions of the Code, however, do not necessarily preclude the possibility of these various circumstances being themselves, depending on the degree and severity of the disorder, *indicia* of psychological incapacity.

Until further statutory and jurisprudential parameters are established, every circumstance that may have some bearing on the degree, extent, and other conditions of that incapacity must, in every

case, be carefully examined and evaluated so that no precipitate and indiscriminate nullity is peremptorily decreed. The well-considered opinions of psychiatrists, psychologists, and persons with expertise in psychological disciplines might be helpful or even desirable.

Marriage is not just an adventure but a lifetime commitment. We should continue to be reminded that innate in our society, then enshrined in our society, then enshrined in our Civil Code, and even no still indelible in Article 1 of the Family Code, is that —

"Art. 1. Marriage is a *special contract of permanent union* between a man and a woman entered into in accordance with law *for* the establishment *of* conjugal and family life. It is the *foundation of the family and* an *inviolable social institution* whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code." (Italics supplied)

Our Constitution is no less emphatic:

"Section 1. The State recognizes the Filipino family as the foundation of the nation.

Accordingly, it shall strengthen its solidarity and actively promote its total development.

"Section 2. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State." (Article XV, 1987 Constitution).

The above provisions express so well and so distinctly the basic nucleus of our laws on marriage and the family, and they are no doubt the tenets we still hold on to.

The factual settings in the case at bench, in no measure at all, can come close to the standards required to decree a nullity of marriage. Undeniably and understandably, Leouel stands aggrieved, even desperate, in his present situation. Regrettably, neither law nor society itself can always provide all the specific answers to every individual problem.[286]

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[286]At pp. 33-36.

[58.4] Guidelines in the Interpretation and Application of Article 36; the "Molina" Case and A.M. No. 02-11-10-SC

Since the effectivitiy of the Family Code, our courts have been swamped with various petitions to declare marriages void based on "psychological incapacity." It has been abused as a convenient divorce law and many judges and lawyers find difficulty in applying said novel provision in specific cases. For these reasons, the Supreme laid down certain guidelines in the interpretation and application of Article 36 in **Republic of the Philippines vs. Court of Appeals and Molina**.[287] Since then, all cases on "psychological incapacity" are decided on the basis of these guidelines. Recently, however, the Supreme Court modified its pronouncements in the Molina case when it promulgated **A.M. No. 02-11-10-SC** or the "Rule on Declaration of Absolute Nullity of Marriages and Annulment of Voidable Marriages" which took effect on 15 March 2003.

In the Molina case and A.M. No. 02-11-10-SC, the Supreme Court handed down the following guidelines in the interpretation and application of Art. 36 of the Family Code for the guidance of the bench and the bar:

(1) The burden of proof to show the nullity of the marriage belongs to the plaintiff.[288] Any doubt should be resolved in favor of the existence and continuation of the marriage and against its dissolution and nullity. This is rooted in the fact that both our Constitution and our laws cherish the validity of marriage and unity of the family. Thus, our Constitution devotes an entire Article on the Family, recognizing it "as the foundation of the nation." It decrees marriage as legally "inviolable," thereby protecting it from dissolution at the whim of the parties. Both the family and marriage are to be "protected" by the state. The Family Code echoes this constitutional edict on marriage and the family and emphazises their *permanence, inviolability* and *solidarity*.[289]

(2) A petition under Article 36 of the Family Code shall specifically allege the complete facts showing that either or both parties were

[287] 268 SCRA 198, 212 (1997).
[288] *Id.*, at pp. 209-210.
[289] *Id.*

psychologically incapacitated from complying with the essential marital obligations of marriage at the time of the celebration of marriage even if such incapacity becomes manifest only after its celebration.[290] The complete facts should allege the physical manifestations, if any, as are indicative of psychological incapacity at the time of the celebration of the marriage but expert opinion need not be alleged.[291] As such, attachment of expert opinion to petitions for declaration of absolute nullity of marriage under Article 36 is dispensed with. Instead, the court shall determine the advisability of expert testimony during the pre-trial conference.[292]

(3) The incapacity must be proven to be existing at the time of the marriage. The evidence must show that the illness was existing when the parties exchanged their "I do's." The manifestation of the illness need not be perceivable at such time, but the illness itself must have attached at such moment, or prior thereto.[293]

(4) Such incapacity must also be shown to be medically or clinically permanent or incurable. Such incurability may be absolute or even relative only in regards to the other spouse, not necessarily absolutely against everyone of the same sex. Furthermore, such incapacity must be relevant to the assumption of marriage obligations, not necessarily to those not related to marriage, like the exercise of profession or employment in a job. Hence, a pediatrician may be effective in diagnosing illnesses of children and prescribing medicine to cure them but may not be psychologically capacitated to procreate, bear and raise his/her own children as an essential obligation of marriage.[294]

(5) Such illness must be grave enough to bring about the disability of the party to assume essential obligations of marriage. Thus, "mild characteriological peculiarities, mood changes, occasional emotional outbursts" cannot be accepted as root causes. The illness must be shown as downright incapability, not a refusal, neglect or difficulty, much less ill will. In other words, there is a natal of supervening disabling factor in

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[290]Sec. 2(d), Rule on Declaration of Absolute Nullity of Void Marriages (A.M. No. 02-11-10-SC).

[291]*Id.*

[292]See Note No. 45, Carating-Siayngco vs. Siayngco, 441 SCRA 422 (2004).

[293]Republic vs. CA, *supra*, at p. 211.

[294]*Id.*

the person, an adverse integral element in the personality structure that effectively incapacitates the person from really accepting and thereby complying with the obligations essential to marriage.[295]

(6) The essential marital obligations must be those embraced by Articles 68 up to 71 of the Family Code as regards the husband and wife as well as Articles 220, 221 and 225 of the same Code in regard to parents and their children. Such non-complied marital obligation(s) must also be stated in the petition, proven by evidence and included in the text of the decision.[296]

(7) Interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given respect in our courts.[297]

Note that the certification of the Solicitor General required in the Molina case is already dispensed with to avoid delay.[298]

Interestingly, in the case of **Republic vs. Quintero-Hamano**,[299] the Court of Appeals refused to equate said case with **Republic vs. Court of Appeals and Molina** and **Santos vs. Court of Appeals** simply because in the latter two cases, the spouses were Filipinos while the case of Quintero-Hamano involved a "mixed marriage," the husband being a Japanese national. Commenting on the pronouncement of the Court of Appeals, the Supreme Court held —

> "According to the appellate court, the requirements in *Molina* and *Santos* do not apply here because the present case involves a 'mixed marriage,' the husband being a Japanese national. We disagree. In proving psychological incapacity, we find no distinction between an alien spouse and a Filipino spouse. We cannot be lenient in the application of the rules merely because the spouse alleged to be psychologically incapacitated happens to be a foreign national. The medical and clinical rules to determine psychological incapacity were formulated on the basis of studies of human behavior in gen-

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[295]*Id.*, at pp. 211-212.
[296]*Id.*, at p. 212.
[297]*Id.*, at p. 212.
[298]See Note No. 45, Carating-Siayngco vs. Siayngco, 441 SCRA 422 (2004).
[299]428 SCRA 735 (2004).

eral. Hence, the norms used for determining psychological incapacity should apply to any person regardless of nationality."

Leonilo Antonio vs. Marie Ivonne F. Reyes
G.R. No. 155800, March 10, 2006

FACTS: In this case, petitioner (husband) and respondent (wife) met in August 1989 when petitioner was 26 years old and respondent was 36 years old. Barely a year after their first meeting, they got married before a minister of the Gospel at the Manila City Hall, and through a subsequent church wedding at the Sta. Rosa de Lima Parish in Pasig City on December 6, 1990. Out of their union, a child was born on April 19, 1991 but the child dies after five (5) months.

In this case, the respondent persistently lied about herself, the people around her, her occupation, income, educational attainment and other events or things, as follows: (1) she concealed the fact that she previously gave birth to an illegitimate son, and instead introduced the boy to petitioner (husband) as the adopted child of her family and that she only confessed the truth about the boy's parentage when petitioner learned about it from other sources after their marriage; (2) she fabricated a story that her brother-in-law, Edwin David, attempted to rape and kill her when in fact, no such incident occurred; (3) she misrepresented herself as a psychiatrist to her obstetrician, Dr. Consuelo Gardiner, and told some of her friends that she graduated with a degree in psychology, when she was neither; (4) she claimed to be a singer or a free-lance voice talent affiliated with Blackgold Recording Company (Blackgold); yet, not a single member of her family ever witnessed her alleged singing activities with the group; (5) she even postulated that a luncheon show was held at the Philippine Village Hotel in her honor and even presented an invitation to that effect but petitioner discovered per certification by the Director of Sales of said hotel that no such occasion had taken place; (6) she invented friends named Babes Santos and Via Marquez, and under those names, sent lengthy letters to petitioner claiming to be from Blackgold and touting her as the "number one moneymaker" in the commercial industry worth ₱2 million but petitioner later found out that respondent herself was the one who wrote and sent the letters to him when she admitted the truth in one of their quarrels and that Babes Santos and Via Marquez were only figments of her imagination when he discovered they were not known in or connected with Blackgold; (7) she represented herself as a person of greater means, thus, she altered her payslip to make it appear that she earned a higher income and she spent lavishly on unnecessary items and ended up borrowing money from other people on false pretexts; (8) and she exhibited insecurities and jealousies over him to the extent of calling up his officemates to monitor his whereabouts.

When petitioner could no longer take her unusual behavior, he separated from her in August 1991. He tried to attempt a reconciliation but since her behavior did not change, he finally left her for good in November 1991. On March 8, 1993, petitioner filed a petition to have his marriage to respondent declared null and void based on Article 36 of the Family Code. After trial, the trial court gave credence to petitioner's evidence and held that respondent's propensity to lying about almost anything had been duly established. According to the trial court, respondent's fantastic ability to invent and fabricate stories and personalities enabled her to live in a world of make-believe and that this made her psychologically incapacitated as it rendered her incapable of giving meaning and significance to her marriage. On appeal, however, the Court of Appeals reversed the decision holding that the totality of the evidence presented was insufficient to establish respondent's psychological incapacity, thus failing to meet the requirements in the case of *Republic vs. Court of Appeals and Molina*. Petitioner elevated the case to the Supreme Court. Accepting the factual version of the petitioner as operative facts, the Court held that this case satisfies the requirements of the Molina case. The Court explained:

> *First*. Petitioner had sufficiently overcome his burden in proving the psychological incapacity of his spouse. Apart from his own testimony, he presented witnesses who corroborated his allegations on his wife's behavior, and certifications from Blackgold Records and the Philippine Village Hotel Pavillon which disputed respondent's claims pertinent to her alleged singing career. He also presented two (2) expert witnesses from the field of psychology who testified that the aberrant behavior of respondent was tantamount to psychological incapacity. In any event, both courts below considered petitioner's evidence as credible enough. Even the appellate court acknowledged that respondent was not totally honest with petitioner.
>
> As in all civil matters, the petitioner in an action for declaration of nullity under Article 36 must be able to establish the cause of action with a preponderance of evidence. However, since the action cannot be considered as a non-public matter between private parties, but is impressed with State interest, the Family Code likewise requires the participation of the State, through the prosecuting attorney, fiscal, or Solicitor General, to take steps to prevent collusion between the parties and to take care that evidence is not fabricated or suppressed. Thus, even if the petitioner is able establish the psychological incapacity of respondent with preponderant evidence, any finding of collusion among the parties would necessarily negate such proofs.

Second. The root cause of respondent's psychological incapacity has been medically or clinically identified, alleged in the complaint, sufficiently proven by experts, and clearly explained in the trial court's decision. The initiatory complaint alleged that respondent, from the start, had exhibited unusual and abnormal behavior "of peren[n]ially telling lies, fabricating ridiculous stories, and inventing personalities and situations," of writing letters to petitioner using fictitious names, and of lying about her actual occupation, income, educational attainment, and family background, among others.

These allegations, initially characterized in generalities, were further linked to medical or clinical causes by expert witnesses from the field of psychology. Petitioner presented two (2) such witnesses in particular. Dr. Abcede, a psychiatrist who had headed the department of psychiatry of at least two (2) major hospitals, testified as follows:

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The other witness, Dr. Lopez, was presented to establish not only the psychological incapacity of respondent, but also the psychological capacity of petitioner. He concluded that respondent "is [a] pathological liar, that [she continues] to lie [and] she loves to fabricate about herself."

These two witnesses based their conclusions of psychological incapacity on the case record, particularly the trial transcripts of respondent's testimony, as well as the supporting affidavits of petitioner. While these witnesses did not personally examine respondent, the Court had already held in *Marcos v. Marcos* that personal examination of the subject by the physician is not required for the spouse to be declared psychologically incapacitated. We deem the methodology utilized by petitioner's witnesses as sufficient basis for their medical conclusions. Admittedly, Drs. Abcede and Lopez's common conclusion of respondent's psychological incapacity hinged heavily on their own acceptance of petitioner's version as the true set of facts. However, since the trial court itself accepted the veracity of petitioner's factual premises, there is no cause to dispute the conclusion of psychological incapacity drawn therefrom by petitioner's expert witnesses.

Also, with the totality of the evidence presented as basis, the trial court explicated its finding of psychological incapacity in its decision in this wise:

To the mind of the Court, all of the above are indications that respondent is psychologically incapacitated to perform the essential obligations of marriage. It has been shown clearly from her actuations that respondent has that propensity for telling lies about almost anything, be it her occupation, her state of health, her singing abilities, her income, etc. She has this fantastic ability to invent and fabricate stories and personalities. She practically lived in a world of make believe making her therefore not in a position to give meaning and significance to her marriage to petitioner. In persistently and constantly lying to petitioner, respondent undermined the basic tenets of relationship between spouses that is based on love, trust and respect. As concluded by the psychiatrist presented by petitioner, such repeated lying is abnormal and pathological and amounts to psychological incapacity.

Third. Respondent's psychological incapacity was established to have clearly existed at the time of and even before the celebration of marriage. She fabricated friends and made up letters from fictitious characters well before she married petitioner. Likewise, she kept petitioner in the dark about her natural child's real parentage as she only confessed when the latter had found out the truth after their marriage.

Fourth. The gravity of respondent's psychological incapacity is sufficient to prove her disability to assume the essential obligations of marriage. It is immediately discernible that the parties had shared only a little over a year of cohabitation before the exasperated petitioner left his wife. Whatever such circumstance speaks of the degree of tolerance of petitioner, it likewise supports the belief that respondent's psychological incapacity, as borne by the record, was so grave in extent that any prolonged marital life was dubitable.

It should be noted that the lies attributed to respondent were not adopted as false pretenses in order to induce petitioner into marriage. More disturbingly, they indicate a failure on the part of respondent to distinguish truth from fiction, or at least abide by the truth. Petitioner's witnesses and the trial court were emphatic on respondent's inveterate proclivity to telling lies and the pathologic nature of her mistruths, which according to them, were revelatory of respondent's inability to understand and perform the essential obligations of marriage. Indeed, a person unable to distinguish between fantasy and reality would similarly be unable to comprehend the legal nature of the marital bond, much less its psychic meaning,

and the corresponding obligations attached to marriage, including parenting. One unable to adhere to reality cannot be expected to adhere as well to any legal or emotional commitments.

The Court of Appeals somehow concluded that since respondent allegedly tried her best to effect a reconciliation, she had amply exhibited her ability to perform her marital obligations. We are not convinced. Given the nature of her psychological condition, her willingness to remain in the marriage hardly banishes nay extenuates her lack of capacity to fulfill the essential marital obligations. Respondent's ability to even comprehend what the essential marital obligations are is impaired at best. Considering that the evidence convincingly disputes respondent's ability to adhere to the truth, her avowals as to her commitment to the marriage cannot be accorded much credence.

At this point, it is worth considering Article 45(3) of the Family Code which states that a marriage may be annulled if the consent of either party was obtained by fraud, and Article 46 which enumerates the circumstances constituting fraud under the previous article, clarifies that "no other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage." It would be improper to draw linkages between misrepresentations made by respondent and the misrepresentations under Articles 45(3) and 46. The fraud under Article 45(3) vitiates the consent of the spouse who is lied to, and does not allude to vitiated consent of the lying spouse. In this case, the misrepresentations of respondent point to her own inadequacy to cope with her marital obligations, kindred to psychological incapacity under Article 36.

Fifth. Respondent is evidently unable to comply with the essential marital obligations as embraced by Articles 68 to 71 of the Family Code. Article 68, in particular, enjoins the spouses to live together, observe mutual love, respect and fidelity, and render mutual help and support. As noted by the trial court, it is difficult to see how an inveterate pathological liar would be able to commit to the basic tenets of relationship between spouses based on love, trust and respect.

Sixth. The Court of Appeals clearly erred when it failed to take into consideration the fact that the marriage of the parties was annulled by the Catholic Church. The appellate court apparently deemed this detail totally inconsequential as no reference was made to it anywhere in the assailed decision despite petitioner's efforts to

bring the matter to its attention. Such deliberate ignorance is in contravention of *Molina*, which held that interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect by our courts.

As noted earlier, the Metropolitan Tribunal of the Archdiocese of Manila decreed the invalidity of the marriage in question in a *Conclusion* dated 30 March 1995, citing the "lack of due discretion" on the part of respondent. Such decree of nullity was affirmed by both the National Appellate Matrimonial Tribunal, and the Roman Rota of the Vatican. In fact, respondent's psychological incapacity was considered so grave that a restrictive clause was appended to the sentence of nullity prohibiting respondent from contracting another marriage without the Tribunal's consent.

In its Decision dated 4 June 1995, the National Appellate Matrimonial Tribunal pronounced:

> The JURISPRUDENCE in the Case maintains that matrimonial consent is considered ontologically defective and wherefore judicially ineffective when elicited by a Part Contractant in possession and employ of a discretionary judgment faculty with a perceptive vigor markedly inadequate for the practical understanding of the conjugal Covenant or serious impaired from the correct appreciation of the integral significance and implications of the marriage vows.
>
> The FACTS in the Case sufficiently prove with the certitude required by law that based on the depositions of the Partes in Causa and premised on the testimonies of the Common and Expert Witnesse[s], the Respondent made the marriage option in tenure of adverse personality constracts that were markedly antithetical to the substantive content and implications of the Marriage Covenant, and that seriously undermined the integrality of her matrimonial consent in terms of its deliberative component. In other words, afflicted with a discretionary faculty impaired in its practico-concrete judgment formation on account of an adverse action and reaction pattern, the Respondent was impaired from eliciting a judicially binding matrimonial consent. There is no sufficient evidence in the Case however to prove as well the fact of grave lack of due discretion on the part of the Petitioner.

Evidently, the conclusion of psychological incapacity was arrived at not only by the trial court, but also by canonical bodies.

Yet, we must clarify the proper import of the Church rulings annulling the marriage in this case. They hold sway since they are drawn from a similar recognition, as the trial court, of the veracity of petitioner's allegations. Had the trial court instead appreciated respondent's version as correct, and the appellate court affirmed such conclusion, the rulings of the Catholic Church on this matter would have diminished persuasive value. After all, it is the factual findings of the judicial trier of facts, and not that of the canonical courts, that are accorded significant recognition by this Court.

Seventh. The final point of contention is the requirement in *Molina* that such psychological incapacity be shown to be medically or clinically permanent or incurable. It was on this score that the Court of Appeals reversed the judgment of the trial court, the appellate court noting that it did not appear certain that respondent's condition was incurable and that Dr. Abcede did not testify to such effect.

Petitioner points out that one month after he and his wife initially separated, he returned to her, desiring to make their marriage work. However, respondent's aberrant behavior remained unchanged, as she continued to lie, fabricate stories, and maintained her excessive jealousy. From this fact, he draws the conclusion that respondent's condition is incurable.

From the totality of the evidence, can it be definitively concluded that respondent's condition is incurable? It would seem, at least, that respondent's psychosis is quite grave, and a cure thereof a remarkable feat. Certainly, it would have been easier had petitioner's expert witnesses characterized respondent's condition as incurable. Instead, they remained silent on whether the psychological incapacity was curable or incurable.

But on careful examination, there was good reason for the experts' taciturnity on this point.

The petitioner's expert witnesses testified in 1994 and 1995, and the trial court rendered its decision on 10 August 1995. These events transpired well before *Molina* was promulgated in 1997 and made explicit the requirement that the psychological incapacity must be shown to be medically or clinically permanent or incurable. Such requirement was not expressly stated in Article 36 or any other provision of the Family Code.

On the other hand, the Court in *Santos*, which was decided in January 1995, began its discussion by first citing the deliberations

of the Family Code committee, then the opinion of canonical scholars, before arriving at its formulation of the doctrinal definition of psychological incapacity. *Santos* did refer to Justice Caguioa's opinion expressed during the deliberations that "psychological incapacity is incurable," and the view of a former presiding judge of the Metropolitan Marriage Tribunal of the Archdiocese of Manila that psychological incapacity must be characterized "by (a) gravity, (b) juridical antecedence, and (c) incurability." However, in formulating the doctrinal rule on psychological incapacity, the Court in *Santos* omitted any reference to incurability as a characteristic of psychological incapacity.

This disquisition is material as *Santos* was decided months before the trial court came out with its own ruling that remained silent on whether respondent's psychological incapacity was incurable. Certainly, *Santos* did not clearly mandate that the incurability of the psychological incapacity be established in an action for declaration of nullity. At least, there was no jurisprudential clarity at the time of the trial of this case and the subsequent promulgation of the trial court's decision that required a medical finding of incurability. Such requisite arose only with *Molina* in 1997, at a time when this case was on appellate review, or after the reception of evidence.

We are aware that in *Pesca vs. Pesca*, the Court countered an argument that *Molina* and *Santos* should not apply retroactively with the observation that the interpretation or construction placed by the courts of a law constitutes a part of that law as of the date the statute was enacted. Yet we approach this present case from utterly practical considerations. The requirement that psychological incapacity must be shown to be medically or clinically permanent or incurable is one that necessarily cannot be divined without expert opinion. Clearly in this case, there was no categorical averment from the expert witnesses that respondent's psychological incapacity was curable or incurable simply because there was no legal necessity yet to elicit such a declaration and the appropriate question was not accordingly propounded to him. If we apply *Pesca* without deep reflection, there would be undue prejudice to those cases tried before *Molina* or *Santos*, especially those presently on appellate review, where presumably the respective petitioners and their expert witnesses would not have seen the need to adduce a diagnosis of incurability. It may hold in those cases, as in this case, that the psychological incapacity of a spouse is actually incurable, even if not pronounced as such at the trial court level.

We stated earlier that *Molina* is not set in stone, and that the interpretation of Article 36 relies heavily on a case-to-case perception. It would be insensate to reason to mandate in this case an expert medical or clinical diagnosis of incurability, since the parties would have had no impelling cause to present evidence to that effect at the time this case was tried by the RTC more than ten (10) years ago. From the totality of the evidence, we are sufficiently convinced that the incurability of respondent's psychological incapacity has been established by the petitioner. Any lingering doubts are further dispelled by the fact that the Catholic Church tribunals, which indubitably consider incurability as an integral requisite of psychological incapacity, were sufficiently convinced that respondent was so incapacitated to contract marriage to the degree that annulment was warranted.

All told, we conclude that petitioner has established his cause of action for declaration of nullity under Article 36 of the Family Code. The RTC correctly ruled, and the Court of Appeals erred in reversing the trial court.

There is little relish in deciding this present petition, pronouncing as it does the marital bond as having been inexistent in the first place. It is possible that respondent, despite her psychological state, remains in love with petitioner, as exhibited by her persistent challenge to the petition for nullity. In fact, the appellate court placed undue emphasis on respondent's avowed commitment to remain in the marriage. Yet the Court decides these cases on legal reasons and not vapid sentimentality. Marriage, in legal contemplation, is more than the legitimatization of a desire of people in love to live together.

[58.5] Essential Marital Obligations

The essential marital obligations referred to in this Article must be those embraced by Articles 68 up to 71 of the Family Code as regards the husband and wife as well as Articles 220, 221 and 225 of the same Code in regard to parents and their children.[300] Such non-complied marital obligation(s) must also be stated in the petition, proven by evidence and included in the text of the decision.[301]

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[300]Republic vs. CA, *supra*, at p. 212; also in Marcos vs. Marcos, 343 SCRA 755 (2000).
[301]*Id*.

Chi Ming Tsoi VS. Court of Appeals
266 SCRA 324 (1997)

FACTS: On May 22, 1988, Chi Ming Tsoi and Gina Lao were married at the Manila Cathedral in Manila. After the celebration of their marriage and wedding reception at the South Villa, Makati, they went and proceeded to the house of Chi Ming's mother. There, they slept together on the same bed in the same room for the first night of their married life. However, Chi Ming just went to bed, slept on one side thereof, then turned his back and went to sleep. There was no sexual intercourse between them during the first night and on the succeeding nights. In an effort to have their honeymoon in a private place where they can enjoy together during their first week as husband and wife, they went to Baguio City. However, Chi Ming invited the mother and uncle of her wife and his mother, as well as his nephew. During their four-day stay in Baguio, again nothing happened. There was no sexual intercourse between them since Chi Ming avoided his wife by taking a long walk during siesta time or by just sleeping in a rocking chair located at the living room. After Baguio, they slept in the same room and on the same bed since May 22, 1988 until March 15, 1989. But during this period, there was no attempt at sexual intercourse between them. She did not even see her husband's private parts nor did he see hers. An examination conducted on Jan. 20, 1989 revealed that Gina was still a virgin. Gina claimed that her husband is impotent, a closet homosexual and that she had observed him using an eyebrow and sometimes the cleansing cream of his mother. Thus, the distraught wife filed a petition to declare her marriage to her husband as null and void under Article 36 of the Family Code. In his answer, Chi Ming claimed that he did not want his marriage annulled because he loves her very much and that their differences can still be settled. Chi Ming admitted that since their marriage until their separation, there was no sexual intercourse. But he attributed the problem to his wife's filing of the case. During the trial, Chi Ming submitted himself to a physical examination. As a result thereof, it was determined that Chi Ming was capable of erection. After trial, the trial court rendered a judgment declaring the marriage void *ab initio.* On appeal, the Court of Appeals affirmed the decision. Hence, Chi Ming Tsoi elevated the matter to the Supreme Court.]

Mr. Justice Justo P. Torres, Jr., ***ponente:***

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> Evidently, one of the essential marital obligations under the Family Code is "To procreate children based on the universal principle that procreation of children through sexual cooperation is the basic end of marriage." Constant non-fulfillment of this obligation will

finally destroy the integrity or wholeness of the marriage. In the case at bar, the senseless refusal of one of the parties to fulfill the above marital obligation is equivalent to psychological incapacity.

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While the law provides that the husband and the wife are obliged to live together, observe mutual love, respect and fidelity (Art. 68, Family Code), the sanction therefor is actually the "spontaneous, mutual affection between husband and wife and not any legal mandate or court order" (Cuaderno vs. Cuaderno, 120 Phil. 1298). Love is useless unless it is shared with another. Indeed, no man is an island, the cruelest act of a partner in marriage is to say "I could not have cared less." This is so because an ungiven self is an unfulfilled self. The egoist has nothing but himself. In the natural order, it is sexual intimacy which brings spouses wholeness and oneness. Sexual intimacy is a gift and a participation in the mystery of creation. It is a function which enlivens the hope of procreation and ensures the continuation of family relations.

It appears that there is absence of empathy between petitioner and private respondent. That is — a shared feeling which between husband and wife must be experienced not only by having spontaneous sexual intimacy but a deep sense of spiritual communion. Marital union is a two-way process. An expressive interest in each other's feelings at a time it is needed by the other can go a long way in deepening the marital relationship. Marriage is definitely not for children but for two consenting adults who view the relationship with love *amor gignit amorem,* respect, sacrifice and a continuing commitment to compromise, conscious of its value as a sublime social institution.

This Court, finding the gravity of the failed relationship which the parties themselves trapped in its mire of unfulfilled vows and unconsummated marital obligations, can do no less but sustain the studied judgment of respondent appellate court.[302]

[58.6] Evidentiary Requirement

The burden of proof to show the nullity of the marriage belongs to the plaintiff. Any doubt should be resolved in favor of the existence and

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[302] At pp. 333-335.

continuation of the marriage and against its dissolution and nullity. This is rooted in the fact that both our Constitution and our laws cherish the validity of marriage and unity of the family.[303]

Whether or not psychological incapacity exists in a given case calling for the declaration of the nullity of the marriage depends crucially on the facts of the case. Each case must be closely scrutinized and judged according to its own facts as there can be no case that is on "all fours" with another.[304]

The court shall determine the advisability of expert testimony during the pre-trial conference.[305] It is not a requirement, however, that the person to be declared psychologically incapacitated be examined by a physician or a psychologist as a condition *sine qua non* for such declaration. In fact, the root cause may be "medically or clinically identified." What is important is the presence of evidence that can adequately establish the party's psychological condition. For indeed, if the totality of evidence presented is enough to sustain a finding of psychological incapacity, then actual medical examination of the person concerned need not be resorted to.[306]

Marcos vs. Marcos
343 SCRA 755 (2000)

FACTS: Wilson Marcos joined the Armed Forces of the Philippines in 1973. Later on, he was transferred to the Presidential Security Command in MalacaÒang during the Marcos regime. Brenda Marcos, on the other hand, joined the Women's Auxiliary Corps under the Philippine Air Force in 1978. They first met in 1980 and eventually became sweethearts. Brenda and Wilson Marcos were married in 1982. Out of their marriage, five children were born. After their marriage, they resided in Mandaluyong. After the Edsa Revolution, both of them sought a discharge from the military service. Wilson then engaged in different business ventures that did not however prosper. As a wife, Brenda always urged Wilson to look for work so that their children would see him, instead of her, as the head of the family and they would often quarrel and, as

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[303]Republic vs. CA, *supra*, at p. 209; Hernandez vs. CA, 320 SCRA 76, 88 (1999).
[304]Carating-Siayngco vs. Siayngco, 441 SCRA 422, 432; citing Republic vs. Dagdag, 351 SCRA 425.
[305]See Note No. 45, Carating-Siayngco vs. Siayngco, 441 SCRA 422 (2004).
[306]Marcos vs. Marcos, 343 SCRA 755 (2000).

consequence, he would hit her and beat her. He would even force her to have sex with him despite her weariness. He would also inflict physical harm on their children for a slight mistake and was so severe in the way he chastised them. Thus, for several times during their cohabitation, he would leave their house. In 1992, they were already living separately. On October 16, 1994, they had a bitter quarrel. As they were already living separately, she did not want him to stay in their house anymore. On that day, when she saw him in their house, she was so angry that she lambasted him. He then turned violent, inflicting physical harm on her and even on her mother who came to her aid. The following day, she and their children left the house and sought refuge in her sister's house. Sometime in August 1995, she together with her two sisters and driver went to him at their residence in Mandaluyong to look for their missing child. Upon seeing them, he got mad. After knowing the reason for their unexpected presence, he ran after them with a samurai and even beat her driver. Brenda thereafter filed a petition for judicial declaration of nullity of her marriage on the ground of psychological incapacity under Article 36 of the Family Code. After trial, the trial court rendered a decision declaring the marriage void ab initio. The Court of Appeals, however, reversed the decision of the trial court. The Court of Appeals held that psychological incapacity had not been established by the totality of the evidence presented. The Court of Appeals likewise capitalized on the fact that Wilson was not subjected to any psychological or psychiatric evaluation. Hence, Brenda appealed to the Supreme Court.]

Mr. Justice Artemio V. Panganiban, *ponente:*

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The Court's Ruling

> We agree with petitioner that the personal medical or psychological examination of respondent is not a requirement for a declaration of psychological incapacity. Nevertheless, the totality of the evidence she presented does not show such incapacity.

Preliminary Issue:
Need for Personal Medical Examination

> Petitioner contends that the testimonies and the results of various tests that were submitted to determine respondent's psychological incapacity to perform the obligations of marriage should not have been brushed aside by the Court of Appeals, simply because respondent had not taken those tests himself. Petitioner adds that the CA should have realized that under the circumstances, she

had no choice but to rely on other sources of information in order to determine the psychological capacity of respondent, who had refused to submit himself to such tests.

In *Republic vs. CA and Molina*, the guidelines governing the application and the interpretation of *psychological incapacity* referred to in Article 36 of the Family Code were laid down by this Court as follows:

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The guidelines incorporate the three basic requirements earlier mandated by the Court in *Santos vs. Court of Appeals*: "psychological incapacity must be characterized by (a) gravity, (b) juridical antecedence, and (c) incurability. *The foregoing guidelines do not require that* a *physician examine the person to be declared psychologically incapacitated. In fact, the root cause may be "medically or clinically identified." What is important is the presence of evidence that can adequately establish the party's psychological condition. For indeed, if the totality of evidence presented is enough to sustain* a *finding of psychological incapacity, then actual medical examination of the person concerned need not be resorted to.* (Italics supplied)

Main Issue:
Totality of Evidence Presented

The main question, then, is whether the totality of the evidence presented in the present case — including the testimonies of petitioner, the common children, petitioner's sister and the social worker — was enough to sustain a finding that respondent was psychologically incapacitated.

We rule in the negative. Although this Court is sufficiently convinced that respondent failed to provide material support to the family and may have resorted to physical abuse and abandonment, the totality of his acts does not lead to a conclusion of psychological incapacity on his part. There is absolutely no showing that his "defects" were already present at the inception of the marriage or that they are incurable.

Verily, the behavior of respondent can be attributed to the fact that he had lost his job and was not gainfully employed for a period of more than six years. It was during this period that he became intermittently drunk, failed to give material and moral support and even left the family home.

Thus, his alleged psychological illness was traced only to said period and not to the inception of the marriage. Equally important, there is no evidence showing that his condition is incurable, especially now that he gainfully employed as a taxi driver.

Article 36 of the Family Code, we stress, is not to be confused with a divorce law that cuts the marital bond at the time the causes therefor manifest themselves. It refers to a serious psychological illness afflicting a party even before the celebration of the marriage. It is a malady so grave and so permanent as to deprive one of awareness of the duties and responsibilities of the matrimonial bond one is about to assume. These marital obligations are those provided under Articles 68 to 71, 220, 221 and 225 of the Family Code.

Neither is Article 36 to be equated with legal separation, in which the grounds need not be rooted in psychological incapacity but on physical violence, moral pressure, moral corruption, civil interdiction, drug addiction, habitual alcoholism, sexual infidelity, abandonment and the like. At best, the evidence presented by petitioner refers only to grounds for legal separation, not for declaring a marriage void.

Because Article 36 has been abused as a convenient divorce law, this Court laid down the procedural requirements for its invocation in Molina. Petitioner, however, has not faithfully observed them.

In sum, this Court cannot declare the dissolution of the marriage for failure of petitioner to show that the alleged psychological incapacity is characterized by gravity, juridical antecedence and incurability; and for her failure to observe the guidelines outlined in *Molina.*[307]

[58.7] No Award of Moral Damages in Psychological Incapacity

In **Buenaventura vs. Court of Appeals**,[308] the trial court awarded moral and exemplary damages to the defendant in a petition for declara-

[307]At pp. 761-766.
[308]454 SCRA 261 (2005).

tion of nullity of marriage on the ground of psychological incapacity, after the court found the petitioner to be psychologically incapacitated. The award of damages was based on Articles 21, 2217 and 2229 of the Civil Code. In ordering the deletion of the award for moral and exemplary damages, attorney's fees and expenses of litigation, the Supreme Court explained —

> "The trial court referred to Article 21 because Article 2219 of the Civil Code enumerates the cases in which moral damages may be recovered and it mentions Article 21 as one of the instances. It must be noted that Article 21 states that the individual must willfully cause loss or injury to another. There is a need that the act is willful and hence done in complete freedom. In granting moral damages, therefore, the trial court and the Court of Appeals could not but have assumed that the acts on which the moral damages were based were done willfully and freely, otherwise the grant of moral damages would have no leg to stand on.
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> On the other hand, the trial court declared the marriage of the parties null and void based on Article 36 of the Family Code, due to psychological incapacity of the petitioner, Noel Buenaventura. Article 36 of the Family Code states:
>
> A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization.
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> Psychological incapacity has been defined, thus:
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> . . . no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage which, as so expressed by Article 68 of the Family Code, include their mutual obligations to live together, observe love, respect and fidelity and render help and support. There is hardly any doubt that the intendment of the law has been to confine the meaning of "psychological incapacity" to the most serious cases of personality disorders

clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage. . . .

The Court of Appeals and the trial court considered the acts of the petitioner after the marriage as proof of his psychological incapacity, and therefore a product of his incapacity or inability to comply with the essential obligations of marriage. Nevertheless, said courts considered these acts as willful and hence as grounds for granting moral damages. It is contradictory to characterize acts as a product of psychological incapacity, and hence beyond the control of the party because of an innate inability, while at the same time considering the same set of acts as willful. By declaring the petitioner as psychologically incapacitated, the possibility of awarding moral damages on the same set of facts was negated. The award of moral damages should be predicated, not on the mere act of entering into the marriage, but on specific evidence that it was done deliberately and with malice by a party who had knowledge of his or her disability and yet willfully concealed the same. No such evidence appears to have been adduced in this case.

For the same reason, since psychological incapacity means that one is truly incognitive of the basic marital covenants that one must assume and discharge as a consequence of marriage, it removes the basis for the contention that the petitioner purposely deceived the private respondent. If the private respondent was deceived, it was not due to a willful act on the part of the petitioner. Therefore, the award of moral damages was without basis in law and in fact.

Since the grant of moral damages was not proper, it follows that the grant of exemplary damages cannot stand since the Civil Code provides that exemplary damages are imposed in addition to moral, temperate, liquidated or compensatory damages.

With respect to the grant of attorney's fees and expenses of litigation the trial court explained, thus:

Regarding Attorney's fees, Art. 2208 of the Civil Code authorizes an award of attorney's fees and expenses of litiga-

tion, other than judicial costs, when as in this case the plaintiff's act or omission has compelled the defendant to litigate and to incur expenses of litigation to protect her interest (par. 2), and where the Court deems it just and equitable that attorney's fees and expenses of litigation should be recovered. (par. 11)

The Court of Appeals reasoned as follows:

On Assignment of Error D, as the award of moral and exemplary damages is fully justified, the award of attorney's fees and costs of litigation by the trial court is likewise fully justified.

The acts or omissions of petitioner which led the lower court to deduce his psychological incapacity, and his act in filing the complaint for the annulment of his marriage cannot be considered as unduly compelling the private respondent to litigate, since both are grounded on petitioner's psychological incapacity, which as explained above is a mental incapacity causing an utter inability to comply with the obligations of marriage. Hence, neither can be a ground for attorney's fees and litigation expenses. Furthermore, since the award of moral and exemplary damages is no longer justified, the award of attorney's fees and expenses of litigation is left without basis."

[58.8] Distinguish From Divorce and Legal Separation

Article 36 of the Family Code must not be confused with a divorce law that cuts the marital bond at the time the causes therefor manifest themselves. Article 36 refers to a serious psychological illness afflicting a party even before the celebration of the marriage. It is a malady so grave and so permanent as to deprive one of awareness of the duties and responsibilities of the matrimonial bond one is about to assume. These marital obligations are those provided under Articles 68 to 71, 220, 221 and 225 of the Family Code.[309] Hence, the marriage is void *ab initio*. In divorce, all the requisites of a valid marriage are present. The authorized

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[309]Marcos vs. Marcos, *supra*.

causes or grounds for the termination of the marital bond occur only after the celebration of the marriage. Similarly, in legal separation, the marriage is valid and the grounds for legal separation occur only after the celebration of the marriage. In legal separation, however, the marital bond is not broken.

[58.9] Not Subject to Prescription

When the Family Code took effect on August 3, 1988, Article 39 thereof reads as follows:

> "Art. 39. The action of defense for the declaration of absolute nullity of a marriage shall not prescribe. However, in the case of marriages celebrated before the effectivity of this Code and falling under Article 36, such action or defense shall prescribe in ten years after this Code shall have taken effect."

In 1998, Congress enacted Republic Act No. 8533 for the purpose of removing the prescriptive period for the filing of a petition for declaration of nullity of marriage based on Article 36 of the Family Code. R.A No. 8533 amended Article 39 of the Family Code, to read as follows:

> "Art. 39. The action or defense for the declaration of absolute nullity of a marriage shall not prescribe." (as amended by R.A. No. 8533)

Art. 37. Marriages between the following are incestuous and void from the beginning, whether relationship between the parties be legitimate or illegitimate:

(1) Between ascendants and descendants of any degree; and

(2) Between brothers and sisters, whether of the full or half blood. (81a)

COMMENTS:

§59. Void Marriages Under Article 37

[59.1] Incestuous marriages
[59.2] Between ascendants and descendants
[59.3] Between brothers and sisters, whether full or half blood

[59.1] Incestuous Marriages

Incestuous marriages are void from the beginning.[310] Under the Family Code, incestuous marriages are limited to the following: (1) those between ascendants and descendants of any degree, whether the relationship is legitimate or illegitimate;[311] and (2) those between brothers and sisters, whether of the full or half blood and whether the relationship is legitimate or illegitimate.[312] Even if the marriage is solemnized abroad in accordance with the laws in force in the country where they are solemnized, and valid there as such, such incestuous marriage is not recognized as valid in the Philippines.[313]

[59.2] Between Ascendants and Descendants

Proximity of relationship is determined by the number of generations. Each generation forms a degree.[314] A series of degrees form a line, which may be either direct or collateral.[315] A direct line is that constituted by the series of degrees among ascendants and descendants.[316] In counting the degrees in the direct line, ascent is made to the common ancestor. Thus, the child is one degree removed from the parent, two from the grandparent, and three from the great grandparent.[317] Under the Family Code, marriages between ascendants and descendants of "any degree" are incestuous, hence void, whether the relationship between them is legitimate or illegitimate.[318]

[59.3] Between Brothers and Sisters, Whether Full or Half Blood

Full blood relationship is that existing between persons who have the same father and the same mother.[319] Half blood relationship is that existing between persons who have the same father, but not the same

[310]Art. 37, FC.
[311]Art. 37(1), FC.
[312]Art. 37(2), FC.
[313]Art. 26, 1st par., FC.
[314]Art. 963, NCC.
[315]Art. 964, 1st par., NCC.
[316]Art. 964, 2nd par., NCC.
[317]Art. 966, 2nd par., NCC.
[318]Art. 37(1), FC.
[319]Art. 967, 1st par., NCC.

mother, or the same mother, but not the same father.[320] Under the Family Code, marriages between brothers and sisters "whether of the full or half blood" are incestuous, hence, void, whether the relationship between them is legitimate or illegitimate.[321]

Art. 38. The following marriages shall be void from the beginning for reasons of public policy:

(1) Between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree;

(2) Between step-parents and step-children;

(3) Between parents-in-law and children-in-law;

(4) Between the adopting parent and the adopted child;

(5) Between the surviving spouse of the adopting parent and the adopted child;

(6) Between the surviving spouse of the adopted child and the adopter;

(7) Between an adopted child and a legitimate child of the adopter;

(8) Between adopted children of the same adopter; and

(9) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse. (82a)

COMMENTS:

§ 60. Void Marriages Under Article 38

[60.1] Void marriages by reason of public policy
[60.2] Between collateral blood relatives up to 4th degree
[60.3] Between step-parents and step-children
[60.4] Between parents-in-law and children-in-law
[60.5] Between adopting parent and adopted child
[60.6] Between the surviving spouse of adopting parent and the adopted child
[60.7] Between the surviving spouse of the adopted child and the adopter
[60.8] Between adopted child and legitimate child of the adopter
[60.9] Between adopted children of the same adopter
[60.10] Intentional killing of spouse

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[320] Art. 967, 2nd par., NCC.
[321] Art. 37(2), FC.

[60.1] Void Marriages By Reason of Public Policy

Under Article 38, there are nine kinds of marriages that are declared void *ab initio* by reason of public policy, as follows: (1) between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree; (2) between step-parents and step-children; (3) between parents-in-law and children-in-law; (4) between the adopting parent and the adopted child; (5) between the surviving spouse of the adopting parent and the adopted child; (6) between the surviving spouse of the adopted child and the adopter; (7) between an adopted child and a legitimate child of the adopter; (8) between adopted children of the same adopter; and (9) between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.

[60.2] Void Marriage under Article 38(1); Between Collateral Blood Relatives Up to 4th Degree

Marriages between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree, are void from the beginning.[322] A collateral line is that constituted by the series of degrees among persons who are not ascendants and descendants, but who come from a common ancestor.[323] In counting the degrees in the collateral line, ascent is made to the common ancestor and then descent is made to the person with whom the computation is to be made. Thus, a person is two degrees removed from his brother, three from his uncle, who is the brother of his father, four from his first cousin, and so forth.[324] Hence, the following marriages are void under Article 38 (1) of the Family Code: (1) between uncle and niece; (2) between aunt and nephew; and (3) between first cousins. Note that while brothers and sisters are collateral relatives within the second civil degree, marriages between them are not void by reason of public policy under Article 38(1), but void for being incestuous under Article 37(2).

[60.3] Void Marriages under Article 38(2); Between Step-Parents and Step-Children

Marriages between step-parents and step-children are void by reason of public policy. They are relatives by affinity — a relation formed

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[322]Art. 38(1), FC.
[323]Art. 964, 3rd par., NCC.
[324]Art. 966, 3rd par., NCC.

by reason of marriage. For example, A and B are spouses. They have a son, C. X and Y are also spouses and they have a daughter, W. Let us assume that upon the death of A and Y, B and X got married. C, therefore, becomes a step-child of X. The latter, on the other hand, becomes the step-parent of C. Upon the death of B, X cannot marry C. If X and C will be married upon the death of B, their marriage will be void under Article 38(2) of the Family Code.

[60.3.1] Marriages Between Step-Brothers and Step-Sisters

Prior to the effectivity of the Family Code, step-brothers and step-sisters are prohibited from marrying each other.[325] This prohibition, however, was eliminated under the Family Code since they are not related at all, either by blood or by affinity. Consequently, marriages between step-brothers and step-sisters are now valid. In the example above, the marriage between C and W is a valid marriage.

[60.4] Void Marriages under Article 38(3); Between Parents-In-Law and Children-In-Law

Marriages between parents-in-law and children-in-law are void from the beginning.[326] They are relatives by affinity. It is scandalous for parents-in-law to marry their children-in-law because it is more in keeping with Philippine customs and traditions that parents-in-law treat children-in-law like their own children and vice-versa.[327]

There are others who are of the view that once the marriage is annulled or nullified, the persons who used to be parents-in-law and children-in-law become strangers to each other and can now marry each other, since the relationship by affinity is terminated. It is submitted, however, that the intention of the law is to prohibit marriages between persons who were once related to each other by affinity as parents-in-law and children-in-law, even if the marriage, which serves as the source of relationship by affinity, is already dissolved or terminated by reason of death or final judgment of annulment or of absolute nullity. If we will sustain the view that once the marriage is terminated the persons who

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[325] Art. 80(7), NCC.

[326] Art. 38(3), FC.

[327] Minutes of the 152nd Joint Meeting of the Civil Code and Family Law committees held on August 23, 1982, p. 3.

used to be parents-in-law and children-in-law are now allowed to marry since the relationship by affinity is already terminated, the provisions of Article 38(3) will be rendered nugatory. It is quite obvious that prior to the termination of the marriage, the parent-in-law cannot marry his or her child-in-law since the marriage of his or her child-in-law with his or her own child still subsists. Obviously, therefore, the prohibition under Article 38(3) does not apply to this situation where such marriage still exists. The prohibition under Article 38(3), it is submitted, must necessarily apply to situations where the marital bond between the parent-in-law's own child and his or her child-in-law is already terminated. This interpretation, after all, is in keeping with Philippine customs and traditions which treat the children-in-law as the parent-in-laws' own children, which treatment must necessarily subsist even after the severance of the marital bond.

[60.5] Void Marriages under Article 38(4); Between Adopting Parent and Adopted Child

Adoption is a juridical act which creates between two persons a relationship similar to that which results from legitimate paternity and filiation.[328] Under the law, the adopted child is considered the legitimate son or daughter of the adopter for all intents and purposes.[329] It is for this reason that the law prohibits marriages between the adopter and the adopted child. Any such marriage is void *ab initio*.[330]

[60.6] Void Marriages under Article 38(5); Between the Surviving Spouse of Adopting Parent and the Adopted Child

Ordinarily, the relationship established by adoption is limited to the adopting parent and does not extend to the latter's other relatives, except as expressly provided by law.[331] This is one of the few situations where the law expressly extends the relationship created by adoption to the adopter's relatives. For purposes of marriage, the law makes an express declaration that the adopted child cannot marry the surviving spouse

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[328]I Tolentino, Civil Code, 1990 ed., p. 554.
[329]Sec. 17, Domestic Adoption Act of 1998.
[330]Art. 38(4), FC.
[331]I Tolentino, Civil Code, 1990 ed., p. 564.

of the adopter, although the latter is not, by law, related to the former. Under the Family Code, marriages between the surviving spouse of the adopting parent and the adopted child are void *ab initio*.[332]

The use of the term "surviving spouse" raises an interesting question. Suppose, the marital bond between the adopting parent and his or her spouse is terminated not by reason of death (*i.e.*, by reason of a final judgment of annulment or of absolute nullity), is the marriage between the previous or former spouse of the adopter and the adopted within the ambit of the prohibition under Article 38(5)? It appears that the use of the term "surviving spouse" restricts the application of Article 38(5) to situations where the marital bond between the adopting parent and his or her spouse is terminated by reason of death. This being the case, it is submitted that if the marital bond is terminated not by reason of death, the marriage between the adopter's previous or former spouse and the adopted is not within the ambit of the prohibition under Article 38(5). This should be the case considering that the policy of the law is to favor the validity of marriages. Hence, such marriage is deemed to be valid.

[60.7] Void Marriages under Article 38(6); Between the Surviving Spouse of the Adopted Child and the Adopter

As earlier intimated, the relationship created by adoption is exclusive between the adopter and the adopted and does not extend to the relatives of either.[333] The Family Code, however, expressly declares as void the marriage between the surviving spouse of the adopted child and the adopter.[334] This is another situation where the law expressly extends the relationship created by adoption beyond the adopter and the adopted child.

[60.8] Void Marriages under Article 38(7); Between Adopted Child and Legitimate Child of the Adopter

Marriages between an adopted child and a legitimate child of the adopter are considered void *ab initio* by reason of public policy.[335] Note, however, that the adopted child is prohibited from marrying only the

[332]Art. 38(5), FC.
[333]I Tolentino, Civil Code, 1990 ed., p. 564.
[334]Art. 38(6), FC.
[335]Art. 38(7), FC.

"legitimate child" of the adopting parent. The prohibition does not extend to the adopter's illegitimate children. This being the case, the marriage between an adopted child and an illegitimate child of the adopter is a valid marriage.

[60.9] Void Marriages under Article 38(8); Between Adopted Children of the Same Adopter

Marriages between adopted children of the same adopter are likewise declared void by reason of public policy.[336] Thus, as far as the adopted child is concerned, he or she is prohibited from marrying the following: (1) the adopter; (2) the surviving spouse of the adopter; (3) the legitimate children of the adopter; and (4) the other adopted children of the same adopter. The adopter, on the other hand, is prohibited from marrying the following: (1) the adopted child; and (2) the surviving spouse of the adopted child.

[60.10] Void Marriages under Article 38(9); Intentional Killing of Spouse

Marriages between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse, are void from the beginning by reason of public policy.[337] Compared with its counterpart provision under the Civil Code,[338] the new law no longer requires a prior criminal conviction for the killing. Note that under Article 80(6) of the Civil Code, it is required that the author of the killing must "have been found guilty of the killing." This requirement was deliberately deleted under the new law. This being the case, a prior criminal conviction for the killing is no longer necessary to render the marriage void under the Family Code.

What has been emphasized under the new law is that the killing, whether perpetrated by the spouse or by another person, must be animated primarily by the intention or desire to do away with the victim, who is an obstacle to a contemplated marriage, for the purpose of marrying the surviving spouse. So long as the killing is for the purpose of

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[336] Art. 38(8), FC.
[337] Art. 38(9), FC.
[338] Art. 80(6), NCC.

contracting a marriage with the surviving spouse, the marriage will be void *ab initio* even if the surviving spouse is not aware of such plan.

Art. 39. The action or defense for the declaration of absolute nullity of a marriage shall not prescribe. (As amended by R.A. No. 8533)

COMMENTS:

§ 61. Action or Defense Based on Nullity of Marriage, Imprescriptible

When the Family Code took effect on August 3, 1988, Article 39 thereof reads as follows:

> "Art. 39. The action or defense for the declaration of absolute nullity of a marriage shall not prescribe. However, in the case of marriages celebrated before the effectivity of this Code and falling under Article 36, such action or defense shall prescribe in ten years after this Code shall have taken effect."

In 1998, Congress enacted Republic Act No. 8533 for the purpose of removing the prescriptive period for the filing of a petition for declaration of nullity of marriage based on Article 36 of the Family Code. R.A No. 8533 amended Article 39 of the Family Code, to read as follows:

> "Art. 39. The action or defense for the declaration of absolute nullity of a marriage shall not prescribe." (as amended by R.A. No. 8533)

Hence, the rule is now absolute that an action or defense based on the absolute nullity of the marriage is imprescriptible. In fact, void marriages can be questioned even after the death of either party.[339]

In view, however, of **A.M. No. 02-11-10-SC**,[340] which provides that a petition for declaration of absolute nullity of a void marriage may be filed solely by the husband or the wife[341] and, if filed, the case shall

[339]Niñal vs. Bayadog, *supra*, at p. 271,
[340]Which took effect on March 15, 2003.
[341]Sec. 2(a), A.M. No. 02-11-10-SC.

be closed and terminated upon the death of either parties at any stage of the proceeding prior to entry of judgment,[342] it now appears that a direct proceeding for the purpose of obtaining a judicial declaration of nullity of a void marriage may no longer be filed after the death of either of the party to such void marriage. This does not mean, however, that a void marriage may no longer be questioned after the death of either party since it is beyond question that such marriage is subject to a collateral attack.

Art. 40. The absolute nullity of a previous marriage may be invoked for purposes of remarriage on the basis solely of a final judgment declaring such previous marriage void. (n)

COMMENTS:

§ 62. Judicial Declaration of Nullity of Void Marriages

[62.1] Need for judicial declaration of nullity of a void marriage
[62.2] Article 40 explained
[62.3] Subsequent marriage without judicial declaration of nullity of previous marriage, void a*b initio*
[62.4] Article 40 applies to remarriages during the effectivity of the Family Code
[62.5] Article 40 and bigamy

[62.1] Need For Judicial Declaration of Nullity of a Void Marriage

The Civil Code contains no express provision that a judicial declaration of nullity of a void marriage is necessary. Jurisprudence prior to the effectivity of the Family Code on the matter, however, appears to be conflicting.

Originally, in **People vs. Mendoza**[343] and **People vs. Aragon**,[344] the Supreme Court held that no judicial decree is necessary to establish the nullity of a void marriage. Both cases involved the same factual milieu. Accused contracted a second marriage during the subsistence of

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[342]Sec. 24(a), A.M. No. 02-11-10-SC.
[343]95 Phil. 845 (1954).
[344]100 Phil. 1033 (1957).

his first marriage. After the death of his first wife, accused contracted a third marriage during the subsistence of the second marriage. The second wife initiated a complaint for bigamy. The Court acquitted the accused on the ground that the second marriage is void, having been contracted during the existence of the first marriage. The Court held that there is no need for a judicial declaration that said second marriage is void. Since the second marriage is void, and the first one terminated by the death of his wife, there are no two subsisting valid marriages. Hence, there can be no bigamy. Justice Alex Reyes dissented in both cases stating that:

> "Though the logician may say that where the former marriage was void there would be nothing to dissolve, still it is not for the spouses to judge whether that marriage was void or not. That judgment is reserved to the courts. xxx"

This dissenting opinion was adopted as the majority position in subsequent cases involving the same issue. In **Gomez vs. Lipana**,[345] the Court abandoned its earlier ruling in the *Aragon* and *Mendoza* cases. In reversing the lower court's order forfeiting the husband's share of the disputed property acquired during the second marriage, the Court stated that *"if the nullity, or annulment of the marriage is the basis for the application of Article 1417, there is a need for a judicial declaration thereof, which of course contemplates an action for that purpose."*

In **Vda. de Consuegra vs. Government Service Insurance System**,[346] the Supreme Court recognized the right of the second wife who entered into the marriage in good faith, to share in their acquired estate and in proceeds of the retirement insurance of the husband. The Court observed that although the second marriage can be presumed to be void *ab initio* as it was celebrated while the first marriage was still subsisting, still there was a need for judicial declaration of such nullity (of the second marriage). And since the death of the husband supervened before such declaration, the Court upheld the right of the second wife to share in the estate they acquired on grounds of justice and equity.

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[345] 33 SCRA 615 (1970).
[346] 37 SCRA 315 (1971).

But in **Odayat vs. Amante**,[347] the Court turned around and applied the *Aragon* and *Mendoza* ruling once again. In this case, the Court exonerated a clerk of court of the charge of immorality on the ground that his marriage to Filomena Abella in October 1948 was void, since she was already previously married to one Eliseo Portales in February of the same year. The Court held that no judicial decree is necessary to establish the invalidity of void marriages.

The ruling in *Odayat* was affirmed in **Tolentino vs. Paras**.[348] In granting the prayer of the first wife asking for a declaration as the lawful surviving spouse and the correction of the death certificate of her deceased husband, the Court explained that *"(t)he second marriage that he contracted with private respondent during the lifetime of his first spouse is null and void from the beginning and of no force and effect. No judicial decree is necessary to establish the invalidity of a void marriage."*

Yet, again in **Wiegel vs. Sempio-Diy**,[349] the Court reverted to the *Consuegra* case and held that there is a need for a judicial declaration of nullity of a void marriage. In *Wiegel,* Lilia married Maxion in 1972. In 1978, she married another man, Wiegel. Wiegel filed a petition with the Juvenile Domestic Relations Court to declare his marriage to Lilia as void on the ground of her previous valid marriage. The Court, expressly relying on *Consuegra,* concluded that:

"There is likewise no need of introducing evidence about the existing prior marriage of her first husband at the time they married each other, for then such a marriage though void still needs according to this Court a judicial declaration (citing Consuegra) of such fact and for all legal intents and purposes she would still be regarded as a married woman at the time she contracted her marriage with respondent Karl Heinz Wiegel; accordingly, the marriage of petitioner and respondent would be regarded VOID under the law.

In **Yap vs. Court of Appeals**,[350] however, the Court found the second marriage void without need of judicial declaration, thus reverting to the *Odayat, Mendoza* and *Aragon* rulings.

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[347] 77 SCRA 338 (1977).
[348] 122 SCRA 525 (1983).
[349] G.R. No. 530703, August 19, 1986, 143 SCRA 499 (1986).
[350] 145 SCRA 229 (1986).

Then came the Family Code which settled once and for all the conflicting jurisprudence on the matter. The rulings in *Gomez*, *Consuegra* and *Wiegel* were eventually embodied in Article 40 of the Family Code. Article 40 of said Code now expressly requires a judicial declaration of nullity of marriage.

[62.2] Article 40 Explained

Under Article 40 of the Family Code, the absolute nullity of a previous marriage may be invoked for purposes of remarriage on the basis solely of a final judgment declaring such previous marriage void. Meaning, where the absolute nullity of a previous marriage is sought to be invoked for purposes of contracting a second marriage, the sole basis acceptable in law, for said projected marriage to be free from legal infirmity, is a final judgment declaring the previous marriage void.[351] However, other than for purposes of remarriage, no judicial action is necessary to declare a marriage an absolute nullity. For other purposes, such as but not limited to determination of heirship, legitimacy or illegitimacy of a child, settlement of estate, dissolution of property regime, or a criminal case for that matter, the court may pass upon the validity of marriage even in a suit not directly instituted to question the same so long as it is essential to the determination of the case.[352] In such instances, evidence must be adduced, testimonial or documentary, to prove the existence of grounds rendering such a previous marriage an absolute nullity. These need not be limited solely to an earlier final judgment of a court declaring such previous marriage void.[353]

For purposes of remarriage, however, the only legally acceptable basis for declaring a previous marriage an absolute nullity is a final judgment declaring such previous marriage void. Hence, in the instance where a party who has previously contracted a marriage which remains subsisting desires to enter into another marriage which is legally unassailable, he is required by law to prove that the previous one was an absolute nullity. But this he may do on the basis solely of a final judgment declaring such previous marriage void.[354]

[351]Domingo vs. CA, 226 SCRA 572, 579 (1993).
[352]Niñal vs. Bayadog, 328 SCRA 122 (2000).
[353]Carino vs. Carino, 351. SCRA 127, 132 (2001).
[354]Domingo vs. CA, *supra*, at p. 584.

Domingo vs. Court of Appeals
226 SCRA 572 (1993)

FACTS: In 1976, Delia Soledad Domingo and Roberto Domingo were married. Unknown to Delia, Roberto had a previous marriage with one Emerlinda dela Paz in 1969. She came to know of the prior marriage only sometime in 1983 when Emerlinda dela Paz sued them for bigamy. In 1991, Delia filed a petition before the Regional Trial Court of Pasig entitled "Declaration of Nullity of Marriage and Separation of Property" against Roberto. Instead of answering the petition, Roberto filed a Motion to Dismiss on the ground that the petition stated no cause of action. Roberto contends that since the marriage is void ab initio, the petition for the declaration of its nullity is superfluous and unnecessary. Furthermore, under his own interpretation of Article 40 of the Family Code, he submits that a petition for declaration of absolute nullity of marriage is required only for purposes of remarriage. Since the petition contains no allegation of Delia's intention to remarry, said petition should, therefore, be dismissed. The motion to dismiss was denied by the trial court, as well as the motion for reconsideration. Roberto filed a special civil action for certiorari before the Court of Appeals, which dismissed the petition. Hence, Roberto elevated the matter to the Supreme Court.]

Mme. Justice Flerida Ruth P. Romero, ***ponente:***

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As regards the necessity for a judicial declaration of absolute nullity of marriage, petitioner submits that the same can be maintained only if it is for the purpose of remarriage. Failure to allege this purpose, according to petitioner's theory, will warrant dismissal of the same.

Article 40 of the Family Code provides:

"ART. 40. The absolute nullity of a previous marriage may be invoked for purposes of remarriage on the basis solely of a final judgment declaring such previous marriage void."

Crucial to the proper interpretation of Article 40 is the position in the provision of the word "solely." As it is placed, the same shows that it is meant to qualify "final judgment declaring such previous marriage void." Realizing the need for careful craftsmanship in conveying the precise intent of the Committee members, the provision in question, as it finally emerged, did not state "The absolute nullity of a previous marriage may be invoked *solely* for purposes of remarriage. . . ," in which case "solely" would clearly

qualify the phrase "for purposes of remarriage." Had the phraseology been such, the interpretation of petitioner would have been correct and, that is, that the absolute nullity of a previous marriage may be invoked *solely* for purposes of remarriage, thus rendering irrelevant the clause "on the basis solely of a final judgment declaring such previous marriage void."

That Article 40 as *finally formulated included the significant clause denotes that such final judgment declaring the previous marriage void need not be obtained only for purposes of remarriage.* Undoubtedly, one can conceive of other instances where a party might well invoke the absolute nullity of a previous marriage for purposes other than remarriage, such as in case of an action for liquidation, partition, distribution and separation of property between the erstwhile spouses, as well as an action for the custody and support of their common children and the delivery of the latter's presumptive legitimes. In such cases, evidence needs must be adduced, testimonial or documentary, to prove the existence of grounds rendering such a previous marriage an absolute nullity. These need not be limited solely to an earlier final judgment of a court declaring such previous marriage void. *Hence, in the instance where* a *party who has previously contracted* a *marriage which remains subsisting desires to enter into another marriage which is legally unassailable, he is required by law to prove that the previous one was an absolute nullity. But this he may do on the basis solely of* a *final judgment declaring such previous marriage void.*

This leads us to the question: Why the distinction? In other words, for purposes of remarriage, why should the only legally acceptable basis for declaring a previous marriage an absolute nullity be a final judgment declaring such previous marriage void? Whereas, for other purposes other than remarriage, other evidence is acceptable?

Marriage, a sacrosanct institution, declared by the Constitution as an "inviolable social institution, is the foundation of the family;" as such, it "shall be protected by the State." In more explicit terms, the Family Code characterizes it as a "special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life." So crucial are marriage and the family to the stability and peace of the nation that their "nature, consequences, and incidents are governed by law and not subject to stipulation. . ." *As* a *matter of policy, therefore, the nullification* of a *marriage for the purpose*

of contracting another cannot be accomplished merely on the basis of the perception of both parties or of one that their union is so *defective with respect to the essential requisites of* a *contract of marriage* as *to render it void ipso jure and with no legal effect — and nothing more.* Were this so, this inviolable social institution would be reduced to a mockery and would rest on very shaky foundations indeed. And the grounds for nullifying the marriage would be as diverse and far-ranging as human ingenuity and fancy could conceive. For such a socially significant institution, an official state pronouncement through the courts, and nothing less, will satisfy the exacting norms of society. Not only would such an open and public declaration by the courts definitively confirm the nullity of the contract of marriage, but the same would be easily verifiable through records accessible to everyone.

That the law seeks to ensure that a prior marriage is no impediment to a second sought to be contracted by one of the parties may be gleaned from new information required in the Family Code to be included in the application for a marriage license, viz, "If previously married, how, when and where the previous marriage was dissolved and annulled."

Reverting to the case before us, petitioner's interpretation of Art. 40 of the Family Code is, undoubtedly, quite restrictive. Thus, his position that private respondent's failure to state in the petition that the same is filed to enable her to remarry will result in the dismissal of S. P. No. 1989-J is untenable. His misconstruction of Art. 40 resulting from the misplaced emphasis on the term "solely" was in fact anticipated by the members of the Committee.

"Dean Gupit commented that the word "only" may be misconstrued to refer to "for purposes of remarriage." Judge Diy stated that "only" refers to "final judgment." Justice Puno suggested that they say "on the basis only of a final judgment." Prof. Baviera suggested that they use the legal term "solely" instead of "only," which the Committee approved." (Italics supplied)

Pursuing his previous argument that the declaration for absolute nullity of marriage is unnecessary, petitioner suggests that private respondent should have filed an ordinary civil action for the recovery of properties alleged to have been acquired during their union. In such an eventuality, the lower court would not be acting as a mere special court but would be clothed with jurisdiction to rule on the issues of possession and ownership. In addition,' he pointed out that there is actually nothing to separate or partition as

the petition admits that all the properties were acquired with private respondent's money.

The Court of Appeals disregarded this argument and concluded that "the prayer for declaration of absolute nullity of marriage may be raised together with the other incident of their marriage such as the separation of their properties."

When a marriage is declared void *ab initio*, the law states that the final judgment therein shall provide for "the liquidation, partition and dissolution of the properties of the spouses, the custody and support of the common children, and the delivery of their presumptive legitimes, unless such matters had been adjudicated in previous judicial proceedings." Other specific effects following therefrom, in proper cases, are the following:

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Based on the foregoing provisions, private respondent's ultimate prayer for separation of property will simply be one of the necessary consequences if the judicial declaration of absolute nullity of their marriage. Thus, petitioner's suggestion that in order for their properties to be separated, an ordinary civil action has to be instituted for that purpose is baseless. The Family Code has clearly provided the effects of the declaration of nullity of marriage, one of which is the separation of property according to the regime of property relations governing them. It stands to reason that the lower court before whom the issue of nullity of a first marriage is brought is likewise clothed with jurisdiction to decide the incidental questions regarding the couple's properties. Accordingly, the respondent court committed no reversible error in finding that the lower court committed no grave abuse of discretion in denying petitioner's motion to dismiss in SP No. 1989-J.[355] [Italics supplied]

[62.3] Subsequent Marriage Without Judicial Declaration of Nullity of Previous Marriage, Void A*b Initio*

Under Article 40 of the Family Code, for purposes of remarriage, there must first be a prior judicial declaration of nullity of a previous

[355] At pp. 583-587

marriage, though void, before a party can enter into a second marriage, otherwise, the subsequent marriage is in itself void *ab initio.*[356]

But there is an interesting question in connection with Article 40. Does Article 40 merely provide for a rule of procedure or does it define or declare a void marriage distinct and separate from void marriages under Article 35(4) and Article 35(6), in relation to Articles 53 and 52?

If taken by itself, it appears that Article 40 is a mere rule of procedure as declared in **Atienza vs. Brillantes, Jr.**,[357] but if taken in conjunction with Article 50 of the Family Code, the inevitable conclusion is that Article 40 is a definition and/or declaration of a void marriage. The first paragraph of Article 50 states that *"the effects provided for in paragraphs (2), (3), (4) and (5) of Article 43 and in Article 44 shall also apply in proper cases to marriages which are declared void ab initio or annulled by final judgment under Articles 40 and 45."* The clause "marriages which are declared void *ab initio*" in the first paragraph of Article 50 obviously refers to Article 40, while the clause "marriages which are xxx annulled" has reference to Article 45. Such being the case, it is apparent that the intention of the Family Code is to declare a marriage void *ab initio* by reason of non-compliance with the provisions of Article 40 of the Family Code.

Is the marriage declared void *ab initio* under Article 40, in relation to Article 50, distinct and separate from the marriage declared void under Article 35(4)? In **Cariño vs. Cariño**,[358] the Supreme Court held that the subsequent marriage entered into in violation of Article 40 is a bigamous marriage, having been solemnized during the subsistence of a previous marriage then presumed to be valid.[359] For which reason, the Supreme Court applied the provisions of Article 148 of the Family Code to such marriage.[360] In other words, **Cariño vs. Cariño** is telling us that a subsequent marriage entered into in violation of Article 40 is a void marriage under Article 35(4). This line of reasoning, however, renders nugatory the explicit provisions of Article 50, which makes applicable paragraph (2) of Article 43 to marriages which are declared void under

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[356]Cariño vs. Cariño, 351 SCRA 127, 134 (2001).
[357]243 SCRA 32, 35 (1995).
[358]351 SCRA 127 (2001).
[359]*Id.*, at p. 135.
[360]*Id.*, at p. 135.

Article 40, since in a bigamous marriage which is declared void under Article 35(4), the applicable property regime is not the absolute community nor conjugal partnership of gains, but rather, the provisions of Article 148 applies.

Note that Article 40 applies to a situation where the prior marriage is void and one of the parties thereto contracts a subsequent marriage without first securing a judicial declaration of the nullity of the previous marriage. This is to be distinguished from a situation where the previous marriage is merely voidable and one of the parties thereto contracts a subsequent marriage without first securing a judgment annulling the previous marriage. In the latter example, while the subsequent marriage is void, its nullity proceeds from the fact that the subsequent marriage is bigamous, hence, void pursuant to Article 35(4). In the previous example, the subsequent marriage is also void, not because it is bigamous, but because of failure to comply with the requirement of Article 40.

Is the marriage declared void *ab initio* in Article 40, in relation to Article 50, distinct and separate from the marriage declared void under Article 35(6), in relation to Articles 53 and 52? The answer must be in the affirmative for the following reasons:

(1) The situations contemplated in these two (2) kinds of marriages are very much different. In a marriage declared void *ab initio* under Article 40, in relation to Article 50, it presupposes the existence of a prior void marriage and that a party thereto contracts a subsequent marriage without first securing a judicial declaration of the nullity of the previous marriage. In a marriage declared void under Article 35(6), in relation to Articles 53 and 52, on the other hand, it contemplates a situation where there is a previous marriage which is either voidable or void and that one of the parties thereto eventually obtains a judgment of annulment or of absolute nullity of the marriage, as the case may be, but fails to cause the recording or registration in the appropriate civil registry and registries of property of the judgment of annulment or of absolute nullity of the marriage, the partition and distribution of the properties of the spouses, and the delivery of the children's presumptive legitimes.

(2) The effects provided for in paragraphs (2), (3), (4) and (5) of Article 43 and in Article 44 are expressly made applicable only to marriages which are declared void *ab initio* under Article 40. If the intention

of the Family Code is to treat Articles 40, 52 and 53 as forming just one ground to declare a marriage void, then why is it that the effects provided for in paragraphs (2), (3), (4) and (5) of Article 43 and in Article 44 are not likewise made applicable to a void marriage under Article 35(6), in relation to Articles 53 and 52.

(3) Note that the effects provided for in paragraph (1) of Article 43 are not made applicable to marriages which are declared void under Article 40. Under paragraph (1) of Article 43, children of the subsequent marriage under Article 41 conceived or born prior to its termination are considered legitimate. By refusing to extend the application of Article 43(1) to void marriages under Article 40, the intention of the Family Code is to consider children of void marriages under this article as illegitimates, following the general rule under Article 165 of the Family Code. On the other hand, children conceived or born before the judgment of absolute nullity of the marriage under Article 53 has become final and executory are considered legitimate.[361]

The importance of distinguishing between void marriages under Article 40, in relation to Article 50, Article 35(4), Article 35(6), in relation to Articles 53 and 52, need be emphasized in view of the legal consequences flowing therefrom, as follows:

- In the aspect of property relations. In a void marriage, regardless of the cause thereof, the property relations of the parties during the period of cohabitation, is governed by the provisions of Articles 147 or 148, as the case may be, of the Family Code.[362] In other words, the applicable property regime is neither absolute community nor conjugal partnership of gains.[363] In a bigamous marriage which is void under Article 35(4), for example, the property regime is governed by Article 148 of the Family Code.[364] Article 147, on the other hand, governs the property regime of void marriages under Article 35(6), in relation to Articles 53 and 52, since the said article applies to unions of parties who are legally capaci-

[361] Art. 54, FC.
[362] Valdes vs. Regional Trial Court, Br. 102, Quezon City, 260 SCRA 221, 226 (1996).
[363] Cariño vs. Cariño, *supra*, at p. 135.
[364] *Id.*

tated and not barred by any impediment to contract marriage, but whose marriage is nonetheless void for other reasons.[365] By way of exception, however, the provisions of paragraph (2) of Article 43 are made applicable to void marriages under Article 40, which provisions contain rules set up to govern the liquidation of either the absolute community or the conjugal partnership of gains. In other words, in void marriages under Article 40, the provisions of Articles 147 and 148 do not apply but rather the provisions of Article 43(2), in relation to Article 50. Viewed in this light, the ruling of the Supreme Court in **Cariño vs. Cariño** that the subsequent void marriage under Article 40 is governed by Article 148 of the Family Code is contrary to the explicit terms of Article 50.

- <u>In the aspect of filiation</u>. Children conceived or born before the judgment of absolute nullity of the marriage under Article 53 has become final and executory are considered legitimate;[366] while children conceived or born of void marriages under Articles 35(4) and Article 40, in relation to Article 50, are illegitimates pursuant to the general rule embodied in Article 165 of the Family Code.

Cariño vs. Cariño
351 SCRA 127 (2001)

FACTS: During the lifetime of SPO4 Santiago Carino, he contracted two marriages: the first was in 1969, with Susan Nicdao, with whom he had two offsprings; and the second on November 10, 1992, with Susan Yee, with whom he had no children in their almost ten year cohabitation starting way back 1982. On November 23, 1992, SPO4 Cariño died. Both Susan Nicdao and Susan Yee filed claims for monetary benefits and financial assistance pertaining to the deceased from various government agencies. Susan Nicdao was able to collect a total of P146,000.00 from MBAI, PCCUI, Commutation, NAPOLCOM, and Pag-ibig. Susan Yee, on the other hand, received a total of P21,000.00 from GSIS Life, burial (GSIS) and burial (SSS). On December 14, 1993, Susan Yee filed a case for collection of sum of money against Susan Nicdao praying, inter alia, that Nicdao be ordered to return to her at least one-

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[365] *Id*.
[366] Art. 54, FC.

half of the P146,000.00 (collectively referred as "death benefits"). Despite service of summons, Nicdao failed to file her answer, prompting the trial court to declare her in default. To bolster her action for collection, Yee contended that the marriage of Nicdao and the deceased was void ab initio because the same was solemnized without the required marriage license. In support thereof, Yee presented: (1) the marriage certificate of the deceased and Nicdao which bears no marriage license; and (2) a certification issued by the local civil registrar of San Juan, Metro Manila to the effect that it has no record of marriage license of the spouses Santiago Cariño and Susan Nicdao. After trial, the trial court rendered a judgment in favor of Yee ordering Nicdao to pay Yee half of the amount she received in the form of death benefits, plus attorney's fees. The Court of Appeals affirmed in *toto* the decision of the trial court. Hence, Nicdao appealed to the Supreme Court.]

Mme. Consuelo Ynares-Santiago, *ponente:*

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> Under Article 40 of the Family Code, the absolute nullity of a previous marriage may be invoked for purposes of remarriage on the basis solely of a final judgment declaring such previous marriage void. Meaning, where the absolute nullity of a previous marriage is sought to be invoked for purposes of contracting a second marriage, the sole basis acceptable in law, for said projected marriage to be free from legal infirmity, is a final judgment declaring the previous marriage void. However, other than for purposes of remarriage, no judicial action is necessary to declare a marriage an absolute nullity. For other purposes, such as but not limited to determination of heirship, legitimacy or illegitimacy of a child, settlement of estate, dissolution of property regime, or a criminal case for that matter, the court may pass upon the validity of marriage even in a suit *not* directly instituted to question the same so long as it is essential to the determination of the case. In such instances, evidence must be adduced, testimonial or documentary, to prove the existence of grounds rendering such a previous marriage an absolute nullity. These need not be limited solely to an earlier final judgment of a court declaring such previous marriage void.
>
> It is clear therefore that the Court is clothed with sufficient authority to pass upon the validity of the two marriages in this case, as the same is essential to the determination of who is rightfully entitled to the subject "death benefits" of the deceased.
>
> Under the Civil Code, which was the law in force when the marriage of Petitioner Susan Nicdao and the deceased was solem-

nized in 1969, a valid marriage license is a requisite of marriage, and the absence hereof, subject to certain exceptions, renders the marriage void *ab initio.*

In the case at bar, there is no question that the marriage of petitioner and the deceased does not fall within the marriages exempt from the license requirement. A marriage license, therefore, was indispensable to the validity of their marriage. This notwithstanding, the records revealed that the marriage contract of petitioner and the deceased bears no marriage license number and, as certified by the Local Civil registrar of San Juan, Metro Manila, their office has no record of such marriage license. In *Republic vs. Court of Appeals,*[367] the Court held that such a certification is adequate to prove the non-issuance of a marriage license. Absent any circumstance of suspicion, as in the present case, the certification issued by the local civil registrar enjoys probative value, he being the officer charged under the law to keep a record of all data relative to the issuance of a marriage license.

Such being the case, the presumed validity of the marriage of petitioner and the deceased has been sufficiently overcome. It then became the burden of petitioner to prove that their marriage is valid and that they secured the required marriage license. Although she was declared in default before the trial court, petitioner could have squarely met the issue and explained the absence of a marriage license in her pleadings before the Court of Appeals and this Court. But petitioner conveniently avoided the issue and chose to refrain from pursuing an argument that will put her case in jeopardy. Hence, the presumed validity of their marriage cannot stand.

It is beyond cavil, therefore, that the marriage between petitioner Susan Nicdao and the deceased, having been solemnized without the necessary marriage license, and not being one of the marriages exempt from the marriage license requirement, is undoubtedly void *ab initio.*

It does not follow from the foregoing disquisition, however, that since the marriage of petitioner and the deceased is declared void ab initio, the "death benefit" under scrutiny would now be awarded to respondent Susan Yee. To reiterate, under Article 40 of the family Code, for purposes of remarriage, there must be a prior judicial declaration of the nullity of a previous marriage, otherwise, the second marriage would also be void.

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[367]236 SCRA 257.

Accordingly, the declaration in the instant case of nullity of the previous marriage of the deceased and petitioner Susan Nicdao does not validate the second marriage of the deceased with respondent Susan Yee. The fact remains that their marriage was solemnized without first obtaining a judicial decree declaring the marriage of petitioner Susan Nicdao and the deceased void. Hence, the marriage of respondent Susan Yee and the deceased is, likewise, void *ab initio.*[368]

[62.4] Article 40 Applies to Remarriages During the Effectivity of the Family Code

Article 40 is applicable to remarriages entered into after the effectivity of the Family Code on August 3, 1988 regardless of the date of the first marriage.[369] If the second marriage, however, took place prior to the promulgation of the *Wiegel* case[370] and the effectivity of the Family Code, there is no need for a judicial declaration of nullity of the first marriage pursuant to the prevailing jurisprudence at that time.[371]

In **Atienza vs. Brillantes, Jr.**,[372] a complaint for gross immorality was filed against Judge Francisco Brillantes. It was alleged in the complaint that Judge Brillantes was married to a certain Zenaida Ongkiko and yet he was cohabiting with Yolanda De Castro. Complainant has two children with De Castro. Judge Brillantes alleged in his answer to the complaint that while he and Ongkiko went through a marriage ceremony before a town mayor in Nueva Ecija in 1965, the marriage was not valid for lack of a marriage license. Judge Brillantes admitted marrying De Castro in civil rights in Los Angeles, California in 1991. Judge Brillantes further argued that the provision of Article 40 of the Family Code "does not apply to him considering that his first marriage took place in 1965 and was governed by the Civil Code of the Philippines; while the second marriage took place in 1991 and governed by the Family Code." In dismissing Judge Brillantes from the service for impropriety, the Court ruled that *"Article* 40 *is applicable to remarriages entered*

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[368]At pp. 131-134.
[369]Atienza vs. Brillantes, Jr., 243 SCRA 32,35 (1995).
[370]Wiegel vs. Sempio-Dy, *supra,* was promulgated on August 19, 1986.
[371]Apiag vs. Cantero, 268 SCRA 47 (1997); Ty vs. Court of Appeals, 346 SCRA 86 (2000).
[372]*Supra*.

into after the effectivity of the Family Code on August 3, 1988 regardless of the date of the first marriage."

Ty vs. Court of Appeals
346 SCRA 86 (2000)

FACTS: Edgardo Reyes married Anna Margarita Regina Villanueva in 1977 in Manila. However, on August 4, 1980, the Juvenile and Domestic Relations Court of Quezon City declared their marriage nulll and void for lack of a valid marriage license. Even before the decree was issued nullifying his marriage to Anna Maria, Edgardo married Ofelia Ty on April 4, 1979, in ceremonies officiated by the judge of the City Court of Pasay. On April 4, 1982, they also had a church wedding in Makati. On January 3, 1991, Edgardo filed a civil case with the Regional Trial Court of Pasig City praying that his marriage to Ty be declared null and void. He alleged that they had no marriage license when they got married. He also averred that the time he married Ty, he was still married to Anna Maria. He stated that at the time he married Ty the decree of nullity of his marriage to Anna Maria had not been issued. The decree of nullity of his marriage to Anna Maria was rendered only on August 4, 1980, while his civil marriage to Ty took place on April 4, 1979. Ty, on the other hand, defended her marriage to Edgardo. After trial, the trial court rendered a decision declaring the marriage void *ab initio*. On appeal, the Court of Appeals affirmed the trial court's decision. It ruled that a judicial declaration of nullity of the first marriage (to Anna Maria) must first be secured before a subsequent marriage could be validly contracted. Ty appealed to the Supreme Court.

Mr. Justice Leonardo A. Quisumbing, *ponente:*

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At any rate, the confusion under the Civil Code was put to rest under the Family Code. Our rulings in *Gomez, Consuegra,* and *Wiegel* were eventually embodied in Article 40 of the Family Code. Article 40 of said code expressly required a judicial declaration of nullity of marriage —

Art. 40. The absolute nullity of a previous marriage may be invoked for purposes of remarriage on the basis solely of a final judgment declaring such previous marriage void.

In *Terre vs. Terre* (1992) the Court, applying *Gomez, Consuegra* and *Wiegel,* categorically stated that a judicial declaration of nullity of a void marriage is necessary. Thus, we disbarred a lawyer for contracting a bigamous marriage during the subsistence

of his first marriage. He claimed that his first marriage in 1977 was void since his first wife was already married in 1968. We held that Atty. Terre should have known that the prevailing case law is that "for purposes of determining whether a person is legally free to contract a second marriage, a judicial declaration that the first marriage was null and void *ab initio* is essential."

The Court applied this ruling in subsequent cases. In *Domingo vs. Court of Appeals* (1993), the Court held:

Came the Family Code which settled once and for all the conflicting jurisprudence on the matter. A declaration of absolute nullity of marriage is now explicitly required either as a cause of action or a ground for defense. (Art. 39 of the Family Code). Where the absolute nullity of a previous marriage is sought to be invoked for purposes of contracting a second marriage, the sole basis acceptable in law for said projected marriage to be free from legal infirmity is a final judgment declaring the previous marriage void. (Family Code, Art. 40: See also arts. 11, 13, 42, 44, 48, 50, 52, 54, 86, 99, 147, 148).

However, a recent case applied the old rule because of the peculiar circumstances of the case. In *Apiag vs. Cantero,* (1997) the first wife charged a municipal trial judge of immorality for entering into a second marriage. The judge claimed that his first marriage was void since he was merely forced into marrying his first wife whom he got pregnant. On the issue of nullity of the first marriage, we applied *Odayat, Mendoza* and *Aragon.* We held that since the second marriage took place and all the children thereunder were born *before* the promulgation of *Wiegel* and the effectivity of the Family Code, there is no need for a judicial declaration of nullity of the first marriage pursuant to prevailing jurisprudence at that time.

Similarly, in the present case, the second marriage of private respondent was entered into in 1979, before *Wiegel.* At that time, the prevailing rule was found in *Odayat, Mendoza* and *Aragon.* The first marriage of private respondent being void for lack of license and consent, there was no need for judicial declaration of its nullity before he could contract a second marriage. In this case, therefore, we conclude that private respondent's second marriage to petitioner is valid.

Moreover, we find that the provisions of the Family Code cannot be retroactively applied to the present case, for to do so would prejudice the vested rights of petitioner and of her children.

As held in *Jison vs. Court of Appeals,* the Family Code has retroactive effect unless there be impairment of vested rights. In the present case, that impairment of vested rights of petitioner and the children is patent. Additionally, we are not quite prepared to give assent to the appellate court's finding that despite private respondent's "deceit and perfidy" in contracting marriage with petitioner, he could benefit from her silence on the issue. Thus, coming now to the civil effects of the church ceremony wherein petitioner married private respondent using the marriage license used three years earlier in the civil ceremony, we find that petitioner claimed now has raised this matter properly. Earlier petitioner claimed as untruthful private respondent's allegation that he wed petitioner but they lacked a marriage license. Indeed we find there was a marriage license, though it was the same license issued on April 13, 1979 and used in both the civil and the church rites. Obviously, the church ceremony was confirmatory of their civil marriage. As petitioner contends, the appellate court erred when it refused to recognize the validity and salutary effects of said canonical marriage on a technicality, *i.e.*, that petitioner had failed to raise this matter as affirmative defense during the trial. She argues that such failure does not prevent the appellate court from giving her defense due consideration and weight. She adds that the interest of the State in protecting the inviolability of marriage, as a legal and social institution, outweighs such technicality. In our view, petitioner and private respondent had complied with all the essential and formal requisites for a valid marriage, including the requirement of a valid license in the first of the two ceremonies. That this license was used legally in the celebration of the civil ceremony does not detract from the ceremonial use thereof in the church wedding of the same parties to the marriage, for we hold that the latter rites served not only to ratify but also to fortify the first. The appellate court might have its reasons for brushing aside this possible defense of the defendant below which undoubtedly could have tendered a valid issue, but which was not timely interposed by her before the trial court. But we are now persuaded we cannot play blind to the absurdity, if not inequity, of letting the wrongdoer profit from what the CA calls "his own deceit and perfidy."[373]

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[373]At pp. 94-97.

[62.5] Article 40 and Bigamy

In **Mercado vs. Tan**,[374] the Supreme Court held that *"a judicial declaration of nullity of a previous marriage is necessary before a subsequent one can be legally contracted"*[375] and *that "one who enters into a subsequent marriage without first obtaining such judicial declaration is guilty of bigamy."*[376] According to the Court, this principle applies even if the earlier union is characterized by statutes as "void."[377] In his concurring opinion in **Abunado vs. People**,[378] Justice Carpio explains that *"Article 40 of the Family Code considers the marital vinculum of the previous marriage to subsist for purposes of remarriage, unless the previous marriage is judicially declared void by final judgment."*[379] He adds, *"if the marital vinculum of the previous marriage subsists because of the absence of judicial declaration of its nullity, the second marriage is contracted during the existence of the first marriage resulting in the crime of bigamy."*[380] In **Marbella-Bobis vs. Bobis**,[381] the Court likewise held that "without a judicial declaration of its nullity, the first marriage is presumed to be subsisting."

As such, the present state of jurisprudence is to the effect that one must first secure a final judicial declaration of nullity of the previous marriage before he is freed from the marital bond or vinculum of the previous marriage and that if he fails to secure such judicial declaration of nullity and contracts a second marriage, then the second marriage becomes bigamous.

In his dissenting opinion in the *Mercado* case, Justice Vitug opines that the Family Code did not have the effect of overturning the rule in criminal law and related jurisprudence in connection with the crime of bigamy. Justice Vitug maintains that the complete nullity of a previously contracted marriage, being a total nullity and inexistent, is capable of being independently raised by way of a defense in a criminal case for

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[374]337 SCRA 122 (2000).
[375]*Id.*, at p. 124.
[376]*Id.*
[377]*Id.*
[378]426 SCRA 562 (2004).
[379]*Id.*, at p. 571.
[380]*Id.*
[381]336 SCRA 747, 756 (2000).

bigamy. He thus concludes that there is no incongruence between this rule in criminal law and that of the Family Code and that each may be applied within their respective spheres of governance.

The position taken by Justice Vitug in the *Mercado* case deserves serious consideration.

In the first place, the Family Code does not consider a subsequent marriage entered into in violation of Article 40 as bigamous. As explained earlier, a marriage which is declared void *ab initio* under Article 40, in relation to Article 50, is distinct and separate from the marriage declared void under Article 35(4). In other words, a subsequent marriage contracted in violation of Article 40 is not a bigamous marriage under Article 35(4). A contrary interpretation may not be sustained since it will render nugatory the explicit terms of Article 50, which makes applicable paragraph (2) of Article 43 to void marriages under Article 40. Pursuant to Article 50, the effects of the termination of a subsequent marriage under Article 41, specifically those provided in paragraphs (2), (3), (4) and (5) of Article 43, are applicable *pro hac vice* to void marriages under Article 40. One of such effects is the dissolution of the absolute community or the conjugal partnership, as the case may be.[382] In other words, in a void marriage under Article 40, the property regime of the union is not governed by Article 148 of the Family Code. On the other hand, the property regime of a bigamous marriage under Article 35(4) is governed by Article 148. As explained by the Supreme Court, Article 148 refers to the property regime of bigamous marriages, adulterous relationships, relationships in a state of concubinage, relationships where both man and woman are married to other persons, multiple alliances of the same married man.[383] This being the case, it is submitted that the Family Code itself does not classify as bigamous a subsequent marriage contracted in violation of Article 40. Consequently, the ruling of the Supreme Court in **Cariño vs. Cariño** applying the provisions of Article 148 to a void marriage under Article 40 appears to be erroneous as it contradicts the explicit mandate of Article 43(2), in relation to Article 50.

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[382]Art. 43(2), in relation to Art. 50, FC.

[383]Cariño vs. Cariño, *supra*, p. 135; citing Sempio-Diy, Handbook on the Family Code of the Philippines, pp. 233-234 (1995).

If the Family Code itself does not classify as bigamous the subsequent marriage contracted in violation of Article 40, then the ruling in the *Mercado* case, to the effect that a party who enters into a subsequent marriage without first obtaining a judicial declaration of nullity of the previous marriage is guilty of bigamy, must be revisited.

It is a cardinal principle in criminal law that penal statutes are strictly construed against the Government and liberally in favor of the accused[384] in cases where the law is ambiguous and there is doubt as to its interpretation.[385] Since Article 40 of the Family Code, which is the basis of the ruling in the *Mercado* case, does not expressly declare that a subsequent marriage contracted in violation thereof is bigamous, it cannot be said with certainty that such subsequent marriage is indeed bigamous. On the contrary, if Article 40 is to be interpreted in conjunction with Article 50, what is certain is that the marriage declared void under Article 40 is distinct and separate from a bigamous marriage which is declared void under Article 35(4). If in the Family Code itself there is doubt as to whether a subsequent marriage entered into in violation of Article 40 is bigamous or not, there is more reason to doubt the applicability of Article 40 to the crime of bigamy under Article 349 of the Revised Penal Code.

As correctly stated by Justice Vitug in **Valdez vs. Regional Trial Court, Br. 102, Quezon City**,[386] in now requiring for purposes of remarriage, the declaration of nullity by final judgment of the previously contracted void marriage, the present law simply aims to do away with any continuing uncertainty of the status of the second marriage. In other words, the purpose of the law is to clarify the status of the subsequent marriage as void *ab initio* — which is a civil law rule. The new law did not clearly intend to change the law on bigamy; otherwise, Article 40 could have expressly declared that violation of its provisions would render the subsequent marriage bigamous.

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[384]U.S. vs. Abad Santos, 36 Phil. 243; People vs. Yu Hai, 99 Phil. 728; cited in I Reyes, Revised Penal Code, 13th ed., p. 17).

[385]People vs. Gatchalian, 104 Phil. 664; cited in I Reyes, Revised Penal Code, 13th ed., p. 17).

[386]*Supra*, at p. 233.

Mercado vs. Tan
337SCRA 122 (2000)

FACTS: Dr. Vincent Mercado and Ma. Consuelo Tan were married on June 27, 1991 before a judge of the lower court. In the marriage contract, the status of Dr. Mercado was stated as "single." At that time, however, Dr. Mercado was actually married to Ma. Thelma Olivia. He got married with Ma. Thelma on April 10, 1976. On October 5, 1992, a letter-complaint for bigamy was filed by Ma. Consuelo, through counsel, with the City Prosecutor of Bacolod City, which eventually resulted in the filing of the criminal case for bigamy with the Regional Trial Court of Bacolod City. More than a month after the bigamy case was filed in the prosecutor's office, the accused filed an action for Declaration of Nullity of Marriage against Ma. Thelma Olivia before the Regional Trial Court of Cebu City. In a decision dated May 6, 1993, the marriage between the accused and Ma. Thelma was declared null and void. He was convicted, however, by the trial court of bigamy. The Court of Appeals affirmed the trial court's decision. Hence, Dr. Mercado appealed to the Supreme Court. On appeal, Dr. Domingo contends that he is not liable for bigamy because he was able to obtain a judicial declaration of nullity of his first marriage. Thus, he argues that there is no first marriage to speak of.

Mr. Justice Artemio V. Panganiban, *ponente:*

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Moreover, Justice Reyes, an authority in Criminal Law whose earlier work was cited by petitioner, changed his view on the subject in view of Article 40 of the Family Code and wrote in 1993 that a person must first obtain a judicial declaration of the nullity of a void marriage before contracting a subsequent marriage (citing Reyes. Revised Penal Code, Book Two, 13th ed. [1993], p. 829):

"It is now well-settled that the fact that the first marriage is void from the beginning is not a *defense in* a *bigamy charge. As with* a *voidable marriage, there must be* a *judicial declaration of the nullity of* a *marriage before contracting the second marriage.* Article 40 of the Family Code states that xxx. The Code Commission believes that the parties to a marriage should not be allowed to assume that their marriage is void, even if such is the fact, but must first secure a judicial declaration of nullity of their marriage before they should be allowed to marry again xxx."

In the instant case, petitioner contracted a second marriage although there was yet no judicial declaration of nullity of his first marriage. In fact, he instituted the Petition to have the first marriage declared void only after complainant had filed a letter-

complaint charging him with bigamy. By contracting a second marriage while the first was still subsisting, he committed the acts punishable under Article 349 of the Revised Penal Code.

That he subsequently obtained a judicial declaration of the nullity of the first marriage was immaterial. To repeat, the crime had already been consummated by then. Moreover, his view effectively encourages delay in the prosecution of bigamy cases; an accused could simply file a petition to declare his previous marriage void and invoke the pendency of that action as a prejudicial question in the criminal case. We cannot allow that.

Under the circumstances of the present case, he is guilty of the charge against him.

Concurring and Dissenting Opinion, **Mr. Justice Jose C. Vitug:**

At the pith of the controversy is the defense of the absolute nullity of a previous marriage in an indictment for bigamy. The majority opinion, penned by my esteemed brother, Mr. Justice Artemio V. Panganiban, enunciates that it is only a judicially decreed prior void marriage which can constitute a defense against the criminal charge.

The *civil law* rule stated in Article 40 of the Family Code is a given but I have strong reservations on its application beyond what appears to be its expressed context.

The subject of the instant petition is a criminal prosecution, not a civil case, and the *ponencia* affirms the conviction of petitioner Vincent Paul G. Mercado for bigamy.

Article 40 of the Family Code reads:

"ART. 40. The absolute nullity of a previous marriage may be invoked for purposes of remarriage on the basis solely of a final judgment declaring such previous marriage void."

The phrase "for purposes of remarriage" is not at all insignificant. Void marriages, like void contracts, are inexistent from the very beginning. It is only by way of exception that the Family Code requires a judicial declaration of nullity of the previous marriage before a subsequent marriage is contracted; without such declaration, the validity and the full legal consequence of the subsequent marriage would itself be in similar jeopardy under Article 53, in relation to Article 52, of the Family Code. Parenthetically, I would daresay that the necessity of a judicial declaration of nullity of a void marriage for the purpose of remarriage should be held to refer

merely to cases where it can be said that a marriage, at least ostensibly, had taken place. No such judicial declaration of nullity, in my view, should still be deemed essential when the "marriage," for instance, is between persons of the same sex or when either or both parties had not at all given consent to the "marriage." Indeed, it is likely that Article 40 of the Family Code has been meant and intended to refer only to marriages declared void under the provisions of Articles 35, 36, 37, 38 and 53 thereof.

In fine, the Family Code I respectfully submit, did not have the effect of overturning the rule in criminal law and related jurisprudence. The Revised Penal Code express:

"Art. 349. *Bigamy.* — The penalty of *prision mayor* shall be imposed upon any person who shall contract a second or subsequent marriage *before the former marriage has been legally dissolved,* or before the absent spouse has been declared presumptively dead by means of a judgment rendered in the proper proceedings.

Surely, the foregoing provision contemplated an existing, not void, prior marriage. Covered by Article 349 would thus be, for instance, a voidable marriage, it obviously being valid and subsisting until set aside by a competent court. As early as *People vs. Aragon,* this Court has underscored:

"xxx Our Revised Penal Code is of recent enactment and had the rule enunciated in Spain and in America requiring judicial declaration of nullity of *ab initio* void marriages been within the contemplation of the legislature, an express provision to that effect would or should have been inserted in the law. In its absence, we are bound by said rule of strict interpretation."

Unlike a voidable marriage which legally exists until judicially annulled (and therefore not a defense in bigamy if the second marriage were contracted prior to the decree of *annulment),* the complete *nullity* however, of a previously contracted marriage, being a total nullity and inexistent, should be capable of being independently raised by way of a defense in a criminal case for bigamy. I see no incongruence between this rule in criminal law and that of the Family Code, and each may be applied within the respective spheres of governance.[387]

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[387]At pp. 135-136.

Marbella-Bobis vs. Bobis
336 SCRA 747 (2000)

FACTS: On October 1985, Isagani Bobis contracted a first marriage with one Maria Dulce Javier. Without said marriage having been annulled, nullified or terminated, he contracted a second marriage with Imelda Marbella-Bobis in 1996 and allegedly a third marriage with a certain Julia Sally Hernandez. Based on Imelda's complaint-affidavit, an information for bigamy was filed against Isagani in 1998. Sometime thereafter, Isagani initiated a civil action for the judicial declaration of absolute nullity of his first marriage on the ground that it was celebrated without a marriage license. Isagani then filed a motion to suspend the proceedings in the criminal case for bigamy invoking the pending civil case for nullity of the first marriage as a prejudicial question to the criminal case. The trial court granted the motion to suspend the criminal case. Imelda filed a motion for reconsideration, but the same was denied. Hence, Imelda filed a petition for review on *certiorari* before the Supreme Court.

Mme. Justice Consuelo Ynares-Santiago, ***ponente:***

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> Article 40 of the Family Code, which was effective at the time of celebration of the second marriage, requires a prior judicial declaration of nullity of a previous marriage before a party may remarry. The clear implication of this is that it is not for the parties, particularly the accused, to determine the validity or invalidity of the marriage. Whether or not the first marriage was void for lack of a license is a matter of defense because there is still no judicial declaration of its nullity at the time the second marriage was contracted. It should be remembered that bigamy can successfully be prosecuted provided all its elements concur — two of which are a previous marriage and a subsequent marriage which would have been valid had it not been for the existence at the material time of the first marriage.
>
> In the case at bar, respondent's clear intent is to obtain a judicial declaration of nullity of his first marriage and thereafter to invoke that very same judgment to prevent his prosecution for bigamy. He cannot have his cake and eat it too. *Otherwise, all that an adventurous bigamist has to do is to disregard Article 40 of the Family Code, contract a subsequent marriage and escape a bigamy charge by simply claiming that the first marriage is void and that the subsequent marriage is equally void for lack of a prior judicial declaration of nullity of the first.* A party may even enter into a

marriage unaware of the absence of a requisite — usually the marriage license — and thereafter contract a subsequent marriage without obtaining a declaration of nullity of the first on the assumption that the first marriage is void. Such scenario would render nugatory the provisions on bigamy. As succinctly held in *Landicho vs. Relova*:

"(P)arties to the marriage should not be permitted to judge for themselves its nullity, for the same must be submitted to the judgment of the competent courts and only when the nullity of the marriage is so declared can it be held as void, and so long as there is no such declaration the presumption is that the marriage exists. Therefore, he who contracts a second marriage before the judicial declaration of nullity of the first marriage assumes the risk of being prosecuted for bigamy."

Respondent alleges that the first marriage in the case before us was void for lack of a marriage license. Petitioner, on the other hand, argues that her marriage to respondent was exempt from the requirement of a marriage license. More specifically, petitioner claims that prior to their marriage, they had already attained the age of majority and had been living together as husband and wife for at least five years. The issue in this case is limited to the existence of a prejudicial question, and we are not called upon to resolve the validity of the first marriage. Be that as it may, suffice it to state that the Civil Code, under which the first marriage was celebrated, provides that "every intendment of the law or fact leans towards the validity of marriage, the indissolubility of the marriage bonds." Hence, parties should not be permitted to judge for themselves the nullity of their marriage, for the same must be submitted to the determination of competent courts. Only when the nullity of the marriage is so declared can it be held as void, and so long as there is no such declaration the presumption is that the marriage exists. No matter how obvious, manifest or patent the absence of an element is, the intervention of the courts must always be resorted to. That is why Article 40 of the Family Code requires a "final judgment," which only the courts can render. Thus, as ruled in *Landicho vs. Relova,* he who contracts a second marriage before the judicial declaration of nullity of the first marriage assumes the risk of being prosecuted for bigamy, and in such a case the criminal case may not be suspended on the ground of the pendency of a civil case for declaration of nullity. In a recent case for concubinage, we held that the pendency of a civil case for declaration of nullity of marriage is not a prejudicial question. This ruling applies here by analogy since both crimes presuppose the subsistence of a marriage.

Ignorance of the existence of Article 40 of the Family Code cannot even be successfully invoked as an excuse. The contracting of a marriage knowing that the requirements of the law have not been complied with or that the marriage is in disregard of a legal impediment is an act penalized by the Revised Penal Code. The legality of a marriage is a matter of law and every person is presumed to know the law. As respondent did not obtain the judicial declaration of nullity when he entered into the second marriage, why should he be allowed to belatedly obtain the judicial declaration in order to delay his criminal prosecution and subsequently defeat it by his own disobedience of the law. If he wants to raise the nullity of the previous marriage, he can do it as a matter of defense when he presents his evidence during the trial proper in the criminal case.

The burden of proof to show the dissolution of the first marriage before the second marriage was contracted rests upon the defense, but that is a matter that can be raised in the trial of the bigamy case. In the meantime, it should be stressed that not every defense raised in the civil action may be used as a prejudicial question to obtain the suspension of the criminal action. The lower court, therefore, erred in suspending the criminal case for bigamy. Moreover, when respondent was indicted for bigamy, the fact that he entered into two marriage ceremonies appeared indubitable. It was only after he was sued by petitioner for bigamy that he thought of seeking a judicial declaration of nullity of his first marriage. The obvious intent, therefore, is that respondent merely resorted to the civil action as a potential prejudicial question for the purpose of frustrating or delaying his criminal prosecution. As has been discussed above, this cannot be done.

In the light of Article 40 of the Family Code, respondent, without first having obtained the judicial declaration of nullity of the first marriage, can not be said to have validly entered into the second marriage. Per current jurisprudence, a marriage though void still needs a judicial declaration of such fact before any party can marry again; otherwise the second marriage will also be void. The reason is that, without a judicial declaration of its nullity, the first marriage is presumed to be subsisting. In the case at bar, respondent was for all legal intents and purposes regarded as a married man at the time he contracted his second marriage with petitioner. Against this legal backdrop, any decision in the civil action for nullity would not erase the fact that respondent entered into a second

marriage during the subsistence of a first marriage. Thus, a decision in the civil case is not essential to the determination of the criminal charge. It is, therefore, not a prejudicial question. As stated above, respondent cannot be permitted to use his own malfeasance to defeat the criminal action against him.[388]

Art. 41. A marriage contracted by any person during the subsistence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouse had been absent for four consecutive years and the spouse present had a well-founded belief that the absent spouse was already dead. In case of disappearance where there is danger of death under the circumstances set forth in the provisions of Article 391 of the Civil Code, an absence of only two years shall be sufficient.

