CIVIL CODE OF THE PHILIPPINES

PRELIMINARY TITLE

Chapter 1

EFFECT AND APPLICATION OF LAWS

Article 1. This Act shall be known as the Civil Code of the Philippines.

REPUBLIC ACT NUMBER 386. The main draft of the Civil Code was prepared by the Roxas Code Commission, which was created via Executive Order No. 48 of March 20, 1947 by President Manuel Roxas. Dr. Jorge C. Bocobo was the chairman. The members were Judge Guillermo B. Guevarra, Dean Pedro Y. Ylagan, and Francisco R. Capistrano. Arturo M. Tolentino was added to the Commission but, after a while, had to resign due to his election as a congressman. In his place, Dr. Carmelino Alvendia was appointed. The 1947 Code Commission started working on May 8, 1947 and ended on December 15, 1947. On January 26, 1949, the Senate and the House of Representatives of the Philippines passed Republic Act 386, which is "An Act to Ordain and Institute the Civil Code of the Philippines."

Article 2. Laws shall take effect after fifteen days following the completion of their publication in the Official Gazette, unless it is otherwise provided. This Code shall take effect one year after publication.

EFFECTIVITY OF THE CIVIL CODE. The 1950 Civil Code of the Philippines took effect on August 30, 1950.

EXECUTIVE ORDER NO. 200. Article 2 of the Civil Code has been expressly amended by Executive Order No. 200 dated June 18, 1987 issued by President Corazon Aquino during the time of her revolutionary government. Hereunder is the text of the said executive order:

EXECUTIVE ORDER NO. 200

PROVIDING FOR THE PUBLICATION OF LAWS EITHER IN THE OFFICIAL GAZETTE OR IN A NEWSPAPER OF GENERAL CIRCULATION IN THE PHILIPPINES AS A REQUIREMENT FOR THEIR EFFECTIVITY.

WHEREAS, Article 2 of the Civil Code partly provides that "laws shall take effect after fifteen days following the completion of their publication in the Official Gazette, unless it is otherwise provided x x x";

WHEREAS, the requirement that the laws to be effective only a publication thereof in the Official Gazette shall suffice has entailed some problems, a point recognized by the Supreme Court in *Tañada, et al. v. Tuvera, et al.,* (G.R. No. 63915, December 29, 1986) when it observed that "there is much to be said of the view that the publication need not be made in the Official Gazette, considering its erratic release and limited readership";

WHEREAS, it was likewise observed that "undoubtedly, newspapers of general circulation could better perform the function of communicating the laws to the people as such periodicals are more easily available, have a wide circulation, and come out regularly"; and

WHEREAS, in view of the foregoing premises Article 2 of the Civil Code should accordingly be amended so that laws to be effective must be published either in the Official Gazette or in a newspaper of general circulation in the country;

NOW, THEREFORE, I, CORAZON C. AQUINO, President of the Philippines, by virtue of the powers vested in me by the Constitution, do hereby order:

SECTION 1. 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.

SECTION 2. Article 2 of Republic Act No. 386, otherwise known as the "Civil Code of the Philippines," and all other laws

> inconsistent with this Executive Order are hereby repealed or modified accordingly.
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> SECTION 3. This Executive Order shall take effect immediately after its publication in the Official Gazette.
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> Done in the City of Manila, this 18th day of June, in the year of Our Lord, nineteen hundred and eighty-seven.

EFFECTIVITY OF LAWS. When a statute does not explicitly provide for its effectivity, it shall have effect only after the expiration of the fifteen-day period following the completion of its publication either in the Official Gazette or in a newspaper of general circulation in the Philippines. The publication and the fifteen-day period requirements are intended to enable the people to become familiar with the statute. They are necessary requisites and no one shall be charged with notice of the statute's provision until the said publication is completed and the fifteen-day period has expired. Publication must be in full or it is not publication at all since its purpose is to inform the public of its contents (*Tañada v. Tuvera*, 146 SCRA 446). After the accomplishment of this requirement, the people are deemed to have conclusively been notified of the law even if actually the people or some of the same have not read them.

> Covered by this rule 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, at present, directly conferred by the Constitution. Administrative rules and regulations must also be published if their purpose is to enforce or implement existing law pursuant also to a valid delegation.
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> Interpretative regulations and those merely internal in nature, that is, regulating only the personnel of the administrative agency and not the public, need not be published. Neither is publication required of the so-called letters of instructions issued by the administrative superiors concerning rules or guidelines to be followed by their subordinates in the performance of their duties.
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> Accordingly, even the charter of a city must be published notwithstanding that it applies to only a portion of the national territory and directly affects only the inhabitants of that place. All presidential decrees must be published, including even say, those naming a public place after a favored individual or exempting him from certain prohibitions or requirements. The

> circulars issued by the Monetary Board must 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.
>
> However, no publication is required of the instructions issued by, say, the Minister of Social Welfare on the case studies to be made in the petitions for adoptions or the rules laid down by the head of a government agency on the assignments or workload of his personnel or the wearing of office uniforms. Parenthetically, municipal ordinances are not covered by this rule but by the Local Government Code (*Tañada v. Tuvera*, 146 SCRA 446).

THE CLAUSE "UNLESS IT IS OTHERWISE PROVIDED." The clause "unless it is otherwise provided" solely refers to the fifteen-day period and not to the requirement of publication. Publication is an indispensable requisite the absence of which will not render the law effective. In *Tañada v. Tuvera,* 146 SCRA 446, where the clause "unless it is otherwise provided" contained in Article 2 of the Civil Code was interpreted by the Supreme Court, it was stated that:

> 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 due process insofar as it would deny the public 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 its 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. Significantly, this is not true only of penal laws as is commonly supposed. One can think of many non-penal measures, like a law on prescription, which must also be communicated to the persons they may affect before they can begin to operate.

If the law provides for a different period shorter or longer than the fifteen-day period provided by Section 1 of Executive Order No. 200, then such shorter or longer period, as the case may be, will prevail. If the law provides that it shall take effect immediately, it means that it shall take effect immediately after publication with the fifteen-day period being dispensed with.

LAWS. Section 1 of Executive Order No. 200 uses the word "laws." Hence, the effectivity provision refers to all statutes,

including those local and private laws (*Tañada v. Tuvera*, 146 SCRA 446), unless there are special laws providing a different effectivity mechanism for particular statutes.

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

REASON. The legal precept that "ignorance of the law excuses no one from compliance therewith" is founded not only on expediency and policy but on necessity (*Zulueta v. Zulueta*, 1 Phil. 254; *U.S. v. Gray*, 8 Phil. 506; *U.S. v. Deloso*, 11 Phil. 180; *Delgado v. Alonso*, 44 Phil. 739). That every person knows the law is a conclusive presumption (*Tañada v. Tuvera,* 146 SCRA 446). When a law is passed by Congress, duly approved by the President of the Philippines, properly published, and consequently becomes effective pursuant to its effectivity clause or to some provision of a general law on the effectivity of statutes, the public is always put on constructive notice of the law's existence and effectivity. This is true even if a person has no actual knowledge of such law. To allow a party to set up as a valid defense the fact that he has no actual knowledge of a law which he has violated is to foment disorder in society. However, Article 3 applies only to mandatory and prohibitory laws (*Consunji v. Court of Appeals,* G.R. No. 137873, April 20, 2001).

Article 3 is a necessary consequence of the mandatory provision that all laws must be published. Without such notice and publication, there will 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 (*Tañada v. Tuvera,* 136 SCRA 27).

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

NON-RETROACTIVITY OF LAWS. Laws have no retroactive effect, unless the contrary is provided, for it is said that the law looks to the future and has no retroactive effect unless the legislature may have given that effect to some legal provisions, and that statutes are to be construed as having only prospective operation, unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the

language used, and that, in case of doubt, the same must be resolved against the retrospective effect (*Buyco v. PNB,* 2 SCRA 682; *Lazaro v. Commissioner of Customs*, 17 SCRA 37; *Universal Corn Products, Inc. vs. Rice and Corn Board*, 20 SCRA 1048; *Cebu Portland Cement Co. vs. CIR*, 25 SCRA 789).

RETROACTIVE APPLICATION. Well-settled is the principle that while the legislature has the power to pass retroactive laws which do not impair the obligation of contracts, or affect injuriously vested rights, it is equally true that statutes are not to be construed as intended to have a retroactive effect so as to affect the pending proceedings, unless such intent is expressly declared or clearly and necessarily implied from the language of the enactment (*Espiritu v. Cipriano,* 55 SCRA 533).

The following are instances when a law may be given retroactive effect:

1. When the law expressly provides for retroactivity. Thus, the Family Code of the Philippines which became effective on August 3, 1988 specially provides in Article 256 thereof that the said 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."

2. When the law is curative or remedial. Since curative laws are not within constitutional inhibitions or retrospective legislation impairing the obligation of contracts or disturbing vested rights, statutes of a curative nature which are necessarily retrospective must be given a retrospective operation by the courts (25 RCL 790). The legislature has power to pass healing acts which do not impair the obligations of contracts nor interfere with vested rights. They are remedial by curing defects and adding to the means of enforcing existing obligations. The rule in regard to curative statutes is that if the thing omitted or failed to be done, and which constitutes the defect sought to be removed or make harmless, is something which the legislature might have dispensed with by previous statutes, it may do so by subsequent ones. If the irregularity consists in doing some act, or doing it in the mode which the legislature might have made immaterial by an express law, it may do so by a subsequent one (*Government v. Municipality of Binalonan*, 32 Phil. 634). Retroactive operation will more readily be ascribed to legislation that is curative or legalizing than to legislation which may disadvantageously, though legally, affect past relations and transactions (*People v. Zeta*, L-7140, December 22, 1955).

Hence, in *Development Bank of the Philippines v. Court of Appeals,* 96 SCRA 342, where there were some questions as to the legality of the purchase of certain lots acquired by the DBP pursuant to Republic Act No. 85 and where Congress enacted Republic Act No. 3147 precisely to correct any invalidity as to the said acquisition, the Supreme Court observed and ruled:

> "It may be stated, as a general rule, that curative statutes are forms of 'retrospective legislation which reach back on past events to correct errors or irregularities and to render valid and effective attempted acts which would otherwise be ineffective for the purpose the parties intended.' They are intended to enable persons to carry into effect that which they have designed and intended, but which has failed of expected legal consequences by reason of some statutory disability or irregularity in their action. They, thus make valid that which, before enactment of the statute, was invalid. There cannot be any doubt that one of the purposes of Congress when it enacted Republic Act No. 3147, by amending Section 13 of Republic Act No. 85, was to erase any doubt regarding the legality of the acquisition by the DBP of the 159 lots from the PHHC for the housing project which it intended to establish for its employees who did not yet have houses of their own. This is obvious from the fact that Republic Act No. 3147 was enacted on July 17, 1961, at a time when the legality of the acquisition of the lots by the DBP for its housing project was under question. It is therefore a curative statute to render valid the acquisition by the DBP of the 159 lots from the PHHC."

Also, laws which regulate the registration of instruments affecting titles to land may be held to apply to deeds dated before as well as after their enactment when a reasonable time is given within which the effect of such statutes, as applied to existing conveyances, may be avoided and rendered harmless in respect to vested rights (25 RCL 790).

3. When the law is procedural. When a statute deals with procedure only, *prima facie*, it applies to all actions — those which have accrued or pending and future actions. Thus, a law prescribing the form of pleadings will apply to all pleadings filed after its enactment, although the action is begun before that time (25 RCL 791).

Also, it has been held that while changes in substantive law or Supreme Court judicial doctrines interpreting the application

of a particular law may not be applied retroactively, especially when prejudice will result to the party that has followed the earlier law or judicial doctrine (*People v. Licera,* 65 SCRA 270), that principle does not obtain in remedial or procedural law (*Araneta v. Doronilla,* 72 SCRA 113, citing *Aguillon v. Director of Lands,* 17 Phil. 507-508; *Hosana v. Diomano and Dioman*, 56 Phil. 741, 745-746; *Guevara v. Laico,* 64 Phil. 150; *Laurel v. Misa*, 76 Phil. 372, 378; *People v. Sumilang,* 77 Phil. 764, 765, 766). This is especially true in the Philippines where it is within the power of the Supreme Court to excuse failure to literally observe any rule under the Rules of Court to avoid possible injustice, particularly in cases where the subject matter is of considerable value and the judgment being appealed from is, by its nature, reasonably open to possible modification, if not reversal (*Araneta v. Doronila*, 72 SCRA 413).

4. When the law is penal in character and favorable to the accused. Article 22 of the Revised Penal Code specifically provides that penal laws shall have retroactive effect insofar as they favor the person guilty of a felony, who is not a habitual criminal, although at the time of the publication of such laws a final sentence has been pronounced and the convict is serving the same. Article 62 of the Revised Penal Code provides that a person shall be deemed a habitual delinquent, if within a period of ten years from the date of his release or last conviction of the crime of serious or less serious physical injuries, *Robo, Hurto*, Estafa, or falsification, he is found guilty of any said crimes a third time or oftener.

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

MANDATORY AND PROHIBITORY LAWS. A mandatory provision of law is one the omission of which renders the proceeding or acts to which it relates generally illegal or void. Thus, prescriptive periods provided by the law for filing particular suits are mandatory in character. For instance, the Family Code provides, among others, that the husband, in order to impugn the legitimacy of a child, must file a case within one year from the knowledge of the birth of the child or its recording in the civil register, if he should live within the same municipality where the birth took place or was recorded. Should the husband file the case beyond the one-year period, such case will be dismissed.

Prohibitory laws are those which contain positive prohibitions and are couched in the negative terms importing that the act required shall not be done otherwise than designated (*Brehm v. Republic*, 9 SCRA 172). Acts committed in violation of prohibitory laws are likewise void. Hence, under the Family Code, it is specifically provided that "No decree of legal separation shall be based upon a stipulation of facts or a confession of judgment."

However, if the law expressly provides for the validity of acts committed in violation of a mandatory or prohibitory provision of a statute, such act shall be considered valid and enforceable.

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

WAIVER. Waiver is the intentional relinquishment of a known right (*Castro v. Del Rosario,* 19 SCRA 196). Waivers are not presumed, but must be clearly and convincingly shown, either by express stipulation or acts admitting no other reasonable explanation (*Arrieta v. National Rice and Corn Corporation*, 10 SCRA 79). It is essential that a right, in order that it may be validly waived, must be in existence at the time of the waiver (*Ereneta v. Bezore*, 54 SCRA 13) and it must be exercised by a duly capacitated person actually possessing the right to make the waiver.

> It is an act of understanding that presupposes that a party has knowledge of its rights, but chooses not to assert them. It must be generally shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of the party's rights or of all material facts upon which they depended. Where one lacks knowledge of a right, there is no basis upon which waiver of it can rest. Ignorance of material fact negates waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact (*Consunji v. Court of Appeals*, G.R. No. 137873, April 20, 2001).
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> A person makes a knowing and intelligent waiver when that person knows that a right exists and has adequate knowledge upon which to make an intelligent decision. Waiver requires a knowledge of the facts basic to the exercised of the right waived, with an awareness of its consequences. That a

> waiver is made knowingly and intelligently must be illustrated on the record or by evidence (*Consunji v. Court of Appeals*, G.R. No. 137873, April 20, 2001).

PROHIBITION AGAINST WAIVER. Waivers cannot be made if they are contrary to law, public order, public policy, morals or good customs, or prejudicial to a third person with a right recognized by law. Hence, in *Gongon vs. Court of Appeals*, 32 SCRA 412, the Supreme Court held that the preferential rights of tenants under Commonwealth Act No. 539 to purchase a public land cannot be validly waived; as such waiver was against public policy. Pertinently, the Supreme Court said:

> On the second issue, petitioner's position is that his preferential right could not be validly waived, such waiver being against public policy. Under Article 6 of the New Civil Code, "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." The old Civil Code (Art. 4) carried a similar provision, although it mentioned only public interest or public order.
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> That Commonwealth Act No. 539 lays down a public policy there can be no doubt. In the case of *Juat v. Land Tenure Administration*, G.R. No. L-17080, January 28, 1961, this Court, thru Mr. Justice Felix Angelo Bautista, ruled in this wise:
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> "x x x it may also be stated that the avowed policy behind the adoption of such a measure is, as aptly observed by the Court of Appeals, to provide the landless elements of our population with lots upon which to build their homes and small farms which they can cultivate and from which they can derive livelihood without being beholden to any man (*Pascual v. Lucas*, 51 O.G., No. 4, p. 2429), such measure having been adopted in line with the policy of social justice enshrined in our Constitution to remedy and cure the social unrest caused by the concentration of landed estates in the hands of a few by giving to the landless elements a piece of land they call their own."
>
> Being contrary to public policy, the alleged waiver of his right made by herein petitioner should be considered null and void.

Likewise it has been held that the signing by a disabled employee of a satisfaction receipt does not constitute a waiver; the law does not consider as valid any agreement to receive less compensation than the worker is entitled to recover under the law (*Franklin Baker Co.*

of the Philippines v. Alillana, 21 SCRA 1247). Also, it has been held that the acceptance of benefits such as separation pay and terminal leave benefits would not amount to estoppel or waiver of right of employee to contest his illegal dismissal (*San Miguel v. Cruz*, 31 SCRA 819).

Rights, protections, and advantages conferred by statutes may be generally waived. Where, however, the object of a statute is to promote great public interests, liberty and morals, it cannot be defeated by any private stipulation (*Griffith v. New York L. Ins Co.,* 101 Cal. 627, cited in 25 RCL 781). Hence, since marriage is a social institution greatly affected by public interest and the purity of which is a basic concern of the state, a private agreement between a husband and a wife providing that they consent or allow the commission of adultery or concubinage by the other spouse, as the case may be, thereby waiving their rights to live with each other, is a void agreement or a void waiver of rights as the same is contrary to public interest and morals.

Article 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 declare 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.

REPEAL. Repeal of a law is the legislative act of abrogating through a subsequent law the effects of a previous statute or portions thereof. Repeal is either express or implied. An implied repeal takes place when a new law contains provisions contrary to or inconsistent with those of a former without expressly repealing them (25 RCL 911). Repeals and amendments by implications are not favored (*Quimsing v. Lachica,* 2 SCRA 182).

An express repeal is a repeal which is literally declared by a new law, either in specific terms, as where particular laws and provisions are named and identified and declared to be repealed, or in general terms, as where a provision in a new law declares all

laws and parts of laws inconsistent therewith to be repealed (25 RCL 911). However, in *Iloilo Palay and Corn Planters Association, Inc. v. Feliciano,* 13 SCRA 377, the Philippine Supreme Court ruled that:

> a repealing clause in an Act which provides that "all laws and parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly" is certainly not an express repealing clause because it fails to identify or designate the Act or Acts that are intended to be repealed. Rather, it is a clause which predicates the intended repeal upon the condition that substantial conflict must be found in existing and prior acts. Such being the case the presumption against implied repeals and the rule against strict construction regarding implied repeals apply *ex proprio vigore.*

Also, it is a well-established rule in statutory construction that:

> a special statute, providing for a particular case or class of cases, is not repealed by a subsequent statute, general in its terms, provisions and applications, 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 (*Manila Railroad Co. v. Rafferty,* 40 Phil. 225, 228; *City of Manila v. PSC*, 52 Phil. 515; *National Power Corporation v. Arca,* 25 SCRA 931).

UNCONSTITUTIONAL STATUTES. The Constitution is the supreme, organic and fundamental law of the land. It is axiomatic that no ordinary statute can override a constitutional provision (*Floresca v. Philex Mining Corporation,* 136 SCRA 136). But in deciding the constitutionality of a statute, every presumption favors the validity of the same and whenever possible, statutes should be given a meaning that will not bring them in conflict with the Constitution (*Noblejas v. Teehankee,* 23 SCRA 774).

The constitutionality or unconstitutionality of a statute depends upon factors other than those existing at the time of the enactment thereof, unaffected by the acts or omissions of law enforcing agencies, particularly those that take place subsequently to the passage or approval of the law (*Gonzales v. Commission of Elections,* 21 SCRA 774).

PARTIAL UNCONSTITUTIONALITY OF STATUTES. Where a portion of a statute is rendered unconstitutional and the remainder

valid, the parts will be separated, and the constitutional portion upheld. However, the Supreme Court in *Lidasan v. COMELEC*, 21 SCRA 496, held:

> "x x x But when the parts of the statute are so mutually dependent and connected, as conditions, considerations, inducements, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."
>
> In substantially similar language, the same exception is recognized in the jurisprudence of this Court, thus:
>
> "The general rule is that where part of a statute is void, as repugnant to the organic law, while another part is valid, the valid portion, if separable from the invalid, may stand and be enforced. But in order to do this, the valid portion must be so far independent of the invalid portion that it is fair to presume that the Legislature would have enacted it by itself if they had supposed that they could not constitutionally enact the other. x x x Enough must remain to make a complete, intelligible and valid statute, which carries out the legislative intent x x x. The language used in the invalid part of the statute can have no legal force or efficacy for any purpose whatever, and what remains must express the legislative will independently of the void part, since the court has no power to legislate. x x x" (*Barrameda v. Moir*, 25 Phil. 44, 47-48 quoted in *Government v. Springer*, 50 Phil. 259, 292).

RULES AND REGULATIONS/ADMINISTRATIVE AND EXECUTIVE ACTS. Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partake of the nature of a sanction provided in the law. This is so because statutes are usually couched in general terms, after expressing the policy, purposes, remedies and sanctions intended by the legislature. The details and the manner of carrying out the law are oftentimes left to the administrative agency entrusted with its enforcement (*Victorias Milling Company, Inc. v. Social Security Commission*, 4 SCRA 627).

A rule is binding on the courts so long as the procedure fixed for its promulgation is followed, and its scope is within the statutory authority granted by the legislature, even if the courts are not

in agreement with the policy stated therein or its innate wisdom (*Victorias Milling Company, Inc. v. Social Security Commission*, 4 SCRA 627).

The regulations adopted under legislative authority by a particular department must be in harmony with the provisions of the law, and for the sole purpose of carrying into effect its general provisions. By such regulations, of course, the law itself cannot be extended, so long, however, as the regulations relate solely to carrying into effect the provisions of the law, they are valid (*United States v. Tupasi*, 29 Phil. 119).

Rules and regulations as well as administrative or executive acts violative of the law and the constitution are invalid. Thus, in *Teoxon v. Members of the Board of Administrator*, 33 SCRA 585, the Supreme Court pertinently stated:

> It cannot be otherwise as the Constitution limits the authority of the President, in whom all executive power resides, to take care that the laws be faithfully executed. No lesser administrative executive office or agency then, contrary to the express language of the Constitution, assert for itself a more extensive prerogative. Necessarily, it is bound to observe the constitutional mandate. There must be strict compliance with the legislative enactment. Its terms must be followed. The statute requires adherence to, not departure from, its provisions. No deviation is allowable. In the terse language of the present Chief Justice, an administrative agency "cannot amend an act of Congress."

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

JUDICIAL CONSTRUCTION AND INTERPRETATION. The courts have the principal function of not only resolving legal controversies but also of interpreting and construing vague provisions of law relative to a particular dispute. Construction, verily, is the art or process of discovering and expounding the meaning and intention of the authors of the law with respect to its application to a given case, where that intention is rendered doubtful, among others by reason of the fact that the given case is not explicitly provided for in the law (Black, Interpretations of Laws, page 1, cited in *Caltex, Inc. v. Palomar*, 18 SCRA 247).

EFFECT OF JUDICIAL DECISION. Judicial decisions applying and interpreting the law shall form part of the legal system of the Philippines. In effect, judicial decisions, although in themselves not laws, assume the same authority as the statute itself and, until authoritatively abandoned, necessarily become, to the extent that they are applicable, the criteria which must control the actuations not only of those called upon to abide thereby but also those duty bound to enforce obedience thereto (*Caltex, Inc. v. Palomar*, 18 SCRA 247). These decisions also constitute evidence of what the law means (*People v. Licera*, 65 SCRA 270).

The settled rule supported by numerous authorities is a restatement of the legal maxim "*legis interpretatio legis vim obtinet*" — the interpretation placed upon the written law by a competent court has the force of law (*People v. Jabinal*, 55 SCRA 607).

Judicial decisions of the Supreme Court are authoritative and precedent-setting while those of the inferior courts and the Court of Appeals are merely persuasive. Indeed, it is the duty of judges to apply the law as interpreted by the Supreme Court (*Secretary of Justice v. Catolico*, 68 SCRA 62; *Albert v. CFI*, 23 SCRA 948).

WHEN JUDICIAL DECISIONS DEEMED PART OF THE LAW. The application and interpretation placed by the [Supreme] Court upon a law is part of the law as of the date of the enactment of the said law since the [Supreme] Court's application and interpretation merely established the contemporaneous legislative intent that the construed law purports to carry into effect (*People v. Licera*, 65 SCRA 270).

However, in *People v. Jabinal*, 55 SCRA 607, the Supreme Court held that:

> when a doctrine of this Court is overruled and a different view is adopted, the new doctrine should be applied prospectively, and should not apply to parties who had relied on the old doctrine and acted on the faith thereof. This is especially true in the construction and application of criminal laws, where it is necessary that the punishability of an act be reasonably foreseen for the guidance of society.

Thus, in the *Jabinal* case, where the accused was conferred his appointment as a secret confidential agent and authorized to possess a firearm in 1964 pursuant to a prevailing doctrine enunciated by the Supreme Court in two previous cases, under which no criminal

liability attached in connection with the possession of said firearm in spite of the absence of a permit, the Supreme Court ruled that said accused should be absolved of the crime charged. This is so even if the said two decisions were subsequently reversed by the Supreme Court in 1967. The doctrine laid down in 1967 should be prospectively applied and should not prejudice persons who relied on the overturned doctrines while the same were still controlling. Thus, in *People v. Licera*, 65 SCRA 270, it has likewise been held that where a new doctrine abrogates an old rule, the new doctrine should operate prospectively only and should not adversely affect those favored by the old rule, especially those who relied thereon and acted on the faith thereof.

In *Apiag v. Cantero*, A.M. No. MTJ 95-1070, February 12, 1997, 79 SCAD 327, where a judge entered into a second marriage contract in 1986 without having his first void marriage judicially declared a nullity, the Supreme Court ruled that the second marriage cannot be the basis of administrative liability against the judge for immorality because, at the time of the second marriage, the prevailing jurisprudence was that a judicial declaration of nullity is not needed in void marriages. The subsequent marriage of the judge was solemnized just before the Supreme Court decided the case of *Wiegel v. Sempio Diy* (143 SCRA 499), declaring that there was a need for a judicial declaration of nullity of a void marriage.

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

DUTY OF JUDGES. Judges are tasked with the dispensation of justice in accordance with the constitutional precept that no person shall be deprived of life, liberty, and property without due process of law. Judges must not evade performance of this responsibility just because of an apparent non-existence of any law governing a particular legal dispute or because the law involved is vague or inadequate. He must always be guided by equity, fairness, and a sense of justice in these situations. Where the conclusions of a judge in his decision are not without logic or reason, he cannot be said to have been incompetent (*Corpus v. Cabaluna*, 55 SCRA 374).

Thus, in a case where the paraphernal property of the wife was demolished to give way for the construction of another building which redounded to the benefit of the conjugal partnership of gains

of the spouses and where the claim of the wife to be reimbursed of the value of the demolished property was resisted because the law did not expressly provide that reimbursement can be made by the conjugal partnership at the time of its liquidation of the amount of the property demolished, the Supreme Court ruled for the reimbursement by saying, thus:

> x x x it is but just therefore that the value of the old buildings at the time they were torn down should be paid to the wife. We dismiss, as without any merit whatever the appellant's contention that because Article 1404, par. 2 of the Civil Code does not provide for reimbursement of the value of demolished improvements, the wife should not be indemnified. Suffice it to mention the ancient maxim of the Roman law, *"Jure naturae aequum est, meminem cum alterius detrimento et injuria fieri locupletiorem"* which was restated by the Partidas in these terms: *"Ninguno non deue enriquecerse tortizeramente con dano de otro."* When the statutes are silent or ambiguous, this is one of those fundamental principles which the courts invoke in order to arrive at a solution that would respond to the vehement urge of conscience (*In re Padilla*, 74 Phil. 377).

JUDICIAL LEGISLATION. Our government is divided into three great departments, namely the executive, the legislature and the judiciary. Each department cannot encroach into the respective domain of the other. Hence, the legislature cannot undertake the execution of the law. Neither could the executive legislate substantial law. The judiciary is tasked with resolving legal controversies and interpreting statutes. The judiciary cannot legislate. Legislation is the function of Congress. Interestingly however, in *Floresca v. Philex Mining Corporation*, 136 SCRA 136, the Supreme Court said that, while there is indeed the existence of the concept that the courts cannot engage in judicial legislation, that myth has been exploded by Article 9 of the new Civil Code, which provides that "no judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws."

Hence, even the legislator himself, through Article 9 of the Civil Code, recognizes that in certain instances, the court, in the language of Justice Holmes, "do and must legislate" to fill in the gaps in the law; because the mind of the legislator, like all human beings, is finite and therefore cannot envisage all possible cases to which the law may apply. Nor has the human mind the infinite capacity to anticipate all situations.

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

DOUBTFUL STATUTES. Where the law is clear, it must be applied according to its unambiguous provisions. It must be taken as it is devoid of judicial addition and subtraction (*Acting Commissioner of Customs v. Manila Electric Company*, 77 SCRA 469). The first and foremost duty of the court is to apply the law. Construction and interpretation come only after it has been demonstrated that application is impossible or inadequate without them (*Republic Flour Mills, Inc. v. Commissioner of Customs*, 39 SCRA 269).

If there is ambiguity in the law, interpretation of the law requires fidelity to the legislative purpose. What Congress intended is not to be frustrated. Its objective must be carried out. Even if there be doubt as to the meaning of the language employed, the interpretation should not be at war with the end sought to be attained (*Republic Flour Mills, Inc. v. Commissioner of Customs*, 39 SCRA 269).

The Supreme Court has time and again cautioned against narrowly interpreting a statute as to defeat the purpose of the legislator and stressed that it is of the essence of judicial duty to construe statutes so as to avoid such deplorable result (of injustice or absurdity) and that, therefore, a literal interpretation is to be rejected if it would be unjust or lead to absurd results (*Bello v. Court of Appeals*, 56 SCRA 509).

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

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

CUSTOMS. Custom has been defined as a rule of conduct formed by repetition of acts, uniformly observed (practiced) as a social rule, legally binding and obligatory. Courts take no judicial notice of custom. A custom must be proved as a fact according to the rules of evidence. A local custom as a source of right cannot be considered by a court of justice unless such custom is properly established by

competent evidence like any other fact. Merely because something is done as a matter of practice does not mean that courts can rely on the same for purposes of adjudication as a juridical custom. Juridical custom must be differentiated from social custom. The former can supplement statutory law or applied in the absence of such statute. Not so with the latter. Customs which are contrary to law, public order or public policy shall not be countenanced. Custom, even if proven, cannot prevail over a statutory rule or even a legal rule enunciated by the Supreme Court (*In the Matter of the Petition for Authority to Continue use of the Firm name "Ozaeta, Romulo, etc.,"* 92 SCRA 1).

Article 13. When the law speaks 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.

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)

YEAR. In *Garvida v. Sales*, 82 SCAD 188, 271 SCRA 767, the Supreme Court discussed the one-year cycle of successive years in construing Section 428 of the Local Government Code providing that certain elective officials should not be more than 21 years of age on the day of their election, to wit:

> The provision that an elective official of the SK should not be more than 21 years of age on the day of his election is very clear. The Local Government Code speaks of years, not months, nor days. When the law speaks of years, it is understood that years are 365 days each. One born on the first day of the year is consequently deemed to be one year old on the 365th day after his birth — the last day of the year. In computing years, the first year is reached after completing the first 365 days. After the first 365th day, the first day of the second 365-day cycle begins. On the 365th day of the second cycle, the person turns two years old. This cycle goes on and on in a lifetime — a person turns 21 years old on the 365th day of his 21st 365-day cycle. This means that on his 21st birthday, he has completed the entire span of

> 21 365-day cycles. After this birthday, the 365-day cycle for his 22nd year begins. The day after the 365th day is the first day of the next 365-day cycle and he turns 22 years old on the 365th day.
>
> The phrase "not more than 21 years of age" means not over 21 years, not beyond 21 years. It means 21 365-day cycle. It does not mean 21 years and one or some days or a fraction of a year because that would be more than 21 365-day cycles. "Not more than 21 years old" is not equivalent to "less than 22 years old," contrary to petitioner's claim. The law does not state that the candidate be less than 22 years on election day.

MONTHS AND LEAP YEARS. In *National Marketing Corporation v. Tecson*, 29 SCRA 70, the Supreme Court explained how days, months, years, including a leap year, should be counted by observing, thus:

> Pursuant to Article 1144(3) of our Civil Code, an action upon a judgment "must be brought within ten years from the time the right of action accrues," which, in the language of Art. 1152 of the same Code, "commences from the time the judgment sought to be revived has become final." This, in turn, took place on December 21, 1955, or thirty (30) days from notice of the judgment — which was received by the defendants herein on November 21, 1955 — no appeal having been taken therefrom. The issue is thus confined to the date on which ten (10) years from December 21, 1955 expired.
>
> Plaintiff-appellant alleged that it was December 21, 1965, but appellee Tecson maintains otherwise, because "when the laws speak of years x x x it shall be understood that years are of three hundred sixty-five days each" — according to Article 13 of our Civil Code — and, 1960 and 1964 being leap years, the month of February in both had 29 days, so that ten (10) years of 365 days each, or an aggregate of 3,650 days, from December 21, 1955, expired on December 19, 1965. The lower court accepted this view in its appealed order of dismissal.
>
> Plaintiff-appellant insists that the same "is erroneous because a year means a *calendar year* (Statutory Construction, Interpretation of Laws, by Crowford, p. 383) and since what is being computed here is the number of years, a calendar year should be used as the basis of computation. There is no question that when it is not a leap year, December 21 to December 21 of the following year is one year. If the extra day in a leap year is not a day of the year, because it is the 366th day, then to what

year does it belong? Certainly, it must belong to the year where it falls and, therefore, the 366 days constitute one year.

The very conclusion thus reached by appellant shows that its theory contravenes the explicit provision of Art. 13 of the Civil Code of the Philippines, limiting the connotation of each "year" — as the term is used in our laws — to 365 days. Indeed, prior to the approval of the Civil Code of Spain, the Supreme Court thereof had held on March 30, 1887, that, when the law spoke of months, it meant a "natural" month or "solar" month, in the absence of express provision to the contrary. Such provision was incorporated into the Civil Code of Spain, subsequently promulgated. Hence, the same Supreme Court declared that, pursuant to Art. 7 of said Code, "whenever months x x x are referred to in the law, it shall be understood that months are 30 days," not the "natural," "solar" or "calendar" months, unless they are "designated by name," in which case "they shall be computed by the actual number of days they have." This concept was later modified in the Philippines, by Section 13 of the Revised Administrative Code, pursuant to which, "month shall be understood to refer to a calendar month." In the language of this Court, in *People v. Del Rosario* [97 Phil. 70-71], "with the approval of the Civil Code of the Philippines (Republic Act 386) x x x we have reverted to the provisions of the Spanish Civil Code in accordance with which a month is to be considered as the regular 30-day month x x x and not the solar or civil month," with the particularity that, whereas, the Spanish Code merely mentioned "months, days or nights," ours has added thereto the term "years" and explicitly ordains that "it shall be understood that years are of three hundred sixty-five days."

Although some members of the Court are inclined to think that this legislation is not realistic, for failure to conform with ordinary experience or practice, the theory of plaintiff-appellant herein cannot be upheld without ignoring, if not nullifying, Art. 13 of our Civil Code, and reviving Section 13 of the Revised Administrative Code, thereby engaging in judicial legislation, and, in effect, repealing an act of Congress. If public interest demands a reversion to the policy embodied in the Revised Administrative Code, this may be done through legislative process, not judicial decree.

The law likewise states that, if the month is designated by its name, it shall be computed by the number of days which it has. Thus, if the law provides that a particular tax shall be paid in January 1998, it means anytime within the 31 days of January. If the month designated is April, then it means within the 30 days of April.

DAY, NIGHT AND PERIOD. The law also provides that when the law speaks of days, it shall be understood that days are of twenty-four hours, and nights from sunset to sunrise. In counting a period, the first day shall be excluded and the last day included. Hence, if a law states that a particular statute is to be effective on the 20th day from its publication and such publication was actually made on February 3, 1998, then the law shall be effective on February 23, 1998. The first day which is February 3, 1998 is excluded while the last day which is February 23, 1998 is included.

Article 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)

OBLIGATORY FORCE OF PENAL LAWS. Citizens and foreigners are subject to all penal laws and all other laws designed to maintain public security and safety. The liability for any violation of the said laws will even attach regardless of whether or not a foreigner is merely sojourning in Philippine territory.

EXCEPTION. While foreigners may be liable for committing offenses in violation of penal laws and those of public security and safety, they may however be immune from suit and, therefore, cannot be criminally prosecuted in the Philippines in certain cases where the Philippine government has waived its criminal jurisdiction over them on the basis of the principles of public international law and treaty stipulations.

Under the 1961 Vienna Convention on Diplomatic Relations of which the Philippines is a signatory, it is provided that the person of the diplomatic agent shall be inviolable and he shall not be liable to any form of arrest or detention (Article 29, Vienna Convention). He shall enjoy immunity from criminal jurisdiction of the receiving state (Article 31, Vienna Convention). A diplomatic agent, under Article 1 of the same convention, is the head of the mission or a member of the diplomatic staff of the mission.

Also, heads of state who are officially visiting here in the Philippines are immune from Philippine criminal jurisdiction.

Article 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)

NATIONALITY RULE. Regardless of where a citizen of the Philippines might be, he or she will be governed by Philippine laws with respect to his or her family rights and duties, or to his or her status, condition and legal capacity. Hence, if a Filipino, regardless of whether he or she was married here or abroad, initiates a petition abroad to obtain an absolute divorce from his wife or her husband (whether Filipino or foreigner) and eventually becomes successful in getting an absolute divorce decree, the Philippines will not recognize such absolute divorce. This is so because, pursuant to the second paragraph of Article 26 of the Family Code, the only absolute divorce which the Philippines recognizes is one which is procured by the alien spouse of the Philippine citizen. Hence, in the eyes of Philippine law in so far as the Filipino is concerned and in cases where he or she is the one who procures the absolute divorce abroad, his or her status is still married and therefore should he or she marry again, he or she can be considered to have committed either concubinage in case of the husband or adultery in case of the wife (See *Tenchavez v. Escano*, 15 SCRA 355).

Article 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 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)

LAW GOVERNING REAL PROPERTIES. The law of the country where the real property is situated shall be the governing law over such real property. However, with respect to the order of succession and the amount of successional rights, whether in

intestate or testamentary succession, they shall be regulated by the national law of the deceased and this is applicable regardless of the nature of the property. Thus, in a case where a citizen of Turkey made out a last will and testament providing that his property shall be disposed of pursuant to Philippine laws, the Supreme Court ruled that such provision is illegal and void because, pursuant to Article 10 (now Article 16) of the Civil Code, the national law should govern and therefore Turkish laws and not Philippine laws should apply (*Minciano v. Brimo*, 50 Phil. 867).

In *Bellis v. Bellis*, 20 SCRA 358, where a foreigner executed a will in the Philippines but, who, at the time of his death, was both a national of the United States and also domiciled in the United States, the Supreme Court observed:

Article 16, par. 2 and Article 1039 of the Civil Code render applicable the national law of the decedent, in intestate or testamentary succession, with regard to four items: (a) the order of succession; (b) the amount of successional rights; (c) the intrinsic validity of the provisions of the will; and (d) the capacity to succeed. They provide that —

> "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 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.
>
> ART. 1039. Capacity to succeed is governed by the law of the nation of the decedent."

Appellants would, however, counter that Article 17, paragraph three, of the Civil Code, stating that —

> > "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."

prevails as the exception to Article 16, par. 2 of the Civil Code afore-quoted. This is not correct. Precisely, Congress deleted

the phrase, "notwithstanding the provisions of this and the next preceding article" when they incorporated Article 11 of the old Civil Code as Article 17 of the new Civil Code, while reproducing without substantial change the second paragraph of Article 10 of the old Civil Code as Article 16 in the new. It must have been their purpose to make the second paragraph of Article 16 a specific provision in itself which must be applied to testate and intestate successions. As further indication of this legislative intent, Congress added a new provision, under Article 1039, which decrees that capacity to succeed is to be governed by the national law of the decedent.

It is therefore evident that whatever public policy or good customs may be involved in our system of legitimes, Congress has not intended to extend the same to the succession of foreign nationals. For it has specifically chosen to leave, *inter alia*, the amount of successional rights, to the decedent's national law. Specific provisions must prevail over general ones.

Appellants would also point out that the decedent executed two wills — one to govern his Texas estate and the other his Philippine estate — arguing from this that he intended Philippine law to govern his Philippine estate. Assuming that such was the decedent's intention in executing a separate Philippine will, it would not alter the law, for as this Court ruled in *Miciano v. Brimo*, 50 Phil. 867, 870, 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 cannot be ignored in regard to those matters that Article 10 — now Article 16 — of the Civil Code states said national law should govern.

The parties admit that the decedent Amos G. Bellis was a citizen of the State of Texas, U.S.A., and that under the laws of Texas, there are no forced heirs or legitimes. Accordingly, since the intrinsic validity of the provision of the will and the amount of successional rights are to be determined under Texas law, the Philippine law on legitimes cannot be applied to the testacy of Amos G. Bellis.

Article 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 solem-

nities 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)

EXTRINSIC VALIDITY. The law provides clearly that the forms and solemnities of public instruments, wills, and contracts shall be governed by the laws of the country where they are executed. Thus, if in Japan, for example, it is required that for a holographic will to be valid the date thereof need not be in the handwriting of the testator, "then" such a will is valid even if under Philippine laws the contents of a holographic will, including the date, must all be in the handwriting of the testator.

ACTS BEFORE DIPLOMATIC AND CONSULAR OFFICIALS. Diplomatic and consular officials are representatives of the state. Hence, any act or contract made in a foreign country before diplomatic and consular officials must conform with the solemnities under Philippine law. This is so, also, because the host country where such diplomatic or consular officials are assigned, by rules of international law, waives its jurisdiction over the premises of the diplomatic office of another country located in the said host country. Hence, marriages between two Filipinos solemnized by a consular official abroad must be made following Philippine laws. Thus, 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 the marriage shall be performed by a consul-general, consul, or vice-consul abroad (See Article 10 of the Family Code).

PROHIBITIVE LAWS. Under our law, 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. Hence, considering that the only ways to terminate a marriage in the Philippines are by nullifying a marriage or by annulling the same on the basis of the specific grounds exclusively enumerated under the Family Code of the Philippines, and by filing an affidavit of reappearance for the purpose of terminating a subsequent

marriage solemnized under Article 41 of the same code, any Filipino who procures an absolute divorce abroad will remain, in the eyes of Philippine law, as not having been divorced. Thus, in a case where a Filipina wife obtained a divorce abroad and later remarried an American, the Filipino husband in the Philippines can file a legal separation case against the wife for having technically committed adultery, considering that the absolute divorce is not recognized in the Philippines (See *Tenchavez v. Escano*, 15 SCRA 355).

Article 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)

SUPPLETORY NATURE. The law clearly provides that, in matters which are governed by the Code of Commerce or by special laws, any deficiency in the latter shall be supplied by the provisions of the Civil Code. Thus, in *Insular v. Sun Life*, 41 Phil. 269, the Supreme Court held that there was no perfection of a life annuity because there was no acceptance of the contract. The Supreme Court applied the rules on contracts under the Civil Code in view of the absence of any provision in the Insurance Act relative to the manner by which a contract is perfected. Thus, the Supreme Court observed and ruled:

> While, as just noticed, the Insurance Act deals with life insurance, it is silent as to the methods to be followed in order that there may be a contract of Insurance. On the other hand, the Civil Code in Article 1802 not only describes a contract of life annuity markedly similar to the one we are considering, but in two other articles, gives strong clues as to the proper disposition of the case. For instance, Article 16 of the Civil Code provides that "In matters which are governed by special laws, any deficiency of the latter shall be supplied by the provisions of this Code" [now Article 18 of the Civil Code]. On the supposition, therefore, which is incontestable, that the special law on the subject of insurance is deficient in enunciating the principles governing acceptance, the subject-matter of the Civil Code, if there be any, would be controlling. In the Civil Code is found Article 1262, providing that "Consent is shown by the concurrence of offer and acceptance with respect to the thing and consideration which are to constitute the contract. An acceptance made by letter shall not bind the person making the offer except from

> the time it came to his knowledge. The contract, in such case, is presumed to have been entered into at the place where the offer was made." This latter article is in opposition to the provisions of Article 54 of the Code of Commerce.
>
> If no mistake has been made in announcing the successive steps by which we reach a conclusion, then the only duty remaining is for the court to apply the law as it is found. The legislature in its wisdom having enacted a new law on insurance, and expressly repealed the provisions in the Code of Commerce on the same subject, and having thus left a void in the commercial law, it would seem logical to make use of the only pertinent provision of law found in the Civil Code, closely related to the chapter concerning life annuities.
>
> The Civil Code rule that an acceptance made by letter shall bind the person making the offer only from the date it came to his knowledge, may not be the best expression of modern commercial usage. Still, it must be admitted that its enforcement avoids uncertainty and tends to security. Not only this, but in order that the principle may not be taken too lightly, let it be noticed that it is identical with the principles announced by a considerable number of respectable courts in the United States. x x x
>
> We hold that the contract for a life annuity in the case at bar was not perfected because it has not been proved satisfactorily that the acceptance of the application ever came to the knowledge of the applicant.

Also, it has been held that the word "loss" in Section 3(6) of the Carriage of Goods by Sea Act is determinable under the concept given to it by the Civil Code in accordance with Article 18 providing for the suppletory nature of the said code (*Ang v. American Steamship Agencies, Inc.*, 19 SCRA 631). However, not all deficiency in the Carriage of Goods by Sea Act can be supplied by the Civil Code. Hence, in *Dole Philippines, Inc. v. Maritime Co. of the Philippines*, 148 SCRA 119, the Supreme Court rejected the contention of the petitioner that the one-year prescriptive period for making a claim for loss or damage under Section 3, paragraph 6 of the Carriage of Goods by Sea Act was tolled by making an extrajudicial demand pursuant to Article 1155 of the Civil Code which should be applied in a suppletory nature pursuant to Article 18 of the same code. Pertinently, the Supreme Court observed and ruled:

> The substance of its argument is that since the provisions of the Civil Code are, by express mandate of said code, suppletory

of deficiencies in the Code of Commerce and special laws in matters governed by the latter [Article 18, Civil Code], and there being "* * * a patent deficiency * * * with respect to the tolling of the prescriptive period * * * provided for in the Carriage of Goods by Sea Act, prescription under said Act is subject to the provisions of Article 1155 of the Civil Code on tolling; and because Dole's claim for loss or damage made on May 4, 1972 amounted to a written extrajudicial demand which would toll or interrupt prescription under Article 1155, it operated to toll the prescription also in actions under the Carriage of Goods by Sea Act. To much the same effect is the further argument based on Article 1176 of the Civil Code which provides that the rights and obligations of common carriers shall be governed by the Code of Commerce and by special laws in all matters not regulated by the Civil Code.

These arguments might merit weightier consideration were it not for the fact that the question has already received a definitive answer, adverse to the position taken by Dole, in the *Yek Tong Lin Fire & Marine Insurance Co., Ltd. v. American President Lines, Inc.* [103 Phil. 1125]. There, in a parallel factual situation, where suit to recover for damage to cargo shipped by vessel from Tokyo to Manila was filed more than two years after the consignees' receipt of the cargo, this Court rejected the contention that an extrajudicial demand tolled the prescriptive period provided for in the Carriage of Goods by Sea Act, *viz.:*

"In the second assignment of errors plaintiff-appellant argues that it was error for the court *a quo* not to have considered the action of plaintiff-appellant suspended by the extrajudicial demand which took place, according to defendant's own motion to dismiss, on August 22, 1952. We notice that while plaintiff avoids stating any date when the goods arrived in Manila, it relies upon the allegation made in the motion to dismiss that a protest was filed on August 22, 1952 — which goes to show that plaintiff-appellant's counsel has not been laying the facts squarely before the court for the consideration of the merits of the case. We have already decided that in a case governed by the Carriage of Goods by Sea Act, the general provisions of the Code of Civil Procedure on prescription should not be made to apply (*Chua Kuy v. Everett Steamship Corp*., G.R. No. L-5554, May 27, 1953). Similarly, we now hold that in such a case the general provisions of the new Civil Code (Article 1155) cannot be made to apply, as such application would have the effect of extending the one-year period of prescription fixed in the law. It is desirable that matters affecting transportation of goods by sea be decided in as short a time as possible; the application of the provisions of Article 1155 of the new Civil Code would

> unnecessarily extend the period and permit delays in the settlement of questions affecting transportation, contrary to the clear intent and purpose of the law. * * *"

However, for suits not predicated upon loss or damage but on alleged misdelivery or conversion of the goods, the applicable rule on prescription is that found in the Civil Code, namely, either ten years for breach of a written contract or four years for quasi-delict, and not the rule on prescription in the Carriage of Goods by Sea Act (*Ang v. American Steamship Agencies, Inc*., 19 SCRA 631).

Chapter 2

HUMAN RELATIONS

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

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

Article 21. Any person who willfully 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.

HONESTY AND GOOD FAITH, ACTS CONTRARY TO LAW, AND AGAINST MORALS, GOOD CUSTOMS AND PUBLIC POLICY. Article 19 provides a rule of conduct that is consistent with an orderly and harmonious relationship between and among men and women. It codifies the concept of what is justice and fair play so that the abuse of right by a person will be prevented.

> Article 19, known to contain what is commonly referred to as the principle of abuse of rights, sets 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 a 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.
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> x x x x x x x x x

> 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 x x x (*Albenson Enterprises Corp. v. Court of Appeals*, 217 SCRA 16).
>
> On the other hand, the 1947 Code Committee in explaining Article 20 stated that the said rule enunciated in the said article pervades the entire legal system, and renders it impossible that a person who suffers damage because another has violated some legal provision, should find himself without relief (Report of the Code Commission, page 39).

In *Development Bank of the Philippines v. Court of Appeals*, 445 SCRA 500, the Supreme Court said:

> Malice or bad faith is at the core of said provision. Good faith is presumed and he who alleges bad faith has the duty to prove the same. Good faith refers to the state of the mind which is manifested by the acts of the individual concerned. It consists of the intention to abstain from taking an unconscionable and unscrupulous advantage of another. Bad faith does not simply connote bad judgment or simple negligence, dishonest purpose or some moral obliquity and conscious doing of a wrong, a breach of known duty due to some motives or interest or ill-will that partakes of the nature of fraud. Malice connotes ill-will or spite and speaks not in response to duty. It implies an intention to do ulterior and unjustifiable harm. Malice is bad faith or bad motive.

According to *Albenson Enterprises Corp. v. Court of Appeals*, 217 SCRA 16, Article 20 speaks of the general sanction for all other provisions of law which do not especially provide 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 or her victim for injuries suffered thereby.

Insofar as Article 21 is concerned, the same 1947 Code Committee stated that it was designed to fill in the "countless gaps in the statutes, which leave so many victims of moral wrongs helpless, even though they have actually suffered material and moral injury" (Report of the Code Commission, page 39, *Manuel v. People*, 476 SCRA 461). The 1947 Code Commission continued, thus:

> "An example will illustrate the purview of the foregoing norm: *'A'* seduces the nineteen year-old daughter of *'X.'* A promise of marriage either has not been made, or can not be

> proved. The girl becomes pregnant. Under the present laws, there is no crime, as the girl is above eighteen years of age. Neither can any civil action for breach of promise of marriage be filed. Therefore, though a grievous moral wrong has been committed, and though the girl and her family have suffered incalculable moral damage, she and her parents cannot bring any action for damages. But under the proposed article, she and her parents would have such a right of action.
>
> Thus, at one stroke, the legislator, if the foregoing rule is approved, would vouchsafe adequate legal remedy for that untold number of moral wrongs which it is impossible for human foresight to provide for specifically in the statutes.
>
> But, it may be asked, would not this proposed article obliterate the boundary line between morality and law? The answer is that, in the last analysis every good law draws its breadth of life from morals, from those principles which are written with words of fire in the conscience of man. If this premise is admitted, then the proposed rule is a prudent earnest of justice in the face of the impossibility of enumerating, one by one, all wrongs which cause damage. When it is reflected that while codes of law and statutes have changed from age to age, the conscience of man has remained fixed to its ancient moorings, one can not feel that it is safe and salutary to transmute, as far as may be, moral norms into legal rules, thus imparting to every legal system that enduring quality which ought to be one of its superlative attributes.
>
> Furthermore, there is no belief of more baneful consequences upon the social order than that a person may with impunity cause damage to his fellowmen so long as he does not break any law of the State, though he may be defying the most sacred postulates of morality. What is more, the victim loses faith in the ability of the government to afford him protection or relief. (Report of the Code Commission, pages 40-41).

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; 3) and it is done with intent to injure (*Albenson Enterprises Corp. v. Court of Appeals*, 217 SCRA 16). It presupposes loss or injury, material or otherwise, which one may suffer as a result of such violation (*Cogeo-Cubao Operators and Drivers Association v. Court of Appeals*, 207 SCRA 343).

Articles 19, 20, and 21 are related to each other and, under these articles, an act which causes injury to another may be made

the basis for an award of damages (*Albenson Enterprises Corp. v. Court of Appeals*, 217 SCRA 16). 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" *(Ibid.).*

In a case where a particular government employee was singled out by the deputy administrator and strictly subjected to the rules for obtaining benefits after retirement while employees similarly situated were liberally granted their benefits for as long as the rules were substantially complied with by them, the Supreme Court affirmed the ruling of the lower court awarding damages in favor of the government employee on the basis of Article 19 of the Civil Code by observing and stating, thus:

> As we said, the acts of petitioner were legal (that is, pursuant to procedure), as he insists in this petition, yet it does not follow, as we said, that his acts were done in good faith. For emphasis, he had no valid reason to "go legal" all of a sudden with respect to Mr. Curio, since he had cleared three employees who, as the Sandiganbayan found, "were all similarly circumstanced in that they all had pending obligations when, their clearances were filed for consideration, warranting similar official action."
>
> The Court is convinced that the petitioner had unjustly discriminated against Mr. Curio.
>
> It is no defense that the petitioner was motivated by no ill will (a grudge, according to the Sandiganbayan), since the facts speak for themselves. It is no defense either that he was, after all, complying merely with legal procedures since, as we indicated, he was not as strict with respect to the three retiring other employees. There can be no other logical conclusion that he was acting unfairly, no more, no less, to Mr. Curio.
>
> It is the essence of Article 19 of the Civil Code, under which the petitioner was made to pay damages, together with Article 27, that the performance of duty be done with justice and good faith. In the case of *Velayo v. Shell Co. of the Philippines*, 120 Phil. 187, we held the defendant liable under Article 19 for disposing of its property — a perfectly legal act — in order to escape the reach of a creditor. In two fairly recent cases, *Sevilla v. Court of Appeals*, 160 SCRA 171 and *Valenzuela v. Court of Appeals*, 190 SCRA 1, we held that a principal is liable under Article 19 in terminating the agency — again, a legal act — when terminating the agency would deprive the agent of his legitimate business (*Llorente v. Sandiganbayan*, 202 SCRA 309).

Following the same principle, though a person may not have acted criminally, he or she can nevertheless undertake acts which injure another. In *Philippine National Bank v. Court of Appeals*, 83 SCRA 237, where a sugar quota was mortgaged to the PNB and a lease of such sugar quota allotment made by the debtor to a third person required the consent of the PNB and where the responsible officers of the same told the lessor and the lessee that PNB will approve the lease if the amount thereof was increased from P2.50 to P2.80 per picul and whereupon, the lessor and the lessee agreed to the increase which prompted even the vice-president of the bank to recommend to the PNB Board of Directors the approval of the lease but which, consequently, was twice turned down by the said Board because it wanted to raise the consideration to P3.00 per picul, resulting to the loss by the lessee of the amount of P2,800, the Supreme Court, after deliberating on the other important circumstances surrounding the case, observed and ruled, to wit:

> There is no question that Tapnio's failure to utilize her sugar quota for the crop year 1956-1957 was due to the disapproval of the lease by the Board of Directors of the petitioner. The issue, therefore, is whether or not petitioner is liable for the damage caused.
>
> As observed by the trial court, time is of the essence in the approval of the lease of sugar quota allotments, since the same must be utilized during the milling season, because any allotment which is not filled during such milling season may be reallocated by the Sugar Quota Administration to other holders of allotments. There was no proof that there was any other person at that time willing to lease the sugar quota allotment of private respondents for a price higher than P2.80 per picul. "The fact that there were isolated transactions wherein the consideration for the lease was P3.00 a picul," according to the trial court, "does not necessarily mean that there are always ready takers of said price." The unreasonableness of the position adopted by the petitioner's Board of Directors is shown by the fact that the difference between the amount of P2.80 per picul offered by Tuazon and the P3.00 per picul demanded by the Board amounted only to a total sum of P200.00. Considering that all the accounts of Rita Gueco Tapnio with the Bank were secured by the chattel mortgage on standing crops, assignment of leasehold rights and interests on her properties, and surety bonds and that she had apparently "the means to pay her obligation to the Bank, as shown by the fact that she has been granted several sugar crop loans of the total value of almost P80,000 for the agricultural year 1952 to 1956," there was

> no reasonable basis for the Board of Directors of petitioner to have rejected the lease agreement because of a measly sum of P200.00.
>
> While petitioner had the ultimate authority of approving or disapproving the proposed lease since the quota was mortgaged to the Bank, the latter certainly cannot escape its responsibility of observing, for the protection of the interest of private respondents, that degree of care, precaution and vigilance which the circumstances justly demand in approving or disapproving the lease of said sugar quota. The law makes it imperative that every person "must in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith" (Article 19 of the Civil Code). This petitioner failed to do. Certainly, it knew that the agricultural year was about to expire, that by its disapproval of the lease private respondents would be unable to utilize the sugar quota in question. In failing to observe the reasonable degree of care and vigilance which the surrounding circumstances reasonably impose, petitioner is consequently liable for damages caused on private respondents. Under Article 21 of the New Civil Code, "any person who willfully 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 aforecited provisions on human relations were intended to expand the concept of torts in this jurisdiction by granting adequate legal remedy for the untold number of moral wrongs which is impossible for human foresight to specifically provide in the statutes.

Also, in a case where a person sold a parcel of land to another; thereby transferring title to such other person and subsequently the same transferor claimed and misrepresented that the title to the said land was lost during the Second World War, which enabled him to procure another title which he used to have the same property sold to another person with the active participation of the register of deeds and the lawyer-son of the said register of deeds, who both knew of the first sale, the Supreme Court held that the register of deeds and his lawyer son

> are likewise civilly liable for failure to observe honesty and good faith in the performance of their duties as public officer and as member of the Bar (Art. 19, New Civil Code) or for willfully or negligently causing damage to another (Art. 20, New Civil Code), or for willfully causing loss or injury to another in a manner that is contrary to morals, good customs and/or public

> policy (Art. 21, New Civil Code). (*Vda. de Laig v. Court of Appeals*, 82 SCRA 294).

In the same vein, where the petitioners were denied irrigation water for their farm lots in order to make them vacate their landholdings, it was held that the defendants violated the plaintiff's rights and caused prejudice to the latter by the unjustified diversion of the water for which the award of damages under Article 21 can be made (*Magbanua v. IAC*, 137 SCRA 329). Also, creditors are protected in cases of contracts intended to defraud them. Further, any third person who induces another to violate his contract shall be liable for damages to the other contracting party also under Articles 20 and 21 of the Civil Code (*People's Bank v. Dahican Lumber Company*, 20 SCRA 84).

Similarly, in a case where a drivers' group, claiming to protect the interest of all drivers of a particular transportation company and in protest of certain policies of the said company, decided to take over the operation of the jeepney service in the Cogeo-Cubao route without authorization from the Public Service Commission and in violation of the right of the transportation company to operate its services in the said route under its certificate of public convenience, the Supreme Court affirmed the lower court's decision awarding damages in favor of the transportation company by observing and ruling, to wit:

> x x x Although there is no question that petitioner can exercise their constitutional right to redress their grievances with respondent *Lungsod Corp*., the manner by which this constitutional right is to be exercised should not undermine public peace and order nor should it violate the legal rights of other person. Article 21 of the Civil Code provides that any person who willfully 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. The provision covers a situation where a person has a legal right which was violated by another in a manner contrary to morals, good customs or public policy. It presupposes loss or injury, material or otherwise, which one may suffer as a result of such violation. It is clear from the facts of this case that petitioner formed a barricade and forcibly took over the motor units and personnel of the respondent corporation. This paralyzed the usual activities and earnings of the latter during the period of ten days and violated the right of respondent *Lungsod Corp*. to conduct its operations thru its authorized officers.

Significantly, while a breach of promise to marry is not actionable (*Gashem Shookat Baksh v. Court of Appeals*, 219 SCRA 115), it has been held that to formally set a wedding and go through and spend for all the wedding preparations and publicity, only to walk out of it when the matrimony was about to be solemnized, is a different matter. This is palpably and unjustifiably contrary to good customs for which the defendant must be held answerable for damages in accordance with Article 21 of the Civil Code (*Wassmer v. Velez*, 12 SCRA 649). In the same vein, it has been held that for a married man to force a woman not his wife to yield to his lust constitutes a clear violation of the rights of his victim which entitled her to compensation under Article 21 of the Civil Code (*Quimiguing v. Icao*, 34 SCRA 133). Similarly, in *Gashem Shookat Baksh v. Court of Appeals*, 219 SCRA 115, the Supreme Court ruled:

> In the light of the above laudable purpose of Article 21, We are of the opinion, and so hold, 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 fulfill 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 willful 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, respondent Court found that it was the petitioner's "fraudulent and deceptive protestations of love for and promise to marry plaintiff 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 appellant's part that made plaintiff's parents agree to their daughter's living-in with him preparatory to their supposed marriage." In short, private respondent surrendered her virginity, the cherished possession of every single Filipina, not because of lust but because of moral seduction, the kind illustrated by the Code Commission in its example earlier adverted to.
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> x x x x x x x x x
>
> The *pari delicto* rule does not apply in this case for while indeed, the private respondent may not have been impelled

> by the purest of intentions, she eventually submitted to the petitioner in sexual congress not out of lust, but because of moral seduction. In fact, it is apparent that she had qualms of conscience about the entire episode for as soon as she found out that petitioner was not going to marry her after all she left him. She is not, therefore, in *pari delicto* with the petitioner. *Pari delicto* means "in equal fault; in a similar offense or crime; equal in guilt or in legal fault." At most, it could be conceded that she is merely in *delicto*.
>
> "Equity often interfered for the relief of the less guilty of the parties, where his transgression has been brought about by the imposition of undue influence of the party on whom the burden of the original wrong principally rests, or where his consent to the transaction was itself procured by fraud."

However, no damages can be recovered under Articles 19 and 21 where the sexual intercourse is a product of voluntariness and mutual desire (*Hermosisima v. Court of Appeals*, 109 Phil. 629). Thus, in *Constantino v. Mendez*, 209 SCRA 18, where it was shown that where a man invited the woman to go to a hotel after meeting in a restaurant and that the woman was 28 years old then and admitted that she was attracted to the man and that sexual intercourse transpired between the two even after the man confessed that he was married, the Supreme Court, in disregarding the claim of the woman that she was deceived by the man in his representation that he would have his marriage with his present wife annulled and thereafter he would marry her, accordingly held that no damages under Articles 19 and 21 can be awarded to the woman because the attraction to the man was 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 sexual relation with the man when she was informed after their first sexual intercourse that he was a married man. Her declaration that in the following three months, they repeated their sexual intercourse only indicated that passion and not the alleged promise of marriage was the moving force that made her submit herself to the man.

> **Article 22. Every person who through an act or 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.**

Article 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.

UNJUST ENRICHMENT. No person can claim what is not validly and legally his or hers. Hence, he or she should not unduly profit on something which does not meritoriously belong to him or her. This is the concept of Article 22, namely, the prevention of unjust enrichment. Thus, in a case where an original buyer bought 170 cavans of palay from the seller which, though partly unpaid, the said original buyer later sold and delivered the said rice to a third person who, in turn, upon being informed that the said cavan of palay was not yet fully paid from the original seller, was reimbursed of the amount of money he paid to the original buyer but did not deliver back the subject cavan of palay, the Supreme Court, referring to Article 22, observed and ruled:

> Having been repaid the purchase price by Chan Lin, the sale, as between them, had been voluntarily rescinded, and the petitioner-defendant was thereby divested of any claim to the rice. Technically, therefore, he should return the rice to Chan Lin, but since even the latter, again from the petitioner-defendant's own testimony above-quoted, was ready to return the rice to Sandoval, and the latter's driver denies that the rice had been returned by petitioner-defendant either to him or to Chan Lin, it follows that petitioner-defendant should return the rice to Sandoval. Petitioner-defendant cannot be allowed to unjustly enrich himself at the expense of another by holding on to property no longer belonging to him. In law and in equity, therefore, Sandoval is entitled to recover the rice, or the value thereof since he was not paid the price therefor (*Obana v. Court of Appeals*, 135 SCRA 557).

Also, in a case where the receiver of certain properties, without approval of the court that appointed him as receiver, entered in an indemnity agreement whereby he bound himself liable as principal to the obligations of the corporation under receivership, such that the creditor of the corporation sought payment of the construction materials and improvements made on a theater owned by the corporation under receivership from the said receiver who evaded payment on the ground that the theater was adjudicated in another court case as belonging to him and not the corporation

under receivership, the Supreme Court held that it is but just that said owner-receiver should reimburse the creditor of the cost of improvements made on the theater as he benefited from it and further observed and ruled:

> Moreover, it will be recalled that the obligation due the Pacific Merchandising Corporation represented the cost of materials used in the construction of the Paris Theatre. There can not be any question that such improvements, in the final analysis, redounded to the advantage and personal profit of appellant Pajarillo because the judgment in Civil Case No. 50201, which was in substance affirmed by the Appellate Court ordered that the "possession of the lands, buildings, equipment, furniture, and accessories * * *" of the theater be transferred to said appellant as owner thereof.
>
> As the trial court aptly observed "* * * it is only simple justice that Pajarillo should pay for the said claim; otherwise, he would be enriching himself without paying the plaintiff for the cost of certain materials that went into its construction. * * * It is argued, however, that he did so only as a receiver x x x but all of the properties of Leo enterprises passed on to Pajarillo by virtue of the judgment in Civil Case No. 50210 * * * * *." The Roman Law principle of *"Nemo cum alterious detrimento locupletari potest"* is embodied in Article 22 (Human Relations) and Articles 2142 to 2175 (Quasi-Contracts) of the New Civil Code. Long before the enactment of this Code, however, the principle of unjust enrichment, which is basic in every legal system, was already expressly recognized in this jurisdiction.
>
> As early as 1903, in *Perez v. Pomar*, 2 Phil. 682, this Court ruled that where one has rendered services to another, and these services are accepted by the latter, in the absence of proof that the service was rendered gratuitously, it is but just that he should pay a reasonable remuneration therefor because "it is a well-known principle of law, that no one should be permitted to enrich himself to the damage of another." Similarly in 1914, this Court declared that in this jurisdiction, even in the absence of statute, "* * * under the general principle that one person may not enrich himself at the expense of another, a judgment creditor would not be permitted to retain the purchase price of land sold as the property of the judgment debtor after it has been made to appear that the judgment debtor had no title thereto * * *." The foregoing equitable principle which springs from the fountain of good conscience are applicable to the case at bar (*Pacific Merchandising Corporation v. Consolacion Insurance & Surety Co., Inc.*, 73 SCRA 564).

In *Republic v. Ballocanag* G.R. No. 163794, November 28, 2008, 572 SCRA 436, where a person in good faith invested money to develop and grow fruit-bearing trees on land which he believed as his own but which turned out as timberland belonging to the State, the Supreme Court recognized the ownership of the State over the land but ordered it to pay the person the value of the actual improvements he made. More particularly, the Supreme Court said:

> To order Reyes to simply surrender all of these fruit-bearing trees in favor of the State — because the decision in the reversion case declaring that the land is part of inalienable forest land and belongs to the State is already final and immutable — would inequitably result in unjust enrichment of the State at the expense of Reyes, a planter in good faith.
>
> *Nemo cum alterius detrimento locupletari potest.* This basic doctrine on unjust enrichment simply means that a person shall not be allowed to profit or enrich himself inequitably at another's expense. There is unjust enrichment when a person unjustly retains a benefit to the loss of another, or when a person retains money or property of another against the fundamental principles of justice, equity and good conscience. Article 22 of the Civil Code states the rule in this wise:
>
> > 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.
>
> The requisites for the application of this doctrine are present in the instant case. There is enrichment on the part of the petitioner, as the State would come into possession of – and may technically appropriate – the more than one thousand fruit-bearing trees planted by the private respondent. There is impoverishment on the part of Reyes, because he stands to lose the improvements he had painstakingly planted and invested in. There is lack of valid cause for the State to acquire these improvements, because, as discussed above, Reyes introduced the improvements in good faith.
>
> The prohibition against unjust enrichment likewise applies to the Government. Thus, in *Republic v. Lacap,* G.R. No. 158253, March 2, 2007, 517 SCRA 255, where the contractor who was engaged by the government was found out to have an expired license in violation of the law, the Supreme Court ruled that this will subject the contractor to penalties but it would not deprive him of the payment due him. The Supreme

> Court said that "since respondent had rendered services to the full satisfaction and acceptance by petitioner, then the former should be compensated for them. To allow petitioner to acquire the finished project at no cost would undoubtedly constitute unjust enrichment for the petitioner to the prejudice of the respondent. Such unjust enrichment is not allowed by law."

As for Article 23, it likewise seeks to prevent unjust enrichment. The 1947 Code Commission illustrates, to wit:

> *For 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* (Report of the Code Commission, pages 41-42).

Article 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.

COURT VIGILANCE. The courts must render justice and, therefore, they must be very vigilant in protecting the rights of the disadvantaged with the end in view that any decision will be in consonance with what is right and legal. Thus, in *De Lima v. Laguna Tayabas Company*, 160 SCRA 70, where the pauper litigants, who were the aggrieved parties in a collision case which was pending for a long time with the court, appealed the decision of the lower court to the Court of Appeals on some points of law but not on the question of the interest which they believed should be awarded to them, the Supreme Court, because of the special circumstances of the case and of the litigants, decided to adopt a liberal view and decided even the issue on the interest which was not appealed in the Court of Appeals by observing and ruling, thus:

> At any rate, this Court is inclined to adopt a liberal stance in this case as We have done in previous decisions where We have held that litigations should, as much as possible, be decided on their merits and not on technicality.
>
> We take note of the fact that petitioners are litigating as paupers. Although they may not have appealed, they had filed their motion for reconsideration with the court *a quo* which

> unfortunately did not act on it. By reason of their indigence, they failed to appeal but petitioners De Lima and Requijo had filed their manifestation making reference to the law and jurisprudence upon which they base their prayer for relief while petitioner Flores filed a brief.
>
> Pleadings as well as remedial laws should be construed liberally in order that the litigants may have ample opportunity to pursue their respective claims and that a possible denial of substantial justice due to legal technicalities may be avoided.
>
> Moreover, under the circumstances of this case where the heirs of the victim in the traffic accident chose not to appeal in the hope that the transportation company will pay the damages awarded by the lower court but unfortunately said company still appealed to the Court of Appeals, which step was obviously dilatory and oppressive of the rights of the said claimants: that the case had been pending in court for about 30 years from the date of the accident in 1958 so that as an exception to the general rule aforestated, the said heirs who did not appeal judgment, should be afforded equitable relief by the courts as it must be vigilant for their protection (see Article 24, Civil Code). The claim for legal interest and increase in the indemnity should be entertained in spite of the failure of the claimants to appeal the judgment.

In a case where the parties executed a contract, implemented it for a lengthy period of time pursuant to its unambiguous provisions, and benefited from the same, the Supreme Court rejected the claim of one of the parties that the said party was disadvantaged pursuant to Article 24 considering that it was proven that the parties undertook a lengthy negotiations before the contract was finalized and that the said party was good in business (*Spouses Domingo v. Astorga*, G.R. No. 130982, September 16, 2005).

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

EXTRAVAGANCE DURING EMERGENCY. The law seeks to prevent inconsiderate and ostentatious activities during times of emergency. However, Article 25 specifically provides for the entities which are given legal standing to seek an injunction: any government or private charitable institution.

Article 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.

PROTECTION OF HUMAN DIGNITY. The explanation of the 1947 Civil Code Commission relative to the inclusion of Article 26 in the New Civil Code is quite elucidating.

> The sacredness of human personality is a concomitant of every plan for human amelioration. The touchstone of every system of laws, of the culture and civilization of every country, is how far it dignifies man. If in legislation, inadequate regard is observed for human life and safety; if the laws do not sufficiently forestall human suffering or do not try effectively to curb those factors or influences that would the noblest sentiments; if the statutes insufficiently protect persons from being unjustly humiliated, in short, if human personality is not properly exalted — then the laws are indeed defective. Sad to say, such is to some degree the present state of legislation in the Philippines. To remedy this grave fault in the laws is one of the principal aims of the Project Civil Code. Instances will now be specified x x x (text of Article 26 omitted).
>
> The privacy of one's home is an inviolable right. Yet, the laws in force do not squarely and effectively protect this right.
>
> The acts referred to in No. 2 are multifarious, and yet many of them are not within the purview of the laws in force. Alienation of the affection of another's wife or husband, unless it constitutes adultery or concubinage, is not condemned by the law, much as it may shock society. There are numerous acts, short of criminal unfaithfulness, whereby the husband or wife

breaks the marital vows, thus causing untold moral suffering to the other spouse. Why should not these acts be the subject matter of a civil action for moral damages? In American law they are.

Again, there is the meddling of so-called friends who poison the mind of one or more members of the family against the other members. In this manner, many a happy family is broken up or estranged. Why should not the law try to stop this by creating a civil action for moral damages?

Of the same nature is that class of acts specified in No. 3: intriguing to cause another to be alienated from his friends.

Not less serious are the acts mentioned in No. 4: vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect or other personal conditions. The penal laws against defamation and unjust vexation are glaringly inadequate.

Religious freedom does not authorize anyone to heap obloquy and disrepute upon another by reason of the latter's religion.

Not a few of the rich people treat the poor with contempt because of the latter's lowly station in life. To a certain extent this is inevitable, from the nature of the social make-up, but there ought to be a limit somewhere, even when the penal laws against defamation and unjust vexation are not transgressed. In a democracy, such a limit must be established. The courts will recognize it in each case. Social equality is not sought by the legal provision under consideration, but due regard for decency and propriety.

Place of birth, physical defect and other personal conditions are too often the pretext of humiliation cast upon persons. Such tampering with human personality, even though the penal laws are not violated, should be the cause of civil action.

The article under study denounced "similar acts" which could readily be named, for they occur with unpleasant frequency (Report of the Code Commission, pages 32 to 34).

In *RCPI v. Verchez,* G.R. No. 164349, January 31, 2006, where a family in Sorsogon sent a telegram to another member of a family in Manila asking for money for their ailing mother; and where the telegram-company was negligent in failing to send the telegram on time and in not immediately informing the family of the reason for the delay, thereby causing filial disturbance on the part of the family as they blamed each other for failing to respond immediately to the

emergency involving their mother, the Supreme Court awarded damages on the basis of Article 26(2) of the Civil Code considering that the act or omission of the telegraph company disturbed the peace of mind of the family.

> **Article 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.**

RELIEF AGAINST PUBLIC OFFICIALS. A public official is supposed to be an agent or at least a representation of the government and, therefore, the law exacts on him or her an obligation to be very vigilant and just so that the public can be assured that the government is truly effective in servicing their needs. Any person, suffering from the refusal or neglect of any government employee or public servant to perform his duties, is entitled to damages. Thus, in a case where the president of a state college, in bad faith and despite the decision and directives of the Office of the Bureau of Public Schools, refused to graduate a student with honors, an award which the student honestly earned and deserved, the Supreme Court ruling that the award of damages in favor of the said student under Article 27 was proper (*Ledesma v. Court of Appeals*, 160 SCRA 449). Thus, the Supreme Court said:

> The Solicitor General tries to cover-up the petitioner's deliberate omission to inform Miss Delmo by stating that it was not the duty of the petitioner to furnish her a copy of the Director's decision. Granting this to be true, it was nevertheless the petitioner's duty to enforce the said decision. He could have done so considering that he received the decision on April 27, 1966 and even though he sent it back with the records of the case, he undoubtedly read the whole of it which consisted of only three pages. Moreover, the petitioner should have had the decency to meet with Mr. Delmo, the girl's father, and inform the latter, at the very least of the decision. This, the petitioner likewise failed to do, and not without the attendant bad faith which the appellate court correctly pointed in its decision, to wit:
>
> "Third, assuming that defendant could not furnish Miss Delmo of a copy of the decision, he could have used his

> discretion and plain common sense by informing her about it or he could have directed the inclusion of Miss Delmo's honor in the printed commencement program or announced it during the commencement exercises.
>
> "Fourth, defendant despite receipt of the telegram of Director Bernardino hours before the commencement exercises on May 3-4 1966, disobeyed his superior by refusing to give the honors due Miss Delmo with a lame excuse that he would be embarrassed if he did so, to the prejudice of and in complete disregard of Miss Delmo's rights.
>
> "Fifth, defendant did not even extend the courtesy of meeting Pacifico Delmo, father of Miss Delmo, who tried several times to see defendant in his office, thus Mr. Delmo suffered extreme disappointment and humiliation.
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> x x x x x x x x x
>
> "Defendant, being a public officer should have acted with circumspection and due regard to the rights of Miss Delmo. Inasmuch as he exceeded the scope of his authority by defiantly disobeying the lawful directive of his superior, Director Bernardino, defendant is liable for damages in his personal capacity."

Also, in *Vda. de Laig v. Court of Appeals*, 82 SCRA 294, where the register of deeds assisted in the fraudulent procurement of a certificate of title in violation of the Land Registration Act (Act No. 496), the Supreme Court ruled that he was liable for damages under Article 27 by pronouncing:

> For in essence, his refusal to follow the directive of law (Act No. 496) was conduct injurious to petitioner. Thus, a chief of police is liable under Article 27 of the New Civil Code for refusal to give assistance to the complainants which was his official duty as an officer of the law (*Amarro, et al. v. Sumnanggit,* L-14986, July 31, 1962, 5 SCRA 707-709). Similarly, a municipal mayor incurs the same liability for neglecting to perform his official functions (*Javellana v. Tayo*, L-18919, December 29, 1962, 6 SCRA 1042, 1051).

In *Correa v. CFI of Bulacan*, 92 SCRA 312, where a mayor was personally held liable for illegally dismissing policemen even if such mayor had relinquished his position, the Supreme Court ruled:

> A public officer who commits a tort or other wrongful act, done in excess or beyond the scope of his duty, is not protected

> by his office and is personally liable therefor like any private individual (*Palma v. Graciano*, 99 Phil. 72, 74; *Carreon v. Province of Pampanga*, 99 Phil. 808). This principle of personal liability has been applied to cases where a public officer removes another officer or discharges an employee wrongfully, the reported cases saying that by reason of non-compliance with the requirements of law in respect to removal from office, the officials were acting outside of their official authority (*Stiles v. Lowell*, 233 Mass. 174, 123 NE 615, 4 ALR 1365, cited in 63 Am. Jur. 2d 770).

Article 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 damage.

UNFAIR COMPETITION. The 1947 Civil Code Commission justifies the inclusion of this provision by saying that it

> is necessary in a system of free enterprise. Democracy becomes a veritable mockery if any person or group of persons by any unjust or highhanded method may deprive others of a fair chance to engage in business or earn a living (Report of the Code Commission, page 31).

Article 29. When the accused in 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.

CIVIL ACTION. Proof beyond reasonable doubt means that amount of proof which forms an abiding moral certainty that the accused committed the crime charged. It is not, therefore, absolute certainty. However, such degree of proof is more exacting than what is needed in a civil case which is merely preponderance of evidence. Preponderance of evidence means that, as a whole, the evidence adduced by one side outweighs that of the adverse party (*Sarmiento v. Court of Appeals*, G.R. No. 96740, March 25, 1999). Hence, if the guilt of the accused is not proven beyond reasonable doubt, a civil action to prove the civil liability can still be filed where only preponderance of evidence is needed. The fact that the guilt was not proven beyond reasonable doubt must be expressly stated in the criminal decision. However, if it is not so expressly stated, it can be inferred from the decision itself. Thus, in a case where the accused was acquitted of estafa after a civil case was filed against the accused arising from the same transaction for purposes of the civil liability, the Supreme Court overruled the decision of the trial court dismissing the civil complaint by observing and ruling as follows:

> The appellant contends that the trial court committed error in dismissing the present action. It is claimed that as in its decision in Criminal Case No. 3219 the trial court did not make any express finding that the fact on which the action was predicated did not exist, but merely found that "the prosecution has not proved beyond reasonable doubt that the defendant had in fact represented to Gaudencio T. Mendoza that he had 100 cavans of palay stored in his sister's bodega, which he offered to sell for P1,100.00," that "there is sufficient evidence to warrant a finding that there had been no deceit or misrepresentation and that Exhibit B is not what it purports to be," and that "any obligation which the defendant may have incurred in favor of Gaudencio T. Mendoza is purely civil in character, and not criminal," which findings amount to a declaration that the defendant was acquitted on reasonable doubt, a civil action based on the same transaction may still be instituted.
>
> The appellee, on the other hand, maintains that the judgment appealed from is correct. It is urged that the findings made in the said decision, particularly those quoted above, amount to a declaration that the transaction which was the subject matter of that criminal case did not exist and no civil action based on that same transaction would lie.
>
> The pertinent provisions of law are Article 29 of the new Civil Code and Rule 107, Section 1, Subsection (d) of the Rules of Court. x x x

Interpreting the scope of the above quoted provisions of law, we held in the case of *Philippine National Bank v. Catipon*, 52 O.G. 3589, that:

> The acquittal of the accused of the charge of estafa predicated on the conclusion "that the guilt of the defendant has not been *satisfactorily* established," is equivalent to one on reasonable doubt and does not preclude a suit to enforce the civil liability for the same act or omission under Article 29 of the new Civil Code.

and in *Republic of the Philippines v. Asaad*, 51 O.G. 703, that —

> A judgment of acquittal does not constitute a bar to a subsequent civil action involving the same subject matter, even in regard to a civil action brought against the defendant by the State, nor is it evidence of his innocence in such action, and is not admissible in evidence to prove that he was not guilty of the crime with which he was charged (50 C.J.S., pp. 272-273; 30 Am. Jur., 1003).

As we analyze the record in the light of the above provisions of law and jurisprudence, we are fully persuaded that appellant's contention is not without foundation. It will be noted that nowhere in the decision rendered in Criminal Case No. 3219 of the Court of First Instance of Nueva Ecija is found an express declaration that the fact from which the civil action might arise did not exist. It is true that said decision likewise contains no express declaration that the acquittal of the defendant was based upon reasonable doubt. Whether or not, however, the acquittal is due to that ground may, under the above quoted provision of Article 29 of the Civil Code, be inferred from the test of the decision, and a close consideration of the language used in said decision, particularly the findings above, which are of similar import as the phrase "that the guilt of the defendant has not been satisfactorily established," held in *Philippine National Bank v. Catipon, supra*, to be equivalent to a declaration that the acquittal was based on reasonable doubt, convinces us that the acquittal of the defendant in the criminal case in question was predicated on the conclusion that his guilt of the crime charged has not been proved beyond reasonable doubt and does not preclude a suit to enforce the civil liability arising from the same transaction which was the subject-matter of said criminal action. The right, therefore, of the appellant to bring the present action cannot be questioned, the fact that he did not reserve his right to file an independent civil action, and this action has been instituted before final judgment in the

> criminal case rendered, notwithstanding. The declaration in the decision in Criminal Case No. 3219 to the effect that "any obligation which the defendant may have incurred in favor of Gaudencio T. Mendoza is purely civil in character, and not criminal," amounts to a reservation of the civil action in favor of the offended party, *Philippine National Bank v. Catipon, supra*, and the offense charged in said criminal case being estafa, which is fraud, the present action falls under the exception to the general rule and it can be filed independently of the criminal action (*Mendoza v. Alcala*, 2 SCRA 1032).

Article 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.

CIVIL OBLIGATION ARISING FROM A CRIMINAL OFFENSE. Even if the civil obligation arose from a criminal offense, the required quantum of evidence in a civil suit to claim such civil obligation is not proof beyond reasonable doubt but merely preponderance of evidence.

Article 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.

CIVIL OBLIGATION NOT ARISING FROM FELONY. There are certain injuries which do not necessarily arise from the commission of a crime. Article 31 seeks to give an aggrieved party a remedy and a cause of action in this kind of situations. An example of this is quasi-delict which is governed by Articles 2176 to 2194 of Title XVII, Chapter 2 of the New Civil Code. Pertinently, Article 2176 of the Civil Code provides that:

> Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.

The learned opinion of the late Supreme Court Associate Justice Francisco R. Capistrano who was a member of the 1947 Civil Code Commission on the nature of Article 31 contained in the notes of *Corpus v. Page*, 28 SCRA 1062, 1068, 1069, is quite enlightening, thus:

> Article 31 of the Civil Code does not provide for an independent civil 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 is based on the obligation 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. Article 31 (drafted by Code Commissioner Capistrano) which provides:
>
> > 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
>
> states a self-explanatory rule different and distinct from that laid down in Articles 32, 33 and 34. *For 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. The distinction is made in Article 2177 itself which in part provides that:
>
> > Responsibility for fault or negligence under the preceding article is entirely separate and distinct from the civil liability arising from negligence under the Penal Code. But plaintiff cannot recover damages twice for the same act or omission of the defendant.
>
> Code Commission chairman Bocobo, who drafted Article 2177 of the New Civil Code, took the distinction from modern authorities in civil law. Accordingly, the report of the Code Commission on the Project of Civil Code makes reference to the sources of the distinction, thus:
>
> > "The foregoing provision though at first sight startling, is not so novel or extraordinary when we consider the exact nature of criminal and civil

> negligence. The former is a violation of the criminal law, while the latter, is a distinct and independent negligence, which is the *'culpa aquiliana'* or quasi-delict, of ancient origin, having always had its own foundation and individuality, separate from criminal negligence. Such distinction between criminal negligence and 'culpa extra-contractual' or *'quasi-delito'* has been sustained by decisions of the Supreme Court of Spain and maintained as clear, sound, and perfectly tenable by Maura, an outstanding Spanish jurist."
>
> Therefore, under the proposed Article 2177, acquittal from an accusation of criminal negligence, whether on reasonable doubt or not, shall not be a bar to a subsequent civil action, not for civil liability arising from criminal negligence but for damages due to a *'quasi-delict*' or *'culpa aquiliana.'* But said article forestalls a double recovery (Capistrano, Civil Code of the Philippines, With Comments and Annotations, Volume 4, p. 470).

Article 31 likewise applies to *culpa contractual*. Thus, in a case where, due to the reckless imprudence of the driver of a bus company, the bus being driven fell off a deep precipice resulting in the death of and injuries to certain passengers and where the driver was later acquitted in the consequent criminal case for double homicide thru reckless imprudence on the ground that his guilt was not proven beyond reasonable doubt and where the aggrieved parties later on filed a civil case against the bus company for failure of the said company to carry the passengers safely to their destination but which civil case was dismissed, the Supreme Court held that the lower court erred in dismissing the civil case because, even if the driver was acquitted in the criminal case.

Article 31 of the Civil Code expressly provides that when the civil action is based upon 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. This provision evidently refers to a civil action based, not on the act or omission charged as a felony in a criminal case, but to one based on an obligation arising from other sources, such as law or contract. Upon the other hand, it is clear that a civil action based on contractual liability of a common carrier is distinct from the criminal action instituted against the carrier or its employee based on the latter's criminal negligence. The first is governed by

the provision of the Civil Code, and not those of the Revised Penal Code, and it being entirely separate and distinct from the criminal action, the same may be instituted and prosecuted independently of, and regardless of the result of the latter (*Visayan Land Transportation Co. v. Meijuz, et al.*, G.R. Nos. L-8830, L-8837-39, 52 O.G., p. 4241).

The civil action instituted against appellee in this case is based on alleged *culpa contractual* incurred by it due to its failure to carry safely the late Nicasio Bernaldes and his brother Jovito in their place of destination, whereas the criminal action instituted against the appellee's driver involved exclusively the criminal liability of the latter arising from his criminal negligence. In other words, the appellant's action concerned the civil liability of appellee as a common carrier, regardless of the liabilities of its driver who was charged in the criminal case. x x x (*Bernaldes, Sr. v. Bohol Land Transportation, Inc.*, 7 SCRA 276).

Article 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 witness 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 or 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.

PARTICULAR WRONG OR INJURY. In *Liwayway Vinzons-Chato v. Fortune Tobacco Corporation*, G.R. No. 141309, December 23, 2008, 575 SCRA 23, the Supreme Court had occasion to discuss the applicability of Article 32 in relation to public officers, thus:

> There are two kinds of duties exercised by public officers: the "duty owing to the public collectively" (the body politic), and the "duty owing to particular individuals," thus:
>
> > **1. Of Duties to the Public.** — The first of these classes embraces those officers whose duty is owing primarily to the public collectively — to the body politic — and not to any particular individual; who act for the public at large, and who are ordinarily paid out of the public treasury.
> >
> > The officers whose duties fall wholly or partially within this class are numerous and the distinction will be readily recognized. Thus, the governor owes a duty to the public to see that the laws are properly executed, that fit and competent officials are appointed by him, that unworthy and ill-considered acts of the legislature do not receive his approval, but these, and many others of a like nature, are duties which he owes to the public at large and no one individual could single himself out and assert that they were duties owing to him alone. So, members of the legislature owe a duty to the public to pass only wise and proper laws, but no one person could pretend that the duty was owing to himself rather than to another. Highway commissioners owe a duty that they will be governed only by considerations of the public good in deciding upon the opening or closing of highways, but it is not a duty to any particular individual of the community.
> >
> > These illustrations might be greatly extended, but it is believed that they are sufficient to define the general doctrine.

> **2. Of Duties to Individuals. –** The second class above referred to includes those who, while they owe to the public the general duty of a proper administration of their respective offices, yet become, by reason of their employment by a particular individual to do some act for him in an official capacity, under a special and particular obligation to him as an individual. They serve individuals chiefly and usually receive their compensation from fees paid by each individual who employs them.
>
> A sheriff or constable in serving civil process for a private suitor, a recorder of deeds in recording the deed or mortgage of an individual, a clerk of court in entering up a private judgment, a notary public in protesting negotiable paper, an inspector of elections in passing upon the qualifications of an elector, each owes a general duty of official good conduct to the public, but he is also under a special duty to the particular individual concerned which gives the latter a peculiar interest in his due performance.

In determining whether a public officer is liable for an improper performance or non-performance of a duty, it must first be determined which of the two classes of duties is involved. For, indeed, as the eminent Floyd R. Mechem instructs, "[t]he *liability* of a public officer to an individual or the public is based upon and is co-extensive with his *duty* to the individual or the public. If to the one or the other he owes no duty, to that one he can incur no liability."

Stated differently, when what is involved is a "duty owing to the public in general," an individual cannot have a cause of action for damages against the public officer, even though he may have been injured by the action or inaction of the officer. In such a case, there is damage to the individual but no wrong to him. In performing or failing to perform a public duty, the officer has touched his interest to his prejudice; but the officer owes no duty to him as an individual. The remedy in this case is not judicial but political.

The exception to this rule occurs when the complaining individual suffers a *particular or special injury* on account of the public officer's improper performance or non-performance of his public duty. An individual can never be suffered to sue for an injury which, technically, is one to the public only; he must show a wrong which he specially suffers, and damage alone does not constitute a wrong. A contrary precept (that an individual,

in the absence of a special and peculiar injury, can still institute an action against a public officer on account of an improper performance or non-performance of a duty owing to the public generally) will lead to a deluge of suits, for if one man might have an action, all men might have the like — the complaining individual has no better right than anybody else. If such were the case, no one will serve a public office. Thus, the rule restated is that an individual cannot have a particular action against a public officer *without a particular injury, or a particular right,* which are the grounds upon which all actions are founded.

Juxtaposed with Article 32 of the Civil Code, the principle may now translate into the rule that *an individual can hold a public officer personally liable for damages on account of an act or omission that violates a constitutional right only if it results in a particular wrong or injury to the former.* This is consistent with this Court's pronouncement in its June 19, 2007 Decision (subject of petitioner's motion for reconsideration) that Article 32, in fact, allows a damage suit for "tort for impairment of rights and liberties."

It may be recalled that in tort law, for a plaintiff to maintain an action for damages for the injuries of which he complains, he must establish that such injuries resulted *from a breach of duty which the defendant owed the plaintiff*, meaning *a concurrence of injury to the plaintiff and legal responsibility by the person causing it.* Indeed, central to an award of tort damages is the premise that an individual was injured in contemplation of law. Thus, in *Lim v. Ponce de Leon,* we granted the petitioner's claim for damages because he, in fact, suffered the loss of his motor launch due to the illegal seizure thereof. In *Cojuangco, Jr. v. Court of Appeals,* we upheld the right of petitioner to the recovery of damages as there was an injury sustained by him on account of the illegal withholding of his horserace prize winnings.

In the instant case, what is involved is a public officer's duty owing to the public in general. The petitioner, as the then Commissioner of the Bureau of Internal Revenue, is being taken to task for Revenue Memorandum Circular (RMC) No. 37-93 which she issued without the requisite notice, hearing and publication, and which, in *Commissioner of Internal Revenue v. Court of Appeals,* we declared as having "fallen short of a valid and effective administrative issuance." A public officer, such as the petitioner, vested with quasi-legislative or rule-making power, owes a duty to the public to promulgate rules which are compliant with the requirements of valid administrative regulations. But it is a duty owed not to the respondent alone,

but to the entire body politic who would be affected, directly or indirectly, by the administrative rule.

Furthermore, as discussed above, to have a cause of action for damages against the petitioner, respondent must allege that it suffered a *particular or special injury* on account of the non-performance by petitioner of the public duty. A careful reading of the complaint filed with the trial court reveals that no *particular injury* is alleged to have been sustained by the respondent. The phrase "financial and business difficulties" mentioned in the complaint is a vague notion, ambiguous in concept, and cannot translate into a "particular injury." In contrast, the facts of the case eloquently demonstrate that the petitioner took nothing from the respondent, as the latter did not pay a single centavo on the tax assessment levied by the former by virtue of RMC 37-93.

With no "particular injury" alleged in the complaint, there is, therefore, no delict or wrongful act or omission attributable to the petitioner that would violate the primary rights of the respondent. Without such delict or tortious act or omission, the complaint then fails to state a cause of action, because a cause of action is the act or omission by which a party violates a right of another.

A cause of action exists if the following elements are present: (1) a right in favor of the plaintiff by whatever means and under whatever law it arises or is created; (2) an obligation on the part of the named defendant to respect or not to violate such right; and (3) an act or omission on the part of such defendant violative of the right of the plaintiff or constituting a breach of the obligation of defendant to plaintiff for which the latter may maintain an action for recovery of damages.

SEPARATE CIVIL ACTION FOR VIOLATION OF CONSTITUTIONAL RIGHTS. The 1947 Code Commission found it imperative that a separate civil action is necessary for the violation of the individual's constitutional rights.

The creation of an absolutely separate and independent civil action for the violation of civil liberties is essential to the effective maintenance of democracy, for these reasons:

(1) In most cases, the threat to freedom originates from abuses of power of government officials and peace officers. Heretofore, the citizen had to depend upon the prosecution attorney for the institution of criminal proceedings, in order that the wrongful act might 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 Project of Civil Code, would afford the proper remedy by preponderance of evidence.
>
> (3) Direct and open violations 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 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 Project of 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 (Report of the Code Commission, pages 30-31).