For the purpose of contracting the subsequent marriage under the preceding paragraph, the spouse present must institute a summary proceeding as provided in this Code for the declaration of presumptive death of the absentee, without prejudice to the effect of reappearance of the absent spouse. (83a)

Art. 42. The subsequent marriage referred to in the preceding Article shall be automatically terminated by the recording of the affidavit of reappearance of the absent spouse, unless there is a judgment annulling the previous marriage or declaring it void *ab initio.*

A sworn statement of the fact and circumstances of reappearance shall be recorded in the civil registry of the residence of the parties to the subsequent marriage at the instance of any interested person, with due notice to the spouses of the subsequent marriage and without prejudice to the fact of reappearance being judicially determined in case such fact is disputed. (n)

COMMENTS:

§ 63. Subsequent Bigamous Marriage Under Article 41

[63.1] General rule
[63.2] Exception: subsequent bigamous marriage under article 41
[63.2] Old rule
[63.4] Judicial declaration of presumptive death

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[388] At pp. 752-756.

[63.5] Requisites for declaration of presumptive death
[63.6] Effects of judicial declaration of presumptive death
[63.7] Effects of recording of affidavit of reappearance
[60.8] Who can file affidavit of reappearance

[63.1] General Rule

Generally, any marriage contracted by any person during the subsistence of a previous marriage shall be null and void[389] and any person who shall contract a second or subsequent marriage before the former marriage has been legally dissolved, or before the absent spouse has been declared presumptively dead by means of a judgment rendered in the proper proceedings is guilty of the crime of bigamy.[390]

[63.2] Exception: Subsequent Bigamous Marriage under Article 41

Under Article 41 of the Family Code, a subsequent bigamous marriage may exceptionally be considered valid if the following conditions concur:

(a) The prior spouse of the contracting party must have been absent for four consecutive years, or two years where there is danger of death under the circumstances stated in Article 391 of the Civil Code at the time of disappearance;

(b) The spouse present has a well-founded belief that the absent spouse is already dead; and

(c) There is a judicial declaration of presumptive death of the absentee for which purpose the spouse present can institute a summary proceeding in court to ask for that declaration.

The last condition is consistent and in consonance with the requirement of judicial intervention in subsequent marriages as so provided in Article 41, in relation to Article 40, of the Family Code.[391]

[389] Art. 41 & Art. 35(4), Family Code.
[390] Art. 349, Revised Penal Code.
[391] Armas vs. Calisterio, 330 SCRA 201, 206 (2000).

[63.3] Old Rule

Prior to the effectivity of the Family Code, the applicable provision with respect to a valid subsequent bigamous marriage is Article 83 of the New Civil Code which provides:

> "Art. 83. Any marriage subsequently contracted by any person during the lifetime of the first spouse of such person with any other person other than such first spouse shall be illegal and void from its performance, unless:
>
> (1) The first marriage was annulled or dissolved; or
>
> (2) The first spouse had been absent for seven consecutive years at the time of the second marriage without the spouse present having news of the absentee being alive, or if the absentee, though he has been absent for less than seven years, is generally considered as dead and believed to be so by the spouse present at the time of the contracting such subsequent marriage, or if the absentee is presumed dead according to articles 390 and 391. The marriage so contracted shall be valid in any of the three cases until decreed null and void by a competent court."

When Article 41 is compared with the old provision of the Civil Code, which it superseded, the following crucial differences emerge. Under Article 41, the time required for the presumption to arise has been shortened to four (4) years; however, there is need for a judicial declaration of presumptive death to enable the spouse present to remarry. Also, Article 41 of the Family Code imposes a stricter standard than the Civil Code; Article 83 of the Civil Code merely requires that there be *no news that such absentee is still alive;* or the absentee is *generally considered to be dead* and *believed to be so by the spouse present,* or is *presumed dead* under Articles 390 and 391 of the Civil Code. The Family Code, upon the other hand, prescribes a *"well-founded belief"* that the absentee is *already dead* before a petition for declaration of presumptive death can be granted.[392]

[392]Republic vs. Nolasco, 220 SCRA 20, 24-25 (1993).

[63.4] Judicial Declaration of Presumptive Death

Under the Family Code, there must be a judicial declaration of presumptive death; otherwise the subsequent marriage is void *ab initio* for being a bigamous marriage.[393] Under the Civil Code, however, a judicial declaration of presumptive death is not necessary as long as the prescribed period of absence is met. Thus, if the subsequent marriage took place prior to the effectvity of the Family Code, the same is considered valid notwithstanding the absence of a judicial declaration of presumptive death.[394]

Armas vs. Calisterio
330 SCRA 201 (2000)

FACTS: On April 24, 1992, Teodorico Calisterio died intestate, leaving several parcels of land with an estimated value of P604,750.00. He was survived by his wife, Marietta Calisterio. Teodorico was the second husband of Marietta who had previously been married to James William Bounds on January 13, 1946 in Caloocan City. James Bounds disappeared without a trace on February 11,1947. After eleven years or on May 8,1958, Teodorico and Marietta were married without Marietta having priorly secured a court declaration that James was presumptively dead. Upon Teodorico's death, his sister, Antonia Armas y Calisterio, filed a petition for the appointment of her son as the administrator of the intestate estate of the late Teodorico. In her petition, Armas claimed that the marriage of Teodorico and Marietta was bigamous and that she was the only surviving heir of the deceased. In her opposition to the petition, Marietta claimed that her first marriage with James Bounds had been dissolved due to the latter's absence, his whereabouts being unknown, for more than eleven years before she contracted her second marriage with Teodorico. Contending to be the surviving spouse of Teodorico, she sought priority in the administration of the estate of the decedent. The trial court thereafter issued an order jointly appointing the son of Armas and Marietta as administrator and administratrix, respectively, of the estate. On June 17, 1996, the trial court rendered its decision declaring Armas as the sole heir of the deceased. Marietta appealed the decision. The Court of Appeals, however, reversed the decision. The appellate court sustained the validity of Marietta's marriage with the deceased. Hence, Armas appealed to the Supreme Court.

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[393]Arts. 41 & 35(4), Family Code.
[394]Armas vs. Calisterio, *supra.*

Mr. Justice Jose C. Vitug, ***ponente:***

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The marriage between the deceased Teodorico and respondent Marietta was solemnized on 08 May 1958. The law in force at that time was the Civil Code, not the Family Code which took effect only on 03 August 1988. Article 256 of the family Code itself limited its retroactive governance only to cases where it thereby would not prejudice or impair vested or acquired rights in accordance with the Civil Code or other laws.

Verily, the applicable specific provision in the instant controversy is Article 83 of the New Civil Code which provides:

"Art. 83. Any marriage subsequently contracted by any person during the lifetime of the first spouse of such person with any other person other than such first spouse shall be illegal and void from its performance, unless:

"(1) The first marriage was annulled or dissolved; or

"(2) The first spouse had been absent for seven consecutive years at the time of the second marriage without the spouse present having news of the absentee being alive, or if the absentee, though he has been absent for less than seven years, is generally considered as dead and believed to be so by the spouse present at the time of the contracting such subsequent marriage, or if the absentee is presumed dead according to articles 390 and 391. The marriage so contracted shall be valid in any of the three cases until decreed null and void by a competent court."

Under the foregoing provisions, a subsequent marriage contracted during the lifetime of the first spouse is illegal and void *ab initio* unless the prior marriage is first annulled or dissolved. Paragraph (2) of the law gives exceptions from the above rule. For subsequent marriage referred to in the three exceptional cases therein provided to be held valid, the spouse present (not the absentee spouse) so contracting the later marriage must have done so in good faith. Bad faith imports a dishonest purpose or some moral obliquity and conscious doing of wrong — it partakes of the nature of fraud, a breach of a known duty through some motive of interest or ill will. The Court does not find these circumstances to be here extant.

A judicial declaration of absence of the absentee spouse is not necessary as long as the prescribed period of absence is met. It

is equally noteworthy that the marriage in these exceptional cases are, by the explicit mandate of Article 83, to be deemed valid "until declared null and void by a competent court." It follows that the burden of proof would be, in these cases, on the party assailing the second marriage.

In contrast, under the 1988 Family Code, in order that a subsequent bigamous marriage may exceptionally be considered valid, the following conditions must concur, *viz.:* (a) The prior spouse of the contracting party must have been absent for four consecutive years, or two years where there is danger of death under the circumstances stated in Article 391 of the Civil Code at the time of disappearance; (b) the spouse present has a well-founded belief that the absent spouse is already dead; and (c) there is, unlike the old rule, a judicial declaration of presumptive death of the absentee for which purpose the spouse present can institute a summary proceeding in court to ask for that declaration. The last condition is consistent and in consonance with the requirement of judicial intervention in subsequent marriages as so provided in Article41, in relation to Article 40 of the Family Code.

In the case at bar, it remained undisputed that respondent Marietta's first husband, James William Bounds, had been absent or had disappeared for more than eleven years before she entered into a second marriage in 1958 with the deceased Teodorico Calisterio. *This second marriage, having been contracted during the regime* of *the Civil Code, should thus be deemed valid notwithstanding the absence* of a *judicial declaration* of *presumptive death* of *James Bounds.* (Italics supplied)

The conjugal property of Teodorico and Marietta, no evidence having been adduced to indicate another property regime between the spouses, pertains to them in common. Upon its dissolution with the death of Teodorico, the property should rightly be divided in two equal portions — one portion going to the surviving spouse and the other portion to the estate of the deceased spouse. The successional right in intestacy of a surviving spouse over the net estate of the deceased, concurring with legitimate brothers and sisters or nephews and nieces (the latter by right of representation), is one-half of the inheritance, the brothers and sisters or nephews and nieces, however, being entitled to the other half. Nephews and nieces, however, can only succeed by right or representation in the presence of uncles and aunts; alone, upon the other hand, nephews and nieces can succeed in their own right which is to say that brothers

and sisters exclude nephews and nieces except only in representation by the latter of their parents who predecease or are incapacitated to succeed. The appellate court has thus erred in granting, in paragraph (c) of the dispositive portion of its judgment, successional rights, to petitioner's children, along with their own mother Antonia who herself is invoking successional rights over the estate of her deceased brother.[395]

[63.5] Requisites for Declaration of Presumptive Death

In **Republic vs. Nolasco**,[396] the Supreme Court enumerates the requisites for the issuance of a judicial declaration of presumptive death, to wit:

(a) That the absent spouse has been missing for four consecutive years, or two consecutive years if the disappearance occurred where there is danger of death under the circumstances laid down in Article 391, Civil Code;

(b) That the present spouse wishes to remarry;

(c) That the present spouse has a well-founded belief that the absentee spouse is dead; and

(d) That the present spouse files a summary proceeding for the declaration of presumptive death of the absentee.

Republic vs. Nolasco
220 SCRA 20, G.R. No. 94053, March 17, 1993

FACTS: Gregorio Nolasco filed before the Regional Trial Court of Antique a petition for the declaration of presumptive death of his wife Janet Monica Parker, invoking Article 41 of the Family Code. The Republic of the Philippines opposed the petition through the Provincial Prosecutor of Antique who had been deputized to assist the Solicitor General in the case. During trial, Nolasco testified that he was a seaman and that he had first met Parker, a British subject, in a bar in England during one of his ship's port calls. From that chance meeting onwards, Parker lived with Nolasco on his ship for six months until

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[395]At pp. 204-207.
[396]*Supra*.

they returned to Nolasco's hometown of San Jose, Antique in 1980 after his seaman's contract expired. On January 1982, Nolasco married Parker in San Jose, Antique. After the marriage celebration, Nolasco obtained another employment as a seaman and left his wife with his parents in Antique. Sometime in 1983, while working overseas, Nolasco received a letter from his mother informing him that Parker had left Antique. Nolasco claimed he then immediately asked permission to leave ship to return home. He arrived in Antique in November 1983. Nolasco further testified that his efforts to look for her himself whenever his ship docked in England proved fruitless. He also stated that all the letters he had sent to his missing spouse at No. 38 Ravena Road, Allerton, Liverpool, England, the address of the bar where he and Parker first met, were all returned to him. He also claimed that he inquired from among friends but they too had no news of Parker. On cross-examination, Nolasco stated that he had lived with and later married Parker despite his lack of knowledge as to her family background. He insisted that his wife continued to refuse to give him such information even after they were married. He also testified that he did not report the matter of Parker's disappearance to the Philippine government authorities. Nolasco likewise presented her mother as his witness. After trial, the trial court granted Nolasco's petition. The Republic appealed to the Court of Appeals but the appellate court affirmed the decision. Hence, the Republic appealed to the Supreme Court.

Mr. Justice Florentino P. Feliciano, ***ponente:***

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> The present case was filed before the trial court pursuant to Article 41 of the Family Code which provides that:
>
> "Art. 41. A marriage contracted by any person during the subsistence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouse had been absent for four consecutive years and *the spouse present had* a *well-founded belief that the absent spouse was already dead.* In case of disappearance where there is danger of death under the circumstances set forth in the provisions of Article 391 of the Civil Code, an absence of only two years shall be sufficient.
>
> For purposes of contracting the subsequent marriage under the preceding paragraph, the spouse present must institute a summary proceeding as provided in this Code for the declaration of presumptive death of the absentee, without prejudice to the effect of reappearance of the absentee spouse." (Italics supplied)
>
> When Article 41 is compared with the old provision of the Civil Code, which it superseded, the following crucial differences

emerge. Under Article 41, the time required for the presumption to arise has been shortened to four (4) years; however, there is need for a judicial declaration of presumptive death to enable the spouse present to remarry. Also, Article 41 of the Family Code imposes a stricter standard than the Civil Code; Article 83 of the Civil Code merely requires that there be *no news that such absentee is still alive;* or the absentee is *generally considered to be dead* and *believed* to *be* so *by the spouse present,* or is *presumed dead* under Articles 390 and 391 of the Civil Code. The Family Code, upon the other hand, prescribes a *"well-founded belief"* that the absentee is *already dead* before a petition for declaration of presumptive death can be granted.

As pointed out by the Solicitor General, there are four (4) requisites for the declaration of presumptive death under Article 41 of the Family Code.

"1. That the absent spouse has been missing for four consecutive years, or two consecutive years if the disappearance occurred where there is danger of death under the circumstances laid down in Article 391, Civil Code;

2. That the present spouse wishes to remarry;

3. That the present spouse has a well-founded belief that the absentee spouse is dead; and

4. That the present spouse files a summary proceeding for the declaration of presumptive death of the absentee."

Respondent naturally asserts that he had complied with all these requirements. Petitioner's argument, upon the other hand, boils down to this: that respondent failed to prove that he had complied with the third requirement, i.e., the existence of a "well-founded belief" that the absent spouse is already dead.

The Court believes that respondent Nolasco failed to conduct a *search for his missing wife with such diligence* as *to give rise to* a *"well-founded belief" that she is dead.* (Italics supplied)

[63.6] Effects of judicial declaration of presumptive death

Upon compliance with the requisites mentioned in Article 41, the spouse present may contract a subsequent marriage after obtaining a judicial declaration of presumptive death of the absentee. With such

declaration, the absentee shall be presumed dead, but only for the purpose of allowing the spouse present to contract a subsequent marriage. In effect, the law likewise presumes the termination of the previous marriage following the judicial declaration of presumptive death of the absentee spouse since death of one of the spouses results in the termination of the marriage. Since the presumptive death of the absentee results in a presumption of termination of the previous marriage, the spouse present will then be capacitated to contract a subsequent marriage. Note, however, that the judicial declaration of presumptive death of the absentee is without prejudice to the effect of his reappearance. Once the reappearance of the absentee spouse is clearly established in the manner required by law, the presumption of death of the absentee is rendered ineffective. Under the Family Code, an affidavit of reappearance of the absentee spouse is required to be recorded in the civil registry of the residence of the parties to the subsequent marriage.[397] If the fact of reappearance is not disputed, the recording of such affidavit has the effect of rendering the presumption of death of the absentee ineffective. Consequently, the presumption of termination of the previous marriage is likewise overthrown thereby resulting in the automatic termination of the subsequent marriage[398] and resumption of all the rights, obligations and effects of the previous marriage. But the subsequent marriage, though contracted during the subsistence of the previous marriage, is exceptionally recognized as valid[399] if both parties thereto did not act in bad faith.[400]

What is the effect of such judicial declaration on the property regime of the previous marriage? While the Family Code is not clear on the effects of such declaration upon the property regime of the previous marriage, if the presumption of death of the absentee is to be carried to its logical conclusion, such presumptive death of the absentee necessarily results in a presumption of termination of the previous marriage and the dissolution of the absolute community regime[401] or of the conjugal partnership,[402] as the case may be.

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[397]Art. 42, 2nd par., FC.
[398]Art. 42, 1st par., FC.
[399]Art. 41, FC.
[400]Art. 44, FC.
[401]Art. 99(1), FC.
[402]Art. 126(1), FC.

[63.7] Effects of Recording of Affidavit of Reappearance

The mere reappearance of the absentee spouse does not terminate the subsequent marriage. Under the law, it is the recording of the affidavit of reappearance of the absentee spouse in the civil registry of the residence of the parties to the subsequent marriage which results in the automatic termination of the subsequent marriage.[403] Note that this is the only instance where the law recognizes as valid an extra-judicial termination of a marriage. Since the termination of the subsequent marriage is "automatic" and without need of judicial intervention, the second spouse (of the spouse present), barring the existence of other impediments, may immediately contract another marriage since the requirements in Article 52 of the Family Code do not apply in the case of extra-judicial termination of the subsequent marriage under Article 41.

The affidavit of reappearance must state the facts and circumstances surrounding the reappearance of the absentee spouse and the same must be recorded in the civil registry of the residence of the parties to the subsequent marriage.[404] The spouses of the subsequent marriage are required to be notified of the fact of recording to enable them to dispute the fact of reappearance in a judicial proceeding if there is doubt as to its authenticity.

[63.8] Who Can File Affidavit of Reappearance

The affidavit of reappearance required in Article 42 may be executed and filed by "any interested person," and not only by the reappearing spouse. Obviously, any of the parties to the previous and subsequent marriages may qualify as an interested person for purposes of filing the affidavit of reappearance. Such being the case, the second spouse (of the spouse present) may cause the automatic termination of his or her marriage to the spouse present by simply recording the required affidavit of reappearance, without prejudice to the fact of reappearance being judicially determined in case such fact is disputed.

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[403] Art. 42, FC.
[404] *Id.*

Art. 43. The termination of the subsequent marriage referred to in the preceding Article shall produce the following effects:

(1) The children of the subsequent marriage conceived prior to its termination shall be considered legitimate, and their custody and support in case of dispute shall be decided by the court in a proper proceeding;

(2) The absolute community of property or the conjugal partnership, as the case may be, shall be dissolved and liquidated, but if either spouse contracted said marriage in bad faith, his or her share of the net profits of the community property or conjugal partnership property shall be forfeited in favor of the common children or, if there are none, the children of the guilty spouse by a previous marriage or in default of children, the innocent spouse;

(3) Donations by reason of marriage shall remain valid, except that if the donee contracted the marriage in bad faith, such donations made to said donee are revoked by operation of law;

(4) The innocent spouse may revoke the designation of the other spouse who acted in bad faith as beneficiary in any insurance policy, even if such designation be stipulated as irrevocable; and

(5) The spouse who contracted the subsequent marriage in bad faith shall be disqualified to inherit from the innocent spouse by testate and intestate succession. (n)

Art. 44. If both spouses of the subsequent marriage acted in bad faith, said marriage shall be void *ab initio* and all donations by reason of marriage and testamentary dispositions made by one in favor of the other are revoked by operation of law. (n)

COMMENTS:

§ 64. Effects of Termination of Subsequent Marriage

[64.1] Status of children
[64.2] Dissolution and liquidation of property regime
[64.3] Effect on donation propter nuptias
[64.4] Effect on designation of one spouse as beneficiary in insurance policy
[64.5] Disqualification to inherit from innocent spouse
[64.6] Where both parties acted in bad faith

The automatic termination of the subsequent marriage referred to in Article 41 brought about by the recording of the affidavit of reappearance of the absentee spouse shall produce the following effects:

[64.1] Status of Children

Since the law exceptionally recognized as valid the subsequent marriage referred to in Article 41, children of such marriage conceived prior to its termination are considered legitimate.[405] With respect to the custody and support of such children, the same may be the subject of an agreement between the spouses to the subsequent marriage. In case of dispute, the matter shall be decided by the court in a proper proceeding.

[64.2] Dissolution and Liquidation of Property Regime

Upon the termination of the subsequent marriage referred to in Article 41, the absolute community or the conjugal partnership, as the case may be, shall be dissolved and liquidated.[406] If either spouse has contracted the marriage in bad faith, his or her share of the net profits of the community property or conjugal partnership property shall be forfeited in favor of the common children or, if there are none, the children of the guilty spouse by a previous marriage or in default thereof, the innocent spouse.[407] The procedure for the liquidation of the absolute community or of the conjugal partnership is discussed thoroughly under Articles 102 and 129 of the Family Code.

[64.3] Effect on Donation *Propter Nuptias*

Donations by reason of marriage (or "donation propter nuptias") are those which are made before its celebration, in consideration of the same, and in favor of one or both of the future spouses.[408] In donations *propter nuptias*, it is necessary that the donee should be one or both of the spouses, although the donor may either be a third person or one of the spouses. Upon the termination of the subsequent marriage as a result of the recording of the affidavit of reappearance of the absentee spouse, donations *propter nuptias*, as a rule, remain valid.[409] However, if the donee contracted the marriage in bad faith, such donations made to said donee are revoked by operation of law.[410] If both spouses contracted the

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[405] Art. 43(1), FC.
[406] Art. 43(2), FC.
[407] *Id.*
[408] Art. 82, FC.
[409] Art. 43(3), FC.
[410] *Id.*

marriage in bad faith, in which case the subsequent marriage is void *ab initio*, all donations by reason of marriage are likewise revoked by operation of law.[411]

[64.4] Effect on Designation of One Spouse as Beneficiary in Insurance Policy

Under the Insurance Code, if the designation of the beneficiary in the insurance policy is irrevocable, the insured has no right to change the beneficiary he designated in the policy.[412] By way of exception, however, in the subsequent marriage referred to in Article 41, if one of the spouses acted in bad faith in contracting the marriage and he or she had been designated as the beneficiary in any insurance policy of the innocent spouse, the latter has the right to revoke such designation even if the designation be stipulated as irrevocable[413] upon the termination of the subsequent marriage by reason of the recording of the affidavit of reappearance of the absentee spouse.

[64.5] Disqualification to Inherit From Innocent Spouse

Upon the termination of the subsequent marriage, the parties thereto cease to be a legal heir of each other, unless the parties are collateral blood relatives within the fifth civil degree.[414] Even in the latter case, however, the disqualification to inherit by intestate succession provided under Article 43(5) still applies.[415] The spouse who contracted the subsequent marriage in bad faith is also disqualified to inherit from the innocent spouse by testate succession.[416] If both spouses contracted the subsequent marriage in bad faith, in which case the marriage is void *ab initio*, testamentary dispositions made by one in favor of the other are revoked by operation of law.[417]

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[411] Art. 44, FC.

[412] Sec. 11, Insurance Code.

[413] Art. 43(4), FC.

[414] Collateral blood relatives within the 5th civil degree are not prohibited from marrying each other (see Art. 38[1], FC); and under the law, they are considered legal heirs (see Art. 1010, NCC) entitled to inherit by intestate succession.

[415] Minutes of Committee Mtg., Aug. 30, 1986, pp. 16-17.

[416] Art. 43(5), FC.

[417] Art. 44, FC.

[64.6] Where Both Parties Acted In Bad Faith

Under the Civil Code, for the subsequent marriage referred to in the three exceptional cases provided in Article 83(2) to be held valid, it is essential that the spouse present (not the absentee spouse) so contracting the later marriage must have done so in good faith.[418] The good faith or bad faith of the other contracting party to the subsequent marriage is not all that consequential.[419] Under the Family Code, however, the subsequent marriage referred to in Article 41 is deemed to be valid unless "both spouses of the subsequent marriage acted in bad faith," in which case the subsequent marriage is declared by law to be void *ab initio*.[420] It seems that under the Family Code, if only one of the parties to the subsequent marriage acted in bad faith, whether it is the spouse present or the other party, the subsequent marriage remains valid.

What constitute "bad faith" under Article 44? Bad faith imports a dishonest purpose or some moral obliquity and conscious doing of wrong — it partakes of the nature of fraud, a breach of a known duty through some motive of interest or ill-will.[421] If Article 44 is to be read in conjunction with Articles 41, 42 and 43, it can be deduced that the subsequent marriage referred to in Article 41 is deemed to have been contracted in bad faith if a party thereto knows, at the time of the celebration of the marriage, that the absentee is still alive.

It may then be asked, is it possible for the spouse present to contract the marriage in bad faith even if he or she obtains a judicial declaration of presumptive death of the absentee prior to the celebration of the subsequent marriage? The answer must be in the affirmative; otherwise, the provisions of Article 44 will be rendered nugatory. It is obvious that if the subsequent marriage is contracted in the absence of a judicial declaration of presumptive death of the absentee spouse, such subsequent marriage is void *ab initio* for being a bigamous marriage.[422] Necessarily, Article 44 contemplates a situation where the subsequent

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[418]Armas vs. Calisterio, *supra*, at p. 205.
[419]Lapuz Sy vs. Eufemio, 43 SCRA 177.
[420]Art. 44, FC.
[421]Armas vs. Calisterio, *supra*, at p. 205.
[422]Art. 35(4), in relation to Art. 41, FC.

marriage is contracted after obtaining a judicial declaration of presumptive death. Such being the case, the existence of a judicial declaration of presumptive death is not a guarantee that the spouse present has acted in good faith in contracting the marriage since it is possible that after obtaining such declaration, but prior to the celebration of the subsequent marriage, the spouse present will become aware that the absentee is still alive. In other words, the law requires that the good faith should last up to the time of the celebration of the subsequent marriage.

Note that if both parties to the subsequent marriage referred to in Article 41 contracted the marriage in bad faith, the general rule in the opening sentence of Article 41 applies, in which case, the subsequent marriage is to be considered void *ab initio* since it is contracted during the subsistence of a previous marriage. In other words, if both parties in said subsequent marriage have acted in bad faith, their marriage is considered bigamous under Article 35 (4) and they shall be liable for the crime of bigamy notwithstanding the existence of the judicial declaration of presumptive death. In effect, the existence of such judicial declaration does not immunize the parties from liability for the crime of bigamy. Also, the effects applicable to void marriages under Article 35(4) also apply to the void marriage under Article 44.

Art. 45. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

(1) That the party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one, and the marriage was solemnized without the consent of the parents, guardian or person having substitute parental authority over the party, in that order, unless after attaining the age of twenty-one, such party freely cohabited with the other and both lived together as husband and wife;

(2) That either party was of unsound mind, unless such party after coming to reason, freely cohabited with the other as husband and wife;

(3) That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife;

(4) That the consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabited with the other as husband and wife;

(5) That either party was physically incapable of consummating the marriage with the other, and such incapacity continues and appears to be incurable; or

(6) That either party was afflicted with a sexually-transmissible disease found to be serious and appears to be incurable. (85a)

Art. 46. Any of the following circumstances shall constitute fraud referred to in Number 3 of the preceding Article:

(1) Non-disclosure of a previous conviction by final judgment of the other party of a crime involving moral turpitude;

(2) Concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband;

(3) Concealment of a sexually transmissible disease, regardless of its nature, existing at the time of the marriage; or

(4) Concealment of drug addiction, habitual alcoholism or homosexuality or lesbianism existing at the time of the marriage.

No other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage. (86a)

Art. 47. The action for annulment of marriage must be filed by the following persons and within the periods indicated herein:

(1) For causes mentioned in number 1 of Article 45, by the party whose parent or guardian did not give his or her consent, within five years after attaining the age of twenty-one; or by the parent or guardian or person having legal charge of the minor, at any time before such party has reached the age of twenty-one;

(2) For causes mentioned in number 2 of Article 45, by the sane spouse who had no knowledge of the other's insanity; or by any relative, guardian or person having legal charge of the insane, at any time before the death of either party; or by the insane spouse during a lucid interval or after regaining sanity;

(3) For causes mentioned in number 3 of Articles 45, by the injured party, within five years after the discovery of the fraud;

(4) For causes mentioned in number 4 of Article 45, by the injured party, within five years from the time the force, intimidation or undue influence disappeared or ceased;

(5) For causes mentioned in numbers 5 and 6 of Article 45, by the injured party, within five years after the marriage. (87a)

COMMENTS:

§ 65. Voidable Marriages

[65.1] Concept
[65.2] Annulment explained
[65.3] Characteristics of voidable marriages
[65.4] Enumeration of voidable marriages

[65.1] Concept

In general, a marriage is voidable if there is a defect in any of its essential requisites (legal capacity and consent).[423] A voidable marriage is considered valid and produces all its civil effects until it is set aside by final judgment of a competent court in an action for annulment.[424] A marriage that is annulled presupposes that it subsists but later ceases to have legal effects when it is terminated through a court action.[425] While the annulment of a marriage dissolves the special contract as if it had never been entered into, the law makes express provisions to prevent the effects of the marriage from being totally wiped out.[426] For example, the status of children conceived or born before the judgment of annulment has become final and executory is legitimate.[427] In other words, the annulment of a marriage does not destroy the juridical consequences which the marital union produced during its continuance.[428]

[65.2] Annulment Explained

Annulment, as applied to marriage in the Philippine setting, is the judicial or legal process of invalidating a voidable marriage. It is to be distinguished from an action for declaration of absolute nullity of a void marriage. The terms "annul" and "null and void" have different legal connotations and implications. Annul means to reduce to nothing; to nullify; to abolish; to do away with; whereas, null and void is something that does not exist from the beginning.[429] A marriage that is annulled

[423]Art. 4, 2nd par., FC.
[424]Suntay vs. Cojuangco-Suntay, 300 SCRA 760, 771 (1998).
[425]*Id.*
[426]*Id.*
[427]Art. 54, FC.
[428]Suntay vs. Cojuangco-Suntay, *supra*, at p. 771.
[429]*Id.*

presupposes that it subsists but later ceases to have legal effect when it is terminated through a court action.[430] But in a judicial declaration of absolute nullity of a void marriage, the court simply declares a status or condition which already exists from the very beginning.

[65.3] Characteristics of Voidable Marriages

A voidable marriage has the following characteristics: (1) It is valid until otherwise declared by the court;[431] (2) In a voidable marriage, the defect which serves as ground for annulment must be in existence at the time of the celebration of the marriage;[432] (3) A voidable marriage cannot be assailed collaterally except in a direct proceeding;[433] (4) A voidable marriage can be assailed only during the lifetime of the parties and not after death of either, in which case the parties and their offspring will be left as if the marriage had been perfectly valid;[434] (5) Only the parties to a voidable marriage can assail it;[435] (6) The action for annulment is subject to prescription;[436] and (7) The defect in a voidable marriage is generally subject to ratification[437] except for the grounds mentioned in paragraphs (5) and (6) of Article 45, which are not subject to ratification.

[65.4] Enumeration of Voidable Marriages

In the Philippines, the following marriages are considered voidable and subject to annulment: (1) where, at the time of its celebration, either party was eighteen years of age or over but below twenty-one and the marriage was solemnized without the parental consent of such party;[438] (2) where, at the time of its celebration, either party was of unsound mind;[439] (3) where, at the time of its celebration, the consent of either party was obtained by fraud;[440] (4) where, at the time of its cel-

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[430] *Id.*
[431] Niñal vs. Bayadog, *supra*, p. 134.
[432] Art. 45, FC.
[433] Niñal vs. Bayadog, *supra*, p. 134.
[434] *Id.*
[435] *Id.*
[436] Art. 47, FC.
[437] Niñal vs. Bayadog, *supra*, p. 134.
[438] Art. 45(1), FC.
[439] Art. 45(2), FC.
[440] Art. 45(3), FC.

ebration, the consent of either party was obtained by force, intimidation or undue influence;[441] (5) where, at the time of its celebration, either party was physically incapable of consummating the marriage with the other and such incapacity continues and appears to be incurable;[442] and (6) where, at the time of its celebration, either party was afflicted with a sexually-transmissible disease found to be serious and appears to be incurable.[443]

§ 66. Grounds for Annulment

a. No Parental Consent
b. Unsoundness of Mind
c. Fraud
d. Force, Intimidation or Undue Influence
e. Physical Incapability of Consummating Marriage
f. Sexually-transmissible Disease

§ 67. No Parental Consent

[67.1] In general
[67.2] Who must give consent
[67.3] Who may file annulment
[67.4] Prescriptive period
[67.5] Subject to ratification

[67.1] In General

While a person at least eighteen years of age is legally capacitated to contract marriage,[444] the law imposes a further requirement of obtaining "parental consent" if such party is "below twenty-one."[445] In the absence of such parental consent, the marriage is voidable and subject to annulment pursuant to the provisions of Articles 45(1) and 47(1) of the Family Code. In other words, the law deems to be insufficient the consent given by a party who is at least 18 years old but below 21. In the absence of parental consent, the law considers the consent given by such party as defective, thus rendering the marriage voidable.[446]

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[441] Art. 45(4), FC.
[442] Art. 45(5), FC.
[443] Art. 45(6), FC.
[444] Art. 5, FC.
[445] Art. 14, FC.
[446] Art. 4, 2nd par., FC; in relation to Art. 45(1), FC.

[67.2] Who Must Give Consent

Article 45 (1) must be read in conjunction with Article 14. Under Article 14, "parental consent" is required to be given by the *"father, mother, surviving parent or guardian, or persons having legal charge"* of a party whose age is at least 18 but below 21, in the order mentioned. Under Article 14, the consent of the father is required when the party who is at least 18 but below 21 is in the father's custody, and in such case his consent alone will satisfy the statute. If the father refuses to give his consent to a contemplated marriage where his consent is required, the mother cannot do anything.[447] However, if the party concerned is an illegitimate child, it is the mother who must give her consent to the marriage since illegitimate children are under the parental authority of their mother.[448] Also, where the father is dead, the consent of the mother is sufficient.[449]

[67.3] Who May File Annulment

If the ground for annulment is lack of parental consent, the action for annulment may be filed either: (1) by the person whose consent is required under Article 14 of the Family Code, but only in cases where the party whose parent did not give consent has not yet reached the age of 21; or (2) by the party whose parent did not give consent, but only in cases where such party has already reached the age of 21.[450] In other words, prior to attaining the age of 21, the party whose parent did not give consent has no legal standing to file the annulment case. On the other hand, if such party attains the age of 21, the person whose consent is required under Article 14 loses his or her legal standing to institute the annulment case.

[67.4] Prescriptive Period

If the petition for annulment is to be filed by the person whose consent is required under Article 14, the action is required to be instituted before the party (for whom no parental consent was given) reaches

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[447]Committee, June 7, 1986 Minutes, p. 3.
[448]See Art. 176, FC.
[449]Art. 14, FC.
[450]Art. 47(1), FC.

the age of 21.[451] If the action, on the other hand, is to be filed by the party whose parents did not give consent, the action may prosper only if such party has already reached the age of 21 and the action is filed within a period of five years after attaining the age of 21.[452] After such period, the action for annulment is already prescribed or barred by the statute of limitation.

[67.5] Subject to Ratification

A marriage that is annullable by reason of lack of parental consent is subject to ratification or confirmation.[453]

Ratification or confirmation is defined as the act or means by virtue of which efficacy is given to contract which suffers from vice of curable nullity.[454] Stated otherwise, it is the act by which a person, entitled to bring an action for annulment, with knowledge of the cause of annulment and after it has ceased to exist, validates the contract either expressly or impliedly.[455]

For the ratification to be effective, it must satisfy the following requisites: (1) the contract should be tainted with a vice which is susceptible of being cured; (2) the confirmation or ratification should be effected by the person who is entitled to do so under the law; (3) it should be effected with knowledge of the vice or defect of the contract; and (4) the cause of the nullity or defect should have already disappeared.[456] If all the foregoing requisites are satisfied, the ratification cleanses the contract from all its defects from the moment it was constituted.[457] Hence the action to annul a voidable contract is extinguished by ratification.[458]

The manner of ratifying a marriage which is voidable by reason of lack of parental consent is provided for in Article 45(1). Under said article, this kind of voidable marriage is ratified if the party whose parent did not give consent, after reaching the age of 21, freely cohabits with

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[451]*Id.*
[452]*Id.*
[453]Art. 45(1), FC.
[454]Luna vs. Linatoc, 74 Phil. 15.
[455]IV Tolentino, Civil Code, 1991 ed., p. 600.
[456]Jurado, Obligations and Contracts, 11th ed., p. 539.
[457]Art. 1396, NCC.
[458]Art. 1392, NCC.

the other and both lived together as husband and wife.[459] This is the only way by which the defect in the marriage may be ratified. Note that only the party whose parent did not give consent is entitled to ratify the marriage in the manner required by law. Hence, the person whose consent is required under Article 14 may not ratify the marriage, even if the same is to be done while the party is still below 21. Also, the consent of the other contracting party is not required for the ratification to take effect, since in ratification the conformity of the contracting party who has no right to bring the action for annulment is not necessary.[460]

§ 68. Unsoundness of Mind

[68.1] In general
[68.2] Presumption of sanity
[68.3] Who may file annulment
[68.4] Prescriptive period
[68.5] Subject to ratification

[68.1] In General

If either party was of unsound mind at the time of the celebration of the marriage, the marriage is likewise annullable.[461] To successfully invoke this ground, it is essential, however, that the mental incapacity of one of the parties must relate specifically to the contract of marriage. The test is whether the party at the time of the marriage was capable of understanding the nature and consequences of the marriage.[462] To be a ground for annulment, the insanity must exist at the time of the marriage.[463]

[68.2] Presumption of Sanity

A person is presumed to be of sound mind at any particular time and the condition is presumed to continue to exist, in the absence of proof to the contrary.[464] Therefore, the burden of proof rests upon him

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[459] Art. 45(1), FC.
[460] Art. 1395, NCC.
[461] Art. 45(1), FC.
[462] I Tolentino, Civil Code, 1990 ed., p. 289.
[463] Art. 45, FC.
[464] Mendezona vs. Ozamiz, 376 SCRA 482, 499. See also Art. 800, NCC.

who alleges insanity or seeks to avoid an act on account of it, and it devolves upon him to establish the fact of insanity by preponderance of evidence.[465]

[68.3] Who May File Annulment

The sane spouse has the legal standing to file the action for annulment only in cases where he or she contracted the marriage without knowledge of the other's insanity.[466] If the sane spouse had knowledge of the other's insanity at the time of the marriage, the action for annulment may be filed only by the following: (1) any relative or guardian or person having legal charge of the insane; or (2) the insane spouse during a lucid interval or after regaining sanity.[467]

[68.4] Prescriptive Period

Since a voidable marriage can be assailed only during the lifetime of the parties and not after the death of either,[468] the law requires that the action for annulment based on the ground mentioned in Article 45(2) must be filed at anytime before the death of either party.[469]

[68.5] Subject to Ratification

A marriage that is annullable by reason of insanity is subject to ratification or confirmation. The law, however, authorizes only the insane person, after gaining sanity, to ratify the marriage by freely cohabiting with the sane spouse as husband and wife.[470] The sane spouse is not entitled to ratify the marriage even if he or she had no knowledge of the other's insanity at the time of the marriage. An interesting situation may therefore arise if the sane spouse had no knowledge of the other's insanity at the time of the marriage and the insane spouse, after coming to reason, chooses to ratify the marriage. Will such ratification effected by the insane spouse prevent the sane spouse from filing an action for annulment? It appears that the answer should be in the affirmative con-

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[465] Carillo vs. Jaoco, 46 Phil. 597.
[466] Art. 47(2), FC.
[467] *Id.*
[468] Niñal vs. Bayadog, *supra*, p. 134.
[469] Art. 47(2), FC.
[470] Art. 45(2), FC.

sidering that ratification cleanses the contract from all its defects from the moment it was constituted[471] and thus extinguishing the action for annulment.[472] Although this interpretation may appear to be in conflict with the provisions of Article 47(2) authorizing the sane spouse (who had no knowledge of the other's insanity at the time of the marriage) to file an action for annulment at anytime before the death of either party, a reasonable construction of Article 47(2), however, is necessary to avoid a conflict. It is thus suggested that the provisions of Article 47(2) authorizing the sane spouse (who had no knowledge of the other's insanity at the time of the marriage) to file an action for annulment must be interpreted as exercisable only prior to the ratification of the marriage by the insane spouse after coming to reason. Because after such ratification, the contract is cleansed of its defect[473] and the action for annulment is extinguished.[474] It would be safe to assume that the sane spouse has accepted the other's insanity if, after discovery of the other party's insanity, the sane spouse fails to file the annulment and allows the insane spouse to ratify the marriage after coming to reason. The sane spouse, however, cannot ratify the marriage by continuing to cohabit with the insane spouse after learning of such insanity. Such kind of cohabitation may not prevent the relative, guardian or the person having legal charge of the insane, or the insane himself during a lucid interval or after coming to reason, from annulling the marriage. Again, to repeat, the law authorizes only the insane person to ratify the marriage after he has regained his sanity.

§ 69. Fraud

[69.1] In general
[69.2] Who may file annulment
[69.3] Prescriptive period
[69.4] Subject to ratification
[69.5] What constitutes fraud
  [69.5.1] Non-disclosure of previous conviction
  [69.5.2] Concealment of pregnancy
  [69.5.3] Concealment of sexually-transmissible disease
  [69.5.4] Concealment of drug addiction, habitual alcoholism, lesbianism or homosexuality

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[471] Art. 1396, NCC.
[472] Art. 1392, NCC.
[473] Art. 1396, NCC.
[474] Art. 1392, NCC.

[69.1] In General

Fraud, as a ground for annulment of marriage, must be distinguished from fraud, as a ground for annulment of ordinary contracts. Fraud which renders ordinary contract voidable refers to those insidious words or machinations employed by one of the contracting parties in order to induce the other to enter into a contract, which without them he would not have agreed to.[475] Fraud, as a ground for annulment of marriage, on the other hand, refers to non-disclosure or concealment of some facts deemed material to the marital relations. The circumstances which may constitute fraud as a ground for the annulment of marriage are enumerated in Article 46 of the Family Code. The enumeration under this article is exclusive and no other circumstance may constitute fraud for the annulment of marriage. This is clear from the last paragraph of Article 46: *"No other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage."*

[69.2] Who May File Annulment

If the annulment of marriage is based on fraud, the action can only be filed by the injured party[476] or the party who was not responsible for the fraud.

[69.3] Prescriptive Period

The action for annulment of marriage based on fraud must be filed within five years after the discovery of the fraud;[477] otherwise, the action is already prescribed or barred by the statute of limitation.

[69.4] Subject to Ratification

A marriage that is annullable by reason of fraud is subject to ratification by the injured party by freely cohabiting with the guilty spouse as husband and wife after gaining full knowledge of the facts constituting the fraud.[478]

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[475] Art. 1338, NCC.
[476] Art. 47(3), FC.
[477] *Id.*
[478] Art. 45(3), FC.

[69.5] What Constitutes Fraud

The kind or degree of fraud which may be said to go to the essence of the marriage contract is determined by the provisions of Article 46 of the Family Code, which enumerates the circumstances constituting fraud. No other circumstance may constitute fraud since Article 46 itself states that "[n]o other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage."

Under Article 46, only the following circumstances may constitute fraud: (1) non-disclosure of a previous conviction by final judgment of the other party of a crime involving moral turpitude; (2) concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband; (3) concealment of sexually transmissible disease, regardless of its nature, existing at the time of the marriage; or (4) concealment of drug addiction, habitual alcoholism or homosexuality or lesbianism existing at the time of the marriage.

> [69.5.1] <u>Non-Disclosure of Previous Conviction</u>: A party to a contract of marriage has the obligation of disclosing to the other party any previous conviction by final judgment of any crime involving moral turpitude. Failure to disclose such fact will constitute fraud entitling the other party to seek for the annulment of the marriage.[479] To constitute as ground for annulment, the non-disclosure of a crime must contain the following requisites: (1) there must be conviction by final judgment; and (2) the crime must involve moral turpitude. An act of moral turpitude is any act done contrary to justice, honesty, principle or good morals; or an act of baseness, vileness or depravity in private and social duties which a man owes to his fellowmen or to society in general, contrary to the accepted and customary rule of right and duty between man and man.[480] The term includes everything which is done contrary to justice, honesty, modesty or good morals.[481]

[479] Art. 46(1), FC.
[480] In re: Basa, 41 Phil. 27; In re: Isada, 60 Phil. 915.
[481] In re: Gutierrez, 58 SCRA 661.

[69.5.2] Concealment of Pregnancy: Pregnancy by another man at the time of the marriage is not, by itself, a ground for annulment of marriage. It is the concealment of such fact, at the time of the marriage that may constitute as ground for annulment.[482] Hence, if the bride was not aware that she was pregnant by another man at the time of the marriage, there is no fraud. Note that what constitutes fraud under the law is concealment of pre-nuptial pregnancy by another man and not any false representation as to chastity. There is likewise no fraud if the groom was aware or could have been aware of the bride's pregnancy. It was thus held that if, at the time of the marriage, the groom was aware (or could have been aware) of the bride's pregnancy, there can be no fraud to annul the marriage.[483] According to medical authorities, even in the 5th month of pregnancy, the enlargement of a woman's abdomen is still below the umbilicus, that is to say, the enlargement is limited to the lower part of the abdomen so that it is hardly noticeable and may, if noticed, be attributed only to fat formation on the lower part of the abdomen. It is only on the 6th month of pregnancy that the enlargement of the woman's abdomen reaches the height above the umbilicus, making the roundness of the abdomen more general and apparent.[484] In this connection, it has been held that where the bride was only four months pregnant at the time of the marriage, the groom could not be expected to know, merely by looking at the physical appearance of the bride, that the latter was pregnant.[485]

[69.5.3] Concealment of Sexually-Transmissible Disease: Affliction with a sexually-transmissible disease, at the time of the marriage, by itself and even without concealment, is a ground for annulment so long as the disease is serious and appears to be incurable.[486] If the disease is not serious and does not appear to be incurable, it is not a ground for annulment unless the existence of such disease is concealed by the party-afflicted from the other party at the time of the marriage. If the ground for annulment is conceal-

[482]Art. 46(2), FC.
[483]Buccat vs. Buccat, 72 Phil. 19.
[484]Lull, Clinical Obstetrics, p. 122; cited in Aquino vs. Delizo, 109 Phil. 21.
[485]Aquino vs. Delizo, 109 Phil. 21.
[486]Art. 45(6), FC.

ment of sexually-transmissible disease, the law does not distinguish between serious or non-serious and curable or incurable disease.[487] As such, if the party-afflicted with a sexually-transmissible disease was not aware of its existence at the time of the marriage, there is no fraud that will constitute as ground for annulment, although it may be a ground under Article 45(6) if the disease is serious and incurable.

[69.5.4] Concealment of Drug Addiction, Habitual Alcoholism, Homosexuality or Lesbianism: If the fact of drug addiction, habitual alcoholism, homosexuality or lesbianism existing at the time of the marriage is not concealed and is known to the other party, it is not a ground for annulment of the marriage.[488] It may not likewise be a ground for legal separation[489] since in the latter, the causes or grounds thereof must necessarily exist only after the celebration of the marriage. In addition, condonation of the offense or act complained of is a defense in legal separation.[490]

§ 70. Force, Intimidation or Undue Influence

[70.1] Violence or intimidation
[70.2] Who may file annulment
[70.3] Prescriptive period
[70.4] Subject to ratification

[70.1] Violence or Intimidation

There is violence when in order to wrest consent, serious or irresistible force is employed.[491] There is intimidation when one of the contracting parties is compelled by a reasonable and well-grounded fear of an imminent and grave evil upon his person or property, or upon the person or property of his spouse, descendants or ascendants, to give his consent.[492] There are four requisites in order that duress (including both

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[487] See Art. 46(3), FC.
[488] Art. 46(4), FC.
[489] See Art. 55(5) & (6), FC.
[490] Art. 56(1), FC.
[491] Art. 1335, 1st par., NCC.
[492] Art. 1335, 2nd par., NCC.

violence and intimidation) may vitiate consent and render the contract voidable or invalid: (a) that it must be the determining cause of the contract,[493] (b) that it must be unjust, (c) that it be serious or grave, and (d) that it produced a reasonable and well-grounded fear from the fact that the person from whom it comes has the necessary means to inflict the threatened injury.[494] Duress, as a ground for annulment, is illustrated in a case where the party intimidated was taken from her residence to the intended place of marriage ceremony at a very late hour, or at about one o' clock in the morning; and she was made to accede to the signing of the marriage contract due to a reasonable fear of losing her life in view of the threats and armed demonstration of the brothers of the groom.[495]

Duress which will vitiate a marriage must clearly have dominated throughout the transaction to such an extent that the person influenced could not and did not act as a free agent.[496] However, the force or coercion must have been unlawful,[497] and where a man marries under threat of, or constraint from, a criminal prosecution for a crime he has committed, he cannot avoid the marriage on the ground of duress.[498] Moreover, a threat to enforce one's claim through competent authority, if the claim is just or legal, does not vitiate consent.[499] Thus, where a man who had previous carnal knowledge of a woman, married her under threat to oppose his admission to the practice of law for immorality if he did not marry her, he cannot seek the annulment of the marriage on the ground of duress.[500]

[70.2] Who May File Annulment

If the ground for annulment is that consent was obtained by force, intimidation or undue influence, the action can only be filed by the injured party[501] or the party who was subjected to duress.

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[493]Honnet vs. Honnett, 34 Am. Rep. 39.
[494]Alarcon vs. Kasilag, O.G. Supp., p. 203, Oct. 11, 1941.
[495]Tiongco vs. Matig-a, 44 O.G. No. 1, p. 96.
[496]Campbell vs. Moore, 1 S.E. 2d. 784, 189 S.C. 497.
[497]Sotto vs. Maria no, 36 O.G. 1056.
[498]*Id.*
[499]Art. 1335, last par., NCC.
[500]Ruiz vs. Atienza, O.G., Aug. 30, 1941, p. 1903.
[501]Art. 47(4), FC.

[70.3] Prescriptive Period

If the action for annulment of marriage is based on duress, it must be filed within five years from the time the force, intimidation or undue influence disappeared or ceased;[502] otherwise, the action is already prescribed or barred by the statute of limitation.

[70.4] Subject to Ratification

A marriage that is annullable by reason of force, intimidation or undue influence is subject to ratification by the injured party by freely cohabiting with the guilty spouse as husband and wife after the disappearance or cessation of force, intimidation or undue influence.[503] Thus, if after the marriage ceremony, the supposed aggrieved husband readily took his wife with him to Legaspi where they spent the night together as husband and wife, and, later, to Manila in the very house of his own sister, where his mother also lived, and thereafter continued with their marital relationships, such subsequent acts of the parties have produced the effect of ratifying the marriage supposedly effected by force or intimidation.[504] But, if immediately after the marriage ceremony, the groom, who previously had carnal knowledge with the woman by force, gave the latter a few pesos and sent her to her father's home, such conduct shows that he had no intention of making her as his wife and the ceremony cannot be considered as binding on him because of duress,[505] and there would be no cohabitation to speak of.

§ 71. Physical Incapability of Consummating Marriage

[71.1] In general
[71.2] What constitutes physical incapability
[71.3] Not presumed
[71.4] Requisites
[71.5] Who may file annulment
[71.6] Prescriptive period
[71.7] Not subject to ratification

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[502] *Id.*
[503] Art. 45(4), FC.
[504] Sison vs. Ambalada, 30 Phil. 118.
[505] People vs. Santiago, 51 Phil. 68.

[71.1] In General

The marriage of one physically incapable of consummating the marriage with the other (or physical incapability of sexual intercourse) is voidable[506] and subject to annulment at the instance of the injured party.[507] The theory on which the marriage is invalidated is not that there was an original incapacity to contract, but that there has been an entire and complete failure of the consideration of the marriage contract.[508] The physical incapacity must have existed, however, at the time of the celebration of the marriage.[509] Hence, impotency caused by a supervening infirmity does not invalidate the marriage.

[71.2] What Constitutes Physical Incapability

Physical incapacity for marriage (or "impotency) imports a total want of power of copulation, and only as necessary incident thereto the inability for procreation;[510] hence barrenness or sterility of itself[511] or mere sexual weakness or frigidity[512] are not to be considered as grounds for annulment. As defined in the celebrated case of **Menciano vs. San Jose,**[513] impotency is the physical inability to have sexual intercourse. It is not synonymous with sterility. Sterility refers to the inability to procreate, whereas, impotence refers to the physical inability to perform the act of sexual intercourse.[514] The word "copulate," as used in statutes, such as act authorizing annulment of marriage because of one spouse's incurable physical impotency or of incapacity for copulation means act of gratifying sexual desire by union of sexual organs of two biological entities.[515]

[71.3] Not Presumed

Impotency being an abnormal condition should not be presumed. The presumption is in favor of potency.[516] Thus, the burden of proving

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[506]Art. 45(1), FC.
[507]Art. 47(5), FC.
[508]N.J. — G. vs. G., 56 A. 736, 67 N. J. Eq. 30.
[509]Art. 45, FC.
[510]N.Y. — Schroter vs. Schroter, 106 N.Y.S. 22, 56 Misc. 69.
[511]Del. — S. vs. S., 29 A. 2d. 325, 3 Terry 192.
[512]Eng. — G. vs. M., 10 App. Cass. 171. 38 C.J. p. 1288 note 78.
[513]89 Phil. 63
[514]Cited in Macadangdang vs. CA, G.R. No. L-49542, Sept. 12, 1980.
[515]S. vs. S., Del., 29 A.2d. 325.
[516]Menciano vs. San Jose, *supra*.

the existence of impotency is upon him who alleges the existence of such condition. Hence, it was held that the fact that the physician was able to get a specimen of the semen of the supposed impotent for examination as to its contents, through the use of a rubber sac and a woman, conclusively shows potency.[517]

The foregoing rule, however, does not apply if the wife continues to be a virgin after three (3) years of cohabitation. Under the doctrine of *"triennial cohabitation,"* if the wife remains a virgin after three years of cohabitation, the husband will be presumed impotent, and the burden to overcome such presumption of impotency will be shifted upon him.[518] The presumption may, however, be rebutted by proof to the contrary.

[71.4] Requisites

In order that physical incapability of consummating marriage (or "impotency") be a ground for annulment, the following requisites must be present: (1) the incapacity must be existing at the time of the celebration of the marriage;[519] (2) the same continues up to the time of the filing of the action for annulment;[520] (3) the same appears to be incurable;[521] and (4) it must be unknown to the other contracting party.

[71.5] Who May File Annulment

If the ground for annulment is that one of the parties was physically incapable of consummating marriage (or "impotency"), the action can only be filed by the injured party[522] — referring to the other party who was not aware of the existence of such incapacity at the time of the marriage and who himself or herself was not suffering from the same incapacity.

[71.6] Prescriptive Period

If the action for annulment of marriage is based on the physical incapacity of one spouse to consummate marriage, the action must be

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[517]*Id.*
[518]Tompkins vs. Tompkins, 92 N.J. 113, 111 Atl. 599.
[519]Art. 45, FC.
[520]*Id.*
[521]*Id.*
[522]Art. 47(5), FC.

filed within five (5) years after the celebration of the marriage[523] and not after discovery of such incapacity.

[71.7] Not Subject to Ratification

If the ground for annulment is physical incapacity of one spouse to consummate marriage, the marriage is not subject to ratification by continued cohabitation as husband and wife. Unlike in the previous grounds for annulment of voidable marriages,[524] which are all subject to ratification by continued cohabitation as husband and wife, the law does not authorize ratification of a voidable marriage under Article 45(5). The reason for this rule is that there has been an entire and complete failure of the consideration of the marriage contract[525] in a voidable marriage under Article 45(5). Note that while the defect is not subject to ratification, the action for annulment may, however, be barred by prescription.[526]

§ 72. Sexually-Transmissible Disease

[72.1] Compared with Art. 46(3)
[72.2] Requisites
[72.3] Who may file annulment
[72.4] Prescriptive period
[72.5] Not subject to ratification

[72.1] Compared With Art. 46(3)

Under Article 46(3), the ground for annulment is not the existence of a sexually-transmissible disease at the time of the marriage but its concealment. If the existence of the sexually-transmissible disease at the time of the marriage is concealed from the other contracting party, the marriage may be annulled whatever may be the nature of the disease.[527] Hence, even if the disease is curable or not serious, the marriage may still be annulled since the ground for annulment is fraud or concealment of such disease at the time of the marriage. Under Article 45(6), however, the existence of the sexually-transmissible disease at the time

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[523] Art. 47(5), FC.
[524] Art. 45(1), (2) (3) and (4), FC.
[525] N.J. — G. vs. G., 56 A. 736, 67 N. J. Eq. 30.
[526] Art. 47(5), FC.
[527] See Art. 46(3), FC.

of the marriage is, in itself, a ground for annulment so long as the disease is found to be serious and appears to be incurable. It is necessary, however, that the existence of such disease be not known to the other party at the time of the marriage. The rule that a person should come to court with clean hands apply.

[72.2] Requisites

In order for the existence of a sexually-transmissible disease to be a ground for annulment, the following requisites must be satisfied: (1) the sexually-transmissible disease must have existed at the time of the celebration of the marriage;[528] (2) it is found to be serious;[529] (3) it appears to be incurable;[530] and (4) it must be unknown to the other party at the time of the marriage.

[72.3] Who May File Annulment

If the ground for annulment is the existence of a sexually transmissible disease at the time of the marriage in the nature mentioned in Article 45(6), the action can only be filed by the injured party[531] — referring to the other party who was not aware of the existence of such disease at the time of the marriage and who himself or herself was not afflicted with a disease of the same nature.

[72.4] Prescriptive Period

If the action for annulment of marriage is based on the existence of a sexually transmissible disease at the time of the marriage in the nature mentioned in Article 45(6), the action must be filed within five (5) years after the celebration of the marriage[532] and not after discovery of such disease.

[72.5] Not Subject to Ratification

If the ground for annulment is the existence of a sexually transmissible disease at the time of the marriage in the nature mentioned in Arti-

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[528]Art. 45, FC.
[529]Art. 45(6), FC.
[530]*Id*.
[531]Art. 47(5), FC.
[532]Art. 47(5), FC.

cle 45(6), the marriage is not subject to ratification by continued cohabitation as husband and wife. Unlike in the grounds for annulment mentioned in paragraphs (1), (2), (3) and (4) of Article 45, the law does not authorize ratification of a voidable marriage under Article 45(6). Note that while the defect is not subject to ratification, the action for annulment may, however, be barred by prescription.[533]

§ 73. Effects of Final Judgment of Annulment

Prior to its termination by a final judgment of a competent court in an action for annulment, a voidable marriage is considered valid and produces all its civil effects.[534] The final judgment of annulment dissolves the special contract of marriage as if it had never been entered into but the effects of the marriage are not totally wiped out.[535] As such, a final judgment of annulment shall produce the following effects:

(1) Termination of the marital bond, as if it had never been entered into, but the effects thereof are not totally wiped out.[536]

(2) Since the marriage is considered valid prior to the judgment of annulment, children conceived or born before the judgment of annulment has become final and executory are considered legitimate.[537]

(3) The absolute community property regime[538] or the conjugal partnership property regime[539] is terminated or dissolved and the same shall be liquidated in accordance with the provisions of Articles 102 and 129, respectively, of the Family Code. If either spouse contracted the marriage in bad faith, his or her share of the net profits of the community property or conjugal partnership property shall be forfeited in favor of the common children or if there be none, the children of the guilty spouse by a previous marriage or in default thereof, the innocent spouse.[540] The final judgment in the annulment case must provide for

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[533]Art. 47(5), FC.
[534]Suntay vs. Cojuangco-Suntay, 300 SCRA 760, 771 (1998).
[535]*Id*.
[536]*Id*.
[537]Art. 54, FC.
[538]Art. 99(3), FC.
[539]Art. 126(3), FC.
[540]Art. 43(2), in relation to Article 50, FC.

the liquidation, partition and distribution of the properties of the spouses, unless such matters had been adjudicated in previous judicial proceedings .[541]

(4) The final judgment in the annulment case must also provide for the custody and support of the common children and the delivery of the common children's presumptive legitimes, unless such matters had been adjudicated in previous judicial proceedings.[542] The value of the presumptive legitimes of all common children, computed as of the date of the final judgment of the trial court, shall be delivered in cash, property or sound securities, unless the parties, by mutual agreement judicially approved, had already provided for such matters.[543] The delivery of such presumptive legitimes shall in no way prejudice the ultimate successional rights of the children accruing upon the death of either or both of the parents; but the value of the properties already received under the decree of annulment shall be considered as advances on their legitime.[544]

(5) Donations by reasons of marriage shall remain valid except if the donee contracted the marriage in bad faith, in which case, the donor may revoke the donation.[545]

(6) The innocent spouse may revoke the designation of the other spouse who acted in bad faith as beneficiary in any insurance policy, even if such designation be stipulated as irrevocable.[546]

(7) The spouse who contracted the marriage in bad faith shall be disqualified to inherit from the innocent spouse by testate and intestate succession.[547]

(8) In case of annulment of marriage, and the wife is the guilty party, she shall resume her maiden name and surname. If she is the innocent spouse, she may resume her maiden name and surname. However, she may choose to continue employing her former husband's surname,

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[541] Art. 50, 2nd par., FC.
[542] *Id.*
[543] Art. 51, 1st par., FC.
[544] Art. 51, 3rd par., FC.
[545] Art. 86(3), FC.
[546] Art. 43(4), in relation to Art. 50, FC.
[547] Art. 43(5), in relation to Art. 50, FC.

unless: (a) the court decrees otherwise, or (b) she or the former husband is married again to another person.[548]

(9) Since the marital bond is terminated, the parties are again free to re-marry but they must comply with the requirements of Article 52, that is, the judgment of annulment, the partition and distribution of the properties of the spouses and the delivery of the children's presumptive legitimes shall be recorded in the appropriate civil registry and registries of property; otherwise, the same shall not affect third persons[549] and the subsequent marriage shall be null and void.[550]

Art. 48. In all cases of annulment or declaration of absolute nullity of marriage, the Court shall order the prosecuting attorney or fiscal assigned to it to appear on behalf of the State to take steps to prevent collusion between the parties and to take care that evidence is not fabricated or suppressed.

In the cases referred to in the preceding paragraph, no judgment shall be based upon a stipulation of facts or confession of judgment. (88a)

Art. 49. During the pendency of the action and in the absence of adequate provisions in a written agreement between the spouses, the Court shall provide for the support of the spouses and the custody and support of their common children. The Court shall give paramount consideration to the moral and material welfare of said children and their choice of the parent with whom they wish to remain as provided for in Title IX. It shall also provide for appropriate visitation rights of the other parent. (n)

COMMENTS:

§ 74. Procedure in Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages.

[74.1] In general
[74.2] Jurisdiction
[74.3] Venue of action
[74.4] Contents and form of petition
[74.5] Service of summons
[74.6] No motion to dismiss, no declaration of default
[74.7] Role of the public prosecutor

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[548]Art. 371, NCC.
[549]Art. 52, FC.
[550]Art. 53, FC.

[74.8] Pre-trial stage
[74.9] Prohibited compromise
[74.10] Decision
[74.11] Appeal
[74.12] Rule on liquidation, partition and distribution of properties
[74.13] Issuance of decree
[74.14] Registration and publication of decree
[74.15] Effect of death of parties
[74.16] Grant of provisional remedies or protection orders

[74.1] In General

The procedure governing petitions for declaration of absolute nullity of void marriages and annulment of voidable marriages is now governed by A.M. No. 02-11-10-SC[551] and A.M. 02-11-12-SC.[552]

[74.2] Jurisdiction

The Family Courts shall have exclusive original jurisdiction to hear and decide complaints for annulment of marriage and declaration of nullity of marriage.[553]

[74.3] Venue of Action

The petition shall be filed in the Family Court of the province or city where the petitioner or the respondent has been residing for at least six months prior to the date of the filing, or in the case of a non-resident, where he may be found in the Philippines, at the election of the petitioner.[554]

[74.4] Contents and Form of Petition

(a) The petition shall allege the complete facts constituting the cause of action.[555] If the ground of the petition is Article 36 of the Family Code, the petition must specially allege the complete facts showing that either or both parties were psychologically incapacitated from complying with the essential marital obligations of marriage at the time of

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[551]Which took effect on March 15, 2003.
[552]Also became effective on March 15, 2003.
[553]Sec. 5(d), R.A. 8369.
[554]Sec. 4, A.M. No. 02-11-10-SC.
[555]Sec. 5(1), A.M. No. 02-11-10-SC.

the celebration of marriage even if such incapacity becomes manifest only after its celebration.[556] The complete facts should allege the physical manifestations, if any, as are indicative of psychological incapacity at the time of the celebration of the marriage but expert opinion need not be alleged.[557]

Barcelona vs. Court of Appeals
412 SCRA 41 (2003)

FACTS: The petitioner husband filed a petition for annulment of his marriage to her wife on the ground of the latter's psychological incapacity at the time of the marriage. The petition alleged that the parties were legally married at the Holy Cross Parish after a whirlwind courtship as shown by the marriage contract attached to the petition; that the couple established their residence in Quezon City; that the union begot five children. The petition further alleged that the wife Diana was psychologically incapacitated at the time of the celebration of their marriage to comply with the essential obligations of marriage and such incapacity subsists up to the present time. The petition alleged the non-complied marital obligations of the wife. The wife filed a Motion to Dismiss the petition on the ground that it fails to state a cause of action. The wife relied heavily on the rulings of the Supreme Court in *Santos vs. Court of Appeals*[558] as well as in *Republic vs. Court of Appeals and Molina*.[559] The wife argues that the petition falls short of the guidelines set forth in *Santos* and *Molina*. Specifically, she contends that the second petition is defective because it fails to allege the root cause of the alleged psychological incapacity and that it fails to state that the alleged psychological incapacity existed from the celebration of the marriage and that it is permanent or incurable. In addition, she contends that the petition is devoid of any reference of the grave nature of the illness to bring about the disability of the petitioner to assume the essential obligations of marriage and that the same did not even state the marital obligations which she allegedly failed to comply due to psychological incapacity. In debunking her argument, the Supreme Court explained —

> "Subsequent to *Santos* and *Molina*, the Court adopted the new Rules on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages ("new Rules"). Specifically, Section 2, paragraph (d) of the new Rules provides:

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[556]Sec. 2(d), A.M. No. 02-11-10-SC.
[557]*Id*.
[558]310 Phil. 21 (1995).
[559]G.R. No. 108763, 13 February 1997, 268 SCRA 198.

SEC. 2. Petition for declaration of absolute nullity of void marriages —

x x x.

(d) *What to allege*. — A petition under Article 36 of the Family Code shall specifically allege the complete facts showing that either or both parties were psychologically incapacitated from complying with the essential marital obligations of marriage at the time of the celebration of marriage even if such incapacity becomes manifest only after its celebration.

The complete facts should allege the physical manifestations, if any, as are indicative of psychological incapacity at the time of the celebration of the marriage but expert opinion need not be alleged. (Emphasis supplied)

Procedural rules apply to actions pending and unresolved at the time of their passage. The obvious effect of the new Rules providing that "***expert opinion need not be alleged***" in the petition is that there is also no need to allege the root cause of the psychological incapacity. Only experts in the fields of neurological and behavioural sciences are competent to determine the root cause of psychological incapacity. Since the new Rules do not require the petition to allege expert opinion on the psychological incapacity, it follows that there is also no need to allege in the petition the root cause of the psychological incapacity.

Science continues to explore, examine and explain how our brains work, respond to and control the human body. Scientists still do not understand everything there is to know about the root causes of psychological disorders. The root causes of many psychological disorders are still unknown to science even as their outward, physical manifestations are evident. Hence, what the new Rules require the petition to allege are the physical manifestations indicative of psychological incapacity. Respondent Tadeo's second petition complies with this requirement.

(b) The petition shall state the names and ages of the common children of the parties and specify the regime governing their property relations, as well as the properties involved. If there is no adequate provision in a written agreement between the parties, the petitioner may

apply for a provisional order for spousal support, custody and support of common children, visitation rights, administration of community or conjugal property, and other matters similarly requiring urgent action.[560]

(c) The petition must be verified and accompanied by a certification against forum shopping. The verification and certification must be signed personally by the petitioner. No petition may be filed solely by counsel or through an attorney-in-fact. If the petitioner is in a foreign country, the verification and certification against forum shopping shall be authenticated by the duly authorized officer of the Philippine embassy or legation, consul general, consul or vice-consul or consular agent in said country.[561]

(d) The petition shall be filed in six copies. The petitioner shall serve a copy of the petition on the Office of the Solicitor General and the Office of the City or Provincial Prosecutor, within five days from the date of its filing and submit to the court proof of such service within the same period. Failure to comply with any of the preceding requirements may be a ground for immediate dismissal of the petition.[562]

[74.5] Service of Summons

The service of summons shall be governed by Rule 14 of the Rules of Court and by the following rules: (1) Where the respondent cannot be located at his given address or his whereabouts are unknown and cannot be ascertained by diligent inquiry, service of summons may, by leave of court, be effected upon him by publication once a week for two consecutive weeks in a newspaper of general circulation in the Philippines and in such places as the court may order. In addition, a copy of the summons shall be served on the respondent at his last known address by registered mail or any other means the court may deem sufficient. (2) The summons to be published shall be contained in an order of the court with the following data: (a) title of the case; (b) docket number; (c) nature of the petition; (d) principal grounds of the petition and the reliefs prayed for; and (e) a directive for the respondent to answer within thirty days from the last issue of publication.[563]

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[560]Sec. 5(2), A.M. No. 02-11-10-SC.
[561]Sec. 5(3), A.M. No. 02-11-10-SC.
[562]Sec. 5(4), A.M. No. 02-11-10-SC.
[563]Sec. 6, A.M. No. 02-11-10-SC.

[74.6] No Motion to Dismiss, No Declaration of Default

No motion to dismiss the petition shall be allowed except on the ground of lack of jurisdiction over the subject matter or over the parties; provided, however, that any other ground that might warrant a dismissal of the case may be raised as an affirmative defense in an answer.[564] Instead, the respondent must file his answer within fifteen days from service of summons, or within thirty days from the last issue of publication in case of service of summons by publication. The answer must be verified by the respondent himself and not by counsel or attorney-in-fact.[565] If the respondent fails to file an answer, the court shall not declare him or her in default.[566] In an action for annulment or declaration of nullity of marriage or for legal separation, an order of default is not allowed.[567]

Ancheta vs. Ancheta
424 SCRA 725 (2004)

FACTS: The husband filed a petition for the declaration of nullity of his marriage on the ground of psychological incapacity. Although he knew that his wife was residing in Carmona, Cavite, he stated in his petition that her address was in Las Piñas, Metro Manila. Hence, summons was served in the said address in Las Piñas. When the wife failed to file an answer, the husband moved to declare her in default. During the hearing of the said motion, there was no appearance on the part of the wife. The public prosecutor appeared for the State and offered no objection to the motion filed by the husband who appeared with counsel. The trial court granted the motion and declared the wife in default, and allowed the husband to adduce evidence ex-parte. After the ex-parte presentation of evidence, the trial court granted the petition and declared the marriage of the parties void. Thereafter, a certificate of finality of the decision was issued by the clerk of court. When the wife learned of said decision, she filed a verified petition with the Court of Appeals for the annulment of the said judgment. When the Court of Appeals dismissed petition, she filed an appeal before the Supreme Court. In finding merit in her petition, the Court ruled —

> "The action in Rule 47 of the Rules of Court does not involve the merits of the final order of the trial court. However, we cannot but express alarm at what transpired in the court *a quo* as shown by the records. The records show that for the petitioner's failure to file

[564]Sec. 7, A.M. No. 02-11-10-SC.
[565]Sec. 8(1), A.M. No. 02-11-10-SC.
[566]Sec. 8(2), A.M. No. 02-11-10-SC.
[567]Sec. 3(e), Rule 9, 1997 Rules of Civil Procedure.

an answer to the complaint, the trial court granted the motion of the respondent herein to declare her in default. The public prosecutor condoned the acts of the trial court when he interposed no objection to the motion of the respondent. The trial court forthwith received the evidence of the respondent *ex-parte* and rendered judgment against the petitioner without a whimper of protest from the public prosecutor. The actuations of the trial court and the public prosecutor are in defiance of Article 48 of the Family Code, which reads:

Article 48. In all cases of annulment or declaration of absolute nullity of marriage, the Court shall order the prosecuting attorney or fiscal assigned to it to appear on behalf of the State to take steps to prevent collusion between the parties and to take care that evidence is not fabricated or suppressed.

In the cases referred to in the preceding paragraph, no judgment shall be based upon a stipulation of facts or confession of judgment.

The trial court and the public prosecutor also ignored Rule 18, Section 6 of the 1985 Rules of Court (now Rule 9, Section 3[e] of the 1997 Rules of Civil Procedure) which provides:

Sec. 6. *No defaults in actions for annulment of marriage or for legal separation.* — If the defendant in an action for annulment of marriage or for legal separation fails to answer, the court shall order the prosecuting attorney to investigate whether or not a collusion between the parties exists, and if there is no collusion, to intervene for the State in order to see to it that the evidence submitted is not fabricated.

In the case of *Republic vs. Court of Appeals*, this Court laid down the guidelines in the interpretation and application of Art. 48 of the Family Code, one of which concerns the role of the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the State:

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

This Court in the case of *Malcampo-Sin vs. Sin* reiterated its pronouncement in *Republic vs. Court of Appeals*, regarding the role of the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the State. The trial court, abetted by the ineptitude, if not sheer negligence of the public prosecutor, waylaid the Rules of Court and the Family Code, as well as the rulings of this Court.

The task of protecting marriage as an inviolable social institution requires vigilant and zealous participation and not mere pro-forma compliance. The protection of marriage as a sacred institution requires not just the defense of a true and genuine union but the exposure of an invalid one as well.

A grant of annulment of marriage or legal separation by default is fraught with the danger of collusion. Hence, in all cases for annulment, declaration of nullity of marriage and legal separation, the prosecuting attorney or fiscal is ordered to appear on behalf of the State for the purpose of preventing any collusion between the parties and to take care that their evidence is not fabricated or suppressed. If the defendant-spouse fails to answer the complaint, the court cannot declare him or her in default but instead, should order the prosecuting attorney to determine if collusion exists between the parties. The prosecuting attorney or fiscal may oppose the application for legal separation or annulment through the presentation of his own evidence, if in his opinion, the proof adduced is dubious and fabricated.

Our constitution is committed to the policy of strengthening the family as a basic social institution. Our family law is based on the policy that marriage is not a mere contract, but a social institution in which the State is vitally interested. The State can find no stronger anchor than on good, solid and happy families. The break-up of families weakens our social and moral fabric; hence, their preservation is not the concern of the family members alone. Whether or not a marriage should continue to exist or a family should stay together must not depend on the whims and caprices of only one party, who claims that the other suffers psychological imbalance, incapacitating such party to fulfill his or her marital duties and obligations.

[74.7] Role of the Public Prosecutor

Where no answer is filed or if the answer does not tender an issue, the court shall order the public prosecutor to investigate whether collusion exists between the parties.[568] Within one (1) month after receipt of such court order, the public prosecutor shall submit a report to the court stating whether the parties are in collusion and serve copies thereof on the parties and their respective counsels, if any.[569] If the public prosecutor finds that collusion exists, he shall state the basis thereof in his report. The parties shall file their respective comments on the finding of collusion within ten days from receipt of a copy of the report. The court shall set the report for hearing and if convinced that the parties are in collusion, it shall dismiss the petition.[570] If the public prosecutor reports that no collusion exists, the court shall set the case for pre-trial. It shall be the duty of the public prosecutor to appear for the State at the pre-trial.[571]

In one case,[572] when the respondent in a petition for declaration for nullity of marriage based on Article 36 did not file an answer in Court, the public prosecutor entered his appearance, on behalf of the Solicitor General, during the ex-*parte* presentation of petitioner's evidence and even cross-examined the expert witness of the petitioner. The Supreme Court held that such acts do not suffice to comply with the mandatory requirement that the court should order the public prosecutor to investigate whether collusion exists between the parties. The Court reasoned that such directive must be made by the court before trial could proceed, not after the trial on the merits of the case had already been had.

The role of the public prosecutor or fiscal in annulment of marriage, declaration of nullity of void marriages and legal separation proceedings is to determine whether collusion exists between the parties and to take care that the evidence is not suppressed or fabricated.[573] Thus, *"in all cases of annulment or declaration of absolute nullity of marriage, the court shall order the prosecuting attorney or fiscal as-*

[568] Sec. 8(3), A.M. No. 02-11-10-SC.
[569] Sec. 9(1), A.M. No. 02-11-10-SC.
[570] Sec. 9(2), A.M. No. 02-11-10-SC.
[571] Sec. 9(3), A.M. No. 02-11-10-SC.
[572] Corpus vs. Ochotorena, 435 SCRA 446 (2004).
[573] Tuazon vs. CA, 256 SCRA 158, 169 (1996).

signed to it to appear on behalf of the State to take steps to prevent collusion between the parties and to take care that evidence is not fabricated or suppressed."[574] If the defendant spouse fails to answer the complaint, the court cannot declare him or her in default but instead, should order the prosecuting attorney to determine if collusion exists between the parties.[575] The prosecuting attorney or fiscal may oppose the application for legal separation or annulment (or declaration of nullity of marriages) through the presentation of his own evidence, if in his opinion, the proof adduced is dubious and fabricated.[576]

Tuazon vs. Court of Appeals
256 SCRA 158 (1996)

FACTS: The wife filed a petition for declaration of nullity of her marriage on the ground of psychological incapacity on the part of her husband. The husband answered the petition denying the imputation of psychological incapacity on his part. Trial then commenced. The petitioner presented her evidence. After petitioner rested her case, the court scheduled the reception of the husband's evidence on May 11, 1990. The husband's counsel, however, moved for the postponement of the hearing to June 8, 1990. On June 8, 1990, the husband failed to appear. On motion of the petitioner, the court declared the husband to have waived the right to present evidence on his behalf. On June 29, 1990, the court rendered a judgment declaring the nullity of the marriage. No appeal was taken from said decision. When the wife, however, filed a motion for dissolution of the conjugal partnership and adjudication to her of the conjugal properties, the husband filed a petition for relief from judgment questioning the decision of the trial court. His petition was dismissed, both by the trial court and the Court of Appeals. He then elevated the matter to the Supreme Court. In his appeal before the Supreme Court, the husband claims that he was deprived of due process. He cites Article 48 of the Family Code. He further contends that when he failed to appear during the scheduled hearings for presentation of his evidence, the trial court should have ordered the prosecuting attorney to intervene for the State and inquire as to the reason for his non-appearance. In debunking the husband's contention, the Court explained —

> "The facts in the case at bar do not call for the strict application of Articles 48 and 60 of the Family Code. For one, petitioner

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[574]Art. 48, FC.

[575]Tuazon vs. CA, *supra*, at p. 168. See also Sec. 3(e), Rule 9, 1997 Rules of Civil Procedure and Ancheta vs. Ancheta, 424 SCRA 725 (2004).

[576]*Id.*

was not declared in default by the trial court for failure to answer. Petitioner filed his answer to the complaint and contested the cause of action alleged by private respondent. He actively participated in the proceedings below by filing several pleadings and cross-examining the witnesses of private respondent. It is crystal clear that every stage of the litigation was characterized by a no-holds barred contest and not by collusion.

The role of the prosecuting attorney or fiscal in annulment of marriage and legal separation proceedings is to determine whether collusion exists between the parties and to take care that the evidence is not suppressed or fabricated. Petitioner's vehement opposition to the annulment proceedings negates the conclusion that collusion existed between the parties. There is no allegation by the petitioner that evidence was suppressed or fabricated by any of the parties. Under these circumstances, we are convinced that the non-intervention of a prosecuting attorney to assure lack of collusion between the contending parties is not fatal to the validity of the proceedings in the trial court.

Malcampo-Sin vs. Sin
355 SCRA 285 (2001)

FACTS: The wife filed a complaint for declaration of nullity of her marriage. Trial ensued and the parties presented their respective documentary and testimonial evidence. Thereafter, the trial court dismissed the petition. The wife appealed the order of dismissal to the Court of Appeals but the appellate court sustained the order dismissing the petition. Not contented, the wife went to the Supreme Court on appeal. All throughout, the State did not participate in the proceedings. While the prosecutor filed with the trial court a manifestation that he found no collusion between the parties, he did not actively participate therein. Other than entering his appearance at certain hearings of the case, nothing more was heard from him. Neither did the presiding judge take any step to encourage the fiscal to participate actively in the case. In remanding the case to the trial court for re-trial, the Supreme Court explained —

"It can be argued that since the lower court dismissed the petition, the evil sought to be prevented (*i.e.*, dissolution of the marriage) did not come about, hence, the lack of participation of the State was cured. Not so. The task of protecting marriage as an inviolable social institution requires vigilant and zealous participation and not mere *pro-forma* compliance. The protection of mar-

riage as a sacred institution requires not just the defense of a true and genuine union but the exposure of an invalid one as well. This is made clear by the following pronouncement:

"(8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the 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 shall discharge the equivalent function of the defensor vinculi contemplated under Canon 1095 (italics ours)."

The records are bereft of any evidence that the State participated in the prosecution of the case not just at the trial level but on appeal with the Court of Appeals as well. Other than the "manifestation" filed with the trial court on November 16, 1994, the State did not file any pleading, motion or position paper, at any stage of the proceedings.

In *Republic of the Philippines vs. Erlinda Matias Dagdag*, while we upheld the validity of the marriage, we nevertheless characterized the decision of the trial court as "prematurely rendered" since the investigating prosecutor was not given an opportunity to present controverting evidence before the judgment was rendered. This stresses the importance of the participation of the State.

Having so ruled, we decline to rule on the factual disputes of the case, this being within the province of the trial court upon proper re-trial.

[74.8] Pre-trial Stage

Pre-trial is mandatory.[577] If the petitioner fails to appear personally, the case shall be dismissed unless his counsel or a duly authorized representative appears in court and proves a valid excuse for the non-appearance of the petitioner.[578] If the respondent has filed his answer but fails to appear, the court shall proceed with the pre-trial and require the public prosecutor to investigate the non-appearance of the respond-

[577] Sec. 11(1), A.M. No. 02-11-10-SC.
[578] Sec. 13(a), A.M. No. 02-11-10-SC.

ent and submit within fifteen days thereafter a report to the court stating whether his non-appearance is due to any collusion between the parties. If there is no collusion, the court shall require the public prosecutor to intervene for the State during the trial on the merits to prevent suppression or fabrication of evidence.[579] Failure to file the pre-trial brief or to comply with its required contents shall have the same effect as failure to appear at the pre-trial.[580]

[74.9] Prohibited Compromise

The court shall not allow compromise on prohibited matters, such as the following: (a) The civil status of persons; (b) The validity of a marriage or of a legal separation; (c) Any ground for legal separation; (d) Future support; (e) The jurisdiction of courts; and (f) Future legitime.[581]

[74.10] Decision

If the court renders a decision granting the petition, it shall declare therein that the decree of absolute nullity or decree of annulment shall be issued by the court only after compliance with Articles 50 and 51 of the Family Code as implemented under the Rule on Liquidation, Partition and Distribution of Properties.[582]

The parties, including the Solicitor General and the public prosecutor, shall be served with copies of the decision personally or by registered mail. If the respondent summoned by publication failed to appear in the action, the dispositive part of the decision shall be published once in a newspaper of general circulation.[583]

The decision becomes final upon the expiration of fifteen days from notice to the parties. Entry of judgment shall be made if no motion for reconsideration or new trial, or appeal is filed by any of the parties the public prosecutor, or the Solicitor General.[584] Upon the finality of the decision, the court shall forthwith issue the corresponding decree if the

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[579]Sec. 13(b), A.M. No. 02-11-10-SC.
[580]Sec. 12, last par., A.M. No. 02-11-10-SC.
[581]Sec. 16, A.M. No. 02-11-10-SC.
[582]Sec. 19(1), A.M. No. 02-11-10-SC.
[583]Sec. 19(2), A.M. No. 02-11-10-SC.
[584]Sec. 19(3), A.M. No. 02-11-10-SC.

parties have no properties.[585] If the parties have properties, the court shall observe the procedure prescribed under the Rule on Liquidation, Partition and Distribution of Properties.[586]

The entry of judgment shall be registered in the Civil Registry where the marriage was recorded and in the Civil Registry where the Family Court granting the petition for declaration of absolute nullity or annulment of marriage is located.

[74.11] Appeal

No appeal from the decision shall be allowed unless the appellant has filed a motion for reconsideration or new trial within fifteen days from notice of judgment.[587] An aggrieved party or the Solicitor General may appeal from the decision by filing a Notice of Appeal within fifteen days from notice of denial of the motion for reconsideration or new trial. The appellant shall serve a copy of the notice of appeal on the adverse parties.[588]

[74.12] Rule on Liquidation, Partition and Distribution of Properties

Upon entry of the judgment granting the petition, or, in case of appeal, upon receipt of the entry of judgment of the appellate court 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, including custody, support of common children and delivery of their presumptive legitimes pursuant to Articles 50 and 51 of the Family Code unless such matters had been adjudicated in previous judicial proceedings.[589]

Failure to comply with the partition and distribution of the properties of the spouses and the delivery of the children's presumptive legitimes required under Articles 50 and 51 shall render any subsequent marriage by the parties to the previous marriage null and void.[590]

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[585] Sec. 19(4), A.M. No. 02-11-10-SC.
[586] *Id.*
[587] Sec. 20(1), A.M. No. 02-11-10-SC.
[588] Sec. 20(2), A.M. No. 02-11-10-SC.
[589] Sec. 21, A.M. No. 02-11-10-SC.
[590] Art. 53, in relation to Article 52, FC.

[74.13] Issuance of Decree

The court shall issue the Decree of declaration of absolute nullity or annulment of marriage after compliance with the following requirements: (1) registration of the entry of judgment granting the petition for declaration of nullity or annulment of marriage in the Civil Registry where the marriage was celebrated and in the Civil Registry of the place where the Family Court is located; (2) registration of the approved partition and distribution of the properties of the spouses, in the proper Register of Deeds where the real properties are located; and (3) the delivery of the children's presumptive legitimes in cash, property, or sound securities.[591] The court shall quote in the Decree the dispositive portion of the judgment entered and attach to the Decree the approved deed of partition.[592]

Except in the case of children under Articles 36 and 53 of the Family Code, the court shall order the Local Civil Registrar to issue an amended birth certificate indicating the new civil status of the children affected.[593]

[74.14] Registration and Publication of Decree

The prevailing party shall cause the registration of the Decree in the Civil Registry where the marriage was registered, the Civil Registry of the place where the Family Court is situated, and in the National Census and Statistics Office. He shall report to the court compliance with this requirement within thirty days from receipt of the copy of the Decree.[594] The registered Decree shall be the best evidence to prove the declaration of absolute nullity or annulment of marriage and shall serve as notice to third persons concerning the properties of petitioner and respondent as well as the properties or presumptive legitimes delivered to their common children.[595] Failure to cause the registration of the Decree shall render the subsequent marriages of the former spouses in the previous marriage null and void.[596]

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[591] Sec. 22(a), A.M. No. 02-11-10-SC.
[592] Sec. 22, A.M. No. 02-11-10-SC.
[593] *Id.*
[594] Sec. 23(a), A.M. No. 02-11-10-SC.
[595] Sec. 23(c), A.M. No. 02-11-10-SC.
[596] Art. 53, in rel. to Art. 52, FC.

In case service of summons was made by publication, the parties shall cause the publication of the Decree once in a newspaper of general circulation.[597]

[74.15] Effects of Death of Parties

In case a party dies at any stage of the proceedings before the entry of judgment, the court shall order the case closed and terminated, without prejudice to the settlement of the estate in proper proceedings in the regular courts.[598] It thus appear that a direct proceeding for the purpose of obtaining a judicial declaration of nullity of a void marriage may no longer be filed, or if filed, may no longer prosper after the death of either of the party to such void marriage before entry of judgment. This does not mean, however, that a void marriage may no longer be questioned after the death of either party since it is beyond doubt that such marriage is still subject to a collateral attack.[599] However, if the marriage is merely voidable, there is no doubt that it may no longer prosper since it can be assailed only during the lifetime of the parties and not after death of either, in which case the parties and their offspring will be left as if the marriage had been perfectly valid.[600]

If the party dies after the entry of judgment of nullity or annulment, the judgment shall be binding upon the parties and their successors in interest in the settlement of the estate in the regular courts,[601] whether the judgment is one of annulment or of declaration of nullity of a marriage.

[74.16] Grant of Provisional Remedies or Protection Orders

Upon receipt of a verified petition for declaration of absolute nullity of void marriage or for annulment of voidable marriage, or for legal separation, 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 immedi-

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[597]Sec. 23(b), A.M. No. 02-11-10-SC.
[598]Sec. 24, A.M. No. 02-11-10-SC.
[599]Niñal vs. Bayadog, *supra*.
[600]*Id.*; citing I Tolentino, Civil Code, 1990 ed., p. 271.
[601]Sec. 24(b), A.M. No. 02-11-10-SC.

ately, with or without a bond, and for such period and under such terms and conditions as the court may deem necessary.

(a) Spousal Support

In determining support for the spouses, the court may be guided by the following rules: (a) In the absence of adequate provisions in a written agreement between the spouses, the spouses may be supported from the properties of the absolute community or the conjugal partnership. (b) The court may award support to either spouse in such amount and for such period of time as the court may deem just and reasonable based on their standard of living during the marriage. (c) The court may likewise consider the following factors: (1) whether the spouse seeking support is the custodian of a child whose circumstances make it appropriate for that spouse not to seek outside employment; (2) the time necessary to acquire sufficient education and training to enable the spouse seeking support to find appropriate employment, and that spouse's future earning capacity; (3) the duration of the marriage; (4) the comparative financial resources of the spouses, including their comparative earning abilities in the labor market; (5) the needs and obligations of each spouse; (6) the contribution of each spouse to the marriage, including services rendered in home-making, child care, education, and career building of the other spouse; (7) the age and health of the spouses; (8) the physical and emotional conditions of the spouses; (9) the ability of the supporting spouse to give support, taking into account that spouse's earning capacity, earned and unearned income, assets, and standard of living; and (10) any other factor the court may deem just and equitable. (d) The Family Court may direct the deduction of the provisional support from the salary of the spouse.[602]

(b) Child Support

The common children of the spouses shall be supported from the properties of the absolute community or the conjugal partnership.[603]

Subject to the sound discretion of the court, either parent or both may be ordered to give an amount necessary for the support, mainte-

[602]Sec. 2, A.M. 02-11-12-SC.
[603]Sec. 3, A.M. 02-11-12-SC.

nance, and education of the child. It shall be in proportion to the resources or means of the giver and to the necessities of the recipient.[604]

In determining the amount of provisional support, the court may likewise consider the following factors: (1) the financial resources of the custodial and non-custodial parent and those of the child; (2) the physical and emotional health of the child and his or her special needs and aptitudes; (3) the standard of living the child has been accustomed to; (4) the non-monetary contributions that the parents will make toward the care and well-being of the child.[605]

The Family Court may direct the deduction of the provisional support from the salary of the parent.[606]

(c) Child Custody

In determining the right party or person to whom the custody of the child of the parties may be awarded pending the petition, the court shall consider the best interests of the child and shall give paramount consideration to the material and moral welfare of the child.[607]

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.[608]

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, espe-

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[604] *Id.*
[605] *Id.*
[606] *Id.*
[607] Sec. 4, A.M. 02-11-12-SC.
[608] *Id.*

cially the choice of the child over seven years of age, unless the parent chosen is unfit; (3) to the 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.[609]

The custodian temporarily designated by the court shall give the court and the parents five days notice of any plan to change the residence of the child or take him out of his residence for more than three days provided it does not prejudice the visitation rights of the parents.[610]

(d) Visitation Rights

Appropriate visitation rights shall be provided to the parent who is not awarded provisional custody unless found unfit or disqualified by the court.[611]

(e) Hold Departure Order

Pending resolution of the petition, no child of the parties shall be brought out of the country without prior order from the court.[612] The court, *motu proprio* or upon application under oath, may issue *ex-parte* a hold departure order, addressed to the Bureau of Immigration and Deportation, directing it not to allow the departure of the child from the Philippines without the permission of the court.[613]

The Family Court issuing the hold departure order shall furnish the Department of Foreign Affairs and the Bureau of Immigration and Deportation of the Department of Justice a copy of the hold departure order issued within twenty-four hours from the time of its issuance and through the fastest available means of transmittal.[614]

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[609] *Id.*
[610] *Id.*
[611] Sec. 5, A.M. No. 02-11-12-SC.
[612] Sec. 6, A.M. No. 02-11-12-SC.
[613] *Id.*
[614] *Id.*

The hold-departure order shall contain the following information: (a) the complete name (including the middle name), the date and place of birth, and the place of last residence of the person against whom a hold-departure order has been issued or whose departure from the country has been enjoined; (b) the complete title and docket number of the case in which the hold departure was issued; (c) the specific nature of the case; and (d) the date of the hold-departure order.[615]

If available, a recent photograph of the person against whom a hold-departure order has been issued or whose departure from the country has been enjoined should also be included.[616]

The court may recall the order *motu proprio* or upon verified motion of any of the parties after summary hearing, subject to such terms and conditions as may be necessary for the best interests of the child.[617]

(f) Order of Protection

The court may issue an Order of Protection requiring any person: (a) to stay away from the home, school, business, or place of employment of the child, other parent or any other party, and to stay away from any other specific place designated by the court; (b) to refrain from harassing, intimidating, or threatening such child or the other parent or any person to whom custody of the child is awarded; (c) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety, or welfare of the child; (d) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods; (e) to permit a designated party to enter the residence during a specified period of time in order to take personal belongings not contested in a proceeding pending with the Family Court; (f) to comply with such other orders as are necessary for the protection of the child.[618]

(g) Administration of Common Property

If a spouse without just cause abandons the other or fails to comply with his or her obligations to the family, the court may, upon appli-

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[615]*Id.*
[616]*Id.*
[617]*Id.*
[618]Sec. 7, A.M. No. 02-11-12-SC.

cation of the aggrieved party under oath, issue a provisional order appointing the applicant or a third person as receiver or sole administrator of the common property subject to such precautionary conditions it may impose.[619]

The receiver or administrator may not dispose of or encumber any common property or specific separate property of either spouse without prior authority of the court.[620]

The provisional order issued by the court shall be registered in the proper Register of Deeds and annotated in all titles of properties subject of the receivership or administration.[621]

Art. 50. The effects provided for in paragraphs (2), (3), (4) and (5) of Article 43 and in Article 44 shall also apply in the proper cases to marriages which are declared void *ab initio* or annulled by final judgment under Articles 40 and 45.

The final judgment in such cases shall provide for the liquidation, partition and distribution of the properties of the spouses, the custody and support of the common children, and the delivery of their presumptive legitimes, unless such matters had been adjudicated in previous judicial proceedings.

All creditors of the spouses as well as of the absolute community or the conjugal partnership shall be notified of the proceedings for liquidation.

In the partition, the conjugal dwelling and the lot on which it is situated, shall be adjudicated in accordance with the provisions of Articles 102 and 129.

Art. 51. In said partition, the value of the presumptive legitimes of all common children, computed as of the date of the final judgment of the trial court, shall be delivered in cash, property or sound securities, unless the parties, by mutual agreement judicially approved, had already provided for such matters.

The children or their guardian, or the trustee of their property, may ask for the enforcement of the judgment.

The delivery of the presumptive legitimes herein prescribed shall in no way prejudice the ultimate successional rights of the children accruing

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[619]Sec. 8, A.M. No. 02-11-12-SC.
[620]*Id*.
[621]*Id*.

upon the death of either or both of the parents; but the value of the properties already received under the decree of annulment or absolute nullity shall be considered as advances on their legitime. (n)

COMMENTS:

§ 75. Effects of Judicial Declaration of Nullity Of Marriage

[75.1] In general
[75.2] Retroactivity of judicial declaration
[75.3] Effect on status of children
[75.4] Effect on property relations
[75.5] Effect on donation *propter nuptias*
[75.6] Effect on designation as irrevocable beneficiary in insurance policy
[75.7] Effect on right to inherit
[75.8] Effect on parental authority and custody of children

[75.1] In General

Void marriages, like void contracts, are inexistent from the very beginning[622] and no judicial decree is required to establish their nullity.[623] Thus, the general rule is if the marriage is void *ab initio*, it is *ipso facto* void without need of any judicial declaration of nullity.[624] It is only by way of exception that the Family Code[625] requires a judicial declaration of nullity of the previous marriage before a subsequent marriage is contracted.[626] As clarified by the Court in **Domingo vs. Court of Appeals**,[627] a prior and separate declaration of nullity of a marriage is an all important condition precedent only for purposes of remarriage.[628] That is, if a party who is previously married wishes to contract a second marriage, he or she has to obtain first a judicial decree declaring the first marriage void, before he or she could contract said second marriage, otherwise the second marriage would be void.[629] The same rule applies even if the first marriage is patently void because the parties are not free

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[622]J. Vitug, Concurring and Dissenting Opinion in Mercado vs. Tan, 337 SCRA 122, 135 (2000).

[623]J. Vitug, Separate Opinion in Tenebro vs. CA, 423 SCRA 272, 286 (2004).

[624]J. Carpio, Concurring Opinion in Abunado vs. People, 426 SCRA 562, 572 (2004).

[625]Under Article 40.

[626]J. Vitug, Concurring and Dissenting Opinion in Mercado vs. Tan, 337 SCRA 122, 135 (2000).

[627]226 SCRA 572 (1993).

[628]Cited in Cariño vs. Cariño, 351 SCRA 127, 138.

[629]*Id*.

to determine for themselves the validity or invalidity of their marriage.[630] However, for purposes other than remarriage, no judicial action is necessary to declare a marriage an absolute nullity.[631]

Thus, under ordinary circumstances, the effect of a void marriage, so far as concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place.[632] And therefore, being good for no legal purpose, its invalidity can be maintained in any proceeding in which the fact of marriage may be material, either direct or collateral, in any civil court between the parties at any time, whether before or after the death of either or both the husband and the wife,[633] and upon mere proof of the facts rendering such marriage void, it will be disregarded or treated as non-existent by the courts.[634]

[75.2] Retroactivity of Judicial Declaration

A marriage that is void *ab initio* is considered as having never to have taken place.[635] As such, the judicial declaration of the nullity of the marriage retroacts to the date of the celebration of the marriage insofar as the vinculum between the spouses is concerned.[636]

Morigo vs. People
422 SCRA 376 (2004)

FACTS: In this case, Lucio Morigo and Lucia Barrete were boardmates while they were studying. After school year 1977-78, they lost contact with each other. In 1984, Lucio was surprised to receive a card from Lucia from Singapore. The former replied and after an exchange of letters, they became sweethearts. In 1986, Lucia returned to the Philippines but left again for Canada to work there. While in Canada, they maintained constant communication. In 1990, Lucia came back to the Philippines and proposed to petition Lucio to join

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[630]*Id*.

[631]*Id*.; Also in Niñal vs. Bayadog, 328 SCRA 122, 136 (2000).

[632]Niñal vs. Bayadog, 328 SCRA 122, 135-136 (2000).

[633]*Id*.; Note, however, that upon the death of either party to a void marriage prior to the entry of judgment, a direct action assailing the validity of a void marriage may no longer prosper (see A.M. No. 02-11-10-SC).

[634]Niñal vs. Bayadog, 328 SCRA 122, 135-136 (2000).

[635]*Id*., citing Suntay vs. Cojuanco-Suntay, 300 SCRA 760 (1998); People vs. Retirement Board, 272 Ill. App. 59 cited in I Tolentino, Civil Code, 1990 ed., p. 271.

[636]Tenebro vs. CA, 423 SCRA 272, 284 (2004). See also Morigo vs. People, 422 SCRA 376, 383 (2004).

her in Canada. Both agreed to get married, thus they were married on August 30, 1990 at the *Iglesia de Filipina Nacional* in Bohol. On September 8, 1990, Lucia reported back to her work in Canada leaving Lucio behind. On August 19, 1991, Lucia filed with the Ontario Court (General Division) a petition for divorce against appellant which was granted by the court on January 17, 1992 and to take effect on February 17, 1992. On October 4, 1992, appellant Lucio Morigo married Maria Jececha Lumbago at the *Virgen sa Barangay* Parish, Tagbilaran City, Bohol. On September 21, 1993, Lucio filed a complaint for judicial declaration of nullity of his marriage to Lucia. The complaint seeks, among others, the declaration of nullity of Lucio's marriage with Lucia, on the ground that no marriage ceremony actually took place. On October 19, 1993, Lucio was charged with Bigamy in an Information filed by the City Prosecutor of Tagbilaran [City], with the Regional Trial Court of Bohol. Lucio then moved for suspension of the arraignment on the ground that the civil case for judicial nullification of his marriage with Lucia posed a prejudicial question in the bigamy case. His motion was granted, but subsequently denied upon motion for reconsideration by the prosecution. On August 5, 1996, the RTC of Bohol handed down its judgment in the criminal case finding the accused guilty of bigamy. Lucio appealed the judgment of conviction to the Court of Appeals. During the pendency of the appeal, the trial court rendered a decision in the civil case declaring the marriage between Lucio and Lucia void *ab initio* since no marriage ceremony actually took place. The trial court found that there was no actual marriage ceremony performed between Lucio and Lucia by a solemnizing officer. Instead, what transpired was a mere signing of the marriage contract by the two, without the presence of a solemnizing officer. The trial court thus held that the marriage is void *ab initio*, in accordance with Articles 3 and 4 of the Family Code. Said judgment became final and executory. But nonetheless, the Court of Appeals affirmed the judgment of conviction. In reversing the decision of the Court of Appeals, the Supreme Court explained —

> "Before we delve into petitioner's defense of good faith and lack of criminal intent, we must first determine whether all the elements of bigamy are present in this case. In *Marbella-Bobis vs. Bobis*, we laid down the elements of bigamy thus:
>
> (1) the offender has been legally married;
>
> (2) the first marriage has not been legally dissolved, or in case his or her spouse is absent, the absent spouse has not been judicially declared presumptively dead;
>
> (3) he contracts a subsequent marriage; and
>
> (4) the subsequent marriage would have been valid had it not been for the existence of the first.

Applying the foregoing test to the instant case, we note that during the pendency of CA-G.R. CR No. 20700, the RTC of Bohol Branch 1, handed down the following decision in Civil Case No. 6020, to wit:

WHEREFORE, premises considered, judgment is hereby rendered decreeing the annulment of the marriage entered into by petitioner Lucio Morigo and Lucia Barrete on August 23, 1990 in Pilar, Bohol and further directing the Local Civil Registrar of Pilar, Bohol to effect the cancellation of the marriage contract.

SO ORDERED.

The trial court found that there was no actual marriage ceremony performed between Lucio and Lucia by a solemnizing officer. Instead, what transpired was a mere signing of the marriage contract by the two, without the presence of a solemnizing officer. The trial court thus held that the marriage is void *ab initio*, in accordance with Articles 3 and 4 of the Family Code. As the dissenting opinion in CA-G.R. CR No. 20700, correctly puts it, "This simply means that there was no marriage to begin with; and that such declaration of nullity retroacts to the date of the first marriage. In other words, for all intents and purposes, reckoned from the date of the declaration of the first marriage as void *ab initio* to the date of the celebration of the first marriage, the accused was, under the eyes of the law, never married." The records show that no appeal was taken from the decision of the trial court in Civil Case No. 6020, hence, the decision had long become final and executory.

The first element of bigamy as a crime requires that the accused must have been legally married. But in this case, legally speaking, the petitioner was never married to Lucia Barrete. Thus, there is no first marriage to speak of. Under the principle of retroactivity of a marriage being declared void *ab initio*, the two were never married "from the beginning." The contract of marriage is null; it bears no legal effect. Taking this argument to its logical conclusion, for legal purposes, petitioner was not married to Lucia at the time he contracted the marriage with Maria Jececha. The existence and the validity of the first marriage being an essential element of the crime of bigamy, it is but logical that a conviction for said offense cannot be sustained where there is no first marriage to speak of. The petitioner, must, perforce be acquitted of the instant charge.

The present case is analogous to, but must be distinguished from *Mercado vs. Tan.* In the latter case, the judicial declaration of

nullity of the first marriage was likewise obtained *after* the second marriage was already celebrated. We held therein that:

A judicial declaration of nullity of a previous marriage is necessary before a subsequent one can be legally contracted. One who enters into a subsequent marriage without first obtaining such judicial declaration is guilty of bigamy. This principle applies even if the earlier union is characterized by statutes as "void."

It bears stressing though that in *Mercado,* the first marriage was actually solemnized not just once, but twice: first before a judge where a marriage certificate was duly issued and then again six months later before a priest in religious rites. Ostensibly, at least, the first marriage appeared to have transpired, although later declared void *ab initio*.

In the instant case, however, no marriage ceremony at all was performed by a duly authorized solemnizing officer. Petitioner and Lucia Barrete merely signed a marriage contract on their own. The mere private act of signing a marriage contract bears no semblance to a valid marriage and thus, needs no judicial declaration of nullity. Such act alone, without more, cannot be deemed to constitute an ostensibly valid marriage for which petitioner might be held liable for bigamy unless he first secures a judicial declaration of nullity before he contracts a subsequent marriage."

[75.3] Effect on the Status of Children

All children conceived and born outside a valid marriage are illegitimate, unless the law itself gives them legitimate status.[637] Hence, children born of void marriages are considered illegitimate[638] except those born of void marriages under Articles 36 and 53 of the Family Code, which are exceptionally considered legitimate.[639]

Article 54 of the Code provides these exceptions: "Children conceived or born before the judgment of annulment or absolute nullity of the marriage under Article 36 has become final and executory shall be

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[637]Briones vs. Miguel, 440 SCRA 455; citing Art. 165, FC.
[638]Art. 165, FC.
[639]Art. 54, FC.

considered legitimate. Children conceived or born of the subsequent marriage under Article 53 shall likewise be legitimate."[640]

As previously discussed, children born of marriages that are declared void under Article 40 are considered illegitimate since the latter provision provides for a ground distinct and separate from that provided for in Article 53, in relation to Articles 52 and 35(6), of the Family Code.