Thus, in *Aberca v. Ver,* 160 SCRA 590, where the plaintiffs alleged that the defendants who were members of a military raiding team were liable for damages for violating their rights when the said raiding team, in undertaking its raid, employed defectively issued search warrants; confiscated a number of purely personal items belonging to plaintiffs; made arrests without proper warrants from the courts; denied them visits of relatives and lawyers; interrogated them in violation of their right to counsel; and employed, during the interrogation, threats, tortures and other forms of violence to obtain incriminatory information or confessions, all in violation of their constitutional rights, the trial court, upon motion of the Solicitor General, dismissed the case on the ground that the plaintiffs stated no cause of action for damages; that the defendants were immune from liability for acts done in the performance of their official duties; and that, as to the plaintiffs, the privilege of *habeas corpus* had been suspended. The Supreme Court reversed the decision of the lower court and stated, among others, that the plaintiffs had a

cause of action on the basis of Article 32 of the Civil Code. In further explaining the import of Article 32, the Supreme Court stated, thus:

> "It is obvious that the above codal provision is to provide a sanction to the deeply cherished rights and freedoms enshrined in the Constitution. Its message is clear: no man may seek to violate those sacred rights with impunity. In times of great upheaval or of social and political stress, when the temptation is strongest to yield, borrowing the words of Chief Justice Claudio Teehankee, to the law of force rather than the force of the law, it is necessary to remind ourselves that certain basic rights and liberties are immutable and cannot be sacrificed to the transient needs of imperious demands of the ruling power. The rule of law must prevail, or else liberty will perish. Our commitment to democratic principles and to the rule of law compels us to reject the view which reduces law to nothing but the expression of the will of the predominant power in the community. "Democracy cannot be a reign of progress, of liberty, of justice unless the law is respected by him who makes it and by him for whom it is made. Now this respect implies a maximum of faith, a minimum of idealism. On going to the bottom of the matter, we discover that life demands of us a certain *residuum* of sentiment which is not derived from reason, but which reason nevertheless controls."
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> x x x x x x x x x
>
> It may be that the respondents, as members of the Armed Forces of the Philippines, were merely responding to a call of duty, as they claim, "to prevent or suppress lawless violence, insurrection, rebellion and subversion" in accordance with Proclamation No. 2054 of President Marcos, despite the lifting of Martial Law on January 27, 1981, and in pursuance of such objective, to launch pre-emptive strikes against alleged communist terrorist's underground houses. But this cannot be construed as a blanket license of a roving commission untrammeled by any constitutional restraint, to disregard or transgress upon the rights and liberties of the individual citizen enshrined in and protected by the Constitution. The Constitution remains the supreme law of the land to which all officials, high or low, civilian or military, owe obedience and allegiance at all times.
>
> Article 32 of the Civil Code which renders any public officer or employee or any private individual liable in damages for violating the constitutional rights and liberties of another, as enumerated therein, does not exempt the respondents from responsibility. Only judges are excluded from liability under the

said article, provided their acts or omissions do not constitute a violation of the Penal Code or other penal statute.

This is not to say that military authorities are restrained from pursuing their assigned task of carrying out their mission with vigor. We have no quarrel with their duty to protect the Republic from its enemies, whether of the left or of the right, or from within or without, seeking to destroy our democratic institutions and imperil their very existence. What we are merely trying to say is that in carrying out this task and mission, constitutional and legal safeguards must be observed; otherwise, the very fabric of our faith will start to unravel. In the battle of competing ideologies, the struggle for the mind is just as vital as the struggle of arms. The linchpin in that psychological struggle is faith in the rule of law. Once that faith is lost or compromised, the struggle may well be abandoned.

x x x x x x x x x

This brings us to the crucial issue raised in this petition. May a superior officer under the notion of *respondeat superior* be answerable for damages, jointly and severally with his subordinates, to the person whose constitutional rights and liberties have been violated?

Respondents contend that the doctrine of *respondeat superior* is inapplicable to the case. We agree. The doctrine of *respondeat superior* has been generally limited in its application to principal and agent or to master and servant (*i.e.*, employer and employee) relationship. No such relationship exists between superior officers of the military and their subordinates.

Be that as it may, however, the decisive factor in this case, in our view, is the language of Article 32. The law speaks of an officer or employee or person "directly" or "indirectly" responsible for the violation of the constitutional rights and liberties of another. Thus, it is not the actor alone (*i.e.,* the one directly responsible) who must answer for damages under Article 32; the person indirectly responsible has also to answer for the damages or injury caused to the aggrieved party.

By this provision, the principle of accountability of public officials under the Constitution acquires added meaning and assumes a larger dimension. No longer may a superior official relax his vigilance or abdicate his duty to supervise his subordinates, secure in the thought that he does not have to answer for the transgressions committed by the latter against the constitutionally protected rights and liberties of the citizen. Part of the factors that propelled people power in February 1986 was the widely held perception that the government was callous

> or indifferent to, if not actually responsible for, the rampant violation of human rights. While it would certainly be too naive to expect that violators of human rights would easily be deterred by the prospect of facing damage suits, it should nonetheless be made clear in no uncertain terms that Article 32 of the Civil Code makes the persons who are directly, as well as indirectly, responsible for the transgression joint tortfeasors.

GOOD FAITH NOT A DEFENSE. In *Lim v. Ponce de Leon*, 66 SCRA 299, where a fiscal ordered the impounding of a stolen motor launch without a valid search warrant issued by a court despite having enough time to legally obtain one, and where a detachment commander of the province, faced with a possible disciplinary action, hesitantly seized the motor launch upon orders of the provincial commander who was in turn ordered by the fiscal, and where the fiscal, to prevent being made liable under Article 32 contended that he was in good faith and without malice in seizing the stolen boat while the detachment commander contended that he was obeying the order of a superior officer, the Supreme Court rejected the good faith defense of the fiscal but absolved the detachment commander, as he was led to believe that the order of the station commander was lawful. Pertinently, the Supreme Court in explaining Article 32 said:

> Defendant-appellee Fiscal Ponce De Leon wanted to wash his hands of the incident by claiming that "he was in good faith, without malice and without the lightest intention of inflicting injury to plaintiff-appellant, Jikil Taha." We are not prepared to sustain his defense of good faith. To be liable under Article 32 of the New Civil Code, it is enough that there was a violation of the constitutional rights of the plaintiffs and it is not required that defendants should have acted with malice or bad faith. Dr. Jorge Bocobo, Chairman of the Code Commission, gave the following reasons during the public hearings of the Joint Senate and House Committees, why good faith on the part of the public officer or employee is immaterial. Thus:
>
> "DEAN BOCOBO. Article 32, regarding individual rights, Attorney Cirilo Paredes proposes that Article 32 be so amended as to make a public official liable for violation of another person's constitutional rights only if the public official acted maliciously or in bad faith. The Code Commission opposes this suggestion for these reasons:
>
> "The very nature of Article 32 is that the wrong may be civil or criminal. It is not necessary therefore that there should be malice or bad faith. To make such a requisite would defeat

the main purpose of Article 32 which is that effective protection of individual rights. Public officials in the past have abused their powers on the pretest 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. In the United States this remedy is in the nature of a tort.

"Mr. Chairman, this article is firmly one of the fundamental articles introduced in the new Civil Code to implement democracy. There is no real democracy if a public official is abusing, and we made the article so strong and so comprehensive that it concludes an abuse of individual rights even if done in good faith, that official is liable. As a matter of fact, we know that there are very few public officials who openly and definitely abuse the individual rights of the citizens. In most cases, the abuse is justified on a plea of desire to enforce the law to comply with one's duty. And so, if we should limit the scope of this article, that would practically nullify the object of the article. Precisely, the opening object of the article is to put an end to abuses which are justified by a plea of good faith, which is in most cases the plea of officials abusing individual rights."

But defendant appellee Orlando Maddela cannot be held accountable because he impounded the motor launch upon the order of his superior officer. While a subordinate officer may be held liable for executing unlawful orders of his superior officer, there are certain circumstances which would warrant Maddela's exculpation from liability. The records show that after Fiscal Ponce de Leon made his first request to the Provincial Commander on June 15, 1962, Maddela was reluctant to impound the motor launch despite repeated orders from his superior officer. It was only after he was furnished a copy of the reply of Fiscal Ponce De Leon, dated June 26, 1962, to the letter of the Provincial Commander, justifying the necessity of the seizure of the motor launch on the ground that the subsequent sale of the launch to Delfin Lim could not prevent the court from taking custody of the same, that he impound the motor launch on July 6, 1962. With the letter coming from the legal officer of the province, Maddela was led to believe that there was a legal basis and authority to impound the launch. Then came the order of his superior officer to explain for the delay in the seizure of the motor launch. Faced with a possible disciplinary action from his commander, Maddela was left with no alternative but to seize the vessel. In the light of the above circumstances, We are not disposed to hold Maddela answerable for damages.

JUDGES. Article 32 provides that "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." In *Esguerra v. Gonzales-Asdala*, G.R. No. 168906, December 4, 2004, 573 SCRA 50, the Supreme Court said:

> Judges cannot be subjected to liability — civil, criminal or administrative — for any of their official acts, no matter how erroneous, so long as they act in good faith. It is only when they act fraudulently or corruptly, or with gross ignorance, may they be held criminally or administratively responsible.
>
> In *Ang v. Quilala,* we further explained that it is settled doctrine that judges are not liable to respond in a civil action for damages, and are not otherwise administratively responsible for what they may do in the exercise of their judicial functions when acting within their legal powers and jurisdiction. Certain it is that a judge may not be held administratively accountable for every erroneous order or decision he renders. To hold otherwise would be to render judicial office *untenable*, for no one called upon to try the facts or interpret the law in the process of administering justice can be infallible in his judgment. More importantly, the error must be gross or patent, deliberate and malicious, or incurred with evident bad faith. Bad faith does not simply connote bad judgment or negligence; it imputes a dishonest purpose or some moral obliquity and conscious doing of a wrong, a breach of a sworn duty through some motive or intent or ill will; it partakes of the nature of fraud. It contemplates a state of mind affirmatively operating with furtive design or some motive of self-interest or ill will for ulterior purposes.

Article 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.

RATIONALE. In all of the provisions in the Civil Code giving a right of independent civil actions which include Article 33, the Code Commission said:

> The underlying purpose of the principles 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 upon the government for the vindication of their own private rights. It is true that in many of the cases referred to in the provisions 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.
>
> In England and the United States, the individual may bring an action in tort for assault and battery, false imprisonment, libel and slander, deceit, trespass, malicious prosecution, and other acts which also fall within the criminal statutes. This independent civil action is in keeping with the spirit of individual initiative and the intense awareness of one's individual rights in those countries.
>
> Something of the same sense of self-reliance in the enforcement of one's rights is sought to be nurtured by the Project of Civil Code. Freedom and Civil Courage thrive best in such an atmosphere, rather than under a paternalistic system of law (Report of the Code Commission, pages 46-47).

DEFAMATION, FRAUD AND PHYSICAL INJURIES. The terms fraud, defamation and physical injuries must be understood in their ordinary sense. Hence, fraud can include estafa; defamation can include libel. Physical injuries can include death or the crime of homicide (*Dyogi v. Yatco*, G.R. No. L-9623, January 22, 1957) but it cannot include reckless imprudence resulting in homicide (*Marcia v. Court of Appeals*, 120 SCRA 200).

> Criminal negligence, that is, reckless imprudence, is not one of the three crimes mentioned in Article 33 of the Civil Code which authorizes the institution of an independent civil action, that is, of an entirely separate and distinct civil action for damages, which shall proceed independently of the criminal prosecution and shall be proved by a preponderance of evidence. x x x The law penalizes thus the negligent act or careless act, not the result thereof. The gravity of the consequences is only taken into account to determine the penalty; it does not qualify the substance of the offense. x x x As reckless imprudence or criminal negligence is not one of the three crimes mentioned in Article 33 of the Civil Code, there is no independent civil action for damages that may be instituted in connection with the same offense. Hence, homicide through reckless imprudence or criminal negligence comes under the general rule that the

acquittal of the defendant in the criminal action is a bar to his civil liability based upon the same criminal act x x x (*Corpus v. Paje*, 28 SCRA 1062).

Article 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.

MEMBERS OF POLICE FORCE. It is the duty of police officers to see to it that peace and order are maintained in the community. Hence, should a citizen go to them to seek assistance, their failure or refusal to render the needed assistance to maintain lawful order can be a basis for claiming damages against them. The city or municipality shall be subsidiarily responsible therefor.

Article 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 shall be supported by 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.

RESERVATION OF CIVIL ACTIONS. Rule 111 of the Rules of Court of the Philippines sets out the procedure with respect to the

reservations in criminal cases with respect to the civil liability of the accused. Thus,

> Section 1. *Institution of criminal and civil actions.* — (a) 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 his right to institute it separately or institutes the civil action prior to the criminal action.
>
> 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.
>
> When the offended party seeks to enforce civil liability against the accused by way of moral, nominal, temperate, or exemplary damages without specifying the amount thereof in the complaint or information, the filing fees therefor shall constitute a first lien on the judgment awarding such damages.
>
> Where the amount of damages, other than actual, is specified in the complaint or information, the corresponding filing fees shall be paid by the offended party upon the filing thereof in court.
>
> Except as otherwise provided in these Rules, no filing fees shall be required for actual damages.
>
> No counterclaim, cross-claim or third-party complaint may be filed by the accused in the criminal case, but any cause of action which could have been the subject thereof may be litigated in a separate civil action. (1a)
>
> (b) The criminal action for violation of Batas Pambansa Blg. 22 shall be deemed to include the corresponding civil action. No reservation to file such civil action separately shall be allowed.
>
> Upon filing of the aforesaid joint criminal and civil actions, the offended party shall pay in full the filing fees based on the amount of the check involved, which shall be considered as the actual damages claimed. Where the complaint or information also seeks to recover liquidated, moral, nominal, temperate or exemplary damages, the offended party shall pay the filing fees based on the amounts alleged therein. If the amounts are not so alleged but any of these damages are subsequently awarded by the court, the filing fees based on the amount awarded shall constitute a first lien on the judgment.

Where the civil action has been filed separately and trial thereof has not yet commenced, it may be consolidated with the criminal action upon application with the court trying the latter case. If the application is granted, the trial of both actions shall proceed in accordance with section 2 of this Rule governing consolidation of the civil and criminal action.

Section 2. *When separate civil action is suspended.* — After the criminal action has been commenced, the separate civil action arising therefrom cannot be instituted until final judgment has been entered in the criminal action.

If the criminal action is filed 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 in the court trying the criminal action. In case of consolidation, the evidence already adduced in the civil action shall be deemed automatically reproduced in the criminal action without prejudice to the right of the prosecution to cross-examine the witnesses presented by the offended party in the criminal case and of the parties to present additional evidence. The consolidated criminal and civil actions shall be tried and decided jointly.

During the pendency of the criminal action, the running of the period of prescription of the civil action which cannot be instituted separately or whose proceeding has been suspended shall be tolled. (n)

The extinction of the penal action does not carry with it extinction of the civil action. However, the civil action based on delict may be deemed extinguished if there is a finding in a final judgment in the criminal action that the act or omission from which the civil liability may arise did not exist. (2a)

Section 3. *When civil action may proceed independently.* — In the cases provided in Articles 32, 33, 34 and 2176 of the Civil Code of the Philippines, the 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, however, may the offended party recover damages twice for the same act or omission charged in the criminal action. (3a)

Section 4. *Effect of death on civil actions.* — The death of the accused after arraignment and during the pendency of the criminal action shall extinguish the civil liability arising from

the delict. However, the independent civil action instituted under section 3 of this Rule or which thereafter is instituted to enforce liability arising from other sources of obligation may be continued against the estate or legal representative of the accused after proper substitution or against said estate, as the case may be. The heirs of the accused may be substituted for the deceased without requiring the appointment of an executor or administrator and the court may appoint a guardian *ad litem* for the minor heirs.

The court shall forthwith order said legal representative or representatives to appear and be substituted within a period of thirty (30) days from notice.

A final judgment entered in favor of the offended party shall be enforced in the manner especially provided in these Rules for prosecuting claims against the estate of the deceased.

If the accused dies before arraignment, the case shall be dismissed without prejudice to any civil action the offended party may file against the estate of the deceased. (n)

Section 5. *Judgment in civil action not a bar.* — A final judgment rendered in a civil action absolving the defendant from civil liability is not a bar to a criminal action against the defendant for the same act or omission subject of the civil action. (4a)

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

PRECEDENCE. The general rule is that where both a civil and a criminal case arising from the same facts are filed in court, the criminal case takes precedence. An exception to this general rule would be if there exist prejudicial questions which should be resolved first before action could be taken in a criminal case and when the law provides that both civil and criminal case can be instituted simultaneously such as that provided in Article 33 of the Civil Code (*Benitez v. Concepcion*, 2 SCRA 178).

PREJUDICIAL QUESTION. A prejudicial question is one that arises in a case, the resolution of which is a logical antecedent of the issue involved therein, and the cognizance of which pertains

to another tribunal (*Zapanta v. Montesa*, 4 SCRA 510; *Fortich v. Celdran*, 19 SCRA 502). In prejudicial question matters, there are always two cases involved, namely, a civil and a criminal one. The criminal is always suspended because the issues in the civil is determinative of the outcome of the criminal case. There are, therefore, two essential elements of a prejudicial question, to wit:

> 1. the previously instituted civil action involves an issue similar or intimately related to the issue raised in the subsequent criminal action; and
>
> 2. the resolution of such issue determines whether or not the criminal action may proceed (Section 7, Rule 111 of the Rules of Court).

With respect to the suspension of the criminal action in cases where there is a prejudicial question to be determined in a civil case, Section 6 of Rule 111 of the Revised Rules of Criminal Procedure provides:

> Section 6. *Suspension by reason of prejudicial question.* — 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. (6a)

Thus, in a case where a person alleges that his "motion to withdraw" filed in and approved by the court was falsified and that consequently the decision of the said court, basing his rights on the said motion and disregarding his claim that the subject motion was falsified, was erroneous and where the said decision was appealed to the Court of Appeals before the said person filed a criminal case against the accused for falsification of public document (namely, the motion filed in court), the Supreme Court held that the resolution in the civil case of whether the motion is authentic or not "will in a sense be determinative of the guilt or innocence of the accused in the criminal suit pending in another tribunal. As such, it is a prejudicial question which should first be decided before the prosecution can proceed in the criminal case" (*Fortich-Celdran v. Celdran*, 19 SCRA 502).

However, in *Jimenez v. Averia*, 22 SCRA 1380, where the accused were criminally charged of estafa for not returning the

money given to them as agents for the purpose of buying a boat which never materialized but who, prior to the arraignment, filed a civil case assailing the validity of the receipt wherein they acknowledged having received the said amount of money and contended that their signatures in the said receipt were obtained through fraud, deceit and intimidation, the lower court, upon motion of the accused, suspended the criminal case on the ground that the issues in the civil case posed a prejudicial question. The Supreme Court, however, overturned the decision of the lower court by observing and ruling that there was no prejudicial question because

> "x x x it will readily be seen that the alleged prejudicial question is not determinative of the guilt or innocence of the parties charged with estafa, because even on the assumption that the execution of the receipt whose annulment they sought in the civil case was vitiated by fraud, duress or intimidation, their guilt could still be established by other evidence showing, to the degree required by law, that they actually receive from the complainant the sum of P20,000 with which to buy for him a fishing boat, and that, instead of doing so, they misappropriated the money and refused or otherwise failed to return it to him upon demand. The contention of the private respondent here would be tenable had they been charged with the falsification of the same receipt involved in the civil action.

Also, where a spouse was criminally charged of bigamy by his first spouse and, thereafter, the second spouse filed a civil case for the annulment of marriage contending that the accused only forced and intimidated her to marry him and in which civil case the said accused filed a third-party complaint against his first spouse alleging that the said first spouse intimidated and forced him to marry her, the Supreme Court ruled that the existence of the civil suit does not constitute a prejudicial question to warrant the suspension of the criminal case for bigamy because prior to the annulment of the first marriage, the same cannot be considered as without effect and, therefore, shall be presumed to be validly existing. Hence, a party who contracts a second marriage then assumes the risk of being prosecuted for bigamy (*Landicho v. Relova*, 22 SCRA 731). However, it must be pointed out that if the situation were that the accused was the one who was intimidated or forced by the second spouse to enter into the bigamous marriage, his consent to the second marriage would be involuntary and cannot be the basis of his conviction for bigamy and, in which case, the civil case for annulment of the second marriage is a prejudicial question to warrant the suspension of the

criminal case for bigamy (*Zapanta v. Mendoza,* L-14534, February 28, 1962). The cases referred to dealt with civil cases which invoked grounds for annulment of marriage under the Civil Code and which are now under Article 45 of the Family Code.

In a case where the husband filed a civil action for declaration of nullity of his marriage on the ground of psychological incapacity under Article 36 of the Family Code and the wife filed a criminal case for concubinage against the said husband and his paramour, the Supreme Court held that the civil action for nullity of marriage is not a suit involving a prejudicial action to justify the suspension of the criminal case for concubinage considering that, except for purposes of remarriage under Article 40 of the Family Code, the nullity of a marriage can be proven by any evidence other than a judicial decision of nullity and also because a subsequent judicial pronouncement of the nullity of marriage is not a defense in concubinage. Moreover, the Supreme Court citing the *Landicho* case *(supra)* said that, as long as there is no judicial declaration of nullity of marriage, the presumption is that the marriage exists for all intents and purposes (*Beltran v. People*, G.R. No. 137567, June 20, 2000; *Te v. Court of Appeals*, G.R. No. 126746, November 29, 2000).

BOOK I

PERSONS

TITLE I. — CIVIL PERSONALITY

Chapter 1
GENERAL PROVISIONS

Article 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 effect, is acquired and may be lost. (n)

JURIDICAL CAPACITY AND CAPACITY TO ACT. Juridical capacity is acquired upon the birth of a person. In fact, there are certain cases when, even if a child is still unborn and merely inside the womb of the mother, such child is already given a provisional personality which entitles him to be supported or to receive donation (Articles 40, 41, 742, 854). Juridical capacity is terminated only upon death. Capacity to act, on the other hand, is not inherent in a person; it is attained or conferred and, therefore, it can likewise be lost not only by death of the person but by any valid cause provided by law.

Article 38. Minority, insanity or imbecility, the state of being a deaf-mute, prodigality and civil interdiction are mere restrictions on the 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)

Article 39. The following circumstances, among others, modify or limit 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.

SIGNIFICANCE OF ARTICLES 38 AND 39. Article 38 restricts the capacity to act, while Article 39 is broader in scope but it enumerates situations which merely modify the capacity to act. Essentially, however, the objective of the two codal provisions is the same, namely: to make an overview of the situation that qualifies a person's power to undertake acts which can produce legal effects. The consequences of these restrictions and modifications in a person's capacity to act are provided by the Civil Code itself, other codes, special laws and the Rules of Court. Also, the two provisions are intended to give people not adept in the technicalities of law an immediate sense that, since the Civil Code principally provides rules governing the relationship between and among men, women, juridical entities and even the government, there are certain situations which may effectively, juridically and legally affect such relationships.

Chapter 2

NATURAL PERSONS

Article 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)

Article 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)

COMMENCEMENT OF CIVIL PERSONALITY. Article 5 of Presidential Decree Number 603, otherwise known as the "Child and Youth Welfare Code," amended Article 40 of the Civil Code. The amendment and the law now provide that:

> the civil personality of the child shall commence from the time of his conception for all purposes favorable to him, subject to the requirements of Article 41 of the Civil Code.

In the case of *Quimiguing v. Icao*, 34 SCRA 132, the Supreme Court had occasion to explain the concept of civil personality and Article 41, to wit:

> 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 the plaintiff several times by force and intimidation, and without her consent; that as a result thereof 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 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 llamados 'derechos en estado de pendencia'; 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 a trata de un hecho que tiene efectos declarativos."* (1 Manresa, *op. cit.,* page 271).

For purposes of inheritance and succession, Article 1025 of the Civil Code also provides that "a child already conceived at the time of the death of the decedent is capable of succeeding, provided that it be born later under the conditions prescribed in Article 41."

In *Geluz v. Court of Appeals*, 2 SCRA 801, the Supreme Court ruled that a parent cannot invoke the concept of "provisional personality" of a conceived child to obtain damages for and on behalf of an aborted child considering that the conditions set in Articles 40 and 41 were not met. However, the Supreme Court said that the parents can obtain damages in their own right against the doctor who caused the abortion 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 disappointment of their parental expectations. The parents, however, must be shown not to have consented or acquiesced to the abortion.

BIRTH CERTIFICATE. The birth certificate is the best evidence of the fact of birth. Once it is registered with the office of the local civil registrar, it becomes a public document. However, the entries therein are only *prima facie* evidence of the facts contained therein (Article 410 of the Civil Code). They can be rebutted by competent evidence. Section 4 of the Civil Registry Law Act No. 3753 pertinently provides:

> The declaration of the physician or midwife in attendance at the birth or, in default thereof, the declaration of either parent of the newborn child, shall be sufficient for the registration of a birth in the civil register. Such declaration shall be exempt from documentary stamp tax and shall be sent to the local civil registrar not later than thirty days after the birth, by the physician or midwife in attendance at the birth or by either parent of the newborn child.
>
> In such declaration, the persons above mentioned shall certify to the following facts: (a) date and hour of birth; (b) sex and nationality of infant; (c) names, citizenship, and religion of parents or, in case the father is not known, of the mother alone; (d) civil status of parents; (e) place where the infant was born; and (f) and such other data as may be required in the regulations to be issued.
>
> In the case of an exposed child, the person who found the same shall report to the local civil registrar the place, date and hour of finding and other attendant circumstances.
>
> In case of an illegitimate child, the birth certificate shall be signed and sworn to jointly by the parents of the infant or only by the mother if the father refuses. In the latter case, it shall not be permissible to state or reveal in the document the name of the father who refuse to acknowledge the child, or to give therein any information by which such father could be identified.

CONFIDENTIALITY OF BIRTH RECORDS. Birth records, including a birth certificate, are strictly confidential and the contents therein cannot be revealed except in the cases provided by law. The mere filing of these documents with the Office of the Local Civil Registrar does not serve as constructive notice to all persons of such documents or the facts contained therein because, by mandate of the law, they are required to be confidential and therefore should not be known to the public. Nevertheless, they still maintain their nature as public documents because, following the proper legal procedure, they can be obtained by those interested therein. Thus, Article 7 of

Presidential Decree No. 603 as amended, otherwise known as "The Child and Youth Welfare Code," provides:

> Art. 7. *Non-disclosure of Birth Records.* — The records of a person's birth shall be kept strictly confidential and no information relating thereto shall be issued except upon the request of any of the following:
>
> (1) The person himself, or any person authorized by him;
>
> (2) His spouse, his parent or parents, his direct descendants, or the guardian or institution legally in charge of him if he is a minor;
>
> (3) The court or proper public official whenever absolutely necessary in administrative, judicial or other official proceedings to determine the identity of the child's parents or other circumstances surrounding his birth; and
>
> (4) In case of the person's death, the nearest of kin.
>
> Any person violating the prohibition shall suffer the penalty of imprisonment of at least two months or a fine in an amount not exceeding five hundred pesos, or both, in the discretion of the court.

Article 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)

DEATH. Death puts an end to civil personality. Thus, in a case where a testator owned one-sixth of a certain property co-owned with other persons and such testator died making his heirs co-owners of the said 1/6 of the property, it was held that the said heir-co-owners of the testator's 1/6 share became, in turn, co-owners of the other persons relative to the whole property which such other persons co-owned with the testator such that, when such other persons sold their share in the co-ownership to a corporation, the heir-co-owners shall have the right of redemption as to the portion sold not by virtue of their being heirs of the testator but by virtue of their personal rights as co-owners of the whole property because:

> the right of legal redemption only came into existence when the sale to *Uy & Sons, Inc.* was perfected eight (8) years after

> the death of Jose V. Ramirez, and formed no part of his estate. The redemption rights vested in the co-heirs. Originally, in their individual capacity, they did not derivatively acquire it from their decedent, for when Jose V. Ramirez died, none of the other co-owners of the property had as yet sold his undivided share to a stranger. Hence, there was nothing to redeem and no right of redemption; and if the late Ramirez had no such right at his death, he could not transmit it to his own heirs. Much less could Ramirez acquire such right of redemption after his death, when the sale to *Uy & Sons, Inc.* was made because death extinguished civil personality and, therefore, all further juridical capacity to acquire or transmit rights and obligations of any kind (Civil Code of the Phil., Art. 42; *Butte v. Manuel Uy & Sons, Inc.,* 4 SCRA 526).

DEATH CERTIFICATE. The office of the local civil registrar of a municipality or city must also have in its custody the death certificates of persons who died in its locality. Section 6 of the Civil Registry Law (Act No. 3753) pertinently provides:

> No human body shall be buried unless the proper death certificate has been presented and recorded in the office of the local civil registrar. The physician who attended the deceased or, in his default, the health officer concerned, or in default of the latter, any member of the family of the deceased or any person having knowledge of the death, shall report the same to the local health authorities, who shall issue a death certificate and shall order the same to be recorded in the office of the local civil registrar. The death certificate, which shall be issued by the attending physician of the deceased, or in his default, by the proper health officer, shall contain the following data which shall be furnished by the person reporting the death: (a) date and place of death, (b) full name, (c) age, (d) occupation or profession, (e) residence, (f) status as regards marriage, (g) nationality of the deceased, and (h) probable cause of death.
>
> During epidemic, bodies may be buried, provided the proper death certificates have been secured, which shall be registered not later than five days after the burial of the body.

CONTRACT, WILL AND THE LAW. The rights and obligations of a dead person can still be regulated by contract, will or the law. Hence, the creditors are given the right to claim from the estate of the deceased any obligation due them before the estate can finally be partitioned in favor of the heirs. Also, the testator through an express provision in a will may disinherit any of his or her heirs under any of

the valid grounds provided by law, thereby, in effect, controlling the disposition of his properties even after death. Likewise, any person who shows disrespect to the dead, or wrongfully interferes with a funeral, shall be liable to the family of the deceased for damages, material and moral (Article 309 of the Civil Code).

Article 43. If there is 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)

PROOF OF DEATH. Article 43 specifically applies only to persons who are called to succeed each other. The proof of death must be established by positive evidence. However, it can likewise be established by circumstantial evidence derived from facts. If ever an inference is to be made, it must be derived from an existing fact. Proof of death can never be established from mere inference arising from another inference or from presumptions and assumptions. Thus, in *Joaquin v. Navarro*, 93 Phil. 257, where the death of the mother and her son occurred during the massacre of civilians in February, 1945 and at the time when Manila was being bombarded during the war, the Supreme Court upheld the ruling of the trial court (which was reversed by the Court of Appeals) that, from the evidence presented, the son died before the mother. Pertinently, the Supreme Court observed and ruled:

> While the possibility that the mother died before the son cannot be ruled out, it must be noted that this possibility is entirely speculative and must yield to the more rational deduction from proven facts that it was the other way around. *Joaquin Navarro, Jr.* (the son), it will be recalled, was killed while running in front of, and 15 meters from, the German Club. Still in the prime of life at 30, he must have negotiated that distance in five seconds or less, and so died within that interval from the time he dashed out of the building. Now, when *Joaquin Navarro, Jr.,* with his father and wife, started to flee from the clubhouse, the old lady was alive and unhurt, so much so that the Navarro father and son tried hard to have her come along. She could have perished within those five or fewer seconds, as stated, but the probabilities that she did seem very

remote. True, people in the building were also killed but these, according to Lopez (the witness), were mostly refugees who had tried to slip away from it and were shot by the Japanese troops. It was not very likely that Mr. Joaquin Navarro, Sr. made an attempt to escape. She even made frantic efforts to dissuade her husband and son from leaving the place and exposing themselves to gunfire.

This determination of Mrs. Angela Navarro to stay where she was may well give an idea, at the same time, of a condition of relative safety in the clubhouse at the moment her husband, son, and daughter-in-law left her. It strongly tends to prove that, as the situation looked to her, the perils of death from staying were not so imminent. And it lends credence to Mr. Lopez' statement that the collapse of the clubhouse occurred about 40 minutes after Joaquin Navarro (the son) was shot in the head and dropped dead, and that it was the collapse that killed Mrs. Angela Navarro. The Court of Appeals said, the interval between Joaquin Navarro's death and the breaking down of the edifice was "minutes." Even so, it was much longer than five seconds, long enough to warrant the inference that Mrs. Angela Navarro was still alive when her son expired.

The Court of Appeals mentioned several causes, besides the collapse of the building, by which Mrs. Navarro could have been killed. All these causes are speculative and the probabilities, in the light of the known facts, are against them. Dreading Japanese sharpshooters outside as evidenced by her refusal to follow the only remaining living members of her family, she could not have kept away from protective walls. Besides, the building had been set on fire to trap the refugees inside, and there was no necessity for the Japanese to waste their ammunition except upon those who tried to leave the premises. Nor was Angela Navarro likely to have been killed by falling beams because the building was made of concrete and its collapse, more likely than not, was sudden. As to fumes, these do not cause instantaneous death; certainly not within the brief space of five seconds between her son's departure and death.

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In conclusion, the presumption that Angela Joaquin de Navarro died before her son is based purely on surmises, speculations, or conjectures without any sure foundation in the evidence. The opposite theory — that the mother outlived her son — is deduced from established facts which, weighed by common experience, engender the inference as a very strong probability. Gauged by the doctrine of preponderance of evidence by which civil cases are decided, this inference ought to prevail. x x x

Chapter 3

JURIDICAL PERSONS

Article 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)

Article 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)

Article 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)

JURIDICAL PERSON. A juridical person is a being of legal existence susceptible of rights and obligations, or of being the subject

of juridical relations (*Roldan v. Philippine Veterans Board*, 105 Phil. 1081).

STATE. The State and its political subdivisions are juridical persons. The state is a sovereign person with the people composing it viewed as an organized corporate society under a government with the legal competence to exact obedience of its commands. It is the political organization of a society legally supreme within and independent of legal control from without (Philippine Law Dictionary by Federico B. Moreno, 1982 Edition, page 587). As a juridical person, the state can enter into treaties and contracts. The Civil Code even provides that, in default of persons entitled to succeed to the estate of a deceased person, the State shall inherit his whole estate (Article 1011 of the Civil Code).

As a fundamental rule, the state cannot be sued without its consent (Article XVI, Section 2 of the 1987 Philippine Constitution).

> Express consent may be embodied in a general law or a special law. The standing consent of the State to be sued in case of money claims involving liability arising from contracts is found in Act No. 3083. A special law may be passed to enable a person to sue the government from an alleged quasi-delict (*Merritt v. Government of the Philippine Islands*, 34 Phil. 311; see *United States of America v. Guinto*, G.R. No. 76607, February 26, 1990, 182 SCRA 644, 654).
>
> Consent is implied when the government enters into business contracts, thereby descending to the level of the other contracting party, and also when the State files a complaint, thus opening itself to a counterclaim. *(Ibid.)*
>
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>
> A distinction should first be made between suability and liability. "Suability depends on the consent of the state to be sued, liability on the applicable law and the established facts. The circumstance that a state is suable does not necessarily mean that it is liable; on the other hand, it can never be held liable if it does not first consent to be sued. When the state does waive its sovereign immunity, it is only giving the plaintiff the chance to prove, if it can, that the defendant is liable" (*United States v. Guinto*, *supra*, pp. 659-660; *Municipality of San Fernando v. Judge Firme*, G.R. No. 52179, April 8, 1991).

In *Philrock v. Board of Liquidators*, 180 SCRA 171, the Supreme Court further held that:

> even when the government has been adjudged liable in a suit to which it has consented, it does not necessarily follow that the judgment can be enforced by execution against its funds for, as held in *Republic v. Villasor*, 54 SCRA 84, every disbursement of public funds must be covered by a corresponding appropriation passed by the Legislature:
>
> "x x x where the State gives its consent to be sued by private parties either by general or special law, it may limit claimant's action only up to the completion of proceedings anterior to the state of execution and that the powers of the Courts end when the judgment is rendered, since government funds and properties may not be seized under writs of execution or garnishment to satisfy such judgments x x x. Disbursement of public funds must be covered by the corresponding appropriation as required by law. The functions and public services rendered by the State cannot be allowed to be paralyzed or disrupted by the diversion of public funds from their legitimate and specific objects, as appropriated by law." (p. 87)

POLITICAL SUBDIVISIONS. Political subdivisions are municipal corporations and, in the Philippines, consist of the provinces, cities and municipalities.

> Municipal corporations exist in a dual capacity, and their functions are two-fold. In one, they exercise the right springing from sovereignty, and while in the performance of the duties pertaining thereto, their acts are political and governmental. Their officers and agents in such capacity, though elected or appointed by them, are nevertheless public functionaries performing a public service, and as such they are officers, agents and servants of the state. In the other capacity, the municipalities exercise a private, proprietary or corporate right, arising from their existence as legal persons and not as public agencies. Their officers and agents in the performance of such functions act in behalf of the municipalities in their corporate or individual capacity, and not for the state of sovereign power (*City of Kokomo v. Loy*, 112 N.E. 994-995).

Thus, in a case where a municipality was sought to be held liable for the damages caused by its employee (a driver), the Supreme Court exonerated the municipality because the employee was undertaking governmental activities, thus:

> Municipal corporations, for example, like provinces and cities, are agencies of the State when they are engaged in governmental functions and, therefore, should enjoy the sovereign

immunity from suit. Nevertheless, they are subject to suit even in the performance of such functions because their charter provides that they can sue and be sued (*Municipality of San Fernando v. Judge Firme*, G.R. No. 52179, April 1991, citing Cruz, Philippine Political Law, 1987 Edition, p. 39).

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Anent the issue of whether or not the municipality is liable for the torts committed by its employee, the test of liability of the municipality depends on whether or not the driver, acting in behalf of the municipality, is performing governmental or proprietary functions. As emphasized in the case of *Torio v. Fontanilla* (G.R. No. L-29993, October 23, 1978, 85 SCRA 599, 606), the distinction of powers becomes important for purposes of determining the liability of the municipality for the acts of its agents which result in an injury to third persons.

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It has already been remarked that municipal corporations are suable because their charters grant them the competence to sue and be sued. Nevertheless, they are generally not liable for torts committed by them in the discharge of governmental functions and can be held answerable only if it can be shown that they were acting in a proprietary capacity. In permitting such entities to be sued, the State merely gives the claimant the right to show that the defendant was not acting in its governmental capacity when the injury was committed or that the case comes under the exceptions provided by law. Failing this, the claimant cannot recover (Cruz, *supra*, p. 44).

In the case at bar, the driver of the dump truck of the municipality insists that "he was on his way to the Naguilian river to get a load of sand and gravel for the repair of San Fernando's municipal streets."

In the absence of any evidence to the contrary, the regularity of the performance of official duty is presumed pursuant to Section 3(m) of Rule 131 of the Revised Rules of Court. Hence, We rule that the driver of the dump truck was performing duties or tasks pertaining to his office.

We already stressed in the case of *Palafox, et al. v. Province of Ilocos Norte,* the District Engineer, and the Provincial Treasurer (102 Phil. 1186) that "the construction or maintenance of roads in which the truck and the driver worked at the time of the accident are admittedly governmental activities."

After a careful examination of existing laws and jurisprudence, We arrive at the conclusion that the municipality

> cannot be held liable for the torts committed by its regular employee, who was then engaged in the discharge of governmental functions. Hence, the death of the passenger — tragic and deplorable though it may be — imposed on the municipality no duty to pay monetary compensation (*Municipality of San Fernando v. Judge Firme*, G.R. No. 52179, April 1991).

CORPORATION. The general law governing public corporations is Batas Pambansa Blg. 68, otherwise known as the Corporation Code of the Philippines. It became effective on May 1, 1980. Partnerships and associations for private interest are governed by Title IX of the Civil Code.

Government corporations, such as the Philippine National Bank, the Development Bank of the Philippines, and the Philippine Gaming and Amusement Corporation, are created by their special charters passed by the legislature. However, Batas Pambansa Blg. 68 applies in a suppletory nature.

A corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes, and properties expressly authorized by law or incident to its existence (Section 2, Batas Pambansa Blg. 68).

> Corporations are creatures of the law, and can only come into existence in the manner prescribed by law. As has already been stated, general laws authorizing the formation of corporations are general offers to any persons who may bring themselves within their provisions; and if condition precedents are prescribed in the statute, or certain acts are required to be done, they are the terms of the offer, and must be complied with substantially before legal corporate existence can be acquired (*Cagayan Fishing Development Co., Inc. v. Teodoro Sandiko*, 65 Phil. 223, citing 14 C.J., Sec. 111, p. 118).

PARTNERSHIP. By the contract of partnership, two or more persons bind themselves to contribute money, property, or industry to a common fund, with the intention of dividing the profits among themselves. Two or more persons may also form a partnership for the exercise of a profession (Article 1767 of the Civil Code).

DISTINCT PERSONALITY AND EXCEPTIONS. Corporations, partnerships and associations for private interest and purpose may be granted by law a juridical personality, separate and distinct from that of each shareholder, partner or member. Hence,

the obligation of the corporation is not the obligation of the stockholders and *vice versa*. In *Saw v. Court of Appeals,* 195 SCRA 740, where the shareholders sought to intervene in a case involving their corporation, the Supreme Court ruled that the said shareholders had no personality to intervene in a litigation which involved corporate liability because the shareholders' interest in the corporation was merely inchoate. Thus:

> Here, the interest, if it exists at all, of petitioners-movants is indirect, contingent, remote, conjectural, consequential and collateral. At the very least, their interest is purely inchoate, or in sheer expectancy of a right in the management of the corporation and to share in the profits thereof and in the properties and assets thereof on dissolution, after payment of the corporate debts and obligations.
>
> While a share of stock represents a proportionate or aliquot interest in the property of the corporation, it does not vest the owner thereof with any legal right or title to any of the property, his interest in the property being equitable or beneficial in nature. Shareholders are in no legal sense the owner of corporate property, which is owned by the corporation as a distinct legal person.

This legal fiction is highly pronounced in corporations. However, it can be pierced or disregarded, thereby making the shareholders liable for any liability of the corporation. In *Cease, et al. v. Court of Appeals, et al.*, 93 SCRA 493, the Supreme Court summarized the rule, thus:

> A rich store of jurisprudence has established the rule known as the doctrine of disregarding or piercing the veil of corporate fiction. Generally, a corporation is invested by law with a personality separate and distinct from that of the persons composing it as well as from that of any other legal entity to which it may be related. By virtue of this attribute, a corporation may not, generally, be made to answer for acts or liabilities of its stockholders or those of the legal entities to which it may be connected, and *vice versa*. This separate and distinct personality is, however, merely a fiction created by law for convenience and to promote the ends of justice (*Laguna Transportation Company v. Social Security System*, L-14606, April 28, 1960; *La Campana Coffee Factory, Inc. v. Kaisahan ng mga Manggagawa sa La Campana*, L-5677, May 25, 1953). For this reason, it may not be used or invoked for

ends subversive of the policy and purpose behind its creation (*Emiliano Cano Enterprises, Inc. v. CIR*, L-20502, February 26, 1965) or which could not have been intended by law to which it owes its being (*McConnel v. Court of Appeals*, L-10510, March 17, 1961, 1 SCRA 722). This is particularly true where the fiction is used to defeat public convenience, justify wrong, protect fraud, defend crime (*Yutivo Sons Hardware Company v. Court of Tax Appeals*, L-13203, January 28, 1961, 1 SCRA 160), confuse legitimate legal or judicial issues (R.F. Sugay & Co. vs. Reyes, L-20451, Dec. 28, 1964), and perpetrate deception or otherwise circumvent the law (*Gregorio Araneta, Inc. v. Tuazon de Paterno*, L-2886, August 22, 1952, 49 O.G. 721). This is likewise true where the corporate entity is being used as an *alter ego*, adjunct or business conduit for the sole benefit of the stockholders or of another corporate entity (*McConnel v. Court of Appeals*, *supra*; *Commissioner of Internal Revenue vs. Norton Harrison Co.,* L-7618, August 31, 1964).

In any of these cases, the notion of corporate entity will be pierced or disregarded, and the corporation will be treated merely as an association of persons or, where there are two corporations, they will be merged as one, the one being merely regarded as part or instrumentality of the other (*Koppel Phils., Inc. vs. Yatco*, 77 Phil. 496; *Yutivo Sons Hardware Company v. Court of Appeals*, *supra*).

Article 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)

DISSOLUTION. The dissolution of private corporations is governed by Title IV of the Corporation Code. With respect to corporations for public interest or purposes created by a charter, their dissolution shall be governed in accordance with the provisions of their respective charters and in the absence of any such provision, by the provision of the Corporation Code. The dissolution of a partnership is governed by Title IX, Chapter 3 of the Civil Code.

TITLE II. — CITIZENSHIP AND DOMICILE

Article 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.

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

Article 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)

Article 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)

DOMICILE. Domicile denotes a fixed permanent residence to which, when absent, one has the intention of returning. Residence is used to indicate a place of abode, whether permanent or temporary. Domicile is residence coupled with the intention to remain for an unlimited time. No length of residence without intention of remaining will constitute domicile. A man may have a residence in one place and a domicile in another place. He may have as many residences as he wants but he can only have one domicile. Hence, a woman may have lived for so many years in different places and may have even registered as a voter in a certain place but that place may not necessarily be her domicile if it is not her residence where she really has the intention of returning (See *Romualdez-Marcos v. COMELEC*, 64 SCAD 358, 248 SCRA 300).

A minor follows the domicile of his or her parents. Domicile of origin can only be lost and a change of domicile occurs when the following requisites are present: 1) an actual removal or an actual change of domicile; 2) a *bona fide* intention of abandoning the former place of residence establishing a new one; and 3) acts which correspond with the purpose (See *Romualdez-Marcos v. COMELEC*, 64 SCAD 358, 248 SCRA 300).

Under the Family Code, the husband and wife shall fix the family domicile. In case of disagreement, the court shall decide (Article 69 of the Family Code).

CITIZENSHIP. Article IV of the 1987 Philippine Constitution now governs the rule on citizenship. Thus:

> Section 1. The following are citizens of the Philippines:
>
> (1) Those who are citizens of the Philippines at the time of the adoption of this Constitution;
>
> (2) Those whose fathers and mothers are citizens of the Philippines;
>
> (3) Those born before January 17, 1973, of Filipino mothers, who elect Philippine citizenship upon reaching the age of majority; and
>
> (4) Those who are naturalized in accordance with law.
>
> Section 2. Natural-born citizens are those who are citizens of the Philippines from birth, without having to perform any act to acquire or perfect their Philippine citizenship. Those who elect Philippine citizenship in accordance with paragraph (3), Section 1 hereof shall be deemed natural-born citizens.

> Section 3. Philippine citizenship may be lost or reacquired in the manner provided by law.
>
> Section 4. Citizens of the Philippines who marry aliens shall retain their citizenship, unless by their act or omission they are deemed, under the law, to have renounced it.
>
> Section 5. Dual allegiance of citizens is inimical to the national interest and shall be dealt with by law.

JUS SANGUINIS. By providing that those born of Filipino fathers and mothers are Philippine citizens, the Philippine Constitution highlights the fact that in this jurisdiction what is followed is the concept of *jus sanguinis* as opposed to *jus soli*. *Jus sanguinis* refers to citizenship by blood while *jus soli* refers to citizenship on the basis of the place of birth.

ACQUISITION OF CITIZENSHIP. The law that governs the acquisition of Philippine citizenship is Commonwealth Act No. 473, as amended. Basically, the law provides that, for a foreigner to be able to become a Philippine citizen, a proper petition shall be filed in the proper court which, after due hearing, shall issue the certificate of naturalization. Pertinently, the said law provides:

> x x x x x x x x x
>
> Section 2. *Qualifications.* — Subject to section four of this Act, any person having the following qualifications may become a citizen of the Philippines by naturalization:
>
> *First.* He must not be less than twenty-one years of age on the day of the hearing of the petition;
>
> *Second.* He must have resided in the Philippines for a continuous period of not less than ten years;
>
> *Third.* He must be of good moral character and believes in the principles underlying the Philippine Constitution, and must have conducted himself in a proper and irreproachable manner during the entire period of his residence in the Philippines in his relation with the constituted government as well as with the community in which he is living;
>
> *Fourth.* He must own real estate in the Philippines worth not less than five thousand pesos, Philippine currency, or must have some known lucrative trade, profession, or lawful occupation (Under the present Constitution, however, no alien or foreigner may own land except through hereditary succession [Article 12, Section 7 of the 1987 Philippine Constitution].);

Fifth. He must be able to speak and write English or Spanish and any one of the principal Philippine languages; and

Sixth. He must have enrolled his minor children of school age, in any public school or private school recognized by the Office of Private Education of the Philippines, where Philippine history, government and civics are taught or prescribed as part of the school curriculum, during the entire period of the residence in the Philippines required of him prior to the hearing of his petition for naturalization as Philippine citizen.

Section 3. *Special qualifications.* — The years of continuous residence required under the second condition of the last preceding section shall be understood as reduced to five years for any petitioner having any of the following qualifications:

(1) Having honorably held office under the Government of the Philippines or under that of any of the provinces, cities, municipalities or political subdivisions thereof;

(2) Having established a new industry or introduced a useful invention in the Philippines;

(3) Being married to a Filipino woman;

(4) Having been engaged as a teacher in the Philippines in a public or recognized private school not established for exclusive instruction of children of persons of a particular nationality or race, in any of the branches of education or industry for a period of not less than two years; and

(5) Having been born in the Philippines.

Section 4. *Who are disqualified.* — The following cannot be naturalized as Philippine citizens:

(a) Persons opposed to organized government or affiliated with any association or group of persons who uphold and teach doctrines opposing all organized governments;

(b) Persons defending or teaching the necessity or propriety of violence, personal assault, or assassination for the success and predominance of their ideas;

(c) Polygamists or believers in the practice of polygamy;

(d) Persons convicted of crimes involving moral turpitude;

(e) Persons suffering from mental alienation or incurable contagious diseases;

(f) Persons who, during the period of their residence in the Philippines, have not mingled socially with the Filipinos, or

who have not evinced a sincere desire to learn and embrace all customs, traditions, and ideals of the Filipinos;

(g) Citizens or subjects of nations with whom (the United States and) the Philippines are at war, during the period of war; and

(h) Citizens or subjects of a foreign country other than the United States, whose laws do not grant Filipinos the right to become naturalized citizens or subject thereof.

LOSS AND REACQUISITION OF CITIZENSHIP. The law that governs the loss or reacquisition of citizenship is Commonwealth Act No. 63 as amended by Republic Act No. 106. The grounds for the loss of citizenship are as follows:

1. By naturalization in a foreign country;

2. By express renunciation of citizenship;

3. By subscribing to an oath of allegiance to support the constitution or laws of a foreign country upon attaining twenty-one years of age or more: *Provided, however,* That a Filipino may not divest himself of Philippine citizenship in any manner while the Republic of the Philippines is at war with any country;

4. By rendering service to, or accepting commission in, the armed forces of a foreign country: *Provided*, That the rendering of service to, or acceptance of such commission in, the armed forces of a foreign country, and the taking of an oath of allegiance incident thereto, with the consent of the Republic of the Philippines, shall not divest a Filipino of his Philippine citizenship if either of the following circumstances is present:

(a) The Republic of the Philippines has a defensive and/or offensive pact of alliance with the said foreign country; or

(b) The said foreign country maintains armed forces on Philippine territory with the consent of the Republic of the Philippines: *Provided*, That the Filipino citizen concerned, at the time of rendering said service, or acceptance of said commission, and taking the oath of allegiance incident thereto, states that he does so only in connection with his service to said foreign country: *And provided, finally*, That any Filipino citizen who is rendering service to, or is commissioned in, the armed forces of a foreign

country under any of the circumstances mentioned in paragraph (a) or (b), shall not be permitted to participate nor vote in any election of the Republic of the Philippines during the period of his service to, or commission in, the armed forces of the said foreign country. Upon discharge from the service of the said foreign country, he shall be automatically entitled to the full enjoyment of his civil and political rights as Filipino citizen;

5. By cancellation of the certificate of naturalization;

6. By having been declared by competent authority a deserter of the Philippine armed forces in time of war, unless subsequently, a plenary pardon or amnesty has been granted; and

7. In the case of a woman, upon her marriage to a foreigner if, by virtue of the laws in force in her husband's country, she acquires his nationality (Section 1, C.A. No. 63 as amended).

The grounds for the reacquisition of citizenship are as follows:

1. By naturalization: *Provided*, That the applicant possess none of the disqualification prescribed in Section 4 of Commonwealth Act No. 473;

2. By repatriation of deserters of the Army, Navy or Air Corps: *Provided*, That a woman who lost her citizenship by reason of her marriage to an alien may be repatriated in accordance with the provisions of Commonwealth Act No. 63, as amended, after the termination of the marital status; and

3. By direct act of the Congress of the Philippines.

THE FAMILY CODE OF THE PHILIPPINES

EXECUTIVE ORDER NO. 209. On July 6, 1987, President Corazon C. Aquino signed into law Executive Order No. 209, otherwise known as the "Family Code of the Philippines." The reason and objective of the code are clearly set out in its whereas clauses, to wit:

> WHEREAS, almost four decades have passed since the adoption of the Civil Code of the Philippines;
>
> WHEREAS, experience under said Code as well as pervasive changes and developments have necessitated revision of its provisions on marriage and family relations to bring them closer to Filipino customs, values and ideals and reflect contemporary trends and conditions;
>
> WHEREAS, there is a need to implement policies embodied in the new Constitution that strengthen marriage and the family as basic social institutions and ensure equality between men and women.
>
> The committee which drafted the Family Code included three well-renowned civilists, namely: Justice Jose B.L. Reyes, Justice Eduardo P. Caguioa and Justice Ricardo C. Puno.
>
> Subsequently, Executive Order No. 277 was signed by President Aquino on July 17, 1987. This particular executive order was subjected to further amendments and modifications specifically referring to Articles 26, 36 and 39.

On August 3, 1988, the Family Code of the Philippines finally took effect.

Thereafter, Republic Act No. 6809 was passed by Congress on October 20, 1989 and approved by President Aquino. It took effect on December 18, 1989. It amended Title X of the Family Code dealing with emancipation and the age of majority.

TITLE I. — MARRIAGE

Chapter 1
REQUISITES OF MARRIAGE

Article 1. Marriage is a special contract of permanent union between a man and a woman entered into in accordance with the 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)

NATURE AND IMPORTANCE OF MARRIAGE. By the contract of marriage, a man and a woman enter a joint life acting, living and working as one. Whether under the common law or under the civil law, upon marriage, the husband and the wife become one single moral, spiritual and social being, not only for the purpose of procreation, but also for the purpose of mutual help and protection physically, morally and materially (*Saclolo v. CAR*, 106 Phil. 1038). Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival (*Skinner v. State of Oklahoma*, 316 US 535, 62 S. Ct. 1110, 86 L. Ed. 1655). The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men (*Loving v. Virginia*, 388 US 1, 87 S. Ct. 1817, 18 L. Ed. 20). Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal (*Reynolds v. US*, 98 US 145, 25 L. Ed. 144).

> It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, x x x, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress (*Maynard v. Hill*, 125 US 190, 8 S. Ct. 723, 31 L. Ed. 654).
>
> It is not then a contract within the meaning of the clause of the Constitution which prohibits the impairing of the obligation of contracts. It is rather a social relation like that of a parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress (*Adams v. Palmer*, 51 Me. 481, 483).
>
> The marital relation, unlike ordinary contractual relations, is regarded by the laws as the basis of the social organization. The preservation of that relation is deemed essential to public welfare (*Hood v. Roleson*, 125 Ark. 30, 187 SW 1059).

Thus, in a case where the petitioner filed for the annulment of his marriage on the ground that he never had any intention at all to marry the respondent because the main consideration why he entered in such a marriage contract was only to give a name to the child in respondent's womb which however was never born, and therefore clearly proving a failure of consideration of the marriage contract warranting the annulment of the same, it was held that such annulment cannot be granted on such a ground, not only because the said ground for annulment was not among those provided in the marriage laws of that state but also because the policy of the law clearly was against such an annulment considering that a marriage is not *at most* a civil contract but it is *at least* a civil contract, with status and the interest of the State added to it (*Bove v. Pinciotti*, 46 Pa D. & C. [C.P. 1942]). The court further stated:

> to say that the failure of the child to materialize is a failure of consideration and, hence, avoids the point just made is merely to emphasize the artificiality of comparing the marriage to the ordinary civil contract. It is not possible to have a marriage for one purpose and no marriage at all for other purposes, for marriage is not only a contract but a status and a kind of fealty to the State as well x x x.
>
> x x x The second is that Judge Crichton assumed, even under the civil contract theory, that the parties intended no marriage, whereas that is precisely what they did; it was, as he said, to "be ostensible only, and for the sole purpose of giving a name to the child." The fact is that they intended the marriage to be ostensible as it concerned themselves but real as it concerned the child. Nothing short of a real marriage could give the child a name. We know of no authority permitting two persons to split up the incidents and obligations of marriage to suit themselves in this way, nor any, even in civil law, which permits two people to enter into a contract for the "ostensible" purpose of affecting the rights of a child and having done so to recede from it at pleasure and without recourse. If the rules governing the rescission of civil contracts do not obtain in the annulment of a marriage contract (*Eisenberg v. Eisenberg*, 105 Pa. Superior Ct. 30 [1932]), still less is there any sanction for valid private reservations in entering upon marriage, or room for the forced analogy of failure because the expected child did not appear (*Bove v. Pinciotti*, 46 Pa. D. & C. [C.P. 1942]).

Marriage as a special contract cannot be restricted by discriminatory policies of private individuals or corporations. In *Philippine Telegraph and Telephone Company v. NLRC,* 82 SCAD 747, 272 SCRA 596, where a company's policy disqualified from work any woman worker who contracts marriage, the Supreme Court invalidated such policy as it not only runs afoul of the constitutional provision on equal protection but also on the fundamental policy of the State toward marriage. The Supreme Court relevantly said:

> In the final reckoning, the danger of such a policy against marriage followed by petitioner PT & T is that it strikes at the very essence, ideals, and purpose of marriage as an inviolable social institution and, ultimately, of the family as the foundation of the nation. That it must be effectively interdicted here in all its indirect, disguised or dissembled forms as discriminatory conduct derogatory of the laws of the land is not only in order but imperatively required.

That a marriage is not an ordinary contract is even highlighted by the fact that Article 350 of the Revised Penal Code provides that

the penalty of *prision correccional* in its medium and maximum periods shall be imposed upon any person who, not having committed bigamy which is separately penalized under Article 349 of the Revised Penal Code, shall contract marriage knowing that the requirements of the law have not been complied with or that the marriage is in disregard of a legal impediment. Likewise, Sections 37 to 45 of the Marriage Law of 1929 (Act No. 3631) providing for the criminal penalties for erring persons who are authorized to solemnize a marriage are the only remaining provisions in the said law which have not been repealed by any law, including the Family Code.

MAIL-ORDER BRIDE. Marriage is vested with public interest such that the legislature has even enacted a law making it a criminal offense for any person, natural or juridical, association, club or any entity to commit, directly or indirectly, any of the following acts:

> (1) To establish or carry on a business which has for its purpose the matching of Filipino women for marriage to foreign nationals either on a mail-order basis or through personal introduction;
>
> (2) To advertise, publish, print or distribute or cause the advertisement, publication, printing, or distribution of any brochure, flier, or any propaganda material calculated to promote the prohibited acts in the preceding subparagraph;
>
> (3) To solicit, enlist or in any manner attract or induce any Filipino woman to become a member in a club or association whose objective is to match women for marriage to foreign nationals whether on a mail-order basis or through personal introduction for a fee;
>
> (4) To use the postal service to promote the prohibited acts in subparagraph 1 (Republic Act No. 6955, Section 2, June 13, 1990).

It is unlawful for the manager or officer-in-charge or advertising manager of any newspaper, magazine, television or radio station, or other media, or of an advertising agency, print company or other similar entities, to knowingly allow, or consent, to the acts prohibited above (Republic Act No. 6955, Section 2, June 13, 1990).

TRAFFICKING IN WOMEN. Under Republic Act No. 9208, the Anti Trafficking in Persons Act of 2003, the following acts are considered trafficking:

> **Section 4.** *Acts of Trafficking in Persons.* — It shall be unlawful for any person, natural or juridical, to commit any of the following acts:
>
> x x x x x x x x x
>
> (b) To introduce or match for money, profit, or material, economic or other consideration, any person or, as provided for under Republic Act No. 6955, any Filipino woman to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling or trading him/her to engage in prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage;
>
> (c) To offer or contract marriage, real or simulated, for the purpose of acquiring, buying, offering, selling, or trading them to engage in prostitution, pornography, sexual exploitation, forced labor or slavery, involuntary servitude or debt bondage.

MARRIAGE BETWEEN RAPIST AND RAPED VICTIM. As a special contract, a subsequent valid marriage of the offender and the offended party in the crime of rape likewise extinguishes the criminal action or the penalty imposed for rape. In case the victim is already married and it is the legal husband who is the offender, the subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty, provided that the crime shall not be extinguished or the penalty shall not be abated if the marriage is void *ab initio* (Article 266-C of the Revised Penal Code, as amended by Republic Act No. 8353).

MARRIAGE AS A STATUS. Marriage creates a social status or relation between the contracting parties (*State v. Tatty*, 7 LEA 50; Greek vs. State, 58 Ala. 190), in which not only they but the State as well are interested (*Magee v. Young*, 40 Miss. 164; *Trammell v. Voughman*, 158 Mo. 214), and involves a personal union of those participating in it of a character unknown to any other human relations, and having more to do with the morals and civilization of a people than any other institution (*State v. Dukit*, 70 Wis. 272, 63 NW 83). Indeed, marriage is one of the cases of double status, in that the status therein involves and affects two persons. One is married, never in abstract or a vacuum, but, always, to somebody else. Hence, a judicial decree on the marriage status of a person necessarily reflects upon the status of another and the relation between them (*Rayray v. Chae Kyung Lee*, 18 SCRA 450). And, it must be noted that:

> whenever a peculiar status is assigned by law to members of any particular class of persons, affecting their general position

> in or with regard to the rest of the community, no one belonging to such class can vary by any contract the rights and liabilities incident to this status (Freeman's Appeal, 68 Conn 533, 37 All 420, 57 ASR 112).

Hence, in a case where the parties, prior to the civil marriage ceremony, agreed that the said civil marriage was not to be considered valid and binding until after the celebration of a religious marriage ceremony, it was held that a case for annulment based on the non-fulfillment of the said condition cannot prosper. Pertinently, the court said:

> There being no fraud in the inception of the marriage, the law recognizes no privately imposed conditions that would alter the marital status. That status is too much a matter of public concern to allow the parties to tinker with it according to their own notions of what is expedient and proper (*Anonymous v. Anonymous*, 49 NYSd 314).

MARRIAGE IN INTERNATIONAL LAW. The right to marry is a recognized fundamental human right under international law. The Universal Declaration of Human Rights adopted by the members of the United Nations including the Philippines specifically provides in Article 16 thereof that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and "to found a family." They are entitled to equal rights as to marriage, during marriage and after its dissolution. It further provides that marriage shall be entered into only with the free and full consent of the intending parties. It declares that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The International Covenant on Economic, Social and Cultural Rights signed by the Philippines on December 19, 1966 and ratified on May 17, 1974 went into force on January 3, 1976. Article 10 of this international covenant also provides declarations similar to those enunciated in the Universal Declaration of Human Rights.

The International Covenant on Civil and Political Rights which the Republic of the Philippines signed on December 19, 1966, ratified on February 28, 1986 and entered into force on January 23, 1987 likewise specifically provides in Article 23 thereof the same provisions on family and marriage stated in the Universal Declaration of Human Rights.

There can be no doubt, therefore, that the institution of marriage is universally regarded as fundamentally important deserving the full protection of all states of whatever ideology or political persuasions. Moreover, the 1987 Philippine Constitution provides in its Declaration of Principles and State Policies that the Philippines adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations (Article II, Section 2 of the 1987 Philippine Constitution).

CONSTITUTIONAL PROTECTION. The 1987 Philippine Constitution provides that "the State recognizes the sanctity of family life and shall protect and strengthen the family as a basic social institution" (Section 12, Article II). Marriage is a relationship of the highest importance. (*Manuel v. People*, G.R. No. 165842, November 29, 2005, 476 SCRA 461). As a matter of fact, to highlight the importance of the family and of marriage, the Constitution further provides a separate Article 15 exclusively dealing with the family. Among others, it provides that 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 1, Article 15). Marriage, according to the Constitution, is an inviolable social institution and the foundation of the family and shall be protected by the State (Section 2, Article 15). It has likewise been authoritatively stated that the "right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause" (*Zablocki v. Redhail*, 434 U.S. 374, 54 L. Ed. 618). The right to enter into a marriage has also been regarded as within the ambit of the constitutional right of association. And, once married, a couple has a right to privacy which is protected against all undue and unwarranted government intrusion. The right of privacy in a marriage is a right

> older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose x x x (*Griswold v. Connecticut*, 381 US 479, 14 L. Ed. 510).

The constitutional provisions on marriage, however, do not imply that the legislature cannot enact a law allowing absolute

divorce. While it is fundamental that marriage must be protected, it is likewise to be acknowledged that there may be certain cases where the parties might have undergone a marriage ceremony to bind themselves together but, subsequently, no functional marital life would exist. Hence, there is no marriage to preserve at all. The legislature has the plenary power to decide what sort of situations allowing absolute divorce may be recognized within the limits allowed by the Constitution.

While a lawful marriage seeks to create a permanent union between man and woman, it does not shed the spouses' integrity or their privacy as individuals. Thus, in *Zulueta v. Court of Appeals*, 68 SCAD 440, 253 SCRA 699 where a wife, to get evidence of infidelity in a case for legal separation she filed against her husband, ransacked his office and forcibly took documents and letters of the husband addressed to his paramour, the Supreme Court ruled that the wife cannot use the said documents and letters as evidence because they were obtained in violation of the husband's constitutional right to privacy. Pertinently, the Supreme Court ruled:

> Indeed, the documents and papers in question are inadmissible in evidence. The constitutional injunction declaring "the privacy of communication and correspondence (to be) inviolable" is no less applicable simply because it is the wife (who thinks herself aggrieved by her husband's infidelity) who is the party against whom the constitutional provision is to be enforced. The only exception to the prohibition in the Constitution is if there is a "lawful order (from a) court or when public safety or order requires otherwise, as prescribed by law." Any violation of this provision renders the evidence obtained inadmissible "for any purpose in any proceeding."
>
> The intimacies between husband and wife do not justify any one of them in breaking the drawers and cabinets of the other and in ransacking them for any telltale evidence of marital infidelity. A person, by contracting marriage, does not shed his/her integrity or his/her right to privacy as an individual and the constitutional protection is ever available to him or to her.
>
> The law insures absolute freedom of communication between spouses by making it privileged. Neither the husband nor wife may testify for or against the other without the consent of the affected spouse while the marriage subsists. Neither may be examined without the consent of the other as to any communication received in confidence by one from the other during the marriage, save for specified exceptions. But one thing

> is freedom of communication; quite another is a compulsion for each one to share what one knows with the other. And this has nothing to do with the duty of fidelity that each owes to the other.

In the case of *Duncan v. Glaxo,* 438 SCRA 343, an employment contract requiring an employee to disclose to management any existing or future relationship by consanguinity or affinity with co-employees or employees of competing drug companies and requiring such employee to resign should management find that such relationship poses a possible conflict of interest was not held to be in violation of the equal protection clause of the constitution considering that the said stipulation is reasonable under the circumstances because such relationship might compromise the interest of the company and the requirement was shown to be aimed against the possibility that a competitor company will gain access to its secrets and procedures. The Supreme Court said that the provision does not impose an absolute prohibition against relationships between the company's employees and those of competitor company.

In the subsequent case of *Star Paper Corporation v. Simbol*, 487 SCRA 228, where a company policy provided that, in case two of their employees decide to get married to each other , one of them should resign from the company, the Supreme Court held that the act of the company in enforcing such policy is illegal as it failed to prove a legitimate business concern in imposing the questioned policy especially so when the asserted policy is premised on the mere fear that employees married to each other will be less efficient. Thus, it was not shown how the marriage between a sheeting machine operator of the company married to an employee in the repacking section in the same company, or a production helper to a cutter-machine helper, can be detrimental to the business operations of the company.

LEGISLATIVE CONTROL OF MARRIAGE. The Constitution itself however does not establish the parameters of state protection to marriage and the family, as it remains the province of the legislature to define all legal aspects of marriage and prescribe the strategy and the modalities to protect it and put into operation the constitutional provisions that protect the same. With the enactment of the Family Code, this has been accomplished as it defines marriage and the family, spells out the corresponding legal effects, imposes the limitations that affect married and family life, as well as prescribes the grounds for declaration of nullity and those for legal separation (*Ong v. Ong*, G.R. No. 153206, October 23, 2006,

505 SCRA 76). Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature (*Maynard v. Hill*, 125 US 190, 8 S. Ct. 723, 31 L. Ed. 654). In a real sense, there are three parties to every civil marriage; two willing spouses and an approving State. On marriage, the parties assume new relations to each other and the State touching nearly on every aspect of life and death. In a real sense, there are three parties to every civil marriage; two willing spouses and an approving State (*Manuel v. People*, G.R. No. 165842, November 29, 2005, 476 SCRA 461).

The relations, duties, obligations, and consequences flowing from the marriage contract are so important to the peace and welfare of society as to have placed it under the control of special municipal regulations, independent of the will of the parties, and it has always been the subject of legislative control (*Maynard v. Hill*, 125 US 190, 8 S. Ct. 723, 31 L. Ed. 654). Indeed, not only is the state concerned with the validity of marriage *per se* but also with the sustainability and maintenance of a harmonious and healthy family life brought about by such marriage. It is a generally accepted doctrine that the legislature may impose such restrictions upon marital relation as the laws of God and the laws of propriety and morality and social order demand, provided, such regulations are not prohibitory (*State v. Walker*, 36 Kan. 297).

> The social aspects of marriage have become so impressed upon us that law-making bodies everywhere have seen fit to impose safeguards against ill-advised unions. Thus, waiting periods, medical examinations, age restrictions, marriage within degrees of consanguinity and affinity, and many other controls have been universally imposed by state legislatures in order to preserve and maintain the utmost purity and integrity of marriage (*In re* Barbara Haven 86 Pa., D.C.CC 141).
>
> Public policy, good morals and the interest of society require that the marital relation should be surrounded with every safeguard and its severance only in the manner prescribed and the causes specified by law. The laws regulating civil marriages are necessary to serve the interest, safety, good order, comfort or general welfare of the community and the parties can waive nothing essential to the validity of the proceedings. A civil marriage anchors an ordered society by encouraging stable relationships over transient ones; it enhances the welfare of the community (*Manuel v. People*, G.R. No. 165842, November 29, 2005, 476 SCRA 461).

Legislative regulation of marriage must, however, not contravene the mandates of the Constitution. It must not violate for instance the "equal protection clause" by forbidding certain types of marriages on the basis of race or political inclinations (*Loving v. Virginia*, 388 US 1, 18 L. Ed. 2d 1010).

By legislation, marriage can be made a statutory basis for limiting one's capacity to act or for affecting one's right to acquire property. For example, if a person attests the execution of a last will and testament, to whose spouse a devise or legacy is given by such will, such devise or legacy shall, so far only as concerns such spouse or anyone claiming under such spouse, be void, unless there are three other competent witnesses to such will (Article 823 of the Civil Code). In this case, the fact of marriage of the witness in a will to the devisee or legatee shall render void the gratuitous disposition of a real property in favor of the devisee-spouse or a personal property in favor of the legatee-spouse, unless there are three other witnesses.

Also, according to Article 874 of the Civil Code, an absolute condition not to contract a first or subsequent marriage made in a last will and testament on an instituted voluntary heir, legatee, or devisee shall be considered as not written unless such condition has been imposed on the widow or widower by the deceased spouse, or by the latter's ascendants or descendants. It must be pointed out that, in case the heir, legatee, or devisee falls under the exception, the contravention of such a condition in a will imposed on them will nevertheless not make the marriage void but will only make ineffective the grant, devise or legacy.

PROPERTY RELATIONS. Under the New Family Code, except for property relations which may be fixed in a marriage settlement executed prior to the marriage ceremony, the nature, consequence and incidents of marriage as a social institution are governed by law and not subject to stipulations. However, marriage settlements must not contravene the mandatory provisions of the new Family Code. As the law mandates, marriage settlements must be within the limits provided by the Family Code. For instance, while persons who intend to marry can stipulate in their marriage settlement that the property regime that will govern their marriage shall be the conjugal partnership property arrangement, they cannot provide any stipulation, whether express or implied, that the commencement of such property regime shall be at anytime other than at the precise moment that the marriage was celebrated. If they do so, Article 107 of the Family Code in relation to Article 88 statutorily makes such

stipulation void. Also, Article 77 of the Family Code provides that the marriage settlement and any modification thereof shall be in writing, signed by the parties and executed before the celebration of the marriage. Any modification after the marriage must be approved by the courts and must be made only in accordance and in the instances provided for in Article 76. Other limitations are set out in the Family Code.

LAW GOVERNING VALIDITY OF MARRIAGE. To create the relation of husband and wife, and give rise to the mutual rights, duties, and liabilities arising out of that relation, there must be a valid marriage. The requisites for a valid marriage are provided for by law. In determining the validity of marriage, it is to be tested by the law in force at the time the marriage was contracted (*Social Security System v. Jarque Vda. de Bailon*, 485 SCRA 376; *Stewart v. Vandervort*, 34 W. Va. 524, 12 SE 736, 12 LRA 50; *Ninal v. Bayadog*, 328 SCRA 122). In *Gomez v. Lipana,* 33 SCRA 615 decided in 1970, the Supreme Court was confronted with the issue of whether or not a second marriage is void and could be the subject of a collateral attack. In determining the validity of the marriage, the Supreme Court did not apply the 1950 Civil Code provisions on marriage which was the one effective at the time the decision was rendered. The Supreme Court applied the law which was effective at the time the questioned marriage was celebrated. Since the second marriage was solemnized in 1935, the Supreme Court stated that the controlling law determinative of the suit was Act 3613 of the Philippine Legislature, otherwise known as the Marriage Law of 1929, which became effective on December 4, 1929 and which remained effective up to the date the second marriage was celebrated. The Marriage Law of 1929 was subsequently superseded by the Civil Code (See also *Yap v. CA*, 145 SCRA 229).

The principle that the validity of a marriage is determined by the law effective at the time of the celebration of the marriage is further highlighted by the fact that, as a general rule, the nature of the marriage already celebrated cannot be changed by a subsequent amendment to the law.

> Thus, it has been held that a marriage void *in toto* at the time it is made cannot be made voidable by a subsequent statute, so as to impose upon the husband the burden of alimony. Similarly, repealing a statute prohibiting certain marriages does not operate to make valid and effectual a marriage contracted previously in violation of such act. The rule as to retroactive application is otherwise, however, for statutes

> expressly validating certain marriages formerly considered invalid (52 Am. Jur. 2d 955-956).
>
> In order to avoid the consequences that would otherwise flow from declaring particular kinds of prohibited or irregular marriages void, or voidable, legislatures have sometimes enacted statutes expressly making such marriages valid. Such statutes are constitutional even when retroactive in their operation. Accordingly, it has been held that such a statute is not void because it may impair vested rights, and that although it may affect the rights of individuals, the judiciary have no authority to declare it void if it is just and reasonable and conducive to the public good (52 Am. Jur. 2d 958).

Under the Civil Code of 1950, a marriage between stepbrother and stepsister was void. Such a marriage is not anymore prohibited under the new Family Code. However, the effectivity of the new Family Code does not affect the void nature of a marriage between stepbrother and stepsister solemnized during the effectivity of the 1950 Civil Code. It remains void or nullifiable considering that the validity of a marriage is governed by the law enforced at the time of the marriage ceremony.

Also, in the Family Code, there is now a new provision, specifically Article 53, which considers a subsequent marriage void if, before contracting the same, the former spouses, in violation of Article 52, failed, among others, to liquidate their property of the previous marriage after the finality of a nullity or annulment decree and to deliver the presumptive legitime of their children. This ground to nullify a marriage or to declare it as void did not exist in the 1950 Civil Code and, therefore, cannot be availed of by a person who, after obtaining a decree nullifying or annulling his previous marriage, wants to again nullify his subsequent marriage on the basis that such subsequent marriage which has been entered into prior to the effectivity of the Family Code does not comply with the requirement relative to the delivery of the presumptive legitime of his children in the first marriage.

In the same vein, "mistake in identity" was an instance of fraud which constituted a ground to make a marriage annullable (valid until terminated) under the Civil Code. In the Family Code, such a "mistake in identity" is a ground to declare a marriage void from the beginning. The effectivity of the Family Code does not affect the annullable nature of those marriages contracted prior to the effectivity of the Family Code where "mistake in identity" is

involved. In short, the annullable nature of such a marriage is not *ipso jure* converted into a marriage which is void *ab initio* upon the implementation of the Family Code. The new Family Code does not likewise expressly provide that marriages such as those contracted as a result of "mistake in identity" become automatically void upon the effectivity of the new Family Code just because the same amended the Civil Code by making "mistake of identity" a ground to declare a marriage void from the beginning and not anymore a legal basis for annulment. An express validation or invalidation provision is important because any ambiguity or doubt in the law should follow the general rule that marriages are governed by the law enforced at the time of their celebration and any interpretation of the law must always be made upholding the validity of a marriage.

While Article 256 of the Family Code provides that the law shall have a retroactive effect insofar as it does not prejudice or impair vested or acquired rights in accordance with the Civil Code and other laws, this retroactivity clause is a general one and does not expressly and directly validate a previously void marriage under the Civil Code. Moreover, void marriages can never be ratified. Also, though a marriage is void, vested rights can be acquired from such a relationship like those which may refer to property relationships and, therefore, a clear and direct legislative mandate to validate a void marriage must expressly be enacted if the legislature really intends such a curative measure.

There is one clear case where the Family Code allows the filing of a petition to declare a marriage void even if the ground was not statutorily provided as a basis for a void marriage under the Civil Code. Prior to its amendment, Article 39 of the Family Code clearly provides that in cases of marriages celebrated before the effectivity of the Family Code and falling under the said Code's Article 36, which makes a marriage void because either or both of the contracting spouses are psychologically incapacitated to perform the essential marital obligation, an action or a defense to declare the marriage void shall prescribe in ten years after the effectivity of the Family Code. This means that a spouse who, prior to the effectivity of the Family Code on August 3, 1988, got married to an individual who is psychologically incapacitated under Article 36, may file a case to declare such marriage void under the said article of the New Family Code despite the fact that such ground did not exist as a legal basis for nullity of marriage at the time his or her marriage was celebrated when the Civil Code was in effect. Later, Republic Act Number 8533 amended Article 39 by deleting the prescriptive

period of 10 years. Hence, if the ground for nullity is Article 36, there is no more prescriptive period whether or not the marriage has been celebrated before or after August 3, 1988.

However, in the case of *Balogbog v. Court of Appeals,* G.R. No. 83598, March 7, 1997, 80 SCAD 229, where it was contended that a particular marriage should have been proven in accordance with Articles 53 and 54 of the Spanish Civil Code of 1889 because this was the law in force at the time of the alleged marriage, the Supreme Court ruled that Articles 53 and 54 of the Spanish Civil Code never took effect in the Philippines because they were suspended by the Spanish Governor General of the Philippines shortly after the extension of the Spanish Civil Code to this country. In such a case, the Supreme Court said that:

> since this case was brought in the lower court in 1968, the existence of the marriage must be determined in accordance with the present Civil Code, which repealed the provisions of the former Civil Code, except as they related to vested rights, and the rules of evidence.

Article 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. (53a)

Article 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)

Article 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. (n)

Article 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)

Article 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)

LEGAL CAPACITY. Under the New Family Code, the marrying age is 18 years old and above. This is likewise the age of majority. If any of the parties is below 18 years of age, the marriage is void even if the consent of the parents has been previously obtained. Also, the contracting parties must not be related to each other in the manner provided for in Article 37, which refers to incestuous marriages, and Article 38 which refers to void marriages for reasons of public policy. Legal capacity to marry must likewise have reference to Article 39 of the Civil Code stating that capacity to act is, among others, limited by family relations. Hence, an already married person cannot marry again unless his or her previous marriage has been nullified or annulled or his or her case falls under the "valid bigamous marriage" provided for in Article 41 of the Family Code.

CONTRACTING PARTIES MUST BE OF DIFFERENT SEX. Marriage is a union founded on the distinction of sex. The law likewise provides that the contracting parties must be a male and a female. This particular requirement appears to be for emphasis purposes only for even in its absence, the phrase "contracting parties" could not have included within its ambit persons of the same sex. This is evidenced by the fact that the New Family Code as well as the Civil Code are replete with words of heterosexual import such as "husband and wife," "man and woman," and "father and mother." In fact, the very first article of the Family Code explicitly provides that marriage is a special contract of permanent union between a man and a woman.

EFFECT OF SEX-CHANGE. Although gay marriages are definitely not covered within the purview of the Article 2 of the Family Code, the emerging issue of transsexuals and intersexuals' gender identities have called the attention of the Supreme Court in the cases of *Silverio v. Republic*, G.R. No. 174689, October 22, 2007 and *Republic v. Cagandahan*, G.R. No. 166676, September 12, 2008, respectively. Thus, the question which needs to be addressed is when should the gender identity of a contracting party to a marriage be determined: at the time of his or her birth or at the time when he or she decides to enter into marriage? From a human rights perspective which espouses a non-discriminatory and more inclusive interpretation, it would seem that a man or a woman should be considered as such at the time of the marriage when the parties themselves assert their own gender identities.

In *Silverio v. Republic*, G.R. No. 174689, October 19, 2007, 537 SCRA 373, where the petitioner who had a biological sex change from male to female through sex-reassignment-surgery and where he sought the amendment of his birth certificate to reflect the change in sex as a preliminary step to get married to his partner, the Supreme Court rejected the said petition and ruled that the sex determined by visually looking at the genitals of a baby at the time of birth is immutable and that there is no law legally recognizing sex reassignment.

However in *Republic v. Cagandahan*, G.R. No. 166676, September 12, 2008, 565 SCRA 72 where the respondent was found out to have Congenital Adrenal Hyperplasia (CAH) which is a condition where the person afflicted has both male and female characteristics and organs and where, through expert evidence, it was shown that the respondent, though genetically a female, secreted

male hormones and not female hormones, had no breast, and did not have any monthly menstrual period and where the respondent, in his mind and emotion, felt like a male person and did not want to have surgery, the Supreme Court considered the person as an "intersex individual" and granted the preference of the person to be considered as a male person, thereby allowing the amendment of the birth certificate of the person from female to male. The Supreme Court said:

> Intersex individuals are treated in different ways by different cultures. In most societies, intersex individuals have been expected to conform to either a male or female gender role. Since the rise of modern medical science in Western societies, some intersex people with ambiguous external genitalia have had their genitalia surgically modified to resemble either male or female genitals. More commonly, an intersex individual is considered as suffering from a "disorder" which is almost always recommended to be treated, whether by surgery and/or by taking lifetime medication in order to mold the individual as neatly as possible into the category of either male or female.
>
> In deciding this case, we consider the compassionate calls for recognition of the various degrees of intersex as variations which should not be subject to outright denial. "It has been suggested that there is some middle ground between the sexes, a 'no-man's land' for those individuals who are neither truly 'male' nor truly 'female'". The current state of Philippine statutes apparently compels that a person be classified either as a male or as a female, but this Court is not controlled by mere appearances when nature itself fundamentally negates such rigid classification.
>
> In the instant case, if we determine respondent to be a female, then there is no basis for a change in the birth certificate entry for gender. But if we determine, based on medical testimony and scientific development showing the respondent to be other than female, then a change in the subject's birth certificate entry is in order.
>
> Biologically, nature endowed respondent with a mixed (neither consistently and categorically female nor consistently and categorically male) composition. Respondent has female (XX) chromosomes. However, respondent's body system naturally produces high levels of male hormones (androgen). As a result, respondent has ambiguous genitalia and the phenotypic features of a male.
>
> Ultimately, we are of the view that where the person is biologically or naturally intersex the determining factor in

his gender classification would be what the individual, like respondent, having reached the age of majority, with good reason thinks of his/her sex. Respondent here thinks of himself as a male and considering that his body produces high levels of male hormones (androgen) there is preponderant biological support for considering him as being male. Sexual development in cases of intersex persons makes the gender classification at birth inconclusive. It is at maturity that the gender of such persons, like respondent, is fixed.

Respondent here has simply let nature take its course and has not taken unnatural steps to arrest or interfere with what he was born with. And accordingly, he has already ordered his life to that of a male. Respondent could have undergone treatment and taken steps, like taking lifelong medication, to force his body into the categorical mold of a female but he did not. He chose not to do so. Nature has instead taken its due course in respondent's development to reveal more fully his male characteristics.

In the absence of a law on the matter, the Court will not dictate on respondent concerning a matter so innately private as one's sexuality and lifestyle preferences, much less on whether or not to undergo medical treatment to reverse the male tendency due to CAH. The Court will not consider respondent as having erred in not choosing to undergo treatment in order to become or remain as a female. Neither will the Court force respondent to undergo treatment and to take medication in order to fit the mold of a female, as society commonly currently knows this gender of the human species. Respondent is the one who has to live with his intersex anatomy. To him belongs the human right to the pursuit of happiness and of health. Thus, to him should belong the primordial choice of what courses of action to take along the path of his sexual development and maturation. In the absence of evidence that respondent is an "incompetent" in the absence of evidence to show that classifying respondent as a male will harm other members of society who are equally entitled to protection under the law, the Court affirms as valid and justified the respondent's position and his personal judgment of being a male.

In so ruling we do no more than give respect to (1) the diversity of nature; and (2) how an individual deals with what nature has handed out. In other words, we respect respondent's congenital condition and his mature decision to be a male. Life is already difficult for the ordinary person. We cannot but respect how respondent deals with his unordinary state and thus help make his life easier, considering the unique circumstances in this case.

> As for respondent's change of name under Rule 103, this Court has held that a change of name is not a matter of right but of judicial discretion, to be exercised in the light of the reasons adduced and the consequences that will follow. The trial court's grant of respondent's change of name from Jennifer to Jeff implies a change of a feminine name to a masculine name. Considering the consequence that respondent's change of name merely recognizes his preferred gender, we find merit in respondent's change of name. Such a change will conform with the change of the entry in his birth certificate from female to male.

It is also interesting to look at some jurisprudence in the United States. The following are excerpts from the case of *M.T. v. J.T.* (the full names according to New Jersey legal practice are kept undisclosed in cases of this nature), 140 N.J. Super. 77, 355 A.2d 204 (1976), decided by the superior court in New Jersey, U.S.A. squarely dealing with the effect of sex-change:

> We accept — and it is not disputed — as the fundamental premise in this case that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female. Despite winds of change, this understanding of a valid marriage is almost universal. In the matrimonial field, the heterosexual union is usually regarded as the only one entitled to legal recognition and public sanction.
>
> There is not the slightest doubt that New Jersey follows the overwhelming authority. xxx xxx xxx The issue must then be confronted whether the marriage between a male and a post-operative transsexual, who has surgically changed her external sexual anatomy from male to female, is to be regarded as a lawful marriage between a man and a woman.
>
> In sum, it has been established that an individual suffering from the condition of transsexualism is one with a disparity between his or her genitalia or anatomical sex and his or her gender, that is, the individual's strong and consistent emotional and psychological sense of sexual being. A transsexual in a proper case can be treated medically by certain supportive measures and, through surgery, to remove and replace existing genitalia with sex organs which will coincide with the person's gender. If such sex reassignment surgery is successful and the post operative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or a female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public

> policy to prevent the person's identification at least for purposes of marriage to the sex finally indicated.
>
> In this case, the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did do so here. In so ruling, we do more than give legal effect to a *fait accompli* based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.
>
> Accordingly, the court below correctly determined that plaintiff at the time of her marriage was a female and that defendant, a man, became her lawful husband, obligated to support her as his wife. The judgment of the court is therefore affirmed (Family Law by Harry D. Krause, 2nd Edition, 1983, West Publishing Company, St. Paul, Minnesota, pages 468-469).

The decision cited seems to challenge the established concept that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Indeed, the above case does not show that the male person surgically converted into a female would be capable of reproducing or siring human beings. In another American case decided by a court in New York, this basic premise was, however, greatly taken into consideration. Thus,

> even if the defendant were a male entrapped in the body of a female, the court noted that the record indicated that the entrapped male never successfully escaped to enable the defendant to perform male functions in a marriage, and that attempted sex reassignment by mastectomy, hysterectomy, and hormonal therapy had not achieved this result. The court concluded by stating that while defendant might function as a male in other situations and other relationships, the defendant could not function as a husband by assuming male duties and obligations inherent in the marital relationship, and that hormone treatments and surgery had not succeeded in supplying the necessary apparatus to enable the defendant to function as

> a man for the purpose of procreation (*Marriage Between Persons of the Same Sex* by Peter G. Guthrie, J.D., citing B vs. B [1976], 78 Misc 2d 112, 355 NYS 2d 712).

In another case decided by a New York court where the parties were of the same sex at the time of the marriage ceremony but there was a subsequent change of sex from male to female by one of the parties after the marriage ceremony, the said court stated that the so-called marriage ceremony between the parties was a nullity as both parties were males during the said ceremony. Also, the said court referred to the medical journals submitted by counsel stating that mere removal of the male organ would not of itself change a person into a true female. Significantly, the court likewise said that the case presented before it was different from a petition for the annulment of marriage or a petition to declare a marriage void because the situation in the said petitions presupposed that the contracting parties were of different sex. The alleged marriage ceremony between the two male persons did not create a contract of marriage. In short, what took place was not a marriage which created a contract, whether annullable or void. Particularly, the said court said:

> The court finds as a fact that the defendant was not a female at the time of the marriage ceremony. It may be that since that time the defendant's sex has been changed to female by operative procedures, although it would appear from the medical articles and other information supplied by counsel, that mere removal of the male organs would not, in and of itself, change a person into a true female. What happened to the defendant after the marriage ceremony is irrelevant, since the parties never lived together.
>
> The law makes no provision for a "marriage" between persons of the same sex. Marriage is and always has been a contract between a man and a woman. "Marriage" may be defined as the status or relation of a man and a woman who have been legally united as husband and wife. It may be more particularly defined as the voluntary union for life of one man and one woman as husband and wife * * *.
>
> Accordingly, the court declares that the so-called marriage ceremony in which the plaintiff and the defendant took part in Belton, Texas on February 22, 1969 did not in fact or in law create a marriage contract and that the plaintiff and the defendant are not and have not ever been "husband and wife" or parties to a valid marriage (*Anonymous v. Anonymous*, Supreme

Court, Special Term, Part V, 1971, 67 Misc. 2d 982, 325 NYS 2d 499).

CONSENT. The requirements of consent are that it must be: (a) freely given and (b) the same must be made in the presence of the solemnizing officer. The child shall have the prerogative of choosing his or her future spouse. Parents should not force or unduly influence him or her to marry a person he or she has not freely chosen (Article 57, PD 603).

The total absence of consent makes the marriage void *ab initio*. However, consent in marriage obtained through fraud, force, intimidation, or undue influence makes such marriage merely annullable or voidable (valid until annulled). The vitiated manner by which such consent is obtained merely renders defective such consent.

Free consent connotes that the contracting parties willingly and deliberately entered into the marriage. It signifies that, at the time of the marriage ceremony, they were capable of intelligently understanding the nature and consequences of the act. The consent requisite to the marriage relation need not, however, be expressed in any special manner, or any particular form (*Teter v. Teter*, 101 Ind. 129) so long as there is a manifestation that the contracting parties take each other as husband and wife.

The free consent must be given in the presence of the solemnizing officer "in order that it may have due publication, before a third person or persons, for the sake of notoriety and the certainty of its being made" (*Dyer v. Brannock*, 66 Mo. 391, 27 Ann Rep. 359). Together with the mandatory requirement under Article 6 of the Family Code that the contracting parties must be personally present during the solemnization of marriage, this requirement prohibits proxy-marriages in the Philippines.

AUTHORITY OF THE SOLEMNIZING OFFICER. The solemnizing officer may be any one of those enumerated in Article 7 of the New Family Code. It must be observed that it is not the presence or absence of the solemnizing officer which constitutes the formal requirement but it is the absence or presence of the authority of such solemnizing officer. Article 7 also provides the limits of their authority and the elements or requirements for such authority to fully vest on the solemnizer.

Under the new Local Government Code which took effect on January 1, 1992, the mayor of a city or municipality is empowered

to solemnize a marriage, any provision of law to the contrary notwithstanding (Chapter 3, Article 1, Section 444 [xviii] of the 1991 Local Government Code).

The authority of the officer or clergyman shown to have performed a marriage ceremony will be presumed in the absence of any showing to the contrary (*Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121). This is in accordance with the rule that where a marriage ceremony is shown, every presumption will be indulged that it was legally performed (*Gaines v. New Orleans*, 18 US 950). Moreover, the solemnizing officer is not duty bound to investigate whether or not a marriage license has been duly and regularly issued by the local civil registrar. All the solemnizing officer needs to know is that the license has been issued by the competent official, and it may be presumed from the issuance of the license that said official has fulfilled the duty to ascertain whether the contracting parties had fulfilled the requirements of law (*People v. Janssen*, 54 Phil. 176).

However, under Article 29 in relation to Articles 27 and 28 of the Family Code providing the cases where the contracting parties are legally excused from obtaining a marriage license because one of them is in the point of death or there is no means of transportation to go to the local civil registrar as their places of residence are far, the solemnizing officer must undertake the necessary steps to ascertain the ages and relationship of the contracting parties and the absence of legal impediment to marry. Similarly, under Article 34 of the Family Code, providing that persons living together as husband and wife for at least five years without the benefit of marriage may contract a valid marriage even in the absence of a marriage license, the solemnizing officer, in such situation, is duty bound to ascertain the qualifications of the contracting parties.

Considering that the consent of the State is given through a solemnizing officer duly authorized by the law, his or her very position as a marriage solemnizer is affected by public interest that criminal penalties are even imposable against a person who solemnizes a marriage without authority. Thus, Section 38 of the Marriage Law of 1929 (Act No. 3613) which has not yet been repealed provides that:

> Any priest or minister solemnizing marriage without being authorized by the Director of the Philippine National Library (now Director of National Library who is concurrently the Civil Registrar General under the Civil Register Law, Act No. 3753), or who, upon solemnizing marriage, refuses to exhibit

> his authorization in force when called upon to do so by the parties or parents, grandparents, guardians, or persons having charge; and any bishop or officer, priest, or minister of any church, religion or sect the regulations and practices whereof require banns or publications previous to the solemnization of a marriage in accordance with Section 10 (now Article 12 of the Family Code), who authorizes the immediate authorization of the marriage that is subsequently declared illegal; or any officer, priest or minister solemnizing marriage in violation of the provisions of this Act (now the Family Code), shall be punished by imprisonment for not less than one month nor more than two years, or by a fine of not less than two hundred pesos nor more than two thousand pesos (See also Revised Penal Code, Article 352).

Criminal liability likewise attaches to any person who, not being authorized to solemnize marriage, shall publicly advertise himself, by means of signs or placards placed on his residence or office or through the newspapers, as authorized to solemnize marriage. He or she shall be punished by imprisonment for not less than one month nor more than two years, or by a fine of not less than fifty pesos nor more than two thousand pesos, or both, in the discretion of the court (Section 43 of the Marriage Law of 1929, not repealed by the Family Code). The Marriage Law of 1929 likewise provides that any priest or minister of the gospel of any denomination, church, sect, or religion convicted of a violation of any of the provision of the said law or of any crime involving moral turpitude, shall, in addition to the penalties incurred in each case, be disqualified to solemnize marriage for a period of not less than six months nor more than six years at the discretion of the court.

VALID MARRIAGE LICENSE. A valid marriage license must be issued by the local civil registrar of the place where the marriage application was filed. Once issued, it has only a lifetime of 120 days from the date of issue and is effective in any part of the Philippines. The date of issue is the date of the signing of the marriage license by the local civil registrar (Minutes of the 145th meeting of the Civil Code and Family Law Committee, June 28, 1986, page 15). A marriage license is not effective if it will be used as the marriage license to be able to solemnize a marriage abroad. It is deemed automatically canceled at the expiration of the 120-day period if the contracting parties have not made use of it. The other requirements for the issuance of a marriage license are merely directory in the sense that their non-observance is a mere irregularity which will

not render a marriage null and void or even annullable. Hence, if the marriage license is issued in a place wherein the contracting parties do not reside and a marriage is performed on the basis of such marriage license, such marriage is still valid (*People v. Janssen*, 54 Phil. 176).

Likewise, the fact that a party to whom a license is issued is represented therein by a name other than his true name or had his name spelled wrongly will not invalidate a marriage solemnized on the authority of such license (Validity of Solemnized Marriage as Affected by Absence of License Required by Statute authored by F.M. English, 61 ALR 2d 841, citing *Matturo v. Matturo*, 111 NYS 2d 533).

There are also authorities to the effect that a marriage license procured by one of the contracting parties by false representation as to her or his age, which was however above the marrying age, in order to avoid the statutory requirement of parental consent did not result in the invalidity of the marriage in the absence of a statutory declaration expressly nullifying a marriage contracted without the required parental consent and considering further that the requirement of parental consent was applicable only to the issuance of the marriage license, and simply directory to the clerk who issued the license (*Teagae v. Allred*, 173 P2d 117, 119 Mont. 193). Under the Family Code, while a marriage where one of the contracting parties is at least 18 years of age and below 21 years of age is not void from the beginning, it is nevertheless annullable which means that it is valid up to the time it is terminated (Article 45 of the Family Code). The commission of perjury or deception on the part of the contracting parties as to their age in order to avoid the statutory requirement of parental consent is not a cause to invalidate the marriage obtained through such marriage license (*Payne v. Payne*, 298 F. 970).

In the same vein, the fact that one of the contracting parties did not disclose his or her prior marriage and divorce in the application as required by statute; or falsely stated that he or she had not been previously married (*Lea v. Galbraith,* 137 P2d 320); or misrepresented his or her residence (*Boysen v. Boysen*, 23 NE2d 231); or falsely swore that he or she was not under guardianship (*Johnson v. Johnson*, 214 Minn. 462); or forged her or his mother's consent to the marriage (*Ex Parte* Hollopeter, 52 Wass 41, 100 P 159), will not justify a judicial declaration that marriages performed on the basis of marriage licenses procured through such acts are nullities.

However, it has been ruled that:

> "a license to enter into a status or a relationship which the parties are incapable of achieving is a nullity. If the appellants had concealed from the clerk the fact that they are of the same sex and he had issued a license to them and a ceremony had been performed, the resulting relationship would not constitute a marriage (*Jones v. Hallahan*, 63 ALR 3d 1195)."