[75.4] Effect on Property Relations

One of the effects of the declaration of nullity of marriage is the separation of the property of the spouses according to the applicable property regime.[641] In a void marriage, regardless of the cause thereof, the property relations of the parties during the period of cohabitation is governed by the provisions of Article 147 or 148, such as the case may be, of the Family Code.[642] Article 147 applies to unions of parties who are legally capacitated and not barred by any impediment to contract marriage, but whose marriage is nonetheless void for other reasons, like the absence of a marriage license.[643] Article 148, on the other hand, refers to the property regime of bigamous marriages, adulterous relationships, relationships in a state of concubine, relationships where both man and woman are married to other persons, multiple alliances of the same married man.[644]

In the liquidation and partition of the property owned in common by the spouses in a void marriage, the provisions on co-ownership under the Civil Code ordinarily applies, not Articles 50, 51 and 52, in relation to Articles 102 and 129, of the Family Code.[645] The rules set up to govern the liquidation of either the absolute community or the conjugal partnership of gains, the property regimes recognized for valid and voidable marriages (in the latter until the contract is annulled), are irrelevant to the liquidation of the co-ownership that exists between the spouses in a void marriage.[646]

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[640] Cited in Briones vs. Miguel, *supra*.
[641] Cariño vs. Cariño, *supra*, at p. 134.
[642] Valdes vs. RTC, Br. 102, QC, 260 SCRA 221, 226 (1996).
[643] Cariño vs. Cariño, *supra*, at p. 136.
[644] *Id.*, at p. 135.
[645] Valdes vs. RTC, Br. 102, QC, *supra*, at pp. 229-230.
[646] *Id.*, at pp. 231-232.

Article 50 of the Family Code, however, by its explicit terms, makes applicable the provisions of paragraph (2) of Article 43 to void marriages under Article 40 of the Family Code, *i.e.*, the declaration of nullity of a subsequent marriage contracted by a spouse of a prior void marriage before the latter is judicially declared void.[647] Said paragraph provides, as follows:

> "Art. 43. The termination of the subsequent marriage referred to in the preceding Article shall produce the following effects:
>
> xxx xxx xxx
>
> (2) The absolute community of property or the conjugal partnership, as the case may be, shall be dissolved and liquidated, but if either spouse contracted said marriage in bad faith, his or her share of the net profits of the community property or conjugal partnership property shall be forfeited in favor of the common children or, if there are none, the children of the guilty spouse by a previous marriage or in default of children, the innocent spouse; xxx"

In other words, for marriages which are declared void under Article 40 of the Family Code, the rules governing the liquidation of either the absolute community or the conjugal partnership[648] of gains are applicable, except that the spouse who contracted the subsequent marriage in bad faith shall forfeit his or her share of the net profits of the community property or conjugal partnership property in favor of the common children or, if there are none, the children of the said guilty spouse by a previous marriage or in default of children, the innocent spouse.[649]

The foregoing is a special rule that somehow recognizes the philosophy and an old doctrine that void marriages are inexistent from the very beginning and no judicial decree is necessary to establish their nullity.[650] In now requiring for *purposes of remarriage*, the declaration of nullity by final judgment of the previously contracted void marriage, the present law aims to do away with any continuing uncertainty on the

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[647] *Id.*, at pp. 232-233.

[648] Arts. 102 and 129, FC.

[649] Art. 43(2), in rel. to Art. 50, FC.

[650] Valdes vs. RTC, Br. 102, QC, *supra*, at p. 233.

status of the second marriage.[651] It is not then illogical for the provisions of Article 43, in relation to Articles 41 and 42, of the Family Code, on the effects of the termination of a subsequent marriage contracted during the subsistence of a previous marriage to be made applicable *pro hac vice*.[652]

[75.5] Effect on Donations Propter Nuptias

If the marriage is judicially declared void ab initio, the donor may revoke the donation propter nuptias.[653] However, if the donation was made in the marriage settlement, the same shall be void if the marriage is later judicially declared void ab initio.[654]

The rule is different, however, if the marriage is judicially declared void under Article 40, *i.e.*, the declaration of nullity of a subsequent marriage contracted by a spouse of a prior void marriage before the latter is judicially declared void. In the latter case, the provisions of paragraph (3) of Article 43 apply.[655] As such, donations propter nuptias in a void marriage under Article 40 shall remain valid, except that if the donee contracted the marriage in bad faith, such donations made to said donee are revoked by operation of law.

The rule is also different if the marriage is void pursuant to Article 44 of the Family Code, *i.e.*, where both parties to a subsequent marriage in Article 41 of the Family Code acted in bad faith. If both spouses of such subsequent marriage acted in bad faith, all donations *propter nuptias* are revoked by operation of law.[656]

[75.6] Effect on Designation as Irrevocable Beneficiary in Insurance Policy

Under the Insurance Code, if the designation of the beneficiary in the insurance policy is irrevocable, the insured has no right to change the beneficiary he designated in the policy.[657] The rule will still be the

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[651] *Id*.
[652] *Id*.
[653] Art. 86(1), FC.
[654] Art. 81, in relation to Art. 86(1), FC.
[655] As expressly provided in Article 50, FC.
[656] See Art. 44, FC.
[657] Sec. 11, Insurance Code.

same even if the beneficiary and the insured are spouses and their marriage is later judicially declared void. By way of exception to the rule, if the marriage is declared void under Article 40, the provisions of Article 43(3) apply.[658] Hence, the innocent spouse in a void marriage under Article 40 may revoke the designation of the other spouse who acted in bad faith as a beneficiary in any insurance policy, even if such designation be stipulated as irrevocable.[659]

[75.7] Effect on Right to Inherit

If the marriage is judicially declared void, it is as if no marriage had taken place. As such, the parties thereto are not to be considered as legal heir of each other, except if they are collateral blood relatives within the fifth civil degree.[660] Ordinarily, therefore, such former spouses may not inherit from each other by way of intestate succession. There is nothing, however, that will prevent them from providing for testamentary provisions in their respective wills in favor of each other.

If the marriage is, however, declared void under Article 40, in which case the provisions of Article 43(5) will apply,[661] the spouse who contracted the marriage in bad faith shall be disqualified to inherit from the innocent spouse by testate and intestate succession. If the marriage is void pursuant to Article 44 of the Family Code, testamentary dispositions made by one in favor of the other are revoked by operation of law.[662]

[75.8] Effect on Parental Authority and Custody of Common Children

Since children of void marriages are generally illegitimate,[663] they shall be under the parental authority and custody of their mother.[664] This is the rule regardless of whether the father admits paternity.[665]

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[658]As expressly mandated in Art. 50, FC.

[659]Art. 43(3), in relation to Art. 50, FC.

[660]Collateral blood relatives within the 5th civil degree are not prohibited from marrying each other (see Art. 38[1], FC); and under the law, they are considered legal heirs (see Art. 1010, NCC) entitled to inherit by intestate succession.

[661]See Art. 50, FC.

[662]Art. 44, FC.

[663]Art. 165, FC.

[664]Art. 176, FC.

[665]Briones vs. Miguel, 440 SCRA 455, 462 (2004); citing Mossesgeld vs. CA, 300 SCRA 464, 468 (1998).

In **David vs. Court of Appeals**,[666] the Supreme Court held that the recognition of an illegitimate child by the father could be a ground for ordering the latter to give support to, but not custody of, the child. The law explicitly confers to the mother sole parental authority over an illegitimate child; it follows that only if she defaults can the father assume custody and authority over the minor. Of course, the putative father may adopt his own illegitimate child;[667] in such a case, the child shall be considered a legitimate child of the adoptive parent.[668]

The father is entitled, however to visitorial rights. In **Silva vs. Court of Appeals**,[669] the Court sustained the visitorial right of an illegitimate father over his children in view of the constitutionally protected *inherent and natural right* of parents over their children.[670] Even when the parents are estranged and their affection for each other is lost, their attachment to and feeling for their offspring remain unchanged. Neither the law nor the courts allow this affinity to suffer, absent any real, grave or imminent threat to the well-being of the child.[671]

Art. 52. The judgment of annulment or of absolute nullity of the marriage, the partition and distribution of the properties of the spouses, and the delivery of the children's presumptive legitimes shall be recorded in the appropriate civil registry and registries of property; otherwise, the same shall not affect third persons. (n)

Art. 53. Either of the former spouses may marry again after complying with the requirements of the immediately preceding Article; otherwise, the subsequent marriage shall be null and void.

Art. 54. Children conceived or born before the judgment of annulment or absolute nullity of the marriage under Article 36 has become final and executory shall be considered legitimate. Children conceived or born of the subsequent marriage under Article 53 shall likewise be legitimate.

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[666]250 SCRA 82, 86 (1995).
[667]See Art. 185, FC.
[668]Mossesgeld vs. CA, *supra*.
[669]275 SCRA 604, 609 (1997). See also Bondagjy vs. Bondagjy, 371 SCRA 642, 653 (2001).
[670]Article II, Section 12, 1987 Constitution.
[671]Briones vs. Miguel, *supra*.

COMMENTS:

§ 76. Requirement of Registration

A decree of declaration of absolute nullity or annulment of marriage shall not be issued unless the following requirements are complied with:

(1.) Registration of the entry of judgment granting the petition for declaration of nullity or annulment of marriage in the civil registry of the place where the Family Court is located;[672]

(2.) Registration of the approved partition and distribution of the properties of the spouses, in the proper Register of Deeds where the real properties are located;[673] and

(3.) The delivery of the children's presumptive legitimes in cash, property, or sound securities.[674]

If the foregoing requirements are not complied with, the subsequent marriage contracted by the parties to the previous marriage shall be null and void[675] and the partition and distribution of the properties of the spouses shall not affect third persons.[676]

§ 77. Issuance of Decree

After the foregoing requirements are complied, the prevailing party shall be entitled to the issuance of a Decree of declaration of absolute nullity or annulment of marriage, as the case may be. He or she is required, however, to cause the registration of the Decree in the civil registry of the place where the marriage was registered, the civil registry of the place where the Family Court is situated, and in the National Census and Statistics Office (NCSO).[677] The registered Decree shall be the best evidence to prove the declaration of absolute nullity or annulment of marriage and shall serve as notice to third persons concerning the prop-

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[672] Sec. 22(1), A.M. No. 02-11-10-SC.
[673] Sec. 22(2), A.M. No. 02-11-10-SC.
[674] Sec. 22(3), A.M. No. 02-11-10-SC.
[675] Art. 53, in relation to Art. 52.
[676] Art. 52, FC.
[677] Sec. 23(a), A.M. No. 02-11-10-SC.

erties of petitioner and respondent as well as the properties or presumptive legitimes delivered to their common children.[678]

§ 78. Status of Children

As previously stated, since a voidable marriage is considered valid prior to the judgment of annulment, children conceived or born before the judgment of annulment has become final and executory are considered legitimate.[679] Children born of void marriages are considered illegitimate[680] except those born of void marriages under Articles 36 and 53 of the Family Code, which are exceptionally considered legitimate.[681] Thus, if the marriage is judicially declared an absolute nullity, the Family Court shall order the local civil registrar to issue an amended birth certificate indicating the new civil status of the children affected,[682] except in the case of children under Articles 36 and 53 of the Family Code.

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[678] Sec. 23(c), A.M. No. 02-11-10-SC.
[679] Art. 54, FC.
[680] Art. 165, FC.
[681] Art. 54, FC.
[682] Sec. 22, A.M. No. 02-11-10-SC.

Title II

LEGAL SEPARATION

Art. 55. A petition for legal separation may be filed on any of the following grounds:

(1) Repeated physical violence or grossly abusive conduct directed against the petitioner, a common child, or a child of the petitioner;

(2) Physical violence or moral pressure to compel the petitioner to change religious or political affiliation;

(3) Attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement;

(4) Final judgment sentencing the respondent to imprisonment of more than six years, even if pardoned;

(5) Drug addiction or habitual alcoholism of the respondent;

(6) Lesbianism or homosexuality of the respondent;

(7) Contracting by the respondent of a subsequent bigamous marriage, whether in the Philippines or abroad;

(8) Sexual infidelity or perversion;

(9) Attempt by the respondent against the life of the petitioner; or

(10) Abandonment of petitioner by respondent without justifiable cause for more than one year.

For purposes of this Article, the term "child" shall include a child by nature or by adoption. (97a)

COMMENTS:

§79. Legal Separation

[79.1] Concept
[79.2] Distinguished from annulment and absolute divorce
[79.3] Grounds for legal separation

[79.4] Infliction of physical violence
[79.5] Moral pressure
[79.6] Grossly abusive conduct
[79.7] Promotion of prostitution
[79.8] Final judgment of more than six years imprisonment
[79.9] Drug addiction, habitual alcoholism, lesbianism or homosexuality
[79.10] Contracting of subsequent bigamous marriage
[79.11] Sexual infidelity
[79.12] Sexual perversion
[79.13] Attempt on the life of the spouse
[79.14] Abandonment

[79.1] Concept

Legal separation is a legal remedy available to parties in a valid but failed marriage for the purpose of obtaining a decree from court entitling him or her to certain reliefs such as the right to live separately from each other (without affecting the marital bond that exists between them), the dissolution and liquidation of their absolute community or conjugal partnership property regime and the custody of their minor children. However, this remedy may be availed of only if there is a ground for doing so, which grounds are enumerated under Article 55 of the Family Code. Based on these grounds, the law allows spouses who have obtained a decree of legal separation to live separately from each other, but in such a case the marriage bonds are not severed. Elsewise stated, legal separation does not dissolve the marriage tie, much less authorize the parties to remarry.

[79.2] Distinguished from annulment and absolute divorce

Legal separation is to be distinguished from annulment and absolute divorce in that in the former, the marriage bond is not severed; whereas, in annulment and absolute divorce, the marriage bond is severed or terminated, thus allowing the parties thereto to remarry. The cause giving rise to legal separation must necessarily exist only after the celebration of the marriage.[1] This is likewise true in the case of absolute divorce. In annulment, however, the grounds thereof must necessarily exist at the time of the marriage.[2]

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[1]Tolentino, Civil Code of the Philippines, Vol. 1, 1990 ed., p. 288.
[2]Art. 45, FC.

Philippine laws do not provide for absolute divorce although it recognizes as valid the divorce obtained by an alien spouse who is married to a citizen of the Philippines, even in so far as the latter is concerned.[3] What Philippine laws provide are relative divorce, in the form of legal separation, and annulment.

[79.3] Grounds for legal separation

The policy of our laws on marriage 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 to depend upon the parties themselves.[4] State policies recognize the fact that public interest will not be served if the spouses are to be allowed to go their respective ways. Where there are offspring, the reason for maintaining the conjugal union is even more imperative.[5] It is for this reason that the grounds for legal separation must be construed as exclusive and restrictive. Hence, legal separation may only be allowed based on the following grounds enumerated under Article 55 of the Family Code:

(1) Repeated physical violence or grossly abusive conduct directed against the petitioner, a common child, or a child of the petitioner;

(2) Physical violence or moral pressure to compel the petitioner to change religious or political affiliation;

(3) Attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement;

(4) Final judgment sentencing the respondent to imprisonment of more than six years, even if pardoned;

(5) Drug addiction or habitual alcoholism of the respondent;

(6) Lesbianism or homosexuality of the respondent;

(7) Contracting by the respondent of a subsequent bigamous marriage, whether in the Philippines or abroad;

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[3] Art. 26, 2nd par., FC; see discussions under Art. 26.

[4] Adong vs. Cheong Gee, 43 Phil. 43.

[5] Somosa-Ramos vs. Vamenta, Jr., G.R. No. L-34132, July 29, 1972.

(8) Sexual infidelity or perversion;

(9) Attempt by the respondent against the life of the petitioner; or

(10) Abandonment of petitioner by respondent without justifiable cause for more than one year.

[79.4] Infliction of Physical Violence

Infliction of physical violence is a ground for legal separation under paragraph (1) of Article 55 if the same is repeatedly resorted to by the respondent against the petitioner, a common child, or a child of the petitioner. If the physical violence is directed against the wife, a common child or a child of the wife, the same is also punishable under R.A. No. 9262, otherwise known as the "Anti-Violence Against Women and Their Children Act of 2004."

If the physical violence committed by the respondent is in the form of an attempt against the life of the petitioner, the same is likewise a ground for legal separation under paragraph (9) of Article 55. Under this paragraph, the physical violence need not be repeated for it to be a ground for legal separation.

If the physical violence is employed by the respondent in order to compel the petitioner to change his or her religious or political affiliation, the same is likewise a ground for legal separation under paragraph (2) of Article 55, even if physical violence is employed only once. Note, however, that the physical violence must be directed against the petitioner in this paragraph. Thus, if the physical violence is directed against a common child or a child of the petitioner to compel said child to change religious or political affiliation, there is no ground for legal separation if the physical violence is not repeatedly resorted to.

[79.5] Moral Pressure

Exertion of moral pressure by the respondent is a ground for legal separation under paragraph (2) of Article 55 if the same is resorted to in order to compel the petitioner to change his or her religious or political affiliation. Note that under paragraph (2), the moral pressure must be directed against the petitioner. If the same is directed against a common child or a child of the petitioner to compel said child to change religious or political affiliation, there is no ground for legal separation.

[79.6] Grossly Abusive Conduct

Violence, as a ground for legal separation, need not be physical. In view of the presence of *"grossly abusive conduct"* as a ground for legal separation under paragraph (1), it is submitted that psychological and sexual violence and repeated verbal abuse may likewise qualify as grounds for legal separation under paragraph (1) of Article 55.

The definition of the term *"psychological violence"* under Republic Act No. 9262 may prove useful. Under said law, psychological violence is defined as "acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and mental infidelity. It includes causing or allowing the victim to witness the physical, sexual or psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children."[6]

The definition of the term *"sexual violence"* under Republic Act No. 9262 may likewise prove useful. Under said law, sexual violence is defined as "an act which is sexual in nature, committed against a woman or her child. It includes, but is not limited to: a) rape, sexual harassment, acts of lasciviousness, treating a woman or her child as a sex object, making demeaning and sexually suggestive remarks, physically attacking the sexual parts of the victim's body, forcing her/him to watch obscene publications and indecent shows or forcing the woman or her child to do indecent acts and/or make films thereof, forcing the wife and mistress/lover to live in the conjugal home or sleep together in the same room with the abuser; b) acts causing or attempting to cause the victim to engage in any sexual activity by force, threat of force, physical or other harm or threat of physical or other harm or coercion; c) prostituting the woman or child."[7]

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[6]Sec. 3(a)(C), RA 9262.
[7]Sec. 3(a)(B), RA 9262.

[79.7] Promotion of Prostitution

An attempt on the part of the respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement, is a ground for legal separation under paragraph (3) of Article 55. It may likewise be a ground for legal separation under paragraph (1), referring to "grossly abusive conduct." Note that under R.A. No. 9262, the ground under paragraph (3) is also punished as a crime if the same is directed against the wife or a child of the wife.[8]

[79.8] Final Judgment of More Than Six Years Imprisonment

If the respondent is convicted of a crime by final judgment where the sentenced imposed is imprisonment of more than six (6) years, it is a ground for legal separation even if the respondent is pardoned and regardless of the nature of the crime for which the respondent is convicted. If the respondent is convicted in a final judgment prior to the celebration of the marriage, it is a ground for annulment if the crime involves moral turpitude and the fact of conviction is not disclosed to the other party. For a final judgment of conviction to be considered as a ground for legal separation, the following requisites are required: (1) the sentenced imposed is imprisonment of more than six (6) years; and (2) the conviction occurs only after the celebration of the marriage.

[79.9] Drug addiction, habitual alcoholism, lesbianism or homosexuality

If the drug addiction, habitual alcoholism, lesbianism or homosexuality is already present during the time of the marriage but the same is concealed from the other party, there is fraud which constitutes as ground for annulment of the marriage.[9] If there is no concealment and such circumstance is known to the other party at the time of the marriage, there is no ground to annul the marriage. The existence of any such circumstance, at the time of the marriage, may not likewise qualify as a ground for legal separation since in the latter, the causes or grounds thereof must necessarily exist only after the celebration of the marriage.

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[8]Sec. 5(g), RA 9262.
[9]See Art. 46(4), FC.

Thus, for drug addiction, habitual alcoholism, lesbianism or homosexuality to be a ground for legal separation, said cause is required to arise only after the celebration of the marriage.

[79.10] Contracting of Subsequent Bigamous Marriage

Contracting a subsequent bigamous marriage is a ground to declare the subsequent marriage as void *ab initio* but it does not affect the validity of the prior marriage. In such a situation, the remedy of the aggrieved party in the prior marriage is legal separation under paragraph (7) of Article 55. A plain reading of the said law indicates that the provision considers the mere act of contracting a second or subsequent marriage during the subsistence of the prior valid marriage as a ground for legal separation, regardless of the fact that the second marriage is void *ab initio* on grounds other than the existence of the first marriage.

[79.11] Sexual Infidelity

Under the New Civil Code,[10] it is required that the sexual infidelity must be in the form of adultery (on the part of the wife) or concubinage (on the part of the husband) before the same may constitute as ground for legal separation. As a consequence, a single act of sexual intercourse on the part of the husband with a woman other than his spouse will not necessarily be a ground for legal separation if such infidelity will not fall under concubinage, as the term is defined under the Revised Penal Code. Note that for the crime of concubinage to be committed, it is required that the husband must either (1) keep a mistress in the conjugal dwelling; (2) have sexual intercourse, under scandalous circumstances, with a woman who is not his wife; or (3) cohabit with her in any other place.[11] On the other hand, a single act of sexual intercourse on the part of the wife with a man other than her husband is always a ground for legal separation since the same constitutes adultery.[12]

This basic inequality in the commission of a cause for legal separation between husbands and wives, in relation to sexual infidelity, has been sufficiently addressed under the Family Code. Now, it is no longer

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[10]See Art. 97(1), NCC.
[11]See Art. 334, RPC.
[12]See Art. 333, RPC.

required that the sexual infidelity be in the form of adultery or concubinage before the same may constitute as ground for legal separation. Under paragraph (8) of Article 55, mere sexual infidelity is now a ground for legal separation, without requiring that the same be in the form of adultery or concubinage. As a result, a single act of sexual intercourse on the part of both the husband and the wife with a person other than their spouse will now be a ground for legal separation. Additionally, the new law no longer requires that there be sexual intercourse since any sexual act short of the actual sexual intercourse may fall under "sexual infidelity." Moreover, the new law no longer requires that the sexual infidelity by a spouse be committed with a person of opposite sex for it to be a ground for legal separation — which is a requirement under the old law since the crimes of adultery and concubinage may be committed only by the spouses through sexual relations with an opposite sex.

[79.12] Sexual Perversion

According to the late Senator Tolentino, sexual perversion, as a ground for legal separation, includes all unusual or abnormal sexual practices which may be offensive to the feelings or sense of decency of either the husband or the wife.[13] If the husband uses force or threat of force, physical or other harm or threat of physical or other harm, or intimidation, against his wife for the purpose of satisfying his sexual perversion, the same also constitutes a crime under R.A. No. 9262.

[79.13] Attempt on the Life of the Spouse

An attempt on the life of the spouse is a ground for legal separation under paragraph (9) of Article 55. The obvious intent of the law, however, is to require the presence of "intent to kill." Thus, if the injury caused to a spouse is merely accidental or not intentional, it will not be a ground for legal separation even if the injury is life-threatening. Also, if the act of attempting to kill the spouse is wholly justified or excused, as in the case of legitimate self-defense, the same is not a ground for legal justification. For example, if the husband surprises his wife in an act of sexual intercourse with another man, the former has a ground for legal separation under paragraph (8) of Article 55 (referring to sexual

[13]Tolentino, Civil Code Annotated, Vol. 1, 1990 ed., p. 323.

infidelity), although he had attempted to kill his wife immediately thereafter. In the said action for legal separation, the wife may not put up the defense of mutual guilt since the act of the husband in attempting to kill his wife, given the said scenario, does not give rise to a ground for legal separation on the part of the wife. Under Article 247 of the Revised Penal Code, if the husband shall inflict upon his wife physical injuries of any kind upon surprising her in the act of committing sexual intercourse with another person, he shall be exempt from punishment.

[79.14] Abandonment

Generally, abandonment in legal significance is the act of one spouse voluntarily separating from the other, with the intention of not returning to live together as husband and wife, that continues for the length of time required by statute.[14] For abandonment to constitute a ground for legal separation, it is required that: (1) the abandonment must be without a justifiable cause; and (2) the abandonment must be for more than a year.

A spouse is deemed to have abandoned the other when he or she has left the conjugal dwelling without intention of returning. The spouse who has left the conjugal dwelling for a period of three months or has failed within the same period to give any information as to his or her whereabouts shall be *prima facie* presumed to have no intention of returning to the conjugal dwelling.[15]

Art. 56. The petition for legal separation shall be denied on any of the following grounds:

(1) Where the aggrieved party has condoned the offense or act complained of;

(2) Where the aggrieved party has consented to the commission of the offense or act complained of;

(3) Where there is connivance between the parties in the commission of the offense or act constituting the ground for legal separation;

(4) Where both parties have given ground for legal separation;

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[14] Tex. — Liberty Mut. Ins. Co. vs. Woody, App. 1 Dist., 640 S. W. 2d 718.
[15] See Articles 101 and 128, FC.

(5) Where there is collusion between the parties to obtain the decree of legal separation; or

(1) Where the action is barred by prescription. (100a)

Art. 57. An action for legal separation shall be filed within five years from the time of the occurrence of the cause. (102a)

COMMENTS:

§80. Defenses in Legal Separation

[80.1] In general
[80.2] Condonation
[80.3] Consent
[80.4] Connivance
[80.5] Collusion
[80.6] Recrimination
[80.7] Prescription
[80.8] Effect of death

[80.1] In General

The petition for legal separation shall be denied on any of the following grounds: (1) where the aggrieved party has condoned the offense or act complained of; (2) where the aggrieved party has consented to the commission of the offense or act complained of; (3) where there is connivance between the parties in the commission of the offense or act constituting the ground for legal separation; (4) where both parties have given ground for legal separation; (5) where there is collusion between the parties to obtain decree of legal separation; or (6) where the action is barred by prescription.[16] Hence, any of these circumstances shall be a defense in an action for legal separation.

[80.2] Condonation

Condonation is the conditional forgiveness or remission, by a husband or wife, of a matrimonial offense which the other has committed.[17] It blots out an imputed offense against the marital relation so as to restore the offending party to the same position he or she occupied before

[16]Art. 56, FC.
[17]Bouvier's Law Dictionary, Vol. 1, 3rd revision, p. 585.

the offense was committed.[18] As such, it bars the right to legal separation.

It is a conditional forgiveness because the condonation is subject to an implied condition that the party forgiven will abstain from the commission of the like offense thereafter.[19] A breach of this condition revives the right of suit for the original misconduct.[20] But while the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned.[21]

Condonation may either be express, *i.e.*, signified by words or writing, or implied from the conduct of the parties. The latter, however, is much the more common; and it is in regard to this that the chief legal difficulty has arisen. The only general rule is, that any cohabitation with the guilty party, after the commission of the offense, and with the knowledge or belief on the part of the injured party of its commission, will amount to conclusive evidence of condonation; but this presumption may be rebutted by evidence to the contrary.[22]

[80.3] Consent

Consent is agreement or conformity in advance of the commission of the act which would be a ground for legal separation.[23] It may be given expressly or impliedly. Express consent is that directly given, either viva voce or in writing.[24] Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, from which arises an inference that the consent has been given.

Consent differs from condonation in that the former is given in advance or prior to the commission of the act which would be a ground for legal separation; whereas, the latter is the forgiveness of a matrimonial offense after its commission.

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[18]Odom vs. Odom, 36 Ga. 286; cited in Bouvier's Law Dictionary, Vol. 1, 3rd revision, p. 585.

[19]Bouvier's Law Dictionary, Vol. 1, 3rd revision, p. 586.

[20]Smith vs. Smith, 167 Mass. 87, 45 N.E. 52; cited in Bouvier's Law Dictionary, Vol. 1, 3rd revision, p. 586.

[21]Bish. Mar. & Div. ß 354; cited in Bouvier's Law Dictionary, Vol. 1, 3rd revision, p. 585.

[22]Bouvier's Law Dictionary, Vol. 1, 3rd revision, p. 585; citing 60 L. J. Prob. 73.

[23]I Tolentino, Civil Code, Vol. 1, 1990 ed., p. 325.

[24]Bouvier's Law Dictionary, Vol. 1, 3rd revision, p. 611.

[80.4] Connivance

While consent is unilateral, or an act of only one spouse, connivance implies agreement, express or implied, by both spouses to the ground for legal separation.[25]

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offense has been committed; condonation is the result of a determination to forgive an injury which was not known until after it was inflicted.[26]

Connivance differs, also, from collusion: the former is generally collusion for a particular purpose, while the latter may exist without connivance.[27]

A husband who connives at or consents to adultery by his wife is deemed as consenting to it with others and cannot have a divorce (or legal separation) for a subsequent act with a different person, though the act connived at was not committed;[28] nor can he where the wife was led into it by connivance of a detective employed by the husband, not for such purpose but to obtain evidence.[29] Also, abandonment by the wife, knowing (as she said she did) that the husband would naturally seek other women, was held to be connivance.[30]

[80.5] Collusion

Collusion in divorce or legal separation means the agreement between husband and wife for one of them to commit, or to appear to commit, or to be represented in court as having committed, a matrimonial offense, or to suppress evidence of a valid defense, for the purpose of enabling the other to obtain a divorce or legal separation. This agree-

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[25]I Tolentino, Civil Code, Vol. 1, 1990 ed., p. 325.
[26]3 Hagg. Eccl. 350.; cited in Bouvier's Law Dictionary, Vol. 1, 3rd revision, p. 608.
[27]*Id.*
[28]Hedden vs. Hedden, 21 N.J. Eq. 61.
[29]Rademacher vs. Rademacher, 74 N. J. Eq. 570, 70 Atl. 687; L.R. 2 P. & D. 428.
[30]Richardson vs. Richardson, 114 N.Y. Supp. 912.

ment, if not express, may be implied from the acts of the parties.[31] It is a ground for denying the legal separation.

It has been held that collusion may not be inferred from the mere fact that the guilty party confesses to the offense and thus enables the other party to procure evidence necessary to prove it.[32] On the other hand, there would be collusion if the parties had arranged to make it appear that a matrimonial offense had been committed although it was not, or if the parties had connived to bring about a legal separation even in the absence of grounds therefore.[33]

De Ocampo vs. Florenciano
G.R. No. L-13553, Feb. 23, 1960

BENGZON, J.:

Action for legal separation by Jose de Ocampo against his wife Serafina, on the ground of adultery. The court of first instance of Nueva Ecija dismissed it. The Court of Appeals affirmed, holding there was confession of judgment, plus condonation or consent to the adultery and prescription.

We granted *certiorari* to consider the application of articles 100 and 101 of the New Civil Code, which for convenience are quoted herewith:

> ART. 100. The legal separation may be claimed only by the innocent spouse, provided there has been no condonation of or consent to the adultery or concubinage. Where both spouses are offenders, a legal separation cannot be claimed by either of them. Collusion between the parties to obtain legal separation shall cause the dismissal of the petition.
>
> ART. 101. No decree of legal separation shall be promulgated upon a stipulation of facts or by confession of judgment.
>
> In case of non-appearance of the defendant, the court shall order the prosecuting attorney to inquire whether or not a collusion between the parties exists. If there is no collusion, the prosecuting attorney shall intervene for the State in order to take care that the evidence for the plaintiff is not fabricated.

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[31]De Ocampo vs. Florenciano, G.R. No. L-13553, Feb. 23, 1960; citing Griffiths vs. Griffiths, 69 N. J. Eq. 689 60 Atl. 1099; Sandoz vs. Sandoz, 107 Ore. 282, 214 Pas. 590.

[32]Williams vs. Williams, [N. Y.] 40 N. E. (2d) 1017; Rosenweig vs. Rosenweig, 246 N. Y. Suppl. 231; Conyers, vs. Conyers, 224 S. W. [2d] 688; cited in De Ocampo vs. Florenciano, *supra*.

[33]De Ocampo vs. Florenciano, *supra*.

The record shows that on July 5, 1955, the complaint for legal separation was filed. As amended, it described their marriage performed in 1938, and the commission of adultery by Serafina, in March 1951 with Jose Arcalas, and in June 1955 with Nelson Orzame.

Because the defendant made no answer, the court defaulted her, and pursuant to Art. 101 above, directed the provincial fiscal to investigate whether or not collusion existed between the parties. The fiscal examined the defendant under oath, and then reported to the Court that there was no collusion. The plaintiff presented his evidence consisting of the testimony of Vicente Medina, Ernesto de Ocampo, Cesar Enriquez, Mateo Damo, Jose de Ocampo and Capt. Serafin Gubat.

According to the Court of Appeals, the evidence thus presented shows that "plaintiff and defendant were married in April 5, 1938 by a religious ceremony in Guimba, Nueva Ecija, and had lived thereafter as husband and wife. They begot several children who are now living with plaintiff. In March, 1951, plaintiff discovered on several occasions that his wife was betraying his trust by maintaining illicit relations with one Jose Arcalas. Having found the defendant carrying marital relations with another man plaintiff sent her to Manila in June 1951 to study beauty culture, where she stayed for one year. Again, plaintiff discovered that while in the said city defendant was going out with several other men, aside from Jose Arcalas. Towards the end of June, 1952, when defendant had finished studying her course, she left plaintiff and since then they had lived separately.

"On June 18, 1955, plaintiff surprised his wife in the act of having illicit relations with another man by the name of Nelson Orzame. Plaintiff signified his intention of filing a petition for legal separation, to which defendant manifested her conformity provided she is not charged with adultery in a criminal action. Accordingly, plaintiff filed on July 5, 1955, a petition for legal separation."

The Court of Appeals held that the husband's right to legal separation on account of the defendant's adultery with Jose Arcalas had prescribed, because his action was not filed within one year from March 1951 when plaintiff discovered her infidelity. (Art. 102, New Civil Code) We must agree with the Court of Appeals on this point.

As to the adultery with Nelson Orzame, the appellate court found that in the night of June 18, 1955, the husband upon discovering the illicit connection, expressed his wish to file a petition for legal separation and defendant readily agreed to such filing. And when she was questioned by the Fiscal upon orders of the court, she reiterated her conformity to the legal separation even as she admitted having had sexual relations with Nelson Orzame. Interpreting these

facts virtually to mean a confession of judgment the Appellate Court declared that under Art. 101, legal separation could not be decreed.

As we understand the article, it does not exclude, as evidence, any admission or confession made by the defendant outside of the court. It merely prohibits a decree of separation upon a confession of judgment. Confession of judgment usually happens when the defendant appears in court and confesses the right of plaintiff to judgment or files a pleading expressly agreeing to the plaintiff's demand. This did not occur.

Yet, even supposing that the above statement of defendant constituted practically a confession of judgment, inasmuch as there is evidence of the adultery *independently* of such statement, the decree may and should be granted, since it would not be based on her confession, but upon evidence presented by the plaintiff. What the law prohibits is a judgment based exclusively or mainly on defendant's confession. If a confession defeats the action *ipso facto*, any defendant who opposes the separation will immediately confess judgment, purposely to prevent it.

The mere circumstance that defendants told the Fiscal that she "like also" to be legally separated from her husband, is no obstacle to the successful prosecution of the action. When she refused to answer the complaint, she indicated her willingness to be separated. Yet, the law does not order the dismissal. Allowing the proceeding to continue, it takes precautions against collusion, which implies more than consent or lack of opposition to the agreement.

Needless to say, when the court is informed that defendant equally desires the separation and admitted the commission of the offense, it should be doubly careful lest a collusion exists. (The Court of Appeals did not find collusion.)

Collusion in divorce or legal separation means the agreement.

> . . . between husband and wife for one of them to commit, or to appear to commit, or to be represented in court as having committed, a matrimonial offense, or to suppress evidence of a valid defense, for the purpose of enabling the other to obtain a divorce. This agreement, if not express, may be implied from the acts of the parties. It is a ground for denying the divorce. (Griffiths vs. Griffiths, 69 N. J. Eq. 689 60 Atl. 1099; Sandoz vs. Sandoz, 107 Ore. 282, 214 Pas. 590.).

In this case, there would be collusion if the parties had arranged to make it appear that a matrimonial offense had been committed *although it was not*, or if the parties had connived to bring about a legal separation even in the absence of grounds therefor.

Here, the offense of adultery had really taking place, according to the evidence. The defendant could not have *falsely told* the adulterous acts to the Fiscal, because her story might send her to jail the moment her husband requests the Fiscal to prosecute. She could not have practiced deception at such a personal risk.

In this connection, it has been held that collusion may not be inferred from the mere fact that the guilty party confesses to the offense and thus enables the other party to procure evidence necessary to prove it. (Williams vs. Williams, [N. Y.] 40 N. E. [2d] 1017; Rosenweig vs. Rosenweig, 246 N. Y. Suppl. 231; Conyers, vs. Conyers, 224 S. W. [2d] 688.).

And proof that the defendant desires the divorce and makes no defense, is not by itself collusion. (Pohlman vs. Pohlman, [N. J.] 46 Atl. Rep. 658.).

We do not think plaintiff's failure actively to search for defendant and take her home (after the latter had left him in 1952) constituted condonation or consent to her adulterous relations with Orzame. It will be remembered that she "left" him after having sinned with Arcalas and after he had discovered her dates with other men. Consequently, it was *not his duty to search for her* to bring her home. Hers was the obligation to return.

Two decisions are cited wherein from apparently similar circumstances, this Court inferred the husband's consent to or condonation of his wife's misconduct. However, upon careful examination, a vital difference will be found: in both instances, the husband had abandoned his wife; here it was the wife who "left" her husband.

Wherefore, finding no obstacles to the aggrieved husband's petition we hereby reverse the appealed decision and decree a legal separation between these spouse, all the consequent effects. Costs of all instances against Serafina Florenciano. So ordered.

[80.6] Recrimination (Mutual Guilt)

Where both parties have given ground for legal separation, the petition for legal separation must be dismissed.[34] In other words, for legal separation to prosper, it must be claimed only by the innocent spouse and where both spouses are offenders, a legal separation cannot be claimed by either of them.

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[34]Art. 56(4), FC.

[80.7] Prescription

An action for legal separation must be filed within five years from the time of the occurrence of the cause;[35] otherwise, the action is barred by prescription.[36] In this connection, it has been held that while the wife has not interposed prescription as a defense, the courts may nevertheless take cognizance thereof, because actions seeking a decree of legal separation, or annulment of marriage, involve public interest and it is the policy of our law that no such decree be issued if any legal obstacles thereto appear upon the record.[37]

[80.8] Effect of Death

An action for legal separation which involves nothing more than the bed-and-board separation of the spouses is purely personal. Being personal in character, it follows that the death of one party to the action causes the death of the action itself — *action personalis moritur cum persona*.[38] Hence, Section 21 of the Rule on Legal Separation (A.M. No. 02-11-11-SC) now clearly provides:

> "Section 21. *Effect of death of a party; duty of the Family Court or Appellate Court.* — (a) In case a party dies at any stage of the proceedings before the entry of judgment, the court shall order the case closed and terminated without prejudice to the settlement of estate proper proceedings in the regular courts.
>
> (b) If the party dies after the entry of judgment, the same shall be binding upon the parties and their successors in interest in the settlement of the estate in the regular courts."

Art. 58. An action for legal separation shall in no case be tried before six months shall have elapsed since the filing of the petition. (103)

Art. 59. No legal separation may be decreed unless the Court has taken steps toward the reconciliation of the spouses and is fully satisfied, despite such efforts, that reconciliation is highly improbable. (n)

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[35]Art. 57, FC.

[36]Art. 56(6), FC.

[37]Brown vs. Yambao, G.R. No. L-10699, October 18, 1957.

[38]Lapuz Sy vs. Eufemio, G.R. No. L-30977, Jan. 31, 1972.

COMMENTS:

§ 81. Cooling Off Period

Article 58 of the Family Code mandates that an action for legal separation must *"in no case be tried before six months shall have elapsed since the filing of the petition,"* obviously in order to provide the parties a "cooling-off" period. In this interim, the court should take steps toward getting the parties to reconcile.[39] During this period, the court where the action is pending shall remain passive and is precluded from hearing the suit.[40]

In explaining the import of Article 103 of the New Civil Code, which is now Article 58 of the Family Code, the Court in **Somosa-Ramos vs. Vamenta**,[41] held —

> "It is understandable why there should be a period during which the court is precluded from acting. Ordinarily of course, no such delay is permissible. Justice to parties would not thereby be served. The sooner the dispute is resolved, the better for all concerned. A suit for legal separation, however, is something else again. It involves a relationship on which the law for the best reasons would attach the quality of permanence. That there are times when domestic felicity is much less than it ought to be is not of course to be denied. Grievances, whether fancied or real, may be entertained by one or both of the spouses. There may be constant bickering. The loss affection on the part of one or both may be discernible. Nonetheless, it will not serve public interest, much less the welfare of the husband or the wife, to allow them to go their respective ways. Where there are offspring, the reason for maintaining the conjugal union is even more imperative. It is a mark of realism of the law that for certain cases, adultery on the part of the wife and concubinage on the part of the husband, or an attempt of one spouse against the life of the other, it recognizes, albeit reluctantly, that the couple is better

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[39]Pacete vs. Carriaga, Jr., G.R. No. L-53880, March 17, 1994.
[40]Somosa-Ramos vs. Vamenta, Jr., G.R. No. L-34132, July 29, 1972.
[41]*Supra.*

off apart. A suit for legal separation lies. Even then, the hope that the parties may settle their differences is not all together abandoned. The healing balm of time may aid in the process. Hopefully, the guilty parties may mend his or her ways, and the offended party may in turn exhibit magnanimity. Hence, the interposition of a six-month period before an action for legal separation is to be tried."

Does Article 58 in prohibiting the hearing of an action for legal separation before the lapse of six-month cooling-off period likewise preclude the court from acting on a motion for preliminary mandatory injunction applied for as an ancillary remedy to such suit? In the case of **Somosa-Ramos vs. Vamenta**,[42] the Court held that Article 103 of the New Civil Code (now Article 58 of the Family Code) is not an absolute bar to the hearing of a motion for preliminary injunction prior to the expiration of the six-month cooling-off period. The Court explained —

"That the law, however, remains cognizant of the need in certain cases for judicial power to assert itself is discernible from what is set forth in the following article. It reads thus: 'After the filing of the petition for legal separation, the spouse shall be entitled to live separately from each other and manage their respective property. The husband shall continue to manage the conjugal partnership property but if the court deems it proper, it may appoint another to manage said property, in which case the administrator shall have the same rights and duties as a guardian and shall not be allowed to dispose of the income or of the capital except in accordance with the orders of the court.' There would appear to be then a recognition that the question of management of their respective property need not be left unresolved even during such six-month period. An administrator may even be appointed for the management of the property of the conjugal partnership. The absolute limitation from which the court suffers under the preceding article is thereby eased. The parties may in the meanwhile be heard. There is justification then for the

[42]*Supra.*

petitioner's insistence that her motion for preliminary mandatory injunction should not be ignored by the lower court. There is all the more reason for this response from respondent Judge, considering that the husband whom she accused of concubinage and an attempt against her life would in the meanwhile continue in the management of what she claimed to be her paraphernal property, an assertion that was not specifically denied by him."

The requirement of six months cooling-off period under Article 58 shall not apply, however, in cases of legal separation where violence, as specified in R.A. No. 9262 ("Anti-Violence Against Women and Their Children Act of 2004"), is alleged.[43] In such cases, the court shall proceed on the main case and other incidents of the case as soon as possible and the hearing on any application for protection order filed by the petitioner must be conducted within the mandatory period provided in said Act.[44]

Under Section 3 of R.A. No. 9262, "*violence against women and their children*" refers to any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty. It includes, but is not limited to, the following acts:

A. "*Physical Violence*" refers to acts that include bodily or physical harm;

B. "*Sexual violence*" refers to an act which is sexual in nature, committed against a woman or her child. It includes, but is not limited to:

a) rape, sexual harassment, acts of lasciviousness, treating a woman or her child as a sex object, making demeaning and sexually suggestive remarks, physically attacking the sexual parts of

[43]Sec. 19, RA 9262.
[44]*Id*.

the victim's body, forcing her/him to watch obscene publications and indecent shows or forcing the woman or her child to do indecent acts and/or make films thereof, forcing the wife and mistress/lover to live in the conjugal home or sleep together in the same room with the abuser;

b) acts causing or attempting to cause the victim to engage in any sexual activity by force, threat of force, physical or other harm or threat of physical or other harm or coercion;

c) Prostituting the woman or child.

C. "*Psychological violence*" refers to acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and mental infidelity. It includes causing or allowing the victim to witness the physical, sexual or psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children.

D. "*Economic abuse*" refers to acts that make or attempt to make a woman financially dependent which includes, but is not limited to the following:

1. withdrawal of financial support or preventing the victim from engaging in any legitimate profession, occupation, business or activity, except in cases wherein the other spouse/partner objects on valid, serious and moral grounds as defined in Article 73 of the Family Code;

2. deprivation or threat of deprivation of financial resources and the right to the use and enjoyment of the conjugal, community or property owned in common;

3. destroying household property;

4. controlling the victims' own money or properties or solely controlling the conjugal money or properties.

Art. 60. No decree of legal separation shall be based upon a stipulation of facts or a confession of judgment.

In any case, the Court shall order the prosecuting attorney or fiscal assigned to it to take steps to prevent collusion between the parties and to take care that the evidence is not fabricated or suppressed. (101a)

COMMENTS:

§ 82. No Judgment Based on Stipulation of Facts or Confession of Judgment

Even the 1940 Rules of Court, which preceded the 1950 Civil Code of the Philippines and the Family Code, direct that actions for the annulment of marriage or divorce shall not be decided unless the material facts alleged in the complaint are proved.[45] The same rule is reiterated in Section 1 of Rule 19 of the 1964 Revised Rules, with "legal separation" being substituted for "divorce," obviously because the Civil Code did not authorize absolute divorce. The rule is now enshrined in Article 60 of the Family Code, to the effect that no decree of legal separation shall be based upon a stipulation of facts or a confession of judgment.

The prohibition expressed in the aforesaid laws and rules is predicated on the fact that the institutions of marriage and of the family are sacred and therefore are as much the concern of the State as of the spouses; because the State and the public have vital interest in the maintenance and preservation of these social institutions against desecration by collusion between the parties or by fabricated evidence. The prohibition against annulling a marriage or legal separation based on the stipulation of facts or by confession of judgment or by non-appearance of the defendant stresses the fact that marriage is more than a mere contract between the parties; and for this reason, when the defendant fails to appear, the law enjoins the court to direct the prosecuting officer to intervene for the State in order to preserve the integrity and sanctity of the marital bonds.[46]

Confession of judgment usually happens when the defendant appears in court and confesses the right of plaintiff to judgment or files a pleading expressly agreeing to the plaintiff's demand.[47] A judgment based

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[45]Sec. 10, Rule 35, 1940 Rules of Court.

[46]Tolentino vs. Villanueva, G.R. No. L-23264, March 15, 1974; citing De Ocampo vs. Florenciano, 107 Phil. 35, 38-40; Brown vs. Yambao, 102 Phil. 168, 172; Bigornia de Cardenas vs. Cardenas, et al., 98 Phil. 73, 78-79; Roque vs. Encarnacion, et al., 95 Phil. 643, 646.

[47]De Ocampo vs. Florenciano, *supra*.

on a stipulation of facts occurs when the parties in a suit stipulated on the existence of certain facts and thereafter submits the case for decision based on said stipulation. The law prohibits the court from granting a decree of legal separation based on stipulation of facts and a confession of judgment.[48] The law does not, however, exclude, as evidence, any admission or confession made by the respondent in a legal separation case outside of the court.[49] Yet, even supposing that the statement of respondent constituted practically a confession of judgment, but if the ground for legal separation can be proven by other evidence independent of such statement, the decree of legal separation may and should be granted, since it would not be based on respondent's confession, but upon evidence presented by the petitioner.[50] What the law prohibits is a judgment based exclusively or mainly on respondent's confession. If a confession defeats the action *ipso facto*, any respondent who opposes the separation will immediately confess judgment, purposely to prevent it.[51]

§ 83. Intervention of State Attorneys

Where no answer is filed by the respondent in a legal separation case or if the answer does not tender an issue, the court shall order the public prosecutor to investigate whether collusion exists between the parties.[52]

Within one month after receipt of the court order mentioned above, the public prosecutor shall submit a report to the court on whether the parties are in collusion and serve copies on the parties and their respective counsels, if any. If the public prosecutor finds that collusion exists, he shall state the basis thereof in his report. The parties shall file their respective comments on the finding of collusion within ten days from receipt of copy of the report. The court shall set the report for hearing and if convinced that parties are in collusion, it shall dismiss the petition. If the public prosecutor reports that no collusion exists, the court

[48]Art. 60, FC.

[49]De Ocampo vs. Florenciano, *supra*.

[50]*Id*.

[51]*Id*.

[52]Sec. 5(c), A.M. No. 02-11-11-SC (Rule on Legal Separation); Art. 60, FC.

shall set the case for pre-trial. It shall be the duty of the public prosecutor to appear for the State at the pre-trial.[53]

The policy of Article 101 of the new Civil Code (now Article 60, 2nd par., of the Family Code), calling for the intervention of the state attorneys in case of uncontested proceedings for legal separation, 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 to depend upon the parties themselves.[54] It is consonant with this policy that the inquiry by the Fiscal should be allowed to focus upon any relevant matter that may indicate whether the proceedings for legal separation or annulment are fully justified or not.[55]

Art. 61. After the filing of the petition for legal separation, the spouses shall be entitled to live separately from each other.

The court, in the absence of a written agreement between the spouses, shall designate either of them or a third person to administer the absolute community or conjugal partnership property. The administrator appointed by the court shall have the same powers and duties as those of a guardian under the Rules of Court. (104a)

Art. 62. During the pendency of the action for legal separation, the provisions of Article 49 shall likewise apply to the support of the spouses and the custody and support of the common children. (105a)

COMMENTS:

§ 84. Pendency of Legal Separation Case

During the pendency of the action for legal separation, 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.[56] A.M. No. 02-11-12-

[53]Sec. 6, A.M. No. 02-11-11-SC.

[54]Adong vs. Cheong Gee, 43 Phil. 43; Ramirez vs. Gmur 42 Phil. 855; Goitia vs. Campos, 35 Phil. 252.

[55]Brown vs. Yambao, G.R. No. L-10699, October 18, 1957; cited in Pacete vs. Carriaga, Jr., G.R. No. L-53880, March 17, 1994.

[56]Sec. 1, A.M. No. 02-11-12-SC (Rule on Provisional Orders); effective March 15, 2003.

SC (Rule on Provisional Orders) enumerates these provisional orders, as follows:

"Section 2. *Spousal Support.* — In determining support for the spouses, the court may be guided by the following rules:

(a) In the absence of adequate provisions in a written agreement between the spouses, the spouses may be supported from the properties of the absolute community or the conjugal partnership.

(b) The court may award support to either spouse in such amount and for such period of time as the court may deem just and reasonable based on their standard of living during the marriage.

(c) The court may likewise consider the following factors: (1) whether the spouse seeking support is the custodian of a child whose circumstances make it appropriate for that spouse not to seek outside employment; (2) the time necessary to acquire sufficient education and training to enable the spouse seeking support to find appropriate employment, and that spouse's future earning capacity; (3) the duration of the marriage; (4) the comparative financial resources of the spouses, including their comparative earning abilities in the labor market; (5) the needs and obligations of each spouse; (6) the contribution of each spouse to the marriage, including services rendered in home-making, child care, education, and career building of the other spouse; (7) the age and health of the spouses; (8) the physical and emotional conditions of the spouses; (9) the ability of the supporting spouse to give support, taking into account that spouse's earning capacity, earned and unearned income, assets, and standard of living; and (10) any other factor the court may deem just and equitable.

(d) The Family Court may direct the deduction of the provisional support from the salary of the spouse.

Section 3. *Child Support.* — The common children of the spouses shall be supported from the properties of the absolute community or the conjugal partnership.

Subject to the sound discretion of the court, either parent or both may be ordered to give an amount necessary for the support, maintenance, and education of the child. It shall be in proportion

to the resources or means of the giver and to the necessities of the recipient.

In determining the amount of provisional support, the court may likewise consider the following factors: (1) the financial resources of the custodial and non-custodial parent and those of the child; (2) the physical and emotional health of the child and his or her special needs and aptitudes; (3) the standard of living the child has been accustomed to; (4) the non-monetary contributions that the parents will make toward the care and well-being of the child.

The Family Court may direct the deduction of the provisional support from the salary of the parent.

Section 4. *Child Custody.* — In determining the right party or person to whom the custody of the child of the parties may be awarded pending the petition, the court shall consider the best interests of the child and shall give paramount consideration to the material and moral welfare of the child.

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 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.

The custodian temporarily designated by the court shall give the court and the parents five days notice of any plan to change the residence of the child or take him out of his residence for more than three days provided it does not prejudice the visitation rights of the parents.

Section 5. *Visitation Rights.* — Appropriate visitation rights shall be provided to the parent who is not awarded provisional custody unless found unfit or disqualified by the court.

Section 6. *Hold Departure Order.* — Pending resolution of the petition, no child of the parties shall be brought out of the country without prior order from the court.

The court, *motu proprio* or upon application under oath, may issue *ex-parte* a hold departure order, addressed to the Bureau of Immigration and Deportation, directing it not to allow the departure of the child from the Philippines without the permission of the court.

The Family Court issuing the hold departure order shall furnish the Department of Foreign Affairs and the Bureau of Immigration and Deportation of the Department of Justice a copy of the hold departure order issued within twenty-four hours from the time of its issuance and through the fastest available means of transmittal.

The hold-departure order shall contain the following information:

(a) the complete name (including the middle name), the date and place of birth, and the place of last residence of the person against whom a hold-departure order has been issued or whose departure from the country has been enjoined;

(b) the complete title and docket number of the case in which the hold departure was issued;

(c) the specific nature of the case; and

(d) the date of the hold-departure order.

If available, a recent photograph of the person against whom a hold-departure order has been issued or whose departure from the country has been enjoined should also be included.

The court may recall the order, *motu proprio* or upon verified motion of any of the parties after summary hearing, subject to such terms and conditions as may be necessary for the best interests of the child.

Section 7. *Order of Protection.* — The court may issue an Order of Protection requiring any person:

(a) to stay away from the home, school, business, or place of employment of the child, other parent or any other party, and to stay away from any other specific place designated by the court;

(b) to refrain from harassing, intimidating, or threatening such child or the other parent or any person to whom custody of the child is awarded;

(c) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety, or welfare of the child;

(d) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(e) to permit a designated party to enter the residence during a specified period of time in order to take personal belongings not contested in a proceeding pending with the Family Court;

(f) to comply with such other orders as are necessary for the protection of the child.

Section 8. *Administration of Common Property.* — If a spouse without just cause abandons the other or fails to comply with his or her obligations to the family, the court may, upon application of the aggrieved party under oath, issue a provisional order appointing the applicant or a third person as receiver or sole administrator of the common property subject to such precautionary conditions it may impose.

The receiver or administrator may not dispose of or encumber any common property or specific separate property of either spouse without prior authority of the court.

The provisional order issued by the court shall be registered in the proper Register of Deeds and annotated in all titles of properties subject of the receivership or administration."

In addition, after the filing of the petition for legal separation, the spouses shall be entitled to live separately from each other.[57]

§ 85. Issuance of Protection Orders

A protection order is an order issued pursuant to the provisions of Republic Act No. 9262, otherwise known as "Anti-Violence Against Women and Their Children Act of 2004," for the purpose of preventing further acts of violence against a woman or her child specified in Section 5 of said Act and granting other necessary relief. The relief granted under a protection order serves the purpose of safeguarding the victim from further harm, minimizing any disruption in the victim's daily life, and facilitating the opportunity and ability of the victim to independently regain control over her life.[58] It is enforced by law enforcement agencies.[59]

The protection orders that may be issued under R.A. No. 9262 are the barangay protection order (BPO), temporary protection order (TPO) and permanent protection order (PPO):

(a) Barangay Protection Orders (BPOs): Barangay Protection Orders (BPOs) refer to the protection order issued by the *Punong Barangay* ordering the perpetrator to desist from committing acts under Section 5(a) and (b) of R.A. No. 9262. A *Punong Barangay* who receives applications for a BPO shall issue the protection order to the applicant on the date of filing after *ex parte* determination of the basis of the application. If the *Punong Barangay* is unavailable to act on the application for a BPO, the application shall be acted upon by any available *Barangay*

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[57]Art. 61, FC.
[58]Sec. 8, RA 9262.
[59]*Id.*

Kagawad. If the BPO is issued by a *Barangay Kagawad* the order must be accompanied by an attestation by the *Barangay Kagawad* that the *Punong Barangay* was unavailable at the time for the issuance of the BPO. BPOs shall be effective for fifteen (15) days. Immediately after the issuance of an *ex parte* BPO, the *Punong Barangay or Barangay Kagawad* shall personally serve a copy of the same on the respondent, or direct any barangay official to effect is personal service. The parties may be accompanied by a non-lawyer advocate in any proceeding before the Punong Barangay.[60]

(b) Temporary Protection Orders: Temporary Protection Orders (TPOs) refers to the protection order issued by the court on the date of filing of the application after *ex parte* determination that such order should be issued. A court may grant in a TPO any, some or all of the reliefs mentioned in R.A. No. 9262 and shall be effective for thirty (30) days. The court shall schedule a hearing on the issuance of a PPO prior to or on the date of the expiration of the TPO. The court shall order the immediate personal service of the TPO on the respondent by the court sheriff who may obtain the assistance of law enforcement agents for the service. The TPO shall include notice of the date of the hearing on the merits of the issuance of a PPO.[61]

(c) Permanent Protection Orders: Permanent Protection Order (PPO) refers to protection order issued by the court after notice and hearing. Respondent's non-appearance despite proper notice, or his lack of a lawyer, or the non-availability of his lawyer shall not be a ground for rescheduling or postponing the hearing on the merits of the issuance of a PPO. If the respondent appears without counsel on the date of the hearing on the PPO, the court shall appoint a lawyer for the respondent and immediately proceed with the hearing. In case the respondent fails to appear despite proper notice, the court shall allow *ex parte* presentation of the evidence by the applicant and render judgment on the basis of the evidence presented. The court shall allow the introduction of any history of abusive conduct of a respondent even if the same was not directed against the applicant or the person for whom the applicant is made.[62]

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[60]Sec. 14, RA 9262.
[61]Sec. 15, RA 9262.
[62]Sec. 16, RA 9262.

The court shall, to the extent possible, conduct the hearing on the merits of the issuance of a PPO in one (1) day. Where the court is unable to conduct the hearing within one (1) day and the TPO issued is due to expire, the court shall continuously extend or renew the TPO for a period of thirty (30) days at each particular time until final judgment is issued. The extended or renewed TPO may be modified by the court as may be necessary or applicable to address the needs of the applicant.[63]

The court may grant any, some or all of the reliefs specified in Section 8 of R.A. No. 9262 in a PPO. A PPO shall be effective until revoked by a court upon application of the person in whose favor the order was issued. The court shall ensure immediate personal service of the PPO on respondent. The court shall not deny the issuance of protection order on the basis of the lapse of time between the act of violence and the filing of the application. Regardless of the conviction or acquittal of the respondent, the Court must determine whether or not the PPO shall become final. Even in a dismissal, a PPO shall be granted as long as there is no clear showing that the act from which the order might arise did not exist.[64]

Art. 63. 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 absolute community or the conjugal partnership shall be dissolved and liquidated but the offending spouse shall have no right to any share of the net profits earned by the absolute community or the conjugal partnership, which shall be forfeited in accordance with the provisions of Article 43(2);

(3) The custody of the minor children shall be awarded to the innocent spouse, subject to the provisions of Article 213 of this Code; and

(4) The offending spouse shall be disqualified from inheriting from the innocent spouse by intestate succession. Moreover, provisions in favor of the offending spouse made in the will of the innocent spouse shall be revoked by operation of law. (106a)

Art. 64. After the finality of the decree of legal separation, the innocent spouse may revoke the donations made by him or by her in favor of

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[63]*Id.*
[64]*Id.*

the offending spouse, as well as the designation of the latter as a beneficiary in any insurance policy, even if such designation be stipulated as irrevocable. The revocation of the donations shall be recorded in the registries of property in the places where the properties are located. Alienations, liens and encumbrances registered in good faith before the recording of the complaint for revocation in the registries of property shall be respected. The revocation of or change in the designation of the insurance beneficiary shall take effect upon written notification thereof to the insured.

The action to revoke the donation under this Article must be brought within five years from the time the decree of legal separation has become final. (107a)

COMMENTS:

§ 86. Effects of Decree of Legal Separation

[86.1] Right to live separately
[86.2] Dissolution and liquidation of property regime
[86.3] Custody of children
[86.4] Disqualification to inherit
[86.5] Revocation of donations
[86.6] Cessation of support
[86.7] Wife's use of surname

[86.1] Right to Live Separately

An action for legal separation involves nothing more than the bed-and-board separation of the spouses.[65] As a consequence, the law allows spouses who have obtained a decree of legal separation to live separately from each other, but in such a case the marriage bonds are not severed. Elsewise stated, legal separation does not dissolve the marriage tie, much less authorize the parties to remarry.

[86.2] Dissolution and Liquidation of Property Regime

The law mandates the dissolution and liquidation of the property regime of the spouses upon finality of the decree of legal separation. Such dissolution and liquidation are necessary consequences of the final decree. This legal effect of the decree of legal separation *ipso facto* or automatically follows, as an inevitable incident of the judgment decree-

[65] Lapuz Sy vs. Eufemio, G.R. No. L-30977, Jan. 31, 1972.

ing legal separation — for the purpose of determining the share of each spouse in the community property or conjugal assets.[66]

In the distribution of the net profits of the community property or conjugal partnership property, the offending offense shall have no right to any share of the same, which shall be forfeited in favor of the common children or, if there are none, the children of the guilty spouse by a previous marriage or in default of children, the innocent spouse.[67] The concept of "net profits" is discussed in *infra* § 116.

Procedurally, the Family Court trying the legal separation case shall, upon motion of either party, proceed with the liquidation, partition and distribution of the properties of the spouses upon entry of the judgment granting the petition for legal separation, or, in case of appeal, upon receipt of the entry of the judgment of the appellate court granting the petition.[68]

[86.3] Custody of Children

The custody of the minor children shall be awarded to the innocent spouse.[69] This rule is subject, however, to the provisions of Article 213 of the Family Code,[70] which reads, as follows:

> "Art. 213. In case of separation of the parents, parental authority shall be exercised by the parent designated by the Court. The Court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit.
>
> No child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise."

The rule quoted above clearly mandates that a child under seven years of age shall not be separated from his mother unless the court finds compelling reasons to order otherwise.[71] The use of the word "shall"

[66]Macadandang vs. CA, 108 SCRA 314, 322 (1981).
[67]Art. 63(2), in relation to Art. 43(2), FC.
[68]Sec. 18, Rule on Legal Separation (AM No. 02-11-11-SC).
[69]Art. 63(3), FC.
[70]*Id.*
[71]Perez vs. CA, 255 SCRA 661 (1996).

in Article 213 of the Family Code connotes a mandatory character.[72] This concept is discussed extensively in *infra* § 191.

More importantly, Section 28 of R.A. No. 9262 ("Anti-Violence Against Women and Their Children Act of 2004") prohibits the awarding of custody of minor children to the perpetrator of a woman who is suffering from battered woman syndrome. It provides, as follows:

> "SECTION 28. *Custody of children.* — The woman victim of violence shall be entitled to the custody and support of her child/children. Children below seven (7) years old or 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."

[86.4] Disqualification to Inherit

Once the legal separation has been decreed, the offending spouse shall be disqualified to inherit from the innocent spouse by intestate succession.[73] Unless the decree of legal separation is set aside, the offending spouse shall cease to be a legal heir of the innocent spouse. The offending spouse is not, however, disqualified to inherit from the innocent spouse by way of testate succession, although any provision in the latter's will existing at the time of the issuance of the decree of legal separation in favor of the former is considered revoked by operation of law.[74] This will not, however, prevent the innocent spouse from validly naming the offending spouse as an heir in his or her will executed after the decree of legal separation.

[86.5] Revocation of Donations

The decree of legal separation does not affect the validity of any donation *propter nuptias* made by the innocent spouse in favor of the

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[72] *Id.*; see further discussions under Article 213, FC.
[73] Art. 63(4), FC.
[74] *Id.*

offending spouse and neither does it affect the validity of the designation of the latter as beneficiary in any insurance policy of the former. However, the innocent spouse has the right to revoke said donation, as well as the designation of the offending spouse as beneficiary in his or her insurance policy, even if such designation be stipulated as irrevocable.[75]

With respect to the revocation of the designation of the offending spouse as beneficiary in the insurance policy of the innocent spouse, such revocation or change in the designation of the insurance policy shall take effect only upon written notification thereof to the insurer.[76] On the other hand, the action to revoke the donation must be brought within five years from the finality of the decree of legal separation[77] in the same court which decreed the legal separation,[78] otherwise, the same shall be considered barred by statute of limitations. In order to bind third persons, the complaint for revocation must be recorded in the registries of property in the places where the properties are located.[79] However, the revocation of said donation does not affect any alienation, lien or encumbrance registered in good faith before such recording.[80]

[86.6] Cessation of Support

Upon the finality of the decree of legal separation, the obligation of mutual support between the spouses ceases.[81] However, the court may, in its discretion, order the guilty spouse to give support to the innocent one.[82]

[86.7] Wife's Use of Surname

The wife, even after the legal separation has been decreed, shall continue using her name and surname employed before the legal separa-

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[75]Art. 64, FC.

[76]*Id.*; While there has been a typographical error in article 64 when it uses the word "insured" instead of "insurer," the obvious intent of the law is to require notice of the revocation to the insurer and not to the insured. It is quite obvious that such notice must necessarily come from the insured; hence, it is not possible that the same notice be also addressed to him.

[77]*Id.*

[78]Sec. 22, Rule of Legal Separation (AM No. 02-11-11-SC).

[79]*Id.*

[80]*Id.*

[81]Art. 198, FC.

[82]*Id.*

tion.[83] This is so because her married status is unaffected by the separation, there being no severance of the *vinculum*. It seems to be the policy of the law that the wife should continue to use the name indicative of her unchanged status for the benefit of all concerned.[84]

Art. 65. If the spouses should reconcile, a corresponding joint manifestation under oath duly signed by them shall be filed with the court in the same proceeding for legal separation. (n)

Art. 66. The reconciliation referred to in the preceding Article shall have the following consequences:

(1) The legal separation proceedings, if still pending, shall thereby be terminated at whatever stage; and

(2) The final decree of legal separation shall be set aside, but the separation of property and any forfeiture of the share of the guilty spouse already effected shall subsist, unless the spouses agree to revive their former property regime.

The court's order containing the foregoing shall be recorded in the proper civil registries. (108a)

Art. 67. The agreement to revive the former property regime referred to in the preceding Article shall be executed under oath and shall specify:

(1) The properties to be contributed anew to the restored regime;

(2) Those to be retained as separated properties of each spouse; and

(1) The names of all their known creditors, their addresses and the amounts owing to each.

The agreement of revival and the motion for its approval shall be filed with the court in the same proceeding for legal separation, with copies of both furnished to the creditors named therein. After due hearing, the court shall, in its order, take measures to protect the interest of creditors and such order shall be recorded in the proper registries of properties.

The recording of the order in the registries of property shall not prejudice any creditor not listed or not notified, unless the debtor-spouse has sufficient separate properties to satisfy the creditor's claim. (195a, 108a)

[83]Art. 372, NCC.
[84]Laperal vs. Republic of the Philippines, G.R. No. L-18008, Oct. 30, 1962.

COMMENTS:

§ 87. Effects of Reconciliation

If the spouses should reconcile, they must file a corresponding joint manifestation under oath, duly signed by them, in the same proceeding for legal separation.[85] The effects of such reconciliation are as follows:

(a) If the reconciliation occurred while the proceeding for legal separation is pending, the court shall immediately issue an order terminating the proceeding;[86]

(b) If the reconciliation occurred after the rendition of the judgment granting the petition for legal separation but before the issuance of the decree of legal separation, the spouses shall express in their manifestation whether or not they agree to revive the former regime of their property relations,[87] in case their former regime was either absolute community or conjugal partnership of gains. The court shall immediately issue a Decree of Reconciliation declaring that the legal separation proceeding is set aside and specifying the revival of their previous property regime, if any.[88]

(c) If the spouses reconcile after the issuance of the decree of legal separation, the court, upon proper motion, shall issue a decree of reconciliation declaring therein that the decree of legal separation is set aside but the separation of property and any forfeiture of the share of the guilty spouse already effected subsists, unless the spouses have agreed to revive their former regime of property relations.[89]

If, after the issuance of the decree of legal separation, the parties simply reconcile and resume their marital relations previous to the decree but without obtaining a decree of reconciliation from the same court which issued the decree of legal separation, their *defacto* reconciliation does not have the effect of setting aside the decree of legal separation. But once their reconciliation has been manifested in court and a decree of reconciliation has been obtained, the decree of legal separation is

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[85]Art. 65, FC; Sec. 23(a), Rule on Legal Separation.
[86]Art. 66(1), FC; Sec. 23(b), Rule on Legal Separation.
[87]Sec. 23(c), Rule on Legal Separation.
[88]*Id.*
[89]Art. 66(2), FC; Sec. 23(d), Rule on Legal Separation.

considered set aside, as well as its effects provided under Articles 63 and 64, except that the separation of property and any forfeiture of the share of the guilty spouse already effected shall subsist, unless the spouses agree to revive their former property regime.[90] In other words, when the final decree of legal separation is set aside, the following consequences necessarily follow:

(i) The spouses shall again be entitled to joint custody of their children;

(ii) The offending spouse shall again be entitled to inherit from the innocent spouse by way of intestate succession;

(iii) The provisions in the will of the innocent spouse favoring the offending spouse shall be revived automatically, as if the same had not been revoked;

(iv) Any revocation of donations in favor of the offending spouse, or revocation of the designation of the offending spouse as beneficiary in the innocent spouse's insurance policy, already effected, shall likewise be set aside, as if the same had not been revoked;

(v) However, the separation of property and any forfeiture of the share of the guilty spouse already effected shall subsist, unless the spouses agree to revive their former property regime.

§ 88. Revival of Former Property Regime

Upon the finality of the decree of legal separation, there shall be a liquidation of the absolute community or the conjugal partnership and the spouses shall thereafter be governed by a regime of complete separation of property.[91] Once the spouses reconcile and the court issues a decree of reconciliation, their former property regime, be it absolute community or conjugal partnership, is not automatically revived.[92] If they want to revive their previous property regime, the spouses must execute an agreement to revive the former property regime, which agree-

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[90]See Art. 66(2), FC.
[91]Art. 63(2), FC.
[92]Art. 66(2), FC.

ment shall be submitted in court, together with a verified motion for its approval.[93] The agreement to revive must be under oath and must specify: (1) the properties to be contributed anew to the restored regime; (2) those to be retained as separated properties of each spouse; and (3) the names of all their known creditors, their addresses and the amounts owing to each.[94] Note that the parties may even restore to the former property regime even the share of the offending spouse in the net profits which has been forfeited in favor of the innocent spouse.

§ 89. Adoption of New Property Regime

The new Rule on Legal Separation appears to allow the spouses, upon reconciliation, to adopt a regime of property relations different from that which they had prior to the filing of the petition for legal separation.[95] This rule, however, does not find any support under the Family Code since the latter speaks only of "revival" of the former property regime of the spouses in case of reconciliation and not an adoption of an altogether different property regime. At any rate, even assuming that the spouses may adopt a new regime of property relations upon reconciliation, it is submitted that they may not adopt either absolute community or conjugal partnership of gains as their new property regime since these two property regimes can only commence at the precise moment that the marriage is celebrated and any stipulation, express or implied, for the commencement of these regimes at any other time shall be void.[96]

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[93]Art. 67, FC.

[94]*Id.*

[95]See Sections 23(e) and 24, Rule on Legal Separation (A.M. No. 02-11-11-SC).

[96]Arts. 88 and 107, FC.

Title III

RIGHTS AND OBLIGATIONS BETWEEN HUSBAND AND WIFE

Art. 68. The husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support. (109a)

COMMENTS:

§ 90. Rights and Obligations between Husband and Wife

[90.1] In general
[90.2] Cohabitation
[90.3] Sexual relations
[90.4] Mutual love, respect and fidelity
[90.5] Mutual Help and Support

[90.1] In General

The marriage relationship creates certain personal rights and duties as between the husband and wife.[1] These rights and obligations ordinarily continue as long as the marriage endures,[2] but they usually terminate on the death of either of the spouses.[3] Thus, one spouse, by virtue of the marriage relation, has the right to the society, companionship, services, love, affection, respect, fidelity, help and support of the other.[4]

[90.2] Cohabitation

A spouse's obligation to live and cohabit with his or her partner in marriage is a basic ground rule in marriage.[5] Thus, the first in the list of

[1]Stephenson vs. Stephenson, 105 S. 867, 213 Ala. 545.
[2]In re: Stableford's Estate, 20 N.Y.S.2d
[3]Johnson vs. Feeney, App. 3 Dist. 507 So.2d 722.
[4]Art. 68, FC.
[5]See Santos vs. CA, 240 SCRA 20 (1995).

the mutual rights and obligations of the spouses is cohabitation or the obligation to live together.[6] Cohabitation, at the very least, is public assumption by a man and a woman of the marital relation, and dwelling together as man and wife, thereby holding themselves out to the public as such.[7]

While the spouses are obliged to live together, the court is powerless to enforce such obligation. The sanction therefor is actually the *"spontaneous, mutual affection between husband and wife and not any legal mandate or court order."*[8] Thus, in one case,[9] the wife filed a petition with the Court of Appeals for *habeas corpus* to have custody of her husband in consortium alleging that her children were illegally restraining her husband to fraudulently deprive her of property rights out of pure greed. She claimed that her two children were using their sick and frail father to sign away the spouses' property to companies controlled by the two children. The wife states that Article XII of the 1987 Constitution and Articles 68 and 69 of the Family Code support her position that as spouses, they are duty bound to live together and care for each other. When the Court was convinced that the husband was not mentally incapacitated to choose whether to see his wife or not, the Court held —

> "The law provides that the husband and the wife are obliged to live together, observe mutual love, respect and fidelity. The sanction therefor is the "spontaneous, mutual affection between husband and wife and not any legal mandate or court order" to enforce consortium.
>
> Obviously, there was absence of empathy between spouses Erlinda and Potenciano, having separated from bed and board since 1972. We defined *empathy* as a shared feeling between husband and wife experienced not only by having spontaneous sexual intimacy but a deep sense of spiritual communion. Marital union is a two-way process.

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[6]Art. 68, FC.

[7]Bitangcor vs. Tan, 112 SCRA 113.

[8]Chi Ming Tsoi vs. CA, 266 SCRA 324, 334 (1997); citing Cuaderno vs. Cuaderno, 120 Phil. 1298.

[9]Ilusorio vs. Ilusorio-Bildner, 361 SCRA 427 (2001). See also Ilsurio vs. Bildner, 332 SCRA 169 (2000).

> Marriage is definitely for two loving adults who view the relationship with "*amor gignit amorem*" respect, sacrifice and a continuing commitment to togetherness, conscious of its value as a sublime social institution."

While the courts cannot force one of the spouses to cohabit with the other, the law, however, provides for other remedies and sanctions. For example, if a spouse without just cause abandons the other, the aggrieved spouse may petition the court for receivership, for judicial separation of property or for authority to be the sole administrator of the absolute community or of the conjugal partnership property.[10] Upon a judicial declaration of abandonment of his or her children, the parent concerned may likewise be deprived of parental authority.[11] The deserted spouse cannot likewise be obliged to give support to the other spouse who refuses to live with him or her without just cause.[12]

[90.3] Sexual Relations

The right to live together, as earlier intimated, also includes the right to demand sexual intimacy from the other spouse. Evidently, one of the essential marital obligations under the Family Code is to "procreate children based on the universal principle that procreation of children through sexual cooperation is the basic end of marriage."[13] Constant non-fulfillment of this obligation will finally destroy the integrity or wholeness of the marriage.[14] Thus, the senseless and protracted refusal of one of the parties to fulfill this marital obligation is equivalent to psychological incapacity.[15]

While the husband has the right to insist on sexual relations with the wife, there is a view that he can do so only if he has the right of consortium with his wife arising from connubial relations.[16] If, however, they are legally separated, although the marital bonds are not severed and in law they remain as husband and wife, the husband no longer

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[10]Arts. 101 & 128, FC.
[11]Art. 229, FC.
[12]1 Tolentino, Civil Code, 1990 ed., p. 341; citing 3 Castan 498-499.
[13]Chi Ming Tsoi vs. CA, *supra*, at p. 333.
[14]*Id.*
[15]*Id.*
[16]Regalado, Criminal Law Conspectus, 1st ed., p. 484.

has the right of consortium and if he forces his wife to submit to him, he could be liable for rape.[17] In addition, the wife may refuse to accede to unchaste sexual intercourse.[18] In one case,[19] for example, the husband demanded that the wife perform unchaste and lascivious acts on his genital organs and because she spurred such obscene demands, refusing any act other than normal sexual intercourse, he maltreated her and inflicted bodily harm upon her. When the wife left the conjugal home, the Court held that she was entitled to separate maintenance because she was forced to leave the marital home without fault on her part.

[90.4] Mutual Love, Respect and Fidelity

It is said that marriage is definitely not for children but for two consenting adults who view the relationship with love *amor gignit amorem,* respect, sacrifice and a continuing commitment to compromise, conscious of its value as a sublime social institution.[20] However, the obligation to observe mutual love, respect and fidelity between the spouses cannot be compelled, elicited or imposed by court action.[21] Nevertheless, the law provides for sanctions for non-observance of fidelity. For example, the Revised Penal Code penalizes the acts of contracting of two or more marriages and of having extramarital affairs, *i.e.*, bigamy[22] and concubinage[23] and adultery[24] and the spouse who is guilty of adultery or concubinage is not entitled to support from the other spouse.[25] Also, the Family Code considers sexual infidelity as a ground for legal separation.[26]

[90.5] Mutual Help and Support

The husband and wife assume a mutual obligation of support upon marriage, such that each spouse is obligated to support each other.[27]

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[17]*Id*.
[18]Goitia vs. Campos Rueda, 35 Phil. 252.
[19]*Id*.
[20]Chi Ming Tsoi vs. CA, *supra*, at p. 334.
[21]1 Tolentino, Civil Code, 1990 ed., p. 348.
[22]Art. 349, RPC.
[23]Art. 334, RPC.
[24]Art. 333, RPC.
[25]Lerma vs. CA, G.R. No. L-33352, December 20, 1974.
[26]Art. 55(8), FC.
[27]Arts. 68 & 195(1), FC.

Such obligation to support one's spouse attaches at the inception of the marriage and ordinarily continues as long as the relationship of husband and wife exists. Hence, once the marriage is terminated, the obligation to give support ceases.[28]

Of the mutual obligations between the spouses mentioned in article 68 of the Code, it is only the obligation of mutual support between the spouses which can be enforced through legal action.[29]

Pelayo vs. Lauron
12 Phil. 453

FACTS: Arturo Pelayo (plaintiff) was a physician whom the spouses Marcelo Lauron & Juana Abella (defendants) called one evening to their house to render medical assistance to their daughter-in-law who was about to give birth to a child. The daughter-in-law lived with her husband independently and in a separate house without any relation whatever with the defendants, and on the day she gave birth she was in the house of the defendants only by chance. The plaintiff rendered the medical assistance, but the daughter-in-law died in consequence of the child-birth. Plaintiff now seeks to recover P500 for professional services.

RULING: The rendering of medical assistance in case of illness is comprised among the mutual obligations to which spouses are bound by way of mutual support. When either of them by reason of illness should be in need of medical assistance, the other is under the unavoidable obligation to furnish the necessary services of a physician in order that health may be restored; the party bound to furnish such support is therefore, liable for all expenses, including the fees of the medical expert for his professional services. This liability arises from the obligation which the law has expressly established between married couples. It is therefore the husband of the patient who is bound to pay for the services of the plaintiff. The fact that it was not the husband who called the plaintiff and requested the medical assistance for his wife is no bar to his fulfillment of the said obligation, as the defendants, in view of the imminent danger to which the life of the patient was at that moment exposed, considered that medical assistance was urgently needed. Therefore, plaintiff should direct his action against the husband of the patient, and not against her parents-in-law.

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[28]See Mendoza vs. Parungao, 49 Phil. 271; and Art. 198, FC.
[29]1 Tolentino, Civil Code, 1990 ed., p. 343.

Art. 69. The husband and wife shall fix the family domicile. In case of disagreement, the court shall decide.

The court may exempt one spouse from living with the other if the latter should live abroad or there are other valid and compelling reasons for the exemption. However, such exemption shall not apply if the same is not compatible with the solidarity of the family. (110a)

COMMENTS:

§ 91. Fixing the Family Domicile

Fixing the family domicile is the right and obligation of both the husband and the wife. Under the Code,[30] the husband and wife shall jointly fix the family domicile and, in case of disagreement, neither spouse may impose his or her will upon the other. Should the spouses fail to agree on the choice of domicile, it is the court which should decide on such matter.[31]

The court may also exempt one spouse from living with the other if the latter should live abroad or there are other valid and compelling reasons for the exemption.[32] Such exemption shall not apply if the same is not compatible with the solidarity of the family.[33] However, in the event that one spouse refuses to live with the other in the family dwelling, as fixed either by the spouses or by the court, the court is powerless to enforce the provisions of article 69 of the Code, even if such refusal is not justifiable. As earlier stated, marital rights including coverture and living in conjugal dwelling may not be enforced through a court action.[34] The spouse who refuses to live with the other without just cause is not, however, entitled to a separate maintenance or support.[35]

Art. 70. The spouses are jointly responsible for the support of the family. The expenses for such support and other conjugal obligations shall be paid from the community property and, in the absence thereof, from the income or fruits of their separate properties. In case of insufficiency or

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[30]Art. 69, FC.
[31]*Id.*
[32]Art. 69, 2nd par., FC.
[33]*Id.*
[34]See Ilusorio vs. Bildner, 332 SCRA 169 (2000).
[35]See 1 Tolentino, Civil Code, 1990 ed., p. 341; citing 3 Castan 498-499.

absence of said income or fruits, such obligations shall be satisfied from the separate properties. (111a)

Art. 71. The management of the household shall be the right and the duty of both spouses. The expenses for such management shall be paid in accordance with the provisions of Article 70. (115a)

COMMENTS:

§ 92. Family Expenses and Management of the Household

[92.1] Family expenses
[92.2] Management of the household

[92.1] Family Expenses

Under the Code, expenses of the family are chargeable to the following, in the order mentioned: (1) the community or conjugal partnership property; (2) the income or fruits of the separate properties of the spouses; or (3) the separate properties of the spouses.

Included in the family expenses are the necessaries, consisting of food, drink, clothing, washing, medical attention, a suitable place of residence,[36] suitable furniture,[37] etc. However, the expenses of the family embrace more than "necessaries." But for an article to constitute a family expense, it is essential that it be not only purchased for, but also that it be used, or be kept for use, in or by the family, or be beneficial thereto.[38] An expense for the family is one which is incurred for an item which contributes to the family's welfare generally and tends to maintain its integrity.[39]

[92.2] Management of the Household

Under the Civil Code, it is the wife who manages the affairs of the household.[40] But in keeping with the realities of the times, the Family Code now provides that the management of the household is the right and duty of both the husband and the wife.[41] The expenses to be in-

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[36]Audrain County vs. Muir, 249 S.W. 383, 297 Mo. 499.
[37]Raymond vs. Cowdrey, 42 N.Y. S. 557, 19 Misc. 34.
[38]Dubow vs. Gottinello, 149 A. 768, 111 Conn. 306.
[39]Lyman vs. Harbaugh, 454 N.E.2d 906, 73 Ill. Dec. 81, 117 Ill. App. 3d 1089.
[40]Art. 115, NCC.
[41]Art. 71, FC.

curred for the management of the household are likewise chargeable to the following, in the order mentioned: (1) the community or conjugal partnership property; (2) the income or fruits of the separate properties of the spouses; or (3) the separate properties of the spouses.

Art. 72. When one of the spouses neglects his or her duties to the conjugal union or commits acts which tend to bring danger, dishonor or injury to the other or to the family, the aggrieved party may apply to the court for relief. (116a)

COMMENTS:

§ 93. Relief Available to Spouses

Some of the reliefs available under the law are the following:

[a] When spouse leaves conjugal dwelling

Although the husband and the wife are obliged to live together,[42] our laws contain no provision compelling the wife to live with her husband where even without legal justification she establishes her residence apart from that provided for by the former.[43] However, the husband may avail of the option granted him under Article 198 of the Family Code of receiving and maintaining in the family dwelling the person to be supported (the wife, for example). As such, the husband will be justified in cutting the wife's support if she refuses to live with him without just cause and in the absence of some "moral or legal obstacle."[44]

If one of the spouses has left the conjugal dwelling without the intention of returning, in which case he or she is deemed to have abandoned the family, the aggrieved spouse may petition the court for receivership, for judicial separation of property or for authority to be the sole administrator of the absolute community.[45] If such abandonment lasts for more than one year, the aggrieved spouse may likewise petition for legal separation.[46]

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[42]Art. 68, FC.
[43]Atilano vs. Chua Ching Beng, No. L-11086, 55 O.G. 3841.
[44]*Id.*
[45]Art. 101, FC.
[46]Art. 55(10), FC.

[b] When spouse commits acts of sexual infidelity

When one of the spouses commits acts of sexual infidelity, the aggrieved spouse may petition the court for legal separation,[47] aside from prosecuting the erring spouse criminally for adultery or concubinage, as the case may be. Also, when a philandering husband squanders the properties of the conjugal partnership or of the absolute community to satisfy his vices, the aggrieved spouse may petition the court for injunction to stop his further disposition of property aside from seeking sole administration of the conjugal or community property.[48] The wife, in this case, may also petition for judicial separation of property in view of the fact that the other spouse has failed to comply with his obligations to the family.[49]

[c] When spouse sells the conjugal or community property without the other's consent

When one spouse commits fraud upon the other in the administration of the conjugal or community property, the aggrieved spouse may seek an injunction to stop further disposition of property without the other's consent[50] aside from seeking a receivership or authority to be the sole administrator of the absolute community[51] or of the conjugal partnership.[52] If the transaction is already consummated, the aggrieved spouse who did not consent to any disposition or encumbrance of a property belonging to the absolute community or conjugal partnership may also petition for declaration of nullity of such disposition or encumbrance.[53]

[d] When husband commits violation of R.A. No. 9262

When the husband commits any act or series of acts against the wife, their common children, or against the wife's other children, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, as-

[47]Art. 55(8), FC.
[48]Art. 101, FC.
[49]Art. 135(4), FC.
[50]Harden vs. Pena, 48 O.G. 1307.
[51]Art. 101, FC.
[52]Art. 128, FC.
[53]See Arts. 96 & 124, FC.

sault, coercion, harassment or arbitrary deprivation of liberty, the wife may obtain "protection orders" either from the barangay or from the courts for the purpose of preventing further acts of violence against her and her children and other reliefs provided for in Section 8 of R.A. 9262, otherwise known as "Anti-Violence Against Women and Their Children Act of 2004."

Art. 73. Either spouse may exercise any legitimate profession, occupation, business or activity without the consent of the other. The latter may object only on valid, serious and moral grounds.

In case of disagreement, the court shall decide whether or not:

(1) The objection is proper, and

(2) Benefit has accrued to the family prior to the objection or thereafter. If the benefit accrued prior to the objection, the resulting obligation shall be enforced against the separate property of the spouse who has not obtained consent.

The foregoing provisions shall not prejudice the rights of creditors who acted in good faith. (117a)

COMMENTS:

§ 94. Exercise of Profession, Business or Activity

The law is clear that either of the spouses may exercise any "legitimate" profession, occupation, business or activity without the consent of the other. Thus, in the absence of any valid, serious and moral grounds, the husband may not lawfully forbid his wife from engaging in any legitimate profession, business or occupation. If he does, the husband may be held liable for violation of R.A. No. 9262 since preventing the wife from engaging in any legitimate profession, business, occupation or activity, in the absence of any valid, serious and moral grounds, is one of the acts made punishable under said law.[54]

When the other spouse objects to the profession, occupation, business or activity of his or her spouse and such objection is found to be proper by the courts, the spouse who did not obtain consent for such

[54]Sec. 5(e)(4), in relation to Sec. 3(a)(D)(1), R.A. 9262.

profession, business or activity shall be responsible, with his or her own separate property, for any obligation that may be incurred in connection therewith unless it is shown that the same has redounded to the benefit of the family, in which case, the absolute community or the conjugal partnership shall be liable.

Title IV

PROPERTY RELATIONS BETWEEN HUSBAND AND WIFE

Chapter 1

General Provisions

Art. 74. The property relations between husband and wife shall be governed in the following order:

(1) By marriage settlements executed before the marriage;

(2) By the provisions of this Code; and

(3) By the local customs. (118)

Art. 75. The future spouses may, in the marriage settlements, agree upon the regime of absolute community, conjugal partnership of gains, complete separation of property, or any other regime. In the absence of marriage settlement, or when the regime agreed upon is void, the system of absolute community of property as established in this Code shall govern. (119a)

COMMENTS:

§ 95. Property Relations Between Spouses

[95.1] In general
[95.2] Property regime by default
[95.3] Customs

[95.1] In General

The nature, consequences and incidents of marriage are governed by law and not subject to stipulation between the spouses.[1] This, how-

[1]Art. 1, FC.

ever, is not an absolute rule. The law allows the spouses to fix their property relations during the marriage through a device known as "marriage settlement," subject only to the condition that whatever settlement they may have must be within the limits provided by the Family Code.[2]

Since the spouses may fix their property relations during the marriage by way of a marriage settlement, their property relations are primarily governed by their agreement,[3] so long as such agreement is within the limits provided for by the Family Code and is not contrary to morals or public policy. In the absence of a marriage settlement or when the property regime agreed upon by the spouses in their marriage settlement is void, the property relations of the spouses shall primarily be governed by the provisions of the Family Code.

[95.2] Property Regime by Default

The future spouses may, in the marriage settlements, agree upon the regime of absolute community, conjugal partnership of gains, complete separation of property or any other regime[4] that is not contrary to law, morals, good customs, public order and public policy.[5]

Prior to the effectivity of the Family Code, if the spouses marry in the absence of a marriage settlement, or when the same is void, the system of relative community or conjugal partnership of gains shall govern the property relations between husband and wife.[6] The Family Code changes this rule. Under the Family Code, in the absence of a marriage settlement, or when the regime agreed upon is void, the system of absolute community of property governs the property relations of the spouses.[7] Hence, for spouses who got married on August 3, 1988[8] or thereafter without any marriage settlement, their property relations shall be governed by a regime of absolute community. However, for spouses who got married without a marriage settlement prior to August 3, 1988 but

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[2]*Id.*
[3]Art. 74(1), FC.
[4]Art. 75, FC.
[5]Art. 1306, NCC.
[6]Art. 119, NCC.
[7]Art. 75, FC.
[8]The effectivity date of the Family Code.

after August 30, 1950,[9] their property relations shall be governed by a regime of conjugal partnership of gains.

[95.3] Customs

The Family Code provides that the property relationship between husband and wife shall be governed in the following order: (1) by marriage settlements executed before the marriage; (2) by the provisions of the Family Code; and (3) by the local custom.[10] The Family Code additionally provides that in the absence of a marriage settlement, or when the regime agreed upon is void, the system of absolute community of property governs the property relations of the spouses.[11] Thus, if the spouses got married after August 3, 1988 in the absence of a marriage settlement, the regime of absolute community of property shall automatically govern the property relations of the spouses. It may then be asked, when will local customs govern the property relations of the spouses?

Taking into considerations the provisions of Articles 74 and 75 of the Family Code, the possibility that local customs will govern the property relations of the spouses during the marriage will only arise if the future spouses execute a marriage settlement and stipulate therein that the absolute community shall not exist between them but without providing for the rules or regime that will govern their property relations.

Art. 76. In order that any modification in the marriage settlements may be valid, it must be made before the celebration of the marriage, subject to the provisions of Articles 66, 67, 128, 135 and 136. (121)

Art. 77. The marriage settlements and any modification thereof shall be in writing, signed by the parties and executed before the celebration of the marriage. They shall not prejudice third persons unless they are registered in the local civil registry where the marriage contract is recorded as well as in the proper registries of property. (122a)

Art. 78. A minor who according to law may contract marriage may also execute his or her marriage settlements, but they shall be valid only if the persons designated in Article 14 to give consent to the marriage are

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[9]The effectivity date of the New Civil Code.
[10]Art. 74, FC.
[11]Art. 75, FC.

made parties to the agreement, subject to the provisions of Title IX of this Code. (120a)

Art. 79. For the validity of any marriage settlements executed by a person upon whom a sentence of civil interdiction has been pronounced or who is subject to any other disability, it shall be indispensable for the guardian appointed by a competent court to be made a party thereto. (123a)

COMMENTS:

§ 96. Marriage Settlement or Ante Nuptial Contract

[96.1] Concept
[96.2] Parties to marriage settlement
[96.3] Formalities required

[96.1] Concept

A marriage settlement or *ante nuptial* contract is a contract which is entered into before, but in contemplation and in consideration of, marriage, whereby the property relations of the spouses during the marriage are fixed and determined. Under the Family Code, the marriage settlement itself[12] or any modifications thereto[13] must be made prior to the celebration of the marriage. It is not possible for the parties to execute a marriage settlement during the marriage if there is none at the start of the marriage since, by default, the regime of absolute community automatically governs their property relations. It is possible, however, for the parties to modify their agreement in their marriage settlement by resorting to complete separation of property pursuant to the provisions of Article 135 or Article 136 of the Family Code.

[96.2] Parties to Marriage Settlement

Ordinarily, only the future spouses are the parties to a marriage settlement since the same is for the purpose of fixing their property relations. However, if one of the future spouses is below 21, in which case parental consent to the marriage is required, the person whose consent is required under Article 14 of the Family Code is also required to be a party to the marriage settlement, otherwise, the agreement is not valid.[14]

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[12]Art. 77, FC.
[13]Art. 76, FC.
[14]Art. 78, FC.

Also, if one of the future spouses is suffering from civil interdiction or from any incapacity to give consent, it is indispensable for the guardian appointed by a competent court to be made a party thereto, otherwise, the agreement is not valid.[15]

[96.3] Formalities Required

The law requires that the marriage settlements and any modification thereof shall be in writing.[16] What then is the effect of a marriage settlement between the future spouses which was made verbally or orally? Is the same void?

Prior to the amendments introduced by the Family Code, the formalities of a marriage settlement were governed by Article 122 of the New Civil Code, which reads:

> "Art. 122. The marriage settlements and any modifications thereof shall be governed by the Statute of Frauds, and executed before the celebration of the marriage. They shall not prejudice third persons unless they are recorded in the Registry of Property."

The requirement under the above-quoted provisions that the marriage settlements and its modifications shall be governed by the Statute of Frauds was not reproduced in the present Article 77 of the Family Code. Will this now mean that a marriage settlement and its modifications are no longer governed by the Statute of Frauds?

It is submitted that notwithstanding the absence of express provisions in the present article, the marriage settlements and its modifications shall continue to be governed by the Statute of Frauds under Article 1403, paragraph 2, sub-paragraph (c), which reads, as follows:

> "Art. 1403. The following contracts are unenforceable, unless they are ratified:
>
> xxx xxx xxx
>
> (2) Those that do not comply with the Statute of Frauds as set forth in this number. In the following cases an agreement hereafter made shall be unenforceable by action, unless the same, or

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[15]Art. 79, FC.
[16]Art. 77, FC.

some note or memorandum, thereof, be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement cannot be received without the writing, or a secondary evidence of its contents:

(a) An agreement that by its terms is not to be performed within a year from the making thereof;

(b) A special promise to answer for the debt, default, or miscarriage of another;

(c) An agreement made in consideration of marriage, other than a mutual promise to marry;

xxx xxx xxx."

Obviously, a marriage settlement is an agreement made in consideration of a marriage. Hence, it is governed by the statute of frauds under Article 1403(2)(c), the deletion of Article 122 of the New Civil Code notwithstanding. In fact, the provisions of Article 122 are superfluous as the same is already covered by the provisions of Article 1403(2)(c).

It suffice to say that a contract which infringes the Statute of Frauds is not a void contract but merely unenforceable. In other words, it is a valid contract but cannot be enforced unless ratified. Consequently, an oral marriage settlement is merely unenforceable under the Statute of Frauds. It is a valid agreement but it cannot be enforced through a court action by either of the parties since its existence cannot be proved without the written agreement. Such oral marriage settlement shall not likewise prejudice the interest of third persons. For a marriage settlement to affect third persons, it is necessary that the same must be in writing and registered in the local civil registry where the marriage contract between the spouses is recorded, as well as in the proper registries of properties.[17]

Art. 80. In the absence of a contrary stipulation in a marriage settlement, the property relations of the spouses shall be governed by Philippine laws, regardless of the place of the celebration of the marriage and their residence.

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[17]Art. 77, FC.

This rule shall not apply:

(1) Where both spouses are aliens;

(2) With respect to the extrinsic validity of contracts affecting property not situated in the Philippines and executed in the country where the property is located; and

(3) With respect to the extrinsic validity of contracts entered into in the Philippines but affecting property situated in a foreign country whose laws require different formalities for its extrinsic validity. (124a)

COMMENTS:

§ 97. Laws Governing Property Relations

The property relations of Filipino spouses shall be governed by Philippine laws, regardless of the place of the celebration of the marriage and their residence.[18] This rule shall not apply in the following instances: (a) if there is a contrary stipulation in the marriage settlement;[19] (b) with respect to the extrinsic validity of contracts affecting property not situated in the Philippines and executed in the country where the property is located;[20] and (c) with respect to the extrinsic validity of contracts entered into in the Philippines but affecting property situated in a foreign country whose laws require different formalities for its extrinsic validity.[21]

The future spouses are free to stipulate in their marriage settlement what laws shall govern their property relations,[22] especially, if they are residents in a foreign country. It is submitted, however, that with respect to the mandatory provisions of the Family Code, the latter shall still govern since the freedom of the parties to stipulate in their marriage settlement must be done within the limits provided for under the Code.

With respect to the properties that are not located in the Philippines, it is submitted that Philippine laws shall not apply in relation to contracts affecting said properties, whether the issue is the extrinsic or intrinsic validity of such contracts. Following the principle of *lex rei*

[18] Art. 80, FC.
[19] *Id.*
[20] Art. 80(2), FC.
[21] Art. 80(3), FC.
[22] Arts. 80 and 74(1), FC.

sitae embodied in Article 16 of the New Civil Code, issues relating to property, whether real or personal, are to be governed by the law of the country where the property is situated. Hence, while the present article seems to limit the inapplicability of Philippines laws only to the extrinsic validity of contracts affecting property not situated in the Philippines, the rule must likewise be extended to any issues relating to such properties, including the intrinsic validity of contracts affecting the same.

The foregoing discussion likewise applies to a marriage where one of the parties is a Filipino citizen.

Art. 81. Everything stipulated in the settlements or contracts referred to in the preceding articles in consideration of a future marriage, including donations between the prospective spouses made therein, shall be rendered void if the marriage does not take place. However, stipulations that do not depend upon the celebration of the marriages shall be valid. (125a)

COMMENTS:

§ 98. Effect of Non-Celebration of Marriage Upon the Marriage Settlement

The validity of a marriage settlement and any stipulation thereto, including donations *propter nuptias* between the prospective spouses made therein, is dependent upon the celebration of the marriage. If the marriage does not take place, everything stipulated in the marriage settlement, including donations between the prospective spouses made therein, shall be rendered void.[23] In other words, the celebration of the marriage is a condition *sine qua non* for the validity of the marriage settlement. In essence, the marriage is a condition necessary to give birth to any right and obligation under this contract.

In this aspect, a marriage settlement must be distinguished from a donation *propter nuptias*. While both are considered contracts in consideration of marriage, the celebration of the marriage is more of a resolutory condition in the latter. In donations *propter nuptias*, the fact that the marriage did not take place does not render the donation void, except if the donation is contained in the marriage settlement itself. The

[23] Art. 81, FC.

fact that the marriage did not take place shall only give rise to a cause or ground to revoke a donation *propter nuptias*.[24] If the same is not revoked, it continues to be valid.

The rule that the non-happening of the marriage shall render any stipulation in the marriage settlement void does not apply to any provision therein that does not depend upon the celebration of the marriage for its validity.[25] A good example of this is recognition of paternity made in the marriage settlement. Even if the marriage will not take place, any such recognition shall continue to be effective because its validity does not depend upon the marriage taking place.

As earlier discussed, a donation *propter nuptias* does not likewise depend upon the marriage for its validity. This much is recognized in the provisions of Article 86(1) of this Code which only makes such donation revocable at the instance of the donor if the marriage does not take place. Hence, the fact that such donation is made in the marriage settlement itself does not change the fact that its validity does not depend upon the marriage taking place. It could have been better, for the sake of consistency, if the rule in Article 86(1) is likewise applied to donations *propter nuptias* made in the marriage settlement.

Chapter 2

Donations by Reason of Marriage

Art. 82. Donations by reason of marriage are those which are made before its celebration, in consideration of the same, and in favor of one or both of the future spouses. (126)

COMMENTS:

§ 99. Donation Propter Nuptias

Donations by reason of marriage or donations *propter nuptias* are those which are made before its celebration, in consideration of the same, and in favor of one or both of the future spouses.[26] Thus, for a donation

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[24]Art. 86(1), FC.
[25]Art. 81, FC.
[26]Art. 82, FC.

to be considered as donation *propter nuptias*, the following requisites must be present: (1) it must be made before celebration of the marriage; (2) it must be made in consideration of the marriage; and (3) it must be made in favor of one or both of the future spouses. In this kind of donation, it is essential that the donee or donees be either of the future spouses or both of them, although the donor may either be one of the future spouses or a third person.

Therefore, the following donations are not donations *propter nuptias*: (1) those made in favor of the spouses after the celebration of marriage; (2) those executed in favor of the future spouses but not in consideration of the marriage; and (3) those granted to persons other than the spouses even though they may be founded on the marriage.[27]

In donations *propter nuptias*, the marriage is really a consideration but not in the sense of being necessary to give birth to the obligation.[28] This may be clearly inferred from paragraph (1) of Article 86 of the Family Code, which makes the fact that the marriage did not take place a cause for the revocation of such donations, thus taking it for granted that there may be a valid donation *propter nuptias*, even without marriage, since that which has not existed cannot be revoked.[29] And such a valid donation would forever be valid, even if the marriage never took place, if the proper action for revocation were not instituted, or if it were instituted after the lapse of the statutory period of prescription.[30] This is so because the marriage in a donation *propter nuptias* is rather a resolutory condition which, as such, presupposes the existence of the obligation which may be resolved or revoked, and it is not a condition necessary for the birth of the obligation.[31]

Art. 83. These donations are governed by the rules on ordinary donations established in Title III of Book III of the Civil Code, insofar as they are not modified by the following articles. (127a)

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[27]Serrano vs. Solomon, G.R. No. L-12093, June 29, 1959; citing 6 Manresa 232.
[28]Solis vs. Barroso, G.R. No. L-27939, Oct. 30, 1928.
[29]*Id.*
[30]*Id.*
[31]*Id.*

COMMENTS:

§ 100. Rules Governing Donation *Propter Nuptias*

[100.1] In general
[100.2] Formalities required
[100.3] Requirement of express acceptance

[100.1] In General

A donation *propter nuptias* is a special kind of donation and is limited only to a donation "made before the celebration of the marriage, in consideration of the same, and in favor of one or both of the future spouses." Nevertheless, it is also governed by the rules on ordinary donations,[32] by express provisions of Article 83 of the Family Code, insofar as the rules on ordinary donations are not modified by Articles 82 to 87 of the Family Code.

[100.2] Formalities Required

Prior to the amendments introduced by the Family Code, the formalities required in donations *propter nuptias* were governed by Article 127 of the New Civil Code, which provides:

> "Art. 127. These donations are governed by the rules on ordinary donations established in Title III of Book III, except as to their form which shall be regulated by the Statute of Frauds; and insofar as they are not modified by the following articles. (1328a)"

Under the Family Code, however, the rules are different. The present article[33] intentionally deleted the clause *"except as to their form which shall be regulated by the Statute of Frauds"* which is found in Article 127 of the New Civil Code. With the deletion of this clause, the obvious intention is that donations *propter nuptias* are no longer to be governed by the Statute of Frauds with respect to their form. And in view of the applicability of the rules on ordinary donations to donations *propter nuptias*, the latter must now follow the formal requirements outlined in

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[32]Arts. 725 to 773, NCC.
[33]Art. 83, FC.

Articles 748 and 749 of the New Civil Code, otherwise, such donations *propter nuptias* shall be void. These articles read, as follows:

> "Art. 748. The donation of a movable may be made orally or in writing.
>
> An oral donation requires the simultaneous delivery of the thing or of the document representing the right donated.
>
> If the value of the personal property donated exceeds five thousand pesos, the donation and the acceptance shall be made in writing, otherwise, the donation shall be void. (632a)
>
> Art. 749. In order that the donation of an immovable may be valid, it must be made in a public document, specifying therein the property donated and the value of the charges which the donee must satisfy.
>
> The acceptance may be made in the same deed of donation or in a separate public document, but it shall not take effect unless it is done during the lifetime of the donor.
>
> If the acceptance is made in a separate instrument, the donor shall be notified thereof in an authentic form, and this step shall be noted in both instruments."

Following the change in the rule, an oral donation *propter nuptias* of a parcel of land is now considered void under the new law; while it is merely unenforceable under the old law. However, even if the donation *proper nuptias* is void for failure to comply with formal requisites, it could still constitute as legal basis for adverse possession.[34]

[100.3] Requirement of Express Acceptance

Articles 82 to 87 of the Family Code did not modify the requirement of express acceptance under Articles 748 and 749 of the New Civil Code. As such, if what is donated is a personal property, the value of which exceeds Five Thousand Pesos, the law requires that the acceptance shall also be in writing, otherwise, the donation shall be void.[35] On

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[34]Heirs of Segunda Maningding vs. CA, 276 SCRA 601 (1997).
[35]Art. 748, NCC.

the other hand, if the donation involves real property, the law requires that the acceptance must also be in a public instrument and if it is made in a separate instrument, there is an additional requirement that the donor should be notified thereof in an authentic form and this step must be noted in both instruments. If these requirements are not followed, the donation shall be void.[36]

Under the New Civil Code, the rules are different. Article 129 thereof provides that *"express acceptance is not necessary for the validity of these donations."* Thus, implied acceptance is sufficient[37] for the validity of donations *propter nuptias* under the New Civil Code. This is possible under the old law since donations *propter nuptias* under the New Civil Code were then governed by the Statute of Frauds,[38] where form is required only for purposes of enforceability and not for validity.

Art. 84. If the future spouses agree upon a regime other than the absolute community of property, they cannot donate to each other in their marriage settlements more than one-fifth of their present property. Any excess shall be considered void.

Donations of future property shall be governed by the provisions on testamentary succession and the formalities of wills. (130a)

COMMENTS:

§ 101. Donations Between Future Spouses

[101.1] Limitations
[101.2] Donation of future property

[101.1] Limitations

As earlier explained, the donee or donees in donation *propter nuptias*, for it to be considered as such, must either be one of the future spouses or both of them. The donor, however, may either be one of the future spouses or a third person.

If the donation is to be made by one of the future spouses in favor of the other in a marriage settlement, such donation must not exceed

[36]Art. 749, NCC.
[37]Valnecia vs. Locquiao, 412 SCRA 600 (2003).
[38]Art. 127, NCC.

one-fifth of the present property of the donor, if the property regime agreed upon in the marriage settlement is other than absolute community.[39] If such donation exceeds this limitation, only the excess is considered void[40] but the remainder thereof remains valid. But if the property regime agreed upon in the marriage settlement is absolute community, the law does not impose any limitation as to the extent of what may be donated by one of the future spouses in favor of the other. The reason for this rule is obvious. In a regime of absolute community, the spouses are considered co-owners of all the property owned by them at the time of the celebration of the marriage or acquired thereafter, unless otherwise provided in Article 92 of the Family Code or in the marriage settlement.[41]

The phraseology of the present article seems to limit the extent of the donation *propter nuptias* only if such donation is contained in the marriage settlement and the property regime agreed upon is other than absolute community. An interesting question therefore arises in a situation where the future spouses agreed upon a regime other than absolute community in their marriage settlement but the donation *propter nuptias* by one spouse in favor of the other is not contained in the marriage settlement. In such a situation, will the limitation provided for in the present article apply?

Although the language of the present article seems to suggest that the one-fifth limitation applies only if the donation is contained in the marriage settlement, this kind of interpretation, however, ignores the policy behind the rule contained in the present article. The rule is based on the policy that no spouse should be allowed to take advantage of the love or tender feelings of the other to acquire property from the latter.[42] This is the reason why the spouses are prohibited, as a general rule, from selling to each other,[43] or from donating to each other during the marriage,[44] or from leasing lands to each other.[45] Thus, it is submitted that the intent of the law is to apply the one-fifth limitation not only to dona-

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[39]Art. 84, 1st par., FC.
[40]*Id.*
[41]See Art. 91, FC.
[42]1 Tolentino, Civil Code, 1990 ed., p. 372.
[43]Art. 1490, NCC.
[44]Art. 87, FC.
[45]Art. 1646, NCC.

tions *propter nuptias* (between the future spouses) that are contained in the marriage settlement, but also to donations between them outside of the marriage settlement, so long as the property regime agreed upon is other than absolute community.

Additionally, if the future spouses did not execute a marriage settlement prior to the celebration of the marriage, any donation *propter nuptias* between them is not subject to the one-fifth limitation since they will, after all, be governed by a regime of absolute community by default pursuant to the provisions of Article 75 of the Family Code.

[101.2] Donations of Future Property

While ordinary donations cannot comprehend future property,[46] donations *propter nuptias* of future property between future spouses are not prohibited.[47] However, such donations shall be governed by the provisions on testamentary succession and the formalities of wills.[48] In other words, donations *propter nuptias* of future property between future spouses are in the nature of donations *mortis causa*, which are effective only upon the death of the donor spouse. In this kind of donations, the formalities outlined in Articles 748 and 749 do not apply. What applies, instead, are the formalities of wills outlined in Articles 804 to 819 of the New Civil Code.

By future property is understood anything which the donor cannot dispose of at the time of the donation.[49] Note that in the second paragraph of Article 84 of the Family Code, the donation of future property referred to is a donation *propter nuptias* of future property between the future spouses. If the donation of future property is to be made by a third person, Article 84 of the Family Code does not apply but Article 751 of the New Civil Code, even if the donation is one of *propter nuptias*. In which case, such donation is prohibited.

Art. 85. Donations by reason of marriage of property subject to encumbrances shall be valid. In case of foreclosure of the encumbrance and the property is sold for less than the total amount of the obligation se-

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[46]Art. 751, 1st par., NCC.
[47]Art. 84, 2nd par., FC.
[48]*Id.*
[49]Art. 751, 2nd par., NCC.

cured, the donee shall not be liable for the deficiency. If the property is sold for more than the total amount of said obligation, the donee shall be entitled to the excess. (131a)

COMMENTS:

§ 102. Donations Subject To Encumbrance

A donation *propter nuptias* of a property subject to encumbrance is valid[50] since a mere encumbrance does not divest the donor of ownership of the property donated. If the donee has actual knowledge of the existence of such encumbrance or if the same is recorded in the proper registry of property, in which case the donee has constructive notice of its existence, such encumbrance is binding upon the donee and attaches to the property donated. In case of foreclosure, if the proceeds of the sale of the property are not sufficient to cover the amount of indebtedness, the donee is not liable to the donor's creditor for the deficiency since the donee is not the debtor. The payment of such deficiency remains to be an obligation of the donor. On the other hand, if the proceeds of the sale are more than the amount of the indebtedness, the donee is entitled to the excess since he is now the owner of the property donated.

Art. 86. A donation by reason of marriage may be revoked by the donor in the following cases:

(1) If the marriage is not celebrated or judicially declared void *ab initio* except donations made in the marriage settlements, which shall be governed by Article 81;

(2) When the marriage takes place without the consent of the parents or guardian, as required by law;

(3) When the marriage is annulled, and the donee acted in bad faith;

(4) Upon legal separation, the donee being the guilty spouse;

(5) If it is with a resolutory condition and the condition is complied with;

(6) When the donee has committed an act of ingratitude as specified by the provisions of the Civil Code on donations in general. (132a)

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[50]Art. 85, NCC.

COMMENTS:

§ 103. Revocation of Donation *Propter Nuptias*

[103.1] By reason of non-celebration of marriage
[103.2] By reason of judicial declaration of nullity of marriage
[103.3] By reason of annulment of marriage
[103.4] By reason of legal separation
[103.5] By reason of compliance of resolutory condition
[103.6] By reason of acts of ingratitude

[103.1] By Reason of Non-Celebration of Marriage

If the marriage is not celebrated, the donation *propter nuptias* is not rendered ineffective or void, except a donation made in the marriage settlement itself. Insofar as donations *propter nuptias* made in the marriage settlements are concerned, such donations shall be rendered void if the marriage does not take place. This is clear from the provisions of the present article which makes applicable the provisions of Article 81 to such kind of donations.

For donations *propter nuptias* outside of the marriage settlement, the mere non-celebration of the marriage does not affect its validity but such fact only gives rise to a cause for the revocation of such donations.[51] In other words, the donation *propter nuptias* remains valid notwithstanding the fact that the marriage did not take place. Hence, if the proper action for revocation is not instituted, or if it is instituted but after the lapse of the statutory period of prescription, the donation will forever be considered valid. As earlier explained, the marriage in donation *propter nuptias* is really a consideration but not in the sense of being necessary to give birth to the obligation.[52] Far from being a condition necessary for the birth of the obligation, the marriage in a donation *propter nuptias* is rather a resolutory condition which, as such, presupposes the existence of the obligation which may be resolved or revoked.[53]

[103.2] By Reason of Judicial Declaration of Nullity of Marriage

If the marriage is judicially declared void *ab initio*, the donation

[51]Art. 86(1), FC.
[52]Solis vs. Barroso, G.R. No. L-27939, Oct. 30, 1928.
[53]*Id*.

propter nuptias remains valid but such fact gives rise to a ground for the revocation of said donation.[54] By way of exception, however, if the marriage is judicially declared void ab initio under Article 40 of the Family Code, the donation *propter nuptias* is revoked by operation of law *"if the donee contracted the marriage in bad faith"*[55] or *"if both spouses of the subsequent marriage contracted the marriage in bad faith."* This is because Article 50 of the Family Code makes applicable paragraph (3) of Article 43 and Article 44 to marriages which are declared void *ab initio* under Article 40.

[103.3] By Reason of Annulment of Marriage

The annulment of the marriage does not, ordinarily, affect the validity of donations *propter nuptias*.[56] However, if the donee acted in bad faith in contracting the marriage, the present article[57] presents the donor a cause or ground to revoke the donation. The present article, however, is incompatible and inconsistent with the provisions of Article 50, in relation to Article 43(3) and Article 44. Note that Article 50 makes applicable to marriages that are annulled under Article 45 the provisions of paragraph 3 of Article 43 and Article 44. In the latter articles, if the donee contracted the marriage in bad faith,[58] or if both spouses contracted the marriage in bad faith,[59] the donation *propter nuptias* is revoked by operation of law and not merely revocable. Since the provisions of Article 86(3) and Articles 50, in relation to Article 43(3), are incompatible with each other and may not be harmonized, it is submitted that the rule stated in Article 86(3) must be followed since it is the policy of the law, as embodied in Article 86, to recognize, as much as possible, the effectivity of donations *propter nuptias* although the donor is given grounds to demand for its revocation for causes enumerated in said article.

To give rise to a cause or ground for revocation, the rule is that a voidable marriage must first be annulled. In other words, what gives rise to a cause for revocation of donation *propter nuptias* is the final judg-

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[54]Art. 86(21), FC.
[55]Art. 43(3), in relation to Art. 50, FC.
[56]Art. 86(3), FC; Art. 50, in relation to Art. 43(3), FC.
[57]Art. 86(3), FC.
[58]Art. 43(3), FC.
[59]Art. 44, FC.

ment of annulment and not simply the existence of grounds for annulment. By way of exception, however, if the marriage is voidable by reason of absence of parental consent, there is no more need for a judgment annulling the marriage for the donation to be revocable. Under the law, the mere fact that the marriage takes place without the consent of the parents or guardians, when required, already gives rise to a cause or ground for revocation of the donation.[60]

[103.4] By Reason of Legal Separation

See discussions under *supra* § 86.5.

[103.5] By Reason of Compliance with Resolutory Condition

A resolutory condition, also known as condition subsequent, has the effect of extinguishing rights already existing upon its happening. An obligation subject to a resolutory condition is immediately demandable[61] but it is extinguished upon the happening of the condition.[62] Hence, if a donation *propter nuptias* is subject to a resolutory condition and the condition is fulfilled, the donor acquires a right to revoke the donation.[63]

[103.6] By Reason of Acts of Ingratitude

Donations *propter nuptias* are revocable by reason of ingratitude.[64] This is based upon the presumed will of the donor and is a form of penalty imposed upon the donee for failing to observe those moral imperatives that devolve upon him by virtue of the benefit he has received from the donation.[65] This action, however, is personal to the donor and is not transmissible to his heirs and neither may this action be brought against the heir of the donee, unless upon the latter's death the complaint has been filed.[66] The acts of ingratitude referred to in the present article are those specified in Article 765 of the New Civil Code, as follows:

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[60]See Art. 86 (2), FC.
[61]Art. 1179, NCC.
[62]Art. 1181, NCC.
[63]Art. 86(5), FC.
[64]Art. 86(6), FC.
[65]5 Manresa, 5th ed., 170.
[66]See Art. 770, NCC.

"Art. 765. The donation may also be revoked at the instance of the donor, by reason of ingratitude in the following cases:

(1) If the donee should commit some offense against the person, the honor or the property of the donor, or of his wife or children under his parental authority;

(2) If the donee imputes to the donor any criminal offense, or any act involving moral turpitude, even though he should prove it, unless the crime or the act has been committed against the donee himself, his wife or children under his authority;

(3) If he unduly refuses him support when the donee is legally or morally bound to give support to the donor. (648a)"

§ 104. Prescriptive Period of Action to Revoke

Except for revocation of donations *propter nuptias* by reason of a final decree of legal separation under Article 86(4) and Article 64, the Family Code does not expressly provide for the prescriptive period of actions to revoke donations *propter nuptias*. Under Article 64 of the Family Code, the innocent spouse may revoke the donations made by him or her in favor of the offending spouse after the finality of the decree of legal separation. The action to revoke the donation based on this ground is required to be brought within five years from the time the decree of legal separation has become final.[67]

For the other causes or grounds enumerated under Article 86, the Family Code is silent on their prescriptive periods for the filing of actions for revocation. Since the rules on ordinary donations likewise apply to donations *propter nuptias* insofar as they have not been modified by the Family Code, it is submitted that the one-year prescriptive period for revocation of donations based on acts of ingratitude[68] also applies to revocations of donation *propter nuptias* under Article 86(6) of the Family Code. This one-year prescriptive period is to be counted from the

[67] Art. 64, FC.
[68] Art. 769, NCC.

time the donor had knowledge of the act and it was possible for him to bring the action for revocation.[69]

For other grounds or causes mentioned in Article 86 which are not controlled by a particular prescriptive period, resort to the ordinary rules of prescription may be had. Under Article 1144 of the Civil Code, actions upon an obligation created by law must be brought within ten years from the time the right of action accrues. This ten-year prescriptive period applies, therefore, to the action for revocation under Article 86.[69a]

Art. 87. Every donation or grant of gratuitous advantage, direct or indirect, between the spouses during the marriage shall be void, except moderate gifts which the spouses may give each other on the occasion of any family rejoicing. The prohibition shall also apply to persons living together as husband and wife without a valid marriage. (133a)

COMMENTS:

§ 105. Prohibited Transactions Between Spouses

[105.1] Donations during marriage
[105.2] Other prohibited transactions

[105.1] Donations During Marriage

The law recognizes the validity of donations between future spouses prior to the marriage, in the form of donations *propter nuptias*, but it prohibits the spouses from donating to each other during the marriage. Any such donation between the spouses during the marriage, whether direct or indirect, is considered void.[70] The prohibition applies whatever may be the property regime that governs the spouses. The rule, however, is not absolute. The present article recognizes the validity of moderate gifts which the spouses may give each other on the occasion of any family rejoicing.

Significantly, the prohibition also applies to persons living together as husband and wife without a valid marriage.[71] In other words, the pro-

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[69] *Id.*

[69a] Applying by analogy the rulings in Imperial vs. CA, 316 SCRA 393; and Santos vs. Alana, 467 SCRA 176.

[70] Art. 87, FC.

[71] *Id.* See also Arcaba vs. Vda. De Batocael, 370 SCRA 414 (2001).

hibition against donations between spouses must likewise apply to donations between persons living together in illicit relations; otherwise, the latter would be better situated than the former.[72] However, for the prohibition to apply, it is necessary to prove that the man and the woman are living together as husband and wife. In **Bitangcor vs. Tan**,[73] the Court held that the term "cohabitation" or "living together as husband and wife" means not only residing under one roof, but also having repeated sexual intercourse. Cohabitation, of course, means more than sexual intercourse, especially when one of the parties is already old and may no longer be interested in sex.[74] At the very least, cohabitation is the public assumption by a man and a woman of the marital relation, and dwelling together as man and wife, thereby holding themselves out to the public as such. Secret meetings or nights clandestinely spent together, even if often repeated, do not constitute such kind of cohabitation; they are merely meretricious.[75] In this jurisdiction, this Court has considered as sufficient proof of common-law relationship the stipulations between the parties,[76] a conviction of concubinage,[77] or the existence of illegitimate children.[78]

[105.2] Other Prohibited Transactions

The husband and the wife are prohibited from selling property to each other,[79] and any such sale is considered void *ab initi*o.[80] By way of exception, however, Article 1490 permits sale between spouses, in two instances: (1) when a separation of property was agreed upon in the marriage settlements; or (2) when there has been a judicial separation of property under Article 191.[81] The reason for the exceptions is that the separation of property of the spouses renders remote all danger of fraud

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[72]Joaquino vs. Reyes, 434 SCRA 260 (2004).

[73]112 SCRA 113 (1982); cited in Arcaba vs. Vda. De Batocael, *supra*.

[74]Arcaba vs. Vda. De Batocael, *supra*.

[75]*Id*.

[76]The Insular Life Company, Ltd. vs. Ebrado, 80 SCRA 181 (1977); Matabuena vs. Cervantes, 38 SCRA 284 (1971).

[77]Calimlim-Canullas vs. Fortun, 129 SCRA 675 (1984).

[78]People vs. Villagonzalo, 238 SCRA 215 (1994); Bienvenido vs. Court of Appeals, 237 SCRA 676 (1994).

[79]Art. 1490, NCC.

[80]Camia de Reyes vs. Reyes de Ilano, 63 Phil. 629 (1936); Medina vs. Collector of Internal Revenue, 1 SCRA 302 (1961).

[81]Now Arts. 135 and 136, FC.

in contracts of sale that may be celebrated between husband and wife, inasmuch as that separation can easily be known by the third person who takes care of his interests; or at least, such contracts do not imply, in the cases in which the law permits them, more danger than such as can always exist when a sale is simulated with a person of whom he is not a relative.[82] Note, however, that these exceptions do not apply in the prohibition between spouses from donating to each other under Article 87 of the Family Code. Under the Family Code, the spouses are prohibited from donating to each other during the marriage whether their property regime is complete separation of property or otherwise.

It is not the oneness of person that the law has taken into account in prohibiting, as a general rule, the contract of sale between husband and wife. Neither perhaps has it sought basis in the weakness of the sex and in the possibility that the husband, by suggestions of diverse kind, may incline the wife to perform ruinous acts. The law has sought to secure the interests of third persons who contract in reliance upon a determinate state of fortune, and who otherwise could find themselves flouted with facility on finding that the properties which they understood to constitute a true guaranty have been withdrawn, as pertaining to the wife, from contractual responsibility.[83] The reason for the prohibition between spouses to sell property to each other during the marriage is likewise applicable to the prohibition embodied in the present article.

Additionally, the spouses are likewise prohibited from leasing to each other parcels of land. Article 1646 provides, as follows:

> "Art. 1646. The persons disqualified to buy referred to in Articles 1490 and 1491, are also disqualified to become lessees of the things mentioned therein."

Chapter 3

System of Absolute Community

Section 1. General Provisions

Art. 88. The absolute community of property between spouses shall commence at the precise moment that the marriage is celebrated. Any

[82] 10 Manresa 102.
[83] 10 Manresa 99-100.

stipulation, express or implied, for the commencement of the community regime at any other time shall be void. (145a)

Art. 89. No waiver of rights, interests, shares and effects of the absolute community of property during the marriage can be made except in case of judicial separation of property.

When the waiver takes place upon a judicial separation of property, or after the marriage has been dissolved or annulled, the same shall appear in a public instrument and shall be recorded as provided in Article 77. The creditors of the spouse who made such waiver may petition the court to rescind the waiver to the extent of the amount sufficient to cover the amount of their credits. (146a)

Art. 90. The provisions on co-ownership shall apply to the absolute community of property between the spouses in all matters not provided for in this Chapter. (n)

COMMENTS:

§ 106. Regime of Absolute Community

[106.1] Regime of absolute community explained
[106.2] Rules governing absolute community
[106.3] Commencement of the absolute community

[106.1] Regime of Absolute Community, Explained

In the property regime known as the "absolute community," the spouses are considered co-owners of all property brought into and acquired during the marriage which are not otherwise excluded from the community property either by the provisions of the Family Code or by the marriage settlement.[84] This regime will govern the property relations of the spouses in the following instances:

(1) when it is agreed upon in the marriage settlement;[85]

(2) when the spouses did not execute a marriage settlement;[86] or

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[84]Art. 91, FC.
[85]Art. 74(1), in relation to Art. 75, FC.
[86]Art. 75, FC. This is true only for marriages during the effectivity of the Family Code. For marriages prior the Family Code, it is conjugal partnership of gains that shall govern in the absence of marriage settlement pursuant to Art. 119, NCC.

(3) when the regime agreed upon in the marriage settlement is void.[87]

[106.2] Rules Governing Absolute Community

If the regime of absolute community is provided for in the marriage settlement, the provisions of the marriage settlement shall primarily govern the property relations of the spouses[88] so long as the agreement of the parties does not violate the mandatory provisions of the Family Code[89] and is not contrary to morals and public policy.[90] In this situation, the provisions of the Family Code on absolute community (Arts. 88 to 104) shall apply in a suppletory manner.[91] In all matters not provided for under the Family Code, the provisions of the Civil Code on co-ownership (Arts. 484 to 501) shall also apply.[92]

If the regime of absolute community applies to the spouses by default pursuant to the provisions of Article 75 of this Code, then the provisions of the Family Code on absolute community shall primarily govern[93] and the provisions of the Civil Code on co-ownership shall apply in a suppletory manner.[94]

The applicability of the provisions of the Civil Code on co-ownership to the regime of absolute community is recognition that this regime is a special kind of co-ownership. Under the provisions of the Civil Code on co-ownership, it is provided that if the co-ownership is created by law, such kind of co-ownership shall be primarily governed by the special provisions of law creating it and the provisions of the Civil Code on co-ownership shall only apply in a suppletory manner.[95]

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[87] Art. 75, FC. This is true only for marriages during the effectivity of the Family Code. For marriages prior the Family Code, it is conjugal partnership of gains that shall govern if the marriage settlement is void pursuant to Art. 119, NCC.

[88] Art. 74(1), FC.

[89] Art. 1, FC.

[90] Art. 1306, NCC.

[91] Art. 74(2), FC.

[92] Art. 90, FC.

[93] Art. 74(2), FC.

[94] Art. 90, FC.

[95] See Art. 484, 2nd par., NCC.

[106.3] Commencement of the Absolute Community

Whether the regime of absolute community is agreed upon in the marriage settlement or applies by default, the same shall commence at the precise moment that the marriage is celebrated.[96] Any agreement between the spouses, express or implied, that this regime shall commence at any other time is void.[97] It is for this reason that the spouses are not allowed to modify their property regime during the marriage to change it into absolute community, if the latter is not their property regime at the start of the marriage. In view of this mandatory provision in Article 88, it is submitted that the spouses who are legally separated may not adopt absolute community as their new regime, in case of reconciliation, although the same seems to be permitted under the provisions of Sections 23(c) and 24(a) of the Rule on Legal Separation (A.M. No. 02-11-11-SC). In addition, this kind of modification in the marriage settlement is not allowed to be done after the celebration of the marriage under the provisions of Article 76 of the Family Code.

§ 107. Prohibition on Waiver of Rights, Interest, Shares and Effects

In **Abalos vs. Macatangay, Jr.**,[98] the Court explained the nature of the interest of each spouse in the conjugal partnership prior to liquidation, to wit —

> More significantly, it has been held that prior to the liquidation of the conjugal partnership, the interest of each spouse in the conjugal assets is inchoate, a mere expectancy, which constitutes neither a legal nor an equitable estate, and does not ripen into title until it appears that there are assets in the community as a result of the liquidation and settlement. The interest of each spouse is limited to the net remainder or "*remanente liquido*" (*haber ganancial*) resulting from the liquidation of the affairs of the partnership after its dissolution.[99] Thus, the right of the husband or wife to one-half of the con-

[96]Art. 88, FC.

[97]*Id*.

[98]439 SCRA 649, 662-663 (2004).

[99]Citing Nable Jose vs. Nable Jose, 41 Phil. 713 (1916); Manuel vs. Losano, 41 Phil. 855 (1918).

> jugal assets does not vest until the dissolution and liquidation of the conjugal partnership, or after dissolution of the marriage, when it is finally determined that, after settlement of conjugal obligations, there are net assets left which can be divided between the spouses or their respective heirs.[100]

The same principle may likewise apply in a regime of absolute community with respect to the share of each spouse in the community prior to dissolution and liquidation. Since the right of each spouse in the net asset of the community property does not vest until after the dissolution of the marriage, or until the dissolution and liquidation of the interest of each spouse in the community property, any waiver of such right, interest, share or effects of the absolute community during the marriage cannot be made,[101] and if made, the same shall not produce any legal effect because for a waiver to be valid, it is required that the person renouncing must actually have the right which he renounces.[102] There is only one instance when such waiver during the marriage may be considered valid, and that is, if the waiver is made in case of judicial separation of property.[103] In the latter case, note that the absolute community is terminated,[104] in which case, the interest of each spouse in the net asset of the community shall ripen into a title when it is finally determined that, after settlement of the obligations of the community, there are net assets left which can be divided between the spouses or their respective heirs.

A valid waiver may likewise take place after the marriage has been dissolved or annulled. In both instances, the liquidation of the absolute community is a necessary consequence. Hence, the right of each spouse to the remaining assets of the community, after payment of obligations, already ripens into a title, hence, subject to a valid renunciation.

In order to protect the interest of third persons who may be prejudiced by such waiver, the Code requires that any waiver of the interest or share in the absolute community after the dissolution of the marriage or its annulment or in case of judicial separation of property, must

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[100]Citing Quintos de Ansaldo vs. Sheriff of Manila, 64 Phil. 115 (1937).
[101]Art. 89, 1st par., FC.
[102]1 Tolenino, Civil Code, 1990 ed., p. 30.
[103]Art. 89, 1st par., FC.
[104]Art. 99(4), FC.

appear in a public instrument and recorded in the local civil registry where the marriage contract is recorded as well as in the proper registries of property.[105]

Section 2. What Constitutes Community Property

Art. 91. Unless otherwise provided in this Chapter or in the marriage settlements, the community property shall consist of all the property owned by the spouses at the time of the celebration of the marriage or acquired thereafter. (197a)

Art. 92. The following shall be excluded from the community property:

(1) Property acquired during the marriage by gratuitous title by either spouse, and the fruits as well as the income thereof, if any, unless it is expressly provided by the donor, testator or grantor that they shall form part of the community property;

(2) Property for personal and exclusive use of either spouse. However, jewelry shall form part of the community property;

(3) Property acquired before the marriage by either spouse who has legitimate descendants by a former marriage, and the fruits as well as the income, if any, of such property. (201a)

Art. 93. Property acquired during the marriage is presumed to belong to the community, unless it is proved that it is one of those excluded therefrom. (160a)

COMMENTS:

§ 108. What Constitutes Community Property

The properties included in the regime of absolute community, which are co-owned by the spouses, are called "community property." Except for the properties excluded by the Family Code in Article 92 and those excluded by the spouses in the marriage settlement,[106] all properties owned by the spouses at the time of the celebration of the marriage or acquired during the marriage are community property.[107]

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[105]Art. 89, 2nd par., FC.
[106]Art. 91, FC.
[107]*Id.*

If the future spouses execute a marriage settlement prior to the marriage and adopt absolute community as their property regime, they may agree to exclude from the community property whatever properties they may have at the time of the celebration of the marriage and include therein only the properties that they may acquire during the marriage. This much is clear from the provisions of Article 91 which authorizes the future spouses to exclude certain properties existing prior to the celebration of the marriage from the community property. But what about the fruits and income of these properties, will they also be excluded from the community property?

The answer to the foregoing question will depend upon the agreement of the spouses in their marriage settlement. They may likewise agree to exclude even the fruits and income of said properties from the community property, in which case, their agreement shall prevail pursuant to the provisions of paragraph (1) of Article 74. In the absence, however, of any agreement in the marriage settlement to exclude these fruits and income from the community property, they are to be considered part of the community property since they will not fall in any of the exclusions enumerated in Article 92. Hence, they will fall under the general rule that all property owned by the spouses at the time of the celebration of the marriage or acquired thereafter shall be part of the community property.[108] If these fruits and income are generated during the marriage, there is even a presumption that they belong to the community property.[109]

§ 109. Presumption in Favor of Community Property

Article 93 of this Code provides that "property acquired during the marriage is presumed to belong to the community, unless it is proved that it is one of those excluded therefrom." Unlike in conjugal partnership of gains, the presumption in favor of community property should not be limited only to the properties acquired during the marriage. By the very nature of this regime, which consists of practically all the properties of the spouses, whether acquired before or during the marriage, the presumption in favor of the community must relate to all the proper-

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[108]*Id.*
[109]See Art. 93.

ties of the spouses and not only to the properties acquired during the marriage.

In conjugal partnership, for the presumption in favor of conjugality embodied in Article 116 of this Code to operate, it is necessary that the party invoking this presumption must first prove that the property in controversy was acquired during the marriage.[110] Proof of acquisition during the coverture is a condition *sine qua non* for the operation of the presumption in favor of the conjugal partnership.[111] The reason for this rule is that in conjugal partnership the properties of each spouse at the time of the celebration of the marriage are not included in the conjugal partnership property, unless the contrary is provided in the marriage settlement. Thus, the presumption of conjugality attached only to properties acquired during the marriage.

In absolute community, however, all properties of the spouses are included in the community property as a matter of rule, whether the property is acquired before or after the marriage. This being the case, it is submitted that proof of acquisition during the coverture must not be considered a condition *sine qua non* for the operation of the presumption in favor of the absolute community. For the same reason, the presumption should operate even when there is no showing as to when property alleged to be community was acquired.

§ 110. Separate or Exclusive Properties of the Spouses

[110.1] In general
[110.2] Property excluded in the marriage settlement
[110.3] Property acquired during the marriage by gratuitous title
[110.4] Property for personal or exclusive use
[110.5] Property acquired prior to the marriage
[110.6] Sale or exchange of separate properties

[110.1] In general

The properties which are not included in the absolute community, over which the spouse-owner retain ownership, possession, administra-

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[110]Jocson vs. Court of Appeals, 170 SCRA 333 (1989) at p. 344 citing Cobb-Perez vs. Lantin, 23 SCRA 637 (1968).

[111]*Id.*

tion and enjoyment, are called "separate" or "exclusive" properties. In the regime of absolute community, the following properties are classified as separate or exclusive properties:

(1) Property acquired before the marriage by either spouse which has been excluded from the absolute community in the marriage settlement;[112]

(2) Property acquired during the marriage by gratuitous title by either spouse, and the fruits as well as the income thereof, if any, unless it is expressly provided by the donor, testator or grantor that they shall form part of the community property;[113]

(3) Property for personal and exclusive use of either spouse. However, jewelry shall form part of the community property;[114] and

(4) Property acquired before the marriage by either spouse who has legitimate descendants by a former marriage, and the fruits as well as the income, if any, of such property.[115]

[110.2] Property Excluded in the Marriage Settlement

See discussions in *supra* § 108.

[110.3] Property Acquired During Marriage by Gratuitous Title

All properties acquired by the spouses during the marriage belong to the community property except: (1) those that are acquired by gratuitous title by either spouse, and (2) those for personal and exclusive use of either spouse.

For properties acquired through gratuitous title to be considered exclusive or separate properties, the following requisites must concur: (1) they must be acquired during the marriage; (2) they are acquired by either spouse; and (3) the donor, testator, or grantor does not expressly provide that they shall form part of the community property. Hence, if

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[112]Art. 91, FC.
[113]Art. 92(1), FC.
[114]Art. 92(2), FC.
[115]Art. 92(3), FC.

the property was gratuitously acquired prior to the celebration of the marriage or if the donor, testator, or grantor expressly provided that it shall form part of the community property, said property shall belong to the community.

Paragraph (1) of Article 92 excludes from the absolute community property acquired by gratuitous title only if the acquisition is made by either spouse. The Family Code is silent, however, if the property is acquired through gratuitous title by both spouses jointly. Will such acquisition belong to the community or will it remain as exclusive property of the spouses?

Under the regime of conjugal partnership, there is a provision which squarely answers this question. Article 113 of this Code provides that *"property donated or left by will to the spouses, jointly and with designation of determinate shares, shall pertain to the donee-spouses as his or her own exclusive property, and in the absence of designation, share and share alike, without prejudice to the right of accretion when proper."* This provision, however, is not made applicable to the regime of absolute community. Since in the absence of any special provision under the chapter on absolute community the rules on ordinary donation under Civil Code apply, it is submitted that the matter shall be regulated by article 753 of the New Civil Code, which reads:

> "Art. 753. When a donation is made to several persons jointly, it is understood to be in equal shares, and there shall be no right of accretion among them, unless the donor has otherwise provided.
>
> The preceding paragraph shall not be applicable to donations made to the husband and wife jointly, between whom there shall be a right of accretion, if the contrary has not been provided by the donor."

In view of the availability of the right of accretion between spouses in case of a donation to husband and wife jointly, it is submitted that the share of each spouse in the donation, which is understood to be equal, shall pertain to his or her exclusive property.

Note that the fruits and income of the properties mentioned in paragraph (1) of Article 92 are also considered separate properties.

[110.4] Property for Personal and Exclusive Use

The terms "personal" and "exclusive" use of either spouse in paragraph (2) of Article 92 are used in their ordinary meanings, examples of which are clothes, shoes, etc. However, by express provisions, jewelry shall be part of the community property.

[110.5] Property Acquired Prior to the Marriage

All properties acquired prior to the marriage are likewise included in the community property except: (1) those excluded in the marriage settlement; (2) those for personal and exclusive use of either spouse; and (3) those acquired by either spouse who has legitimate descendants by a former marriage.

With respect to a spouse who has legitimate descendants by a prior marriage, the Family Code excludes from the community all his or her property acquired prior to the subsequent marriage. In other words, only those that he or she may acquire during the subsequent marriage are included in the community property. The purpose of the rule is to facilitate identification of properties from which the legitimate descendants in the prior marriage may later on lay a claim. Note that fruits and interests of these properties are likewise excluded from the community property.

May the future spouses in the subsequent marriage agree to include these properties as part of the absolute community in their marriage settlement? The answer must be in the negative. While the future spouses are free to fix their property relations in their marriage settlement, the law expressly provides that they can only do so within the limits provided by the Family Code.[116] It is clear from the language of Article 92 that its provisions are mandatory and may not be the subject of a contrary agreement between the spouses. Besides, the purpose of the rule in Article 92(3) may easily be defeated if the parties are to be allowed to stipulate to the contrary.

[110.6] Sale or Exchange of Separate Properties

If a separate property of either spouse is later on sold or exchanged for another property, will the proceeds of the sale or the property so

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[116]See Art. 1, FC.

acquired remain separate property or be now part of the community property?

If a property is excluded from the community property by reason of the marriage settlement, in the absence of any agreement, the alienation of such property converts the proceeds or the property acquired in its place to community property, following the rule in Article 91 that *"the community property shall consist of all the property owned by the spouses at the time of the celebration of the marriage or acquired thereafter"* and the presumption in Article 93 that *"property acquired during the marriage is presumed to belong to the community, unless it is proved that it is one of those excluded therefrom."* Note that the separate character of these properties is not one imposed by law but only by agreement. Hence, there is no policy of the law that may be violated if the properties are to be stamped out of its separate character.

On the other hand, if a property is excluded from the community property by reason of the mandatory provisions of law, as in the case of those excluded under Article 92 of this Code, it is submitted that the policy of the law to stamp these properties with separate character should not be easily defeated by the simple expedient of converting said properties into some new form. This is the view shared by Senator Tolentino[117] —

> "If such property, however, is later sold exchanged by the spouse who owns it for another property, does the price or property so acquired become community property? The Family Code is silent on this point. The Portuguese code, from which the present article was taken, stamps the separate character, not only on the property acquired from the donor or testator, but also upon any property which substitutes it. We believe that this principle can be applied under our code; it is merely a necessary consequence of the principle of separation of patrimonies. The mere alienation of separate property of a spouse does not convert the price or the property acquired thereby into community property."

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[117]1 Tolentino, Civil Code, 1990 ed., pp. 385-386.

Section 3. Charges and Obligations of the Absolute Community

Art. 94. The absolute community of property shall be liable for:

(1) The support of the spouses, their common children, and legitimate children of either spouse; however, the support of illegitimate children shall be governed by the provisions of this Code on Support;

(2) All debts and obligations contracted during the marriage by the designated administrator-spouse for the benefit of the community, or by both spouses, or by one spouse with the consent of the other;

(3) Debts and obligations contracted by either spouse without the consent of the other to the extent that the family may have been benefited;

(4) All taxes, liens, charges and expenses, including major or minor repairs, upon the community property;

(5) All taxes and expenses for mere preservation made during marriage upon the separate property of either spouse used by the family;

(6) Expenses to enable either spouse to commence or complete a professional or vocational course, or other activity for self-improvement;

(7) Antenuptial debts of either spouse insofar as they have redounded to the benefit of the family;

(8) The value of what is donated or promised by both spouses in favor of their common legitimate children for the exclusive purpose of commencing or completing a professional or vocational course or other activity for self-improvement;

(9) Antenuptial debts of either spouse other than those falling under paragraph (7) of this Article, the support of illegitimate children of either spouse, and liabilities incurred by either spouse by reason of a crime or a quasi-delict, in case of absence or insufficiency of the exclusive property of the debtor-spouse, the payment of which shall be considered as advances to be deducted from the share of the debtor-spouse upon liquidation of the community; and

(10) Expenses of litigation between the spouses unless the suit is found to be groundless.

If the community property is insufficient to cover the foregoing liabilities, except those falling under paragraph (9), the spouses shall be solidarily liable for the unpaid balance with their separate properties. (161a, 162a, 163a, 202a-205a)

Art. 95. Whatever may be lost during the marriage in any game of chance, betting, sweepstakes, or any other kind of gambling, whether permitted or prohibited by law, shall be borne by the loser and shall not be

charged to the community but any winnings therefrom shall form part of the community property. (164a)

COMMENTS:

§ 111. Charges and Obligations of the Absolute Community

[111.1] Support
[111.2] Debts and obligations contracted during the marriage
[111.3] Ante nuptial debts
[111.4] Taxes and expenses incurred on the property
[111.5] Expenses for education and self-improvement
[111.6] Expenses of litigation between spouses

[111.1] Support

The community property shall be liable for the support of the spouses, their common children and legitimate children of either spouse in their previous marriage.[118] Since an adopted child is considered legitimate son/daughter of the adopter for all intents and purposes, adopted children are likewise entitled to all rights and obligations provided by law to legitimate children without any discrimination,[119] including the right to support.[120]

However, the support of illegitimate children of either spouse shall come from the exclusive property of the illegitimate parent-spouse and, in case of absence or insufficiency of the exclusive property of the illegitimate parent-spouse, the payment of which may be taken from the community property and the same shall be considered as advances to be deducted from the share of such parent upon liquidation of the absolute community.[121]

[111.2] Debts and Obligations Contracted During the Marriage

The absolute community shall be liable for the following debts and obligations contracted during the marriage: (a) those contracted by

[118]Art. 94(1), FC.
[119]Sec. 17, RA 8552.
[120]Art. 105(2), FC.
[121]Art. 94(9), FC.

the designated administrator-spouse for the benefit of the community;[122] (b) those contracted by both spouses;[123] (c) those contracted by one spouse with the consent of the other;[124] and (d) those contracted by either spouse without the consent of the other to the extent that the family may have been benefited.[125]

Note that if the debt is contracted during the marriage by both spouses or by either spouse with the consent of the other, the law conclusively presumes that such debt has redounded to the benefit of the family, in which case, the creditor no longer has the burden of proving that the debt was contracted for the benefit of the community or of the family.

If the debt is contracted by the designated administrator-spouse or by one spouse without the consent of the other, the absolute community shall be liable only if it can be proven that the debt benefited the community or the family. The burden of proof that the debt was contracted for the benefit of the community or of the family lies with the creditor-party litigant claiming as such. *Ei incumbit probatio qui dicit, non qui negat* (he who asserts, not he who denies, must prove).[126]

[111.3] Ante Nuptial Debts

With respect to *ante nuptial* debts or debts contracted by either spouse prior to the marriage, the absolute community shall be liable only if it can be proven that such debt has redounded to the benefit of the family,[127] and the burden of proving that such debt has redounded to the family's benefit lies with the creditor claiming as such.[128] If such debt did not redound to the benefit of the family, it is the exclusive property of the debtor-spouse which must respond for the payment of such debt.[129] In case of absence or insufficiency of the exclusive property of the debtor-spouse, the payment of which shall be considered as advances to be

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[122]Art. 94(2), FC.
[123]*Id.*
[124]*Id.*
[125]Art. 94(3), FC.
[126]Homeowner's Savings & Loan Bank vs. Dailo, 453 SCRA 283, 292, March 11, 2005.
[127]Art. 94(7), FC.
[128]Homeowner's Savings & Loan Bank vs. Dailo, *supra*, at p. 292.
[129]Art. 94(9), FC.

deducted from the share of the debtor-spouse upon liquidation of the community.[130]

[111.4] Taxes and Expenses Incurred on the Property

All taxes, liens, charges and expenses, including major and minor repairs, upon the community property shall be the liability of the absolute community.[131] For taxes and expenses incurred during the marriage for the preservation of a separate property of either spouse, the same shall be chargeable to the absolute community if the separate property is used by the family;[132] otherwise, the community is not liable. Note that the liability of the absolute community extends only to expenses incurred for the preservation of such separate property used by the family and does not extend to expenses incurred for mere improvement or embellishment of such separate property, even if the same is used by the family.

[111.5] Expenses for Education and Self-Improvement

Expenses to enable either spouse or their common legitimate children to complete a professional or vocational course or expenses incurred for other activities aimed at self-improvement are chargeable to the absolute community.[133]

[111.6] Expenses of Litigation Between Spouses

Expenses of litigation between the spouses are chargeable to the absolute community unless the suit is found to be groundless.[134]

If the community property is insufficient to cover the foregoing liabilities, the spouses shall be solidarily liable for the unpaid balance with their separate properties.[135]

§ 112. Obligations Chargeable to Exclusive Property

The following obligations, on the other hand, are chargeable to the exclusive properties of the debtor-spouse:

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[130] *Id.*
[131] Art. 94(4), FC.
[132] Art. 94(5), FC.
[133] Art. 94(6) & (8), FC.
[134] Art. 94(10), FC.
[135] Art. 94, FC.

(a) Support of illegitimate children of either spouse;[136]

(b) Debts contracted by the designated administrator-spouse during the marriage which did not benefit the community;[137]

(c) Debts contracted during the marriage by either spouse without the consent of the other which did not redound to the benefit of the family;[138]

(d) Ante nuptial debt of either spouse which did not redound to the benefit of the family;[139]

(e) Taxes and expenses incurred during the marriage for the preservation of a separate property of either spouse which is not being used by the family;[140]

(f) Civil liability of either spouse arising from crime or quasi-delict;[141]

(g) Expenses of litigation between spouses, if the suit is found to be groundless;[142]

(h) Losses during the marriage in any game of chance, betting, sweepstakes, or any other kind of gambling, whether permitted or prohibited by law, shall be borne by the loser and shall not be charged to the community but any winnings therefrom shall form part of the community property.[143]

In case of absence or insufficiency of the exclusive property of the debtor-spouse, the payment of which shall be considered as advances from the absolute community to be deducted from the share of the debtor-spouse upon liquidation of the community.[144]

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[136]Art. 94(9), FC.
[137]Art. 94(2), FC.
[138]Art. 94(3), FC.
[139]Art. 94(9), in relation to Art. 94(7), FC.
[140]Art. 94(5), FC.
[141]Art. 94(9), FC.
[142]Art. 94(10), FC.
[143]Art. 95, FC.
[144]Art. 94(9), FC.

Section 4. Ownership, Administrative, Enjoyment and Disposition of the Community Property

Art. 96. The administration and enjoyment of the community property shall belong to both spouses jointly. In case of disagreement, the husband's decision shall prevail, subject to recourse to the court by the wife for proper remedy, which must be availed of within five years from the date of the contract implementing such decision.

In the event that one spouse is incapacitated or otherwise unable to participate in the administration of the common properties, the other spouse may assume sole powers of administration. These powers do not include the powers of disposition or encumbrance without authority of the court or the written consent of the other spouse. In the absence of such authority or consent, the disposition or encumbrance shall be void. However, the transaction shall be construed as a continuing offer on the part of the consenting spouse and the third person, and may be perfected as a binding contract upon the acceptance by the other spouse or authorization by the court before the offer is withdrawn by either or both offerors. (206a)

Art. 97. Either spouse may dispose by will of his or her interest in the community property. (n)

Art. 98. Neither spouse may donate any community property without the consent of the other. However, either spouse may, without the consent of the other, make moderate donations from the community property for charity or on occasions of family rejoicing or family distress. (n)

COMMENTS:

§ 113. Administration and Disposition of Community Property

[113.1] Administration of community property
[113.2] Disposition of community property
[113.3] Disposition of spouse's interest in the community property

[113.1] Administration of Community Property

The administration and enjoyment of the community property belong to both spouses jointly and, in case of disagreement, the husband's decision shall prevail, subject to recourse to the court by the wife for proper remedy, which must be availed of within five years from the date of the contract implementing such decision.[145]

[145]Art. 96, 1st par., FC.

In the following situations, one of the spouses may assume sole powers of administration:

(1) In the event that one spouse is incapacitated or otherwise unable to participate in the administration of the common properties, in which case, the other spouse may assume sole powers of administration, without need of court approval or authorization.[146]

(2) During the pendency of a legal separation case, the court hearing the case may designate either of the spouses as sole administrator of the absolute community, in which case, the court-appointed administrator shall have the same powers and duties as those of a guardian under the Rules of Court.[147]

(3) If a spouse without just cause abandons the other or fails to comply with his or her obligations to the family, the aggrieved spouse may petition the court for authority to be the sole administrator of the absolute community.[148]

[113.2] Disposition of Community Property

Under a regime of absolute community, alienation of community property must have the written consent of the other spouse or the authority of the court without which the disposition or encumbrance is void.[149] The same rule applies even if the disposition is to be made by the administrator-spouse because the powers of sole administration do not include disposition or encumbrance without authority of the court or the written consent of the other spouse. Article 96 of this Code is clear on this:

> "Art. 96. The administration and enjoyment of the community property shall belong to both spouses jointly. In case of disagreement, the husband's decision shall prevail, subject to recourse to the court by the wife for proper remedy, which must be availed of within five years from the date of the contract implementing such decision.

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[146]Art. 96, 2nd par., FC.

[147]Art. 61, FC.

[148]Art. 101, FC.

[149]San Juan Structural and Steel Fabricators, Inc. vs. CA, 296 SCRA 631 (1998); citing Justice Jose C. Vitug, Compendium of Civil Law and Jurisprudence, (revised ed., 1993), p. 177.

> In the event that one spouse is incapacitated or otherwise unable to participate in the administration of the common properties, the other spouse may assume sole powers of administration. These powers do not include disposition or encumbrance without authority of the court or the written consent of the other spouse. In the absence of such authority or consent, the disposition or encumbrance shall be void. However, the transaction shall be construed as a continuing offer on the part of the consenting spouse and the third person, and may be perfected as a binding contract upon the acceptance by the other spouse or authorization by the court before the offer is withdrawn by either or both offerors."

While the Code considers the disposition or encumbrance made by the administrator-spouse as void, if the same is without authority of the court or the written consent of the other spouse, the same is nevertheless considered as a continuing offer on the part of the consenting spouse and the third person, which may be perfected as a binding contract upon the acceptance by the other spouse or authorization by the court before the offer is withdrawn by either or both offerors. Note, however, that when the other spouse or the court eventually gives their consent or authorization, the previous transaction is not deemed ratified since a void contract is not subject to ratification. When such consent or authorization is eventually given, what happens is that there will now be a meeting of the offer and acceptance since the void transaction is nevertheless considered as a continuing offer on the part of the consenting spouse and third person, thereby resulting in the perfection of a contract.

The perfection of the contract mentioned above deviates from the normal process. Ordinarily, the offer and the acceptance that result in a contract are respectively given by the opposing parties, *i.e.*, the seller and the buyer. In the situation contemplated above, the offer comes from one of the sellers (the consenting spouse) and the buyer (the third person) while the acceptance comes either from the non-consenting spouse, as co-seller, or from the court. In the same way that an offer may be withdrawn in ordinary contracts, the continuing offer contemplated above may likewise be withdrawn either by the consenting spouse or by the third person, so long as the withdrawal of the offer is made prior to acceptance thereof, in the form of consent given by the other spouse or court authorization.

If the administrator-spouse disposes of a community property without the consent of the other spouse or without court authorization and, pursuant thereto, delivery has already been effected in favor of the third person, the remedy of the non-consenting spouse is an action for declaration of nullity of the contract entered into and for reconveyance. This type of action is not subject to prescription since the contract under question is void. Note that the five-year prescriptive period provided for in the first paragraph of Article 96 does not apply in this case since the transaction contemplated in said paragraph is a valid transaction, although it has been the subject of disagreement between the spouses.

The foregoing discussion likewise applies to donation of community property by one spouse without the consent of the other. Since donation is also a form of disposition, neither spouse may donate any community property without the consent of the other spouse.[150] Any such donation is void. However, the Code allows either spouse, even without the consent of the other, to make moderate donations from the community property for charity or on occasions of family rejoicing or family distress.[151]

[113.3] Disposition of Spouse's Interest in the Community Property

While the absolute community is a form of co-ownership between the spouses, neither spouse can dispose of their respective interest in the community property by way of disposition *inter vivos*. In this respect, the rules on co-ownership embodied in Article 493 of the Civil Code, which reads, as follows:

> "Art. 493. Each co-owner shall have the full ownership of his part and of the fruits and benefits pertaining thereto, and he may therefore alienate, assign or mortgage it, and even substitute another person in its enjoyment, except when personal rights are involved. But the effect of the alienation or the mortgage, with respect to the co-owners, shall be limited to the portion which may be alloted to him in the division upon the termination of the co-ownership."

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[150]Art. 98, FC.
[151]*Id*.

do not find application in the case of the co-ownership that exists in absolute community. The reason for this is because prior to liquidation of the absolute community, the interest of each spouse in the community assets is inchoate, a mere expectancy, which constitutes neither a legal nor an equitable estate, and does not ripen into title until it appears that there are assets in the community as a result of the liquidation and settlement. Hence, any disposition of the spouse's respective shares or interest in the absolute community shall be void since such right to one-half of the community assets does not vest until the liquidation of the absolute community. *Nemo dat qui non habet.* No one can give what he has not.

The foregoing is also the reason why dispositions of community property made by one spouse without the consent of the other or without court authorization may not likewise be deemed valid even insofar as the share of the consenting spouse in the community property is concerned. Such alienation or disposition must be regarded as invalid in its entirety and not only with respect to the share of the non-consenting spouse in the property.

Besides, the legal prohibition against the disposition of the community property (or conjugal property) by one spouse without the consent of the other has been established for the benefit, not of third persons, but only of the other spouse for whom the law desires to save the absolute community (or the conjugal partnership) from damages that might be caused.[152]

The Code, however, expressly authorizes either spouse to dispose of his or her interest in the community property if the disposition is in the nature of a disposition *mortis causa* and made in a will.[153] In this case, the disposition is to take effect upon the death of the testator spouse, at which time, the community property is already terminated.[154] Hence, the prohibition no longer applies.

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[152]Villaranda vs. Villaranda, 423 SCRA 571 (2004); citing Papa vs. Montenegro, 54 Phil. 331, 341 (1930).

[153]Art. 97, FC.

[154]Art. 99(1), FC.

Section 5. Dissolution of Absolute Community Regime

Art. 99. The absolute community terminates:

(1) Upon the death of either spouse;

(2) When there is a decree of legal separation;

(3) When the marriage is annulled or declared void; or

(4) In case of judicial separation of property during the marriage under Article 134 to 138. (175a)

Art. 100. The separation in fact between husband and wife shall not affect the regime of absolute community except that:

(1) The spouse who leaves the conjugal home or refuses to live therein, without just cause, shall not have the right to be supported;

(2) When the consent of one spouse to any transaction of the other is required by law, judicial authorization shall be obtained in a summary proceeding;

(3) In the absence of sufficient community property, the separate property of both spouses shall be solidarily liable for the support of the family. The spouse present shall, upon proper petition in a summary proceeding, be given judicial authority to administer or encumber any specific separate property of the other spouse and use the fruits or proceeds thereof to satisfy the latter's share. (178a)

Art. 101. If a spouse without just cause abandons the other or fails to comply with his or her obligations to the family, the aggrieved spouse may petition the court for receivership, for judicial separation of property or for authority to be the sole administrator of the absolute community, subject to such precautionary conditions as the court may impose.

The obligations to the family mentioned in the preceding paragraph refer to marital, parental or property relations.

A spouse is deemed to have abandoned the other when he or she has left the conjugal dwelling without intention of returning. The spouse who has left the conjugal dwelling for a period of three months or has failed within the same period to give any information as to his or her whereabouts shall be *prima facie* presumed to have no intention of returning to the conjugal dwelling. (178a)

COMMENTS:

§ 114. Causes of Termination of Absolute Community

A property regime, be it absolute community or conjugal partnership of gains, is intended to govern the property relations of the spouses

during the marriage. As such, its existence is co-terminus with the marriage. This is the reason why the regimes of absolute community and conjugal partnership of gains commence "at the precise moment that the marriage is celebrated"[155] and terminate upon the death of either spouse[156] or upon the annulment of the marriage,[157] although these regimes may likewise be terminated even prior to the termination of the marriage, *e.g.*, when there is a decree of legal separation[158] or in case of judicial separation of property during the marriage under Articles 134 to 138.[159]

Of the three kinds of property regimes specifically provided for under the Family Code, namely, absolute community, conjugal partnership of gains and complete separation of property, it is only the latter which the Code allows to commence during the marriage. With respect to absolute community and conjugal partnership of gains, the Code requires these regimes to commence at the precise moment of the celebration of the marriage and any stipulation, express or implied, allowing these regimes to commence at any other time is expressly declared to be void.[160] As such, the Code allows only a shift to complete separation of property during the marriage, either as an incident of the decree of legal separation or pursuant to a petition for judicial separation under Articles 135 or 136 of the Family Code. In both instances, the absolute community, if governing, is dissolved or terminated.

In view of the foregoing, the regime of absolute community is terminated or dissolved: (1) upon the death of either spouse;[161] (2) when there is a decree of legal separation;[162] (3) when the marriage is annulled;[163] (4) when the marriage is judicially declared void under Article 40;[164] and (5) in case of judicial separation of property during the marriage under Articles 134 to 138.[165]

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[155]Arts. 80 & 107, FC.
[156]Art. 99(1), FC.
[157]Art. 99(3), FC.
[158]Art. 99(2), FC.
[159]Art. 99(4), FC.
[160]Arts. 88 & 107, FC.
[161]Art. 99(1), FC.
[162]Art. 99(2), FC.
[163]Art. 99(3), FC.
[164]Art. 99(3), in relation to Art. 50, FC.
[165]Art. 99(4), FC.

While the Code includes judicial declaration of nullity of marriage as one of the causes for the termination of the absolute community,[166] this cause must be viewed to be limited only to judicial declaration of a void marriage under Article 40. Note that the regime of absolute community may only exist in a valid, or at least voidable marriage (in the latter case until the contract is annulled), and does not, as a rule, exist in a void marriage. In a void marriage, regardless of the cause thereof, the property relation of the parties during the period of cohabitation is governed by the provisions of Article 147 or Article 148, as the case may be, of the Family Code.[167] Thus, the rules set up to govern the liquidation of the absolute community do not, as a rule, apply to a marriage that is judicially declared void. It is only in the case of a void marriage under Article 40, *i.e.*, where a spouse in a prior void marriage contracts a subsequent marriage in the absence of a judicial declaration of nullity of the prior marriage, where the regime of absolute community exceptionally exists.[168] This is to be inferred from the provisions of Article 50 of the Code which makes applicable to a marriage judicially declared void under Article 40 the provisions of the second paragraph of Article 43. As explained by the Court in **Valdes vs. RTC, Br. 102, QC** —

> "xxx The latter is a special rule that somehow recognizes the philosophy and an old doctrine that void marriages are inexistent from the very beginning and no judicial decree is necessary to establish their nullity. In now requiring for *purposes of remarriage*, the declaration of nullity by final judgment of the previously contracted void marriage, the present law aims to do away with any continuing uncertainty on the status of the second marriage. It is not then illogical for the provisions of Article 43, in relation to Articles 41 and 42, of the Family Code, on the effects of the termination of a subsequent marriage contracted during the subsistence of a previous marriage to be made applicable *pro hac vice*. xxx"

With respect to separation, as a cause for terminating the absolute community, note that it is the decree of legal separation which results in

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[166]See Art. 99(3), FC.
[167]Valdes vs. RTC, Br. 102, QC, G.R. No. 122749, July 31, 1996.
[168]*Id.*

the termination of the absolute community.[169] Hence, a mere separation de facto between the spouses does not affect the regime of absolute community.[170]

§ 115. Effects of Separation De Facto

[115.1] In general
[115.2] In case of abandonment

[115.1] In General

Separation *de facto* refers to a situation where the spouses simply separate without the benefit of a decree of legal separation. Since there is no decree of legal separation, the separation *de facto* does not produce the effects provided for in article 63 of the Code. As a consequence: (1) the spouses retained their right of consortium because in the eyes of the law, they are not entitled to live separately from each other, unlike in legal separation where the spouses enjoy the right to live separately from each other;[171] (2) the separation *de facto* does not likewise affect the regimes of absolute community[172] or conjugal partnership of gains;[173] (3) the spouses continue to be the legal heir of each other in intestate succession; and (4) there is neither a guilty spouse nor an innocent spouse.

In case of separation *de facto*, however, judicial authorization may be obtained in a summary proceeding when the consent of one spouse to any transaction of the other is required by law.[174] Since the regime of absolute community or the conjugal partnership of gains is not affected by the separation-in-fact between the spouses, the absolute community or the conjugal partnership continues to be liable for all obligations mentioned in articles 94 and 121 of the Code. In the absence, however, of sufficient absolute community property[175] or conjugal partnership property, the separate property of both spouses shall be solidarily liable for the support of the family. For this purpose, the spouse present may peti-

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[169]Art. 63(2), FC & Art. 99(2), FC.
[170]Art. 100, FC.
[171]See Art. 63(1), FC. See also discussions under *supra* § 90.2.
[172]Art. 100, FC.
[173]Art. 127, FC.
[174]Arts. 100(2) & 127(2), FC.
[175]Arts. 100(3) & 127(3), FC.

tion the court in a summary proceeding for judicial authority to administer or encumber any specific separate property of the other spouse and use the fruits or proceeds thereof to satisfy the latter's share.[176]

As in the case of a legal separation, the marital bond is likewise not severed in case of separation *de facto* no matter how long the separation may be. And ordinarily, separation *de facto* is not a ground for legal separation. It may be considered as a ground for legal separation only if the separation *de facto* arises from abandonment.

[115.2] In Case of Abandonment

Abandonment in legal significance is the act of one spouse voluntarily separating from the other, with the intention of not returning to live together as husband and wife, that continues for the length of time required by statute.[177] Under the Code, a spouse is deemed to have abandoned the other when he or she has left the conjugal dwelling without intention of returning.[178] The spouse who has left the conjugal dwelling for a period of three months or has failed within the same period to give any information as to his or her whereabouts shall be *prima facie* presumed to have no intention of returning to the conjugal dwelling.[179]

In addition to the effects mentioned above, if the separation *de facto* is attended by abandonment, the following effects are likewise produced: (1) the spouse who leaves the conjugal home or refuses to live therein, without just cause, shall not have the right to be supported;[180] (2) the aggrieved spouse may petition the court for receivership, for judicial separation of property or for authority to be the sole administrator of the absolute community or of the conjugal partnership, subject to such precautionary conditions as the court may impose;[181] and (3) the aggrieved spouse may petition for legal separation if the abandonment lasts for more than one (1) year.[182]

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[176] *Id.*
[177] Tex. — Liberty Mut. Ins. Co. vs. Woody, App. 1 Dist., 640 S. W. 2d 718.
[178] Art. 101, 3rd par., FC.
[179] *Id.*
[180] Arts. 100(1) & 127(1), FC.
[181] Arts. 101, 1st par. & 128, 1st par., FC.
[182] Art. 55 (10), FC.

Section 6. Liquidation of the Absolute Community Assets and Liabilities

Art. 102. Upon dissolution of the absolute community regime, the following procedure shall apply:

(1) An inventory shall be prepared, listing separately all the properties of the absolute community and the exclusive properties of each spouse.

(2) The debts and obligations of the absolute community shall be paid out of its assets. In case of insufficiency of said assets, the spouses shall be solidarily liable for the unpaid balance with their separate properties in accordance with the provisions of the second paragraph of Article 94.

(3) Whatever remains of the exclusive properties of the spouses shall thereafter be delivered to each of them.

(4) The net remainder of the properties of the absolute community shall constitute its net assets, which shall be divided equally between husband and wife, unless a different proportion or division was agreed upon in the marriage settlements, or unless there has been a voluntary waiver of such share as provided in this Code. For purposes of computing the net profits subject to forfeiture in accordance with Articles 43, No. (2) and 63, No. (2), the said profits shall be the increase in value between the market value of the community property at the time of the celebration of the marriage and the market value at the time of its dissolution.

(5) The presumptive legitimes of the common children shall be delivered upon partition, in accordance with Article 51.

(6) Unless otherwise agreed upon by the parties, in the partition of the properties, the conjugal dwelling and the lot on which it is situated shall be adjudicated to the spouse with whom the majority of the common children choose to remain. Children below the age of seven years are deemed to have chosen the mother, unless the court has decided otherwise. In case there in no such majority, the court shall decide, taking into consideration the best interests of said children. (n)

COMMENTS:

§ 116. Procedure in the Liquidation of Absolute Community

Whatever may be the cause of the termination of the absolute community, the following procedure shall govern the liquidation and dissolution of this regime:

(1) An inventory shall be prepared, listing separately all the prop-

erties of the absolute community and the exclusive properties of each spouse.[183]

(2) The debts and obligations of the absolute community shall be paid out of its assets. In case of insufficiency of said assets, the spouses shall be solidarily liable for the unpaid balance with their separate properties in accordance with the provisions of the second paragraph of Article 94.[184]

(3) Whatever remains of the exclusive properties of the spouses shall thereafter be delivered to each of them.[185]

(4) The net remainder of the properties of the absolute community shall constitute its net assets, which shall be divided equally between husband and wife, unless a different proportion or division was agreed upon in the marriage settlements, or unless there has been a voluntary waiver of such share provided in this Code.[186]

The "net assets" of the absolute community must be distinguished from the "net profits" subject to forfeiture in accordance with Articles 43, No. (2) and 63, No. (2). "Net assets" is what remains of the community property after payment of all the charges and obligations for which the absolute community is liable. On the other hand, the "net profits" of the absolute community represents the increase in the market value of the community property at the time of the celebration of the marriage and the market value at the time of its dissolution but minus the charges and obligations for which the community is liable.

(5) The presumptive legitimes of the common children shall be delivered upon partition, in accordance with Article 51.[187]

Legitime is that part of the testator's property which he cannot dispose of because the law has reserved it for certain heirs who are, therefore, called compulsory heirs.[188] Common children are regarded as compulsory heirs of their parents, whether they are legitimate or illegiti-

[183]Art. 102(1), FC.
[184]Art. 102(2), FC.
[185]Art. 102(3), FC.
[186]Art. 102(4), FC.
[187]Art. 102(5), FC.
[188]Art. 886, NCC.

mate. Hence, they are entitled to their legitimes. Ordinarily, it is only upon the death of a person that the existence of compulsory heirs capable of inheriting is determined, as well as the amount of their legitimes, since the estate of the deceased can only be determined with finality at the time of his death. Consequently, legitimes of compulsory heirs are ordinarily delivered only after the death of the decedent. Exceptionally, however, the Code requires the delivery of the common children's presumptive legitimes upon the liquidation of the absolute community. Note that the legitime to be delivered to the common children upon the dissolution of the absolute community is merely "presumptive" and provisional since the final legitime can only be determined upon the death of the person whose succession is under consideration.

(6) Unless otherwise agreed upon by the parties, in the partition of the properties, the conjugal dwelling and the lot on which it is situated shall be adjudicated to the spouse with whom the majority of the common children choose to remain. Children below the age of seven years are deemed to have chosen the mother, unless the court has decided otherwise. In case there in no such majority, the court shall decide, taking into consideration the best interests of said children.[189]

Art. 103. Upon the termination of the marriage by death, the community property shall be liquidated in the same proceeding for the settlement of the estate of the deceased.

If no judicial settlement proceeding is instituted, the surviving spouse shall liquidate the community property either judicially or extra-judicially within one year from the death of the deceased spouse. If upon the lapse of the said period, no liquidation is made, any disposition or encumbrance involving the community property of the terminated marriage shall be void.

Should the surviving spouse contract a subsequent marriage without compliance with the foregoing requirements, a mandatory regime of complete separation of property shall govern the property relations of the subsequent marriage. (n)

Art. 104. Whenever the liquidation of the community properties of two or more marriages contracted by the same person before the effectivity of this Code is carried out simultaneously, the respective capital, fruits and income of each community shall be determined upon such proof as

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[189]Art. 102(6), FC.

may be considered according to the rules of evidence. In case of doubt as to which community the existing properties belong, the same shall be divided between the different communities in proportion to the capital and duration of each. (189a)

§ 117. Termination of Marriage by Death

[117.1] Mandatory liquidation of the absolute community
[117.2] Effect upon disposition or encumbrance of community property
[117.3] Mandatory regime of complete separation

[117.1] Mandatory Liquidation of the Absolute Community

Upon the death of either spouse, the absolute community is terminated,[190] in which case, the community property may be liquidated in the same proceeding for the settlement of the estate of the deceased.[191] If no judicial settlement proceeding is instituted for the settlement of the estate of the deceased, the law nevertheless requires the liquidation of the absolute community, either judicially or extrajudicially.[192]

Note that the termination of the absolute community is different from its liquidation. The termination of the absolute community is produced *ipso jure* by any of the causes mentioned in article 99 of the Code. Liquidation, on the other hand, involves some positive act on the part of the spouses or of the surviving spouse, in case the absolute community is terminated by reason of death. The latter entails the observance of the procedure discussed in *supra* § 116.

Under the Code, if the marriage is terminated by reason of the death of either spouse, the liquidation of the absolute community is mandatory. If upon the lapse of one year from the death of either spouse, no liquidation is made, any disposition or encumbrance involving the community property of the terminated marriage is declared by law to be void.[193] In addition, if the surviving spouse contracts a subsequent marriage without compliance with the foregoing requirements, the subsequent marriage shall be governed, mandatorily, by a regime of complete separation of property.[194]

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[190] Art. 99(1), FC.
[191] Art. 103, 1st par., FC.
[192] Art. 103, 2nd par., FC.
[193] *Id.*
[194] Art. 103, 3rd par., FC.

[117.2] Effect Upon Disposition or Encumbrance of Community Property

The Code declares that if no liquidation of the absolute community is made within one year from the death of the deceased spouse, any disposition or encumbrance involving the community property of the terminated marriage shall be void.[195] Notwithstanding the language employed by article 103 of the Code, it is submitted, however, that the transaction is not entirely void.

Under the law, the rights to the succession are transmitted from the moment of the death of the decedent.[196] From that moment, and pending the actual partition of the estate, the heirs become co-owners of such estate, each one having an undivided interest in the property to the extent of his share therein.[197] In a co-ownership, each co-owner has the full ownership of his part and of the fruits and benefits pertaining thereto.[198] As a consequence, a co-owner has the right to alienate his *pro indiviso* share in the co-owned property even without the consent of the other co-owners.[199] Such being the case, it is submitted that any alienation or encumbrance involving the community property of the terminated marriage prior to liquidation and partition shall be valid to the extent of what may be allotted in the property involved, in the final partition, to the vendor or mortgagor.[200] In other words, what the transferee obtains by virtue of such alienation or encumbrance are the same rights as the transferor had as a co-owner, in an ideal share equivalent to the consideration given under their transaction.[201] In essence, the transferee merely steps into the shoes of the transferor as co-owner and acquires a proportionate share in the property held in common, thereby making the transferee a co-owner of the property.[202]

The alienation or encumbrance of the community property under this article must be distinguished from the alienation or encumbrance of the spouses' respective interests in the community property during the

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[195]Art. 103, 2nd par., FC.
[196]Art. 777, NCC.
[197]See Art. 1078, NCC.
[198]Art. 493, NCC.
[199]Mercado vs. CA, 240 SCRA 616, 621, Jan. 26, 1995.
[200]Art. 493, NCC.
[201]Del Ocampo vs. CA, 351 SCRA 1, 7-8, Feb. 1, 2001.
[202]*Ibid.*

existence of the marriage. As discussed under *supra* § 113.3, the spouses are prohibited from disposing of their respective interests in the community property by way of disposition *inter vivos* during the existence of the marriage. Any such disposition is considered void *ab initio*, the reason being that prior to the liquidation of the absolute community, the interest of each spouse in the community assets is inchoate, a mere expectancy, which constitutes neither a legal nor an equitable estate, and does not ripen into title until it appears that there are assets in the community as a result of the liquidation and settlement. Hence, any disposition of the spouse's respective shares or interest in the absolute community shall be void since such right to one-half of the community assets does not vest until the liquidation of the absolute community. *Nemo dat qui non habet.* Under the present article, however, the disposition of the interest in the community property is done after the termination of the marriage and after the right of the vendor and/or mortgagor to the inheritance has been transmitted and/or consolidated.

[117.3] Mandatory Regime of Complete Separation

If there is no liquidation of the absolute community within one year from the death of the deceased spouse and the surviving spouse contracts a subsequent marriage, a mandatory regime of complete separation of property shall govern the property relations of the subsequent marriage, even if such marriage is celebrated in the absence of a marriage settlement or even if the future spouses in such subsequent marriage had agreed on absolute community or conjugal partnership of gains as their property regime in a marriage settlement. Note that this is an exception to the rule embodied in article 75 of the Code.

Chapter 4

Conjugal Partnership of Gains

Section 1. General Provisions

Art. 105. In case the future spouses agree in the marriage settlements that the regime of conjugal partnership of gains shall govern their property relations during marriage, the provisions in this Chapter shall be of supplementary application.

The provisions of this Chapter shall also apply to conjugal partnerships of gains already established between spouses before the effectivity

of this Code, without prejudice to vested rights already acquired in accordance with the Civil Code or other laws, as provided in Article 256. (n)

Art. 106. Under the regime of conjugal partnership of gains, the husband and wife place in a common fund the proceeds, products, fruits and income from their separate properties and those acquired by either or both spouses through their efforts or by chance, and, upon dissolution of the marriage or of the partnership, the net gains or benefits obtained by either or both spouses shall be divided equally between them, unless otherwise agreed in the marriage settlements. (142a)

Art. 107. The rules provided in Articles 88 and 89 shall also apply to conjugal partnership of gains. (n)

Art. 108. The conjugal partnership shall be governed by the rules on the contract of partnership in all that is not in conflict with what is expressly determined in this Chapter or by the spouses in their marriage settlements. (147a)

COMMENTS:

§ 118. Conjugal Partnership of Gains

[118.1] Regime of conjugal partnership of gains, explained
[118.2] Rules governing conjugal partnership of gains
[118.3] Commencement of the conjugal partnership of gains
[118.4] Prohibition on waiver of rights, interests, shares and effects

[118.1] Regime of Conjugal Partnership of Gains, Explained

The regime of conjugal partnership of gains is a special type of partnership, where the husband and wife place in a common fund the proceeds, products, fruits and income from their separate properties and those acquired by either or both spouses through their efforts or by chance.[203] Upon dissolution of the marriage or of the partnership, the net gains or benefits obtained by either or both spouses shall be divided equally between them, unless otherwise agreed in the marriage settlement.[204] In *supra* § 106.1, it has been discussed that in the property regime of absolute community, the spouses are considered co-owners of the community property. The rule is different in conjugal partnership. There is no co-ownership between the spouses in the properties of the

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[203]Homeowners Savings & Loan Bank vs. Dailo, 453 SCRA 283, 290 (2005); citing Art. 106, FC.

[204]Art. 106, FC.

conjugal partnership of gains.[205] This is the reason why the rules on co-ownership do not apply to conjugal partnership even in a suppletory manner.[206] Unlike the absolute community of property wherein the rules on co-ownership apply in a suppletory manner,[207] the conjugal partnership shall be governed by the rules on contract of partnership in all that is not in conflict with what is expressly determined in the chapter on conjugal partnership of gains or by the spouses in their marriage settlements.[208]

This property regime shall govern the property relations of the spouses only if the same has been agreed upon in the marriage settlement. But this rule is true only for marriages celebrated after the effectivity of the Family Code on August 3, 1988. Prior to the effectivity of the Family Code, the system that governs the property relations of spouses in case of absence of marriage settlement, or when the same is void, is the conjugal partnership of gains.[209] However, the provisions of the Family Code on conjugal partnership[210] are also made applicable to conjugal partnership of gains already established before its effectivity unless vested rights have already been acquired under the Civil Code or other laws.[211]

[118.2] Rules Governing Conjugal Partnership of Gains

As discussed earlier, the regime of conjugal partnership will govern the property relations of the spouses only if the future spouses have expressly agreed in their marriage settlement that this regime shall govern their property relations. In case the future spouses agree in their marriage settlements that the regime of conjugal partnership of gains shall govern their property relations during marriage, their property relations shall be governed, primarily, by their agreement,[212] subject only to the limitations provided for under the Family Code,[213] and the provi-

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[205]San Juan Structural and Steel Fabricators, Inc. vs. CA, 296 SCRA 631, 653 (1998); citing Arturo M. Tolentino, Commentaries and Jurisprudence on the Civil Code of the Philippines, Vol. I (1990), p. 408.

[206]Homeowners Savings & Loan Bank vs. Dailo, *supra*, at p. 290.

[207]Art. 90, FC.

[208]Homeowners Savings & Loan Bank vs. Dailo, *supra*, at pp. 290-291.

[209]Art. 119, NCC.

[210]Chapter 4 of Title IV (Arts. 105 to 133).

[211]Art. 105, 2nd par., FC.

[212]Art. 74(1), FC.

[213]Art. 1, FC.

sions of the Code on conjugal partnership shall be of supplementary application.[214] The conjugal partnership shall also be governed by the rules on the contract of partnership in all that is not in conflict with what is expressly determined in this Chapter or by the spouses in their marriage settlements.[215]

[118.3] Commencement of the Conjugal Partnership of Gains

The Code expressly provides that the regime of conjugal partnership of gains can only commence at the precise moment that the marriage is celebrated.[216] Any agreement between the spouses, express or implied, that this regime shall commence at any other time is void.[217] Hence, it is not possible for the spouses to shift to this regime during the marriage. Besides, this regime can only exist if there is a marriage settlement and the Code expressly requires that any modification of the marriage settlement, to be valid, must be made before the celebration of the marriage.[218] In view of these mandatory provisions, it is submitted that the spouses who are legally separated may not adopt conjugal partnership as their new regime, in case of reconciliation, although the same seems to be permitted under the provisions of Sections 23(c) and 24(a) of the Rule on Legal Separation (A.M. No. 02-11-11-SC).

[118.4] Prohibition on Waiver of Rights, Interests, Shares and Effects

See discussions under *supra* § 107.

Section 2. Exclusive Property of Each Spouse

Art. 109. The following shall be the exclusive property of each spouse:

(1) That which is brought to the marriage as his or her own;

(2) That which each acquires during the marriage by gratuitous title;

[214]Art. 105, 1st par., FC.
[215]Art. 108, FC.
[216]Art. 107, in relation to Art. 88, FC.
[217]*Id.*
[218]Art. 76, FC.

(3) That which is acquired by right of redemption, by barter or by exchange with property belonging to only one of the spouses; and

(4) That which is purchased with exclusive money of the wife or of the husband. (148a)

COMMENTS:

§ 119. Exclusive Property in CPG

[119.1] In general
[119.2] Property acquired before the marriage
[119.3] Property acquired during the marriage by gratuitous title
[119.4] Property acquired by redemption, barter or exchange
[119.5] Property purchased with exclusive money

[119.1] In General

The conjugal partnership does not produce the merger of the separate property of each spouse.[219] Each of them, notwithstanding the existence of the partnership, continues to be the owner of what he or she brought to the marriage[220], as well as what he or she may have acquired later by gratuitous title,[221] by right of redemption,[222] or by barter,[223] or by exchange with his or her property,[224] or by purchase with his or her own money.[225]

[119.2] Property Acquired Before the Marriage

Unlike in the regime of absolute community, the property of either spouse that he or she brings to the marriage remains[226] as his or her exclusive property in the regime of conjugal partnership of gains, although the fruits and income thereof are considered conjugal partnership property.[227]

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[219]PNB vs. Quintos, G.R. No. L-22383, Oct. 6, 1924.
[220]Art. 109(1), FC.
[221]Art. 109(2), FC.
[222]Art. 109(3), FC.
[223]*Id*.
[224]*Id*.
[225]Art. 109(4), FC.
[226]Art. 109(1), FC.
[227]Art. 117(3), FC & Art. 106, FC.

There is nothing, however, that prevents the future spouses from including in their conjugal partnership properties acquired prior to the marriage. This is apparent from the provisions of Article 74, No. (1), which state that the property relations of the spouses during the marriage shall primarily be governed by their marriage settlement, subject only to the limitations provided for under the Family Code. However, the right of the future spouses to include properties acquired prior to the marriage in their conjugal partnership is subject to the following limitations provided for under the Family Code:

(1) The future spouses cannot include in their conjugal partnership more than one-fifth of their present property, applying by analogy the provisions of article 84 of the Code. Although this article refers to donations *propter nuptias* between the future spouses, the rationale for the limitation provided for in said article may likewise be applied to the inclusion of the present properties of the future spouses in their conjugal partnership. (see discussions under *supra* §101)

(2) The future spouses cannot include in their conjugal partnership properties acquired prior to the marriage by one of them who has legitimate descendants in his or her previous marriage, applying by analogy the provisions of Article 92, No. (3). Although the latter provision is found under Chapter 3 on Absolute Community, the rationale why those properties are required to be exclusive may likewise be applied in the regime of conjugal partnership of gains. (see discussions under *supra* §110.5)

If what is brought by either of the spouse into the marriage is livestock, the same shall continue to be exclusive property of the owner spouse in the same number of each kind brought to the marriage.[228] Only the excess of the number of each kind brought to the marriage, which shall be determined upon the dissolution of the partnership, shall be considered conjugal partnership property.[229] Note that the separate character of the property, with respect to livestock, does not attach only to the original stock brought by either spouse during the marriage but to the

[228]See Art. 117, No. (6), FC.
[229]*Id.*

number of such livestock of each kind brought into the marriage. This being the case, the young of such animals are not considered as "fruits" under Article 117, No. (3).

[119.3] Property Acquired During the Marriage by Gratuitous Title

Just like in the regime of absolute community, in conjugal partnership of gains, any property acquired by either spouse during the marriage is to be considered as an exclusive property if the same is acquired through gratuitous title. The only difference is that in absolute community, even the fruits and income of the property so acquired are likewise considered exclusive properties.[230] In conjugal partnership, however, the fruits and income of the separate properties of the spouses are part of the conjugal partnership.[231]

If the property is donated or left by will to the spouses jointly and with designation of determinate shares, the share of each in the said property shall be considered as his or her own exclusive property.[232] If there is no such designation, the spouses shall share and share alike, but their respective share shall still be considered as exclusive property.[233]

[119.4] Property Acquired by Redemption, Barter or Exchange

A property that is acquired by either spouse through the exercise of a right of redemption is an exclusive property of the redemptioner-spouse,[234] regardless of the source of the money used to redeem said property. What is important is that the right of redemption pertains exclusively to the redemptioner-spouse. Even if the source of the money used in the redemption is the conjugal partnership, the property so redeemed shall still be considered as exclusive property of the owner of the right of redemption, subject, however, to reimbursement by the redemptioner-spouse.

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[230] See Art. 92(1), FC.
[231] See Art. 117(3), FC.
[232] Art. 113, FC.
[233] *Id.*
[234] Art. 109, No. (3), FC.

A property acquired by either spouse through barter or through exchange with property belonging to only one of the spouses is likewise considered exclusive property of the acquiring spouse.[235]

[119.5] Property Purchased With Exclusive Money

In conjugal partnership, the law protects the separate character of the exclusive properties of either spouse. Hence, whether the exclusive property remains in its original state or transformed into a new form, the separate character of the property attaches. This is apparent from the provisions of article 109, Nos. (3) and (4). Hence, whatever is acquired through the use of exclusive money of either spouse shall also be considered as exclusive property of the owner of the funds.[236]

The principle discussed above also applies to any property acquired by either spouse through dation in payment (or *"dacion en pago"*) or as payment for any indebtedness owing exclusively to one of the spouses. Note that dation in payment, whereby property is alienated to the creditor in satisfaction of a debt in money, shall be governed by the law of sales.[237] So, it is as if the property acquired through *dacion en pago* is acquired through purchase with exclusive money, hence, the same is exclusive property of the owner of the credit.

Art. 110. The spouses retain the ownership, possession, administration and enjoyment of their exclusive properties.

Either spouse may, during the marriage, transfer the administration of his or her exclusive property to the other by means of a public instrument, which shall be recorded in the registry of property of the place where the property is located. (137a, 168a, 169a)

Art. 111. A spouse of age may mortgage, encumber, alienate or otherwise dispose of his or her exclusive property, without the consent of the other spouse, and appear alone in court to litigate with regard to the same. (n)

Art. 112. The alienation of any exclusive property of a spouse administered by the other automatically terminates the administration over such property and the proceeds of the alienation shall be turned over to the owner-spouse. (n)

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[235]*Id.*
[236]Art. 109, No. (4), FC.
[237]Art. 1245, NCC.

COMMENTS:

§ 120. Administration and Disposition of Exclusive Property

[120.1] Administration of exclusive property
[120.2] Disposition or encumbrance of exclusive property

[120.1] Administration of Exclusive Property

The administration of exclusive property belongs to its owner[238] although the same may be transferred to the other spouse either voluntarily or upon order of a competent court for causes authorized under the law.[239] In the event that the owner-spouse transfers the administration of his or her exclusive property to the other spouse during the marriage, such transfer of administration must be embodied in a public instrument and recorded in the registry of property of the place where the property is located,[240] otherwise, the same shall not prejudice the interest of third persons. Such administration, however, does not include the power to dispose or encumber. The moment any exclusive property is alienated by the administrator-spouse without the consent of the owner-spouse or without court authorization, such administration is automatically terminated and the proceeds of the alienation shall be turned over to the owner-spouse.[241]

[120.2] Disposition or Encumbrance of Exclusive Property

Being the sole owner of his or her exclusive property, the owner-spouse may mortgage, encumber, alienate or otherwise dispose of it without need of obtaining the consent of the other spouse.[242] Any action, therefore, that involves an exclusive property as its subject matter requires the participation only of the owner-spouse.[243]

Art. 113. Property donated or left by will to the spouses, jointly and with designation of determinate shares, shall pertain to the donee-spouse as his or her own exclusive property, and in the absence of designation, share and share alike, without prejudice to the right of accretion when proper. (150a)

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[238]Art. 110, FC.
[239]See Art. 142, FC.
[240]*Id.*
[241]Art. 112, FC.
[242]Art. 111, FC.
[243]*Id.*

Art. 114. If the donations are onerous, the amount of the charges shall be borne by the exclusive property of the donee-spouse, whenever they have been advanced by the conjugal partnership of gains. (151a)

COMMENTS:

§ 121. Donation to Spouses in Conjugal Partnership of Gains

[121.1] Spouses as joint donees
[121.2] Onerous donations

[121.1] Spouses as Joint Donees

If the property is donated or left by will to the spouses jointly and with designation of determinate shares, the share of each in the said property shall be considered as his or her own exclusive property.[244] If there is no such designation, the spouses shall share and share alike, but their respective share shall still be considered as exclusive property.[245]

If a donation is made jointly to persons who are not husband and wife the rule is that there is no accretion, accretion taking place only when so expressly provided for by the donor. [246] However, if the donation is made to husband and wife jointly, the rule is that there is accretion between them if the contrary has not been provided for by the donor.[247]

There being a right of accretion between the spouses, as a rule, the share of the other who did not accept or could not accept or who died before he or she had accepted shall go to the other donee-spouse. In addition, the acceptance by one of the spouses shall be sufficient for the purpose of perfecting the donation notwithstanding the non-acceptance by the other donee-spouse, thereby preventing the donor from revoking that part of the donation that would have corresponded to the donee-spouse who did not accept.

[121.2] Onerous Donations

The onerous donations referred to in article 114 are those where a burden or charges inferior in value compared to the property donated is

[244]Art. 113, FC.
[245]*Id.*
[246]Art. 753, NCC.
[247]*Id.*

imposed on the donee. Thus, if a donation is made during the marriage in favor of the husband but the donor imposes a burden or charges inferior in value to the property donated, the property donated remains an exclusive property of the donee-spouse although the burden or charges were paid from conjugal funds. In such a case, the conjugal partnership shall be reimbursed for the amount it advanced in favor of the donee-spouse.

Art. 115. Retirement benefits, pensions, annuities, gratuities, usufructs and similar benefits shall be governed by the rules on gratuitous or onerous acquisitions as may be proper in each case. (n)

COMMENTS:

§ 122. Retirement Benefits, Pensions, Annuities, etc.

The ownership of retirement benefits, pensions, annuities, gratuities, usufructs and other similar benefits accumulating during the marriage in favor of either or both spouses depends on the manner of its acquisition. If one of the spouses obtains such benefit out of pure liberality of the grantor, then the rule stated in article 109, No. (2) applies, in which case, the benefit is to be considered as exclusive property of the grantee-spouse. However, if the benefit is simply an accumulation or deductions from money earned during the marriage or from salaries of either spouse, the rule stated in article 117, No. (2) applies, in which case, the benefit is part of the conjugal partnership.

Section 3. Conjugal Partnership Property

Art. 116. All property acquired during the marriage, whether the acquisition appears to have been made, contracted or registered in the name of one or both spouses, is presumed to be conjugal unless the contrary is proved. (160a)

COMMENTS:

§ 123. Presumption in Favor of Conjugality

As a general rule, all property acquired by the spouses, regardless of in whose name the same is registered, during the marriage is pre-

sumed to belong to the conjugal partnership, unless it is proved that it pertains exclusively to the husband or to the wife.[248] For the presumption to apply, it is not even necessary to prove that the property was acquired with funds of the partnership.[249] So that when a property is shown to be acquired during the marriage, it is considered as conjugal property.[250] In fact, even when the manner in which the property was acquired does not appear, the presumption applies and it will be considered conjugal property.[251]

Note that the presumption applies even if "the acquisition appears to have been made, contracted or registered in the name of one or both spouses."[252] Hence, the presumption is not rebutted by the mere fact that the certificate of title of the property or the tax declaration is in the name of one of the spouses only.[253] What is important is that the acquisition is made "during the marriage."[254] The reason for this rule is stated by the Court in **Villanueva vs. Court of Appeals**,[255] to wit —

> "Petitioners also point out that all the other tax declarations presented before the trial court are in the name of Nicolas alone. Petitioners argue that this serves as proof of Nicolas' exclusive ownership of these properties. Petitioners are mistaken. The tax declarations are not sufficient proof to overcome the presumption under Article 116 of the Family Code. All property acquired by the spouses during the marriage, regardless in whose name the property is registered, is presumed conjugal unless proved otherwise. The presumption is not rebutted by the mere fact that the certificate of title of the property or the tax declaration is in the name of one of the spouses only. Article 116 of the Family Code expressly pro-

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[248]Art. 116, FC; Diancin vs. CA, 345 SCRA 117, 122 (2000); citing Heirs of Spouses Benito Gavino and Juana Euste vs. CA, 291 SCRA 495 (1998).

[249]Tan vs. CA, 273 SCRA 229, 236 (1997); cited in Ching vs. CA, 423 SCRA 356 (2004). See also Castro vs. Miat, 397 SCRA 271 (2003).

[250]Diancin vs. CA, *supra*. See also Laluan vs. Malpaya, 65 SCRA 494 (1975).

[251]Tan vs. CA, *supra*, at p. 236; cited in Ching vs. CA, *supra*.

[252]Art. 116, FC.

[253]Villanueva vs. CA, 427 SCRA 439 (2004); citing Mendoza vs. Reyes, 209 Phil. 120 (1983).

[254]*Id*.

[255]*Supra*.

> vides that the presumption remains even if the property is "registered in the name of one or both of the spouses."
>
> In some of the documents that petitioners presented, Nicolas misrepresented his civil status by claiming that he was single. Petitioners point to this as proof of Nicolas' desire to exclude Eusebia from the properties covered by the documents. Petitioners further claim that this supports their stand that the subject properties are not conjugal. This argument is baseless. *Whether a property is conjugal or not is determined by law and not by the will of one of the spouses. No unilateral declaration by one spouse can change the character of conjugal property.* The clear intent of Nicolas in placing his status as single is to exclude Eusebia from her lawful share in the conjugal property. The law does not allow this." (Italics supplied)

The presumption, however, refers only to the property acquired during the marriage and does not operate when there is no showing as to when property alleged to be conjugal was acquired.[256] In other words, the presumption applies only when there is proof that the property was acquired during the marriage. Proof of acquisition of property during the marriage is a condition *sine qua non* for the operation of the presumption in favor of the conjugal partnership.[257] Hence, it is incumbent upon the party who invokes this presumption to first prove that the property in controversy was acquired during the marriage.[258] Thus, when the property is registered in the name of only one spouse and there is no showing as to when the property was acquired by same spouse, this is an indication that the property belongs exclusively to the said spouse.[259] The rule, however, is different in the case of the absolute community. In the regime of absolute community, the presumption in favor of the community property exists regardless of whether or not the property is shown to be acquired during the marriage or prior thereto, since all the property

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[256]Cuenca vs. Cuenca, 168 SCRA 335, 344 (1988); citing PNB vs. CA, 153 SCRA 435 (1987); Magallon vs. Montejo, 146 SCRA 282 (1986); Maramba vs. Lozano, 20 SCRA 474 (1967).

[257]Estonina vs. CA, 266 SCRA 627, 637 (1997); cited in Manongsong vs. Estimo, 404 SCRA 683, 694 (2003).

[258]Francisco vs. CA, 299 SCRA 188 (1998).

[259]Valdez, Jr. vs. CA, 439 SCRA 55 (2004); citing PNB vs. CA, 153 SCRA 435 (1987).

of the spouses are, as a rule, included in the community property, whether the property is acquired prior or during the marriage. In the regime of conjugal partnership of gains, however, properties of the spouses prior to the marriage are, as a rule, considered as their separate or exclusive properties. In conjugal partnership, only properties acquired during the marriage are to be presumed included in the partnership.

The presumption in Article 116 is, however, rebuttable with strong, clear, categorical, and convincing evidence that the property belongs exclusively to one of the spouses and the burden of proof rests upon the party asserting it.[260] He who claims that property acquired by the spouses during their marriage is not conjugal partnership property but belongs to one of them as his personal property is burdened to prove the source of the money utilized to purchase the same.[261]

Art. 117. The following are conjugal partnership properties:

(1) Those acquired by onerous title during the marriage at the expense of the common fund, whether the acquisition be for the partnership, or for only one of the spouses;

(2) Those obtained from the labor, industry, work or profession of either or both of the spouses;

(3) The fruits, natural, industrial, or civil, due or received during the marriage from the common property, as well as the net fruits from the exclusive property of each spouse;

(4) The share of either spouse in the hidden treasure which the law awards to the finder or owner of the property where the treasure is found;

(5) Those acquired through occupation such as fishing or hunting;

(6) Livestock existing upon the dissolution of the partnership in excess of the number of each kind brought to the marriage by either spouse; and

(7) Those which are acquired by chance, such as winnings from gambling or betting. However, losses therefrom shall be borne exclusively by the loser-spouse. (153a, 154, 155, 159)

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[260]Tan vs. CA, *supra*, at p. 236.
[261]Ching vs. CA, *supra*.

Art. 118. Property bought on installments paid partly from exclusive funds of either or both spouses and partly from conjugal funds belongs to the buyer or buyers if full ownership was vested before the marriage and to the conjugal partnership if such ownership was vested during the marriage. In either case, any amount advanced by the partnership or by either or both spouses shall be reimbursed by the owner or owners upon liquidation of the partnership. (n)

Art. 119. Whenever an amount or credit payable within a period of time belong to one of the spouses, the sums which may be collected during the marriage in partial payments or by installments on the principal shall be the exclusive property of the spouse. However, interests falling due during the marriage on the principal shall belong to the conjugal partnership. (156a, 157a)

COMMENTS:

§ 124. Conjugal Partnership Property

[124.1] Property acquired during the marriage by onerous title
[124.2] Property obtained from labor, industry, work or profession
[124.3] Property acquired through occupation
[124.4] Fruits and income of separate property
[124.5] Livestock
[124.6] Property acquired by chance

[124.1] Property Acquired During the Marriage by Onerous Title

A two-tiered test may be applied in determining whether a property acquired during the marriage is conjugal or exclusive: (1) the manner of acquisition test (whether onerous or gratuitous); and (2) in case of onerous acquisitions, the source of funds test (whether conjugal funds or exclusive money).

If the property is acquired during the marriage by gratuitous title by either spouse, the property so acquired is exclusive property.[262] If the manner of acquisition is through onerous title, the ownership of the property will depend upon the source of the funds used in such acquisition. If the funds are sourced from the exclusive money of either spouse, the property so acquired is exclusive property.[263] On the other hand, if the

[262]Art. 109, No. (2), FC.
[263]Art. 109, No. (4), FC.

source of the funds used in the acquisition is the conjugal partnership, the property so acquired is conjugal property,[264] regardless of whether the acquisition is in the name of the conjugal partnership or in the name of only one of the spouses.[265]

The foregoing rule does not apply to a property purchased on installments by either or both spouses prior to the marriage but the payment thereof is completed only during the marriage.[266] In this case, the time when full ownership is vested is what determines ownership of the property and not the source of the fund or the time when payment is completed. Hence, if full ownership of the property was vested before the marriage, it is an exclusive property of the buyer or buyers, even if the purchase price is partly and/or substantially paid from conjugal funds.[267] If full ownership of the property was vested during the marriage, it is part of the conjugal partnership, even if the purchase price is partly and/or substantially paid from exclusive funds of either or both spouses.[268] In either case, any amount advanced by the partnership or by either or both spouses shall be reimbursed by the owner or owners upon liquidation of the partnership.[269]

Bear in mind, however, the presumption of conjugality under the previous article. When a property is shown to be acquired during the marriage, it is presumed to belong to the conjugal partnership, unless the contrary is proved.[270] For the presumption to apply, it is not even necessary to prove that the property was acquired with funds of the partnership.[271] In fact, even when the manner in which the property was acquired does not appear, the presumption applies and it will be considered conjugal property.[272] He who claims that property acquired by the spouses during their marriage is not conjugal partnership property but exclusive has the burden of proving the manner by which the property

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[264]Art. 117, No. (1), FC.
[265]*Id*.
[266]See Art. 118, FC.
[267]*Id*.
[268]*Id*.
[269]*Id*.
[270]Art. 116. FC.
[271]Tan vs. CA, 273 SCRA 229, 236 (1997); cited in Ching vs. CA, 423 SCRA 356 (2004). See also Castro vs. Miat, 397 SCRA 271 (2003).
[272]Tan vs. CA, *supra*, at p. 236; cited in Ching vs. CA, *supra*.

was acquired and/or the source of the money utilized to purchase the same.[273]

[124.2] Property Obtained From Labor, Industry, Work or Profession

Any property obtained by either or both spouses from their labor, industry, work or profession[274] belongs to the conjugal partnership. It includes daily wages, periodic salaries, honorarium or fees in the practice of profession, or income from industrial, agricultural or commercial enterprise.[275] It is essential, however, that said wages, salaries, fees or income be earned during the marriage for them to be considered conjugal partnership properties. If earned prior to the marriage, they will pertain to the spouse who earned it as his or her exclusive property.

The foregoing explains the reason why debts contracted by either spouse during the marriage, for and in the exercise of the industry or profession by which he or she contributes toward the support of his or her family, are not to be considered as personal debts but obligations of the conjugal partnership.[276]

[124.3] Property Acquired Through Occupation

The term *"occupation"* in article 117, No. (5) of the Code refers to the mode of acquiring ownership or dominion by the seizure of things corporeal which have no owner and with the intention of acquiring them according to the rules laid down by law.[277] In order that things may be acquired by occupation the following are the requisites: (1) there must be a seizure; (2) the things must be corporeal; (3) there must be intention to appropriate; (4) the things must not be owned by anybody; and (5) the rules laid down by the law must be fulfilled.[278]

Things appropriable by nature which are without an owner, such as animals that are object of hunting or fishing, hidden treasure and aban-

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[273]See Ching vs. CA, *supra*.

[274]Art. 117, No. (2), FC.

[275]I Tolentino, Civil Code, 1990 ed., p. 442; citing 9 Manresa 580.

[276]See Javier vs. Osmena, 34 Phil. 336 (1916); Cobb-Perez vs. Lantin, No. L-22320, May 23, 1968.

[277]3 Sanchez Roman 209.

[278]3 Sanchez Roman 210.

doned movables are acquired by occupation.[279] Under the Code, any property acquired through occupation, such as those acquired through fishing or hunting[280] or the share of either spouse in the hidden treasure which the law[281] awards to the finder or owner of the property where the treasure is found,[282] belongs to the conjugal partnership. It is important, however, that the property be acquired through occupation during the marriage. If the hidden treasure, for example, was acquired prior to the marriage, it is an exclusive property of the spouse to whom the same had been awarded.

[124.4] Fruits and Income of Separate Property

The fruits of conjugal partnership property due or received during the marriage are also part of the conjugal partnership. With respect to the exclusive property of either spouse, only the net fruits are part of the conjugal partnership. "Net fruits" refer to the remainder of the fruits after deducting the amount necessary to cover the expenses of administration of said exclusive property.[283]

The fruits referred to include natural, industrial and civil fruits. Natural fruits are the spontaneous products of the soil, and the young and other products of animals.[284] Industrial fruits are those produced by lands of any kind through cultivation or labor.[285] Civil fruits, on the other hand, are the rents of building, the price of leases of lands and other property and the amount of perpetual or life annuities or other similar income.[286]

Also, any interest income falling due during the marriage on a credit payable on installment and belonging to one of the spouses belongs to the conjugal partnership,[287] although any sum collected during the marriage in partial payments or by installments on the principal shall remain as exclusive property of the creditor-spouse.[288]

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[279]Art. 731, NCC.
[280]Art. 117, No. (5), FC.
[281]See Arts. 438 and 439, NCC.
[282]Art. 117, No. (4), FC.
[283]Minutes, Family Code and Civil Code Committee Meeting, Feb. 28, 1987, p. 13.
[284]Art. 442, 1st par., NCC.
[285]Art. 442, 2nd par., NCC.
[286]Art. 442, 3rd par., NCC.
[287]Art. 119, FC.
[288]*Id.*

[124.5] Livestock

See discussions under *supra* § 119.2.

[124.6] Property Acquired by Chance

Any property acquired by chance, such as winnings from gambling or betting, belongs to the conjugal partnership.[289] However, losses therefrom shall be borne exclusively by the loser-spouse.[290]

Art. 120. The ownership of improvements, whether for utility or adornment, made on the separate property of the spouses at the expense of the partnership or through the acts or efforts of either or both spouses shall pertain to the conjugal partnership, or to the original owner-spouse, subject to the following rules:

When the cost of the improvement made by the conjugal partnership and any resulting increase in value are more than the value of the property at the time of the improvement, the entire property of one of the spouses shall belong to the conjugal partnership, subject to reimbursement of the value of the property of the owner-spouse at the time of the improvement; otherwise, said property shall be retained in ownership by the owner-spouse, likewise subject to reimbursement of the cost of the improvement.

In either case, the ownership of the entire property shall be vested upon the reimbursement, which shall be made at the time of the liquidation of the conjugal partnership. (158a)

COMMENTS:

§ 125. Improvement on a Separate Property

[125.1] Applicability of article 120
[125.2] Determination of ownership
[125.3] When ownership is vested

[125.1] Applicability of Article 120

Article 120 of the Code applies in a situation where a property belonging exclusively to one of the spouses (in a regime of conjugal partnership) is the subject of an improvement during the marriage at the

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[289] Art. 117, No. (7), FC.
[290] *Id.*

expense of the conjugal partnership or through the acts or efforts of either or both spouses. Hence, for article 120 to apply the following requisites must be present: (1) the property is owned exclusively by one of the spouses; (2) said property has been the subject of an improvement, whether for utility or adornment; and (3) the improvements were made at the expense of the conjugal partnership or through the acts or efforts of either or both spouses.

[125.2] Determination of Ownership

In the situation contemplated under article 120, a problem arises as to the ownership of the improvements. In order to resolve this problem, the present article provides for the solution, as follows:

(a) If the cost of the improvements and any resulting increase in value are more than the value of the property at the time of the improvement, the entire property shall belong to the conjugal partnership, subject to the reimbursement of the value of the property of the owner-spouse at the time of the improvement; or

(b) If the cost of the improvements and any resulting increase in value are less than the value of the property at the time of the improvement, the entire property shall belong to the owner of the property, subject to the reimbursement of the cost of the improvement in favor of the conjugal partnership.

Note that in the solution presented by the Code, it is not only the ownership of the improvement that is resolved but likewise the ownership of the property itself. Thus, if the cost of the improvements and any resulting increase in value are more than the value of the separate property at the time of the improvement, both the property and the improvement shall belong to the conjugal partnership; otherwise, both the property and the improvement shall belong to the owner of the separate property. In either case, there shall be corresponding reimbursements of the value of the property or of the cost of the improvement.

[125.3] When Ownership Is Vested

According to article 120, the ownership over the entire property shall be vested in favor of the conjugal partnership or of the owner-spouse only upon reimbursement. Under the same article, the conjugal

partnership or the owner-spouse is required to make the reimbursement only at the time of the liquidation of the conjugal partnership. Prior thereto, they cannot be forced to make the same. There is nothing in the law, however, that will prevent either the conjugal partnership or the owner-spouse from making the reimbursement even prior to the liquidation of the conjugal partnership. If reimbursement is made prior to liquidation, it is submitted that the ownership over the entire property shall immediately vests upon the payor.

Section 4. Charges Upon and Obligations of the Conjugal Partnership

Art. 121. The conjugal partnership shall be liable for:

(1) The support of the spouses, their common children, and the legitimate children of either spouse; however, the support of illegitimate children shall be governed by the provisions of this Code on Support;

(2) All debts and obligations contracted during the marriage by the designated administrator-spouse for the benefit of the conjugal partnership of gains, or by both spouses or by one of them with the consent of the other;

(3) Debts and obligations contracted by either spouse without the consent of the other to the extent that the family may have been benefited;

(4) All taxes, liens, charges, and expenses, including major or minor repairs upon the conjugal partnership property;

(5) All taxes and expenses for mere preservation made during the marriage upon the separate property of either spouse;

(6) Expenses to enable either spouse to commence or complete a professional, vocational, or other activity for self-improvement;

(7) Antenuptial debts of either spouse insofar as they have redounded to the benefit of the family;

(8) The value of what is donated or promised by both spouses in favor of their common legitimate children for the exclusive purpose of commencing or completing a professional or vocational course or other activity for self-improvement; and

(9) Expenses of litigation between the spouses unless the suit is found to be groundless.

If the conjugal partnership is insufficient to cover the foregoing liabilities, the spouses shall be solidarily liable for the unpaid balance with their separate properties. (161a)

Art. 122. The payment of personal debts contracted by the husband or the wife before or during the marriage shall not be charged to the conjugal partnership except insofar as they redounded to the benefit of the family.

Neither shall the fines and pecuniary indemnities imposed upon them be charged to the partnership.

However, the payment of personal debts contracted by either spouse before the marriage, that of fines and indemnities imposed upon them, as well as the support of illegitimate children of either spouse, may be enforced against the partnership assets after the responsibilities enumerated in the preceding Article have been covered, if the spouse who is bound should have no exclusive property or if it should be insufficient; but at the time of the liquidation of the partnership, such spouse shall be charged for what has been paid for the purpose above-mentioned. (163a)

Art. 123. Whatever may be lost during the marriage in any game of chance or in betting, sweepstakes, or any other kind of gambling whether permitted or prohibited by law, shall be borne by the loser and shall not be charged to the conjugal partnership but any winnings therefrom shall form part of the conjugal partnership property. (164a)

COMMENTS:

§ 126. Charges and Obligations of the Conjugal Partnership

The foregoing provisions on conjugal partnership of gains (Articles 121 to 123) are substantially the same as those of the absolute community (Articles 94 to 95), hence, whatever has been discussed under said articles likewise applies in the present provisions. See comments under *supra* § 111.