MARRIAGE CEREMONY. "In our society, the importance of a wedding ceremony cannot be underestimated as it is the matrix of the family and, therefore, an occasion worth reliving in the succeeding years" (*Go v. Court of Appeals*, G.R. No. 114791, May 29, 1997, 82 SCAD 887). The Family Code only recognizes ceremonial marriages. This means marriages which are solemnized by persons duly authorized by the state.

> The purpose of enactments requiring the solemnization of marriage before an authorized person, together with those dealing with the prior procurement of a license, is doubtless to protect the parties to the marriage contract in the rights flowing therefrom, and likewise to protect their offspring. A solemn record of the contract is made to which recourse may be had when rights or obligations of the husband or wife arising from the marriage are in issue. So, too, are the interests of third parties in dealing with either of the contracting parties, subsequent to marriage, thus protected. x x x (*Vetas v. Vetas*, 170 P.2d 183).

The Family Code does not generally prescribe any particular form of a marriage ceremony. However, the minimum requirement imposed by law is that the contracting parties appear personally before the solemnizing officer and declare that they take each other as husband and wife in the presence of at least two witnesses of legal age.

> An exchange of vows can be presumed to have been made from the testimonies of the witnesses who state that a wedding took place, since the very purpose for having a wedding is to exchange vows of marital commitment. It would indeed be unusual to have a wedding without an exchange of vows and quite unnatural for people not to notice its absence (*Balogbog v. Court of Appeals*, G.R. No. 83598, March 7, 1997, 80 SCAD 229).

The declaration of consent need not be vocally expressed. It can be shown by other manifestations or signs of approval and consent.

Indeed, they may signify it by whatever ceremony their whim, their taste, or their religious belief may select. It is the agreement itself, and not the form in which it is couched, which constitutes the contract. The words used and the manner by which the ceremony was performed are mere evidence of a present intention and agreement to marry of the parties.

> 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, and is not a cause for annulment, it being sufficient that they declared in and signed the marriage contract that they were taking each other as husband and wife. 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 (Annotation on Annulment of Marriage by Judge Domingo Luciano, 22 SCRA 525, citing *Karganilla v. Familiar*, 1 O.G. 345, and *Infante v. Arenas*, CA-G.R. No. 5278-R, June 29, 1957).

Also, it has been held that a marriage is valid where a man and a woman appeared before a justice of the peace and there signed a statement setting forth that they had agreed to marry each other and asked the justice of the peace to solemnize the marriage and thereafter another document was signed by them, by the justice, and by two witnesses, stating that the man and woman appeared before the justice and ratified all that was contained in the preceding instrument and insisted upon the marriage and, after the signing of these documents, the justice announced to the man and the woman that they were married (*Martinez v. Tan*, 12 Phil. 731).

While the law provides that the declaration shall be contained in the marriage certificate, the marriage certificate itself is not an essential nor formal requirement of marriage. Failure to sign a marriage certificate or absence of the marriage certificate itself does not render the marriage void nor annullable (*Madridejo v. De Leon*, 55 Phil. 1; *Loria v. Felix*, 5 O.G. 8114).

WITNESSES IN A MARRIAGE CEREMONY. Article 3(3) expressly provides that, as part of the marriage ceremony which is a formal requirement, there must be no less than two witnesses of legal age in attendance. From the provision itself, it appears that there can be no marriage ceremony to speak of if the two witnesses of legal age are absent. The requirement of the presence of the two witnesses of legal age has been given further emphasis in Article 6 which provides that, while there is no prescribed form as to the

solemnization of a marriage, it shall be *necessary,* however, for the contracting parties to appear 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. Furthermore, tracing the legislative history of this requirement, under the Civil Code which was repealed by the Family Code, the presence of the two witnesses was not provided for under Article 53 thereof, which enumerated the requirements when a marriage can be solemnized. In the Family Code, the presence of the two witnesses of legal age is now included in Article 3 enumerating the formal requirements of a marriage, the absence of any of them, as a general rule, will make the marriage void. Also, such requirement as to the two witnesses of legal age under the Civil Code was contained only in Article 55 thereof which is the counterpart provision of Article 6 of the Family Code. Hence, the significant amendments in the Family Code making a double reference to the requirement of two witnesses of legal age in the marriage ceremony in two significant articles seem to indicate an intention to make the presence of two witnesses of legal age determinative of the presence of a marriage ceremony.

It can, however, be justifiably argued that the absence of two witnesses of legal age in a marriage ceremony is merely an irregularity in the said formal requirement which, according to Article 4, shall not affect the validity of the marriage but the party or parties responsible for the irregularity shall be civilly, criminally, and administratively liable. It can be validly explained that while there were no witnesses of legal age or there was only one witness of legal age or there were witnesses but not of legal age, there was still a marriage ceremony that was performed where the principal contracting parties and the solemnizing officer were present but only that it was deficient by the absence of the required witnesses of legal age. In short, a marriage ceremony, though inadequate, was not strictly absent so as to consider the marriage void under Article 4 of the Family Code. Besides, in marriage, it is the agreement itself of the principal contracting parties in the presence of the representative of the state, namely the solemnizing officer, which constitutes the contract. At the most, such inadequacy as to the witnesses, is merely an irregularity not enough to invalidate a marriage. This is the better view with respect to the interpretation and implementation of the Family Code. The law and public policy favor matrimony. Consequently, every intendment of the law leans toward legalizing matrimony, as it is the basis of human society throughout the civilized world (*Perido v. Perido*, 63 SCRA 97).

Significantly, the Supreme Court appears to lean in favor of the view that absence of witnesses is merely an irregularity which will not render a marriage void. In *Balogbog v. Court of Appeals,* G.R. No. 83598, March 7, 1997, 80 SCAD 229, where it was contended that the existence of a marriage cannot be presumed because there was no evidence that the parties, in the presence of two witnesses, declared that they take each other as husband and wife, the Supreme Court stated that an exchange of vows can already "be presumed to have been made from the testimonies of the witnesses who state that a wedding took place, since the very purpose for having a wedding is to exchange vows of marital commitment." Significantly, the Supreme Court did not say that a presumption of the presence of witnesses to the marriage ceremony is created by the said testimonies of the court witnesses. In this case, the issue of the absence of the witnesses during the marriage ceremony was not even taken up by the Supreme Court. In other words, to prove the validity of the marriage, it was enough that there was proof that a wedding took place where an exchange of vows can be presumed though the presence of witnesses will not necessarily be presumed. The absence of witnesses, therefore, was not such a serious flaw and would therefore only constitute an irregularity.

COMMON-LAW MARRIAGES NOT RECOGNIZED IN THE PHILIPPINES. A common-law marriage may be defined as a non-ceremonial or informal marriage by agreement, entered into by a man and a woman having capacity to marry, ordinarily without compliance with such statutory formalities as those pertaining to marriage licenses (*Re Zemmick*, 76 NE2d 902). Such agreement must be coupled by consummation, which includes at least cohabitation as husband and wife, and reputation in such a way that the public will recognize the marital status (*Huard v. Mcteigh*, 39 ALR 528; *Drewy v. State*, 208 Ga. 239).

Common-law marriages recognized in England and the United States have never been and are still not recognized in the Philippines (*Enriquez v. Enriquez*, 8 Phil. 565).

> Indeed, Philippine law does not recognize common-law marriages. A man and woman not legally married cohabit for many years as husband and wife, who represent themselves to the public as husband and wife, and who are reputed to be husband and wife in the community where they live may be considered legally "married" in common-law jurisdictions but not in the Philippines (*Eugenio, Sr. v. Velez*, 185 SCRA 425).

This is so because the Civil Code and the New Family Code expressly and mandatorily provide that the intervention in a valid marriage ceremony of an ecclesiastical or civil functionary authorized by the state to solemnize marriage constitutes one of the indispensable requisites for a valid marriage in the Philippines. Moreover, the contracting parties must appear before the said authorized solemnizer and personally declare in his presence that they take each other as husband and wife. Accordingly, only ceremonial marriage, where solemnization is an inherent aspect, is recognized in the Philippines.

Thus, the use of the word "spouses" in the Civil Code as well as the Family Code refers only to husband and wife lawfully married according to Philippine laws and not to common-law marriages, unless the law otherwise provides (*Enriquez, Sr. v. Velez*, 185 SCRA 425). In the same vein, the phrase "husband and wife" refers to parties who are lawfully married unless the law provides otherwise, as in the cases of Articles 34 and 147 of the Family Code.

ABSENCE, DEFECT, IRREGULARITIES IN ESSENTIAL AND FORMAL REQUIREMENTS. Generally, absence of any of the essential or formal requirements of a marriage renders such marriage null and void. Hence, a marriage license which has already automatically expired is not a valid marriage license, thereby making any marriage undertaken on the basis of such alleged license void. In such a case, there is absence of a valid marriage license.

Marriage by way of a jest is likewise void because there is absolutely no genuine consent on the part of both contracting parties. In *McClurg v. Terry*, 21 N.J.Eq. 225, the Court of Chancery of New Jersey had occasion to rule on a marriage by jest as null and void. The case is as follows:

> THE CHANCELLOR. The complaint seeks to have the ceremony of marriage performed between herself and the defendant, in November, 1869, declared to be a nullity. The ground on which she asks this decree is that, although the ceremony was actually performed, and by a justice of the peace of the county, it was only in jest, and not intended to be a contract of marriage, and that it was so understood at the time by both parties, and the other persons present; and that both parties have never since so considered and treated it, and have never lived together, or acted towards each other as man and wife. The bill and answer both state these as the facts of the case, and that neither party intended it as a marriage, or was willing to take the other as husband and wife. These statements

> are corroborated by the witnesses present. The complainant is an infant of nineteen years, who had returned late in the evening to Jersey City, from an excursion with the defendant and a number of young friends, among whom was a justice of the peace. All being in good spirits and excited by the excursion, she in jest challenged the defendant to be married to her on the spot. He in the same spirit accepted the challenge, and the justice, at their request, performed the ceremony with then making the proper responses. The ceremony was in the usual and proper form, the justice doubting whether it was in earnest or in jest. The defendant escorted the complainant to her home, and left her there as usual on occasions of such excursions; both acted and treated the matter as if no ceremony had taken place. After some time, the friends of the complainant having heard of the ceremony, and that it had been formally and properly performed before the proper magistrate, raised the question and entertained doubts whether it was not a legal marriage; and the justice mediated returning a certificate of the marriage to be recorded before the proper officer. The bill seeks to have the marriage declared a nullity, and to restrain the justice from certifying it for record.
>
> Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case, the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage. x x x

Marriage by proxy solemnized here in the Philippines is likewise void because of the absence of the essential requisite that consent freely given must be made in the presence of the solemnizing officer and the absence of the formal requisite that the contracting parties must personally declare before the solemnizing officer that they take each other as husband and wife.

Exceptions, however, are provided by law. Thus, absence of a marriage license does not affect the validity of a marriage if the situation falls under Chapter 2, Title I of the Family Code. These situations are marriages in *articulo mortis*, marriages of two contracting parties living in places where there are no means of transportation to enable them to appear personally before the local civil registrar, marriages among Muslims and among other ethnic cultural minorities performed in accordance with their practices,

and marriages of couples without any impediment to get married living together as husband and wife for at least five years.

Another exception is a marriage solemnized by a person without authority to solemnize a marriage provided that either one of the parties believed in good faith that such solemnizer had the proper authority (Article 35[2]).

Defects in the essential requirements of marriage make the marriage merely annullable or voidable. Specifically, these defects are enumerated in Articles 45 and 46 of the New Family Code.

Irregularities in the formal requisites do not affect the validity of the marriage. Except when the contracting parties eighteen years or over but below twenty-one did not obtain the consent of their parents as provided for in Article 14 of the Family Code, any irregularity in the formal requisites does not even render the marriage voidable or annullable.

A judge who solemnizes a marriage without having been shown a valid marriage license and merely requires the submission of the marriage license after the marriage ceremony acts improperly (*Cosca v. Palaypayon*, 55 SCAD 759, 237 SCRA 249). If, in such case, the parties really have a valid marriage license and they just forgot to bring it, the marriage will still be valid. It is just an irregularity. However, if the parties really do not have a marriage license and the judge requires them to apply and procure a marriage license after the marriage ceremony, the marriage is void. A judge who did not sign and date the marriage contract, did not furnish the parties, and did not forward the marriage contract to the local civil registrar, may be held administratively liable (*Cosca v. Palaypayon*, 55 SCAD 759, 237 SCRA 249).

The practice of a judge of requiring the parties to sign the marriage contract first before solemnization of the marriage is

> highly improper and irregular, if not illegal, because the contracting parties are supposed to be first asked by the solemnizing officer and declare that they take each other as husband and wife before the solemnizing officer in the presence of two witnesses before they are supposed to sign the marriage contract (*Cosca v. Palaypayon*, 55 SCAD 759, 237 SCRA 249).

Such a marriage solemnized by the judge in such an irregular manner, however, does not invalidate the marriage because a marriage contract is not a formal requirement of a valid marriage.

The following are some of the irregularities which do not affect the validity of a marriage: 1) absence of two witnesses of legal age during the marriage ceremony (*Meister v. Moore*, 96 US 76, 24 US L. Ed. 826); 2) absence of a marriage certificate (*People v. Janssen*, 54 Phil. 176); 3) marriage solemnized in a place other than publicly in the chambers of the judge or in open court, in church, chapel, or temple, or in the office of the consul-general, consul, or vice-consul; 4) issuance of marriage license in city or municipality not the residence of either of the contracting parties (*Alcantara v. Alcantara,* G.R. No. 167746, August 28, 2007, 531 SCRA 446); 5) unsworn application for a marriage license; 6) failure of the contracting parties to present original birth certificate or baptismal certificate to the local civil registrar who likewise failed to ask for the same; 7) failure of the contracting parties between the ages of eighteen and twenty-one to exhibit consent of parents or persons having legal charge of them to the local civil registrar; 8) failure of the contracting parties between the ages of twenty-one to twenty-five to exhibit advice of parents to local civil registrar; 9) failure to undergo marriage counseling; 10) failure of the local civil registrar to post the required notices; 11) issuance of marriage license despite absence of publication or prior to the completion of the 10-day period for publication (*Alcantara v. Alcantara*, G.R. No. 167746, August 28, 2007, 531 SCRA 446); 12) failure of the contracting parties to pay the prescribed fees for the marriage license; 13) failure of the person solemnizing the marriage to send copies of the marriage certificate to the local civil registrar (*Madridejos v. De Leon*, 55 Phil. 1); and 14) failure of the local civil registrar to enter the applications for marriage licenses filed with him in the registry book in the order in which they were received.

BREACH OF PROMISE TO MARRY. Mere breach of a promise to marry is not an actionable wrong (*Hermosisima v. CA*, L-14628, September 30, 1960; *Estopa v. Biansay*, L-14733, September 30, 1960). Hence, the aggrieved party in this case cannot file a case to compel the person who has breached such promise to enter into the marriage contract. In *Ramirez-Cuaderno v. Cuaderno*, 12 SCRA 505, the Supreme Court said:

> We recognize the exhortation that in the interest of society, and perhaps of the parties, the courts should move with caution in providing separate maintenance for the wife, a situation which would be an acknowledgment of the *de facto* separation of the spouses. However, it would be taking an unrealistic view for us to compel or urge them to live together when, at least for the present, they, specially the husband, are speaking of the impossibility of the cohabitation. For while marriage

entitles both parties to cohabitation or consortium, the sanction therefor is the spontaneous, mutual affection between husband and wife and not any legal mandate or court order. This is due to the inherent characteristic and nature of marriage in this jurisdiction.

However, in *Wassmer v. Velez,* 12 SCRA 648, it was held that:

> It must not be overlooked, however, that to the extent to which acts not contrary to law may be perpetrated with impunity is not limitless, for Article 21 of the said Code (Civil Code) provides that "any person who willfully 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."
>
> The record reveals that on August 23, 1954 plaintiff and defendant applied for a license to contract marriage which was subsequently issued xxx. Their wedding was set for September 4, 1954. Invitations were printed and distributed to relatives, friends and acquaintances xxx. The bride-to-be's trousseau, party dresses and other apparel for the important occasion were purchased xxx. Dresses for the maid of honor and the flower girls were prepared. A matrimonial bed, with accessories, was bought. Bridal showers were given and gifts received xxx. And then, but with two days before the wedding, defendant, who was then 28 years old, simply left a note for the plaintiff stating: "will have to postpone wedding My mother opposes it xxx." He enplaned to his home city in Mindanao, and the next day, the day before the wedding, he wired plaintiff "Nothing changed rest assured returning soon." But he never returned and was never heard from again.
>
> Surely, this is not a case of mere breach of a promise to marry. As stated, 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 publicity, 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 the defendant must be made answerable for damages in accordance with Article 21 aforesaid.

In the *Wassmer* case, actual damages were also awarded to the plaintiff for the expenses incurred relative to the preparation for the wedding.

Article 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 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)

AUTHORIZED SOLEMNIZERS OF MARRIAGE. Marriage contracts have always been considered as involving questions of public policy and the interests of other than those of the contracting parties, and should therefore be construed in accordance with such policy (*Cunningham v. Cunningham*, 43 LRA [N.SS] 355). In this regard, there is a need to limit the persons who could solemnize marriage. Moreover, the state being an interested party, its consent is essential to every marriage (*Eaton v. Eaton*, 66 Neb. 676, 60 LRA 605). This state consent is manifested or granted vicariously by the people granted by the state the privileged authority to solemnize marriage, such that any annulment case which, in effect, seeks to invalidate such state consent must pass through the courts and cannot be made merely by agreement of parties. The institution of marriage is so directly concerned with the public welfare that the state is a third party thereto (*Trammell v. Vaugham*, 158 Mo. 214).

Inasmuch as the State officiates in the celebration of marriage through the person solemnizing the same, it is logical that such person must have the authority from the Government at that time. Such authority is the foundation of marriage (Civil Code by Dean Francisco Capistrano, Volume I, page 80). The authority given to specified people to solemnize marriages is provided for in Article 7. It is very important to note that Article 7 defines the limits and scope of the authority granted to the solemnizers. Hence, if they fail to comply with any of the requisites mandated by law for them to

validly solemnize a marriage, such a marriage is generally void on the ground of absence of a formal requirement which is authority of the solemnizing officer.

JUDGES. Judges can solemnize marriage only within their courts' jurisdiction. Moreover, they must be incumbent and not retired judges. Needless to state, the jurisdiction of the Court of Tax Appeals, Sandiganbayan, the Court of Appeals and the Supreme Court is national in scope. Judges who are appointed to specific jurisdictions may officiate in weddings only within said areas and not beyond (*Navarro v. Domagtoy*, A.M. No. MTJ 96-1088, July 19, 1996, 72 SCAD 328). If a marriage is solemnized by a judge of the Regional Trial Court, Metropolitan Trial Court, or Municipal Court beyond his jurisdiction, there is absence of a formal requisite in such a marriage, namely, the authority of the solemnizing officer. Hence, the marriage is void unless either of the parties believed in good faith that such solemnizing officer has authority to conduct such marriage.

It is very interesting to note that in *Navarro v. Domagtoy*, A.M. No. MTJ 06-1088, July 19, 1996, 72 SCAD 328, involving an administrative case filed against a judge who committed several irregularities in solemnizing a marriage, the Supreme Court said that "where judge solemnizes 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." This statement is erroneous because the law clearly provides that a judge has authority only if he or she solemnizes within his or her jurisdiction. Non-observance of this rule is not a mere irregularity because it generally makes the marriage null and void. It is submitted, however, that since the principal issue in the *Domagtoy case* involves the liability of a judge and not the validity of a marriage, the said statement of the Supreme Court is merely an *obiter dictum* and, therefore, does not create a precedent.

After solemnizing a marriage, it is highly irregular for a judge to collect fees for the ceremony. It is reprehensible. By such act, a judge cheapens his or her noble office as well as the entire judiciary in the eyes of the public (*Dysico v. Dacumos*, 74 SCAD 625, 262 SCRA 274).

PRIEST, RABBI, IMAM, OR MINISTER OF ANY CHURCH OR RELIGIOUS SECT. A priest, according to lexicographers, means one especially consecrated to the service of a divinity and considered

as the medium through whom worship, prayer, sacrifice, or other service is to be offered to the one being worshipped, and pardon, blessing, and deliverance, obtained by the worshiper, as a priest of Baal or of Jehovah, or a Buddhist priest (*Adong v. Cheong Seng Gee*, 43 Phil. 43).

For a priest, rabbi, imam, or minister of any church or religious sect to be able to validly solemnize a marriage, the following four essential requisites must concur: he or she 1) must be duly authorized by his or her church or religious sect; 2) must act within the limits of the written authority granted to him or her by the church or religious sect; 3) must be registered with the civil registrar general; and 4) at least one of the contracting parties whose marriage he or she is to solemnize belongs to his or her church or religious sect. The written authority granted to a priest by his sect may impose a limitation as to the place where he could solemnize a marriage. For instance, 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 the place allowed by his Bishop (*Navarro v. Domagtoy*, A.M. No. MTJ 06-1088, July 19, 1996, 72 SCAD 328).

SHIP CAPTAIN AND AIRPLANE CHIEF. For a ship captain or airplane chief to be able to validly solemnize a marriage, the following requisites must concur: 1) the marriage must be in *articulo mortis* (at least one of the parties is at the point of death); 2) the marriage must be between passengers or crew members; and 3) generally, the ship must be at sea or the plane must be in flight. Hence, an assistant pilot has no authority to solemnize a marriage. If the airplane chief dies during the trip, the assistant pilot who assumes command of the airplane cannot solemnize a marriage as there is no law allowing such assumption of authority for the purpose of solemnizing a marriage.

Such marriages can be solemnized during stopovers at ports of call. During one of the joint civil code and family law committee meetings,

> Justice Puno remarked that when they say "stopover" and "ports of call," it means that the voyage is not yet terminated, which Justice Caguioa affirmed. He added that it means therefore that they are including instances when there are transit passengers which the others affirmed (Minutes of the 147th joint Civil Code and Family Law committees held on July 19, 1986, page 10).

MILITARY COMMANDER. For a military commander to be able to solemnize a marriage, the following requisites must concur: 1) he or she must be a military commander of a unit; 2) he or she must be a commissioned officer; 3) a chaplain must be assigned to such unit; 4) the said chaplain must be absent at the time of the marriage; 5) the marriage must be one in *articulo mortis;* 6) the contracting parties, whether members of the armed forces or civilians, must be within the zone of military operation. If the chaplain is present, he must be the one who should solemnize the marriage. The chaplain's authority to solemnize proceeds from Article 7(2). Hence, if the chaplain cannot comply with Article 7(2), then it is as if he is absent as he cannot solemnize a marriage, in which case, the military commander can solemnize the marriage.

The military commander must be a commissioned officer which means that his rank should start from a second lieutenant, ensign and above (Webster Dictionary, 1991 edition).

During the committee meetings of the drafters of the Family Code, Justice Caguioa insisted that the phrase "who should be a commissioned officer" qualifying a military commander be emphasized in the law to show the mandatory character of the said qualification (Minutes of the 148th joint Civil Code and Family Law committees held on July 26, 1986, page 2).

The word "unit," according to the deliberations of the Civil Code Revision Committee, refers to a battalion under the present table of organization and not to a mere company (Minutes of the Civil Code Revision Committee held on May 23, 1983, page 4). A military commander may solemnize a marriage even if the contracting parties do not belong to his or her unit (Minutes of the 147th joint Civil Code and Family Law committees held on July 19, 1986, page 10).

The phrase "within the zone of military operation" implies a widespread military activity over an area and does not refer to a simulated exercise because it requires absence of civilian authorities (Minutes of the 147th Joint Meeting of the Civil Code and Family Law committees held on July 19, 1986, page 13). Also,

> the committee agreed that this item shall include situations like maneuvers, police actions, declared and undeclared wars, civil war, rebellion and the like and that jurisprudence can define the application of this phrase more clearly (Minutes of the meeting of the Civil Code Revision Committee held on May 23, 1983, page 5).

CONSUL-GENERAL, CONSUL, OR VICE CONSUL. Heads of consular posts are divided into four classes, namely: 1) consul-general; 2) consul; 3) vice-consul; 4) consul agents (Article 9, Vienna Convention of 1963). Only the first three are expressly authorized by the Family Code to solemnize marriage. They can solemnize marriage abroad only when the contracting parties are both Filipino citizens. They act not only as the solemnizer of a marriage but also perform the duties of the local civil registrar, such as the issuance of a marriage license. When the marriage, which in itself is a special type of contract, is to be solemnized by the consul-general, consul, or vice-consul abroad or, specifically in his place of assignment, the solemnities established by Philippine laws shall be observed in their execution (Article 17 of the Civil Code). Thus, the contracting parties shall personally appear before the consul-general, consul, or vice-consul in the latter's office abroad 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. If the contracting parties desire to have their marriage solemnize in a place other than the office of the consul-general, consul, or vice-consul, they shall request the said official 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.

A marriage between a Filipino and a foreigner abroad solemnized by a Philippine consul appears to be void. This is so because the very authority of the consul-general, consul, or vice-consul to solemnize marriage is limited to Filipino citizens. This is gleaned from the provision in Art. 7 which provides that, among others, "marriage may be solemnized by . . . any consul-general, consul, or vice-consul in the case provided in Article 10." The latter article, in turn, provides that marriages between Filipino citizens abroad may be solemnized by a consul-general, consul, or vice-consul of the Republic of the Philippines. The law therefore specifically limits their authority to solemnize marriages only in one particular case, namely, the marriage between Filipino citizens. Clearly, they do not have any authority or there is absence on their part of any authority to solemnize marriage between a foreigner and a Filipino. Such marriage, therefore, is wanting of one of the formal requirements of a valid marriage provided in Article 3(1), which is the authority of the solemnizing officer. Hence, in accordance with Article 4, such absence makes the marriage void *ab initio*. However, by way of excep-

tion, if the marriage between the foreigner and the Filipino citizen abroad solemnized by a Philippine consul assigned in that country is recognized as valid in the host country, then such marriage shall be considered valid in the Philippines. This exception is pursuant to Article 26 of the Family Code.

Also, Article 10 clearly refers to marriages "abroad." Hence, a consul-general, consul, and vice-consul have no authority to solemnize a marriage within the territory of the Philippines.

MAYOR. Pursuant to the Local Government Code which took effect on January 1, 1992, the mayor of a city or municipality is now empowered to solemnize a marriage, any provision of law to the contrary notwithstanding (Chapter 3, Article 1, Section 444[xviii] of the Local Government Code). When the mayor is temporarily incapacitated to perform his duties for physical or legal reasons such as, but not limited to, leave of absence, travel abroad, and suspension from office, the vice mayor or the highest ranking sangguniang bayan member shall automatically exercise the powers and perform the duties of the local chief executive concerned, except the power to appoint, suspend, dismiss employees which can only be exercised if the period of temporary incapacity exceeds thirty days (Section 46 in relation to Section 445[4] of the 1991 Local Government Code). Relevantly, it has been held that the vice mayor of a municipality acting as Acting Mayor has the authority to solemnize marriages, because if the vice mayor assumes the powers and duties of the office of the mayor, when proper, it is immaterial whether he is the Acting Mayor or merely acting as mayor, for in both cases, he discharges all the duties and wields the powers appurtenant to said office (*People v. Bustamante*, 105 Phil. 64, citing *Laxamana v. Baltazar*, 92 Phil. 32).

GOOD FAITH OF PARTIES. Under Article 35(2), if the marriage was solemnized by a person not legally authorized to solemnize a marriage and either of the contracting parties believed in good faith that such solemnizing officer had such authority, then the marriage shall be considered as valid. This will be discussed in more detail under Article 35(2).

Article 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 the

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)

VENUE. Article 8 is directory in nature. Its non-observance will not invalidate a marriage but can subject the person or persons who cause the violation to civil, criminal, or administrative liability. Exceptions to the rule on venue are provided by law, namely: marriages contracted in *articulo mortis* or in a remote place in accordance with Article 29 of the Family Code, and marriages where *both* of the parties request a solemnizing officer in writing (*Navarro v. Domagtoy*, July 19, 1996, A.M. No. MTJ 96-1088, 72 SCAD 328) in which case the marriage may be solemnized at a house or place designated by the parties at a house or place designated by them in a sworn statement to that effect.

Article 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)

PLACE OF ISSUE. The contracting parties should get a marriage license from the local civil registrar of the city or municipality where either of them resides. If the contracting parties obtain a marriage license in a place other than the place where either of them reside, it is merely an irregularity which will not render null and void the marriage celebrated on the basis of such license (*People v. Janssen*, 54 Phil. 176).

Article 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)

CONSULAR OFFICIALS. The duties of the local civil registrar and the solemnizing officer are performed by the consul-general, consul, or vice consul of the Republic of the Philippines abroad. Hence, he or she issues the marriage license and likewise solemnizes the marriage of the contracting parties, which must be both Filipinos. The marriage ceremony shall be in accordance with the laws of the Philippines because Article 17 of the Civil Code pertinently provides that when contracts, among others, 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.

Article 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 parties;

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 parties has neither father nor mother and is under the age of twenty-one years.

The applicants, their parents or guardians shall not be required to exhibit their residence certificate in any formality in connection with the securing of the marriage license. (59a)

PURPOSE OF DOCUMENTARY REQUIREMENTS. It is the concern of the state to make marriages the secure and stable institution they should be (*Kilburn v. Kilburn*, 89 Cal. 46). In this regard, proper documents must be maintained to serve as proofs for their existence. Mainly, the task of seeing to it that these documentary proofs are accomplished is addressed to the local civil registrar to secure publicity (*State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556), and to require a record to be made of marriages contracted (*State v. Walker,* 36 Kan. 297, 59 Am. Rep. 556). It is also the purpose of these statutes to discourage deception and seduction, prevent illicit intercourse under the guise of matrimony, and relieve from doubt the status of parties who live together as man and wife (*State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556), by providing competent evidence of the marriage (*Reeves v. Reeves*, 15 Okla. 240). The record required to be made also furnishes evidence of the status and legitimacy of the offspring of the marriage (*State v. Walker*, 36 Kan 297, 59 Am. Rep. 556).

MARRIAGE APPLICATION. A marriage application can be obtained by anybody. Once it is signed and sworn to by the parties and thereafter filed, the local civil registrar has no choice but to accept the application and process the same up to the time of the issuance of the marriage license. If the local civil registrar has knowledge of some legal impediment, he or she cannot discontinue processing the application. He must only note down the legal impediments in the application and thereafter issue the marriage license unless otherwise stopped by the court (Article 18).

> **Article 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 document duly attested by the persons having custody of the original. 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 the 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)

Article 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 status and the name and date of death of the deceased spouse. (61a)

Article 14. In case either or both of the contracting parties, not having been emancipated by

a previous marriage, are between the ages of eighteen 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 application. (61a)

NO EMANCIPATION BY MARRIAGE. There is no more emancipation by marriage under the Family Code. Emancipation is attained if the child reaches the age of 18 years (Article 234, as amended by Republic Act No. 6809).

PARENTAL CONSENT. The law requires also that if any of the contracting parties, not being emancipated by a previous marriage, is at least 18 years old but above and below 21 years of age, the consent of the father, mother, surviving parent, or guardian, or persons having legal charge of them, in the order mentioned, must be obtained before a marriage license can be issued to the contracting parties. However, considering that Article 236 of the Family Code, as amended by Republic Act No. 6809, provides that emancipation takes place when a person reaches the age of majority which is 18 years, a person under the present law who wishes to get married must necessarily be 18 years of age and emancipated. This is so because the marrying age and the age of majority are both 18 years. The reference, therefore, in Article 14 of the Family Code to contracting parties "not having been emancipated by a previous marriage" has been accordingly repealed and is now of no legal consequence. Nevertheless, the contracting parties between 18 years old and above but below 21 years of age must still obtain the consent of the parents as this is required under the second paragraph of Article 236 of the Family Code. Non-compliance with this requirement, however, does not make the marriage invalid or void but merely annullable which means that the marriage is valid

until annulled. It is well-settled that the effect of statutes forbidding the issuance of marriage licenses without such consent is not to render such marriages void when solemnized without the required consent, the statute being regarded as directory only, in the absence of any provision declaring such marriages absolutely void (18 RCL 442, citing *Browning vs. Browning*, 89 Kan. 98).

Parental consent required of parties between the ages of 18 and above but below 21 does not add anything to the legal capacity of the said contracting parties as the law itself declares that people 18 years and above can legally and validly contract marriage. The required parental consent provision simply means that the said contracting parties "may not be licensed to marry upon their own consent alone, but that the consent of their parents must be added thereto; lack of such consent, however, does not affect the validity of a marriage, but only subjects those who have neglected to acquire it to the penalties of the law" (*Cushman v. Cushman*, 80 Was. 615).

Preference is given to the father to give consent. If he cannot give consent, the mother, surviving parent or guardian or persons having legal charge of them in the order mentioned shall give the consent. It must be remembered, however, that if any of the contracting parties is below 18 years of age, the marriage is void regardless of the existence or non-existence of the consent of the parents. The age of consent of the contracting parties is the age at which persons are considered in law to be capable of entering into the marriage relation. It is to be distinguished from the age below 18 in which the consent of the parents or guardian may be required by marriage. In this respect, parental consent may be considered as one of the statutory requirements for marriage, not owing to the capacity of the parties, but only to the formalities of a lawful marriage under the statute (52 Am. Jur. 2d footnote 18, citing *Needam v. Needam*, 183 Va. 681, 33 SE 2d 268; *Cushman v. Cushman*, 80 Was. 615, 142 P 26). It must be noted, however, that in the Family Code, parental consent is needed in relation to the procurement of a formal requisite, namely, a valid marriage license (Article 14) and, therefore, the absence of such parental consent should only be considered as an irregularity in a formal requirement which, pursuant to Article 4 of the Family Code, should not affect the validity of a marriage. However, under Article 45(1) of the Family Code, absence of the required parental consent makes the marriage annullable which means that it is valid up to the time it is judicially terminated. In this sense, the legal effect of the non-procurement of parental consent, though dealing with a formal requisite of a valid

marriage license, is the same as in the case where there is a defect in an essential requirement. In both instances, the marriage shall be voidable or annullable under Article 45 of the Family Code.

> **Article 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)**
>
> **Article 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 counselor 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)**

PARENTAL ADVICE. Absence of parental advice does not affect the marriage. It does not even make the marriage annullable,

as non-advise is not a ground for annulment provided for in Article 45 of the Family Code. While it is not an essential nor a formal requirement under Articles 2 and 3,

> prescribing parental advice for those 21-25 years of age is in keeping with Philippine tradition and it does not bar marriage totally. It is just a vehicle to induce further and more mature deliberation over the decision to get married (Minutes of the 185th Meeting of the Civil Code and Family Law committees, June 27, 1987, page 6).

> **Article 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 conspicuous 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)**

DUTY OF THE LOCAL CIVIL REGISTRAR. After the marriage application has been properly filled up and submitted to the local civil registrar, the latter shall post a notice to inform everybody of the impending marriage. This 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.

The 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. However, if the contracting parties between the ages of twenty-one and twenty-five do not obtain the advice of the parents or if such advice is unfavorable, the local civil registrar shall not issue the marriage license till after three months following the completion of the publication of the application therefor. If, however, the marriage license is issued within the said three months and the contracting parties were able to get married on the basis of

such marriage license, the said marriage is completely valid. It is not even annullable.

Also, in case where parental consent (contracting parties between the ages of eighteen and above but below twenty-one) or parental advice is needed, the failure of the parties to attach to the marriage application a certification that they have undergone marriage counseling provided for in Article 16 of the Family Code 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.

> **Article 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 a 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 interested party. No filing fee shall be charged for the petition nor a corresponding bond required for the issuance of the order. (64a)**
>
> **Article 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 a 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)**

INVESTIGATIVE POWER OF LOCAL CIVIL REGISTRAR AND COURT INTERVENTION. It is very important to note, however, that in case of any impediment known to the local civil registrar or brought to his attention, he shall merely note down the particulars thereof and his findings thereon in the application for a marriage license. He is nonetheless duty bound to issue said

license after payment of the necessary fees unless exempted due to indigence, after the completion of the period of publication, or after a period of three months from the completion of such publication in cases where parental advice is necessary and the same was not obtained as well as in cases where undergoing marriage counseling is required and a certificate to that effect was not attached to the marriage application.

During one of the joint meetings of the Civil Code and Family Law committees which drafted the Family Code, Justice Caguioa explained that the law does not restrain the local civil registrar from investigating any impediment on the part of the contracting parties, but the local civil registrar is only generally prohibited from withholding the marriage license despite the legal impediment (See Minutes of the 145th joint meeting of the Civil Code and Family Law committees held on June 28, 1986, page 10) because the purpose of Article 18, as agreed upon by the committee members, is "to eliminate any opportunity for extortion" (See Minutes of the 145th joint meeting of the Civil Code and Family Law committees held on June 28, 1986, page 10) and considering the observations obtained from the National Census and Statistics Office by the Civil Code and Family Laws committees that giving much leeway to the local civil registrar "could be a source of graft" (See Minutes of the 144th joint meeting of the Civil Code and Family Law committees held on June 21, 1986, page 13).

Only court intervention directing the non-issuance of the marriage license can empower the local civil registrar to validly refuse to issue said license. The court action may be brought by the local civil registrar himself or by any interested party. Included in the phrase "interested party" are the contracting parties' parents, brothers, sisters, existing spouse, if any, or those which may be prejudiced by the marriage. No filing fee shall be charged for the petition nor a corresponding bond required for the issuance of the order.

If, despite an injunction order from the court, the local civil registrar nevertheless issues a marriage license and a marriage is solemnized on the basis of such marriage license, the marriage will still be valid because the validity of the marriage license is not affected by the violation of the injunction. The issuance of the license despite the restraining order can be considered only as an irregularity in the formal requisite of a valid marriage license which shall not affect the validity of the marriage but the party or parties

responsible for the irregularity shall be civilly, criminally and administratively liable.

CRIMINAL LIABILITY OF LOCAL CIVIL REGISTRAR. Inteestingly, two of the few provisions of the Marriage Law of 1929 which have not yet been repealed provide the following:

> SEC. 37. *Influencing parties in religious respects.* — Any municipal secretary or clerk of the Municipal Court (now the local civil registrar) of Manila who directly or indirectly attempts to influence any contracting party to marry or refrain from marrying in any church, sect, or religion or before any civil authority, shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by imprisonment for not more than one month and a fine of not more than two hundred pesos.
>
> SEC. 38. *Illegal issuance or refusal of license.* — Any municipal secretary (now local civil registrar) who issues a marriage license unlawfully or who maliciously refuses to issue a license to a person entitled thereto or fails to issue the same within twenty-four hours after the time when, according to law, it was proper to issue the same, shall be punished by imprisonment for not less than one month nor more than two years, or by a fine of not less than two hundred pesos nor more than two thousand pesos.

Article 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 said period if the contracting parties have not made use of it. The expiry date shall be stamped in bold characters at the face of every license issued. (65a)

MARRIAGE LICENSE AND DATE OF ISSUE. The marriage license is valid only within the Philippines and not abroad. It is good for 120 days from the date of issue. The date of the signing of the local civil registrar of the marriage license is the date of the issue. From the date of issue, it should be claimed by the parties. If it is not claimed and therefore not used within 120 days, it shall automatically become ineffective (Minutes of the 145th meeting of the Civil Code and Family Law committees, June 28, 1986, page 15).

Article 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)

CERTIFICATE OR AFFIDAVIT OF LEGAL CAPACITY. Citizens of any foreign country may contract marriage in the Philippines. If both contracting parties are foreigners and they intend to have their marriage solemnized by a judge, priest, imam, rabbi, or any minister of any church or religious sect as provided for in Article 7 of the Family Code, or the mayor pursuant to the Local Government Code, then they have to secure a marriage license in the Philippines. Before such license is issued, they have to submit a certificate of legal capacity. A certificate of legal capacity is necessary because the Philippines, in so far as marriage is concerned, adheres to the national law of the contracting parties with respect to their legal capacity to contract marriage. Hence, if a sixteen-year-old United States citizen is legally capacitated to marry in the United States and wants to marry a Filipino here or another foreigner for that matter, he can do so by obtaining a certificate of legal capacity stating that in the United States, persons sixteen years of age can be validly married. He can thereafter show this to the proper local civil registrar where he is residing in the Philippines and a marriage license will subsequently be issued. Without this certification of legal capacity, the local civil registrar will not issue the marriage license. The law clearly provides that, as to the foreigner, this is a necessary requisite before a marriage license can be obtained by him or her. This is an exception to the rule that the local civil registrar, even if he finds an impediment in the impending marriage, must nevertheless issue the marriage license unless, at his own instance or that of an interested party, he is judicially restrained from issuing the marriage license. If without the certificate of legal capacity the marriage license was nevertheless issued, the marriage celebrated on the basis of such marriage license will still be considered valid as this is merely an irregularity in complying with a formal requirement of the law in procuring a marriage license which, according to Article

4, will not affect the validity of the marriage (*Garcia v. Recio*, G.R. No. 138322, October 2, 2001).

If they are stateless persons or refugees, they shall be required to file an affidavit stating the circumstances showing such capacity to contract marriage in lieu of the certificate of legal capacity.

However, if the contracting parties who are citizens of a foreign country desire to have their marriage solemnized by their country's consul-general officially assigned here in the Philippines, they can get married before such consul-general without procuring a marriage license here in the Philippines if their country's laws allow the same. Such marriage shall be recognized here in the Philippines.

Article 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 marriages 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 a marriage settlement, if any, attaching a copy thereof. (67a)

Article 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 receipt 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)

PRESUMPTION OF MARRIAGE. That a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage is a presumption which is considered satisfactory if uncontradicted, but may be contradicted and overcome by evidence (Rule 131, Section 5[aa], New Rules of Court of the Philippines). The law and public policy favor matrimony. Consequently, every intendment of the law leans toward legalizing matrimony as it is the basis of human society throughout the civilized world (*Perido v. Perido*, 63 SCRA 97). This presumption of legality is said to be one of the strongest known to the law (*In re* Rash, 21 Mont. 170, 53 Pac 312), especially where the legitimacy of the children is involved, for the law presumes morality and not immorality; marriage and not concubinage; legitimacy and not bastardy (*Pittinger v. Pittinger*, 28 Colo. 308). The presumption gains strength through the lapse of time. Hence,

> persons dwelling 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 hold themselves out as being, they would be living in the constant violation of decency and law (*Perido v. Perido*, 63 SCRA 97).

Also, when the celebration of the marriage is once shown, the contract of marriage, the capacity of the parties, and, in fact, everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed (*Gaines v. New Orleans*, 18 US [L. Ed.] 950). Thus, credible testimony stating that a wedding took place gives rise to the presumption that an exchange of vows was made between the parties declaring that they take each other

as husband and wife (*Balogbog v. Court of Appeals*, G.R. No. 83598, March 7, 1997, 80 SCAD 229). Public policy should aid acts intended to validate marriages and should retard acts intended to invalidate marriages. This is necessary for the order of society. *SEMPER PRESUMITUR PRO MATRIMONIO* (Always presume marriage) (*Adong v. Cheong Seng Gee*, 43 Phil. 43).

> It is settled law that when a marriage has been consummated in accordance with the forms of the law, it is presumed that no legal impediments existed to the parties entering into such marriage, and the fact, if shown, that either or both of the parties have been previously married, and that such wife or husband of the first marriage is still living, does not destroy the *prima facie* legality of the last marriage. The presumption in such case is that the former marriage has been legally dissolved, and the burden of proving that it has not rests upon the party seeking to impeach the last marriage (*Wenning v. Teeple*, 144 In. 189; *Son Cui v. Guepangco*, 22 Phil. 216).

PROOF OF MARRIAGE. When the question as to whether or not a marriage has been contracted arises in litigation, said marriage may be proved by evidence of any kind (*Pugeda v. Trias*, 4 SCRA 849). But the primary or best evidence of a marriage is the marriage contract or the marriage certificate (*Lim Tanhu v. Ramolete*, 66 SCRA 425). A mere photostat copy of a marriage certificate is a worthless piece of paper (*Vda. De Chua v. Court of Appeals*, G.R. No. 116835, March 5, 1998) but if such photostat copy emanated from the Office of the Local Civil Registrar and duly certified by the local civil registrar as an authentic copy of the records in his office, such certified photostat copy is admissible as evidence. If the photostat copies, though not certified by the office of the local civil registrar, are presented in court without objection from the opposing parties and consequently admitted by the court, the said photostat copies are deemed sufficient proof of the facts contained therein and therefore can be proof of marriage (*Sy v. Court of Appeals*, G.R. No. 127263, April 12, 2000). Also, baptismal certificates, birth certificates, judicial decisions, and family bible in which the names of the spouses have been entered as married are good evidences of marriage (*Trinidad v. Court of Appeals*, 289 SCRA 188. See also *Orfila v. Arellano*, 482 SCRA 280, February 13, 2006). However,

> x x x Transfer Certificates of Title, Residence Certificates, passports and other similar documents cannot prove marriage especially so when the petitioner has submitted a certification

> from the Local Civil Registrar concerned that the alleged marriage was not registered and a letter from the judge alleged to have solemnized the marriage that he has not solemnized said alleged marriage (*Vda. De Chua v. Court of Appeals*, G.R. No. 116835, March 5, 1998).

It has been declared that a certificate of marriage made many years after the marriage is inadmissible, especially where there was no register of the marriage in the official records (*Gaines v. Relf,* 13 US [L. Ed.] 1071). Relevantly, any officer, priest, or minister failing to deliver to either of the contracting parties one of the copies of the marriage contract or to forward the other copy to the authorities within the period fixed by law for said purpose, shall be punished by imprisonment for not more than one month or by a fine of not more than three hundred pesos, or both, in the discretion of the court (Section 41 of the Marriage Law of 1929).

However, failure to present a marriage certificate is not fatal in a case where a marriage is in dispute, as the parties can still rely on the presumption of marriage. Thus, in *Rivera v. IAC*, 182 SCRA 322, it was held:

> It is true that Adelaido could not present his parents' marriage certificate because as he explained it, the marriage records for 1942 were burned during the war. Even so, he could still rely on the presumption of marriage since it is not denied that Venancio Rivera and Maria Jocson lived together as husband and wife and for many years, begetting seven children in all during that time.

In *Delgado Vda. De La Rosa v. Heirs of Mariciana Rustia Vda. De Damian*, G.R. No. 155733, January 27, 2006, 480 SCRA 334, where the absence of a record of the contested marriage was asserted to assail the existence of the marriage, the Supreme Court, after reviewing the evidence rejected such assertion by stating the following reasons:

> *First*, although a marriage contract is considered a primary evidence of marriage, its absence is not always proof that no marriage in fact took place. Once the presumption of marriage arises, other evidence may be presented in support thereof. The evidence need not necessarily or directly establish the marriage but must at least be enough to strengthen the presumption of marriage. Here, the certificate of identity issued to Josefa Delgado as Mrs. Guillermo Rustia, the passport issued to her as Josefa D. Rustia, the declaration under oath of no less

> than Guillermo Rustia that he was married to Josefa Delgado and the titles to the properties in the name of "Guillermo Rustia married to Josefa Delgado," more than adequately support the presumption of marriage. These are public documents which are *prima facie* evidence of the facts stated therein. No clear and convincing evidence sufficient to overcome the presumption of the truth of the recitals therein was presented by petitioners.
>
> *Second*, Elisa Vda. de Anson, petitioners' own witness whose testimony they primarily relied upon to support their position, confirmed that Guillermo Rustia had proposed marriage to Josefa Delgado and that eventually, the two had "lived together as husband and wife." This again could not but strengthen the presumption of marriage.
>
> *Third*, the baptismal certificate was conclusive proof only of the baptism administered by the priest who baptized the child. It was no proof of the veracity of the declarations and statements contained therein, such as the alleged single or unmarried ("*Señorita*") civil status of Josefa Delgado who had no hand in its preparation.
>
> Petitioners failed to rebut the presumption of marriage of Guillermo Rustia and Josefa Delgado. In this jurisdiction, every intendment of the law leans toward legitimizing matrimony. Persons dwelling together apparently in marriage are presumed to be in fact married. This is the usual order of things in society and, if the parties are not what they hold themselves out to be, they would be living in constant violation of the common rules of law and propriety. *Semper praesumitur pro matrimonio*. Always presume marriage.

A marriage, like any other contract, may be proved by parol evidence (*Watson v. Lawrence*, 134 La. 48). Testimony by one of the parties or witnesses to the marriage, or by the person who solemnized the same, is admissible (*Pugeda v. Trias*, 4 SCRA 849; *People v. Velasco*, G.R. Nos. 135231-33, February 28, 2001) and competent to prove marriage (*Balogbog v. Court of Appeals*, G.R. No. 83598, March 7, 1997, 80 SCAD 229). The testimonies must themselves be credible and must proceed from a witness who is likewise credible. In *People v. Ignacio*, G.R. No. 107801, March 26, 1997, 81 SCAD 138, the fact of marriage of the accused-appellant to the victim in the crime of parricide was established by the Supreme Court on the basis of the oral testimonies of the witnesses, thus:

> Here, apellant not only declared in court that the victim was her fourth husband but she also swore that they were

> married before a judge in Montalban, Rizal. The victim's son testified that his father and appellant were husband and wife in much the same way that the appellant's daughter, Milagros, held the victim to be her mother's husband. Appellant's admission that she was married to the victim was a confirmation of the *semper praesumitur pro matrimonio* and the presumption that a man and a woman had verily entered into a lawful contract of marriage.

In a case where the complainant alleged in an admininstrative case that the marriage took place on March 15, 1993 but it appears that, in court records and pleadings in a previous case which was already terminated, the complainant stated that it was on June 9, 1993, the Supreme Court ruled that such allegation in the administrative case cannot be accepted to disprove that the marriage was celebrated on June 9, 1993. The Supreme Court held that the complainant himself admitted in his petition in a case for annulment of marriage, which he previously filed, that his marriage was celebrated on June 9, 1993. He was bound by such admission. Moreover, all other evidence led to the conclusion that the marriage could not have occurred on March 15, 1993. Thus,

> The allegation of the complainant that the marriage was actually celebrated on March 15, 1993 is belied by the documents supporting the application for marriage such as the Affidavit in Lieu of Legal Capacity to Contract Marriage for American Citizens, issued on May 19, 1993, and Pre-Marriage Counseling issued on May 25, 1993. In particular, the Affidavit in Lieu of Legal Capacity to Contract Marriage for American Citizens was subscribed and sworn to before the Consul of the United States on May 19, 1993 by complainant himself. It is difficult to see how a marriage could be celebrated on March 15, 1993 when the documents necessary for its validity were available only months later. It is well-settled that entries in official records made in the performance of a duty by a public officer of the Philippines, or by a person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts therein stated (*Young v. Mapayo*, AM No. RTJ-00-1552, May 31, 2000).

With respect to a marriage ceremony, the testimony of an eyewitness to be sufficient should disclose not only the performance of the ceremony by someone, but that all the circumstances attending it were such as to constitute it a legal marriage (*State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 702). It has been held, however, that the fact that a marriage has been solemnized gives rise to the presump-

tion that there has been an exchange of marital vows (*Balogbog v. Court of Appeals*, G.R. No. 83598, March 7, 1997, 80 SCAD 229).

Also, public and open cohabitation as husband and wife after the alleged marriage, birth and baptismal certificates of children borne by the alleged spouses, and a statement of such marriage in subsequent documents are competent evidence to prove the fact of marriage (*Pugeda v. Trias*, 4 SCRA 849). A solemn statement in the will of a deceased as to the fact of his marriage is also admissible proof of such a marriage (*Son Cui v. Guepangco*, 22 Phil. 216).

However, it has been held that mere cohabitation is not direct proof of marriage, which must be proved by the proper documents or by oral testimony in case these have been lost (*Santiago v. Cruz*, 19 Phil. 145; *U.S. v. Evangelista*, 29 Phil. 215). Thus, it has been held that whatever presumption of marriage there may have been by cohabitation of one claiming to share in the estate of the decedent as his wife, and the decedent, based upon their cohabitation between 1905 and 1914, was considered destroyed, in the light of lack of any documentary evidence of marriage by the conduct of the parties both during and after that time (*Ramos v. Ortugar,* August 29, 1951, L-3290). Significantly, to cohabit is to live together, to have the same habitation, so that where one lives and dwells, there does the other live and dwell with him (*Kilburn v. Kilburn*, 89 Cal. 46), but the conduct of the parties, in order to constitute evidence of marital consent must, generally speaking, be something more than mere living together; it must be an association, consciously and openly, as husband and wife (*Cox v. State*, 117 Ala. 103).

PROOF TO ATTACK VALIDITY OF MARRIAGE. Anyone assailing the validity of a marriage is required to make plain, against the constant pressure of the presumption of legality, the truth of law and fact that the marriage was not legal. The evidence to repel that presumption must be strong, distinct and satisfactory (*Murchison v. Green*, 128 Ga. 339, 11 LRA [NS] 702). Thus, it has been held that:

> the statement of the civil status of a person in a certificate of title issued to him is not conclusive to show that he is not actually married to another. It is weak and insufficient to rebut the presumption that persons living together as husband and wife are married to each other. This presumption, especially where the legitimacy of the issue is involved, may be overcome only by cogent proof on the part of those who allege the illegitimacy (*Perido v. Perido*, 63 SCRA 97).

In a case where the petitioner failed to assert the absence of a marriage license as ground for nullity in her petition based solely on psychological incapacity under Article 36 and where she only invoked such absence of a marriage license in her appeal to the Supreme Court, the Supreme Court made an exception to the general rule that litigants cannot raise an issue for the first time on appeal, and consequently, declared the marriage void due to the absence of a marriage license. The Supreme Court said that, in order to protect the substantive rights of the parties, it was making an exception to the application of the said general rule considering that the marriage contract itself, which was presented as evidence, clearly showed that the solemnization of the marriage occurred on November 15, 1973 before the issuance of the marriage license on September 17, 1974. Also the birth certificates of the children indicated that the marriage was celebrated on November 15, 1973. There was clearly no marriage license at the time of the marriage ceremony (*Sy v. Court of Appeals*, G.R. No. 127263, April 12, 2000).

While obtaining a marriage license in a place which is not the place of residence of any of the contracting parties is merely an irregularity that does not invalidate a marriage (*People v. Janssen*, 54 Phil. 176), such circumstance is nevertheless an indication that the license may be spurious or non-existent (See *Sy v. Court of Appeals, supra*), which should necessitate further investigations as to its authenticity.

An official certification issued by the Office of the Local Civil Registrar of a municipality, where a particular marriage license has been issued as indicated in the marriage contract, stating that, after earnest effort to locate and verify the existence of the particular marriage license, the said office has no record of the marriage license, or is issued to another couple, or is spurious and fabricated, is a convincing evidence to destroy the validity of marriage on the ground of absence of a valid marriage license (*Republic of the Philippines v. Court of Appeals and Castro*, 55 SCAD 157, 236 SCRA 257). In a case where it was shown that the marriage contract did not indicate the marriage license and where there was a certification from the pertinent local civil registrar stating that, after earnest efforts to look for the marriage license, the said office had no record of the marriage license of the parties and therefore, it cannot issue a true copy of the same, the Supreme Court said that such certification was adequate to prove the non-issuance of a marriage license and, absent any suspicion, it enjoyed probative value considering that the local civil registrar was the officer charged under the law to keep

a record of all data relative to the issuance of a marriage license (*Nicdao Cariño v. Cariño*, G.R. No. 132529, February 2, 2001).

In a case however where the local civil registrar certified that that there was no marriage license despite the exertion of all efforts but with an admission that, due to the work load of the said office, it cannot give full force in locating the marriage license compounded by the fact that the custodian already retired, the Supreme Court did not allow the nullity of the marriage on the ground of absence of a marriage license considering that the circumstances and the certification do not categorically and with absolutely certainty show and state that the marriage license cannot be found and that there were earnest efforts to look for the same (*Sevilla v. Cardenas*, G.R. No. 167684, July 31, 2006, 497 SCRA 428).

Also, it has been held that a marriage, followed by forty years of uninterrupted marital life, should not be impugned and discredited after the death of the husband and administration of his estate, through an alleged prior Chinese marriage, save upon proof so clear, strong, and unequivocal as to produce a moral conviction of the existence of such an impediment (*Sy Joe Lieng v. Sy Quia*, 228 US 335, 40 Phil. 113).

It has been held, however, that any presumption of marriage from the fact that there was cohabitation between a man and a woman many years ago may be considered offset by the fact that, for the last 35 years of their lives, they lived separately and several thousands of miles away from each other (*Fernandez v. Puatu*, October 31, 1957, L-10071).

In a case where one party, to prove the existence of a marriage, introduced as evidence, a birth certificate indicating the status of the child of the parties as legitimate and therefore implying a valid marriage of the child's parents, and another party, to disprove the existence of a marriage, introduced as pieces of evidence a death certificate of the alleged husband indicating that he was a "widower" at the particular time material to the suit, a transfer certificate of title indicating also that he was a "widower" at such time, and the record of marriage of the local civil registrar which did not reflect any marriage of the parties after he became a widower, the Supreme Court said that, while a birth certificate can prove the fact of marriage between the parties, the pieces of evidences disproving the existence of the marriage also have probative value, such that the evidence, if weighed against each other, preponderated in favor

of the assertion that there was no marriage (*Sarmiento v. Court of Appeals*, 305 SCRA 138).

DECLARATORY RELIEF. In the event that the parties are not certain whether, under the law, they can proceed with a marriage, they can file a petition for declaratory relief, to seek from the court a judgment on their capacity to marry. A petition for declaratory relief may be brought by any person interested under a deed, will, contract, or other written instrument, or whose rights are affected by a statute, executive order, regulation, ordinance, or other governmental regulation for the purpose of determining any question of construction or validity arising therefrom, and for a declaration of his or her rights or duties thereunder, provided that the action is brought before any violation or breach (*Republic v. Orbecido III*, G.R. No. 154380, October 5, 2005, 472 SCRA 114). Clearly the legal status of a person to marry, his or her rights and duties are governed by law or contract and therefore can be a subject of a petition for declaratory relief.

Article 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)

Article 25. The local civil registrar concerned shall enter all applications for marriage licenses filed with him in a registry book strictly in the order 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)

EFFECT OF DUTY OF LOCAL CIVIL REGISTRAR. Because the local civil registrar is the specific government official charged with the preparation and keeping of all official documents in connection with marriage, any certification issued by him or her in connection with any matter involving the marriage of any particular individual within his or her jurisdiction is given high probative value. Thus, it has been held that a certification of the local civil registrar that there was no record in his office of any marriage license of the alleged spouses is enough to prove that the marriage

is void due to the absence of a formal requirement, namely, a valid marriage license (*Republic of the Philippines v. Court of Appeals*, 55 SCAD 157, 236 SCRA 257; *Nicdao Cariño v. Cariño*, G.R. No. 132529, February 2, 2001).

MARRIAGE REGISTER. The office of the local civil registrar keeps a marriage register of all persons married in its locality. In the marriage register, there shall be entered the full name and address of each of the contracting parties, their ages, the place and date of the solemnization of the marriage, the names and addresses of the witnesses, the full name, address and relationship with the contracting party or parties of the person or persons who gave their consent to the marriage, and the full name, title, and address of the person who solemnized the marriage (Section 7, Civil Registry Law, Act No. 3753).

> **Article 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they are 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 likewise have capacity to remarry under Philippine law. (n) *(As amended by Executive Order Number 227, July 17, 1987.)***

VALIDATION PROVISION. The Family Code expressly provides that, except for marriages prohibited under Articles 35(1), (4), (5) and (6), 36, 37 and 38, marriages solemnized abroad and which are valid there as such are recognized as valid here. As a general rule, therefore, the Philippines follows the *lex loci celebrationis* rule.

> The sanctity of the home and every just and enlightened sentiment require uniformity in the recognition of the marriage status — that persons legally married according to the law of one jurisdiction shall not be considered as living in adultery in another, and that children begotten in lawful wedlock in one place shall not be regarded as illegitimate in another. Accordingly, it is a general principle of international and interstate law that

> the validity of a marriage, so far at least as it depends upon the preliminaries, and the manner or mode of its celebration, is to be determined in reference to the law of the place where it is celebrated. Therefore, a marriage valid where celebrated will generally be regarded as valid everywhere, and where there is *bona fide* attempt on the part of the parties to effect a legal marriage, every assumption will be in favor of the marriage. The converse of the proposition is equally true — that a marriage void where it is celebrated is void everywhere; but under the operation of the rule that all presumptions favor marriage and every *bona fide* attempt to effect it, and since the courts are extremely reluctant, and rightly so, to declare a marriage void except for the strongest and most obvious reasons, the converse rule stated above is subject to many exceptions and will not be enforced where the circumstances afford a reasonable ground for the course taken and show a *bona fide* attempt to effect a marriage (*Medway v. Needham*, 16 Mass. 157; *State v. Tuffy*, 41 Feb. 753; *Alabama GSR Co. v. Carroll*, 97 Ala. 126).

A MATTER OF INTERNATIONAL COMITY. The legal effect which may be given by one state to the marriage laws of another state is merely because of comity (*Gunter v. Dealers Transport Co*., 120 Ind. 409), or because public policy and justice demand the recognition of such laws (*Henderson v. Henderson*, 199 Md. 449; *Toles v. Oakwood Smokelen Coal Corp*., 127 ALR 430; *Sirois v. Sirois*, 94 NH 215), and no state is bound by comity to give effect in its courts to laws which are repugnant to its own laws and policy (*Brimson v. Brimson*, 233 Ca. 417). This is because every sovereign state is the conservator of its own morals and the good order of society (*Jackson v. Jackson*, 82 Md. 17, 33 Atb. 317). Each sovereign state has the right to declare what marriages it will or will not recognize, regardless of whether the participants are domiciled within or without its borders (*US ex rel Modianos v. Tutle*, DC La 12 F2d 92) and notwithstanding such marriages' validity under the laws of a foreign state where such marriages were contracted (*Kapigan v. Der Minassian*, 212 Mass. 412).

Hence, applying the first paragraph of Article 26, marriages without a license solemnized abroad, and proxy marriages abroad shall be valid in the Philippines if such marriages are valid in accordance with the laws in force in the country where they are solemnized. Likewise foreign marriages solemnized by a professor of law shall be valid in the Philippines if legally valid in the country where they were celebrated. If, however, the foreign marriage is to be solemnized inside the Philippine Consulate abroad, such marriage

must observe the forms and solemnities established by Philippine laws (Article 17 of the Civil Code).

EXCEPTIONS. Under the Family Code, if either or both contracting parties are Filipinos and they are below 18 years of age, their marriage solemnized abroad will not be recognized in the Philippines as valid even if the marriage is valid in the place where it has been solemnized. Our law clearly adheres to the rule that the marrying capacity of the contracting parties is governed by the national law of that party, which is the Philippine law. Article 15 of the Civil Code provides that laws relating to family rights and duties, or to the status, conditions and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad. In the Philippines, persons below 18 years of age are not legally capacitated to marry. Article 26 of the Family Code and Article 15 of the Civil Code express the "extra-territorial effect of the exception" (*State v. Shattuck*, 69 Vt. 403). Moreover, Article 17, paragraph 3 of the Civil Code provides that 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.

However, if one is a Filipino and another an alien whose national laws capacitate persons below 18 years of age (for instance, 16 years of age) to marry, the Family Code does not seem to give a precise solution to this situation. It must be pointed out that Article 35(1), which is made an exception to the comity provision, provides that a marriage is void *ab initio* if "contracted by any party below eighteen years of age." The law is addressed "to any party." It does not distinguish whether one of the parties is a Philippine citizen or a foreigner. Hence, the law can be construed as a blanket exception that should apply likewise to a situation where the foreign spouse is below 18 years of age. The only problem with this construction is that it will lead to an absurdity if Article 26 and the exception under Article 35(1) are related to the other provisions of the Family Code, specifically Article 21. It should be remembered that under Article 21, a foreigner can get married in the Philippines even if he is below 18 years of age if he obtains a certificate of legal capacity from his diplomatic mission in the Philippines stating that, in his country, persons even under 18 years of age can marry. Upon showing of this certificate, he can be given by the local civil registrar a valid marriage license which will allow him to be able to marry a Filipino in the Philippines. The absurdity lies in the circumstance that while

such a marriage may be considered valid here, it will not be so if it were celebrated in the country of the foreigner. This should not be the case. With respect to legal capacity, our country follows the nationality rule and, hence, should accord respect to the laws of the country in so far as the legal capacity to marry of the foreigner is concerned. Hence, the better rule is that the exception under Article 26 referring to Article 35(1) should be construed as referring to a situation where the marriage abroad is between a Filipino and a Filipina and not between a Filipino or Filipina and an alien married in the alien's state where he or she (the alien), though below 18 years of age, is capacitated to marry.

Bigamous and polygamous marriages, though valid abroad, shall likewise not be recognized in the Philippines. A bigamous marriage is committed by a person who contracts a second 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 proceeding (*US v. Mcleod*, 3 Phil. 513; *US v. Ibang*, 13 Phil. 688; Article 349 of the Revised Penal Code of the Philippines). Polygamy is the act or state of a person who, knowing that he has two or more wives, or that she has two or more husbands, marries another (Bouvier's Law Dictionary, Third edition, Volume 2, page 2630).

Under Article 41 of the Family Code, however, a "bigamous" marriage may be recognized. This occurs when, before the celebration of the subsequent marriage, one of the spouses had been absent for four (4) consecutive years, or two consecutive years in cases where there is danger of death, and the spouse present has a well-founded belief that the absent spouse was already dead. The spouse present thereafter obtains a judicial declaration of presumptive death and subsequently marries again. The second marriage is valid without prejudice to the reappearance of the absentee spouse.

Marriage abroad where there is mistake of identity of the other contracting party is also not recognized in the Philippines. This is true even if the one who committed the mistake is the foreigner-spouse.

Also, if a spouse is able to annul or to declare as null and void his or her marriage but failed to record the judicial decree with the local civil registrar, to partition and distribute their properties and to deliver the presumptive legitime of their children, any subsequent marriage of either of the spouses shall be void. This is provided for under Article 53 in relation to Article 52 of the Family Code.

If the said spouse contracts a subsequent marriage abroad without undertaking the aforementioned requirements, the said marriage shall not likewise be recognized.

A marriage by a Filipino to a person who is psychologically incapacitated to perform the essential marital obligations abroad, even if valid in the foreign country where it has been solemnized, shall not be considered valid here. If the Filipino is himself the person who is psychologically incapacitated, such marriage is likewise considered void here in the Philippines.

Marriages between ascendants and descendants of any degree as well as between brothers and sisters, whether of the full or half blood are likewise not considered as valid here even if such marriages are allowed in the country where they were celebrated. These marriages are void as they are incestuous.

Marriages declared void under Philippine laws for being against public policy will not be recognized here even if such marriages are not against public policy or not illegal in the country where said marriages were solemnized. Marriages considered as going against public policy are those exclusively enumerated in Article 38 of the Family Code. Indeed, it has been held that:

> when the state of domicile has a strong public policy against the type of marriage which its domiciliaries have gone to another state to contract, and this policy is evidenced by a statute declaring such marriages to be void, then the state of domicile, as the one most interested in the status and welfare of the parties, will ordinarily look into its own law to determine the validity of the marriage (*Metropolitan Life Ins. Co. vs. Chase,* 294 F2d 500).

ARE COMMON-LAW MARRIAGES OBTAINED ABROAD BY FILIPINOS VALID IN THE PHILIPPINES? Article 26 of the Family Code apparently does not specifically include common-law marriages contracted by Filipinos abroad as one of the exceptions to the general rule that marriages solemnized abroad is generally valid here in the Philippines if valid where they were solemnized.

However, common-law marriages obtained by Filipinos abroad should not be recognized here. Article 26 clearly uses the word "solemnized" and not "contracted" or "performed." "Solemnization," as used in marriage statutes, has a very technical and limited meaning. It means the performance of the formal act or ceremony by

which a man and a woman contract marriage and assume the status of husband and wife (Ballantines Law Dictionary, 3rd edition).

> A marriage is solemnized when, in the presence of a judicial officer, priest or minister, the parties declare that they take each other as husband and wife; and the officer or minister who witnesses the ceremony is said to "solemnize" the marriage (*Sharon v. Sharon*, 75 Cal. 1, 16 P 345).

It is a rule in statutory construction that words and phrases having a special and technical meaning are to be considered as having been used in their technical sense (*State v. Bolsinger*, 21 NW 2d, page 480 as cited in Statutory Construction by Martin, 6th edition, page 85). Also, technical words and phrases which have acquired a peculiar and appropriate meaning in law are presumed to have been used by the legislature according to their legal meaning (*City of St. Louis v. Triangle Fuel Co.,* 193 SW 2d 914 as cited in Statutory Construction by Martin). Hence, if words used in a statute have a meaning which those who are or should be learned in the law are supposed to understand, the courts must accept such construction (*St. Charles Bldg. & Loans Association v. Hamil*, 319 Pa. 1220).

Solemnization refers to or implies a ceremonial marriage and not one which was "contracted" or merely performed by way of a mere agreement of the parties, such as in cases of a common-law marriage. Indeed, the formality, namely, the solemnization, inherent in a ceremonial marriage is what primarily distinguishes it from a common law marriage (*Pratt v. Pratt*, 157 Mass. 503, 32 NE 747).

Moreover, the terms "solemnized" and "contracted" are not entirely the same. The term solemnization has a narrower meaning, as stated previously. On the other hand, the term "contracted" is broader and may include as one of its modes the process of solemnization. This distinction has a practical and even legal significance. In fact, in marriage statutes in other jurisdiction having similarly worded comity provisions, it has been held that if the term used by the statute is "solemnized," the law precludes local recognition of common law marriages, which did not undergo the process of solemnization, contracted in another state. The Supreme Court of Utah had occasion to interpret a similarly worded comity provision in the *Re Veta's* case, 110 Utah 187, 170 P2d 183 (See also *Beddow v. Beddow*, 257 [Ky.] SW 2d). The pertinent portions of the said case are as follows:

In the light of the foregoing, we return to a consideration of Sec. 40-1-2(3) U.C.A. 1943, declaring a marriage void when not solemnized by an authorized person. We consider it in connection with Sec. 40-1-4, U.C.A. 1943. x x x Sec. 40-1-4 declares: "marriages solemnized in any other country, state or territory, if valid where solemnized, are valid here."

The problem narrows down to this: Do these two sections evidence a legislative intent to recognize a marriage in another state between parties domiciled in Utah only if it is formally entered — "solemnized" — before a person authorized by the laws of such state to perform a marriage ceremony; or is Sec. 40-1-4, *supra,* to be construed as voicing the general rule that a marriage lawful where celebrated or contracted is lawful everywhere? What we may here say in resolving the question we confine to marriages of persons domiciled in Utah whose marriage in another state or country, while here domiciled, is brought into question; and shall assume, for the purpose of this decision, that in the enactments now under examination it was not the purpose to legislate with respect to the marriage in another jurisdiction of persons there domiciled.

The purpose of enactments requiring the solemnization of marriage before an authorized person, together with those dealing with the prior procurement of a license, is doubtless to protect the parties to the marriage contracts in the rights flowing therefrom, and likewise to protect their offspring. A solemn record of the contract is made to which recourse may be had when the rights or obligations of the husband or wife arising from the marriage are in issue. So, too are the interest of third parties in dealing with either of the contracting parties, subsequent to marriage, thus protected. Other advantages of a formal recorded ceremony might be cited, but those just adverted to will suffice in considering the intendment of the provisions in question.

To effect such objects, a marriage must, in this state, be "solemnized before an authorized person" to be valid. But should persons domiciled in this state go to a neighboring state and attempt to contract a common-law marriage, the protection of the parties, their offspring and the public, which the statute was designed to effect, would not result should such attempted marriage be recognized here. With this fact in mind, we consider Sec. 40-1-4.

Insofar as neighboring states are concerned, the wording of this section is peculiar to Utah. Thus, the California Code provides: "all marriages contracted without this state, which would be valid by the laws of the country in which the same were

> contracted are valid in this State." x x x Identical provisions are found in Idaho xxx and Montana x x x, while Colorado has an identical enactment with a proviso relative to bigamy and polygamy x x x. By contrast with neighboring examples, the section of our code specifies that "marriages *solemnized* in any other country, state or territory, if valid where *solemnized*, are valid here." (Emphasis added) We think that the use of the italicized word was made advisedly and that this section, construed with paragraph (3) of Sec. 40-1-2, *supra*, evidences a legislative pronouncement that as to domiciliaries of Utah a common-law marriage contracted in another jurisdiction would not be here recognized. To be valid as between domiciliaries of this state a marriage must be "solemnized" either in accordance with the laws of this state or those of another jurisdiction. Webster's New International Dictionary, Second Edition, defines "solemnize" thus: "To perform with pomp and ceremony or according to legal form; specif.; to unite a couple in marriage with religious ceremony; * * * ." That the word was used in this sense was abundantly clear from its employment in the two provisions under examination, as well as elsewhere in the chapter of which they are part. Taking into consideration the purposes of the statute requiring solemnization within the state, the meaning of the words employed, the departure from neighboring examples in the employment of the word "solemnized" in Sec. 40-1-4, *supra*, the holding is compelled that persons domiciled in Utah may not go into another state, there contract a common-law marriage, and, returning here, have such marriage recognized as valid.

The jurisprudence laid down in the aforequoted case may well be applicable here in the Philippines. The legislative history of the provision supports this view. The very first time a validation or comity provision existed in Philippine law history was when the United States introduced the same via Section 5 of General Order No. 68, which provides that:

> All marriages contracted without these Islands which would be valid by the law of the country in which the same were contracted, are valid in these Islands.

The above provision clearly uses the word "contracted" rather than "performed" or "solemnized." Thereafter, Section 19 of Act 3613, as amended, otherwise known as the Philippine Marriage Law of 1929, provided this comity-validation provision, to wit:

> Section 19. All marriages performed outside of the Philippine Islands in accordance with the laws in force in the

> country where they were performed and valid there as such, shall also be valid in the Islands.

The word "contracted" in General Order No. 68 was changed to "performed." Subsequently, the above provision was incorporated in the Philippine Civil Code of 1950 with substantial exceptions. Section 71 of the same provided that:

> Section 71. All marriages performed outside the Philippines in accordance with the laws in force in the country where they were performed, and valid there as such, shall also be valid in this country, except bigamous, polygamous, or incestuous marriages as determined by Philippine law.

Finally, this validation provision was again re-enacted in the Family Code as the first paragraph of Article 26, with substantial modifications and amendments. The term "performed" under the Civil Code was changed to "solemnized" and the exceptions were amended to read, thus: "except those prohibited under Articles 35(1), (4), (5) and (6), 36, 37 and 38." This change in the wording from "performed" to "solemnized" is very significant. The change appears to signify the intent of the framers to limit the scope of the provision so as not to include common-law marriages. Moreover, the non-recognition of common-law marriage appears to be consistent with the jurisprudence laid down in *Enriquez v. Enriquez* (8 Phil. 565) stating that the Philippines, even during the Spanish rule, has never recognized common-law marriages.

The second paragraph of Article 26 also uses the term "celebrated." Again, this connotes a ceremonial marriage where solemnization is inherently involved. This is clearly consistent with the term "solemnized" used in the main validation provision, which is the first paragraph of Article 26.

SAME SEX MARRIAGE OF FILIPINOS ABROAD INVALID. Public policy in the Philippines mandates that only a man and a woman can marry each other. This clear public policy consideration is enunciated in Article 1 of the Family Code, stating that marriage is a special contract of permanent union between a man and a woman. Article 2(1) also states that the contracting parties must be a male and a female. In fact, the Family Code is replete with terms and articles clearly indicating that marriage is a heterosexual relationship. It is based on the distinction between a man and a woman. Hence, words like "husband and wife," "father and mother," and "man and woman" are used. Same sex marriage, therefore, is

not allowed in the Philippines. If a Filipino contracts a marriage abroad with a person of the same sex, whether such person is another Filipino or a foreigner, such a marriage shall not be recognized here. Article 15 of the Civil Code provides that "laws relating to family rights and duties, or to status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad." In the Philippines, a person has legal capacity to marry only a person of the opposite sex. As stated previously, this public policy consideration can be clearly seen as one of the objects or bases of the Family Code. Hence, this limitation will follow the Filipino anywhere in the world. Moreover, the third paragraph of Article 17 of the Civil Code provides that "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." The Family Code mandates that only a male and a female can marry each other. This is, therefore, a public policy matter which cannot be rendered ineffective by any foreign law.

PROOF OF FOREIGN MARRIAGE. To establish a valid marriage pursuant to the comity provision of Article 26, it is necessary to prove the foreign law as a question of fact and then to prove the celebration of marriage pursuant thereto by convincing evidence (See *Ching Huat v. Co Heong*, 77 Phil. 988). The presumption arises on proof of a marriage in another jurisdiction, that such marriage was performed in accordance with the law of that jurisdiction (*Patterson v. Gaines*, 12 L. Ed. 553). If such law of the other state is not pleaded nor proved and for the purpose of determining the validity of a marriage in the said state, the laws of such state, in the absence of proof to the contrary, will be presumed by the court to be the same as the laws of its own state (See *Wong Woo Yin v. Vivo*, 13 SCRA 552).

Thus, in a particular case where a Chinese woman alleged that she was married to a Filipino and that their marriage in China was solemnized by a village leader, but the said woman failed to show proof of the marriage laws in China, the Supreme Court ruled that the marriage laws in China were presumed to be the same as the domestic laws on the subject, and considering that Philippine law only recognized a marriage celebrated before any of the officers mentioned in the law, and a village leader was not one of them, it was clear that the Chinese woman's marriage to the said Filipino,

even if true, cannot be recognized in the Philippines (See *Wong Woo Yin v. Vivo*, 13 SCRA 552).

In previous cases decided by the Supreme Court prior to 1991, it has been held that the burden of proof to show the fact of marriage and the foreign marital law is upon the one who asserts the validity of the marriage celebrated abroad (See *Yao kee v. Sy-Gonzales*, 167 SCRA 736). However, in 1991, the Supreme Court decided the case of *Board of Commissioners (CID) v. Dela Rosa,* 197 SCRA 853, where it held that, considering that in case of doubt, all presumptions favor the solidarity of the family and every intendment of the law or facts leans toward the validity of marriage, "he who asserts that the marriage is *not valid* under our law bears the burden of proof to present the foreign law." This case, therefore, shifted the burden of proof from the one who asserts the validity of a marriage to the one assailing the validity of the marriage. Pertinently, the Supreme Court stated, to wit:

> In *Miciano v. Brimo* (50 Phil. 867 [1924]; *Lim and Lim v. Collector of Customs*, 36 Phil. 472; *Yam Ka Lim v. Collector of Customs*, 30 Phil. 46 [1915]), this Court held that in the absence of evidence to the contrary, foreign laws on a particular subject are presumed to be the same as those of the Philippines. In the case at bar, there being no proof of Chinese law relating to marriage, there arises a presumption that it is the same as Philippine law.
>
> The lack of proof of Chinese law on the matter cannot be blamed on Santiago Gatchalian, much more on respondent William Gatchalian who was then a twelve year-old minor. The fact is, as records indicate, Santiago was not pressed by the Citizenship Investigation Board to prove the laws of China relating to marriage, having been content with the testimony of Santiago that the Marriage Certificate was lost or destroyed during the Japanese occupation of China. Neither was Francisco Gatchalian's testimony subjected to the same scrutiny by the Board of Special Inquiry. Nevertheless, the testimonies of Santiago Gatchalian and Francisco Gatchalian before the Philippine consular and immigration authorities regarding their marriages, birth and relationship to each other are not self-serving but are admissible in evidence as statements or declarations regarding family relation, reputation or tradition in matters of pedigree (Sec. 34, Rule 130). Furthermore, this salutary rule of evidence finds support in substantive law. Thus, Art. 267 of the Civil Code provides:
>
> > "Art. 267. In the absence of a record of birth, authentic document, final judgment or possession

> of status, legitimate filiation may be proved by any other means allowed by the Rules of Court and special laws" (See also Art. 172 of the Family Code).
>
> Consequently, the testimonies/affidavits of Santiago Gatchalian and Francisco Gatchalian aforementioned are not self-serving but are competent proofs of filiation (Art. 172[2], Family Code).
>
> Philippine law, following the *lex loci celebrationis*, adheres to the rule that a marriage formally valid where celebrated is valid everywhere. Referring to marriages contracted abroad, Art. 71 of the Civil Code (now Art. 26 of the Family Code) provides that "all marriages performed outside of the Philippines in accordance with the laws in force in the country where they were performed and valid there as such, shall also be valid in this country . . ." And any doubt as to the validity of the matrimonial unity and the extent as to how far the validity of such marriage may be extended to the consequences of the coverture is answered by Art. 220 of the Civil Code in this manner: "In case of doubt, all presumptions favor the solidarity of the family. Thus, *every intendment of law or facts leans toward the validity of marriage,* the indissolubility of marriage bonds, *the legitimacy of children,* the community of property during the marriage, the authority of parents over their children, and the validity of defense for any member of the family in case of unlawful aggression." (Italics supplied). Bearing in mind the "processual presumption" enunciated in Miciano and other cases, he who asserts that the marriage is not valid under our law bears the burden of proof to present the foreign law.

Interestingly and with reasons, Justice Florentino Feliciano strongly registered his dissent in the aforequoted ruling by stating that "the rule that a foreign marriage valid in accordance with the law of the place where it was performed shall be valid also in the Philippines, cannot begin to operate until after the marriage performed abroad and its compliance with the requirements for validity under the marriage law of the place where performed, are first shown as factual matters" (*Ibid.*, pages 913-914).

ABSOLUTE DIVORCE. Generally, absolute divorce between two citizens of the Philippines is not recognized in the Philippines (*Garcia v. Recio*, G.R. No. 138322, October 2, 2001). Hence, if the contracting parties who are citizens of the Philippines get validly married in the Philippines or anywhere in the world, their status, in so far as the Philippines is concerned, as married persons follow them anywhere in the world. They can only sever their relationship

as husband and wife if anyone of them has a cause of action to declare the marriage void or to annul the marriage. Divorce initiated by a Filipino is against public policy (*Cang v. Court of Appeals*, 296 SCRA 128).

Thus, in a case where a Filipina wife obtained a divorce from her Filipino husband in Nevada, USA, the divorce, though recognized in the USA or even in the rest of the world, was declared by the Supreme Court as not recognizable here in the Philippines. Therefore, in so far as the Philippines was concerned, the wife, in entering into a subsequent marriage with an American by virtue of the divorce, technically committed adultery. The Supreme Court anchored its decision mainly on Article 15 and the last paragraph of Article 17 of the New Civil Code. The former provides that laws relating to family rights and duties or to status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad. The latter provides that 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 (*Tenchavez v. Escano*, 15 SCRA 256).

Generally, states recognize divorces of aliens obtained in other states as a matter of international comity (*Gildersleeve v. Gildersleeve*, 88 Conn. 689). Aliens may obtain divorces abroad, which may be recognized in the Philippines, provided, they are valid according to their national law. The foreign marital law and the divorce decree must be duly proven and cannot be taken judicial notice of (*Garcia v. Recio*, G.R. No. 138322, October 2, 2001). Our civil law adheres to the nationality rule on the matter of status or legal capacity of a person (*Recto v. Harden*, 100 Phil. 427; *Van Dorn v. Romillo*, 139 SCRA 139; *Pilapil v. Ibay Somera*, 174 SCRA 653). This means that as to a person's status or legal capacity, the law of the country of the person shall determine such status or legal capacity.

The second paragraph of Article 26 of the Family Code provides the recognition in the Philippines of a particular absolute divorce obtained in another country which will allow the divorced Filipino to remarry. Hence, where a valid marriage is celebrated, either in the Philippines or abroad, between a Filipino citizen and a foreigner and, subsequently, the foreigner-spouse obtains a valid divorce abroad capacitating him or her to remarry, the Filipino spouse shall

likewise have capacity to remarry under Philippine law. The second paragraph of Article 26 is a codification of the jurisprudence laid down in the 1985 case of *Van Dorn v. Romillo* (*supra*, see *San Luis v. San Luis*, G.R. No. 133743, February 6, 2007).

The second paragraph of Article 26 also applies to a situation where originally, at the time of the marriage ceremony, both parties were Filipinos, but at the time of the divorce, the petitioner was already a citizen of a foreign country that allows absolute divorce. For purposes of Article 26 therefore, the determinative point when the foreigner who procured the divorce should be a foreigner is at the time of the divorce and not at the time of the marriage ceremony (*Republic v. Orbecido III*, G.R. No. 154380, October 5, 2005, 472 SCRA 114).

Although not expressly provided in Article 26, the Filipino spouse, who did not procure the divorce, must be a Filipino also at the time of the issuance of the divorce decree for Article 26 to be applicable. Hence, if the Filipino spouse subsequently acquires his or her foreign spouse's citizenship before the divorce and he or she initiates the divorce proceeding, the eventual divorce decree will be recognized in the Philippines not because of Article 26 but because of our adherence to the nationality principle with respect to the status of a person (*Quita v. Court of Appeals*, 300 SCRA 406; *Llorente v. Court of Appeals*, G.R. No. 124371, November 23, 2000; *Garcia v. Recio*, *supra*). The nationality principle postulates that, as to the legal capacity of a person, the Philippines shall adhere or follow the law of the country of the person involved. It must be remembered that at the time of the divorce decree, the Filipino had already become a foreign citizen and, therefore, Philippine laws will not anymore govern his or her status. What will be followed will be the law of the foreign country of the person who was formerly a Filipino. In the event that the former Filipino spouse who has been naturalized as a foreign citizen decides to return to the Philippines and reacquire Philippine citizenship, the divorce decree will still be recognized here because, at the time of the filing of the petition for divorce and at the time of the issuance of the decree of divorce, he or she was not a citizen of the Philippines. His or her status, therefore, at the time of the divorce will be governed by the foreign country of which he or she is a naturalized citizen and will continue even after he or she successfully reacquires Philippine citizenship. His or her status will not be changed just because he or she reacquires Philippine citizenship.

If the marriage is between two Filipinos and one of them obtains an absolute divorce abroad after he has been naturalized as a citizen of a foreign country where absolute divorce is recognized, such naturalized foreigner, who was formerly a Filipino, can come back to the Philippines and validly remarry. The nationality rule shall likewise apply to him. Article 26 will not apply but the law of the country where he was naturalized (*Recio v. Garcia*, *supra*).

In the event that it is the Filipino who obtains the foreign absolute divorce, such divorce, as previously explained, *will not* be recognized here (*Republic v. Iyoy*, 407 SCRA 508). However, in so far as the foreigner is concerned, the divorce *will be* recognized here because of the Philippine's adherence to the nationality rule. Thus, even if after an absolute divorce obtained in another country by the Filipino spouse has been decreed, a foreigner-spouse cannot claim that he or she still has an interest in the property acquired by the Filipino after the divorce on the ground that, as to Philippine laws, his or her marriage to the Filipino is not considered terminated. As to the foreigner, he or she shall be considered divorced and, therefore, will not have any interest in properties acquired by the Filipino after the divorce (See *Van Dorn v. Romillo*, 139 SCRA 139). In the event that a Filipino wife decides to have sexual intercourse with another man after such wife obtains an absolute divorce abroad, the foreigner husband cannot file a criminal case for adultery because, while the Filipino wife is *still* considered *married to him* under Philippine laws, such foreigner *is not* considered *married to her* and, therefore, does not have any legal standing to file such criminal case. Under Philippine criminal laws, only a spouse can file such a criminal case for adultery and, because as to legal capacity, the Philippines follows the nationality rule, the Philippines shall consider the foreigner as a divorced man and, therefore, not a spouse who can file the case (*Pilapil v. Ibay Somera*, 174 SCRA 653).

The divorce recognized under Article 26 was prompted by the lamentable experiences and disadvantageous position of many Filipinos who, before the effectivity of the Family Code and though divorced by their alien-spouses abroad, could not validly marry again, thereby forcing them to live, in the eyes of Philippine law, in illicit relationships with others in the event they decide to "re-marry" abroad.

PROVING FOREIGN DIVORCE. In *Bayot v. Court of Appeals*, G.R. Nos. 155635/163979, November 7, 2008, 570 SCRA 472, where the Supreme Court affirmed the dismissal of a case for declaration

of nullity on the ground that the petitioner thereof already obtained a divorce in another country, which can be recognized in the Philippines, the Supreme Court pertinently explained:

Validity of Divorce Decree

Going to the second core issue, we find Civil Decree Nos. 362/96 and 406/97 valid.

First, at the time of the divorce, as above elucidated, Rebecca was still to be recognized, assuming for argument that she was in fact later recognized, as a Filipino citizen, but represented herself in public documents as an American citizen. At the very least, she chose, before, during, and shortly after her divorce, her American citizenship to govern her marital relationship. *Second*, she secured personally said divorce as an American citizen, as is evident in the text of the Civil Decrees, which pertinently declared:

> IN THIS ACTION FOR DIVORCE in which the parties expressly submit to the jurisdiction of this court, by reason of the existing incompatibility of temperaments x x x. The parties MARIA REBECCA M. BAYOT, **of United States nationality**, 42 years of age, married, domiciled and residing at 502 Acacia Ave., Ayala Alabang, Muntin Lupa, Philippines, x x x, who **personally appeared before this court**, accompanied by DR. JUAN ESTEBAN OLIVERO, attorney, x x x and VICENTE MADRIGAL BAYOT, of Philippine nationality, of 43 years of age, married and domiciled and residing at 502 Acacia Ave., Ayala Alabang, Muntin Lupa, Filipino, appeared before this court represented by DR. ALEJANDRO TORRENS, attorney, x x x, revalidated by special power of attorney given the 19th of February of 1996, signed before the Notary Public Enrico L. Espanol of the City of Manila, duly legalized and authorizing him to subscribe all the acts concerning this case.

Third, being an American citizen, Rebecca was bound by the national laws of the United States of America, a country which allows divorce. *Fourth*, the property relations of Vicente and Rebecca were properly adjudicated through their Agreement executed on December 14, 1996 after Civil Decree No. 362/96 was rendered on February 22, 1996, and duly affirmed by Civil Decree No. 406/97 issued on March 4, 1997. Veritably, the foreign divorce secured by Rebecca was valid.

To be sure, the Court has taken stock of the holding in *Garcia v. Recio* that a foreign divorce can be recognized here,

provided the divorce decree is proven as a fact and as valid under the national law of the alien spouse. Be this as it may, the fact that Rebecca was clearly an American citizen when she secured the divorce and that divorce is recognized and allowed in any of the States of the Union, the presentation of a copy of foreign divorce decree **duly authenticated** by the foreign court issuing said decree is, as here, sufficient.

It bears to stress that the existence of the divorce decree has not been denied, but in fact admitted by both parties. And neither did they impeach the jurisdiction of the divorce court nor challenge the validity of its proceedings on the ground of collusion, fraud, or clear mistake of fact or law, albeit both appeared to have the opportunity to do so. The same holds true with respect to the decree of partition of their conjugal property. As this Court explained in *Roehr v. Rodriguez*:

> Before our courts can give the effect of *res judicata* to a foreign judgment [of divorce] x x x, it must be shown that the parties opposed to the judgment had been given ample opportunity to do so on grounds allowed under Rule 39, Section 50 of the Rules of Court (now Rule 39, Section 48, 1997 Rules of Civil Procedure), to wit:
>
> SEC. 50. *Effect of foreign judgments*.—The effect of a judgment of a tribunal of a foreign country, having jurisdiction to pronounce the judgment is as follows:
>
> (a) In case of a judgment upon a specific thing, the judgment is conclusive upon the title to the thing;
>
> (b) In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title; but the judgment may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

It is essential that there should be an opportunity to challenge the foreign judgment, in order for the court in this jurisdiction to properly determine its efficacy. In this jurisdiction, our Rules of Court clearly provide that with respect to actions *in personam*, as distinguished from actions *in rem*, a foreign judgment merely constitutes *prima facie* evidence of the justness of the claim of a party and, as such, is subject to proof to the contrary.

As the records show, Rebecca, assisted by counsel, personally secured the foreign divorce while Vicente was duly represented by his counsel, a certain Dr. Alejandro Torrens, in said proceedings. As things stand, the foreign divorce decrees rendered and issued by the Dominican Republic court are valid and, consequently, bind both Rebecca and Vicente.

Finally, the fact that Rebecca may have been duly recognized as a Filipino citizen by force of the June 8, 2000 affirmation by Secretary of Justice Tuquero of the October 6, 1995 Bureau Order of Recognition will not, standing alone, work to nullify or invalidate the foreign divorce secured by Rebecca as an American citizen on February 22, 1996. For as we stressed at the outset, in determining whether or not a divorce secured abroad would come within the pale of the country's policy against absolute divorce, the reckoning point is the citizenship of the parties at the time a valid divorce is obtained.

Legal Effects of the Valid Divorce

Given the validity and efficacy of divorce secured by Rebecca, the same shall be given a *res judicata* effect in this jurisdiction. As an obvious result of the divorce decree obtained, the marital *vinculum* between Rebecca and Vicente is considered severed; they are both freed from the bond of matrimony. In plain language, Vicente and Rebecca are no longer husband and wife to each other. As the divorce court formally pronounced: "[T]hat the marriage between MARIA REBECCA M. BAYOT and VICENTE MADRIGAL BAYOT is hereby **dissolved x x x leaving them free to remarry after completing the legal requirements**."

Consequent to the dissolution of the marriage, Vicente could no longer be subject to a husband's obligation under the Civil Code. He cannot, for instance, be obliged to live with, observe respect and fidelity, and render support to Rebecca.

The divorce decree in question also brings into play the second paragraph of Art. 26 of the Family Code, providing as follows:

> Art. 26. x x x x
>
> 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 likewise have capacity to remarry under Philippine law (*As amended by E.O. 227*).

In *Republic v. Orbecido III*, we spelled out the twin elements for the applicability of the second paragraph of Art. 26, thus:

x x x [W]e 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.

Both elements obtain in the instant case. We need not belabor further the fact of marriage of Vicente and Rebecca, their citizenship when they wed, and their professed citizenship during the valid divorce proceedings.

Not to be overlooked of course is the fact that Civil Decree No. 406/97 and the Agreement executed on December 14, 1996 bind both Rebecca and Vicente as regards their property relations. The Agreement provided that the ex-couple's conjugal property consisted only their family home, thus:

> 9. That the parties stipulate that the **conjugal property which they acquired during their marriage consists only of the real property** and all the improvements and personal properties therein contained at 502 Acacia Avenue, Ayala Alabang, Muntinlupa, covered by TCT No. 168301 dated Feb. 7, 1990 issued by the Register of Deeds of Makati, Metro Manila registered in the name of Vicente M. Bayot, married to Rebecca M. Bayot, x x x.

This property settlement embodied in the Agreement was affirmed by the divorce court which, per its second divorce decree, Civil Decree No. 406/97 dated March 4, 1997, ordered that, "THIRD: That the agreement entered into between the parties dated 14th day of December 1996 in Makati City, Philippines shall survive in this Judgment of divorce by reference but not merged and that the parties are hereby ordered and directed to **comply with each and every provision of said agreement**."

Rebecca has not repudiated the property settlement contained in the Agreement. She is thus estopped by her representation before the divorce court from asserting that her

and Vicente's conjugal property was not limited to their family home in Ayala Alabang.

No Cause of Action in the Petition for Nullity of Marriage

Upon the foregoing disquisitions, it is abundantly clear to the Court that Rebecca lacks, under the premises, cause of action. *Philippine Bank of Communications v. Trazo* explains the concept and elements of a cause of action, thus:

A cause of action is an act or omission of one party in violation of the legal right of the other. A motion to dismiss based on lack of cause of action hypothetically admits the truth of the allegations in the complaint. The allegations in a complaint are sufficient to constitute a cause of action against the defendants if, hypothetically admitting the facts alleged, the court can render a valid judgment upon the same in accordance with the prayer therein. A cause of action exists if the following **elements** are present, namely: (1) a right in favor of the plaintiff by whatever means and under whatever law it arises or is created; (2) an obligation on the part of the named defendant to respect or not to violate such right; and (3) an act or omission on the part of such defendant violative of the right of the plaintiff or constituting a breach of the obligation of the defendant to the plaintiff for which the latter may maintain an action for recovery of damages.

One thing is clear from a perusal of Rebecca's underlying petition before the RTC, Vicente's motion to dismiss and Rebecca's opposition thereof, with the documentary evidence attached therein: The petitioner lacks a cause of action for declaration of nullity of marriage, a suit which presupposes the existence of a marriage.

To sustain a motion to dismiss for lack of cause of action, the movant must show that the claim for relief does not exist rather than that a claim has been defectively stated or is ambiguous, indefinite, or uncertain. With the valid foreign divorce secured by Rebecca, there is no more marital tie binding her to Vicente. There is in fine no more marriage to be dissolved or nullified.

VOID AND VOIDABLE FOREIGN MARRIAGES. In the event that a Filipino contracts a foreign marriage which is null and void under the laws of the state where it has been solemnized, such marriage shall likewise be null and void in the Philippines. This is so because the first paragraph of Article 26 clearly provides that foreign marriages, to be considered valid in the Philippines, must

be valid in accordance with the laws in force in the country where they are solemnized. Accordingly, if the marriage is not valid in the country where it has been solemnized, it is likewise not valid in the Philippines. In this regard, a civil case can be filed in the Philippines to nullify a foreign marriage using as basis the legal grounds for nullity provided by the marriage laws of the state where the marriage was celebrated.

Implicit in the first paragraph of Article 26 is also the recognition that a Filipino's foreign marriage, which is invalid under the laws where such marriage has been solemnized but which would have been valid had such marriage been celebrated in the Philippines, is likewise invalid in the Philippines. Thus, if a Filipino contracts a marriage solemnized in the residence of the solemnizing judge in a country where the law provides that a marriage shall be void if celebrated in a place other than the chambers of the solemnizing judge, such marriage shall be considered void in the Philippines although such marriage would have been valid had the celebration been performed in the Philippines also in the residence of the judge. In the Philippines, provided that the judge is within his or her jurisdiction, the venue of the marriage ceremony can be anywhere within his or her jurisdiction.

In case of voidable or annullable marriage (valid up to the time of termination), the same rule as in null and void marriages applies. Under the general rules of private international law on marriage, it is a rule that, as to the extrinsic and intrinsic requirements of a marriage, the law where the marriage has been solemnized shall apply.

Chapter 2

MARRIAGES EXEMPT FROM LICENSE REQUIREMENT

Article 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)

Article 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 necessity of a marriage license. (72a)

Article 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)

Article 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 per-

formed within the period of thirty days after the performance of the marriage. (73a)

Article 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)

Article 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)

Article 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)

Article 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 and found no legal impediment to the marriage. (76a)

EXEMPTION FROM MARRIAGE LICENSE. Articles 27, 28, 31, 32, 33 and 34 are situations where the contracting parties need not obtain a marriage license prior to getting validly married. These situations are explicitly declared by Article 3(2) as exceptions to the formal requirement of a valid marriage license. These exceptions are likewise referred to in Article 9, which provides that a "marriage license shall be issued by the local civil registrar of the city or municipality where either of the contracting parties habitually reside, except in a marriage where no license is required

in accordance with Chapter 2 of this Title." Except for Muslims who are now governed by the Code of Muslim Personal Laws of the Philippines, the various ethnic groups in the Philippines and the contracting parties referred to in the said articles must comply with all other essential and formal requirements provided under Articles 2 and 3 of the Family Code. Also, the solemnizing officer must be authorized to solemnize the marriage under Article 7. Moreover, their marriage should not fall under those declared as void under Articles 35, 36, 37, 38, 40, 41, 44 and 53 of the Family Code.

The reasons for the exceptions are mainly anchored on necessity and practicality such as in the case of marriages in *articulo mortis* where at least one of the parties is in the brink of death and of marriages in remote places; on the respect for and recognition of the customs and practices of Muslims and ethnic minorities; and on the policy of the state to, as much as possible, validate or legitimize illicit cohabitation between persons who do not suffer any legal impediment to marry.

FAR AREAS. 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 necessity of a marriage license. A sacred institution like marriage should always be encouraged. Without this provision, illicit relationships may proliferate only because the parties could not get a marriage license with really no fault on their part.

SOLEMNIZING OFFICERS UNDER ARTICLE 7 AND THE MAYOR. It must be observed that, on the basis of Article 27, all those who are authorized to solemnize a marriage enumerated in Article 7 and the mayor are empowered to act as the solemnizer of a marriage even without a valid marriage license if either or both of the contracting parties are at the point of death. The marriage will remain valid even if the ailing party subsequently survives. The judge must, however, solemnize the marriage within his jurisdiction and the imam, priest or rabbi or any minister of a particular sect or religious group must comply with the requisites provided in Article 7(2). The consul or consul general abroad can only do so if the parties are both Filipinos as provided for in Article 7(5) in relation to Article 10.

CHIEF PILOT AND SHIP CAPTAINS. A chief pilot or a ship captain may solemnize only marriages in *articulo mortis* while the plane is in flight or the ship is at sea and even during stopovers

at ports of call. They can solemnize marriages only among their passengers and crew members.

MILITARY COMMANDER. As far as the military commander is concerned, he or she must be a commissioned officer, which means that his or her rank should start from a second lieutenant, ensign and above (Webster Dictionary, 1991 edition). He or she must likewise be a commander of a unit, which means any subdivision (regiment, battalion, etc.) of an army whose strength is laid down by regulations (Webster Dictionary, 1991 edition). However, from the deliberations of the Civil Code revision committee, it appears that "unit" has been referred to be at least a "battalion" (Minutes of the Civil Code Revision Committee held on May 23, 1983, page 4). Also he or she can only solemnize a marriage if it is in *articulo mortis* and in the absence of a chaplain. The marriage must be solemnized within the zone of military operation and during such military operation. The contracting parties may either be members of the armed forces or civilians.

MUSLIM AND ETHNIC GROUPS. It is interesting to note that under the Civil Code, for as long as the marriages of ethnic groups, pagans and Muslims were performed in accordance with their customs, rites and practices, such marriages were considered valid (Article 78 of the Civil Code). The previous law likewise even provided that the formal requisites of a marriage need not be complied with including the authority of the solemnizing officer as defined in the Civil Code. The privilege given to these Filipinos, according to the Civil Code, was good only for twenty years from the time the Civil Code took effect in 1950 unless prolonged or shortened by the President. After the period had lapsed, these Filipinos had to comply with the mandates of the Civil Code just like any other Filipino.

Subsequently, the Code of Muslim Personal Laws of the Philippines was signed on February 4, 1977 and became effective in the same year. This particular law governs the law on persons and family relations among Muslims. It does not provide that, for a marriage to be valid, a marriage license has to be procured by the contracting parties. On August 3, 1988, the new Family Code took effect, expressly providing that the Muslims and ethnic groups are exempted only from procuring a marriage license for as long as the marriage will be solemnized in accordance with their customs, rites and practices. In effect, the code commission was consistent with the Code of Muslim Personal Laws of the Philippines in so far as not requiring Muslims to obtain a marriage license.

Under Republic Act No. 6766, the Organic Act for the Cordillera Autonomous Region (CAR), Article X, sec. 2 provides: "Marriages solemnized between or among members of the indigenous tribal group or cultural community in accordance with the indigenous customary laws of the place shall be valid, and the dissolution thereof in accordance with these laws shall be recognized."

However, as to other ethnic groups in the Philippines, they are still governed by the Family Code, as they do not have a separate law like the Code of Muslim Personal Laws of the Philippines for the Muslims or the Organic Act of the Cordillera Autonomous Region.

COHABITATION FOR FIVE YEARS. With respect to the exemption relative to persons cohabiting for at least five years under Article 34 of the Family Code, it must be observed that their living together as husband and wife must meet two distinct conditions namely: 1) they must live as such for at least five years characterized by exclusivity and continuity that is unbroken. (*Republic v. Dayot*, G.R. No. 175581, March 28, 2008, 550 SCRA 435); *and* 2) they must be without any legal impediment to marry each other. While both conditions must concur, they do not qualify each other. In other words, during the five-year period, it is not necessary that they must not have suffered from any legal impediment. The second condition as to the absence of any legal impediment must be construed to refer only to the time of the actual marriage celebration. Hence, the parties must be without legal impediment only at the time of the marriage ceremony and not during all those previous five (5) years. This must be the interpretation because the essential requirements under Article 2 and the formal requirements under Article 3 for a valid marriage must be present only at the celebration of the marriage and not at any other point in time. The five-year period is not among the said essential and formal requirements. Neither could such time element add or diminish the legal effects of the said essential and formal requirements. This, in fact, is the intention of the drafters of the Family Code. It was Justice Puno who recommended the phrase relative to the absence of legal impediment, thus:

> Justice Puno suggested that they say "and having no legal impediment to marry."
>
> Justice Reyes, however, commented that the provision may be misinterpreted to mean that during the five years, the couple should have capacity to marry each other. Justice Puno opined that the idea in the provision is that, at the time of the marriage, there is no legal impediment to said marriage. Judge

> Diy remarked that it may appear that they are consenting to an adulterous relationship. Justice Caguioa pointed out that what is important is that at the time of the marriage, both parties are capacitated to marry (Minutes of the 150th joint Civil Code and Family Law committees held on August 9, 1986, page 3).

This must be the interpretation of the law if the intention of the Code Commission is to really improve the previous provision contained in Article 76 of the Civil Code. It must be noted that the said Article 76 of the Civil Code, which has been repealed by Article 34 of the Family Code, had three conditions for the exemption to apply, namely: 1) the contracting parties must have lived as husband and wife for at least five years; 2) they must have attained the age of majority; and 3) they must be unmarried. Although these conditions should likewise concur, they did not qualify each other. Clearly, instead of providing specific conditions such as the attainment of the age of majority and the status of being "unmarried" which seem to indicate that, under the Civil Code, these were the only legal impediments pertinent in determining the application of the exemption, the Family Code now provides a broader condition by an amendment providing that no legal impediment must exist with respect to the contracting parties. There are no more specific types of legal impediments. The phrase "legal impediment" under Article 34 of the Family Code refers to any possible ground or basis under the Family Code, including non-age and the status of being already married among others, to make a marriage infirm. But the presence or absence of such legal impediment should only be considered at the time of the celebration of the marriage ceremony.

Unlike Article 34 of the Family Code, the repealed Article 76 of the Civil Code made it mandatory that, during the whole five (5)-year period, the contracting parties must be unmarried. Hence, under the repealed law, a person who was married at anytime during the five-year period and who was living with another person cannot avail of the exception in case he or she intends to marry his or her live-in partner after his or her legitimate spouse died. In short, there must be no such legal impediment during the whole five-year period (*Niñal v. Bayadog*, G.R. No. 133778, March 14, 2000, 328 SCRA 122). Under Article 34 of the Family Code, however, for as long as there is no legal impediment at the time of the marriage ceremony, the parties can avail of the exception (*Manzano v. Sanchez*, AM No. MTJ 00-1329, March 8, 2001). Hence, under the Family Code, a spouse who was living-in with his or her paramour can avail of

this exception and marry his or her paramour without a marriage license after the death of his or her legal spouse.

Under this exception, the contracting parties shall state the fact of their cohabitation for at least five years and the absence of any legal impediment to marry 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 and found no legal impediment to the marriage. The failure of the solemnizing officer to investigate shall not invalidate the marriage. In *Cosca v. Palaypayon*, 55 SCAD 759, 237 SCRA 249, where a judge solemnized a marriage involving a party who was only 18 years of age without a marriage license on the basis of an affidavit where the parties indicated that they lived together as husband and wife for six years already, the Supreme Court held that the judge acted improperly because he should have conducted first an investigation as to the qualification of the parties. The judge should have been alerted by the fact that the child was 18 years old at the time of the marriage ceremony, which means that the parties started living together when the 18-year-old was barely 13 years of age. There was a probability that the affidavit was forged. Nevertheless, the Supreme Court did not state that the marriage was void because clearly at the time of the marriage ceremony, the parties had no legal impediment to marry.

> The aim of this provision 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 (*De Castro v. Assidao-De Castro*, G.R. No. 160172, February 13, 2008, 545 SCRA 162).

In *De Castro v. Assidao-De Castro*, G.R. No. 160172, February 13, 2008, 545 SCRA 162, the Supreme Court ruled the nullity of a marriage on the ground of absence of a valid marriage license upon evidence that there was in fact no cohabitation for five years contrary to the statements in the falsified affidavit executed by the parties. The falsity of the affidavit cannot be considered to be a mere irregularity considering that the 5-year period is a substantial requirement of the law to be exempted from obtaining a marriage license (See also *Republic v. Dayot*, G.R. No. 175581, March 28, 2008, 550 SCRA 435).

DIRECTORY REQUIREMENTS. The procedure laid down in Articles 29 to 30 of the Family Code relative to the duties of

the solemnizing officer with respect to the affidavit he or she has to execute is merely directory in character. Non-observance of the requirements will not render the marriage void or annullable (*Loria v. Felix*, 55 O.G. 8118). However, under the Marriage Law of 1929, any officer, priest or minister who, having solemnized a marriage in *articulo mortis* or any other marriage of an exceptional character, shall fail to comply with the provisions of Chapter II of this Act (now Chapter 2, Title I of the Family Code), shall be punished by imprisonment for not less than one month nor more than two years, or by a fine of not less than three hundred pesos nor more than two thousand pesos, or both, in the discretion of the court.

Chapter 3

VOID AND VOIDABLE MARRIAGES

Article 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 a license, except those covered by the preceding Chapter;

4) Those bigamous or polygamous marriages not falling 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.

VOID MARRIAGES. A void marriage is that which is not valid from its inception. Article 4 of the Family Code declares that absence of any of the essential or formal requirements for a valid marriage as provided for in Articles 2 and 3 makes a marriage void. Exceptions are, however, provided for in Articles 27, 28, 31, 32, 33, 34 and 35(2). In addition, Articles 35, 36, 37, 38, 40, 41, 44, and 53 in relation to Article 52 of the Family Code enumerate marriages which are void. Only marriages declared void by the legislature should be treated as such. There can be no other void marriages

outside of those specifically provided by law. Thus, in the absence of any other grounds to consider a marriage void, a court appointed guardian and his or her ward can marry each other and likewise stepbrothers and stepsisters can validly marry each other.

The grounds for a void marriage may co-exist in one case. Thus, a person may claim that his or her marriage is void because he or she not only contracted it when he or she was 17 years of age but also it has been contracted without a valid marriage license and with a person who has a subsisting marriage and who is his or her collateral blood relative within the fourth civil degree of consanguinity. A petition for declaration of nullity, without any other incidental prayers like support, deals with only one cause of action, which is the invalidity of the marriage from the beginning. Hence, a petition may contain many grounds for nullity of marriage, such as absence of consent, no marriage license, psychological incapacity of the parties and bigamy, but it has only one cause of action, which is the nullity of the marriage (*Mallion v. Alcantara*, G.R. No. 141528, October 31, 2006).

VOID AND VOIDABLE MARRIAGE. A void marriage is different from a voidable or annullable marriage under Article 45 of the Family Code.

> A marriage that is annullable 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 marriage where the action prescribes. Only the parties (or those designated by the law such as parents and guardians) 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 (or absolute community) and the children conceived before its annulment are legitimate (*Ninal v. Bayadog*, 328 SCRA 122; matters inside parenthesis supplied).

Void marriages can never be ratified or cured by any act of any of the contracting parties. Neither could estoppel or acquiescence apply to remedy the infirmity. Thus, even if one of the parties stated under oath in his or her marriage application that he or she was 21 years of age when in fact he or she was only 16 years of age and a marriage was solemnized at the time he or she was a minor, the marriage is still void and can still be judicially declared as void. The parties cannot invoke that the 16-year-old or the other party who knew of the infirmity is estopped from invoking the said infirmity just because in the marriage application the said parties agreed to state a false age. Likewise, if in order to be exempted from procuring a marriage license, the parties stated in their sworn statement that they were already cohabiting continuously for five years to comply with the time requirement of the law when in fact they only cohabited for two years and a marriage was consequently solemnized, such marriage is still void and the parties can nullify the marriage on the ground of absence of a marriage license as the infirmity in the marriage cannot be cured by their misrepresentation in their sworn statement or affidavit and neither could they be estopped by such misrepresentation (See *De Castro v. Assidao-De Castro*, G.R. No. 160172, February 13, 2008, 545 SCRA 162; *Republic v. Dayot*, G.R. No. 175581, March 28, 2008, 550 SCRA 435).

However, in *Mallion v. Alcantara,* G.R. No. 141528, October 31, 2006, where the petitioner, after being denied the nullity of his marriage via a petition based on psychological incapacity, subsequently filed another petition for nullity of marriage based on the absence of a marriage license, the Supreme Court directed the dismissal of the subsequent case on the ground that the petitioner violated the rule on splitting-a-cause of action, that the rule on *res judicata* applied and that the petitioner waived the defect. The Supreme Court said that a case for nullity of marriage involved only one cause of action which was to declare the marriage void. The different grounds for nullity of marriage did not mean different causes of action. Hence, in not invoking the ground of absence of a marriage license in the first case and then in filing a subsequent case invoking the said ground, the petitioner violated the rule on splitting of a cause of action. Accordingly, the petitioner was considered to

have been barred by *res judicata*. According to the Supreme Court, not having invoked the ground of absence of a marriage license in the first case, the petitioner was considered to have impliedly admitted the validity of the celebration of the marriage and he had therefore waived all the defects. This ruling in the *Mallion* case appears to have given more weight to procedure rather than substantial law which should not be the case The decision did not take into account that no amount of ratification, waiver, acquiescence, or estoppel can validate a void marriage. This is so because a void marriage is invalid from the very beginning. Marriage is a social institution affected by public interest. A legal declaration that a marriage is void is likewise a fiat vested with public interest. A null and void marriage cannot be validated directly or indirectly. In this particular case, the Supreme Court gave a valid effect to an invalid marriage which is inconsistent with the very notion of void marriages.

BAD FAITH OR GOOD FAITH IN VOID MARRIAGES. As a general rule, good faith and bad faith are immaterial in determining whether or not a marriage is null and void. Hence, even if a woman believed in good faith that she married a man not related to her but who, in truth and in fact, was her long-lost brother, her good faith will not cure the infirmity even if she willingly and freely cohabited with him for a reasonable length of time after discovering the relationship. She can still nullify such a marriage because it is incestuous. Also, if a person marries without a marriage license or one that is spurious and does not fall under the exceptions, the marriage is void regardless of his or her good faith or bad faith. Likewise, if a person marries his or her first cousin knowing fully well of such a relationship which he or she conceals from his or her first cousin, the marriage is still void and it can be nullified even at the instance of the person who conceals the fact as such marriage is void for being against public policy. In *Chi Ming Tsoi v. Court of Appeals*, 78 SCAD 57, 266 SCRA 324, where the ground of psychological incapacity under Article 36 was invoked to nullify a marriage and where evidence showed that the spouses did not engage in sexual intercourse but there was no finding as to who between the husband and the wife refused to have sexual intercourse, the Supreme Court ruled that such absence of a finding as to the one who refused to have sex is immaterial because the action to declare a marriage void may be filed by either party, even the psychologically incapacitated one.

In this regard, it has been authoritatively opined that the equitable doctrine of unclean hands where the court should not grant

relief to the wrongdoer is not a rule as applied in nullity actions because it is merely judge-made and has no statutory basis (See *Faustin v. Lewis*, 85 N.J. 507, 427 A. 2d 1105). Significantly, while the Family Code generally refers to an "injured party" in annullable or voidable marriages, it does not make any statutory reference to an "injured party" in null and void marriages. Moreover, what is sought to be protected here is also the interest and public policy of the State. In declaring a marriage void, the State expresses that it does not consider a union in a void marriage as serving the fundamental purpose of the state of fostering and nurturing a family which is the foundation of society. Hence, either the husband or the wife in a void marriage can file a case to declare it null and void. Nonetheless, the party who knew that he or she was entering a void marriage before its solemnization may be held liable for damages by the other contracting party under the provisions on Human Relations in the Civil Code, specially Articles 19, 20, and 21 thereof.

There are only *two exceptions* to the general rule that good faith and bad faith are not relevant in void marriages. These exceptions are all expressly provided by law. *First*, Article 35(2) states that if either of the contracting parties is in good faith in believing that a solemnizing officer has authority to solemnize a marriage though he or she actually has none, the marriage will be considered valid. *Second*, in the case provided in Article 41 referring to a person whose spouse disappears for four years or two years, in the proper cases, the present spouse may validly marry again if he or she: 1) has a well-founded belief that his or her spouse is dead; 2) procures a judicial declaration of presumptive death; and 3) at the time of the subsequent marriage ceremony, is in good faith together with the subsequent spouse; otherwise, the subsequent marriage shall be considered void in accordance with Article 44. In these *two cases*, the good faith even of only one of the contracting parties shall make the marriage valid. To be void, both of the contracting parties must be in bad faith.

BAD FAITH AS AFFECTING PROPERTY DISPOSITION. In determining the disposition of properties in a void marriage, good faith and bad faith of one of the parties at the time of the marriage ceremony are material. As a general rule, in a void marriage, the property regime is one of co-ownership. In the disposition of the co-ownership at the time of liquidation, whether or not one of the parties is in bad faith is a basic consideration. This is in accordance with Article 147 or 148 of the Family Code, as the case may be. Hence, 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 the termination of the cohabitation.

This rule described in the preceding paragraph applies to all void marriages except to a subsequent void marriage due to the failure of a party to get a prior judicial declaration of nullity of the previous void marriage pursuant to Article 40 of the Family Code. Thus, if a person, whose existing marriage is void, remarries another without obtaining a judicial declaration of nullity, the subsequent marriage is void. However, even if the subsequent marriage is void, Article 147 or 148 will not apply but Article 50, which provides that paragraph (2), among others, of Article 43 shall apply in case of a subsequent void marriage under Article 40 (*Valdes v. RTC*, 72 SCAD 967, 260 SCRA 221). Paragraph (2) of Article 43 provides that, upon the termination of the marriage, 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.

COLLATERAL AND DIRECT ATTACK. As a general rule, a void marriage can be collaterally attacked. This means that the nullity of a marriage can be asserted even if it is not the main or principal issue of a case and that no previous judicial declaration of nullity is required by law with respect to any other matter where the issue of the voidness of a marriage is pertinent or material, either directly or indirectly. Hence, if, in an inheritance case, it is important to show that certain children should get less inheritance because they are illegitimate due to the void marriage of the decedent with their mother, any proof to show the nullity of the marriage can be presented in court. There is no need to produce a judicial declaration of nullity to prove that the marriage is void. In short, it is not mandatory to show that, prior to the death of the decedent, either the decedent or the mother filed a civil case precisely and mainly for the purpose of judicially declaring the marriage void. Evidence other than a judicial decision declaring the said marriage void can

be presented to show the nullity of the marriage (*Domingo v. Court of Appeals*, 44 SCAD 955, 226 SCRA 572).

In *De Castro v. Assidao-De Castro*, G.R. No. 160172, February 13, 2008, 545 SCRA 162, petitioner filed a complaint for support against her husband to compel the latter to support their child. The husband interposed an affirmative defense claiming that the petitioner and she were not married. The Supreme Court ruled that while the case was one of support, the lower court can make a declaration that the marriage was void to determine the rights of the child to be supported. The Supreme Court rejected the contention that a separate case for judicial declaration of nullity must be filed first before the lower court, in a case for support, can rule that the marriage was void.

There are, however, three cases where a direct attack, not a collateral attack, on the nullity of a marriage must first be undertaken so that the proper effects provided by law can appropriately apply. Direct attack means filing a case precisely putting forth as principal issue the nullity of the marriage. It is a suit precisely filed to assail the validity of a marriage or to assert the nullity of a marriage for the court to issue the proper judicial declaration. In a direct attack, only the husband or the wife can file a case for declaration of nullity. The *first case* is provided in Article 40 of the Family Code which provides that "the absolute nullity of a previous marriage may be invoked for purposes of remarriage on the basis solely of a final judgment declaring such marriage void." This means that, if a person has a void marriage and he or she wants to remarry, he or she must first file a civil case precisely to obtain a judicial declaration of the nullity of the first marriage before he or she can remarry. In short, for purposes of remarriage, the only acceptable proof to show the voidness of the first marriage is a judicial declaration issued by the court directly stating that the first marriage is null and void (*Domingo v. Court of Appeals*, 44 SCAD 955, 226 SCRA 572).

The *second case* where a direct attack is necessary has been alluded to by the Supreme Court in *Niñal v. Bayadog*, 328 SCRA 122, when it said that for purposes other than remarriage, no judicial declaration of nullity is necessary. However,

> for other purposes, such as but not limited to determination of heirship, legitimacy or illegitimacy of the child, settlement of estate, dissolution of property regime, or a criminal case for that matter, the court may pass upon the validity of a 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 arise, 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. (italics supplied)

The *third case* where a direct attack is required is provided in Articles 50 in relation to Article 43(3) and in Article 86(1) of the Family Code. Thus, if a donor desires to revoke a donation *propter nuptias* (in consideration of marriage) given to one or both of the married couple on the ground that the marriage is void, it is important that a judicial declaration of nullity of the marriage must first be obtained. It is not enough that the marriage is void pursuant to law. There must first be a civil suit filed by either of the parties in the void marriage to have the marriage judicially declared null and void. The existence of a valid judicial declaration of nullity will give the donor the cause of action to revoke the donation (Article 86[1]) or to consider the donation as revoked by operation of law (Article 50 in relation to Article 43[3]), as the case may be.

BELOW EIGHTEEN YEARS OF AGE. An individual below eighteen years of age is declared by law as not possessing the legal capacity to contract marriage. The consent of the parents is immaterial in the sense that, even if present, it will not make the marriage valid. Neither can subsequent parental consent ratify such a void marriage. The legal capacity to marry both for male and female is 18 years of age.

Under the Spanish Civil Code, the marrying ages were 14 years old for male and 12 years old for female as these ages were considered to be the minimum ages when a male and a female can effectively procreate. These are the ages when puberty normally starts. Eventually, the level of maturity or responsibility of the marrying couple was taken into consideration such that the 1950 Civil Code changed the marrying-ages to 16 years of age for male and 14 years of age for female. This discrepancy in age under the old law has for its basis the primary obligation of a husband or father to support the family.

> Presumably, interwoven in the latter obligation is the recognition that natural order, taught both by history and reason, designates the male as the provider in the usual

> marriage relation. That duty, different in recognizable degree than the other mutual duties of marriage, is sufficient reason to require males to be older and generally more suited to their duty before they may independently decide to marry (*Friedrich v. Katz*, 318 N.E. ed. 606).

The above basis for the discrepancy in sex-age appears today as quite anachronistic considering the fact that women today can equally provide for the family. The above justification, in fact, has been abandoned in many states of the United States which declared statutes with age discrepancy between male and female as constitutionally infirm for being discriminatory (See *Stanton v. Stanton*, 421 U.S. 7, 95; 429 U.S. 501). The amendment therefore in the Family Code appears to give emphasis to the present-day reality that there is no significant difference as to the maturity of male and female of the same age. Moreover, scientific studies have been shown that adolescent child bearing on the part of the female (who is between 12 to 17 years of age) increases the probability of unsafe pregnancies such as those characterized by pre-eclampsia, eclampsia, prolonged labor, severe toxema, uterine inertia, prematurity, contracted pelvis and others. Those situations may even lead to cerebral palsy, epilepsy and mental retardation. Also, adolescent pregnancy can likewise deprive a fetus of proper nutrition. This is because, in her adolescent life, a female (like a male) is biologically developing such that she needs all the nutrients in her body to grow up as a healthy person. With a child in her womb, an adolescent female may not provide the fetus with enough nutrition as her own body is directly competing with the fetus for the said nutrients. This situation is not good both for the adolescent pregnant female and the fetus in her womb.

NON-AUTHORITY OF SOLEMNIZER. As discussed in a previous chapter of this book, the present and the old marriage laws applicable in the Philippines exclusively recognize ceremonial marriage which involves the intervention of an ecclesiastical or civil functionary empowered by the state to declare a couple as husband and wife. If a person is not among those enumerated under Article 7, or if he or she is among those enumerated but does not comply with the specific requirements for his or her authority to vest on him or her as also provided by law, or he or she is not the mayor or, at least, a person empowered by law to act as mayor when the latter cannot perform his or her duties, he or she has no authority to solemnize a marriage.

GOOD FAITH MARRIAGE. If the marriage were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so when in fact he or she has none, then the marriage shall be considered valid. The good faith is clearly addressed to the contracting parties and not to the solemnizing officer. Likewise, the good faith that will validate the marriage refers to only one formal requisite, namely: authority of the solemnizing officer, and not to any other requisite, whether essential or formal. Without the declaration by the law of its validity, such good-faith marriage would have been an instance of a putative marriage which is void because of the absence of the authority of a solemnizing officer.

> The term "putative marriage" is applied to a matrimonial union which has been solemnized in due form and good faith on the part of one or of both of the parties but which by reason of some legal infirmity is either void or voidable. The essential basis of such marriage is the belief that it is valid (*Estate of Foz,* 109 Cal. App. 2d 329).

Like a putative marriage, the good-faith marriage under Article 35(2) is not founded on the actual marriage or the ceremonial marriage, but on the reasonable belief by one or both of the parties that they were honestly married (Succession of Marinoni, 183 La. 776) and that the solemnizing officer had authority when, in fact, he had none. While the question of good faith is a question of fact, which must be determined by the trial court (Succession of Chavis, 211 La. 313), good faith is always presumed until the contrary is shown (*Kunafoff v. Woods*, 166 Cal App 2d J9 332 P2d 773). The scope of good faith in putative marriages may likewise be applicable to good faith marriages under Article 35(2).

> The term "good faith," when used in connection with putative marriage, means an honest and reasonable belief that the marriage was valid at its inception, and that no legal impediment exists to impair its validity. A finding that a person entered a marriage in good faith is equivalent to a finding that he or she was innocent of fraud or wrongdoing in inducing or entering into the marriage. While it has frequently been said that a party may be in good faith so long as he receives no certain or authoritative knowledge of some legal impediment to the marriage, such person cannot close his ears to information or his eyes to suspicious circumstances, and must not act blindly or without reasonable precautions. The extent to which a person has the duty to ascertain the existence of an impediment to his

marriage depends ultimately upon the facts and circumstances in each individual case (52 Am. Jur. 2d 96).

EXPLANATIONS OF JUSTICES RICARDO PUNO AND EDUARDO CAGUIOA. Justice Ricardo Puno, one of the framers of the present Family Code, had this to say on the aspect of good-faith marriage recognized under our present law in reply to the various criticisms on the same made during the deliberations on the Family Code in the Senate Committee on Women and Family Relation on January 27, 1988:

> Mr. Puno: xxx xxx She had, however, a very notable observation regarding Article 35, No. 2, where Judge Claraval proposes that the exception clause should be deleted — "Those solemnized by any person not legally authorized to perform marriages" — and the exception is sought to be deleted now — "UNLESS SUCH MARRIAGES WERE CONTRACTED WITH EITHER OR BOTH PARTIES BELIEVING IN GOOD FAITH THAT THE SOLEMNIZING OFFICER HAD LEGAL AUTHORITY TO DO SO."
>
> Under the old jurisprudence, this was a recognized exception — that when the parties in good faith believe the authority of the solemnizing officer, the marriage would nevertheless be valid. But in the Civil Code of 1950, the rules were made stringent and, therefore, the authority of the solemnizing officer was an absolute condition. We feel, however, that the old rule should be brought back, in keeping with the remarks of Judge Claraval that this general rule is that the marriage should be protected. The general rule is that there should be marriage and, therefore, the good faith of the parties should come to their rescue. Sometimes, it is not really their fault. Sometimes the misrepresentation is made so well — signatures are forged with greater facility, it seems, these days. The art has been perfected. Therefore, sometimes we cannot really say with absolute certainty whether there has been falsification or not, and the solemnizing officer looks trustworthy, and he presents himself as duly authorized, then, the good faith, we feel, should come forth in order to save the validity of the marriage." xxx xxx.

Also, in the same committee hearing, Justice Eduardo Caguioa, another framer of the present Family Code explained, thus:

> Justice Caguioa: xxx xxx Well, when we say the marriage is void, and then we say "except," it means that the exception is not void.

> In other words, it is an exception to the voidability of the marriage. Here is a marriage performed by a solemnizing officer where the parties believe or know that he is a solemnizing officer. But there is no authority of the solemnizing officer, so therefore, it is void. The exception where the marriage is not void is where the parties were made to believe, one or both, that the solemnizing officer has authority. The point of that is this: This is to prevent unscrupulous chauvinistic males from deceiving the girls, because they were made to believe that they are going to be married when marriage is not what they want. All right. So, what do they do? They asked a friend, a notary public, to appear as if he were the solemnizing officer when in fact he is not at all. And the girl believes because it is held in a place that is believable or the person is a very good actor and can be more the judge than the judge himself, the parties believe or the girl believes that he is really authorized. But in that case, we say, "why do you have to go and follow the deception of that male person?" We say that it is a valid marriage even though he has no authority. It is not void. We are not saying it is void, we are saying it is valid, not only as between the parties but everybody. It is valid. It is as if it was solemnized by a person with authority.

If we are to take the example of a notary public made by Justice Caguioa as representative of the code committee's thinking, it would appear that they are inclined to interpret the good faith provision literally.

However, Dr. Arturo Tolentino has a different view. He distinguishes between "ignorance of the law" and "mistake of fact." If the contracting parties go before a person not specifically mentioned by law as having any authority to solemnize a marriage, then the good faith or bad faith of the parties is immaterial because they cannot be excused from being ignorant of the persons authorized by law to solemnize marriage. Article 4 of the Civil Code provides that ignorance of the law excuses no one from compliance therewith. Hence, the marriage will still be void. But if the contracting parties go before a person stated by law as qualified to solemnize a marriage but in fact is not because of non-fulfillment of a requirement by law such as procuring a solemnizer's license to be able to marry, then the good faith of the parties in believing that the solemnizer had authority is material. Such good faith will validate the marriage because the situation is a mistake of fact which is excusable (Civil Code by Tolentino, Vol. 1, 1983 ed., page 237).

NO MARRIAGE LICENSE. As previously discussed elsewhere in this book, a marriage license is a formal requisite the absence of

which makes a marriage void. Exceptions, however, are provided for in Articles 27, 28, 29, 30, 31, 32, 33, and 34 of the Family Code.

BIGAMOUS OR POLYGAMOUS MARRIAGE. Except those allowed under special laws such as the Muslim Code or under Article 41 of the Family Code, the law prohibits a married man or woman from contracting another bond of union as long as the consort is alive (*U.S. v. Ibañez*, 13 Phil. 686). Thus, a subsequent marriage contracted by a wife during the life of a former husband, with any person other than such former husband, is illegal and void from the beginning (*Carratala v. Samson*, 43 Phil. 75). Also, a subsequent marriage, contracted in Hongkong, by a husband who had secured a void Nevada divorce, is bigamous and void (*Manila Surety & Fidelity Co., Inc. v. Teodoro*, 20 SCRA 463). It is important to note, however, that in a bigamous marriage, the first marriage must have been valid. If the first marriage is in itself void and a subsequent marriage is contracted without a prior judicial declaration of nullity of the first marriage, the subsequent marriage is also void because it violates Article 40 in relation to Articles 52 and 53 of the Family Code. Essentially, Article 40 states that a judicial declaration of nullity must first be obtained before any of the contracting parties is to remarry and, in accordance with Article 52, such judicial declaration of nullity must be recorded with the local civil registrar also before any subsequent marriage. Non-observance of Article 40 in relation to Article 52 shall make the subsequent marriage void pursuant to the express provision of Article 53.

In *Nicdao Cariño v. Cariño*, G.R. No. 132529, February 2, 2001, the Supreme Court said that violation of Article 40 make the subsequent marriage void because it is bigamous. The inaccuracy of this ruling is discussed under Article 40.

MISTAKE IN IDENTITY. Under the Civil Code, mistake in identity is an instance of fraud which makes the marriage annullable. Under the new Family Code, however, mistake in identity is a ground for the nullity of the marriage. The oft-given example of mistake in identity is when one of the contracting parties marries the twin of the other party, believing that such twin is his or her lover. This ground goes into the very essentials of a valid marriage as there is complete absence of consent, thereby rendering the marriage void *ab initio*. The important thing to be remembered here is that the contracting party absolutely did not intend to marry the other, as the same is not the person he or she actually knew before the marriage. Mistake in identity as a ground for nullity covers

only those situations in which there has been a mistake on the part of the party seeking the nullification of marriage as to the actual physical identity of the other party. It does not include mistake in the name, the character of the person, or in his or her attributes, his or her age, religion, social standing, pedigree, pecuniary means, temperaments, acquirements, condition in life, or previous habits (See *Mckee v. Mckee*, 50 ALR 3d 1290 [La App] 262 So 2d 111). Thus, a mistaken belief by one spouse as to the real name of the person he or she married does not indicate that such spouse had married one other than the person she intended to marry as to give a cause of action to nullify the marriage. Also, it has been held that mistake as to identity is not applicable in a situation where the husband had been led to believe that he was marrying a virtuous woman, when in fact she had previously led an immoral life (*Delpit v. Young*, 51 La Ann 923).

VOID UNDER ARTICLE 53. For persons whose marriages have been annulled or declared null and void to be able to validly marry again, they must undertake the liquidation, partition and distribution of their properties, if any, and, only in proper cases, the delivery of the children's presumptive legitimes and thereafter all these requirements, including the decree of annulment or nullity, should be recorded in the appropriate civil registry and the registries of property. Non-compliance with these requirements will render any subsequent marriage void.

> **Article 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. (n)** ***(As amended by Executive Order Number 227 dated July 17, 1987)***

PSYCHOLOGICAL INCAPACITY. The law does not define what psychological incapacity is and therefore, the determination is left solely with the courts on a case-to-case basis. Determination of psychological incapacity "depends 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" (*Republic v. Dagdag*, G.R. No. 109975, February 9, 2001). From the Committee deliberations relative to the drafting of the Family

Code, it can be clearly deduced that this absence of definition was intentionally made because the situations contemplated by the law vary from one case to another. The rationale for this want of definition was succinctly explained by Justice Eduardo Caguioa, one of the members of the Civil Code Revision Committee and the main proponent for the incorporation of this provision in the Family Code, during the Congressional Hearing before the Senate Committee on Women and Family Relations on February 3, 1988. Thus, Justice Caguioa stated that —

> a code should not have so many definitions, because a definition straight-jackets the concept and, therefore, many cases that should go under it are excluded by the definition. That's why we leave it up to the court to determine the meaning of psychological incapacity.

However, this ground must be taken in its proper context and should not be equated with insanity or a total mental inability to function in all aspects of human life. Clearly, the ground is restricted to psychological incapacity *"to comply with the essential marital obligations."* The malady or mental disposition of one or both of the spouses must be such as to seriously and effectively prevent them from having a functional and normal marital life clearly conducive to bringing up a healthy personal inter-marital relationship within the family which is necessary for its growth. It must be a psychological illness afflicting a party even before the celebration of the marriage (*Perez-Ferraris v. Ferraris*, G.R. No. 162368 July 17, 2006). It involves a senseless, protracted, and constant refusal to comply with the essential marital obligations by one or both of the spouses although he, she or they are physically capable of performing such obligations (*Chi Ming Tsoi v. Court of Appeals*, 78 SCAD 57, 266 SCRA 325). Hence, while a person may be truly very efficient and mentally capable in undertaking a particular profession in life, he or she can still be considered as a completely irresponsible person *vis-a-vis* his or her married life if he or she spends almost the whole day working and not minding his or her family (*Tongol v. Tongol*, G.R. No. 157610, October 19, 2007 537 SCRA 135). Also, the fact that a person really loves his or her spouse and children does not constitute a bar to successfully invoke this ground if it is clearly shown that, despite this very authentic feeling of love, he or she is so absolutely indifferent with respect to his or her duties as a father and husband or mother and wife, as the case may be. Indeed, there must be something wrong for one to feel affection and love inside a

marital life for another and yet totally inhibited to foster the same. It is indeed a mental disposition.

The ground, therefore, does not comprehend any and all forms of mental incapacity so as to preclude the individual from performing other endeavors in life, such as the carrying out of his or her profession or career. The incapacity is clearly limited to his and/or her failure or disregard to comply with his and/or her essential marital obligations. The spouses simply refuse to perform these obligations although physically capable of doing so. It is not mere stubborn refusal but can be attributed to psychological causes. As Justice Caguioa stated during the committee deliberations relative to this particular ground, psychological incapacity solely refers to the "lack of appreciation of one's marital obligation" (See Minutes of Civil Code Revision Committee Meeting of August 9, 1986) and that "psychological incapacity does not refer to mental faculties and has nothing to do with consent; it refers to obligations attendant to marriage" (Minutes of the 148th joint Civil Code and Family Law committees held on July 26, 1986, page 10). It does not deal with mental faculties in the sense that he or she or both should necessarily be shown to be insane. While insanity can be a good indicator of psychological incapacity, it is not a pre-requisite for the existence of the ground for nullity under Article 36. In the same vein, the eminent civilist likewise stated:

> The ground is a valid ground. How can you live with a wife or a husband who cannot perform his obligations with regard to the married life? That would be condemning the other to perpetually support the other party for that (p. 5, Transcript of the Senate Committee on Women and Family Relations during the hearing relative to the Family Code, February 3, 1986).

Psychological incapacity, to perform the essential marital obligations, must be present at the time of the marriage ceremony, but can be manifested later on during the marriage. It is considered a ground to nullify a marriage. Such a marriage cannot be cured by cohabitation considering that it is void and, therefore, ratification cannot apply. Indeed, during one of the meetings of the joint Civil Code and Family Law committees and in response to the query: "Will not cohabitation be a defense?"

> Justice Puno stated that even the bearing of children and cohabitation should not be a sign that the psychological incapacity has been cured (Minutes of the 148th Joint Meeting

of the Civil Code and Family Law committees held on July 26, 1986, page 13).

The very first case decided by the Supreme Court which discussed the scope and meaning of Article 36 was the case of *Santos v. Court of Appeals and Julia Rosario Bedia-Santos,* G.R. No. 112019, 58 SCAD 17, promulgated on January 4, 1995. In denying the nullity case based on Article 36, the Supreme Court narrated:

> The present petition for review on *certiorari,* at the instance of Leouel Santos ("Leouel"), brings into force the above provision which is now invoked by him. Undaunted by the decisions of the court *a quo* and the Court of Appeals, Leouel persists in beseeching its application in his attempt to have his marriage with herein private respondent, Julia Rosario Bedia-Santos ("Julia"), declared a nullity.
>
> It was in Iloilo City where Leouel, who then held the rank of First Lieutenant in the Philippine Army, first met Julia. The meeting later proved to be an eventful day for Leouel and Julia. On 20 September 1986, the two exchanged vows before Municipal Trial Court Judge Cornelio G. Lazaro of Iloilo City, followed, shortly thereafter, by a church wedding. Leouel and Julia lived with the latter's parents at the J. Bedia Compound, La Paz, Iloilo City. On 18 July 1987, Julia gave birth to a baby boy, who was christened Leouel Santos, Jr. The ecstasy, however, did not last long. It was bound to happen, Leouel averred, because of the frequent interference by Julia's parents into the young spouses' family affairs. Occasionally, the couple would also start a "quarrel" over a number of other things, like when and where the couple should start living independently from Julia's parents or whenever Julia would express resentment on Leouel's spending a few days with his own parents.
>
> On 18 May 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, or on 01 January 1989, Julia called up 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 from 10 April up to 25 August 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, Branch

30, a complaint for "Voiding of Marriage Under Article 36 of the Family Code" (docketed, Civil Case No. 9814). Summons was served by publication in a newspaper of general circulation in Negros Oriental.

On 31 May 1991, respondent Julia, in her answer (through counsel), opposed the complaint and denied its allegations, claiming, in main, that it was the petitioner who had, in fact, been irresponsible and incompetent.

A possible collusion between the parties to obtain a decree of nullity of their marriage was ruled out by the Office of the Provincial Prosecutor (in its report to the court).

On 25 October 1991, after pre-trial conferences had repeatedly been set, *albeit* unsuccessfully, by the court, Julia ultimately filed a manifestation, stating that she would neither appear nor submit evidence.

On 06 November 1991, the court *a quo* finally dismissed the complaint for lack of merit.

Leouel appealed to the Court of Appeals. The latter affirmed the decision of the trial court.

The petition should be denied not only because of its non-compliance with Circular 28-91, which requires a certification of non-forum shopping, but also for its lack of merit.

Leouel argues that the failure of Julia to return home, or at the very least to communicate with him, for more than five years are circumstances that clearly show her being psychologically incapacitated to enter into married life. In his own words, Leouel asserts:

> "x x x (T)here is no love, there is no affection for (him) because respondent Julia Rosario Bedia-Santos failed all these years to communicate with the petitioner. A wife who does not care to inform her husband about her whereabouts for a period of five years, more or less, is psychologically incapacitated to comply with the essential marital obligations of marriage. Respondent Julia Rosario Bedia-Santos is one such wife."

The Family Code did not define the term "psychological incapacity." The deliberations during the sessions of the Family Code Revision Committee, which had drafted the Code, can, however, provide an insight on the import of the provision.

> "*Article 35.* — The following marriages shall be void from the beginning:

'x x x x x x x x x

'*Article 36.* — x x x

'(7) Those marriages contracted by any party who, at the time of the celebration, was wanting in the sufficient use of reason or judgment to understand the essential nature of marriage or was psychologically or mentally incapacitated to discharge the essential marital obligations, even if such lack of incapacity is made manifest after the celebration.'

"On subparagraph (7), which as lifted from the Canon Law, Justice (Jose B.L.) Reyes suggested that they say 'wanting in sufficient use' instead of 'wanting in the sufficient use,' but Justice (Eduardo) Caguioa preferred to say 'wanting in the sufficient use.' On the other hand, Justice Reyes proposed that they say 'wanting in sufficient reason.' Justice Caguioa, however, pointed out that the idea is that one is not lacking in judgment but that he is lacking in the exercise of judgment. He added that lack of judgment would make the marriage voidable. Judge (Alicia) Sempio-Diy remarked that lack of judgment is more serious than insufficient use of judgment and yet, the latter would make the marriage null and void and the former, only voidable. Justice Caguioa suggested that subparagraph (7) be modified to read:

'"That contracted by any party who, at the time of the celebration, was psychologically or mentally incapacitated to discharge the essential marital obligations, even if such lack of incapacity is made manifest after the celebration.'

"Justice Caguioa explained that the phrase 'was wanting in sufficient use of reason or judgment to understand the essential nature of marriage' refers to defects in the mental faculties vitiating consent, which is not the idea in subparagraph (7), but lack of appreciation of one's marital obligations.

"Judge Diy raised the question: Since 'insanity' is also a psychological or mental incapacity, why is 'insanity' only a ground for annulment and not for declaration of nullity? In reply, Justice Caguioa explained that in insanity, there is the appearance of consent, which is the reason why it is a ground for voidable marriages, while subparagraph (7) does not refer to consent but to the very essence of marital obligations.

"Prof. (Araceli) Baviera suggested that in subparagraph (7), the word 'mentally' be deleted, with which Justice Caguioa

concurred. Judge Diy, however, preferred to retain the word 'mentally.'

"Justice Caguioa remarked that subparagraph (7) refers to psychological impotence. Justice (Ricardo) Puno stated that sometimes a person may be psychologically impotent with one but not with another. Justice (Leonor Ines) Luciano said that it is called selective impotency.

"Dean (Fortunato) Gupit stated that the confusion lies in the fact that in inserting the Canon Law annulment in the Family Code, the Committee used a language which describes a ground for voidable marriages under the Civil Code. Justice Caguioa added that in Canon Law, there are no voidable marriages. Dean Gupit said that this is precisely the reason why they should make a distinction.

"Justice Puno remarked that in Canon Law, the defects in marriage cannot be cured.

"Justice Reyes pointed out that the problem is … Why is 'insanity' a ground for voidable marriage, while 'psychological or mental incapacity' is a ground for void *ab initio* marriages? In reply, Justice Caguioa explained that insanity is curable and there are lucid intervals, while psychological incapacity is not.

"On another point, Justice Puno suggested that the phrase 'even if such lack or incapacity is made manifest' be modified to read 'even if such lack or incapacity becomes manifest.'

"Justice Reyes remarked that in insanity, at the time of the marriage, it is not apparent.

"Justice Caguioa stated that there are two interpretations of the phrase 'psychologically or mentally incapacitated': in the first one, there is vitiation of consent because one does not know all the consequences of the marriages, and if he had known these completely, he might not have consented to the marriage.

"x x x x x x x x x

"Prof. Bautista stated that he is in favor of making psychological incapacity a ground for voidable marriages since otherwise it will encourage one who really understood the consequences of marriage to claim that he did not and to make excuses for invalidating the marriage by acting as if he did not understand the obligations of marriage. Dean Gupit added that it is a loose way of providing for divorce.

"x x x x x x x x x

"Justice Caguioa explained that his point is that in the case of incapacity by reason of defects in the mental faculties,

which is less than insanity, there is a defect in consent and, therefore, it is clear that it should be a ground for voidable marriage because there is the appearance of consent and it is capable of convalidation for the simple reason that there are lucid intervals and there are cases when the insanity is curable. He emphasized that psychological incapacity does not refer to mental faculties and has nothing to do with consent; it refers to obligations attendant to marriage.

"x x x x x x x x x

"On psychological incapacity, Prof. (Flerida Ruth P.) Romero inquired if they do not consider it as going to the very essence of consent. She asked if they are really removing it from consent. In reply, Justice Caguioa explained that ultimately, consent in general is affected but he stressed that his point is that it is not principally a vitiation of consent since there is a valid consent. He objected to the lumping together of the validity of the marriage celebration and the obligations attendant to marriage, which are completely different from each other, because they require a different capacity, which is eighteen years of age, for marriage but in contract, it is different. Justice Puno, however, felt that psychological incapacity is still a kind of vice of consent and that it should not be classified as a voidable marriage, which is incapable of convalidation; it should be convalidated but there should be no prescription. In other words, as long as the defect has not been cured, there is always a right to annul the marriage and if the defect has been really cured, it should be a defense in the action for annulment so that when the action for annulment is instituted, the issue can be raised that actually, although one might have been psychologically incapacitated at the time the action is brought, it is no longer true that he has no concept of the consequence of marriage.

"Prof. (Esteban) Bautista raised the question: Will not cohabitation be a defense? In response, Justice Puno stated that even the bearing of children and cohabitation should not be a sign that psychological incapacity has been cured.

"Prof. Romero opined that psychological incapacity is still insanity of a lesser degree. Justice Luciano suggested that they invite a psychiatrist, who is the expert on this matter. Justice Caguioa, however, reiterated that psychological incapacity is not a defect in the mind but in the understanding of the consequences of marriage, and, therefore, a psychiatrist will not be of help.

"Prof. Bautista stated that, in the same manner that there is a lucid interval in insanity, there are also momentary

periods when there is an understanding of the consequences of marriage. Justice Reyes and Dean Gupit remarked that the ground of psychological incapacity will not apply if the marriage was contracted at the time when there is understanding of the consequences of marriage.

"x x x x x x x x x

"Judge Diy proposed that they include physical incapacity to copulate among the grounds for void marriages. Justice Reyes commented that in some instances, the impotence is only temporary and only with respect to a particular person. Judge Diy stated that they can specify that it is incurable. Justice Caguioa remarked that the term 'incurable' has a different meaning in law and in medicine. Judge Diy stated that 'psychological incapacity' can also be cured. Justice Caguioa, however, pointed out that 'psychological incapacity' is incurable.

"Justice Puno observed that under the present draft provision, it is enough to show that at the time of the celebration of the marriage, one was psychologically incapacitated so that later on if already he can comply with the essential marital obligations, the marriage is still void *ab initio*. Justice Caguioa explained that since in divorce the psychological incapacity may occur after the marriage, in void marriages, it has to be at the time of the celebration of marriage. He, however, stressed that the idea in the provision is that at the time of the celebration of the marriage, one is psychologically incapacitated to comply with the essential marital obligations, which incapacity continues and later becomes manifest.

"Justice Puno and Judge Diy, however, pointed out that it is possible that after the marriage, one's psychological incapacity becomes manifest but later on he is cured. Justice Reyes and Justice Caguioa opined that the remedy in this case is to allow him to remarry.

"x x x x x x x x x

"Justice Puno formulated the next Article as follows:

> " '*Article 37*. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential obligations of marriage shall likewise be void from the beginning even if such incapacity becomes manifest after its solemnization.'

"Justice Caguioa suggested that 'even if' be substituted with 'although.' On the other hand, Prof. Bautista proposed that the clause 'although such incapacity becomes manifest after its

solemnization' be deleted since it may encourage one to create the manifestation of psychological incapacity. Justice Caguioa pointed out that, as in other provisions, they cannot argue on the basis of abuse.

"Judge Diy suggested that they also include mental and physical incapacities, which are lesser in degree than psychological incapacity. Justice Caguioa explained that mental and physical incapacities are vices of consent, while psychological incapacity is not a species of vices of consent.

"Dean Gupit read what Bishop Cruz said on the matter in the minutes of their February 9, 1984 meeting:

> " 'On the third ground, Bishop Cruz indicated that the phrase 'psychological or mental impotence' is an invention of some churchmen who are moralists but not canonists, that is why it is considered a weak phrase. He said that the Code of Canon Law would rather express it as 'psychological or mental incapacity to discharge . . .'

"Justice Caguioa remarked that they deleted the word 'mental' precisely to distinguish it from vice of consent. He explained that 'psychological incapacity' refers to lack of understanding of the essential obligations of marriage.

"Justice Puno reminded the members that at the last meeting, they have decided not to go into the classification of 'psychological incapacity' because there was a lot of debate on it and that this is precisely the reason why they classified it as a special case.

"At this point, Justice Puno remarked that, since there have been annulments of marriages arising from psychological incapacity, Civil Law should not reconcile with Canon Law because it is a new ground even under Canon Law.

"Prof. Romero raised the question: With this common provision in Civil Law and in Canon Law, are they going to have a provision in the Family Code to the effect that marriages annulled or declared void by the church on the ground of psychological incapacity is automatically annulled in Civil Law? The other members replied negatively.

"Justice Puno and Prof. Romero inquired if Article 37 should be retroactive or prospective in application.

"Judge Diy opined that she was for its retroactivity because it is their answer to the problem of church annulments of marriages, which are still valid under the Civil Law. On the

other hand, Justice Reyes and Justice Puno were concerned about the avalanche of cases.

"Dean Gupit suggested that they put the issue to a vote, which the Committee approved.

"The members voted as follows:

"(1) Justice Reyes, Justice Puno and Prof. Romero were for prospectivity.

"(2) Justice Caguioa, Judge Diy, Dean Gupit, Prof. Bautista and Director Eufemio were for retroactivity.

"(3) Prof. Baviera abstained.

"Justice Caguioa suggested that they put in the prescriptive period of ten years within which the action for declaration of nullity of the marriage should be filed in court. The Committee approved the suggestion."

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, has been quoted by Mr. Justice Josue N. Bellosillo in *Salita v. Hon. Magtolis* (G.R. No. 106429, June 13, 1994, 52 SCAD 208), 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."

A part of the provision is similar to 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." (Underscoring supplied.)

Accordingly, although neither decisive nor even perhaps all that persuasive for having no juridical or secular effect, the jurisprudence under Canon Law prevailing at the time of the Code's enactment, nevertheless, cannot be dismissed as impertinent for its value as an aid, at least, to the interpretation or construction of the codal provision.

One author, Ladislas Orsy, S.J., in his treatise, giving an account on how the third paragraph of Canon 1095 has been framed, states:

"The history of the drafting of this canon does not leave any doubt that the legislator intended, indeed, to broaden the rule. A strict and narrow norm was proposed first:

'Those who cannot assume the essential obligations of marriage because of a grave psycho-sexual anomaly *(ob gravem anomaliam psychosexualem)* are unable to contract marriage (cf. SCH/1975, canon 297, a new canon, *novus*);

then a broader one followed:

'. . . because of a grave psychological anomaly *(ob gravem anomaliam psychicam)* . . .' (cf. SCH/1980, canon 1049);

then the same wording was retained in the text submitted to the Pope (cf. SCH/1982, canon 1095, 3);

finally, a new version was promulgated:

'because of causes of a psychological nature *(ob causas naturae psychiae).'*

"So the progress was from psycho-sexual to psychological anomaly, then the term anomaly was altogether eliminated. It would be, however, incorrect to draw the conclusion that the cause of the incapacity need not be some kind of psychological disorder; after all, normal and healthy person should be able to assume the ordinary obligations of marriage."

Fr. Orsy concedes that the term "psychological incapacity" defies any precise definition since psychological causes can be of an infinite variety.

In a book entitled "Canons and Commentaries on Marriage," written by Ignatius Gramunt, Javier Hervada and LeRoy Wauck, the following explanation appears:

> This incapacity consists of the following . . . (a) a true *inability to commit* oneself to the essentials

> of marriage. Some psychosexual disorders and other disorders of personality can be the psychic cause of this defect, which is here described in legal terms. This particular type of incapacity consists of a real *inability to render what is due by the contract.* This could be compared to the incapacity of a farmer to enter a binding contract to deliver the crops which he cannot possibly reap; (b) this inability to commit oneself must refer to the *essential obligations of marriage:* the conjugal act, the community of life and love, the rendering of mutual help, the procreation and education of offspring; (c) the inability must be tantamount to a psychological abnormality. *The mere difficulty of assuming these obligations, which could be overcome by normal effort, obviously does not constitute incapacity. The canon contemplates a true psychological disorder which incapacitates a person from giving what is due* (cf. John Paul II, Address to R. Rota, Feb. 5, 1987). However, if the marriage is to be declared invalid under this incapacity, it must be proved not only that the person is afflicted by a psychological defect, but that the defect *did in fact* deprive the person, at the moment of giving consent, of the ability to assume the essential duties of marriage and, consequently, of the possibility of being bound by these duties.

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 obvious, 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 "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, extremely low intelligence, immaturity, and like circumstances (cited in Fr. Artemio Baluma's "Void and Voidable Marriages in the Family Code and Their Parallels in Canon

Law," quoting from the Diagnostic Statistical Manual of 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 render 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 Civil Code, and even now still indelible in Article 1 of the Family Code, is that —

> "Article 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." (Underscoring 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.

WHEREFORE, the petition is DENIED.

CONSTITUTIONAL CONSIDERATION. In the case of *Antonio v. Reyes*, G.R. No. 155880, March 10, 2006, the Supreme Court discussed the proper perspective by which Article 36 must be implemented. Pertinently, it stated:

> xxx All too frequently, this Court and lower courts, in denying petitions of the kind, have favorably cited Sections 1 and 2, Article XV of the Constitution, which respectively state that "[t]he State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total developmen[t]," and that "[m]arriage,

as an inviolable social institution, is the foundation of the family and shall be protected by the State." These provisions highlight the importance of the family and the constitutional protection accorded to the institution of marriage.

But the Constitution itself does not establish the parameters of state protection to marriage as a social institution and the foundation of the family. It remains the province of the legislature to define all legal aspects of marriage and prescribe the strategy and the modalities to protect it, based on whatever socio-political influences it deems proper, and subject of course to the qualification that such legislative enactment itself adheres to the Constitution and the Bill of Rights. This being the case, it also falls on the legislature to put into operation the constitutional provisions that protect marriage and the family. This has been accomplished at present through the enactment of the Family Code, which defines marriage and the family, spells out the corresponding legal effects, imposes the limitations that affect married and family life, as well as prescribes the grounds for declaration of nullity and those for legal separation. While it may appear that the judicial denial of a petition for declaration of nullity is reflective of the constitutional mandate to protect marriage, such action in fact merely enforces a statutory definition of marriage, not a constitutionally ordained decree of what marriage is. Indeed, if circumstances warrant, Sections 1 and 2 of Article XV need not be the only constitutional considerations to be taken into account in resolving a petition for declaration of nullity.

Indeed, Article 36 of the Family Code, in classifying marriages contracted by a psychologically incapacitated person as a nullity, should be deemed as an implement of this constitutional protection of marriage. Given the avowed State interest in promoting marriage as the foundation of the family, which in turn serves as the foundation of the nation, there is a corresponding interest for the State to defend against marriages ill-equipped to promote family life. Void *ab initio* marriages under Article 36 do not further the initiatives of the State concerning marriage and family, as they promote wedlock among persons who, for reasons independent of their will, are not capacitated to understand or comply with the essential obligations of marriage.

PROVING PSYCHOLOGICAL INCAPACITY. Unlike the other grounds for declaration of nullity and the grounds for annulment and legal separation which generally constitute clearly definable physical acts or situations such as impotency, non-age (below

18 years of age), physical violence, infidelity, etc., psychological incapacity is psychosomatic and deals with a state of mind and thus, can only be proven by indicators or external manifestations of the person claimed to be psychologically incapacitated. These indicators must be clearly alleged in the complaint filed in court. Pertinently, in a case where the plaintiff made a general description in the complaint of these indicators by essentially repeating the wordings of Article 36, the Supreme Court ruled that the following allegation made in a bill of particulars is sufficient as averring ultimate facts constituting psychological incapacity, to wit:

> x x x at the time of their marriage, respondent x x x was psychologically incapacitated to comply with the essential marital obligations of their marriage in that she was unable to understand and accept the demands made by his profession — that of newly qualified doctor of Medicine — upon petitioner's time and efforts so that she frequently complained of his lack of attention to her even to her mother, whose intervention caused petitioner to lose his job (*Salita v. Hon. Delilah Magtolis*, *et al.*, G.R. No. 106429, June 13, 1994, 52 SCAD 208).

Also, as a start, one should see if the husband or wife observes his or her duty as such towards his or her spouse, the children, and the family. 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." Procreation is likewise an essential obligation.

> 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 (*Chi Ming Tsoi v. Court of Appeals*, 78 SCAD 57, 266 SCRA 324).

Articles 220, 221, and 225 of the Code likewise enumerate the rights, duties, and liabilities of parents relative to their parental authority over their children. Failure to comply with these rights, duties, and obligations is a good indicator of psychological incapacity to perform the essential marital obligation. The fear of a wife, who is afraid of children, to engage in sexual intercourse is an indicator of psychological incapacity (Minutes of the Civil Law and Family Code committees held on October 14, 1983, page 3).

> If a spouse, although physically capable but simply refuses to perform his or her essential marital obligations, and the refusal is senseless and constant, Catholic marriage tribunals attribute the causes to psychological incapacity than to stubborn refusal. Senseless and protracted refusal is equivalent to psychological incapacity. Thus, the prolonged refusal of a spouse to have sexual intercourse with his or her spouse is considered a sign of psychological incapacity (*Chi Ming Tsoi v. Court of Appeals*, 78 SCAD 57, 266 SCRA 324).

Unreasonable attachment by the spouse to his or her family (meaning his or her father and mother, brothers and sisters) or to the spouse's friends or *"barkada"* such that the importance and devotion which should be given to his or her own spouse and children are subordinated to the said attachment is also a good indicator of psychological incapacity. Actual breakdown of family life characterized by separation of husband and wife is also a good indicator of the presence of this particular ground. However, separation or abandonment alone is not conclusive proof of psychological incapacity (*Republic v. Quintero Hamano*, 428 SCRA 735).

Mere isolated idiosyncrasies of a spouse are not of themselves manifestations of psychological incapacity to perform the essential marital obligations. The manifestations of psychological incapacity must be attributed to a psychological illness and not merely physical illness (*Bier v. Bier*, G.R. No. 173294, February 27, 2008, 547 SCRA 123, *Navales v. Navales,* G.R. No. 167523, June 27, 2008). Psychological incapacity cannot be mere refusal or neglect to comply with the obligations, it must be downright incapacity to perform (*Republic v. Cabantug-Baguio*, G.R. No.171042, June 30, 2008). Also mere incompatibility and irreconcilable differences are not enough. (*Aspillaga v. Aspillaga*, G.R. No. 170925, October 26, 2009). The totality of the marriage life as affected by the gross irresponsibility and utter disregard by the subject spouse toward family life as manifested by his or her actions must be taken into consideration (*Laurena v. Court of Appeals*, G.R. No. 159220, September 22, 2008). Significantly, it must also be noted that this ground is a very personal and limited one. It does not mean that just because a person is psychologically incapacitated to perform his or her marital obligations with his or her present spouse, this would also be the case with any other person other than his or her present spouse.

The fact that the person alleged to be psychologically incapacitated is a foreigner does not negate the existence of such incapacity. The Supreme Court in *Republic v. Hamano*, 428 SCRA 735 stated

that "the medical and clinical rules to determine psychological incapacity were formulated on the basis of studies of human behavior in general. Hence, the norms used for determining psychological incapacity should apply to any person regardless of nationality."

In *Te v. Te*, G.R. No. 161793, February 13, 2009, the Supreme Court granted nullity of marriage as it was shown that the petitioner was suffering from dependent personality disorder and the respondent was also suffering from narcissistic and anti-social personality disorder, both consistent with psychological incapacity to perform the essential marital obligation.

> The parties' whirlwind relationship lasted more or less six (6) months. They met in January 1996, eloped in March, exchanged marital vows in May, and parted ways in June. The psychologist who provided expert testimony found both parties psychologically incapacitated. Petitioner's behavioral pattern falls under the classification of dependent personality disorder, and respondent's, that of the narcissistic and antisocial personality disorder.
>
> By the very nature of Article 36, courts, despite having the primary task and burden of decision-making, **must not discount but, instead, must consider as decisive evidence the expert opinion on the psychological and mental temperaments of the parties.**

Justice Romero explained this in *Molina*, as follows:

> Furthermore, and equally significant, *the professional opinion of a psychological expert became increasingly important in such cases. Data about the person's entire life, both before and after the ceremony, were presented to these experts and they were asked to give professional opinions about a party's mental capacity at the time of the wedding*. These opinions were rarely challenged and tended to be accepted as decisive evidence of lack of valid consent.
>
> The Church took pains to point out that its new openness in this area did not amount to the addition of new grounds for annulment, but rather was an accommodation by the Church to the *advances made in psychology during the past decades. There was now the expertise to provide the all-important connecting link between a marriage breakdown and premarital causes*.
>
> During the 1970s, the Church broadened its whole idea of marriage from that of a legal contract to that of a covenant. The result of this was that *it could no longer be assumed* in annulment cases *that a person who could intellectually*

understand the concept of marriage could necessarily give valid consent to marry. The ability to both grasp and assume the real obligations of a mature, lifelong commitment are now considered a necessary prerequisite to valid matrimonial consent.

Rotal decisions continued applying the concept of incipient psychological incapacity, "not only to sexual anomalies but to all kinds of personality disorders that incapacitate a spouse or both spouses from assuming or carrying out the essential obligations of marriage. For marriage . . . is not merely cohabitation or the right of the spouses to each other's body for heterosexual acts, but is, *in its totality the right to the community of the whole of life; i.e., the right to a developing lifelong relationship. Rotal decisions since 1973 have refined the meaning of psychological or psychic capacity for marriage* as presupposing the development of an adult personality; as *meaning the capacity of the spouses to give themselves to each other and to accept the other as a distinct person; that the spouses must be 'other oriented' since the obligations of marriage are rooted in a self-giving love; and that the spouses must have the capacity for interpersonal relationship* because marriage is more than just a physical reality but involves a true intertwining of personalities. *The fulfillment of the obligations of marriage depends, according to Church decisions, on the strength of this interpersonal relationship.* A serious incapacity for interpersonal sharing and support is held to impair the relationship and consequently, the ability to fulfill the essential marital obligations. *The marital capacity of one spouse is not considered in isolation but in reference to the fundamental relationship to the other spouse.*

Fr. Green, in an article in *Catholic Mind*, lists six elements necessary to the mature marital relationship:

"The courts consider the following elements crucial to the marital commitment: (1) a permanent and faithful commitment to the marriage partner; (2) openness to children and partner; (3) stability; (4) emotional maturity; (5) financial responsibility; (6) an ability to cope with the ordinary stresses and strains of marriage, etc."

Fr. Green goes on to speak about some of the psychological conditions that might lead to the failure of a marriage:

"At stake is a type of constitutional impairment precluding conjugal communion even with the best intentions of the parties. Among the psychic factors possibly giving rise to his or her inability to fulfill marital obligations are the following: (1) antisocial personality with its fundamental lack of loyalty to persons or sense of moral values; (2) hyperesthesia, where the individual has no real freedom of sexual choice; (3) the

inadequate personality where personal responses consistently fall short of reasonable expectations.

x x x x

The psychological grounds are the best approach for anyone who doubts whether he or she has a case for an annulment on any other terms. A situation that does not fit into any of the more traditional categories often fits very easily into the psychological category.

As new as the psychological grounds are, experts are already detecting a shift in their use. Whereas originally the emphasis was on the parties' inability to exercise proper judgment at the time of the marriage (lack of due discretion), recent cases seem to be concentrating *on the parties' incapacity to assume or carry out their responsibilities and obligations as promised* (lack of due competence). An advantage to using the ground of lack of due competence is that at the time the marriage was entered into *civil divorce and breakup of the family almost always is proof of someone's failure to carry out marital responsibilities as promised* at the time the marriage was entered into."

Hernandez v. Court of Appeals emphasizes the importance of presenting expert testimony to establish the precise cause of a party's psychological incapacity, and to show that it existed at the inception of the marriage. And as *Marcos v. Marcos* asserts, there is no requirement that the person to be declared psychologically incapacitated be personally examined by a physician, if the totality of evidence presented is enough to sustain a finding of psychological incapacity. Verily, the evidence must show a link, medical or the like, between the acts that manifest psychological incapacity and the psychological disorder itself.

This is not to mention, but we mention nevertheless for emphasis, that the presentation of expert proof presupposes a thorough and in-depth assessment of the parties by the psychologist or expert, for a conclusive diagnosis of a grave, severe and incurable presence of psychological incapacity. Parenthetically, the Court, at this point, finds it fitting to suggest the inclusion in the *Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages,* an option for the trial judge to refer the case to a court-appointed psychologist/expert for an independent assessment and evaluation of the psychological state of the parties. This will assist the courts, who are no experts in the field of psychology, to arrive at an intelligent and judicious determination of the

case. The rule, however, does not dispense with the parties' prerogative to present their own expert witnesses.

Going back, in the case at bench, the psychological assessment, which we consider as adequate, produced the findings that both parties are afflicted with personality disorders—to repeat, dependent personality disorder for petitioner, and narcissistic and antisocial personality disorder for respondent. We note that *The Encyclopedia of Mental Health* discusses personality disorders as follows —

A group of disorders involving behaviors or traits that are characteristic of a person's recent and long-term functioning. Patterns of perceiving and thinking are not usually limited to isolated episodes but are deeply ingrained, inflexible, maladaptive and severe enough to cause the individual mental stress or anxieties or to interfere with interpersonal relationships and normal functioning. Personality disorders are often recognizable by adolescence or earlier, continue through adulthood and become less obvious in middle or old age. An individual may have more than one personality disorder at a time.

The common factor among individuals who have personality disorders, despite a variety of character traits, is the way in which the disorder leads to pervasive problems in social and occupational adjustment. Some individuals with personality disorders are perceived by others as overdramatic, paranoid, obnoxious or even criminal, without an awareness of their behaviors. Such qualities may lead to trouble getting along with other people, as well as difficulties in other areas of life and often a tendency to blame others for their problems. Other individuals with personality disorders are not unpleasant or difficult to work with but tend to be lonely, isolated or dependent. Such traits can lead to interpersonal difficulties, reduced self-esteem and dissatisfaction with life.

Causes of Personality Disorders. Different mental health viewpoints propose a variety of causes of personality disorders. These include Freudian, genetic factors, neurobiologic theories and brain wave activity.

Freudian Sigmund Freud believed that fixation at certain stages of development led to certain personality types. Thus, some disorders as described in the *Diagnostic and Statistical Manual of Mental Disorders* (3d ed., rev.) are derived from his oral, anal and phallic character types. Demanding and dependent behavior (dependent and passive-aggressive) was thought to derive from fixation at the oral stage. Characteristics of obsessionality, rigidity and emotional aloofness were thought

to derive from fixation at the anal stage; fixation at the phallic stage was thought to lead to shallowness and an inability to engage in intimate relationships. However, later researchers have found little evidence that early childhood events or fixation at certain stages of development lead to specific personality patterns.

Genetic Factors. Researchers have found that there may be a genetic factor involved in the etiology of antisocial and borderline personality disorders; there is less evidence of inheritance of other personality disorders. Some family, adoption and twin studies suggest that schizotypal personality may be related to genetic factors.

Neurobiologic Theories. In individuals who have borderline personality, researchers have found that low cerebrospinal fluid 5-hydroxyindoleacetic acid (5-HIAA) negatively correlated with measures of aggression and a past history of suicide attempts. Schizotypal personality has been associated with low platelet monoamine oxidase (MAO) activity and impaired smooth pursuit eye movement.

Brain Wave Activity. Abnormalities in electroencephalograph (EEG) have been reported in antisocial personality for many years; slow wave is the most widely reported abnormality. A study of borderline patients reported that 38 percent had at least marginal EEG abnormalities, compared with 19 percent in a control group.

Types of Disorders. According to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3d ed., rev., 1987), or DSM-III-R, personality disorders are categorized into three major clusters:

Cluster A: Paranoid, schizoid and schizotypal personality disorders. Individuals who have these disorders often appear to have odd or eccentric habits and traits.

Cluster B: Antisocial, borderline, histrionic and narcissistic personality disorders. Individuals who have these disorders often appear overly emotional, erratic and dramatic.

Cluster C: Avoidant, dependent, obsessive-compulsive and passive-aggressive personality disorders. Individuals who have these disorders often appear anxious or fearful.

The DSM-III-R also lists another category, "personality disorder not otherwise specified," that can be used for other specific personality disorders or for mixed conditions that do not qualify as any of the specific personality disorders.

Individuals with diagnosable personality disorders usually have long-term concerns, and thus therapy may be long-term.

Dependent personality disorder is characterized in the following manner —

A personality disorder characterized by a pattern of dependent and submissive behavior. Such individuals usually lack self-esteem and frequently belittle their capabilities; they fear criticism and are easily hurt by others' comments. At times they actually bring about dominance by others through a quest for overprotection.

Dependent personality disorder usually begins in early adulthood. Individuals who have this disorder may be unable to make everyday decisions without advice or reassurance from others, may allow others to make most of their important decisions (such as where to live), tend to agree with people even when they believe they are wrong, have difficulty starting projects or doing things on their own, volunteer to do things that are demeaning in order to get approval from other people, feel uncomfortable or helpless when alone and are often preoccupied with fears of being abandoned.

and antisocial personality disorder described, as follows —

Characteristics include a consistent pattern of behavior that is intolerant of the conventional behavioral limitations imposed by a society, an inability to sustain a job over a period of years, disregard for the rights of others (either through exploitiveness or criminal behavior), frequent physical fights and, quite commonly, child or spouse abuse without remorse and a tendency to blame others. There is often a façade of charm and even sophistication that masks disregard, lack of remorse for mistreatment of others and the need to control others.

Although characteristics of this disorder describe criminals, they also may befit some individuals who are prominent in business or politics whose habits of self-centeredness and disregard for the rights of others may be hidden prior to a public scandal.

During the 19th century, this type of personality disorder was referred to as moral insanity. The term described immoral, guiltless behavior that was not accompanied by impairments in reasoning.

According to the classification system used in the *Diagnostic and Statistical Manual of Mental Disorders* (3d ed., rev. 1987), anti-social personality disorder is one of the four "dra-

matic" personality disorders, the others being borderline, histrionic and narcissistic.

The seriousness of the diagnosis and the gravity of the disorders considered, the Court, in this case, finds as decisive the psychological evaluation made by the expert witness; and, thus, rules that the marriage of the parties is null and void on ground of both parties' psychological incapacity. We further consider that the trial court, which had a first-hand view of the witnesses' deportment, arrived at the same conclusion.

Indeed, petitioner, who is afflicted with dependent personality disorder, cannot assume the essential marital obligations of living together, observing love, respect and fidelity and rendering help and support, for he is unable to make everyday decisions without advice from others, allows others to make most of his important decisions (such as where to live), tends to agree with people even when he believes they are wrong, has difficulty doing things on his own, volunteers to do things that are demeaning in order to get approval from other people, feels uncomfortable or helpless when alone and is often preoccupied with fears of being abandoned. As clearly shown in this case, petitioner followed everything dictated to him by the persons around him. He is insecure, weak and gullible, has no sense of his identity as a person, has no cohesive self to speak of, and has no goals and clear direction in life.

Although on a different plane, the same may also be said of the respondent. Her being afflicted with antisocial personality disorder makes her unable to assume the essential marital obligations. This finding takes into account her disregard for the rights of others, her abuse, mistreatment and control of others without remorse, her tendency to blame others, and her intolerance of the conventional behavioral limitations imposed by society. Moreover, as shown in this case, respondent is impulsive and domineering; she had no qualms in manipulating petitioner with her threats of blackmail and of committing suicide.

Both parties being afflicted with grave, severe and incurable psychological incapacity, the precipitous marriage which they contracted on April 23, 1996 is thus, declared null and void.

In *Halili v. Halili*, G.R. No. 165424, June 9, 2009, the Supreme Court likewise granted the nullity of marriage based on the finding that the petitioner was suffering from "mixed personality disorder from self-defeating personality disorder to dependent personality disorder."

EXPERT TESTIMONY. In the course of the proceedings, expert testimonies of a psychologist or psychiatrist evaluating the behavioral pattern of the person alleged to be psychologically incapacitated are extremely helpful (*Matias v. Dagdag,* G.R. No. 109975, February 9, 2001; *Hernandez v. Court of Appeals*, G.R. No. 126010, December 8, 1999). Significantly, in *Marcos v. Marcos*, G.R. No. 136490, October 19, 2000, the Supreme Court ruled that "the personal medical or psychological examination of respondent is not a requirement for a declaration of psychological incapacity" and that it is not "a *conditio sine qua non* for such declaration." (*Republic v. Tayag San Jose,* G.R. No. 168328, February 28, 2007, 517 SCRA 123)

However, the Court may or may not accept the testimony of the psychologist or psychiatrist because the decision must be based on the totality of the evidence. (*Paras v. Paras,* G.R. No. 147824, August 2, 2007, 529 SCRA 81) Nevertheless, the testimony of an expert witness, like a psychiatrist or psychologist, if credible and if consistent with the totality of the evidence, which is also credible, must be given great weight. In *Azcueta v. Azcueta*, G.R. No. 180660, May 26, 2009, the Supreme Court, in granting the nullity of marriage under Article 36 due to the dependent personality disorder of the respondent as reliably assessed by the competent psychiatrist who did not personally examine the respondent said that "[b]y the very nature of Article 36, courts, despite having the primary task and burden of decision-making, must not discount but, instead, must consider as decisive evidence the expert opinion on the psychological and mental temperaments of the parties." In *Antonio v. Reyes,* G.R. No. 155880, March 10, 2006, the Supreme Court even adhered to the medical and clinical findings of the psychiatrist and psychologist who did not personally examine the subject but who were given reliable data about the respondent and read the pertinent court records in coming up with a more reliable assessment that the respondent was a pathological liar, as against the faulty clinical and medical findings of the psychiatrist of the respondent who examined the respondent and claimed that the respondent was not suffering from psychological incapacity. The mere fact therefore that a psychiatrist personally examined the subject person is not an assurance that his or her findings would be sustained.

In *Ting v. Ting,* G.R. No. 166562, March 31, 2009, the Supreme Court did not grant the nullity of marriage. As between the psychiatrist presented by the petitioner and the one presented by the respondent, the Supreme Court adhered to the findings of the latter that respondent was not psychologically incapacitated

considering that the psychiatrist of the respondent, aside from analyzing the transcripts of the respondent's deposition, was able to consider the finding of another psychiatrist who personally examined the respondent and also to interview the respondent's brothers. The psychiatrist of the petitioner, however, merely evaluated the respondent by only analyzing his deposition. In *So v. Valera,* G.R. No. 150677, June 5, 2009, the Supreme Court rejected the findings of the psychologist as unreliable and stated:

> In examining the psychologist's Report, we find the "Particulars" and the "Psychological Conclusions" disproportionate with one another; the conclusions appear to be exaggerated extrapolations, derived as they are from isolated incidents, rather than from continuing patterns. The "particulars" are, as it were, *snapshots, rather than a running account of the respondent's life* from which her whole life is totally judged. Thus, we do not see her psychological assessment to be comprehensive enough to be reliable.

In *Rumbaua v. Rumbaua*, G.R. No. 166738, August 14, 2009, the Supreme Court denied the petition for nullity of marriage on the ground that the psychological report was very general and did not state specific linkages between the personality disorder and the behavioral pattern of the spouse during the marriage.

In a particular case decided by the Supreme Court, a husband, in a hearing for nullity of marriage under Article 36, sought to introduce the confidential psychiatric evaluation report made by the psychiatrist with respect to his wife. This was objected to by the lawyer of the wife on the ground that such a report was within the privileged communication rule between doctor and patient. The Supreme Court ruled that the testimony of the husband with respect to the report was not within the doctor-patient privileged communication rule since the one who would testify is not the doctor but the husband. Also, the Supreme Court ruled that "neither can his testimony be considered a circumvention of the prohibition because his testimony cannot have the force and effect of the testimony of the physician who examined the patient and executed the report." Also,

> counsel for petitioner indulged heavily in objecting to the testimony of private respondent on the ground that it was privileged. In his Manifestation before the trial court dated 10 May 1991, he invoked the rule on privileged communications but never questioned the testimony as hearsay. It was a fatal mistake. For, in failing to object to the testimony on the

> ground that it was hearsay, counsel waived his right to make such objection, and consequently, the evidence offered may be admitted (*Krohn v. Court of Appeals*, G.R. No. 108854, June 14, 1994, 52 SCAD 250).

In *Najera v. Najera,* G.R. No. 164817, July 3, 2009, where the testimony of the psychologist was also inadequate and, in fact, did not conform to one of the persuasive evidence, which is the decision of the church matrimonial tribunal that nullified the marriage not on psychological incapacity but on a different church ground, the Supreme ruled against the nullity of marriage.

LIFTED FROM CANON LAW. This particular ground for nullity was essentially lifted from the Canon Laws of the Catholic Church. The learned opinion of Canon Law experts are greatly helpful in understanding Article 36. Indeed, during the discussions of the Civil Law revision committee on October 14 and 28, 1983 regarding this ground, the committee in fact invited Fr. Gerald Healy of the Society of Jesus and of the Ateneo De Manila University, an expert in Canon Law, to enlighten the members on the concept of psychological incapacity. For instance, when

> Justice Caguioa mentioned the case of a woman who submits herself to sexual intercourse just because she is obliged to do so. Fr. Healy said that if this happens right from the beginning, it could be an indicator of a psychological problem (Minutes of the Civil Code and Family Law committees held on October 14, 1983).

The decisions of the Catholic tribunal on this matter, therefore, are greatly helpful and as a matter of fact persuasive. Also the interpretation of Catholic Canon Law is very helpful. In *Te v. Te*, *supra*, the Supreme Court highlighted this point by saying that the intendment of the law is consistent with Canon Law. The Supreme Court quoted the explanation of the eminent and foremost Jesuit Canon law expert in the Philippines, **Fr. Adolfo Dacanay S.J.,** (*Dacanay*, Canon Law on Marriage: Introductory Notes and Comments, 2000 ed., pp. 110-119) thus

> **3.5.3.1. The Meaning of Incapacity to Assume**. A sharp conceptual distinction must be made between the second and third paragraphs of C.1095, namely between the grave lack of discretionary judgment and the incapacity to assume the essential obligation. Mario Pompedda, a rotal judge, explains the difference by an ordinary, if somewhat banal,

example. Jose wishes to sell a house to Carmela, and on the assumption that they are capable according to positive law to enter such contract, there remains the object of the contract, *viz,* the house. The house is located in a different locality, and prior to the conclusion of the contract, the house was gutted down by fire unbeknown to both of them. This is the hypothesis contemplated by the third paragraph of the canon. The third paragraph does not deal with the psychological process of giving consent because it has been established a priori that both have such a capacity to give consent, and they both know well the object of their consent [the house and its particulars]. Rather, C.1095.3 deals with the object of the consent/contract which does not exist. The contract is invalid because it lacks its formal object. The consent as a psychological act is both valid and sufficient. The psychological act, however, is directed towards an object which is not available. Urbano Navarrete summarizes this distinction: the third paragraph deals not with the positing of consent but with positing the object of consent. The person may be capable of positing a free act of consent, but he is not capable of fulfilling the responsibilities he assumes as a result of the consent he elicits.

Since the address of Pius XII to the auditors of the Roman Rota in 1941 regarding psychic incapacity with respect to marriage arising from pathological conditions, there has been an increasing trend to understand as ground of nullity different from others, the incapacity to assume the essential obligations of marriage, especially the incapacity which arises from sexual anomalies. Nymphomania is a sample which ecclesiastical jurisprudence has studied under this rubric.

The problem as treated can be summarized, thus: do sexual anomalies always and in every case imply a grave psychopathological condition which affects the higher faculties of intellect, discernment, and freedom; or are there sexual anomalies that are purely so — that is to say, they arise from certain physiological dysfunction of the hormonal system, and they affect the sexual condition, leaving intact the higher faculties however, so that these persons are still capable of free human acts. The evidence from the empirical sciences is abundant that there are certain anomalies of a sexual nature which may impel a person towards sexual activities which are not normal, either with respect to its frequency [nymphomania, satyriasis] or to the nature of the activity itself [sadism, masochism, homosexuality]. However, these anomalies notwithstanding, it is altogether possible that the higher faculties remain intact such that a person so afflicted continues to have an adequate understanding of what marriage is and of the gravity of its

responsibilities. In fact, he can choose marriage freely. The question though is whether such a person can assume those responsibilities which he cannot fulfill, although he may be able to understand them. In this latter hypothesis, the incapacity to assume the essential obligations of marriage issues from the incapacity to posit the object of consent, rather than the incapacity to posit consent itself.

Ecclesiastical jurisprudence has been hesitant, if not actually confused, in this regard. The initial steps taken by church courts were not too clear whether this incapacity is incapacity to posit consent or incapacity to posit the object of consent. A case *c. Pinna*, for example, arrives at the conclusion that the intellect, under such an irresistible impulse, is prevented from properly deliberating and its judgment lacks freedom. This line of reasoning supposes that the intellect, at the moment of consent, is under the influence of this irresistible compulsion, with the inevitable conclusion that such a decision, made as it was under these circumstances, lacks the necessary freedom. It would be incontrovertible that a decision made under duress, such as this irresistible impulse, would not be a free act. But this is precisely the question: is it, as a matter of fact, true that the intellect is always and continuously under such an irresistible compulsion? It would seem entirely possible, and certainly more reasonable, to think that there are certain cases in which one who is sexually hyperaesthetic can understand perfectly and evaluate quite maturely what marriage is and what it implies; his consent would be juridically ineffective for this one reason that he cannot posit the object of consent, the exclusive *jus in corpus* to be exercised in a normal way and with usually regularity. It would seem more correct to say that the consent may indeed be free, but is juridically ineffective because the party is consenting to an object that he cannot deliver. The house he is selling was gutted down by fire.

3.5.3.2. Incapacity as an Autonomous Ground. Sabattani seems to have seen his way more clearly through this tangled mess, proposing as he did a clear conceptual distinction between the inability to give consent on the one hand, and the inability to fulfill the object of consent, on the other. It is his opinion that nymphomaniacs usually understand the meaning of marriage, and they are usually able to evaluate its implications. They would have no difficulty with positing a free and intelligent consent. However, such persons, capable as they are of eliciting an intelligent and free consent, experience difficulty in another sphere: delivering the object of the consent. Anne, another rotal judge, had likewise treated the difference between the act of consenting and the act of positing the object of consent

from the point of view of a person afflicted with nymphomania. According to him, such an affliction usually leaves the process of knowing and understanding and evaluating intact. What it affects is the object of consent: the delivering of the goods.

3.5.3.3 Incapacity as Incapacity to Posit the Object of Consent. From the selected rotal jurisprudence cited, *supra*, it is possible to see a certain progress towards a consensus doctrine that the incapacity to assume the essential obligations of marriage (that is to say, the formal object of consent) can coexist in the same person with the ability to make a free decision, an intelligent judgment, and a mature evaluation and weighing of things. The decision *coram Sabattani* concerning a nymphomaniac affirmed that such a spouse can have difficulty not only with regard to the moment of consent but also, and especially, with regard to the matrimonium *in facto esse*. The decision concludes that a person in such a condition is incapable of assuming the conjugal obligation of fidelity, although she may have no difficulty in understanding what the obligations of marriage are, nor in the weighing and evaluating of those same obligations.

Prior to the promulgation of the Code of Canon Law in 1983, it was not unusual to refer to this ground as moral impotence or psychic impotence, or similar expressions to express a specific incapacity rooted in some anomalies and disorders in the personality. These anomalies leave intact the faculties of the will and the intellect. It is qualified as moral or psychic, obviously to distinguish it from the impotence that constitutes the impediment dealt with by C.1084. Nonetheless, the anomalies render the subject incapable of binding himself in a valid matrimonial pact, to the extent that the anomaly renders that person incapable of fulfilling the essential obligations. According to the principle affirmed by the long tradition of moral theology: *nemo ad impossibile tenetur*.

x x x x

3.5.3.5 Indications of Incapacity. There is incapacity when either or both of the contractants are not capable of initiating or maintaining this consortium. One immediately thinks of those cases where one of the parties is so self-centered [*e.g.,* a narcissistic personality] that he does not even know how to begin a union with the other, let alone how to maintain and sustain such a relationship. A second incapacity could be due to the fact that the spouses are incapable of beginning or maintaining a heterosexual consortium, which goes to the very substance of matrimony. Another incapacity could arise when a spouse is unable to concretize the good of himself or of the other

party. The canon speaks, not of the *bonum partium,* but of the *bonum conjugum*. A spouse who is capable only of realizing or contributing to the good of the other party *qua persona* rather than *qua conjunx* would be deemed incapable of contracting marriage. Such would be the case of a person who may be quite capable of procuring the economic good and the financial security of the other, but not capable of realizing the *bonum conjugale* of the other. These are general strokes and this is not the place for detained and individual description.

A rotal decision *c. Pinto* resolved a petition where the concrete circumstances of the case concerns a person diagnosed to be suffering from serious sociopathy. He concluded that while the respondent may have understood, on the level of the intellect, the essential obligations of marriage, he was not capable of assuming them because of his "constitutional immorality."

Stankiewicz clarifies that the maturity and capacity of the person as regards the fulfillment of responsibilities is determined not only at the moment of decision but also and especially during the moment of execution of decision. And when this is applied to constitution of the marital consent, it means that the actual fulfillment of the essential obligations of marriage is a pertinent consideration that must be factored into the question of whether a person was in a position to assume the obligations of marriage in the first place. When one speaks of the inability of the party to assume and fulfill the obligations, one is not looking at *matrimonium in fieri*, but also and especially at *matrimonium in facto esse*. In [the] decision of 19 Dec. 1985, Stankiewicz collocated the incapacity of the respondent to assume the essential obligations of marriage in the psychic constitution of the person, precisely on the basis of his irresponsibility as regards money and his apathy as regards the rights of others that he had violated. Interpersonal relationships are invariably disturbed in the presence of this personality disorder. A lack of empathy (inability to recognize and experience how others feel) is common. A sense of entitlement, unreasonable expectation, especially favorable treatment, is usually present. Likewise common is interpersonal exploitativeness, in which others are taken advantage of in order to achieve one's ends.

Authors have made listings of obligations considered as essential matrimonial obligations. One of them is the right to the *communio vitae*. This and their corresponding obligations are basically centered around the good of the spouses and of the children. Serious psychic anomalies, which do not have to be necessarily incurable, may give rise to the incapacity to assume any, or several, or even all of these rights. There are some cases in which interpersonal relationship is impossible.

Some characteristic features of inability for interpersonal relationships in marriage include affective immaturity, narcissism, and antisocial traits.

Marriage and Homosexuality. Until 1967, it was not very clear under what rubric homosexuality was understood to be invalidating of marriage – that is to say, is homosexuality invalidating because of the inability to evaluate the responsibilities of marriage, or because of the inability to fulfill its obligations. Progressively, however, rotal jurisprudence began to understand it as incapacity to assume the obligations of marriage so that by 1978, Parisella was able to consider, with charity, homosexuality as an autonomous ground of nullity. This is to say that a person so afflicted is said to be unable to assume the essential obligations of marriage. In this same rotal decision, the object of matrimonial consent is understood to refer not only to the *jus in corpus* but also the *consortium totius vitae*. The third paragraph of C.1095 [incapacity to assume the essential obligations of marriage] certainly seems to be the more adequate juridical structure to account for the complex phenomenon that homosexuality is. The homosexual is not necessarily impotent because, except in very few exceptional cases, such a person is usually capable of full sexual relations with the spouse. Neither is it a mental infirmity, and a person so afflicted does not necessarily suffer from a grave lack of due discretion because this sexual anomaly does not by itself affect the critical, volitive, and intellectual faculties. Rather, the homosexual person is unable to assume the responsibilities of marriage because he is unable to fulfill this object of the matrimonial contract. In other words, the invalidity lies, not so much in the defect of consent, as in the defect of the object of consent.

3.5.3.6 Causes of Incapacity. A last point that needs to be addressed is the source of incapacity specified by the canon: causes of a psychological nature. Pompedda proffers the opinion that the clause is a reference to the personality of the contractant. In other words, there must be a reference to the psychic part of the person. It is only when there is something in the psyche or in the psychic constitution of the person which impedes his capacity that one can then affirm that the person is incapable according to the hypothesis contemplated by C.1095.3. A person is judged incapable in this juridical sense only to the extent that he is found to have something rooted in his psychic constitution which impedes the assumption of these obligations. A bad habit deeply engrained in one's consciousness would not seem to qualify to be a source of this invalidating incapacity. The difference being that there seems to be some

freedom, however remote, in the development of the habit, while one accepts as given one's psychic constitution. It would seem then that the law insists that the source of the incapacity must be one which is not the fruit of some degree of freedom.

JURISPRUDENTIAL GUIDELINES. In *Republic of the Philippines v. CA and Molina,* G.R. No. 108763, February 13, 1997, 79 SCAD 462, the Supreme Court enumerated the guidelines in invoking and proving psychological incapacity under Article 36. They are as follows:

(1) 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 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 emphasizes their *permanence, inviolability and solidarity*.

(2) The *root cause* of the psychological incapacity must be: (a) medically or clinically identified, (b) alleged in the complaint, (c) sufficiently proven by experts, and (d) clearly explained in the decision. Article 36 of the Family Code requires that the incapacity must be psychological — not physical, although its manifestations and/or symptoms may be physical. The evidence must convince the court that the parties, or one of them, was mentally or psychically ill to such an extent that the person could not have known the obligations he was assuming or, knowing them, could not have given valid assumption thereof. Although no example of such incapacity need be given here so as not to limit the application of the provision under the principle of *ejusdem generis*, nevertheless, such root cause must be identified as a psychological illness and its incapacitating nature fully explained. Expert evidence may be given by qualified psychiatrists and clinical psychologists.

(3) The incapacity must be proven to be existing at "the time of the celebration" 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.

(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 regard 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 a 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.

(5) 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, much less ill will. In other words, there is a natal or supervening factor in 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.

(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.

(7) 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. It is clear that Article 36 was taken by the Family Code Revision Committee from Canon 1095 of the new Code of Canon law, which became effective in 1983 and which provides:

> "The following are incapable of contracting marriage: Those who are unable to assume the essential obligations of marriage due to causes of psychological nature."

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. Ideally — subject to our law on evidence — what is decreed as canonically invalid should also be decreed civilly void.
>
> This is one instance where, in view of the evident source and purpose of the Family Code provision, contemporaneous religious interpretation is to be given persuasive effect. Here, the State and the Church — while remaining independent, separate and apart from each other — shall walk together in synodal cadence towards the same goal of protecting and cherishing marriage and the family as the inviolable base of the nation.
>
> (8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the state.

The certification of the Solicitor General is not anymore needed pursuant to Supreme Court *En Banc* resolution in A.M. 00-11-01-SC.

In *Te v. Te*, *supra,* however, the Supreme Court stressed that each case on psychological incapacity must be seen on its own merit. Thus, the Supreme Court said:

> Noteworthy is that in *Molina*, while the majority of the Court's membership concurred in the *ponencia* of then Associate Justice (later Chief Justice) Artemio V. Panganiban, three justices concurred "in the result" and another three — including, as aforesaid, Justice Romero — took pains to compose their individual separate opinions. Then Justice Teodoro R. Padilla even emphasized that "each case must be judged, not on the basis of *a priori* assumptions, predelictions or generalizations, but according to its own facts. In the field of psychological incapacity as a ground for annulment of 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."
>
> Predictably, however, in resolving subsequent cases, the Court has applied the aforesaid standards, without too much regard for the law's clear intention that **each case is to be treated differently,** as "courts should 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."

In hindsight, it may have been inappropriate for the Court to impose a rigid set of rules, as the one in *Molina*, in resolving all cases of psychological incapacity. Understandably, the Court was then alarmed by the deluge of petitions for the dissolution of marital bonds, and was sensitive to the OSG's exaggeration of Article 36 as the "most liberal divorce procedure in the world." The unintended consequences of *Molina*, however, has taken its toll on people who have to live with deviant behavior, moral insanity and sociopathic personality anomaly, which, like termites, consume little by little the very foundation of their families, our basic social institutions. Far from what was intended by the Court, *Molina* has become a strait-jacket, forcing all sizes to fit into and be bound by it. Wittingly or unwittingly, the Court, in conveniently applying *Molina*, has allowed diagnosed sociopaths, schizophrenics, nymphomaniacs, narcissists and the like, to continuously debase and pervert the sanctity of marriage. Ironically, the Roman Rota has annulled marriages on account of the personality disorders of the said individuals.

The Court need not worry about the possible abuse of the remedy provided by Article 36, for there are ample safeguards against this contingency, among which is the intervention by the State, through the public prosecutor, to guard against collusion between the parties and/or fabrication of evidence. The Court should rather be alarmed by the rising number of cases involving marital abuse, child abuse, domestic violence and incestuous rape.

In dissolving marital bonds on account of either party's psychological incapacity, the Court is not demolishing the foundation of families, but it is actually protecting the sanctity of marriage, because it refuses to allow a person afflicted with a psychological disorder, who cannot comply with or assume the essential marital obligations, from remaining in that sacred bond. It may be stressed that the infliction of physical violence, constitutional indolence or laziness, drug dependence or addiction, and psychosexual anomaly are manifestations of a sociopathic personality anomaly. Let it be noted that in Article 36, there is no marriage to speak of in the first place, as the same is void from the very beginning. To indulge in imagery, the declaration of nullity under Article 36 will simply provide a decent burial to a stillborn marriage.