Note that under the system of conjugal partnership of gains, the legislator did not intend to effect a mixture or merger of the debts or properties between the spouses. On the contrary, the law established absolute separation of capitals — a complete independence of the capital account from the account of benefit pertaining to the conjugal partnership, all of which constitutes an unsurmountable obstacle to the presumption of solidarity between spouses.[291] As such, the conjugal partnership is not liable to the personal obligations of the debtor-spouse, absent any showing that such obligation has redounded to the benefit of

[291]PNB vs. Quintos, G.R. No. L-22383, Oct. 6, 1924.

the family. It is only in case of absence or insufficiency of exclusive property on the part of the debtor-spouse that such obligation may be enforced against the partnership assets, which shall be considered as advances on the debtor's share in the conjugal assets upon liquidation.[292] In the same manner, the exclusive property of either spouse shall not, as a rule, be liable to the obligations of the partnership. However, in the event that the partnership assets are not sufficient to pay for its obligations, the spouses shall be "solidarily liable" for the unpaid balance with their separate properties.[293] Hence, for such solidary liability of either spouse to attach, it is incumbent upon the creditor to prove that the assets of the partnership are not sufficient to pay for its obligations.

It must be noted that for marriages governed by the rules of conjugal partnership of gains, an obligation entered into by the husband and wife is chargeable against their conjugal partnership and it is the partnership which is primarily bound for its repayment. Thus, when the spouses are sued for the enforcement of an obligation entered into by them, they are being impleaded in their capacity as representatives of the conjugal partnership and not as independent debtors such that the concept of joint or solidary liability, as between them, does not apply.[294]

Can a creditor sue the surviving spouse for the collection of a debt which is owed by the conjugal partnership of gains? Or must such claim be filed in proceedings for the settlement of the estate of the decedent?

In **Alipio vs. Court of Appeals**,[295] the Court held that a creditor cannot sue the surviving spouse of a decedent in an ordinary proceeding for the collection of a sum of money chargeable against the conjugal partnership and that the proper remedy is for him to file a claim in the settlement of estate of the decedent. The Court explained —

> "Petitioner and her late husband, together with the Manuel spouses, signed the sublease contract binding themselves to pay the amount of stipulated rent. Under the law, the Alipios' obligation (and also that of the Manuels) is one which is chargeable against

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[292]Art. 122, FC.
[293]Art. 121, last par., FC.
[294]Alipio vs. CA, G.R. No. 134100, Sept. 29, 2000.
[295]*Id.*

their conjugal partnership. Under Art. 161(1) of the Civil Code, the conjugal partnership is liable for —

All debts and obligations contracted by the husband for the benefit of the conjugal partnership, and those contracted by the wife, also for the same purpose, in the cases where she may legally bind the partnership.

When petitioner's husband died, their conjugal partnership was automatically dissolved and debts chargeable against it are to be paid in the settlement of estate proceedings in accordance with Rule 73, § 2 which states:

Where estate settled upon dissolution of marriage. — When the marriage is dissolved by the death of the husband or wife, the community property shall be inventoried, administered, and liquidated, and the debts thereof paid, in the testate or intestate proceedings of the deceased spouse. If both spouses have died, the conjugal partnership shall be liquidated in the testate or intestate proceedings of either.

As held in *Calma vs. Tañedo*,[296] after the death of either of the spouses, no complaint for the collection of indebtedness chargeable against the conjugal partnership can be brought against the surviving spouse. Instead, the claim must be made in the proceedings for the liquidation and settlement of the conjugal property. The reason for this is that upon the death of one spouse, the powers of administration of the surviving spouse ceases and is passed to the administrator appointed by the court having jurisdiction over the settlement of estate proceedings.[297] Indeed, the surviving spouse is not even a *de facto* administrator such that conveyances made by him of any property belonging to the partnership prior to the liquidation of the mass of conjugal partnership property is void.[298]

The ruling in *Calma vs. Tañedo* was reaffirmed in the recent case of *Ventura vs. Militante*.[299] In that case, the surviving wife was sued in an amended complaint for a sum of money based on an

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[296]66 Phil. 594, 598 (1938).

[297]*Id*., at p. 597.

[298]Corpuz vs. Corpuz, 97 Phil. 655 (1955). See also Ocampo vs. Potenciano, 89 Phil. 159 (1951). Under the Family Code (Art. 124), both the husband and the wife now act as co-administrators of the conjugal partnership property.

[299]G.R. No. 63145, Oct. 5, 1999.

obligation allegedly contracted by her and her late husband. The defendant, who had earlier moved to dismiss the case, opposed the admission of the amended complaint on the ground that the death of her husband terminated their conjugal partnership and that the plaintiff's claim, which was chargeable against the partnership, should be made in the proceedings for the settlement of his estate. The trial court nevertheless admitted the complaint and ruled, as the Court of Appeals did in this case, that since the defendant was also a party to the obligation, the death of her husband did not preclude the plaintiff from filing an ordinary collection suit against her. On appeal, the Court reversed, holding that —

as correctly argued by petitioner, the conjugal partnership terminates upon the death of either spouse. . . Where a complaint is brought against the surviving spouse for the recovery of an indebtedness chargeable against said conjugal [partnership], any judgment obtained thereby is void. The proper action should be in the form of a claim to be filed in the testate or intestate proceedings of the deceased spouse.

In many cases as in the instant one, even after the death of one of the spouses, there is no liquidation of the conjugal partnership. This does not mean, however, that the conjugal partnership continues. And private respondent cannot be said to have no remedy. Under Sec. 6, Rule 78 of the Revised Rules of Court, he may apply in court for letters of administration in his capacity as a principal creditor of the deceased . . . if after thirty (30) days from his death, petitioner failed to apply for administration or request that administration be granted to some other person.[300]

§127. Debts "Redounding to the Benefit of the Family"

Note that if the debt is contracted during the marriage by both spouses or by either spouse with the consent of the other, the law conclusively presumes that such debt has redounded to the benefit of the family, in which case, the creditor no longer has the burden of proving that the debt was contracted for the benefit of the conjugal partnership or of the family.

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[300]*Id.*, at p. 13.

If the debt is contracted by the designated administrator-spouse or by one spouse without the consent of the other or if the debt is contracted prior to the marriage, the conjugal partnership shall be liable only if it can be proven that the debt redounded to the benefit of the conjugal partnership or of the family. For example, in one case,[301] while the husband refused to sign the acknowledgment of indebtedness executed by his wife but it was undoubtedly proven that the loan redounded to the benefit of the family because it was used to purchase the house and lot which became the conjugal home, it was held that the husband was also liable to pay the loan pursuant to Article 121 of the Family Code.

The burden of proof that the debt was contracted for the benefit of the conjugal partnership of gains lies with the creditor-party litigant claiming as such.[302] *Ei incumbit probatio qui dicit, non qui negat* (he who asserts, not he who denies, must prove).[303]

What debts and obligations contracted by one spouse alone are considered "for the benefit of the conjugal partnership" which are chargeable against the conjugal partnership?

The rule is that for the conjugal partnership to be liable for a liability that should appertain to one of the spouses alone, there must be a showing that some advantages accrued to the spouses. Certainly, to make a conjugal partnership responsible for a liability that should appertain alone to one of the spouses is to frustrate the objective of the law to show the utmost concern for the solidarity and well being of the family as a unit.[304] The law, however, does not require that actual profit or benefit must accrue to the conjugal partnership from the spouse's transaction for the partnership to be liable.[305] It suffices that the transaction should be one that normally would produce such benefit for the partnership.[306]

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[301]Carlos vs. Abelardo, 380 SCRA 361 (2002).

[302]Homeowner's Savings & Loan Bank vs. Dailo, 453 SCRA 283 (2005); citing Ayala Investment & Development Corp. vs. Court of Appeals, 349 Phil. 942, 952 (1998), citing Luzon Surety Co., Inc. vs. De Garcia, 30 SCRA 111 (1969).

[303]*Id.*; citing Castilex Industrial Corporation vs. Vasquez, Jr., 378 Phil. 1009 (1999).

[304]Ching vs. CA, 423 SCRA 356 (2004).

[305]Concurring Opinion, Justice J.B.L. Reyes, Luzon Surety, Inc. vs. De Garcia, 30 SCRA 111 (1969).

[306]*Id.*

In the cases of **Javier vs. Osmeña**,[307] **Abella de Diaz vs. Erlanger & Galinger, Inc.**,[308] **Cobb-Perez vs. Lantin**[309] and **G-Tractors, Inc. vs. Court of Appeals**,[310] the Court held that:

"The debts contracted by the husband during the marriage relation, for and in the exercise of the industry or profession by which he contributes toward the support of his family, are not his personal and private debts, and the products or income from the wife's own property, which, like those of her husband's, are liable for the payment of the marriage expenses, cannot be excepted from the payment of such debts." (Javier)

"The husband, as the manager of the partnership (Article 1412, Civil Code), has a right to embark the partnership in an ordinary commercial enterprise for gain, and the fact that the wife may not approve of a venture does not make it a private and personal one of the husband." (Abella de Diaz)

"Debts contracted by the husband for and in the exercise of the industry or profession by which he contributes to the support of the family, cannot be deemed to be his exclusive and private debts." (Cobb-Perez)

"x x x if he incurs an indebtedness in the legitimate pursuit of his career or profession or suffers losses in a legitimate business, the conjugal partnership must equally bear the indebtedness and the losses, unless he deliberately acted to the prejudice of his family." (G-Tractors)

However, in the cases of **Ansaldo vs. Sheriff of Manila, Fidelity Insurance & Luzon Insurance Co.**,[311] **Liberty Insurance Corporation vs. Banuelos**,[312] and **Luzon Surety Inc. vs. De Garcia**,[313] the Court ruled that:

"The fruits of the paraphernal property which form part of the assets of the conjugal partnership, are subject to the payment

[307]34 Phil. 336 (1916).
[308]59 Phil. 326 (1933).
[309]No. L-22320, May 23, 1968, *supra*.
[310]135 SCRA 193 (1995).
[311]64 Phil. 115 (1937).
[312]59 O.G. No. 29, 4526.
[313]30 SCRA 111 (1969).

of the debts and expenses of the spouses, but not to the payment of the personal obligations (guaranty agreements) of the husband, unless it be proved that such obligations were productive of some benefit to the family." (Ansaldo; parenthetical phrase ours.)

"When there is no showing that the execution of an indemnity agreement by the husband redounded to the benefit of his family, the undertaking is not a conjugal debt but an obligation personal to him." (Liberty Insurance)

"In the most categorical language, a conjugal partnership under Article 161 of the new Civil Code is liable only for such 'debts and obligations contracted by the husband for the benefit of the conjugal partnership.' There must be the requisite showing then of some advantage which clearly accrued to the welfare of the spouses. Certainly, to make a conjugal partnership respond for a liability that should appertain to the husband alone is to defeat and frustrate the avowed objective of the new Civil Code to show the utmost concern for the solidarity and well-being of the family as a unit. The husband, therefore, is denied the power to assume unnecessary and unwarranted risks to the financial stability of the conjugal partnership." (Luzon Surety, Inc.)

From the foregoing jurisprudential rulings of the Court, the following conclusions can be derived:

(1) If the husband himself is the principal obligor in the contract, *i.e.*, he directly received the money and services to be used in or for his own business or his own profession, that contract falls within the term "x x x x obligations for the benefit of the conjugal partnership." Here, no actual benefit may be proved. It is enough that the benefit to the family is apparent at the time of the signing of the contract. From the very nature of the contract of loan or services, the family stands to benefit from the loan facility or services to be rendered to the business or profession of the husband. It is immaterial, if in the end, his business or profession fails or does not succeed. Simply stated, where the husband contracts obligations on behalf of the family business, the law presumes, and rightly so, that such obligation will redound to the benefit of the conjugal partnership.[314]

[314]Ayala Investment & Development Corp. vs. Court of Appeals, 286 SCRA 272 (1998).

(2) On the other hand, if the money or services are given to another person or entity, and the husband acted only as a surety or guarantor, that contract cannot, by itself, alone be categorized as falling within the context of "obligations for the benefit of the conjugal partnership." The contract of loan or services is clearly for the benefit of the principal debtor and not for the surety or his family. No presumption can be inferred that, when a husband enters into a contract of surety or accommodation agreement, it is "for the benefit of the conjugal partnership." Proof must be presented to establish benefit redounding to the conjugal partnership.[315]

In the case of **Ayala Investments & Development Corp. vs. Court of Appeals**,[316] this question was posed: Is an obligation under a surety agreement or an accommodation contract entered into by the husband in favor of his employer for the benefit of the conjugal partnership, thereby chargeable against the conjugal partnership? The Court ruled that the signing as surety is certainly not an exercise of an industry or profession. It is not embarking in a business. No matter how often an executive acted on or was persuaded to act as surety for his own employer, this should not be taken to mean that he thereby embarked in the business of suretyship or guaranty. Thus, the conjugal partnership should not be made liable for the surety agreement which is clearly for the benefit of a third party. According to the Court, the benefits contemplated under Article 161 of the Civil Code (now Article 121 of the Family Code) must be one directly resulting from the loan and cannot merely be a by-product or a spin-off of the loan itself.

This is different from the situation where the husband borrows money or receives services to be used for his own business or profession. In the *Ayala* case, the Court ruled that it is such a contract that is one within the term "obligation for the benefit of the conjugal partnership." Thus:

> "(A) If the husband himself is the principal obligor in the contract, *i.e.*, he directly received the money and services to be used in or for his own business or his own profession, that contract

[315]*Id.*
[316]*Supra.*

falls within the term ". . . obligations for the benefit of the conjugal partnership." Here, no actual benefit may be proved. It is enough that the benefit to the family is apparent at the time of the signing of the contract. From the very nature of the contract of loan or services, the family stands to benefit from the loan facility or services to be rendered to the business or profession of the husband. It is immaterial, if in the end, his business or profession fails or does not succeed. Simply stated, where the husband contracts obligations on behalf of the family business, the law presumes, and rightly so, that such obligation will redound to the benefit of the conjugal partnership.[317]

Section 5. Administration of the Conjugal Partnership Property

Art. 124. The administration and enjoyment of the conjugal partnership property shall belong to both spouses jointly. In case of disagreement, the husband's decision shall prevail, subject to recourse to the court by the wife for proper remedy, which must be availed of within five years from the date of the contract implementing such decision.

In the event that one spouse is incapacitated or otherwise unable to participate in the administration of the conjugal properties, the other spouse may assume sole powers of administration. These powers do not include disposition or encumbrance without authority of the court or the written consent of the other spouse. In the absence of such authority or consent, the disposition or encumbrance shall be void. However, the transaction shall be construed as a continuing offer on the part of the consenting spouse and the third person, and may be perfected as a binding contract upon the acceptance by the other spouse or authorization by the court before the offer is withdrawn by either or both offerors. (165a)

Art. 125. Neither spouse may donate any conjugal partnership property without the consent of the other. However, either spouse may, without the consent of the other, make moderate donations from the conjugal partnership property for charity or on occasions of family rejoicing or family distress. (174 a)

[317]See Ching vs. CA, 423 SCRA 356.

COMMENTS:

§ 128. Joint Administration of Conjugal Partnership Property

[128.1] In general
[128.2] Sole power of administration under Art. 124
[128.3] Disposition or encumbrance of conjugal property
(a) Rule under the Civil Code
(b) Rule under the Family Code
[128.4] Contract, void in its entirety

[128.1] In General

Under the Civil Code, the husband is the administrator of the conjugal partnership property.[318] More, the husband is the sole administrator. The wife is not entitled as of right to joint administration.[319] The Family Code changed this rule. Under the Family Code, the administration and enjoyment of the conjugal partnership belongs to both spouses jointly[320] but, in case of disagreement, the decision of the husband shall prevail.[321] In the latter case, the remedy of the wife is to file the proper remedy in court within a period of five years from the date of the contract implementing such decision.[322]

As in the case of the regime of absolute community, one of the spouses in the regime of conjugal partnership of gains may assume sole power of administration in the following instances:

(1) In the event that one spouse is incapacitated or otherwise unable to participate in the administration of the common properties, in which case, the other spouse may assume sole powers of administration, without need of court approval or authorization.[323]

(2) During the pendency of a legal separation case, the court hearing the case may designate either of the spouses as sole administrator of the absolute community, in which case, the court-appointed administrator shall have the same powers and duties as those of a guardian under the Rules of Court.[324]

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[318]Art. 165, NCC.
[319]Ysasi vs. Hon. Fernandez, et. al., 132 Phil. 526 (1968).
[320]Art. 124, 1st par., FC.
[321]*Id*.
[322]*Id*.
[323]Art. 124, 2nd par., FC
[324]Art. 61, FC.

(3) If a spouse without just cause abandons the other or fails to comply with his or her obligations to the family, the aggrieved spouse may petition the court for authority to be the sole administrator of the absolute community.[325]

[128.2] Sole Power of Administration under Art. 124

Under the Civil Code, even if the husband is statutorily designated as sole administrator of the conjugal partnership, he cannot validly alienate or encumber any real property of the conjugal partnership without the wife's consent.[326] Similarly, the wife cannot dispose of any property belonging to the conjugal partnership without the conformity of the husband.[327] The Civil Code is explicit that the wife cannot bind the conjugal partnership without the husband's consent, except in cases provided by law.[328]

The same rule applies under the Family Code, except that in the Family Code, the spouse exercising the sole power of administration does not have the power to dispose or encumber all property of the conjugal partnership, be it real or personal. Under the Civil Code, the prohibition on the part of the husband, acting as sole administrator, extends only to alienation or encumbrance of real property without the wife's consent.

Under the present law,[329] in the event that one spouse is incapacitated or otherwise unable to participate in the administration of the conjugal properties, the other spouse may assume sole powers of administration. But these powers do not include disposition or encumbrance without authority of the court or the written consent of the other spouse[330] since these two acts are in the nature of acts of strict ownership, which acts are not included in the term administration. The word *"alienation"* means "the transfer of the property and possession of lands, tenements, or other things from one person to another" while *"encumbrance"* has been defined to be "every right to, or interest in, the land which may subsist in third persons, to the diminution of the value

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[325]Art. 101, FC.
[326]Art. 166, NCC.
[327]Abalos vs. Macatangay, 439 SCRA 649 (2004).
[328]Art. 172, NCC.
[329]Art. 124, FC.
[330]*Id.*

of the land, but consistent with the passing of the fee by the conveyance; or any act that impairs the use or transfer of property or real estate, which includes not only lies such as mortgages and taxes, but also attachment, leases, inchoate dower rights, water rights, easements, and other restrictions to use."[331]

[128.3] Disposition or Encumbrance of Conjugal Property

(a) Rule under the Civil Code

As discussed earlier, the husband is the administrator of the conjugal partnership under the Civil Code[332] and, in fact, he is the sole administrator. However, even if the husband is statutorily designated as administrator of the conjugal partnership, he cannot validly alienate or encumber any real property of the conjugal partnership without the wife's consent.[333] As an exception, the husband may dispose of conjugal property without the wife's consent if such sale is necessary to answer for conjugal liabilities mentioned in Articles 161 and 162 of the Civil Code. Thus, in **Tinitigan vs. Tinitigan, Sr.**,[334] the Court ruled that the husband may sell property belonging to the conjugal partnership even without the consent of the wife if the sale is necessary to answer for a big conjugal liability which might endanger the family's economic standing. This is one instance where the wife's consent is not required and, impliedly, no judicial intervention is necessary.[335] Other than this exception, the husband cannot alienate or encumber any real property of the conjugal partnership without his wife's consent. In several cases,[336] the Court had ruled that such alienation or encumbrance by the husband is void. The better view, however, is to consider the transaction as merely voidable and not void.[337] This is consistent with Article 173 of the Civil Code

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[331]Roxas vs. CA, G.R. No. 92245, June 26, 1991.

[332]Art. 165, NCC.

[333]Art. 166, NCC.

[334]No. L- 45418, October 30, 1980, 100 SCRA 619.

[335]See Abalos vs. Macatangay, Jr., 439 SCRA 649 (2004).

[336]Garcia vs. Court of Appeals, 215 Phil. 380, 383 (1984); Nicolas vs. Court of Appeals, G.R. No. L-37631, 12 October 1987, 154 SCRA 635; Tolentino vs. Cardenas, 123 Phil. 517, 521 (1966).

[337]Heirs of Ignacia Aguilar-Reyes vs. Mijares, 410 SCRA 97 (2003). See also Heirs of Christina Ayuste vs. Court of Appeals, 313 SCRA 493 (1999), citing Felipe vs. Heirs of Aldon, et al., 205 Phil. 537 (1983); Roxas vs. Court of Appeals, G.R. No. 92245, 26 June 1991, 198 SCRA 541, 546; Spouses Guiang vs. Court of Appeals, 353 Phil. 578, 588 (1998); Vitug, Compendium of Civil Law and Jurisprudence, 1993 edition, p. 71.

pursuant to which the wife could, during the marriage and within 10 years from the questioned transaction, seek its annulment.[338]

In the case of **Heirs of Christina Ayuste vs. Court of Appeals**,[339] it was categorically held that —

> "There is no ambiguity in the wording of the law. A sale of real property of the conjugal partnership made by the husband without the consent of his wife is voidable. The action for annulment must be brought during the marriage and within ten years from the questioned transaction by the wife. Where the law speaks in clear and categorical language, there is no room for interpretation — there is room only for application."

Likewise, in **Spouses Guiang vs. Court of Appeals**,[340] the Court quoted with approval the ruling of the trial court that under the Civil Code, the encumbrance or alienation of a conjugal real property by the husband absent the wife's consent, is voidable and not void.

Similarly, under the Civil Code,[341] the wife cannot dispose of any property belonging to the conjugal partnership without the conformity of the husband. The law is explicit that the wife cannot bind the conjugal partnership without the husband's consent, except in cases provided by law. In the event that the wife sold some parcels of land belonging to the conjugal partnership without the consent of the husband, the contract of sale, however, is merely voidable and not void.[342]

(b) Rule under the Family Code

Significantly, the Family Code has introduced some changes particularly on the aspect of the administration of the conjugal partnership. The new law provides that the administration of the conjugal partnership is now a joint undertaking of the husband and the wife. In the event that one spouse is incapacitated or otherwise unable to participate in the

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[338]Heirs of Ignacia Aguilar-Reyes vs. Mijares, *supra*, citing Vitug, Compendium of Civil Law and Jurisprudence, 1993 edition, p. 71; Concurring Opinion of Associate Justice Jose C. Vitug in Heirs of Christina Ayuste vs. Court of Appeals, *supra*.

[339]*Supra*.

[340]*Supra*.

[341]Art. 172, NCC.

[342]Alfredo vs. Borras, 404 SCRA 145 (2003); citing Felipe vs. Aldon, 205 Phil. 537 (1982).

administration of the conjugal partnership, the other spouse may assume sole powers of administration. However, the power of administration does not include the power to dispose or encumber property belonging to the conjugal partnership.[343] In all instances, the present law specifically requires the written consent of the other spouse, or authority of the court for the disposition or encumbrance of conjugal partnership property without which, the disposition or encumbrance shall be void.[344] Note that the particular provision under the Civil Code giving the wife ten (10) years during the marriage to annul the alienation or encumbrance made by the husband without her consent was not carried over to the Family Code. It is thus clear that any alienation or encumbrance made after August 3, 1988 when the Family Code took effect by the husband of the conjugal partnership property without the consent of the wife is null and void.[345] The same rule likewise applies to any alienation or encumbrance of conjugal property made by the wife after August 3, 1988 without the husband's consent.

Considering that Chapter 4 on Conjugal Partnership of Gains in the Family Code is likewise applicable to conjugal partnership of gains already established between spouses before the effectivity of the Family Code,[346] the question that may be asked then is whether the provisions of Article 124 of the Family Code, declaring void any alienation or encumbrance of conjugal partnership property by either spouse without the consent of the other or without court authorization, be made applicable to transactions occurring prior to August 3, 1988 (the effectivity of the Family Code)?

According to the Court, when the transaction (disposition or encumbrance) is made before the effectivity of the Family Code, the applicable law is the Civil Code.[347] Obviously, the provisions of Article 124 of the Family Code cannot be applied to transactions made prior to the effectivity of the Family Code since the applicability of Chapter 4 on Conjugal Partnership of Gains in the Family Code to conjugal partner-

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[343]Art. 124, FC.

[344]*Id*., cited in Abalos vs. Macatangay, Jr., *supra*.

[345]Spouses Guiang vs. CA, *supra*; cited in Heirs of Ignacia Aguilar-Reyes vs. Mijares, *supra*.

[346]See Art. 105, FC.

[347]Alfredo vs. Borras, *supra*, citing Sps. Guiang vs. CA, *supra*. See also Heirs of Ignacia Aguilar-Reyes vs. Mijares, *supra*, and Heirs of Christina Ayuste, *supra*.

ship of gains already established between spouses before the effectivity of this Code is subject to the condition that no vested rights already acquired in accordance with the Civil Code must be prejudiced.[348] Hence, the rule stated in Article 124 of the Family Code may only be applied to any alienation or encumbrance of the conjugal partnership property after the effectivity of the Family Code on August 3, 1988.

[128.4] Contract, Void in Its Entirety

If one of the spouses disposes or encumbers a conjugal property without the consent of the other spouse or without court authorization, may the transaction be considered valid, at least insofar as the share of the consenting spouse is concerned? In other words, may the transaction be considered as either a disposition or encumbrance only of the share of the consenting spouse in the property?

In **Homeowners Savings & Loan Bank vs. Dailo**,[349] the trial and appellate courts declared as void the mortgage in favor of the bank on the subject property, which is conjugal in nature, because it was constituted without the knowledge and consent of the wife, in accordance with Article 124 of the Family Code. On appeal, the bank contended that the mortgage constituted by the husband on the subject property as co-owner thereof is valid as to his undivided share. The bank contends that Article 124 of the Family Code should be construed in relation to Article 493 of the Civil Code, which states:

> "Art. 493. Each co-owner shall have the full ownership of his part and of the fruits and benefits pertaining thereto, and he may therefore alienate, assign or mortgage it, and even substitute another person in its enjoyment, except when personal rights are involved. But the effect of the alienation or the mortgage, with respect to the co-owners, shall be limited to the portion which may be allotted to him in the division upon the termination of the co-ownership."

The bank argued that although Article 124 of the Family Code requires the consent of the other spouse to the mortgage of conjugal

[348]See Art. 105, FC.
[349]453 SCRA 283 (2005).

properties, the framers of the law could not have intended to curtail the right of a spouse from exercising full ownership over the portion of the conjugal property pertaining to him under the concept of co-ownership. In upholding the nullity of the mortgage in its entirety, the Court held —

> "The rules on co-ownership do not even apply to the property relations of respondent and the late Marcelino Dailo, Jr. even in a suppletory manner. The regime of conjugal partnership of gains is a special type of partnership, where the husband and wife place in a common fund the proceeds, products, fruits and income from their separate properties and those acquired by either or both spouses through their efforts or by chance. Unlike the absolute community of property wherein the rules on co-ownership apply in a suppletory manner, the conjugal partnership shall be governed by the rules on contract of partnership in all that is not in conflict with what is expressly determined in the chapter (on conjugal partnership of gains) or by the spouses in their marriage settlements. Thus, the property relations of respondent and her late husband shall be governed, foremost, by Chapter 4 on *Conjugal Partnership of Gains* of the Family Code and, suppletorily, by the rules on partnership under the Civil Code. In case of conflict, the former prevails because the Civil Code provisions on partnership apply only when the Family Code is silent on the matter.
>
> The basic and established fact is that during his lifetime, without the knowledge and consent of his wife, Marcelino Dailo, Jr. constituted a real estate mortgage on the subject property, which formed part of their conjugal partnership. By express provision of Article 124 of the Family Code, in the absence of (court) authority or written consent of the other spouse, any disposition or encumbrance of the conjugal property shall be void.
>
> The aforequoted provision does not qualify with respect to the share of the spouse who makes the disposition or encumbrance in the same manner that the rule on co-ownership under Article 493 of the Civil Code does. Where the law does not distinguish, courts should not distinguish.

Thus, both the trial court and the appellate court are correct in declaring the nullity of the real estate mortgage on the subject property for lack of respondent's consent."

In the case of **Heirs of Ignacia Aguilar-Reyes vs. Mijares**,[350] it was contended that the sale of the conjugal property by the husband without the consent of the wife should not be annulled in its entirety but only with respect to the share of the non-consenting spouse. In upholding the annulment of the sale in its entirety, the Court explained —

> "Anent the second issue, the trial court correctly annulled the voidable sale of Lot No. 4349-B-2 in its entirety. In **Bucoy v*s*. Paulino**,[351] a case involving the annulment of sale with assumption of mortgages executed by the husband without the consent of the wife, it was held that the alienation or encumbrance must be annulled in its entirety and not only insofar as the share of the wife in the conjugal property is concerned. Although the transaction in the said case was declared void and not merely voidable, the rationale for the annulment of the whole transaction is the same thus —
>
> The plain meaning attached to the plain language of the law is that the contract, in its entirety, executed by the husband without the wife's consent, may be annulled by the wife. Had Congress intended to limit such annulment in so far as the contract shall "prejudice" the wife, such limitation should have been spelled out in the statute. It is not the legitimate concern of this Court to recast the law. As Mr. Justice Jose B. L. Reyes of this Court and Judge Ricardo C. Puno of the Court of First Instance correctly stated, "[t]he rule (in the first sentence of Article 173) revokes **Baello vs. Villanueva**, 54 Phil. 213 and **Coque vs. Navas Sioca**, 45 Phil. 430," in which cases annulment was held to refer only to the extent of the one-half interest of the wife. . .
>
> The necessity to strike down the contract of July 5, 1963 as a whole, not merely as to the share of the wife, is not without its basis in the common-sense rule. To be underscored

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[350] *Supra*.
[351] 131 Phil. 790 (1968).

here is that upon the provisions of Articles 161, 162 and 163 of the Civil Code, the conjugal partnership is liable for many obligations while the conjugal partnership exists. Not only that. The conjugal property is even subject to the payment of debts contracted by either spouse before the marriage, as those for the payment of fines and indemnities imposed upon them after the responsibilities in Article 161 have been covered (Article 163, par. 3), if it turns out that the spouse who is bound thereby, "should have no exclusive property or if it should be insufficient." These are considerations that go beyond the mere equitable share of the wife in the property. These are reasons enough for the husband to be stopped from disposing of the conjugal property without the consent of the wife. Even more fundamental is the fact that the nullity is decreed by the Code not on the basis of prejudice but lack of consent of an indispensable party to the contract under Article 166."

§ 129. Donation of Conjugal Property

The foregoing discussion also applies to donation of conjugal partnership property by one spouse without the consent of the other. Since donation is also a form of disposition, neither spouse may donate any conjugal partnership property without the consent of the other spouse.[352] Any such donation is void. However, the Code allows either spouse, even without the consent of the other, to make moderate donations from the conjugal partnership property for charity or on occasions of family rejoicing or family distress.[353]

§130. Disposition of Spouse's Interest in the Conjugal Partnership

In the regime of absolute community, the Code allows either spouse to dispose by will of his or her interest in the community property.[354] The Code, however, prohibits the spouses to dispose by acts *inter vivos* their respective interests in the community property. Will the same rule apply with respect to the interest or share of the spouses in the regime of

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[352]Art. 125, FC.
[353]*Id.*
[354]Art. 97, FC.

conjugal partnership of gains even in the absence of a counter part provisions of Article 97 in conjugal partnership?

Prior to the liquidation of the conjugal partnership, the interest of each spouse in the conjugal assets is inchoate, a mere expectancy, which constitutes neither a legal nor an equitable estate, and does not ripen into title until it appears that there are assets in the community as a result of the liquidation and settlement. The interest of each spouse is limited to the net remainder or "*remanente liquido*" (*haber ganancial*) resulting from the liquidation of the affairs of the partnership after its dissolution.[355] Thus, the right of the husband or wife to one-half of the conjugal assets does not vest until the dissolution and liquidation of the conjugal partnership, or after dissolution of the marriage, when it is finally determined that, after settlement of conjugal obligations, there are net assets left which can be divided between the spouses or their respective heirs.[356] Hence, any disposition of the spouse's respective shares or interest in the conjugal partnership shall be void since such right to one-half of the conjugal assets does not vest until the liquidation of the conjugal partnership. *Nemo dat qui non habet.* No one can give what he has not.[357]

However, the spouses are not prohibited from disposing by will of his or her interest in the conjugal partnership, applying by analogy the provisions of Article 97. Since such disposition becomes effective only upon the death of the testator-spouse, at which time the conjugal partnership has already been terminated and liquidated, and hence, the right of each spouse to the net remainder resulting from the liquidation of the affairs of the partnership after its dissolution already vests and ripens into a title.

Section 6. Dissolution of Conjugal Partnership Regime

Art. 126. The conjugal partnership terminates:

(1) Upon the death of either spouse;

(2) When there is a decree of legal separation;

(3) When the marriage is annulled or declared void; or

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[355]Abalos vs. Macatangay, Jr., *supra*; citing Nable Jose vs. Nable Jose, 41 Phil. 713 (1916); Manuel vs. Losano, 41 Phil. 855 (1918).

[356]*Id.*; citing Quintos de Ansaldo vs. Sheriff of Manila, 64 Phil. 115 (1937).

[357]*Id.*

(4) In case of judicial separation of property during the marriage under Articles 134 to 138. (175a)

Art. 127. The separation in fact between husband and wife shall not affect the regime of conjugal partnership, except that:

(1) The spouse who leaves the conjugal home or refuses to live therein, without just cause, shall not have the right to be supported;

(2) When the consent of one spouse to any transaction of the other is required by law, judicial authorization shall be obtained in a summary proceeding;

(3) In the absence of sufficient conjugal partnership property, the separate property of both spouses shall be solidarily liable for the support of the family. The spouse present shall, upon petition in a summary proceeding, be given judicial authority to administer or encumber any specific separate property of the other spouse and use the fruits or proceeds thereof to satisfy the latter's share. (178a)

Art. 128. If a spouse without just cause abandons the other or fails to comply with his or her obligation to the family, the aggrieved spouse may petition the court for receivership, for judicial separation of property, or for authority to be the sole administrator of the conjugal partnership property, subject to such precautionary conditions as the court may impose.

The obligations to the family mentioned in the preceding paragraph refer to marital, parental or property relations.

A spouse is deemed to have abandoned the other when he or she has left the conjugal dwelling without intention of returning. The spouse who has left the conjugal dwelling for a period of three months or has failed within the same period to give any information as to his or her whereabouts shall be *prima facie* presumed to have no intention of returning to the conjugal dwelling. (167a, 191a)

COMMENTS:

§131. Causes of Termination of the Conjugal Partnership of Gains

See discussions under *supra* §§ 114 and 115.

Section 7. Liquidation of the Conjugal Partnership Assets and Liabilities

Art. 129. Upon the dissolution of the conjugal partnership regime, the following procedure shall apply:

(1) An inventory shall be prepared, listing separately all the prop-

erties of the conjugal partnership and the exclusive properties of each spouse.

(2) Amounts advanced by the conjugal partnership in payment of personal debts and obligations of either spouse shall be credited to the conjugal partnership as an asset thereof.

(3) Each spouse shall be reimbursed for the use of his or her exclusive funds in the acquisition of property or for the value of his or her exclusive property, the ownership of which has been vested by law in the conjugal partnership.

(4) The debts and obligations of the conjugal partnership shall be paid out of the conjugal assets. In case of insufficiency of said assets, the spouses shall be solidarily liable for the unpaid balance with their separate properties, in accordance with the provisions of paragraph (2) of Article 121.

(5) Whatever remains of the exclusive properties of the spouses shall thereafter be delivered to each of them.

(6) Unless the owner had been indemnified from whatever source, the loss or deterioration of movables used for the benefit of the family, belonging to either spouse, even due to fortuitous event, shall be paid to said spouse from the conjugal funds, if any.

(7) The net remainder of the conjugal partnership properties shall constitute the profits, which shall be divided equally between husband and wife, unless a different proportion or division was agreed upon in the marriage settlements or unless there has been a voluntary waiver or forfeiture of such share as provided in this Code.

(8) The presumptive legitimes of the common children shall be delivered upon partition in accordance with Article 51.

(9) In the partition of the properties, the conjugal dwelling and the lot on which it is situated shall, unless otherwise agreed upon by the parties, be adjudicated to the spouse with whom the majority of the common children choose to remain. Children below the age of seven years are deemed to have chosen the mother, unless the court has decided otherwise. In case there is no such majority, the court shall decide, taking into consideration the best interests of said children. (181a, 182a, 183a, 184a, 185a)

COMMENTS:

§ 132. Procedure in Liquidation of Conjugal Partnership of Gains

The procedure for the liquidation of the conjugal partnership of gains is similar to the procedure for the liquidation of the absolute com-

munity of property. Hence, the discussion in *supra* § 116 likewise applies to the present article.

Art. 130. Upon the termination of the marriage by death, the conjugal partnership property shall be liquidated in the same proceeding for the settlement of the estate of the deceased.

If no judicial settlement proceeding is instituted, the surviving spouse shall liquidate the conjugal partnership property either judicially or extra-judicially within one year from the death of the deceased spouse. If upon the lapse of the one-year period no liquidation is made, any disposition or encumbrance involving the conjugal partnership property of the terminated marriage shall be void.

Should the surviving spouse contract a subsequent marriage without compliance with the foregoing requirements, a mandatory regime of complete separation of property shall govern the property relations of the subsequent marriage. (n)

COMMENTS:

§ 133. Termination of Marriage by Death

See discussion under *supra* §117.

Art. 131. Whenever the liquidation of the conjugal partnership properties of two or more marriages contracted by the same person before the effectivity of this Code is carried out simultaneously, the respective capital, fruits and income of each partnership shall be determined upon such proof as may be considered according to the rules of evidence. In case of doubt as to which partnership the existing properties belong, the same shall be divided between the different partnerships in proportion to the capital and duration of each. (189a)

Art. 132. The Rules of Court on the administration of estates of deceased persons shall be observed in the appraisal and sale of property of the conjugal partnership, and other matters which are not expressly determined in this Chapter. (187a)

Art. 133. From the common mass of property support shall be given to the surviving spouse and to the children during the liquidation of the inventoried property and until what belongs to them is delivered; but from this shall be deducted that amount received for support which exceeds the fruits or rents pertaining to them. (188a)

Chapter 5

Separation of Property of the Spouses and Administration of Common Property by One Spouse During the Marriage

Art. 134. In the absence of an express declaration in the marriage settlements, the separation of property between spouses during the marriage shall not take place except by judicial order. Such judicial separation of property may either be voluntary or for sufficient cause. (190a)

COMMENTS:

§ 134. Separation of Property, When May It Take Place

From the various provisions of the Family Code, it can be culled that separation of property between the spouses shall only take place in the following instances:

(1) When the future spouses have agreed in the marriage settlements that their property relations during the marriage shall be governed by the regime of separation of property;[358]

(2) When a previous marriage has been terminated by death of one of the spouses and the surviving spouse contracts a subsequent marriage without subjecting the absolute community[359] or the conjugal partnership of gains[360] in said previous marriage to liquidation within a period of one year from death of the spouse, in which case, a mandatory regime of complete separation of property shall govern the property relations of the subsequent marriage;

(3) Upon the finality of a decree of legal separation, the absolute community or conjugal partnership shall be dissolved and liquidated and, thereafter, the spouses shall be governed by a regime of complete separation of property;[361]

(4) When the court approves the joint petition of the spouses for the voluntary dissolution of the absolute community or the

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[358]Art. 143, in relation to Art. 74(1), FC.
[359]See Art. 103, FC.
[360]See Art. 130, FC.
[361]See Art. 63(2), FC.

conjugal partnership of gains, in which case, the spouses shall thereafter be governed by a regime of complete separation of property; and[362]

(5) When the court decrees the separation of property of the spouses following the petition of one of the spouses for such separation under the grounds enumerated in Article 135 of the Family Code.

Note, again, that the mere separation *de facto* of the spouses does not affect the regimes of absolute community[363] or conjugal partnership of gains.[364] In other words, a mere separation *de facto* between the spouses does not bring about a regime of separation of property.

Art. 135. Any of the following shall be considered sufficient cause for judicial separation of property:

(1) That the spouse of the petitioner has been sentenced to a penalty which carries with it civil interdiction;

(2) That the spouse of the petitioner has been judicially declared an absentee;

(3) That loss of parental authority of the spouse of petitioner has been decreed by the court;

(4) That the spouse of the petitioner has abandoned the latter or failed to comply with his or her obligations to the family as provided for in Article 101;

(5) That the spouse granted the power of administration in the marriage settlements has abused that power; and

(6) That at the time of the petition, the spouses have been separated in fact for at least one year and reconciliation is highly improbable.

In the cases provided for in Numbers (1), (2) and (3), the presentation of the final judgment against the guilty or absent spouse shall be enough basis for the grant of the decree of judicial separation of property. (191a)

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[362] Art. 136, FC.
[363] Art. 100, FC.
[364] Art. 127, FC.

COMMENTS:

§ 135. Separation of Property for Sufficient Cause

[135.1] Civil interdiction
[135.2] Judicial declaration of absence
[135.3] Loss of parental authority
[135.4] Abandonment or failure to comply with obligations to the family
[135.5] Abuse of power of administration
[135.6] Separation in fact

As discussed above, if separation of property is not provided for in the marriage settlements, it may be resorted to by the spouses during the marriage in two ways: (1) by filing a petition for legal separation; or (2) by filing a petition for separation of property, either voluntarily or for sufficient cause.

Under the Family Code, the following are deemed sufficient causes for separation of property: (1) that the spouse of the petitioner has been sentenced to a penalty which carries with it civil interdiction; (2) that the spouse of the petitioner has been judicially declared an absentee; (3) that loss of parental authority of the spouse of petitioner has been decreed by the court; (4) that the spouse of the petitioner has abandoned the latter or failed to comply with his or her obligations to the family as provided for in Article 101; (5) that the spouse granted the power of administration in the marriage settlements has abused that power; and (6) that at the time of the petition, the spouses have been separated in fact for at least one year and reconciliation is highly improbable.[365]

[135.1] Civil Interdiction

The concept of civil interdiction is already discussed in *supra* § 33.8. As therein discussed, civil interdiction deprives the offender of the following rights: (1) right to dispose of his property by an act *inter vivos*; (2) marital rights, (3) parental authority; (4) guardianship of any ward; and (5) management of his property.[366] The presentation of the final judgment convicting the accused of a crime which carries with it

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[365]Art. 135, FC.
[366]See Art. 34, RPC.

civil interdiction shall be enough basis for the grant of the decree of judicial separation of property.[367]

[135.2] Judicial Declaration of Absence

Under the Civil Code,[368] a person may be declared judicially as an absentee if two years has elapsed without news about him or the same period has elapsed since the receipt of the last news about him. However, if the absentee has left a person in charge of the administration of his property, the period required by law before he can be judicially declared as an absentee is five years. The presentation of the final judgment declaring one of the spouses as an absentee shall be enough basis for the grant of the decree of judicial separation of property.[369]

[135.3] Loss of Parental Authority

Under the provisions of Article 231 of the Family Code, the court may deprive the guilty party of parental authority based on the grounds mentioned therein "if the degree of seriousness so warrants or the welfare of the child so demands" in an action filed for the purpose or in a related case. If the person exercising parental authority has subjected the child or allowed him to be subjected to sexual abuse, such person shall also be permanently deprived by the court of such authority.[370] The presentation of the final judgment depriving one of the spouses of parental authority shall be enough basis for the grant of the decree of judicial separation of property.[371]

[135.4] Abandonment or Failure to Comply with Obligations to the Family

The concept of abandonment is discussed in *supra* § 115.2. Aside from abandonment, the failure on the part of the other spouse to comply with his or her obligations to the family is likewise a ground for separation of property. The obligations referred to are those embraced by

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[367]Last par., Art. 135, FC.
[368]Art. 384, NCC.
[369]Last par., Art. 135, FC.
[370]Art. 232, FC.
[371]Last par., Art. 135, FC.

Articles 68 up to 71 of the Family Code as regards the husband and wife as well as Articles 220, 221 and 225 of the same Code in regard to parents and their children.

[135.5] Abuse of Power of Administration

Abuse in the exercise of the sole power of administration of the properties of the spouses is a ground for separation of property.[372] However, it is necessary that the power of administration must be granted to the abusive spouse in the marriage settlement itself, otherwise the provisions of paragraph 5 of Article 135 will not apply. As such, if the power of administration has been assumed solely by one of the spouses in view of the incapacity or inability of the other spouse to participate in the administration of the absolute community[373] or the conjugal partnership of gains,[374] and not by virtue of the marriage settlements, any abuse of such power is not the ground contemplated in Article 135(5) of the Family Code.

[135.6] Separation in Fact

As discussed earlier, a mere separation in fact between the spouses does not bring about a regime of separation of property. However, when the spouses have been separated in fact for at least one year and reconciliation is highly improbable, either of the spouse may petition for separation of property.[375]

Art. 136. The spouses may jointly file a verified petition with the court for the voluntary dissolution of the absolute community or the conjugal partnership of gains, and for the separation of their common properties.

All creditors of the absolute community or of the conjugal partnership of gains, as well as the personal creditors of the spouse, shall be listed in the petition and notified of the filing thereof. The court shall take measures to protect the creditors and other persons with pecuniary interest. (191a)

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[372]Art. 135(5), FC.
[373]Art. 96, FC.
[374]Art. 124, FC.
[375]Art. 135(6).

COMMENTS:

§ 136. Voluntary Separation of Property

The spouses may agree to voluntarily dissolve the absolute community or the conjugal partnership of gains. However, such agreement will not produce any legal effect if the same is not approved by the courts. In other words, the agreement of the spouses to dissolve the absolute community or the conjugal partnership must be submitted to the court for approval before it can produce any legal effect. Under the provisions of Article 136 of the Family Code, the spouses may jointly file a verified petition with the court for the voluntary dissolution of the absolute community or the conjugal partnership of gains, and for the separation of their common properties.

Note that under the provisions of Article 136 of the Family Code, the spouses may petition for separation of property even in the absence of a sufficient cause. In other words, the court is not required to look into the reasons of the spouses for resorting to separation of property. In other words, the court may not disapprove any petition for separation of property under this article simply because the court is not satisfied with the reasons of the parties. It appears therefore that the Family Code is requiring the process to be done judicially only to protect the interest of third persons, especially the creditors of the absolute community or of the conjugal partnership of gains. Thus, the Code requires that all creditors of the absolute community or of the conjugal partnership of gains, as well as the personal creditors of the spouses, must be listed in the joint petition and notified of the filing thereof.

Art. 137. Once the separation of property has been decreed, the absolute community or the conjugal partnership of gains shall be liquidated in conformity with this Code.

During the pendency of the proceedings for separation of property, the absolute community or the conjugal partnership shall pay for the support of the spouses and their children. (192a)

Art. 138. After dissolution of the absolute community or of the conjugal partnership, the provisions on complete separation of property shall apply. (191a)

Art. 139. The petition for separation of property and the final judgment granting the same shall be recorded in the proper local civil registries and registries of property. (193a)

Art. 140. The separation of property shall not prejudice the rights previously acquired by creditors. (194a)

COMMENTS:

§ 137. Effects of Decree Granting Separation of Property

Once the separation of property has been decreed by the court, the following effects shall be produced:

(1) The absolute community or the conjugal partnership of gains shall be liquidated[376] in accordance with the provisions of Articles 102 and 129 of the Family Code. The procedure of liquidation is discussed in *supra* § 116.

(2) After the dissolution of the absolute community or conjugal partnership of gains, the spouses shall thereafter be governed by a regime of complete separation of property.[377]

(3) In order to bind third persons, the petition for separation of property and the final judgment granting the same are required to be recorded in the proper local civil registries and registries of property.[378] However, rights which are previously acquired by creditors prior to the judicial separation of property shall not be prejudiced by the judicial decree of separation of property.[379]

Art. 141. The spouses may, in the same proceedings where separation of property was decreed, file a motion in court for a decree reviving the property regime that existed between them before the separation of property in any of the following instances:

(1) When the civil interdiction terminates;

(2) When the absentee spouse reappears;

(3) When the court, being satisfied that the spouse granted the power of administration in the marriage settlements will not again abuse that power, authorizes the resumption of said administration;

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[376]Art. 137, FC.
[377]Art. 138, FC.
[378]Art. 139, FC.
[379]Art. 140, FC.

(4) When the spouse who has left the conjugal home without a decree of legal separation resumes common life with the other;

(5) When parental authority is judicially restored to the spouse previously deprived thereof;

(6) When the spouses who have separated in fact for at least one year, reconcile and resume common life; or

(7) When after voluntary dissolution of the absolute community of property or conjugal partnership has been judicially decreed upon the joint petition of the spouses, they agree to the revival of the former property regime. No voluntary separation of property may thereafter be granted.

The revival of the former property regime shall be governed by Article 67. (195a)

COMMENTS:

§ 138. Revival of Previous Property Regime

After the judicial separation of property is obtained by one of the spouses under the provisions of Articles 135 of the Code, the spouses may, in the same proceedings where separation of property was decreed, file a motion in court for a decree reviving their previous property regime if the fact which gives to a ground for judicial separation of property no longer exists, as follows:

(a) when the civil interdiction terminates;

(b) when the absentee spouse reappears;

(c) when the court, being satisfied that the spouse granted the power of administration in the marriage settlements will not again abuse that power, authorizes the resumption of said administration;

(d) when the spouse who has left the conjugal home without a decree of legal separation resumes common life with the other;

(e) when parental authority is judicially restored to the spouse previously deprived thereof; or

(f) when the spouses who have separated in fact for at least one year, reconcile and resume common life.[380]

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[380] Art. 141, pars. (1) to (6), FC.

In the same way, the spouses who obtained a voluntary separation of property under the provisions of Article 136 of the Family Code may, in the same proceedings where separation of property was decreed, likewise file a motion in court for a decree reviving their previous property regime. However, the said spouses are already barred from resorting again to voluntary separation of property as this procedure can be resorted to by the spouses only once during the marriage.[381]

The procedure for the revival of the previous property regime in case of judicial separation of property under Articles 135 and 136 is the same as that provided under Article 67 of the Code. Such procedure is discussed under *supra* § 88.

Art. 142. The administration of all classes of exclusive property of either spouse may be transferred by the court to the other spouse:

(1) When one spouse becomes the guardian of the other;

(2) When one spouse is judicially declared an absentee;

(3) When one spouse is sentenced to a penalty which carries with it civil interdiction; or

(4) When one spouse becomes a fugitive from justice or is in hiding as an accused in a criminal case.

If the other spouse is not qualified by reason of incompetence, conflict of interest, or any other just cause, the court shall appoint a suitable person to be the administrator. (n)

COMMENTS:

§ 139. Transfer of Administration of Exclusive Property

The administration of the exclusive property of either spouse may be transferred to the other spouse either by agreement or by order of the court. There is nothing under the Code which prohibits the spouses to transfer the administration of the exclusive property of one spouse to the other. In fact, under Article 110 of the Family Code, the law allows such transfer by means of a public instrument, which shall be recorded in the registry of property of the place where the property is situated.

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[381]Art. 141(7), FC.

If the transfer of administration is by virtue of a court order, the same can only be based on the following grounds: (1) if the owner-spouse is under guardianship; (2) if the owner-spouse is judicially declared an absentee; (3) if the owner-spouse is sentenced to a penalty which carries with it civil interdiction; and (4) if the owner-spouse becomes a fugitive from justice or is in hiding as an accused in a criminal case.[382] In all these instances, the administration of all classes of exclusive property of the spouse suffering from any of these incapacities shall be transferred to the other spouse unless the latter is not qualified by reason of incompetence, conflict of interest, or any other just cause, in which case, the court shall appoint a suitable person to be the administrator.[383]

Such power of administration does not, of course, include the right to alienate or encumber the exclusive property of the owner-spouse without court authorization. The alienation of any exclusive property of a spouse administered by the other results in the automatic termination of the administration over such property and the proceeds of the alienation shall be turned over to the owner-spouse.[384]

Chapter 6

Regime of Separation of Property

Art. 143. Should the future spouses agree in the marriage settlements that their property relations during marriage shall be governed by the regime of separation of property, the provisions of this Chapter shall be of suppletory application. (212a)

Art. 144. Separation of property may refer to present or future property or both. It may be total or partial. In the latter case, the property not agreed upon as separate shall pertain to the absolute community. (213a)

Art. 145. Each spouse shall own, dispose of, possess, administer and enjoy his or her own separate estate, without need of the consent of the other. To each spouse shall belong all earnings from his or her profession, business or industry and all fruits, natural, industrial or civil, due or received during the marriage from his or her separate property. (214a)

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[382]Art. 142, FC.

[383]*Id.*

[384]Art. 112, FC.

Art. 146. Both spouses shall bear the family expenses in proportion to their income, or, in case of insufficiency or default thereof, to the current market value of their separate properties.

The liabilities of the spouses to creditors for family expenses shall, however, be solidary. (215a)

COMMENTS:

§ 140. Regime of Complete Separation of Property

In the regime of Complete Separation of Property, each spouse shall own, dispose of, possess, administer and enjoy his or her own separate property, whether acquired prior to the marriage or during the marriage, without need of the consent of the other.[385] In this regime, all earnings by each spouse from his or her profession, business or industry and all fruits, natural, industrial or civil, due or received during the marriage from his or her separate property shall likewise belong to him or her.[386] With respect to family expenses, both spouses shall bear the same in proportion to their income or, in case of insufficiency or default thereof, to the current market value of their separate properties.[387] They shall, however, be considered solidarily liable to the creditors in connection with such family expenses.[388]

The separation of property between the spouses may take place in the five instances discussed under *supra* § 134. If such separation is agreed upon in the marriage settlements, the spouses may provide for separation only with respect to their present properties or with respect only to their future properties or even with respect to both.[389] The spouses may likewise provide for either total or partial separation.[390] If the spouses, in their marriage settlements, agree on a partial separation, or separation only with respect either to their present or future property, the property not agreed upon as separate shall pertain to the absolute community following the provisions of Articles 75 and 144 of the Family Code.

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[385]Art. 145, FC.
[386]*Id.*
[387]Art. 146, FC.
[388]*Id.*
[389]Art. 144, FC.
[390]*Id.*

Chapter 7

Property Regime of Unions Without Marriage

Art. 147. When a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through their work or industry shall be governed by the rules on co-ownership.

In the absence of proof to the contrary, properties acquired while they lived together shall be presumed to have been obtained by their joint efforts, work or industry, and shall be owned by them in equal shares. For purposes of this Article, a party who did not participate in the acquisition by the other party of any property shall be deemed to have contributed jointly in the acquisition thereof if the former's efforts consisted in the care and maintenance of the family and of the household.

Neither party can encumber or dispose by acts inter vivos of his or her share in the property acquired during cohabitation and owned in common, without the consent of the other, until after the termination of their cohabitation.

When only one of the parties to a void marriage is in good faith, the share of the party in bad faith in the co-ownership shall be forfeited in favor of their common children. In case of default of or waiver by any or all of the common children or their descendants, each vacant share shall belong to the respective surviving descendants. In the absence of descendants, such share shall belong to the innocent party. In all cases, the forfeiture shall take place upon termination of the cohabitation. (144a)

Art. 148. In cases of cohabitation not falling under the preceding Article, only the properties acquired by both of the parties through their actual joint contribution of money, property, or industry shall be owned by them in common in proportion to their respective contributions. In the absence of proof to the contrary, their contributions and corresponding shares are presumed to be equal. The same rule and presumption shall apply to joint deposits of money and evidences of credit.

If one of the parties is validly married to another, his or her share in the co-ownership shall accrue to the absolute community or conjugal partnership existing in such valid marriage. If the party who acted in bad faith is not validly married to another, his or her share shall be forfeited in the manner provided in the last paragraph of the preceding Article.

The foregoing rules on forfeiture shall likewise apply even if both parties are in bad faith. (144a)

COMMENTS:

§ 141. Property Relations in Void Marriages

[141.1] In general
[141.2] Property regime under Article 147
(a) Applicability
(b) Distribution of properties
(c) Prohibition in alienation of share
[141.3] Property regime under Article 148
(a) Applicability
(b) Distribution of properties

[141.1] In General

Except for a marriage that is declared void *ab initio* under article 40 of the Code, the applicable property regime in a void marriage is not absolute community or conjugal partnership of property.[391] In a void marriage, regardless of the cause thereof,[392] the property relations of the parties during the period of cohabitation is governed by the provisions of Article 147 or Article 148, such as the case may be, of the Family Code.[393]

[141.2] Property Regime under Article 147

(a) Applicability

Article 147 applies when a man and a woman, suffering no legal impediment to marry each other, so exclusively live together as husband and wife under a void marriage or without the benefit of marriage.[394] Thus, for Article 147 to operate, the man and the woman: (1) must be capacitated to marry each other; (2) live exclusively with each other as husband and wife; and (3) their union is without the benefit of marriage or their marriage is void.[395]

The term "capacitated" in the provision (in the first paragraph of the law) refers to the *legal capacity* of a party to contract marriage, *i.e.*,

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[391]Cariño vs. Cariño, 351 SCRA 127 (2001).
[392]Except a void marriage under article 40. See discussions under *supra* § 75.4.
[393]Valdez vs. RTC, Br. 102, QC, 260 SCRA 221, 226 (1996).
[394]Valdez vs. RTC, Br. 102, QC, *supra*.
[395]Mercado-Fehr vs. Fehr, 414 SCRA 288 (2003).

any "male or female of the age of eighteen years or upwards not under any of the impediments mentioned in Articles 37 and 38 of the Code.[396]

In the following situations, for example, the property relations of the couple shall not be governed by article 147 of the Code: (1) If two minors coming from opposite sexes live exclusively as husband and wife without the benefit of marriage since they are not capacitated to marry each other; (2) In a void marriage between first cousins since there is an impediment to marry as provided in article 38 of the Code. Article 147, on the other hand, applies to unions of parties who are legally capacitated and not barred by any impediment to contract marriage, but whose marriage is nonetheless void for other reasons, like the absence of a marriage license[397] or by reason of psychological incapacity.[398]

(b) Distribution of Properties

Under the property regime mentioned in article 147, the properties acquired during the cohabitation shall be distributed as follows:

(1) With respect to their wages and salaries, the same shall be owned by them in equal shares,[399] even if only one party earned the wages and the other did not contribute thereto;[400]

(2) The property acquired by both of them through their *work* or *industry* shall be governed by the rules on co-ownership.[401] In the absence of proof to the contrary, properties acquired while they lived together shall be presumed to have been obtained by their joint efforts, work or industry, and shall be owned by them in equal shares.[402] In other words, any property acquired during the union is *prima facie* presumed to have been obtained through their joint efforts.[403] However, a party who did not participate in the acquisition of the property shall still be considered as having contributed thereto jointly if said party's "efforts" consisted in the care and maintenance of the family household.[404]

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[396] *Id.*
[397] See Cariño vs. Cariño, *supra*.
[398] Mercado-Fehr vs. Fehr, *supra*.
[399] Art. 147, FC.
[400] Cariño vs. Cariño, *supra*.
[401] *Id.*
[402] *Id.*
[403] Valdez vs. RTC, Br. 102, QC, *supra*.
[404] Art. 147, FC.

(3) When only one of the parties to a void marriage is in good faith, the share of the party in bad faith in the co-ownership shall be forfeited in favor of their common children.[405] In case of default of or waiver by any or all of the common children or their descendants, each vacant share shall belong to the respective surviving descendants. In the absence of descendants, such share shall belong to the innocent party.[406] In all cases, the forfeiture shall take place upon termination of the cohabitation.[407]

[c] Prohibition in Alienation of Share

In an ordinary co-ownership, any of the co-owner has the right to dispose or alienate his aliquot or ideal share in the co-ownership without need of getting the consent of the other co-owners.[408] In the co-ownership that exists between the parties under article 147 of the Code, however, neither party can encumber or dispose by acts *inter vivos* of his or her share in the property acquired during the cohabitation and owned in common, without the consent of the other, until after the termination of their cohabitation.[409] In other words, either party may dispose of his or her share in the co-ownership only in the following instances: (1) if the disposition is by way of acts *mortis causa*; or (2) even if the disposition is by way of acts *inter vivos*, if the same is with the consent of the other party.

[141.3] Property Regime under Article 148

(a) Applicability

Article 148 of the Code refers to the property regime of bigamous marriages, adulterous relationships, relationships in a state of concubinage, relationships where both man and woman are married to other persons, multiple alliances of the same married man.[410] Article 148 also applies when the common-law spouses suffer from a legal

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[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] See Art. 493, NCC.
[409] Art. 147, FC.
[410] Cariño vs. Cariño, *supra*, citing Sempio-Diy, Handbook on the Family Code of the Philippines, pp. 233-234 (1995).

impediment to marry or when they do not live exclusively with each other as husband and wife.[411]

(b) Distribution of Properties

Under article 148, the properties acquired during the cohabitation shall be distributed as follows:

(1) Wages and salaries earned by each party belong to him or her exclusively;[412]

(2) Only the property acquired by both of them through their *actual joint* contribution of money, property or industry shall be owned in common and in *proportion to their respective contributions*.[413] Stated otherwise, article 148 of the Code now provides for a limited co-ownership in cases where the parties in union are incapacitated to marry each other[414] provided that the parties prove their "actual joint contribution of money, property, or industry" and only to the extent of their proportionate interest therein.[415] It must be stressed that actual contribution is required by this provision, in contrast to Article 147 which states that efforts in the care and maintenance of the family and household, are regarded as contributions to the acquisition of common property by one who has no salary or income or work or industry.[416] If the actual contribution of the party is not proved, there will be no co-ownership and no presumption of equal shares.[417] Hence, mere cohabitation without proof of contribution will not result in a co-ownership. [418] Such contributions and corresponding shares, however, are *prima facie* presumed to be equal.[419]

(3) The share of the party validly married to another shall accrue to the property regime of such existing marriage.[420] In **Belcodero vs.**

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[411]Valdez vs. RTC, Br. 102, QC, *supra*.
[412]Cariño vs. Cariño, *supra*.
[413]Art. 148, FC.
[414]Mallilin, Jr. vs. Castillo, 333 SCRA 628 (2000).
[415]Malang vs. Moson, 338 SCRA 755 (2000).
[416]Agapay vs. Palang, 276 SCRA 340 (1997).
[417]*Id*.
[418]Tumlos vs. Fernandez, 386 Phil. 936 (2000).
[419]Valdez vs. RTC, Br. 102, QC, *supra*.
[420]Art. 148, FC.

Court of Appeals,[421] the Court held that property acquired by a man while living with a common-law wife during the subsistence of his marriage is conjugal property, even when the property was titled in the name of the common-law wife. In such cases, a constructive trust is deemed to have been created by operation of Article 1456 of the Civil Code over the property which lawfully pertains to the conjugal partnership of the subsisting marriage.

(4) If the party who has acted in bad faith is not validly married to another, his or her share shall be forfeited in the manner already heretofore expressed.[422] The foregoing rules on forfeiture shall likewise apply even if both parties are in bad faith.[423]

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[421]227 SCRA 303.
[422]*Id.*
[423]*Id.*

Title V
THE FAMILY

Chapter 1
The Family as an Institution

Art. 149. The family, being the foundation of the nation, is a basic social institution which public policy cherishes and protects. Consequently, family relations are governed by law and no custom, practice or agreement destructive of the family shall be recognized or given effect. (216a, 218a)

Art. 150. Family relations include those:

(1) Between husband and wife;

(2) Between parents and children;

(3) Among other ascendants and descendants; and

(4) Among brothers and sisters, whether of the full or halfblood. (217a)

Art. 151. No suit between members of the same family shall prosper unless it should appear from the verified complaint or petition that earnest efforts toward a compromise have been made, but that the same have failed. If it is shown that no such efforts were in fact made, the case must be dismissed.

This rule shall not apply to cases which may not be the subject of compromise under the Civil Code. (222a)

COMMENTS:

§ 142. Family as Basic Social Institution

The Family Code considers the family as a basic social institution which, by reasons of public policy, deserves the State's protection.[1] No

[1]Art. 149, FC.

less than the Philippine Constitution recognizes the importance of the Filipino family, which it emphatically declares to be the "foundation of the nation."[2] As such, our Constitution is committed to the policy of strengthening the family as a basic autonomous social institution.[3]

And since the institution of marriage, in turn, serves as the foundation of the family, the Constitution likewise commands the State to protect the institution of marriage.[4] Indeed, our family law is based on the policy that marriage is not a mere contract but a social institution in which the state is vitally interested.[5] Hence, its preservation is not the concern of the family members alone considering that the break up of families may eventually weaken our moral and social fabric.[6]

§ 143. Family Relations

[143.1] Govern by law
[143.2] Extent of family relations

[143.1] Govern by Law

In view of the importance that the family plays upon the affairs of the nation, the Family Code provides that "family relations are governed by law."[7] In addition, the Code mandates that "no custom, practice or agreement destructive of the family shall be recognized or given effect."[8]

Senator Tolentino clarifies, however, that only the external aspect of the family relations is contemplated in the rule stated in the second sentence of Article 149 because it is only here that third persons and the public interest are concerned.[9] With respect, however, to the internal aspect of the family relations which involves the spiritual and moral affairs of the family members, he believes that the same are not within the sphere of the law unless the same will affect the social order.[10]

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[2]Art. XV, Sec. 1.
[3]Art. II, Sec. 12.
[4]Art. XV, Sec. 2.
[5]Tuason vs. CA, 256 SCRA 158 (1996).
[6]*Id.*
[7]Art. 149, FC.
[8]*Id.*
[9]I Tolentino, Civil Code, 1991 ed., pp. 502-503.
[10]*Id.*

[143.2] Extent of "Family Relations"

The scope and coverage of the term "family relations" is defined in Article 150, as follows: (a) between husband and wife; (b) between parents and children; (c) among other ascendants and descendants; and (d) among brothers and sisters, whether of the full or halfblood. According to the Court, this enumeration is exclusive and defines the operation of Article 151 of the Family Code.[11]

§ 144. Family Solidarity

[144.1] Earnest efforts toward compromise
[144.2] Purpose of the rule
[144.3] Effect of failure to comply
[144.4] Scope and coverage
[144.5] When Art. 151 not applicable

[144.1] "Earnest Efforts Toward Compromise"

Because of the very important role that the family plays in nation-building, it is the policy of the state to strengthen family solidarity. Thus, Section 1 of Article XV of the Constitution provides:

"Sec. 1. The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development."

This policy of the state is exemplified and given flesh in the provisions of Article 151 of the Family Code which requires that earnest efforts toward a compromise be first exerted before action or suit between or among the members of the same family may be given due course.

[144.2] Purpose of the Rule

The Code Commission, which drafted the precursor provision in the Civil Code,[12] explains the reason for the requirement that earnest efforts toward a compromise be first exerted before a complaint is given due course —

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[11] Hontiveros vs. RTC, 309 SCRA 340 (1999); Esquivias vs. CA, 272 SCRA 803 (1997); Guerrero vs. RTC, Ilocos Norte, Br. XVI, 229 SCRA 274 (1994).

[12] Art. 222, NCC.

"This rule is introduced because it is difficult to imagine a sadder and more tragic spectacle than a litigation between members of the same family. It is necessary that every effort should be made toward a compromise before a litigation is allowed to breed hate and passion in the family. It is known that a lawsuit between close relatives generates deeper bitterness than between strangers . . . A litigation in a family is to be lamented far more than a lawsuit between strangers . . ."[13]

[144.3] Effect of Failure to Comply

Considering that Art. 151 starts with the negative word "No," the requirement is mandatory that the complaint or petition, which must be verified, should allege that earnest efforts toward a compromise have been made but that the same failed, so that if it is shown that no such efforts were in fact made, the case must be dismissed.[14] Hence, the attempt to compromise as well as its failure or inability to succeed is a condition precedent to the filing of a suit between members of the same family;[15] the absence of such allegation in the complaint being assailable at any stage of the proceeding, even on appeal, for lack of cause of action.[16]

[144.4] Scope and Coverage

The phrase "members of the same family" in Article 151 must be construed in relation to Article 150 of the Family Code.[17] As early as **Gayon vs. Gayon**,[18] the Supreme Court, in interpreting the precursor provision of Article 151,[19] already held that the impediment arising from the provision applies to suits "filed or maintained between members of the same family" and that the phrase "members of the same family" should be construed in the light of Article 217 of the same Code.[20] Hence, the phrase "members of the same family" in Article 151 refers to "the

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[13]Guerrero vs. RTC of Ilocos Norte, Br. XVI, 229 SCRA 274 (1994); citing Report of the Code Commission, cited in Vicente J. Francisco, The Revised Rules of Court in the Philippines (1973), Vol. I, p. 959.

[14]*Id*.

[15]Wee vs. Gonzales, 436 SCRA 96.

[16]O' Laco vs. Co Cho Chit, March 31, 1993; Mendoza vs. CA, 19 SCRA 756.

[17]Martinez vs. Martinez, 461 SCRA 562, 570 (2005).

[18]36 SCRA 104 (1970).

[19]See Art. 222, NCC.

[20]Now Article 150, FC.

husband and wife, parents and children, ascendants and descendants, and brothers and sisters, whether full or halfblood."[21]

A brother-in-law[22] or a sister-in-law[23] is a stranger with respect to the family of their spouses and, as such, the mandatory requirement of "earnest effort toward a compromise" does not apply to them. In **Magbaleta vs. Gonong**,[24] the Supreme Court ruled that "efforts to compromise" are not a jurisdictional prerequisite for the maintenance of an action whenever a stranger to the family is a party thereto, whether as necessary or indispensable one. An alien to the family may not be willing to suffer the inconvenience of, much less relish, the delay and the complications that wranglings between and among relatives more often than not entail. Besides, it is neither practical nor fair that the rights of a family be made to depend on a stranger who just happens to have innocently acquired some interest in a property by virtue of his affinity to the parties.[25]

[144.5] When Art. 151 Not Applicable

The rule under Article 151 does not apply to cases which are not subject to compromise, as follows:

> "Art. 2035. No compromise upon the following questions shall be valid:
>
> (1) The civil status of persons;
>
> (2) The validity of a marriage or legal separation;
>
> (3) Any ground for legal separation;
>
> (4) Future support;
>
> (5) The jurisdiction of courts;
>
> (6) Future legitime."[26]

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[21]Esquivias vs. CA, *supra*.
[22]*Id*.
[23]Gayon vs. Gayon, *supra*.
[24]76 SCRA 511.
[25]Esquivias vs. CA, *supra*.
[26]Art. 2035, NCC.

Chapter 2

The Family Home

Art. 152. The family home, constituted jointly by the husband and the wife or by an unmarried head of a family, is the dwelling house where they and their family reside, and the land on which it is situated. (223a)

Art. 153. The family home is deemed constituted on a house and lot from the time it is occupied as a family residence. From the time of its constitution and so long as any of its beneficiaries actually resides therein, the family home continues to be such and is exempt from execution, forced sale or attachment except as hereinafter provided and to the extent of the value allowed by law. (223a)

Art. 154. The beneficiaries of a family home are:

(1) The husband and wife, or an unmarried person who is the head of a family; and

(2) Their parents, ascendants, descendants, brothers and sisters, whether the relationship be legitimate or illegitimate, who are living in the family home and who depend upon the head of the family for legal support. (226a)

COMMENTS:

§ 145. Family Home

[145.1] Concept
[145.2] Constitution of family home
[145.3] Who may constitute
[145.4] Beneficiaries of family home

[145.1] Concept

A family home is the dwelling place of a person and his family. It is said, however, that the family home is a real right, which is gratuitous, inalienable and free from attachment, constituted over the dwelling place and the land on which it is situated, which confers upon a particular family the right to enjoy such properties, which must remain with the person constituting it and his heirs.[27]

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[27]Taneo, Jr. vs. CA, CA, 304 SCRA 308; citing Tolentino, Commentaries and Jurisprudence on the Civil Code of the Philippines, Vol. I, p. 523.

[145.2] Constitution of Family Home

Under the Civil Code,[28] a family home may be constituted judicially and extrajudicially, the former by the filing of the petition and with the approval of the proper court, and the latter by the recording of a public instrument in the proper registry of property declaring the establishment of the family home. The operative act then which created the family home extrajudicially was the registration in the Registry of Property of the declaration prescribed by Articles 240 and 241 of the Civil Code.

Under the Family Code, however, a family home is deemed constituted on a house and lot from the time it is occupied as a family residence.[29] There is no need to constitute the same judicially or extrajudicially as required in the Civil Code.[30] If the family actually resides in the premises, it is, therefore, a family home as contemplated by law.[31] And it continues to be such so long as any of its beneficiaries actually resides therein.[32]

Note that the law explicitly provides that occupancy of the family home either by the owner thereof or by "any of its beneficiaries" must be *actual*. That which is "actual" is something real, or actually existing, as opposed to something merely possible, or to something which is presumptive or constructive. Actual occupancy, however, need not be by the owner of the house specifically. Rather, the property may be occupied by the "beneficiaries" enumerated by Article 154 of the Family Code.[33]

[145.3] Who May Constitute

It is not only the spouses[34] who may constitute a family home on the properties of the absolute community or conjugal partnership or on the exclusive property of either with the latter's consent.[35] Even an un-

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[28]Arts. 224 to 251, NCC.
[29]Art. 153, FC.
[30]Modequillo vs. Breva, May 31, 1990.
[31]*Id.*
[32]Art. 153, FC.
[33]Manacop vs. CA, 277 SCRA 57 (1997).
[34]Art. 152, NCC.
[35]Art. 156, NCC.

married head of the family may likewise constitute a family home on his or her own property.[36]

However, for purposes of availing of the benefits of a family home, *i.e.*, exemption from execution, forced sale or attachment, a person may constitute, or be the beneficiary of only one family home.[37]

[145.4] Beneficiaries of Family Home

A family residence shall continue to be considered as a "family home" so long as any of its beneficiaries actually resides therein.[38] Under Article 154 of the Family Code, the following are the beneficiaries of the family home: (a) the husband and wife, or an unmarried person who is the head of a family; and (b) their parents, ascendants, descendants, brothers and sisters, whether the relationship be legitimate or illegitimate, who are living in the family home and who depend upon the head of the family for legal support.

The above enumeration may include the in-laws where the family home is constituted jointly by the husband and wife.[39] But the law definitely excludes maids and overseers. They are not the beneficiaries contemplated by the Code. Consequently, occupancy of a family home by an overseer is insufficient compliance with the law.[40]

Art. 155. The family home shall be exempt from execution, forced sale or attachment except:

(1) For nonpayment of taxes;

(2) For debts incurred prior to the constitution of the family home;

(3) For debts secured by mortgages on the premises before or after such constitution; and

(4) For debts due to laborers, mechanics, architects, builders, materialmen and others who have rendered service or furnished material for the construction of the building. (243a)

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[36]*Id.*

[37]Art. 161, FC.

[38]Art. 153, FC.

[39]Manacop vs. CA, *supra*; citing Sempio-Diy, Handbook On The Family Code Of The Philippines, 1988 ed., p. 219.

[40]*Id.*

Art. 156. The family home must be part of the properties of the absolute community or the conjugal partnership, or of the exclusive properties of either spouse with the latter's consent. It may also be constituted by an unmarried head of a family on his or her own property.

Nevertheless, property that is the subject of a conditional sale on installments where ownership is reserved by the vendor only to guarantee payment of the purchase price may be constituted as a family home. (227a, 228a)

Art. 157. The actual value of the family home shall not exceed, at the time of its constitution, the amount of three hundred thousand pesos in urban areas, and two hundred thousand pesos in rural areas, or such amounts as may hereafter be fixed by law.

In any event, if the value of the currency changes after the adoption of this Code, the value most favorable for the constitution of a family home shall be the basis of evaluation.

For purposes of this Article, urban areas are deemed to include chartered cities and municipalities whose annual income at least equals that legally required for chartered cities. All others are deemed to be rural areas. (231a)

COMMENTS:

§146. Benefits of Family Home

[146.1] Rule: exempt from execution, etc.
[146.2] Extent of exemption
[146.3] Exception to the rule

[146.1] Rule: Exempt From Execution, etc.

As a rule, the family home is exempt from execution, forced sale or attachment.[41] This exemption is effective from the time of the constitution of the family home as such, and lasts so long as any of its beneficiaries actually resides therein.[42]

[146.2] Extent of Exemption

Article 153 of the Family Code states that the family home is exempt from execution, forced sale or attachment only *"to the extent of the value*

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[41]*Id.*
[42]Manacop vs. CA, *supra*.

allowed by law." Article 157, on the other hand, requires that *"the actual value of the family home shall not exceed, at the time of its constitution, the amount of three hundred thousand pesos in urban areas, and two hundred thousand pesos in rural areas."* Reading these two provisions together, it appears that the intent of the law is to exempt the family home from execution, forced sale or attachment only to the extent of the value provided for in Article 157. It is for this reason that the law authorizes the sale of the family home when a judgment creditor (whose claims is not among those mentioned in Article 155 of the Family Code) has reasonable grounds to believe that the family home *"is actually worth more than the maximum amount fixed in Article 157."*[43]

[146.3] Exception to the Rule

A family home is not exempt from execution, forced sale or attachment in connection with the following claims: (1) for nonpayment of taxes; (2) for debts incurred prior to the constitution of the family home; (3) for debts secured by mortgages on the premises before or after such constitution; and (4) for debts due to laborers, mechanics, architects, builders, materialmen and others who have rendered service or furnished material for the construction of the building.[44]

Art. 158. The family home may be sold, alienated, donated, assigned or encumbered by the owner or owners thereof with the written consent of the person constituting the same, the latter's spouse, and a majority of the beneficiaries of legal age. In case of conflict, the court shall decide. (235a)

COMMENTS:

§ 147. Alienation or Encumbrance of Family Home

The law does not prohibit the alienation or encumbrance of the family home.[45] In fact, the family home is not exempt from execution, forced sale or attachment for "debts secured by mortgages on the premises [of the family home]," whether such debts are secured before or after the constitution of the family home.[46] However, the law requires the

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[43]Art. 160, FC.
[44]Art. 155, FC.
[45]Art. 158, FC.
[46]Art. 157, FC.

written consent of the following persons in the sale, alienation, donation or encumbrance of the family home: (1) the person constituting the family home; (2) the latter's spouse; and (3) majority of the beneficiaries of legal age.[47]

Will the absence of such written consent affect the validity of the alienation or encumbrance? The law is silent as to the effect of alienation or encumbrance of the family home without the written consent of the persons enumerated in Article 158 of the Family Code. Considering, however, the purpose of the law which affords protection to the family home only to the extent of the value allowed under Article 157, it is submitted that the alienation or encumbrance in excess of the value allowed under Article 157 shall be considered valid. After all, this solution is consistent with the well-established principle that the binding force of a contract must be recognized as far as it is legally possible to do so — *quando res non valet ut ago, valeat quantum valere potest*.[48] However, when the family home is part of the conjugal partnership or absolute community property, its alienation or encumbrance during the marriage without the consent of the other spouse shall be void. (See discussions under *supra* §§ 113.3 and 128.]

Art. 159. The family home shall continue despite the death of one or both spouses or of the unmarried head of the family for a period of ten years or for as long as there is a minor beneficiary, and the heirs cannot partition the same unless the court finds compelling reasons therefor. This rule shall apply regardless of whoever owns the property or constituted the family home. (238a)

COMMENTS:

§ 148. Continuance of the Family Home

The present article appears to be in conflict with the provisions of Article 153 which declares that the family home continues to be as such *"so long as any of its beneficiaries actually resides therein."* Under the present article, however, upon the death of the person or persons who

[47]Art. 158, FC.

[48]"When a thing is of no effect as I do it, it shall have effect as far as (or in whatever way) it can." Black's Law Dictionary 1243, 1991, 6th ed.

constituted the family home, it continues to be as such but only *"for a period of ten years or for as long as there is a minor beneficiary."* The present article, therefore, qualifies the rule stated in Article 153 of the Family Code. Reading the two articles together, the following rules shall apply in the event of death of the person or persons who constituted the family home:

(1) The family home continues to be as such for as long as there is a minor beneficiary actually residing therein;

(2) But if there is no minor beneficiary, the family home continues to be as such only for a period of ten years provided that a beneficiary of legal age actually resides therein.

§ 149. Prohibition on Partition

Upon the death of the person or persons who constituted the family home and there are two or more heirs, the whole estate of the decedent (including the family home) is, before its partition, owned in common by such heirs, subject to the payment of the debts of the deceased.[49] As a rule, any one of the co-owners may demand partition at any time.[50] However, so long as the family home continues as such pursuant to the provisions of the present article, the heirs are prohibited from partitioning the family home unless the court finds compelling reason therefore.[51]

Art. 160. When a creditor whose claim is not among those mentioned in Article 155 obtains a judgment in his favor, and he has reasonable grounds to believe that the family home is actually worth more than the maximum amount fixed in Article 157, he may apply to the court which rendered the judgment for an order directing the sale of the property under execution. The court shall so order if it finds that the actual value of the family home exceeds the maximum amount allowed by law as of the time of its constitution. If the increased actual value exceeds the maximum allowed in Article 157 and results from subsequent voluntary improvements introduced by the person or persons constituting the family home, by the owner or owners of the property, or by any of the beneficiaries, the same rule and procedure shall apply.

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[49] Art. 1078, NCC.
[50] Art. 494, NCC.
[51] Art. 159, FC.

At the execution sale, no bid below the value allowed for a family home shall be considered. The proceeds shall be applied first to the amount mentioned in Article 157, and then to the liabilities under the judgment and the costs. The excess, if any, shall be delivered to the judgment debtor. (247a, 248a)

COMMENTS:

§ 150. Execution Sale of Family Home

As earlier stated, the family home enjoys protection only to the extent of the value provided for in Article 157 of the Family Code. In other words, the family home is exempted from execution, forced sale or attachment only up to such extent. Thus, when a creditor whose claims is not among those mentioned in Article 155 obtains a judgment in his favor, and he has reasonable grounds to believe that the family home is actually worth more than the maximum amount fixed in Article 157, he may apply to the court which rendered the judgment for an order directing the execution and sale of the family home.[52] If the court finds that the actual value of the family home exceeds the maximum amount allowed by law, the court shall order the execution and sale of the family home. At the execution sale, the law mandates that "no bid below the value allowed for a family home shall be considered."[53] Since the law affords protection to the family home up the extent of the value allowed in Article 157, the law also directs that, in the distribution of the proceeds of the sale, the amount mentioned in Article 157 shall first be satisfied prior to the satisfaction of the judgment debt and the costs.[54] Any excess shall be delivered to the judgment debtor.[55]

Art. 161. For purposes of availing of the benefits of a family home as provided for in this Chapter, a person may constitute, or be the beneficiary of, only one family home. (n)

Art. 162. The provisions in this Chapter shall also govern existing family residences insofar as said provisions are applicable. (n)

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[52] Art. 160, 1st par., FC.
[53] Art. 160, 2nd par., FC.
[54] *Id.*
[55] *Id.*

COMMENTS:

§ 151. No Retroactive Effect

Under Article 162 of the Family Code, it is provided that "the provisions of this Chapter shall also govern existing family residences insofar as said provisions are applicable." Since under the Family Code, the family home is deemed constituted on a house and lot from the time it is occupied as family residence, the effect of Article 162 is to constitute, by operation of law, all existing family residences at the time of the effectivity of the Family Code on August 3, 1988 into family homes.[56]

However, Articles 152 and 153 of the Family Code do not have a retroactive effect such that all existing family residences are deemed to have been constituted as family homes at the time of their occupation prior to the effectivity of the Family Code and are exempt from execution for the payment of obligations incurred before the effectivity of the Family Code.[57] Article 162 simply means that all existing family residences at the time of the effectivity of the Family Code are considered family homes and are prospectively entitled to the benefits accorded to a family home under the Family Code.[58] Article 162 does not state that the provisions of Chapter 2, Title V have a retroactive effect.[59] In other words, prior to August 3, 1988, the procedure mandated by the Civil Code had to be followed for a family home to be constituted as such.[60]

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[56]Modequillo vs. Breva, *supra*.
[57]Manacop vs. CA, 277 SCRA 57 (1997); citing Modequillo vs. Breva, *supra*.
[58]Modequillo vs. Breva, *supra*.
[59]*Id*.
[60]*Id*.

TITLE VI

PATERNITY AND FILIATION

Chapter 1

Legitimate Children

Art. 163. The filiation of children may be by nature or by adoption. Natural filiation may be legitimate or illegitimate. (n)

Art. 164. Children conceived or born during the marriage of the parents are legitimate.

Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child. (255a, 258a)

Art. 165. Children conceived and born outside a valid marriage are illegitimate, unless otherwise provided in this Code. (n)

COMMENTS:

§ 152. Paternity and Filiation

[152.1] In general
[152.2] Types of filiation

[152.1] In General

Paternity is the civil status of a father in relation to his child. Filiation, on the other hand, is the civil status of a child in relation to his or her parents. In other words, paternity speaks of the father's relation to his child while filiation refers to the child's relation to his or her parents.

Note that the law is concerned with the establishment of paternity only and not maternity. This is because nature always points out the

mother by evident signs, and, whether married or not, she is always certain: *mater simper certa est, etiamsi vulgo conceperit.* There is not the same certainty with regard to the father, and the mother may not know or may feign ignorance as to the paternity.[1]

[152.2] Types of Filiation

The filiation of children may be by nature or by adoption.[2] Natural filiation, which is established by blood relationship, can either be legitimate or illegitimate.[3]

Filiation may likewise be created by a judgment of adoption. A judgment of adoption is a judicial act whereby the same rights and obligations arising out of filiation by blood are established for the adoptive parent and the adopted child. The judgment substitutes filiation by adoption for the child's original filiation, and the child ceases to belong to his or her original family, except that the child will not be able to marry with a member of that original family within the degree prohibited by law.

In some other jurisdiction,[4] there is such a thing as filiation by assisted procreation. A parental project involving assisted procreation exists when a single individual or spouses decide to have a child by using the genetic material of another individual. In this jurisdiction, our law likewise recognizes the filiation resulting from the artificial insemination of the wife with the sperm of a donor (other than the husband)[5] but such filiation is subsumed in our concept of natural filiation since the child born out of such process is considered as the legitimate child of both the husband and the wife, if the requisites laid down by the Code are followed, although the husband is not, in reality, related to the child by blood.

§ 153. Status of Children

On the whole, the status of a marriage determines in large part the filiation of its resultant issue.[6] Thus, a child born within a valid marriage is legitimate. Thus, the Code provides:

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[1]Bouvier's Law Dictionary, Vol. 1, 8th ed., pp. 1219-1220.
[2]Art. 163, FC.
[3]*Id.*
[4]Canada, for example.
[5]See Art. 164, FC.
[6]De Santos vs. Angeles, 251 SCRA 206 (1995).

> "Art. 164. Children conceived or born during the marriage of the parents are legitimate."

Also, children conceived or born in a voidable marriage are likewise considered legitimate since a voidable marriage is valid until it is annulled. On this respect, the Code provides:

> "Art. 54. Children conceived or born before the judgment of annulment or absolute nullity of the marriage under Article 36 has become final and executory shall be considered legitimate. Children conceived or born of the subsequent marriage under Article 53 shall likewise be legitimate."

On the other hand, children conceived and born outside of a valid marriage are, as a rule, considered illegitimate. Hence, children born outside of wedlock and those born out of void marriages are illegitimate. This is clear from the provisions of Article 165 of the Code:

> "Art. 165. Children conceived and born outside a valid marriage are illegitimate, unless otherwise provided in this Code. (n)"

As clearly expressed in article 165, the rule is not absolute. There are two kinds of void marriages which produce legitimate children, as expressly stated in article 54 of the Code. Hence, the following children of void marriages are also considered legitimate: (1) children of marriages which are declared void under article 36; and (2) children of marriages which are declared void under article 53.

If, however, the parents of children born outside of wedlock were, at the time of the child's conception and birth, not legally barred from marrying each other and subsequently do so, the child's filiation improves as he becomes legitimized and the "legitimated" child eventually enjoys all the privileges and rights associated with legitimacy. This is clear in the provisions of article 177 of the Code:

> "Art. 177. Only children conceived and born outside of wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other may be legitimated. (269a)"

§ 154. Children Conceived of Artificial Insemination

As discussed above, children conceived or born inside a perfectly valid marriage or, at least, a voidable marriage, are legitimate.[7]

Likewise considered legitimate are children conceived of artificial insemination of the wife with the sperm, either of the husband or donor, or both, provided that both the husband and the wife authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child,[8] which instrument is required to be recorded in the civil registry together with the birth certificate of the child.

Note that the child conceived as a result of artificial insemination is considered a legitimate child of both the husband and the wife, even if the husband is not related by blood to the child (if the donor of the sperm used in the insemination is not the husband). So long as the requirements of article 164 are met, the law deems the child to be filiated, by nature, to both the husband and the wife, and not to the biological father. If the husband and the wife indeed authorized or ratified the insemination using the sperm other than that of the husband, the husband may not impugned the child's legitimacy by claiming that he could not have been the father of the child due to biological or other scientific reasons. This is clearly expressed in article 166, No. (1), sub-paragraph (c).

What the law allows is the artificial insemination of the wife with the sperm of the husband or that of a donor or both. As such, the law does not recognize as valid the use of a surrogate mother, even if the sperm is that of the husband. Our law does not recognize the validity of a surrogate mother contract, which is defined as any agreement in which a woman agrees to conceive or carry a child for another individual or a couple, either free of charge or for a consideration. In this jurisdiction, such kind of agreement is contrary to law, morals and public policy.

If a child is conceived by a surrogate mother through the use of the sperm of the husband, the child is not to be considered legitimate child of the husband and the wife, even if both had authorized or ratified the

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[7]Arts. 164 and 54, FC.
[8]Art. 164, 2nd par., FC.

surrogate-mother contract, unless the child is adopted by the spouses. In other words, while the child may be able to establish his natural filiation with the husband, albeit illegitimate, the child is not filiated or related to the wife.

Art. 166. Legitimacy of a child may be impugned only on the following grounds:

(1) That it was physically impossible for the husband to have sexual intercourse with his wife within the first 120 days of the 300 days which immediately preceded the birth of the child because of:

(a) the physical incapacity of the husband to have sexual intercourse with his wife;

(b) the fact that the husband and wife were living separately in such a way that sexual intercourse was not possible; or

(c) serious illness of the husband, which absolutely prevented sexual intercourse.

(2) That it is proved that for biological or other scientific reasons, the child could not have been that of the husband, except in the instance provided in the second paragraph of Article 164; or

(3) That in case of children conceived through artificial insemination, the written authorization or ratification of either parent was obtained through mistake, fraud, violence, intimidation, or undue influence. (255a)

Art. 167. The child shall be considered legitimate although the mother may have declared against its legitimacy or may have been sentenced as an adulteress. (256a)

COMMENTS:

§ 155. Presumption of Legitimacy

[155.1] Statement of the presumption
[155.2] How to rebut presumption
[155.3] Who may impugn child's legitimacy
[155.4] Illustration of how presumption operates
[155.5] Presumption applies even when mother declares against child's legitimacy
[155.6] Grounds to impugn child's legitimacy
  [155.6.1] Physical impossibility to have sexual intercourse
  [155.6.2] Biological or other scientific reasons
  [155.6.3] In case of artificial insemination

[155.1] Statement of the Presumption

Under the Family Code, a child conceived or born during a valid marriage is presumed to be legitimate.[9] In the words of the Court in **Tison vs. Court of Appeals**,[10] there is perhaps no presumption of the law more firmly established and founded on sounder morality and more convincing reason than the presumption that children born in wedlock are legitimate. But such presumption of legitimacy of children does not only flow out from a declaration contained in the statute but is based on the broad principles of natural justice and the supposed virtue of the mother. The presumption is grounded in a policy to protect innocent offspring from the odium of illegitimacy.[11]

[155.2] How to Rebut Presumption

The presumption of legitimacy of the child, however, is not conclusive and consequently, may be overthrown by evidence to the contrary.[12] The grounds for impugning the legitimacy of a child conceived or born during a valid marriage are enumerated in article 166 of the Code, to wit:

(1) That it was physically impossible for the husband to have sexual intercourse with his wife within the first 120 days of the 300 days which immediately preceded the birth of the child because of:

(a) the physical incapacity of the husband to have sexual intercourse with his wife;

(b) the fact that the husband and wife were living separately in such a way that sexual intercourse was not possible; or

(c) serious illness of the husband, which absolutely prevented sexual intercourse.

(2) That it is proved that for biological or other scientific reasons, the child could not have been that of the husband, except in the instance provided in the second paragraph of Article 164; or

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[9]Art. 164, 1st par., FC; see Liyao, Jr. vs. Tanhoti-Liyao, 378 SCRA 563 (2002).
[10]276 SCRA 582 (1997).
[11]Liyao, Jr. vs. Tanhoti-Liyao, *supra*.
[12]*Id*.

(3) That in case of children conceived through artificial insemination, the written authorization or ratification of either parent was obtained through mistake, fraud, violence, intimidation, or undue influence.

[155.3] Who May Impugn Child's Legitimacy

As a rule, impugning the legitimacy of the child is a strictly personal right of the husband for the simple reason that he is the one directly confronted with the scandal and ridicule which the infidelity of the wife produces and he should be the one to decide whether to conceal that infidelity or expose it in view of the moral and economic interest involved.[13] It is only in exceptional cases that his heirs are allowed to contest such legitimacy.[14] Under article 171 of the Code, the heirs may, exceptionally, be allowed to impugn the child's legitimacy in the following instances: (1) if the husband should die before the expiration of the period fixed for bringing his action; (2) if the husband should die after the filing of the complaint without having desisted therefrom; or (3) if the child was born after the death of the husband. Outside of these cases, none — even the husband's heirs — can impugn legitimacy; that would amount to an insult to his memory.[15]

In other words, the child himself cannot choose his own filiation. If the husband, presumed to be the father does not impugn the legitimacy of the child, then the status of the child is fixed, and the latter cannot choose to be the child of his mother's alleged paramour.[16] On the other hand, if the presumption of legitimacy is overthrown, the child cannot elect the paternity of the husband who successfully defeated the presumption.[17]

[155.4] Illustration of How Presumption Operates

Liyao, Jr. vs. Tanhoti-Liyao
378 SCRA 563 (2002)

FACTS: Corazon Garcia had been living separately with her husband, Ramon Yulo, at the time that the former gave birth to William Liyao, Jr. on June

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[13]*Id.*, citing I Tolentino, Civil Code 537 (1990).
[14]*Id.*
[15]*Id.*
[16]*Id.*
[17]*Id.*

9, 1975. Prior to William Liyao, Jr.'s birth, Corazon had been cohabiting with William Liyao from 1965 up to the latter's death on December 2, 1975. While he was alive, William Liyao allegedly introduced the child William Liyao, Jr. as his son.

On November 29,1976, William Liyao, Jr., represented by his mother Corazon G. Garcia, filed Civil Case No. 24943 before the RTC of Pasig, Branch 167, which is an action for compulsory recognition as the illegitimate (spurious) child of the late William Liyao against the surviving wife and children of the late William Liyao. The complaint was later amended to include the allegation that William Liyao, Jr., "*was in continuous possession and enjoyment of the status of the child of said William Liyao*," having been "*recognized and acknowledged as such child by the decedent during his lifetime.*"

In ruling for William Liyao, Jr., the trial court said it was convinced by preponderance of evidence that the deceased William Liyao sired William Liyao, Jr. since the latter was conceived at the time when Corazon Garcia cohabited with the deceased. The Court of Appeals, however, reversed the ruling of the trial court saying that the law favors the legitimacy rather than the illegitimacy of the child and "the presumption of legitimacy is thwarted only on ethnic ground and by proof that marital intimacy between husband and wife was physically impossible. In effect, the Court of Appeals considered William Liyao, Jr. as the legitimate child of the spouses Corazon Garcia and Ramon Yulo since the child was born during their marriage.

In affirming the decision of the Court of Appeals, the Supreme Court explained —

> "Petitioner insists that his mother, Corazon Garcia, had been living separately for ten (10) years from her husband, Ramon Yulo, at the time that she cohabited with the late William Liyao and it was physically impossible for her to have sexual relations with Ramon Yulo when petitioner was conceived and born. To bolster his claim, petitioner presented a document entitled, "Contract of Separation," executed and signed by Ramon Yulo indicating a waiver of rights to any and all claims on any property that Corazon Garcia might acquire in the future.
>
> The fact that Corazon Garcia had been living separately from her husband, Ramon Yulo, at the time petitioner was conceived and born is of no moment. While physical impossibility for the husband to have sexual intercourse with his wife is one of the grounds for impugning the legitimacy of the child, it bears emphasis that the grounds for impugning the legitimacy of the child mentioned in Article 255 of the Civil Code may only be invoked by the husband,

or in proper cases, his heirs under the conditions set forth under Article 262 of the Civil Code. Impugning the legitimacy of the child is a strictly personal right of the husband, or in exceptional cases, his heirs for the simple reason that he is the one directly confronted with the scandal and ridicule which the infidelity of his wife produces and he should be the one to decide whether to conceal that infidelity or expose it in view of the moral and economic interest involved. It is only in exceptional cases that his heirs are allowed to contest such legitimacy. Outside of these cases, none — even his heirs — can impugn legitimacy; that would amount to an insult to his memory.

It is therefor clear that the present petition initiated by Corazon G. Garcia as guardian *ad litem* of the then minor, herein petitioner, to compel recognition by respondents of petitioner William Liyao, Jr, as the illegitimate son of the late William Liyao cannot prosper. It is settled that a child born within a valid marriage is presumed legitimate even though the mother may have declared against its legitimacy or may have been sentenced as an adulteress. We cannot allow petitioner to maintain his present petition and subvert the clear mandate of the law that only the husband, or in exceptional circumstances, his heirs, could impugn the legitimacy of a child born in a valid and subsisting marriage. The child himself cannot choose his own filiation. If the husband, presumed to be the father does not impugn the legitimacy of the child, then the status of the child is fixed, and the latter cannot choose to be the child of his mother's alleged paramour. On the other hand, if the presumption of legitimacy is overthrown, the child cannot elect the paternity of the husband who successfully defeated the presumption.

De Jesus vs. Estate of Decedent Juan Gamboa Dizon
366 SCRA 499 (2001)

FACTS: Danilo B. de Jesus and Carolina Aves de Jesus got married on 23 August 1964. It was during this marriage that Jacqueline A. de Jesus and Jinkie Christie A. de Jesus, herein petitioners, were born, the former on 01 March 1979 and the latter on 06 July 1982. In a notarized document, dated 07 June 1991, Juan G. Dizon acknowledged Jacqueline and Jinkie de Jesus as being his own illegitimate children by Carolina Aves de Jesus. Juan G. Dizon died intestate on 12 March 1992, leaving behind considerable assets consisting of shares of stock in various corporations and some real property. It was on the strength of his notarized acknowledgment that petitioners filed a complaint on

01 July 1993 for "Partition with Inventory and Accounting" of the Dizon estate with the Regional Trial Court, Branch 88 of Quezon City.

Respondents, the surviving spouse and legitimate children of the decedent Juan G. Dizon, including the corporations of which the deceased was a stockholder, sought the dismissal of the case, arguing that the complaint, even while denominated as being one for partition, would nevertheless call for altering the status of petitioners from being the legitimate children of the spouses Danilo de Jesus and Carolina de Jesus to instead be the illegitimate children of Carolina de Jesus and deceased Juan Dizon. The trial court denied, due to lack of merit, the motion to dismiss and the subsequent motion for reconsideration on, respectively, 13 September 1993 and 15 February 1994. Respondents assailed the denial of said motions before the Court of Appeals.

On 20 May 1994, the appellate court upheld the decision of the lower court and ordered the case to be remanded to the trial court for further proceedings. It ruled that the veracity of the conflicting assertions should be threshed out at the trial considering that the birth certificates presented by respondents appeared to have effectively contradicted petitioners' allegation of illegitimacy. On 03 January 2000, long after submitting their answer, pre-trial brief and several other motions, respondents filed an omnibus motion, again praying for the dismissal of the complaint on the ground that the action instituted was, in fact, made to compel the recognition of petitioners as being the illegitimate children of decedent Juan G. Dizon and that the partition sought was merely an ulterior relief once petitioners would have been able to establish their status as such heirs. It was contended, in fine, that an action for partition was not an appropriate forum to likewise ascertain the question of paternity and filiation, an issue that could only be taken up in an independent suit or proceeding.

Finding credence in the argument of respondents, the trial court, ultimately, dismissed the complaint of petitioners for lack of cause of action and for being improper. It decreed that the declaration of heirship could only be made in a special proceeding inasmuch as petitioners were seeking the establishment of a status or right. Petitioners assail the foregoing order of the trial court. Basically, petitioners maintain that their recognition as being illegitimate children of the decedent, embodied in an authentic writing, is in itself sufficient to establish their status as such and does not require a separate action for judicial approval following the doctrine enunciated in *Divinagracia vs. Bellosillo.*

In ruling for the respondents, the Supreme Court explained —

> "Succinctly, in an attempt to establish their illegitimate filiation to the late Juan G. Dizon, petitioners, in effect, would impugn their legitimate status as being children of Danilo de Jesus and Carolina Aves de Jesus. This step cannot be aptly done because the law

itself establishes the legitimacy of children conceived or born during the marriage of the parents. The presumption of legitimacy fixes a civil status for the child born in wedlock, and only the father, or in exceptional instances the latter's heirs, can contest in an appropriate action the legitimacy of a child born to his wife. Thus, it is only when the legitimacy of a child has been successfully impugned that the paternity of the husband can be rejected.

Respondents correctly argued that petitioners hardly could find succor in *Divinagracia*. In said case, the Supreme Court remanded to the trial court for further proceedings the action for partition filed by an illegitimate child who had claimed to be an acknowledged spurious child by virtue of a private document, signed by the acknowledging parent, evidencing such recognition. It was not a case of legitimate children asserting to be somebody else's illegitimate children. Petitioners totally ignored the fact that it was not for them, given the attendant circumstances particularly, to declare that they could not have been the legitimate children, clearly opposed to the entries in their respective birth certificates, of Danilo and Carolina de Jesus.

The rule that the written acknowledgment made by the deceased Juan G. Dizon establishes petitioners' alleged illegitimate filiation to the decedent cannot be validly invoked to be of any relevance in this instance. This issue, *i.e.*, whether petitioners are indeed the acknowledged illegitimate offsprings of the decedent, cannot be aptly adjudicated without an action having been first been instituted to impugn their legitimacy as being the children of Danilo B. de Jesus and Carolina Aves de Jesus born in lawful wedlock. Jurisprudence is strongly settled that the paramount declaration of legitimacy by law cannot be attacked collaterally, one that can only be repudiated or contested in a direct suit specifically brought for that purpose. Indeed, a child so born in such wedlock shall be considered legitimate although the mother may have declared against its legitimacy or may have been sentenced as having been an adulteress."

[155.5] Presumption Applies Even When Mother Declares Against Child's Legitimacy

Article 167 of the Code, which provides that the child is presumed legitimate although the mother may have declared against its legitimacy or may have been sentenced as an adulteress, has been adopted for two

solid reasons. *First*, in a fit of anger, or to arouse jealousy in the husband, the wife may have made this declaration.[18] *Second*, the article is established as a guaranty in favor of the children whose condition should not be under the mercy of the passions of their parents. The husband whose honor if offended, that is, being aware of his wife's adultery, may obtain from the guilty spouse by means of coercion, a confession against the legitimacy of the child which may really be only a confession of her guilt. Or the wife, out of vengeance and spite, may declare the child as not her husband's although the statement be false. But there is another reason which is more powerful, demanding the exclusion of proof of confession or adultery, and it is, that at the moment of conception, it cannot be determined when a woman cohabits during the same period with two men, by whom the child was begotten, it being possible that it be the husband himself.[19]

Thus, in the case of **Liyao, Jr. vs. Tanhoti-Liyao**,[20] the child was still regarded as the legitimate child of Corazon Garcia and Ramon Yulo even if the mother made a declaration that the child's father was the late William Liyao.

Article 167 covers a situation where the wife denies the husband's paternity of a child conceived or born during their marriage. Thus, when the wife says that a child is her child but not of her husband, such declaration does not defeat the presumption of the child's legitimacy. This is the situation contemplated by article 167. It does not, however, contemplate a situation where a child is alleged not to be the child of nature or biological child of a certain couple. Thus, when the mother says that the child is not of the couple, such declaration is not within the ambit of the prohibition under article 167, since in this case the wife is not merely asserting that the child is not legitimate, but that he or she is not their child at all.

[155.6] Grounds to Impugn Child's Legitimacy

The presumption of legitimacy of the child, however, is not conclusive and consequently, may be overthrown by evidence to the con-

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[18]Macadangdang vs. CA, 100 SCRA 73 (1980), citing Power vs. State, 95 N., 660.
[19]*Id.*, citing Manresa, Vol. 1, pp. 503-504.
[20]*Supra.*

trary.[21] The grounds to impugn the child's legitimacy are enumerated in article 166 of the Code.

[155.6.1] Physical Impossibility to Have Sexual Intercourse

The presumption of legitimacy is based on the assumption that there is sexual union in marriage, particularly during the period of conception. Hence, proof of the physical impossibility of such sexual union prevents the application of the presumption.[22] The modern rule is that, in order to overthrow the presumption of legitimacy, it must be shown *beyond reasonable doubt* that there was no access as could have enabled the husband to be the father of the child. Sexual intercourse is to be presumed where personal access is not disproved, unless such presumption is rebutted by evidence to the contrary; where sexual intercourse is presumed or proved, the husband must be taken to be the father of the child.[23]

The first 120 days of the 300 days immediately preceding the birth of the child is important for the purpose of impugning the child's legitimacy because it is within said period that the law presumes that conception takes place. So, we may refer to this period as the period of conception. Hence, if sexual intercourse or access is disproved within this period, the presumption of legitimacy is effectively overthrown. It is essential, however, that there must be physical impossibility of sexual intercourse or access by the husband to the wife during the period of conception, otherwise, the presumption of legitimacy may not be defeated. To prove physical impossibility of sexual intercourse within the period of conception, the husband must effectively show that:

(1) he was physically incapacitated to have sexual intercourse with the wife during the period of conception; or

(2) he was living separately with his wife during the period of conception in such a way that sexual intercourse was not possible; or

(3) he had serious illness during the period of conception which absolutely prevented sexual intercourse with the wife.