The prospect of a possible remarriage by the freed spouses should not pose too much of a concern for the Court. First and foremost, because it is none of its business. And second, because the judicial declaration of psychological incapacity operates as a warning or a lesson learned. On one hand, the normal spouse

would have become vigilant, and never again marry a person with a personality disorder. On the other hand, a would-be spouse of the psychologically incapacitated runs the risk of the latter's disorder recurring in their marriage.

Lest it be misunderstood, we are not suggesting the abandonment of *Molina* in this case. We simply declare that, as aptly stated by Justice Dante O. Tinga in *Antonio v. Reyes,* there is need to emphasize other perspectives as well which should govern the disposition of petitions for declaration of nullity under Article 36. At the risk of being redundant, we reiterate once more the principle that each case must be judged, not on the basis of *a priori* assumptions, predilections or generalizations but according to its own facts. And, to repeat for emphasis, courts should 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.

DAMAGES. In a case involving psychological incapacity, the Supreme Court in *Buenaventura v. Court of Appeals*, G.R. Nos. 127358/127449, March 31, 2005, 454 SCRA 261 disallowed the award of moral damages, exemplary damages and attorney's fees on the ground that the very nature of psychological incapacity which is non-cognizance of one's essential marital obligation at the time of the marriage ceremony, negates bad faith, which is an essential element in awarding moral damages in contracting the marriage. Consequently, no award of exemplary damages and attorneys fees can also be made in the absence of a showing of bad faith.

Article 37. Marriages between the following are incestuous and void from the beginning, whether the 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)

REASONS FOR PROHIBITION OF INCESTUOUS MARRIAGE. Incestuous marriages have been universally condemned as grossly indecent, immoral, and inimical to the purity and happiness of the family and the welfare of future generations. Various reasons have been assigned why incestuous marriages should be prohibited, especially those between persons closely related by consanguinity.

In the first place, they are abhorrent to the nature, not only of civilized men, but of barbarous and semi-civilized peoples and, in the second place, tend to the confusion of rights and duties incident to family relations (*Gould v. Gould*, 78 Conn. 242, 61 A 604, cited in 35 Am. Jur. 266).

> A child of an incestuous union creates a special problem of social placement, because its status is so confused, as is that of its parents. If the child is born to a union between daughter and father, then its mother is also its sister. Its father is married to its grandmother, and its father is simultaneously its grandfather. Its brother (half-brother) is also its uncle (*i.e.*, the brother of its mother). Similar status discrepancies arise if the child is the offspring of a brother-sister union, or a mother-son union (W. Goode, The Family 24 [1964] cited in page 31 Family Law by Harry D. Krause).

In addition, science and experience have established beyond cavil that such intermarriages very often result in deficient and degenerate offsprings, which, if occurring to any great extent, would amount to a serious deterioration of the race (*Gould v. Gould*, 78 Conn 242, 61 A 604, cited in 35 Am. Jur. 266). The genetic reason for advising against the marriage of related persons is, of course, to prevent the coming together in their offspring of any deleterious recessive genes (Farrow and Juberg, Genetics and Laws Prolubity Marriage in the United States, 209 U.A.M.A. 534, 537 [1959]).

> In breeding, therefore, yields an increased probability of homozygosity with respect to a particular trait — that is, a greater chance that the offspring will receive an identical genetic contribution from each parent. If the pedigree contains a recessive abnormality — a genetic defect that does not appear in an individual unless parents transmit the appropriate determinant — the increased probability of homozygosity in the first generation of offspring may have tragic consequences (American Law Institute, Model and Commentaries 230.2, pp. 403-407 [1980] contained in Family Law by Harry Krause, St. Paul, Min., West Publishing Co., 1983, pages 29-30).

Another reason deals with the social and psychological aspects of an incestuous marriage. Social prohibitions against incest promote the solidarity of the nuclear family.

> The essentials of a nuclear family are a man and a woman in a relation of sexual intimacy and bearing a responsibility for

the upbringing of the woman's children. This institution is the principal context for socialization of the individual. A critical component of that process is the channeling of the individual's erotic impulses into socially acceptable patterns. The incest prohibition regulates erotic desire in two ways that contribute to preservation of the nuclear family. First, the prohibition controls sex rivalries and jealousies within the family unit. It inhibits competing relations of sexual intimacy that would disorganize the family structure and undermine the family's role as the unit of socialization and personality development. Second, by ensuring suitable role models, the incest restriction prepares the individual for assumption of familial responsibility as an adult. Eventually, it propels the individual toward creation of a new nuclear family of his own marriage. It is worth noting also that the theory of the relation of incest to the nuclear family is consistent with Freudian psychology, which posits interfamily sexual attraction as one of the basic facts of mental life and attributes much psychic disturbance to failure of the personality to resolve the internal conflict between such desires and societal repression of them (American Law Institute, Model and Commentaries 230.2, pp. 403-407 [1980] contained in Family Law by Harry Krause, St. Paul, Min., West Publishing Co., 1983, pages 29-30).

Article 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 parents 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 the adopted children of the same adopter;

9) Between parties where one, with the intention to marry the other, killed that other person's spouse or his or her own spouse. (82)

REASONS FOR THE PROHIBITION OF VOID MARRIAGES. Article 38 of the Family Code clearly provides that the marriages described therein are against public policy. It is the policy of the state to foster a normal, peaceful, and wholesome integral nuclear family unit which would constitute the very foundation of society. For the state, therefore, the marriages described in Article 38 will not serve the fundamental objective of nurturing a stable family unit that can effectively be the foundation of society. Following the general rule that only those declared by law as a void marriage should be treated as such, the enumeration in Article 38 is exclusive. Hence, a guardian and his or her ward can validly marry each other as this relationship is not included in the enumeration. A principal and his or her agent can likewise marry each other provided they do not suffer from any other impediment provided in the Family Code.

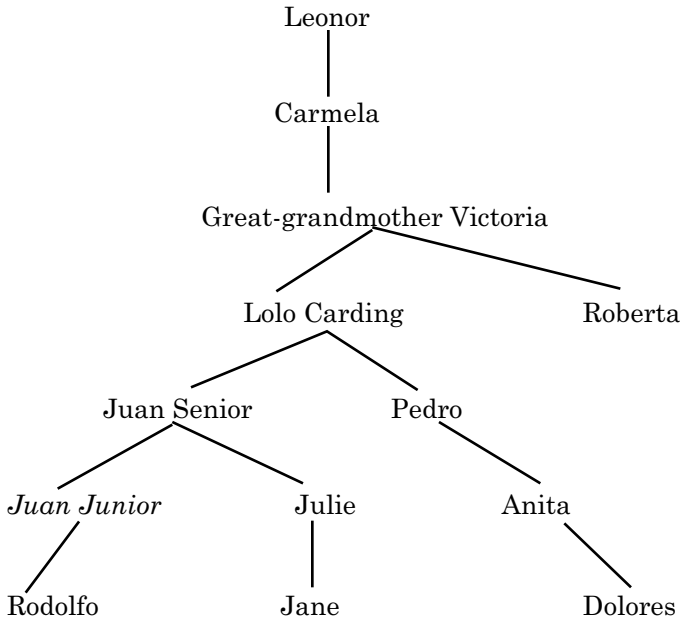
COLLATERAL BLOOD RELATIVES BY CONSANGUINITY. Marriage between collateral blood relatives up to the fourth civil degree may disturb the policy of the state as it may likely result though not of the same gravity, in the dangers and confusion attendant in incestuous marriages under Article 37. Moreover,

> the genetic reason for advising against marriage of related persons is, of course, to prevent the coming together in their offspring of any deleterious recessive genes. The probability of this event is determined by the coefficient of inbreeding, e.g., 0.125 for an uncle-niece mating, 0.0625 for the mating of first cousins, and 0.0156 in union of second cousins. Presumably, the role of the legislature has been to decide that risk is too much to allow citizens and then to enact a law accordingly (Farrow and Juberg, Genetics and Laws Prolubity Marriage in the United States, 209 U.A.M.A. 534, 537 [1959]).

Pertinently, relationship by consanguinity is in itself not capable of dissolution. Hence, the mere fact that a common ascendant, a grandfather for example, died does not sever the blood relationship of first cousins.

To determine whether or not two persons are relatives of each other up to the fourth civil degree, they have to consider their

nearest and immediate common ascendant and then count the number of relatives from one of them to the common ascendant and from the common ascendant to the other one. Let us consider the blood-relation diagram of a person whom we shall designate Juan Junior and determine the relationship of Juan Junior to some other persons within his blood relationship.



Juan Junior is related to the following:

1. *Anita* is a first cousin of Juan Junior and is related to him by blood in the 4th collateral civil degree. Anita is the daughter of Juan Junior's uncle, namely *Pedro*. The said uncle undoubtedly is the brother of Juan Junior's father, namely, *Juan Senior*. The father of Juan Senior and Pedro is *Lolo Carding*. The nearest and immediate common ascendant of Juan Junior and Anita, therefore, is their grandfather Lolo Carding. To connect the blood relationship of Juan Junior and Anita, there are four immediate relatives. Excluding Juan Junior who is the reckoning point, the first relative going to the common ascendant is Juan Senior, the second relative is Lolo Carding (who is the common ascendant himself), the third relative from the common ascendant is Pedro and finally, the fourth

relative is Anita. Anita, being the fourth relative from Juan to Lolo Carding (the common ascendant) and from Lolo Carding to Anita, Anita therefore is related to Juan by consanguinity in the fourth civil degree. Juan Junior is related to his uncle, Pedro Senior, in the 3rd civil degree; to Lolo Carding in the 2nd civil degree (in the direct ascending line not the collateral line); and to his father, Juan Senior, in the 1st civil degree (in the direct line and not collateral line). Juan Junior and Anita cannot marry each other.

2. *Jane* is a collateral relative by blood in the 3rd civil degree. Jane is the daughter of Julie who is the sister of Juan Junior. The immediate and nearest common ascendant of Juan Junior and Jane is Juan Senior. Though Lolo Carding is also their common ascendant, he is not the immediate and nearest common ascendant. Juan Junior and Jane cannot therefore validly marry each other.

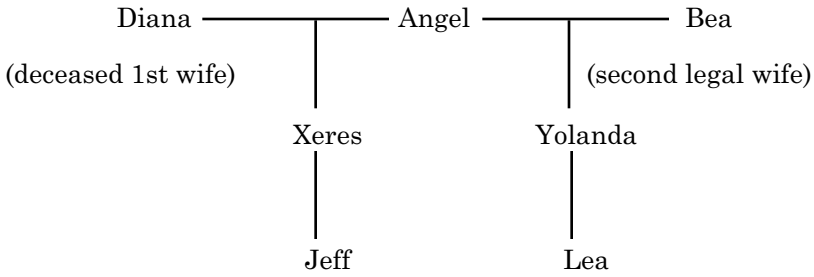
3. *Roberta* is a collateral relative by blood in the 4th civil degree. Roberta is the daughter of Victoria who is the great-grandmother of Juan Junior. The immediate and nearest common ascendant of Roberta and Juan Junior is *Victoria*. From Juan Junior to Victoria and from Victoria to Roberta, there are four relatives (excluding Juan Junior but including Roberta), namely: Juan Senior, Lolo Carding, Victoria, and finally, Roberta. Juan Junior and Roberta cannot therefore validly marry each other.

4. *Dolores* is a collateral relative by blood in the 5th civil degree. Dolores is the daughter of Juan Junior's cousin Anita. The nearest and immediate common ascendant of Juan Junior and Dolores is Lolo Carding. From Juan Junior to Lolo Carding and from Lolo Carding to Dolores, there are five relatives (excluding Juan Junior but including Dolores), namely: Juan Senior, Lolo Carding, Pedro, Anita, and finally Dolores. Juan Junior can therefore validly marry Dolores because she is not a collateral blood relative up to the 4th civil degree.

5. Leonor is a relative by blood in the 5th civil degree but in the direct ascending line. Juan Junior therefore cannot marry her pursuant to Article 37(1) which provides that a marriage between an ascendant and a descendant of any degree is void.

COLLATERAL HALF-BLOOD RELATIVES BY CONSANGUINITY. Under the Family Code, the prohibition extends to the collateral blood relatives up to the fourth civil degree which include one's uncle, aunt, niece, nephew, and first cousins. There is no question that the prohibition applies to full-blood relationships. How-

ever, it is interesting to point out that the law does not provide that marriages between collateral blood relatives by the half-blood are prohibited.



In the illustration, *Xeres* is the son of *Diana* and *Angel*. *Lea* is the daughter of Yolanda who, in turn, is the daughter of Angel and *Bea*. Angel is the nearest and immediate common ascendant of Xeres and Lea. Lea and Xeres are relatives by consanguinity in the 3rd civil degree. However, they are only related in the half-blood because Lea comes from the line of Bea and Angel, while Xeres comes from the line of Diana and Angel. Lea and Xeres are therefore related only through Angel because they have different mothers. Xeres therefore is the half-blood uncle of Lea.

There are two significant American cases which advance two different views as to whether or not such marriages are void. In the first case, *Audley v. Audley*, 230 NYS 652, the issue presented was whether or not the provision in a marital statute prohibiting marriages between uncles and nieces or aunts and nephews also include "half-blood relationships." The Supreme Court Appellate Division of New York, speaking through Mr. Justice Laughlin, answered in the affirmative by observing and ruling, thus:

> The point presented for decision is whether the relationship of uncle and niece existed between the defendant and plaintiff within the purview of subdivisions 3 @ 5, of the Domestic Relations Law (Consolidated Laws, c. 14, arts. 2 @ 5), which so far as here material declares that a marriage is incestuous and void between "an uncle and niece or an aunt and nephew," whether they are legitimate or illegitimate. Prior to 1893, incestuous and void marriages were limited to marriages between an ancestor and a descendant and a brother and a sister of either the whole or half-blood (2 R.S. p. 139, @ 3; Matter of Williams, 2 City Court Rep. 143), and marriages between uncles and nieces

and aunts and nephews have only been prohibited in this state since the enactment of chapter 601 of the Laws of 1893, amending said section 3 of the Revised Statutes (*Weisberg v. Weisberg*, 112 App. Div. 231, 98 N.Y. Supp. 260).

It is argued in behalf of the respondent, that since, in said subdivision 3, which was added in 1893, there is no reference to whether uncles and nieces or aunts and nephews are of the whole or half-blood, the provisions should be construed as prohibiting only marriages between an uncle and a niece and an aunt or a nephew of the whole blood, for the reason that the preceding subdivision 2 of the section relating to marriages between brothers and sisters expressly provided that it applied to brothers and sisters either of the whole or of the half blood. In 1880 the United States Circuit Court for the Northern District of New York, in a very able and exhaustive opinion written by Judge Wallace, in *Campbell v. Crampton*, 8 Abb. New Cases, 363, in construing a statute of Alabama prohibiting marriages between an aunt and a nephew or an uncle and a niece, and containing no reference to whether they were of the whole or half-blood, held that the prohibition extended to relatives of the half-blood as well as relatives of the whole blood. It is, therefore, a reasonable inference that the Legislature which enacted the law in 1893 was aware of that decision, and deemed it necessary to specify whether the relationship was of the half or the whole blood.

Moreover, in other jurisdictions it has been held that a statute prohibiting such marriages and making them criminal and containing no reference to whether the prohibition extended to relatives of the whole or half-blood, embraces relatives of the half blood as well as those of the whole blood; and that is the general rule of construction applied to such statutes (*Shelley vs. State*, 95 Tenn. 152, 31 S.W. 492, 49 Am. St. Rep. 926; *State vs. Wyman*, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753; *State vs. Reedy*, 44 Kan. 190-192, 24 Pac. 66; Bishop on Marriage and Divorce and Separation, @ 748). Furthermore, the specification of the whole or half blood with respect to brothers and sisters may have been incorporated for the reason that brothers and sisters of the half blood are commonly referred to as half-brothers and half-sisters, whereas in speaking of uncles and nieces and aunts and nephews, no distinction is made with respect to whether they are of the whole or half blood. It may also be that, in view of the fact that the former Legislature had by subdivision 2 expressly provided that the prohibition as to brothers and sisters was intended to relate to relatives of the half as well as of the whole blood, it was considered that the public policy of making no distinction between relatives of the whole and half blood in

legislating on questions of marriage and incest was sufficiently shown, and that it was not deemed necessary to repeat that specification of relationship.

The decisions refer to the relationship of uncles and nieces and aunts and nephews as being of the whole or half blood, and for brevity I have done so; but that is not strictly accurate, because for an uncle and niece to be of the whole blood would require both parents of the niece to be of the whole blood with the uncle, and that could only be if the parents of the niece were brother and sister of the whole blood. A niece, one only of whose parents is of the blood, and of the whole blood, with her uncle, would be of the half blood of the common ancestor, while her uncle would be of his whole blood; and if the parent of the niece who is of the same blood as the uncle is only of the half blood, then the niece would only be of the quarter blood, while her uncle would be of the half blood of the common ancestor. This shows that it would not have been accurate for the Legislature to have adopted the same phraseology in said subdivision 3 as was adopted in subdivision 2; for, with respect to lawful marriages, uncles and nieces and aunts and nephews could not be of the whole blood. I deem it probable that the Legislature recognized this and addressed the prohibition against marriages in subdivision 3, not to the percentage of blood relationship, but to the relationship generally known and understood, and on that theory it has prohibited marriages between an uncle and a niece or an aunt and nephew without regard to the percentage of their blood relationship.

The prohibition was enacted for the benefit of public health and the perpetuation of the human race. Since the closest relationship of an uncle and niece under a lawful marriage of those so related are plainly prohibited, I think it would be unreasonable to impute to the Legislature the belief that the evils which it was anticipated would flow from such marriages, would not befall the issue of a marriage between an uncle of the half blood and a niece of the quarter blood of the common ancestor. The marriage having been prohibited by law and declared void by said section 5 of the Statute, it is as if no marriage has taken place between the parties (*McCullen v. McCullen*, 162 App. Div. 599, 147 N.Y. Supp. 1069). The marriage on which the action is predicated being void, there is no basis for the maintenance of the action for divorce.

The second case is that of *In Re Simms Estate,* 26 NY2d 163, 46 ALR 3d 1398, where the New York Court of Appeals stated that a marriage between uncle and niece by the half blood is not incestuous and void. The said court's reason was that such a marriage is not

specifically included by law as a void marriage and, therefore, cannot be considered as such. Pertinently, the court said:

> This omission would not ordinarily be troublesome since it would be assumed that the term would include relationship by the half blood were it not for the fact that the preceding subdivision 2 of the section, in dealing with marriages between brothers and sisters, spells out both the full and the half blood relationship, *i.e.*, "A brother and sister of either the whole or the half blood."
>
> In this context, it seems reasonable to think that if the legislature intended to prohibit marriages between uncles, nieces, aunts, and nephews whose parents were related to the contracting party only by the half blood, it would have used similar language, and its failure to do so in immediate context in dealing with a more remote relationship than brother and sister, suggests that it did not intend to put this limited class within the interdiction.
>
> This question was examined closely in 1921 in *Audley v. Audley*, 196 App Div 103, 187 NYS 652. In a direct action between the parties for annulment, it was held that a marriage between uncle and niece by the half blood was void. In some part of the rationale followed in the opinion by Justice Laughlin was based on the assumption that it would be technically inaccurate to use the term "half blood" in relation to uncle and niece; and that this was a probable reason the legislature did not use the term dealing with this type of marriage.
>
> Still, the term is one of common usage and meaning where the parent of the nephew or niece is not a full brother or sister of the contracting party. (See, *e.g.,* the use of the term by Chief Judge Lewis in Matter of May's Estate, 305 NY 486, 488, 114 NE2d 4, *i.e.,* "his niece by the half blood"). If the legislature had intended that its interdiction on this type of marriage should extend down to the rather more remote relationship of half blood between uncle and niece, it could have made suitable provision. Its failure to do so in the light of its explicit language relating to brothers and sisters, suggests it may not have intended to carry the interdiction this far.

The second case of *In Re Simms Estate*, 26 NY2d 163, 46 ALR 3d 1398 appears to be the proper view. All doubts must be construed in favor of marriage. Only those expressly prohibited by law as void shall be treated as such. Also, since what is involved in Article 38(1) has been categorized as a marriage against public policy, it must be strictly construed in favor of the contracting parties and against its illegality.

RELATIONSHIP BY AFFINITY. Step-parents and step-children as well as parents-in-law and children-in-law are related by affinity. The doctrine of affinity grew out of the canonical maxim that marriage makes husband and wife one. The husband has the relation, by affinity, to his wife's blood relatives as she has to them by consanguinity and *vice versa* (*State v. Hooper*, 37 P.2d 52, 140 Kan. 481).

> Affinity is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relatives of the wife as that in which she herself stands towards them, and give the wife the same reciprocal connection with the relations of the husband. It is used in contra-distinction to consanguinity. It is no real kindred. Affinity arises from marriage, by which each party becomes related to all the *consanguinei* of the other party to the marriage, but in such case these respective *consanguinei* do not become related by affinity to each other (*Kelly v. Neely*, 12 Ark. 657, 659, 56 Am. Dec. 288).

The only marriages by affinity prohibited in the Family Code are marriages between step-parents and step-children as well as parents-in-law and children-in-law. It is believed that these kinds of marital relationships, if allowed, can most likely destroy the peacefulness of the family relations and also cause disturbance within the family circle. Philippine society is characterized as practicing what has been known as "extended families" which have proven most advantageous and beneficial to the society itself. This is specially true with respect to parents-in-law and children-in-law as it is

> strongly believed that it would be 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 just like their own children and vice-versa (Minutes of the 152nd Joint Meeting of the Civil Code and Family Law committees held on August 23, 1986, page 3).

Step-brother and step-sister can, however, marry each other as this relationship by affinity is not included in the prohibition.

EFFECT OF TERMINATION OF MARRIAGE ON THE "AFFINITY PROHIBITION." In the event that the marriage is annulled or nullified in accordance with law, there can be no question that the relationship by affinity between step-parents and step-children as well as parents-in-law and children-in-law is terminated. The said

persons become strangers to each other. This will allow them therefore to marry each other legally. Thus, in an illustrative American case, namely *Back v. Back,* 125 Northwestern Reports (NW) 1009, where the marriage between a deceased husband and the daughter of his former wife by another man of a previous marriage was assailed as void under a statute providing that the marriage between a husband and his "wife's daughter" is incestuous and, therefore, criminally punishable, the Supreme Court of Iowa pertinently observed and ruled,

> x x x Therefore, in determining that the construction to be put upon the words "wife's daughter," we are required to determine their meaning as defining a degree of relationship by affinity. Now it seems to be settled by the unanimous concurrence of authorities on the subject that relationship by affinity terminates with the termination of the marriage either by death or divorce which gave rise to the relationship of affinity between the parties. (*Blodget v. Brismaid*, 9 Vt 27; *Noble vs. State,* 22 Ohio St. 541; *State v. Brown*, 47 Ohio St. 102, 23 N.E. 747, 21 Am. St. Rep. 790; *Wilson vs. State,* 100 Tenn. 596, 46 S.W. 451, 66 Am. St. Rep. 789; *Johnson v. State*, 20 Tex. App. 609, 54 Am. Rep. 535; *Pegues v. Baker,* 110 Ala. 251, 17 South 943; *Tagert v. State*, 143 Ala. 88, 39 South 293, 111 Am. St. Rep. 17; *Bigelow v. Spraguye*, 140 Mass. 425, N.E. 144; *Vannoy v. Givens N.J. Law 201*; 1 Bishop, New. Crim. Procedure, @ 901; 26 Cyc. 845). Of the cases cited, those from Texas, Alabama and Ohio are directly in point as relating to a marriage between a man and the daughter of a former wife, deceased or divorced, and the only discrepancy between them is that in the Alabama cases, a modification of the rule is insisted upon, by which the relationship by affinity is held to continue after the dissolution of the marriage if and so long as there is surviving issue of such marriage. This qualification is suggested also in some of the other cases, but, as it appears in the case before us, there was no issue of the former marriage between decedent and plaintiff's mother, the question need not now be determined.
>
> We reach the conclusion, therefore, that the relationship of affinity between the decedent and plaintiff which existed during the continuance of the marriage relation between decedent and plaintiff's mother terminated when the latter procured a divorce from decedent, and after that time, plaintiff was not the daughter of decedent's wife, and the marriage between them was valid.

In case a marriage is terminated by the death of one of the spouses, there are conflicting views. There are some who believe

that relationship by affinity is not terminated whether there are children or not in the marriage (*Carman v. Newell*, N.Y., 1 Demo 25, 26). However, the better view supported by most judicial authorities in other jurisdictions is that, if the spouses have no living issues or children and one of the spouses dies, the relationship by affinity is dissolved. It follows the rule that relationship by affinity ceases with the dissolution of the marriage which produces it (*Kelly v. Neely*, 12 Ark. 657, 659, 56 Am. Dec. 288). On the other hand, the relationship by affinity is continued despite the death of one of the spouses where there are living issues or children of the marriage "in whose veins the blood of the parties are commingled, since the relationship of affinity was continued through the medium of the issue of the marriage" (*Paddock v. Wells*, 2 Barb. Ch. 331, 333).

ADOPTIVE RELATIONSHIP. The relationship created in adoption is merely limited to one of parent and child. The void marriages in an adoptive relationship are specifically and expressly limited by law to those mentioned in Article 37(4), (5), (6), (7) and (8). The adopter cannot marry the adopted and the surviving spouse of the adopted. The adopted cannot marry any of the following: the adopter, the surviving spouse of the adopter, the legitimate child of the adopter, and the other adopted children of the adopter. It must be observed that while the adopted is, by law, not related to the surviving spouse, legitimate child and other adopted children of the adopter, the law makes an express declaration that they cannot marry each other, as the same will be considered void. In making these void marriages against public policy, the law seeks to duplicate, insofar as possible, the structure of the natural family and to ensure that the "artificial" family will mirror a natural family not only in terms of legal relationships but also in the emotional content and social significance of such a relationship.

Nonetheless, since only void marriages are those expressly provided by law, it can be seen that, barring any other grounds to make the marriage void as provided in the Family Code and in line with the legal rule that the only relationship created in adoption is one of parent and child, an adopted can validly marry the following: the parents, illegitimate child, and other relatives, whether by consanguinity or affinity, of the adopter. There is no prohibition against the marriage between an adopted and the illegitimate child of the adopter as such a marriage will not most likely destroy the tranquility of the family home and the "artificial" family "because usually, an illegitimate child does not live in the same house where the adopted child and the legitimate child of the adopter are living"

(Minutes of the 151st joint Civil Code and Family Law committees held on August 16, 1986, page 151).

On the other hand, the adopter can validly marry the legitimate, illegitimate or adopted child, the natural parent, and other relatives, whether by consanguinity or affinity, of the adopted.

It must likewise be observed that, since Article 38 qualifies the spouse of either the adopted or the adopter as a *surviving spouse*, this can only imply that the marriage between the surviving spouse of either the adopted or the adopter has been terminated by death. Hence, if the marriage of the adopter and his or her spouse is judicially nullified or annulled and barring any other ground to make the marriage void, the adopted can validly marry the previous spouse of the adopter because such spouse is not a *surviving spouse* as contemplated by law but a *former spouse* who, after the finality of the nullity or annulment decree, has become a complete stranger to the adopter. Likewise and under the same condition, the adopter can marry the spouse of the adopted if the marriage of the adopted and his or her spouse is severed by a final judicial nullity or annulment decree.

INTENTIONAL KILLING OF SPOUSE. As to subparagraph 9 of Article 38, the situation described therein is highly criminal, involving as it does, grave moral turpitude, destructive not only of the family but the whole society itself. Indeed, if the guilty spouse can undertake a sinister scheme to kill his or her spouse in order to marry another person and can eventually be successful about it, there is no guarantee that he or she will not do the same evil act again to his or her subsequent spouse so that he or she can again marry for the third time. However, it must be emphasized that, in killing his or her spouse, the guilty party must be animated by an intention to marry another person. Thus, if a wife kills her husband because he was an incorrigible philanderer and thereafter marries her lawyer who has been defending her in the criminal case, the marriage is valid. The reason for killing the husband was obviously not for the purpose of marrying the lawyer.

No prior criminal conviction by the court for the killing is required by the law. Justice Caguioa even said that mere preponderance of evidence is required to prove the killing (Minutes of the 149th Meeting of the joint Civil Code and Family Law committees held on August 2, 1986, page 3).

Also, to come within the purview of Article 38(a) of the Family Code, Justice Puno explained that it

can be a unilateral intention and need not be shared by the other spouse so that even the unknowing party will be affected by the void character of the marriage (Minutes of the 149th Joint Meeting of the Civil Law and Family Law committees held on August 2, 1986, page 3).

The reasons for a spouse killing his or her own spouse to marry another and thus making the subsequent marriage void, likewise apply to a person who kills the spouse of another to marry the latter.

Article 39. The action or defense for the declaration of absolute nullity of a marriage shall not prescribe. (n) ***(Amended by Executive Order Number 227 dated July 17, 1987 and further amended by Republic Act No. 8533 dated February 23, 1998)***

PRESCRIPTIVE PERIOD. The time within which to file an action for the declaration of nullity of a marriage or to invoke such nullity as a defense, whether in a direct or collateral manner, does not prescribe. A judicial decree of nullity of a marriage does not legally dissolve a marriage because such a marriage is invalid from the beginning and therefore, being non-existent, cannot be dissolved. The judicial decree merely declares or confirms the voidness, non-existence, or incipient invalidity of a marriage. Hence, the decree is known as a judicial declaration of nullity of marriage decree.

In *Niñal vs. Bayadog*, 328 SCRA 122, where the petition for the declaration of nullity of marriage was filed by the children of the deceased contracting party only after the latter's death, the Supreme Court ruled that such a petition can still proceed. The Supreme Court justified its decision by stating that a void marriage is considered as having never to have taken place and will be treated as non-existent by the courts. As such, the petition is imprescriptible and can be filed by the children even after the death of the contracting party, who was their father. The Supreme Court said that "if the death of either party would extinguish the cause of action or the ground for defense, then the same cannot be considered imprescriptible" which should not be the case.

However under Supreme Court *en banc* resolution in A.M. No. 02-11-10 which took effect on March 15, 2003, the ruling in the Ninal case as to prescription does not hold anymore because said resolution provides that only the husband and wife can file the case and, if filed, the case will be closed or terminated if during its

pendency, either the husband or wife should die. Moreover, under the said new rules on declaration of nullity (A.M. No. 02-11-10), the heirs can no longer file a case for the nullity of marriage of their parents or of their parent with their step-parent (*Enrico v. Heirs of Medinaceli,* G.R. No. 173614, September 28, 2007, 534 SCRA 419).

Under Executive Order Number 227, if the ground for declaration of nullity is that the spouse is psychologically incapacitated to perform the essential marital obligations and the marriage ceremony was celebrated prior to the effectivity of the Family Code which was on August 3, 1988, such action or defense must be filed or invoked within ten years from August 3, 1988, or more specifically up to August 1, 1998. However, if the marriage was celebrated after the effectivity of the Family Code, the action or defense shall not prescribe. Republic Act Number 8533 further amended Article 39 by deleting the prescriptive period of 10 years. Hence, as it now stands, there is no prescriptive period to nullify a marriage under Article 36 even if the marriage were celebrated before August 3, 1988. All void marriages under the Family Code do not prescribe.

PARTIES. While the Family Code is silent as to who can file a petition to declare the nullity of a marriage (*Ninal v. Bayadog*, 328 SCRA 122), only the husband or the wife can file a court case declaring the marriage void (Supreme Court Resolution A.M. No. 02-11-10-SC, *Carlos v. Sandoval*, G.R. No. 179922, December 16, 2008). Significantly, it has been authoritatively opined that the equitable doctrine of unclean hands where the court should not grant relief to the wrongdoer is not a rule as applied in nullity actions because it is merely judge-made and has no statutory basis (See *Faustin v. Lewis*, 85 N.J. 507, 427 A.2d 1105). Any of the parties in a void marriage can file a nullity case even though such party is the wrongdoer (See *Chi Ming Tsoi v. Court of Appeals*, 78 SCAD 57, 266 SCRA 324). Moreover, what is sought to be protected here is also the interest and public policy of the State. In declaring a marriage void, the State expresses that it does not consider such a union as serving the fundamental purpose of the state in fostering and nurturing a family which is the foundation of society. Nonetheless, the wrongdoer may be held liable for damages by way of counterclaim by the other contracting party under the provisions on Human Relations in the Civil Code, specially Articles 19, 20, and 21 thereof.

Significantly prior to the Supreme Court Resolution in A.M. No. 02-11-10-SC which took effect on March 15, 2003, any interested party, such as a the father or the step-children, can file a direct

case for nullity of marriage. Moreover, under the new rules on declaration of nullity, the heirs can no longer file a case for the nullity of marriage of their parents or of their parent with their stepparent (*Enrico v. Heirs of Medinaceli,* G.R. No. 173614, September 28, 2007, 534 SCRA 419).

Thus, previously a father can file a case for declaration of nullity of a bigamous marriage entered into by his daughter and a married man (*Cojuangco v. Romillo*, 167 SCRA 751). Likewise, the legitimate heirs can file a suit against their stepmother for the declaration of nullity of her marriage with their deceased father to protect their successional rights (*Niñal v. Bayadog*, 328 SCRA 122). Now, under the new rules, parents cannot file a case for nullity in relation to the marriage of their children. Neither can an heir file such a case in relation to the marriage of his or her parent with another (*Enrico v. Heirs of Medinaceli*, G.R. No. 173614, September 28, 2007, 534 SCRA 419).

In *Perez v. Court of Appeals,* G.R. No. 162580, January 27, 2006, 480 SCRA 411 where the second wife filed a petition for intervention in the declaration-of-nullity-of marriage case filed by her husband in relation the latter's first marriage, the Supreme Court denied such intervention on the ground that the second wife has no legal interest to justify her intervention. The Supreme Court said that, since the divorce obtained by her husband in the Dominican Republic from the first wife to be able to marry the second wife was not recognized in the Philippines, Philippine law does not recognize the second marriage of her husband to her (the second wife).

However a void marriage can still be collaterally attacked by any interested party in any proceeding where the determination of the validity of marriage is necessary to give rise to certain rights or to negate certain rights. This can occur for example in an intestate proceeding where certain heirs can attack the validity of the marriage of the deceased parent so that the children of the deceased parent can be considered illegitimate for purposes of inheritance.

Article 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)

JUDICIAL DECLARATION OF NULLITY. If a marriage between two contracting parties is void *ab initio*, any one of them

cannot contract a subsequent valid marriage without a previous judicial declaration of nullity of the previous void marriage. A subsequent marriage without such judicial declaration of nullity of the previous void marriage is in itself void *ab initio* in accordance with Articles 40, 52, and 53. Also, in so far as Article 40 is concerned, if a judicial declaration of nullity were obtained and not registered with the local civil registrar and the liquidation, partition, and distribution of the properties, if any, were not also recorded in the proper registry of property in accordance with Articles 52 and 53 of the Family Code, any subsequent marriage is likewise void *ab initio.* Only after full compliance with Articles 52 and 53 can a subsequent valid marriage be entered into. Hence, though the first marriage is judicially declared void, any subsequent marriage may still be declared void because of the failure to comply with Articles 52 and 53. Also, if there is no judicial declaration of nullity and no decree of annulment, there can be no way by which the party can comply with Article 52 in the matter of the registration with the local civil registrar of a nullity or annulment decree prior to a subsequent marriage. In such, the marriage is likewise void under Articles 40, 52, and 53.

> For the sake of the good order of society and for the peace of mind of all persons concerned, it is generally expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction. Another reason why a judicial determination of such a marriage ought to be sanctioned is that an opportunity should be given, when the evidence is obtainable and the parties living, to have the proof of invalidity of such marriage presented in the form of a judicial record, so that it cannot be disputed or denied (35 Am. Jur. 220).

HISTORICAL BACKGROUND OF THE NEED FOR A JUDICIAL DECLARATION OF NULLITY. Prior to the effectivity of the Family Code, the rule on the need for a judicial declaration of nullity of a void marriage for purposes of remarriage changed from time to time. Thus, in *People v. Mendoza* (95 Phil. 845) decided on September 28, 1954 and *People v. Aragon* (100 Phil. 1033) decided on February 28, 1957, the Supreme Court ruled that there was no need for a judicial declaration of nullity of a void marriage. Then, in *Gomez v. Lipana* (33 SCRA 614) decided on June 30, 1970 and *Conseguera v. Conseguera* (37 SCRA 315) decided on January 30, 1971, the Supreme Court changed the rule and pronounced that there was a need for a judicial declaration of nullity of a void marriage. Thereafter, in *Odayat v. Amante* (77 SCRA 338) decided on June 2, 1977 and in

Tolentino v. Paras (122 SCRA 525) decided on May 30, 1983, the Supreme Court reverted to the rule that there was no need for a judicial declaration for nullity of a void marriage. Subsequently, in *Wiegel v. Sempio Diy* (143 SCRA 499) decided later on August 19, 1986, the Supreme Court returned to the rule that there was a need for a judicial declaration of nullity of a void marriage. Then, in a later case, *Yap v. Court of Appeals* (145 SCRA 229), decided on October 28, 1986, the Supreme Court again reverted to the rule that there was no need for a judicial declaration of nullity of a void marriage. Finally, on August 3, 1988, the Family Code took effect which provides in Article 40 thereof that "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"; thus, by statute, the rule now is that there is a need for a judicial declaration of nullity of a void marriage only for purposes of remarriage.

As a consequence of these changing rules, the status of a subsequent marriage depends upon the time of the solemnization of the said subsequent marriage. *For example*, Juan and Ana were married to each other on September 2, 1952. The marriage was, however, void because there was no marriage license. Without having his marriage with Ana judicially declared null and void, Juan married Gina. The following scenarios can happen, thus:

1) If Juan married Gina on March 7, 1960, this subsequent marriage is valid because, at the time of the second marriage ceremony, the prevailing rule is the doctrine laid down in the *Mendoza* and *Aragon* cases allowing the validity of the subsequent marriage of Juan and Gina without need of a judicial declaration of nullity of Juan's previous void marriage with Ana.

2) If Juan married Gina on March 7, 1972, this subsequent marriage is void because, at the time of the second marriage ceremony, the prevailing rule is the doctrine laid down in the *Gomez* and *Conseguera* cases requiring a judicial declaration of nullity of Juan's previous void marriage with Ana.

3) If Juan married Gina on March 7, 1978, this subsequent marriage is valid because, at the time of the second marriage ceremony, the prevailing rule is the doctrine laid down in the *Odayat* case reasserting the rule in the *Mendoza* and *Aragon* cases allowing the validity of the subsequent marriage of Juan and Gina without need of a judicial declaration of nullity of Juan's previous void marriage with Ana (See *Ty v. Court of*

Appeals, G.R. No. 127406, November 27, 2000; *Apiag v. Cantero*, 268 SCRA 1997).

4) If Juan married Gina on March 7, 1985, this subsequent marriage is valid because, at the time of the second marriage ceremony, the prevailing rule is the doctrine laid down in the *Tolentino* case reasserting the rule in the *Odayat*, *Mendoza* and *Aragon* cases allowing the validity of the subsequent marriage of Juan and Gina without need of a judicial declaration of nullity of Juan's previous void marriage with Ana.

5) If Juan married Gina on September 15, 1986, this subsequent marriage is void because, at the time of the second marriage ceremony, the prevailing rule is the doctrine laid down in the *Wiegel* case reasserting the rule in the *Gomez* and *Conseguera* cases requiring a judicial declaration of nullity of Juan's previous void marriage with Ana.

6) If Juan married Gina on December 26, 1986, this subsequent marriage is valid because, at the time of the second marriage ceremony, the prevailing rule is the doctrine laid down in the *Yap* case reasserting the rule in the *Odayat*, *Mendoza* and *Aragon* cases allowing the validity of the subsequent marriage of Juan and Gina without need of a judicial declaration of nullity of Juan's previous void marriage with Ana.

7) If Juan married Gina on March 7, 1991, this subsequent marriage is void because, at the time of the second marriage ceremony, the prevailing rule is Article 40 of the Family Code which provides that "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" reasserting the doctrine laid down in the *Wiegel*, *Gomez* and *Conseguera* cases requiring a judicial declaration of nullity of Juan's previous void marriage with Ana (See *Atienza v. Brilliantes*, 60 SCAD 119, 243 SCRA 32; *Terre v. Terre*, 211 SCRA 7).

The Supreme Court, in the case of *Domingo v. Court of Appeals, et al.*, 44 SCAD 955, 226 SCRA 572, had the occasion to discuss the reason for the need to obtain a judicial declaration of nullity for purposes of remarriage and the proper interpretation of Article 40 of the Family Code. After tracing the changing doctrines in relation to the need of obtaining a judicial declaration of nullity, the Supreme Court said:

> Came the Family Code which settled once and for all the conflicting jurisprudence on the matter. A declaration of the absolute nullity of a marriage is now explicitly required

either as a cause of action or a ground for defense. 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.

The Family Law Revision Committee and the Civil Code Revision Committee which drafted what is now the Family Code of the Philippines took the position that parties to a marriage should not be allowed to assume that their marriage is void even if such be the fact but must first secure a judicial declaration of the nullity of their marriage before they can be allowed to marry again. This is borne out by the following minutes of the 152nd Joint Meeting of the Civil Code and Family Code Committees where the present Article 40, then Art. 39, was discussed.

"B. Article 39. —

The absolute nullity of a marriage may be invoked only on the basis of a final judgment declaring the marriage void, except as provided in Article 41.

Justice Caguioa remarked that the above provision should include not only void but also voidable marriages. He then suggested that the above provision be modified as follows:

> The validity of a marriage may be invoked only . . .

Justice Reyes (J.B.L. Reyes), however, proposed that they say:

> The validity or invalidity of a marriage may be invoked only . . .
>
> On the other hand, Justice Puno suggested that they say:
>
> The invalidity of a marriage may be invoked only . . .

Justice Caguioa explained that his idea is that one cannot determine for himself whether or not his marriage is valid and that a court action is needed. Justice Puno accordingly proposed that the provision be modified to read:

> The invalidity of a marriage may be invoked only on the basis of a final judgment annulling the marriage or declaring the marriage void, except as provided in Article 41.

Justice Caguioa remarked that in annulment, there is no question. Justice Puno, however, pointed out that, even if it is a judgment of annulment, they still have to produce the judgment.

Justice Caguioa suggested that they say:

> The invalidity of a marriage may be invoked only on the basis of a final judgment declaring the marriage invalid, except as provided in Article 41.

Justice Puno raised the question: When a marriage is declared invalid, does it include the annulment of a marriage and the declaration that the marriage is void? Justice Caguioa replied in the affirmative. Dean Gupit added that in some judgments, even if the marriage is annulled, it is declared void. Justice Puno suggested that this matter be made clear in the provision.

Prof. Baviera remarked that the original idea in the provision is to require first a judicial declaration of a void marriage and not annullable marriages, with which the other members concurred. Judge Diy added that annullable marriages are presumed valid until a direct action is filed to annul it, which the other members affirmed. Justice Puno remarked that if this is so, then the phrase 'absolute nullity' can stand since it might result in confusion if they change the phrase 'invalidity' if what they are referring to in the provision is the declaration that the marriage is void.

Prof. Bautista commented that they will be doing away with collateral defense as well as collateral attack. Justice Caguioa explained that the idea in the provision is that there should be a final judgment declaring the marriage void and a party should not declare for himself whether or not the marriage is void, which the other members affirmed. Justice Caguioa added that they are, therefore, trying to avoid a collateral attack on that point. Prof. Bautista stated that there are actions which are brought on the assumption that the marriage is valid. He then asked: Are they depriving one of the rights to raise the defense that he has no liability because the basis of the liability is void? Prof. Bautista added that they cannot say that there will be no judgment on the validity or invalidity of the marriage because it will be taken up in the same proceeding. It will not be a unilateral declaration that it is a void marriage. *Justice Caguioa saw the point of Prof. Bautista and suggested that they limit the provision to remarriage.* He then proposed that Article 39 be reworded as follows:

> The absolute nullity of a marriage for purposes of remarriage may be invoked only on the basis of final judgment . . .

Justice Puno suggested that the above be modified as follows:

> The absolute nullity of a previous marriage may be invoked for purposes of establishing the validity of a subsequent marriage only on the basis of a final judgment declaring such previous marriage void, except as provided in Article 41.

Justice Puno later modified the above as follows:

> For the purpose of establishing the validity of a subsequent marriage, the absolute nullity of a previous marriage may only be invoked on the basis of a final judgment declaring such nullity, except as provided in Article 41.

Justice Caguioa commented that the above provision is too broad and will not solve the objection of Prof. Bautista. He proposed that they say:

> For the purpose of entering into a subsequent marriage, the absolute nullity of a previous marriage may only be invoked on the basis of a final judgment declaring such nullity, except as provided in Article 41.

Justice Caguioa explained that the idea in the above provision is that if one enters into a subsequent marriage without obtaining a final judgment declaring the nullity of a previous marriage, said subsequent marriage is void *ab initio.*

After further deliberation, Justice Puno suggested that they go back to the original wording of the provision as follows:

> The absolute nullity of a previous marriage may be invoked for purposes of remarriage only on the basis of a final judgment declaring such previous marriage void, except as provided in Article 41."

In fact, the requirement for a declaration of absolute nullity of a marriage is also for the protection of the spouse who, believing that his or her marriage is illegal and void, marries again. With the judicial declaration of the nullity of his or her first marriage, the person who marries again cannot be charged with bigamy.

Just over a year ago, the Court made the pronouncement that there is a necessity for a judicial declaration of absolute

nullity of a prior subsisting marriage before contracting another in the recent case of *Terre v. Terre* (211 SCRA 6). The Court, in turning down the defense of respondent Terre who was charged with grossly immoral conduct consisting of contracting a second marriage and living with another woman other than complainant while his prior marriage with the latter remained subsisting, said 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."

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." (n)

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 the 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 the 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 children and the delivery of the latters' 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 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 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" (Article 11 of the Family Code).

Significantly, Article 40 of the Family Code, which is a rule of procedure (*Atienza v. Brillantes, Jr.*, 60 SCAD 119, 243 SCRA 32), in effect states that the only acceptable proof of the nullity of a first marriage for purposes of remarriage is a judicial declaration of nullity (*Domingo v. Court of Appeals*, 44 SCAD 955, 226 SCRA 572). Article 40, in relation to Articles 52 and 53, has the effect of making the subsequent marriage void if it were contracted before the declaration of nullity of the first void marriage. The aim of Article 40, in requiring for purposes of remarriage a judicial declaration of nullity by final judgment of the previously contracted void marriage, is "to do away with any continuing uncertainty on the status of the second marriage" (*Valdes v. RTC,* 72 SCAD 967, 260 SCRA 221). The second marriage shall likewise be void.

In *De Castro v. Assidao-De Castro*, G.R. No. 160172, February 13, 2008, 545 SCRA 162, the Supreme Court ruled that in a case for support, a lower court can declare a marriage void even without prior judicial declaration of nullity of a void marriage filed in a separate action considering that the determination of the issue on the validity of marriage was important in the resolution of the right of the child to be supported. This is so because the validity of a marriage, as a general rule, can be collaterally attacked. It reiterated however the ruling in the *Domingo* case, *supra,* that, for purposes of remarriage, the only acceptable proof is a judicial declaration of nullity of marriage.

ARTICLE 40 AND BIGAMY. The law distinctly separated the provisions of a subsequent void marriage contracted while a previous void marriage is still subsisting, which is contained in Articles 40 in relation to Articles 52 and 53, from the provisions on void bigamous marriage, which are contained in Article 35(4) and Article 41. All of these provisions contemplate a situation where the subsequent marriage is void but they differ on the status of the first marriage.

If the first marriage is void and a party to that first marriage subsequently remarries without obtaining a judicial declaration of nullity of the first marriage, there is no doubt that the subsequent marriage is likewise void. It is void not because it is bigamous but because it failed to comply with the requirements under Article 40

(See *Valdes v. RTC*, 72 SCAD 967, 260 SCRA 221) and, pertinently, Articles 52 and 53. Thus, if the contracting parties marry without a marriage license and they do not fall under the exceptions for obtaining a valid marriage license, their marriage is void on the ground of absence of a formal requirement namely: a valid marriage license. If one of them remarries without procuring a judicial declaration of nullity of the first marriage, the subsequent marriage is void not because it is bigamous but because it violates Article 40 in relation to Articles 52 and 53. Article 40 *does not provide or expressly declare or define* that a subsequent void marriage obtained in violation of Article 40 is bigamous. This is precisely because there is no bigamy if the first marriage is void and Article 40 precisely contemplates a situation where the first marriage is void.

On the other hand, a subsequent void bigamous marriage contemplates a situation where such subsequent marriage was contracted at the time when the first marriage, which is valid in all respects, was still subsisting. A void bigamous marriage therefore involves a situation where the first marriage is not void but completely valid or at least annullable.

In other words, in a bigamous void marriage, the subsisting first marriage is valid, while in Article 40 in relation to Articles 52 and 53, the subsisting first marriage is void.

It is very interesting to note however that, in *Nicdao Cariño v. Cariño,* G.R. No. 132529, February 2, 2001, the Supreme Court, while acknowledging that the previous marriage was void for having been solemnized without a marriage license, nevertheless stated that the subsequent marriage of one of the parties was bigamous because the first marriage, though void, was still presumed to be valid considering that there was no judicial declaration of nullity of the first marriage. Accordingly, the Supreme Court applied the property regime under Article 148. This particular decision creates confusion for, in making the presumption, there seems to be no more distinction between the voidness of the subsequent marriage under Article 40 and the voidness of the subsequent marriage due to bigamy under Article 41. By the statement of the Supreme Court presuming the validity of the first marriage, though it is indeed void due to lack of marriage license, it obfuscates the difference between Articles 40 and 41. The question now is this: if the first marriage will always be presumed valid, though it is clearly void, would there still be any difference between Article 40 and bigamy under Article 41? Is it not the law in Article 40 that there is precisely no judicial

declaration of nullity of the first void marriage? If in such case all subsequent marriages shall be considered void on the ground of bigamy anyway, what then would be the usefulness of Article 40 especially in the light of the doctrine laid down in the *Valdez v. RTC case*, 260 SCRA 221, that the subsequent void marriage in Article 40 is a very exceptional void marriage? It is submitted therefore that, despite the decision of the Supreme Court in the *Nicdao Cariño* case, the basic difference between Article 40 and Article 41 must still be maintained.

ARTICLE 40 AND CRIMINAL BIGAMY. The crime of bigamy under our laws is committed by 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 proceeding (Article 349 of the Revised Penal Code). The crime of bigamy therefore contemplates a situation where the first marriage is valid or at least annullable and not void from the beginning. It likewise contemplates a situation where the subsequent marriage would have been valid had it not been bigamous. Hence, if the second marriage is likewise void because of legal grounds other than bigamy, there can be no crime of bigamy. It must likewise be pointed out that good faith in contracting the second marriage is a defense in the crime of bigamy.

However in the case of *Mercado v. Mercado*, G.R. No. 137110, August 1, 2000, 337 SCRA 122, the Supreme Court held that the criminal offense of bigamy is committed for as long as a subsequent marriage was contracted by a person without him or her obtaining a judicial declaration of nullity of his or her first marriage pursuant to Article 40 of the Family Code. The Supreme Court did not find it material to focus on the nullity of the first marriage but instead merely reasoned that, for as long as Article 40 of the Family Code was not complied with, the subsequent marriage will always be criminally bigamous. Hence, the ruling, in effect, states, that criminal bigamy is determined not by the fact that the first marriage is really legally void but by the fact that no judicial declaration of nullity of the first marriage was obtained prior to the subsequent marriage. This decision is the subject of a strong dissenting opinion of Associate Justice Jose Vitug. He stated that the criminal law on bigamy contemplated an existing marriage or at least an annullable or voidable one but not a null and void one. When the criminal law on bigamy referred to a "legally dissolved" marriage, it clearly contemplates a marriage which is at least annullable or voidable

but not void. He observed that, it has been a sound rule in criminal law that a void marriage is a defense in a criminal bigamy case regardless of whether or not a judicial declaration of its nullity has been obtained. This is so because the criminal law on bigamy, as explained by the Supreme Court in the case of *People v. Aragon*, 100 Phil. 1033, does not require a judicial declaration of nullity in order to set up the defense of the nullity marriage in cases of criminal bigamy. He stated that the total nullity and inexistence of a void marriage "should be capable of being independently raised by way of a defense in a criminal case for bigamy." He observes that there is "no incongruence between this rule in criminal law and of the Family Code and each may be applied within the respective spheres of governance."

The dissenting opinion of Associate Justice Jose Vitug in the *Mercado* case appears to be the correct rule. While the accused may have violated Article 40, such violation is not a bar in invoking the nullity of the first marriage because Article 40 merely aims to put certainty as to the void status of the subsequent marriage and is not aimed as a provision to define bigamy under the Family Code or criminal bigamy under the Revised Penal Code. The only effect of the non-observance of Article 40 is to make the subsequent marriage void pursuant to Articles 52 and 53.

Relevantly, in an earlier case entitled *People v. Cobar*, CA-G.R. No. 19344, November 10, 1997, the Court of Appeals had occasion to discuss the crime of bigamy and Article 40, which is in consonance with the opinion of Justice Jose Vitug. The pertinent portions of the well-written decision are as follows:

> Is a party to a void marriage who remarries without a prior judicial declaration of nullity of such marriage guilty of bigamy?
>
> Accused Vicente Y. Cobar poses the above question in his appeal from the decision in Criminal Case No. 1268 of the Regional Trial Court, 10th Judicial Region Branch 13, at Oroquieta City, the dispositive portion of which reads as follows:
>
> > WHEREFORE, finding him guilty beyond reasonable doubt of the crime of bigamy under Article 349 of the Revised Penal Code and applying the provisions of the Indeterminate Sentence Law, the Court hereby sentences accused Vicente Y. Cobar as principal, to suffer an indeterminate penalty of imprisonment from ONE (1) YEAR of *prision correccional* as its

> minimum to EIGHT (8) YEARS and ONE (1) DAY of *prision mayor* as maximum with the necessary penalty provided for by law and to pay the costs.

Briefly stated in chronological order are the pertinent facts which are not in dispute:

In September 1964, Marriage License No. 3942696 was issued at Marawi City in favor of appellant Vicente Y. Cobar and Rosalita Decena (Exh. 1-D).

On September 1, 1965 or about a year later, the two were married before Marawi City Judge Demetrio B. Benitez (Exh. 2).

On July 19, 1991, appellant contracted a second marriage with co-accused Genara Herodias. The marriage was solemnized by Judge Triumfo Velez of the Municipal Circuit Trial Court of Sapang Dalaga, Misamis Occidental (Exh. A). At that time, appellant's marriage with Rosalita Decena had not been judicially declared void *ab initio*.

To this day, Rosalita Decena is still alive.

Under the foregoing facts, is appellant liable for bigamy as defined and penalized under Article 349 of the Revised Penal Code?

The court *a quo* believes so, this despite its ruling, which we find to be in accord with law and the evidence, that accused Vicente Cobar and his first wife Rosalita Decena not having made use of their marriage license No. 3942490 within the limited period of 120 days from its issuance in September 1964 ("Exhibit 1-D"), the same was automatically cancelled thereafter and their marriage contracted on September 1, 1965 (Exhibit "D-4") was deemed solemnized without a license and as such void from the beginning pursuant to paragraph 3 of Article 35 of the Family Code or paragraph 3 of Article 80 of the New Civil Code.

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Not in agreement with the court *a quo*, the Solicitor General recommends appellant's acquittal for the following reasons:

> An accused is entitled to acquittal unless his guilt is proven beyond reasonable doubt (*People v. Dupali,* 48 SCAD 269, 230 SCRA 621). In this case, it was established as a fact that appellant's supposed first marriage was void *ab initio;* hence, he was never legally married to Rosalita Decena. However, the trial court convicted appellant based

on the Supreme Court's pronouncement in *Domingo vs. Court of Appeals, supra.*

The trial court's reliance on Domingo is misplaced. The pronouncements thereon has no relevance to a prosecution for bigamy. The petition which gave rise to the aforesaid decision "seeks the reversal of respondent court's (Court of Appeals) ruling finding no grave abuse of discretion in the lower court's order denying petitioner's motion to dismiss the petition for declaration of nullity of marriage and separation of property" (on p. 574). The Supreme Court summarized the issues confronting it in said case as follows:

> *"First,* whether or not a petition for judicial declaration of a void marriage is necessary. If in affirmative, whether the same should be filed only for purposes of remarriage.
>
> *Second,* whether or not SP No. 1989-5 is the proper remedy of private respondent to recover certain real and personal properties allegedly belonging to her exclusively (on p. 577)."

The *Domingo v. Court of Appeals* case is the authority for the rule that "in the instance where a party who has previously contracted a marriage which remains subsisting desires to enter into another marriage 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 (on p. 584); otherwise, said subsequent marriage is void *ab initio*. However, 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 latter's presumptive legitime, (i)n such cases, 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" (on pp. 583-584).

In convicting appellant, the trial court disregarded the doctrine laid down in Domingo and

> focused wholly on the Supreme Court's casual comment which actually cited the opinion of J. Alicia V. Sempio-Diy, found on page 46 of her book Handbook On the Family Code of the Philippines, stating that Article 40 of the Family Code is "also for the protection of the spouse who believing that his or her marriage is null and void, marries again and (w)ith the judicial declaration of the nullity of his or her first marriage, the person who marries again cannot be charged with bigamy."
>
> Article 40 of the Family Code states:
>
> > "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 foregoing opinion of J. Sempio-Diy only means that getting a court judgment declaring a previous marriage void *ab initio* makes matters clear between the parties and thus prevent the person who contracted a subsequent marriage from being exposed to a prosecution for bigamy. This is so because without such court declaration the other party to the previous marriage of his/her heirs naturally might contend that said marriage is valid, hence, raising doubts that the subsequent marriage could be bigamous.
>
> x x x x x x x x x
>
> It being established that appellant's first marriage is void *ab initio* for lack of a valid marriage license at the time of its celebration, appellant is not liable for bigamy because the element that there should be a first valid marriage when he contracted the second one is lacking (pp. 59-63, *Rollo*).

We share the view of the Solicitor General.

In addition to the reasons given in support thereof, we shall state our own justification for that view.

Bigamy is committed by "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" (Article 349, RPC).

Thus, constitutive of said crime are the following essential ingredients:

FIRST: The offender has been legally married.

This means that the former marriage is either valid or voidable, the latter being presumed valid until it is judicially annulled. Thus, in *People v. Mendoza*, 95 Phil. 845, it was held that a prosecution for bigamy based on a void marriage will not lie. And in *People v. Aragon,* 100 Phil. 1033, the Supreme Court reiterated its ruling in *Mendoza* that "no judicial decree is necessary to establish its invalidity as distinguished from mere annullable marriages."

SECOND: The marriage has not been legally dissolved or in case his or her spouse is absent, the absent spouse could not yet be presumed dead according to the Civil Code.

The term legally dissolved used in Article 349 presupposes a prior valid or voidable marriage. Such marriage is dissolved upon the death of either spouse and in case of a voidable marriage, by the annulment thereof. The term could not be deemed to embrace a marriage which is void *ab initio* because this is considered non-existent. Of course for purposes of remarriage, there is a necessity for a judicial declaration of nullity of a void marriage. But such declaration does not dissolve the marriage; it merely confirms its nullity or non-existence.

THIRD: The offender contracts a second or subsequent marriage.

FOURTH: The second or subsequent marriage has all the essential requisites for validity.

An indispensable requisite to the validity of a marriage contracted subsequent to a void one is a final judgment declaring the former marriage a nullity (Article 40, Family Code), which must be recorded in the appropriate civil registry (Article 52, *Ibid.*). Without such declaration and registration, the subsequent marriage shall be null and void (Article 53, *Ibid.*).

Clearly, appellant is entitled to an acquittal because of the absence of the first and fourth elements of bigamy. The nullity of appellant's first marriage to Rosalita Decena is obvious from the marriage certificate, Exhibit "1," which shows that the marriage license had already expired at the time of its celebration. Far from proving that appellant is legally married to Rosalita Decena, the prosecution's evidence indubitably shows otherwise.

As regards the fourth element, it must be emphasized that appellant's subsequent marriage to Genara Herodias is void not because it is bigamous but for his failure to comply with Articles

40 and 52 of the Family Code which require, as additional requisites for its validity, a judicial declaration of nullity of the former marriage and the registration of the judgment with the civil registry.

This is not to say, however, that a party to a void marriage who remarries without such marriage being first judicially declared a nullity incurs no criminal liability. Prior to the effectivity of the Family Code, not only would the party contracting such marriage be free from any penal sanction: his subsequent marriage would also be considered valid, a judicial declaration of nullity of the former marriage being then unnecessary. This no longer holds true in view of the provisions of Articles 40, 52 and 53 thereof. Without such judicial declaration and its registration with the civil registry, the subsequent marriage will be null and void. What is more, the party contracting such marriage will be guilty of the crime defined and penalized under Article 350 of the Revised Penal Code, which provides *inter alia* as follows:

> Art. 350. *Marriage contracted against provisions of laws.* — The penalty of *prison correccional* in its medium and maximum periods shall be imposed upon <u>any person who, without being included in the provisions of the next preceding article, shall contract marriage knowing that the requirements of the law have not been complied with</u> or that the marriage is in disregard of a legal impediment. (Underscoring supplied)

It is not disputed that appellant entered into a subsequent marriage with Genara Herodias knowing that he had not complied with the requirements of Articles 40 and 52 of the Family Code. Undoubtedly, his acts come squarely within the purview of Article 350 not Article 349, of the Revised Penal Code. However, while the offense penalized under Article 350 is of lesser gravity than bigamy, it is not necessarily included in the latter. Hence, appellant may not be convicted of a violation of Article 350 under the information charging him with bigamy.

We are aware of the strong dissent of Justice Alex Reyes in Mendoza to the effect 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."

It is worthy to note, however, that in Aragon, the majority of the Supreme Court while acknowledging the weighty reasons for the dissent, rejected it for the following reasons:

> We are aware of the very weighty reasons expressed by Justice Alex Reyes in his dissent in the case above-quoted. But these weighty reasons notwithstanding the very fundamental principle of strict construction of penal laws in favor of the accused, which principle we may not ignore seems to justify our stand in the above-cited case of *People v. Mendoza.* 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 already adverted to.
>
> To our mind, these reasons remain valid.

And so, it is our opinion that the rule enunciated in *Mendoza* reiterated in *Aragon*, still prevails, this notwithstanding the provisions of the Family Code particularly Articles 40, 52 and 53 thereof and the prouncements of the Supreme Court in *Consuegra v. GSIS,* 37 SCRA 315; *Weigel v. Sempio-Diy*, 134 SCRA 499; *Terre v. Terre*, 211 SCRA 6; and *Domingo v. CA*, 44 SCAD 455, 226 SCRA 572.

The provisions of the Family Code on judicial declaration of nullity of a void marriage and its registration with the proper civil registry merely impose additional requisites for the validity of a subsequent marriage contracted by a party to a void marriage and are not meant to change the concept of bigamy or its elements.

As to the cases of *Consuegra, Weigel, Terre,* and *Domingo*, suffice it to stress that these do not involve prosecutions for bigamy. Consequently, any pronouncement made therein tending to imply that, in a case for bigamy, a judicial declaration is the only admissible proof of the nullity of the former marriage, would merely be an *obiter dictum* and as such, could not prevail over the rule enunciated by the Supreme Court in Mendoza.

Article 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 disap-

pearance 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 purposes of contracting the subsequent marriage under the preceding paragraph, the spouse present must institute a summary proceeding as provided for in this Code for the declaration of presumptive death of the absentee, without prejudice to the effect of reappearance of the absent spouse. (83a)

Article 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)

BIGAMOUS MARRIAGE. As a general rule, a marriage contracted during the lifetime of the first spouse is null and void (*Gomez v. Lipana*, 33 SCRA 615). A person who marries another, knowing that the latter is already married and that his marriage is valid and subsisting, can be prosecuted for bigamy (*People v. Archilla*, 1 SCRA 698). Even if the first marriage is annullable or voidable, any subsequent marriage celebrated without such prior annullable or voidable marriage being in fact annulled, is bigamous and therefore void *ab initio.* When the law states "the subsistence of a previous marriage," the said phrase necessarily implies a valid marriage. It does not mean a void marriage because the same is technically nonexistent. If the previous marriage is void and there is a subsequent marriage without judicial declaration of nullity of the first void marriage, the subsequent marriage is also void technically because it does not comply with Articles 40, 52, and 53 and not because it is

bigamous. However in the *Nicdao Carino (supra)* and the *Mercado* case *(supra)*, the Supreme Court appeared to have said that, for as long as, the first void marriage is not judicially declared void, any subsequent marriage is also bigamous.

EXCEPTION. A "bigamous" marriage may be considered valid if, prior to the subsequent marriage and without prejudice to the effect of the reappearance of the other spouse, the present spouse obtains a judicial declaration of presumptive death via a summary proceeding in a court of competent jurisdiction. But before such declaration can be obtained, it must be shown that the prior spouse had been absent for four consecutive years and the present spouse had a well founded belief that the absent spouse is dead. The period is shortened to two years in case of disappearance where there is danger of death under the circumstances set forth in Article 391 of the Civil Code. These circumstances are when the absent spouse was on a vessel and the same was lost during a sea voyage and he has not been heard of for two years since the loss; when the absent spouse was on an airplane which was missing and such spouse was not heard of for two years since the loss of the airplane; when the absent spouse who was in the armed forces has taken part in the war and has been missing for two years; and when the absent spouse has been in danger of death under other circumstances.

The judicial declaration of presumptive death is without prejudice to the effect of reappearance of the absent spouse. It must be remembered that the judicial declaration is merely a statement to the effect that the prior spouse is merely presumed dead. The declared presumption will still be only *prima facie*, and can be overthrown by evidence (*People v. Archilla*, 1 SCRA 698). Hence, the fact of death is not really established.

A judicial declaration of presumptive death is a new requirement under the Family Code. It was not required in the Civil Code which the Family Code amended (*Valdez v. Republic,* G.R. No. 180863, September 8, 2009).

TERMINATION OF THE SUBSEQUENT MARRIAGE. Unless there is a judgment annulling the previous marriage or declaring it void *ab initio,* automatic termination of the subsequent marriage can be obtained by the recording of the affidavit of reappearance of the absent spouse in the civil registry of the residence of the parties to the subsequent marriage pursuant to Article 42. This is the only instance where a marriage is terminated extra-judicially. In case

the reappearance is disputed, the same shall be subject to judicial determination.

If, however, the spouse reappeared and he or she or any interested party does not file an affidavit or sworn statement with the civil register of the fact of reappearance, there will technically exist two valid marriages. It is at this point where a valid "bigamous" marriage shall exist if the marriage between the present spouse and the reappearing spouse is in itself valid. However, if the marriage between them is also void, there is no subsequent valid bigamous marriage.

LIQUIDATION OF THE PROPERTIES OF THE FIRST MARRIAGE. Under Article 41 of the Family Code, the judicial declaration of presumptive death should be issued for the purpose of contracting the subsequent marriage. After the issuance of this judicial declaration, the properties of the first marriage should be liquidated using by analogy the provisions of Articles 103 and 130 of the Family Code if the marriage to be liquidated is in itself valid. If there is no liquidation and the present spouse immediately remarries, the property regime that will apply in the subsequent marriage will be the complete separation of property. However if there were a liquidation, the parties may agree in the settlement as to what type of property regime will govern their marital relationship and, in the absence of such marriage settlement or when the latter is void, the spouses shall be governed by the absolute community of property regime. If the marriage is void, then the rules of co-ownership will apply and the properties will be liquidated in accordance with the said rules.

For purposes of opening the succession of the absent spouse after the community property of the first marriage has been liquidated, the second paragraph of Article 390 of the Civil Code will apply stating that "the absentee shall not be presumed dead for purposes of opening his succession till after an absence of ten years. If he disappeared after the age of seventy-five years, an absence of five years shall be sufficient in order that his succession may be opened." If the absentee disappears under circumstances where the risk of death is high as provided in Article 391 of the Civil Code, four years shall be enough for purposes of the division of the estate. But if the person proves to be alive, Rule 73, Section 4 of the Rules of Court provides that "he shall be entitled to the balance of his estate after payment of all his debts. The balance may be recovered by motion in the same proceeding."

WELL-FOUNDED BELIEF OF DEATH. A comparison of Article 41 with the repealed Article 83(3) of the Civil Code shows the following crucial differences. Under Article 41, the time required for the presumption to arise has been shortened to four (4) years; however, there is a 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 required either that there be no news that such absentee was still alive, or the absentee was generally considered to be dead and believed to be so by the spouse present, or was 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 (*Republic of the Philippines v. Gregorio Nolasco*, 220 SCRA 20).

The requirement of "well-founded belief" depends on the circumstances of the case. In the case of *Republic of the Philippines v. Gregorio Nolasco*, 220 SCRA 20, the Supreme Court discussed the concept of "well-founded belief." In that case, a Filipino seaman wanted to get a judicial declaration of presumptive death from the court relative to his missing English spouse. The Supreme Court ruled that the Filipino seaman failed to conduct a search for the missing wife with such diligence to give rise to a "well-founded belief" that she was dead. Pertinently, the Supreme Court stated:

> *United States v. Biasbas* (25 Phil. 71) is instructive as to the degree of diligence required in searching for a missing spouse. In that case, defendant Macario Biasbas was charged with the crime of bigamy. He set up the defense of a good faith belief that his first wife had already died. The Court held that defendant had not exercised due diligence to ascertain the whereabouts of his first wife, noting that:
>
> > "While the defendant testified that he had made inquiries concerning the whereabouts of his wife, he fails to state of whom he made such inquiries. He did not even write to the parents of his first wife, who lived in the Province of Pampanga, for the purpose of securing information concerning her whereabouts. He admits that he had a suspicion only that his first wife was dead. He admits that the only basis of his suspicion was the fact that she had been absent. x x x "
>
> In the case at bar, the Court considers that the investigation allegedly conducted by respondent in his attempt to ascer-

tain Janet Monica Parker's whereabouts is too sketchy to form the basis of a reasonable or well-founded belief that she was already dead. When he arrived in San Jose, Antique after learning of Janet Monica's departure, instead of seeking the help of local authorities or of the British Embassy, he secured another seaman's contract and went to London, a vast city of many millions of inhabitants, to look for her there. x x x.

Respondent's testimony, however showed that he confused London for Liverpool and this casts doubt on his supposed efforts to locate his wife in England. The Court of Appeal's justification of the mistake, to wit:

> "x x x. Well, while the cognoscente (sic) would readily know the geographical difference between London and Liverpool, for a humble seaman like Gregorio the two places could mean one place in England, the port where his ship docked and where he found Janet. Our own provincial folks, every time they leave home to visit relatives in Pasay City, Kalookan City, or Parañaque, would announce to friends and relatives, 'We're going to Manila.' This apparent error in naming of places of destination does not appear to be fatal,

is not well taken. There is no analogy between Manila and its neighboring cities, on the one hand, and London and Liverpool, on the other, which, as pointed out by the Solicitor General, are around three hundred fifty (350) kilometers apart. We do not consider that walking into a major city like Liverpool or London with a simple hope of somehow bumping into one particular person there — which is in effect what Nolasco says he did — can be regarded as a reasonably diligent search.

The Court also views respondent's claim that Janet Monica declined to give any information as to her personal background even after she had married the respondent too convenient an excuse to justify his failure to locate her. The same can be said of the loss of the alleged letters respondent had sent to his wife which respondent claims were all returned to him. Respondent said he had lost these returned letters, under unspecified circumstances.

Neither can this Court give much credence to respondent's bare assertion that he had inquired from their friends of her whereabouts, considering that respondent did not identify those friends in his testimony. The Court of Appeals ruled that since the prosecutor failed to rebut this evidence during trial, it is good evidence. But this kind of evidence cannot, by its nature, be rebutted. In any case, admissibility is not

> synonymous with credibility. As noted before, there are serious doubts to respondent's credibility. Moreover, even if admitted as evidence, said testimony merely tended to show that the missing spouse had chosen not to communicate with their common acquaintances and not that she was dead.
>
> Respondent testified that immediately after receiving his mother's letter sometime in January 1983, he cut short his employment contract to return to San Jose, Antique. However, he did not explain the delay of nine (9) months from January 1983, when he allegedly asked leave from his captain, to November 1983 when he finally reached San Jose. Respondent, moreover, claimed he married Janet Monica Parker without inquiring about her parents and their place of residence. Also, respondent failed to explain why he did not even try to get help of the police or other authorities in London and Liverpool in his effort to find his wife. The circumstances of Janet Monica's departure and respondent's subsequent behaviour make it very difficult to regard the claimed belief that Janet Monica was dead a well-founded one x x x.
>
> x x x Since respondent failed to satisfy the clear requirements of the law, his petition for judicial declaration of presumptive death must be denied."

Also, in the case of *Republic v. Court of Appeals*, G.R. No. 159614, December 9, 2005, 477 SCRA 277, where the person seeking a judicial declaration presented only the Barangay Captain, but did not present the persons from whom he allegedly made inquiries, and did not even make inquiries with his parents-in-law who knew of his wife's abandonment of the conjugal abode, the Supreme Court ruled that there was a failure to prove a well-founded belief that the wife was already dead.

JUDICIAL DECLARATION OF PRESUMPTIVE DEATH. As a general rule, no judicial declaration of presumptive death is required as such presumption arises from the law (*In Re Szatraw*, 81 Phil. 461). Under Articles 390 and 391 of the Civil Code, it is provided that, after an absence of seven years, it being unknown whether or not the absentee still lives, he shall be presumed dead for all purposes except for those of succession, in which case, the absentee shall not be presumed dead till after an absence of ten years. It is shortened to five years if he disappears after the age of seventy-five. In cases where the disappearance happened under circumstances described in Article 391 of the Civil Code where the risk of death is high, the period to have an absentee presumed dead, including for purposes of succession, is only four (4) years. It is only in Article 41

of the Family Code that a judicial declaration of presumptive death is mandatorily required by law to be obtained by the present spouse only for the purpose of capacitating the present spouse to remarry. The judicial proceeding shall be summary in nature in accordance with Article 253. For purposes of remarriage, the period of absence to be able to presume an absentee dead has been shortened to a normal period of four (4) consecutive years and two (2) consecutive years, if the disappearance occurred under circumstances described in Article 391 of the Civil Code where the danger of death is high. Such judicial declaration of presumptive death is the best evidence of the "well-founded belief" on the part of the present spouse that the absent spouse is dead. It immunizes the present spouse from being charged of bigamy, adultery or concubinage (*Manuel v. People*, G.R. No. 165842, November 29, 2005, 476 SCRA 461).

SWORN STATEMENT OF REAPPEARANCE. If the absent spouse reappears, such spouse can easily terminate the subsequent marriage by executing a sworn statement or affidavit of the fact and circumstance of such reappearance and recording the same with due notice to the spouses of the subsequent marriage. The subsequent marriage is automatically terminated by the recording of the affidavit of reappearance in the civil registry of the residence of the parties to the subsequent marriage. Also, any interested party may file this sworn statement of reappearance. This includes their parents, their children, the present spouse and even the subsequent spouse of the present spouse. The parents and children of the other contracting spouse in the subsequent marriage are also interested parties.

In the case of *Social Security System v. Jarque Vda. De Bailon*, 485 SCRA 376, March 24, 2006, the Supreme Court said:

> If the absentee reappears, but no step is taken to terminate the subsequent marriage, either by affidavit or by court action, such *absentee's mere reappearance, even if made known to the spouses in the subsequent marriage, will not terminate such marriage.* Since the second marriage has been contracted because of a presumption that the former spouse is dead, such presumption continues inspite of the spouse's physical reappearance, and by *fiction of law, he or she must still be regarded as legally an absentee until the subsequent marriage is terminated as provided by law.*

Nothwithstanding the view of the Supreme Court that the presumption of death will subsist upon the appearance of the absentee

prior to the filing of the sworn statement of reappearance, it is submitted that the better view is that if the reappearance of the absent spouse is authentic, the judicial declaration of presumptive death is immediately rendered *functus officio*. The mere fact of reappearance renders without effect the judicial declaration of presumptive death creating therefore a valid bigamous marriage prior to the filing of the sworn statement of reappearance

While the law provides that the termination of the subsequent marriage shall be automatic upon the recording of the sworn statement in the proper civil registry, such termination is without prejudice to the outcome of any judicial proceeding questioning such reappearance. Hence, if a person, claiming to be the reappearing spouse files such sworn statement and later it is judicially determined that such alleged reappearing spouse is actually an impostor, the automatic termination will be rendered ineffectual. In effect, there was no automatic termination because the sworn statement filed was not the correct or proper sworn statement having been fraudulently filed without the absent spouse really reappearing. Also, not being the real absent spouse or an interested party, he or she is not qualified by law to file such sworn statement of reappearance. Hence, the subsequent marriage will continue to subsist.

If the reappearing spouse or any interested party does not file any sworn statement of reappearance, the subsequent marriage remains validly subsisting, while the first marriage is likewise considered subsisting not having been judicially nullified or annulled. However, as between the two marriages, the law or the state shall continue to protect the second marriage rather than the first. This is so because, if indeed the reappearing spouse wants to assert his or her rights, he or she could easily file the affidavit of reappearance to terminate the subsequent marriage. If he or she does not do so, then he or she cannot just cause a disturbance in the subsequent marriage without following the requirements of the law. In essence, therefore, the statutory requirement of the filing of a sowrn statement of reappearance also serves as the best evidence to show that the State is also prepared to return the preference to the first marriage and consider it as the only marriage allowable under the circumstances if even one of the parties or any interested person so desires. Hence, the recording requirements of the law must be observed.

However, it must be important to note that, in case no sworn statement of reappearance is filed, a lot of confusing situations may

arise among the parties concerned. Thus, the reappearing spouse cannot enter into a contract of marriage with another person. This is so because he or she is still married to the present spouse. If the reappearing spouse really wants to get married to another person, the reappearing spouse has no choice but to file a nullity or annulment case against the present spouse if there are valid grounds to do so. If the reappearing spouse has no grounds, then he or she will forever live as a married person despite the fact that his or her spouse is validly living as the wife or husband of another. If he or she remarries without obtaining a nullity or annulment decree, such subsequent marriage is either bigamous or violative of Articles 40, 52 and 53 and therefore void. Also, a confusing situation will arise where the subsequent new spouse may file a case for legal separation based on sexual infidelity against the present spouse if the latter, without filing an affidavit of reappearance, decides to have amorous relations with the reappearing husband whose marriage with her is likewise subsisting. However, whether the case will prosper is questionable because the present spouse is still married to the reappearing spouse. Thus, it can also be observed, therefore, that the filing of an affidavit of reappearance serves as the legal and speedy process through which the maintenance of an ordered and harmonious family relationship can be achieved. If the parties do not desire to make use of this process, then the legal disadvantages attendant in the confusing situation they themselves, in effect, fostered must be suffered or borne by them.

CRIMINAL LIABILITY. Article 349 of the Revised Penal Code provides that 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 proceeding.

Article 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 a 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)

Article 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)

STATUS OF CHILDREN. Under Article 43, children conceived during the subsequent marriage contemplated in Article 41 in cases of presumptive death of one of the spouses and before termination of the same shall be considered legitimate. This is so because the children have been conceived either inside a valid bigamous marriage or inside a valid marriage despite the non-observance of Articles 40, 52 and 53. This status of the children will be maintained even if one of the contracting parties is in bad faith. It must be noted that such subsequent marriage in cases of presumptive death under Article 41 can only be considered void if, according to Article 44, both spouses were in bad faith in contracting the subsequent marriage. If only one is in bad faith, the marriage would still be valid and hence, the children born inside such marriage are legitimate.

EFFECT OF TERMINATION ON THE PROPERTY REGIME. The effect of the termination of the subsequent marriage on the property regime, whether absolute community or conjugal partnership, is the same. The property regime shall be dissolved and liquidated. After payment of all debts and obligations of the absolute community or conjugal partnership, the spouses shall divide the property equally or in accordance with the sharing stipulated in a valid marriage settlement, unless there has been a voluntary waiver of share by either of the spouses upon the judicial separation of the property.

If either of the spouses acted in bad faith, the guilty spouse shall not get his share in the net profits of the property regime. His or her share shall be forfeited in favor of the common children. In the absence of the latter, the children by a previous marriage of the guilty spouse shall be given the share of the latter. Finally, in the absence of common children and children by a previous marriage of the guilty party, the share of the latter shall be forfeited in favor of the innocent spouse.

For purposes of computing the net profits subject to forfeiture, 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 (Article 102[4]).

DONATIONS BY REASON OF MARRIAGE. Donations are essentially gratuitous. Hence, if both parties are in good faith, the donation by reason of marriage shall be valid even in the event that the subsequent marriage has been terminated. It shall also be valid even if the donor acted in bad faith in contracting the marriage.

If the donee acted in bad faith in contracting the marriage, the donation by reason of marriage *ipso jure* is terminated by operation of law. This rule applies with more reason if both parties acted in bad faith considering that in such a case, the marriage is void in accordance with Article 44 and therefore, the principal consideration for such donation does not exist. It may be argued however that since the fault is on the part of both contracting parties, neither may recover what he has given by virtue of the contract pursuant to the ordinary rules on contract set out in Article 1412 of the Civil Code. This view should not apply considering the express mandate of Article 44 and because marriage is a special contract vested with public interest. It is not a simple ordinary contract. Also, the doctrine

of estoppel on both parties will not apply considering that such doctrine is not applicable if public policy is violated. Undoubtedly, marriage is a matter of public policy. For instance, if the present spouse, after obtaining the judicial declaration of presumptive death and before celebration of the subsequent marriage, is able to talk to the reappearing spouse, thereby knowing that he or she is alive, such present spouse is already in bad faith. If the other contracting party of the subsequent marriage is likewise in bad faith, the subsequent marriage will be void. In this case, any donation propter nuptias of the present spouse who is in bad faith in favor of the other contracting party who is also in bad faith will surely prejudice the reappearing spouse as he or she is a presumptive heir of the present spouse. Also, it can be said that, technically speaking, since the subsequent marriage is void, the present spouse who has subsequently married may even be considered as committing an act of adultery or concubinage. Under Article 739 of the Civil Code, a donation made between persons who are guilty of adultery or concubinage at the time of the donation is void.

Article 44, however, provides that, where both parties are in bad faith, testamentary dispositions made by one in favor of the other are revoked by operation of law.

DESIGNATION AS BENEFICIARY IN INSURANCE POLICY. The innocent spouse has the choice of revoking or maintaining as beneficiary in an insurance policy the other spouse who acted in bad faith. If the innocent spouse opts to revoke, he can do so even if the designation as beneficiary is irrevocable.

DISQUALIFICATION AS TO INHERITANCE. The spouse who contracted the subsequent marriage in bad faith shall be disqualified to inherit from the innocent spouse by testate and intestate succession. During the 153rd joint meeting of the Civil Code and Family Law committees held on August 30, 1986, Justice Puno made an important clarificatory point on this matter, thus:

> At this point, Justice Puno raised a clarificatory question: The present law provides that there can be succession up to the fifth degree. Supposing there is a subsequent marriage, the parties to this subsequent marriage are within the fifth degree and there is bad faith, are they also going to disqualify the spouse who contracted the subsequent marriage in bad faith to inherit from the innocent spouse? Justice Caguioa replied in the affirmative and added that the disqualification is by a voluntary act done in bad faith. It was therefore clarified that

> subparagraph (4) will apply even if the parties are mutual heirs of each other but the innocent spouse can still succeed (Minutes of the 153rd joint meeting of the Civil Code and Family Law committees held on August 30, 1986, pages 16-17).

If both parties in the subsequent marriage are in bad faith, such marriage is void and, according to Article 44, testamentary dispositions made by one in favor of the other are revoked by operation of law. If a marriage is void, the contracting parties cannot likewise inherit by intestate succession because no legal relation binds them.

MARRIAGE CONTRACTED IN BAD FAITH. If the subsequent marriage in cases under Article 41 were contracted where only one of the parties, whether the present spouse or the new spouse, to the subsequent marriage was in bad faith, the said marriage is still valid. According to Article 44, the marriage shall be considered void only if *both spouses* in the subsequent marriage are in bad faith. Thus, if, prior to the subsequent marriage, the would-be spouse of the present spouse personally saw the absentee spouse, such would-be spouse is in bad faith in contracting the subsequent marriage. However, the subsequent marriage is still valid if the present spouse is in good faith. If the present spouse were able to personally know that the absent spouse was in fact alive prior to the issuance of any judicial declaration of presumptive death, such present spouse should not be issued such a judicial declaration.

It is important to note that the good faith of the present spouse must be present up to the time of the celebration of the subsequent marriage. In other words, the present spouse must not be in bad faith up to the time of the solemnization of the subsequent marriage. However, if only the present spouse is in bad faith and the other contracting party is in good faith, the subsequent marriage will still be valid. Thus, if, after the issuance of the judicial declaration of presumptive death and before the celebration of the subsequent marriage, the present spouse personally sees and talks to the supposedly absent spouse who has been judicially presumed to be dead, such present spouse is already in bad faith in contracting the subsequent marriage. In the event that such present spouse still contracts the subsequent marriage with the other contracting party who is in good faith, such marriage will still be considered valid. It is only when the said other contracting party is also in bad faith will the marriage be considered void. Article 44 clearly provides that the subsequent marriage shall be considered void only if *both spouses* in the said subsequent marriage are in bad faith.

Article 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)

Article 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 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)

PUBLIC POLICY CONSIDERATION. The state is interested in the permanency of the marriage relation. The preservation of that relation is deemed essential to public welfare. The fundamental policy of the state, which regards marriage as indissoluble and sacred, being the foundation upon which society rests, is to be cautious and strict in granting annulment of marriage.

> Marriage is an institution, in the maintenance of which in its purity the public is deeply interested. It is a relation for life and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and no other. When the legal existence of the parties is merged into one by the marriage, the new relation is regulated and controlled by the state or government upon principles of public policy for the benefit of society as well as the parties. And when the object of a marriage is defeated by rendering the continuance intolerable to one of the parties and productive of no possible good to the community, relief in some way should be obtainable (*Goitia v. Campos Rueda*, 35 Phil. 252).

This state interest finds its expression in the Family Code provisions exclusively prescribing the grounds for annulment. The law favors marriage as the most important of the domestic relations and therefore allows only its dissolution under such restrictions and limitations as the legislature may deem best for the public welfare .As such, in order to annul a marriage, clear and undeniable proofs are necessary (*Roque v. Encarnacion*, O.G. 4193; *Bucat v. De Buccat*,

72 Phil. 19; *Jamias v. Rodriguez*, 81 Phil. 303; *Sy Joc Lieng v. Sy Quia*, 40 Phil. 113; *Arca v. Javier*, 95 Phil. 579).

> Marriage was instituted for the good of society, and the marital relation is the foundation of all forms of government. For that reason, the state has an interest in every divorce suit, and the marital relation, once established, continues until the marriage is dissolved on some grounds prescribed by the statute (*Marshal v. Marshal*, 115 Ark. 51, 170 S.W. 567).

EXCLUSIVITY OF GROUNDS FOR ANNULMENT. Under the Family Code, annullable marriage is the same as a voidable marriage. Unlike a void marriage which is invalid from the beginning, an annullable or voidable marriage is considered valid up to the time it is terminated. Consequently, grounds for annulment are only those specified by law. Any ground not provided by law cannot be invoked to annul a marriage. The exclusivity of the grounds is in line with the policy of the state to enhance the permanence of marriage. The interest of the public in all actions for annulment or divorce is such that a policy has grown up, in accord with enlightened sentiment, to discourage and deny annulment or divorce unless claimed on proper grounds and sustained by an honest disclosure of the facts. Annulment cannot be left to the whims of the spouses, as the state has a serious concern and interest over the maintenance of the marriage and the family unit brought about by the same. Thus mere non-cohabitation is not a ground for annulment of marriage (*Villanueva v. Court of Appeals*, G.R. No. 132955, October 27, 2006, 505 SCRA 564).

NO PARENTAL CONSENT. The law considers persons of the age of at least 18 years and below 21 years as not possessing that degree of maturity to be able to comprehend thoroughly the consequences and serious responsibilities of marital relations. Hence, before marriage, he or she must obtain parental consent. Any marriage contracted by persons of these ages are considered annullable at the instance of the party whose parent, guardian or person having substitute parental authority did not give his or her consent and of the parents, guardian or person having substitute parental authority over the party in that order. The opportunity to annul the marriage exists in this situation so that the probability of a troublesome, ill-advised or stormy marriage relationship due to unpreparedness of the contracting parties financially, emotionally and psychologically to enter into such relationship can be terminated or prevented. Also the age-of-parental-consent limitation provided

in the law of which all, including the youth, is put on notice, was enacted so that

> one in the sunlight of youth, standing on the threshold of life, should not walk precipitously into the marriage chamber but first should look with calm deliberation whether the step is both desirable and safe. In this concept, there has been ample support in aphorism and precept. Certainly, it is based upon common experience and logic (*In re* Barbara, 86 Pa D.C. 141).

UNSOUND MIND. To successfully invoke unsoundness of mind as a ground for annulment, there must be such a derangement of the mind to prevent the party from comprehending the nature of the contract and from giving to it his free and intelligent consent.

> Ordinarily, the mental incapacity must relate specifically to the contract of marriage in order to affect it, and therefore any form of mental disease that does not render the afflicted party incapable of understanding or assenting to the marriage contract cannot be used as a basis for attacking the validity of the marriage (52 ALR 3d 880).

Thus, it is clear that marriages are not invalidated by mere weakness of mind or dullness of intellect, nor by eccentricities or partial dementia *(Ibid.)*. In one case, it was held that:

> a marriage contract will be invalidated by the want of consent of capable persons; it requires the mutual consent of two persons of sound mind, and if at the time one is mentally incapable of giving an intelligent consent to what is done, with an understanding of the obligations assumed, the solemnization is a mere idle ceremony — they must be capable of entering understandingly into the relation. It is impossible to prescribe a definite rule by which the mental condition as to sanity or insanity in regard to a marriage can in every case be tested; the question is not altogether of brain quantity or quality in the abstract, but whether the mind could and did act rationally regarding the precise thing in contemplation — marriage — and the particular marriage in dispute, not whether his or her conduct was wise, but whether it proceeded from a mind sane as respects the particular thing done. The decree here [denying annulment] is not contrary to the manifest weight of the evidence or to the law. Prior to and at the time of the marriage, the plaintiff noticed nothing abnormal about the defendant. There is no evidence that any of the unusual things she thought and did some months after the marriage had also occurred prior

to and at the time of the marriage. Her first commitment to Elgin State Hospital was in 1952, more than two years after the marriage. In 1954, she was found to have recovered and was restored to all her civil rights. She got along well for awhile thereafter. Her second commitment was in 1956, more than four and one-half years after the marriage. The plaintiff continued to live regularly with the defendant as husband and wife except for such times when she was actually physically confined at the hospital. The doctor who testified had never examined, or treated the defendant and his entire testimony is based, necessarily on a hypothetical question. The ostensible diagnosis was evidently made by another or other doctors, who were not available or who did not testify here. No doctor, nurse, or attendant at the hospital who might have observed, examined or treated her testified. In the doctor's opinion, even a patient of that type may have lucid intervals for months or years — she may not have had any symptoms which a layman would recognize as insanity — she might be all right for years — and he would not say a patient of such type could never be cured. Even he said that such a patient might be legally all right — not legally insane — though medically it may be very difficult to say. The other witness' testimony was either quite remote in point of time, or related to an incident eight years after the marriage, or had to do with matters having no great legal significance.

The plaintiff has not satisfied the burden of proving, clearly and definitely, that the defendant was an "insane person" at the particular time of this marriage, March 21, 1950 — that she was at that time incapable of understanding the nature of the act, that she had insufficient mental capacity to enter into the status and understand the nature, effect, duties, and obligations of the marriage contract, that she was mentally incapable of giving an intelligent, understanding consent, or that her mind could not and did not act rationally regarding the precise thing in contemplation, marriage, and this particular marriage dispute (*Larson v. Larson*, 42 Ill. App. 2d 467, 192 N.E. 2d 549).

BURDEN OF PROOF. In all civil actions, it is generally held that the burden of proof of insanity rests upon him 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 a preponderance of evidence. If, however, a previous state of insanity is proved, the burden of proof is then usually considered to shift to him who asserts that the act was done while the person was sane, though it has been frequently held that insanity which is not shown to be settled or general as contradistinguished from a mere temporary aberration

or hallucination will not be presumed to continue until the contrary is shown. A lucid interval is in its nature temporary and uncertain in its duration, and there is no legal presumption of its continuance (See *Engle v. Doe*, 47 Phil. 753).

FRAUD. Under the Family Code, fraud refers to the non-disclosure or concealment of certain circumstances which materially affect the essence of marriage. Hence, there is no fraud when there is no concealment or there is disclosure. The circumstances of fraud are limited to those specified in Article 46 of the same Code. The enumeration in the said article is exclusive (*Anaya v. Palaroan*, 36 SCRA 97). Hence, any act of fraud not included in Article 46 cannot be invoked to annul a marriage. Thus, it has been held:

> Non-disclosure of a husband's pre-marital relationship with another woman is not one of the enumerated circumstances that would constitute a ground for fraud; and it is further excluded by the last paragraph of the article, providing that "no other misrepresentation or deceit as to . . . chastity" shall give ground for an action to annul a marriage. While a woman may detest such non-disclosure of pre-marital lewdness or feel having been cheated into giving her consent to the marriage, nevertheless the law does not assuage her grief after her consent was solemnly given, for upon marriage she entered into an institution in which society, and not herself alone, is interested (*Anaya v. Palaroan*, 36 SCRA 97).

Explicitly, the last paragraph of Article 46 provides that no other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute fraud. These circumstances are accidental matters not going into the essence of the marriage and not affecting the free consent of the injured party thereto since it is the duty of the parties to inform themselves of such matters before entering into a contract of such importance to themselves and to society (*Marshall v. Marshall*, 212 Cal. 736, 800 P 816; *Williamson v. Williamson*, 34 App DC 536, 30 LRA[NS] 301; *Brown v. Scott*, 22 ALR 810).

NON-DISCLOSURE OF PREVIOUS CONVICTION AS FRAUD. To constitute fraud, the party must have been convicted by final judgment of a crime involving moral turpitude. Homicide, for example, is a crime involving moral turpitude, the reasoning being that "moral" as here used is tautological, and that turpitude, as meaning inherent baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society

in general, contrary to accepted rule of right and duty between man and man, is comprehended by the intentional taking of human life contrary to law (See *In re* Basa, 41 Phil. 275; *Holloway v. Holloway*, 126 Ga. 459, cited in 17 Am Jur 282). Moral turpitude includes everything which is contrary to justice, honesty, or good morals (*In re Vinzon*, 19 SCRA 815). Generally, the crimes punishable under the Revised Penal Code are crimes involving moral turpitude.

Thus, it has been held that:

> the marriage of an immature schoolgirl to an ex-convict who, at the time of marriage, had committed a crime for which he is subject to an indictment, will be annulled where it was brought about by his false representations as to his standing in society and his war record, so that not only would life be abhorrent to a person of ordinary instincts and refinement, but every purpose of the marriage relation would be defeated (*Brown v. Scott*, 140 Md. 258; 22 ALR 810).

Under Article 46(1), there is a need for a conviction by final judgment. It is not necessary, however, that one of the parties investigates the other in order to determine whether the latter has a criminal record, and his or her failure to do so will not bar a case for annulment on this ground if it later develops that the party concerned has been convicted of a crime before the marriage. The burden is on the convicted party to reveal his criminal record. His failure to do so will constitute the non-disclosure.

CONCEALMENT OF PREGNANCY AS FRAUD. The law limits the fraud to the wife only and not to the husband. According to the Code Commssion, this is so because

> if the wife is pregnant by another man, the husband would be misled in devoting all his attention and care on somebody else's child. In addition, compared to pregnancy, the fact of the husband's having a child in a concealed prior relationship is speculative and difficult to prove (185th Meeting of the Civil Code and Family Law committees, June 27, 1987, Pages 2 and 3).

Indeed, maternity is always certain while paternity may be disputed. The concealment must have been done in bad faith. Thus, if a woman, after having sexual intercourse with another man previous to the marriage ceremony was diagnosed as not pregnant because she was completely barren and thereafter married her

fiancé believing that she was not pregnant, the marriage cannot later be annulled even if it turned out that her previous diagnosis was completely wrong and that actually she was really pregnant at the time of the marriage ceremony as a result of her sexual contact with the other man. There was no bad faith on her part. She could not even be guilty of concealment.

Mere pregnancy alone at the time of the marriage is not sufficient to successfully annul a marriage on this ground. There must be a concealment of such pregnancy by the wife. However, if the woman did not expressly inform the man of her pregnancy but such physical condition was readily apparent to the man, he cannot claim lack of knowledge of such pregnancy (*Buccat v. Buccat*, 72 Phil. 19). Also, the mere fact that the woman at the time of the marriage is four months pregnant cannot be conclusive as to the apparency of such pregnancy so as to bar the man from invoking this particular ground. Thus, in the case of *Aquino v. Delizo*, 109 Phil. 21, the Supreme Court stated:

> In the case of *Buccat v. Buccat* (72 Phil. 19) cited in the decision sought to be reviewed, which was also an action for annulment of marriage on the ground of fraud, plaintiff's claim that he did not even suspect the pregnancy of the defendant was held to be unbelievable, it having been proven that the latter was already in an advanced stage of pregnancy (7th month) at the time of the marriage. That pronouncement, however, cannot apply to the case at bar. Here, the defendant wife was alleged to be only more than four months pregnant at the time of her marriage to the plaintiff. At that stage, we are not prepared to say that her pregnancy was readily apparent, especially since she was "naturally plump" or fat as alleged by plaintiff. According to medical authorities, even on 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 (See Lull, Clinical Obstetrics, p. 122). If, as claimed by plaintiff, defendant is "naturally plump," he could hardly be expected to know, merely by looking, whether or not she was pregnant at the time of their marriage, more so because she must have attempted to conceal the true state of affairs. Even physicians and surgeons, with the aid of the woman herself who shows and gives her subjective

> and objective symptoms, can only claim positive diagnosis of pregnancy in 33% at five months and 50% at six months (XI Cyclopedia of Medicine, Surgery, etc. Pregnancy, p. 10).

Interestingly, it has been held in *Foss v. Foss*, 94 Mass. 26, an American case, that where a man, who knew of the unchaste character of a woman with whom he likewise had extra-marital sexual intercourse, and who subsequently married such woman who, at the time of the marriage was pregnant and who assured him that it was his child when in fact it could not have been his child, the said man cannot be allowed to have his marriage annulled on this particular fraudulent act by the said unchaste wife. The four reasons generally given for the denial of the termination of the marriage in the said situation are as follows:

> (1) that the plaintiff in such case does not come into court with clean hands; (2) that the husband, knowing of the wife's unchastity and pregnancy, was put upon his inquiry as to her condition and the paternity of any child she may have conceived, and that in the pursuit of his inquiry he was, in view of what he knew, put upon his guard as to the confidence to be reposed in her word, so that he was not entitled to rely on it, but was bound to pursue searching independent investigations; (3) that, having experienced and participated in the woman's incontinence, he was thereby sufficiently apprised of her want of chastity to deprive him of the right to complain that he was deceived by her false assurance that he was the only participant in her illicit intercourse; (4) that, having taken the woman as his wife for better or for worse, he ought not to be permitted to say that she was worse than he expected (*Lyman v. Lyman*, 90 Conn. 399, 97 Atl. 312, L.R.A. 1916E, 643).

If a woman misrepresented to her fiancé that she was pregnant for the purpose of inducing her fiancé to marry her when in fact she was not pregnant, such fiancé, who entered into the contract of marriage principally because of such inducement, cannot annul the marriage under Article 46(2) considering that there was in fact no pregnancy to conceal.

Article 46(2) must already be re-examined as it is subject to attack for being unduly discriminatory against the woman. Fraud should also be imputed on a husband who did not disclose at the time of the marriage ceremony or prior thereto to his future wife that he impregnated another woman not his would-be-wife. This must be so for after all, the focus of the ground is fraud which can be committed either by the husband or the wife.

CONCEALMENT OF SEXUALLY-TRANSMISSIBLE DISEASE, REGARDLESS OF NATURE, AS FRAUD. In cases of fraud, the nature or gravity is irrelevant in order to invoke this ground. It is enough that there was concealment of the Sexually Transmissible Disease (STD) at the time of the marriage ceremony to warrant the annulment of such a marriage on the ground of fraud. The fact that the STD fraudulently concealed was of a less virulent character and one that, perhaps, would be more correctly described as local, will not bar this ground (See *Anonymous v. Anonymous*, 21 Misc. 765, 49 N.Y. Supp. 331). Also, it has been held:

> What a practical recovery from such a disease may import, where it has existed for more than two years, with the danger of its return and ultimate transmission, is difficult if not impossible to determine. But it is certain, at least, that at the time of the marriage, the defendant was incapable of meeting the obligations and performing the functions of a marital relation, and was morally and physically unfit to become or continue to be the husband of a pure and innocent girl. When he concealed that condition from her and still induced her to marry him in ignorance thereof, he was guilty of a base and an unmitigated fraud as to a matter essential to a relation into which they contracted to enter.
>
> Obviously, the principle that refuses relief in cases of ordinary ill health after the marriage contract has been actually consummated has no application to a case like this, where there has been no consummation, and the disease is one involving disgrace in its contraction and presence, contagion in marital association, and includes danger of transmission and heredity that even science cannot fathom or certainly define. The suppression of the presence of a disease including such dire and disastrous possibilities, directly affecting the marital relation, constitute fraud which clearly entitled the innocent party to a decree annulling the marriage contract, particularly when it has not been consummated (*Svenson v. Svenson*, 178 N.Y. 54, 70 N.E. 120).

Under the Family Code, consummation is not required for this ground to exist.

CONCEALMENT OF DRUG ADDICTION AND HABITUAL ALCOHOLISM AS FRAUD. These are new circumstances of fraud. Under American jurisprudence, "habitual drunkenness" and "habitual intemperance" are interchangeably used to refer to "habitual alcoholism" and are grounds for divorce. It is submitted

that their concept or significance can be used under our jurisdiction as a ground for annulment on the basis of fraud. Although these terms are not susceptible to an exact meaning, they nevertheless have been defined as the persistent habit of becoming intoxicated, and that the nature and extent of the drunkenness must be such that the person by frequent indulgence may be said to have a fixed and irresistible habit of drunkenness, whereby he has lost the power or will to control his appetite for intoxicating liquor, as where he indulges in the practice of becoming intoxicated whenever the temptation is presented and the opportunity offered (*Lewis v. Lewis*, 235 Iowa 693, 17 NW2d 407; *Ash v. Ash*, 327 Ill. App 656). However,

> to be a habitual drunkard, a person does not have to drink all the time, nor necessarily be incapacitated from pursuing, during the working hours of the day, ordinary unskilled manual labor. One is a habitual drunkard, in the meaning of the divorce laws, who has a fixed habit of frequently getting drunk. It is not necessary that he be constantly or universally drunk, nor that he have more drunken than sober hours. It is enough that he has the habit so firmly fixed upon him that he becomes drunk periodically, or that he is unable to resist when the opportunity and temptation presented.
>
> It is true xxx that a man may drink occasionally to excess, and yet not be a habitual drunkard; but to constitute him as one, it is not necessary that he should be constantly under the influence of intoxicating liquors. A man may be a habitual drunkard even though there be intervals when he entirely refrains from the use of intoxicating drinks. But before he can be regarded as such, it must appear that he drinks to excess so frequently as to become a fixed practice or habit with him . . . . And where a person indulges in the practice of becoming intoxicated whenever the temptation is presented, and the opportunity is afforded him, it may safely be said that he is a habitual drunkard within the meaning of the statute relating to divorce (*Page v. Page*, 43 Wash. 293, 86, p. 582).

Habitual drunkenness is a ground to sever the marriage relations not merely because it disqualifies the party from attending to business, but in part, if not mainly, because it renders him unfit for the duties of the marital relation and disqualifies him from properly rearing and caring for the children born of the marriage (*Lewis v. Lewis*, 235 Iowa 693). Thus, it has been said:

> When a man has reached such a state of demoralization that his inebriety has become habitual, its effect upon his

> character and conduct is to disqualify him from properly attending to his business, and if he is married, to render his presence in the marriage relation disgusting and intolerable (*Mcbee v. Mcbee*, 22 Or. 329, 29, p. 887).

Concealment of drug addiction is another situation constituting fraud. The deleterious and evil effects resulting from the continued and excessive use of drugs, such as opium or morphine, are well known, and that they interfere as much, to say the least, with the happiness of married life, and produce other effects upon the marriage relation as deplorable, as those resulting from excessive use of intoxicating liquors (*Gowey v. Gowey*, 191 Mass. 72, 77 N.E. 526).

CONCEALMENT OF HOMOSEXUALITY OR LESBIANISM AS FRAUD. Concealment of homosexuality or lesbianism is also fraud under the Family Code. Since the very institution of marriage is based on trust and the difference of sexes both in the physical and psychological constitution of the parties, a lesbian or a homosexual, who is disposed to have affection toward the same sex to the extent that having relations with the other sex to him or her is repugnant to his or her being, may not serve the purpose of the law mandating a heterosexual relationship. Homosexuality and lesbianism indicate that questions of sexual identity strike so deeply at one of the most basic elements of marriage which is the exclusive sexual bond between the spouses (78 ALR 2d 807). It must, however, be importantly pointed out that the ground is not homosexuality or lesbianism *per se* but the concealment of such sexual orientation. Hence, the element of bad faith on the part of the one making the concealment is essential and must be duly proven. (*Almelor v. Regional Trial Court*, G.R. No. 179620, August 26, 2008). Homosexuality and lesbianism are not afflictions or diseases. They are sexual orientation or preference. They are not intrinsically abhorrent. The fact that their concealment is a ground for annulment and not nullity and therefore subject to ratification indicates that the parties could in fact eventually accept each other and lead a family life of their own with children.

The effects to the "injured spouse" in case of concealment and discovery of the homosexuality or lesbianism of the other spouse may even seriously affect the innocent spouse's performance of his or her marital duties.

In the United States, homosexuality or lesbianism of a spouse has been considered as a basis for divorce coming within the purview

of the statutory ground of "cruelty" to the other spouse because such behavior endangers the life or health of the aggrieved party or renders his or her life one of such extreme discomfort and wretchedness as to incapacitate him or her physically from discharging the marital duties (In Anonymous, 2 Ohio NP 342; *H v. H*, 78 ALR 2d 799; *Poler v. Poler*, 73 P 372).

VITIATED CONSENT. One of the essential requisites for a valid marriage is that the consent of both parties must be freely given. Consent must not be obtained by force, intimidation or undue influence.

> It is not necessary that the coercion or force be such as a person of ordinary physical and mental stability would be unable to resist, and that if either party is mentally incapable of resisting the improper pressure applied, there is no consent such as the law requires. Violence constituting duress may be physical or moral — that is, it may consist of the coercion of the person continuing down to the moment of the celebration of the marriage, or of the coercion of the will by antecedent threats of bodily harm. In the latter case, the person is forced to elect between consenting to marry and exposure to the threatened evils (*Quealy v. Waldron*, 126 La 258, 52 So 479 as cited in 35 Am. Jur. 243).

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. To determine the degree of intimidation, the age, sex and condition of the person shall be borne in mind (Article 1335 of the New Civil Code). However,

> the intimidation that will annul a contract has to do with the evil or harm arising from an unlawful act, not from the exercise of a right, such as the right to file a criminal complaint against a person who has committed a crime. Thus, a threat to prosecute a person for a crime he has committed does not constitute intimidation. A threat to enforce one's claim through competent authority, if the claim is just or legal, does not vitiate consent. Also, where a man who had previous carnal knowledge of a girl, married her under the threat to oppose 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. For under existing rules, a man with bad moral character

> should not be admitted to the bar. However, if the charge of immorality subject of the threat was false, the marriage can be annulled (Annotation, Annulment of Marriage by Judge Domingo Lucenario, 22 SCRA 525, citing *Sotto v. Mariano*, 36 OG 1056; Art. 1335 of the New Civil Code; *Ruiz v. Atienza, Official Gazette*, August 30, 1941, p. 1903; *Soriente v. Aliman*, CA-G.R. No. 29350-R, December 15, 1965; *Collins v. Collins*, 2 Brewst [Pa.] 515).

The vitiated consent must be proven by preponderance of evidence which may include the actuations of the parties previous to the marriage. Thus, it has been held that:

> petitioner's averment that his consent was obtained by private respondent through force, violence and intimidation and undue influence in entering a subsequent marriage is belied by the fact that both petitioner and private respondent executed an affidavit which stated that they had lived together as husband and wife without the benefit of marriage for five years, one month and one day until their marital union was formally ratified by the second marriage and that it was private respondent who eventually filed the civil action for nullity.
>
> Another event that militates against petitioner's contention is the fact that it was only when Civil Case No. E-02627 was filed on September 28, 1979, or more than the lapse of one year from the solemnization of the second marriage, that petitioner came up with the story that his consent to the marriage was secured through the use of force, violence, intimidation and undue influence. Petitioner also continued to live with private respondent until November 1978, when the latter left their abode upon learning that Leonilo Donato was already previously married (*Donato v. Luna*, 160 SCRA 441).

In *Villanueva v. Court of Appeals,* G.R. No. 132955, October 27, 2006, 505 SCRA 564, the Supreme Court again had the occasion to explain the nature of vitiated consent by quoting with approval the decision of the Court of Appeals, thus:

> Factual findings of the Court of Appeals, especially if they coincide with those of the trial court, as in the instant case, are generally binding on this Court. We affirm the findings of the Court of Appeals that petitioner freely and voluntarily married private respondent and that no threats or intimidation, duress or violence compelled him to do so, thus —
>
> To begin with, We are at once disturbed by the circumstance that despite the alleged coerced consent which suppos-

edly characterized his marriage with Lilia on April 13, 1988, it was only on November 17, 1992 or after a span of not less than four (4) years and eight (8) months when Orlando took serious step to have the same marriage annulled. Unexplained, the prolonged inaction evidently finds basis in Lilia's allegation that this annulment suit was filed by Orlando solely in the hope that a favorable judgment thereon would bolster his defense, if not altogether bring about his acquittal in the criminal case for bigamy which was then already pending against him. Unfortunately, however, let alone the fact that the criminal case was admittedly decided ahead with a judgment of conviction against Orlando x x x even the very outcome of the present case disappointed his expectation. At this late, with his appeal in the bigamy case still pending with this Court x x x Orlando must be hoping against hope that with a decree of annulment ensuing from this Court, he may yet secure an acquittal in the same bigamy charge. Viewed in this perspective, the instant appeal is, therefore, understandable.

But even in terms of merit, the recourse must have to fall.

Appellant anchored his prayer for the annulment of his marriage on the ground that he did not freely consent to be married to the appellee. He cited several incidents that created on his mind a reasonable and well-grounded fear of an imminent and grave danger to his life and safety, to wit: the harassing phone calls from the appellee and strangers as well as the unwanted visits by three men at the premises of the University of the East after his classes thereat, and the threatening presence of a certain *Ka* Celso, a supposed member of the New People's Army whom appellant claimed to have been hired by appellee and who accompanied him in going to her home province of Palawan to marry her.

The Court is not convinced that appellant's apprehension of danger to his person is so overwhelming as to deprive him of the will to enter voluntarily to a contract of marriage. It is not disputed that at the time he was allegedly being harassed, appellant worked as a security guard in a bank. Given his employment at that time, it is reasonable to assume that appellant knew the rudiments of self-defense, or, at the very least, the proper way to keep himself out of harm's way. For sure, it is even doubtful if threats were indeed made to bear upon appellant, what with the fact that he never sought the assistance of the security personnel of his school nor the police regarding the activities of those who were threatening him. And neither did he inform the judge about his predicament prior to solemnizing their marriage.

Appellant also invoked fraud to annul his marriage, as he was made to believe by appellee that the latter was pregnant with his child when they were married. Appellant's excuse that he could not have impregnated the appellee because he did not have an erection during their tryst is flimsy at best, and an outright lie at worst. The complaint is bereft of any reference to his inability to copulate with the appellee. His counsel also conceded before the lower court that his client had a sexual relationship with the appellee x x x. He also narrated x x x that sometime in January 1988, he and the appellee went to a hotel where "*the sexual act was consummated, with the defendant on top*" x x x.

Instead of providing proofs that he was tricked into marrying his wife, appellant resorted to undermining the credibility of the latter by citing her testimony that her child was born, and died, on August 29, 1989, a year off from August 29, 1988, the date of fetal death as appearing in the registry of deaths of the Office of the Civil Registrar of Puerto Princesa City x x x.

To Our mind, appellant cannot make capital of the lapse because it is inconsequential, as there is no controversy regarding the date of death of appellee's fetus. Nevertheless, during the continuation of the cross-examination of the appellee, she declared that her child was prematurely born on August 29, 1988, matching the date in the certification of the Civil Registrar x x x. The Court is not prepared to disbelieve the appellee and throw overboard her entire testimony simply on account of her confusion as to the exact date of the death of the fetus, especially when she herself had presented documentary evidence that put August 29, 1988 as the date her fetus died.

Appellant's propensity to rely on his perceived weakness of the appellee's evidence continues in his argument that if indeed there is truth to her claim that she was impregnated sometime in December 1987, then she could not have a premature delivery on August 29, 1988, as she had testified during the trial, because the 35-week period of pregnancy is complete by that time. Whether the appellee's impression that she had delivered prematurely is correct or not will not affect the fact that she had delivered a fetus on August 29, 1988. In the light of appellant's admission that he had a sexual intercourse with his wife in January 1988, and his failure to attribute the latter's pregnancy to any other man, appellant cannot complain that he was deceived by the appellee into marrying her.

Appellant also puts in issue the lower court's appreciation of the letters allegedly written by him to the appellee. During his cross-examination, when confronted with thirteen (13)

> letters, appellant identified the seven (7) letters that he sent to the appellee, but denied the remaining six (6) x x x. The letters admitted by the appellant contained expressions of love and concern for his wife, and hardly the rantings of a man under duress. During the re-direct examination, however, appellant suddenly changed mind and denied authorship of those seven (7) letters, claiming that he was forced to admit them because he was threatened with harm by the appellee. If he was laboring under duress when he made the admission, where did he find the temerity to deny his involvement with the remaining six (6) letters? The recantation can only be motivated by a hindsight realization by the appellant of the evidentiary weight of those letters against his case.

Relevantly, criminal liability attaches on anyone who uses violence, intimidation and fraud in contracting a marriage. Thus, the second paragraph of Article 350 of the Revised Penal Code provides that if either of the contracting parties shall obtain the consent of the other by means of violence, intimidation or fraud, he shall be punished by *prision correccional* in its maximum period.

INCAPACITY TO CONSUMMATE. Incapacity to consummate denotes the permanent inability on the part of one of the spouses to perform the complete act of sexual intercourse. During the deliberations of the Civil Code and Family Law committees, the terms "impotent" and "physically" were present in the original drafts but were later deleted to highlight the concept that all types of causes for non-consummation, even psychological, which leads to physical inability, are included in the provision. However, the term "physically" was again reincorporated prior to the phrase "incapable of consummating the marriage." However,

> Justice Caguioa clarified that the idea in subparagraph (5) is that either party was physically incapable of consummating the marriage with the other, arising not only from physical causes but also from whatever causes including psychological causes (Minutes of the 173rd Joint Meeting of the Civil Code and Family Law committees held on February 21, 1987, page 6).

The word "impotent" was not reincorporated in the law because the term is limited only to males who cannot engage in sexual intercourse. Non-consummation of a marriage may be on the part of the husband or of the wife and may be caused by a physical or structural defect in the anatomy of one of the parties or it may be due to chronic illness and inhibitions or fears arising in whole or

in part from psychophysical conditions. It may also be caused by psychogenic causes, where such mental block or disturbance has the result of making the spouse physically incapable of performing the marriage act (*Alcazar v. Alcazar*, G.R. No. 174451, October 13, 2009). Also, it has been held that excessive sensibility, if medically and sufficiently proven on the part of the wife, rendering sexual intercourse practically impossible on account of the pain it must inflict, may be sufficient to show incapacity. Also, an incurable nervous disorder on the part of the wife known as *vaginismus* which renders sexual coition impossible is good proof of inability to perform the marital act (*Vanden Berg v. Vanden Berg*, 197 NYS 641).

However, merely suffering from epilepsy is not sufficient to show incapacity. Likewise, physical incapability of consummating the marriage cannot be equated to the mere refusal of one party, without being physically incapable, to engage in sexual intercourse. Also, it must be observed that what is required is physical incapability. Hence, if a husband can attain erection but is psychologically inhibited in engaging in sexual intercourse despite his erection, this situation will not fall under impotency as contemplated in the Family Code.

The incapacity to consummate the marriage must exist at the time of the marriage ceremony. Thus, in a case where the wife, as a result of an accident which occurred after the marriage ceremony, became paralyzed which physically incapacitated her from consummating the marriage, it was held that the marriage cannot be annulled as the incapability did not exist at the time of the marriage ceremony (*Anonymous v. Anonymous*, 49 NYS 2d 314).

Also, it must be continuous and appears to be incurable. Accidental or temporary impotency is not enough. Thus, it has been held that

> x x x as ground for annulment of marriage, impotency means permanent and incurable incapacity of one of the parties to the marriage contract to perform the complete act of sexual intercourse. Public policy considerations require that impotency, as a ground for either annulment or divorce, not encompass temporary or occasional incapacity for sexual intercourse (*Dolan v. Dolan*, 52 ALR 3d 577).

Also, in a case where the firmness and rigidity of the hymen of the wife cannot easily be opened by natural means but could be broken by a simple surgical procedure, it was held that annulment on the ground of the wife's incapacity to consummate the marriage

cannot be availed of because the physical incapability was not incurable (*Devanbagh v. Devanbagh*, cited in 52 ALR 3d 607).

BURDEN OF PROOF IN CASES OF INCAPACITY TO CONSUMMATE. An adult male is presumed to have normal powers of virility (*People v. Fontanilla*, 23 SCRA 1227). Whoever alleges the incapacity has the burden of proving the same. As a general rule, incapacity to engage in sexual intercourse cannot be presumed but must be proven by preponderance of evidence. Impotency, being an abnormal condition, should not be presumed. The presumption is in favor of potency (*Menciano v. Neri San Jose*, 89 Phil. 63). Thus,

> It was found that the plaintiff, husband, failed to prove that his wife was "physically incapable" within the meaning of the statute authorizing the annulment of marriage on that ground, where it was alleged, not that intercourse was impossible, but only that it was imperfect and not satisfactory to the husband owing to the shortness of the wife's vagina, and where medical testimony indicated that the measurements of the defendant, although less than average, still came within normal lengths. (*Schroter v. Schroter*, 106 NYS 22).

It has been ruled also that the incapacity or impotence need not be universal (*Vanden Berg v. Vanden Berg*, 197 NYS 641). Hence, it has been said that when impotence is psychological in origin, the condition may exist only as to the present spouse and not as to others (*C v. C*, 91 NJ Super 562). The Family Code adheres to the relative or selective nature of the incapacity to consummate as ground for annulment. It clearly provides in Article 45(5), that the physical incapability of consummating the marriage by either of the spouses must only be "with the other" spouse and not with all persons.

RULE OF TRIENNIAL COHABITATION. However, the presumption of impotence may arise if the situation comes within the purview of the rule of triennial cohabitation. This rule postulates that if the wife remains a virgin for at least 3 years from the time the spouses started cohabiting, the husband must show that he was not impotent during the said period and the burden will be upon him to overcome the presumption of impotence. Thus, in a case where the husband claimed that he did not engage in sexual intercourse with his wife allegedly because such act painfully hurt and distressed the wife, the court rejected the said argument considering that the wife was found out to be a virgin after five years of marriage

and that there was medical finding that she was physically and psychologically normal and, as a result, the court declared the husband incurably impotent though he was physically normal in other matters (*Tompkins v. Tompkins*, 92 NJ 113).

STERILITY. Sterility is not impotency. A sterile person can successfully engage in sexual coition. Sterility does not imply want of power for copulation. Hence, sterility is not a ground for annulment (*Menciano v. San Jose*, 89 Phil. 63). Thus, in a case for annulment where the husband contended that his wife was physically incapable of entering into marriage due to an operation occurring prior to the marriage, in which his wife's ovaries were removed, and as a result of which she was unable to bear children, the court dismissed the annulment suit and concluded that possession of the organs necessary to conception is not essential to entrance into the marriage state, so long as there is no impediment to the indulgence of the passion incident to that state (*Wendel v. Wendel,* 52 NYS 72).

SEXUALLY TRANSMISSIBLE DISEASE. If the sexually transmissible disease were concealed at the time of the marriage ceremony, it constitutes fraud. As previously discussed, STD in cases of fraud need not be incurable. If the STD is not concealed, it can still be a ground for annulment of marriage but, to successfully invoke this ground, the sexually transmissible disease, unlike in case of fraud, must be found to be serious and incurable. During the discussion of this ground by the Civil Code and Family Laws Committee,

> Justice Caguioa stated that the prohibition is not in the inability to procreate but in the transmissibility of the disease to the other spouse. Justice Reyes agreed that the idea in the provision is that it is likely to contaminate the other spouse. Justice Caguioa added that the other point is the transmissibility of the disease to the fetus and the offspring (Minutes of the 158th joint meeting of the Civil Code and Family Law committees held on October 11, 1986, page 4).

Thus, in a case where it was shown that, two months after the marriage ceremony, the husband contracted syphilis from his wife who had the said sexually transmissible disease at the time of the marriage ceremony and that while the syphilis temporarily regressed for a time, it again constantly recurred, and in fact their child who was born one year later died of a mass of syphilitic sores traceable to the wife and that subsequently, the husband cannot anymore engage in healthy and safe sexual intercourse with the

wife without himself again contracting syphilis, the court, after presentation of the relevant evidence, ruled that the chronic syphilis was really grave and in an incurable diseased state at the time of the marriage ceremony which can justify the annulment of the marriage (*Ryder v. Ryder,* 66 Vt. 158).

If the venereal disease were obtained after the marriage ceremony, it cannot be a ground for annulment. However, it can be used as evidence of sexual infidelity which is a ground for legal separation considering that, generally, such disease is communicated through sexual contact.

RATIFICATION OF ANNULLABLE MARRIAGES. As previously stated, the policy of the state is to enhance and promote the permanence of marriage. Everything must be undertaken to preserve the marriage and uphold the family as an integral unit of society. Hence, if there are circumstances to show that, despite the presence of some defects at the time of the marriage ceremony which would render the marriage annullable, the parties nevertheless subsequently manifest their approval of the marital union, a decree of annulment cannot properly issue. Under the Family Code, ratification is made if the "injured" party freely cohabits with the guilty party in the proper situations provided by law. Thus, the law provides the following situations which will defeat any petition for annulment:

> 1. In case of no consent by the parents, guardian or person having substitute parental authority, the contracting party, who is eighteen years or over but below twenty-one and did not obtain such consent from his or her parents, guardian or person having parental authority over him or her, cannot file the suit if, after attaining the age of twenty-one, he or she freely cohabited with the other and lived as husband and wife. However, if he or she were between 18 and 21 years of age, even if he or she freely cohabited with the other, this will not constitute ratification. It is only the free cohabitation after reaching the age of 21 that will constitute ratification;
>
> 2. In case of insanity, if the contracting party with unsound mind, after coming to reason, freely cohabited with the other as husband and wife, ratification has set in. Only the insane spouse can ratify by free cohabitation. It must be noted that the sane spouse who knew of the insanity of the other at the time of the marriage ceremony cannot ratify. Also, the subsequent free cohabitation of a sane spouse, who had no knowledge of the insanity of the other at the time of the marriage ceremony but who later found out such insanity after

the marriage ceremony, will not constitute ratification and he or she can still file an action for annulment;

3. In case of fraud, if the injured party, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife, there is likewise ratification; and

4. In case of vitiated consent, if the injured party, after the disappearance or cessation of the force, intimidation or undue influence, freely cohabited with the other as husband and wife, there is also ratification.

However, if the ground relied upon is either the incurable physical incapacity to consummate the marriage by either party or the affliction of either party with an incurable sexually-transmissible disease, both existing at the time of the marriage ceremony, the mere free cohabitation as husband and wife of the parties will not ratify the annullable marriage. Also, even if the impotency or incurable sexually-transmissible disease is known to both parties prior to the marriage ceremony, the injured party can still file a case for annulment on the said grounds. This is so because these grounds are not based on defective consent like the others but based on the fact that the impotency or disease is incurable. Moreover, they negate the other important purpose of marriage which is to procreate normal, healthy and upright children. In fact, in the case of incurable sexually-transmissible disease, the continuance of the marriage may even pose a danger to the life of the other contracting party. However, if the aggrieved parties in these cases do not bring the suit within five years after the marriage ceremony, they are barred forever from annulling the marriage.

Article 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 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; 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 Article 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)

NATURE OF ANNULMENT CASE. Annulment cases are actions in rem, for they concern the status of the parties, and status affects or binds the whole world. The "res" is the relation between the said parties, or their marriage tie. Jurisdiction over the same by the proper Regional Trial Court depends upon the nationality or domicile of the parties, not the place of the celebration of the marriage, or the *locus celebrationis* (*Rayray v. Chae Kyung Lee*, 18 SCRA 450). Thus, where the plaintiff, a Filipino, is domiciled in the Philippines, the lower court has jurisdiction to annul his marriage to a Korean girl contracted by him in Korea *(Ibid.)*.

GROUNDS, PARTIES, PRESCRIPTIVE PERIOD. A prescriptive period is the time within which a case can be filed in court. After the lapse of the prescriptive period, the case cannot be filed anymore. Hereunder is a tabulation of the grounds, parties and prescriptive period for bringing an action for annulment.

GROUND	PARTY TO FILE THE SUIT	PRESCRIPTION PERIOD
1. No Parental-Consent	a. Parent or Guardian having Legal Charge of "no-consent party"	Anytime before "no-consent party" reaches age of Twenty-one
	b. "No-Consent" Party	Within Five Years after attaining Twenty-one
2. Insanity	a. Sane Spouse without knowledge of insanity	At any time before death of either party

	b. Relative, guardian or person having legal charge of insane	At any time before death of either party
	c. Insane spouse	During lucid interval or after regaining sanity
3. Fraud	Injured Party	Within Five Years after discovery of Fraud
4. Vitiated Consent	Injured Party	Within Five Years from time force, intimidation or undue influence disappeared or ceased
5. Incapability to Consummate/ Sexually transmissible disease	Injured Party	Within Five Years after the marriage ceremony

The law clearly provides the person or persons who can file a case for annulment depending on the grounds involved. Thus, the parents, guardian or person exercising substitute parental authority can only file a case for annulment if the ground invoked is that the child is 18 and above but below 21 years of age and he or she or both got married without parental consent. Accordingly, if for example, the ground invoked is fraud or force and intimidation, only the "injured party," which means the aggrieved spouse and not the parents, can file the case for annulment. Parents, guardian or person having legal charge of the child can never file an annulment case on a ground other than those provided in Article 45(1) and (2) even if he or she alleges a cause of action for and on behalf of the child. And even if the ground is under Article 45(1), the parents, guardian or person having legal charge of the child can only file it anytime before the child reaches the age of 21. If the child is 21 years old or over, the parents, guardian, or person having legal charge of the child has no more legal standing to file the annulment case. It is not enough for the plaintiff-parent to allege a cause of action in favor of someone; he or she must show that it exists in favor of himself or herself (*Siman v. Leus*, 37 Phil. 967). After reaching the age of 21 years, the child or contracting party herself or himself does not even need a guardian *ad litem* in order to bring the suit (*Siman v. Leus*, 37 Phil. 967).

In case of insanity, if the sane spouse knew that his or her spouse has already been insane previous to the marriage, such sane spouse cannot file the suit for annulment as he or she is already estopped. If the sane spouse only knew of the insanity after the

marriage ceremony, he or she is given legal standing to file the suit at anytime prior to the death of the insane spouse. A relative, guardian or person having legal charge of the insane is likewise given legal standing to file the annulment case based on insanity of the insane spouse. The insane himself or herself can file during a lucid interval.

In cases provided for under Article 45(3), (4), (5) and (6), the person given legal standing is the "injured party." In these cases, no other person can file the case for the injured party. Not even the parents, the guardian or person having charge of the injured party can file the case for him or her. Thus, even if the injured party were married because of force or intimidation and thereafter, such injured party became insane, the parents or the person who is legally charged of such aggrieved party who eventually became insane, cannot file a case for annulment for him or her.

The starting points of the prescriptive period differ depending on the ground invoked. For "non-consent," the parents, guardians or person given legal charge of the child can file the case at any time after the marriage ceremony but before the child reaches the age of 21. As to the child himself or herself, the law provides that he or she can file the case within five years after reaching the age of 21. It may be argued, however, that the lowering of the majority age from 21 to 18 by Republic Act 6809 amending Article 234 of the Family Code has, in effect, extended the prescriptive period in favor of the child. He or she is emancipated upon reaching the age of 18 years, thereby qualifying him or her to do all acts of civil life, save exceptions established by existing laws in special cases (Article 236).

For insanity, the prescriptive period for those who are given legal standing to file the case is at any time before the death of either party. Where one of the parties is insane, he or she cannot reciprocate the marital commitment of the sane spouse. The insane spouse cannot even appreciate and comply with the essential marital obligations. To a great extent, an insane person is even worse than a person who is merely psychologically incapacitated to perform the essential marital obligations. The failure of insane person's mental faculties to perform normally even affects not only his or her marital life but the totality of his life.

For vitiated consent, the five-year period is counted from the time of the *disappearance* of the force, intimidation or undue influence. For fraud, the five-year period starts from the *discovery* of

the fraud. Lastly, for incurable impotency and sexually transmissible disease, the five-year period begins from the time of the *marriage ceremony*.

It must be borne in mind, however, that, except for the grounds of incurable physical incapacity to consummate and incurable sexually transmissible disease, the other grounds are subject to the rule on ratification. Hence, even if the aggrieved party has five years from the discovery of the fraud within which to file a petition for annulment based on the said ground, his or her action to annul the marriage filed within the said five years will not succeed if it is shown that at anytime during the said five-year period, he or she freely cohabited with the other as husband and wife.

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 all cases referred to in the preceding paragraph, no judgment shall be based upon a stipulation of facts or confession of judgment. (88a)

Article 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)

PROCEDURE IN ANNULMENT AND IN DECLARATION OF NULLITY CASES. The procedure is now governed by Supreme Court *En Banc* Resolution in A.M. No. 00-11-01-SC effective March 15, 2003. It is reproduced in full at the end of this chapter.

After a complaint for the annulment or for the declaration of nullity of marriage has been filed with the proper Regional Trial Court, the defendant shall be given 15 days from receipt of the

summons and of a copy of the complaint within which to file an answer. In the event that the defendant fails to file an answer, he or she cannot be declared in default (See Section 3[e], Rule 9, 1997 Rules of Civil Procedure) unlike in ordinary civil cases, and the Court will order the full-blown hearing of the case where the fiscal shall appear on behalf of the State to make sure that there is no collusion or the evidence is not fabricated.

However, if, erroneously, the court renders a default judgment in an annulment case, this would not prevent the decree from having legal effect. "An erroneous judgment is not a void judgment" (See *De La Cruz v. Ejercito*, 68 SCRA 1, citing *Chereau v. Fuentabella*, 43 Phil. 216).

In the event that the defendant answers, the issues of the case are considered joined and, thereafter, the court shall order the hearing of the case. The fiscal shall likewise appear on behalf of the State to make sure that there is no collusion between the parties or the evidence is not fabricated.

If the defending party in an action for annulment or declaration of nullity 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 (Section 3[e], 1997 Rules of Civil Procedure). If the Court issues an order directing the fiscal to investigate whether or not there is collusion and the petitioner, upon being subpoenaed by the Fiscal, does not appear claiming that she does not want to reveal her evidence prematurely to the fiscal, the annulment case may be dismissed by the Court upon motion of the fiscal (*Tolentino v. Villanueva*, 56 SCRA 1). The inquiry of the fiscal can focus upon any relevant matter that may indicate whether the proceedings for annulment, nullity or legal separation are fully justified or not (*Brown v. Yambao*, 102 Phil. 168).

No suspension of the case can be made for the purpose of discussing a compromise upon the question of the validity of the marriage. An annulment suit cannot be terminated by way of a compromise agreement. No valid compromise is legally possible on the issue of the validity of marriage (*Mendoza v. CA*, 19 SCRA 756).

In all cases, a full-blown hearing must be undertaken where the parties are duty-bound to prove their grounds by preponderance of evidence. Summary proceedings are not allowed. Also, a

counterclaim seeking to annul defendant's marriage to petitioner, although not denied or resisted by the latter, cannot be decided by summary judgment proceeding — first, because such action is not one to "recover upon a claim" or "to obtain a declaratory relief," and second, because it is the avowed policy of the State to prohibit annulment of marriages by summary proceedings (See *Roque v. Encarnacion*, 95 Phil. 643). Even if the allegations in the petition as to the grounds for annulment are categorically admitted by the respondent, judgment on the pleadings cannot be decreed by the court. In actions for declaration of nullity or annulment of marriage or legal separation, the material facts alleged in the complaint shall always be proved (Section 1, Rule 34 of the 1997 Rules of Procedure).

> The fundamental policy of the State, which is predominantly Catholic and considers marriage as indissoluble (there is no divorce under the Civil Code of the Philippines), is to be cautious and strict in granting annulment of marriage x x x. Pursuant to this policy the Rules of Court expressly prohibit annulment of marriages without actual trial. x x x The mere fact that no genuine issue was presented, and the desire to expedite the dispatch of the case, cannot justify a misinterpretation of the rule adopted or a violation of the avowed policy of the State *(Ibid.).*

ROLE OF FISCAL AND SOLICITOR GENERAL. In annulment and nullity cases, the prosecuting attorney or the fiscal must be present. While Article 48 does not specifically mention the Office of the Solicitor General, such office nevertheless can intervene in the proceeding considering that the issue of the validity of marriage is vested with public interest. (*Republic v. Iyoy,* G.R. No. 152577, September 21, 2005, 470 SCRA 508). The Office of the Solicitor General can also be required to submit a memorandum. Aside from making sure that there is no collusion or that the evidence is not fabricated, it is the duty of the Fiscal and the Solicitor General not only to defend a valid marriage but also to expose an invalid one *(Sin v. Sin,* G.R. No. 137590, March 26, 2001). The prosecuting attorney must actively participate (*Republic v. Cuison-Melgar*, G.R. No. 139676, March 31, 2006 486 SCRA 177). Hence, in *Sin v. Sin, supra*, where the fiscal merely filed a manifestation that there was no collusion and where he merely entered his appearance at certain hearings of the case but was not heard of anymore, the Supreme Court remanded the case for further proceeding even if the judge of the lower court already denied the petition for nullity.

In *Maquilan v. Maquilan,* G.R. No. 155409, June 8, 2007, 524 SCRA 167, the Supreme Court ruled that a partial voluntary separation of property agreed upon by the parties via a compromise agreement duly approved by the court prior to the judicial declaration of nullity of marriage is valid. It cannot be voided because of non-participation of the prosecuting attorney or the Office of the Solicitor General. An agreement to separate property is not of itself an indicator of collusion. In fact, there is no need for the fiscal to participate in the negotiation leading to the agreement. The task of the fiscal is to determine if the parties colluded or fabricated their evidence to get a nullity or annulment of marriage. If there is no showing that the compromise agreement for the separation of property touched on the merits of the nullity or annulment case, the participation of the fiscal or the Office of the Solicitor General in such an agreement is not needed.

However, if the annulment or declaration of nullity case were strongly opposed and heatedly contested in that the defendant filed his answer, and was represented by counsel who filed several pleadings and actively participated in the case and even cross-examined the witnesses of the plaintiff, it is clear that the litigation was characterized by a no-holds-barred contest and not by collusion. Under these circumstances, the non-intervention of the fiscal or prosecuting-attorney to assure lack of collusion between the contending parties is not fatal to the validity of the proceedings in court especially when it was not shown that evidence was suppressed or fabricated by any of the parties. These kinds of situations do not call for the strict application of Articles 48 and 60 of the Family Code (*Tuason v. Court of Appeals*, 256 SCRA 158).

COLLUSION. Collusion occurs where, for purposes of getting an annulment or nullity decree, the parties come up with an agreement making it appear that the marriage is defective due to the existence of any of the grounds for the annulment of marriage or the declaration of its nullity provided by law and agreeing to represent such false or non-existent cause of action before the proper court with the objective of facilitating the issuance of a decree of annulment or nullity of marriage. The commission of a matrimonial offense, or the creation of the appearance of having committed it, with the consent or privity of the other party, or under an arrangement between the spouses, has been held to be collusion (9 R.C.L. 789). Collusion implies a corrupt agreement between the husband and wife and, therefore, renders dismissible any annulment or nullity case initiated through the same.

Significantly, the failure to file an answer by the defendant or his or her failure, whether deliberate or not to appear in court or be represented by counsel after the filing of his or her answer cannot of itself be taken against the plaintiff as conclusive evidence of collusion, especially since the fiscal is ordered, in any case, to represent the government precisely to prevent such collusion (See *Aquino v. Delizo,* 109 Phil. 21). However, failure to answer, in connection with other circumstances such as an agreement between the parties, duly proven in court, that the respondent shall withdraw his or her opposition or shall not defend the action, can be evidence of collusion (2 ALR 705) but is not THE evidence of collusion. Indeed, even if there is an agreement between the parties to file the annulment or nullity case, collusion will not exist if the grounds relied upon for the annulment or nullity truly exist and are not just concocted. As held in the case of *Ocampo v. Florenciano,* 107 Phil. 35, which is a case for legal separation but which is undoubtedly applicable in annulment and nullity cases in so far as the concept of collusion is concerned, there will be collusion only if the parties had arranged to make it appear that a ground existed or had been committed although it was not, or if the parties had connived to bring about a matrimonial case even in the absence of grounds therefor. To say that mere agreement is collusion and therefore enough to dismiss a case is dangerous because this could very well leave the fate of the proceeding to the defendant who would, if he or she wishes to proceed with the case, deny an agreement, or who, if he or she desires to terminate the case, merely invoke that the parties agreed to file the suit even though there is a real ground for the matrimonial case. Also,

> 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 v. Williams* [N.Y.] 40 N.E. [2d] 1017; *Rosenweig v. Rosenweig,* 246 N.Y. Suppl. 231; *Conyers v. Conyers*, 224 S.W. [2d] 688, cited in *Ocampo v. Florenciano*, 107 Phil. 36).
>
> And proof that the defendant desires the divorce and makes no defense, is not by itself collusion (*Pohlman v. Pohlman*, [N.J.] 46 Atl. Rep. 658, cited in *Ocampo v. Florenciano*, 107 Phil. 36).

A judge who does not order an investigation for collusion when the situation falls squarely within the rules for him to order such investigation can be subject to administrative sanction (*Corpus v. Ochotorena*, AM No. RTJ-04-1861, July 30, 2004, 435 SCRA 446).

STIPULATION OF FACTS OR CONFESSION OF JUDGMENT. An annulment or nullity decree cannot be issued by the court on the sole basis of a stipulation of facts, or a confession of judgment (*Cardenas v. Cardenas and Rinen*, 98 Phil. 73). The former is practically an admission by both parties made in court agreeing to the existence of the act constituting the ground for annulment or for the declaration of nullity of the marriage, while the latter is the admission made in court by the respondent or defendant admitting fault as invoked by the plaintiff to sever the marriage ties.

> 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 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 (*Tolentino v. Villanueva*, 56 SCRA 1).

However, stipulation of facts or confession of judgment, if sufficiently supported or corroborated by other independent substantial evidence to support the main ground relied upon, may warrant an annulment of a marriage or the declaration of nullity of the same. Interpreting the provision under the Civil Code relative to confession of judgment and stipulation of facts in legal separation cases which interpretation is also applicable in annulment and declaration of nullity cases both under the Civil Code and the Family Code, the Supreme Court, in *Ocampo v. Florenciano*, 107 Phil. 35, stated:

> 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 defendant told the fiscal that she "liked 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 precaution against collusion, which implies more than consent or lack of opposition to the agreement.

However, in the case of *Cardenas v. Cardenas and Rinen,* 98 Phil. 73, where the first wife filed an annulment of marriage case with respect to the subsequent marriage of her husband with the "second wife" and where, during the hearing, there was a stipulation of facts entered into by the first wife and the defendants, whereby the parties agreed that the first wife was married to her husband (one of the defendants) prior to his marriage to the "second wife" (the other defendant), and where the marriage certificates of the first and second marriages were duly attached to the stipulation of facts, the Supreme Court ruled that the stipulation of facts and the attached marriage certificates were sufficient to declare as null and void the second marriage. The Supreme Court stated thus:

> In disposing of this appeal we did not overlook Article 88 of the New Civil Code which provides that "No judgment annulling a marriage shall be promulgated upon a stipulation of facts * * *." This Article and Article 101 on legal separation of the same Code contemplate the annulment of marriage or their legal separation by collusion. In this case, the possibility of such collusion is remote, because the interest of the two wives are conflicting. Apart from this, the marriage certificates attached to the stipulation of facts are evidence and cannot be deemed as stipulation of facts.

SUPPORT OF SPOUSES AND CUSTODY OF CHILDREN. While the annulment of marriage or declaration of nullity suit is being tried, the support of the spouses and the custody and support of the common children shall be governed by whatever agreement

the parties have made with respect to the same. Principally, the spouses and their children shall be supported from the properties of the absolute community of property or the conjugal partnership of gains as the case may be during the pendency of the suit for annulment or nullity of marriage in proper cases (Article 198 of the Family Code). Hence, support *pendente lite* and custody *pendente lite* can be ordered. However, should the court find the agreement to be inadequate, it may disregard the same and make the necessary provisions which, in its sound discretion, would be adequate under the circumstances.

In nullity cases, however, where the court provisionally gives support *pendente lite* to a spouse who, at the end of the case, has been found out to be not entitled to the support because his or her marriage with the one giving the support is void *ab initio,* the court shall order the recipient to return to the person who furnished the support the amounts already paid with legal interest from the dates of actual payment (See Section 7, Rule 61 of the 1997 Rules of Civil Procedure).

Unless there are other reasons later proven to show non-entitlement to the support, the support given to one of the spouses during the pendency of an annulment-of-marriage case need not be reimbursed because, in such cases, the marriage is valid up to the time it is dissolved.

The court shall give extra attention on the issue relative to the support and custody of the 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. In making its decision as to the custody of the children,

> the sex and age of the children are indeed very important considerations; however, the court must go beyond these to consider the characteristics and needs of each child, including their emotional, social, moral, material and educational needs; their respective home environments offered by the parties; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children; the interpersonal relationship between the child and the parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; the preference of each child, if the child is of sufficient age and maturity; the report and recommendation of any

> expert witness or other independent investigator; available alternatives; and any other relevant matter the evidence may disclose (*Ex Parte Devine*, 398 So. 2d 686).

Pertinently, Article 213 of the Family Code provides that "no child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise." The court shall also provide for appropriate visitation rights to the other parent.

VISITATION RIGHTS. While custody of a child may be awarded to a particular parent, this does not deprive the other parent from exercising his or her visitorial rights unless the court, for some compelling reason, deprives him or her of this right. And even if a parent has been legally deprived of his or her visitorial rights, this can be reinstated if it can be shown that the grounds for deprivation have become too harsh or are not anymore present. In the case of *Silva v. Court of Appeals*, 84 SCAD 651, 275 SCRA 604, the Supreme Court explained the reason for a parent's visitorial rights, thus:

> Parents have the natural right, as well as the moral and legal duty, to care for their children, see to their proper upbringing and safeguard their best interest and welfare. This authority and responsibility may not be unduly denied the parents; neither may it be renounced by them. Even when the parents are estranged and their affection for each other is lost, the attachment and feeling for their offsprings invariably remain unchanged. Neither the law nor the courts allow this affinity to suffer absent, of course, any real, grave and imminent threat to the well-being of the child.
>
> The petition bears upon this concern.
>
> 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.
>
> The instant controversy was spawned, 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.

In an order, dated 07 April 1989, the trial court adjudged:

> "WHEREFORE, premises considered, judgment is rendered directing respondent to allow herein petitioner *visitorial rights to his children during Saturdays and/or Sundays, but in no case should he take out the children without the written consent of the mother or respondent herein.* No pronouncement as to costs." (*Rollo*, p. 29)

Silva appeared somehow satisfied with the judgment for only Gonzales interposed an appeal from the RTC's order to the Court of Appeals.

In the meantime, Gonzales got married to a Dutch national. The newly-weds emigrated to Holland with Ramon Carlos and Rica Natalia.

On 23 September 1993, the appellate tribunal ruled in favor of Gonzales. It held:

> "'In all questions, regarding the care, custody, education and property of the *child, his welfare shall be the paramount consideration'* — not the welfare of the parents (Article 8, PD 603). Under the predicament and/or status of both petitioner-appellee and respondent-appellant, We find it more wholesome morally and emotionally for the children if we put a stop to the rotation of custody of said children. Allowing these children to stay with their mother on weekdays and then with their father and the latter's live-in partner on weekends may not be conducive to a normal upbringing of children of tender age. There is no telling how this kind of set-up, no matter how temporary and/or remote, would affect the moral and emotional conditions of the minor children. Knowing that they are illegitimate is hard enough, but having to live with it, witnessing their father living with a woman not their mother may have a more damaging effect upon them.
>
> "Article 3 of PD 603, otherwise known as the Child and Youth Welfare Code, provides in part:
>
> "'Art. 3. *Rights of the Child.* — x x x

'(1) x x x

'(2) x x x

'(3) x x x

'(4) x x x

'(5) Every child has the right *to be brought up in an atmosphere of morality and rectitude for the enrichment and the strengthening of his character.*

'(6) x x x

'(7) x x x

'(8) Every child has the right *to protection against exploitation*, *improper influences, hazards and other conditions or circumstances prejudicial to his* physical, *mental, emotional, social and moral development.*

'x x x

"With Articles 3 and 8 of P.D. No. 603 in mind, We find it to the best interest of the minor children to deny visitorial and/or temporary custodial rights to the father, even at the expense of hurting said parent. After all, if indeed his love for the children is genuine and more divine than the love for himself, a little self-sacrifice and self-denial may bring more benefit to the children. While petitioner-appellee, as father, may not intentionally prejudice the children by improper influence, what the children may witness and hear while in their father's house may not be in keeping with the atmosphere of morality and rectitude where they should be brought up.

"The children concerned are still in their early formative years of life. The molding of the character of the child starts at home. A home with only one parent is more normal than two separate houses (one house where one parent lives and another house where the other parent *with another woman/man* lives). After all, under Article 176 of the Family Code, illegitimate children are supposed to use the surname of and shall be under the parental authority of their mother.

"The child is one of the most important assets of the nation. It is thus important we be careful in rearing the children especially so if they are illegitimates, as in this case.

> "WHEREFORE, in view of all the foregoing, judgment is hereby rendered giving due course to the appeal, The Order of the Regional Trial Court of Quezon City dated April 7, 1989 is hereby reversed. Petitioner-appellee's petition for visitorial rights is hereby denied.
>
> "SO ORDERED." (*Rollo*, pp. 22-23)

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 (See Black's Law Dictionary, Sixth edition, p. 1572).

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. (Article 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 relationships as well. (Articles. 176, 195, Family Code). Then, too, and most importantly, in the declaration of *nullity* of marriages, a situation that presupposes a *void* or *inexistent* 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." (*Rollo*, p. 29).

The Court appreciates the apprehensions of private respondent and her well-meant concern for the children; nevertheless, it seems unlikely that petitioner would have ulterior motives or undue designs more than a parent's natural desire to be able to call on, even if it were only on brief visits, his own children. The trial court, in any case, has seen it fit to understandably provide this precautionary measure, *i.e.,* "in no case (can petitioner) take out the children without the written consent of the mother."

WHEREFORE, the decision of the trial court is REINSTATED, reversing thereby the judgment of the appellate court which is hereby SET ASIDE. No costs.

SO ORDERED.

Article 50. 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 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. (n)

Article 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 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)

JUDGMENT OF ANNULMENT OR NULLITY OF MARRIAGE. The judgment of annulment or nullity of marriage shall state the factual and the legal basis for its dispositive conclusion. A court cannot grant any relief which is not based on the allegation of the petition unless issues related to the main case were presented without objection from any party. Should a court render a judgment which is not in conformity with the allegations in a pleading or which grants a relief which is not based on the pleadings, the judgment is void for being *coram-non-judice*. However, even if the judgment is void but was not assailed in a motion for reconsideration and therefore not made an issue on appeal, such void judgment shall not be set aside and will continue to be effective (*Lam v. Chua*, 426 SCRA 29).

The finding of the trial court as to the existence or non-existence of a party's psychological incapacity at the time of the marriage is

final and binding on the Supreme Court unless it can be sufficiently shown that the trial court's factual findings and evaluation of the testimonies and the pieces of evidence presented are clearly and manifestly erroneous (*Tuason v. Court of Appeals*, 256 SCRA 158).

Considering that the judgment in an annulment or nullity of marriage case in proper cases shall involve the dissolution of the conjugal or absolute property regime of the parties or the co-ownership of the parties, the liquidation, partition and distribution of the same shall be provided for in the said judgment unless such matters had been adjudicated in previous judicial proceedings or the parties had agreed in their marriage settlement executed prior to the marriage that the regime of separation of property governed their marriage. Thus, in *Domingo v. Court of Appeals*, *et al.*, 44 SCAD 955, 226 SCRA 572, the Supreme Court ruled that, based on the second paragraph of Article 50 and the effects of a nullity decree of a void marriage which are contained in paragraphs (2), (3), (4) and (5) of Article 43,

> private respondent's ultimate prayer for separation of property will simply be one of the necessary consequences of 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.

In so far as void marriages are concerned, paragraphs (2), (3), (4) and (5) of Article 43 exceptionally apply only to void subsequent marriages that occur as a result of the non-observance of Article 40. Specifically, they apply only to the subsequent void marriage contracted by a spouse of a prior void marriage before the latter is judicially declared void (*Valdes v. RTC,* 72 SCAD 967, 260 SCRA 221). This is the clear mandate of Article 50. In this case, though the subsequent marriage is void, the property shall be liquidated as if there is a conjugal partnership of gains or an absolute community of property. In all other cases of a void marriage other than the void subsequent marriage that occurs as a result of the non-observance of Article 40, the property regime shall be governed by the rule on co-ownership provided for in Articles 147 and 148, as the case

may be, and not the conjugal partnership of gains or the absolute community of property. Hence, in these cases where Article 147 or 148 will apply, the property regime shall be liquidated pursuant to the ordinary rules on co-ownership pursuant to the Civil Code provided they are not contrary to the Family Code (*Valdes v. RTC*, 72 SCAD 967, 260 SCRA 221).

However, in the case of *Nicdao Cariño v. Cariño*, G.R. No. 132529, February 2, 2001, the Supreme Court ruled that a subsequent marriage celebrated in violation of Article 40 is void because it is bigamous and therefore the property regime in the said subsequent void marriage is co-ownership under Article 148 of the Family Code. If this is the case, then the presumptive legitime need not be delivered as it now follows the general rule. This *Nicdao Cariño* ruling is inaccurate. The legal rationale of the Supreme Court in the *Valdez* ruling must still be followed considering that it is a clear application of what Article 50 provides.

Significantly, the Supreme Court En Banc Resolution in A.M. No. 02-11-10-SC which took effect on March 15, 2003 provides in Section 21 thereof that, after the entry of judgment as a consequence of the finality of a nullity or annulment decree, the presumptive legitime of the common children shall be delivered "pursuant to Articles 50 and 51 of the Family Code." The wordings of the said rule referring to Article 50 does not detract from the *Valdez* ruling. Indeed, the new rules seem to have acknowledged that, for purposes of a void marriage, the presumptive legitime shall be delivered in accordance with Article 50 which, in turn expressly provides that, the proper case of a void marriage referred to is only the one under Article 40 which is the subsequent void marriage resulting from the failure to get a judicial declaration of nullity of the first void marriage.

In the partition of the conjugal dwelling and the lot on which it is situated, Article 102(6) (on the absolute community of property regime) and Article 129(9) (on the conjugal partnership of gains regime) shall apply in case the marriage has been annulled under Article 45 or in case the marriage is the void subsequent marriage that occurs as a result of the non-observance of Article 40 in relation to Articles 52 and 53. Pertinently, Articles 102(6) and 129(9) identically provide that:

> 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 is no such majority, the court shall decide taking into consideration the best interest of the children.

In other cases of a void marriage (*e.g.,* not the void subsequent marriage referred in Article 40 in relation to Articles 52 and 53), the above provision is not applicable. The rule that will apply is the rule on co-ownership (*Valdes v. RTC*, 72 SCAD 967, 260 SCRA 221). The dwelling shall be co-owned equally in the absence of any evidence that it is the exclusive property of only one party in accordance with the rules on co-ownership. In case of liquidation, it can be sold and the proceeds thereof be divided equally between the co-owners or, if it can be shown that it is legally owned only by one party, it shall be awarded to such party.

In order that their interest will be amply protected, all the creditors of the spouses as well as of the absolute community or the conjugal partnership shall be notified of the liquidation proceeding. For instance, if in the dissolution and partition, one of the parties decides to waive his or her rights, share or interest in the community or conjugal property in favor of the other party or any other person, the creditors of the one who makes the waiver can seek the rescission of the waiver to the extent of the amount sufficient to cover the amount of their credit (Articles 89 and 107).

ENTRY OF JUDGMENT AND DECREE OF NULLITY OR ANNULMENT. Unless there is a motion for reconsideration or an appeal made after the decision, such decision will become final upon the expiration of 15 days from receipt of the parties of the decision. Upon finality, the Entry of Judgment shall be issued. Subsequently, a Decree of Absolute Nullity of Marriage or Annulment of Marriage shall be issued. This decree shall be the best evidence of nullity or annulment of Marriage. However, the decree will issue only after the registrations of the Entry of Judgment in the proper local civil registries and of the approved partition and distribution of properties of the spouses in the proper registry of deeds, and the delivery of the presumptive legitime.

PRESUMPTIVE LEGITIME. 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 (Article 886 of the Civil Code). The decree of annulment or nullity of marriage shall also provide that the presumptive legitime of the common children shall be delivered to the same in cash,

property or sound securities, unless the parties, by mutual agreement judicially approved, had already provided for such matter.

During the hearing on the Family Code in the Senate Committee on Women and Family Relations held on January 27, 1988, Justices JBL Reyes and Puno had the following remarks on the purpose of the delivery of the presumptive legitime:

> JUSTICE REYES. xxx xxx May I point out that the reason for this was to protect the legitime of the children against the result of subsequent marriages that might be contracted after an annulment or its declaration as void. You will notice that the question of its being a presumptive legitime is expressed in the Code. It is not a real legitime and, of course, if he is incapacitated to have any legitime at all at the time of the transmission that is an objection that will be raised by the transferor and can be decided by the court.
>
> Second point: Assuming that he has received a presumptive legitime and the transferee becomes incapacitated to receive, it is a matter of recovery of the property that has been transmitted to him, or its value, since the legitime anyway is a matter of values and not of specific property. xxx xxx (copied verbatim from the transcript of the Senate hearing January 27, 1988). xxx xxx xxx
>
> MR. PUNO. xxx xxx Well, this is not a new phrase: This is not a new provision. It is contained in the Civil Code of 1950 and even in the Spanish Code. It is contained in Article 201, for instance, of the present Civil Code of 1950 where in the case of absolute community the law excludes from the community, among others, a portion of the property of either of the presumptive legitime of the children by the former marriage.
>
> Now, the term "presumptive legitime" is exactly what it is, it is a presumption. It is not actual legitime. Actual legitime is that which is present at the time of death. Now, since the parties are still alive, we can only presume what legitime is, what is the basis of the presumption? The basis of the presumption is that properties of the persons involved at the time of this particular situation arises would be the same as when he dies which is not a fact. Because these properties may increase or they may decrease or they may disappear. But the point is, certain persons have to be protected.
>
> In the case of the system of absolute community when the two parties to the marriage merge their properties, the law looks forward. It is possible that there have been children by a former marriage. If you do not exclude the presumptive legitime,

> then the children of the first marriage will be at a disadvantage because they will have to share that part which should have belonged to them, to one of the children of the second marriage.
>
> That is why in the present Code, in a system of absolute community, we exclude that presumptive legitime. Meaning, that property which would have belonged to the children, if there had been death at this moment. But there is no doubt; the parties are still alive. So therefore, we can only presume. That is the same theory insofar as the Family Code is concerned. We except this, we exclude this, as presumptive legitime, meaning that we assumed that if he died at this moment, this would have been the legitime of the children, but they have to be protected for the time being. That's why we set aside the property. xxx xxx (Copied verbatim from the Transcript of the hearing of January 27, 1988).

The presumptive legitime shall be computed as of the date of the final judgment of the trial court. It shall be delivered in cash, property or sound securities, unless the parties, by mutual agreement judicially approved, had already provided for such matters. The judicial proceeding for the approval of the mutual agreement of the spouses shall be summary in nature in accordance with Article 253. Significantly, the law also provides that the delivery of the presumptive legitime will 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 or absolute nullity shall be considered as advances on their legitime.

In case the marriage is annulled, the presumptive legitime of the common children, if there are any, must be delivered to them. However, in void marriages, the delivery of the presumptive legitime is *generally* not required *except only* in the void subsequent marriage resulting from the non-observance of Article 40 in relation to Articles 52 and 53. In *Valdes v. RTC,* 72 SCAD 967, 260 SCRA 221, the Supreme Court ruled that, as a general rule, in case of void marriages, the special rules on co-ownership under Articles 147 and 148, as the case may be, are applicable and, in case of liquidation and partition of such co-ownership, the ordinary rules of co-ownership under the Civil Code are applicable and *not Articles 50, 51 and 52 of the Family Code.* It must be observed that Article 50, among others, requires the delivery of the presumptive legitime. Article 51 provides how, in the delivery of the presumptive legitime, the same shall be valued. Article 52, among others, requires the recording of the delivery of the presumptive legitime in the proper

registry of property. In the ordinary liquidation and partition rules of co-ownership under the Civil Code as well as in Articles 147 and 148 which are generally applicable to void marriages, there is no provision requiring the delivery of the presumptive legitime similar to Articles 50, 51 and 52 of the Family Code.

Following therefore the rationale of the *Valdes* ruling, delivery of the presumptive legitime is not required as *a general rule* in void marriages; but, as an exception to this general rule, the *Valdes* ruling also states that paragraphs (2), (3), (4) and (5) of Article 43 relates only, by the explicit terms of Article 50, to voidable marriages under Article 45 and, *exceptionally, to void marriages under Article 40* of the Family Code, namely, the declaration of nullity of *a subsequent marriage* contracted by a spouse of a prior void marriage before the latter is judicially declared void. Paragraph (2) of Article 43, in turn, provides for the liquidation of the conjugal partnership of gains or the absolute community of property. Hence, the liquidation of the property of the void subsequent marriage referred to in Article 40 will be done as if the property relationship is the absolute community of property or the conjugal partnership of gains. It shall therefore follow the liquidation procedures under Articles 102 referring to the absolute community of property and 129 referring to the conjugal partnership of gains, which expressly include the mandatory delivery of the presumptive legitime in accordance with Article 51 (See Article 102[5] and Article 129[8]). By way of exception, therefore, and following the spirit of the *Valdes* ruling, Articles 50, 51 and 52 requiring the delivery of the presumptive legitime, exceptionally applies to a subsequent void marriage resulting from the non-observance of Article 40.

However, in the case of *Nicdao Cariño v. Cariño*, G.R. No. 132529, February 2, 2001, the Supreme Court ruled that a subsequent marriage celebrated in violation of Article 40 is void because it is bigamous and therefore the property regime in the said subsequent void marriage is co-ownership under Article 148 of the Family Code. This *Nicdao Cariño* ruling is inaccurate. The legal rationale of the Supreme Court in the *Valdez* ruling must still be followed considering that it is a clear application of what Article 50 provides.

While the common children are not parties to the annulment case relative to voidable marriages under Article 45 or a nullity case relative to a subsequent void marriage under Article 40, but considering that they are materially affected by the nullity or annulment judgment in so far as the presumptive legitime

is concerned, they are specially granted by law legal standing to seek the enforcement of the judgment. The children's guardian or the trustee of their property may likewise ask for the enforcement for and on behalf of the children. The delivery of the presumptive legitime can be done by filing a summary court proceeding praying for such delivery (Article 253 in relation to Chapter 2 of Title XI of the Family Code).

> **Article 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)**
>
> **Article 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. (n)**
>
> **Article 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. (n)**

LIQUIDATION AND PARTITION OF PROPERTIES. In case of nullity of marriage, the properties shall be liquidated in accordance with the ordinary rules of co-ownership. In *Valdez vs. RTC,* 260 SCRA 221, the Supreme Court ruled that the liquidation process provided under the chapters on the absolute community of property and the conjugal partnership of gains will not apply in a void marriage except in one exceptional case which is the subsequent void marriage under Article 40 of the Family Code. In voidable marriage, the properties shall be liquidated in accordance with the rules provided for under the chapters in the absolute community of property and the conjugal partnership of gains. If the there were a pre-nuptial agreement providing that separation of property regime governed the marriage, then there is no need for liquidation and partition.

In *Maquilan v. Maquilan,* G.R. No. 155409, June 8, 2007, 524 SCRA 167, the Supreme Court ruled that a partial voluntary

separation of property agreed upon by the parties via a compromise agreement duly approved by the court prior to the judicial declaration of nullity of marriage is valid.

RECORDING IN THE CIVIL REGISTRY AND REGISTRY OF PROPERTY. The recording in the civil registry and in the registry of property of the judgment of annulment or of absolute nullity of the marriage and the partition and distribution, as well as the delivery of the presumptive legitimes of the common children in an annulled marriage based on Article 45 or a nullified subsequent marriage under Article 40 in relation to Articles 52 and 53 are necessary to bind third persons. Such recordings are also necessary for the parties to be able to validly contract a subsequent marriage. Non-compliance with the requirement mandated under Article 52 of the Family Code shall not affect third persons and therefore renders any subsequent marriage null and void pursuant to Article 53. It must be noted, however, that, except in the subsequent void marriage that may arise due to the non-observance of Article 40 in relation to Articles 52 and 53, there is no need for the delivery of the presumptive legitime after a marriage is judicially declared void (See *Valdes v. RTC*, 72 SCAD 967, 260 SCRA 221; see discussions under Article 147).

Non-compliance with the liquidation and partition requirements, as well as the delivery of the presumptive legitime shall be a cause for the non-issuance of a decree of nullity or annulment.

It must be pointed out that the observance or non-observance of the requirements of liquidation, partition, distribution and the delivery of the presumptive legitimes is crucially material in determining whether or not the subsequent marriage is void only if the previous marriage has been judicially nullified or annulled in accordance with law. Hence, if the first marriage were terminated by the death of one of the spouses and the surviving spouse remarried, complying with all the essential and formal requirements of Articles 2 and 3 of the Family Code for a marriage, such subsequent marriage is valid even if there has been no previous liquidation, partition, and distribution of the properties of the first marriage as well as no delivery of the presumptive legitimes or actual legitime of the children. The failure to liquidate in this instance will only be determinative of the property regime that will govern the subsequent marriage. Articles 103 and 130 of the Family Code provide, among others, that if a surviving spouse subsequently remarries without liquidating the community or conjugal properties of the first

marriage, the mandatory regime of complete separation of property shall govern the property relations of the subsequent marriage.

APPROPRIATE CIVIL REGISTRY AND REGISTRIES OF PROPERTY. When Article 52 requires that the judgment of annulment or the judicial declaration of nullity shall be recorded in the appropriate civil registry, it refers to the local civil registry of the city or municipality where the court that issued the decision is functioning (Article 409 of the Civil Code) and also the local civil registry of the city or municipality where the marriage was solemnized (Section 7 of the Civil Registry Law, Act No. 3753).

Upon finality of judgment, an entry of judgment and a Decree of Nullity or annullment shall be issued which shall be registered in the local civil registries where the marriage was recorded and where the court granting the petition is located.

It shall be the duty of the successful petitioner to send the copy of the final decree of the court to the proper local civil registrars. Upon the other hand, it shall be the duty of the clerk of court which issued the decree to ascertain whether the same has been registered, and if this has not been done, to send a copy of the said decree to the civil registry of the city or municipality where the court is functioning (Article 409 of the Civil Code).

The registries of property referred to in Article 52 refer to the registries of properties where the properties are located. If there are many properties located in various places, registration must be made in each of the registries of properties where each property is located.

STATUS OF CHILDREN. Generally, children conceived and born outside a valid marriage or inside a void marriage are illegitimate. Children conceived or born inside an annullable or voidable marriage are legitimate while those *conceived and born* inside a void marriage are illegitimate except as provided for in Article 54 of the Family Code.

Hence, if the marriage is null and void because one of the parties is psychologically incapacitated to perform the essential marital obligations or because the parties to the subsequent marriage have not complied with the mandatory recording and distribution requirements under Article 52 in relation to Article 53, the children conceived or born inside a void marriage under Article 36 and before finality of the judgment of nullity in psychological incapacity case, or those conceived or born in a marriage which does not comply with

Article 52 in relation to Article 53, shall be considered legitimate. The judicial decree of nullity becomes final after the lapse of fifteen (15) days from the receipt of the parties of the said decree, unless in the meantime the decree has been appealed to a higher court. Thus, if, after only two days from receipt of a judicial nullity decree on the basis of Article 36, the parties, whose marriage was the subject of nullification, met and had sexual intercourse which resulted in the conception of the child, the said child shall be considered their legitimate child after birth.

It must be understood, however, that the children referred to under Article 54 referring to Article 36 do not involve those conceived *and* born *before* the marriage ceremony of the parents but to those conceived *or* born *after* the marriage ceremony of the parents but before final judgment of nullity. Thus, a child conceived *and* born before the marriage ceremony is illegitimate. If the child were conceived at a time when the parents do not suffer any legal impediment to marry each other, the subsequent marriage of such parents will legitimate the child pursuant to Article 178 of the Family Code. If such subsequent marriage is declared void because of Article 36 (psychological incapacity), the child shall be an illegitimate child. The child will not be considered legitimate. Article 54 will not apply because the child was not conceived *or* born inside the void marriage but was conceived *and* born when there was no marriage ceremony yet.

Under Article 53, if either of the former spouses does not comply with the requirements under Article 52 and he or she remarries, the subsequent marriage is void but the children conceived or born inside the said void marriage are legitimate. Hence, if the marriage of A and B are annulled and A, even before the liquidation of his conjugal properties with B and without delivering the presumptive legitime of their common legitimate child, subsequently marries X, the said marriage is void but any child conceived or born inside such void marriage is legitimate.

RULE ON DECLARATION OF ABSOLUTE NULLITY OF VOID MARRIAGES AND ANNULMENT OF VOIDABLE MARRIAGES

(Supreme Court En Banc Resolution A.M. 02-11-10-SC)

Section 1. *Scope.* — This Rule shall govern petitions for declaration of absolute nullity of void marriages and annulment of voidable marriages under the Family Code of the Philippines.

The Rules of Court shall apply suppletorily.

Sec. 2. *Petition for declaration of absolute nullity of void marriages.* —

(a) *Who may file.* — A petition for declaration of absolute nullity of void marriage may be filed solely by the husband or the wife. (n)

(b) *Where to file.* — The petition shall be filed in the Family Court.

(c) *Imprescriptibility of action or defense.* — An action or defense for the declaration of absolute nullity of void marriage shall not prescribe.

(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.

Sec. 3. *Petition for annulment of voidable marriages.* —

(a) *Who may file.* — The following persons may file a petition for annulment of voidable marriage based on any of the grounds under Article 45 of the Family Code and within the period herein indicated:

(1) The contracting party whose parent, or guardian, or person exercising substitute parental authority did not give his or her consent, within five years after attaining the age of twenty-one unless, after attaining the age of twenty-one, such party freely cohabitated with the other as husband or wife; or the parent, guardian or person having legal charge of the contracting party, at any time before such party has reached the age of twenty-one;

(2) 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, provided that the petitioner, after coming to

reason, has not freely cohabited with the other as husband or wife;

(3) The injured party whose consent was obtained by fraud, within five years after the discovery of the fraud, provided that said party, with full knowledge of the facts constituting the fraud, has not freely cohabited with the other as husband or wife;

(4) The injured party whose consent was obtained by force, intimidation, or undue influence, within five years from the time the force, intimidation, or undue influence disappeared or ceased, provided that the force, intimidation or undue influence having disappeared or ceased, said party has not thereafter freely cohabited with the other as husband or wife;

(5) The injured party where the other spouse is physically incapable of consummating the marriage with the other and such incapacity continues and appears to be incurable, within five years after the celebration of marriage; and

(6) The injured party where the other party was afflicted with a sexually-transmissible disease found to be serious and appears to be incurable, within five years after the celebration of marriage.

(b) *Where to file*. — The petition shall be filed in the Family Court.

Sec. 4. *Venue*. — 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 filing, or in the case of a non-resident respondent, where he may be found in the Philippines, at the election of the petitioner.

Sec. 5. *Contents and form of petition*. — (1) The petition shall allege the complete facts constituting the cause of action.

(2) It 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.

(3) It 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.

(4) It 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.

Sec. 6. *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.

Sec. 7. *Motion to dismiss*. — 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.

Sec. 8. *Answer*. — (1) The respondent shall 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.

(2) If the respondent fails to file an answer, the court shall not declare him or her in default.

(3) 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.

Sec. 9. *Investigation report of public prosecutor*. — (1) Within one month after receipt of the court order mentioned in paragraph (3) of Section 8 above, 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.

(2) 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.

(3) 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.

Sec. 10. *Social worker*. — The court may require a social worker to conduct a case study and submit the corresponding report at least three days before the pre-trial. The court may also require a case study at any stage of the case whenever necessary.

Sec. 11. *Pre-trial*. — (1) *Pre-trial mandatory*. — A pre-trial is mandatory. On motion or *motu proprio*, the court shall set the pre-trial after the last pleading has been served and filed, or upon receipt of the report of the public prosecutor that no collusion exists between the parties.

(2) *Notice of pre-trial*. — (a) The notice of pre-trial shall contain:

(1) the date of pre-trial conference; and

(2) an order directing the parties to file and serve their respective pre-trial briefs in such manner as shall ensure the receipt thereof by the adverse party at least three days before the date of pre-trial.

(b) The notice shall be served separately on the parties and their respective counsels as well as on the public prosecutor. It shall be their duty to appear personally at the pre-trial.

(c) Notice of pre-trial shall be sent to the respondent even if he fails to file an answer. In case of summons by publication and the respondent failed to file his answer, notice of pre-trail shall be sent to respondent at his last known address.

Sec. 12. *Contents of pre-trial brief.* — The pre-trial brief shall contain the following:

(a) A statement of the willingness of the parties to enter into agreements as may be allowed by law, indicating the desired terms thereof;

(b) A concise statement of their respective claims together with the applicable laws and authorities;

(c) Admitted facts and proposed stipulations of facts, as well as the disputed factual and legal issues;

(d) All the evidence to be presented, including expert opinion, if any, briefly stating or describing the nature and purpose thereof;

(e) The number and names of the witnesses and their respective affidavits; and

(f) Such other matters as the court may require.

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 under the succeeding paragraphs.

Sec. 13. *Effect of failure to appear at the pre-trial.* —

(a) 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.

(b) 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 respondent 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.

Sec. 14. *Pre-trial conference.* — At the pre-trial conference, the court:

(a) May refer the issues to a mediator who shall assist the parties in reaching an agreement on matters not prohibited by law.

The mediator shall render a report within one month from referral which, for good reasons, the court may extend for a period not exceeding one month.

(b) In case meditation is not availed of or where it fails, the court shall proceed with the pre-trial conference, on which occasion it shall consider the advisability of receiving expert testimony and such other matters as may aid in the prompt disposition of the petition.

Sec. 15. *Pre-trial order.* — (a) The proceedings in the pre-trial shall be recorded. Upon termination of the pre-trial, the court shall issue a pre-trial order which shall recite in detail the matters taken up in the conference, the action taken thereon, the amendments allowed on the pleadings, and, except as to the ground of declaration of nullity or annulment, the agreements or admissions made by the parties on any of the matters considered, including any provisional order that may be necessary or agreed upon by the parties.

(b) Should the action proceed to trial, the order shall contain a recital of the following:

(1) Facts undisputed, admitted, and those which need not be proved subject to Section 16 of this Rule;

(2) Factual and legal issues to be litigated;

(3) Evidence, including objects and documents, that have been marked and will be presented;

(4) Names of witnesses who will be presented and their testimonies in the form of affidavits; and

(5) Schedule of the presentation of evidence.

(c) The pre-trial order shall also contain a directive to the public prosecutor to appear for the State and take steps to prevent collusion between the parties at any stage of the proceedings and fabrication or suppression of evidence during the trial on the merits.

(d) The parties shall not be allowed to raise issues or present witnesses and evidence other than those stated in the pre-trial order. The order shall control the trial of the case, unless modified by the court to prevent manifest injustice.

(e) The parties shall have five days from receipt of the pre-trial order to propose corrections or modifications.

Sec. 16. *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.

Sec. 17. *Trial.* — (1) The presiding judge shall personally conduct the trial of the case. No delegation of the reception of evidence to a commissioner shall be allowed except as to matters involving property relations of the spouses.

(2) The grounds for declaration of absolute nullity or annulment of marriage must be proved. No judgment on the pleadings, summary judgment, or confession of judgment shall be allowed.

(3) The court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring a party to testify in open court would not enhance the ascertainment of truth; would cause to the party psychological harm or inability to effectively communicate due to embarrassment, fear, or timidity; would violate the right of a party to privacy; or would be offensive to decency or public morals.

(4) No copy shall be taken nor any examination or perusal of the records of the case or parts thereof be made by any person other than a party or counsel of a party, except by order of the court.

Sec. 18. *Memoranda.* — The court may require the parties and the public prosecutor, in consultation with the Office of the Solicitor General, to file their respective memoranda in support of their claims within fifteen days from the date the trial is terminated. It may require the Office of the Solicitor General to file its own memorandum if the case is of significant interest to the State. No other pleadings or papers may be submitted without leave of court. After the lapse of the period herein provided, the case will be considered submitted for decision, with or without the memoranda.

Sec. 19. *Decision*. — (1) 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 Rules on Liquidation, Partition and Distribution of Properties.

(2) 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.

(3) 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.

(4) Upon the finality of the decision, the court shall forthwith issue the corresponding decree if the parties have no properties.

If the parties have no properties, the court shall observe the procedure prescribed in Section 21 of this Rule.

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.

Sec. 20. *Appeal*. — (1) *Pre-condition*. — 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.

(2) *Notice of appeal*. — 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.

Sec. 21. *Liquidation, partition and distribution, custody, support of common children and delivery of their presumptive legitimes*. — 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.

Sec. 22. *Issuance of Decree of Declaration of Absolute Nullity or Annulment of Marriage*. — (a) The court shall issue the Decree after:

(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.

(b) The court shall quote in the Decree the dispositive portion of the judgment entered and attach to the Decree the approved deed of partition.

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.

Sec. 23. *Registration and publication of the decree; decree as best evidence*. — (a) 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.

(b) 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.

(c) 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.

Sec. 24. *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 the estate in proper proceedings in the regular courts.

(b) 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.

Sec. 25. *Effectivity*. — This Rule shall take effect on March 15, 2003 following its publication in a newspaper of general circulation not later than March 7, 2003.

RULE ON PROVISIONAL ORDERS
(Supreme Court En Banc Resolution A.M. 02-11-12-SC)

SECTION 1. *When issued*. — 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 immediately, with or without a bond, and for such period and under such terms and conditions as the court may deem necessary.

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 abuse 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.

SECTION 9. *Effectivity.* — This Rule shall take effect on March 15, 2003 following its publication in a newspaper of general circulation not later than March 7, 2003.

TITLE II. — LEGAL SEPARATION

Article 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)

LEGAL SEPARATION. A decree of legal separation or relative divorce does not affect the marital status, there being no severance of the *vinculum* (*Laperal v. Republic,* 6 SCRA 357). It does not dissolve the marriage. A legal separation decree involves nothing more than bed-and-board separation *(a mensa et thoro)* of the spouses (*Lapuz v. Eufemio,* 43 SCRA 177). However, the decree is terminable at the will of the parties by merely filing a manifestation in court, the marriage continuing in regard to everything not necessarily withdrawn from its operation (*Pettis v. Pettis,* 91 Conn. 608, 101 Atl. 13, 4 ALR 852).

Significantly, the Family Code, like the Civil Code, does not admit absolute divorce (*Tenchavez v. Escano*, 15 SCRA 355) except under the second paragraph of Article 26 of the Family Code. Strictly speaking, the word "divorce" means a dissolution of the bond of matrimony, based on the theory of a valid marriage, for some cause arising after the marriage, while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of the marriage ceremony, the marriage is terminable (*Miller v. Miller,* 175 Cal. 797, 162 Pac. 394 Ann. Cas. 1918E, LRA 1918B 415). Legal separation, under the Family Code, is known as relative divorce.

EXCLUSIVITY OF GROUNDS FOR LEGAL SEPARATION. The grounds enumerated by law to warrant a judicial decree of legal separation are only those enumerated in Article 55. They may or may not exist at the time of the marriage ceremony. As a general rule, they usually occur after the celebration of the marriage. No other grounds can be invoked by any party other than those stated by law. This is in furtherance of the policy of the State to foster unity in and to preserve the marital relation as the same is essential to the public welfare. Thus, the Supreme Court in *Lacson v. San Jose-Lacson,* 24 SCRA 837, stated that separation by the spouses

> is a "state which is abnormal and fraught with grave danger to all concerned." We would like to douse the momentary seething of emotions of couples who, at the slightest ruffling of domestic tranquility — brought about by "mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion" without more — would be minded to separate from each other.

REPEATED PHYSICAL VIOLENCE OR GROSSLY ABUSIVE CONDUCT. The frequency of physical violence inflicted upon the

petitioner, a common child, or a child of the petitioner warrants a decree of legal separation. This ground, however, does not include repeated physical violence upon the child of the respondent or the guilty spouse. The law does not give a cause of action to the petitioner to file a case for legal separation on the ground that the respondent-spouse repeatedly inflicts physical violence upon his or her own child with another person. However, such repeated physical violence may be a cause to suspend or terminate, depending on the severity of the violence, the parental authority of the respondent upon his or her own minor child with another person pursuant to Article 231(1) of the Family Code.

Physical violence connotes the infliction of bodily harm. Although the physical infliction must generally cause a certain degree of pain, the frequency of the act and not the severity of the same is the determinative factor under this ground. Indeed, the act may involve some form of violence although the same is not that severe. However, it must be inflicted with bad faith and malice. In the original draft of the Civil Law and Family Code committees, the phrase used was "habitual physical violence." Justice Caguioa objected to the use of the phrase "habitual" as it connotes a length of time and accordingly, Justice Reyes suggested the word "repeated" which was adopted by the committee (Minutes of the 156th joint meeting of the Civil Code and Family Law committees held on September 27, 1986, page 11).

However, even if the act is not repeated or does not involve physical violence, such act may nevertheless constitute grossly abusive conduct on the part of the respondent which may warrant the issuance of a legal separation decree. "Grossly abusive conduct" has no exact definition and, therefore, is determined on a case-to-case basis. Hence, a singular but serious act "of squeezing of neck, pulling of hair and the like without the intent to kill" may be included in this phrase (Minutes of the 156th joint meeting of the Civil Code and Family Law committees held on September 27, 1986, page 11). Also, the continued manifestation by one spouse of indifference or aversion to the other coupled with persistent neglect of the duties incident to the marital relation has been declared by American jurisprudence as cruelty enough to warrant a decree of divorce (Ann Cas 1918B 480). In the same vein, this may be an example of grossly abusive conduct as a ground for legal separation. If, however, such indifference or neglect are manifestations of the respondent's psychological incapacity to perform the essential marital obligations, the same may be a ground for nullity of marriage

under Article 36 of the Family Code if such behavior exists at the time of the marriage ceremony and is grave and incurable.

Also, where it appears that a spouse has deliberately adopted, as a course of conduct, the use of offensive language toward the other spouse, continually calling him or her vile and opprobrious names, with the intent and fixed purpose of causing unhappiness, American courts usually consider such conduct to be legal cruelty or abusive treatment which can justify a divorce (Ann. Cas. 1918B 487). Under the Family Code, such a situation can fall under grossly abusive conduct.

COMPULSION BY PHYSICAL VIOLENCE OR MORAL PRESSURE TO CHANGE RELIGIOUS OR POLITICAL AFFILIATION. Answering queries and comments relative to this parti-cular ground, Justice Ricardo Puno during the hearing on February 3, 1988 in the Senate Committee of Women and Family Relations, remarked:

> I did catch one suggestion that Article 55(2), physical violence and moral pressure to compel the petitioner to change religious or political affiliation should be amended to remove "political affiliation" so that it would merely be "physical violence or moral pressure to compel the petitioner to change his religious affiliation."
>
> I would like to call attention to paragraph 1. In paragraph 1, it says: "physical violence or grossly abusive conduct directed against the petitioner, the common child or a child of the petitioner."
>
> The "physical violence" here is for any purpose. So, no matter how insignificant the purpose is, as long as there is repeated physical violence, there will be a ground for legal separation. If we remove "political affiliation" here, it will mean that it can still be an item for purposes of legal separation except that you have to do it repeatedly. So, if you're going to have your wife change her political affiliation and you would exert physical violence repeatedly, it will also be a ground for legal separation.
>
> Now, what we did here is, we equate it with religious conviction, so that with one attempt, one incident of physical violence or moral pressure to compel the change in religious affiliation or the change in political affiliation, it can be a ground for legal separation.
>
> Now, with due respect, we believe that political ideas are probably quite as important as religious ideas. We feel that

> there should be unity within the family, we think that the couple should learn to live with each other's political ideas. That is the main context of reconciliation. If they cannot live together within the family, how can we live together as a nation sharing different political ideals? We feel that this is an answer to the human rights concept which includes, among others, the right to accept one another's political beliefs.
>
> So, we feel that the nuance is not really as important as imagined because what will happen here merely, is that you would have a repetition of the physical violence and that would then be a ground for legal separation.
>
> Finally, this is not divorce, this is not a cutting of the marital ties. It is just a separation from bed and board but they remain married, now, perhaps, thereafter, there may still be a reconciliation that would enable them to restore their family life. That was the main point that moved the committee members to include "political affiliation" in paragraph 2 (copied verbatim from transcript of Hearing dated February 3, 1988, 10:30 a.m.).

CORRUPTION OR INDUCEMENT TO ENGAGE IN PROSTITUTION. Parents and those exercising parental authority have the duty, among others, to provide their unemancipated children with moral and spiritual guidance, to instruct them by right precept and good example, and to protect them from bad company and prevent them from acquiring habits detrimental to their health, studies and morals. Hence, if one of the spouses induces the petitioner, a common child, or a child of the petitioner to engage in prostitution or if such spouse connives in such corruption or inducement, a valid legal separation decree may issue to prevent the guilty spouse from exercising such morally depraved acts detrimental to the growth of the children and the family as a whole. The children here may or may not be emancipated. The immoral and corrupt act referred to is prostitution only. The inducement likewise refers to prostitution only. It cannot be any other immoral or corrupt act. Otherwise, the undue stretching of the import of the article will not serve the policy of the law of discouraging legal separation.

It must likewise be observed that a mere "attempt" is enough to be a ground for legal separation. It is not important that the respondent successfully corrupted or induced the petitioner, a common child or a child of the petitioner to engage in prostitution, or connivance in such corruption or inducement. If the respondent is successful, it is, of course, definitely a ground for legal separation.

The ground, however, does not include as the subjects of such an "attempt" the child of the respondent or the guilty spouse with another person. The law does not give a cause of action to the petitioner to file a case for legal separation on the ground that the respondent-spouse committed the ground provided in Article 55(3) upon his or her own child with another person. However, such act may be a cause to suspend or terminate, depending on severity of the corruption, inducement or connivance, the parental authority of the respondent upon his or her own minor child with another person pursuant to Article 231(2) and (4) of the Family Code. If such corruption, inducement or connivance is successful, it can even give cause of action to permanently terminate parental authority under Article 232 of the Family Code.

FINAL JUDGMENT INVOLVING MORE THAN SIX YEARS OF IMPRISONMENT. The offense for which the spouse is sentenced by final judgment of more than six years of imprisonment need not be necessarily against the other spouse, their common children or the petitioner's children. The offense could have been committed against anybody. This ground can be invoked even if the convicted party has been validly pardoned. During one of the Civil Code and Family Law joint meetings,

> Justice Reyes and Justice Caguioa stated that the idea is the stigma created by one spouse being sentenced to imprisonment for more than six years (Minutes of the 156th joint meeting of the Civil Code and Family Law committees held on September 27, 1986, page 12).

The judgment must likewise be final. Hence, the injured spouse cannot file a case for legal separation while the criminal conviction is still on appeal because, in such a case, the decision has not yet become final. While the case is still on appeal, the erring spouse is still presumed innocent and there is still a possibility that the conviction can be reversed by the higher courts.

DRUG ADDICTION, HABITUAL ALCOHOLISM, LESBIANISM AND HOMOSEXUALITY. The extent and nature of drug addiction, habitual alcoholism, lesbianism and homosexuality as grounds for legal separation are the same as those in annulment cases. However, in annulment cases, the drug addiction, habitual alcoholism, lesbianism and homosexuality are instances of fraud which must exist at the time of the celebration of the marriage. In legal separation, such grounds can exist even after the marriage ceremony.

In cases where a spouse had engaged in homosexual activities despite repeated demands from the other spouse for him to desist from undertakings such activities, American courts usually granted a divorce decree to the complaining spouse by considering the homosexual activity within the purview of the statutory ground of "cruelty," as the continued acts can create serious mental anguish on the part of the innocent spouse as to endanger her life and health.

It must be noted however that the law should not have lumped lesbianism and homosexuality with drug addiction and habitual alcoholism as they are clearly different in nature. Lesbianism and homosexuality are not afflictions. They deal with sexual orientation that do not by themselves affect the mental state of a person in relation to his or her judgment, while drug addiction and habitual alcoholism deal with a mental state that is detrimental to ones social and personal well-being as well as to the society as a whole as they prevent the one afflicted from properly exercising their judgment.

BIGAMY. Bigamy is the act of illegally contracting a second marriage despite full knowledge that the first marriage is still validly existing or without obtaining the needed judicial declaration of presumptive death of the first spouse who was absent for four or two consecutive years pursuant to Article 41 of the Family Code. Whether the illegal subsequent marriage has been solemnized in the Philippines or abroad is immaterial. So long as there has been a second bigamous marriage, wherever celebrated, a legal separation decree may issue. However, if the bigamous marriage were committed abroad, the guilty party cannot be criminally prosecuted for bigamy in the Philippines as our penal statutes are territorial in nature.

SEXUAL INFIDELITY OR PERVERSION. The husband and the wife are obliged to observe mutual love, respect and fidelity. Although adultery and concubinage are included in acts of sexual infidelity, other acts of sexual infidelity short of adultery and concubinage are enough so long as the said acts committed by one spouse would constitute a clear betrayal of the trust of his or her spouse by having intimate love affairs with other persons. Hence, even a husband's single act of sexual intercourse with a woman other than his wife may warrant the issuance of a decree of legal separation. This is true even if the husband and the woman did not commit concubinage. This is a drastic departure from the requirements under the Civil Code where, in so far as the husband is concerned, he must have committed concubinage which is done in

any of the following manner, to wit: (a) maintaining a mistress in the conjugal dwelling; (b) sexual intercourse with another woman under scandalous circumstances; and (c) cohabiting with her in any other place.

Also, it has been held that a Filipina who obtains an absolute divorce abroad and subsequently marries a foreigner and cohabits with the same, has technically committed "intercourse with a person other than her husband," considering that the divorce obtained abroad is not recognized in the Philippines and her subsequent marriage therefore, is bigamous (*Tenchavez v. Escano*, 15 SCRA 355; *Manila Surety & Fidelity Co., Inc. v. Teodoro*, 20 SCRA 463).

As to sexual perversion, this would include engaging in such behavior not only with third persons but also with the spouse. Thus, the joint Civil Code and Family Law revision committees

> clarified that it would include sexual perversion with one's spouse and other sexual practices like oral sexual intercourse but that if one condones sexual infidelity or perversion, he is estopped from raising it as a ground for legal separation because condonation would be tantamount to consent (Minutes of the 156th Joint Meeting of the Civil Code and Family Law committees held on September 27, 1986, page 12).

Interestingly, in the United States, certain acts of perversion such as bestiality are not only grounds for relative divorce but also for absolute divorce under the ground of "cruelty" against the other spouse as they exert such an unsettling effect not only on the marital relationship but on the mental condition of the other spouse, as it can create great psychological and physical agony on the part of the said innocent spouse. Thus, in a case where a wife and her relatives saw her husband on different occasions engaging in carnal intercourse with a cow and, when confronted about the situation by the wife, the husband merely evaded the issue and even resorted to vile language, necessitating the wife to separate from the husband, an American court ruled that for the wife to continue living with the erring spouse can seriously impair the wife's health and imperil her life, and, therefore, the divorce is justified (*Prather v. Prather*, 68 NW 806).

ATTEMPT ON LIFE. A criminal attempt to kill a spouse is clearly an act of moral depravity which warrants a decree of legal separation. However, the attempt on the life of the spouse must proceed from an evil design and not from any justifiable cause like

self-defense or from the fact that the spouse caught the other *in flagrante delicto* having carnal knowledge with another man or woman. No previous criminal conviction is required for the legal separation case to prosper. The criminal attempt can be proven by a preponderance of evidence in the civil case for legal separation. If the guilty spouse has been criminally convicted by a competent court, the innocent spouse can disinherit the guilty spouse even if no legal separation case has been filed (Article 921 of the Civil Code). Their children likewise can disinherit the guilty spouse unless there has been a reconciliation between them (Article 920[8]). If the innocent spouse had previously made provisions in a will in favor of the guilty spouse, a legal separation decree will have the effect of revoking such provision by operation of law (Article 63[4]).

UNJUSTIFIED ABANDONMENT. The abandonment or desertion must be willful. The act is willful when there is a design to forsake the other spouse intentionally, or without cause and, therefore, break up the marital union; deliberate intent to cease living with the other spouse; abnegation of all duties of the marriage relation, not to return. Mere severance of the relation is not sufficient. There must be a wrongful intent to desert, continued for the statutory period (*Tipton v. Tipton,* 169 Ia. 182, 151 N.W. 90). It must be an abandonment without justifiable cause. Thus, in a case where the wife left the conjugal abode because she was being battered by the husband, the Supreme Court ruled that the act of the wife was for a justifiable cause and therefore cannot be a ground for legal separation (*Ong v. Ong,* G.R. No. 153206, October 23, 2006, 505 SCRA 76).

Physical separation alone is not the full meaning of the term "abandonment," if the husband or the wife, despite his or her voluntary departure from the society of his or her spouse, neither neglects the management of the conjugal partnership nor ceases to give support to his wife or her husband (See *Dela Cruz v. Dela Cruz*, 22 SCRA 333). There must be absolute cessation of marital relations, duties and rights, with the intention of perpetual separation (*Partosa-Jo v. Court of Appeals,* 216 SCRA 692). Abandonment implies a total renunciation of his or her duties.

> The fact that the defendant never ceased to give support to his wife and children negatives any intent on his part not to return to the conjugal abode and resume his marital duties and rights. In *People v. Schelske* (154 N.W. 781, 783), it was held that where a husband, after leaving his wife, continued to make

small contributions at intervals to her support and that of their minor child, he was not guilty of their "abandonment," which is an act of separation with intent that it shall be perpetual, since contributing to their support negatived such intent. *In re Hoss' Estate* (257 NYS 278), *supra*, it was ruled that a father did not abandon his family where the evidence disclosed that he almost always did give his wife part of his earnings during the period of their separation and that he gradually paid some old rental and grocery bills (*Dela Cruz v. Dela Cruz,* 22 SCRA 333).

The act of separation, and the continued intent to remain separate, must be wrongful in the sense that there is no reasonable excuse for the one who separated. Thus, it has been held to be abandonment by a husband where he forces his wife to leave his home by his refusal to leave with her unless she gets rid of children by a former marriage whom he knows are entirely dependent on her and where he had agreed when he married her that she might bring them to his home (*Williamson v. Williamson*, 183 Ky. 435, 209 S.W. 503, 3 ALR 799).

Also, a separation in which both parties willingly concur is not, in any sense of the word, a willful desertion of one by the other (*Smythe v. Smythe,* 80 Ore. 150, 149 Pac. 516).

The abandonment must be for more than one year to warrant a decree of legal separation. It will not be granted, however, as against a spouse who became insane after the initial act of desertion or abandonment, but before the statutory period had expired, the general rule being that, in computing such period, the time during which the offending spouse has been insane cannot be included (*Wright v. Wright,* 99 S.E. 515, 4 ALR 1331). The rule is grounded on the theory that the desertion must continue to be willful or intentional for the full statutory period, and that an insane person cannot be said to have or maintain such an intention, and, in addition, if he had retained the power of reason, he might have repented and returned before the expiration of the full period (4 ALR 1333).

It has also been held that where a husband used reasonable remonstrance and has endeavored without avail to persuade his wife not to leave him, the fact that he had submitted to the inevitable and has rendered her some assistance in connection with her going, should not be construed to imply consent to the separation (*Nunn v. Nunn,* 91 Ore. 384, 178 Pac. 986, 3 ALR 500).

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 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 (Articles 101 and 128 of the Family Code).

Article 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;

5) Where there is collusion between the parties to obtain the decree of legal separation; or

6) Where the action is barred by prescription. (100a)

Article 57. An action for legal separation shall be filed within five years from the time of the occurrence of the cause. (102a)

CONDONATION. Condonation is the act of forgiving the offense after its commission. However, it has been held that condonation implies a condition of future good behavior by the offending spouse. Condonation of the violation of the marital duties and obligations being conditional on the future good conduct of the offending spouse, subsequent offense on his or her part revokes or nullifies the condonation and revives the original offense (Ann. Cas. 1918A 657 note; *Brown v. Brown,* 103 Kan. 53, 172 Pac. 1005, LRA 1918F 1033 and note). Also,

> where condonation of adultery has been obtained by a false pretense of repentance, the original offense may be revived, although there is only a presumption, and no strict proof, of a

> subsequent matrimonial offense (*Jordan v. Jordan*, 6 Eng. Rul. Cas. 581).