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[21] *Id.*
[22] Macadangdang vs. CA, 100 SCRA 73 (1980); citing 1 Tolentino, Civil Code, p. 513.
[23] *Id.*

(a) Physical Incapacity

When article 166 speaks of *"physical incapacity of the husband to have sexual intercourse with the wife,"* the law is referring to impotence, which imports a total want of power of copulation and, as a necessary incident thereto, the inability to procreate.[24] As a result of which, sexual intercourse or access is physically impossible. In respect of the impotency of the husband of the mother of a child, to overcome the presumption of legitimacy on conception or birth in wedlock or to show illegitimacy, it has been held or recognized that the evidence or proof must be clear or satisfactory: clear, satisfactory and convincing, irresistible or positive.[25] Note, however, that it is only impotency which the law considers as sufficient ground to impugn the child's legitimacy and not sterility, the latter referring to a mere inability to procreate. In explaining why sterility is not a ground to impugn the child's legitimacy, Senator Tolentino wrote, as follows:

> The law may theoretically seem illogical in this respect, but it certainly is practical. Scientists have shown that pregnancy is not likely to occur when the spermatozoa count of the male is less than 60 million per cubic centimeter, because the normal count is 100 to 150 million per cc. In other words, a man with only 30 million spermatozoa per cc. would medically be sterile. And yet, there can be no absolute guarantee that none of those 30 million spermatozoa will be able to reach the ovum; it requires only one spermatozoon to impregnate the ovum. There can be no absolute sterility, except in the absence of testicles or complete absence of spermatozoa in the semen due to atrophy or disease of the testicles or blockade of the vas deferens, which is the tube through which the semen is ejected. Once there is sexual intercourse, therefore, there will always be the possibility — although perhaps not always the probability — of pregnancy. It is for this reason that legally only impossibility of sexual union is admitted to defeat the presumption of legitimacy.[26]

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[24]N.Y. — Schroter vs. Schroter, 106 N.Y.S. 22, 56 Misc. 69.
[25]Macadangdang vs. CA, *supra*.
[26]1 Tolentino, Civil Code, 1990 ed., p. 526.

While sterility, by itself, is not a sufficient ground to overthrow the presumption of legitimacy, the sterile husband, however, may still successfully impugn the child's legitimacy by resorting to biological or other scientific reasons.[27]

(b) Living Separately

The separation between the spouses must be such as to make sexual access impossible. This may take place when they reside in different countries or provinces, and they have never been together during the period of conception.[28] Or, the husband may be in prison during the period of conception, unless it appears that sexual union took place through corrupt violation of or allowed by prison regulations.[29] Thus, in **Macadangdang vs. Court of Appeals**,[30] where the husband and the wife continued to live in the same province after their alleged separation, the Court did not discount the possibility of physical access to each other considering their proximity to each other and considering further that the wife still visited and recuperated in her mother's house where her spouse resided with their children.

(c) Serious Illness of Husband

The illness of the husband must be of such a nature as to exclude the possibility of his having sexual intercourse with his wife; such as, when because of an injury, he was placed in a plaster cast, and it was inconceivable to have sexual intercourse without the most severe pain,[31] or the illness produced temporary or permanent impotence, making copulation impossible.[32] Thus, in the case of **Andal vs. Macaraig**,[33] it was held that just because tuberculosis is advanced in a man does not necessarily mean that he is incapable of sexual intercourse. There are cases where persons suffering from tuberculosis can do the carnal act even in the most crucial stage of health because then they seemed to be more inclined to sexual intercourse.[34]

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[27]See Art. 166, No. (2), FC.

[28]Macadangdang vs. CA, *supra*, citing Estate of Benito Marcelo, 60 Phil. 442.

[29]*Id.*, citing 1 Manresa 492-500.

[30]*Supra*.

[31]*Id.*, citing Tolentino and Commissioner vs. Hotel 256 App. Div. 352, 9 N.Y. Supp. P. 515.

[32]*Id.*, citing Tolentino and O. Bonet 352.

[33]89 Phil. 165

[34]Cited in Macadangdang vs. CA, *supra*.

[155.6.2] Biological or Other Scientific Reasons

In **Tijing vs. Court of Appeals**,[35] the Supreme Court said that courts should apply the results of science when competently obtained in aid of situations presented, since to reject said result is to deny progress. Note that in issues relating to paternity and filiation, our courts are indeed mandated to apply the results of science in proper cases, since it is one of the remedies made available to a husband in impugning the legitimacy of a child.[36]

Obviously, if the husband authorized or ratified in writing the artificial insemination of his wife with the sperm of a donor, he may not later on be allowed to impugn the child's legitimacy based on biological or scientific grounds.[37]

(a) Blood Testing

There is now almost universal scientific agreement that blood grouping tests are conclusive on non-paternity, although inconclusive on paternity.[38] A blood test eliminates all possibility that the putative father is the father of a child, if none of the putative father's phenotype(s) are present in the child's blood type. While the converse does not hold true (*i.e.*, that the presence of identical phenotypes in both individuals establishes paternity), the absence of the former's phenotype in the child's would have made his paternity biologically untenable.[39]

In **Co Tao vs. Court of Appeals**,[40] the result of the blood grouping test showed that the putative father was a "possible father" of the child. Paternity was imputed to the putative father after the possibility of paternity was proven on presentation during trial of facts and circumstances other than the results of the blood grouping test.

In **Jao vs. Court of Appeals**,[41] the child, the mother, and the putative father agreed to submit themselves to a blood grouping test. The National Bureau of Investigation conducted the test, which indicated

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[35]354 SCRA 17 (2001).
[36]See Art. 166, No. (1) (c), FC.
[37]See discussions under *supra* § 154.
[38]Jao vs. CA, 152 SCRA 359 (1987).
[39]People vs. Cartuano, Jr., 255 SCRA 403 (1996).
[40]101 Phil. 188 (1957).
[41]*Supra*.

that the child could not have been the possible offspring of the mother and the putative father. The Supreme Court held that the result of the blood grouping test was conclusive on the non-paternity of the putative father.

(b) DNA Testing

DNA (deoxyribonucleic acid) refers to the chain of molecules found in every cell of the body except in red blood cells, which transmit hereditary characteristics among individuals. In DNA paternity testing, the DNA profiles of the mother and the child are obtained to determine which half of the child's DNA was inherited from the mother. The other half is inherited from the father. If the man does not have the DNA types in his profiles that match the paternal types in the child, he is excluded. If he has, he is not excluded as the father.

In **Lim vs. Court of Appeals**,[42] the Court commented, in an *obiter dictum*, that a party could not establish paternity by means of DNA testing considering the novelty of the technique and the lack of facilities in the country. Four years after, the Court in **Tijing vs. Court of Appeals**,[43] acknowledged the strong weight of DNA testing and confirmed that the country has the facility and expertise in using DNA test for identification and parentage testing. The Court declared —

> "Parentage will still be resolved using conventional methods unless we adopt the modern and scientific ways available. Fortunately, we have now the facility and expertise in using DNA test for identification and parentage testing. The University of the Philippines Natural Science Research Institute (UP-NSRI) DNA Analysis Laboratory has now the capability to conduct DNA typing using short tandem repeat (STR) analysis. The analysis is based on the fact that the DNA of a child/person has two (2) copies, one copy from the mother and the other from the father. The DNA from the mother, the alleged father and child are analyzed to establish parentage. Of course, being a novel scientific technique, the use of DNA test as evidence is still open to challenge. Eventually, as the

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[42]270 SCRA 1 (1997).
[43]354 SCRA 17 (2001).

appropriate case comes, courts should not hesitate to rule on the admissibility of DNA evidence. For it was said, that courts should apply the results of science when competently obtained in aid of situations presented, since to reject said result is to deny progress. Though it is not necessary in this case to resort to DNA testing, in future it would be useful to all concerned in the prompt resolution of parentage and identity issues."

Resort to DNA testing is likewise acknowledged in **Tecson vs. Commission on Elections**,[44] where the Court held that "in case proof of filiation or paternity would be unlikely to satisfactorily establish or would be difficult to obtain, DNA testing, which examines genetic codes obtained from body cells of the illegitimate child and any physical residue of the long dead parent could be resorted to."

In the recent case of **Herrera vs. Alba**,[45] when the putative father was directed by the trial court in a paternity case to undergo DNA paternity testing, he questioned said order on the following grounds: (1) that it violates his right against self-incrimination, and (2) that DNA paternity testing is not a valid probative tool in this jurisdiction to determine filiation. On the issue of self-incrimination, the Court held that the right against self-incrimination is applicable only to testimonial evidence. On the issue of admissibility of DNA test to prove paternity, the Court held that our Rules on Evidence does not pose any legal obstacle to the admissibility of DNA analysis as evidence. However, the Court cautioned the trial courts in giving credence to DNA analysis as evidence, to wit:

"Despite our relatively liberal rules on admissibility, trial courts should be cautious in giving credence to DNA analysis as evidence. We reiterate our statement in *Vallejo*:

In assessing the probative value of DNA evidence, therefore, courts should consider, among other things, the following data: how the samples were collected, how they were handled, the possibility of contamination of the samples, the procedure followed in analyzing the samples, whether the

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[44]424 SCRA 277, 345.
[45]460 SCRA 197, June 15, 2005. See also Agustin vs. CA, 460 SCRA 315 (2005).

proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the tests.

We also repeat the trial court's explanation of DNA analysis used in paternity cases:

In [a] paternity test, the forensic scientist looks at a number of these variable regions in an individual to produce a DNA profile. Comparing next the DNA profiles of the mother and child, it is possible to determine which half of the child's DNA was inherited from the mother. The other half must have been inherited from the biological father. The alleged father's profile is then examined to ascertain whether he has the DNA types in his profile, which match the paternal types in the child. If the man's DNA types do not match that of the child, the man is excluded as the father. If the DNA types match, then he is not excluded as the father.

It is not enough to state that the child's DNA profile matches that of the putative father. A complete match between the DNA profile of the child and the DNA profile of the putative father does not necessarily establish paternity. For this reason, following the highest standard adopted in an American jurisdiction, trial courts should require at least 99.9% as a minimum value of the Probability of Paternity ("W") prior to a paternity inclusion. W is a numerical estimate for the likelihood of paternity of a putative father compared to the probability of a random match of two unrelated individuals. An appropriate reference population database, such as the Philippine population database, is required to compute for W. Due to the probabilistic nature of paternity inclusions, W will never equal to 100%. However, the accuracy of W estimates is higher when the putative father, mother and child are subjected to DNA analysis compared to those conducted between the putative father and child alone.

DNA analysis that excludes the putative father from paternity should be conclusive proof of non-paternity. If the value of W is less than 99.9%, the results of the DNA analysis should be considered as corroborative evidence. If the value

of W is 99.9% or higher, then there is refutable presumption of paternity. This refutable presumption of paternity should be subjected to the *Vallejo* standards."

[155.6.3] In Case of Artificial Insemination

In case of children conceived through artificial insemination,[46] the husband is authorized to impugn the legitimacy of the child if the written authorization or ratification of "either parent" was obtained through mistake, fraud, violence, intimidation, or undue influence.[47] Note that even if it was the wife whose written authorization or ratification was obtained through mistake, fraud, violence, intimidation, or undue influence, she has no right to impugn the legitimacy of the child. In such a situation, the proper party to impugn the child's legitimacy is still the husband since the right is strictly personal to him, or in exceptional cases, the right may be exercised by his heirs.[48]

It is believed, however, that when the sperm used in the artificial insemination of the wife is that of the husband, he should not be allowed to impugn the child's legitimacy even if his written authorization or ratification was obtained through mistake, fraud, violence, intimidation, or undue influence. In such a situation, the husband has no reason to complain since the child is really his. After all, the law is not willing that the child be declared illegitimate to suit the whims and purposes of either parent.[49] It is thus submitted that paragraph number 3 of article 166 should refer only to situations where the sperm of a donor is used in the artificial insemination of the wife.

Art. 168. If the marriage is terminated and the mother contracted another marriage within three hundred days after such termination of the former marriage, these rules shall govern in the absence of proof to the contrary:

(1) A child born before one hundred eighty days after the solemnization of the subsequent marriage is considered to have been conceived during the former marriage, provided it be born within three hundred days after the termination of the former marriage;

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[46]See discussion under *supra* § 154.
[47]Art. 166, No. (3), FC.
[48]See discussions under *supra* § 155.3.
[49]Macadangdang vs. CA, *supra*.

(2) A child born after one hundred eighty days following the celebration of the subsequent marriage is considered to have been conceived during such marriage, even though it be born within the three hundred days after the termination of the former marriage. (259a)

Art. 169. The legitimacy or illegitimacy of a child born after three hundred days following the termination of the marriage shall be proved by whoever alleges such legitimacy or illegitimacy. (261a)

COMMENTS:

§ 156. Articles 168 and 169

[156.1] Applicability of Article 168
[156.2] Applicability of Article 169

[156.1] Applicability of Article 168

Article 168 applies to a situation where a previous marriage has been terminated for whatever reason, *i.e.* by reason of annulment, declaration of nullity of marriage or death of the husband, and the woman contracts a subsequent marriage within three hundred (300) days after such termination of the former marriage and later gives birth to a child within such period. In such a situation, a problem may arise as to which marriage the child belongs. In order to solve this problematic situation, article 168 of the Code provides for these presumptions:

(1) The child is presumed to have been conceived during the former marriage if it is born before 180 days after the solemnization of the subsequent marriage, provided it be born within 300 days after the termination of the former marriage.

(2) The child is presumed to have been conceived during the subsequent marriage if it is born after 180 days after the solemnization of the subsequent marriage, even though it be born within 300 days after the termination of the former marriage.

Note that the presumption created under this article may be rebutted by proof to the contrary. This is clearly expressed in the article. In other words, the presumption under this article applies only in the absence of proof to the contrary.

Further, the article merely establishes presumptions as to which marriage the child belongs and does not provide for presumptions of

legitimacy of the child concerned. The status of the child, whether it is legitimate or illegitimate, is a different matter which must be resolved by applying the rules earlier discussed.

[156.2] Applicability of Article 169

The rule stated in article 169 applies to a situation where a marriage has been terminated and the woman gave birth to a child after 300 days following the termination of the marriage. In this article, the woman does not contract a subsequent marriage within 300 days after the termination of the marriage. In this situation, it may be asked, what is the status of the child?

A cursory reading of the law reveals the intention of not providing for any presumption either of legitimacy or illegitimacy. In other words, the child born under this situation is neither presumed to be legitimate nor illegitimate. The law simply leaves the burden of proof to whoever may allege such legitimacy or illegitimacy. Senator Tolentino did not agree with this formula. He commented:

> If nobody asserts the legitimacy or illegitimacy of a child born after 300 days following the termination of the marriage, what status does it have? We believe that the child should be considered illegitimate child of the mother, unless she or the child proves legitimacy. This was the rule under Article III of the Spanish Civil Code, which seems more positive. It may have been suppressed by the Civil Code, and substituted by Article 261, which is reproduced by the present article, but we believe it can be the only solution. We cannot presume legitimacy, because the birth was beyond the period of gestation (300 days) of a child conceived during the marriage. The presumption of illegitimacy, on the other hand, runs counter to the policy of the law to lean in favor of legitimacy. But there can be no person without status. This is the anomalous situation that the Civil Code and the present article have created. However, we must have some positive rule as a solution, and we submit that presuming illegitimacy is realistic, and will compel the mother or the child to establish a better status.[50]

[50] 1 Tolentino, Civil Code, 1990 ed., pp. 534-535.

Art. 170. The action to impugn the legitimacy of the child shall be brought within one year from the knowledge of the birth or its recording in the civil register, if the husband or, in a proper case, any of his heirs, should reside in the city or municipality where the birth took place or was recorded.

If the husband or, in his default, all of his heirs do not reside at the place of birth as defined in the first paragraph or where it was recorded, the period shall be two years if they should reside in the Philippines; and three years if abroad. If the birth of the child has been concealed from or was unknown to the husband or his heirs, the period shall be counted from the discovery or knowledge of the birth of the child or of the fact of registration of said birth, whichever is earlier. (263a)

Art. 171. The heirs of the husband may impugn the filiation of the child within the period prescribed in the preceding article only in the following cases:

(1) If the husband should die before the expiration of the period fixed for bringing his action;

(2) If he should die after the filing of the complaint, without having desisted therefrom; or

(3) If the child was born after the death of the husband. (262a)

COMMENTS:

§ 157. Action to Impugn Legitimacy

[157.1] Not subject to collateral attack
[157.2] Proper party to impugn legitimacy
[157.3] Prescriptive period for filing action
[157.4] Applicability of Articles 170 and 171 of Family Code

[157.1] Not Subject to Collateral Attack

Well-settled is the rule that the issue of legitimacy cannot be attacked collaterally.[51] The rationale for this rule has been explained in this wise:

> "The presumption of legitimacy in the Family Code x x x actually fixes a civil status for the child born in wedlock, and that civil status cannot be attacked collaterally. The legitimacy of the child can be impugned only in a direct action

[51]Tison vs. CA, 276 SCRA 582 (1997).

brought for that purpose, by the proper parties, and within the period limited by law.

The legitimacy of the child cannot be contested by way of defense or as a collateral issue in another action for a different purpose. The necessity of an independent action directly impugning the legitimacy is more clearly expressed in the Mexican Code (Article 335) which provides: 'The contest of the legitimacy of a child by the husband or his heirs must be made by proper complaint before the competent court; any contest made in any other way is void.' This principle applies under our Family Code. Articles 170 and 171 of the code confirm this view, because they refer to "the action to impugn the legitimacy." This action can be brought only by the husband or his heirs and within the periods fixed in the present articles.

Upon the expiration of the periods provided in Article 170, the action to impugn the legitimacy of a child can no longer be brought. The status conferred by the presumption, therefore, becomes fixed, and can no longer be questioned. The obvious intention of the law is to prevent the status of a child born in wedlock from being in a state of uncertainty for a long time. It also aims to force early action to settle any doubt as to the paternity of such child, so that the evidence material to the matter, which must necessarily be facts occurring during the period of the conception of the child, may still be easily available.

x x x

Only the husband can contest the legitimacy of a child born to his wife. He is the one directly confronted with the scandal and ridicule which the infidelity of his wife produces; and he should decide whether to conceal that infidelity or expose it, in view of the moral and economic interest involved. It is only in exceptional cases that his heirs are allowed to contest such legitimacy. Outside of these cases, none — even his heirs — can impugn legitimacy; that would amount to an insult to his memory."[52]

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[52]Tison vs. CA, *supra*, citing Tolentino, A., Civil Code of the Philippines, Commentaries and Jurisprudence, Vol. 1, 1990 ed., 535-537.

Thus, in **Tison vs. Court of Appeals**, the Court ruled that the issue of legitimacy cannot be properly controverted in an action for reconveyance. In the same way, the action for "partition with inventory and accounting" of the estate of the deceased Juan G. Dizon filed by the petitioners Jacqueline A. de Jesus and Jinkie Christie A. de Jesus, on the strength of the notarized acknowledgment of paternity executed by Juan G. Dizon acknowledging petitioners as his children, was considered as a collateral attack on the petitioners' legitimacy since they are considered legitimate children of the spouses Danilo B. de Jesus and Carolina Aves de Jesus.[53]

In **Liyao, Jr. vs. Tanhoti-Liyao**,[54] the two children of Ramon Yulo and Corazon Garcia testified that their father was not the father of William Liyao, Jr. Nevertheless, the Court refused to consider their acts of testifying for William Liyao, Jr. as amounting to impugnation of the legitimacy of the latter. The Court explained —

> "Do the acts of Enrique and Bernadette Yulo, the undisputed children of Corazon Garcia with Ramon Yulo, in testifying for herein petitioner amount to impugnation of the legitimacy of the latter?
>
> We think not. As earlier stated, it is only in exceptional cases that the heirs of the husband are allowed to contest the legitimacy of the child. There is nothing on the records to indicate that Ramon Yulo has already passed away at the time of the birth of the petitioner nor at the time of the initiation of this proceedings. Notably, the case at bar was initiated by petitioner himself through his mother, Corazon Garcia, and not through Enrique and Bernadette Yulo. It is *settled that the legitimacy of the child can be impugned only in a direct action brought for that purpose, by the proper parties and within the period limited by law*."

[157.2] Proper Party to Impugn Legitimacy

See discussion in *supra* § 155.3.

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[53]See De Jesus vs. Estate of Decedent Juan Gamboa Dizon, *supra*.
[54]*Supra*.

[157.3] Prescriptive Period for Filing Action

The action to impugn the legitimacy of the child must be brought within the following periods:

(a) One year, counted from the knowledge of the birth or recording of such birth in the civil register, if the husband or, in cases provided for in article 171, any of his heirs, resides in the city or municipality where the birth took place or was recorded;[55]

(b) Two years, counted from the knowledge of the birth or recording of such birth in the civil register, if the husband or, in his default, all of his heirs do not reside at the place of birth or where it was recorded, and they reside in the Philippines;[56] or

(c) Three years, counted from the knowledge of the birth or recording of such birth in the civil register, if the husband or, in his default, all of his heirs reside abroad.[57]

If the birth of the child has been concealed from or was unknown to the husband or his heirs, the period shall be counted from the discovery or knowledge of the birth of the child or of the fact of registration of said birth, whichever is earlier.[58]

Upon the expiration of the foregoing periods, the action to impugn the legitimacy of a child can no longer be brought. The status conferred by the presumption, therefore, becomes fixed, and can no longer be questioned. The obvious intention of the law is to prevent the status of a child born in wedlock from being in a state of uncertainty for a long time. It also aims to force early action to settle any doubt as to the paternity of such child, so that the evidence material to the matter, which must necessarily be facts occurring during the period of the conception of the child, may still be easily available.[59]

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[55] Art. 170, 1st par., FC.
[56] Art. 170, 2nd par., FC.
[57] *Id*.
[58] *Id*.
[59] Tison vs. CA, *supra*.

[157.4] Applicability of Articles 170 and 171 of the Family Code

The provisions contemplate situations where a doubt exists that a child is indeed a man's child by his wife, and the husband (or, in proper cases, his heirs) denies the child's filiation. It does not refer to situations where a child is alleged not to be the child at all of a particular couple.[60] Articles 170 and 171 should be read in conjunction with the other articles in the same chapter on paternity and filiation in the Family Code. The provisions refer to an action to impugn legitimacy of a child, to assert and prove that a person is not a man's child by his wife.[61] The provisions presuppose that the child was the undisputed offspring of the mother.[62] Hence, if it is asserted that the child is not the child at all of the spouses, the provisions of articles 170 and 171 do not apply.

Babiera vs. Catotal
333 SCRA 487 (2000)

Presentacion B. Catotal filed a petition for the cancellation of the entry of birth of Teofista Babiera. From the petition filed, Presentacion asserted that she is the only surviving child of the late spouses Eugenio Babiera and Hermogena Cariñosa, who died on May 26, 1996 and July 6, 1990 respectively. It appears that on September 20, 1996, a baby girl was delivered by a 'hilot' in the house of spouses Eugenio and Hermogena Babiera and without the knowledge of said spouses, Flora Guinto, the mother of the child and a housemaid of spouses Eugenio and Hermogena Babiera, caused the registration/recording of the facts of birth of her child, by simulating that she was the child of the spouses Eugenio, then 65 years old and Hermogena, then 54 years old, and made Hermogena Babiera appear as the mother by forging her signature.

Teofista filed a motion to dismiss on the grounds that the petition states no cause of action, it being an attack on her legitimacy as the child of the spouses Eugenio Babiera and Hermogena Cariñosa Babiera; that plaintiff has no legal capacity to file the petition pursuant to Article 171 of the Family Code; and finally that the same is barred by prescription in accordance with Article 170 of the Family Code.The trial court denied the motion to dismiss.

When the case eventually reached the Supreme Court, the Court ruled that the arguments raised by Teofista were not correct. The Court explained —

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[60]See Labagala vs. Santiago, 371 SCRA 360 (2001).
[61]*Id.*
[62]Babiera vs. Catotal, 333 SCRA 487 (2000).

First Issue: *Subject of the Present Action*

Petitioner contends that respondent has no standing to sue, because Article 171 of the Family Code states that the child's filiation can be impugned only by the father or, in special circumstances, his heirs. She adds that the legitimacy of a child is not subject to a collateral attack.

This argument is incorrect. Respondent has the requisite standing to initiate the present action. Section 2, Rule 3 of the Rules of Court, provides that a real party in interest is one "who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit." The interest of respondent in the civil status of petitioner stems from an action for partition which the latter filed against the former. The case concerned the properties inherited by respondent from her parents.

Moreover, Article 171 of the Family Code is not applicable to the present case. A close reading of this provision shows that it applies to instances in which the father impugns the legitimacy of his wife's child. The provision, however, presupposes that the child was the undisputed offspring of the mother. The present case alleges and shows that Hermogena did not give birth to petitioner. In other words, the prayer herein is not to declare that petitioner is an illegitimate child of Hermogena, but to establish that the former is not the latter's child at all. Verily, the present action does not impugn petitioner's filiation to Spouses Eugenio and Hermogena Babiera, because there is no blood relation to impugn in the first place.

In *Benitez-Badua vs. Court of Appeals,* the Court ruled thus:

> "Petitioner's insistence on the applicability of Articles 164, 166, 170 and 171 of the Family Code to the case at bench cannot be sustained. These articles provide:
>
> xxx xxx xxx
>
> "A careful reading of the above articles will show that they do not contemplate a situation, like in the instant case, where a child is alleged not to be the child of nature or biological child of a certain couple. Rather, these articles govern a situation where a husband (or his heirs) denies as his own a child of his wife. Thus, under Article 166, it is the *husband* who can impugn the legitimacy of said child by proving: (1) it was physically impossible for him to have sexual intercourse, with his wife within the first 120 days of the 300 days which immediately preceded the birth of the child; (2) that for biological or other scientific reasons, the child could not have been his child; (3) that in case of children conceived through artificial insemination, the written authorization or ratification by either parent was obtained through mistake, fraud, violence, intimidation or

undue influence. Articles 170 and 171 reinforce this reading as they speak of the prescriptive period within which the *husband or any of his heirs* should file the action impugning the legitimacy of said child. Doubtless then, the appellate court did not err when it refused to apply these articles to the case at bench. *For the case at bench is not one where the heirs of the late Vicente are contending that petitioner is not his child by Isabel. Rather, their clear submission is that petitioner was not born to Vicente and Isabel.* Our ruling in *Cabatbat-Lim vs. Intermediate Appellate Court*, 166 SCRA 451, 457 cited in the impugned decision is apropos, *viz.*:

> 'Petitioners' recourse to Article 263 of the New Civil Code [now Art. 170 of the Family Code] is not well-taken. This legal provision refers to an action to impugn legitimacy. It is inapplicable to this case because this is not an action to impugn the legitimacy of a child, but an action of the private respondents to claim their inheritance as legal heirs of their childless deceased aunt. They do not claim that petitioner Violeta Cabatbat Lim is an illegitimate child of the deceased, but that she is not the decedent's child at all. Being neither [a] legally adopted child, nor an acknowledged natural child, nor a child by legal fiction of Esperanza Cabatbat, Violeta is not a legal heir of the deceased.'" (Emphasis supplied.)

Second Issue: *Prescription*

Petitioner next contends that the action to contest her status as a child of the late Hermogena Babiera has already prescribed. She cites Article 170 of the Family Code which provides the prescriptive period for such action:

> "Art. 170. The action to impugn the legitimacy of the child shall be brought within one year from the knowledge of the birth or its recording in the civil register, if the husband or, in a proper case, any of his heirs, should reside in the city or municipality where the birth took place or was recorded.
>
> "If the husband or, in his default, all of his heirs do not reside at the place of birth as defined in the first paragraph or where it was recorded, the period shall be two years if they should reside in the Philippines; and three years if abroad. If the birth of the child has been concealed from or was unknown to the husband or his heirs, the period shall be counted from the discovery or knowledge of the birth of the child or of the fact of registration of said birth, whichever is earlier."

This argument is bereft of merit. The present action involves the cancellation of petitioner's Birth Certificate; it does not impugn her legitimacy. Thus,

the prescriptive period set forth in Article 170 of the Family Code does not apply. Verily, the action to nullify the Birth Certificate does not prescribe, because it was allegedly void *ab initio.*"

Benitez-Badua vs. Court of Appeals
229 SCRA 468 (1994)

The spouses Vicente Benitez and Isabel Chipongian owned various properties especially in Laguna. Isabel died on April 25, 1982. Vicente followed her in the grave on November 13, 1989. He died intestate. After Vicente's death, the fight for the administration of his estate ensued. On September 24, 1990, private respondents Victoria Benitez-Lirio and Feodor Benitez Aguilar (Vicente's sister and nephew, respectively) instituted Sp. Proc. No. 797 (90) before the RTC of San Pablo City, 4th Judicial Region, Br. 30. They prayed for the issuance of letters of administration of Vicente's estate in favor of private respondent Aguilar. They alleged that the decedent was survived by no other heirs or relatives, be they ascendants or descendants, whether legitimate, illegitimate or legally adopted. On November 2, 1990, petitioner opposed said issuance of letters of administration. She alleged that she was the sole heir of the deceased Vicente Benitez and capable of administering his estate.

The trial court decided in favor of the petitioner. It dismissed the respondents' petition for letters of administration and declared petitioner as the legitimate daughter and sole heir of the spouses Vicente O. Benitez and Isabel Chipongian. The trial court relied on Articles 166 and 170 of the Family Code. On appeal, the Court of Appeals reversed the trial court. The Court of Appeals ruled that the petitioner was not the biological daughter or child by nature of the spouse Vicente O. Benitez and Isabel Chipongian and, therefore, not a legal heir of the deceased Vicente O. Benitez. On appeal to the Supreme Court, petitioner insisted on the applicability of Articles 164, 166, 170 and 171 of the Family Code. The Supreme Court, however, held that petitioner's insistence on the applicability of Articles 164, 166, 170 and 171 of the Family Code cannot be sustained. The Court explained —

> "A careful reading of the above articles will show that they do not contemplate a situation, like in the instant case, where a child is alleged not to be the child of nature or biological child of a certain couple. Rather, these articles govern a situation where a husband (or his heirs) denies as his own a child of his wife. Thus, under Article 166, it is the *husband* who can impugn the legitimacy of said child by proving: (1) it was physically impossible for him to have sexual intercourse, with his wife within the first 120 days of the 300 days which immediately preceded the birth of the child; (2) that for biological or other scientific reasons, the child could not have been his child; (3) that in case of children conceived through

artificial insemination, the written authorization or ratification by either parent was obtained through mistake, fraud, violence, intimidation or undue influence. Articles 170 and 171 reinforce this reading as they speak of the prescriptive period within which the *husband or any of his heirs* should file the action impugning the legitimacy of said child. Doubtless then, the appellate court did not err when it refused to apply these articles to the case at bench. For the case at bench is not one where the heirs of the late Vicente are contending that petitioner is not his child by Isabel. Rather, their clear submission is that petitioner was not born to Vicente and Isabel. Our ruling in *Cabatbat-Lim vs. Intermediate Appellate Court,* 166 SCRA 451, 457 cited in the impugned decision is apropos, *viz.*:

Petitioners' recourse to Article 263 of the New Civil Code [now Article 170 of the Family Code] is not well-taken. This legal provision refers to an action to impugn legitimacy. It is inapplicable to this case because this is not an action to impugn the legitimacy of a child, but an action of the private respondents to claim their inheritance as legal heirs of their childless deceased aunt. They do not claim that petitioner Violeta Cabatbat Lim is an illegitimate child of the deceased, but that she is not the decedent's child at all. Being neither legally adopted child, nor an acknowledged natural child, nor a child by legal fiction of Esperanza Cabatbat, Violeta is not a legal heir of the deceased."

Chapter 2

Proof of Filiation

Art. 172. The filiation of legitimate children is established by any of the following:

(1) The record of birth appearing in the civil register or a final judgment; or

(2) An admission of legitimate filiation in a public document or a private handwritten instrument and signed by the parent concerned.

In the absence of the foregoing evidence, the legitimate filiation shall be proved by:

(1) The open and continuous possession of the status of a legitimate child; or

(2) Any other means allowed by the Rules of Court and special laws. (265a, 266a, 267a)

Art. 173. The action to claim legitimacy may be brought by the child during his or her lifetime and shall be transmitted to the heirs should the

child die during minority or in a state of insanity. In these cases, the heirs shall have a period of five years within which to institute the action.

The action already commenced by the child shall survive notwithstanding the death of either or both of the parties. (268a)

Art. 174. Legitimate children shall have the right:

(1) To bear the surnames of the father and the mother, in conformity with the provisions of the Civil Code on Surnames;

(2) To receive support from their parents, their ascendants, and in proper cases, their brothers and sisters, in conformity with the provisions of this Code on Support; and

(3) To be entitled to the legitime and other successional rights granted to them by the Civil Code. (264a)

Chapter 3

Legitimate Children

Art. 175. Illegitimate children may establish their illegitimate filiation in the same way and on the same evidence as legitimate children.

The action must be brought within the same period specified in Article 173, except when the action is based on the second paragraph of Article 172, in which case the action may be brought during the lifetime of the alleged parent. (289a)

Art. 176. Illegitimate children shall use the surname and shall be under the parental authority of their mother, and shall be entitled to support in conformity with this Code. However, illegitimate children may use the surname of their father if their filiation has been expressly recognized by the father through the record of birth appearing in the civil register, or when an admission in a public document or private handwritten instrument is made by the father. Provided, the father has the right to institute an action before the regular courts to prove non-filiation during his lifetime. The legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child. (As amended by R.A. No. 9225)

COMMENTS:

§ 158. Proof of Filiation

[158.1] Not subject to agreement
[158.2] Accepted proof of filiation
    [158.2.1] Record of birth appearing in the civil register or final judgment
    [158.2.2] Admission of legitimate filiation or paternity

[158.2.3] Open and continuous possession of status
[158.2.4] Any other means allowed by rules and special laws
[158.2.5] Other proof
[158.3] Who may institute action
[158.4] Rights of legitimate children
[158.5] Rights of illegitimate children

[158.1] Not Subject to Agreement

Paternity or filiation, or the lack of it, is a relationship that must be judicially established and it is for the court to declare its existence or absence.[63] As such, it cannot be left to the will or agreement of the parties.[64] It is a serious matter that must be resolved according to the requirements of the law.[65]

In **Jose Rivero, et. al. vs. Court of Appeals, Mary Jane Dy Chiao-De Guzman**,[66] the Supreme Court nullified a regional trial court decision based on the compromise agreement executed between one Mary Jane Dy Chiao-De Guzman, *guardian ad litem* of her brothers Benito Dy Chiao, Jr. and Benson Dy Chiao, and one Benedick Arevalo.

The case stemmed from a complaint filed by Benedick as represented by his mother, Shirley Arevalo, against Mary Jane, Benito, Jr., and Benson, all surnamed Dy Chiao, for compulsory recognition as the illegitimate child of their deceased father, Benito Dy Chiao, Sr. On December 6, 1996, Mary Jane and Benedick signed the compromise agreement in question. One week later, the trial court approved the agreement and on the basis thereof, rendered judgment. It then issued a writ of execution by virtue of which public auction sale of properties belonging to the estate of the deceased was made. Some parcels of land were sold to petitioners Jose Rivero, Jessie Rivero, and Amalia Rivero. On Benito Jr.'s appeal, the CA nullified the RTC decision, likewise voiding the writ of execution issued by the RTC and the subsequent sale of properties to the Riveros. It held that the RTC had no jurisdiction over Benedick's action for recognition as the illegitimate son of Benito, Sr. and for partition of his estate. The denial of petitioners' motion for reconsideration led to the elevation of the case to the SC.

[63] De Asis vs. CA, 303 SCRA 176, 183 (1999).
[64] Rivero vs. CA, 458 SCRA 714, 734-735 (2005).
[65] Go Kim Huy vs. Go Kim Huy, 365 SCRA 490 (2001).
[66] *Supra*.

In affirming the Court of Appeals, the Supreme Court construed the compromise agreement signed by Mary Jane and Benedick as one relating to filiation. In the agreement, Mary Jane recognized Benedick as the illegitimate son of her deceased father, for the consideration of Php6 million to be taken from the estate of her father, the waiver of other claims against the said estate, and the waiver by the Dy Chiao siblings of their counterclaims against Benedick.

The Court held that Mary Jane's recognition was ineffectual since "under the law, recognition must be made personally by the putative parent and not by any brother, sister, or relative." "[A] compromise agreement executed in behalf of another by one who is not duly authorized to do so by the principal, is void and has no legal effect, and the judgment based on such compromise agreement is null and void," said the Court. The judgment may be impugned and its execution may be enjoined in any proceeding by the party against whom it is sought to be enforced, the Court added.

Article 2035(1) of the New Civil Code provides that no compromise upon the civil status of persons shall be valid. As such, paternity and filiation, or the lack of the same, is a relationship that must be judicially established, and it is for the court to determine its existence or absence. It cannot be left to the will or agreement of the parties.

[158.2] Accepted Proof of Filiation

Since illegitimate filiation may likewise be established in the same way and on the same evidence as legitimate filiation,[67] proof of legitimate and illegitimate filiation shall be discussed simultaneously.

The first paragraph of article 172 of the Code provides, as follows:

> "Art. 172. The filiation of legitimate children is established by any of the following:
>
> (1) The record of birth appearing in the civil register or a final judgment; or
>
> (2) An admission of legitimate filiation in a public document or a private handwritten instrument and signed by the parent concerned."

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[67] Art. 175, FC.

[158.2.1] Record of birth appearing in civil register or final judgment

(a) Birth certificate

A birth certificate is a formidable piece of evidence prescribed by both the Civil Code and Article 172 of the Family Code for purposes of recognition and filiation.[68] Being a public document, a birth certificate offers *prima facie* evidence of filiation[69] and a high degree of proof is needed to overthrow the presumption of truth contained in such public document.[70] This is pursuant to the rule that entries in official records made in the performance of his duty by a public officer are *prima facie* evidence of the facts therein stated. The evidentiary nature of such document must, therefore, be sustained in the absence of strong, complete and conclusive proof of its falsity or nullity.[71]

However, for a birth certificate to be considered competent evidence of paternity, it is necessary that the putative father must have a participation in its preparation. It is settled that a certificate of live birth purportedly identifying the putative father is not competent evidence as to the issue of paternity, when there is no showing that the putative father had a hand in the preparation of said certificates, and the Local Civil Registrar is devoid of authority to record the paternity of an illegitimate child upon the information of a third person.[72] Simply put, if the alleged father did not intervene in the birth certificate, *e.g.*, supplying the information himself, the inscription of his name by the mother or doctor or registrar is null and void; the mere certificate by the registrar without the signature of the father is not proof of voluntary acknowledgment on the latter's part.[73]

For a birth certificate to be considered as competent evidence of paternity, it is not indispensable that the same be signed by the putative father. What is important is that the putative father had a hand in the

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[68] Solinap vs. Locsin, Jr., 371 SCRA 711 (2001).

[69] Sayson vs. CA, 205 SCRA 321, 328.

[70] Heirs of Pedro Cabais vs. CA, 316 SCRA 338; citing People vs. Fabro, 277 SCRA 19, 37.

[71] *Id.*; citing Legaspi vs. Court of Appeals, 142 SCRA 82, 89.

[72] Jison vs. CA, 286 SCRA 495 (1998); citing Fernandez vs. Court of Appeals, 230 SCRA 130, 136-137 (1994), Roces vs. Local Civil Registrar, 102 Phil. 1050 (1958). See also Cabatania vs. CA, 441 SCRA 96 (2004).

[73] *Id.*; citing Berciles vs. GSIS, 128 SCRA 53, 77-78 (1984).

preparation of the birth certificate, although he may not be able to sign it. This is illustrated in the case of **Ilano vs. Court of Appeals**.[74]

In ***Ilano***, a former secretary of a lawyer (Leoncia Delos Santos) had an affair with one of the lawyer's clients (Artemio Ilano). The former secretary and the client eventually cohabited and lived together as husband and wife. During their cohabitation, a child was born to them, later named Merceditas S. Ilano. When Leoncia gave birth at the Manila Sanitarium, Artemio arrived in the hospital after five o' clock in the afternoon. When the nurse came to inquire about the bio-data of the child, Leoncia was still unconscious so it was Artemio who supplied the information to the nurse, including the fact of his paternity. After the interview the nurse told Artemio that the information has to be recorded in the formal form and has to be signed by Artemio. Inasmuch as it was already past seven o' clock in the evening, the nurse promised to return the following morning for signature. However, Artemio left an instruction to give the birth certificate to Leoncia for her signature, as he was leaving early the following morning. In giving credence to the birth certificate, the Supreme Court affirmed the Court of Appeal's findings that the birth certificate in question was competent evidence of paternity, although unsigned by the father, since the latter supplied all the data about the child's birth.

In **Castro vs. Court of Appeals**,[75] the Court likewise held —

> "The ruling in **Roces vs. Local Civil Registrar of Manila** (102 Phil. 1050 [1958]) and **Berciles vs. Government Service Insurance System** (128 SCRA 53 [1984]) that if the father did not sign in the birth certificate, the placing of his name by the mother, doctor, registrar, or other person is incompetent evidence of paternity does not apply to this case because it was Eustaqio himself who went to the municipal building and gave all the data about his daughter's birth. In *Berciles* we find no participation whatsoever in the registration by Judge Pascual Berciles, the alleged father."

If the alleged father, however, signed the birth certificate, this is considered as acknowledgment of paternity and the mere presentation

[74]230 SCRA 242 (1994).
[75]173 SCRA 656, 664 (1989).

of a duly authenticated copy of such certificate will successfully establish filiation.[76]

Note, however, that a birth certificate offers only *prima facie* evidence of filiation and may be refuted by contrary evidence.[77] Its evidentiary worth cannot be sustained where there exists strong, complete and conclusive proof of its falsity or nullity.[78] Hence, if there are material discrepancies between a Certificate of Live Birth duly recorded in the Local Civil Registry and the copy transmitted to the Civil Registry General pursuant to the Civil Registry Law, the one entered in the Civil Registry General prevails.[79]

(b) Baptismal certificate

On the contrary, a baptismal certificate, a private document, which, being hearsay, is not a conclusive proof of filiation.[80] It does not have the same probative value as a record of birth, an official or public document.[81] In **US vs. Evangelista**,[82] the Court held that church registers of births, marriages, and deaths made subsequent to the promulgation of General Orders No. 68 and the passage of Act No. 190, are no longer public writings, nor are they kept by duly authorized public officials. Thus, in this jurisdiction, a certificate of baptism is no longer regarded with the same evidentiary value as official records of birth. Moreover, on this score, jurisprudence is consistent and uniform in ruling that the canonical certificate of baptism is not sufficient to prove recognition.[83]

In **Macadangdang vs. Court of Appeals**,[84] the Supreme Court declared that a baptismal certificate is evidence only to prove the administration of the sacrament on the dates therein specified, but not

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[76]See Eceta vs. Eceta, 428 SCRA 782 (2004).

[77]Solinap vs. Locsin, Jr., 371 SCRA 711 (2001); citing Sayson vs. CA, *supra*.

[78]*Id*.

[79]*Id*.

[80]Heirs of Pedro Cabais vs. CA, 316 SCRA 338; citing Canales vs. Arrogante, 91 Phil. 5, citing Malonda vs. Malonda, 81 Phil. 149.

[81]*Id*.; citing In the Matter of the Petition for Change of Name Mario Pabellar, petitioner-appellee, vs. Republic of the Philippines, oppositor-appellant, 70 SCRA 16, 19.

[82]29 Phil 215; cited in Heirs of Pedro Cabais vs. CA, *supra*.

[83]Heirs of Pedro Cabais vs. CA, *supra*; citing Mendoza, et al. vs. Hon. Intermediate Appellate Court, G.R. No. L-63132, July 30, 1987.

[84]100 SCRA 73, 84-85 (1980).

the veracity of the declarations therein stated with respect to his kinsfolk. The same is conclusive only of the baptism administered, according to the rites of the Catholic Church, by the priest who baptized subject child, but it does not prove the veracity of the declarations and statements contained in the certificate concerning the relationship of the person baptized.[85] In other words, a baptismal certificate merely attests to the fact which gave rise to its issue, and the date thereof, to wit, the fact of the administration of the sacrament on the date stated, but not the truth of the statements therein as to the parentage of the child baptized.[86]

Since baptismal certificates are per se inadmissible in evidence as proof of filiation, they cannot be admitted indirectly as circumstantial evidence to prove the same.[87]

[158.2.2] Admission of Legitimate Filiation or Paternity

Admission of legitimate filiation or paternity in a public document or a private handwritten instrument and signed by the parent concerned[88] is also competent evidence to prove the fact of legitimate filiation or paternity, as the case may be.

Under the law, the admission must be made personally by the parent himself or herself, not by any brother, sister or relative.[89] Any admission or recognition made by any brother, sister or relative of the putative father is ineffective.[90] Thus, the voluntary recognition of a child's filiation by the brother before the Municipal Trial Court does not qualify as competent proof of paternity or filiation. After all, the concept of recognition speaks of a voluntary declaration by the parent, or if the parent refuses, by judicial authority, to establish the paternity or maternity of children born outside of wedlock.[91]

Also, the public document contemplated in Article 172 of the Family Code refers to the written admission of filiation embodied in a public document purposely executed as an admission of filiation and not for

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[85]Cited Heirs of Pedro Cabais vs. CA, *supra*.
[86]Acebedo vs. Arquero, 399 SCRA 10 (2003).
[87]Jison vs. CA, *supra*.; cited in Cabatania vs. CA, 441 SCRA 96 (2004).
[88]Art. 172, No. (2), FC.
[89]Cenido vs. Apacionado, 318 SCRA 688 (1999).
[90]Rivero vs. CA, 458 SCRA 714, 737; citing Cenido vs. Apacionado, *supra*.
[91]*Id*., citing Tolentino, Civil Code, Vol. 1, p. 577 (1987).

some other purpose.[92] In **Fernandez vs. Fernandez**,[93] it was contended that the Application for Recognition of Back Pay Rights under Act No. 897 is a public document and a conclusive proof of the legitimate filiation between him and the deceased spouses. Not finding merit in said contention, the Court held —

> "Appellant nonetheless, contends that the Application for Recognition of Back Pay Rights Under Act No. 897 is a public document and a conclusive proof of the legitimate filiation between him and the deceased spouses (Rollo, p. 41, Appellants' Brief). We do not agree.
>
> It may be conceded that the Application for Recognition of Back Pay Rights under Act No. 897 is a public document nevertheless, it was not executed to admit the filiation of Jose K. Fernandez with Rodolfo V. Fernandez, the herein appellant. The public document contemplated in Article 172 of the Family Code refer to the written admission of filiation embodied in a public document purposely executed as an admission of filiation and not as obtaining in this case wherein the public document was executed as an application for the recognition of rights to back pay under Republic Act No. 897. [Fernandez vs. Fernandez, 363 SCRA 811 (2001)]
>
> Corollarily, the Application for Recognition of Back Pay Rights under Act No. 897 is only a proof that Jose K. Fernandez filed said application on June 5, 1954 in Dagupan City but it does not prove the veracity of the declaration and statement contained in the said application that concern the relationship of the applicant with herein appellant. In like manner, it is not a conclusive proof of the filiation of appellant with his alleged father, Jose K. Fernandez the contents being, only prima facie evidence of the facts stated therein."

Filiation may likewise be established by holographic as well as notarial wills, except that they no longer need to be probated or to be

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[92] Fernandez vs. Fernandez, 363 SCRA 811 (2001).
[93] *Id.*

strictly in conformity with the formalities thereof for purposes of establishing filitation.[94]

It must be emphasized, however, that any such admission or recognition of paternity by the putative father cannot be given effect for the purpose of proving illegitimate filiation if the child was conceived or born in a valid marriage since there is a presumption that the child is a legitimate child of the spouses. Such presumption of legitimacy fixes the civil status for the child born in wedlock, and only the father, or in exceptional instances the latter's heirs, can contest in an appropriate action the legitimacy of a child born to his wife. Thus, it is only when the legitimacy of a child has been successfully impugned that the paternity of the husband can be rejected.[95]

[158.2.3] Open and Continuous Possession of Status

If none of the evidence mentioned in the first paragraph of article 172 of the Code can be presented, a high standard of proof is required to establish legitimate or illegitimate filiation. The second paragraph of article 172 of the Code provides, as follows:

> "In the absence of the foregoing evidence, the legitimate filiation shall be proved by:
>
> (1) The open and continuous possession of the status of a legitimate child; or
>
> (2) Any other means allowed by the Rules of Court and special laws."

Open and continuous possession of the status of a legitimate child is meant the enjoyment by the child of the position and privileges usually attached to the status of a legitimate child such as bearing the paternal surname, treatment by the parents and family of the child as legitimate, constant attendance to the child's support and education, and giving the child the reputation of being a child of his parents.[96]

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[94]Potenciano vs. Reynoso, 401 SCRA 391 (2003); citing Vitug, Compendium of Civil Law and Jurisprudence, 1993 revised ed., p. 230.

[95]See De Jesus vs. Estate of Decedent Juan Gamboa Dizon, 366 SCRA 499 (2001); Also Liyao, Jr. vs. Tanhoti-Liyao, 378 SCRA 563 (2002).

[96]Fernandez vs. Fernandez, 363 SCRA 811, 825 (2001); citing Sempio-Diy, The Family Code of the Philippines, pp. 245-246.

To prove open and continuous possession of the status of an illegitimate child, there must be evidence of the manifestation of the permanent intention of the supposed father to consider the child as his, by continuous and clear manifestations of parental affection and care, which cannot be attributed to pure charity. Such acts must be of such a nature that they reveal not only the conviction of paternity, but also the apparent desire to have and treat the child as such in all relations in society and in life, not accidentally, but continuously.[97] By "continuous" is meant uninterrupted and consistent, but does not require any particular length of time.[98]

The foregoing standard of proof required to establish one's filiation is founded on the principle that an order for recognition and support may create an unwholesome atmosphere or may be an irritant in the family or lives of the parties, so that it must be issued only if paternity or filiation is established by clear and convincing evidence.[99]

As to what may constitute *"open and continuous possession of status"* of illegitimate child, the ruling of the Court in **Jison vs. Court of Appeals** is instructive, to wit:

> "FRANCISCO's arguments in support of his first assigned error deserve scant consideration. While it has been observed that unlawful intercourse will not be presumed merely from proof of an opportunity for such indulgence, this does not favor FRANCISCO. Akin to the crime of rape where, in most instances, the only witnesses to the felony are the participants in the sexual act themselves, in deciding paternity suits, the issue of whether sexual intercourse actually occurred inevitably redounds to the victim's or mother's word, as against the accused's or putative father's protestations. In the instant case, MONINA's mother could no longer testify as to the fact of intercourse, as she had, unfortunately, passed away long before the institution of the complaint for recognition. But this did not mean that MONINA could no longer

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[97]Jison vs. CA, 286 SCRA 495, 531 (1998); citing Arturo M. Tolentino, 1 Civil Code of the Philippines: Commentaries and Jurisprudence 602-605 (1985); and Mendoza vs. Court of Appeals, 201 SCRA 675, 683 [1991].

[98]*Id.*, at p. 531; citing Sempio-Diy, at 245-246.

[99]*Id.*, at p. 531; citing Constantino vs. Mendez, 209 SCRA 18, 23-24 (1992).

prove her filiation. The fact of her birth and her parentage may be established by evidence other than the testimony of her mother. The paramount question then is whether MONINA's evidence is coherent, logical and natural.

The complaint stated that FRANCISCO had carnal knowledge of *Pansay* "by about the end of 1945." We agree with MONINA that this was broad enough to cover the fourth quarter of said year, hence her birth on 6 August 1946 could still be attributed to sexual relations between FRANCISCO and MONINA's mother. In any event, since it was established that her mother was still in the employ of FRANCISCO at the time MONINA was conceived as determined by the date of her birth, sexual contact between FRANCISCO and MONINA's mother was not at all impossible, especially in light of the overwhelming evidence, as hereafter shown, that FRANCISCO fathered MONINA, has recognized her as his daughter and that MONINA has been enjoying the open and continuous possession of the status as FRANCISCO's illegitimate daughter.

We readily conclude that the testimonial evidence offered by MONINA, woven by her narration of circumstances and events that occurred through the years, concerning her relationship with FRANCISCO, coupled with the testimonies of her witnesses, overwhelmingly established the following facts:

1) FRANCISCO is MONINA's father and she was conceived at the time when her mother was in the employ of the former;

2) FRANCISCO recognized MONINA as his child through his overt acts and conduct which the Court of Appeals took pains to enumerate, thus:

[L]ike sending appellant to school, paying for her tuition fees, school uniforms, books, board and lodging at the Collegio del Sagrado de Jesus, defraying appellant's hospitalization expenses, providing her with [a] monthly allowance, paying for the funeral expenses of appellant's mother, acknowledging appellant's paternal greetings and calling

appellant his "Hija" or child, instructing his office personnel to give appellant's monthly allowance, recommending appellant for employment at the Miller, Cruz & Co., allowing appellant to use his house in Bacolod and paying for her long distance telephone calls, having appellant spend her vacation in his apartment in Manila and also at his Forbes residence, allowing appellant to use his surname in her scholastic and other records (Exhs Z, AA, AA-1 to AA-5, W & W-5). . .

3) Such recognition has been consistently shown and manifested throughout the years publicly, spontaneously, continuously and in an uninterrupted manner."

[158.2.4] Any other means allowed by Rules and special laws

(a) Physical Resemblance

In **Tijing vs. Court of Appeals**,[100] the Court held that resemblance between a minor and his alleged parent is competent and material evidence to establish parentage. In the recent case of **Cabatania vs. Court of Appeals**,[101] however, the Court held that the extreme subjective test of physical resemblance or similarity will not suffice as evidence to prove paternity and filiation.

In the ***Cabatania*** case, Carmelo Cabatania was sued by his former maid, Florencia Regados, to compel him to recognize and support a son who was allegedly the product of their sexual encounter in 1982. Deciding on this paternity suit, the Regional Trial Court deemed that "based on the personal appearance of the child. . . there can be no doubt" that Cabatania, a sugar planter in Negros Occidental, is the father. The Court of Appeals upheld the lower court's ruling. In overturning the ruling of the lower court and the Court of Appeals, the Supreme Court held *that "in this age of genetic profiling and deoxyribonucleic acid (DNA) analysis, the extremely subjective test of physical resemblance or similarity of features will not suffice as evidence to prove paternity and filiation before the courts of law."*

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[100] 354 SCRA 17 (2001); citing R.J. Francisco, Basic Evidence (1991), pp. 95-96; Chua Yeng vs. Collector of Customs, 28 Phil. 591 595 (1914).

[101] 441 SCRA 96 (2004).

(b) Blood Test

See discussion under *supra* § 155.6.2(a).

(c) DNA Test

See discussion under *supra* § 155.6.2(b).

[158.2.5] Other Proof

A family portrait offered in evidence is not a sufficient proof of filiation. Pictures do not constitute proof of filiation.[102]

[158.3] Who May Institute Action

(a) Action to Claim Legitimacy

An action to claim legitimacy is a strictly personal right of the child, which he or she may exercise at anytime during his or her lifetime.[103] It is only in exceptional cases where the right may be exercised by the child's heirs. Under the Code, an action to claim legitimacy is transmissible to the child's heirs in the following instances: (1) when the child dies during minority;[104] (2) when the child dies in a state of insanity;[105] or (3) when the child dies after the commencement of the action.[106] Should the child die during minority or in a state of insanity, the heirs shall have a period of five (5) years from death of the child within which to institute the action.[107]

(b) Action to Establish Illegitimate Filiation

An action to establish illegitimate filiation may be brought by the child within the same period specified in article 173, except when the action is based on the second paragraph of article 172, in which case the action must be brought during the lifetime of the alleged parent.[108]

[102] Fernandez vs. Fernadez, *supra*.
[103] Art. 173, 1st par., FC.
[104] *Id*.
[105] *Id*.
[106] Art. 173, 2nd par., FC.
[107] Art. 173, 1st par., FC.
[108] Art. 175, 2nd par., FC.

Hence, if the action to establish illegitimate filiation is based on the following evidence: (1) record of birth appearing in the civil register or a final judgment; or (2) admission of paternity in a public document or a private handwritten instrument and signed by the parent concerned, the same may be brought by the child at any time during his or her lifetime.[109] However, if the action is based on the following evidence mentioned in the second paragraph of article 172, *i.e.*, open and continuous possession of the status of illegitimate child, or any other means allowed by the Rules of Court and special laws, the same must be brought during the lifetime of the alleged parent. In other words, if the action is based on the evidence mentioned in the second paragraph of article 172, the illegitimate child can file an action to establish his illegitimate filiation only during the lifetime of the alleged parent.

The putative parent is given by the Family Code a chance to dispute the claim, considering that illegitimate children are usually begotten and raised in secrecy and without the legitimate family being aware of their existence. The putative parent should thus be given the opportunity to affirm or deny the child's filiation, and this, he or she cannot do if he or she is already dead.[110] The requirement that the action be filed during the parent's lifetime is to prevent illegitimate children, on account of strong temptations to large estates left by dead persons, to claim part of this estate without giving the alleged parent personal opportunity to be heard.[111] It is vital that the parent be heard for only the parent is in a position to reveal the true facts surrounding the claimant's conception.[112]

Since illegitimate filiation may be established "in the same way and on the same evidence" as that of establishing legitimate filiation, the action for recognition as an illegitimate child is likewise transmissible to the child's heirs in the following instances: (1) when the child dies during minority; (2) when the child dies in a state of insanity; or (3) when the child dies after the commencement of the action.

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[109] Art. 175, in relation to Art. 173, FC.

[110] Bernabe vs. Alejo, 374 SCRA 180 (2002).

[111] Cenido vs. Apacionado, 318 SCRA 688 (1999); citing Serrano vs. Aragon, 22 Phil. 10, 18 [1912]; Villalon vs. Villalon, 71 Phil. 98, 100 (1940).

[112] *Id.*, citing Barles vs. Ponce Enrile, 109 SCRA 523, 526 (1960).

Bernabe vs. Alejo
374 SCRA 180 (2002)

The late Fiscal Ernesto A. Bernabe allegedly fathered a son with his secretary of twenty-three (23) years, Carolina Alejo. The son was born on September 18, 1981 and was named Adrian Bernabe. Fiscal Bernabe died on August 13, 1993, while his wife Rosalina died on December 3 of the same year, leaving Ernestina as the sole surviving heir.

On May 16, 1994, Carolina, in behalf of Adrian, filed a complaint praying that Adrian be declared an acknowledged illegitimate son of Fiscal Bernabe and as such he (Adrian) be given his share in Fiscal Bernabe's estate, which is now being held by Ernestina as the sole surviving heir. On July 16, 1995, the Regional Trial Court dismissed the complaint on the basis of article 175 of the Family Code. The RTC held that the death of the putative father had barred the action and since the putative father had not acknowledged or recognized Adrian in writing, the action for recognition should have been filed during the lifetime of the alleged father to give him the opportunity either to affirm or deny the child's filiation.

On appeal, the Court of Appeals ruled that Adrian should be allowed to prove that he was the illegitimate son of Fiscal Bernabe since the boy was born in 1981, his rights are governed by Article 285 of the Civil Code. According to the CA, said article allows an action for recognition to be filed within four years after the child has attained the age of majority and the subsequent enactment of the Family Code did not take away that right. When the case was elevated to the Supreme Court, the Court ruled that the right to seek recognition granted by the Civil Code to illegitimate children who were still minors at the time the Family Code took effect cannot be impaired or taken away and that said minors have up to four years from attaining majority age within which to file an action for recognition. The Court explained —

> "Under the new law, an action for the recognition of an illegitimate child must be brought within the lifetime of the alleged parent. The Family Code makes no distinction on whether the former was still a minor when the latter died. Thus, the putative parent is given by the new Code a chance to dispute the claim, considering that "illegitimate children are usually begotten and raised in secrecy and without the legitimate family being aware of their existence. x x x The putative parent should thus be given the opportunity to affirm or deny the child's filiation, and this, he or she cannot do if he or she is already dead."
>
> Nonetheless, the Family Code provides the caveat that rights that have already vested prior to its enactment should not be prejudiced or impaired as follows:

"ART. 255. This Code shall have retroactive effect insofar as it does not prejudice or impair vested or acquired rights in accordance with the Civil Code or other laws."

The crucial issue to be resolved therefore is whether Adrian's right to an action for recognition, which was granted by Article 285 of the Civil Code, had already vested prior to the enactment of the Family Code. Our answer is affirmative.

A vested right is defined as "one which is absolute, complete and unconditional, to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency x x x." Respondent however contends that the filing of an action for recognition is procedural in nature and that "as a general rule, no vested right may attach to [or] arise from procedural laws."

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Applying the foregoing jurisprudence, we hold that Article 285 of the Civil Code is a substantive law, as it gives Adrian the right to file his petition for recognition within four years from attaining majority age. Therefore, the Family Code cannot impair or take Adrian's right to file an action for recognition, because that right had already vested prior to its enactment.

Uyguangco vs. Court of Appeals is not applicable to the case at bar, because the plaintiff therein sought recognition as an illegitimate child when he was no longer a minor. On the other hand, in *Aruego Jr. vs. Court of Appeals* the Court ruled that an action for recognition filed while the Civil Code was in effect should not be affected by the subsequent enactment of the Family Code, because the right had already vested.

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To emphasize, illegitimate children who were still minors at the time the Family Code took effect and whose putative parent died during their minority are thus given the right to seek recognition (under Article 285 of the Civil Code) for a period of up to four years from attaining majority age. This vested right was not impaired or taken away by the passage of the Family Code.

Indeed, our overriding consideration is to protect the vested rights of minors who could not have filed suit, on their own, during the lifetime of their putative parents. As respondent aptly points out in his Memorandum, the State as *parens patriae* should protect a

minor's right. Born in 1981, Adrian was only seven years old when the Family Code took effect and only twelve when his alleged father died in 1993. The minor must be given his day in court."

[158.4] Rights of Legitimate Children

Legitimate children are entitled to the following rights:

(1) To bear the surname of the father and mother, in conformity with the provisions of the Civil Code on Surnames.[113] But legitimate children shall principally use the surname of the father.[114]

(2) To receive support from their parents, their ascendants, and in proper cases, their brothers and sisters, in conformity with the provisions of the Family Code on Support.[115]

(3) To be entitled to the legitime and other successional rights granted to them by the Civil Code.[116]

Under the law on succession,[117] there are three kinds of heirs: (1) *voluntary*, those who become as such only by the express will of the testator in the latter's will and testament (present only in testamentary succession); (2) *legal or intestate*, those who are called by the law to the succession in the absence of voluntary heirs designated by the testator (present only in intestate succession); and (3) *compulsory*, those who are entitled to the legitime and cannot be deprived thereof by the testator unless properly disinherited by testator. Legal or intestate succession takes place in the following instances: (1) if a person dies without a will, or with a void will, or one which has subsequently lost its validity; (2) when the will does not institute an heir to, or dispose of all the property belonging to the testator. In such case, legal succession shall take place only with respect to the property of which the testator has not disposed; (3) if the suspensive condition attached to the institution of heir does not happen or is not fulfilled, or if the heir dies before the testator, or repudiates the inheritance, there being no substitution, and no right of accre-

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[113]Art. 174, No. (1), FC.
[114]Art. 364, NCC.
[115]Art. 174, No. (2), FC.
[116]Art. 174, No. (3), FC.
[117]Arts. 774 to 1105, NCC.

tion takes place; or (4) when the heir instituted is incapable of succeeding, except in cases provided in the Civil Code.[118]

Legitimate children, under the Civil Code, are compulsory[119] and legal[120] heirs, with respect to their legitimate parents and ascendants. Being compulsory heirs, legitimate children are entitled to a legitime, which is that part of the testator's property which he cannot dispose of because the law has reserved it for compulsory heirs.[121] The legitime of legitimate children consists of one-half of the hereditary estate of the father and of the mother.[122] For example, if there is only one legitimate child, he or she is entitled to one-half of the hereditary estate as his or her legitime. If there are two or more legitimate children, their legitime is still one-half of the hereditary estate, which they will divide in equal portions.

[158.5] Rights of Illegitimate Children

(1) Illegitimate children shall principally use the surname of their mother.[123] They may not, as a rule, use the surname of their father. They may be allowed to use the surname of their father only in the following instances: (1) if their illegitimate filiation has been expressly recognized by the father through the record of birth appearing in the civil register;[124] or (2) or when an admission of paternity is made by the putative father in a public document or private handwritten instrument.[125] It appears, therefore, that illegitimate children may be allowed to use the surname of their putative father only if filiation can be established through the use of evidence mentioned in the first paragraph of article 172 of the Code, but without need of establishing such filiation in a judicial proceeding. In other words, if none of the evidence mentioned in the first paragraph can be presented and illegitimate filiation is established only through the use of evidence mentioned in the second paragraph of article 172, an illegitimate child may not be allowed to use the surname of

[118]Art. 960, NCC.
[119]Art. 887, No. (1), NCC.
[120]Art. 979, NCC.
[121]Art. 886, NCC.
[122]Art. 888, 1st par., NCC.
[123]Art. 176, FC.
[124]Art. 176, FC, as amended by R.A. 9255.
[125]*Id.*; Note that R.A. 9255 has rendered obsolete the decisions of the Court in Republic vs. Abadilla, 302 SCRA 358 and Mossesgeld vs. CA, 300 SCRA 464 (1998).

the father. In the latter scenario, it is the general rule stated in article 176 that shall apply, in which case, such illegitimate child shall use the surname of the mother.

(2) Illegitimate children are likewise entitled to support from their parents.[126] However, only the separate property of the person obliged to give support shall be answerable, provided that in case the obligor has no separate property, the absolute community or the conjugal partnership, if financially capable, shall advance the support, which shall be deducted from the share of the spouse obliged upon the liquidation of the absolute community or of the conjugal partnership.[127]

(3) Illegitimate children are also to be considered as compulsory[128] and legal[129] heirs, with respect to their parents. The legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child.[130]

Chapter 4

Legitimated Children

Art. 177. Only children conceived and born outside of wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other may be legitimated. (269a)

Art. 178. Legitimation shall take place by a subsequent valid marriage between parents. The annulment of a voidable marriage shall not affect the legitimation. (270a)

Art. 179. Legitimated children shall enjoy the same rights as legitimate children. (272a)

Art. 180. The effects of legitimation shall retroact to the time of the child's birth. (273a)

Art. 181. The legitimation of children who died before the celebration of the marriage shall benefit their descendants. (274)

Art. 182. Legitimation may be impugned only by those who are prejudiced in their rights, within five years from the time their cause of action accrues. (275a)

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[126]Arts. 176 & 195(4), FC.
[127]See Art. 197, in relation to Arts. 94 & 121, FC.
[128]Art. 176, FC.
[129]Arts. 988 to 994, NCC.
[130]Art. 176, FC.

COMMENTS:

§ 159. Legitimation

[159.1] Concept of legitimation, explained
[159.2] Who can be legitimated
[159.3] How legitimation takes place
[159.4] Effects of legitimation
[159.5] Action to impugn legitimation

[159.1] Concept of Legitimation, Explained

Legitimation is a right granted by law to children conceived and born outside of wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each.[131] The process of legitimation takes place automatically by the subsequent valid marriage of the parents[132] and, as a result of which, such children born out of wedlock ("legitimated children") become legitimate children of the spouses.[133] In other words, children conceived and born outside of wedlock by parents who could have legally married at the time they were conceived, cannot be substantially differentiated from legitimate children once their parents do marry after their birth. This is because said parents can marry any time, there being no legal impediment preventing them from validly contracting marriage.[134]

[159.2] Who Can Be Legitimated

Only children conceived and born outside of wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other may be legitimated. This is expressly provided for in article 177 of the Code. Hence, if, at the time of the child's conception, the parents are "disqualified by any impediment to marry each other," the child is not legitimated by the subsequent marriage of the parents. In this situation, the remedy available to raise the child into the status of legitimacy is that of adoption.

From the wordings of article 177, it appears that the child, to be entitled to legitimation, must be conceived and born outside of wedlock

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[131]Art. 177, FC.
[132]Art. 178, FC.
[133]Arts. 179 & 180, FC.
[134]Separate Opinion, J. Hermosisima, Jr., De Santos vs. Angeles, 251 SCRA 206 (1995).

of parents. It may then be asked, what if the child is conceived and born inside a void marriage but the parents are not disqualified by any impediment to marry each other, *i.e.*, in a marriage which is void by reason of absence of marriage license, may the child be legitimated by the subsequent re-marriage of the parents, now with a valid marriage license? It is submitted that the answer should be in the affirmative. After all, a marriage that is void *ab initio* is considered as having never to have taken place[135] and the judicial declaration of the nullity of the marriage retroacts to the date of the celebration of the marriage insofar as the vinculum between the spouses is concerned.[136] It is as if, therefore, that the child is conceived and born outside of wedlock of his or her parents. What is essential, however, is that the child must be conceived at the time that the parents are not disqualified by any impediment to marry each other.

Article 177 speaks of "any impediment to marry." Impediment to marry is a legal obstacle to contracting a valid marriage[137] or a prohibition to contract marriage established by law between certain persons.[138] It is believed that the impediments referred to under this article include any kind of impediment that prevents the person subject to them from marrying at all, such as being below 18 or any of the impediments enumerated under articles 37 and 38 of the Code. Hence, if a child is conceived and born outside of wedlock of parents who, at the time of the child's conception, were below 18, the subsequent marriage of the parents after reaching the age of 18 will not result in the child's legitimation.

Note that under article 177 of the Code, if the impediment to marry of the parents exists at the "time of the conception of the child," the child may not be legitimated. What if such impediment did not exist at the time of the conception but present when the child was born, can he be legitimated? For example, at the time of the child's conception, the parents were not married but they were not suffering from any impedi-

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[135]Niñal vs. Bayadog, 328 SCRA 122, 135-136 (2000); citing Suntay vs. Cojuangco-Suntay, 300 SCRA 760 (1998); People vs. Retirement Board, 272 Ill. App. 59 cited in I Tolentino, Civil Code, 1990 ed., p. 271.

[136]Tenebro v. CA, 423 SCRA 272, 284 (2004); see also Morigo vs. People, 422 SCRA 376, 383 (2004).

[137]Black's Law Dictionary, 5th ed., p. 678.

[138]Bouvier's Law Dictionary, Vol. 1, 3rd rev., p. 1509.

ment to marry. But prior to the child's birth, his father marries another. If such marriage is later on terminated and his father subsequently marries his mother, may the child be legitimated? The wordings of article 177 seem to support an affirmative answer. In this example, the child is conceived and born outside of wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other. On the other hand, even if the impediment ceases to exist at the time of the child's birth, so long as the same existed at the time of conception, it is believed that the child is not qualified for legitimation.

[159.3] How Legitimation Takes Place

Legitimation shall take place by a subsequent marriage between the parents[139] of the child referred to under article 177. In other words, this process does not require any additional act on the part either of the child or of the parents except that of the marriage of the child's parents. What is essential, however, is that such marriage must be valid or, at least, voidable. In the latter kind of marriage, the Code expressly provides that the annulment of a voidable marriage shall not affect the legitimation that took place upon the celebration of the marriage between the parents. However, if the marriage between the child's parents is void *ab initio*, legitimation is considered not to have taken place because a void marriage is deemed as having never to have taken place.

[159.4] Effects of Legitimation

Prior to the marriage of the parents of the child referred to under article 177 of the Code, the child's status is that of an illegitimate child since he or she is born outside of a valid marriage.[140] Upon the marriage of the child's parents, assuming the marriage to be valid or, at least, voidable, in which case legitimation takes place, the child is automatically raised to the status of legitimacy, without need of any additional act on the part of either the child or of the parents. This is clear from the provisions of articles 179 and 180. When legitimation takes place, the legitimated child is entitled to the same rights as legitimate child[141] and

[139]Art. 178, FC.
[140]Art. 165, FC.
[141]Art. 179, FC.

this effect retroacts to the time of the child's birth.[142] In other words, a legitimated child is to be considered as a legitimate child of the spouses from the time of the child's birth and not only from the time of the marriage of the parents since the effects of legitimation retroacts to the time of the child's birth.

Since legitimation retroacts to the time of the child's birth, the same shall benefit the descendants of a legitimated child who died before the celebration of the marriage of his or her parents.

[159.5] Action to Impugn Legitimation

Legitimation may be impugned only by those who are prejudiced in their rights as a result thereof.[143] Based on the deliberations of the committee which drafted the Code,[144] the rights referred to in article 182 are basically successional rights. As such, all the other legal or compulsory heirs of the parents of the legitimated child are to be considered as proper party to impugn legitimation.

Under article 182, the action to impugn the legitimation must be initiated within a period of five years from the time of accrual of cause of action. Since the rights to the succession are transmitted only from the moment of the death of the decedent,[145] it is believed that the cause of action by those who are prejudiced in their rights because of the legitimation accrues only upon the death of the parent whose property is transmitted through succession.

Since legitimation has the effect of raising the child into the status of legitimacy, the validity of such legitimation may only be questioned in a direct proceeding. It cannot be subjected to a collateral attack because it is, in effect, an attempt to impugn the child's legitimacy, which can only be done in a direct proceeding for that purpose.

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[142] Art. 180, FC.
[143] Art. 182, FC.
[144] Minutes, Meeting held on Aug. 24, 1985, p. 6.
[145] Art. 777, NCC.

Title VII

ADOPTION

Art. 183. A person of age and in possession of full civil capacity and legal rights may adopt, provided he is in a position to support and care for his children, legitimate or illegitimate, in keeping with the means of the family.

Only minors may be adopted, except in the cases when the adoption of a person of majority age is allowed in this Title.

In addition, the adopter must be at least sixteen years older than the person to be adopted, unless the adopter is the parent by nature of the adopted, or is the spouse of the legitimate parent of the person to be adopted. (27a, EO 91 and PD 603)

Art. 184. The following persons may not adopt:

(1) The guardian with respect to the ward prior to the approval of the final accounts rendered upon the termination of their guardianship relation;

(2) Any person who has been convicted of a crime involving moral turpitude;

(3) An alien, except:

(a) A former Filipino citizen who seeks to adopt a relative by consanguinity;

(b) One who seeks to adopt the legitimate child of his or her Filipino spouse; or

(c) One who is married to a Filipino citizen and seeks to adopt jointly with his or her spouse a relative by consanguinity of the latter.

Aliens not included in the foregoing exceptions may adopt Filipino children in accordance with the rules on inter-country adoptions as may be provided by law. (28a, EO 91 and PD 603)

Art. 185. Husband and wife must jointly adopt, except in the following cases:

(1) When one spouse seeks to adopt his own illegitimate child; or

(2) When one spouse seeks to adopt the legitimate child of the other. (29a, EO 91 and PD 603)

Art. 186. In case husband and wife jointly adopt or one spouse adopts the legitimate child of the other, joint parental authority shall be exercised by the spouses in accordance with this Code. (29a, EO 91 and PD 603)

Art. 187. The following may not be adopted:

(1) A person of legal age, unless he or she is a child by nature of the adopter or his or her spouse, or, prior to the adoption, said person has been consistently considered and treated by the adopter as his or her own child during minority;

(2) An alien with whose government the Republic of the Philippines has no diplomatic relations; and

(3) A person who has already been adopted unless such adoption has been previously revoked or rescinded. (30a, EO 91 and PD 603)

Art. 188. The written consent of the following to the adoption shall be necessary:

(1) The person to be adopted, if ten years of age or over;

(2) The parents by nature of the child, the legal guardian, or the proper government instrumentality;

(3) The legitimate and adopted children, ten years of age or over, of the adopting parent or parents;

(4) The illegitimate children, ten years of age or over, of the adopting parent, if living with said parent and the latter's spouse, if any; and

(5) The spouse, if any, of the person adopting or to be adopted. (31a, EO 91 and PD 603)

Art. 189. Adoption shall have the following effects:

(1) For civil purposes, the adopted shall be deemed to be a legitimate child of the adopters and both shall acquire the reciprocal rights and obligations arising from the relationship of parent and child, including the right of the adopted to use the surname of the adopters;

(2) The parental authority of the parents by nature over the adopted shall terminate and be vested in the adopters, except that if the adopter is the spouse of the parent by nature of the adopted, parental authority over the adopted shall be exercised jointly by both spouses; and

(3) The adopted shall remain an intestate heir of his parents and other blood relatives. (39[1]a, [3]a, PD 603)

Art. 190. Legal or intestate succession to the estate of the adopted shall be governed by the following rules:

(1) Legitimate and illegitimate children and descendants and the surviving spouse of the adopted shall inherit from the adopted, in accordance with the ordinary rules of legal or intestate succession;

(2) When the parents, legitimate or illegitimate, or the legitimate ascendants of the adopted concur with the adopters, they shall divide the entire estate, one-half to be inherited by the parents or ascendants and the other half, by the adopters;

(3) When the surviving spouse or the illegitimate children of the adopted concur with the adopters, they shall divide the entire estate in equal shares, one-half to be inherited by the spouse or the illegitimate children of the adopted and the other half, by the adopters;

(4) When the adopters concur with the illegitimate children and the surviving spouse of the adopted, they shall divide the entire estate in equal shares, one-third to be inherited by the illegitimate children, one-third by the surviving spouse, and one-third by the adopters;

(5) When only the adopters survive, they shall inherit the entire estate; and

(6) When only collateral blood relatives of the adopted survive, then the ordinary rules of legal or intestate succession shall apply. (39[4]a, PD 603)

Art. 191. If the adopted is a minor or otherwise incapacitated, the adoption may be judicially rescinded upon petition of any person authorized by the court or proper government instrumentality acting on his behalf, on the same grounds prescribed for loss or suspension of parental authority. If the adopted is at least eighteen years of age, he may petition for judicial rescission of the adoption on the same grounds prescribed for disinheriting an ascendant. (40a, PD 603)

Art. 192. The adopters may petition the court for the judicial rescission of the adoption in any of the following cases:

(1) If the adopted has committed any act constituting a ground for disinheriting a descendant; or

(2) When the adopted has abandoned the home of the adopters during minority for at least one year, or, by some other acts, has definitely repudiated the adoption. (41a, PD 603)

Art. 193. If the adopted minor has not reached the age of majority at the time of the judicial rescission of the adoption, the court in the same proceeding shall reinstate the parental authority of the parents by nature, unless the latter are disqualified or incapacitated, in which case the court shall appoint a guardian over the person and property of the minor. If the adopted person is physically or mentally handicapped, the court shall appoint in the same proceeding a guardian over his person or property or both.

Judicial rescission of the adoption shall extinguish all reciprocal rights and obligations between the adopters and the adopted arising from the relationship of parent and child. The adopted shall likewise lose the right to use the surnames of the adopters and shall resume his surname prior to the adoption.

The court shall accordingly order the amendment of the records in the proper registries. (42a, PD 603)

COMMENTS:

§ 160. Domestic Adoption Act of 1998 and Inter-Country Adoption Act of 1995

During the effectivity of the Family Code, Congress enacted Republic Act No. 8043, otherwise known as the "Inter-Country Adoption Act of 1995," and Republic Act No. 8552, otherwise known as the "Domestic Adoption Act of 1998." These two laws, however, did not expressly repeal Title VII on Adoption in the Family Code. The repealing clauses of these laws provide, as follows:

> "SEC. 21. *Repealing Clause*. — Any law, decree, executive order, administrative order or rules and regulations contrary to, or inconsistent with the provisions of this Act are hereby repealed, modified or amended accordingly." (Inter-Country Adoption Act of 1995)
>
> "SEC. 26. *Repealing Clause*. — Any law, presidential decree or issuance, executive order, letter of instruction, administrative order, rule, or regulation contrary to, or inconsistent with the provisions of this Act is hereby repealed, modified, or amended accordingly." (Domestic Adoption Act of 1998)

As explained in *supra* § 7.2, the foregoing clauses may not be considered as express repeal because they fail to identify or designate the act or acts that are intended to be repealed. Instead, the foregoing clauses are examples of unnecessary statement of the principle of implied repeal. As such, the provisions of the Family Code on adoption shall not be considered to have been repealed by these two laws unless there be irreconcilable inconsistency or repugnancy between them and the provisions of the Code.

§. 161. Applicability of the Domestic Adoption Act of 1998 and the Inter-Country Adoption Act of 1995

The "Domestic Adoption Act of 1998" (DAA) is intended to govern the domestic adoption of Filipino children, whether the adopter is a citizen of the Philippines or an alien. The "Inter-Country Adoption Act of 1995" (ICA), on the other hand, is intended to govern the adoption of a Filipino child in a foreign country by a person who may not even be qualified to adopt under the Family Code or the DAA. In inter-country adoption, the adopter may either be a foreigner or a Filipino citizen permanently residing abroad where the petition for adoption is filed, the supervised child custody is undertaken and the decree of adoption is issued outside of the Philippines.

§ 162. Background on Law and Origin of Adoption

In **Lahom vs. Sibulo**,[1] the Court gave a brief background of the law and origin of adoption, to wit:

> A brief background on the law and its origins could provide some insights on the subject. In ancient times, the Romans undertook adoption to assure male heirs in the family. The continuity of the adopter's family was the primary purpose of adoption and all matters relating to it basically focused on the rights of the adopter. There was hardly any mention about the rights of the adopted. Countries, like Greece, France, Spain and England, in an effort to preserve inheritance within the family, neither allowed nor recognized adoption. It was only much later when adoption was given an impetus in law and still later when the welfare of the child became a paramount concern. Spain itself which previously disfavored adoption ultimately relented and accepted the Roman law concept of adoption which, subsequently, was to find its way to the archipelago. The Americans came and introduced their own ideas on adoption which, unlike most countries in Europe, made the interests of the child an overriding consideration. In the early part of the century just passed, the

[1]406 SCRA 135 (2003).

rights of children invited universal attention; the Geneva Declaration of Rights of the Child of 1924 and the Universal Declaration of Human Rights of 1948, followed by the United Nations Declarations of the Rights of the Child, were written instruments that would also protect and safeguard the rights of adopted children. The Civil Code of the Philippines of 1950 on adoption, later modified by the Child and Youth Welfare Code and then by the Family Code of the Philippines, gave immediate statutory acknowledgment to the rights of the adopted. In 1989, the United Nations initiated the Convention of the Rights of the Child. The Philippines, a State Party to the Convention, accepted the principle that adoption was impressed with social and moral responsibility, and that its underlying intent was geared to favor the adopted child. R.A. No. 8552 secured these rights and privileges for the adopted. Most importantly, it affirmed the legitimate status of the adopted child, not only in his new family but also in the society as well. The new law withdrew the right of an adopter to rescind the adoption decree and gave to the adopted child the sole right to severe the legal ties created by adoption.

§ 163. Concept of Adoption

[163.1] Adoption explained
[163.2] State policies on adoption

[163.1] Adoption Explained

Adoption is defined as the process of making a child, whether related or not to the adopter, possesses in general, the rights accorded to a legitimate child.[2] It is a juridical act, a proceeding *in rem* which creates between two persons a relationship similar to that which results from legitimate paternity and filiation.[3] Since adoption is essentially a juridical act, only an adoption that has gone through judicial processes, fol-

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[2]In the Matter of the Adoption of Stephanie Nathy Astorga Garcia, 454 SCRA 541, 551 (2005); citing Paras, Civil Code of the Philippines Annotated, Vol. I, Fifteenth Edition, 2002, p. 685.

[3]*Id*., citing Pineda, The Family Code of the Philippines Annotated, 1989 Edition, pp. 272-273, citing 4 Valverde, 473.

lowing the procedures outlined in our existing rules and laws, is considered as valid in our country. Thus, a child who is simply treated as a child of a certain couple, although not related to them by blood, does not enjoy the same rights accorded to legitimate children, in the absence of judicial decree of adoption.

The modern trend is to consider adoption not merely as an act to establish a relationship of paternity and filiation, but also as an act which endows the child with a legitimate status.[4] This was, indeed, confirmed in 1989, when the Philippines, as a State Party to the Convention of the Rights of the Child initiated by the United Nations, accepted the principle that adoption is impressed with social and moral responsibility, and that its underlying intent is geared to favor the adopted child.[5] Republic Act No. 8552, otherwise known as the "Domestic Adoption Act of 1998," secures these rights and privileges for the adopted.[6]

[163.2] State's Policies on Adoption

The Domestic Adoption Act of 1998 outlines the policies of the State on adoption. Section 2 of the said law is quoted hereunder, as follows:

> "SECTION 2. *Declaration of Policies.* — (a) It is hereby declared the policy of the State to ensure that every child remains under the care and custody of his/her parent(s) and be provided with love, care, understanding and security towards the full and harmonious development of his/her personality. Only when such efforts prove insufficient and no appropriate placement or adoption within the child's extended family is available shall adoption by an unrelated person be considered.
>
> (b) In all matters relating to the care, custody and adoption of a child, his/her interest shall be the paramount consideration in accordance with the tenets set forth in the United Nations (UN) Convention on the Rights of the Child; UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference

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[4]*Id*. See Paras, *supra*, citing Prasnick vs. Republic, 98 Phil. 665.
[5]See Lahom vs. Sibulo, 406 SCRA 135 (2003).
[6]See Sec. 17, RA 8552.

to Foster Placement and Adoption, Nationally and Internationally; and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption. Toward this end, the State shall provide alternative protection and assistance through foster care or adoption for every child who is neglected, orphaned, or abandoned.

(c) It shall also be a State policy to:

(i) Safeguard the biological parent(s) from making hurried decisions to relinquish his/her parental authority over his/her child;

(ii) Prevent the child from unnecessary separation from his/her biological parent(s);

(iii) Protect adoptive parent(s) from attempts to disturb his/her parental authority and custody over his/her adopted child.

Any voluntary or involuntary termination of parental authority shall be administratively or judicially declared so as to establish the status of the child as "legally available for adoption" and his/her custody transferred to the Department of Social Welfare and Development or to any duly licensed and accredited child-placing or child-caring agency, which entity shall be authorized to take steps for the permanent placement of the child;

(iv) Conduct public information and educational campaigns to promote a positive environment for adoption;

(v) Ensure that sufficient capacity exists within government and private sector agencies to handle adoption inquiries, process domestic adoption applications, and offer adoption-related services including, but not limited to, parent preparation and post-adoption education and counseling; and

(vi) Encourage domestic adoption so as to preserve the child's identity and culture in his/her native

land, and only when this is not available shall inter-country adoption be considered as a last resort."

It is clear from the foregoing policies that inter-country adoption shall only be resorted to when domestic adoption of the child is not available. The purpose, of course, is to encourage domestic adoption in order to preserve the child's identity and culture.

I.
DOMESTIC ADOPTION

§ 164. Governing Law

Domestic adoption is governed by the Domestic Adoption Act and the provisions of Title VII of the Family Code, the latter insofar as they have not been amended by the provisions of the Domestic Adoption Act. The procedure, on the other hand, shall be governed by the Rule on Adoption,[7] which became effective on August 22, 2002.

§ 165. Who Are Qualified to Adopt

[165.1] In general
[165.2] Filipino adopter
[165.3] Alien adopter
[165.4] Guardian as adopter
[165.5] Joint adoption of spouses

[165.1] In General

Domestic adoption is likewise available to any alien possessing the qualifications and none of the disqualifications mentioned under the Domestic Adoption Act. In other words, the adopter may either be a citizen of the Philippines or an alien in domestic adoption, so long as they are qualified to adopt under the provisions of the Domestic Adoption Act.

[165.2] Filipino Adopter

If the adopter is any Filipino citizen, he/she must possess the following qualifications: (1) The adopter must be of legal age and at least

[7] A.M. 02-06-02-SC

sixteen (16) years older than the adoptee, except if the adopter is the biological parent of the adoptee or the spouse of the adoptee's parent, in which case, the requirement of sixteen-year difference may be waived;[8] (2) The adopter must be in possession of full civil capacity and legal rights, of good moral character and has not been convicted of any crime involving moral turpitude;[9] and (3) The adopter must be emotionally and psychologically capable of caring for children and in a position to support and care for his or her children in keeping with the means of the family.[10]

Note that if a person is not of age, as in the case of a minor, and is not in possession of full civil capacity and legal rights, as in the case of insane, imbecile, deaf-mute or a person suffering from civil interdiction, such person cannot adopt. However, a person of legal age and in possession of full civil capacity and legal rights is not necessarily qualified to adopt. In addition, the law requires that he must be:

(1) at least sixteen (16) years older than the adoptee, except if the adopter is the biological parent of the adoptee or the spouse of the adoptee's parent, in which case, the requirement of sixteen-year difference may be waived;

(2) of good moral character and has not been convicted of any crime involving moral turpitude; and

(3) emotionally and psychologically capable of caring for children and in a position to support and care for his or her children in keeping with the means of the family.

[165.3] Alien Adopter

If the adopter is an alien, he/she must possess the same qualifications required of Filipino nationals and, in addition: (1) His/her country must have diplomatic relations with the Republic of the Philippines;[11] (2) He/she has been certified by his/her diplomatic or consular office or any appropriate government agency to be legally capacitated to adopt in

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[8]Sec. 7(a), DAA.
[9]*Id.*
[10]*Id.*
[11]Sec. 7(b), DAA.

his/her country;[12] (3) His/her government allows the adoptee to enter his/her country as his/her adopted son/daughter;[13] (4) He/she has been living in the Philippines for at least three (3) continuous years prior to the filing of the application for adoption and maintains such residence until the adoption decree is entered.[14]

The requirements on residency and the certification of the alien's qualification to adopt in his/her country may be waived for the following: (i) a former Filipino citizen who seeks to adopt a relative within the fourth (4th) degree of consanguinity or affinity; (ii) one who seeks to adopt the legitimate son/daughter of his/her Filipino spouse; or (iii) one who is married to a Filipino citizen and seeks to adopt jointly with his/her spouse a relative within the fourth (4th) degree of consanguinity or affinity of the Filipino spouse.[15]

Under the Civil Code, one who has legitimate, legitimated, acknowledged natural children, or natural children by legal fiction is ineligible to adopt another child,[16] even though such other child is the legitimate son of his wife by a former marriage[17] and notwithstanding the fact that the child to be adopted had been reared under an agreement with the parents of the latter for his adoption.[18] The principal reason behind paragraph 1 of Article 355 of the new Civil Code, denying the right to adopt to those who already have children, is that adoption would not only create conflicts within the family but would also materially diminish or affect the successional rights of the child or children already had.[19] Fortunately, this prohibition was not carried over in the Family Code and in the Domestic Adoption Act.

[165.4] Guardian as Adopter

The guardian may not adopt his or her ward prior to the approval of the final accounts rendered upon the termination of their guardian-

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[12]*Id.*
[13]*Id.*
[14]*Id.*
[15]*Id.*
[16]Art. 335, No. (1), NCC.
[17]Ball vs. Republic, L-5272, Dec. 21, 1953, 50 O.G. 142;
[18]Santos-Ynigo vs. Republic, 50 O.G. 3030.
[19]McGee vs. Republic, 94 Phil. 820, April 29, 1954.

ship relation.[20] Otherwise stated, the guardian may only adopt the ward after the termination of the guardianship and clearance of his/her financial accountabilities.[21]

[165.5] Joint Adoption of Spouses

The Domestic Adoption Act and the Family Code both require a joint adoption by the husband and wife.[22] Note that it is mandatory for both the spouses to jointly adopt, except in three instances:

(1) if one spouse seeks to adopt the legitimate son/daughter of the other;[23] or

(2) if one spouse seeks to adopt his/her own illegitimate son/daughter, provided, however, that the other spouse has signified his/her consent thereto;[24] or

(3) if the spouses are legally separated from each other.[25]

Note that if one spouse seeks to adopt the illegitimate son/daughter of the other spouse, the law does not exempt this adoption from the requirement of joint adoption by spouses. Adoption is still necessary on the part of the parent-spouse for the purpose of improving the child's status to that of legitimacy.[26]

In case husband and wife jointly adopt, or one spouse adopts the illegitimate son/daughter of the other, joint parental authority shall be exercised by the spouses.[27]

§ 166. Who May Be Adopted

Under the provisions of the Domestic Adoption Act, only the following may be adopted:

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[20]Art. 184, No. (1), FC.

[21]Sec. 7(c), DAA.

[22]See Sec. 7, DAA; Art. 185, FC.

[23]Sec. 7, DAA; Art. 185, No. (2), FC.

[24]Sec. 7, DAA. Note that under the Family Code (Art. 185, No. [1]) the consent of the other spouse is not required. Hence, the provisions of Art. 185, No. (1) is deemed amended.

[25]*Id.* Note that this is not one of the exceptions to the requirement of joint adoption by the spouses under The Family Code.

[26]See Sec. 8(c), DAA.

[27]*Id.*

(a) Any person below eighteen (18) years of age who has been administratively or judicially declared available for adoption.[28]

A child is considered "legally available for adoption" if the child is below eighteen (18) years of age,[29] has been voluntarily or involuntarily committed to the Department of Social Welfare and Development ("DSWD") or to a duly licensed and accredited child-placing or child-caring agency and freed of the parental authority of his/her biological parent(s) or guardian or adopter(s) in case of rescission of adoption.[30] A "voluntarily committed child" is one whose parent(s) knowingly and willingly relinquishes parental authority to the DSWD;[31] while an "involuntarily committed child" is one whose parent(s), known or unknown, has been permanently and judicially deprived of parental authority due to abandonment; substantial, continuous, or repeated neglect; abuse; or incompetence to discharge parental responsibilities.[32]

Any voluntary or involuntary termination of parental authority shall be administratively or judicially declared so as to establish the status of the child as "legally available for adoption" and his/her custody transferred to the Department of Social Welfare and Development or to any duly licensed and accredited child-placing or child-caring agency, which entity shall be authorized to take steps for the permanent placement of the child.[33]

(b) The legitimate son/daughter of one spouse by the other spouse.[34]

Obviously, the adopter here is the spouse of the parent of the legitimate son/daughter. In this situation, it is not necessary that the legitimate son/daughter of the other spouse be below eighteen (18) years of age. In other words, the adoptee may even be of legal age if he or she is the child by nature of the adopter's spouse.[35]

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[28]Sec. 8(a), DAA.
[29]Sec. 3(a), DAA.
[30]Sec. 3(b), DAA.
[31]Sec. 3(c). DAA.
[32]Sec. 3(d), DAA.
[33]Sec. 2(c)(iii), DAA.
[34]Sec. 8(b), DAA.
[35]See Art. 187, No. (1), FC.

(c) An illegitimate son/daughter by a qualified adopter to improve his/her status to that of legitimacy.[36]

If the adopter seeking to adopt his/her own illegitimate child is married, the law requires that the other spouse must signify his/her consent but the latter need not join in the adoption.[37] If it is the other spouse who seeks to adopt the illegitimate child of the other spouse, note that the law requires that both spouses must jointly adopt. In any case, the illegitimate child may be adopted even if he or she is already of legal age.[38]

(d) A person of legal age if, prior to the adoption, said person has been consistently considered and treated by the adopter(s) as his/her own child since minority.[39]

(e) A child whose adoption has been previously rescinded.[40] To be legally available for adoption, the child must be below eighteen (18) years of age.[41]

(f) A child whose biological or adoptive parent(s) has died[42] provided that the child is below eighteen (18) years of age.[43] In this case, the law requires that no adoption proceedings shall be initiated within six (6) months from the time of death of said parent(s).[44]

Note that our laws do not prohibit relatives, either by blood or affinity, from adopting one another. In **Santos, Jr. vs. Republic**,[45] the petition for adoption was dismissed by the lower court because the adopter was the elder sister of the person sought to be adopted. The lower court reasoned that such adoption would result in an incongruous situation where the brother of the adopter would also be her son. In reversing the decision of the lower court, the Supreme Court explained —

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[36]Sec. 8(c), DAA.
[37]Sec. 7, DAA.
[38]See Art. 187, No. (1), FC.
[39]Sec. 8(d), DAA; Art. 187, No. (1), FC.
[40]Sec. 8(e), DAA.
[41]Sec. 3(a), DAA.
[42]Sec. 8(f), DAA.
[43]Sec. 3(a), DAA.
[44]Sec. 8(f), DAA.
[45]21 SCRA 379 (1967).

We are not aware of any provision in the law, and none has been pointed to Us by the Office of the Solicitor General who argues for the State in this case, that relatives, by blood or by affinity, are prohibited from adopting one another. The only objection raised is the alleged "incongruity" that will result in the relation of the petitioner-wife and the adopted, in the circumstance that the adopted who is the legitimate brother of the adopter, will also be her son by adoption. The theory is, therefore, advanced that adoption among people who are related by nature should not be allowed, in order that dual relationship should not result, reliance being made upon the views expressed by this Court in **McGee vs. Republic**, L-5387, April 29, 1954, 94 Phil. 820.

In that case, an American citizen, Clyde E. McGee married to a Filipina by whom he had one child, instituted a proceeding for the adoption of two minor children of the wife had by her first husband. The lower court granted the petition of McGee to adopt his two minor step-children. On appeal by the State. We reversed the decision. We said:

The purpose of adoption is to establish a relationship of paternity and filiation where none existed before. Where therefore the relationship of parent and child already exists whether by blood or by affinity as in the case of illegitimate and step-children, it would be unnecessary and superfluous to establish and super impose another relationship of parent and child through adoption. Consequently, an express authorization of law like article 338 is necessary, if not to render it proper and legal, at least, to remove any and all doubt on the subject matter. Under this view, article 338 may not be regarded as a surplusage. That may have been the reason why in the old Code of Civil Procedure, particularly its provisions regarding adoption, authority to adopt a step-child by a step-father was provided in section 766 notwithstanding the general authorization in section 765 extended to any inhabitant of the Philippines to adopt a minor child. The same argument of surplusage could plausibly have been advanced as regards section 766, that is to say, section 766 was unnecessary and superfluous because without it a step-father could adopt a

minor step-child anyway. However, the inserting of section 766 was not entirely without reason. It seems to be an established principle in American jurisprudence that a person may not adopt his own relative, the reason being that it is unnecessary to establish a relationship where such already exists (the same philosophy underlying our codal provisions on adoption). So some states have special laws authorizing the adoption of relatives such as a grandfather adopting a grandchild and a father adopting his illegitimate or natural-child.

Notwithstanding the views thus expressed, a study of American precedents would reveal that there is a variance in the decisions of the courts in different jurisdictions regarding, the matter of adoption of relatives. It cannot be stated as a general proposition that the adoption of a blood relative is contrary to the policy of the law, for in many states of the Union, no restriction of that sort is contained in the statutes authorizing adoption, although laws of other jurisdiction expressly provide that adoption may not take place within persons within a certain degree of relationship (1 Am. Jur. 628-629). Courts in some states hold that in the absence of express statutory restriction, a blood relationship between the parties is not a legal impediment to the adoption of one by the other, and there may be a valid adoption where the relation of parent and child already exists by nature (2 Am. Jur. 2d 869). Principles vary according to the particular adoption statute of a state under which any given case is considered. It would seem that in those states originally influenced by the civil law countries where adoption originated, the rules are liberally construed, while in other states where common law principles predominate, adoption laws are more strictly applied because they are regarded to be in derogation of the common law.

Article 335 of the Civil Code enumerates those persons who may not adopt, and it has been shown that petitioners-appellants herein are not among those prohibited from adopting. Article 339 of the same code names those who cannot be adopted, and the minor child whose adoption is under consideration, is not one of those excluded by the law. Article

338, on the other hand, allows the adoption of a natural child by the natural father or mother, of other illegitimate children by their father or mother, and of a step-child by the step-father or step-mother. This last article is, of course, necessary to remove all doubts that adoption is not prohibited even in these cases where there already exist a relationship of parent and child between them by nature. To say that adoption should not be allowed when the adopter and the adopted are related to each other, except in these cases enumerated in Article 338, is to preclude adoption among relatives no matter how far removed or in whatever degree that relationship might be, which in our opinion is not the policy of the law. The interest and welfare of the child to be adopted should be of paramount consideration. Adoption statutes, being humane and salutary, and designed to provide homes, care and education for unfortunate children, should be construed so as to encourage the adoption of such children by person who can properly rear and educate them (In re Havsgord's Estate, 34 S.D. 131, 147 N.W. 378).

With respect to the objection that the adoption in this particular case will result in a dual relationship between the parties, that the adopted brother will also be the son of the adopting elder sister, that fact alone should not prevent the adoption. One is by nature, while the other is by fiction of law. The relationship established by the adoption is limited to the adopting parents and does not extend to their other relatives, except as expressly provided by law. Thus, the adopted child cannot be considered as a relative of the ascendants and collaterals of the adopting parents, nor of the legitimate children which they may have after the adoption except that the law imposes certain impediments to marriage by reason of adoption. Neither are the children of the adopted considered as descendants of the adopter (Tolentino, Civil Code, Vol. I, 1960 Ed., p. 652, citing 1 Oyuelos 284; Perez, Gonzales and Castan; 4-11 Enneccerus, Kipp & Wolff 177; MuÒoz P. 104). So even considered in relation to the rules on succession which are in *pari materia*, the adoption under consideration would not be objectionable on the ground alone of

the resulting relationship between the adopter and the adopted. Similar dual relationships also result under our law on marriage when persons who are already related, by blood or by affinity, marry each other. But as long as the relationship is not within the degrees prohibited by law, such marriages are allowed notwithstanding the resulting dual relationship. And as We do not find any provision in the law that expressly prohibits adoption among relatives, they ought not to be prevented.

§ 167. Requirement of Consent

The written consent of the following to the adoption is required:

(1) The adoptee, if ten (10) years of age or over;[46]

(2) The biological parent(s) of the child, if known, or the legal guardian, or the proper government instrumentality which has legal custody of the child;[47]

(3) The legitimate and adopted sons/daughters, ten (10) years of age or over, of the adopter(s)[48] and adoptee,[49] if any;

(4) The illegitimate sons/daughters, ten (10) years of age or over, of the adopter if living with said adopter and the latter's spouse, if any;[50]

(5) The spouse, if any, of the person adopting or to be adopted.[51]

If a natural parent is exercising parental authority over the adoptee, it is clear that his or her written consent to the adoption is necessary because one of the effects of a decree of adoption is deprivation of parental authority. The absence, however, of parental authority on the part of a biological parent does not necessarily mean that his or her consent to the adoption is not required. Note that the law[52] in requiring the writ-

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[46]Sec. 9(a), DAA; Art. 188, No. (1), FC.

[47]Sec. 9(b), DAA; Art. 188, No. (2), FC.

[48]Sec. 9(c), DAA; Art. 188, No. (3), FC.

[49]Sec. 9(c), DAA. Note that under the Family Code, the consent of the legitimate and adopted children of the adoptee, ten years or over, is not required.

[50]Sec. 9(d), DAA; Art. 188, No. (4), FC.

[51]Sec. 9(e), DAA; Art. 188, No. (5), FC.

[52]Sec. 9(b), DAA; Art. 188, No. (2), FC.

ten consent of the biological parent(s) of the child, if known, does not distinguish between legitimate and illegitimate filiation. It appears therefore that if the child is illegitimate, in which case, the child is under the parental authority of the mother, the consent of the biological father to the adoption is likewise required, if the latter has recognized or admitted his paternity over the illegitimate child.

It has been held that the written consent of the natural parent to the adoption, while indispensable to the validity of the decree of adoption[53] may, nonetheless, be dispensed with if the parent has abandoned the child or that such parent is insane or hopelessly intemperate.[54]

It is notable, however, that in the case of **Santos, et. al. vs. Arranzanso, et. al.**,[55] the ruling of the Court that the parent's consent may be dispensed with if the parent has abandoned the child or that such parent is insane or hopelessly intemperate was based on Section 3 of Rule 100 of the Old Rules of Court. Thus, the Court declared in *Santos* case —

> In this regard it should be stated that the Court of Appeals completely relied on American jurisprudence and authorities to the effect that parental consent to the adoption is a jurisdictional requisite (*e.g.*, 2 C.J.S., Adoption of Children, Section 45[a] p. 435; Whetmore vs. Fratello, 282 P2d 667, 670). The point to remember, however, is that under our law on the matter, consent *by the parents* to the adoption is *not an absolute requisite*:
>
> SEC. 3. *Consent to adoption.* — There shall be filed with the petition a written consent to the adoption signed by the child if over fourteen years of age and not incompetent, and by each of its known living parents who is not insane or hopelessly intemperate or has not abandoned such child, or if there are no such parents by the general guardian or guardian *ad litem* of the child, or if the child is in the custody of an orphan asylum, children's home, or benevolent society or person, by the proper officer or officers of such asylum, home,

[53]Cang vs. CA, 296 SCRA 128 (1998).

[54]Cang vs. CA, citing Santos vs. Arranzanso, 123 Phil. 160, 167 (1966).

[55]16 SCRA 344 (1966).

or society, or by such person; but if the child is illegitimate and has not been recognized, the consent of its father to the adoption shall not be required. (Rule 100, Old Rules of Court.)[56]

Stated otherwise, if the natural parents have abandoned their children, consent to the adoption by the guardian *ad litem* suffices. This brings as to the question whether in the proceedings at bar the Court of Appeals can still review the evidence in the adoption case and conclude that it was not sufficiently established therein that the parents of Paulina and Aurora Santos had abandoned them.

In **Cang vs. Court of Appeals**,[57] where Santos case was cited, the statement of the Court that the parent's consent may be dispensed with if the parent has abandoned the child or that such parent is insane or hopelessly intemperate was, in turn, based on Section 3 of Rule 99 of the Rules of Court, which reads, as follows:

"SEC. 3. *Consent to adoption.* — There shall be filed with the petition a <u>written consent to the adoption signed</u> by the child, if fourteen years of age or over and not incompetent, and by the child's spouse, if any, and <u>by each of its known living parents who is not insane or hopelessly intemperate or has not abandoned the child</u>, or if there are no such parents by the general guardian or guardian *ad litem* of the child, or if the child is in the custody of an orphan asylum, children's home, or benevolent society or person, by the proper officer or officers of such asylum, home, or society, or by such persons; but if the child is illegitimate and has not been recognized, the consent of its father to the adoption shall not be required." (Underscoring supplied)

Rule 99, however, was already superseded by the Rule on Adoption[58] (A.M. No. 02-6-02-SC), which took effect on August 22, 2002. Under this new rule, the provisions of Section 3 of Rule 99 were not

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[56]Superseded by Section 3, Rule 99, Revised Rules of Court.
[57]*Supra.*
[58]See Sec. 25, Rule on Adoption (A.M. No. 02-6-02-SC).

reproduced. Hence, it is now doubtful if the parent's consent to the adoption can be dispensed with for causes mentioned in Section 3 of Rule 99.

§ 168. Procedure in Domestic Adoption

[168.1] Jurisdiction and venue
[168.2] Nature of adoption proceedings
[168.3] Contents of petition for adoption
[168.4] Rectification of simulated birth
[168.5] Adoption of foundling, abandoned, dependent or neglected child
[168.6] Change of name
[168.7] Annexes to the petition
[168.8] Order of hearing
[168.9] Child and home study reports
[168.10] Hearing
[168.11] Supervised trial custody
[168.12] Decree of adoption

[168.1] Jurisdiction and Venue

The Family Court has exclusive jurisdiction to hear and decide petitions for adoption of children and its revocation[59] and the venue thereof shall be in the province or city where the prospective parents reside.[60]

[168.2] Nature of Adoption Proceedings

Adoption proceedings being *in rem*, no court may entertain them unless it has jurisdiction, not only over the subject matter of the case and over the parties, but also, over the *res*, which is the personal status not only of the person to be adopted, but also of the adopting parents.[61] In adoption proceedings, notice is made through publication[62] to protect the interests of all persons concerned.[63] Said interest will not be protected if the notice by publication does not carry the true name of the child to be adopted because the persons to be served by the notice have the right to expect the use of the child's officially recorded name. Such

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[59]Sec. 5(c), R.A. No. 8369.
[60]Sec. 6, Rule on Adoption.
[61]Ellis vs. Republic, 7 SCRA 962.
[62]Sec. 12(4), Rule on Adoption.
[63]3 Moran 534, 1963 ed.

defect amounts to a failure of service by publication, and the court acquired no jurisdiction over the case.[64] Under the present rules, the registered name of the adoptee in the birth certificate and the names by which the adoptee has been known, is required to be stated in the caption.[65]

[168.3] Contents of Petition for Adoption

The petition shall be verified and specifically state at the heading of the initiatory pleading whether the petition contains an application for change of name, rectification of simulated birth, voluntary or involuntary commitment of children, or declaration of child as abandoned, dependent or neglected.

(1) If the adopter is a Filipino citizen, the petition shall allege the following:

(a) The jurisdictional facts;

(b) That the petitioner is of legal age, in possession of full civil capacity and legal rights; is of good moral character; has not been convicted of any crime involving moral turpitude; is emotionally and psychologically capable of caring for children; is at least sixteen (16) years older than the adoptee, unless the adopter is the biological parent of the adoptee or is the spouse of the adoptee's parent; and is in a position to support and care for his children in keeping with the means of the family and has undergone pre-adoption services as required by Section 4 of Republic Act No. 8552.

(2) If the adopter is an alien, the petition shall allege the following:

(a) The jurisdictional facts;

(b) That the petitioner is of legal age, in possession of full civil capacity and legal rights; is of good moral character; has not been convicted of any crime involving moral turpitude; is emotionally and psychologically capable of caring for children; is at least sixteen (16) years older than the adoptee, unless the adopter

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[64] Yuseco vs. Republic, L-13441, June 20, 1960.
[65] Sec. 12(1), Rule on Adoption.

is the biological parent of the adoptee or is the spouse of the adoptee's parent; and is in a position to support and care for his children in keeping with the means of the family and has undergone pre-adoption services as required by Section 4 of Republic Act No. 8552.

(c) That his country has diplomatic relations with the Republic of the Philippines;

(d) That he has been certified by his diplomatic or consular office or any appropriate government agency to have the legal capacity to adopt in his country and his government allows the adoptee to enter his country as his adopted child and reside there permanently as an adopted child; and

(e) That he has been living in the Philippines for at least three (3) continuous years prior to the filing of the petition and he maintains such residence until the adoption decree is entered.

The requirements of certification of the alien's qualification to adopt in his country and of residency may be waived if the alien:

(i) is a former Filipino citizen who seeks to adopt a relative within the fourth degree of consanguinity or affinity; or

(ii) seeks to adopt the legitimate child of his Filipino spouse; or

(iii) is married to a Filipino citizen and seeks to adopt jointly with his spouse a relative within the fourth degree of consanguinity or affinity of the Filipino spouse.

(3) If the adopter is the legal guardian of the adoptee, the petition shall allege that guardianship had been terminated and the guardian had cleared his financial accountabilities.

(4) If the adopter is married, the spouse shall be a co-petitioner for joint adoption except if:

(a) one spouse seeks to adopt the legitimate child of the other, or

(b) if one spouse seeks to adopt his own illegitimate child and the other spouse signified written consent thereto, or

(c) if the spouses are legally separated from each other.

(5) If the adoptee is a foundling, the petition shall allege the entries which should appear in his birth certificate, such as name of child, date of birth, place of birth, if known; sex, name and citizenship of adoptive mother and father, and the date and place of their marriage.

(6) If the petition prays for a change of name, it shall also state the cause or reason for the change of name.

In all petitions, it shall be alleged:

(a) The first name, surname or names, age and residence of the adoptee as shown by his record of birth, baptismal or foundling certificate and school records.

(b) That the adoptee is not disqualified by law to be adopted.

(c) The probable value and character of the estate of the adoptee.

(d) The first name, surname or names by which the adoptee is to be known and registered in the Civil Registry.

A certification of non-forum shopping shall be included pursuant to Section 5, Rule 7 of the 1997 Rules of Civil Procedure.[66]

[168.4] Rectification of Simulated Birth

"Simulation of birth" is the tampering of the civil registry making it appear in the birth records that a certain child was born to a person who is not his/her biological mother, causing such child to lose his/her true identity and status.[67]

A person who has, prior to the effectivity of the Domestic Adoption Act, simulated the birth of a child shall not be punished for such act, subject to the following conditions: (1) that the simulation of birth was made for the best interest of the child and that he/she has been consistently considered and treated by that person as his/her own son/daughter; (2) that the application for correction of the birth registration and petition for adoption shall be filed within five (5) years from the effectivity of this Act and completed thereafter; and (3) that such person complies

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[66]Sec. 7, Rule on Adoption.
[67]Sec. 3(j), DAA.

with the procedure as specified in Article IV of the Domestic Adoption Act and other requirements as determined by the DSWD.[68]

In case the petition also seeks rectification of a simulated of birth, it shall allege that:

(a) Petitioner is applying for rectification of a simulated birth;

(b) The simulation of birth was made prior to the date of effectivity of the Domestic Adoption Act and the application for rectification of the birth registration and the petition for adoption were filed within five years from said date;

(c) The petitioner made the simulation of birth for the best interests of the adoptee; and

(d) The adoptee has been consistently considered and treated by petitioner as his own child.[69]

[168.5] Adoption of foundling, abandoned, dependent or neglected child

"Foundling" refers to a deserted or abandoned infant or child whose parents, guardian or relatives are unknown; or a child committed to an orphanage or charitable or similar institution with unknown facts of birth and parentage and registered in the Civil Register as a "foundling."[70] "Abandoned child" refers to one who has no proper parental care or guardianship or whose parents have deserted him for a period of at least six (6) continuous months and has been judicially declared as such.[71] "Dependent child" refers to one who is without a parent, guardian or custodian or one whose parents, guardian or other custodian for good cause desires to be relieved of his care and custody and is dependent upon the public for support.[72] "Neglected child" is one whose basic needs have been deliberately not attended to or inadequately attended to, physically or emotionally, by his parents or guardian.[73]

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[68]Sec. 22, DAA.
[69]Sec. 8, Rule on Adoption.
[70]Sec. 3(e), Rule on Adoption.
[71]Sec. 3(f), Rule on Adoption.
[72]Sec. 3(g), Rule on Adoption.
[73]Sec. 3(h), Rule on Adoption.

In case the adoptee is a foundling, an abandoned, dependent or neglected child, the petition shall allege:

(a) The facts showing that the child is a foundling, abandoned, dependent or neglected;

(b) The names of the parents, if known, and their residence. If the child has no known or living parents, then the name and residence of the guardian, if any;

(c) The name of the duly licensed child-placement agency or individual under whose care the child is in custody; and

(d) That the Department, child-placement or child-caring agency is authorized to give its consent.[74]

[168.6] Change of Name

In case the petition also prays for change of name, the title or caption must contain:

(a) The registered name of the child;

(b) Aliases or other names by which the child has been known; and

(c) The full name by which the child is to be known.[75]

[168.7] Annexes to the Petition

The following documents shall be attached to the petition:

A. Birth, baptismal or foundling certificate, as the case may be, and school records showing the name, age and residence of the adoptee;

B. Affidavit of consent of the following:

1. The adoptee, if ten (10) years of age or over;

2. The biological parents of the child, if known, or the legal guardian, or the child-placement agency, child-caring agency, or the proper government instrumentality which has legal custody of the child;

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[74]Sec. 9, Rule on Adoption.
[75]Sec. 10, Rule on Adoption.

3. The legitimate and adopted children of the adopter and of the adoptee, if any, who are ten (10) years of age or over;

4. The illegitimate children of the adopter living with him who are ten (10) years of age or over; and

5. The spouse, if any, of the adopter or adoptee.

C. Child study report on the adoptee and his biological parents;

D. If the petitioner is an alien, certification by his diplomatic or consular office or any appropriate government agency that he has the legal capacity to adopt in his country and that his government allows the adoptee to enter his country as his own adopted child unless exempted under Section 4(2);

E. Home study report on the adopters. If the adopter is an alien or residing abroad but qualified to adopt, the home study report by a foreign adoption agency duly accredited by the Inter-Country Adoption Board; and

F. Decree of annulment, nullity or legal separation of the adopter as well as that of the biological parents of the adoptee, if any.[76]

[168.8] Order of Hearing

If the petition and attachments are sufficient in form and substance, the court shall issue an order which shall contain the following:

(1) the registered name of the adoptee in the birth certificate and the names by which the adoptee has been known which shall be stated in the caption;

(2) the purpose of the petition;

(3) the complete name which the adoptee will use if the petition is granted;

(4) the date and place of hearing which shall be set within six (6) months from the date of the issuance of the order and shall direct that a copy thereof be published before the date of hearing at least once a week for three successive weeks in a news-

[76]Sec. 11, Rule on Adoption.

paper of general circulation in the province or city where the court is situated; *Provided*, that in case of application for change of name, the date set for hearing shall not be within four (4) months after the last publication of the notice nor within thirty (30) days prior to an election.

The newspaper shall be selected by raffle under the supervision of the Executive Judge.

(5) a directive to the social worker of the court, the social service office of the local government unit or any child-placing or child-caring agency, or the Department to prepare and submit child and home study reports before the hearing if such reports had not been attached to the petition due to unavailability at the time of the filing of the latter; and

(6) a directive to the social worker of the court to conduct counseling sessions with the biological parents on the matter of adoption of the adoptee and submit her report before the date of hearing.

At the discretion of the court, copies of the order of hearing shall also be furnished the Office of the Solicitor General through the provincial or city prosecutor, the Department and the biological parents of the adoptee, if known.

If a change in the name of the adoptee is prayed for in the petition, notice to the Solicitor General shall be mandatory.[77]

[168.9] Child and Home Study Reports

No petition for adoption shall be set for hearing unless a licensed social worker of the DSWD, the social service office of the local government unit, or any child-placing or child-caring agency has made a case study of the adoptee, his/her biological parent(s), as well as the adopter(s), and has submitted the report and recommendations on the matter to the court hearing such petition.[78]

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[77]Sec. 12, Rule on Adoption.
[78]Sec. 11, 1st par., DAA.

In preparing the child study report on the adoptee, the concerned social worker shall verify with the Civil Registry the real identity and registered name of the adoptee. If the birth of the adoptee was not registered with the Civil Registry, it shall be the responsibility of the social worker to register the adoptee and secure a certificate of foundling or late registration, as the case may be.[79]

The social worker shall establish that the child is legally available for adoption and the documents in support thereof are valid and authentic, that the adopter has sincere intentions and that the adoption shall inure to the best interests of the child.[80]

In case the adopter is an alien, the home study report must show the legal capacity to adopt and that his government allows the adoptee to enter his country as his adopted child in the absence of the certification required under Section 7(b) of the Domestic Adoption Act.[81]

If after the conduct of the case studies, the social worker finds that there are grounds to deny the petition, he shall make the proper recommendation to the court, furnishing a copy thereof to the petitioner.[82]

[168.10] Hearing

Upon satisfactory proof that the order of hearing has been published and jurisdictional requirements have been complied with, the court shall proceed to hear the petition. The petitioner and the adoptee must personally appear and the former must testify before the presiding judge of the court on the date set for hearing.[83]

The court shall verify from the social worker and determine whether the biological parent has been properly counseled against making hasty decisions caused by strain or anxiety to give up the child; ensure that all measures to strengthen the family have been exhausted; and ascertain if any prolonged stay of the child in his own home will be inimical to his welfare and interest.[84]

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[79]Sec. 13, Rule on Adoption.
[80]*Id.*
[81]*Id.*
[82]*Id.*
[83]Sec. 14, Rule on Adoption.
[84]*Id.*

[168.11] Supervised Trial Custody

No petition for adoption shall be finally granted until the adopter(s) has been given by the court a supervised trial custody period for at least six (6) months within which the parties are expected to adjust psychologically and emotionally to each other and establish a bonding relationship. During said period, temporary parental authority shall be vested in the adopter(s).[85] The trial custody shall be monitored by the social worker of the court, the Department, or the social service of the local government unit, or the child-placement or child-caring agency which submitted and prepared the case studies.[86]

The court may *motu proprio* or upon motion of any party reduce the trial period if it finds the same to be in the best interest of the adoptee, stating the reasons for the reduction of the period. An alien adopter however must complete the 6-month trial custody except the following:

(a) a former Filipino citizen who seeks to adopt a relative within the fourth (4th) degree of consanguinity or affinity; or

(b) one who seeks to adopt the legitimate child of his Filipino spouse; or

(c) one who is married to a Filipino citizen and seeks to adopt jointly with his or her spouse the latter's relative within the fourth (4th) degree of consanguinity or affinity.[87]

If the child is below seven (7) years of age and is placed with the prospective adopter(s) through a pre-adoption placement authority issued by the Department, the prospective adopter(s) shall enjoy all the benefits to which biological parent(s) is entitled from the date the adoptee is placed with the prospective adopter(s).[88]

The social worker shall submit to the court a report on the result of the trial custody within two weeks after its termination.[89]

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[85]Sec. 12, DAA.
[86]Sec. 15, Rule on Adoption.
[87]Sec. 15, Rule on Adoption.
[88]Sec. 12, DAA.
[89]Sec. 15, Rule on Adoption.

[168.12] Decree of Adoption

If, after the publication of the order of hearing has been complied with, and no opposition has been interposed to the petition, and after consideration of the case studies, the qualifications of the adopter(s), trial custody report and the evidence submitted, the court is convinced that the petitioners are qualified to adopt, and that the adoption would redound to the best interest of the adoptee, a decree of adoption shall be entered which shall be effective as of the date the original petition was filed. This provision shall also apply in case the petitioner(s) dies before the issuance of the decree of adoption to protect the interest of the adoptee.[90]

The decree shall:

A. State the name by which the child is to be known and registered;

B. Order:

(1) The Clerk of Court to issue to the adopter a certificate of finality upon expiration of the 15-day reglementary period within which to appeal.

(2) The adopter to submit a certified true copy of the decree of adoption and the certificate of finality to the Civil Registrar where the child was originally registered within thirty (30) days from receipt of the certificate of finality. In case of change of name, the decree shall be submitted to the Civil Registrar where the court issuing the same is situated.

(3) The Civil Registrar of the place where the adoptee was registered:

  (a) to annotate on the adoptee's original certificate of birth the decree of adoption within thirty (30) days from receipt of the certificate of finality;

  (b) to issue a certificate of birth which shall not bear any notation that it is a new or amended certificate and which shall show, among others, the following: registry

[90] Sec. 13, DAA.

number, date of registration, name of child, sex, date of birth, place of birth, name and citizenship of adoptive mother and father, and the date and place of their marriage, when applicable;

(c) to seal the original certificate of birth in the civil registry records which can be opened only upon order of the court which issued the decree of adoption; and

(d) to submit to the court issuing the decree of adoption proof of compliance with all the foregoing within thirty (30) days from receipt of the decree.

If the adoptee is a foundling, the court shall order the Civil Registrar where the foundling was registered, to annotate the decree of adoption on the foundling certificate and a new birth certificate shall be ordered prepared by the Civil Registrar in accordance with the decree.[91]

§ 169. Effects of Adoption

[169.1] Transfer of parental authority
[169.2] Legitimacy
(a) Right to use surname of adopter
(b) Right to support
[169.3] Succession
(a) Compulsory heir
(b) Legal or intestate heir

[169.1] Transfer of Parental Authority

Deprivation of parental authority is one of the effects of a decree of adoption.[92] According to the Code, the parental authority of the parents by nature over the adopted shall terminate and the same shall be vested in the adopters, except that if the adopter is the spouse of the parent by nature of the adopted, in which case, the parental authority over the adopted shall be exercise jointly by both spouses.[93] In the words of the Domestic Adoption Act, all legal ties between the biological

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[91]Sec. 16, Rule on Adoption.

[92]Cang vs. CA, 296 SCRA 128 (1998), citing Cervantes vs. Fajardo, 169 SCRA 575, 579 (1989).

[93]Art. 189(2), FC.

parent(s) and the adoptee shall be severed and the same shall then be vested on the adopter(s), except in cases where the biological parent is the spouse of the adopter. [94]

[169.2] Legitimacy

The modern trend is to consider adoption not merely as an act to establish a relationship of paternity and filiation, but also as an act which endows the child with a legitimate status.[95] This was, indeed, confirmed in 1989, when the Philippines, as a State Party to the Convention of the Rights of the Child initiated by the United Nations, accepted the principle that adoption is impressed with social and moral responsibility, and that its underlying intent is geared to favor the adopted child.[96]

One of the effects of adoption is that the adopted is deemed to be a legitimate child of the adopter for all intents and purposes pursuant to Article 189 of the Family Code and Section 17 of the Domestic Adoption Act.[97] But note that the relationship established by the adoption is limited to the adopting parents and does not extend to their other relatives, except as expressly provided by law.[98] Thus, the adopted child cannot be considered as a relative of the descendants and collaterals of the adopting parents, nor of the legitimate children which they may have after the adoption except that the law imposes certain impediments to marriage by reason of adoption.[99] Neither are the children of the adopted considered as descendants of the adopter.[100]

Being a legitimate child by virtue of adoption, it follows that the adopted is entitled to all the rights provided by law to a legitimate child without discrimination of any kind,[101] including the right to bear the surname of the adopter, the right to support from the adopter and the right to a legitime and other successional rights *vis-a-vis* the adopter.[102]

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[94]Sec. 16, DAA.

[95]Cang vs. CA, *supra*.

[96]*Id*.; citing Lahom vs. Simbulo, 406 SCRA 135 (2003).

[97]*Id*.

[98]Santos, Jr. vs. Republic, 21 SCRA 379 (1967), citing 1 Tolentino, Civil Code, 1960 ed., p. 652.

[99]*Id*.

[100]*Id*.

[101]Sec. 17, DAA.

[102]See Art. 174, FC.

(a) Right to Use Surname of Adopter

The Family Code and the Domestic Adoption Act categorically declare that the adopted child has the right to use the surname of the adopter(s).[103] Section 14 of the Domestic Adoption Act categorically states:

> "SECTION 14. *Civil Registry Record.* — An amended certificate of birth shall be issued by the Civil Registry, as required by the Rules of Court, attesting to the fact that the adoptee is the child of the adopter(s) by being registered with his/her surname. The original certificate of birth shall be stamped "cancelled" with the annotation of the issuance of an amended birth certificate in its place and shall be sealed in the civil registry records. The new birth certificate to be issued to the adoptee shall not bear any notation that it is an amended issue."

However, the provision of law which entitles the adopted minor to the use of the surname of the adopter refers to the adopter's own surname and not to her surname acquired by virtue of marriage. The adoption created a personal relationship between the adopter and the adopted, and the consent of the husband, to the adoption by her wife, did not have the effect of making him an adopting father, so as to entitle the child to the use of the husband's own surname.[104]

May an illegitimate child, upon adoption by her natural father, use the surname of her natural mother as her middle name? This is the issue raised in the case of **In re: Adoption of Stephanie Nathy Astorga Garcia**.[105] In ruling in the affirmative, the Court explained that the there is no law prohibiting an illegitimate child adopted by her natural father to use, as middle name her mother's surname, hence, there is no reason why she should not be allowed to do so. After all, the Court added, the interests and welfare of the adopted child are of primary and paramount consideration, hence, every reasonable intendment should be sustained to promote and fulfill these noble and compassionate objectives of the law.

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[103]Art. 189(1), FC;
[104]Valdes-Johnson vs. Republic, No. L-18284, April 30, 1963.
[105]454 SCRA 541 (2005).

(b) Right to Support

One of the rights being enjoyed by legitimate children is the right to demand support,[106] which can be charged against the absolute community or against the conjugal partnership of gains. Since an adopted child is entitled to all the rights and obligations granted by law to a legitimate child,[107] the former may likewise demand support from the adopter.

Can the adopted likewise demand support from his or her biological parents? With the enactment of the Domestic Adoption Act, it is believed that the adopted and his or her biological parents are not legally bound to support each other. While it is true that support does not necessarily depend upon parental authority,[108] it is to be noted that the right to demand support is based on the legal relation that exists between the person entitled to support and the person obliged to give support. Under the provisions of the Domestic Adoption Act, "all legal ties between the biological parent(s) and the adoptee shall be severed and the same shall then be vested on the adopter(s)." As a consequence of the severance of legal ties between the adopted and his or her biological parents, the basis of the right to demand support and/or the obligation to give support is likewise terminated. Since the legal ties which used to exist between the adopted and his or her biological parents are thereafter vested in favor of the adopter, the adopter and the adopted are mutually bound to support each other.

[169.3] Succession

(a) Compulsory Heir

Is the adopted a compulsory heir of the adopter?

Although the Family Code and the Domestic Adoption Act do not expressly declare the entitlement of an adopted child to a legitime in the estate of the adopter, it is believed that he or she is a compulsory heir of the adopter. Both the Family Code[109] and the Domestic Adoption Act[110]

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[106] Art. 174, FC.
[107] Sec. 17, DAA.
[108] See 1 Tolentino, Civil Code, 1990 ed., p. 565.
[109] Art. 189(1), FC.
[110] Sec. 17, DAA.

declare that an adopted child is to be considered a legitimate child of the adopter "for all intents and purposes" and, therefore, entitled to all the rights and obligations provided by law to legitimate children without discrimination of any kind,[111] and these rights include the right to the legitime and other successional rights granted under the Civil Code.[112] In other words, an adopted child is a compulsory heir of the adopter and his legitime is the same as that granted to a legitimate child of the adopter.[113]

Will the adopted remain a compulsory heir of his or her biological parents? Under the Family Code, it is believed that the adopted, aside from remaining as legal heir of his or her parents and other blood relatives,[114] is likewise a compulsory heir of his parents by nature and cannot be deprived of his legitime.[115] This rule, however, no longer appears to be true under the Domestic Adoption Act. Under the new law, it appears that the only way by which an adopted may be able to inherit from his biological parents is through testamentary succession. Note that all legal ties between the biological parent and the adoptee are severed and the same shall be vested on the adopter.[116]

(b) Legal or Intestate Heir

With respect to legal or intestate succession, the adopter and the adoptee shall have reciprocal rights of succession without distinction from legitimate filiation.[117] Note that Section 18 of the Domestic Adoption Act amended the provisions of article 190 of the Family Code. Under the provisions of the Domestic Adoption Act, the adopter and the adoptee are legal heirs of each other, in the same way and in the same manner that a legitimate child and his/her legitimate parents are legal heirs of each other.

Does the adopted remain an intestate heir of his or her biological parents? In an *obiter dictum*, the Court held in **In re: Adoption of**

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[111]*Id.*
[112]Art. 174(3), FC.
[113]See discussions *supra* § 158.4.
[114]See Art. 189(3), FC.
[115]See 1 Tolentino, Civil Code, 1990 ed., p. 566.
[116]Sec. 16, DAA.
[117]See Sec. 18, DAA.

Stephanie Nathy Astorga Garcia[118] that under Section 18 of the Domestic Adoption Act the adoptee remains an intestate heir of his/her biological parent. This is not, however, supported by the provisions of said law.

Under the Family Code, there is no doubt that the adopted child remains an intestate heir of his parents and other blood relatives.[119] This provision is not reproduced, however, under the Domestic Adoption Act. On the contrary, the latter law simply provides that "*if the adoptee and his/her biological parent(s) had left a will, the law on testamentary succession shall govern.*"[120] The inclusion of this provision in the Domestic Adoption Act is merely to emphasize that under the new law, the adopted and his or her parents by nature may only succeed from each other by way of testamentary succession. In other words, the intention under the Domestic Adoption Act is to extinguish the reciprocal rights of succession that exist between the adopted and his or her parents by nature, including the right to the legitime and rights arising from legal or intestate succession. This is further confirmed by Section 16 of the Domestic Adoption Act which states that *"all legal ties between the biological parent(s) and the adoptee shall be severed and the same shall be vested on the adopter(s)."*

§ 170. Rescission of Adoption

[170.1] Who may rescind
[170.2] Grounds for rescission
[170.3] Prescriptive period
[170.4] Effects of rescission

[170.1] Who May Rescind

The Domestic Adoption Act withdrew the right of an adopter to rescind the adoption decree and gave to the adopted child the sole right to severe the legal ties created by adoption.[121] This clearly expressed in the second paragraph of Section 19 of the new law which provides:

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[118]*Supra*.
[119]Art. 189(3), FC.
[120]Sec. 18, DAA.
[121]Lahom vs. Sibulo, 406 SCRA 135 (2003).

"Adoption, being in the best interest of the child, shall not be subject to rescission by the adopter(s). However, the adopter(s) may disinherit the adoptee for causes provided in Article 919 of the Civil Code."

It is still noteworthy, however, that an adopter, while barred from severing the legal ties of adoption, can always for valid reasons cause the forfeiture of certain benefits otherwise accruing to an undeserving child. For instance, upon the grounds recognized by law, an adopter may deny to an adopted child his legitime and, by a will and testament, may freely exclude him from having a share in the disposable portion of his estate.[122]

If the adopted is still a minor or if over eighteen (18) years of age but is incapacitated, the adopted must be assisted by the DSWD, as guardian/counsel, in filing the petition for rescission of adoption.[123]

[170.2] Grounds for Rescission

The adoption may be rescinded on any of the following grounds committed by the adopter(s):

(a) repeated physical and verbal maltreatment by the adopter(s) despite having undergone counseling;

(b) attempt on the life of the adoptee;

(c) sexual assault or violence; or

(d) abandonment and failure to comply with parental obligations.[124]

[170.3] Prescriptive Period

The adoptee, if incapacitated, must file the petition for rescission or revocation of adoption within five (5) years after he reaches the age of majority, or if he was incompetent at the time of the adoption, within five (5) years after recovery from such incompetency.[125]

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[122] *Id.*
[123] Sec. 19, DAA.
[124] *Id.*
[125] Sec. 21, Rule on Adoption.

[170.4] Effects of Rescission

If the petition for rescission is granted, the following shall be its effects:

(1) The parental authority of the adoptee's biological parent(s), if known, or the legal custody of the Department, shall be restored if the adoptee is still a minor or incapacitated.[126]

(2) The reciprocal rights and obligations of the adopter(s) and the adoptee to each other shall be extinguished.[127]

(3) The court shall order the Civil Registrar to cancel the amended certificate of birth of the adoptee and restore his/her original birth certificate.[128]

(4) Succession rights shall revert to its status prior to adoption, but only as of the date of judgment of judicial rescission. However, vested rights acquired prior to judicial rescission shall be respected.[129]

All the foregoing effects of rescission of adoption shall be without prejudice to the penalties imposable under the Penal Code if the criminal acts are properly proven.[130]

II.

INTER-COUNTRY ADOPTION

§ 171. Applicability

Inter-country adoption refers to the socio-legal proceedings of adopting a Filipino child by a foreigner or by a Filipino citizen permanently residing abroad where the petition is filed, the supervised child custody is undertaken, and the decree of adoption is issued outside the Philippines.[131] In this situation, Republic Act No. 8043, otherwise known as the "Inter-Country Adoption Act," governs.

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[126]Sec. 20, DAA.
[127]*Id.*
[128]*Id.*
[129]*Id.*
[130]*Id.*
[131]Sec. 3, ICA.

§ 172. Priority of Domestic Adoption

The policy of the State is to encourage domestic adoption so as to preserve the Filipino child's identity and culture in his or her native land, and only when this is not available shall inter-country adoption be considered as a last resort.[132] Towards this end, the Inter-Country Adoption Board is mandated to ensure that all possibilities for adoption of the child domestically have been exhausted and that Inter-Country Adoption is in the best interest of the child.[133]

§ 173. Role of the Inter-Country Adoption Board

The Inter-country Adoption Board (ICAB) is mandated by the Inter-country Adoption Act to be the central authority on matters relating to inter-country adoption.[134] It shall act as the policy-making body for purposes of carrying out the provisions of the Inter-Country Adoption Act, in consultation and coordination with the DSWD, the different child-care and placement agencies, adoptive agencies, as well as non-governmental organizations engaged in child-care and placement activities. As such, it shall:

a) Protect the Filipino child from abuse, exploitation, trafficking and/or sale or any other practice in connection with adoption which is harmful, detrimental, or prejudicial to the child;

b) Collect, maintain, and preserve confidential information about the child and the adoptive parents;

c) Monitor, follow-up, and facilitate completion of adoption of the child through authorized and accredited agency;

d) Prevent improper financial or other gain in connection with an adoption and deter improper practices contrary to the Inter-Country Adoption Act;

e) Promote the development of adoption services including post-legal adoption;

f) License and accredit child-caring/placement agencies and collaborate with them in the placement of Filipino children;

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[132] Sec. 2(c)(vi), DAA.
[133] Sec. 7, ICA.
[134] Sec. 4, ICA.

g) Accredit and authorize foreign adoption agency in the placement of Filipino children in their own country; and

h) Cancel the license to operate and blacklist the child-caring and placement agency or adoptive agency involved from the accreditation list of the Board upon a finding of violation of any provision under the Inter-Country Adoption Act.[135]

§ 174. Who May Adopt

Any foreign national or a Filipino citizen permanently residing abroad who has the qualifications and none of the disqualifications under the Inter-Country Adoption Act may file an application if he/she:

(a) is at least twenty-seven (27) years of age;

(b) is at least sixteen (16) years older than the child to be adopted at the time of the filing of the application unless the applicant is the parent by nature of the child to be adopted or is the spouse of such parent by nature;

(c) has the capacity to act and assume all the rights and responsibilities incident to parental authority under his/her national law;

(d) has undergone appropriate counseling from an accredited counselor in his/her country;

(e) has not been convicted of a crime involving moral turpitude;

(f) is eligible to adopt under his/her national law;

(g) can provide the proper care and support and give the necessary moral values and example to the child and in the proper case, to all his/her other children;

(h) comes from a country:

  (i) with whom the Philippines has diplomatic relations;

  (ii) whose government maintains a foreign adoption agency; and

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[135]*Id.*

(iii) whose laws allow adoption; and

(i) files jointly with his/her spouse, if any, who shall have the same qualifications and none of the disqualifications to adopt as prescribed above.[136]

§ 175. Who May Be Adopted

Only a legally free child may be the subject of inter-country adoption.[137] A *legally-free child* means any child who has been voluntarily or involuntarily committed to the DSWD as dependent, abandoned or neglected pursuant to the provisions of the Child and Youth Welfare Code may be the subject of Inter-Country Adoption; provided that in case of a child who is voluntarily committed, the physical transfer of said child shall be made not earlier than six (6) months from the date the Deed of Voluntary Commitment was executed by the child's biological parent/s.[138] The prohibition against physical transfer shall not apply to adoption by a relative or children with special medical conditions.[139] Under the ICA Law, a child means a person below fifteen (15) years of age.[140]

Commitment or surrender of a child is the legal act of entrusting a child to the care of the DSWD or any duly licensed child placement agency or individual.[141] Commitment may be done in the following manner: (a) involuntary commitment, in case of a dependent child, or through the termination of parental or guardianship rights by reason of abandonment, substantial and continuous or repeated neglect and/or parental incompetence to discharge parental responsibilities, and in the manner, form and procedure hereinafter prescribed; or (b) voluntary commitment, through the relinquishment of parental or guardianship rights in the manner and form hereinafter prescribed.[142]

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[136]Sec. 9, ICA; Sec. 26, Amended Implementing Rules and Regulations on ICA.
[137]Sec. 8, ICA.
[138]Sec. 3(f), ICA; Sec. 25, Amended Implementing Rules and Regulations on ICA.
[139]Sec. 25, Amended Implementing Rules and Regulations on ICA.
[140]Sec. 3(b), ICA.
[141]Art. 141, Child and Youth Welfare Code.
[142]*Id.*

(a) Involuntary Commitment

The DSWD Secretary or his authorized representative or any duly licensed child placement agency having knowledge of a child who appears to be dependent, abandoned or neglected, may file a verified petition for involuntary commitment of said child to the care of any duly licensed child placement agency or individual.[143] The petition shall be filed with the Family Court of the province or City Court in which the parents or guardian resides or the child is found.[144] If, after the hearing, the child is found to be dependent, abandoned, or neglected, an order shall be entered committing him to the care and custody of the DSWD or any duly licensed child placement agency or individual.[145]

When a child shall have been committed to the DSWD or any duly licensed child placement agency or individual pursuant to an order of the court, his parents or guardian shall thereafter exercise no authority over him except upon such conditions as the court may impose.[146]

(b) Voluntary Commitment

The parent or guardian of a dependent, abandoned or neglected child may voluntarily commit him to the Department of Social Welfare or any duly licensed child placement agency or individual.[147] No child shall be committed unless he is surrendered in writing by his parents or guardian to the care and custody of the DSWD or duly licensed child placement agency.[148] In case of the death or legal incapacity of either parent or abandonment of the child for a period of at least one year, the other parent alone shall have the authority to make the commitment. The DSWD, or any proper and duly licensed child placement agency or individual shall have the authority to receive, train, educate, care for or arrange appropriate placement of such child.[149]

When any child shall have been committed in accordance with the foregoing procedure and such child shall have been accepted by the

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[143] Art. 142, Child and Youth Welfare Code.
[144] *Id*., as amended by
[145] Art. 149, Child and Youth Welfare Code.
[146] Art. 151, Child and Youth Welfare Code.
[147] Art. 154, Child and Youth Welfare Code.
[148] Art. 155, Child and Youth Welfare Code.
[149] *Id*.

DSWD or any duly licensed child placement agency or individual, the rights of his natural parents, guardian, or other custodian to exercise parental authority over him shall cease.[150]

Such agency or individual shall be entitled to the custody and control of such child during his minority, and shall have authority to care for, educate, train and place him out temporarily or for custody and care in a duly licensed child placement agency. Such agency or individual may intervene in adoption proceedings in such manner as shall best inure to the child's welfare. [151]

§ 176. Where to File Application

An application for inter-country adoption of a Filipino child shall be filed either with the Family Court having jurisdiction over the place where the child resides or may be found,[152] or with the Inter-Country Adoption Board, through an intermediate agency, whether governmental or an authorized and accredited agency, in the country of the prospective adoptive parents.[153]

§ 177. Procedure in Inter-Country Adoption

(a) If Filed in the Family Court

[177.1] Governing rules
[177.2] Contents of petition
[177.3] Annexes to the petition
[177.4] Duty of Court

[177.1] Governing rules

If the application for inter-country adoption is filed before the Family Court, the procedure is governed by the Rule on Adoption (A.M. No. 02-6-02-SC).

[177.2] Contents of Petition

The petitioner must allege:

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[150]Art. 156, Child and Youth Welfare Code.
[151]*Id*.
[152]Sec. 10, ICA; Sec. 28, Rule on Adoption.
[153]Sec. 10, ICA.

(a) his age and the age of the child to be adopted, showing that he is at least twenty-seven (27) years of age and at least sixteen (16) years older than the child to be adopted at the time of application, unless the petitioner is the parent by nature of the child to be adopted or the spouse of such parent, in which case the age difference does not apply;

(b) if married, the name of the spouse who must be joined as co-petitioner except when the adoptee is a legitimate child of his spouse;

(c) that he has the capacity to act and assume all rights and responsibilities of parental authority under his national laws, and has undergone the appropriate counseling from an accredited counselor in his country;

(d) that he has not been convicted of a crime involving moral turpitude;

(e) that he is eligible to adopt under his national law;

(f) that he can provide the proper care and support and instill the necessary moral values and example to all his children, including the child to be adopted;

(g) that he agrees to uphold the basic rights of the child, as embodied under Philippine laws and the U.N. Convention on the Rights of the Child, and to abide by the rules and regulations issued to implement the provisions of Republic Act No. 8043;

(h) that he comes from a country with which the Philippines has diplomatic relations and whose government maintains a similarly authorized and accredited agency and that adoption of a Filipino child is allowed under his national laws; and

(i) that he possesses all the qualifications and none of the disqualifications provided in the Rule, in Republic Act No. 8043 and in all other applicable Philippine laws.[154]

[177.3] Annexes to the Petition

The petition for adoption shall contain the following annexes written and officially translated in English:

[154]Sec. 30, Rule on Adoption.

(a) Birth certificate of petitioner;

(b) Marriage contract, if married, and, if applicable, the divorce decree, or judgment dissolving the marriage;

(c) Sworn statement of consent of petitioner's biological or adopted children above ten (10) years of age;

(d) Physical, medical and psychological evaluation of the petitioner certified by a duly licensed physician and psychologist;

(e) Income tax returns or any authentic document showing the current financial capability of the petitioner;

(f) Police clearance of petitioner issued within six (6) months before the filing of the petitioner;

(g) Character reference from the local church/minister, the petitioner's employer and a member of the immediate community who have known the petitioner for at least five (5) years;

(h) Full body postcard-size pictures of the petitioner and his immediate family taken at least six (6) months before the filing of the petition.[155]

[177.4] Duty of Court

The court, after finding that the petition is sufficient in form and substance and a proper case for inter-country adoption, shall immediately transmit the petition to the Inter-Country Adoption Board for appropriate action.[156]

Note that while the petition for adoption is filed in the Family Court, the process is not judicial in nature but merely administrative. If the Family Court finds the petition in form and substance, the only duty of the court is to immediately transmit the petition to the ICAB for appropriate action.

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[155]Sec. 31, Rule on Adoption.
[156]Sec. 32, Rule on Adoption.

(b) If Petition is Filed in the ICAB

[177.5] Governing rules
[177.6] Form of application and supporting documents
[177.7] Matching
[177.8] Placement authority
[177.9] Fetching of the child
[177.10] Trial Custody
[177.11] Unsuccesful pre-adoptive relationship
[177.12] Satisfactory pre-adoptive relationship

[177.5] Govering Rules

The application may be filed directly with the ICAB through a foreign adoption agency in the country where the applicant resides.[157] In the case of a foreign national who has filed a petition for adoption in the Philippines under Article 184 of the Family Code but after hearing is found not to be qualified under any of the exceptions therein, the Regional Trial Court where the case is pending may determine if the petitioner is qualified to adopt under the Inter-Country Adoption Act and the Rules.[158] If the petitioner has all the qualifications and none of the disqualifications, the Court shall issue an order for inclusion of the petitioner, upon filing of the application and fee, in the Board's Roster of Applicants and shall direct the petitioner to submit a Deed of Voluntary Commitment of the child executed by the child's parents in favor of the DSWD.[159] The procedure is outlined in the Amended Implementing Rules and Regulations on ICA.

[177.6] Form of Application and Supporting Documents

An application shall be in the form prescribed by the ICAB. It shall include an undertaking under oath signed by the applicant to uphold the rights of the child under Philippine laws and the applicant's national laws, the United Nations Convention on the Rights of the Child and to abide by the provisions of the ICA and all rules and regulations issued pursuant thereto. The application shall include an undertaking that should the adoption not be approved, or if for any reason the adop-

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[157]Sec. 30, Amended Implementing Rules and Regulations on ICA.
[158]*Id.*
[159]*Id.*

tion does not take place, the applicant shall pay for the cost of travel back to the Philippines of the child and his/her companion, if any.[160]

The following documents, written and officially translated in English shall accompany the Application:

(a) Family and Home Study Reports on the family and home of the applicant;

(b) Birth Certificate of the applicant;

(c) Marriage Contract of the applicant or Decree of Absolute Divorce, in the proper case;

(d) Written consent to the adoption by the biological or adopted children who are ten (10) years of age or over, witnessed by the social worker after proper counseling;

(e) Physical and medical evaluation by a duly licensed physician and psychological evaluation by a psychologist;

(f) Latest income tax return or any other documents showing the financial capability of the applicant;

(g) Clearance issued by the police or other proper government agency of the place where the applicants reside;

(h) Character reference from the local church minister/priest, the applicant's employer or a non-relative member of the immediate community who have known the applicant for at least five (5) years;

(i) Certification from the Department of Justice or other appropriate government agency that the applicant is qualified to adopt under their national law and that the child to be adopted is allowed to enter the country for trial custody and reside permanently in the said place once adopted; and

(j) Recent postcard-size pictures of the applicant and his immediate family.[161]

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[160]Sec. 27, Amended Implementing Rules and Regulations on ICA.
[161]Sec. 28, Amended Implementing Rules and Regulations on ICA.

[177.7] Matching

A child who has been committed to the DSWD and who may be available for inter-country adoption shall be endorsed to the ICAB by the DSWD. The endorsement shall contain a certification by the DSWD that all possibilities for adoption of the child in the Philippines have been exhausted and that inter-country adoption is in the best interest of the child. The endorsement must be made within one (1) week after transmittal of the Child Study Report and other pertinent documents from the local placement committee for inter-regional matching.[162] The following documents pertaining to the child shall be attached to the endorsement:

(a) Child Study Report which shall include information about the child's identity, upbringing and ethnic, religious and cultural backgrounds, social environment, family history, medical history and special needs;

(b) Birth or Foundling Certificate;

(c) Decree of Abandonment of the child, the Death Certificate of the child's parents or the Deed of Voluntary Commitment executed after the birth of the child and after proper counseling as to the effect of termination of parental authority to ensure that consent was not induced by monetary or other consideration;

(d) Medical evaluation or history including that of the child's biological parents, if available;

(e) Psychological evaluation, as may be necessary; and

(f) Child's own consent if he/she is ten (10) years or older, witnessed by a social worker of the child caring/placing agency and after proper counseling.[163]

The ICAB, in turn, shall carry out a matching of the child to an applicant.[164] *Matching* refers to the judicious pairing of the adoptive child and the applicant to promote a mutually satisfying parent-child

[162]Sec. 32, Amended Implementing Rules and Regulations on ICA.
[163]Sec. 33, Amended Implementing Rules and Regulations on ICA.
[164]Sec. 34, Amended Implementing Rules and Regulations on ICA.

relationship.[165] This process is carried out during a matching conference before the Inter-Country Adoption Placement Committee participated in by the Executive Director or social worker of the child caring agency or the social worker of the DSWD in case of adoption by a relative.[166]

The law, however, requires that no child shall be matched to a foreign adoptive family unless it is satisfactorily shown that the child cannot be adopted locally.[167] No matching arrangement except under these ICAB Rules shall be made between the applicant and the child's parents/guardians or custodians, nor shall any contact between them concerning a particular child be done before the matching proposal of the Inter-Country Adoption Placement Committee has been approved by the ICAB. This prohibition shall not apply in cases of adoption of a relative or in exceptional cases where the child's best interest, as determined by the ICAB is at stake.[168]

[177.8] Placement Authority

Upon receipt of the applicant's acceptance of the matching proposal and confirmation of the pre-adoptive placement plans presented by the foreign adoption agency, the ICAB shall issue the Placement Authority within five (5) working days. A certified excerpt of the Minutes of the meeting of the Committee approving the matching shall be attached to the Placement Authority and shall form part of the records of the child. Copy of the Placement Authority shall be transmitted to the Department of Foreign Affairs and to the foreign adoption agency.[169]

[177.9] Fetching of the Child

Upon acceptance of the matching proposal, the applicant, through the foreign adoption agency, shall pay for the expenses incidental to the pre-adoptive placement of the child, including the cost of the child's travel and medical and psychological evaluation and other related expenses. Under exceptional circumstances, the ICAB may defray the costs subject to reimbursement.[170]

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[165] Sec. 3(g), ICA.
[166] Sec. 34, Amended Implementing Rules and Regulations on ICA.
[167] Sec. 11, ICA.
[168] Sec. 37, Amended Implementing Rules and Regulations on ICA.
[169] Sec. 38, Amended Implementing Rules and Regulations on ICA.
[170] Sec. 39, Amended Implementing Rules and Regulations on ICA.

After the issuance of the Placement Authority and prior to departure abroad, the child shall be given the necessary preparation and guidance by the child caring/placing agency which submitted the matching proposal or by the social worker of the DSWD in case of adoption by a relative, in order to minimize the trauma of separation from the persons with whom the child may have formed attachments and to ensure that the child is physically able and emotionally ready to travel and to form new relationships.[171]

The applicant shall personally fetch the child from the Philippines not later than thirty (30) days after notice of issuance of the visa of the child for travel to the country where the applicant resides.[172] The unjustified failure of the applicant to fetch the child within the said period shall result in the automatic cancellation of the Placement Authority.[173]

[177.10] Trial Custody

Trial custody shall start upon actual physical transfer of the child to the applicant who, as actual custodian, shall exercise substitute parental authority over the person of the child. In all cases, the foreign adoption agency shall supervise and monitor the exercise of custody by maintaining communication with the applicant from the time the child leaves the Philippines.[174]

The foreign adoption agency shall be responsible for the pre-adoptive placement, care and family counseling of the child for at least six (6) months from the arrival of the child in the residence of the applicant. During the period of pre-adoptive placement, the foreign adoption agency shall furnish the ICAB with bi-monthly reports on the child's health, psycho-social adjustment and relationships which the child has developed with the applicant including the applicant's health, financial condition and legal capacity. The ICAB shall furnish the child's home agency a copy of the report.[175]

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[171]Sec. 40, Amended Implementing Rules and Regulations on ICA.
[172]Sec. 41, Amended Implementing Rules and Regulations on ICA.
[173]*Id.*
[174]Sec. 42, Amended Implementing Rules and Regulations on ICA.
[175]Sec. 43, Amended Implementing Rules and Regulations on ICA.

[177.11] Unsuccessful Pre-Adoptive Relationship

If the pre-adoptive relationship is found unsatisfactory by the child or the applicant, or both, or if the foreign adoption agency finds that the continued placement of the child is not in the child's best interest, said relationship shall be suspended by the ICAB and the foreign adoption agency shall arrange for the child's temporary care. No termination of pre-adoptive relationship shall be made unless it is shown that the foreign adoption agency has exhausted all means to remove the cause of the unsatisfactory relationship which impedes or prevents the creation of a mutually satisfactory adoptive relationship.[176]

In the event of termination of the pre-adoptive relationship, the ICAB shall identify from the Roster of Applicants a qualified family to adopt the child with due consideration for suitability and proximity. In the absence of any suitable family in the Roster of Approved Applicants, the foreign adoption agency may propose a replacement family whose application shall be filed for the consideration of the ICAB.[177] The consent of the child shall be obtained in relation to the measures to be taken under this Section, having regard in particular to his/her age and level of maturity.[178]

The child shall be repatriated as a last resort if found by the ICAB to be in his/her best interests. If the ICAB in coordination with the foreign adoption agency fails to find another placement for the child within a reasonable period of time after the termination of the pre-adoptive relationship, the Board shall arrange for the child's repatriation. The ICAB inform the DSWD, the child caring/placing agency concerned and the Department of Foreign Affairs of the decision to repatriate the child.[179]

[177.12] Satisfactory Pre-Adoptive Relationship

If a satisfactory pre-adoptive relationship is formed between the applicant and the child, the Board shall transmit the written consent to the adoption executed by the Department to the foreign adoption agency within thirty (30) days after receipt of the latter's request.[180]

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[176]Sec. 45, Amended Implementing Rules and Regulations on ICA.
[177]Sec. 46, Amended Implementing Rules and Regulations on ICA.
[178]*Id.*
[179]Sec. 47, Amended Implementing Rules and Regulations on ICA.
[180]Sec. 48, Amended Implementing Rules and Regulations on ICA.

The applicant shall file the petition for the adoption of the child with the proper court or tribunal in the country where the applicant resides within six (6) months after the completion of the trial custody period.[181]

A copy of the final Decree of Adoption of the child including the Certificate of Citizenship/Naturalization, whenever applicable, shall be transmitted by the foreign adoption agency to the ICAB within one (1) month after its issuance. The copy of the Adoption Decree shall form part of the records of the ICAB which shall require the recording of the final judgment in the appropriate local and foreign Civil Register.[182]

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[181]Sec. 49, Amended Implementing Rules and Regulations on ICA.
[182]Sec. 50, Amended Implementing Rules and Regulations on ICA.

Title VIII
SUPPORT

Art. 194. Support comprises everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation, in keeping with the financial capacity of the family.

The education of the person entitled to be supported referred to in the preceding paragraph shall include his schooling or training for some profession, trade or vocation, even beyond the age of majority. Transportation shall include expenses in going to and from school, or to and from place of work. (290a)

COMMENTS:

§ 178. Concept of Support

Support comprises everything indispensable for sustenance, dwelling, clothing, medical attendance and transportation, in keeping with the financial capacity of the family,[1] including the education of the person entitled to be supported until he completes his education or training for some profession, trade or vocation, even beyond the age of majority.[2]

While it includes everything necessary to proper maintenance,[3] it includes something more than the bare necessities of life;[4] it involves the comforts of life as well,[5] and it takes in everything, necessities and luxuries, which a person in a certain situation is entitled to have and enjoy;[6] and it may include all such means of living as would enable a

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[1]Art. 194, 1st par., FC.
[2]Art. 194, 2nd par., FC.
[3]Mass. — Gould vss. Lawrence, 35 N.E. 462, 463, 160 Mass. 232.
[4]Pa. — Richardson's Estate, 6 Pa. Dist. & Co., 785, 788.
[5]*Id.*
[6]Ohio. — Frye vs. Burk, 12 P. 2d 152, 158, 57 Ohio App. 99.

person to live in a style and condition and with a degree of comfort suitable and becoming to his situation in life.[7] It therefore follows that anything requisite to the housing, feeding, clothing, health, proper recreation, vacation, or traveling expense is proper,[8] keeping in view the social family relationship and the quantum of the income.[9]

However, "support" applies only to means of subsistence during life;[10] thus funeral expenses are not within the meaning of the word,[11] although the duty and the right to make arrangements for the funeral of a relative shall also be in accordance with the order established for support.[12] It has likewise been held that the term does not include an allowance for the payment of life insurance premiums.[13]

Art. 195. Subject to the provisions of the succeeding articles, the following are obliged to support each other to the whole extent set forth in the preceding article:

(1) The spouses;

(2) Legitimate ascendants and descendants;

(3) Parents and their legitimate children and the legitimate and illegitimate children of the latter;

(4) Parents and their illegitimate children and the legitimate and illegitimate children of the latter; and

(5) Legitimate brothers and sisters, whether of the full or halfblood (291a)

Art. 196. Brothers and sisters not legitimately related, whether of the full or halfblood, are likewise bound to support each other to the full extent set forth in Article 194, except only when the need for support of the brother or sister, being of age, is due to a cause imputable to the claimant's fault or negligence. (291a)

[7]De. Benjamin F. Shaw C. vs. Palmatory, 105 A. 417, 419, 30 Del. 197.

[8]N.Y. — In re Well's Will, 300 N.Y.S. 1075, 1078, 165 Misc. 385.

[9]*Id.*

[10]Pa. — Estate of Richardson, 6 Pa. Dist. & Co., 785, 789.

[11]*Id.*

[12]See Art. 305, NCC.

[13]N.Y. — Rooney vs. Wiener, 263 N.Y. 222, 225, 147 Misc. 48 — In re Vanderbilt's Estate, 223 N.Y.S. 314, 316, 129 Misc. 605.

COMMENTS:

§ 179. Grounds for Action for Support

[179.1] In general
[179.2] Between spouses
[179.3] Between legitimate ascendants and descendants
[179.4] Between parents and their children
[179.5] Between brothers and sisters

[179.1] In General

Support is an obligation that arises from family relationship. Under the Code, "family relations" include those: (a) between husband and wife; (b) between parents and children; (c) among other ascendants and descendants; and (d) among brothers and sisters, whether of the full or halfblood.[14] Thus, the following are obliged to support each other:

(1) The spouses;

(2) Legitimate ascendants and descendants;

(3) Parents and their legitimate children and the legitimate and illegitimate children of the latter;

(4) Parents and their illegitimate children and the legitimate and illegitimate children of the latter; and

(5) Legitimate brothers and sisters, whether of full or halfblood.[15]

[179.2] Between Spouses

The husband and wife are obliged to render mutual help and support.[16] In short, the marriage relation imposes upon the spouses the obligation to support each other.[17] Such right to receive support is one born from the law and created as such by the marriage tie, and subsists throughout the period that the marriage subsists.[18] Generally, a "spouse" in ordinary meaning, is one's husband or wife.[19] More specifically, a

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[14]Art. 150, FC.
[15]Art. 195, FC.
[16]Art. 168, FC.
[17]Art. 195(1), FC.
[18]Canonizado vs. Benitez, 127 SCRA 610, 618.
[19]La., — Crescionne vs. Louisiana State Police Retirement Bd., 455 So. 2d 1362.

"spouse" is a legal wife or husband.[20] Hence, to be entitled to support, the spouse must be the "legitimate spouse."[21] And since the right of a wife to support depends upon her status as such, once the marriage has been annulled, the right ceases, even pending the action filed by her for the liquidation of their conjugal property.[22] This is supported by Article 198 of the Family Code which declares that after the final judgment granting the petition for annulment of marriage and for declaration of nullity of marriage, the obligation of mutual support between the spouses ceases.

In legal separation, while the marriage bond is not severed,[23] the obligation of the spouses to support each other ceases upon the finality of the decree of legal separation.[24] However, the court may, in its discretion, order that the guilty spouse shall give support to the innocent one.[25]

[179.3] Legitimate Ascendants and Descendants

Note that the basis of the right for support is the legitimacy of relationship that exists among ascendants and descendants.[26] However, illegitimate descendants, whether from legitimate or illegitimate children, are entitled to support from the grandparents.[27]

[179.4] Parents and their Children

Children, whether legitimate[28] or illegitimate,[29] are entitled to be supported by their parents. However, while the support of common children and legitimate children of either spouse is chargeable to the absolute community of property[30] or the conjugal partnership,[31] the support of illegitimate children is chargeable to the separate property of the per-

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[20]U.S. — U.S. vs. Robinson, C.C.A. La., 40 F.2d 14.
[21]Santero vs. CFI of Cavite, 153 SCRA 728, 734.
[22]Mendoza vs. Parungao, 49 Phil. 271.
[23]Art. 63(1), FC.
[24]Art. 198, FC.
[25]*Id.*
[26]Art. 195 (2), FC.
[27]See Art. 195(3) & (4), FC.
[28]Art. 195(3), FC.
[29]Art. 195(4), FC.
[30]Art. 94(1), FC.
[31]Art. 121 (1), FC.

son obliged to give support.[32] However, in case the person obliged to give support has no separate property, the absolute community or the conjugal partnership, if financially capable, shall advance the support, which shall be deducted from the share of the spouse obliged upon the liquidation of the absolute community or of the conjugal partnership.[33]

Note that even an unborn child has a right to support from its progenitors even if said child is only *"en ventre de sa mere."*[34]

The obligation of the parents to give support and the corresponding right of the children, whether legitimate or illegitimate to receive support, do not proceed from, nor based upon, the exercise of parental authority. Note that the right of the children to receive support extends even beyond the age of majority.[35] Likewise, an illegitimate father is also obliged to give support[36] even when parental authority is exercised by the mother.[37] See further discussions under *infra* § 196.3.

[179.5] Between Brothers and Sisters

Brothers and sisters, whether their relation is legitimate or illegitimate, whether of the full or halfblood, are likewise bound to support each other to the full extent of support set forth in Article 194 of the Family Code. However, with respect to brothers and sisters *"not legitimately related,"* the right and obligation to support ceases *"when the need for support of the brother or sister, being of age, is due to a cause imputable to the claimant's fault or negligence."*[38]

Art. 197. For the support of legitimate ascendants; descendants, whether legitimate or illegitimate; and brothers and sisters, whether legitimately or illegitimately related, only the separate property of the person obliged to give support shall be answerable provided that in case the obligor has no separate property, the absolute community or the conjugal partnership, if financially capable, shall advance the support, which shall be deducted from the share of the spouse obliged upon the liquidation of the absolute community or of the conjugal partnership. (n)

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[32]Art. 197, FC., in relation to Arts. 94(1) and 121(1), FC.
[33]*Id*.
[34]Quimiguing vs. Icao, 34 SCRA 132.
[35]Art. 194, 2nd par., FC.
[36]See Arts. 94(1), 121 (1), and 195(4), FC.
[37]See Art. 176, FC.
[38]Art. 196, FC.

COMMENTS:

§ 180. Properties Answerable for Support

The support of the spouses, their common children and legitimate children of either spouse is chargeable to the absolute community of property[39] or to the conjugal partnership.[40] However, if the community property or the conjugal partnership is insufficient to cover the support of the foregoing persons, the spouses shall be solidarily liable with their separate properties.[41]

As earlier stated, the support of illegitimate children is chargeable to the separate property of the spouse or person obliged to give support.[42] Likewise, for the support of the ascendants, descendants (whether legitimate or illegitimate), and brother and sisters (whether legitimately or illegitimately related), only the separate property of the person obliged to give support shall be answerable provided that in case the obligor has no separate property, the absolute community or the conjugal partnership, if financially capable, shall advance the support, which shall be deducted from the share of the spouse obliged upon the liquidation of the absolute community or of the conjugal partnership.[43]

Art. 198. During the proceedings for legal separation or for annulment of marriage, and for declaration of nullity of marriage, the spouses and their children shall be supported from the properties of the absolute community or the conjugal partnership. After final judgment granting the petition, the obligation of mutual support between the spouses ceases. However, in case of legal separation the court may order that the guilty spouse shall give support to the innocent one, specifying the terms of such order. (292a)

COMMENTS:

§ 181. When Right to Support Between Spouses Ceases

As earlier stated, since it is the marriage relation or the marital tie that imposes upon the spouses the mutual obligation of support, upon

[39]Art. 94(1), FC.
[40]Art. 121(1), FC.
[41]Last paragraph, Arts. 94 and 121, FC.
[42]Art. 197, FC., in relation to Arts. 94(1) and 121(1), FC.
[43]Art. 197, FC.

the severance of such tie, the obligation of support between the spouses likewise ceases. Hence, after the final judgment granting a petition for annulment or petition for declaration of nullity of marriage, the obligation of mutual support between the spouses ceases.[44] In legal separation, however, even when the marriage bond is not severed,[45] the obligation of mutual support likewise ceases upon the finality of a decree of legal separation,[46] although the court may, in its discretion, order the guilty spouse to give support to the innocent one.[47]

§ 182. Support Pendente Lite Between Spouses

[182.1] Basis
[182.2] Defenses against action for support
[182.3] Procedure
(a) Spousal support
(b) Child support
(c) Cases covered by RA 9261

[182.1] Basis

During the pendency of the action for annulment or declaration of absolute nullity of marriage, the court shall provide for the support of the spouses and their common children in the absence of a written agreement between the spouses.[48] The same rule shall likewise apply during the pendency of an action for legal separation.[49]

[182.2] Defenses Against Action For Support

Since the obligation to give support between the spouses proceeds from the marital tie or marital relation, if the answer of the defendant denies the marriage between him and plaintiff, thus putting in issue the very status of the plaintiff, support *pendente lite* may not be allowed, unless and until the marriage is established as a fact.[50] Also, support *pendente lite* may not be allowed where there is a defense that the plain-

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[44] Art. 198, FC.
[45] Art. 63(1), FC.
[46] Art. 198, FC.
[47] *Id.*
[48] Art. 49, FC.
[49] Art. 62, FC.
[50] Yangco vs. Rhode, 1 Phil. 404.

tiff wife has committed adultery because this is a valid defense in an action for support.[51] If adultery is properly proved and sustained, it will defeat the action for support.[52] However, the alleged adultery of the wife must be established by competent evidence. The mere allegation that the wife has committed adultery will not bar her from the right to receive support *pendente lite*.[53]

[182.3] Procedure

Upon receipt of a verified petition for declaration of absolute nullity of void marriage or for annulment of voidable marriage, or for legal separation, and at any time during the proceeding, the court, *motu proprio* or upon application under oath of any of the parties, may issue provisional orders and protection orders, including spousal support, with or without a hearing.[54] 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.

In determining the amount to be awarded as support *pendente lite* it is not necessary to go fully into the merits of the case, it being sufficient that the court ascertains the kind and amount of evidence which it may deem sufficient to enable it to justly resolve the application, one way or the other, in view of the merely provisional character of the resolution to be entered. Mere affidavits may satisfy the court to pass upon the application for support *pendente lite*.[55] It is enough that the facts be established by affidavits or other documentary evidence appearing in the record.[56]

(a) Spousal Support

In determining support for the spouses, the court may be guided by the following rules: (a) In the absence of adequate provisions in a written agreement between the spouses, the spouses may be supported from the properties of the absolute community or the conjugal partnership;

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[51]Quintana vs. Lerma, 24 Phil. 285; cited in Reyes vs. Ines-Luciano, 88 SCRA 803.
[52]Reyes vs. Ines-Luciano, *supra*.
[53]*Id*.
[54]Sec. 1, A.M. No.02-11-12-SC.
[55]Reyes vs. Ines-Luciano, *supra*, at p. 809; citing Sanchez vs. Zulueta, 68 Phil. 110, 112.
[56]*Id*., citing Salazar vs. Salazar, 82 Phil. 1084.

(b) The court may award support to either spouse in such amount and for such period of time as the court may deem just and reasonable based on their standard of living during the marriage; (c) The court may likewise consider the following factors: (1) whether the spouse seeking support is the custodian of a child whose circumstances make it appropriate for that spouse not to seek outside employment; (2) the time necessary to acquire sufficient education and training to enable the spouse seeking support to find appropriate employment, and that spouse's future earning capacity; (3) the duration of the marriage; (4) the comparative financial resources of the spouses, including their comparative earning abilities in the labor market; (5) the needs and obligations of each spouse; (6) the contribution of each spouse to the marriage, including services rendered in home-making, child care, education, and career building of the other spouse; (7) the age and health of the spouses; (8) the physical and emotional conditions of the spouses; (9) the ability of the supporting spouse to give support, taking into account that spouse's earning capacity, earned and unearned income, assets, and standard of living; and (10) any other factor the court may deem just and equitable; (d) The Family Court may even direct the deduction of the provisional support from the salary of the spouse.[57]

(b) Child Support

The common children of the spouses shall be supported from the properties of the absolute community or the conjugal partnership.[58]

Subject to the sound discretion of the court, either parent or both may be ordered to give an amount necessary for the support, maintenance, and education of the child. It shall be in proportion to the resources or means of the giver and to the necessities of the recipient.[59]

In determining the amount of provisional support, the court may likewise consider the following factors: (1) the financial resources of the custodial and non-custodial parent and those of the child; (2) the physical and emotional health of the child and his or her special needs and aptitudes; (3) the standard of living the child has been accustomed

[57]Sec. 2, A.M. No. 02-11-12-SC.
[58]Sec. 3, A.M. No. 02-11-12-SC.
[59]*Id.*

to; (4) the non-monetary contributions that the parents will make toward the care and well-being of the child.[60]

The Family Court may direct the deduction of the provisional support from the salary of the parent.[61]

(c) Cases Covered By R.A. No. 9262

In cases covered by R.A. No. 9262, otherwise known as "Anti-Violence Against Women and Their Children Act of 2004," the spouse who is a victim of violence has an immediate relief and faster remedy in the form of a Temporary Protection Order (TPO), by virtue of which, the court can direct the respondent husband to provide support to the wife and/or her child if entitled to legal support,[62] and the court may likewise order that an appropriate percentage of the income or salary of the respondent be withheld regularly by the respondent's employer for the same to be automatically remitted directly to the woman.[63] Failure to remit and/or withhold or any delay in the remittance of support to the woman and/or her child without justifiable cause shall render the respondent or his employer liable for indirect contempt of court.[64]

Art. 199. Whenever two or more persons are obliged to give support, the liability shall devolve upon the following persons in the order herein provided:

(1) The spouse;

(2) The descendants in the nearest degree;

(3) The ascendants in the nearest degree; and

(4) The brothers and sisters. (294a)

Art. 200. When the obligation to give support falls upon two or more persons, the payment of the same shall be divided between them in proportion to the resources of each.

However, in case of urgent need and by special circumstances, the judge may order only one of them to furnish the support provisionally,

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[60] *Id.*
[61] *Id.*
[62] Sec. 8, R.A. No. 9262.
[63] *Id.*
[64] *Id.*

without prejudice to his right to claim from the other obligors the share due from them.

When two or more recipients at the same time claim support from one and the same person legally obliged to give it, should the latter not have sufficient means to satisfy all claims, the order established in the preceding article shall be followed, unless the concurrent obligees should be the spouse and a child subject to parental authority, in which case the child shall be preferred. (295a)

COMMENTS:

§ 183. Order of Liability for Support

The liability to give support, whenever two or more persons are obliged to give it, shall devolve upon the following persons in the order herein provided: [1] the spouse; [2] the descendants in the nearest degree; [3] the ascendants in the nearest degree; and [4] the brothers and sisters.[65] When the obligation to give support falls upon two or more persons, the payment of the same shall be divided between them in proportion to the resources of each.[66] However, in case of urgent need and by special circumstances, the judge may order only one of them to furnish the support provisionally, without prejudice to his right to claim from the other obligors the share due from them.[67]

On the other hand, when two or more recipients at the same time claim support from one and the same person legally obliged to give it, should the latter not have sufficient means to satisfy all claims, the order established in Article 199 shall still be followed, unless the concurrent obligees should be the spouse and a child subject to parental authority, in which case the child shall be preferred.[68]

Art. 201. The amount of support, in the cases referred to in Articles 195 and 196, shall be in proportion to the resources or means of the giver and to the necessities of the recipient. (296a)

Art. 202. Support in the cases referred to in the preceding article shall be reduced or increased proportionately, according to the reduction or increase of the necessities of the recipient and the resources or means of the person obliged to furnish the same. (297a)

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[65] Art. 199, FC.
[66] Art. 200, 1st par., FC.
[67] Art. 200, 2nd par., FC.
[68] Art. 200, 3rd par., FC.

COMMENTS:

§ 184. Amount of Support

The amount of support, in the cases referred to in Articles 195 and 196, shall be in proportion to the resources or means of the giver and to the necessities of the recipient,[69] and the same may be reduced or increased proportionately, according to the reduction or increase of the necessities of the recipient and the resources or means of the person obliged to furnish the same.[70] As such, any judgment granting support never becomes final and is always subject to modification, depending upon the needs of the child and the capabilities of the parents to give support.[71]

In determining the amount of support to be awarded, such amount should be in proportion to the resources or means of the giver and the necessities of the recipient.[72] Hence, it is incumbent upon the court to base its award of support on the evidence presented before it. The evidence must prove the capacity or resources of both parents who are jointly obliged to support their children as provided under Article 195 of the Family Code; and the monthly expenses incurred for the sustenance, dwelling, clothing, medical attendance, education and transportation of the child.[73]

Art. 203. The obligation to give support shall be demandable from the time the person who has a right to receive the same needs it for maintenance, but it shall not be paid except from the date of judicial or extra-judicial demand.

Support *pendente lite* may be claimed in accordance with the Rules of Court.

Payment shall be made within the first five days of each corresponding month. When the recipient dies, his heirs shall not be obliged to return what he has received in advance. (298a)

Art. 204. The person obliged to give support shall have the option to fulfill the obligation either by paying the allowance fixed, or by receiving

[69]Art. 201, FC.
[70]Art. 202, FC.
[71]Lam vs. Chua, 426 SCRA 29, 34.
[72]Arts. 194, 201 and 202, FC.
[73]Lam vs. Chua, *supra*, at pp. 38-39.

and maintaining in the family dwelling the person who has a right to receive support. The latter alternative cannot be availed of in case there is a moral or legal obstacle thereto. (299a)

COMMENTS:

§ 185. Demandability and Manner of Payment

[185.1] When demandable
[185.2] Manner of payment
[185.3] Right to recover attorney's fees
[185.4] Judgment immediately executory

[185.1] When Demandable

The obligation to give support is demandable from the time the person who has a right to receive the same needs it for maintenance, but it shall not be paid except from the date of judicial or extra-judicial demand.[74]

[185.2] Manner of Payment

Payment shall be made within the first five days of each corresponding month.[75] In case of death of the person entitled to receive support, his heirs shall not be obliged to return what he has received in advance for such support.[76]

The person obliged to give support shall have the option to fulfill the obligation either: (1) by paying the allowance fixed, or (2) by receiving and maintaining in the family dwelling the person who has a right to receive support.[77] The latter alternative, however, cannot be availed of in case there is a moral or legal obstacle thereto.[78]

In Article 69 of the Family Code, it is provided that *"the court may exempt one spouse from living with the other if the latter should live abroad or there are other valid and compelling reasons for the exemp-*

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[74]Art. 203, 1st par., FC.
[75]Art. 203, 3rd par., FC.
[76]*Id.*
[77]Art. 204, FC.
[78]*Id.*

tion." In the following instances, the right of the wife to separate maintenance is recognized, hence, the latter alternative provided for in Article 204 of the Family Code is not available: (1) where the place chosen by the husband for the family residence is dangerous to her life, or she is subjected to maltreatment or insults which make common life impossible;[79] (2) where the husband spends his time in gambling, giving no money to his family for food and their necessities, and at the same time insulting his wife and laying hands on her;[80] where the husband has continually carried on illicit relations with other women and treated his wife roughly;[81] and where the wife was virtually driven from their home by the husband and threatened with injury.[82] In all the foregoing cases where the wife was justified to live separately from the husband, the courts have uniformly required the husband to give support.

However, misunderstanding or disagreement with in-laws is not a ground for leaving the conjugal residence.[83] In the absence of "moral or legal obstacle" a person obligated to give support may, at his option, fulfill his obligation either by paying an allowance fixed or by maintaining the person to be supported in his house. There is no reason why a husband should not be accorded the option where his wife is living separate and apart from him merely because of disagreements traceable to in-laws, as disagreements of this kind are not a "moral or legal obstacle" within the meaning of the statute.[84]

[185.3] Right to Recover Attorney's Fees

Where the duty to support is admitted, but in spite of demands the duty is not complied with and the person to be supported has to resort to the court for the enforcement of his right, then the person obliged to give support must pay reasonable attorney's fees.[85] In actions for legal support, even in the absence of stipulation, attorney's fees are recoverable.[86]

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[79]Talana vs. Willis, 35 O.G. 1369.
[80]Panuncio vs. Sula, 34 O.G. 1291.
[81]Dadivas vs. Villanueva, 54 Phil. 92.
[82]Garcia vs. Santiago, 53 Phil. 952.
[83]Atilano vs. Chua Ching Beng, No. L-11086, 55 O.G. 3841.
[84]*Id.*
[85]Baltazar vs. Serfino, 14 SCRA 820, 821-822.
[86]Art. 2208(6), NCC.

[185.4] Judgment Immediately Executory

Section 4, Rule 39, Rules of Court clearly states that, unless ordered by the trial court, judgment in actions for support is immediately executory and cannot be stayed by an appeal. This is an exception to the general rule which provides that the taking of an appeal stays the execution of the judgment and that advance executions will only be allowed if there are urgent reasons therefore. The aforesaid provision peremptorily calls for immediate execution of all judgments for support and makes no distinction between those which are the subject of an appeal and those which are not.[87]

In all cases involving a child, his interest and welfare are always the paramount concerns. There may be instances where, in view of the poverty of the child, it would be a travesty of justice to refuse him support until the decision of the trial court attains finality while time continues to slip away.[88] An excerpt from the early case of **De Leon vs. Soriano**[89] is relevant, thus:

> "The money and property adjudged for support and education should and must be given presently and without delay because if it had to wait the final judgment, the children may in the meantime have suffered because of lack of food or have missed and lost years in school because of lack of funds. One cannot delay the payment of such funds for support and education for the reason that if paid long afterwards, however much the accumulated amount, its payment cannot cure the evil and repair the damage caused. The children with such belated payment for support and education cannot act as gluttons and eat voraciously and unwisely, afterwards, to make up for the years of hunger and starvation. Neither may they enroll in several classes and schools and take up numerous subjects all at once to make up for the years they missed in school, due to non-payment of the funds when needed."

Art. 205. The right to receive support under this Title as well as any money or property obtained as such support shall not be levied upon on attachment or execution. (302a)

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[87]Gan vs. Reyes, 382 SCRA 357, 362.
[88]*Id.*, p. 363.
[89]95 Phil. 806 (1954).

COMMENTS:

§ 186. Characteristics of Right to Support

The right to legal support has the following characteristics:

(1) the right to receive legal support, as well as any money or property obtained as such support, cannot be levied upon on attachment or execution[90] for to allow attachment or execution of the right to support, or of what is used for support, would defeat the purpose which the law gives to the recipient against want and misery;[91]

(2) the right to receive support cannot be renounced nor can it be transmitted to a third person;[92]

(3] future support cannot be the subject of a compromise;[93] and

(4) compensation may not even be set up against a creditor who has a claim for support due by gratuitous title.[94]

De Asis vs. Court of Appeals
303 SCRA 176 (1999)

FACTS: Vircel D. Andres, in her capacity as the legal guardian of the Minor, Glen Camil Andres de Asis, brought an action for maintenance and support against Manuel De Asis before the Regional Trial Court of Quezon City, alleging that De Asis is the father of the subject minor, and the former refused and/or failed to provide for the maintenance of the latter, despite repeated demands. In his answer, De Asis denied his paternity of the said minor alleged and that he cannot be required to provide support for him. Subsequently, Andres sent in a manifestation stating that because of De Asis' judicial declarations, it was futile and a useless exercise to claim support from him. Hence, she was withdrawing her complaint against De Asis subject to the condition that the latter should not pursue his counterclaim. By virtue of the said manifestation, the parties mutually agreed to move for the dismissal of the complaint. The motion was granted by the trial court, which then dismissed the case with prejudice. Subsequently, another Complaint for maintenance and support was brought

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[90]Art. 205, NCC.
[91]Tolentino, Commentaries and Jurispudence on the Civil Code, Vol. 1, 1990 ed., p. 205.
[92]De Asis vs. CA, *supra*; citing Article 301, NCC.
[93]Art. 2035, NCC.
[94]Art. 1287, par. 2, NCC.

against De Asis, this time in the name of Glen Camil Andres de Asis, represented by her legal guardian, Andres. De Asis moved to dismiss the complaint on the ground of *res judicata.* The trial court denied the motion, ruling that *res judicata* is inapplicable in an action for support for the reason that renunciation or waiver of future support is prohibited by law. The trial court likewise denied De Asis' motion for reconsideration. De Asis filed with the Court of Appeals a petition for *certiorari.* The Court of Appeals dismissed the same. Thus, he elevated the case to the Supreme Court. In deciding against De Asis, the Court held —

> The right to receive support can neither be renounced nor transmitted to a third person. Article 301 of the Civil Code, the law in point, reads:
>
> Art. 301. The right to receive support cannot be renounced, nor can it be transmitted to a third person. Neither can it be compensated with what the recipient owes the obligor. Xxx
>
> Furthermore, future support cannot be the subject of a compromise.
>
> Article 2035, *ibid*, provides, that:
>
> "No compromise upon the following questions shall be valid:
>
> (1) The civil status of persons;
>
> (2) The validity of a marriage or legal separation;
>
> (3) Any ground for legal separation
>
> (4) Future support;
>
> (5) The jurisdiction of courts;
>
> (6) Future legitime.
>
> The *raison d' etre* behind the proscription against renunciation, transmission and/or compromise of the right to support is stated, thus:
>
> "The right to support being founded upon the need of the recipient to maintain his existence, he is not entitled to renounce or transfer the right for this would mean sanctioning the voluntary giving up of life itself. The right to life cannot be renounced; hence, support, which is the means to attain the former, cannot be renounced.
>
> xxx

To allow renunciation or transmission or compensation of the family right of a person to support is virtually to allow either suicide or the conversion of the recipient to a public burden. This is contrary to public policy.

In the case at bar, respondent minor's mother, who was the plaintiff in the first case, manifested that she was withdrawing the case as it seemed futile to claim support from petitioner who denied his paternity over the child. Since the right to claim for support is predicated on the existence of filiation between the minor child and the putative parent, petitioner would like us to believe that such manifestation admitting the futility of claiming support from him puts the issue to rest and bars any and all future complaint for support.

The manifestation sent in by respondent's mother in the first case, which acknowledged that it would be useless to pursue its complaint for support, amounted to renunciation as it severed the vinculum that gives the minor, Glen Camil, the right to claim support from his putative parent, the petitioner. Furthermore, the agreement entered into between the petitioner and respondent's mother for the dismissal of the complaint for maintenance and support conditioned upon the dismissal of the counterclaim is in the nature of a compromise which cannot be countenanced. It violates the prohibition against any compromise of the right to support.

"Thus, the admission made by counsel for the wife of the facts alleged in a motion of the husband, in which the latter prayed that his obligation to support be extinguished cannot be considered as an assent to the prayer, and much less, as a waiver of the right to claim for support."

It is true that in order to claim support, filiation and/or paternity must first be shown between the claimant and the parent. However, paternity and filiation or the lack of the same is a relationship that must be judicially established and it is for the court to declare its existence or absence. It cannot be left to the will or agreement of the parties.

"The civil status of a son having been denied, and this civil status, from which the right to support is derived being in issue, it is apparent that no effect can be given to such a claim until an authoritative declaration has been made as to the existence of the cause."

Art. 206. When, without the knowledge of the person obliged to give support, it is given by a stranger, the latter shall have a right to claim the same from the former, unless it appears that he gave it without any intention of being reimbursed. (2164a)

Art. 207. When the person obliged to support another unjustly refuses or fails to give support when urgently needed by the latter, any third person may furnish support to the needy individual, with a right of reimbursement from the person obliged to give support. This Article shall apply particularly when the father or mother of a child under the age of majority unjustly refuses to support or fails to give support to the child when urgently needed. (2166a)

COMMENTS:

§ 187. Payment by Stranger or Third Person

(a) Payment by Stranger Under Article 206

When, without the knowledge of the person obliged to give support, it is given by a stranger, the latter shall have a right to claim the same from the former, unless it appears that he gave it without intention of being reimbursed.[95] In order that there can be recovery on the part of the stranger, the following requisites must be present: (1) the support of a dependent has been furnished by a stranger; (2) the support was given without the knowledge of the person obliged to give support; and (3) the support must not have been given without the intention of being reimbursed.

The term "stranger" in this article refers to one who does not have any obligation to give support to the person who received it. In other words, the giver must not be one of those enumerated in Articles 195 and 196 of the Family Code. Hence, if the one who furnished the support is himself or herself obliged to support the recipient, although he or she is lower in the order of priority under Article 199 of the Family Code, the same is not deemed to have been given by a stranger.

The obligation to reimburse under this article is one that arises from quasi-contract.[96] Hence, it is necessary that the support must have been given "without the knowledge of the person obliged to give sup-

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[95] Art. 206, FC.
[96] See Art. 2164, NCC.

port" since in quasi-contract, the juridical relation is created out of a certain lawful, voluntary and unilateral act to the end that no one shall be unjustly enriched at the expense of another.[97]

It is further required that the stranger must not have given the support "out of piety and without intention of being repaid."[98] In this situation, the stranger has no right to recover what he has given.

(b) Payment by Third Person Under Article 207

The obligation to reimburse under this article is one that likewise arises from quasi-contract.[99] Under this article, as distinguished from articles 206 of the Family Code and 2164 of the Civil Code, "the obligor unjustly refuses or fails to give support." The law creates a promise of reimbursement on the part of the person obliged to furnish support, inspite of the deliberate disregard of his legal and moral duty. This provision is demanded by justice and public policy.[100]

Art. 208. In case of contractual support or that given by will, the excess in amount beyond that required for legal support shall be subject to levy on attachment or execution.

Furthermore, contractual support shall be subject to adjustment whenever modification is necessary due to changes in circumstances manifestly beyond the contemplation of the parties. (n)

COMMENTS:

§ 188. Contractual Support

(a) Distinguished from legal support

In legal support, which is contemplated in Articles 195 and 196, the right to support arises from, or is based on, the provisions of law. On the other hand, contractual support is not based on the law but originates either from the will of the obligor (as those given by will) or from the agreement of the parties (or those expressed in contracts). In legal sup-

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[97]See Art. 2142, NCC.
[98]Arts. 206, FC and 2164, NCC.
[99]See Art. 2166, NCC.
[100]Report of the Code Commission, pp. 70-71.

port, the recipient and the giver must be mutually obliged to give support under Articles 195 and 196 of the Family Code; whereas, in contractual support, they need not be so.

(b) Subject to Attachment or Execution

In case of contractual support or that given by will, the excess in amount beyond that required for legal support shall be subject to levy on attachment or execution.[101] Unlike legal support, contractual support can be renounced or waived.

[101]Art. 208, FC.

Title IX
PARENTAL AUTHORITY

Chapter 1
General Provisions

Art. 209. Pursuant to the natural right and duty of parents over the person and property of their unemancipated children, parental authority and responsibility shall include the caring for and rearing of such children for civic consciousness and efficiency and the development of their moral, mental and physical character and well-being. (n)

Art. 210. Parental authority and responsibility may not be renounced or transferred except in the cases authorized by law. (313a)

COMMENTS:

§ 189. Concept of Parental Authority

[189.1] Parental authority, explained
[189.2] Over whom exercised
[189.3] Consequences of parental authority
[189.4] Cannot be renounced or transferred
[189.5] Authorized waiver of parental authority

[189.1] Parental Authority, Explained

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.[1] It is the juridical institution whereby parents rightfully assume control and

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[1]J. Makasiar, Dissenting Opinion, Luna vs. IAC, 137 SCRA 7, 18 (1985); citing 2 Manresa 8, cited in 1 Tolentino, Civil Code, 1983 ed., p. 657.

protection of their unemancipated children to the extent required by the latter's needs.[2]

In the continual evolution of legal institutions, the concept of parental authority or *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.[3] In the early concept of *patria potestas*, the emphasis was on the sum total of the rights which the law grants to the parents over the person and property of their children. In the early period of the Roman history, for example, the paternal authority was unlimited: the father had the absolute control over his children, and might even, as the domestic magistrate of his family, condemn them to death.[4] They could acquire nothing except for the benefit of the *pater familias* (father of the family); and they were even liable to be sold and reduced to slavery by the author of their existence.[5] But in the progress of civilization this stern rule was gradually relaxed.[6]

In the modern concept of parental authority, the obligational aspect is now supreme.[7] As pointed out by Puig Peña, now "there is no power, but a task; no complex of rights (of parents) but a sum of duties; no sovereignty, but a sacred trust for the welfare of the minor."[8] In other words, the rights that the parents may exercise over the person and property of their unemancipated children pursuant to the exercise of parental authority are but ancillary to the proper discharge of parental duties to provide them with adequate support, education, moral, intellectual and civil training and development.[9]

[189.2] Over Whom Exercised

Parental authority is exercised over unemancipated children.[10] But in certain instances, parental authority may still be exercised notwith-

[2]Santos, Sr. vs. CA, 242 SCRA 407 (1995), citing 7 Puig Pena.
[3]Medina vs. Makabali, 27 SCRA 502 (1969).
[4]Bouvier's Law Dictionary, Vol. 2, 3rd rev., p. 2538.
[5]*Id*.
[6]*Id*.
[7]Medina vs. Makabali, *supra*.
[8]Puig Peña, Derecho Civil, Vol. 2, part II, p. 153, cited in Medina vs. Makabali, *supra*.
[9]Medina vs. Makabali, *supra*.
[10]*Id*.

standing the emancipation of the child, *e.g.* parental consent is necessary if a person below 21 years of age wants to get married.

Who are considered unemancipated children? Under the Code, [11] emancipation takes place by the attainment of majority. Majority, under present law,[12] commences at the age of eighteen years. Hence, upon reaching the age of majority (18 years), a child is already considered emancipated and the parental authority over his person is terminated,[13] except in certain situations expressly provided by law.[14]

[189.3] Consequences of Parental Authority

As a consequence of the exercise of parental authority, the parents may exercise the following rights over the person and properties of their children:

(1) the right to have them in their company (custody);[15]

(2) the right to be obeyed and respected;[16]

(3) the right to impose discipline on them as may be required under the circumstances;[17]

(4) the right to withhold or give consent in certain matters;[18]

(5) the right to exercise legal guardianship over the property of unemancipated common children;[19]

(6) limited right of usufruct over the child's property.[20]

As a consequence of the exercise of parental authority, the parents shall have the following duties, with respect to their unemancipated children:

(1) To support, educate and instruct them by right precept and

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[11]Art. 234, FC.
[12]R.A. No. 6809, amending Art. 234, FC.
[13]Art. 236, FC.
[14]See discussion under article 236, *infra* § 202.
[15]Art. 220, No. (1), FC.
[16]Art. 220, No. (6), FC.
[17]Art. 220, No. (7), FC.
[18]See discussion under *infra* § 196.5.
[19]Art. 225, FC.
[20]Art. 226, 2nd par., FC.

good example, and to provide for their upbringing in keeping with their means;[21]

(2) To give them love and affection, advice and counsel, companionship and understanding;[22]

(3) To provide them with moral and spiritual guidance, inculcate in them honesty, integrity, self-discipline, self-reliance, industry and thrift, stimulate their interest in civic affairs, and inspire in them compliance with the duties of citizenship;[23]

(4) To furnish them with good and wholesome educational materials, supervise their activities, recreation and association with others, protect them from bad company, and prevent them from acquiring habits detrimental to their health, studies and morals;[24]

(5) To represent them in all matters affecting their interests;[25]

(6) To perform such other duties as are imposed by law upon parents and guardians.[26]

[189.4] Cannot Be Renounced or Transferred

Parental authority and responsibility are inalienable and may not be transferred or renounced except in cases authorized by law.[27] The right attached to parental authority, being purely personal, the law allows a waiver of parental authority only in cases of adoption, guardianship and surrender to a children's home or an orphan institution.[28] Thus, when a parent entrusts the custody of a minor to another, such as a friend or godfather, even in a document, what is given is merely temporary custody and it does not constitute a renunciation of parental authority.[29] Even if a definite renunciation is manifest, the law still disallows the same.[30]

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[21]Art. 220, No. (1), FC.
[22]Art. 220, No. (2), FC.
[23]Art. 220, No. (3), FC.
[24]Art. 220, No. (4), FC.
[25]Art. 220, No. (5), FC.
[26]Art. 220, No. (8), FC.
[27]Art. 210, FC; Santos, Sr. vs. CA, *supra*.
[28]Santos, Sr. vs. CA, *supra*.
[29]*Id.*, citing Cells vs. Cafuir, 86 Phil. 555; De La Cruz vs. Lim Chai Lay (CA), G.R. No. 14080-R, August 15, 1955; Bacayo vs. Calum, (CA) O.G.8607.
[30]*Id.*, citing Art. 210, FC.

Sagala-Eslao vs. Court of Appeals
266 SCRA 317 (1997)

On June 22, 1984, Maria Paz Cordero-Ouye and Reynaldo Eslao were married; after their marriage, the couple stayed with the mother of the husband, Teresita Eslao, in Paco, Manila. Out of their marriage, two children were begotten, namely, Leslie Eslao who was born on February 23, 1986 and Angelica Eslao who was born on April 20, 1987. In the meantime, Leslie was entrusted to the care and custody of Maria Paz's mother in Sta. Ana, Pampanga, while Angelica stayed with her parents at Teresita's house.

On August 6, 1990, Reynaldo Eslao died. After her husband's death, Maria Paz intended to bring Angelica with her to Pampanga but Teresita prevailed upon her to entrust the custody of Angelica to her, Teresita reasoning out that her son just died and to assuage her grief therefor, she needed the company of the child to at least compensate for the loss of her late son. In the meantime, Maria Paz returned to her mother's house in Pampanga where she stayed with Leslie.

Subsequently, Maria Paz was introduced by her aunt to Dr. James Manabu-Ouye, a Japanese-American, who is an orthodontist practicing in the United States; their acquaintance blossomed into a meaningful relationship where on March 18, 1992, Maria Paz and Dr. James Ouye decided to get married. Less than ten months thereafter, or on January 15, 1993, Maria Paz migrated to San Francisco, California, USA, to join her new husband. On June 24, 1993, Maria Paz returned to the Philippines to be reunited with her children and bring them to the United States; she then informed Teresita about her desire to take custody of Angelica and explained that her present husband, Dr. James Ouye, expressed his willingness to adopt Leslie and Angelica and to provide for their support and education. However, Teresita resisted the idea by way of explaining that the child was entrusted to her when she was ten days old and accused Maria Paz of having abandoned Angelica. Because of the adamant attitude of Teresita, Maria Paz was constrained to institute an action to recover the custody of her child from the latter's paternal grandmother. Both the trial court and the Court of Appeals granted Maria Paz's petition to recover the custody of her minor daughter. Thus, Teresita elevated the matter to the Supreme Court. In affirming the decision of the trial court and the Court of Appeals, the Supreme Court explained —

> Petitioner also argues that it has been amply demonstrated during the trial that private respondent had indeed abandoned Angelica to the care and custody of the petitioner; that during all the time that Angelica stayed with petitioner, there were only three instances or occasions wherein the private respondent saw Angelica;

that private respondent never visited Angelica on important occasions, such as her birthday, and neither did the former give her cards or gifts, "not even a single candy;" that while private respondent claims otherwise and that she visited Angelica "many times" and insists that she visited Angelica as often as four times a month and gave her remembrances such as candies and clothes, she would not even remember when the fourth birthday of Angelica was.

We are not persuaded by such averments.

In *Santos, Sr. vs. Court of Appeals*, 242 SCRA 407, we stated, *viz.*:

"xxx [Parental authority] is a mass of rights and obligations which the law grants to parents for the purpose of the children's physical preservation and development, as well as the cultivation of their intellect and the education of their heart and senses. As regards parental authority, 'there is no power, but a task; no complex of rights, but a sum of duties; no sovereignty but a sacred trust for the welfare of the minor.'

"Parental authority and responsibility are inalienable and may not be transferred or renounced except in cases authorized by law. The right attached to parental authority, being purely personal, the law allows a waiver of parental authority only in cases of adoption, guardianship and surrender to a children's home or an orphan institution. When a parent entrusts the custody of a minor to another, such as a friend or godfather, even in a document, what is given is merely temporary custody and it does not constitute a renunciation of parental authority. Even if a definite renunciation is manifest, the law still disallows the same.

"The father and mother, being the natural guardians of unemancipated children, are duty-bound and entitled to keep them in their custody and company."

Thus, in the instant petition, when private respondent entrusted the custody of her minor child to the petitioner, what she gave to the latter was merely temporary custody and it did not constitute abandonment or renunciation of parental authority. For the right attached to parental authority, being purely personal, the law allows a waiver of parental authority only in cases of adoption, guardianship and surrender to a children's home or an orphan institution which do not appear in the case at bar.

Of considerable importance is the rule long accepted by the courts that "the right of parents to the custody of their minor chil-

dren is one of the natural rights incident to parenthood, a right supported by law and sound public policy. The right is an inherent one, which is not created by the state or decisions of the courts, but derives from the nature of the parental relationship.

[189.5] Authorized Waiver of Parental Authority

The law allows a waiver of parental authority only in cases of adoption, guardianship and surrender to a children's home or an orphan institution.[31]

(a) Adoption

Deprivation of parental authority is one of the effects of a decree of adoption.[32] According to the Code, upon the issuance of a decree of adoption, the parental authority of the parents by nature over the adopted shall terminate and the same shall be vested in the adopters.[33]

In adoption proceedings, when the decree of adoption is entered, the same shall be effective as of the date the original petition was filed.[34] In other words, the effects of a decree of adoption shall retroact to the day of the filing of the original petition. This being the case, it may then be asked: what if, after the filing of the petition for adoption but prior to the issuance and entry of a decree of adoption, the adoptee (a minor) shot another minor with a rifle causing injuries which resulted in the death of the latter, who between the natural parents and the adopter shall be liable assuming that the shooting occurred while the adoptee was in the custody of the natural parents?

In the case of **Tamargo vs. Court of Appeals**[35] involving exactly the same factual scenario, the Supreme Court held that a retroactive effect may be given to the decree of adoption when it is essential to permit the accrual of some benefit or advantage in favor of the adopted child but not when it imposes a liability upon the adopting parents accruing at a time when adopting parents had no actual or physically custody over the adopted child. The Court explained:

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[31]Santos, Sr. vs. CA, *supra*.
[32]Cang vs. CA, 296 SCRA 128 (1998).
[33]Art. 189(1), FC.
[34]Sec. 13, DAA.
[35]209 SCRA 518 (1992).

"We do not believe that parental authority is properly regarded as having been retroactively transferred to and vested in the adopting parents, the Rapisura spouses, at the time the air rifle shooting happened. We do not consider that retroactive effect may be given to the decree of adoption so as to impose a liability upon the adopting parents accruing *at a time when adopting parents had no actual or physically custody over the adopted child*. Retroactive effect may perhaps be given to the granting of the petition for adoption where such is essential to permit the accrual of some benefit or advantage in favor of the adopted child. In the instant case, however, to hold that parental authority had been retroactively lodged in the Rapisura spouses so as to burden them with liability for a tortious act that they could not have foreseen and which they could not have prevented (since they were at that time in the United States and had no physical custody over the child Adelberto) would be unfair and unconscionable. Such a result, moreover, would be inconsistent with the philosophical and policy basis underlying the doctrine of vicarious liability. Put a little differently, no presumption of parental dereliction on the part of the adopting parents, the Rapisura spouses, could have arisen since Adelberto was not in fact subject to their control at the time the tort was committed."

Article 35 of the Child and Youth Welfare Code fortifies the conclusion reached above. Article 35 provides as follows:

> Art. 35. *Trial Custody*. — No petition for adoption shall be finally granted unless and until the adopting parents are given by the courts *a supervised trial custody period* of at least six months to assess their adjustment and emotional readiness for the legal union. *During the period of trial custody, parental authority shall be vested in the adopting parents.* (Emphasis supplied)

Under the above Article 35, parental authority is provisionally vested in the adopting parents during the period of trial custody, *i.e.*, before the issuance of a decree of adoption,

precisely because the adopting parents are given actual custody of the child during such trial period. In the instant case, the trial custody period either had not yet begun or had already been completed at the time of the air rifle shooting; in any case, actual custody of Adelberto was then with his natural parents, not the adopting parents.

Note that in adoption proceedings, temporary parental authority is vested upon the adopter during the period of supervised trial custody.[36]

(b) Voluntary Commitment of a Child to DSWD

The parent or guardian of a dependent, abandoned or neglected child may voluntarily commit him to the DSWD or any duly licensed child placement agency or individual[37] provided that no child shall be committed unless he is surrendered in writing by his parents or guardian to the care and custody of the DSWD or duly licensed child placement agency.[38] In case of the death or legal incapacity of either parent or abandonment of the child for a period of at least one year, the other parent alone shall have the authority to make the commitment.[39]

When any child shall have been committed in accordance with the foregoing manner and procedure and such child shall have been accepted by the DSWD or any duly licensed child placement agency or individual, the rights of his natural parents, guardian, or other custodian to exercise parental authority over him shall cease.[40] Such agency or individual shall be entitled to the custody and control of such child during his minority, and shall have authority to care for, educate, train and place him out temporarily or for custody and care in a duly licensed child placement agency.[41]

(c) Involuntary Commitment of a Child to DSWD

The DSWD Secretary or his authorized representative or any duly licensed child placement agency, having knowledge of a child who ap-

[36]Sec. 12, DAA.
[37]Art. 154, P.D. 603, Child and Youth Welfare Code.
[38]Art. 155, P.D. 603.
[39]*Id.*
[40]Art. 156, P.D. 603.
[41]*Id.*

pears to be dependent, abandoned or neglected, may file a verified petition for involuntary commitment of said child to the care of any duly licensed child placement agency or individual.[42] If, after the hearing, the child is found to be dependent, abandoned, or neglected, an order shall be entered committing him to the care and custody of the DSWD or any duly licensed child placement agency or individual.[43] When a child shall have been committed to the DSWD or any duly licensed child placement agency or individual pursuant to an order of the court, his parents or guardian shall thereafter exercise no authority over him except upon such conditions as the court may impose.[44]

(d) Cases Contemplated by Articles 223 and 224.

If there is a need to impose disciplinary measures upon the child, the parents or, in their absence or incapacity, the individual, entity or institution exercising parental authority, may petition the proper court of the place where the child resides, for an order providing for such measures.[45] The child shall be entitled to the assistance of counsel, either of his choice or appointed by the court, and a summary hearing shall be conducted wherein the petitioner and the child shall be heard.[46]

However, if in the same proceeding the court finds the petitioner at fault, irrespective of the merits of the petition, or when the circumstances so warrant, the court may also order the deprivation or suspension of parental authority or adopt such other measures as it may deem just and proper.[47]

The measures referred to above may include the commitment of the child for not more than thirty (30) days in entities or institutions engaged in child care or in children's homes duly accredited by the proper government agency.[48] During this period of commitment, the parent exercising parental authority shall not interfere with the care of the child but shall provide for his support.[49] Upon proper petition or at its own

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[42]Art. 142, P.D. 603.
[43]Art. 149, P.D. 603.
[44]Art. 151, P.D. 603.
[45]Art. 223, 1st par., FC.
[46]*Id.*
[47]Art. 223, 2nd par., FC.
[48]Art. 224, 1st par., FC.
[49]Art. 224, 2nd par., FC.

instance, the court may terminate the commitment of the child whenever just and proper.[50]

Art. 211. The father and the mother shall jointly exercise parental authority over the persons of their common children. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.

Children shall always observe respect and reverence towards their parents and are obliged to obey them as long as the children are under parental authority. (17a, PD 603)

Art. 212. In case of absence or death of either parent, the parent present shall continue exercising parental authority. The remarriage of the surviving parent shall not affect the parental authority over the children, unless the court appoints another person to be the guardian of the person or property of the children. (17a, PD 603)

COMMENTS:

§ 190. Parents Who Exercise Parental Authority

[190.1] Joint exercise of parental authority
[190.2] Parental authority over illegitimate children

[190.1] Joint Exercise of Parental Authority

According to the Code,[51] the father and the mother shall jointly exercise parental authority over the persons of their common children. In case of disagreement, the decision of the father shall prevail, unless there is a judicial order to the contrary.[52] In case of absence or death of either parent, the parent present shall continue exercising parental authority.[53] In case of death of either parent and the surviving parent remarries, the parental authority of the surviving parent over the children of the previous marriage shall not be affected, unless the court appoints another person to be the guardian of the person or property of said children.[54]

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[50]*Id.*
[51]Art. 211, FC.
[52]*Id.*
[53]Art. 212, FC.
[54]*Id.*

While, as a general rule, parental authority is jointly exercised by the father and the mother, there are several instances in the Code where the exercise of parental authority is primarily lodged in the father, to wit:

(1) Under article 14 of the Code, when parental consent is required for purposes of marriage, *i.e.*, when either or both the contracting parties thereto are between the ages of 18 and below 21, such consent may be given by the "father, mother, surviving parent or guardian, or persons having legal charge of them, in the order mentioned."

(2) Under article 78 of the Code, if a party to a marriage settlement is between the ages of 18 and below 21, in which case parental consent is required, the person designated in Article 14 to give consent to the marriage is required to be a party to the contract; otherwise, the contract is not valid.

It must be emphasized, however, that the foregoing discussion applies only when the children are legitimate.

[190.2] Parental Authority Over Illegitimate Children

Illegitimate children, on the other hand, are under the parental authority only of their mother.[55] Hence, in cases where the child is illegitimate, it is the consent and participation of the mother which is required under articles 14 and 78 of the Code.[56]

(a) Rule Applies Even If Father Admits Paternity

The rule in article 176 of the Code that illegitimate children are under the parental authority of the mother applies whether or not the father admits paternity. In the words of the Court in the case of **David vs. Court of Appeals**,[57] the fact that the father of an illegitimate child has recognized the child may be a ground for ordering him to give support to the latter, but not for giving him custody of the child. Note that pursuant to the amendment introduced by Republic Act No. 9255,[58] ille-

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[55]Art. 176, FC.
[56]See discussion under *supra* § 67.2.
[57]250 SCRA 82 (1995).
[58]Amending Art. 176, FC.

gitimate children are only authorized to use the surnames of their father if paternity is recognized or admitted by the latter in the birth certificate or in a public or private handwritten instrument. Such admission, however, will not authorize the father to exercise parental authority over an illegitimate child.

David vs. Court of Appeals
250 SCRA 82 (1995)

Daisie David had illicit relations with his boss, Ramon Villar, who was a married man. After a while, the relationship between the two developed into an intimate one, as a result of which a son, Christopher J., was born on March 9, 1985 to them. Christopher was followed by two more children, both girls, namely Christine, born on June 9, 1986, and Cathy Mae on April 24, 1988. The relationship became known to Ramon's wife when Daisie took Christopher J, to Ramon's house in Angeles City sometime in 1986 and introduced him to Ramon's legal wife. After this, the children of Daisie were freely brought by Ramon to his house as they were eventually accepted by his legal family.

In the summer of 1991, Ramon asked Daisie to allow Christopher J., then six years of age, to go with his family to Boracay. Daisie agreed, but after the trip, Ramon refused to give back the child. Ramon said he had enrolled Christopher J. at the Holy Family Academy for the next school year. Daisie then filed a petition for *habeas corpus* on behalf of Christopher J. After hearing, the trial court ruled in favor of Daisie. On appeal, the Court of Appeals reversed the decision of the lower court and ruled that it was for the best interest of the child that he should temporarily remain under the Custody of his father since the latter was well-off while the mother depended upon her sisters and parents for support. In reversing the decision of the Court of Appeals, the Supreme Court explained —

> In the case at bar, Christopher J. is an illegitimate child since at the time of his conception, his father, private respondent Ramon R. Villar, was married to another woman other than the child's mother. As such, pursuant to Art. 176 of the Family Code, Christopher J. is under the parental authority of his mother, the herein petitioner, who, as a consequence of such authority, is entitled to have custody of him. Since, admittedly, petitioner has been deprived of her rightful custody of her child by private respondent, she is entitled to issuance of the writ of *habeas corpus*.
>
> Indeed, Rule 102 §1 makes no distinction between the case of a mother who is separated from her husband and is entitled to the

custody of her child and that of a mother of an illegitimate child who, by law, is vested with sole parental authority, but is deprived of her rightful custody of her child.

The fact that private respondent has recognized the minor child may be a ground for ordering him to give support to the latter, but not for giving him custody of the child. Under Art. 213 of the Family Code, "no child under seven years of age shall be separated from the mother unless the court finds compelling reasons to order otherwise."

Briones vs. Miguel
440 SCRA 455 (2004)

Joey Briones filed a petition for *habeas corpus* case to obtain custody of his minor child Michael Kevin Pineda. In his petition he alleged that Michael Kevin Pineda is his illegitimate son with Loreta P. Miguel and that the latter is now married to a Japanese national and is presently residing in Japan. In his petition, he further alleges that on November 4, 1998 he caused the minor child to be brought to the Philippines so that he could take care of him and send him to school. In the school year 2000-2001, the petitioner enrolled him at the nursery school of Blessed Angels L.A. School, Inc. in Caloocan City, where he finished the nursery course.

On May 2, 2001, two relatives of the child's mother, namely, Maricel P. Miguel and Francisca P. Miguel came to the house of the petitioner in Caloocan City on the pretext that they were visiting the minor child and requested that they be allowed to bring the said child for recreation at the SM Department store. They promised him that they will bring him back in the afternoon, to which the petitioner agreed. However, they did not bring him back as promised by them.

Hence, petitioner filed the petition. When the case reached the Court of Appeals, the appellate court dismissed the petition. The dispositive portion of the CA's Decision reads as follows:

"WHEREFORE, the petition is hereby DISMISSED. Respondent Loreta P. Miguel shall have custody over the child Michael Kevin Pineda until he reaches ten (10) years of age. Once the said child is beyond ten (10) years of age, the Court allows him to choose which parent he prefers to live with pursuant to Section 6, Rule 99 of the 1997 Rules of Civil Procedure, as amended. The petitioner, Joey D. Briones, shall help support the child, shall have visitorial rights at least once a week, and may take the child out upon the written consent of the mother."