In *Ocampo v. Florenciano*, 107 Phil. 35, the Supreme Court held that the failure of the husband to look actively for his adulterous wife after she left the conjugal home does not constitute condonation or consent of the wife's adulterous acts. The Supreme Court said that:

> It must 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.

Also, it has been held that the act of giving money to an erring wife and the fact that no action was taken against her before the courts of justice are sufficient to establish forgiveness amounting to condonation, for condonation is the forgiveness of one of the married parties of an offense which he knows the other has committed against the other and, at any rate, pardon or condonation does not require sexual intercourse and it may be express or implied (*Almacen v. Baltazar,* 103 Phil. 1147).

CONSENT. There is consent when either of the spouses agreed to or did not object, despite full knowledge, to the act giving rise to a ground for legal separation, before such act was in fact committed. Hence, an agreement between the parties that they agree to live separately from each other, and that they will not object to the other's act of sexual infidelity, adultery or concubinage has been declared by the Supreme Court as void but, though void, is nevertheless an expression of their clear consent to the commission of the sexual infidelity (*People v. Schneckenburger,* 73 Phil. 413; *People v. Guinucud,* 58 Phil. 621).

Consent may be deduced also from the acts of the spouses. Thus, in *People v. Sensano*, 58 Phil. 73, where the husband, knowing that his wife resumed living with her paramour, did nothing to interfere with their relations or to assert his rights as husband and, instead, left for the Territory of Hawaii where he remained for seven years totally abandoning his wife and child, the Supreme Court ruled that the acts of the husband constituted consent to the adulterous acts of the wife; hence, he cannot file a case for adultery against the wife.

CONNIVANCE. In *Greene v. Greene* (Court of Appeals of North Carolina, 1972, 15 N.C. App. 314, 190 S.E.d 258), it was held that:

> connivance, or procurement, denotes direction, influence, personal exertion, or other action with knowledge and belief that such action would produce certain results and which results are produced (Cohen, Divorce and Alimony in North Carolina, 59, IV, p. 98). "The basis of the defense of connivance is the maxim *'volenti non fit injuria,'"* or that one is not legally injured if he has consented to the act complained of or was willing that it should occur. It is also said that the basis of the defense of connivance is the doctrine of unclean hand" (24 Am. Jur. 2d, Divorce and Separation, 193, p. 352).

In this regard, it has also been held that where a husband employed agents to induce, persuade and coerce his wife into participating in illicit sexual activities, this act of the husband can be considered as active connivance. "When a husband lays a lure for his wife, either acting in person or through an agent, his will necessarily concurs in her act" (*Witherspoon v. Witherspoon,* 108 Pa. Super. 309, 64 A. 842, 84e).

RECRIMINATION OR EQUAL GUILT. The reason for this rule lies in the equitable maxim that he who comes into equity must come with clean hands (Ann. Cas. 1917A 178 note). Also, it is also a rule that, when two persons acted in bad faith, they should be considered as having acted in good faith. They are *in pari delicto.* Hence, the plaintiff-spouse cannot invoke the guilt of the other if such plaintiff-spouse is guilty of giving grounds for legal separation. In *Ong v. Ong,* G.R. No. 153206, October 23, 2006, 505 SCRA 76, where a husband who subjected his wife to physical beatings sought the dismissal of the case for legal separation filed against him by the wife on the ground of equal guilt contending that the wife abandoned him, the Supreme Court rejected such position and stated that there was no equal guilt involved. The law specifically provides that, for abandonment to be a ground for legal separation, it must have been without justifiable cause. In the case of this battered wife, her separation from her husband was clearly with just cause.

COLLUSION. Although collusion and connivance are closely related, it has been held that the distinction between them is that collusion is a corrupt agreement, while connivance is a corrupt consenting. While the courts have not always been careful to distinguish between connivance and collusion, it seems to be well-settled that to constitute collusion there must be an agreement between husband and wife looking to the procuring of a divorce (2 ALR 701 note). In *Ocampo v. Florenciano*, 107 Phil. 35, the Supreme Court expounded on the concept of collusion, thus:

The mere circumstance that defendant told the Fiscal that she 'liked also' to be legally separated from her husband, is not 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 the collusion exists. x x x

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 divorce" (*Griffith v. Griffith,* 69 N.J. Eq. 689, 60 Atl. 1099; *Sandoz v. 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 taken 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 v. Williams*, [N.Y.] 40 N.E. [2d] 1017; *Rosenweig v. Rosenweig*, 246 N.Y. Suppl. 231; *Conyers v. Conyers*, 224 S.W. [2d] 688).

And proof that the defendant desires the divorce and makes no defense, is not by itself collusion (*Pohlman v. Pohlman*, [N.J.] 46 Atl. Rep. 658).

PRESCRIPTION. An action for legal separation must be filed within five years from the occurrence of the cause. After the lapse

of the five-year period, the legal separation case cannot be filed. The time of discovery of the ground for legal separation is not material in counting the prescriptive period. Hence, if the wife commits sexual infidelity and the husband discovered such ground only after six (6) years from the time it was actually committed, the husband cannot anymore file the legal separation case as the filing of the same has already prescribed. During the Senate Committee Hearing on the Family Code on January 28, 1988, Justice Ricardo Puno had the occasion to explain the reason for the prescriptive period, to wit:

> JUSTICE PUNO. Madam Chairman, this is a provision in the Family Code that is precisely in answer to certain objections in the Code of 1950, where "discovery" was one of the starting points of prescription. In the Code of 1950, the law says that "the action for legal separation must be filed within one year from the discovery of the cause, but not later than five years from the occurrence of the cause." The discovery, however, could only serve to shorten but not to lengthen the period. So that if there is discovery before the five-year period, immediately the period for prescription commences to run and it lapses after one year. But if the discovery occurs after the occurrence, the discovery no longer serves to affect the prescriptive period. So, this is really an improvement over the provisions of the Code of 1950 because now, we made the five-year limitation an absolute prescriptive period so that irrespective of when it was discovered, it is the occurrence that will govern and, therefore, it will always be for five years. It will never be shortened to the period of one year. Since the law wants to preserve marriage rather than destroy it, we therefore make this five-year limitation a uniform period of prescription. The danger, Madam Chairman, is that the discovery may come so many years later and, therefore, it will make the stability of the marriage very precarious. The law assumes that if you discover it after five years, forgiveness is already the order of the day, and no longer recrimination.

Article 58. An action for legal separation shall in no case be tried before six months shall have elapsed since the filing of the petition. (103a)

Article 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)

Article 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)

Article 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)

Article 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)

PROCEDURE. The procedure is governed by Supreme Court Resolution En Banc, A.M. No. 00-11-01-SC reproduced at the end of this chapter. Upon the filing of a complaint for legal separation by the plaintiff, the defendant shall be required to answer within 15 days from receipt of the summons and a copy of the petition. If the defending party fails to answer, he or she cannot be defaulted and 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 (Section 3[e], Rule 9, 1997 Rules of Civil Procedure). Even if the party answers, the fiscal is also mandated to be present during the trial to further make sure that there is no collusion and the evidence is not fabricated. However, if the legal separation case were vehemently opposed and heatedly contested, it is clear that the litigation was characterized by a no-holds barred contest and not by collusion. Under these circumstances, the non-intervention of the prosecuting-attorney to assure lack of collusion between the contending parties is not fatal to the validity of the

proceedings in court especially when it was not shown that evidence was suppressed or fabricated by any of the parties. These kinds of situations do not call for the strict application of Articles 48 and 60 of the Family Code (See *Tuason v. Court of Appeals*, 256 SCRA 158).

Whether or not the defendant files an answer to the complaint, no hearing on the merits shall be set by the courts for six months. This six-month period is designed to give the parties enough time to further contemplate their positions with the end in view of attaining reconciliation between them. This is called the cooling-off period.

> 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 the 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 of 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 of 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 offsprings, 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 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 tried (*Somosa-Ramos v. Vamenta, Jr.,* 46 SCRA 110, 112, 113). x x x The recital of their grievances against each other in court may only fan their already inflamed passions against one another, and the lawmaker has imposed the period to give them opportunity for dispassionate reflection (*Ibid.*, page 114).

It is important to note that the six-month-cooling-off-period requirement can be dispensed with if the ground for legal separation involves violence against the woman or the child. Thus, Section 19

of Republic Act No. 9262 (Anti-Violence Against Women and their Children [VAWC] law) provides that

> "in cases of legal separation, where violence as specified in this Act is alleged, Article 58 of the Family Code shall not apply. The court shall proceed on the main case and other incidents of the case as soon as possible. The hearing on any application for a protection order filed by the petitioner must be conducted within the mandatory period specified in this Act."

Unless, excepted by law, failure to observe the six-month cooling-off period is a ground to set aside a decision granting legal separation. Thus, in *Pacete v. Carriaga*, 49 SCAD 673, 231 SCRA 321, where the legitimate wife filed a case with two causes of action, namely: to nullify the bigamous marriage between her husband and the latter's mistress and, at the same time, to obtain a legal separation decree against her husband, and where the trial court, without observing the required six-month cooling-off period, tried the case on the merits and rendered a judgment voiding the bigamous marriage and issuing a legal separation decree, the Supreme Court set aside the decision on the ground that the six-month cooling-off period was a mandatory requirement and its non-compliance made the decision infirm. "That other remedies, whether principal or incidental, have likewise been sought in the same action cannot dispense, nor excuse compliance, with any of the statutory requirement" (*Pacete v. Carrianga,* 49 SCAD 673, 231 SCRA 321).

Nevertheless, what is prevented from being heard during the six-month period is the hearing on the merits with respect to the validity or invalidity of the ground for legal separation. Any other incident such as the determination of the custody of the children, alimony and support *pendente lite* may be heard inside the six-month cooling-off period. The law expressly enjoins that these should be determined by the court according to the circumstances. If these are ignored or the courts close their eyes to actual facts, rank injustice may be caused. If the administrator spouse is dissipating the conjugal assets during this cooling-off period, a motion for injunction may be filed and heard seeking the prevention of the erring spouse from further undertaking such harmful acts (*Somosa-Ramos v. Vamenta, Jr.,* 46 SCRA 110). A motion to dismiss during the six-month cooling-off period may likewise be filed if there are grounds to do so. Hence, if from the face of the petition or complaint, it clearly appears that the legal separation case has already prescribed, a motion to dismiss the suit can be filed within the six-month cooling off period and may even be decided by the court within the said period.

Also, 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. It must be remembered that, unlike in a case of annulment or declaration of nullity of a marriage where the objective of the plaintiff in such cases is the complete severance of the marriage ties, a legal separation decree will not sever such marital ties but will merely separate the husband and wife from bed and board.

Proof by preponderance of evidence is required to substantiate the ground for legal separation (*Gandionco v. Peñaranda*, 155 SCRA 725). In actions for legal separation, the material facts alleged in the complaint shall always be proved (Section 1, Rule 34 of the 1997 Rules of Civil Procedure).

In the event that a civil case for legal separation is filed on the ground of sexual infidelity because the husband committed concubinage and, thereafter, a criminal case is filed for concubinage against the husband, the civil action for legal separation based on concubinage may proceed ahead of, or simultaneously with, a criminal action for concubinage, because said civil action is not one "to enforce the liability arising from the offense" (See Rule 111, Section 3 of the Rules on Criminal Procedure), even if both the civil and criminal actions arise from or are related to the same offense. Such civil action is one intended to obtain the right to live separately, with the legal consequences thereof, such as the dissolution of the absolute community or the conjugal partnership of gains, custody of offsprings, support and disqualification from inheriting from the innocent spouse, among others (*Gandionco v. Peñaranda,* 155 SCRA 725).

After the case had been submitted for decision, judgment shall be issued by the judge, either granting the legal separation or denying the same. Judgment, however, cannot be based on a confession of judgment or stipulation of facts. The Supreme Court had occasion in the case of *Ocampo v. Florenciano,* 107 Phil. 35, to explain the probative value of a confession of judgment under Article 101 of the Civil Code, now Article 60 of the Family Code, relative to legal separation cases, thus:

> 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 Article 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 is not 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.

If the petition is denied, the court, however, cannot compel the parties to live with each other as cohabitation is purely a personal act (*Arroyo v. Vasquez,* 42 Phil. 54). If the legal separation decree is issued, the effects of the same are those provided in Articles 63 and 64.

MANAGEMENT OF PROPERTIES DURING SUIT. 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.

Interestingly, in *Sabalones v. Court of Appeals,* G.R. No. 106169, February 14, 1994, 48 SCAD 286, a husband, after his long years of service as a diplomat, went back to the Philippines. Instead of going back to his legitimate spouse and children, he went to reside with his bigamous "wife" and illegitimate children. During the nineteen years that he was abroad, it was the legitimate wife who administered the conjugal properties without complaint from the husband. After his arrival, the husband filed a case in court to seek approval of an intended sale of one of the conjugal partnership

properties. The wife opposed the petition and counterclaimed for legal separation and praying for the forfeiture of the husband's share in the conjugal partnership property. The wife won as the court found out that the husband really committed bigamy. The case was appealed to the Court of Appeals. The wife filed a motion for the issuance of a preliminary injunction to stop the husband from interfering with her management of the conjugal properties. The husband likewise filed a similar motion to prevent the wife from entering into a renewal of contract with the tenants of their conjugal properties. The Court of Appeals granted the motion of the wife and rejected that of the husband. On a petition for review to the Supreme Court, the husband contended that the Court of Appeals erred in granting the injunction because under Article 124 of the Family Code, the husband and the wife are joint administrators of the property and, hence, no injunctive relief can be issued against one or the other because no right will be violated. The husband further contended that the Court of Appeals failed to appoint an administrator as mandated by Article 61 of the Family Code. The Supreme Court ruled against the husband, stating thus:

> We agree with the respondent court that pending the appointment of an administrator over the whole mass of conjugal assets, the respondent court was justified in allowing the wife to continue with her administration. It was also correct, taking into account the evidence adduced at the hearing, in enjoining the petitioner from interfering with his wife's administration pending the resolution of the appeal.
>
> The law does indeed grant the spouses joint administration over the conjugal properties as clearly provided in the above-mentioned Article 124 of the Family Code. However, Article 61, also above-quoted, states that after a petition for legal separation had been filed, the trial court shall, in the absence of a written agreement between the couple, appoint either one of the spouses or a third person to act as the administrator.
>
> While it is true that no *formal* designation of the administrator has been made, such designation was implicit in the decision of the trial court denying the petitioner any share in the conjugal properties (and thus disqualifying him as administrator thereof). The designation was in effect approved by the Court of Appeals when it issued in favor of the respondent wife the preliminary injunction now under challenge.
>
> The primary purpose of the provisional remedy of injunction is to preserve the *status quo* of the things subject of the action or the relations between the parties and thus protect

the rights of the plaintiff respecting these matters during the pendency of the suit. Otherwise, the defendant may, before final judgment, do or continue doing the act which the plaintiff asks the court to restrain and thus make ineffectual the final judgment that may be rendered afterwards in favor of the plaintiff.

x x x x x x x x x

The Court notes that the wife has been administering the subject properties for almost nineteen years now, apparently without complaint on the part of the petitioner. He has not alleged, much less shown, that her administration has caused prejudice to the conjugal partnership. What he merely suggests is that the lease of the Forbes Park property could be renewed on better terms, or he should at least be given his share of the rentals

x x x x x x x x x

x x x Regardless of the outcome of the appeal, it cannot be denied that as the petitioner's legitimate wife (and the complainant and injured spouse in the action for legal separation), the private respondent has a right to a share (if not the whole) of the conjugal estate. There is also, in our view, enough evidence to raise the apprehension that entrusting said estate to the petitioner may result in its improvident disposition to the detriment of his wife and children. We agree that inasmuch as the trial court had earlier declared the forfeiture of the petitioner's share in the conjugal properties, it would be prudent not to allow him in the meantime to participate in its management.

Let it be stressed that the injunction has not permanently installed the respondent wife as the administrator of the whole mass of conjugal assets. It has merely allowed her to continue administering the properties in the meantime without interference from the petitioner, pending the express designation of the administrator in accordance with Article 61 of the Family Code (*Sabalones v. Court of Appeals,* G.R. No. 106169, February 14, 1994, 48 SCAD 286).

DEATH TERMINATES LEGAL SEPARATION CASE. In *Lapuz v. Eufemio*, 43 SCRA 177, the questions posed for resolution were: Does the death of the plaintiff before final decree, in an action for legal separation, abate the action? If it does, will abatement also apply if the action involves property rights? The pertinent ruling of the Supreme Court, which is applicable under the provisions on

legal separation or relative divorce in the Family Code, is as follows, to wit:

> An action for legal separation which involves nothing more than the bed-and-board separation of the spouses (there being no absolute divorce in this jurisdiction) is purely personal. x x x Being personal in character, it follows that the death of one party to the action causes the death of the action itself — *actio personalis moritur cum persona.*
>
> > ". . . When one of the spouses is dead, there is no need for divorce, because the marriage is dissolved. The heirs cannot even continue the suit, if the death of the spouse takes place during the course of the suit x x x. The action is absolutely dead (Cass., July 27, 1871, D. 71.1.81; Cass req., May 8, 1933, D.H. 1933, 332)."
> >
> > Marriage is a personal relation or status, created under the sanction of law, and an action for divorce is a proceeding brought for the purpose of effecting a dissolution of that relation. The action is one of a personal nature. In the absence of a statute to the contrary, the death of one of the parties to such action abates the action, for the reason that death has settled the question of separation beyond all controversy and deprived the court of jurisdiction, both over the persons of the parties to the action and of the subject-matter of the action itself. x x x
>
> The same rule is true of cases of action and suits for separation and maintenance (*Johnson v. Bates*, Ark. 101 SW 412; 1 *Corpus Juris* 208).
>
> A review of the resulting changes in property relations between spouses shows that they are solely the effect of the decree of legal separation; hence, they cannot survive the death of the plaintiff if it occurs prior to the decree. [The decision then enumerates the effects of a legal separation decree under Article 106 of the Civil Code which has been essentially adopted by Article 63 of the Family Code] x x x.
>
> From this article, it is apparent that the right to the dissolution of the conjugal partnership of gains (or the absolute community of property), the loss of right by the offending spouse to any share of the profits earned by the partnership or community, or his disqualification to inherit by intestacy from the innocent spouse as well as the revocation of testamentary provisions in favor of the offending spouse made by the innocent one, are all rights and disabilities that, by the terms of the Civil

Code article, are vested exclusively in the person of the spouses; and by their nature and intent, such claim and disabilities are difficult to conceive as assignable or transmissible. Hence, a claim to said rights is not a claim that "is not thereby extinguished" after a party dies, under Section 17, Rule 3 of the Rules of Court, to warrant continuation of the action through a substitute of the deceased party.

> "Sec. 17. *Death of party.* — After a party dies and the claim is not thereby extinguished, the court shall order, upon proper notice, the legal representative of the deceased to appear and to be substituted for the deceased, within a period of thirty (30) days, or within such time as may be granted x x x."

The same result flows from a consideration of the enumeration of the actions that survive for or against the administrator in Section 1, Rule 87 of the Revised Rules of Court:

> "Section 1. *Actions which may and which may not be brought against executor or administrator.* — No action upon a claim for the recovery of money or debt or interest thereon, shall be commenced against the executor or administrator; but actions to recover real or personal property, or an interest therein, from the estate, or to enforce a lien thereon, and actions to recover for an injury to person or property, real or personal, may be commenced against him."

Neither actions for legal separation or for annulment of marriage can be deemed fairly included in the enumeration.

A further reason why an action for legal separation is abated by the death of the plaintiff, even if property rights are involved, is that these rights are mere effects of a decree of separation, their source being the decree itself; without the decree such rights do not come into existence, so that before the finality of a decree, these claims are merely rights in expectation. If death supervenes during the pendency of the action, no decree can be forthcoming; death producing a more radical and definitive separation; and the expected consequential rights and claims would necessarily remain unborn.

Article 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 bond 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 in the will of the innocent spouse shall be revoked by operation of law. (106a)

EFFECTS OF A DECREE OF LEGAL SEPARATION. The effects of a decree of legal separation are clearly set out by law. When the decree itself is issued, the finality of the separation is complete after the lapse of the period to appeal the decision to a higher court even if the effects, such as the liquidation of the property, have not yet been commenced nor terminated. This was clearly explained by the Supreme Court in the case of *Macadangdang v. Court of Appeals*, 108 SCRA 314, to wit:

> We do not find merit in petitioner's submission that the questioned decision had not become final and executory since the law explicitly and clearly provides for the dissolution and liquidation of the conjugal partnership as among the effects of the final decree of legal separation. x x x
>
> x x x 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 decreeing the legal separation — for the purpose of determining the share of each spouse in the conjugal assets.
>
> Even American courts have made definite pronouncements on the aforestated legal effect of a divorce (legal separation) decree.
>
> Generally speaking, the purpose of a decree in divorce insofar as the disposition of property is concerned is to fix and make certain the property rights and interest of the parties

(*Mich.-Westgate v. Westgate,* 228 N.W. 860, 291 Mich. 18, 300[1] p. 354, C.J.S. Vol. 27B); and it has been held that the provisions of the decree should definitely and finally determine the property rights and interests of the parties (*Wash.-Shaffer v. Shaffer,* 262 P P.2d 763, 43 Wash 2d 629; 300[1] p. 354, C.J.S. Vol. 27B); and that any attempted reservation of such questions for future determination is improper and error (*Mich.-Karkowski v. Karkowski,* 20 N.W. 2d 851, 313 Mich. 167, 300 [1] p. 354. C.J.S., Vol. 27B; italics supplied). x x x

It has been held that notwithstanding the division of property between the parties, the subject matter of a divorce action remains the marital status of the parties, the settlement of the property rights being merely incidental (*Wash.-State ex rel. Atkins v. Superior Court of King Country*, 97 P. 2d. 139, 1 Wash. 2d 677; 291[1] p. 264, C.J.S., Vol. 27B).

Under other authorities, by the very nature of the litigation, all property rights growing out of marital relations are settled and included in divorce proceedings (*Ind.-Novak v. Novak,* 133 N.E. 2d 578, 126 Ind. App. 428) and a decree of divorce is an adjudication of all property rights connected with the marriage and precludes the parties as to all matters which might have been legitimately proved in support of charges or defenses in the action (*U.S.-Spreckles v. Wakefield,* C.C.A., 286 F. 465) and bars any action thereafter brought by either party to determine the question of property rights (*Fla.-Cooper v. Cooper,* 69 So. 2d 881; *Finston v. Finston,* 37 So. 2d 423, 160 Fla. 935; p. 751, C.J.S. Vol. 27A). x x x

MARRIAGE BOND MAINTAINED. In a decree of legal separation, the spouses shall be entitled to live separately from each other, but the marriage bond shall not be severed. Even if they can legally live apart, a spouse can still be held criminally liable for bigamy, concubinage or adultery if he or she commits the act. This is so because they are still married to each other.

LIQUIDATION OF PROPERTY. The absolute community of property or the conjugal partnership shall be liquidated. However, 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 favor of the common children or, if there be none, the children of the guilty spouse by a previous marriage or, in default of children, the innocent spouse (Article 43[2]). For purposes of computing the net profit, 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 (Article 102[4]).

CUSTODY OF MINOR CHILDREN. The innocent spouse shall be awarded the custody of the minor children. However, in all matters relating to the custody of the child, the paramount interest of the child shall be the standard. Hence, the court may even award the custody of the child to a third person if the court believes that both spouses are not fit to take care of the child. According to Article 213 of the Family Code, "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."

INTESTATE AND TESTATE DISQUALIFICATION. 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. The law does not provide that such revocation by operation of law will be rendered ineffectual in case the legal separation decree is set aside by the court upon manifestation of the parties that they have reconciled.

Under Article 921(4) of the Civil Code which has not been repealed by the Family Code, a person can disinherit his or her spouse in a will if the latter has given cause for legal separation even if he or she has not yet been found guilty of committing such cause. However, under Article 922 of the Civil Code, such disinheritance in a will shall be rendered ineffectual upon the mutual reconciliation of the spouses.

Article 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 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)

DONATIONS AND BENEFICIARY IN INSURANCE. Donations and the act of the innocent party in designating the guilty spouse as a beneficiary in an insurance are essentially acts of liberality and the law gives the option to the innocent party whether or not he or she will revoke the donation or the designation as beneficiary of the guilty party in an insurance. In so far as the designation as beneficiary of the guilty spouse in an insurance is concerned, such designation, even if irrevocable, will be considered revoked upon written notification thereof to the insured. In case of donations, if the innocent spouse decides to revoke a donation, he or she must file an action for revocation within five years from the time the decree of legal separation has become final. However, if the donation is void, such as in the case of a donation in violation of Article 87, the right to bring an action to declare the nullity of the donation does not prescribe. Article 87 provides that "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 deliberations of the Civil Code and Family Law committees, which drafted the Family Code, on this particular article from its original wording up to the finalized version are very enlightening. The discussions starting from the original text up to the final version are as follows, to wit:

> The innocent spouse, after judgment of legal separation has been granted, may revoke donations or any insurance made by him or by her to the offending spouse even if the latter's designation as a beneficiary is irrevocable. The revocation of the donation shall be recorded in the places where the properties are located. Alienations and mortgages made before the notation of the complaint for revocation in the Registries of Property shall be valid. In case of insurance, notice of the revocation of the beneficiary clause shall be given to the insurer.
>
> The right to revoke under this Article prescribes after five years.

Justice Puno suggested that the first sentence of the first paragraph be modified to read as follows:

> "The innocent spouse, after final judgment of legal separation has been rendered, may revoke donations or any insurance policy . . .

Justice Caguioa objected to the phrase "insurance policy" since what is being revoked is the insurance beneficiary. Prof. Bautista and Prof. Baviera proposed the phrase "any insurance benefit." On the other hand, Justice Caguioa suggested the following version:

> . . . may revoke donations or the designation of the beneficiary in the insurance . . .

Justice Puno reworded the first sentence as follows:

> "The innocent spouse, after final judgment of legal separation has been rendered, may revoke donations made by him or by her in favor of the offending spouse and any designation of the latter as insurance beneficiary even if such designation is irrevocable.

Justice Caguioa proposed the following version of the above sentence:

> "Once the judgment of legal separation has been rendered, the innocent spouse may revoke the donations made by him or by her in favor of the offending spouse, as well as the designation of the latter as beneficiary in any insurance, even if the designation is irrevocable.

Judge Diy suggested the opening clause be modified to read:

> After the finality of the decree of legal separation, . . .

The Committee approved the above.

Prof. Bautista proposed that the phrase "as well as the designation of the latter as beneficiary" be substituted with "as well as his or her designation as beneficiary." The other members, however, preferred the original wording.

The Committee approved Justice Puno's a suggestion that the word "policy" be inserted between "insurance" and "even" and that the "designation" be substituted with "such designation."

Dean Gupit proposed that the provision be simplified to ". . . as well as any irrevocable designation . . ."

Justice Reyes, however, suggested that the clause "even if such designation is irrevocable" be clarified to read "even if such designation be stipulated as irrevocable." Prof. Bautista commented that the word "designation" is used twice. The other members, however, approved such repetition for clarity.

Thus, the first sentence of Article 64 shall read:

> 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 the offending spouse, as well as the designation of the latter as beneficiary in any insurance policy, even if such designation be stipulated as irrevocable.

The Committee approved the second sentence as is.

On the third sentence of the first paragraph of Article 64, Justice Reyes suggested that "mortgages" be substituted with "encumbrances." Justice Puno remarked that they should also include "liens." The Committee agreed to say "Alienations, liens and encumbrances."

Justice Reyes raised the question: What is going to be noted or recorded: the revocation or the complaint for revocation? Justice Puno added that the judgment must also be recorded because the judgment is covered by the general law on registration. The judgment will be recorded. Justice Puno suggested that, for clarity, the idea in the provision is to give notice of the complaint for revocation, for which reason the recording of the said complaint would suffice.

On another point, Justice Puno suggested that "in good faith" be inserted between "made" and "before" in the third sentence of the first paragraph of Article 64. Prof. Baviera proposed that they be "recorded in good faith." Justice Puno, however, suggested the following:

> Alienations, liens and encumbrances made before the recording in good faith of the complaint for revocation . . .

Justice Reyes commented that the "good faith" will only refer to the "recording." He added that the idea is that the alienations, liens and encumbrances must be recorded in good faith.

Justice Puno opined that they are really talking of two "recordings" in the provision: the recording of the alienations,

liens and encumbrances and the recording of the complaint for revocation, both of which should be in good faith. He then invited attention to the present Article 1544 of the Civil Code, which reads as follows:

> If the same thing should have been sold to different vendees, the ownership shall be transferred to the person who may have first taken possession thereof in good faith, if it should be movable property.
>
> Should it be immovable property, the ownership shall belong to the person acquiring it who in good faith first recorded it in the Registry of Property.
>
> Should there be no inscription, the ownership shall pertain to the person who in good faith was first in the possession; and, in the absence thereof, to the person who presents the oldest title, provided there is good faith.

After further deliberation, Justice Puno suggested that, in order to simplify the provision, the third sentence of the first paragraph of Article 64 should be deleted since it is covered by the general rules on registration. Justice Caguioa, however, opined that it would be better if they will provide for it in Article 64. Justice Reyes modified the third sentence as follows:

> Alienations, liens and encumbrances recorded in good faith before the notation of the complaint for revocation in the Registries of Property shall be valid.

Prof. Baviera suggested that "shall be valid" be substituted with "shall be respected," which the Committee approved.

Justice Caguioa proposed that "recorded" be substituted with "registered" and "notation" with "recording." The Committee approved the proposal. Thus, the third sentence shall read:

> Alienations, liens and encumbrances registered in good faith before the recording of the complaint for revocation in the Registries. The Property shall be respected.

On the last sentence of the first paragraph of Article 64, Judge Diy raised the question: Why do they have to say that notice will be given to the insurer when they cannot really revoke the beneficiary clause without notifying the insurer? In reply, Justice Caguioa suggested that the last sentence be eliminated. Dean Gupit added that it is already covered by the insurance law.

After a brief discussion, Justice Caguioa proposed that the following sentence be added to the first paragraph:

> In case of insurance, the change of beneficiary shall be governed by the insurance law.

Justice Puno posed the question: It is clear that in the case of revocation of the designation of the beneficiary, if one does not notify the insurer, it remains. What happens if one notifies the beneficiary without notifying the insurer? The other members replied that it also remains. Justice Puno suggested that this point be clarified in the provision. He then proposed the following additional sentences, as slightly modified by Justice Caguioa and Prof. Baviera:

> The revocation or change in the designation of the insurance beneficiary shall take effect upon notice thereof to the insurer.

Prof. Bautista suggested that they say "written notice." Prof. Baviera modified it to read "upon receipt of written notice." Justice Puno, however, proposed that they say "upon written notification." The Committee approved the proposal. Thus, the last sentence of the first paragraph of Article 64 shall read:

> The revocation of or change in the designation of the insurance beneficiary shall take effect upon written notification thereof to the insurer.

On the last paragraph, Judge Diy inquired if it is clear as to when the five-year period should be counted. Justice Puno suggested that the phrase "after the finality of the decree" be added at the end and that the phrase "the donation" be inserted between "revoke" and "under" for clarity since the insurance may be changed anytime. The Committee approved the second suggestion. On the first one, Justice Caguioa suggested that they say "from the time the decree of legal separation becomes final," which the Committee approved.

The Committee likewise approved Justice Caguioa' proposal that "right" be substituted with "action."

Prof. Baviera suggested that the phrase "prescribes after five years" should be substituted with "must be brought within five years." The Committee approved the suggestion.

Thus, the last paragraph shall read:

> 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.

Hence, the proposed Article shall read:

> 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 THE OFFENDING SPOUSE, AS WELL AS THE DESIGNATION OF THE LATTER AS — 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 INSURER.
>
> 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. (Minutes of the 158th joint meeting of the Civil Code and Family Law committees held on October 11, 1986, pages 15-20).

From the deliberation of the Code, the revocation of, or change in, the designation of the insurance beneficiary shall take effect upon written notification thereof to the *insurer* and not *"to the insured"* as provided for in the law itself. There is a discrepancy, therefore, between the final version of the provision as deliberated and the one signed by the President into law. The former states notification to the *insurer* and the latter states notification to the *insured.*

Notification to the insurer is indeed more practical because it is the insurer who will be liable for the insurance. Hence, it is important to notify the insurer so that there will be no way for the insured or the beneficiary to get the proceeds after the policy has been revoked. While there is nothing wrong in making the revocation effective upon notification to the insured as provided by the law and not the insurer, this procedure is very impractical and prejudicial to the insurer. It may happen that, after the revocation

of the insurance by notification to the insured as provided by the law, the insurer, who has no knowledge of the revocation might, by its mistake, or by its ignorance of the revocation or by the fraudulent act of the insured, pay the proceeds of the insurance to the former beneficiary. Inconvenience therefore will result on the part of the insurer in seeking the return of the proceeds unduly given. Hence, clearly there has been a mistake in the printing of the final version signed as law by the President. The correct procedure as deliberated should have been notification to the insurer and not the insured. Be that as it may, since the law states "notification thereof to the insured" and not the insurer, the law must be applied as written up to such time the same is effectively amended. There might be some inconvenience to the insurer but the purpose of revocation can likewise be achieved.

Article 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)

Article 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 in 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)

Article 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 separate properties of each spouse; and

3) 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 property.

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)

EFFECT OF RECONCILIATION. If the spouses decide to reconcile and indeed reconcile, they can file a joint manifestation of reconciliation in court. If the legal separation case is still pending, it shall be terminated. If the decree has been issued already, whether with finality or not, it shall be set aside. The order containing the termination of the case or the setting aside of the decree, as the case may be, shall be recorded in the proper civil registries. However, with respect to the separation of properties which, in the meantime, had been made, it shall subsist. The parties, however, can enter into an agreement, which should be approved by the court, reviving their previous property regime. The agreement shall contain a list of which properties shall remain separate and which properties shall be contributed to the revived property regime. It shall also contain the names and addresses of the creditors and the amounts of the credit. The creditors must be furnished the motion seeking the approval of the agreement. 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 registry of property. 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.

REVIVAL AND ADOPTION. It must be important to note that the reconciling spouses can revive their original property regime. Significantly the new rules promulgated by the Supreme Court for legal separation cases, Supreme Court En Banc Resolution A.M. No.

02-11-12 effective on March 15, 2003, allow in Sections 23(e) and 24 thereof not only the revival of the previous property regime but also they provide a new rule allowing *"the adoption of another regime of property relations different from that which they had prior to the filing of the petition for legal separation."* This is a new rule which is not contained in Articles 66 and 67 of the Family Code. Questions thus arise if the new rule goes beyond the substantive law provided in Articles 66 and 67 of the Family Code which clearly refer only to revival of the previous property regime. The following diverging analyses may be considered:

1. Articles 66 and 67 of the Family Code are the substantive-law-provisions of the Family Code dealing with the property regime upon reconciliation. These substantive provisions refer only to the revival of the former property regime. It is restrictive and therefore no other property regime can be judicially applied for. The new rule allowing the adoption of a different property regime is an undue extension of substantive law and therefore has no legal basis. The adoption of a new property regime is not a revival and hence it should not be allowed. In case of conflict, the substantive law, which is the Family Code, should prevail. Moreover, if the Framers of the Family Code intended to allow the adoption of a new property regime, they could have easily inserted a provision in the Family Code to allow it and yet they did not do so. The clear inference of this omission is that the adoption of another property regime is not allowed. This point of view is fortified by Article 88 in relation to the absolute community property regime and Article 107 in relation to the conjugal partnership property regime in the Family Code which provide the substantive rule that any stipulation, express or implied, for the commencement of either the absolute community of property regime or the conjugal partnership property regime at any other time other than at the precise moment that the marriage is celebrated shall be void. This point of view is likewise supported by the fact that while the Family Code provides in Article 67 the statutory basis for the manner by which revival can be made, the same Family Code does not provide for the procedure for the adoption of any other regime, highlighting therefore the fact that only revival is allowed.

2. A second point of view is that, though Article 66(2) refers to revival only, it does not expressly provide that a different property regime cannot be applied for by the parties.

Article 66 is therefore not restrictive. These provisions therefore must be construed to allow what they do not disallow. The new rule allowing the adoption of a different property regime is therefore acceptable. However, considering the marriage bond is still intact and has never been cut, this new rule cannot include allowing a change from the absolute community to the conjugal partnership and vice versa considering that Article 88 in relation to the absolute community property regime and Article 107 in relation to the conjugal partnership property regime in the Family Code provide the substantive rule that any stipulation, express or implied, for the commencement of either the absolute community of property regime or the conjugal partnership property regime at any other time other than at the precise moment that the marriage is celebrated shall be void. The new rule can allow only a change to a different property regime other than the absolute community or the conjugal partnership. For example, it can allow a different kind of regime devised by the parties themselves. The fact that, unlike Article 67 on revival, there is nothing in the Family Code providing for the procedure on how the adoption of a new regime can be made in court, allows the Supreme Court to fill in these procedural gaps.

3. Still a third point of view is that, provided there is court approval, the parties can request for any other different regime. This view however does not take into consideration the limitations on property relations in the Family Code such as Articles 88 and 107 of the same.

INHERITANCE. If the innocent spouse had disinherited the guilty spouse, their subsequent reconciliation renders ineffectual any disinheritance that may have been made (Article 922 of the Civil Code). However, there is nothing in the Family Code which provides for the revival of the revoked provisions in a will originally made in favor of the offending spouse as a result of the legal separation decree. As a matter of fact, the law does not provide that it is one of the effects of the setting aside of a legal separation decree. This absence gives the innocent spouse the option of again reinstituting the provisions in a will previously made to the guilty spouse, but which was revoked by operation of law by the issuance of the decree of legal separation. This is in harmony with the provision that the parties are given by the law the power to decide which properties they want to maintain as their own separate property in any agreement for revival of the property regime.

RECORDING OF THE ORDER OF REVIVAL. If the order of revival has not at all been recorded in the proper civil registry, the creditors will not be prejudiced whether or not they are listed in the order or they have been notified. It is the recording of the order, the listing or non-listing of the creditors in the said recorded order, and the notification of the creditors which will have an effect on the creditors' claims as provided for in the last paragraph of Article 67. Thus, the recording of the order of revival in the proper registry of property shall prejudice those creditors listed in the order or those notified of the motion for revival and of the order. Those creditors who are not listed in the order or not notified shall not be prejudiced by the recording of the order. However, the creditors who are not listed or who have not been notified shall nevertheless be prejudiced by the recording of the order if the debtor-spouse has sufficient separate properties to satisfy the creditors' claims.

Hence, if *A* and *B* decide to reconcile after a decree of legal separation, their separate properties resulting from the liquidation will remain separate properties of each of them even after the legal separation decree has been dissolved. If they decide to revive their conjugal partnership property, they can do so by filing a motion for that purpose and notifying their creditors. If *A* and *B* decide to put all their separate properties in the conjugal fund to constitute their revived conjugal partnership properties, an order can be issued to that effect subject however to certain reservations which the court may issue for the protection of the creditors. Hence, the court can set aside certain separate properties of each spouse for purposes of paying off or protecting the interests of each of the spouses' respective creditors. If no properties were set aside for the listed creditors who were notified but who did not file their claims to protect their interests, they shall be prejudiced by the recording of the order in the registry of property. Thus, if, long before the revival, *A* was ordered by a particular court to pay *X*, his creditor, and *X* could only execute on *A's* house for the satisfaction of the judgment debt, the subsequent order of another court, which issued the legal separation decree, reviving the spouses' conjugal partnership properties which included the house of A, will prejudice *X* in case he was notified of the motion for revival and listed in the revival-order as a creditor or notified of the revival-order. *X* thereafter cannot, upon default of *A* to pay the obligation, execute anymore on the house considering that *A* and *B* have become co-owners of the house as part of their revived conjugal partnership property regime. Creditor *X* therefore has been legally prejudiced. What *X* should have done was to file his

opposition or claim in the court proceeding which heard the motion for revival and issued the revival-order so that the said court could make provisions to protect his interest.

If, however, *X* was neither listed as a creditor in the recorded-order nor notified of the proceedings and the consequent order, then, upon the default of *A* to pay his obligation, *X* can still foreclose on the house as if such revived conjugal property is still the separate property of *A*. However, if there are still separate properties owned by *A* which are not included in the revived conjugal partnership properties and which are enough to satisfy *X's* claim, *X* will be prejudiced even if he is not listed in the recorded order as a creditor or if he has not been notified. Consequently, he will not be able to execute on the house or any other assets which have become part of the conjugal partnership properties of *A* and *B*.

RULE ON LEGAL SEPARATION
(Supreme Court En Banc Resolution A.M. No. 02-11-11-SC)

Section 1. *Scope*. — This Rule shall govern petitions for legal separation under the Family Code of the Philippines.

The Rules of Court shall apply suppletorily.

Sec. 2. *Petition*. — (a) *Who may and when to file*. — (1) A petition for legal separation may be filed only by the husband or the wife, as the case may be, within five years from the time of the occurrence of any of the following causes:

(a) Repeated physical violence or grossly abusive conduct directed against the petitioner, a common child, or a child of the petitioner;

(b) Physical violence or moral pressure to compel the petitioner to change religious or political affiliation;

(c) 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;

(d) Final judgment sentencing the respondent to imprisonment of more than six years, even if pardoned;

(e) Drug addiction or habitual alcoholism of the respondent;

(f) Lesbianism or homosexuality of the respondent;

(g) Contracting by the respondent of a subsequent bigamous marriage, whether in or outside the Philippines;

(h) Sexual infidelity or perversion of the respondent;

(i) Attempt on the life of petitioner by the respondent; or

(j) Abandonment of petitioner by respondent without justifiable cause for more than one year.

(b) *Contents and form*. — The petition for legal separation shall:

(1) Allege the complete facts constituting the cause of action.

(2) State the names of ages of the common children of the parties, specify the regime governing their property relations, the properties involved, and creditors, if any. 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 similar matters requiring urgent action.

(3) Be verified and accompanied by a certification against forum shopping. The verification and certification must be personally signed 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.

(4) Be filed in six copies. The petitioner shall, within five days from such filing, furnish a copy of the petition to the City or Provincial Prosecutor and the creditors, if any, and submit to the court proof of such service within the same period.

Failure to comply with the preceding requirements may be a ground for immediate dismissal of the petition.

(c) *Venue*. — 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 filing or in

the case of a non-resident respondent, where he may be found in the Philippines, at the election of the petitioner.

Sec. 3. *Summons*. — The service of summons shall be governed by Rule 14 of the Rules of Court and by the following rules:

(a) 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 place as the court may order.

In addition, a copy of the summons shall be served on respondent at his last known address by registered mail or by any other means the court may deem sufficient.

(b) The summons to be published shall be contained in an order of the court with the following data: (1) title of the case; (2) docket number; (3) nature of the petition; (4) principal grounds of the petition and the reliefs prayed for; and (5) a directive for respondent to answer within thirty days from the last issue of publication.

Sec. 4. *Motion to Dismiss*. — 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.

Sec. 5. *Answer*. — (a) The respondent shall file his answer within fifteen days from receipt 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 respondent himself and not by counsel or attorney-in-fact.

(b) If the respondent fails to file an answer, the court shall not declare him in default.

(c) 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.

Sec. 6. *Investigation Report of Public Prosecutor*. — (a) Within one month after receipt of the court order mentioned in paragraph (c) of the preceding section, 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.

(b) 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.

(c) 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.

Sec. 7. *Social Worker*. — The court may require a social worker to conduct a case study and to submit the corresponding report at least three days before the pre-trial. The court may also require a case study at any stage of the case whenever necessary.

Sec. 8. *Pre-trial*. —

(a) *Pre-trial mandatory*. — A pre-trial is mandatory. On motion or *motu proprio*, the court shall set the pre-trial after the last pleading has been served and filed, or upon receipt of the report of the public prosecutor that no collusion exists between the parties on a date not earlier than six months from date of the filing of the petition.

(b) *Notice of Pre-trial*. — (1) The notice of pre-trial shall contain:

(a) the date of pre-trial conference; and

(b) an order directing the parties to file and serve their respective pre-trial briefs in such manner as shall ensure the receipt thereof by the adverse party at least three days before the date of the pre-trial.

(2) The notice shall be served separately on the parties and their respective counsels as well as on the public prosecutor. It shall be their duty to appear personally at the pre-trial.

(3) Notice of pre-trial shall be sent to the respondent even if he fails to file an answer. In case of summons by publication and the respondent failed to file his answer, notice of pre-trial shall be sent to respondent at his last known address.

Sec. 9. *Contents of pre-trial brief*. — The pre-trial brief shall contain the following:

(1) A statement of the willingness of the parties to enter into agreements as may be allowed by law, indicating the desired terms thereof;

(2) A concise statement of their respective claims together with the applicable laws and authorities;

(3) Admitted facts and proposed stipulations of facts, as well as the disputed factual and legal issues;

(4) All the evidence to be presented, including expert opinion, if any, briefly stating or describing the nature and purpose thereof;

(5) The number and names of the witnesses and their respective affidavits; and

(6) Such other matters as the court may require.

Failure to file the pre-trial or to comply with its required contents shall have the same effect as failure to appear at the pre-trial under the succeeding section.

Sec. 10. *Effect of failure to appear at the pre-trial*. — (1) 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.

(2) If the respondent 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 respondent and submit within fifteen days 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.

Sec. 11. *Pre-trial conference*. — At the pre-trial conference, the court may refer the issues to a mediator who shall assist the parties in reaching an agreement on matters not prohibited by law.

The mediator shall render a report within one month from referral which, for good reasons, the court may extend for a period not exceeding one month.

In case mediation is not availed of or where it fails, the court shall proceed with the pre-trial conference, on which occasion it shall consider the advisability of receiving expert testimony and such other matters as may aid in the prompt disposition of the petition.

Sec. 12. *Pre-trial order*. — (a) The proceedings in the pre-trial shall be recorded. Upon termination of the pre-trial, the court shall

issue a pre-trial order which shall recite in detail the matters taken up in the conference, the action taken thereon, the amendments allowed on the pleadings, and, except as to the ground of legal separation, the agreements or admissions made by the parties on any of the matters considered, including any provisional order that may be necessary or agreed upon by the parties.

(b) Should the action proceed to trial, the order shall contain a recital of the following:

(1) Facts undisputed, admitted, and those which need not be proved subject to Section 13 of this Rule;

(2) Factual and legal issues to be litigated;

(3) Evidence, including objects and documents, that have been marked and will be presented;

(4) Names of witnesses who will be presented and their testimonies in the form of affidavits; and

(5) Schedule of the presentation of evidence.

The pre-trial order shall also contain a directive to the public prosecutor to appear for the State and take steps to prevent collusion between parties at any stage of the proceedings and fabrication or suppression of evidence during the trial on the merits.

(c) The parties shall not be allowed to raise issues or present witnesses and evidence other than those stated in the pre-trial order. The order shall control the trial of the case unless modified by the court to prevent manifest injustice.

(d) The parties shall have five days from receipt of the pre-trial order to propose corrections or modifications.

Sec. 13. *Prohibited compromise.* — The court shall not allow compromise on prohibited matters, such as the following:

(1) The civil status of persons;

(2) The validity of a marriage or of a legal separation;

(3) Any ground for legal separation;

(4) Future support;

(5) The jurisdiction of courts; and

(6) Future legitime.

Sec. 14. *Trial.* — (a) The presiding judge shall personally conduct the trial of the case. No delegation of the reception of evidence to a commissioner shall be allowed except as to matters involving property relations of the spouses.

(b) The grounds for legal separation must be proved. No judgment on the pleadings, summary judgment, or confession of judgment shall be allowed.

(c) The court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring a party to testify in open court would not enhance the ascertainment of truth; would cause to the party psychological harm or inability to effectively communicate due to embarrassment, fear, or timidity; would violate the party's right to privacy; or would be offensive to decency or public morals.

(d) No copy shall be taken nor any examination or perusal of the records of the case or parts thereof be made by any person other than a party or counsel of a party, except by order of the court.

Sec. 15. *Memoranda.* — The court may require the parties and the public prosecutor to file their respective memoranda in support of their claims within fifteen days from the date the trial is terminated. No other pleadings or papers may be submitted without leave of court. After the lapse of the period herein provided, the case will be considered submitted for decision, with or without the memoranda.

Sec. 16. *Decision*. — (a) The court shall deny the petition on any of the following grounds:

(1) The aggrieved party had condoned the offense or act complained of or has consented to the commission of the offense or act complained of;

(2) There is connivance in the commission of the offense or act constituting the ground for legal separation;

(3) Both parties have given ground for legal separation;

(4) There is collusion between the parties to obtain the decree of legal separation; or

(5) The action is barred by prescription.

(b) If the court renders a decision granting the petition, it shall declare therein that the Decree of Legal Separation shall be

issued by the court only after full compliance with liquidation under the Family Code.

However, in the absence of any property of the parties, the court shall forthwith issue a Decree of Legal Separation which shall be registered in the Civil Registry where the marriage was recorded and in the Civil Registry where the Family Court granting the legal separation is located.

(c) The decision shall likewise declare that:

(1) The spouses are entitled to live separately from each other but the marriage bond is not severed;

(2) The obligation of mutual support between the spouses ceases; and

(3) The offending spouse is disqualified from inheriting from the innocent spouse by intestate succession, and provisions in favor of the offending spouse made in the will of the innocent spouse are revoked by operation of law.

(d) 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 also be published once in a newspaper of general circulation.

Sec. 17. *Appeal*. —

(a) *Pre-condition*. — 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.

(b) *Notice of Appeal*. — 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 upon the adverse parties.

Sec. 18. *Liquidation, partition and distribution, custody, and support of minor children*. — 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 and support of common children, under the Family Code unless such matters had been adjudicated in previous judicial proceedings.

Sec. 19. *Issuance of Decree of Legal Separation.* — (a) The court shall issue the Decree of Legal Separation after:

(1) registration of the entry of judgment granting the petition for legal separation in the Civil Registry where the marriage was celebrated and in the Civil Registry where the Family Court is located; and

(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.

(b) The court shall quote in the Decree the dispositive portion of the judgment entered and attach to the Decree the approved deed of partition.

Sec. 20. *Registration and publication of the Decree of Legal Separation; decree as best evidence.* —

(a) *Registration of decree.* — The prevailing party shall cause the registration of the Decree in the Civil Registry where the marriage was registered, in the Civil Registry of the place where the Family Court 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.

(b) *Publication of decree.* — 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.

(c) *Best evidence.* — The registered Decree shall be the best evidence to prove the legal separation of the parties and shall serve as notice to third persons concerning the properties of petitioner and respondent.

Sec. 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 in 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.

Sec. 22. *Petition for revocation of donations.* — (a) Within five (5) years from the date the decision granting the petition for legal separation has become final, the innocent spouse may file a petition

under oath in the same proceeding for legal separation to revoke the donations in favor of the offending spouse.

(b) The revocation of the donations shall be recorded in the Register of Deeds in the places where the properties are located.

(c) Alienations, liens, and encumbrances registered in good faith before the recording of the petition for revocation in the registries of property shall be respected.

(d) After the issuance of the Decree of Legal Separation, the innocent spouse may revoke the designation of the offending spouse as a beneficiary in any insurance policy even if such designation be stipulated as irrevocable. The revocation or change shall take effect upon written notification thereof to the insurer.

Sec. 23. *Decree of Reconciliation*. — (a) If the spouses had reconciled, a joint manifestation under oath, duly signed by the spouses, may be filed in the same proceeding for legal separation.

(b) If the reconciliation occurred while the proceeding for legal separation is pending, the court shall immediately issue an order terminating the proceeding.

(c) If the reconciliation occurred after the rendition of the judgment granting the petition for legal separation but before the issuance of the Decree, the spouses shall express in their manifestation whether or not they agree to revive the former regime of their property relations or choose a new regime.

The court shall immediately issue a Decree of Reconciliation declaring that the legal separation proceeding is set aside and specifying the regime of property relations under which the spouse shall be covered.

(d) If the spouses reconciled after the issuance of the Decree, the court, upon proper motion, shall issue a decree of reconciliation declaring therein that the Decree 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 or adopt a new regime.

(e) In case of paragraphs (b), (c) and (d), if the reconciled spouses choose to adopt a regime of property relations different from that which they had prior to the filing of the petition for legal separation, the spouses shall comply with Section 24 hereof.

(f) The decree of reconciliation shall be recorded in the Civil Registries where the marriage and the Decree had been registered.

Sec. 24. *Revival of property regime or adoption of another*. — (a) In case of reconciliation under Section 23, paragraph (c) above, the parties shall file a verified motion for revival of regime of property relations or the adoption of another regime of property relations in the same proceeding for legal separation attaching the said motion their agreement for the approval of the court.

(b) The agreement which shall be verified shall specify the following:

(1) The properties to be contributed to the restored or new regime;

(2) Those to be retained as separate properties of each spouse; and

(3) The names of all their known creditors, their addresses, and the amounts owing to each.

(c) The creditors shall be furnished with copies of the motion and the agreement.

(d) The court shall require the spouses to cause the publication of their verified motion for two consecutive weeks in a newspaper of general circulation.

(e) After due hearing, and the court decides to grant the motion, it shall issue an order directing the parties to record the order in the proper registries of property within thirty days from receipt of a copy of the order and submit proof of compliance within the same period.

Sec. 25. *Effectivity*. — This Rule shall take effect on March 15, 2003 following its publication in a newspaper of general circulation not later than March 7, 2003.

TITLE III. — RIGHTS AND OBLIGATIONS BETWEEN HUSBAND AND WIFE

Article 68. The husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support. (109a)

DUTIES AND OBLIGATIONS. There is a very significant and practical purpose for providing in the law the duties and obligations of husband and wife. In *Lacson v. San Jose-Lacson*, 24 SCRA 837, the Supreme Court said:

> In this jurisdiction, the husband and the wife are obliged to live together, observe mutual respect and fidelity, and render mutual help and support. x x x There is, therefore, virtue in making it as difficult as possible for married couples — impelled by no better cause than their whims and caprices — to abandon each other's company.
>
> x x x For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives; for necessity is a powerful master in teaching the duties which it imposes x x x (*Evans v. Evans,* 1 Hag. Con., 35; 161 Eng. Reprint. 466, 467.)" (*Arroyo v. Vasquez de Arroyo,* 42 Phil. 58-59).

Procreation is also an essential marital obligation considering that such obligation springs from the universal principle that procreation of children through sexual cooperation is the basic end of marriage (*Chi Ming Tsoi v. Court of Appeals,* 78 SCAD 57, 266 SCRA 324).

NO COMPULSION. Except for support, a court cannot validly issue a decision compelling the spouses to live together, observe mutual love, respect and fidelity. Only the moral obligation of the spouses constitutes the motivating factor for making them observe the said duties and obligations which are highly personal (*Ramirez-Cuaderno v. Cuaderno*, 12 SCRA 505; *Potenciano v. Court of Appeals*, G.R. Nos. 139789, 139808, July 19, 2001).

> It is not within the province of the courts of this country to attempt to compel one of the spouses to cohabit with and render conjugal rights to the other x x x. At best, such an order can be effective for no other purpose than to compel the spouses to live under the same roof; and the experience of those countries where the courts of justice have assumed to compel the cohabitation of married people shows that the policy of the practice is extremely questionable (*Arroyo v. Vasquez,* 42 Phil. 54, 60, cited in *Lacson v. San Jose-Lacson,* 24 SCRA 837).

Also, it has been held that a wife's domestic assistance and conjugal companionship are purely personal and voluntary acts which neither the spouses may be compelled to render (*Arroyo v. Arroyo,* 42 Phil. 54).

DAMAGES FOR FAILURE TO COMPLY WITH OBLIGATIONS. There can be no action for damages merely because of a breach of marital obligation (*Ty v. Court of Appeals,* G.R. No. 127406, November 27, 2000). Hence, in a case filed by a husband against his wife for nullity of marriage where the wife also sought damages against the husband for filing a baseless complaint causing her mental anguish, anxiety, besmirched reputation, social humiliation and alienation from her parents, the Supreme Court denied the petition of the husband but also denied the claim of the wife for damages stating, thus:

> x x x Should we grant her prayer, we would have a situation where the husband pays the wife damages from conjugal funds. To do so would make the application of the law absurd. Logic, if not common sense, militates against such incongruity. Moreover, our laws do not comprehend an action for damages between husband and wife merely because of breach of a marital obligation. There are other remedies.

Other remedies can be availed of. Hence, if a spouse in bad faith refuses to comply with the above obligations and if the property regime is separation of property, he or she may be held liable under

Articles 19, 20 or 21 of the Civil Code. These articles deal with the abuse of right doctrine. Thus, every person must, in the exercise of his or her rights and in the performance of his or her duties, act with justice, give everyone his due and observe honesty and good faith (Article 19 of the Civil Code). Also, every person who, contrary to law, willfully or negligently causes damage to another, shall indemnify the latter of the same (Article 20 of the Civil Code). In the same vein, any person who willfully 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 (Article 21 of the Civil Code). Thus, it has been held that the desertion and securing of an invalid divorce decree of one consort entitles the other to recover damages and attorney's fees (*Tenchavez v. Escano*, 15 SCRA 355).

Any person who likewise deprives a spouse of the consortium or services of the other spouse can be held liable for damages. However, how this deprivation was made must be fully proven. Thus, it has been held that:

> under the law and the doctrine of this court, one of the husband's rights is to count on his wife's assistance. This assistance comprises the management of the home and the performance of household duties, including the care and education of the children and attention to the husband upon whom primarily devolves the duty of supporting the family of which he is the head. When the wife's mission was circumscribed to the home, it was not difficult to assume, by virtue of the marriage alone, that she performed all the said tasks and her physical incapacity always redounded to the husband's prejudice inasmuch as it deprived him of her assistance. However, nowadays when women, in their desire to be more useful to society and to the nation, are demanding greater civil rights and are aspiring to become man's equal in all the activities of life, commercial and industrial, professional and political, many of them spending their time outside the home, engaged in their businesses, industry, profession and political, and entrusting the care of their home to a housekeeper, and their children, if not to a nursemaid, to public or private institutions which take charge of young children while their mothers are at work, marriage has ceased to create the presumption that a woman complies with the duties to her husband and children, which the law imposes upon her, and he who seeks to collect indemnity for damages resulting from deprivation of her domestic services must prove such service. In the case under consideration, apart from the services of his wife Sonja Maria Lilius as translator and secretary, the value of which has not been proven, the plaintiff

> Aleko E. Lilius has not presented any evidence showing the existence of domestic services and their nature, rendered by her prior to the accident, in order that it may serve as a basis in estimating their value (*Lilius v. Manila Railroad Company,* 59 Phil. 758).

CAN A HUSBAND COMMIT RAPE AGAINST HIS WIFE? Rape, as provided for in Article 266-A of the Revised Penal Code, as amended by Republic Act 8353, is committed by a man who shall have carnal knowledge of a woman through force, threat or intimidation; when the offended party is deprived of reason or otherwise unconscious; by means of fraudulent machinations or grave abuse of authority; and when the woman is under twelve years of age or is demented, even though none of the circumstances above be present. Rape is also committed by any person who, under any of the circumstances just mentioned, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person. Under Philippine law, a husband can be held liable for raping his wife. However,

> in case it is the legal husband who is the offender, the subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty: *Provided,* That the crime shall not be extinguished or the penalty shall not be abated if the marriage is void *ab initio* (Article 226-C of the Revised Penal Code, as amended by Republic Act 8353).

Rape is also an act of violence against a woman, including the wife. (Section 3 of Republic Act 9262 – Anti-Violence Against Women and Children Law [VAWC]).

Prior to the amendment of the Revised Penal Code, there was a disagreement on whether or not a husband can rape his wife. It has been opined that, even if the husband uses force to have sexual intercourse with the wife, there can be no rape. This is what is known as the matrimonial exemption to the crime of rape. The reason for this exemption is anchored on the following concepts:

> 1. That upon marriage, a man and a woman no longer retained separate legal existence. As a result of this concept, some have argued that a husband could not be convicted of, in effect, raping himself (*State v. Smith,* 24 ALR 4th 90);
>
> 2. That upon entering the marriage contract, a wife consents to sexual intercourse with her husband, and the law

> does not allow her to retract such consent. Under this concept, a husband is legally incapable of raping his wife, since the existence of a marital relationship bears as an evidentiary matter upon the element in the rape statute of lack of consent. A wife is irrebuttably presumed to consent to sexual relations with her husband even if forcible and without consent (*State v. Bell,* 560 2d 925).

In the present time, however, this matrimonial exemption has not been regarded as a universal and absolute rule. As a matter of fact, jurisprudence abroad reveals, that there is now a growing shift to decide situations on forced sexual intercourse by a husband against his wife on a case to case basis, thereby eroding the full acceptability of the previously mentioned justifications for matrimonial exemptions.

As to the first justification on matrimonial exemption, namely, the union of the separate existence of husband and wife, it has been argued that, essentially, rape statutes have always aimed to protect the safety and personal liberty of women. Especially, during these modern times, women have been recognized as possessing rights and privileges completely separable from their husbands. Indeed, in the Philippines even our laws on family relations have been amended to give wives certain rights which they did not have under the Civil Code. Also, our Revised Penal Code has been amended by Republic Act No. 8353, which reclassifies rape as a crime against persons.

As an argument against the second justification on matrimonial exemption, namely, consent of the wife, it has been said by the Supreme Court of New Jersey in the case of *State of New Jersey v. Albert Smith,* February 10, 1981, 24 ALR 4th 90, that:

> this implied consent rationale, besides being offensive to our valued ideals of personal liberty, is not sound where the marriage itself is not irrevocable. If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage "contract," may she not also revoke a "term" of that contract, namely, consent to intercourse? Just as a husband has no right to imprison his wife because of her marriage vow to him, x x x he has no right to force sexual relations upon her will. If her repeated refusals are a "breach of the marriage contract" his remedy is in a matrimonial court, not in violent and forceful self-help.
>
> Changes in divorce laws have significantly affected judicial and legislative construction of marital exemption rules. Some

> jurisdictions have recognized that consent to intercourse does not automatically continue until a marriage is officially ended. They have refused to exempt husbands from the charge of rape where a judicial decree of separation has been entered, where a spouse has filed for divorce or separate maintenance, or where the spouses are simply living apart.

In the Philippines, Republic Act Number 8353 amended the Revised Penal Code by reclassifying rape as a crime against person and making it clear that a husband can be criminally liable for raping his own wife.

> **Article 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)**

DOMICILE. For the exercise of civil rights and the fulfillment of civil obligations, the domicile of natural persons is the place of their habitual residence (Art. 50 of the Civil Code). Thus, the spouses can only have one domicile but many residences. The domicile is the place where the parties intend to have their permanent residence with the intention of always returning even if they have left it for some time. A minor follows the domicile of his or her parents. The fixing of the family domicile should be by agreement between the husband and the wife. This is a marked departure from the repealed Article 100 of the Civil Code where the husband, being the legal administrator of the property, has the sole power to decide where the family domicile will be. The new provision in the Family Code "recognizes revolutionary changes in concept of women's rights in the intervening years by making the choice of domicile a product of mutual agreement between the spouses" (*Romualdez-Marcos v. COMELEC,* 64 SCAD 358, 248 SCRA 300). However, in case of disagreement between the husband and the wife, the court shall decide. The judicial proceeding shall be summary in nature in accordance with Article 253 of the Family Code.

A spouse can validly live away or separately from the other only if the latter should live abroad or there are other valid and

compelling reasons for the exemption. During one of the meetings of the Civil Code and Family Law Committees and by way of an example,

> it was clarified that the phrase "other valid and compelling reasons" will cover a case where the spouse has to work in the mines in the Mountain Province and the like (Minutes of the 161st Joint Meeting of the Civil Code and Family Law Committees held on November 8, 1986).

Should the court find the existence of any of the said grounds, it may validly issue an order exempting one spouse to live with the other. However, such exemption shall not apply if the same is not compatible with the solidarity of the family. The judicial proceeding shall be summary in nature in accordance with Article 253 of the Family Code.

> **Article 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 absence of said income or fruits, such obligations shall be satisfied from their separate properties. (111a)**
>
> **Article 71. The management of the household shall be the right and duty of both spouses. The expenses for such management shall be paid in accordance with the provisions of Article 70. (115a)**
>
> **Article 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)**

EXPENSES FOR SUPPORT AND HOUSEHOLD MANAGEMENT. Support is a very important duty that the frequency by which the Family Code refers to this matter highlights this point. Thus, Article 70 provides that the spouses shall be jointly liable for the support of the family. Article 68 states, among others, that the husband and wife are obliged to support each other. Articles 94 and 121 provide that the absolute community of property and

conjugal partnership of gains, respectively, shall be liable for the support of the spouses, their common and legitimate children of either spouse. Article 49 provides that, in an annulment or nullity of marriage case, the court shall provide for the support of the spouses and the custody and support of their children. Article 198 provides that 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. The whole Title VIII on Support under the Family Code highlights the importance of this duty. Also, Article 220 provides, among others, that the parents and those exercising parental authority shall have with respect to their unemancipated children or wards the duty to support them.

Articles 70 and 71 likewise provide that, in the absence of the community property, the expenses for support and other conjugal obligations, including the expenses for the management of the household, shall be taken from the income or fruits of their separate properties. In case of the insufficiency or absence of said income or fruits, such obligations shall be satisfied from their separate properties. Corollarily, the last paragraphs of Articles 94 and 121 provides that, if the community property or the conjugal partnership, as the case may be, is insufficient to cover the liabilities for which they are liable, the spouses shall be solidarily liable for the unpaid balance with their separate properties. Article 146 provides that in a regime of separate properties, the liability of the spouses to creditors for family expenses shall, however, be solidary.

MANAGEMENT AND RELIEF. It must also be observed that the management of the household shall be the right and duty of both spouses regardless of the property regime involved in the marriage. Hence, even if the family house is separately owned by one of the spouses, the other spouse still has the right and the duty relative to the management of the household. In the event that 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. The relief may take on so many forms like filing a case for legal separation if there are grounds for the same, nullifying the marriage based on Article 36 if the neglect is such that it does not create a functional marital life, petitioning the court for receivership, for judicial separation of property, or for authority to be the sole administrator of the community property or the conjugal partnership subject to

such precautionary conditions as the court may impose (Articles 101, 128).

> **Article 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)**

LEGITIMATE PROFESSION. The husband and the wife can engage in any lawful enterprise or profession. While it is but natural for the husband and the wife to consult each other, the law does not make it a requirement that a spouse has to get the prior consent of the other before entering into any legitimate profession, occupation, business or activity.

It can be added that if the husband compels the wife to desist from pursuing a profession or any other conduct which the wife has the right to engage in, or prevent the wife from engaging in any legitimate profession, occupation, business or activity with the purpose or effect of controlling or restricting her movement or conduct, these are considered acts of violence against women under RA 9262 (Anti-Violence Against Women and their Children Law) which is punishable.

The exercise by a spouse of a legitimate profession, occupation, business or activity is always considered to redound to the benefit of the family. But an isolated transaction of a spouse such as being a guarantor for a third person's debt is not *per se* considered as redounding to the benefit of the family and, therefore, to hold the absolute community or the conjugal partnership property liable

for any loss resulting from such isolated activity, proofs showing a direct benefit to the family must be presented (See *Ayala Investment v. Court of Appeals*, G.R. No. 118305, February 12, 1998). Thus, in *Go v. Court of Appeals,* G.R. No. 114791, May 29, 1997, 82 SCAD 887, where it was proven that it was only the wife who entered into a video contract with the aggrieved parties and who was the only one responsible for the breach of the said contract, the Supreme Court ruled that the husband cannot be held solidarily liable with the wife for the damages resulting from the breach because, under the law, any of the spouses may exercise any legitimate activity without the consent of the other spouse which actually happened in the case and also pursuant to the principle that contracts produce effect only as between the parties who execute them. In the *Go* case, the video contract entered into by the wife was apparently an isolated activity entered into by the wife. However, if the wife is really engaged in the business of video filming or it is her profession or occupation, such undertaking shall be considered as redounding to the benefit of the family or the absolute community or the conjugal partnership and, therefore, any loss shall be shouldered by the absolute community of property or the conjugal partnership of gains (*See Ayala Investment v. Court of Appeals*, G.R. No. 118305, February 12, 1998).

There can, however, be disagreements between the spouses regarding a certain profession, occupation, business or activity which one of them desires to engage in. In case of such disagreement, the objection must be anchored only on valid, serious and moral grounds. Hence, the husband cannot validly object to her wife's undertaking her profession as a lawyer, simply because she meets a number of clients, including men, in the exercise thereof. In case of disagreement, the courts shall decide if the objection is proper. The judicial proceeding shall be summary in nature in accordance with Article 253. If the court finds that it is objectionable, the exercise of the business can be judicially stopped. Hence, if the husband opens up a massage parlor which is actually a prostitution business, it can be validly stopped as it is serious and immoral. The Civil Code and Family Law committees

> agreed that the rule that "what is legal is moral and what is moral is legal" may not apply in the above provision since there are occupations, like escort service, which are legal and immoral (Minutes of the 161st Joint Meeting of the Civil Code and Family Law Committees held on November 8, 1986, page 6).

SEPARATE PROPERTY LIABILITY. The law likewise provides that, in case of disagreement, the court shall decide whether or not the benefit has accrued to the family prior to the objection or thereafter. It must be pointed out that, as a general rule, debts and obligations, of whatever nature and regardless of the time they were incurred whether before or after the marriage ceremony, but redounding to the benefit of the family, shall be chargeable to the conjugal partnership of gains or the absolute community property and not to the separate property of the spouse who incurred the obligation. It is also a general rule that an obligation incurred as a result of a spouse's exercise of his or her legitimate profession/ occupation or as a result of a spouse's undertaking of his or her own legitimate business, especially a family business, is an obligation redounding to or for the benefit of the family or the conjugal partnership or the absolute community and, therefore, shall be shouldered by the conjugal partnership or community property (*Ayala Investment v. Court of Appeals,* G.R. No. 118305, February 12, 1998). Article 73, second paragraph, item number 2, however provides that "*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."* Hence, in case of professions which are seriously invalid and immoral, the separate property of the erring spouse shall be liable for all obligations relating to such exercise of profession even if benefits actually accrued in favor of the family. Clearly therefore, Article 73, 2nd paragraph, item number 2 is an exception to the general rule that, for as long as the obligations inured to the benefit of the family, the absolute or conjugal property shall be liable. For the said exception to apply, however, the innocent spouse must have no knowledge of the other spouse's engagement in an immoral activity such that he could not have interposed any objection. This is so because, if the said spouse knew beforehand that the other spouse undertook such profession and merely interposed a specious objection later in that he actually used the money obtained from such profession for family needs, such objection is of no consequence, as the innocent spouse would be deemed to have agreed with the other spouse's seriously immoral endeavors. In such a case, there was actually no disagreement. However, this will not bar the acquiescing spouse from interposing an authentic objection later because, considering that the profession is immoral, the other spouse should be given the widest latitude to stop the erring spouse from undertaking his or her unwholesome profession.

Making the separate property of the erring spouse liable even if the obligations she or he incurred redounded to the benefit of the family, is a way of penalizing the said spouse for engaging in a seriously invalid and immoral profession or occupation. This is so, even if there is no objection yet from the other spouse so that the law will serve to deter any spouse from attempting to undertake such immoral activity.

For example, if without the knowledge of her husband and to be able to buy an airplane ticket to go to another country to work as a prostitute, the wife borrowed money from a friend, who in turn knew of the wife's plan, and thereafter, the wife indeed worked as a prostitute in another country giving her first income to the husband who used the money to buy food for the family but without knowing that it was an income from an immoral profession, the separate property of the wife alone will be liable to the creditor-friend, in the event the latter demands payment of the money borrowed from him by the wife to pay the airplane ticket. However, if the creditor-friend lent the money to the wife on the belief that it will be used for a legitimate business, such creditor will not be prejudiced and he can collect from the community or conjugal property by demanding from the husband the payment of the obligation. After the objection by the husband, any obligation incurred by the erring spouse which redounded to the benefit of the family shall be borne by the community or conjugal property. It would be unfair if the spouse, after obtaining knowledge of the immoral profession, thereafter, interposed his objection but at the same time made use of the "immoral money" to benefit the family. In such case, the conjugal partnership or the absolute community should be liable.

ERROR IN PRINTING? The exception to the general rule under Article 73, second paragraph, item number 2 explained in the preceding paragraphs, might not have been intended, though justifiable such exception may be. An examination of the deliberations of this particular provision contained in the minutes of the 161st Joint Meeting of the Civil Code and Family Law Committees on November 8, 1986, Pages 7 to 9 appears to show an error in the printing of Article 73, second paragraph, item number 2, thus,

> x x x Justice Puno suggested that obligations incurred prior to the objection be made enforceable against the community property if benefit redounded to the family and those incurred after such objection be charged against the separate property, regardless of whether or not benefit redounded to the family.

On the other hand, Prof. Baviera proposed that the net earnings from the profession, occupation, business or activity be made answerable for the resulting obligations. Prof. Bautista, however, opined that they should leave it to the innocent spouse to recover from the guilty spouse in case of immoral profession, occupation, business or activity with benefits redounding to the family, but third persons should be able to go after the community property.

At this point, Justice Reyes raised the question: Would there be estoppel on the part of the husband, who knew of but did not object to his wife's immoral occupation? In reply, Justice Puno opined that there should be no estoppel and that the husband should be allowed to rectify the immorality at any given time. Justice Reyes agreed since the rule is that estoppel cannot sanction immorality or illegality.

Justice Puno proposed the following additional paragraph:

> "If benefit has accrued to the family from the profession, occupation, business or activity objected to, obligations incurred prior to the objection shall be enforced against the community property and those incurred after such objection shall be enforced only against the separate property."

Prof. Bautista remarked that there should be a definite time as to when the objection should be made. Justice Puno explained that the objection is in the same category as an extra-judicial demand.

Prof. Bautista suggested that the phrase "and those incurred after the objection" be simplified to read "and those incurred thereafter." Judge Diy, however, commented that it may be misinterpreted to mean "incurred after the activity" and not "after the objection."

After a brief discussion, Justice Puno proposed that subparagraph (2) be restored as follows:

> (2) Whether benefit has accrued to the family from the profession, occupation, business or activity objected to prior to the objection or thereafter. If the benefit accrued prior to the objection, the resulting obligation shall be enforced against the community property. If the benefit accrued thereafter, such obligation shall be enforced only against the separate property of the spouse who has not obtained consent.

Judge Diy suggested that the phrase "from the profession, occupation, business or activity objected to" be deleted, which the Committee approved.

Prof. Baviera proposed that the second and third sentences of subparagraph (2) be made a separate paragraph. Justice Puno objected since the second and third sentences refer only to subparagraph (2).

Prof. Baviera remarked that the words "benefit" and "obligation" are vague. Justice Puno and Judge Diy explained that "benefit" refers to the "benefit from the profession, occupation, business or activity objected to," while "obligation" refers to the "resulting obligation from the profession, occupation, business or activity objected to."

Prof. Baviera commented that the provision would require third persons to inquire whether or not there is objection based on valid serious and moral grounds. Justice Puno opined that the "objecting" should be made known to the spouse and to the persons with whom the said spouse deals.

After further deliberation, Justice Puno proposed that the following paragraph be added at the end:

The foregoing provisions shall not prejudice third persons acting in good faith.

Prof. Romero suggested that they say "the rights of third persons." Prof. Baviera proposed that they say "the rights of creditors who acted in good faith" which the Committee approved.

Thus, the last paragraph shall read:

The foregoing provisions shall not prejudice the rights of creditors who acted in good faith.

At this point, the Committee approved Prof. Bautista's suggestion that the opening sentence of the second paragraph be modified to read:

In case of disagreement, the court shall decide whether or not:

and that the word "whether" in subparagraphs (1) and (2) be deleted.

Hence, the proposed Article 73 shall read:

> 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 COMMUNITY PROPERTY. IF BENEFIT ACCRUED THEREAFTER, SUCH OBLIGATION SHALL BE ENFORCED AGAINST THE SEPARATE PROPERTY OF THE SPOUSE WHO HAS NOT OBTAINED CONSENT.

Considering that, what was printed in the final text relative to Article 73, second paragraph, item number 2 was completely different from that which was finally proposed during the committee deliberations and considering that the printed text under the statute was the one contained in the Family Code when the President signed the same into law, there appears to be no alternative but to apply Article 73, second paragraph, item number 2 as it is printed in the law.

TITLE IV. — PROPERTY RELATIONS BETWEEN HUSBAND AND WIFE

Chapter 1

GENERAL PROVISIONS

Article 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)

Article 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 a 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)

Article 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)

Article 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)

PROPERTY RELATIONS AND PRE-NUPTIAL AGREEMENTS. Marriage, as a social contract, seeks to establish as much as possible the complete union of a husband and wife. By the contract of marriage, a man and a woman enter a joint life, acting, living and working as one. There should be between them a full and complete community of existence (*Saclolo v. CAR,* 106 Phil. 1038). Thus, because of their "oneness," Article 1490 of the Civil Code provides that the husband and the wife cannot sell property to each other, except when a separation of property was agreed upon in the marriage settlement; or when there has been a judicial separation of property. Also, the rule that there is no right of accretion in cases of donation made to several persons is not applicable to a donation jointly made to husband and wife. Between husband and wife, there shall be a right of accretion, unless the donor has otherwise provided (Article 753 of the Civil Code).

However, the law recognizes that as to their property relations, the husband and the wife shall primarily be governed by their marriage settlement. This agreement must be in writing, signed by the parties, and made prior to the celebration of the marriage. Significantly, pursuant to Article 1403(2c) of the New Civil Code dealing with the Statute of Frauds, an agreement in consideration of marriage must be in writing; otherwise, it shall be unenforceable. However, under the Family Code, the requirement that an ante-nuptial agreement must be in writing is mandatory not only for the purpose of enforceability but, more importantly, for its validity. An oral marriage settlement, therefore, is void and cannot be ratified by any claim of partial execution or absence of objection.

The contracting parties can stipulate or agree on any arrangement in their marriage settlement that is not contrary to law and public policy and is within the limits provided in the Family Code (Article 1). Thus, the spouses may agree, for example, that in their absolute community of property the division thereof in the event of partition will not be equal (Article 102[24]). Likewise, in the marriage settlement, the parties may agree that the separation of property may refer to present or future property or both and it may be total or partial, in which case the property not agreed upon as separate shall pertain to the absolute community (Article 144). However, by way of example also, the parties cannot stipulate that the conjugal partnership of gains or the absolute community of property will start at a time other than the precise moment of the celebration of marriage because such agreement is void under Articles 88 and 107. Likewise, the parties cannot stipulate that

they can make any substantial donation to each other during their marriage because such donation is void under Article 87. Also, in case a marriage has been terminated by death of one spouse and there has been no liquidation of the properties of the previous marriage, the surviving spouse, if he or she decides to remarry, cannot execute a marriage settlement providing for a regime other than the complete separation of property regime because Articles 103 and 130 specifically provide that, in such a remarriage, the property regime governing the subsequent marriage must be the separation of property regime.

> By an ante-nuptial settlement or agreement, the parties may define their property rights in property existing or after acquired, and they may vary substantially property rights that would otherwise arise on their marriage by operation of law, superseding, in a sense, statutes on that subject. They cannot, however, vary the marital personal rights and duties that arise on marriage by operation of law. Neither can such a settlement or agreement divest the parties' children of legal rights.
>
> Such agreements or settlements are favored by public policy as conducive to the welfare of the parties and the best purpose of the marriage relationship, and to prevent strife, secure peace, adjust rights, and settle the question of marital rights in property, thus tending to remove one of the frequent causes of family disputes — contentions about property and allowances to the wife (41 Am. Jur. 2d 233, 234).

The arrangement, as agreed upon by the parties, may stipulate that the conjugal partnership of gains, the complete separation of property or any other regime shall govern the marital property relationship. If there is no marriage settlement agreed upon or if the same is void, then the absolute community of property will prevail.

The parties may likewise design their own property regime which is not in violation of any law. For example, the parties can provide a property regime which they can call "Mixed-Up Property Regime" where the spouses shall retain as their own exclusive property all their salaries earned during the marriage but will consider any real estate purchased from the same as commonly owned while all personal properties as exclusively owned.

PREJUDICE TO THIRD PARTIES. To bind third persons, the marriage settlement and any modification thereof must be registered in the local civil registrar where the marriage contract is recorded and in the proper registries of property. For example,

spouses *A* and *B*, prior to their marriage, executed a valid marriage settlement stipulating that, of the three real estate properties of *B* located in Quezon City, San Juan and Caloocan City, the properties located in Quezon City and San Juan shall be excluded from their absolute community of property during their marriage, but all the other properties of *B*, including the real estate in Caloocan City, shall be included in the community property. Because the property relationship is governed by the absolute community of property, this means that the property in Caloocan City shall be co-owned by *A* and *B* during the marriage. Had there been no marriage settlement excluding the property in Quezon City and San Juan, such properties would have also been co-owned by *A* and *B* during the marriage. Prior to the marriage, *B* borrowed money from *Y*. The loan was used by *B* personally and it did not benefit the family of *A* and *B* during the marriage. When the debt became due and payable during the marriage, *B* defaulted. After obtaining a favorable court judgment against *B*, can *Y*, a third-party creditor, execute on the property located at Caloocan City now co-owned by *A* and *B* to satisfy the debt of *B*? If the marriage settlement of *A* and *B* is properly registered, *Y* will be prejudiced. This means that *Y* cannot execute the property in Caloocan City by having the court sheriff sell the same to satisfy the judgment debt because, even if the Caloocan City property were exclusively owned by *B* at the time the loan was contracted, such property, during the marriage, became part of the absolute community of property which is liable only for community debts. Such property cannot be liable for the exclusive obligation of *B* especially when *B* still has sufficient separate properties, such as those in Quezon City and San Juan, that can be used to pay his exclusive debt. If the marriage settlement of *A* and *B* is not registered, *Y* can execute on the Caloocan City property because he will not be prejudiced by the marriage settlement. In effect, the Caloocan City property can still be treated by *Y* as exclusively owned by *B* for purposes of paying off the judgment debt. In having community property pay off the exclusive debt of *B*, the absolute community of property is entitled to be repaid by the debtor spouse, *B*. This repayment can be made at the time of liquidation of the absolute community of property of *A* and *B* wherein the value of the Caloocan City property shall be deducted from the share of the debtor-spouse, *B*. This procedure can be done even if there are other sufficient exclusive properties of *B* to pay off the debt. Also, this situation is peculiar and exclusive only to an obligation in favor of a third party affected by the registration or non-registration of a marriage settlement. But if the indebtedness

of *B* redounded to the benefit of the family, the absolute community of property shall definitely be liable.

This procedure should not be confused with Article 94(9) where, only upon showing of the insufficiency of the debtor's spouse separate properties, the creditor can seek payment of such spouse's exclusive debts from the community property and the payment of which shall be considered as advances to be deducted from the share of the debtor-spouse upon liquidation of the community property. Article 94(9) refers to a situation which may or may not involve prejudice or non-prejudice to a creditor regarding ante-nuptial debts as a result of the registration or non-registration of a marriage settlement.

If there is no marriage settlement, the property regime shall be the absolute community of property. Considering that there is no marriage settlement, there is likewise nothing to register with the local civil registrar and the proper registries of properties. The effect of the transformation of property by operation of law from being exclusively-owned *to one* which is co-owned because it has become part of the absolute community of property may have different effects on a third party, despite the fact that there is no marriage settlement to register. For example, *A* borrowed money from *B* payable on January 7, 1999. As security or collateral for the loan, *A* mortgaged his exclusive and unregistered property in Antipolo in favor of *B*. Subsequently, without executing a marriage settlement, *A* and *X* got married to each other. At the time of the marriage, the property of *A* in Antipolo became part of the absolute community of property and, therefore, co-owned by *A* and *X*. This transformation from exclusive ownership to co-ownership has an effect on the creditor's rights because, by such marriage, *A* has impaired the collateral. If the mortgage were registered in the proper registry of property, *X* shall be bound by such mortgage. The creditor will be protected. If the mortgage is not registered, *X* shall not be bound by such mortgage. However, because the collateral of the loan has been impaired, *A* has lost the right to the payment period of the loan. According to Article 1198 of the Civil Code, the debtor shall lose every right to make use of the period when, among others, by his own acts, he has impaired the security given after its establishment unless he immediately gives new ones equally satisfactory. Consequently, creditor *B* can demand the payment of the loan immediately considering that *A* has lost the right to pay it on January 7, 1999, having impaired the collateral by his marriage to *X* who, by operation of law, became a co-owner of the property. To maintain the period in his favor, *A* has to give new securities

equally satisfactory or, under the circumstances, he could get the consent of *X* to the security or collateral already established. In the event that A fail to do this and thereafter fail to pay the debt, the creditor must file an action to collect the amount of indebtedness. If, despite a judgment in his favor, the creditor *B* cannot satisfy the indebtedness because *A* has no more exclusive property to be executed considering that all of them became absolute community of property at the time of his marriage, creditor *B* can still obtain payment pursuant to Article 94(9) from the absolute community of property provided he proves the fact that *A* has no more separate property. Such payment shall be considered as advances by *A* from the absolute community of property to be deducted from his share upon liquidation of the community property. If the indebtedness of *A* ultimately redounded to the benefit of the family, the absolute community of property may be held directly liable and, therefore, creditor *B* can execute immediately on the Antipolo property which has become community property.

If the property itself is registered in the proper civil registry and has the corresponding valid Transfer Certificate of Title (TCT), a third person can rely on the annotations or entries on the TCT such that, if a married man caused the description "single" in the TCT and, through continuous misrepresentation that he is single, sells the property to an innocent purchaser for value and there are no other indicators for the said purchaser to be suspicious, the transaction cannot be annulled (*See PNB v. Court of Appeals,* 153 SCRA 435).

FAIRNESS IN MARRIAGE SETTLEMENT. The relationship between the parties to an ante-nuptial agreement is one of mutual trust and confidence. Since they do not deal at arm's length, they must exercise a high degree of good faith and candor in all matters bearing upon the contract. In weighing the fairness and reasonableness of the provision, the following, among other things depending on the particular case, must be considered: the relative situation of the parties, their respective ages, health and experience, their respective properties, their family ties and connections, the spouse's needs and such factors as tend to show that the agreement was understandingly made. The basic criterion is the element of fairness which should be measured as of the time of the execution of the agreement. But if the provisions made in the agreement are not fair and reasonable, its effectivity can still be maintained if it can be shown that the disadvantaged spouse, when she signed, had some

understanding of her rights to be waived or prejudiced or in any manner affected by the agreement. The spouse must have signed freely, voluntarily, intelligently and preferably upon competent and independent advice. Ordinarily, the burden of proof of the invalidity of a pre-nuptial agreement is on the spouse alleging it but if, on its face, the contract is unreasonable a presumption of concealment arises, the burden shifts and it is incumbent upon the other party to prove validity (*Del Vecchio v. Del Vecchio,* 143 So. 2d 17).

EXCEPTIONS. The last paragraphs of Articles 103 and 130 of the Family Code provide for exceptions to the general rule that the ante-nuptial agreement must be in writing and that, in the absence of an ante-nuptial agreement or if the same is void, the absolute community property regime will prevail. These two articles provide that, in the event that a marriage is terminated by the death of one of the spouses and the surviving spouse marries again without initiating any judicial or extrajudicial settlement of the properties of his or her previous marriage within one year from the death of the deceased spouse, a mandatory regime of complete separation of property shall govern the property relations of the subsequent marriage.

MODIFICATIONS. The general rule is that, in order that any modification in the marriage settlements may be valid, it must be made before the celebration of the marriage, in writing and signed by the parties. By way of exception, modification can be made after the marriage ceremony, but such modification shall need judicial approval and should only refer to the instances provided in Articles 66, 67, 128, 135 and 136 of the Family Code. Otherwise, the modification is not valid. Thus, a revival of the former property regime between reconciling spouses after a judicial decree of legal separation has been rendered between husband and wife can be made only via a court order recorded in the proper civil registries (Articles 66 and 67 of the Family Code). Also, in cases of abandonment or failure to comply with his or her marital obligations (Article 128), the court, on petition by the aggrieved spouse, may issue a decree of judicial separation of property. Likewise, Article 135 provides for further grounds for judicial separation of property. The spouses may likewise file a voluntary and verified petition in court to modify their property regime into a separate community of property regime. A separation of property cannot be effected by the mere execution of the contract or agreement of the parties but by the decree of the court approving the same (*Toda, Jr. v. CA,* 183 SCRA 713). Also,

a husband and wife may not, after their marriage, enter into an agreement or understanding which will have the effect of converting community property into separate property of the wife, so as to relieve the property from liability to be taken in satisfaction for the payment of community debts (171 ALR 1337).

LOCAL CUSTOMS. Custom is defined "as a rule of conduct formed by repetition of acts uniformly observed as a social rule, legally binding and obligatory." The law requires that "a custom must be proved as a fact, according to the rules of evidence" (*Yao Kee v. Sy-Gonzales,* 167 SCRA 736).

When the parties stipulate in their marriage settlement that local custom shall apply or that the absolute community of property regime shall not govern their property relations but fail to stipulate what property regime shall be applied, the only recourse would be to apply the local custom. Under Article 74, the agreement between the parties as to their property relations, if contained in a valid marriage settlement, shall prevail. If they do not execute a marriage settlement or if such agreement is void, the absolute community regime shall be applied as provided by the Family Code. In the aforementioned situation, although the parties executed a marriage settlement, the only stipulation they made was that the absolute community regime shall not apply or that local custom shall apply. In the first case, no particular property regime was designated while in the second case, local custom was expressly provided. Thus, only the local custom can be made to apply.

If the marriage settlement provides that neither the absolute community of property or local custom shall prevail in the marriage without particularizing any other valid property regime which shall apply in the marriage, such provision is void as it contravenes a mandatory provision under Article 74. Article 5 of the Civil Code provides that acts executed against the provisions of a mandatory law shall be void. Being void, the absolute community of property shall prevail.

Article 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 made parties to the agreement, subject to the provisions of Title IX of this Code. (120a)

Article 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)

CONSENT BY THOSE DESIGNATED BY LAW. Article 78 of the New Family Code was lifted from Article 120 of the Civil Code.

The applicability of Article 78 is now in doubt by virtue of the effectivity on December 18, 1989 of Republic Act No. 6809 which specifically provides that a person, whether male or female, attains the age of majority upon reaching 18 years of age. Hence, at present, any person below the age of 18 is a minor. Corollarily, a marriage contracted by a person below 18 years of age is, according to Article 35(1), void *ab initio*. Thus, the phrase "a minor who according to law may contract marriage" under Article 78 has been impliedly repealed considering that no minor now may contract a valid marriage.

At present, it can thus be argued that an 18-year-old person deciding to marry may validly execute a marriage settlement even without obtaining the consent of the persons designated in Article 14 of the Family Code. This is so because, upon being emancipated, an 18-year-old becomes qualified and responsible for all acts of civil life, save the exceptions established by existing laws in special cases.

Article 79 makes it mandatory that, in case of 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 the court, to be made a party to the written marriage settlement. Under Article 34 of the Revised Penal Code of the Philippines,

> Civil interdiction shall deprive the offender during the time of his sentence of the rights of parental authority, or guardianship, either as to the person or property of any ward, of marital authority, of the right to manage his property, and of the right to dispose of such property by any act or any conveyance *inter vivos*.

Significantly, Article 41 of the Revised Penal Code provides that the penalties of *reclusion perpetua* and *reclusion temporal* meted on any accused found guilty of a crime shall carry with them, as accessory penalties, that of civil interdiction for life or during the period of the sentence as the case may be, and that of perpetual

absolute disqualification which the offender shall suffer even though pardoned as to the principal penalty, unless the same shall have been expressly remitted in the pardon.

Also, Article 40 of the Revised Penal Code provides that the death penalty, when it is not executed by reason of commutation or pardon shall carry with it that of perpetual absolute disqualification and that of civil interdiction during thirty years following the date of sentence, unless such accessory penalties have been expressly remitted in the pardon. Under the present 1987 Constitution, the death penalty is not allowed except in heinous crimes provided and defined by law.

Article 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.

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 the Philippines but affecting property situated in a foreign country whose laws require different formalities for its extrinsic validity. (124a)

RULES GOVERNING PROPERTY RELATIONS. As previously stated, the property relations of spouses can be governed by the will of the parties provided that their agreement will not be contrary to law or public policy and it should be within the limits provided in the Family Code (Article 1). If the contracting parties are Filipinos, their property relations will be governed by Philippine laws in the absence of any agreement to the contrary. This rule applies even if they are married abroad or even if they reside abroad.

However, under Article 16 of the Civil Code, real property as well as personal property shall always be subject to the law of the country where it is situated. In case where a contract is entered into

involving properties abroad, the extrinsic validity of such contract, whether executed here or abroad, will not be governed by Philippine laws. If the contract were executed here, the laws of the country where the property is located may govern the extrinsic validity of the contract.

The rule set forth in the first paragraph of Article 80 is not applicable where both spouses are aliens married in the Philippines.

Article 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 marriage shall be valid. (125a)

EFFICACY OF MARRIAGE SETTLEMENT. The consideration of a marriage settlement is the marriage itself. If the marriage does not take place, the marriage settlement is generally rendered void.

> Indeed, marriage is said to be perhaps the most valuable and highly respected consideration of the law. This is true even if the parties had theretofore lived in illicit relations to each other. Marriage, however, is distinguishable from other valuable considerations in that it is not capable of being reduced to a value that can be reduced in dollars and cents, and also in that, after the marriage, the status cannot be changed by setting it aside or by rescinding or canceling it, and hence the parties cannot be placed in *status quo,* which necessarily results in peculiar application of rules of specific performance (41 Am. Jur. 2d 235).

Provisions in a marriage settlement, however, are separable in that if there are provisions which are invalid but do not affect the rest of the provisions stipulated in the marriage settlement, only the said invalid provisions will be rendered ineffectual while the rest will continue to remain enforced. Also, stipulations that do not depend upon the celebration of the marriage shall be valid. Hence, a provision to support the common child of the contracting parties for a particular amount is clearly independent of the fact of marriage. This will be valid regardless of whether or not the marriage has been celebrated because a parent is obliged to support his child, whether legitimate or illegitimate.

Chapter 2

DONATIONS BY REASON OF MARRIAGE

Article 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)

Article 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)

Article 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)

DONATION PROPTER NUPTIAS. Donation by reason of marriage is known as donation *propter nuptias*. Donations *propter nuptias* are without onerous consideration, the marriage being merely the occasion or motive for the donation, not its *"causa."* Being liberalities, they remain subject to reduction for inofficiousness upon the donor's death, if they should infringe the legitime of a forced heir (*Mateo v. Lagua,* 29 SCRA 864).

It is indispensable that such a donation must be made prior to the celebration of the marriage (*Garcia v. Sangil*, 53 Phil. 968), in consideration of the same and must be in favor of one or both of the spouses. Thus, it has been held that a deed of donation executed

before the marriage by one of the spouses which, among other things, provides that the marriage would have to be childless, that one of the spouses would have to die before the donation would operate, and that the donation was made not in favor of the wife but rather in favor of those who acted as her parents and raised her from girlhood to womanhood in the absence of her father, cannot be regarded as one made in consideration of marriage (*Serrano v. Solomon,* 105 Phil. 998).

> Donations excluded are those: (1) made in favor of the spouses after the celebration of the marriage; (2) executed in favor of the future spouses but not in consideration of marriage; and (3) granted to persons other than the spouses even though they may be founded on the marriage (6 Manresa 232, cited in *Serrano v. Solomon*, 105 Phil. 998).

Donation *propter nuptias* can even be contained in a marriage settlement. For a donation of present property to be valid, the rules governing ordinary donations under Title III of Book III of the Civil Code must be observed. Hence, the donee must accept the donation personally, or through an authorized person with a special power for the purpose, or with a general or sufficient power; otherwise, the donation shall be void (Article 745 of the Civil Code). The acceptance must be made during the lifetime of the donor and the donee (Article 746 of the Civil Code). Likewise, according to the Civil Code, 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 (Article 748 of the Civil Code).

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 (Article 749 of the Civil Code).

Donations *propter nuptias* of future property shall be governed by the provisions on testamentary succession and the formalities of a will. The document containing the donation of future property may

be handwritten. However, it must entirely be handwritten, dated and signed by the donor (See Article 810 of the Civil Code). If it is not handwritten, it must be subscribed at the end thereof by the donor himself or the donor's name written by some other person in his presence, and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the donor and of one another. The donor or the person requested by him to write his name and the instrumental witnesses of the deed of donation, shall also sign, as aforesaid, each and every page thereof, except the last, on the left margin, and all the pages shall be numbered correlatively in letters placed on the upper part of the page. The attestation clause shall state the number of pages used in which the deed of donation is written, and the fact that the donor signed the deed of donation and every page thereof, or cause some other person to write his name, under his express direction, in the presence of the instrumental witnesses, and that the latter witnessed and signed the deed of donation and all the pages thereof in the presence of the donor and of one another. If the attestation clause is in a language not known to the witnesses, it shall be interpreted to them. Every will must be acknowledged before a notary public by the donor and the witnesses (See Articles 805 and 806 of the Civil Code).

DONATION BETWEEN FUTURE SPOUSES. Giving a donation *propter nuptias* to a would-be spouse prior to the marriage is useless if the property regime that will govern their marriage is the absolute community of property. This is so because generally, in an absolute community of property, the spouses become co-owners of whatever each of them owns before the marriage and whatever each of them acquires after the marriage. The only exceptions in the absolute community of property regime are those matters enumerated in Article 92 of the Family Code and those stipulated in the marriage settlement.