On appeal to the Supreme Court, the High Court affirmed the CA's decision with modifications. The Court explained —

> Under Article 176 of the Family Code, all illegitimate children are generally placed under one category, without any distinction between *natural* and *spurious*. The concept of "natural child" is important only for purposes of legitimation. Without the subsequent marriage, a natural child remains an illegitimate child.
>
> Obviously, Michael is a natural ("illegitimate," under the Family Code) child, as there is nothing in the records showing that his parents were suffering from a legal impediment to marry at the time of his birth. Both acknowledge that Michael is their son. As earlier explained and pursuant to Article 176, parental authority over him resides in his mother, Respondent Loreta, notwithstanding his father's recognition of him.
>
> *David vs. Court of Appeals* held that the recognition of an illegitimate child by the father could be a ground for ordering the latter to give support to, but not custody of, the child. The law explicitly confers to the mother sole parental authority over an illegitimate child; it follows that only if she defaults can the father assume custody and authority over the minor. Of course, the putative father may adopt his own illegitimate child; in such a case, the child shall be considered a legitimate child of the adoptive parent.
>
> There is thus no question that Respondent Loreta, being the mother of and having sole parental authority over the minor, is entitled to have custody of him. She has the right to keep him in her company. She cannot be deprived of that right, and she may not even renounce or transfer it "except in the cases authorized by law."
>
> Not to be ignored in Article 213 of the Family Code is the caveat that, generally, no child under seven years of age shall be separated from the mother, except when the court finds cause to order otherwise.
>
> Only the most compelling of reasons, such as the mother's unfitness to exercise sole parental authority, shall justify her deprivation of parental authority and the award of custody to someone else. In the past, the following grounds have been considered ample justification to deprive a mother of custody and parental authority: neglect or abandonment, unemployment, immorality, habitual drunkenness, drug addiction, maltreatment of the child, insanity, and affliction with a communicable disease.

> Bearing in mind the welfare and the best interest of the minor as the controlling factor, we hold that the CA did not err in awarding care, custody, and control of the child to Respondent Loreta. There is no showing at all that she is unfit to take charge of him.
>
> We likewise affirm the visitorial right granted by the CA to petitioner. In *Silva vs. Court of Appeals*, the Court sustained the visitorial right of an illegitimate father over his children in view of the constitutionally protected *inherent and natural right* of parents over their children. Even when the parents are estranged and their affection for each other is lost, their attachment to and feeling for their offspring remain unchanged. Neither the law nor the courts allow this affinity to suffer, absent any real, grave or imminent threat to the well-being of the child.
>
> However, the CA erroneously applied Section 6 of Rule 99 of the Rules of Court. This provision contemplates a situation in which the parents of the minor are married to each other, but are separated either by virtue of a decree of legal separation or because they are living separately de facto. In the present case, it has been established that petitioner and Respondent Loreta were never married. Hence, that portion of the CA Decision allowing the child to choose which parent to live with is deleted, but without disregarding the obligation of petitioner to support the child."

(b) Visitation Rights

Visitation right is the right of access of a noncustodial parent to his or her child or children.[59] In **Silva vs. Court of Appeals**,[60] the Supreme Court sustained the visitorial right of an illegitimate father over his children in view of the constitutionally protected inherent and natural right of parents over their children.[61] In explaining the legal basis of the illegitimate father's visitorial rights, Justice Vitug wrote in ***Silva*** —

> There is, despite a dearth of specific legal provisions, enough recognition on the inherent and natural right of parents over their children. Article 150 of the Family Code expresses that "(f)amily relations include those x x x (2)

[59]Silva vs. CA, 275 SCRA 340 (1997), citing Black's Law Dictionary, 6th ed., p. 1572.
[60]Supra, cited in Briones vs. Miguel, *supra.* See also Bondagjy vs. Bondagjy, 370 SCRA 642 (2001).
[61]See Article II, Section 12, 1987 Constitution.

> (b)etween parents and children; x x x." Article 209, in relation to Article 220, of the Code states that it is the natural right and duty of parents and those exercising parental authority to, among other things, keep children in their company and to give them love and affection, advice and counsel, companionship and understanding. The Constitution itself speaks in terms of the "natural and primary rights" of parents in the rearing of the youth. (Art. II, Sec. 12, 1987 Constitution) There is nothing conclusive to indicate that these provisions are meant to solely address themselves to legitimate relationships. Indeed, although in varying degrees, the laws on support and successional rights, by way of examples, clearly go beyond the legitimate members of the family and so explicitly encompass illegitimate relationships as well. (Arts. 176, 195 Family Code) Then, too, and most importantly, in the declaration of nullity of marriages, a situation that presupposes a <u>void</u> or <u>inexistent</u> marriage, Article 49 of the Family Code provides for appropriate visitation rights to parents who are not given custody of their children.

Silva vs. Court of Appeals
275 SCRA 340 (1997)

Carlitos E. Silva, a married businessman, and Suzanne T. Gonzales, an unmarried local actress, cohabited without the benefit of marriage. The union saw the birth of two children: Ramon Carlos and Rica Natalia. Not very long after, a rift in their relationship surfaced. It began, according to Silva, when Gonzales decided to resume her acting career over his vigorous objections. The assertion was quickly refuted by Gonzales who claimed that she, in fact, had never stopped working throughout their relationship. At any rate, the two eventually parted ways. In February 1986, by the refusal of Gonzales to allow Silva, in apparent contravention of a previous understanding, to have the children in his company on weekends. Silva filed a petition for custodial rights over the children before the Regional Trial Court ("RTC"), Branch 78, of Quezon City. The petition was opposed by Gonzales who averred that Silva often engaged in "gambling and womanizing" which she feared could affect the moral and social values of the children.

The trial court granted Silva visitorial rights during Saturdays and/or Sundays. Silva appeared somehow satisfied with the judgment for only Gonzales interposed an appeal to the Court of Appeals. In the meantime, Gonzales got

married to a Dutch national. The newlyweds migrated to Holland with Ramon Carlos and Rica Natalia. Eventually, the Court of Appeals reversed the ruling of the trial court. Hence, Silva appealed to the Supreme Court. In restoring Silva's visitation rights, the Court explained —

> The issue before us is not really a question of child custody; instead, the case merely concerns the visitation right of a parent over his children which the trial court has adjudged in favor of petitioner by holding that he shall have "visitorial rights to his children during Saturdays and/or Sundays, but in no case (could) he take out the children without the written consent of the mother x x x." The visitation right referred to is the right of access of a noncustodial parent to his or her child or children.
>
> There is, despite a dearth of **specific** legal provisions, enough recognition on the **inherent** and **natural right** of parents over their children. Article 150 of the Family Code expresses that "(f)amily relations include those x x x (2) (b)etween parents and children; x x x." Article 209, in relation to Article 220, of the Code states that it is **the natural right and duty of parents** and those exercising parental authority to, among other things, keep children in their company and to give them love and affection, advice and counsel, companionship and understanding. The Constitution itself speaks in terms of the **"natural and primary rights"** of parents in the rearing of the youth. There is nothing conclusive to indicate that these provisions are meant to solely address themselves to legitimate relationships. Indeed, although in varying degrees, the laws on support and successional rights, by way of examples, clearly go beyond the legitimate members of the family and so explicitly encompass illegitimate relationships as well. Then, too, and most importantly, in the declaration of **nullity** of marriages, a situation that presupposes a <u>void</u> or <u>inexistent</u> marriage, Article 49 of the Family Code provides for appropriate visitation rights to parents who are not given custody of their children.
>
> There is no doubt that in all cases involving a child, his interest and welfare is always the paramount consideration. The Court shares the view of the Solicitor General, who has recommended due course to the petition, that a few hours spent by petitioner with the children, however, could not all be that detrimental to the children. Similarly, what the trial court has observed is not entirely without merit; thus:
>
> "The allegations of respondent against the character of petitioner, even assuming as true, cannot be taken as sufficient basis to

render petitioner an unfit father. The fears expressed by respondent to the effect that petitioner shall be able to corrupt and degrade their children once allowed to even temporarily associate with petitioner is but the product of respondent's unfounded imagination, for no man, bereft of all moral persuasions and goodness, would ever take the trouble and expense in instituting a legal action for the purpose of seeing his illegitimate children. It can just be imagined the deep sorrows of a father who is deprived of his children of tender ages."

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

No child under seven years of age shall be separated from the mother unless the court finds compelling reasons to order otherwise.

COMMENTS:

§ 191. Rule in Case of Separation of Parents

[191.1] Who shall exercise parental authority in case of separation
[191.2] Rule in legal separation
[191.3] Subject to the provisions of Article 213
[191.4] Tender-age presumption
(a) General rule
(b) Exception: compelling reasons
[191.5] Children over seven years of age
[191.6] Paramount consideration: welfare of the child
[191.7] Rule in separation de facto

[191.1] Who Shall Exercise Parental Authority In Case of Separation

In case of separation of the parents, parental authority shall be exercised by the parent designated by the Court.[62]

[191.2] Rule in Legal Separation

One of the effects of the decree of legal separation is that *"the custody of the minor children shall be awarded to the innocent spouse,*

[62]Art. 213, FC.

subject to the provisions of article 213 of (the Family) Code."[63] When paragraph no. (3) of article 63 is interpreted in relation to article 213 of the Code, the mandate of the Code becomes clear that in case of legal separation, it is the innocent spouse who shall, generally, be designated by the court to exercise parental authority over minor children. While paragraph no. (3) of article 63 appears to be limited to the issue of custody, nevertheless, what is really contemplated in said paragraph is the exercise of parental authority. This is because the parent who has in his/her custody the minor is in a better position to implement the sum of parental rights and duties associated with parental authority. In legal contemplation, the term "custody" embraces the sum of parental rights,[64] and it includes the right to the services of the child, the right to direct the activities, and the right to make decisions regarding care and control, education, health, and religion.[65] Moreover, it has been held that the concept not only pertains to control by the parent of the child, but is also inseparably linked to the parent's right to access and companionship.[66]

It should be noted, however, that the law only confers on the innocent spouse the "exercise" of parental authority.[67] In other words, the award of custody to the innocent spouse does not deprive the guilty spouse of parental authority.[68] Thus, for the purpose of placing the minor child up for adoption, the written consent of the guilty spouse to such adoption is still necessary.[69] Also, in the event of death of the innocent spouse, the substitute parental authority of the persons designated under article 216 of the Code will not as yet come into play since the parental authority of the surviving guilty spouse is still in existence.

[191.3] "Subject to the Provisions of Article 213"

The rule in paragraph 3 of article 63 that *"the custody of the minor children shall be awarded to the innocent spouse"* is subject to the provisions of article 213 of the Code. This article provides, in part, that *"no child under seven years of age shall be separated from the mother*

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[63]Art. 63, No. (3), FC.
[64]Burge vs. City and County of San Francisco, 262 P.2d 6, 41 C.2d 608.
[65]*Id.*
[66]Delgado vs. Fawcett, 515 P.2d 710.
[67]Cang vs. CA, 296 SCRA 128 (1998).
[68]*Id.*; See also Bondagjy vs. Bondagjy, 370 SCRA 642 (2001).
[69]See Cang vs. CA, *supra*.

unless the court finds compelling reasons to order otherwise." In other words, the Code, as much as possible, prohibits the separation of a child below seven years of age from the mother even if the latter is the guilty spouse in a legal separation case. Indeed, the mere fact that the mother is the guilty spouse in a legal separation case does not necessarily mean that she is not fit to be a parent. In **Bondagjy vs. Bondagjy**,[70] the Court explained that "what determines the fitness of any parent is the ability to see to the physical, educational, social and moral welfare of the children, and the ability to give them a healthy environment as well as physical and financial support taking into consideration the respective resources and social and moral situations of the parents." It may thus happen that the ground relied upon by the husband in legal separation is totally unrelated to the mother's fitness to be a parent of her child.

[191.4] Tender-Age Presumption

(a) General Rule

There is express statutory recognition that, as a general rule, a mother is to be prefered in awarding custody of children under the age of seven — this is the so called *"tender-age presumption"* under Article 213 of the Family Code.[71] The caveat in Article 213 of the Family Code cannot be ignored, except when the court finds cause to order otherwise.[72]

The Family Code, in reverting to the provision of the Civil Code[73] that a child below seven years old should not be separated from the mother, has expressly repealed Article 17, paragraph three of the Child and Youth Welfare Code (Presidential Decree No. 603) which reduced the child's age to five years.

Article 213 of the Code clearly mandates that a child under seven years of age shall not be separated from his mother unless the court finds compelling reasons to order otherwise. The use of the word "shall" in the law connotes a mandatory character.[74]

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[70]*Supra.*
[71]Pablo-Gualberto vs. Gualberto V, 461 SCRA 450, 476 (2005).
[72]*Id.*
[73]Art. 363, NCC.
[74]Perez vs. CA, 255 SCRA 661 (1996).

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

> "The general rule is recommended in order to avoid many a tragedy where a mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age. The exception allowed by the rule has to be for 'compelling reasons' for the good of the child; those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the divorce decree (relative divorce) will ordinarily be sufficient punishment for her. Moreover, moral dereliction will not have any effect upon the baby who is as yet unable to understand her situation."[75]

The general rule that a child under seven years of age shall not be separated from his mother finds its *raison d'etre* in the basic need of a child for his mother's loving care[76] and which, presumably, a father cannot give in equal measure.[77] Hence, in article 213, a strong bias is created in favor of the mother for the law presumes that she is the best custodian.[78]

(b) Exception: "Compelling Reasons"

The foregoing rule is not intended, however, to denigrate the important role fathers play in the upbringing of their children.[79] Indeed, the Court had recognized that both parents "complement each other in giving nurture and providing that holistic care which takes into account the physical, emotional, psychological, mental, social and spiritual needs of the child."[80] Neither does the law nor jurisprudence intend to downplay a father's sense of loss when he is separated from his child:

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[75]Report of the Code Commission, cited in Perez vs. CA, *supra*.
[76]Perez vs. CA, *supra*, citing Espiritu vs. CA, 242 SCRA 362 (1995).
[77]Espiritu vs. CA, *supra*.
[78]Tonog vs. Tonog, 376 SCRA 523 (2002).
[79]*Id*.
[80]*Id*., citing Perez vs. CA, *supra*, at p. 665.

"While the bonds between a mother and her small child are special in nature, either parent, whether father or mother, is bound to suffer agony and pain if deprived of custody. One cannot say that his or her suffering is greater than that of the other parent. It is not so much the suffering, pride, and other feelings of either parent but the welfare of the child which is the paramount consideration."[81]

For these reasons, even a mother may be deprived of the custody of her child who is below seven years of age for "compelling reasons."[82] However, only the most compelling of reasons shall justify the court's awarding the custody of a child below seven (7) years of age to someone other than his mother, such as her unfitness to exercise sole parental authority.[83] In the past the following grounds have been considered ample justification to deprive a mother of custody and parental authority: (1) neglect, abandonment;[84] (2) unemployment and immorality;[85] (3) habitual drunkenness;[86] and (4) drug addiction, maltreatment of the child, insanity and being sick with a communicable disease.[87]

However, the mere fact that the mother is a lesbian is not a compelling reason to deprive her of custody without showing that she carried on her purported relationship with a person of the same sex in the presence of the child or under circumstances not conducive to the child's proper moral development.[88] Sexual preference or moral laxity alone does not prove parental neglect or incompetence.[89] Not even the fact that a mother is a prostitute or has been unfaithful to her husband would render her unfit to have custody of her minor child.[90]

To deprive the wife of custody, the husband must clearly establish that her moral lapses have had an adverse effect on the welfare of the

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[81]Espiritu vs. CA, *supra*, at p. 368, cited in Tonog vs. Tonog, *supra*.

[82]Tonog vs. Tonog, *supra*.

[83]Perez vs. CA, *supra*.

[84]Medina vs. Makabali, 27 SCRA 502 (1969); cited in Perez vs. CA, *supra*.

[85]Cervantez vs. Fajardo, 169 SCRA 575 (1989).

[86]Perez vs. CA, *supra*; citing 1 Tolentino, Civil Code, 1990 ed., p. 609.

[87]Perez vs. CA, citing A. Sempio-Diy, Op. *Cit.* At 287; J. Vitug, Compendium Of Civil Law And Jurisprudence 247 (Revised Ed., 1993).

[88]Pablo-Gualberto vs. Gualberto V, *supra*.

[89]*Id.*, at p. 477.

[90]*Id.*, citing Sempio-Diy, Handbook on the Family Code of the Philippines (1998), p. 297.

child or have distracted the offending spouse from exercising proper parental care.[91] To this effect did the Court rule in **Unson III vs. Navarro**,[92] wherein the mother was openly living with her brother-in-law, the child's uncle. Under that circumstance, the Court deemed it in the nine-year-old child's best interest to free her "from obviously unwholesome, not to say immoral influence, that the situation in which the mother ha[d] placed herself might create in [the child's] moral and social outlook."

In **Espiritu vs. Court of Appeals**,[93] the Court took into account psychological and case study reports on the child, whose feelings of insecurity and anxiety had been traced to strong conflicts with the mother. To the psychologist the child revealed, among others, that the latter was disturbed upon seeing "her mother hugging and kissing a 'bad' man who lived in their house and worked for her father." The Court held that the "illicit or immoral activities of the mother had already caused the child emotional disturbances, personality conflicts, and exposure to conflicting moral values."

[191.5] Children Over Seven Years of Age

If older than seven years of age, a child is allowed to state his preference,[94] but the court is not bound by that choice.[95] The court may exercise its discretion by disregarding the child's preference should the parent chosen be found to be unfit, in which instance, custody may be given to the other parent, or even to a third person.[96]

In other words, the preference of a child is only one factor to be considered, and it is not controlling, decisive, or determinative. Thus, notwithstanding the preference, the court has discretion to determine the question of custody.[97]

In **Perkins vs. Perkins**,[98] for example, the minor over ten years of age expressed preference to live with the mother but the court awarded

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[91] *Id.*, p. 477.
[92] 101 SCRA 183 (1980).
[93] 242 SCRA 362 (1995).
[94] See Art. 213, FC.
[95] Tonog vs. Tonog, *supra*.; Laxamana vs. Laxamana, 388 SCRA 296 (2002).
[96] *Id*.
[97] J. Makasiar, Dissenting Opinion in Luna vs. IAC, 137 SCRA 7, 23.
[98] 57 Phil. 217.

the custody of the child to the father. It appears from the evidence that the mother was still keeping erotic letters written to her many years back by a young man, indicating that she had been unfaithful to the husband; that she twisted facts and deliberately lied during the hearing of the case in which she sought alimony from the husband; that she took advantage of the youth and innocence of the child to attain her ends to testify against him; that she removed the child, over the objection of the father, from school and took her daily to the court where she could listen to the charges and counter-charges that the parents were taking against each other. The father desired the custody of the child primarily to remove her from such atmosphere and place her in a young ladies' school in Switzerland, which school had been tentatively selected by the parents when they were still living in domestic tranquillity.

[191.6] Paramount Consideration: Welfare of the Child

Whether a child is under or over seven years of age, the paramount criterion must always be the child's interests[99] or the welfare and well-being of the child.[100] Discretion is given to the court to decide who can best assure the welfare of the child, and award the custody on the basis of that consideration.[101] In arriving at its decision as to whom custody of the minor should be given, the court must take into account the respective resources and social and moral situations of the contending parents.[102] In **Unson III vs. Navarro**,[103] the Court laid down the rule that "*in all controversies regarding the custody of minors, the sole and foremost consideration is the physical, education, social and moral welfare of the child concerned, taking into account the respective resources and social and moral situations of the contending parents*" and in **Medina vs. Makabali**,[104] where custody of the minor was given to a non-relative as against the mother, then the country's leading civilist, Justice J.B.L. Reyes, explained its basis in this manner:

> ". . . While our law recognizes the right of a parent to the custody of her child, Courts must not lose sight of the

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[99]Espiritu vs. CA, *supra*.
[100]Tonog vs. Tonog, *supra*.
[101]*Id*.
[102]Unson III vs. Navarro, 101 SCRA 183 (1980).
[103]*Supra*.
[104]*Supra*.

> basic principle that "in all questions on the care, custody, education and property of 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. 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 Peña, now "there is no power, but a task; no complex of rights (of parents) but a sum of duties; no sovereignty, but a sacred trust for the welfare of the minor."
>
> As a result, the right of parents to the company and custody of their children is but ancillary to the proper discharge of parental duties to provide the children with adequate support, education, moral, intellectual and civic training and development (Civil Code, Art. 356).

In ascertaining the welfare and best interests of the child, courts are mandated by the Family Code to take into account all relevant considerations. If a child is under seven years of age, the law presumes that the mother is the best custodian. The presumption is strong but it is not conclusive. It can be overcome by "compelling reasons." If a child is over seven, his choice is paramount but, again, the court is not bound by that choice. 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.[105]

[191.7] Rule in Separation De Facto

When the parents of the child are separated, Article 213 of the Family Code is the applicable law.[106] Since the Code does not qualify the word "separation" to mean "legal separation" decreed by a court,

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[105]Espiritu vs. CA, *supra*.
[106]Perez vs. CA, *supra*.

couples who are separated in fact are covered within its terms.[107] As such, the foregoing discussion in *supra* § 191.2 likewise apply in the case of separation in fact.

Art. 214. In case of death, absence or unsuitability of the parents, substitute parental authority shall be exercised by the surviving grandparent. In case several survive, the one designated by the court, taking into account the same consideration mentioned in the preceding article, shall exercise the authority. (355a)

Art. 215. No descendant shall be compelled, in a criminal case, to testify against his parents and grandparents, except when such testimony is indispensable in a crime against the descendant or by one parent against the other. (315a)

COMMENTS:

§ 192. Parental and filial privilege

[192.1] Compared with sec. 25, rule 130
[192.2] Purpose and application

[192.1] Compared With Sec. 25, Rule 130

Article 215 of the Code is complemented by Section 25, Rule 130 of the Rules of Court which provides:

> "Sec. 25. *Parental and filial privilege.* — No person may be compelled to testify against his parents, other direct ascendants, children or other direct descendants."

The two provisions may be distinguished, as follows:

(1) Article 215 of the Family Code is applicable only in criminal proceedings while Sec. 25 of Rule 130 may be invoked in both civil and criminal cases.[108]

(2) In the former, the privilege may be invoked only by descendants; whereas, in the latter, the privilege may be invoked either by descendants or ascendants.

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[107] *Id.*

[108] See Feria, Revised Rules on Evidence, Annotated (Philippine Legal Studies, Series No. 4), p. 16.

(3) In the former, the privilege may be invoked only in criminal cases against the parents and grandparents; whereas, in the latter, the privilege may be invoked in civil or criminal cases against the parents, other direct ascendants, children or other direct descendants.

(4) In the former, the privilege is not absolute since the descendants can be compelled to testify in criminal cases against the parents and grandparents when their testimony is indispensable in a crime against the descendants or by one parent against the other; whereas, there appears to be no exception in the latter.

[192.2] Purpose and Application

The purpose of the rule in article 215 of the Code is to preserve "family cohesion."[109] Note that the privilege may be waived by the descendant and he may, as a consequence, choose to testify against his parent or grandparent in a criminal case against the latter. But if the crime is committed by a parent or grandparent against the descendant or against the other parent and the testimony of the descendant is indispensable, he can be compelled to testify.

Chapter 2

Substitute and Special Parental Authority

Art. 216. In default of parents or a judicially appointed guardian, the following persons shall exercise substitute parental authority over the child in the order indicated:

(1) The surviving grandparent, as provided in Art. 214;

(2) The oldest brother or sister, over twenty-one years of age, unless unfit or disqualified; and

(3) The child's actual custodian, over twenty-one years of age, unless unfit or disqualified.

Whenever the appointment of a judicial guardian over the property of the child becomes necessary, the same order of preference shall be observed. (349a, 351a, 354a)

[109]Report of Code Commission, pp. 21, 35.

COMMENTS:

§ 193. Substitute Parental Authority

[193.1] Parental preference rule
[193.2] Concept of substitute parental authority
[193.3] Who may exercise substitute parental authority

[193.1] Parental Preference Rule

There is in law and jurisprudence a recognition of the deep ties that bind parent and child.[110] Parents are thus placed first in rank in matters of parental authority.[111] Under the parental preference rule embodied in Article 214 of the Code, the father or mother, if suitable, is entitled to exercise parental authority over his or her children. As a consequence of which, the father or the mother, if suitable, is entitled to the custody of the child against all persons, even against the grandparents. This is illustrated in the case of **Santos, Sr. vs. Court of Appeals**:[112]

Santos, Sr. vs. Court of Appeals
242 SCRA 407 (1995)

Leouel Santos, Sr., an army lieutenant, and Julia Bedia, a nurse by profession, were married in Iloilo City in 1986. Their union beget only one child, Leouel Santos, Jr. who was born on July 18, 1987. From the time the boy was released from the hospital until sometime thereafter, he had been in the care and custody of his maternal grandparents, Leopoldo and Ofelia Bedia. Leoue, Sr. and Julia agreed to place Leouel Jr. in the temporary custody of the spouses Bedia.

In 1988, Julia left for the United States to work. Since then, nothing has been heard from her by Leouel Sr. Likewise, his efforts to locate her in the United States proved futile. On September 2, 1990, Leouel Sr. along with his two brothers, visited the Bedia household, where three-year old Leouel Jr. was staying. It was later on alleged by the spouses Bedia that through deceit and false pretensions, Leouel Sr. abducted the boy and clandestinely spirited him away to his hometown in Bacong, Negros Oriental.

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[110]J. Vitug, Concurring Opinion, Vancil vs. Belmes, 358 SCRA 707, 714 (2001).
[111]*Id.*
[112]*Supra.*

The spouses Bedia then filed a "Petition for Care, Custody and Control of Minor Ward Leouel Santos Jr.," before the Regional Trial Court of Iloilo City, with Leouel Santos, Sr. as respondent. After an *ex-parte* hearing on October 8, 1990, the trial court issued an order on the same day awarding custody of the child Leouel Santos, Jr. to his grandparents, the spouses Bedia. Leouel Sr. appealed this Order to the Court of Appeals, which affirmed the trial court's order. On appeal, the Supreme Court reversed the CA's decision and awarded the custody of the child to his legitimate father, Leouel Sr. The Supreme Court explained —

> The right of custody accorded to parents springs from the exercise of parental authority. Parental authority or *patria potestas* in Roman Law is the juridical institution whereby parents rightfully assume control and protection of their unemancipated children to the extent required by the latter' s needs. It is a mass of rights and obligations which the law grants to parents for the purpose of the children's physical preservation and development, as well as the cultivation of their intellect and the education of their heart and senses. As regards parental authority, "there is no power, but a task; no complex of rights, but a sum of duties; no sovereignty but a sacred trust for the welfare of the minor."
>
> Parental authority and responsibility are inalienable and may not be transferred or renounced except in cases authorized by law. The right attached to parental authority, being purely personal, the law allows a waiver of parental authority only in cases of adoption, guardianship and surrender to a children's home or an orphan institution. When a parent entrusts the custody of a minor to another, such as a friend or godfather, even in a document, what is given is merely temporary custody and it does not constitute a renunciation of parental authority. Even if a definite renunciation is manifest, the law still disallows the same.
>
> The father and mother, being the natural guardians of unemancipated children, are duty-bound and entitled to keep them in their custody and company. The child's welfare is always the paramount consideration in all questions concerning his care and custody.
>
> The law vests on the father and mother joint parental authority over the persons of their common children. *In case of absence* or death *of either parent, the parent present shall continue exercising parental authority*. Only in case of the parents' death, absence or unsuitability may substitute parental authority be exercised by

the surviving grandparent. The situation obtaining in the case at bench is one where the mother of the minor Santos, Jr., is working in the United States while the father, petitioner Santos, Sr., is present. Not only are they physically apart but are also emotionally separated. There has been no decree of legal separation and petitioner's attempt to obtain an annulment of the marriage on the ground of psychological incapacity of his wife has failed.

Petitioner assails the decisions of both the trial court and the appellate court to award custody of his minor son to his parents-in-law, the Bedia spouses on the ground that under Art. 214 of the Family Code, substitute parental authority of the grandparents is proper only when both parents are dead, absent or unsuitable. Petitioner's unfitness, according to him, has not been successfully shown by private respondents.

The Court of Appeals held that although there is no evidence to show that petitioner (Santos Sr.) is "depraved, a habitual drunkard or poor, he may nevertheless be considered, as he is in fact so considered, to be unsuitable to be allowed to have custody of minor Leouel Santos, Jr."

The respondent appellate court, in affirming the trial court's order of October 8, 1990, adopted as its own the latter's observations, to wit:

> From the evidence adduced, this Court is of the opinion that it is to be (*sic*) best interest of the minor Leouel Santos, Jr. that he be placed under the care, custody, and control of his maternal grandparents the petitioners herein. The petitioners have amply demonstrated their love and devotion to their grandson while the natural father, respondent herein, has shown little interest in his welfare as reflected by his conduct in the past. Moreover the fact that petitioners are well-off financially, should be carefully considered in awarding to them the custody of the minor herein, lest the breaking of such ties with his maternal grandparents might deprive the boy of an eventual college education and other material advantages (Consaul vs. Consaul, 63 N.Y.S. 688). Respondent had never given any previous financial support to his son, while, upon the other hand, the latter receives so much bounty from his maternal grandparents and his mother as well, who is now gainfully employed in the United States. Moreover, the fact that respondent, as a military personnel who has to

> shuttle from one assignment to another, and, in these troubled times, may have pressing and compelling military duties which may prevent him from attending to his son at times when the latter needs him most, militates strongly against said respondent. Additionally, the child is sickly and asthmatic and needs the loving and tender care of those who can provide for it.

> We find the aforementioned considerations insufficient to defeat petitioner's parental authority and the concomitant right to have custody over the minor Leouel Santos, Jr., particularly since he has not been shown to be an unsuitable and unfit parent. Private respondents' demonstrated love and affection for the boy, notwithstanding, the legitimate father is still preferred over the grandparents. The latter's wealth is not a deciding factor, particularly because there is no proof that at the present time, petitioner is in no position to support the boy. The fact that he was unable to provide financial support for his minor son from birth up to over three years when he took the boy from his in-laws without permission, should not be sufficient reason to strip him of his permanent right to the child's custody. While petitioner's previous inattention is inexcusable and merits only the severest criticism, it cannot be construed as abandonment. His appeal of the unfavorable decision against him and his efforts to keep his only child in his custody may be regarded as serious efforts to rectify his past misdeeds. To award him custody would help enhance the bond between parent and son. It would also give the father a chance to prove his love for his son and for the son to experience the warmth and support which a father can give.

The parental preference rule may not, however, be invoked by the father of an illegitimate child in case of death, absence or unsuitability of the mother, since under article 176 of the Code, an illegitimate child is not under the parental authority of the father.[113] Since the father himself is not entitled to exercise parental authority over an illegitimate child, neither may the paternal grandparents be entitled to exercise substitute parental authority. Hence, in the event that both the mother and the father of an illegitimate child die during the latter's minority and the child is survived by his grandparents on both the maternal and paternal sides,

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[113]See discussions under *supra* § 190.2.

only the grandparents on the maternal side shall be entitled to exercise substitute parental authority, if suitable.

[193.2] Concept of Substitute Parental Authority

Under article 214 of the Code, substitute parental authority may only be exercised by the persons designated in article 216 of the Code *"in case of death, absence or unsuitability"* of both parents.

Substitute parental authority may thus be defined as the parental authority which the persons designated by law may exercise over the persons and property of unemancipated children in case of death, absence or unsuitability of both parents. Such being the case, it is not possible for substitute parental authority to co-exist with the parents' parental authority. This is illustrated in the case of **Vancil vs. Belmes**.[114]

Vancil vs. Belmes
358 SCRA 707 (2001)

Bonifacia Vancil is the mother of Reeder C. Vancil, a Navy serviceman of the United States of America who died in the said country on December 22, 1986. During his lifetime, Reeder had two (2) children named Valerie and Vincent by his common-law wife, Helen G. Belmes.

Sometime in May of 1987, Bonifacia Vancil commenced before the Regional Trial Court of Cebu City a guardianship proceedings over the persons and properties of minors Valerie and Vincent. At that time, Valerie was only 6 years old while Vincent was a 2-year old child. It is claimed in the petition that the minors are residents of Cebu City, Philippines and have an estate consisting of proceeds from their father's death pension benefits with a probable value of P100,000.00. Finding sufficiency in form and in substance, the case was set for hearing, after which the trial court appointed Bonifacia Vancil as legal and judicial guardian over the persons and estate of Valerie Vancil and Vincent Vancil Jr. Thereafter, the natural mother of the minors, Helen Belmes, submitted an opposition to the subject guardianship proceedings asseverating that she had already filed a similar petition for guardianship before the Regional Trial Court of Pagadian City.

After due proceedings, the trial court rejected and denied Belmes' motion to remove and/or to disqualify Bonifacia as guardian of Valerie and Vincent Jr.

[114]358 SCRA 707 (2001).

and instead ordered Bonifacia Vancil to enter the office and perform her duties as such guardian upon the posting of a bond. On appeal, the Court of Appeals reversed the decision of the trial court and ruled in favor of Belmes' opposition. Hence, Vancil appealed to the Supreme Court. In affirming the decision of the Court of Appeals, the Supreme Court explained —

> We agree with the ruling of the Court of Appeals that respondent, being the natural mother of the minor, has the preferential right over that of petitioner to be his guardian. This ruling finds support in Article 211 of the Family Code which provides:
>
> "Art. 211. The father and the mother shall jointly exercise parental authority over the persons of their common children. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary. xxx."
>
> Indeed, being the natural mother of minor Vincent, respondent has the corresponding natural and legal right to his custody. In *Sagala-Eslao vs. Court of Appeals,* this Court held:
>
> "Of considerable importance is the rule long accepted by the courts that 'the right of parents to the custody of their minor children is one of the natural rights incident to parenthood,' a right supported by law and sound public policy. The right is an inherent one, which is not created by the state or decisions of the courts, but derives from the nature of the parental relationship."
>
> Petitioner contends that she is more qualified as guardian of Vincent.
>
> Petitioner's claim to be the guardian of said minor can only be realized by way of *substitute parental authority* pursuant to Article 214 of the Family Code, thus:
>
> "Art. 214. In case of death, absence or unsuitability of the parents, substitute parental authority shall be exercised by the surviving grandparent. xxx."
>
> In *Santos, Sr. vs. Court of Appeals,* this Court ruled:
>
> "The law vests on the father and mother joint parental authority over the persons of their common children. In case of absence or death of either parent, *the parent present shall continue exercising parental authority*. Only in case of the parents' death, absence or unsuitability may substitute parental authority be exercised by the surviving grandparent."

> Petitioner, as the surviving grandparent, can exercise substitute parental authority only in case of death, absence or unsuitability of respondent. Considering that respondent is very much alive and has exercised continuously parental authority over Vincent, petitioner has to prove, in asserting her right to be the minor's guardian, respondent's unsuitability. Petitioner, however, has not proffered convincing evidence showing that respondent is not suited to be the guardian of Vincent. Petitioner merely insists that respondent is morally unfit as guardian of Valerie considering that her (respondent's) live-in partner raped Valerie several times. But Valerie, being now of major age, is no longer a subject of this guardianship proceeding.

[193.3] Who May Exercise Substitute Parental Authority

In default of parents or a judicially appointed guardian, the following person shall exercise substitute parental authority over the child in the order indicated:

(1) The surviving grandparent, as provided in Art. 214;

(2) The oldest brother or sister, over twenty-one years of age, unless unfit or disqualified; and

(3) The child's actual custodian, over twenty-one years of age, unless unfit or disqualified.[115]

As explained above, in the case of an illegitimate child, only the surviving grandparent on the maternal side shall be entitled to exercise substitute parental authority.

Art. 217. In case of foundlings, abandoned, neglected or abused children and other children similarly situated, parental authority shall be entrusted in summary judicial proceedings to heads of children's homes, orphanages and similar institutions duly accredited by the proper government agency. (314a)

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[115]Art. 216, FC.

COMMENTS:

§ 194. Substitute Parental Authority Over Foundlings, Abandoned, or Neglected Children

[194.1] Definition of foundlings, abandoned or neglected child
[194.2] Who shall exercise substitute parental authority

[194.1] Definition of Foundlings, Abandoned or Neglected Child

A "foundling" refers to a deserted or abandoned infant or child whose parents, guardian or relatives are unknown; or a child committed to an orphanage or charitable or similar institution with unknown facts of birth and parentage and registered in the Civil Register as a "foundling."[116]

"Abandoned child" refers to one who has no proper parental care or guardianship or whose parent(s) has deserted him/her for a period of at least six (6) continuous months and has been judicially declared as such.[117]

A neglected child is one whose basic needs have been deliberately unattended or inadequately attended. Neglect may occur in two ways:

(a) There is a physical neglect when the child is malnourished, ill clad and without proper shelter. A child is unattended when left by himself without provisions for his needs and/or without proper supervision.

(b) Emotional neglect exists: when children are maltreated, raped or seduced; when children are exploited, overworked or made to work under conditions not conducive to good health; or are made to beg in the streets or public places, or when children are in moral danger, or exposed to gambling, prostitution and other vices.[118]

[194.2] Who Shall Exercise Substitute Parental Authority

In case of foundlings, abandoned, neglected or abused children and other children similarly situated, parental authority shall be entrusted

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[116]Sec. 3(e), Rule on Adoption.
[117]Sec. 3(e), DAA.
[118]Art. 141, No. (3), P.D. 603.

in summary judicial proceedings to heads of children's homes, orphanages and similar institutions duly accredited by the proper government agency.[119]

Art. 218. The school, its administrators and teachers, or the individual, entity or institution engaged in child care shall have special parental authority and responsibility over the minor child while under their supervision, instruction or custody.

Authority and responsibility shall apply to all authorized activities whether inside or outside the premises of the school, entity or institution. (349a)

Art. 219. Those given the authority and responsibility under the preceding Article shall be principally and solidarily liable for damages caused by the acts or omissions of the unemancipated minor. The parents, judicial guardians or the persons exercising substitute parental authority over said minor shall be subsidiarily liable.

The respective liabilities of those referred to in the preceding paragraph shall not apply if it is proved that they exercised the proper diligence required under the particular circumstances.

All other cases not covered by this and the preceding articles shall be governed by the provisions of the Civil Code on quasi-delicts. (n)

COMMENTS:

§ 195. Special Parental Authority

[195.1] Concept of special parental authority
[195.2] Who may exercise special parental authority
[195.3] Primary liability of persons exercising special parental authority

[195.1] Concept of Special Parental Authority

Special parental authority is granted by law to certain persons, entities or institutions in view of their special relation to children under their supervision, instruction or custody. The parental authority which the law grants to these persons is denominated as *"special"* since the same is limited and is present only while the child is under their *"supervision, instruction or custody."* Necessarily, the exercise of this "special

[119]Art. 217, FC.

parental authority" is limited to the confines of the premises of the school, entity or institution exercising the same. By way of exception, however, the special parental authority and responsibility is extended by law[120] to all authorized activities whether the same is undertaken inside or outside of the premises of the school, entity or institution exercising special parental authority.

Unlike the substitute parental authority, the special parental authority under the Code co-exists with the parents' parental authority.

[195.2] Who May Exercise Special Parental Authority

The following persons or entities shall have special parental authority and responsibility over minor children under their "supervision, instruction or custody:"

(1) the school;

(2) the school's administrators and teachers; or

(3) the individual, entity or institution engaged in child care.[121]

Note that their authority and responsibility shall apply to all "authorized activities" whether inside or outside the premises of the school, entity or institution.[122]

[195.3] Primary Liability of Persons Exercising Special Parental Authority

If a minor child is under the special parental authority of the persons designated under article 218 of the Code, any liability or responsibility for damages caused by the acts or omissions of said child shall be borne, primarily, by those persons exercising special parental authority over the minor child;[123] while the parents, judicial guardians or the persons exercising substitute parental authority shall be subsidiarily liable.[124]

For example, if a minor child, while inside the school premises for an authorized activity, causes injury to one of his schoolmates, the school,

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[120]See Art. 218, 2nd par., FC.
[121]Art. 218, 1st par., FC.
[122]Art. 218, 2nd par., FC.
[123]See Art. 219, 1st par., FC.
[124]*Id.*

its administrators and teacher of the erring child shall be primarily liable for damages sustained by the child's schoolmate. Under the law, the liability of the school, its administrators and teacher shall be solidary.[125] It is only in case of insolvency of those persons primarily bound that the parents, judicial guardians or the persons exercising substitute parental authority over the erring minor may be held liable. This is the meaning of "subsidiary liability" on the part of the parents, judicial guardians or the persons exercising substitute parental authority under article 219 of the Code.

The primary and subsidiary liabilities referred to above shall not apply if it is proved that they exercised the proper diligence required under the particular circumstances.[126] Thus, if the persons primarily liable under article 219 (*i.e.*, the school, its administrators, teachers, etc.) were able to prove that they exercised the proper diligence required under the particular circumstances, then the parents, judicial guardians or the persons exercising substitute parental authority shall be primarily liable to pay the damages unless they too can likewise prove that they exercised the proper diligence required under the particular circumstances. This is exemplified in the case of **St. Mary's Academy vs. Carpitanos**.[127]

St. Mary's Academy vs. Carpitanos
376 SCRA 473 (2002)

From 13 to 20 February 1995, St. Mary's Academy of Dipolog City conducted an enrollment drive for the school year 1995-1996. A facet of the enrollment campaign was the visitation of schools from where prospective enrollees were studying. As a student of St. Mary's Academy, Sherwin Carpitanos was part of the campaigning group. Accordingly, on the fateful day, Sherwin, along with other high school students were riding in a Mitsubishi jeep owned by defendant Vivencio Villanueva on their way to Larayan Elementary School, Larayan, Dapitan City. The jeep was driven by James Daniel II, then 15 years old and a student of the same school. Allegedly, the latter drove the jeep in a reckless manner and as a result the jeep turned turtle. As a consequence, Sherwin Carpitanos died as a result of the injuries he sustained from the accident.

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[125]*Id*.
[126]Art. 219, 2nd par., FC.
[127]376 SCRA 473 (2002).

Claiming damages for the death of their only son, Sherwin Carpitanos, spouses William Carpitanos and Lucia Carpitanos filed on June 9, 1995 a case against James Daniel II and his parents, James Daniel Sr. and Guada Daniel, the vehicle owner, Vivencio Villanueva and St. Mary's Academy before the Regional Trial Court of Dipolog City. The trial court, pursuant to Article 219 of the Family Code, held the school primarily liable while the parents of James Daniel II were adjudged to merely subsidiarily liable. James Daniel II and the owner of the jeep were both absolved from any liability.The Court of Appeals affirmed the decision of the trial court but reduced the award of actual damages. The school filed an appeal before the Supreme Court. In absolving the school of any liability, the Supreme Court explained —

Under Article 218 of the Family Code, the following shall have special parental authority over a minor child while under their supervision, instruction or custody: (1) the school, its administrators and teachers; or (2) the individual, entity or institution engaged in child care. This special parental authority and responsibility applies to all authorized activities, whether inside or outside the premises of the school, entity or institution. Thus, such authority and responsibility applies to field trips, excursions and other affairs of the pupils and students outside the school premises whenever authorized by the school or its teachers.

> Under Article 219 of the Family Code, if the person under custody is a minor, those exercising special parental authority are principally and solidarily liable for damages caused by the acts or omissions of the unemancipated minor while under their supervision, instruction, or custody.
>
> However, for petitioner to be liable, there must be a finding that the act or omission considered as negligent was the proximate cause of the injury caused because the negligence must have a causal connection to the accident.
>
> "In order that there may be a recovery for an injury, however, it must be shown that the 'injury for which recovery is sought must be the legitimate consequence of the wrong done; the connection between the negligence and the injury must be a direct and natural sequence of events, unbroken by intervening efficient causes.' In other words, the negligence must be the proximate cause of the injury. For, 'negligence, no matter in what it consists, cannot create a right of action unless it is the proximate cause of the injury complained of.' And 'the proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any effi-

cient intervening cause, produces the injury, and without which the result would not have occurred.'"

In this case, the respondents failed to show that the negligence of petitioner was the proximate cause of the death of the victim.

Respondents Daniel spouses and Villanueva admitted that the immediate cause of the accident was not the negligence of petitioner or the reckless driving of James Daniel II, but the detachment of the steering wheel guide of the jeep.

In their comment to the petition, respondents Daniel spouses and Villanueva admitted the documentary exhibits establishing that the cause of the accident was the detachment of the steering wheel guide of the jeep. Hence, the cause of the accident was not the recklessness of James Daniel II but the mechanical defect in the jeep of Vivencio Villanueva. Respondents, including the spouses Carpitanos, parents of the deceased Sherwin Carpitanos, did not dispute the report and testimony of the traffic investigator who stated that the cause of the accident was the detachment of the steering wheel guide that caused the jeep to turn turtle.

Significantly, respondents did not present any evidence to show that the proximate cause of the accident was the negligence of the school authorities, or the reckless driving of James Daniel II. Hence, the respondents' reliance on Article 219 of the Family Code that "those given the authority and responsibility under the preceding Article shall be principally and solidarily liable for damages caused by acts or omissions of the unemancipated minor" was unfounded.

Further, there was no evidence that petitioner school allowed the minor James Daniel II to drive the jeep of respondent Vivencio Villanueva. It was Ched Villanueva, grandson of respondent Vivencio Villanueva, who had possession and control of the jeep. He was driving the vehicle and he allowed James Daniel II, a minor, to drive the jeep at the time of the accident.

Hence, liability for the accident, whether caused by the negligence of the minor driver or mechanical detachment of the steering wheel guide of the jeep, must be pinned on the minor's parents primarily. The negligence of petitioner St. Mary's Academy was only a remote cause of the accident. Between the remote cause and the injury, there intervened the negligence of the minor's parents or the detachment of the steering wheel guide of the jeep.

Chapter 3

Effect of Parental Authority Upon the Persons of the Children

Art. 220. The parents and those exercising parental authority shall have with respect to their unemancipated children or wards the following rights and duties:

(1) To keep them in their company, to support, educate and instruct them by right precept and good example, and to provide for their upbringing in keeping with their means;

(2) To give them love and affection, advice and counsel, companionship and understanding;

(3) To provide them with moral and spiritual guidance, inculcate in them honesty, integrity, self-discipline, self-reliance, industry and thrift, stimulate their interest in civic affairs, and inspire in them compliance with the duties of citizenship;

(4) To enhance, protect, preserve and maintain their physical and mental health at all times;

(5) To furnish them with good and wholesome educational materials, supervise their activities, recreation and association with others, protect them from bad company, and prevent them from acquiring habits detrimental to their health, studies and morals;

(6) To represent them in all matters affecting their interests;

(7) To demand from them respect and obedience;

(8) To impose discipline on them as may be required under the circumstances; and

(9) To perform such other duties as are imposed by law upon parents and guardians. (316a)

Art. 221. Parents and other persons exercising parental authority shall be civilly liable for the injuries and damages caused by the acts or omissions of their unemancipated children living in their company and under their parental authority subject to the appropriate defenses provided by law. (2180[2]a and [4][a])

Art. 222. The courts may appoint a guardian of the child's property or a guardian ad litem when the best interests of the child so requires. (317)

COMMENTS:

§ 196. Effects of Parental Authority Upon the Person of Unemancipated Children

[196.1] Parental rights, in general
[196.2] Right to child's custody
[196.3] Duty to provide support
[196.4] Duty of representation
[196.5] Right to give or withhold consent
[196.6] Other duties imposed by law

[196.1] Parental Rights, In General

Parenthood involves duties as well as rights,[128] and the term "parental rights" means the sum total of the rights of the parents to the child, as well as the rights of the child in and to the parent or parents.[129] The rights and duties or obligations arising from the relation of parent and child are reciprocal;[130] the general duty to support, educate, and protect the child rests on the parents, and they have on the other hand in general the right to the custody and control of the child and to the child's services and earnings, and to obedience by the child.[131] Under the modern concept, however, the concept of parental rights is merely ancillary to the performance of parental duties. In other words, the obligational aspect is now supreme.[132]

The following are "parental rights" protected to varying degrees by constitution and statutes: physical possession of child (custody), which, in case of custodial parent, includes day-to-day care and companionship of child; right to discipline child; which includes right to inculcate in child parent's moral and ethical standards; right to control and manage minor child's earnings; right to control and manage minor child's property; right to be supported by adult child; right to have child bear parent's name; and right to prevent adoption of child without parents' consent.

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[128]In re Travis, 126 N.Y.S. 2d
[129]Anguish vs. Superior Court In and For Maricopa County, 429 P.2d 702, 6 Ariz. App. 68.
[130]Chandler vs. Whatley, 189 So. 751, 238 Ala. 206.
[131]Bates vs. Bates, 310 N.Y.S. 2d 26, 30, 62 Misc. 2d 498.
[132]See Medina vs. Makabali, *supra*.

[196.2] Right to Child's Custody

It is a rule long accepted by the courts that the right of parents to the custody of their minor children is one of the natural rights incident to parenthood, a right supported by law and sound public policy.[133] The right is an inherent one, which is not created by the state or decisions of the courts, but derives from the nature of the parental relationship.[134] Nevertheless, the parent's right to custody over their children is enshrined in law.[135] Article 220 of the Family Code thus provides that parents and individuals exercising parental authority over their unemancipated children are entitled, among other rights, "to keep them in their company."[136] In other words, the right of custody accorded to parents springs from the exercise of parental authority.[137] However, this right of parents to the company and custody of their children is but ancillary to the proper discharge of parental duties to provide the children with adequate support, education, moral, intellectual and civic training and development.[138]

In view of the foregoing, the father and mother, being the natural guardians of unemancipated children, are duty-bound and entitled to keep them in their custody and company.[139] This rule, however, applies only if the child is legitimate. In case of an illegitimate child, he is under the sole parental authority of the mother.[140] In the exercise of that authority, the mother is entitled to keep the illegitimate child in her company. And the court will not deprive her of custody, absent any imperative cause showing her unfitness to exercise such authority and care.[141] But while the father is not entitled, as a rule, to the custody of an illegitimate child, he is, however, entitled to visitorial rights.[142]

Parents are never deprived of the custody and care of their children except for cause[143] for the law presumes that the child's welfare will be

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[133]Sagala-Eslao vs. CA, 266 SCRA 317, 323 (1997).
[134]*Id*., at pp. 323-324.
[135]Tonog vs. Tonog, *supra*, at p. 527.
[136]*Id*.
[137]Santos, Sr. vs. CA, *supra*, at p. 411.
[138]Medina vs. Makabali, *supra*, at pp. 504-505.
[139]Santos, Sr. vs. CA, *supra*, at p. 412.
[140]Art. 176, FC.
[141]Briones vs. Miguel, *supra*, at p. 457.
[142]See discussions under *supra* § 190.2.
[143]Art. 210; Santos, Sr. vs. CA, *supra*.

best served in the care and control of his parents. Thus, in a number of cases, the Court has held that parental authority cannot be entrusted to a person simply because he could give the child a larger measure of material comfort than his natural parent.[144] Thus, in **David vs. Court of Appeals**,[145] the Court awarded custody of a minor illegitimate child to his mother who was a mere secretary and market vendor instead of awarding custody to his affluent father who was a married man, not solely because the child opted to go with his mother. The Court said: *"Daisie and her children may not be enjoying a life of affluence that private respondent promises if the child lives with him. It is enough, however, that petitioner is earning a decent living and is able to support her children according to her means."*

However, since the right of parents to the company and custody of their children is but ancillary to the proper discharge of parental duties,[146] the Court has not lost sight of the basic principle in custody disputes that the paramount criterion is the welfare and well-being of the child.[147] Thus, in **Unson III vs. Navarro**,[148] the Court laid down the rule that "in all controversies regarding the custody of minors, the sole and foremost consideration is the physical, education, social and moral welfare of the child concerned, taking into account the respective resources and social and moral situations of the contending parents."

Discretion is thus given to the court to decide who can best assure the welfare of the child, and award the custody on the basis of that consideration.[149] In the exercise of its discretion, the court may award custody even to a third party as it deems fit under the circumstances.[150] In **Medina vs. Makabali**,[151] where custody of the minor was given to a non-relative as against the mother, Justice J.B.L. Reyes, explained its basis in this manner:

> ". . . While our law recognizes the right of a parent to the custody of her child, Courts must not lose sight of the

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[144]Cang vs. CA, 296 SCRA 128 (1998).
[145]250 SCRA 82 (1995).
[146]Medina vs. Makabali, *supra*.
[147]Tonog vs. Tonog, 376 SCRA 523 (2002).
[148]*Supra*.
[149]Espiritu vs. CA, *supra*.
[150]*Id*.
[151]*Supra*.

basic principle that "in all questions on the care, custody, education and property of 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. 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 Peña, now "there is no power, but a task; no complex of rights (of parents) but a sum of duties; no sovereignty, but a sacred trust for the welfare of the minor."

As a result, the right of parents to the company and custody of their children is but ancillary to the proper discharge of parental duties to provide the children with adequate support, education, moral, intellectual and civic training and development (Civil Code, Art. 356).

[196.3] Duty to Provide Support

While the parents are duty-bound to provide support to their unemancipated children, as a consequence of their exercise of parental authority,[152] the latter, however, is not the basis of this obligation. This is clear when we take into consideration the obligation of an illegitimate father to support his illegitimate child[153] notwithstanding the absence of parental authority on his part over the child's person.[154] Moreover, the obligation of the parents to support their children is not co-terminus with the exercise of parental authority. Note that while parental authority is permanently terminated upon the child's emancipation,[155] the parents' obligation to support their children is not necessarily terminated upon such emancipation. This is clear when we consider the second paragraph

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[152]See Art. 220, No. (1), FC.
[153]See Arts. 94(9), 122, 195(4), FC.
[154]See Art. 176, FC.
[155]Art. 228(3), FC.

of article 194 of the Code which states that "the education of the person entitled to be supported referred to in the (first paragraph of Article 194) shall include his schooling or training for some profession, trade or vocation, even beyond the age of majority."

[196.4] Duty of Representation

The parents are likewise duty-bound to represent their unemancipated children in all matters affecting their interests.[156] For example, while minors may become donees, the acceptance of such donation shall be done through their parents or legal representatives.[157]

Does the duty of the parents to represent their unemancipated children extend to court litigations? The answer is in the affirmative. Section 5, Rule 3 of the 1997 Rules of Civil Procedure provides, as follows:

> "Sec. 5. *Minor or incompetent persons*. — A minor or a person alleged to be incompetent, may sue or be sued, with the assistance of his father, mother, guardian, or if he has none, a guardian *ad litem*."

Note that under the rules, the parents are the legal representatives of their minor children in court proceedings. As a rule, it is only in case of absence of the parents or guardians that the court may appoint a guardian *ad litem* to represent the minor in court litigations.[158] However, when the best interests of the child so requires, the court is not prevented from appointing a guardian *ad litem* to represent the minor.[159] For example, the appointment of a guardian *ad litem* is proper if there is no other person who can protect the rights and interest of the minor children as their mother and relatives can not do so because of conflicting interests.[160]

A guardian *ad litem* is an officer of the court appointed to appear for an infant, and to manage and take care of suit for such infant when he

[156]Art. 220(5), FC.
[157]Art. 741, NCC.
[158]Sec. 5, Rule 3, 1997 Rules of Civil Procedure.
[159]See Art. 222, FC.
[160]Logrono vs. Martinez, et. al., G.R. No. 47740, Sept. 10, 1941; IX L.J., 656.

is a plaintiff, and to appear, manage and take care of the defense for the infant when he is defendant.[161]

[196.5] Right to Give or Withhold Consent

Parents likewise have the duty to give their unemancipated children proper advice and counsel.[162] And such duty may extend, in several instances, even beyond the age of majority or even upon the termination of parental authority. For example, in case either or both of the contracting parties are between the ages of 18 and 21, parental consent to the marriage is required.[163] In the absence of such parental consent, the marriage between the parties is voidable.[164] Also, if such parties intend to execute a marriage settlement prior to their marriage, the law requires that the person whose consent is required under article 14 of the Code must be made a party thereto; otherwise, their marriage settlement is not valid.[165]

[196.6] Other Duties Imposed By Law

Under the law, children below fifteen (15) years of age shall not be employed except when a child works directly under the sole responsibility of his/her parents or legal guardian and where only members of his/her family are employed.[166] It is, however, the duty of the parents or legal guardian to ensure that his/her employment neither endangers his/her life, safety, health, and morals, nor impairs his/her normal development and that he/she shall be provided by his/her parent or legal guardian with the prescribed primary and/or secondary education.[167]

A child below 15 years of age may likewise be employed or be allowed to participate in public entertainment or information through cinema, theater, radio, television or other forms of media, provided that the employment contract is concluded by the child's parents or legal guardian, with the express agreement of the child concerned, if possible, and the approval of the Department of Labor and Employment.[168]

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[161]Emeric vs. Alvarado, 54 Cal. 529, 593; 2 Pac. Rep. 418.
[162]Art. 220(2), FC.
[163]Art. 14, FC.
[164]Art. 45(1), FC.
[165]Art. 78, FC.
[166]R.A. 9231.
[167]*Id.*
[168]*Id.*

§ 197. Liability of Parents for Damages Caused by Their Minor Children

[197.1] Liability of parents for quasi-delicts
[197.2] Liability of parents for crimes committed by their minor children
[197.3] Comparison of three articles (arts. 221, fc; 2180, ncc; and 101, rpc)
[197.4] Nature of parent's liability

[197.1] Liability of Parents for Quasi-delicts

(a) Under Article 221 of the Family Code

Parents are civilly liable for quasi-delicts of their minor children under the provisions of article 221 of the Family Code, subject to the following conditions: (1) the minor is living in the company of his parents; (2) the minor is under their parental authority; and (3) the parents failed to exercise all the diligence of a good father of a family to prevent damage.

This principle of parental liability is a species of what is frequently designated as vicarious liability, or the doctrine of *"imputed negligence"* under Anglo-American tort law, where a person is not only liable for torts committed by himself, but also for torts committed by others with whom he has a certain relationship and for whom he is responsible.[169] Thus, parental liability is made a natural or logical consequence of the duties and responsibilities of parents — their parental authority — which includes the instructing, controlling and disciplining of the child.[170]

The civil liability imposed upon parents for the torts (or quasi-delict) of their minor children living with them, may be seen to be based upon the parental authority vested by law upon such parents.[171] The civil law assumes that when an unemancipated child living with its parents commits a tortious acts, the parents were negligent in the performance of their legal and natural duty to closely supervise the child who is in their custody and control.[172] Parental liability is, in other words, anchored upon parental authority coupled with presumed parental dereliction in

[169]*Id.*
[170]Tamargo vs. CA, 209 SCRA 518 (1992).
[171]*Id.*
[172]*Id.*

the discharge of the duties accompanying such authority.[173] The parental dereliction is, of course, only presumed and the presumption can be overturned by proof that the parents had exercised all the diligence of a good father of a family to prevent the damage.[174]

Note that the basis of parental liability for the torts of a minor child is the relationship existing between the parents and the minor child living with them and over whom, the law presumes, the parents exercise supervision and control.[175] Thus, in **Tamargo vs. Court of Appeals**,[176] the Court refused to give retroactive effect to a decree of adoption so as to impose a liability upon the adopting parents accruing at a time when the adopting parents had no actual or physically custody over the adopted child. The Court explained that it would be unfair and unconscionable to hold that parental authority had been retroactively lodged in the adopting parents so as to burden them with liability for a tortuous act that they could not have foreseen and which they could not have prevented since they had no physical custody over the minor child. Put a little differently, no presumption of parental dereliction on the part of the adopting parents could have arisen since the child was not in fact subject to their control at the time the tort was committed.

Since parental liability is anchored upon parental authority coupled with presumed parental dereliction in the discharge of the duties accompanying such authority, no parental liability can be imposed upon the father of an illegitimate child, especially if the child is not living in his company, since an illegitimate child, under the law, is under the sole parental authority of the mother.

(b) Under Article 2180 of the Civil Code

Article 2180 of the New Civil Code also imposes civil liability upon the father and, in case of his death or incapacity, the mother, for any quasi-delict committed by their minor child who lives with them. Article 2180 of the Civil Code reads:

> "The obligation imposed by article 2176 is demandable not only for one's own acts or omissions, but also for those of persons for whom one is responsible.

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[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Supra.*

> The father and, in case of his death or incapacity, the mother, are responsible for the damages caused by the *minor children who live in their company.*
>
> xxx xxx xxx
>
> The responsibility treated of in this Article shall cease when the person herein mentioned prove that they observed all the diligence of a good father of a family to prevent damage." (Emphasis supplied)

While article 2180 refers to "minor children," the age referred to in said article is not below 18 but below 21. This is clarified in the last paragraph of article 236 of the Family Code, as amended by Republic Act No. 6809, which reads:

> "Nothing in this Code shall be construed to derogate from the duty or responsibility of parents and guardians for children and wards below twenty-one years of age mentioned in the second and third paragraphs of Article 2180 of the Civil Code."

In other words, while the child is already emancipated[177] and no longer under the parental authority of his parents,[178] the parents are still liable for the quasi-delict committed by said child if the latter is below 21. Senator Tolentino criticizes this rule for being without juridical basis,[179] to wit:

> "Republic Act No. 6809, amending Article 236 of the Family Code, keeps this responsibility of the parents or guardians for the torts committed by children or wards living in their company. This is more anomalous than parental consent for marriage of children between 18 and 21 years of age. Upon emancipation of a child after reaching 18 years, parental authority ceases, and yet responsibility for his torts continues until he reaches 21 years of age. This is a case of responsibility without authority.

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[177]See Art. 234, FC.
[178]Art. 236, FC.
[179]1 Tolentino, Civil Code, 1990 ed., pp. 643-644.

If both parents are dead, and the child is released from guardianship after reaching 18 years of age, there will be no guardian to answer for the torts of the child, who must himself be personally liable.

The provisions of R.A. No. 6809 on these matters are without juridical basis. In the case of parental consent for marriage inspite of emancipation, there may still be a basis in natural filial relationship. But in the case of torts, there is neither filial nor juridical justification."

[197.2] Liability of Parents for Crimes Committed by Their Minor Children

Parents are also civilly liable for the felonies committed by their minor children. Article 101 of the Revised Penal Code provides:

"Art. 101. *Rules regarding civil liability in certain cases.* —

xxx

First. In cases of subdivisions xxx 2, and 3 of Article 12, the civil liability for acts committed by xxx a person under nine years of age, or by one over nine but under fifteen years of age, who has acted without discernment, shall devolve upon *those having such person under their legal authority or control, unless it appears that there was no fault or negligence on their part."* (Emphasis supplied)

Note that the afore-quoted provisions of the Revised Penal Code do not cover situations where the issue of the civil liability of parents is based on crimes committed by their minor children over 9 but under 15 years of age, who acted with discernment, and also of minors 15 years of age or over. According to the Court in **Salen, et. al. vs. Balce**,[180] these instances are to be resolved in accordance with the provisions of article 2180 of the Civil Code.

[180] 107 Phil. 748 (1960).

[197.3] Comparison of Three articles (Arts. 221, FC; 2180, NCC; and 101, RPC)

Article 221 of the Family Code speaks of the liability of the parents for quasi-delict committed by their minor children living in their company and under their parental authority. This article did not entirely amend the provisions of article 2180 of the Civil Code, insofar as the liability of the parents for the quasi-delict of their children is concerned. As discussed above, parental liability still exists under the provisions of article 2180 even if the child has already been emancipated and no longer under parental authority so long as the adult child is still below 21 years of age. Accordingly, article 221 of the Family Code is intended to govern the matter of parental liability for quasi-delicts committed by children below 18; whereas, article 2180 governs the liability of the parents for quasi-delicts committed by their children who are 18 but under 21 years of age.

Note, however, that under the provisions of article 2180, the enforcement of such liability shall be effected against the father and, in case of his death or incapacity, the mother. However, under article 221 of the Family Code, this civil liability is now, without such alternative qualification, the responsibility of the parents and those who exercise parental authority over the minor offender.[181]

On the other hand, the parents are also liable for the civil liability arising from criminal offenses committed by their minor children under their legal authority or control, or who live in their company, unless it is proven that the former acted with diligence of a good father of a family to prevent such damages.[182] This liability is premised on the provisions of Article 101 of the Revised Penal Code with respect to damages *ex delicto* caused by their children 9 years of age or under, or over 9 but under 15 years of age who acted without discernment; and, with regard to their children over 9 but under 15 years of age who acted with discernment, or 15 years or over but under 21 years of age, such liability shall be imposed pursuant to Article 2180 of the Civil Code.[183]

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[181]Libi vs. IAC, 214 SCRA 16, 33 (1992).
[182]*Id.*, at p. 33.
[183]*Id.*, at p. 33.

[197.4] Nature of Parent's Liability

Whether the liability of the parents arises from quasi-delict or criminal offenses committed by their minor children under their legal authority or control, or who live in their company, the nature of such liability is primary and not subsidiary.[184] Under the Code, parents are subsidiarily liable only if, at the time of the commission of the quasi-delict, the minor children are under the special parental authority of the persons or entities designated under article 218 of the Code, in which case, it is the latter who shall be primarily liable.

Art. 223. The parents or, in their absence or incapacity, the individual, entity or institution exercising parental authority, may petition the proper court of the place where the child resides, for an order providing for disciplinary measures over the child. The child shall be entitled to the assistance of counsel, either of his choice or appointed by the court, and a summary hearing shall be conducted wherein the petitioner and the child shall be heard.

However, if in the same proceeding the court finds the petitioner at fault, irrespective of the merits of the petition, or when the circumstances so warrant, the court may also order the deprivation or suspension of parental authority or adopt such other measures as it may deem just and proper. (318a)

Art. 224. The measures referred to in the preceding article may include the commitment of the child for not more than thirty days in entities or institutions engaged in child care or in children's homes duly accredited by the proper government agency.

The parent exercising parental authority shall not interfere with the care of the child whenever committed but shall provide for his support. Upon proper petition or at its own instance, the court may terminate the commitment of the child whenever just and proper. (391a)

COMMENTS:

§ 198. Disciplinary Action

In the exercise of their parental authority, parents have the right to demand respect and obedience from their unemancipated children.[185] And in order to keep the prestige of parental authority and enforce the parent's right to obedience and respect from their children, the law like-

[184] *Id.*
[185] Art. 220(6), FC.

wise grants parents the right and duty to impose discipline upon their children as may be required under the circumstances.[186] As to the extent of the punishment that the parents may impose upon their children, the Civil Code expressly authorizes "moderate" punishments.[187] Although the Family Code authorizes the imposition of disciplinary measures to the extent "required under the circumstances," the present rule must not be interpreted as allowing punishments beyond moderate ones. Note that under article 231 of the Code, the parental authority of the parents may be suspended, upon proper petition to the court, if the parent or person exercising parental authority "treats the child with excessive harshness or cruelty."[188] In addition, the parent concerned may also be held criminally liable for violation of Republic Act No. 7160, otherwise known as the "Special Protection of Children Against Abuse, Exploitation and Discrimination Act," if he or she employs excessive harshness or cruelty upon the child.

Aside from personally disciplining the child, the parents or other persons exercising parental authority may also petition the court for the imposition of appropriate disciplinary measures upon the child,[189] which measure may include the commitment of the child in entities or institutions engaged in child care or in children's homes duly accredited by the proper government agency.[190] Such commitment, however, must not exceed thirty (30) days.[191]

Chapter 4

Effect of Parental Authority Upon the Property of the Children

Art. 225. The father and the mother shall jointly exercise legal guardianship over the property of their unemancipated common child without the necessity of a court appointment. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.

Where the market value of the property or the annual income of the child exceeds P50,000, the parent concerned shall be required to furnish a

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[186]Art. 220(7), FC.
[187]Art. 316, NCC.
[188]See Art. 231(1), FC.
[189]Art. 223, FC.
[190]Art. 224, FC.
[191]*Id.*

bond in such amount as the court may determine, but not less than ten *per centum* (10%) of the value of the property or annual income, to guarantee the performance of the obligations prescribed for general guardians.

A verified petition for approval of the bond shall be filed in the proper court of the place where the child resides, or, if the child resides in a foreign country, in the proper court of the place where the property or any part thereof is situated.

The petition shall be docketed as a summary special proceeding in which all incidents and issues regarding the performance of the obligations referred to in the second paragraph of this Article shall be heard and resolved.

The ordinary rules on guardianship shall be merely suppletory except when the child is under substitute parental authority, or the guardian is a stranger, or a parent has remarried, in which case the ordinary rules on guardianship shall apply. (320a)

Art. 226. The property of the unemancipated child earned or acquired with his work or industry or by onerous or gratuitous title shall belong to the child in ownership and shall be devoted exclusively to the latter's support and education, unless the title or transfer provides otherwise.

The right of the parents over the fruits and income of the child's property shall be limited primarily to the child's support and secondarily to the collective daily needs of the family. (321a, 323a)

Art. 227. If the parents entrust the management or administration of any of their properties to an unemancipated child, the net proceeds of such property shall belong to the owner. The child shall be given a reasonable monthly allowance in an amount not less than that which the owner would have paid if the administrator were a stranger, unless the owner grants the entire proceeds to the child. In any case, the proceeds thus given in whole or in part shall not be charged to the child's legitime. (322a)

COMMENTS:

§ 199. Effects of Parental Authority Over the Property of Unemancipated Children

[199.1] Legal guardian of minor's property
[199.2] Ownership of child's property
[199.3] Right of usufruct over the child's property

[199.1] Legal Guardian of Minor's Property

Under the Code, the father and the mother shall jointly exercise legal guardianship over the property of the unemancipated common child

without the necessity of a court appointment.[192] However, in case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.[193] While the parents are considered the legal guardian of the minor's property, the court may, appoint a guardian of the child's property other than the parents when the best interests of the child so requires.[194] When the court appointed another guardian, the right of the parents to administer the property of minor children terminates since guardianship of the property of the child by another person is inconsistent with administration by the parents under their parental authority.[195]

Although there is no need for a court appointment of the parents as legal guardian of the minor child's property, the law requires the parents to furnish a bond when the market value of the property or the annual income of the child exceeds P50,000,[196] for the purpose of guaranteeing the performance of the obligations prescribed for general guardians.[197] The amount of the bond is left to the discretion of the court but it must not be less than ten *per centum* (10%) of the value of the property or annual income.[198]

[199.2] Ownership of Child's Property

Properties that may be earned or acquired by a minor child with his work or industry or by onerous or gratuitous title shall belong to the child in ownership.[199] However, things given to the child by the parent by way of support or as necessaries, such as clothing and the like, remain the property of the parent and do not belong to the child,[200] notwithstanding the child's possession of them;[201] and hence the parent has a right of action against a third person who causes or is responsible for the loss or destruction of such property, or deprives the child thereof.[202]

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[192]Art. 225, FC.
[193]*Id*.
[194]Art. 222, FC.
[195]Aldecoa vs. Hongkong & Shanghai Bank, 30 Phil. 228.
[196]Art. 225, FC.
[197]*Id*.
[198]*Id*.
[199]Art. 226, FC.
[200]Payne vs. State Farm Mut. Auto. Ins. Co., C.A. La., 266 F.2d 63.
[201]Semple School for Girls vs. Yielding, 80 So. 158, 16 Ala. App. 584.
[202]Payne vs. State Farm Mut. Auto. Ins. Co., *supra*.

However, clothing purchased by the child with money furnished by the parent for general purposes, without any specific instructions as to the appropriation or use thereof, is not the property of the parent.[203]

While the ownership of the property remains with the child, the parents may make use of them but solely and exclusively for the support and education of the owner of the property,[204] unless the title or transfer provides otherwise.[205] Clearly then, the basis of the right of the parent to the properties of their minor children arises out of the former's duty to support the child;[206] and the parent's right may, therefore, be lost by neglect or refusal to furnish support.

[199.3] Right of Usufruct Over the Child's Property

The parents have a limited right of usufruct over the property of their minor children. Under the second paragraph of article 226 of the Code, the parents, as usufructuary, have the right to make use of the fruits and income of the children's property but only for the following purposes: (1) primarily, for the child's support; and (2) secondarily, for the collective daily needs of the family. Note that in this kind of usufruct, the parents are not required to give security.[207] Additionally, this kind of usufruct may not be alienated.

Chapter 5

Suspension or Termination of Parental Authority

Art. 228. Parental authority terminates permanently:

(1) Upon the death of the parents;

(2) Upon the death of the child; or

(3) Upon emancipation of the child. (327a)

Art. 229. Unless subsequently revived by a final judgment, parental authority also terminates:

(1) Upon adoption of the child;

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[203]Dickinson vs. Winchester, 4 Cush. 114, 50 Am. D. 760.
[204]Art. 226, FC.
[205]*Id*.
[206]Constance vs. Gosnell, D.C.S.C. 62 F. Supp. 253.
[207]Taylor vs. Taylor, 181 So. 543, 189 La. 1084.

(2) Upon appointment of a general guardian;

(3) Upon judicial declaration of abandonment of the child in a case filed for the purpose;

(4) Upon final judgment of a competent court divesting the party concerned of parental authority; or

(5) Upon judicial declaration of absence or incapacity of the person exercising parental authority. (327a)

Art. 230. Parental authority is suspended upon conviction of the parent or the person exercising the same of a crime which carries with it the penalty of civil interdiction. The authority is automatically reinstated upon service of the penalty or upon pardon or amnesty of the offender. (330a)

Art. 231. The court in an action filed for the purpose in a related case may also suspend parental authority if the parent or the person exercising the same:

(1) Treats the child with excessive harshness or cruelty;

(2) Gives the child corrupting orders, counsel or example;

(3) Compels the child to beg; or

(4) Subjects the child or allows him to be subjected to acts of lasciviousness.

The grounds enumerated above are deemed to include cases which have resulted from culpable negligence of the parent or the person exercising parental authority.

If the degree of seriousness so warrants, or the welfare of the child so demands, the court shall deprive the guilty party of parental authority or adopt such other measures as may be proper under the circumstances.

The suspension or deprivation may be revoked and the parental authority revived in a case filed for the purpose or in the same proceeding if the court finds that the cause therefor has ceased and will not be repeated. (332a)

Art. 232. If the person exercising parental authority has subjected the child or allowed him to be subjected to sexual abuse, such person shall be permanently deprived by the court of such authority. (n)

Art. 233. The person exercising substitute parental authority shall have the same authority over the person of the child as the parents.

In no case shall the school administrator, teacher or individual engaged in child care exercising special parental authority inflict corporal punishment upon the child. (n)

COMMENTS:

§ 200. Termination or Suspension of Parental Authority

[200.1] Grounds for termination of parental authority
[200.2] Grounds for suspension of parental authority

[200.1] Grounds for Termination of Parental Authority

Parental authority is automatically terminated upon the occurrence of any of the following grounds:

(1) Upon the death of the parents;[208]

(2) Upon the death of the child;[209]

(3) Upon emancipation of the child;[210]

(4) Upon adoption of the child;[211]

(5) Upon appointment of a general guardian;[212]

(6) Upon judicial declaration of abandonment of the child in a case filed for the purpose;[213]

(7) Upon final judgment of a competent court divesting the party concerned of parental authority;[214] or

(8) Upon judicial declaration of absence or incapacity of the person exercising parental authority.[215]

For grounds (1) to (3), the termination of parental authority is permanent;[216] whereas, for grounds (4) to (8), parental authority may subsequently be revived by the court in a final judgment.[217]

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[208] Art. 228, FC.
[209] *Id.*
[210] *Id.*
[211] Art. 229, FC.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] Art. 228, FC.
[217] Art. 229, FC.

(a) Death of the Parents

The right attached to parental authority is purely personal.[218] As such, upon the death of the parents, the parental authority is likewise terminated. However, if only one of the parents dies, the surviving parent shall continue to exercise parental authority and his or her remarriage shall not affect such parental authority over the children unless the court will appoint another person to be the guardian of the person or property of the children.[219] If both parents should die, substitute parental authority shall be exercised by the persons designated under article 216 of the Code.

(b) Death of the Child

Since parental authority is exercised over an unemancipated child, the death of the latter shall likewise extinguished parental authority.

(c) Emancipation of the Child

As used in the law of parent and child, "emancipation" means the freeing of the child from the parental authority and custody of, and from the obligation to render services to, the parent.[220] Under the Code, emancipation takes place by the attainment of majority age[221] and, as a result of which, parental authority over the person and property of the child is terminated.[222] However, there are some rights and obligations which are retained by the parents even after the termination of parental authority. This will be properly discussed under the topic of emancipation.

(d) Adoption of the Child

One of the effects of a decree of adoption is the termination of the parental authority of the parents by nature and the transfer of the same to the adopter.[223] The deprivation of parental authority on the part of the parents by nature is permanent unless the decree of adoption is rescinded, upon a petition filed for that purpose by the adoptee on grounds author-

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[218] Santos, Sr. vs. CA, *supra*, cited in Sagala-Eslao vs. CA, *supra*.
[219] Art. 212, FC.
[220] Tencza vs. Aetna Cas. & Sur. Co., 521 P. 2d. 1010, 1013, 21 Ariz. App. 552.
[221] Art. 234, FC.
[222] Art. 236, FC.
[223] Art. 189(1), FC.

ized under Section 19 of the Domestic Adoption Act. If the child is still a minor upon the rescission of the decree of adoption, the parental authority of the parents by nature shall automatically be restored.[224]

(e) Appointment of General Guardian

A guardian is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs.[225] A general guardian is one who has the general care and control of the person and estate of his ward; while a special guardian is one who has special or limited powers and duties with respect to his ward, *e.g.*, a guardian who has the custody of the estate but not of the person, or *vice versa*, or a guardian *ad litem*.[226]

Petitions for guardianship of minors are now governed by the new Rule on Guardianship of Minors,[227] amending Rules 92 to 97 of the Rules of Court.[228]

Under the Code, the father and the mother jointly exercise legal guardianship over the person and property of their unemancipated common child without the necessity of a court appointment.[229] However, a guardian other than the parents may be appointed by the court over the person or property, or both, of a minor on grounds authorized by law upon petition of any relative or other person on behalf of the minor or upon petition by the minor himself if fourteen years of age or over.[230] The authorized grounds for the appointment of a guardian are the following: (1) death, continued absence, or incapacity of the minor's parents; (2) suspension, deprivation or termination of parental authority; (3) remarriage of the minor's surviving parent, if the latter is found unsuitable to exercise parental authority; and (4) when the best interests of the minor so require.[231]

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[224]Sec. 20, DAA.
[225]Black's Law Dictionary, 5th ed., p. 635.
[226]*Id*.
[227]A.M. No. 03-02-05-SC, which took effect on May 1, 2003.
[228]See Sec. 27, A.M. No. 03-02-05-SC.
[229]Arts. 220 & 225, FC. See also Sec. 1., A.M. No. 03-02-05-SC.
[230]Sec. 2, A.M. No. 03-02-05-SC.
[231]Sec. 4, A.M. No. 03-02-05-SC.

Upon the appointment of a guardian, the parental authority of the parents is likewise terminated unless the same is subsequently revived by a final judgment.[232]

(f) Judicial Declaration of Abandonment

A parent may forfeit parental authority over a child by abandonment or by failure to provide for the child. Under the Code, parental authority is also permanently terminated upon a judicial declaration of abandonment of the child in a case filed for the purpose.[233] Note, however, that the law requires a judicial declaration of abandonment of the child "in a case filed for the purpose." In other words, in the absence of such judicial declaration of abandonment the parental authority of the parents remains unaffected. In relation to the requirement of consent of the parents for purposes of adoption, it is submitted that the ruling of the Court in **Santos vs. Aranzanso, et. al.**[234] and **Cang vs. Court of Appeals**[235] to the effect that if a parent had abandoned his children, his consent to the adoption may be dispensed with is no longer controlling. Note that the basis of these two decisions is Section 3 of Rule 99, which rule, however, was already superseded by the Rule on Adoption. Since the new Rule on Adoption did not reproduce Section 3 of Rule 99, and since abandonment per se does not result in the termination of parental authority, it is submitted that the consent of such parent is still necessary in adoption proceedings since one of the effects of adoption is the deprivation of parental authority on the part of the natural parents.

In its ordinary sense, the word "abandon" means to forsake entirely, to forsake or renounce utterly. The dictionaries trace this word to the root idea of "putting under a ban." The emphasis is on the finality and publicity with which a thing or body is thus put in the control of another, hence, the meaning of giving up absolutely, with intent never to resume or claim one's rights or interests.[236] In reference to abandonment of a child by his parent, the act of abandonment imports *"any conduct of the parent which evinces a settled purpose to forego all parental duties*

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[232]Art. 229, FC.
[233]Art. 229(3), FC.
[234]16 SCRA 344 (1966).
[235]296 SCRA 128 (1998).
[236]Cang vs. CA, *supra*; citing De la Cruz vs. De la Cruz, 130 Phil. 324 (1968).

and relinquish all parental claims to the child."[237] It means "neglect or refusal to perform the natural and legal obligations of care and support which parents owe their children."[238]

In order to constitute abandonment, there must be an intention to do so, express or implied, which is apparent from the conduct of the parent respecting the child,[239] and the intent of the parent is the decisive factor[240] or primary consideration.[241] In **Cang vs. Court of Appeals**, the Court held that the petitioner's conduct did not manifest a settled purpose to forego all parental duties and relinquish all parental claims over his children as to constitute abandonment. According to the Court, physical estrangement alone, without financial and moral desertion, is not tantamount to abandonment.[242] In that case, petitioner was admittedly physically absent as he was then in the United States, but he was not remiss in his natural and legal obligations of love, care and support for his children. He maintained regular communication with his wife and children through letters and telephone and he used to send packages by mail and catered to their whims.

(g) Final Judgment Divesting Parents of Parental Authority

When the best interests of the child so requires, the parental authority of the parents may be terminated by the court. Note that this is also a ground for the appointment of a guardian.[243] Under article 231 of the Code, the court may deprive the guilty party of parental authority based on the grounds mentioned therein "if the degree of seriousness so warrants or the welfare of the child so demands" in an action filed for the purpose or in a related case.

While the paramount consideration in all matters affecting minor children is the best interest of the children, this is not, however, to be implemented in derogation of the primary right of the parent or parents

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[237]*Id.*, citing Duncan *v.* CFI of Rizal, 69 SCRA 298, 304 (1976); Santos vs. Aranzanso, *supra* at p. 168.

[238]*Id.*

[239]In re Maxwell, 255 P.2d 87, 117 C. A.2d 156.

[240]In re Guardianship of Newell, 10 Cal. Rptr. 29, 187 C.A. 2d 425.

[241]In Interest of Moriarity, 302 N. E. 2d 491, 14 Ill. App. 3d 553.

[242]Citing De la Cruz *v.* De la Cruz, *supra*.

[243]See Sec. 4, A.M. No. 03-02-05-SC.

to exercise parental authority over him.[244] The rights of parents vis-a-vis that of their children are not antithetical to each other, as in fact, they must be respected and harmonized to the fullest extent possible.[245] Thus, in a number of cases, the Court has held that parental authority cannot be entrusted to a person simply because he could give the child a larger measure of material comfort than his natural parent.[246]

(h) Judicial Declaration of Absence or Incapacity

Upon a judicial declaration of absence or incapacity of the person exercising parental authority, parental authority is automatically terminated.[247] Without a judicial declaration of absence, the continued absence of the parents may likewise result in the termination of parental authority if the minor is placed under guardianship. As discussed above, the continued absence of the parents is also a ground for the appointment of a guardian.

[200.2] Grounds for Suspension of Parental Authority

In ground no. (1), parental authority is automatically suspended upon conviction of a parent or person exercising the same of a crime which carries with it the penalty of civil interdiction and such authority is automatically reinstated after service of the sentence or upon pardon or amnesty. In ground nos. (2) to (5), suspension of parental authority must be decreed by the court in an action filed for the purpose or in a related case.[248] In these other grounds, parental authority may be reinstated upon order of the court when it finds that the cause thereof has ceased and will not be repeated.[249]

(a) Civil Interdiction

Civil interdiction is an accessory penalty to the following principal penalties: (a) death, when not executed by reason of commutation or pardon; (b) *reclusion perpetua*; or (c) *reclusion temporal*.[250] The acces-

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[244]Cang vs. CA, *supra*.
[245]*Id*.
[246]*Id*.
[247]Art. 229(5), FC.
[248]Art. 231, FC.
[249]*Id*.
[250]Art. 41, RPC.

sory penalty of civil interdiction deprives the offender during the time of his sentence of: (1) the right to parental authority; (2) guardianship, either as to the person or property of any ward; (3) marital authority; (4) right to manage his property; and (5) right to dispose such property by any act or any conveyance *inter vivos*.[251]

Under the Code, parental authority is automatically suspended as a consequence of one's conviction of a crime which carries with it the penalty of civil interdiction.[252] It remains suspended while the convict is serving his sentence[253] and is automatically reinstated upon service of the penalty or upon pardon or amnesty of the offender.[254]

(b) Other Grounds for Suspension of Parental Authority

The court in an action filed for the purpose or in a related case may also suspend parental authority if the parent or the person exercising the same: (1) treats the child with excessive harshness or cruelty; (2) gives the child corrupting orders, counsel or example; (3) compels the child to beg; or (4) subjects the child or allows him to be subjected to acts of lasciviousness.[255] If the person exercising parental authority has subjected the child or allowed him to be subjected to sexual abuse, such person shall be permanently deprived by the court of such authority.[256]

If the suspension of parental authority is based on the foregoing grounds, such suspension of parental authority must be decreed by the court in an action filed for the purpose or in a related case.[257] However, parental authority may be reinstated upon order of the court when it finds that the cause thereof has ceased and will not be repeated.[258]

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[251] Art. 34, RPC.
[252] Art. 230, FC.
[253] Art. 34, RPC.
[254] Art. 230, FC.
[255] Art. 231, FC.
[256] Art. 232, FC.
[257] Art. 231, FC.
[258] *Id.*

Title X

EMANCIPATION AND AGE OF MAJORITY

Art. 234. Emancipation takes place by the attainment of majority. Unless otherwise provided, majority commences at the age of eighteen years. (As amended by R.A. 6809)

Art. 235. (Repealed by R.A. 6809)

Art. 236. Emancipation shall terminate parental authority over the person and property of the child who shall then be qualified and responsible for all acts of civil life, save the exceptions established by existing laws in special cases.

Contracting marriage shall require parental consent until the age of twenty-one.

Nothing in this Code shall be construed to derogate from the duty or responsibility of parents and guardians for children and wards below twenty-one years of age mentioned in the second and third paragraphs of Article 2180 of the Civil Code. (As amended by R.A. 6809)

Art. 237. (Repealed by R.A. 6809).

COMMENTS:

§ 201. Emancipation: How It Takes Place

As used in the law of parent and child, "emancipation" means the freeing of the child from the parental authority and custody of, and from the obligation to render services to, the parent[1] and thereby rendering the child qualified and responsible for all acts of civil life, save the exceptions established by law.[2]

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[1]Tencza vs. Aetna Cas. & Sur. Co., 521 P. 2d. 1010, 1013, 21 Ariz. App. 552.
[2]See Art. 236.

There is only one way by which emancipation may take place, that is, by the attainment of majority age of the child.[3] In other words, emancipation is effected by operation of law when a child reaches the age of majority. Under existing laws,[4] majority commences at the age of eighteen years.

§ 202. Effects of Emancipation

Emancipation shall have the effect of terminating parental authority over the person and property of the child and the latter then becomes qualified and responsible for all acts of civil life, save the exceptions established by existing laws in special cases. Thus, upon attainment of the age of majority, the child now acquires full civil capacity and may now enter into contracts without the assistance of his parents or guardians.

However, there are some rights and obligations which are retained by the parents even after the termination of parental authority, as follows:

(1) When a child, already emancipated but below 21, contracts marriage, Article 14 of the Family Code still requires parental consent. For the effects of absence of such parental consent, see discussion under *supra* § 67.

(2) When a child, above 21 but below 25, contracts marriage, Article 15 of the Family Code still requires parental advice. For the effects of absence of such parental advice, see discussion under *supra* § 47.3.

(3) When a child, already emancipated but below 21, intends to execute a marriage settlement with his or her future spouse prior to the celebration of the marriage, the law requires that the person whose consent is required under article 14 of the Code must be made a party thereto. See discussion under *supra* §§ 96.2 and 196.3.

(4) The obligation of the parents to support their children is not co-terminus with the exercise of parental authority. Note that while

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[3]Art. 234, FC, as amended by R.A. No. 6809.
[4]*Id*.

parental authority is permanently terminated upon the child's emancipation, the parents' obligation to support their children is not necessarily terminated upon such emancipation. This is clear when we consider the second paragraph of article 194 of the Code which states that "the education of the person entitled to be supported referred to in the (first paragraph of Article 194) shall include his schooling or training for some profession, trade or vocation, even beyond the age of majority." See discussion under *supra* §§ 179.4 and 196.3.

(5) While the child is already emancipated and no longer under the parental authority of his parents, the parents are still liable for the quasi-delict committed by said child if the latter is below 21. This is the implication of the provisions of the last paragraph of Article 236 of the Family Code.

§ 203. Quasi-delicts Committed by Child Above 18 But Below 21

See discussion under *supra* § 197.1.

Title XI

SUMMARY JUDICIAL PROCEEDINGS IN THE FAMILY LAW

Chapter 1

Prefatory Provisions

Art. 238. Until modified by the Supreme Court, the procedural rules provided for in this Title shall apply as regards separation in fact between husband and wife, abandonment by one of the other, and incidents involving parental authority. (n)

Chapter 2

Separation in Fact

Art. 239. When a husband and wife are separated in fact, or one has abandoned the other and one of them seeks judicial authorization for a transaction where the consent of the other spouse is required by law but such consent is withheld or cannot be obtained, a verified petition may be filed in court alleging the foregoing facts.

The petition shall attach the proposed deed, if any, embodying the transaction, and, if none, shall describe in detail the said transaction and state the reason why the required consent thereto cannot be secured. In any case, the final deed duly executed by the parties shall be submitted to and approved by the court. (n)

Art. 240. Claims for damages by either spouse, except costs of the proceedings, may be litigated only in a separate action. (n)

Art. 241. Jurisdiction over the petition shall, upon proof of notice to the other spouse, be exercised by the proper court authorized to hear family cases, if one exists, or in the regional trial court or its equivalent sitting in the place where either of the spouses resides. (n)

Art. 242. Upon the filing of the petition, the court shall notify the other spouse, whose consent to the transaction is required, of said petition, ordering said spouse to show cause why the petition should not be granted,

on or before the date set in said notice for the initial conference. The notice shall be accompanied by a copy of the petition and shall be served at the last known address of the spouse concerned. (n)

Art. 243. A preliminary conference shall be conducted by the judge personally without the parties being assisted by counsel. After the initial conference, if the court deems it useful, the parties may be assisted by counsel at the succeeding conferences and hearings. (n)

Art. 244. In case of non-appearance of the spouse whose consent is sought, the court shall inquire into the reasons for his failure to appear, and shall require such appearance, if possible. (n)

Art. 245. If, despite all efforts, the attendance of the non-consenting spouse is not secured, the court may proceed *ex parte* and render judgment as the facts and circumstances may warrant. In any case, the judge shall endeavor to protect the interests of the non-appearing spouse. (n)

Art. 246. If the petition is not resolved at the initial conference, said petition shall be decided in a summary hearing on the basis of affidavits, documentary evidence or oral testimonies at the sound discretion of the court. If testimony is needed, the court shall specify the witnesses to be heard and the subject-matter of their testimonies, directing the parties to present said witnesses. (n)

Art. 247. The judgment of the court shall be immediately final and executory. (n)

Art. 248. The petition for judicial authority to administer or encumber specific separate property of the abandoning spouse and to use the fruits or proceeds thereof for the support of the family shall also be governed by these rules. (n)

Chapter 3

Incidents Involving Parental Authority

Art. 249. Petitions filed under Articles 223, 225 and 235 of this Code involving parental authority shall be verified. (n)

Art. 250. Such petitions shall be verified and filed in the proper court of the place where the child resides. (n)

Art. 251. Upon the filing of the petition, the court shall notify the parents or, in their absence or incapacity, the individuals, entities or institutions exercising parental authority over the child. (n)

Art. 252. The rules in Chapter 2 hereof shall also govern summary proceedings under this Chapter insofar as they are applicable. (n)

Chapter 4

Other Matters Subject to Summary Proceedings

Art. 253. The foregoing rules in Chapters 2 and 3 hereof shall likewise govern summary proceedings filed under Articles 41, 51, 69, 73, 96, 124 and 217, insofar as they are applicable. (n)

COMMENTS:

§ 204. Matters Subject to Summary Proceedings under the Family Code

The following cases or matters are covered by the summary proceedings provided for in this Title:

(1) For the purpose of contracting the subsequent marriage under Article 41 of the Family Code, the spouse present must institute a summary proceeding for the declaration of presumptive death of the absentee.[1]

(2) Under the Family Code,[2] in case of disagreement on the matter of fixing the family domicile, the matter shall be decided by the courts in a summary proceeding provided for under the Family Code.[3]

(3) Under the Family Code,[4] the court may exempt one spouse from living with the other if the latter should live abroad or there are valid and compelling reasons for the exemption. For the purpose of obtaining such exemption, the spouse concerned must institute a summary proceeding under Title XI of the Family Code.[5]

(4) Under the Family Code,[6] either spouse may exercise any legitimate profession, occupation, business or activity without the consent of the other and the latter may object only on valid, serious and moral grounds. In case of disagreement or if one spouse objects to the other's profession, occupation, business or activity, the propriety of such

---

[1]Last par., Art. 41, FC.
[2]Art. 69, FC.
[3]See Art. 253, FC.
[4]Art. 69, FC.
[5]*Id.*
[6]Art. 73, FC.

objection shall be decided by the court in a summary proceeding under Title XI of the Family Code.[7]

(5) Under the Family Code,[8] the administration and enjoyment of the community property or of the conjugal partnership property shall belong to both spouses jointly and, in case of disagreement, the husband's decision shall prevail. The remedy of the wife, however, is to bring the matter to the attention of the courts in a summary proceeding under Title XI of the Family Code within five years from the date of the contract implementing the husband's decision.

(6) When one spouse is absent and unable to participate in the administration of the common or conjugal properties, court authorization for the alienation or encumbrance of such properties may be obtained by the spouse present in a summary proceeding under Title XI of the Family Code.[9]

(7) When a husband and wife are separated in fact, or one has abandoned the other and one of them seeks judicial authorization for a transaction where the consent of the other spouse is required by law but such consent is withheld or cannot be obtained, such judicial authorization may be obtained in a summary proceeding under Title XI of the Family Code.[10]

(8) In case of separation in fact or abandonment, the deserted spouse may petition for judicial authority to administer or encumber specific separate property of the abandoning spouse and to use the fruits or proceeds thereof for the support of the family.[11] Such judicial authorization may be obtained in a summary proceeding under Title XI of the Family Code.[12]

(9) In case of foundlings, abandoned, neglected or abused children and other children similarly situated, parental authority shall be entrusted in summary judicial proceedings under Title XI of the Family

---

[7]See Art. 253, FC.
[8]Arts. 96 and 124, FC.
[9]*Id*. See Uy vs. CA, 346 SCRA 246.
[10]See Art. 236, in relation to Arts. 100(2) and 127(2), FC.
[11]See Arts. 100(3) and 127(3), FC.
[12]See Art. 248, FC.

Code to heads of children's homes, orphanages and similar institutions duly accredited by the proper government agency.[13]

(10) The parents or, in their absence or incapacity, the individual, entity or institution exercising parental authority, may petition the proper court of the place where the child resides, for an order providing for disciplinary measures over the child. Such petition is likewise governed by the summary judicial proceedings under Title XI of the Family Code.[14]

(11) Under the Code,[15] the father and the mother shall jointly exercise legal guardianship over the property of their minor child without the necessity of a court appointment. However, when the market value of the property or the annual income of the child exceeds P50,000, the parent concerned shall be required to furnish a bond in such amount as the court may determine. For this purpose, a verified petition for approval of the bond shall be filed in the proper court of the place where the child resides, or, if the child resides in a foreign country, in the proper court of the place where the property or any part thereof is situated. Such petition is likewise governed by the summary judicial proceedings under Title XI of the Family Code.[16]

The rules on summary judicial proceedings under the Family Code govern the proceedings under Article 124 of the Family Code. The situation contemplated is one where the spouse is absent, or separated in fact or has abandoned the other or consent is withheld or cannot be obtained. Such rules do not apply to cases where the non-consenting spouse is incapacitated or incompetent to give consent. In the latter cases, the proper remedy is a judicial guardianship proceedings under Rule 93 of the 1964 Revised Rules of Court. This, in substance, is the ruling of the Supreme Court in **Uy vs. Court of Appeals and Jardeleza**[17] and reiterated in **Jardeleza vs. Jardeleza**.[18]

---

[13]See Art. 217, in relation to Art. 253, FC.
[14]Art. 223, in relation to Art. 249, FC.
[15]Art. 225, FC.
[16]Art. 225, in relation to Art. 249, FC.
[17]346 SCRA 246 (2000).
[18]347 SCRA 210 (2000).

Uy vs. CA and Jardeleza
346 SCRA 246

FACT: Dr. Ernesto Jardeleza, Sr., husband of Gilda Jardeleza, suffered a stroke on March 25, 1991, which left him comatose and bereft of any motor or mental faculties. Thereafter, Gilda filed a summary judicial proceedings pursuant to Article 124 of the Family Code for judicial declaration of incapacity of her husband, assumption of sole powers of administration of conjugal properties and judicial authorization to sell a parcel of land with its improvements, worth more than twelve million pesos. The court gave its authorization to the sale in the summary proceeding filed by Gilda. One of the children of the spouses, Teodoro, questioned the procedure resorted to by his mother. It was his contention that since his father was already incapacitated to give consent, what should have been pursued was a guardianship proceeding over the person and property of the incapacitated father. When the case eventually reached the Supreme Court, the Court sustained his arguments. The Court explained —

> "In regular manner, the rules on summary judicial proceedings under the Family Code govern the proceedings under Article 124 of the Family Code. The situation contemplated is one where the spouse is absent, or separated in fact or has abandoned the other or consent is withheld or cannot be obtained. Such rules do not apply to cases where the non-consenting spouse is incapacitated or incompetent to give consent. In this case, the trial court found that the subject spouse "is an incompetent" who was in comatose or semi-comatose condition, a victim of stroke, cerebrovascular accident, without motor and mental faculties, and with a diagnosis of brain stem infarct. In such case, the proper remedy is a judicial guardianship proceedings under Rule 93 of the 1964 Revised Rules of Court.
>
> Even assuming that the rules of summary judicial proceedings under the Family Code may apply to the wife's administration of the conjugal property, the law provides that the wife who assumes sole powers of administration has the same powers and duties as a guardian under the Rules of Court.
>
> Consequently, a spouse who desires to sell real property as such administrator of the conjugal property must observe the procedure for the sale of the ward's estate required of judicial guardians under Rule 95, 1964 Revised Rules of Court, not the summary judicial proceedings under the Family Code."

§ 205. Judgment in Summary Proceeding Final and Executory

In **Republic vs. Bermudez-Lorino**,[19] the Supreme Court emphasized that in Summary Judicial Proceedings under the Family Code, there is no reglementary period within which to perfect an appeal. This is because judgments rendered thereunder, by express provision of Article 247 of the Family Code, are "immediately final and executory."

In Bermudez-Lorino case, Gloria Bermudez-Lorino filed a verified petition with the Regional Trial Court of San Mateo, Rizal under the rules on Summary Judicial Proceedings in the Family Law provided for in the Family Code for judicial declaration of presumptive death of her absentee husband. After a summary proceeding, the trial court granted Bermudez-Lorino's petition in a decision dated November 7, 2001. The Office of the Solicitor General filed a Notice of Appeal from said decision. The Court of Appeals, however, affirmed the decision of the RTC. Not satisfied, the Republic, thru the Office of the Solicitor General, elevated the matter to the Supreme Court via petition for review on *certiorari* under Rule 45. In denying the Republic's petition, the Court explained —

> Article 238 of the Family Code, under Title XI: SUMMARY JUDICIAL PROCEEDINGS IN THE FAMILY LAW, sets the tenor for cases covered by these rules, to wit:
>
> > Art. 238. Until modified by the Supreme Court, the procedural rules in this Title shall apply in all cases provided for in this Code requiring summary court proceedings. Such cases shall be decided in an expeditious manner without regard to technical rules.
>
> Judge Elizabeth Balquin-Reyes of RTC, Branch 75, San Mateo, Rizal duly complied with the above-cited provision by expeditiously rendering judgment within ninety (90) days after the formal offer of evidence by therein petitioner, Gloria Bermudez-Lorino.
>
> The problem came about when the judge gave due course to the Republic's appeal upon the filing of a Notice of Appeal, and had the entire records of the case elevated to the

[19] 449 SCRA 95 (2005).

Court of Appeals, stating in her order of December 18, 2001, as follows:

> "Notice of Appeal having been filed through registered mail on November 22, 2001 by the Office of the Solicitor General who received a copy of the Decision in this case on November 14, 2001, within the reglementary period fixed by the Rules, let the entire records of this case be transmitted to the Court of Appeals for further proceedings.
>
> SO ORDERED."

In Summary Judicial Proceedings under the Family Code, there is no reglementary period within which to perfect an appeal, precisely because judgments rendered thereunder, by express provision of Section 247, Family Code, *supra*, are "immediately final and executory." It was erroneous, therefore, on the part of the RTC to give due course to the Republic's appeal and order the transmittal of the entire records of the case to the Court of Appeals.

An appellate court acquires no jurisdiction to review a judgment which, by express provision of law, is immediately final and executory. As we have said in **Veloria vs. COMELEC**, "the right to appeal is not a natural right nor is it a part of due process, for it is merely a statutory privilege." Since, by express mandate of Article 247 of the Family Code, all judgments rendered in summary judicial proceedings in Family Law are "immediately final and executory," the right to appeal was not granted to any of the parties therein. The Republic of the Philippines, as oppositor in the petition for declaration of presumptive death, should not be treated differently. It had no right to appeal the RTC decision of November 7, 2001.

It was fortunate, though, that the Court of Appeals, acting through its Special Fourth Division, with Justice Elvi John S. Asuncion as Acting Chairman and ponente, denied the Republic's appeal and affirmed without modification the final and executory judgment of the lower court. For, as we have held in **Nacuray vs. NLRC**:

Nothing is more settled in law than that when a judgment becomes final and executory it becomes immutable and unalterable. The same may no longer be modified in any respect, even if the modification is meant to correct what is perceived to be an erroneous conclusion of fact or law, and whether made by the highest court of the land (citing *Nunal vs. Court of Appeals*, G.R. No. 94005, 6 April 1993, 221 SCRA 26).

But, if only to set the records straight and for the future guidance of the bench and the bar, let it be stated that the RTC's decision dated November 7, 2001, was immediately final and executory upon notice to the parties. It was erroneous for the OSG to file a notice of appeal, and for the RTC to give due course thereto. The Court of Appeals acquired no jurisdiction over the case, and should have dismissed the appeal outright on that ground.

This judgment of denial was elevated to this Court via a petition for review on *certiorari* under Rule 45. Although the result of the Court of Appeals' denial of the appeal would apparently be the same, there is a big difference between having the supposed appeal dismissed for lack of jurisdiction by virtue of the fact that the RTC decision sought to be appealed is immediately final and executory, and the denial of the appeal for lack of merit. In the former, the supposed appellee can immediately ask for the issuance of an Entry of Judgment in the RTC, whereas, in the latter, the appellant can still raise the matter to this Court on petition for review and the RTC judgment cannot be executed until this Court makes the final pronouncement.

The Court, therefore, finds in this case grave error on the part of both the RTC and the Court of Appeals. To stress, the Court of Appeals should have dismissed the appeal on ground of lack of jurisdiction, and reiterated the fact that the RTC decision of November 7, 2001 was immediately final and executory. As it were, the Court of Appeals committed grave reversible error when it failed to dismiss the erroneous appeal of the Republic on ground of lack of jurisdiction because, by express provision of law, the judgment was not appealable.

Title XII

FINAL PROVISIONS

Art. 254. Titles III, IV, V, VI, VII, VIII, IX, XI, and XV of Book 1 of Republic Act No. 386, otherwise known as the Civil Code of the Philippines, as amended, and Articles 17, 18, 19, 27, 28, 29, 30, 31, 39, 40, 41, and 42 of Presidential Decree No. 603, otherwise known as the Child and Youth Welfare Code, as amended, and all laws, decrees, executive orders, proclamations, rules and regulations, or parts thereof, inconsistent herewith are hereby repealed.

Art. 255. If any provision of this Code is held invalid, all the other provisions not affected thereby shall remain valid.

Art. 256. This Code shall have retroactive effect insofar as it does not prejudice or impair vested or acquired rights in accordance with the Civil Code or other laws.

Art. 257. This Code shall take effect one year after the completion of its publication in a newspaper of general circulation, as certified by the Executive Secretary, Office of the President.

THE LAW ON PERSONS AND FAMILY RELATIONS

By

ELMER T. RABUYA

Professor of Civil Laws, Arellano University School of Law
LLB., AUSL, Class Valedictorian
A.B. Management Economics, Ateneo de Manila University

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ELMER T. RABUYA

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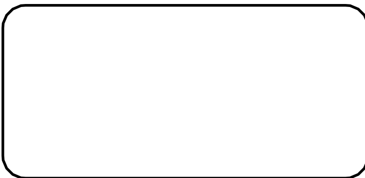

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This book is lovingly dedicated

To my wife, **Atty. Melva P. Cobarrubias-Rabuya**,
from whom I learned the "unwritten" laws of marriage

and

To my son, **John Darrel**,
for whom our contract of marriage was executed.

PREFACE

It has been a fascinating experience to teach the subject of "Persons and Family Relations" in the law school. This is one subject where the student's interest does not usually wane, especially when the topics of Legal Separation, Annulment, Filiation, Paternity and Support are discussed. Truly, this subject is dear to all of us because it deals with the story of our lives.

I was given the privilege (and obligation) to teach this subject almost six years ago. In the course of teaching this subject, I have been exposed to various ideas coming from the experts in this field, from colleagues and even from students –– for which I am truly grateful because these ideas have greatly contributed to the "birth" of this book.

Since I have been exhorting my students to be critical and to think "outside of the box," there are some ideas in this book which seek or attempt to do so. So if this book will be able to generate spirited discussions, or even debates, on some of these ideas, then this writer will be more than satisfied.

I thank my wife for her valuable insights, especially on the topic of rights and obligations of the spouses and support. I likewise extend my heartfelt appreciation for the encouragement and support coming from our Dean, Mariano S. Magsalin, Jr., and from our master educator, Mr. Florentino "Bubut" S. Cayco III. I would likewise wish to thank my boss, Atty. Mario R. Reyes, for giving me the time and opportunity to write this book.

ELMER T. RABUYA

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