Thus, if one of the would-be spouses wants to validly make a donation *propter nuptias,* the following requisites must concur: 1) there must be a valid marriage settlement; 2) the marriage settlement must stipulate a property regime other than the absolute community of property; 3) the donation contained in the marriage settlement must not be more than one-fifth of his or her present property; 4) the donation must be accepted by the would-be spouse; and 5) it must comply with the requisites established in Title III of Book III of the Civil Code on donations.

If the donation *propter nuptias* is not in a marriage settlement as the same was never executed by the parties, making a donation to

the other spouse is also useless because in the absence of a marriage settlement, the absolute community of property will govern the property relationship of the marriage.

"NOT MORE THAN ONE-FIFTH" LIMITATION NOT APPLICABLE IF DONATION NOT CONTAINED IN MARRIAGE SETTLEMENT. If there is a marriage settlement providing for a particular property regime other than the absolute community of property, such as the conjugal partnership of gains or the separation of property regime, and there is also a donation *propter nuptias* not included in a marriage settlement but contained in a separate deed, the "not more than one-fifth" limitation will not apply. Instead, the general rules on donation contained in Title III of Book III of the Civil Code shall govern, providing that:

> the donation may comprehend all the present property of the donor, or part thereof, provided he reserves, in full ownership or in usufruct, sufficient means for the support of himself, and all relatives who, at the time of the acceptance of the donation, are by law entitled to be supported by the donor. Without such reservation, the donation shall be reduced on petition of any person affected (Article 750 of the Civil Code).

However, the above provision is likewise subject to the provision in the Civil Code that "no person may give or receive, by way of donation, more than he may give or receive by will. The donation shall be inofficious in all that it may exceed this limitation" (Article 752 of the Civil Code). Thus, if *A* gave a donation *propter nuptias* to *Z* in the amount of P60,000 and *A's* estate amounted to P100,000, *A's* only son, *G*, is prejudiced to the extent of the amount infringing on his legitime. Had *A* made a will, the legitime of *G* is one-half of *A's* estate. This will be in the amount of P50,000. The other P50,000 is the free portion which *A* can give to anybody he wants to. He can give this to *Z*. The amount of P50,000 representing the free portion is the amount which the donee can validly receive by way of will. Clearly, *G's* legitime of P50,000 has been prejudiced to the extent of P10,000 since he only got P40,000. The donation therefore given by *A* and received by *Z* is inofficious to the extent of P10,000. *Z* should give back the excess of P10,000 from the P60,000 he received through a donation *propter nuptias*.

It may be argued that giving donations *propter nuptias* beyond the "not more than one-fifth" limitation contained in a separate deed of donation violates the "reason" or "the spirit of the law," namely: preventing one spouse from unduly exerting influence on the other

especially so when the Family Code likewise provides that during the marriage, husband and wife cannot, directly or indirectly, make substantial donations to each other (Article 87). This argument stretches the import of the "not more than one-fifth" limitation beyond what the law mandates. Article 84 contemplates a situation where the parties are not yet married. Indeed, it must be pointed out that prior to the marriage, the danger of any contracting party unduly exerting his influence on the other or taking undue advantage of the feelings of the alleged "weaker" party, is remote than if they are already married. Even if there might be the possibility of such undue inclination to exert pressure on the part of the donee, this should not be magnified to the extent of making the limitation apply to a situation not even contemplated in the law, as evidenced by the particular significant wordings it uses. Thus, the law clearly provides that the limitation applies in case the donation is made in their "marriage settlements." This is understandable. A marriage settlement is usually negotiated and definitely agreed upon by the parties. Exerting undue influence by one spouse is clearly a possibility during the discussions about the marriage settlement. In the process of negotiation, it is ideal and proper that the giving of a donation *propter nuptias* should not be discussed to prevent the same from becoming a bargaining point. A donation is an act of pure liberality on the part of the donor. It is not negotiated. Neither is a donation a "settlement" in itself. Though a donation may be contained in a marriage settlement, it cannot be considered as part of the property settlement. That is the reason why Article 81 had to expressly provide the phrase: "including donations between prospective spouses made therein" in referring to the invalidity of everything stipulated in a marriage settlement in the event the marriage ceremony does not take place. Indeed, while a donation *propter nuptias* must be accepted by the donee, he or she must not have any part in the donor's decision of giving such donation.

In essence, the "not more than one-fifth limitation" is not applicable in case the donation *propter nuptias* is made in a separate deed of donation because the subtle hazards and the undue influence attendant in the *negotiation* of a marriage settlement are generally absent in a donation, which is done unilaterally in a separate deed of donation free from the interference of even the donee-spouse. The will and wishes of the donor should not be unduly derailed by a limitation not even provided by law or by an alleged "reason" or "spirit of the law" vaguely inferable, if not totally undetectable, from the law itself and, indeed, inapplicable in a situation where the

contracting parties are not yet even married. It cannot even be said that in the application of what the law exactly provides, the same will lead to an absurdity.

However, considering that all transactions must be presumed to have been done in good faith, a donee-spouse could not be presumed to have acted in bad faith unless the contrary is convincingly shown. The "not more than one-fifth" limitation appears therefore to be a good "compromise" provision to allow the donor to make a generous act in the marriage settlement but at the same time prevent the donee from unduly capitalizing on this act of generosity on the part of the donor-spouse.

> **Article 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 secured, 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)**

DONATION WITH ENCUMBRANCE. Donation is an act of liberality. If the object of the donation is subject of an encumbrance, the donation is still valid. However, the donee's rights are subject to the encumbrance. Hence, if the object of the donation has been foreclosed to answer for the unpaid debt of the donor, the donee shall not be liable for any deficiency in the event the amount obtained as a result of the foreclosure is less than the amount of the debt of the donor which was supposed to be satisfied by the foreclosure. The donee could not be held liable for the deficiency as he is not a debtor with respect to the principal obligation incurred by the donor. The fact that he became the donee of the subject property did not even make him a solidary debtor of the liability of the principal debtor-donor. However, if the property is sold and the resulting money obtained is more than the amount of the liability of the donor, the excess shall properly go to the donee. This is so because, being the owner of the property, the donee is entitled to whatever value of the property which can be obtained. Considering that the donation is a conveyance of pure liberality of the donor, the donee cannot even seek reimbursement from the donor for the amount which was taken by the creditor as a result of the foreclosure sale.

Article 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)

MARRIAGE NOT CELEBRATED. The marriage, being the very reason for the donation, must be celebrated. In the event the marriage is not celebrated, the donor has the option to revoke or maintain the donation. If, however, the donation *propter nuptias* is contained in a marriage settlement executed prior to the marriage and the marriage ceremony does not take place, such donation shall be considered void pursuant to Article 81. The Family Code and Title III of Book III of the Civil Code do not provide for the prescriptive period within which the donor can exercise the right to revoke or recover the donation given. Under Article 1149 of the Civil Code, all actions whose periods are not fixed in this Code or in other laws must be brought within five (5) years from the time the right of action accrues. If the marriage is not celebrated, the right of action accrues from the moment the marriage is not solemnized on the fixed date. If the donation is void as it is contained in a marriage settlement, the period within which to declare the donation void does not prescribe.

Upon the other hand, if it is clear from such marriage settlement that the donation does not depend on the celebration of the marriage (therefore, not a donation *propter nuptias*), then such

donation shall remain effective provided it complies with all the statutory requirements for a valid donation under Title III of Book III of the Civil Code.

MARRIAGE JUDICIALLY DECLARED VOID. The mere fact that a marriage is provided by law as void is not enough for the donor to have the right to revoke the donation. There must first be a judicial declaration that the marriage is void. However, there are *five* situations that can arise depending on the reason for the nullity of the marriage.

First, if a subsequent marriage is void pursuant to Article 40 in relation to Articles 52 and 53 because it has been contracted by a spouse of a prior void marriage before the latter is judicially declared void, the donation shall be revoked by operation of law if the donee-spouse contracted the subsequent void marriage in bad faith. For example, the marriage of spouses *A* and *B* is void because of "mistake in identity." *A*, without obtaining a judicial declaration of nullity of his marriage with *B,* marries *C*. *A* knows all along that without the said judicial declaration, his marriage to *C* is void. Prior to the marriage, *C* gives *A* a donation *propter nuptias*. Upon the finality of the judicial declaration of nullity of the subsequent marriage between *A* and *C,* the donation *propter nuptias* shall be revoked by operation of law pursuant to Article 50, which provides that paragraph (3) of Article 43 shall also apply in proper cases to marriages which are declared void *ab initio* under Article 40 (See *Valdes v. RTC,* 72 SCAD 967, 266 SCRA 324). Paragraph 3 of Article 43 provides that:

> 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.

If the donee does not want to return the donated property, the donor should file an action to recover the thing donated and his or her right of action to file the case starts from the finality of the judicial declaration of nullity as it is only from that time that the right of action accrues. If it is a movable property, the action to recover shall prescribe after eight years from the time the possession thereof is lost (Article 1140 of the Civil Code). If the donation involves real property, the action to recover shall prescribe after thirty years (Article 1141). The possession in this case shall be deemed to have been lost from the finality of the judicial declaration of nullity.

Second, in case there is bad faith on the part of both of the contracting parties in a subsequent marriage where one of them previously obtained a judicial declaration of presumptive death under Article 41 to be able to remarry, Article 44 provides that such subsequent marriage is void and all donations by reason of such void marriage shall be revoked by operation of law.

Third, in all other cases where a marriage has been judicially declared void on grounds other than under Article 40 in relation to Articles 52 and 53 and under Article 44, the provision that will apply is Article 86(1). In this case, good faith or bad faith of the donee is irrelevant. The donor, after finality of a judicial declaration of nullity of marriage, shall have the option to revoke or not to revoke the donation whether or not the donee is in bad faith pursuant to Article 86(1). For example, where a marriage was celebrated without a marriage license, the donation *propter nuptias* in favor of the donee spouse may be revoked by the donor, whether or not the donee was in bad faith, upon finality of the judicial declaration of nullity. Also, where the innocent contracting party was falsely made to believe by the other contracting party that he was the real groom when, in truth and in fact, he was only the identical twin of the real groom, and a donation *propter nuptias* was given by the wife-to-be to such impostor, and thereafter, a marriage was solemnized, such a marriage is void on the ground of "mistake in identity" in accordance with Article 35(5). Upon the finality of the judicial declaration of nullity, the donation *propter nuptias* given to the impostor consequently may or may not be revoked by the donor.

Fourth, if *A* is *validly* married to *B* and subsequently marries *X* while the *first valid* marriage is subsisting, the subsequent marriage is bigamous and, therefore, any donation *propter nuptias* given by *X* to *A* may or may not be revoked by *X* after the finality of the judicial declaration of nullity of the bigamous marriage. However, any donation *propter nuptias* given by *A* (the married person) to *X* may be considered void if *A* and *X* were already guilty of adultery or concubinage at the time of the donation (Article 739[2] of the Civil Code). It is also void if it were made at the time when *A* and *X* were already living together as husband and wife without a valid marriage (Article 87 of the Family Code). If, in this case, the marriage of *A* and *B* is in itself *void* and no declaration of nullity has been obtained prior to the marriage of *A* and *X*, the subsequent void marriage of *A* and *X* is the one contemplated in Article 40 and, therefore, the donation by *X* shall be revoked by operation of law

upon the finality of the judicial declaration of nullity of *X's* marriage with *A*. However, the donation of *A* to *X* is void if it were made at the time when *A* and *X* were living together as husband and wife without a valid marriage (Article 87 of the Family Code).

Fifth, if both contracting parties are in good faith, the donor, after finality of the judicial declaration of nullity, is likewise given by law the option to revoke the donation or not pursuant to Article 86(1) of the Family Code. Thus, if a subsequent marriage was contracted by a man and a woman without complying with the mandatory recording and distribution requirements under Article 52 believing in good faith that the marriage is valid as they have respectively procured their nullity decrees from their separate former spouses, the subsequent marriage will still be void and can be judicially declared as such. However, upon the finality of the judicial declaration of nullity, any donation *propter nuptias* given by one party to the other may or may not be revoked by the donor as both of them were in good faith in contracting the marriage. The donor has five years from the time the judicial declaration of nullity has become final to file an action to recover the property as it is only from that time that the right of action accrues.

NO CONSENT OF PARENTS OR GUARDIAN. Articles 14, 45 and the second paragraph of Article 236 of the Family Code require that contracting parties 18 years old and above but below 21 years old must obtain the consent of the parents, guardians or person having substitute parental authority before getting married. If the consent of the said persons is not obtained, the marriage becomes annullable and the donation *propter nuptias* may be revoked by the donor. Unlike in Article 86(3), it must be observed that Article 86(2) does not require that the marriage should have been annulled first before the donor may revoke the donation. Hence, the donor has five years from the time he had knowledge that the needed consent was not obtained by the parties as it is only from that time that the cause of action will accrue. The knowledge in this case can only come on or after the marriage. If he or she knew of the non-consent of the parents before the marriage, the donor may not yet revoke because the parents can still give their consent at anytime prior to the marriage ceremony. If the marriage does not take place, Article 86(1) or Article 81 will apply in the proper cases.

ANNULLED MARRIAGE AND DONEE ACTED IN BAD FAITH. There is an irreconcilable conflict between Article 86(3) which makes the donation merely revocable at the instance of the

donor in case the marriage is annulled and the donee is proven to be in bad faith in contracting the marriage and Article 50 in relation to Article 43(3) which provides that one of the effects of an annulment decree is that a donation *propter nuptias* is considered revoked by operation of law if the donee is in bad faith in contracting the marriage.

Both provisions of law do not specify whether or not the donor is the other spouse who acted in good faith. While there is a rule in statutory construction that in cases of irreconcilable conflict between two provisions in a statute, the provision last in the order of position will prevail being the latest expression of the legislative will (State *ex rel. Gen v. Toledo*, 26 N.E., p. 1061 cited in Statutory Construction by Martin, page 144, sixth edition), it does not apply where the prior section or provision is more in harmony with the general purpose or intent of the act (82 C.J.S. 717). Hence, the restrictive grounds for the annulment of marriage in Article 45 are provided by law to give parties a chance to terminate a marital relationship due to the absence of the consent of the parents, guardians or persons exercising substitute parental authority, or due to a highly defective consent given by them in contracting the marriage, or due to the other spouse's incurable impotency preventing procreation, or due to the other spouse having a seriously incurable sexually transmissible disease posing a danger to the life and limb of the other spouse or to possible offsprings of that marriage. The particular spouse who acted in bad faith in procuring the marriage, therefore, should not be allowed to profit or gain, by any means whatsoever, from his act of bad faith which precipitated such an annullable marriage considered by society itself as inimical to its very own interest. Thus, it is more in keeping with the spirit of the law to consider any donation *propter nuptias* as revoked by operation of law in case where the marriage is annulled and the donee acted in bad faith. Such *ipso jure* revocation would be consistent with the fact that, had the innocent party known of the guilty party's bad faith prior to or even at the time of the marriage ceremony, he or she would not have entered into such an annullable marriage or would not, in the first place, have even made such a donation. The element of bad faith presupposes a corrupt attitude towards the institution of marriage and should be penalized most severely.

On the other hand, giving the innocent party the option to revoke the donation or not might lead to unwholesome consequences which would defeat the very purpose of an annulment case. For instance, the guilty party may just bargain with the innocent party

that the former will not oppose the annulment case for as long as the donation given to him or her will not be revoked. This in turn may tempt the innocent spouse, knowing that the other spouse will not oppose, to concoct grounds for annulment to make it appear that her case is very strong. If this happens, collusion may arise. Moreover, unlike where the law already provides for *ipso jure* revocation, the option given to the innocent spouse will not be a good deterrent for those people who regard marriage merely as a way to get rich.

If Article 86(3) is to be applicable because it came later in the order of time, then the donor has only five years from the finality of the annulment decree to file the action to revoke the donation as it is only from that time that the right of action accrues. However, if one is to adhere to the view that the donation *propter nuptias* in this case is revoked by operation of law, there is no need to file an action to revoke the donation. Just like in marriages judicially declared void where the donee acted in bad faith, the refusal of the donee to return the object of donation gives the donor a right to file an action to recover the thing donated and his right of action to file the case starts from the finality of the judicial decree of annulment as it is only from that time that the right of action accrues. If it is a movable property, the action to recover the same shall prescribe after eight years from the time the possession thereof is lost (Article 1140 of the Civil Code). If the donation involves real property, the action to recover prescribes after thirty years (Article 1141). The possession in this case shall be deemed to have been lost from the finality of the annulment decree.

It must be observed that there are instances when a marriage is annullable but the spouses may not be in bad faith even if Article 47 refers to an "injured party." For example, if a donee-spouse, prior to the marriage, informed the third-party donor and the other spouse or such other spouse alone in case he or she is likewise the donor, that he or she (the donee-spouse) is suffering from a serious and incurable sexually transmissible disease or is impotent, such donee-spouse can never be considered in bad faith. Hence, even if the marriage is later on annulled on this ground, the donation *propter nuptias* remains effective and can never be revoked either under Article 86(3) or Article 50 in relation to Article 43(3) of the Family Code.

LEGAL SEPARATION. A legal separation decree does not terminate the marital bond between the husband and wife. They are merely separated from bed and board. Hence, since there is a

probability that the spouses may reconcile, the donor is given the option to revoke the donation or maintain it. If he or she decides to revoke the donation, the donor has five years from the finality of the decree of legal separation to file such case as it is only from that time that the right of action accrues (See Article 64). However, if the ground for legal separation is sexual infidelity in the form of adultery on the part of the wife or concubinage on the part of the husband, Article 739(1) of the Civil Code provides that a donation made between persons who are guilty of adultery or concubinage at the time of the donation shall be void.

RESOLUTORY CONDITION. If the donation *propter nuptias* is with a resolutory condition and the condition is complied with, such donation may or may not be revoked by the donor. The happening of the future or uncertain event which constitutes the resolutory condition operates to extinguish the right or the obligation (Obligations and Contracts: Text and Cases by Sta. Maria, 1997 edition, page 107). Hence, if the father of one of the spouses makes a valid donation *propter nuptias* of a car to the parties with a provision stating that such donation already given shall be revoked in the event that they leave the Philippines, the resolutory condition is complied with once such couple migrates to the United States. The donor shall have the option to revoke such donation or to maintain it. If the donor decides to revoke the donation, the said donor must do so within five years from the happening of the resolutory condition as it is only from that time that the right of action accrues. If the donation is validly made by one spouse in favor of the other spouse and the resolutory condition happens, the donor-spouse can recover what is donated at anytime without any prescriptive period because Article 1109 of the Civil Code provides that "prescription does not run between husband and wife, even though there be a separation of property agreed upon in the marriage settlement."

ACTS OF INGRATITUDE. The Civil Code provides the instances of ingratitude in Article 765 of the Civil Code. Thus:

> Article 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 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.

If the donor desires to revoke the donation, he or she must do so within one year from the time the donor had knowledge of the fact of ingratitude and it was possible for him or her to bring the suit (Article 769 of the Civil Code). Although the donation is revoked on account of ingratitude, the alienations and mortgages effected before the notation of the complaint for revocation in the Registry of Property shall subsist. Later ones shall be void (Article 766).

VOID DONATIONS. Article 739 of the Civil Code provides, among others, that donations made by persons who were guilty of adultery or concubinage at the time of the donation is void. In *Agapay v. Palang,* 85 SCAD 491, 276 SCRA 340, where a husband transferred a property to his second wife at the time his first marriage was still subsisting, the Supreme Court ruled that the transfer was in fact a donation and, therefore, void under Article 739 of the Civil Code and also under Article 87 of the Family Code which pertinently provides that donations by between persons living together as husband and wife without a valid marriage is void.

Article 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)

REASON FOR THE PROHIBITION. Significantly, the law considers void any donation in violation of Article 87 (See *Uy Coque v. Navas*, 45 Phil. 430) except any moderate gifts which the spouses may give each other on the occasion of any family rejoicing. Moderate gifts will depend on a case-to-case basis especially considering the financial capacity of the donor (*Harding v. Commercial Union Assurance Co.,* 38 Phil. 464). Significantly, the law makes such donation immediately void so that, according to Justice Puno during the deliberation on this particular subject in the Civil Code and

Family Law Committees, the "intended benefit does not have to be proven anymore" (Minutes of the 164th Joint Meeting of the Civil Code and Family Law Committees held on November 29, 1986, page 5).

The prohibition also applies to persons living together as husband and wife without a valid marriage. The rationale for this was explained by the Supreme Court in the case of *Matabuena v. Cervantes*, 38 SCRA 284, which construed Article 133 of the Civil Code which, in turn was the precursor of the present Article 87. The pertinent portion of the said decision states:

> If the policy of the law is, in the language of the opinion of the then Justice J.B.L. Reyes of that Court, "to prohibit donations in favor of the other consort and his descendants because of fear of undue and improper pressure or influence upon the donor, a prejudice deeply rooted in our ancient law: *'porque no se enganen despojandose el uno al otro por amor que han de consuno* [according to] *the Partidas* (Part IV, Tit. XI, Law IV), reiterating the rationale *'Ne mutuato amore invicen spoliarentur'* of the pandects (Bk. 24, Tit. 1, *De Donat, inter virum et uxorem);* then there is every reason to apply the same prohibitive policy to persons living together as husband and wife without the benefit of nuptials. For it is not to be doubted that assent to such irregular connection for thirty years bespeaks greater influence of one party over the other, so that the danger that the law seeks to avoid is correspondingly increased. Moreover, as already pointed out by Ulpian (in his lib. 32 ad Sabinum, fr. 1), 'it would not be just that such donations should subsist, lest the condition of those who incurred guilt should turn out to be better.' So long as marriage remains the cornerstone of our family law, reason and morality alike demand that disabilities attached to marriage should likewise attach to concubinage.

For a donation given by a person to his or her alleged partner to fall under the last sentence of Article 87, it must be shown that the donation was made at a time when they were still living together as husband and wife without the benefit of marriage (*Sumbad v. Court of Appeals,* G.R. No. 106060, June 21, 1999). Article 87 likewise was referred to by the Supreme Court in *Joaquino v. Reyes,* G.R. No. 154645, July 13, 2004, 434 SCRA 260, in a situation where the husband lived with a woman not his wife.

In *Agapay v. Palang*, 276 SCRA 341, where it was alleged that a property was sold by the husband to his wife of a subsequent bigamous marriage for the purpose of removing the property from

the effects of Article 148 of the Family Code, the Supreme Court ruled that the conveyance of the property was not by way of sale but was a donation and therefore void. Pertinently, the Supreme Court said:

> With respect to the house and lot, Erlinda allegedly bought the same for P20,000.00 on September 23, 1975 when she was only 22 years old. The testimony of the notary public who prepared the deed of conveyance for the property reveals the falsehood of this claim. Atty. Constantino Sagun testified that Miguel Palang provided the money for the purchase price and directed that Erlinda's name alone be placed as the vendee.
>
> The transaction was properly a donation made by Miguel to Erlinda, but one which was clearly void and inexistent by express provision of law because it was made between persons guilty of adultery or concubinage at the time of the donation under Article 739 of the Civil Code. Moreover, Article 87 of the Family Code expressly provides that the prohibition against donations between spouses now applies to donations between persons living together as husband and wife without a valid marriage, for otherwise, the condition of those who incurred guilt would turn out to be better than those in legal union.

EFFECT OF DONATION. 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. Article 87 is a broader provision than Articles 133 and 134 of the Civil Code, which Article 87 repealed. Article 133 of the Civil Code is almost the same as Article 87 except that the latter new provision qualifies the donation whether "direct or indirect." Article 134 of the Civil Code deals with indirect donations which provides that:

> donations during the marriage by one of the spouses to the children whom the other spouse had by another marriage, or to persons of whom the other spouse is a presumptive heir at the time of the donation are voidable, at the instance of the donor's heirs after his death.

Under Article 134 of the Civil Code, indirect donations are merely voidable or annullable. It is very clear that the new Article 87 of the Family Code intends to put into one provision the situations in Articles 133 and 134 of the Civil Code except that Article 87 of the Family Code makes the donation void *ab initio* and not merely

voidable or annullable. Hence, Article 87 includes the following donations of a spouse:

1) to a stepchild who has no compulsory and/or legal heirs, such as his or her children, other than the other spouse at the time of the donation;

2) to a common child who has no compulsory and/or legal heirs other than the other spouse at the time of the donation;

3) to the parents of the other spouse;

4) to the other spouse's adopted child who has no compulsory and/or heirs or, in cases when, at the time of the donation, the only surviving relative of the adopted is the other spouse (parent of the adopted);

5) to a common adopted child who has no other compulsory and/or legal heirs.

The above donations in favor of the said donees are indirect donations to the spouse of the donor-spouse because, once they die, the spouse of the donor will inherit from the donee. If, subsequent to the donation, the donee gives birth to a compulsory and/or legal heir, the invalidity of the donation will not be cured or validated because the donation is void from its inception.

However, donations 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 are valid. The amount of such donation shall be chargeable, however, to the absolute community of property or the conjugal partnership of gains (Article 94[8] and Article 121[8]). Donations by both spouses for any other purpose to the common legitimate children who have no other compulsory and/or legal heirs would appear to fall within the prohibition considering that both spouses are presumptive heirs of the said common children and if the latter dies, the parents will inherit from the said children gratuitously and therefore what the parents will separately get will become their separate properties.

PERSONS WHO CAN CHALLENGE VALIDITY OF TRANSFER. The validity of the donation or transfer cannot be challenged by those who bore absolutely no relation to the parties to the transfer at the time it occurred and had no rights or interests inchoate, present, remote, or otherwise, in the property in question at the

time transfer occurred. Although certain transfers from husband to wife or from wife to husband are prohibited, such prohibition can be taken advantage of only by persons who bear such a relation to the parties making the transfer or to the property itself that such transfer interfere with their rights or interests. Unless such a relationship appears, the transfer cannot be attacked (*Harding v. Commercial Union Assurance Co.,* 38 Phil. 464).

In *Rodriguez v. Rodriguez,* 20 SCRA 908, where a mother sold her exclusive property to her daughter who later sold the same to her father for the purpose of converting such property of the mother to conjugal property, thereby vesting half-interest on the husband and evading the prohibition against donations from one spouse to another during coverture, the Supreme Court ruled that the transactions were indeed designed to circumvent the legal prohibition regarding donations between spouses but refused to grant relief to the wife who filed a case to nullify the transactions on the ground that, while the cause involved an illicit consideration, all the parties knew the illicit purpose of the scheme and thus, all were guilty and therefore no one can recover what was given by virtue of the contract. The Supreme Court applied the rule in *pari delicto non oritur actio,* denying all recovery to the guilty parties *inter se.*

EFFECT ON RESERVA TRONCAL. In the law of succession, there is a rule called *reserva troncal* provided for in Article 891 of the Civil Code. It provides that the ascendant who inherits from his descendant any property which the latter may have acquired by gratuitous title from another ascendant, or a brother or sister, is obliged to reserve such property as he may have acquired by operation of law for the benefit of relatives who are within the third degree and who belong to the line from which said property came. The reason is to keep the property within the same bloodline. An example of *reserva troncal* is as follows: *X* and *A* are married. *Y* is their only son. *X,* before he died, donated to his son *Y* a Pasig-property. *X* has two living brothers, *D* and *M*. Thereafter *Y* died without any descendant-heir. The Pasig-property was therefore inherited by *A*, the mother. When the mother inherits the property, it became her property. If the mother dies, the property will not go to the other heirs of the mother, like her parents or brothers, but to *D* and *M* who are the living brothers of *X* and at the same time are the uncles of *Y*. *D* and *M* are within the third degree from *Y*.

Under the new Family Code, at the moment *X* donated the Pasig-property to *Y*, it was a void donation. This is because it was

clearly an indirect donation to *A*, who eventually got the property upon *Y*'s death. However, nobody can file a case to nullify it except those who may be interested in the same. At the time the donation was made *D* and *M* had no rights at all. Hence it seems that *reserva troncal* will continue to operate here, though the donation was void. If *reserva troncal* operates, the property will nevertheless go to D and M.

Chapter 3
SYSTEM OF ABSOLUTE COMMUNITY

Section 1. *GENERAL PROVISIONS*

Article 88. The absolute community of property between spouses shall commence at the precise moment that the marriage is celebrated. Any stipulation, express or implied, for the commencement of the community regime at any other time shall be void. (145a)

ABSOLUTE COMMUNITY OF PROPERTY. All properties owned by the contracting parties before the marriage ceremony and those which they may acquire thereafter shall comprise the absolute community of property regime. Also, in a partial separation of property regime, the property not agreed upon as separate shall pertain to the absolute community (Article 144). The spouses become co-owners of all the properties in an absolute community of property regime. However, no waiver of rights, interests, shares and effects of the absolute community of property can be made except upon judicial separation of property.

Aside from the properties that may be excluded in the marriage settlement entered into by the contracting parties prior to the marriage ceremony, only those enumerated in Article 92 are excluded from the absolute community of property.

Significantly, even the framers of the 1950 Civil Code had already acknowledged the fact that the absolute community of property is more in consonance with the "traditional oneness of the Filipino family." In making the presumption in favor of the conjugal partnership of gains under the repealed provision of the Civil Code, the members of the code commission stated that, at that time, the idea may be looked upon by the public as revolutionary. Thus,

> According to established custom in a majority of Filipino families, the husband and the wife consider themselves co-owners of all the property brought into and acquired during the marriage. Therefore, there is in fact an absolute community of property between the spouses in the Philippines. If law ought to be based on real and actual conditions, the present system of relative community, or conjugal partnership of gains, should be abolished, and in its stead, the regime of absolute community should be incorporated into the new Civil Code. Were it not for the consideration that such reform in the law would be looked upon as revolutionary, the Commission would have proposed its adoption x x x. (Report of the Civil Code Commission, Page 25).

ALIEN MARRIED TO FILIPINO. In both absolute community of property and conjugal partnership of gains, an alien married to a Filipino cannot have any interest in the community or partnership property. In *Matthews v. Taylor*, G.R. No. 164584, June 22, 2009, where the Filipina spouse entered into a lease agreement without the consent of his foreigner spouse and where the latter assailed the lease as void considering that his consent was not obtained in such encumbrance, the Supreme Court rejected such position stating that to consider the leased property as conjugal and therefore any encumbrance should have been with the consent of the foreigner spouse will be circumventing the proscription in the constitution regarding aliens being prohibited from acquiring property in the Philippines. The Supreme Court said:

> Aliens, whether individuals or corporations, have been disqualified from acquiring lands of the public domain. Hence, by virtue of the aforecited constitutional provision, they are also disqualified from acquiring private lands. The primary purpose of this constitutional provision is the conservation of the national patrimony. Our fundamental law cannot be any clearer. The right to acquire lands of the public domain is reserved only to Filipino citizens or corporations at least sixty percent of the capital of which is owned by Filipinos.
>
> In *Krivenko v. Register of Deeds*, cited in *Muller v. Muller* we had the occasion to explain the constitutional prohibition:
>
> Under Section 1 of Article XIII of the Constitution, "natural resources, with the exception of public agricultural land, shall not be alienated," and with respect to public agricultural lands, their alienation is limited to Filipino citizens. But this constitutional purpose conserving agricultural resources in the hands of Filipino citizens may easily be defeated by the Filipino

citizens themselves who may alienate their agricultural lands in favor of aliens. It is partly to prevent this result that Section 5 is included in Article XIII, and it reads as follows:

> "Section 5. Save in cases of hereditary succession, no private agricultural land will be transferred or assigned except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain in the Philippines."

This constitutional provision closes the only remaining avenue through which agricultural resources may leak into alien's hands. It would certainly be futile to prohibit the alienation of public agricultural lands to aliens if, after all, they may be freely so alienated upon their becoming private agricultural lands in the hands of Filipino citizens. x x x

x x x x

If the term "private agricultural lands" is to be construed as not including residential lots or lands not strictly agricultural, the result would be that "aliens may freely acquire and possess not only residential lots and houses for themselves but entire subdivisions, and whole towns and cities," and that "they may validly buy and hold in their names lands of any area for building homes, factories, industrial plants, fisheries, hatcheries, schools, health and vacation resorts, markets, golf courses, playgrounds, airfields, and a host of other uses and purposes that are not, in appellant's words, strictly agricultural." (Solicitor General's Brief, p. 6) That this is obnoxious to the conservative spirit of the Constitution is beyond question.

The rule is clear and inflexible: aliens are absolutely not allowed to acquire public or private lands in the Philippines, save only in constitutionally recognized exceptions. There is no rule more settled than this constitutional prohibition, as more and more aliens attempt to circumvent the provision by trying to own lands through another. In a long line of cases, we have settled issues that directly or indirectly involve the above constitutional provision. We had cases where aliens wanted that a particular property be declared as part of their father's estate; that they be reimbursed the funds used in purchasing a property titled in the name of another; that an implied trust be declared in their (aliens') favor; and that a contract of sale be nullified for their lack of consent.

In *Ting Ho, Jr. v. Teng Gui,* Felix Ting Ho, a Chinese citizen, acquired a parcel of land, together with the improvements thereon. Upon his death, his heirs (the petitioners therein) claimed the properties as part of the estate of their deceased

father, and sought the partition of said properties among themselves. We, however, excluded the land and improvements thereon from the estate of Felix Ting Ho, precisely because he never became the owner thereof in light of the above-mentioned constitutional prohibition.

In *Muller v. Muller,* petitioner Elena Buenaventura Muller and respondent Helmut Muller were married in Germany. During the subsistence of their marriage, respondent purchased a parcel of land in Antipolo City and constructed a house thereon. The Antipolo property was registered in the name of the petitioner. They eventually separated, prompting the respondent to file a petition for separation of property. Specifically, respondent prayed for reimbursement of the funds he paid for the acquisition of said property. In deciding the case in favor of the petitioner, the Court held that respondent was aware that as an alien, he was prohibited from owning a parcel of land situated in the Philippines. He had, in fact, declared that when the spouses acquired the Antipolo property, he had it titled in the name of the petitioner because of said prohibition. Hence, we denied his attempt at subsequently asserting a right to the said property in the form of a claim for reimbursement. Neither did the Court declare that an implied trust was created by operation of law in view of petitioner's marriage to respondent. We said that to rule otherwise would permit circumvention of the constitutional prohibition.

In *Frenzel v. Catito,* petitioner, an Australian citizen, was married to Teresita Santos; while respondent, a Filipina, was married to Klaus Muller. Petitioner and respondent met and later cohabited in a common-law relationship, during which, petitioner acquired real properties; and since he was disqualified from owning lands in the Philippines, respondent's name appeared as the vendee in the deeds of sale. When their relationship turned sour, petitioner filed an action for the recovery of the real properties registered in the name of respondent, claiming that he was the real owner. Again, as in the other cases, the Court refused to declare petitioner as the owner mainly because of the constitutional prohibition. The Court added that being a party to an illegal contract, he could not come to court and ask to have his illegal objective carried out. One who loses his money or property by knowingly engaging in an illegal contract may not maintain an action for his losses.

Finally, in *Cheesman v. Intermediate Appellate Court,* petitioner (an American citizen) and Criselda Cheesman acquired a parcel of land that was later registered in the latter's name.

Criselda subsequently sold the land to a third person without the knowledge of the petitioner. The petitioner then sought the nullification of the sale as he did not give his consent thereto. The Court held that assuming that it was his (petitioner's) intention that the lot in question be purchased by him and his wife, he acquired no right whatever over the property by virtue of that purchase; and in attempting to acquire a right or interest in land, vicariously and clandestinely, he knowingly violated the Constitution; thus, the sale as to him was null and void.

In light of the foregoing jurisprudence, we find and so hold that Benjamin has no right to nullify the Agreement of Lease between Joselyn and petitioner. Benjamin, being an alien, is absolutely prohibited from acquiring private and public lands in the Philippines. Considering that Joselyn appeared to be the designated "vendee" in the Deed of Sale of said property, she acquired sole ownership thereto. This is true even if we sustain Benjamin's claim that he provided the funds for such acquisition. By entering into such contract knowing that it was illegal, no implied trust was created in his favor; no reimbursement for his expenses can be allowed; and no declaration can be made that the subject property was part of the conjugal/community property of the spouses. In any event, he had and has no capacity or personality to question the subsequent lease of the Boracay property by his wife on the theory that in so doing, he was merely exercising the prerogative of a husband in respect of conjugal property. To sustain such a theory would countenance indirect controversion of the constitutional prohibition. If the property were to be declared conjugal, this would accord the alien husband a substantial interest and right over the land, as he would then have a decisive vote as to its transfer or disposition. This is a right that the Constitution does not permit him to have.

In fine, the Agreement of Lease entered into between Joselyn and petitioner cannot be nullified on the grounds advanced by Benjamin. Thus, we uphold its validity.

COMMENCEMENT. The absolute community of property commences at the precise moment of the celebration of the marriage. Any stipulation, express or implied, for the commencement of the community regime at any other time shall be void. Thus, a provision in a marriage settlement cannot provide that the conjugal partnership of gains shall govern the property relationship of the spouses but on the fifth wedding anniversary of the spouses, such property regime shall automatically convert to the absolute commu-

nity of property. The said stipulation as to the automatic conversion is void because it makes the commencement of the absolute community of property at a time other than the precise moment of the celebration of the marriage.

Article 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)

Article 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)

Section 2. WHAT CONSTITUTES COMMUNITY PROPERTY

Article 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)

Article 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)

Article 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)

SPECIAL TYPE OF CO-OWNERSHIP. The absolute community of property is a special type of co-ownership. Hence, the law provides that the provisions on co-ownership shall apply to the absolute community of property between the spouses in all matters not provided for in this particular chapter of the Family Code. Hence, each co-owner may use the thing owned in common provided he or she does so in accordance with the purpose for which it is intended and in such a way as not to injure the interest of the co-ownership or prevent the other co-owners from using it according to their rights (Article 486 of the Civil Code). Any one of the co-owners may bring an action for ejectment (Article 487 of the Civil Code).

However, unlike an ordinary co-ownership, 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. This is so because, like in the conjugal partnership of gains, the interest of the parties in the community properties is merely inchoate or an expectancy prior to liquidation. (*Abalos v. Macatangay,* 439 SCRA 649). When a 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 phrase "upon judicial separation" in the second paragraph of Article 89 covers the time period during and after judicial separation (see Minutes of the 164th Joint Meeting of the Civil Code and Family Law committees held on November 29, 1986, page 10). 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. For example, spouses *A* and *B* had their absolute community of property worth P1,000,000 dissolved in accordance with law. Upon judicial separation of property, *B* is entitled to get P500,000 as her share. *B* is indebted to *X* in the amount of P100,000. *B* decides to waive her entire share in favor of *A*. *X*, the creditor of *B,* can seek

the rescission of the waiver to the extent of P100,000 to protect his interest.

If the waiver takes place without a judicial separation of property decree, such waiver shall be void because it is contrary to law and public policy pursuant to Article 6 of the Civil Code and because such waiver shall constitute an act which is against a prohibitory law as provided in Article 5 of the Civil Code. Article 89 is clearly a prohibitory provision when it states that "no wavier 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."

Under the Civil Code, if there is no marital agreement entered into by the contracting parties prior to the marriage, the property regime that will govern their relationship will be the conjugal partnership of gains. However, this has been changed by the Family Code in that the property regime, in the absence of any agreement to the contrary, shall be the absolute community of property.

EXCLUSIONS. There are four excluded properties from the absolute community property. Article 91 provides that the marriage settlement may provide for exclusions, therefore making the exclusions thereon depend upon the will of the parties, and Article 92 provides for statutory exclusions.

MARRIAGE SETTLEMENT. The first exclusions are properties of each spouse that are excluded from the community of property in the marriage settlement. This is in accordance with Article 1 of the Family Code, which pertinently provides that "marriage settlements may fix the property relations during the marriage within the limits provided by this Code."

GRATUITOUS TITLE. The second exclusion is property acquired by gratuitous title. It must be a valid gratuitous acquisition during the marriage. Hence, a donation by a spouse made to the other spouse involving substantial amount of separate properties which, in the marriage settlement, has been agreed upon as not to be included in the community property, is not a valid transfer by gratuitous title because under Article 87 any donation between spouses, direct or indirect, is void except moderate gifts which the spouses may give each other on the occasion of any family rejoicing. Included in such a gratuitous acquisition under Article 92(1) are the fruits as well as the income of the subject matter acquired.

However, the donor, testator or grantor may provide that the property and the fruits as well as the income thereof shall form part of the community property. The original draft of the provision appears to refer to the fruits and the income of the property as the matters referred to in the phrase "unless it is expressly provided by the donor, testator or grantor that they shall form part of the community property." Thus, the deliberation of the Civil Code and Family Law committees shows that the original form of Article 92 was that, regarding properties acquired by gratuitous title, there was no immediate reference to fruits and income and that there was a separate second paragraph after the enumeration of the three exclusion, which reads:

> All the fruits and income, if any, of the foregoing classes of property shall form part of the community property, unless the donor, testator, or grantor provides otherwise (Minutes of the 164th Joint Meeting of the Civil Code and Family Law committees on November 29, 1986, pages 16-17).

Thereafter, discussions were made which eventually included the property itself as within the phrase "unless it is expressly provided by the donor, testator or grantor that they shall form part of the community property." Thus, during the same deliberations,

> Dean Carale opined that the above paragraph properly belongs to subparagraph (1) because they could not expect any income from property for personal and exclusive use of either spouse. It should, therefore, be a continuation of subparagraph (1). Justice Puno accordingly modified subparagraph (1) as follows:
>
> > Property acquired during the marriage by gratuitous title by either spouse, including the fruits and income thereof, if any, unless it is expressly provided by the donor, testator or grantor that they shall form part of the community.
>
> Prof. Bautista proposed that the phrase "including the fruits and income thereof, if any" be enclosed in parenthesis to make it clear that the "unless" clause applies to both property acquired by gratuitous title and the fruits thereof since without the parenthesis it would appear that it applies only to the "fruits." Justice Puno suggested that "including" be substituted with "and." He also suggested that "income" be substituted with "as well as the." The Committee approved the suggestion.
>
> Thus, subparagraph (1) of Article 92 shall read:

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 (Minutes of the 164th Joint Meeting of the Civil Code and Family Law committees on November 29, 1986, pages 16-17).

PERSONAL AND EXCLUSIVE USE. The third exclusion is property for personal and exclusive use of either of the spouses, except jewelry which shall form part of the community property. These personal and exclusive properties may either have been brought inside the marriage or were acquired during the marriage. The only exception is jewelry which must involve a substantial amount. This exception highlights the fact that the "property for personal and exclusive use" referred to in the general rule must be interpreted in terms of value. Hence, if a spouse has an expensive car like a Mercedes Benz which is worth millions of pesos and which is for his or her "personal and exclusive use," this must be considered as part of the absolute community of property if the net worth of the family shows that the spouses are not even very rich to just simply afford a car like a Mercedes Benz.

PROPERTY FROM PREVIOUS MARRIAGE. The fourth exclusion is 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. It must be noted that the law uses the word "descendants," not merely children. Hence, it would include grandchildren, great-grandchildren and all other descendants. Likewise, the descendants must be legitimate. Hence, if the previous marriage is declared null and void because the contracting parties are collateral blood relatives of the first civil degree, thereby making the children illegitimate, and thereafter, one of the parties validly marries again, the properties which such party might have acquired as a result of the liquidation of the previous marriage and all other properties derived from other sources, shall belong to the absolute community of property of the subsequent marriage. If the previous marriage is annulled or the marriage is nullified either because anyone of the parties is psychologically incapacitated under Article 36 or because one of the parties did not comply with the provisions of Articles 52 and 53, the children born or conceived inside such marriage are legitimate. Hence, in this case, the property acquired by the spouse who has previous children of a

previous marriage shall not belong to the absolute community of the subsequent marriage. The property shall belong to the spouse who had legitimate children by a previous marriage or it shall already belong to the children of the previous marriage as presumptive legitime in the proper cases.

Relevantly, if the previous marriage is terminated by death and there is no liquidation of the property regime of the previous marriage and thereafter the surviving spouse validly remarries, the subsequent marriage shall be governed by the complete separation of property regime in accordance with Article 103. Hence, the property owned by the surviving spouse prior to his or her subsequent marriage shall be separately owned by him or her during the subsequent marriage.

In the event, however, that there was liquidation of the properties of the previous marriage terminated by death and the surviving spouse remarries, the property regime that will govern the subsequent marriage is the absolute community of property if, prior to the subsequent marriage, there were no marriage settlement providing for a different regime or if there were such a marriage settlement but the same was void. If, however, the surviving spouse has legitimate descendants, the properties owned by the surviving spouse acquired before the marriage shall remain separate in accordance with Article 92(3) despite the fact that the absolute community of property regime governs the subsequent marriage.

NATURE OF ACQUIRED PROPERTY USING SEPARATE PROPERTIES. Under Article 109(4) of the Family Code, one of the exclusive properties of the spouses in relation to the conjugal partnership of gains is that which is purchased with the exclusive money of the wife or of the husband. There is no corresponding rule in the exclusions under Article 92 referring to the excluded properties from the absolute community of property. Had the code commission intended a similar provision in the chapter on the absolute community of property, it could have easily done so. This clearly highlights the intention of the Family Code to make the husband and wife truly a single community. Thus, if for example, a marriage settlement governing the property relationship in a particular marriage provides that the P1,000,000 won by the husband in the sweepstake prior to the marriage shall remain separate during the marriage, such stipulation is valid. If, using the said amount, the husband subsequently buys a house which is used as the family home, the house cannot be considered as his separate

property but as a part of the absolute community of property. This must be so not only because of the reason above given, namely: the absence in the chapter on the absolute community of property of a counterpart provision of Article 109(4) contained in the chapter on the conjugal partnership of gains, but more importantly because Article 93 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."* Moreover, Article 91 clearly provides that "*unless otherwise provided in this Chapter or in the marriage settlement*, the community property shall consist of all the properties owned by the spouses at the time of the celebration of the marriage or *acquired thereafter*."

The *exclusions* are only those contained in a marriage settlement under the exception in Article 91 and those "provided in this chapter" which are contained in Article 92. There are no other exclusions provided by law. The one million pesos is his separate property over which he can undertake any act of dominion. When he bought the house during the marriage, he used his separate property (namely, the one million pesos) to purchase it. The house, therefore, could not have been an excluded property contained in the marriage settlement. What was excluded was the P1,000,000. Neither could the house be considered to have been acquired by the husband through gratuitous title as the husband paid it using his money. Also, the house cannot be considered to be for his personal and exclusive use as it is utilized as the family home. Likewise, he has no legitimate descendant of a previous marriage and therefore, it cannot come under the third exclusion provided in Article 92(3). The law on absolute community of property does not even provide that property purchased with the exclusive money of the wife or husband shall be excluded from the community property, unlike the provisions relative to the conjugal partnership of gains.

The same conclusion in the above example will be reached if the house was donated to the husband and the husband, after becoming the owner of the house, sells the house to a third party. The money obtained from the sale has been acquired during the marriage and it does not fall in any one of the exclusions in Article 92. Neither is it contained as an exclusion in the marriage settlement. Hence, the money is absolute community of property. The same result will be reached in case of money obtained from the sale of personal and exclusive properties under Article 92(2).

In the event that excluded properties under Article 92(3) are likewise sold during the marriage, the money obtained from such

sale will become absolute community of property of the subsequent marriage exactly for the same reasons given in the previous example. This is so because, if the intention of the law is to preserve the property of the previous marriage so that it will not be merged with the properties of the subsequent marriage, then with more reason should the owner-spouse not alienate the same.

In the event any property is exchanged or merely bartered for another property, the result would be the same for the same reasons, unless the property received will qualify as a property used for the personal and exclusive use of the recipient spouse. Thus, unlike in Article 109(3) stating that properties acquired by barter or exchange with property belonging to only one of the spouses shall be excluded in the conjugal partnership of gains, there is glaringly no counterpart provision in the rules governing absolute community of property.

While the above explanation may apparently look unfair to the donee-spouse or to the transferee-spouse, it is just like the unfairness attendant in a case where a rich person marries a poor person without a marriage settlement and thereafter the poor person becomes the co-owner of all the properties of his or her rich spouse. Indeed, in line with the general sense of the Code Commission which drafted the 1950 Civil Code (See Report of the Civil Code Commission, page 25), the absolute community of property and its effects might still be "revolutionary" to some people. However, while the law may appear iniquitous, its underlying intent, namely, to really make the husband and wife one in all respects, can best be served by recognizing these consequences arising from the law. It appears therefore that the intent of the Family Code to foster the essential unity of husband and wife and to make the family a unified and strong nuclear unit which is the foundation of society overrides all other consequences arising from property relations. In fact, these consequences serve rather than negate such public policy considerations.

The *other point of view* is that the object bought using separate property, the proceeds obtained from the sale of separate property, or the subject matter received by way of exchange or barter of the separate properties excluded in the marriage settlement under Article 91 and those excluded under Article 92 will not necessarily make the object purchased, the proceeds of the sale or the subject matter received by way of exchange or barter as absolute community property. Otherwise, it would have been easy to circumvent the law or to negate the purpose of any stipulation in the marriage

settlement making certain properties separately owned by either of the spouses during the marriage. But this view does not seem to have any support in the Family Code itself. There would likewise be no circumvention because, for the matters or properties in Article 92 to remain separate, they must subsist and be maintained as such. This can be clearly gleaned from Article 92 itself. Hence, in Article 92(1), it refers only to the "property acquired" by gratuitous title with provisions as to fruits and income. There is nothing in the law which provides that if it is sold, bartered, or exchanged, the proceeds of the same shall still be considered separate. This is likewise the case in Article 92(2) and (3). Thus, in the event the owner-spouse sells the "property" involved in these exclusions, that is his or her prerogative. But if he or she does so, he or she parts with the "property." The proceeds or objects received by way of the sale, exchange or barter is entirely a different property, object or subject matter. They are not anymore the protected or excluded properties under Article 92. They constitute a part of the absolute community of property. The Family Code favors the absolute community of property rather than the separation of property.

Section 3. *CHARGES UPON AND OBLIGATIONS OF THE ABSOLUTE COMMUNITY*

Article 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 spouses 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)

LIABILITY OF THE ABSOLUTE COMMUNITY OF PROPERTY. The charges upon and obligations of the absolute community of property are specified in Article 94.

SUPPORT. Support is the *most sacred and important* of all obligations imposed by law and is imposed with overwhelming reality. The others may sometimes fail but this one should never fail unless with valid cause (*Sumulong v. Cembrano,* 51 Phil. 719). 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 shall include his or her 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 the place of work (Article 194 of the Family Code).

Support of illegitimate children shall be governed by the provisions on Support under the Family Code. The support of the illegitimate children shall be taken from the separate property of the parent-spouse. In this regard, in case of absence or insufficiency of the exclusive property of the parent of the illegitimate children, the absolute community of property shall pay such support but the payments shall be considered as advances to be deducted from the share of the parent concerned upon liquidation of the community.

DEBTS AND OBLIGATIONS. If the administration of the property has been delegated to any one of the spouses and he or she, as the administrator during the marriage, contracted a debt or obligation for the benefit of the community, the absolute community of property shall be liable for the same. The consent of the other spouse is not needed in incurring the obligation. However, there must be proof to show that the obligation incurred by the designated administrator redounded to the benefit of the family. This requirement is indicative of the solicitude and tender regard that the law manifests for the family as a unit. Its interest is paramount; its welfare uppermost in the minds of the codifiers and legislators (See *BA Finance Corporation v. Court of Appeals*, 161 SCRA 608; *Luzon Surety Co., Inc. v. De Garcia*, 30 SCRA 111).

Even if the debt or obligation were not for the benefit of the community, the absolute community of property shall be liable if such debt or obligation were contracted during the marriage by both spouses or by anyone of them with the consent of the other. Consent may be express or implied. Thus, in *Marmont Resort Hotel Enterprises v. Guiang*, 168 SCRA 373, where the consent of one spouse was being disputed, the Supreme Court said that:

> the Second Memorandum of Agreement, although ostensibly contracted solely by Aurora Guiang with Maris Trading, was also signed by her husband Federico, as one of the witnesses thereto. This circumstance indicates not only that Federico was present during the execution of the agreement but also that he had, in fact, given his consent to the execution thereof

> by his wife Aurora. Otherwise, he should not have appended his signature to the document as witness. Respondent spouses cannot now disown the second Memorandum of Agreement as their effective consent thereto is sufficiently manifested in the document itself.

If, during the marriage, a debt or obligation were contracted by only one of the spouses without the consent of the other spouse, the absolute community of property shall be liable to the extent that the family may have been benefited. Hence, if such debt or obligation were used to defray some of the expenses for the maintenance of the family and the education of the children, which obviously redounded to the benefit of the family, the community of property shall be liable therefor to the extent that the family was benefited.

If the debt or obligation were contracted prior to the marriage, the absolute community of property shall be liable for as long as the same redounded to the benefit of the family. If such debt or obligation did not redound to the benefit of the family, the separate property of the debtor-spouse shall be liable. However, in case of absence or insufficiency of the exclusive property of the debtor spouse, the absolute community of property shall pay the said obligation or debt but such payments shall be considered as advances to be deducted from the share of the debtor spouse upon liquidation of the community.

Any loss resulting from the exercise of a profession or family business by any of the spouses shall be chargeable to the absolute community of property (See *Ayala Investment v. Court of Appeals*, G.R. No. 118305, February 12, 1998). However, any personal undertaking by a spouse, such as making himself or herself a surety or a guarantor in relation to an obligation of another person, cannot be presumed to be for the benefit of the family as any advantage that may arise therefore is merely indirect (*Security Bank and Trust Company v. Mar Tierra Corporation,* G.R. No. 143382, November 29, 2006, 508 SCRA 419; *Ching v. Court of Appeals,* G.R. No. 124642, February 23, 2004, 423 SCRA 356).

TAXES, LIENS, CHARGES, REPAIRS. All taxes, liens, charges and expenses, including major or minor repairs, upon the community property shall be chargeable to the absolute community of property. This can be done even without the consent of the other spouse following the general rules on co-ownership.

TAXES, EXPENSES FOR PRESERVATION OF SEPARATE PROPERTY. The accountability of the absolute community of

property for expenditures incurred for purposes of preservation of the separate property of any of the spouses is premised on the fact that such separate property has been used or is being used by the family during the marriage.

EXPENSES OR DONATION FOR SELF-IMPROVEMENT ACTIVITIES. Essentially, expenses given to either spouse for education and training are within the ambit of the support for which the absolute community of property is likewise liable. Likewise, the law provides that 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 shall be chargeable to the absolute community of property. The donation must be by both of the spouses. If only one of the spouses donate, this may fall under the prohibition under Article 87 making donations between spouses, direct or indirect, void. Except moderate gifts which the spouses may give each other on the occasion of any family rejoicing. A donation by one spouse to a common child who has no descendants or compulsory heir other than his or her parents is an indirect donation to the other spouse.

LIABILITIES BY REASON OF A CRIME OR QUASI-DELICT. The absolute community of property shall not be liable to pay the obligation or debt arising from crime or quasi-delict of a particular spouse. The separate property of the erring spouse shall be liable. However, in case of absence or insufficiency of the exclusive property of the debtor-spouse, the absolute community of property shall pay but such payments shall be considered as advances to be deducted from the share of the debtor spouse upon liquidation of the community. Article 100 of the Revised Penal Code provides that every person criminally liable for a felony is also civilly liable. Hence, a spouse who commits a crime shall likewise be liable to pay civil damages. With respect to quasi-delicts, Article 2176 of Chapter 2, Title XVII of the Civil Code provides that:

> whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between parties, is called quasi-delict and is governed by the provisions of this Chapter.

Thus, it is provided by law as a form of quasi-delict that the proprietor of a building or structure is responsible for the damages resulting from its total or partial collapse, if it should be due to the

lack of necessary repairs (Article 2189 of the Civil Code). The head of a family that lives in a building or part thereof is responsible for damages caused by things thrown or falling from the same (Article 2193 of the Civil Code). Manufacturers and processors of foodstuffs, drinks, toilet articles and similar goods shall be liable for death or injuries caused by any noxious or harmful substances used, although no contractual relation exists between them and the consumers (Article 2187 of the Civil Code). The obligation imposed by Article 2176 is demandable not only for one's own acts or omissions, but also for those persons for whom one is responsible. For example, the owner and managers of an establishment or enterprise are likewise responsible for damages caused by their employees in the service of the branches in which the latter are employed or on the occasion of their functions (Article 2180 of the Civil Code). Other examples of quasi-delict and their other effects are provided for in Articles 2177 up to 2194 of the Civil Code of the Philippines.

EXPENSES OF LITIGATION. Provided, that the suit is between the husband and wife and that the case is not groundless, the absolute community of property may be liable for the expenses of litigation. The absolute community of property may be liable for expenses of litigation in a suit not involving a case between husband and wife for as long as the suit benefits the family. Thus, in *Seva v. Nolan*, 64 Phil. 374, where the wife was criminally sued by her husband for adultery and the wife had to spend attorney's fees to defend herself, the Supreme Court ruled that the legal fees which she spent during litigation, wherein she was subsequently acquitted, can be charged to the community property because her act of defending herself in a criminal case for adultery "was as necessary as a claim for support, inasmuch as the right to a good name and reputation and the right to personal liberty are, at least, as vital and deserving of protection as the right to existence which is, in the last analysis, the meaning of the right to support."

The Supreme Court has had occasion to rule also that the stipulation in a lawyer-client agreement stating:

> "I hereby agree to pay said Attorney Claro M. Recto twenty percent (20%) of the value of the share and participation which I may receive in the funds and properties of the conjugal partnership of myself and defendant Fred M. Harden, as a result of the liquidation thereof either by death, divorce, judicial separation, compromise or by any means or method by virtue of which said partnership is or may be liquidated" (*Recto v. Harden*, 100 Phil. 427).

does not seek to bind the conjugal partnership. The Supreme Court reasoned out that:

> by virtue of said contract, Mrs. Harden merely bound *herself* — or assumed the *personal* obligation to pay, by way of contingent fees, 20% of her share in said partnership. The contact neither gives, nor purports to give to the appellee any right whatsoever, personal or real, in and to her aforesaid share. The amount thereof is simply the basis for the *computation* of said fees (*Recto v. Harden*, 100 Phil. 427).

SOLIDARY LIABILITY OF SPOUSES. Solidary obligations are those where several creditors or debtors or both concur, and where each creditor has the right to demand and each debtor is bound to perform, in its entirety, the prestation constituting the object of the obligation (Comments and Cases in Civil Law by Eduardo P. Caguioa, Volume IV on Obligations and Contracts, 1983 Edition, page 242). As an example, in an ordinary contract, if two debtors solidarily owe a creditor an amount of money, the creditor may demand payment from both debtors or he may choose to ask payment from anyone of the debtors. In both cases, the creditor can ask for the full amount of the obligation, not only the part constituting the share of each of the debtors with respect to the debt. In the Family Code, the last paragraph of Article 94 provides that the spouses shall be solidarily liable for unpaid balance with their separate properties if the community property is insufficient to cover the liabilities for which the absolute community of property is liable. This solidary liability shall not, however, include ante-nuptial debts not redounding to the benefit of the family, the support of illegitimate children by either spouse and liabilities incurred by the spouse by reason of a crime or a quasi-delict.

INSOLVENCY OF SPOUSES. So long as the absolute community subsists, its property shall not be among the assets to be taken possession of by the assignee for the payment of the insolvent debtor's obligations, except insofar as the latter have redounded to the benefit of the family (Article 2238 of the Civil Code). In an insolvency proceeding filed in the proper court, an assignee is appointed. He or she represents the insolvent and the creditors in insolvency proceedings, whether voluntary or involuntary (*Velayo v. Shell*, 100 Phil. 186). An assignee takes all properties of the insolvent and obtain title thereto. He or she shall as speedily as possible convert the estate, real or personal, into money (Section 39

of Insolvency Law, Act No. 1956) for the purposes of the settlement of the debts of the debtor.

Under the 1950 Civil Code provisions on the absolute community of property which have been repealed by the Family Code, the ownership, administration, possession and enjoyment of the common property belong to both spouses jointly and in case of disagreement, the courts shall settle the difficulty (Article 206 of the Civil Code). Though the administration is joint, the *second sentence of Article 2238 of the Civil Code* dealing with insolvency provides that "if it is the husband who is insolvent, the administration of the conjugal partnership or the absolute community may, by order of the court, be transferred to the wife or to a third person other than the assignee." Obviously, the reason for this is to prevent the husband, who usually acts as the actual administrator, from dissipating or transferring the assets of the community property which may be held liable for the insolvent-husband's debts. Under the New Family Code, administration likewise jointly belongs to both the husband and the wife with the decision of the husband prevailing in case of disagreement, but the wife can seek the annulment of the contract if she so desires (Article 96). Hence, the *second sentence of Article 2238* should still apply under the Family Code especially so when there is in the said law an explicit provision that the husband's decision will prevail in the meantime. If both the husband and the wife maintains their joint administration, and one of them become insolvent, the right of the insolvent spouse to jointly administer the community property may be legally curtailed by the court, thereby making the other non-insolvent spouse the sole administrator of the community property. The court can likewise appoint a third person, other than the assignee, as administrator.

> **Article 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)**

GAINS AND LOSSES IN GAMES OF CHANCE. Article 94 provides, basically, the important and even necessary expenditures which the absolute community of property should pay. Engaging in any game of chance, betting, sweepstakes, or any kind of gambling,

whether permitted or prohibited by law, will unduly increase the probability of uselessly depleting the resources of the community property which principally must answer for all the important obligations enumerated in Article 94. Hence, Article 95 provides that losses during the marriage in such highly risky and purely speculative activities enumerated therein shall be borne by the loser. However, winnings, as expressly provided under Article 95, shall form part of the community property. The activities enumerated in Article 95 necessarily connote that the spouses parted with some valuable consideration hoping that some valuable return will be gained.

Hence, if, for example, a stranger just gave, without consideration, one of the spouses a sweepstake ticket which eventually won and such spouse was paid the prize money, the winning shall be considered separate property in accordance with Article 92(1) of the Family Code unless the donor expressly provided that it shall form part of the community property. While it was only the ticket which was freely given to the spouse by the stranger, the winning prize given by the Philippine Charity Sweepstakes Office may be considered "income" derived from the ticket. Hence, according to Article 92(1), one of the properties excluded from the community property is property acquired during the marriage by gratuitous title by either spouse, and the fruits as well as the income thereof. While income is not defined in the Family Code, the National Internal Revenue Code defines "gross income" of a person as including prize and winnings derived from whatever source (Section 32[a][9] of Republic Act No. 8424 as amended, otherwise known as the National Internal Revenue Code of 1997).

Section 4. *OWNERSHIP, ADMINISTRATION, ENJOYMENT AND DISPOSITION OF THE COMMUNITY PROPERTY*

Article 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 a 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 adminis-

tration of the common properties, the other spouse may assume sole powers of administration. These powers do not include the powers of disposition or encumbrance which must have the 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)

JOINT ADMINISTRATION AND ENJOYMENT. Joint administration and enjoyment by the spouses of the absolute community of property highlight the fact that, in this particular regime, the spouses are co-owners of the properties they introduced into the marriage and those acquired after the marriage ceremony except those as may be excluded in the marriage settlement and those listed under Article 92. However, the administration of the property may be validly delegated to only one spouse in a marriage settlement executed prior to the marriage.

Joint management or administration does not require that the husband and the wife always act together. Each spouse may validly exercise full power of management alone, subject to the intervention of the court in proper cases. Thus, while as a general rule the verification and certification of non-forum shopping in a petition or a complaint filed in court must be signed by all the petitioners in a case, the signature of the husband or wife alone is substantial compliance with this requirement in cases involving community or conjugal property, even if both of the spouses are petitioners in the case. Each of the spouses may reasonably be presumed to have personal knowledge of the filing or non-filing by the other spouse of any action or claim similar to the petition which the other spouse filed given the notices and legal processes involved in a legal proceeding involving real property (*Docena v. Lapesura*, G.R. No. 140153, March 28, 2001).

Each spouse may act individually even without the consent of the other in cases of repairs to the property as there may be problems on these matters which need immediate decisions. The rules on co-ownership provide that repairs for preservation may be made at

the will of one of the co-owners, but he or she must, if practicable, first notify his or her co-owners of the necessity for such repairs. The expenses to improve or embellish the thing shall be decided by the co-owners (See Article 489 of the Civil Code). None of the co-owners shall, without the consent of the other, make alterations in the thing owned in common, even though benefits for all would result therefrom (See Article 491 of the Civil Code). Under the Family Code, however, if the alteration redounds to the benefit of the family, the absolute community of property shall be held liable for the expenses incurred which implies that the alteration is valid (Article 94[2]). It must always be remembered that the ordinary rules on co-ownership applies only in a suppletory character. Hence, the provisions and principles on the absolute community of property contained in the Family Code shall prevail in case of conflict with the ordinary rules on co-ownership. For example, spouses *A* and *G* are governed by the absolute community of property. If *A* repairs the roof of the house to prevent leaking, *A* can do so even without the consent of *G*. If *A* decides to alter the appearance of the roof to make it more beautiful, he cannot do so without the consent of *G*. If *A* proceeds with the alteration without the consent or knowledge of *G* and incurs certain obligations in doing so, only *A* would be liable for the said alteration unless *G* ratifies it. If *G* does not ratify it, *G* can demand that the altered roof be removed and the original roofing returned at the expense of *A*. However, if the alteration redounds to the benefit of the family because it has prevented the complete decay of the old leaking roof, the alteration, even without the consent of *G,* will be valid and the absolute community of property will be liable for the debts and obligations incurred in making the alteration (Article 94[2]). If the ordinary rules on co-ownership are to be applied, the alteration would have been invalid even if it redounds to the benefit of the co-owners. The rules on co-ownership, however, cannot be applied because it is only suppletory to the rules on the absolute community of property provided in the Family Code.

Should there be any disagreement in any matter involving administration and enjoyment of the community property between the spouses, the decision of the husband shall prevail in order that a void or a vacuum will not arise, subject to recourse to the court by the wife which must be availed of within five years from the date of the contract implementing such decision.

The fact that the husband's decision shall prevail in case of disagreement is an intermediate *modus vivendi* before winding

> up in court (185th Meeting of the Civil Code and Family Law Committees, June 27, 1987, Page 5).

It is the husband's decision which will temporarily prevail because tradition and experience show that, in very serious matters concerning the family, it is usually the husband who makes the ultimate choices. The judicial proceeding shall be summary in nature pursuant to Article 253 of the Family Code. In the event that alterations or certain matters concerning the administration and enjoyment of the community property have to be made in the thing owned in common and there is disagreement and it is the husband who does not want to give his consent or objects to the undertaking, the wife may go to the courts for adequate relief (See Article 491 of the Civil Code). If, despite the disagreement, the wife implements her desires or enters into any contract to enforce her objectives, the husband can go to court for adequate relief also.

Unlike the Civil Code, there is no provision in the Family Code with respect to a situation where one of the spouses, without suffering from any incapacity whatsoever, encumbers, alienates or disposes any of the common properties without the consent of the other spouse who is likewise capacitated. It would appear, however, that the Code Commission has included the power to dispose, encumber and alienate as within the ambit of the phrase "administration and enjoyment" in the first paragraph of Article 96. Moreover, the explanation of Justice Ricardo Puno during the Senate Committee Hearing on the Family Code before the Committee on Women and Family Relations on January 28, 1988 seems to support this view. Thus, Justice Puno clearly made the example of a contract of sale in explaining the first paragraph of Article 96 and other similarly worded articles incorporated in the Family Code, to wit:

> JUSTICE PUNO: x x x In all these cases, community property under Article 96, conjugal partnership under Article 124, parental authority under Article 211 and authority upon the property of the children under Article 225, we have acceded to the clamor of the women, and we have provided for joint authority in all these cases. x x x
>
> But what happens if there is a disagreement? x x x Necessarily, there must be a provision for temporary management and the logical person on whom that temporary management would fall would be the husband. x x x
>
> Everytime there is a disagreement, you have to come to court, but when you go to court, it does not necessarily mean

> that you [want to] change the administration. You go to court only for purposes of settling that particular disagreement. Should this piece of land be sold or not? That's a joint decision. All right, they decide, nothing happens. x x x But supposing the husband says "this land must be sold." The wife says: "No, this must not be sold." But you have 10 or 15 other parcels of land. You go to court not to administer all these lands. You go to court only to decide whether this particular parcel would be sold or not but the administrator remains joint with respect to the others. x x x

Furthermore, in the second paragraph of Article 96, the assumption of powers of a spouse has been limited and restricted so as not to include the power of disposition, alienation and encumbrance. This provision implies therefore that the power to administer is broadly treated under the first paragraph of Article 96 but may be limited by law as in the case of the second paragraph of Article 96.

EFFECT OF ALIENATION AND ENCUMBRANCE. Considering, however, the idea of the absolute community of property which is the merger into a single ownership of the separate properties of the husband and wife acquired before and during the marriage, under the Family Code, any disposition by one spouse of the said properties, completely without the knowledge and consent of the other spouse, is null and void. This is different from the rule prior to the effectivity of the Family Code where the contract would have been voidable only (*Vda. De Ramones v. Agbayani,* G.R. No. 137808, September 30, 2005, 471 SCRA 306).

The action to nullify the contract entered into by the transacting spouse will not have any prescriptive period as such contract is null and void. However, there are cases when a third-party purchaser is protected by the law. For instance, if a Transfer Certificate of Title (TCT) of a real estate indicates that a person named therein is single when in fact he or she is married and therefore governed by the absolute community of property, the sale of the said property by the registered owner to the third person, who is an innocent purchaser-for-value and who in good faith relies on what is officially annotated in the Transfer Certificate of Title (TCT), cannot be voided. The innocent purchaser-for-value, believing that the seller is single because of what is annotated in the TCT, has all the right to believe that the registered owner is single and, therefore, can sell the property without obtaining consent from anybody, unless the buyer has been informed previously that the seller is in fact

married. The remedy of the aggrieved spouse is to compel the erring spouse to account for the proceeds of the sale as the same is part of the absolute community of property (See *PNB v. Court of Appeals*, 153 SCRA 435). If the buyer acts in bad faith in that he or she knows that the seller is married, then the sale can be voided.

If, however, there was knowledge but without the consent of the other spouse and a disagreement arises, the contract entered into by the husband, whose decision will prevail in cases of disagreement, shall not be considered void but merely annullable at the instance of the wife. The wife shall have five years, from the date of the contract implementing the decision, to go to court to seek the proper remedy which includes the annulment of the contract (*Ravina v. Abrille,* G.R. No. 160708, October 16, 2009). However, if the wife ratifies the contract by any express or implied act, she cannot seek the annulment of the contract even within the 5-year prescriptive period. In this case, the contract shall be deemed not to have suffered from any legal infirmity and would be considered effective as of the time the contract was entered into.

It is important to note that the law clearly provides that the wife has the right to nullify or annul, as the case may be, not only her share in the property involved but the entire contract itself.

If it were the decision of the wife which was implemented, the husband can go to court to seek proper relief. He can file an injunction suit to stop the implementation of the contract entered into by the wife for being unenforceable having been entered into by the wife also in his name without authority (Article 1317 of the Civil Code) or likewise file an action to nullify the contract on the ground that it is contrary to law and public policy.

EFFECT OF INCAPACITY OF ONE OF THE SPOUSES ON ADMINISTRATION. In case one of the spouses is incapacitated or otherwise unable to participate in the administration of the common properties, the other spouse may assume sole powers of administration.

The appointment of the spouse as the sole administrator shall be in a summary proceeding under Article 253 of the Family Code if it involves a situation where the other spouse is absent or separated in fact or has abandoned the other or the consent is withheld. If the subject spouse "is an incompetent" who is in a comatose or semi-comatose condition, a victim of stroke, cerebrovascular accident, without motor and mental faculties, and with diagnosis

of brain stem infarct, the proper remedy is a judicial guardianship proceeding under Rule 93 of the 1964 Revised Rules of Court and not a summary proceeding under the Family Code (*Uy v. Court of Appeals,* G.R. No. 109557, November 29, 2000). In any event, should the administering spouse decide to sell real property as such administrator of the community or conjugal property, he or she must observe the procedure for the sale of the ward's estate required of judicial guardians under Rule 95 of the 1964 Revised Rules of Court, not the summary judicial proceedings under the Family Code. This is so because, as the administrator spouse, he or she must perform the duties of a guardian (*Uy v. Court of Appeals,* G.R. No. 109557, November 29, 2000).

The spouse who assumed such power of administration cannot dispose or encumber property without judicial approval or the written consent of the incapacitated spouse (*Abalos v. Macatangay,* G.R. No. 155043, September 2004, 439 SCRA 649). Otherwise, any contract of encumbrance, disposition or alienation shall be considered void. The only legal significance of such void transaction is to treat the same as a continuing offer on the part of the consenting spouse and the third person. Perfection as a binding contract can be attained only upon written acceptance by the other spouse or authorization by the court before the offer is withdrawn by either or both offerors. The effectivity of the contract shall take effect only upon such written acceptance or court authorization.

Article 97. Either spouse may dispose by will of his or her interest in the community property. (n)

DISPOSITION BY WILL. A will is an act whereby a person is permitted, with the formalities prescribed by law, to control to a certain degree the disposition of his estate, to take effect after his death (Article 783 of the Civil Code). A testator can provide that certain properties after his or her death will go to whoever he or she wishes the property will go, provided that the grant will not encroach on the lawful legitimes of his compulsory heirs. Legitime is that part of the testator's property which cannot be disposed of because the law has reserved it for certain heirs who are therefore called compulsory heirs (Article 886 of the Civil Code). Hence, a spouse can validly dispose any of his or her specific separate properties in a will provided it will not infringe on the legitime of the compulsory heirs. However, considering that an absolute community of property is a co-ownership, the spouse can only dispose his or her interest in

the community property and not in a specific property. A disposition made in a will of an interest in the community property cannot be considered a waiver of such interest in the community property which is prohibited under Article 89 of the Family Code. The act of disposition precisely highlights the testator's intent to control the property to take effect after death.

Article 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)

REASON PROHIBITING DONATIONS. The prohibition against a gift or donation of the community property by either spouse without the consent of the other is intended to protect the latter's share therein from the prodigality of a reckless or faithless spouse (*Estate of McNutt*, 36 Cal App 2d 542, 98 P2d 253). However, donations by both spouses or by one spouse with the consent of the other will generally be valid, subject to revocation or reduction should such donations turn out to be inofficious or they infringe on the legitime or successional rights of another compulsory heir as provided for in Articles 760 to 773 of the Civil Code.

However, even with the consent of the other spouse, the donor-spouse cannot make a substantial donation, direct or indirect, to the consenting spouse during the marriage. Such direct or indirect donation is void under Article 87.

By way of exception, 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. Whether a donation is moderate or not depends upon the financial situation of the spouses and the absolute community of property regime. Thus, it has been held that the husband has the power to make occasional gifts of trifling value without the consent of the wife (*Hanley v. Most*, 9 Wash 2d 429, 115 P2d 933). Also, donations made 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 are valid. The value of such donations shall be chargeable to the absolute community of property (Article 94[8]).

Section 5. *DISSOLUTION OF ABSOLUTE COMMUNITY REGIME*

Article 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 Articles 134 to 138. (175a)

DISSOLUTION OF COMMUNITY PROPERTY. The termination of the absolute community of property does not necessarily mean the termination of the marriage. But the termination of a marriage simultaneously results in the dissolution of the absolute community of property. After the dissolution comes the liquidation and partition. Under Article 99, there are four ways by which to terminate or dissolve the absolute community of property.

DEATH OF EITHER SPOUSE. The death of either of the spouses terminates the marriage. Civil personality is extinguished by death (Article 42 of the Civil Code). The effect of death upon the rights and obligations of the deceased is determined by law, by contract and by will (Article 42). Article 103 provides that, upon the termination of the marriage by death, the community of property shall be liquidated in the same proceeding for the settlement of the estate of the deceased.

LEGAL SEPARATION DECREE. One of the effects of a legal separation decree is that the absolute community of property 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) (See Article 63[2]). However, upon reconciliation of the parties they may agree to revive the property regime subject to the provisions of Article 67.

ANNULMENT DECREE. The final judgment in an annulment granting the termination of the marriage 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 legitime (Article 50, second paragraph). As a consequence of an annulment decree, the absolute community of property shall be dissolved and liquidated, but if either of the spouses acted in bad faith, his or her share of the net profits of the community 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 of children, the innocent spouse (paragraph [2], Article 43 in relation to Article 50).

NULLITY DECREE. As a general rule, there is no absolute community of property in a void marriage. The property arrangement described in either Article 147 or 148 governs a void marriage. Article 147 is applicable in case where 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. It shall be liquidated in accordance with the rules on co-ownership provided under the Civil Code and not under Article 102 of the Family Code dealing with the absolute community of property. However, when only one of the parties to the said 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 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 (See Article 147). In cases of a void marriage not falling under Article 147, the rules in Article 148 will apply. It shall be liquidated also in accordance with the rules on co-ownership under the Civil Code. The forfeiture process described previously with respect to Article 147 shall also apply in cases under Article 148 even if both parties are in bad faith.

By way of exception, there is a special case where, in effect, an absolute community of property or a conjugal partnership of gains could govern a void marriage. This is the subsequent void marriage that could exist by the non-observance of Article 40 which provides that "the absolute nullity of a previous marriage may be invoked for purpose of remarriage on the basis solely of a final judgment declaring such previous marriage void." Accordingly, in case of its non-observance, Article 40 contemplates a situation that involves the "declaration of nullity of a subsequent marriage contracted by a spouse of a *prior void marriage* before the latter is judicially declared void" (*Valdes v. RTC*, 72 SCAD 967, 260 SCRA 221). Upon the declaration of nullity of the subsequent marriage, Article 50 of the Family Code will set in. It provides, among others,

that paragraphs (2), (3), (4) and (5) of Article 43 shall also apply in proper cases to marriages which are declared void *ab initio* by final judgment under Article 40. Paragraph (2) of Article 43, in turn, provides for the dissolution of the absolute community of property and for the forfeiture procedure in case either of the spouses acted in bad faith. In this exceptional case, therefore, it can be said that the absolute community of property or the conjugal partnership of gains terminates when the marriage is declared void. The reason for exceptionally applying paragraph (2) of Article 43 to subsequent void marriages under Article 40 as provided in Article 50 has been explained by the Supreme Court in *Valdes v. RTC,* 72 SCAD 967, 260 SCRA 221, when it said that:

> 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*.

However, in the case of *Nicdao Cariño v. Cariño*, G.R. No. 132529, February 2, 2001, the Supreme Court ruled that a subsequent marriage celebrated in violation of Article 40 is void because it is bigamous and therefore the property regime in the said subsequent void marriage is co-ownership under Article 148 of the Family. This ruling appears to be inaccurate. The legal rationale of the Supreme Court in the *Valdez* ruling must still be followed; otherwise Article 99(3) referring to the termination of the absolute community in case of a judicial declaration of nullity of marriage will not make any sense at all.

JUDICIAL SEPARATION OF PROPERTY. Judicial separation of property may be voluntary or involuntary. If it is voluntary, the parties can file the agreement for separation of property in court to obtain the necessary court approval (Article 136). After approval the parties can nevertheless file a revival of their property regime but once revived, no voluntary separation of property may thereafter be granted (Article 141[7]). If the separation of property is in-

voluntary, it must be for a sufficient cause and must likewise have court approval. Any of the following shall be considered sufficient cause for judicial separation of property as provided for in Article 135 of the Family Code:

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 declared 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 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.

LIQUIDATION AFTER AFFIDAVIT OF REAPPEARANCE. Another instance when an absolute community of property or a conjugal partnership of gains is dissolved is when a reappearing spouse or an interested person under Article 41 files an affidavit of reappearance to terminate the subsequent marriage of the present spouse validly contracted with another person. According to Article 43, the termination of the subsequent marriage, among others, shall result in the dissolution of the absolute community of property or the conjugal partnership of gains of such subsequent marriage. But if either of the spouses contracted the subsequent marriage in bad faith, his or her share of the net profits of the community property or the 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 of children, the innocent spouse.

Article 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)

EFFECT OF SEPARATION IN FACT. Generally, the absolute community of property will not be affected by the separation in fact between the spouses. Hence, the absolute community of property for instance will still be liable for all the obligations incurred by either of the spouses for the benefit of the family. It shall likewise be held liable for all the charges provided under Article 94. The separate property of the separated spouses shall still be solidarily liable for the obligations incurred for the benefit of the family in the event that the absolute community of property is insufficient to pay off the obligation. The exceptions are provided in Article 100 of the Family Code.

NO SUPPORT. The spouse who leaves the conjugal home or refuses to live therein, without just cause, shall not have the right to be supported from the absolute community of property. However, fault must always be proven. The mere fact of separating from the conjugal roof, which cannot be presumed culpable, when there is no evidence of any fault or guilt on the part of the one who so separates, does not constitute a reason for annulling the right of support (*Sumulong v. Cembrano*, 51 Phil. 719). If the spouse left with a valid cause, then he or she can still be supported from the absolute community of property considering that, mere separation *de facto* will not affect the absolute community of property. Also, in accordance with Article 94, such community property can still be held liable for the support of the spouses and any expense to enable the spouse to commence or complete a professional or vocational course, or other activity for self-improvement. In short, the absolute community of property can still be held liable for all obligations incurred by the separating spouse that may redound to the benefit of the family or which are enumerated in Article 94 of the Family Code.

If it is proven that the leaving spouse is at fault or that he or she left the conjugal home without just cause, such erring spouse cannot be supported from the absolute community of property even if he or she is a co-owner of the same. This is a very drastic penalty for his or her act of disrupting the unity of the family which the law seeks to nurture. However, the absolute community of property may still be held liable for the expenses he or she might have incurred for the benefit of the family, especially those enumerated in Article 94.

COURT AUTHORIZATION. When the consent of one spouse to any transaction of the other is required by law, judicial authorization shall be obtained in a summary manner. Any of the spouses, whether or not he or she was the one who left the conjugal home without a valid cause, can seek judicial relief. Hence, if for example, a spouse who left in bad faith and without valid cause needs money in order to have funds to pay the school matriculation fees of a common child for the latter's education and the only way to have money is to sell a car which belongs to the absolute community of property, such spouse can seek judicial authorization if the innocent spouse does not want to give his or her consent to the sale or such consent cannot be obtained. The judicial procedure in connection with the summary proceeding is contained from Articles 239 up to 248 of the Family Code.

SOLIDARY LIABILITY AND ADMINISTRATION OF SEPARATE PROPERTY. Article 100(3) provides that, in the absence of sufficient community property, the separate property of both spouses shall be solidarily liable for the support of the family. This is a reiteration of the last paragraph of Article 94. Also, Article 70 provides that the spouses are jointly responsible for the support of the family and the expenses of the same shall be paid from the community property and, in the absence thereof, from the income or fruits of the separate properties. In case of insufficiency or absence of said income or fruits, such obligations shall be satisfied from their separate properties.

To be able to effectively enforce the solidary nature of the separate properties in cases where the spouses are separated from each other, Article 100(3) likewise provides that the spouse present shall, upon proper petition in court, be given judicial authority through summary proceedings to administer or encumber any specific property of the other spouse and use the fruits or proceeds thereof to satisfy the latter's share. It must be noted that only the present spouse is given standing by the law to file this petition. The authority granted to the present spouse, however, is limited to only

one purpose, namely: to enable the present spouse to satisfy the other spouse's share in the obligations used to support the family which should be totally paid by the absolute community of property had it not been for its insufficiency.

Hence, if for example, the children were able to pay their school fees because the family was able to borrow money from a particular creditor, that particular creditor, in the absence of sufficient absolute community property of the spouses, can go against the separate properties of the present spouse and the spouse who left the conjugal home. If they are separated *de facto,* the creditor can go against the separate properties of the spouses at the same time or against the separate properties of one of them only. Should the creditor decide to go against the present spouse's separate property only, the same should pay the total amount due the creditor. The present spouse can now seek reimbursement from the separate property of the spouse who left the home with respect to his or her share in the obligation. So if the creditor were paid P1,000 and if the payment were obtained from the separate property of the present spouse, the latter can seek reimbursement of P500 from the separate properties of the other spouse. The present spouse can do so by filing a judicial summary proceeding for him or her to be made the administrator of the other spouse's separate properties and to use the fruits or proceeds thereof to pay for the reimbursement of the P500 due him or her (the present spouse). The administrator can also administer or encumber the property for such purpose. Likewise, if the present spouse does not want to pay the total obligation from his or her property alone, he or she, prior to payment, can file the said summary proceeding so that , by the time of payment to the creditor, he or she would have already gotten enough funds from the fruits or proceeds emanating from the property of the absent spouse in order to complete the payment.

Article 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)

ABANDONMENT. The concept of abandonment under Article 178 of the Civil Code, which the Family Code superseded under Article 128 referring to the conjugal partnership of gains which in turn is exactly the same as Article 101 referring to the absolute community of property, was explained by the Supreme Court, to wit:

> Abandonment implies a departure by one spouse with the avowed intent never to return, followed by prolonged absence without just cause, and without in the meantime providing in the least for one's family although able to do so. There must be absolute cessation of marital relations, duties, and rights with the intention of perpetual separation. This idea is clearly expressed in the above-quoted provision, which states that "a spouse is deemed to have abandoned the other when he or she has left the conjugal dwelling without any intention of returning."
>
> The record shows that as early as 1942, the private respondent had already rejected the petitioner, whom he denied admission to their conjugal home in Dumaguete City when she returned from Zamboanga. The fact that she was not accepted by Jo demonstrates all too clearly that he had no intention of resuming their conjugal relationship. Moreover, beginning 1968 until the final determination by this Court of the action for support in 1988, the private respondent refused to give financial support to the petitioner. The physical separation of the parties, coupled with the refusal by the private respondent to give support to the petitioner, suffice to constitute abandonment as a ground for the judicial separation of property.

Abandonment must not only be physical estrangement but also amount to financial and moral desertion (*Dela Cruz v. Dela Cruz,* 130 Phil. 324). Courts must therefore be careful in appreciating the evidence to determine whether or not there really exists a case of abandonment on the part of one of the spouses. This is so because:

> a judgment ordering the division of conjugal assets where there has been no real abandonment, the separation not being wanton and absolute, may altogether slam shut the door for possible reconciliation. The estranged spouses may drift irreversibly farther apart; the already broken family solidarity may be irretrievably shattered; and any flickering hope for a new life may be completely and finally extinguished (*Dela Cruz v. Dela Cruz,* 130 Phil. 324).

Aside from judicial separation of property, under Articles 101 and 128, the aggrieved party may also petition the court for receivership or for authority to be the sole administrator of the absolute community property or the conjugal partnership of gains, as the case may be, subject to such precautionary conditions as the court may impose.

Articles 101 and 128 provide a presumption. They identically provide that a spouse who had 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.

FAILURE TO COMPLY WITH FAMILY OBLIGATIONS. The reliefs provided under Article 101 apply only if either of the spouses fails to comply with his or her obligations to the family. The obligations to the family refers to marital, parental or property relationship. Hence, if a designated administrator abuses his or her administration, any of the reliefs provided for in Article 101 can be availed of. However, it has been held that the mere refusal or failure of the administrator of the property to inform the other spouse of the progress of the family businesses does not by itself constitute abuse (*Dela Cruz v. Dela Cruz*, 130 Phil. 325).

> For "abuse" to exist, it is not enough that the husband performs an act or acts prejudicial to the wife. Nor is it sufficient that he commits acts injurious to the partnership, for these may be the result of mere inefficient or negligent administration. Abuse connotes willful and utter disregard of the interest of the partnership, evidenced by a repetition of deliberate acts and/or omissions prejudicial to the latter (*Dela Cruz v. Dela Cruz*, 130 Phil. 325).

It must be observed that Article 101 and Article 128 of the Family Code use the phrase "fails to comply." Hence, if the negligence or inefficiency is not merely isolated, but so gross that it is likewise

constantly done without any effort or only with a token effort to improve, the reliefs provided for in Articles 101 and 128 may be availed of by the aggrieved spouse. This is also a failure to comply with the family obligations.

Relevantly, if it is shown that such failure to comply with the obligations of a family constitutes a psychological incapacity to perform the essential marital obligations, which existed at the time of the marriage, the marriage itself can be considered void under Article 36 of the Family Code. And if the abandonment without just cause is for more than one year, another remedy is the filing of a legal separation case under Article 55(10).

Section 6. *LIQUIDATION OF THE ABSOLUTE COMMUNITY ASSETS AND LIABILITIES*

Article 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 be-

tween 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 is no such majority, the court shall decide, taking into consideration the best interests of said children. (n)

LIQUIDATION PROCEDURE. Dissolution of the absolute community property occurs upon the happening of the events enumerated in Article 99 of the Family Code. Article 102 states in detail the manner by which the affairs of the absolute community of property shall be settled upon dissolution or after it has been dissolved (see *De la Rama v. De la Rama,* 7 Phil. 754). However, in a voluntary judicial separation of property, the liquidation may be governed by the agreement of the parties provided that the court approves the same. Article 102 provides for the step-by-step procedure in connection with the dissolution of the absolute community of property.

INVENTORY. All properties or assets at the time of the dissolution, whether belonging to the absolute community of property or separate property of the spouses, must be inventoried. They must all be itemized and, usually, valued. It is an error to determine the amount to be divided by adding up the profits which had been made on each year of the community's continuance and saying that the result thereof is that amount (*De la Rama v. De la Rama,* 7 Phil. 745). In the appraisal of the properties, it is not the purchase but the market or, in default thereof, the assessed value at the time of the liquidation that must be taken into account (*Prado v. Natividad*, 47 Phil. 775). However, the process of liquidation may take some time. If the proceedings take a long time and the values have suffered some alterations, there is nothing to prevent a new valuation when the last stage is reached, *i.e.*, the actual division or

partition comes, so long as *all the properties* are newly appraised in reference to the same period of time. There is no law or doctrine that a prior appraisal is conclusive upon the parties and the courts (*Padilla v. Paterno*, 93 Phil. 884).

PAYMENT OF DEBTS. After the inventory, all debts for which the absolute community property is liable must be paid. This will include all obligations enumerated in Article 94 of the Civil Code. However, under Article 94(9), payments made by the absolute community of property due to the insufficiency of the separate property of the debtor spouse for ante-nuptial debts which did not redound to the benefit of the family, the support of illegitimate children of the debtor-spouse, and liabilities incurred by such debtor-spouse by reason of a crime or a quasi-delict, are considered as advances to be deducted from the share of the debtor-spouse upon liquidation of the community property. Moreover, in case of insufficiency of the absolute community property, the spouses shall be solidarily liable for the unpaid balance with their separate properties.

DELIVERY OF EXCLUSIVE PROPERTIES. After payment of the advances made by the absolute community property and/or the obligations of the same for which the separate properties were made solidary liable, the next step is to deliver whatever remains of the exclusive properties of the spouses to each of them. These properties refer to those stipulated in the marriage settlement as exclusive properties or even during the marriage (Article 91) and to the three exclusions referred to in Article 92.

PARTITION OF NET ASSETS. The next step is to equally divide the net assets, which is the net remainder of the community property after undertaking the first three steps provided for in Article 102, to the spouses. The interest of the parties is limited to these net assets or net remainder. As clearly seen, until a liquidation has been made, it is impossible to say whether or not there will be a net remainder to be divided between the parties (*Nable Jose v. Nable Jose,* 41 Phil. 713). Equal sharing will not apply if there is a different proportion or division agreed upon in the marriage settlement, or unless there has been a voluntary waiver of such share as provided for in the Family Code. The waiver, however, must be valid. If the waiver of rights refers to those made during the subsistence of the absolute community of property, such waiver is invalid and ineffective as it is prohibited under Article 89. A valid waiver can only occur upon a judicial separation of property

or after the marriage has been dissolved or annulled and it must be contained in a public instrument as provided for under the second paragraph of Article 89.

In case of annulment of marriage, the absolute community of property 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 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 (Article 50 in relation to Article 43[2]).

It must likewise be recalled that in cases of legal separation and annulment of marriage, the party in bad faith shall forfeit his share in the net profits which 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.

In case the marriage is judicially nullified and when the informal civil relationship is governed by Article 147 and 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 cohabitation. This rule shall likewise apply in cases of void marriages where the property relationship is governed by Article 148. However, this rule will not apply to a subsequent void marriage as a result of the non-observance of Article 40 in relation to Articles 52 and 53. In this case, the rule that will apply is Article 50 in relation to Article 43(2), which is the forfeiture rule in case of the liquidation of the absolute community of property.

DELIVERY OF THE PRESUMPTIVE LEGITIME. The presumptive legitime is delivered only after the finality of a judicial decree of annulment on grounds provided in Article 45 or of nullity of a subsequent void marriage under Article 40 in relation to Articles 52 and 53. The law clearly provides that such delivery should only be "in accordance with Article 51," which only refers to the termination of marriage either by an annulment or a nullity judgment in the proper cases. Hence, delivery of the presumptive legitime need not be made in cases of legal separation or in case of a judicially declared

void marriage other than in a subsequent void marriage as a result of the non-observance of Article 40. Considering that the delivery of the presumptive legitime shall be provided for in the final judgment, the children or their guardian, or the trustee of their property may ask for the enforcement of the judgment in accordance with the last paragraph of Article 51. This can be made via a summary judicial proceeding pursuant to Article 253. The value of the presumptive legitimes of all the 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 (Article 51).

> **Article 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)**

LIQUIDATION UPON DEATH. Section 2, Rule 73 of the Rules of Court provides that:

> 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 estate 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.

However, if the decedent spouse left no will and no debts, and the heirs are all of age, or the minors are represented by their

judicial or legal representatives, duly authorized for the purpose, the parties may, without securing letters of administration from the court, divide the estate among themselves as they see fit by means of a public instrument filed in the office of the register of deeds, and should they disagree, they may do so in an ordinary action for partition. If there is only one heir, he may adjudicate to himself the entire estate by means of an affidavit filed in the office of the register of deeds (Section 1, Rule 74 of the Rules of Court).

Article 103 also provides that if upon the lapse of the one-year period from the death of one of the spouses, no liquidation is made, any disposition or encumbrance involving the community property of the terminated marriage shall be void. It must, however, be stated that any disposition or encumbrance of any specific property before the process of liquidation has been completed and therefore even before the lapse of the one-year period is premature, and hence, likewise void. This is so because, upon the death of one of the spouses, only the interest to the property and not any physical and definite property is vested on the heirs. In fact, if there are creditors of the decedent, the interest will only vest after payment of the debts of the decedent. It is only after liquidation and partition when specific properties are definitely and physically determined that a sale of such allotted property can be made. Hence, although, after the death of the decedent, the heirs can sell, waive or even alienate their interest to the property they inherit, they cannot sell a specific property as the same can only be determined after liquidation and partition.

NATURE OF INTEREST OF HEIRS PRIOR TO LIQUIDATION. Article 103 is identical to Article 130 in connection with the rules on the conjugal partnership of gains. Hence, the explanation hereunder applies both to Articles 103 and 130.

While the spouses have an interest in the absolute community property or the conjugal partnership property, the spouses cannot claim any definite property at the time when the absolute community property or conjugal partnership is still in existence. Upon the death of one of the spouses which is a cause for the dissolution of the absolute community property or the conjugal partnership, the rights of the heirs vest. Pertinently, it has been ruled that:

> the right of succession of a person are transmitted from the moment of death, and where, as in this case, the heir is of legal age and the estate is not burdened with any debts, said heir immediately succeeds, by force of law, to the dominion,

> ownership and possession of the properties of his predecessor and consequently stands legally in the shoes of the latter (*Reganon v. Imperial*, 22 SCRA 80).

Consequently, if the deceased spouse is survived by a spouse and compulsory heirs, like the legitimate children, the absolute community property or the conjugal partnership, which has been dissolved by such death of the spouse, evolves into a co-ownership between the surviving spouse, on the one hand, and the heirs on the other (*Marigsa v. Macabuntoc,* 17 Phil. 107). Thus, in *Hagosojos v. Court of Appeals,* 155 SCRA 175, the Supreme Court ruled:

> x x x Considering that all the properties specified in the Compromise Agreement were described conjugal partnership properties of the first marriage, it follows that upon the death of Jacinta, the conjugal partnership evolved into a co-ownership between the surviving spouse, Anastacio, and her three children, the petitioner and the two other private respondents, Araceli Hagosojos-Alindogan and Hagosojos-Nicolas. Anastacio became the owner of 5/8 of the mass of properties while each of the three children, of 1/8.

Also, the Supreme Court has held in *Maria Lopez v. Magdalena Gonzaga Vda. De Cuaycong*, 74 Phil. 610, citing Manresa, Volume 3, pp. 486-487, 3rd edition, that:

> each co-owner owns the whole, and over it he exercises rights of dominion, but at the same time he is the owner of a share which is really abstract because until the division is effected, such share is not concretely determined. The rights of the co-owners are, therefore, as absolute as dominion requires because they may enjoy and dispose of the common property without any limitation other than that they should not, in the exercise of their right, prejudice the general interest of the community, and possess, in addition, the full ownership of their share, which they may alienate, convey or mortgage, which share we repeat will not be certain until the community ceases.

As a co-owner, the spouse or the heirs can undertake any act of dominion over their interest, share or participation but not over a specific concrete property. Thus, as provided in Article 493 of the Civil Code, 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, although the effect of the alienation or mortgage, with respect to the co-owners, shall be limited to the portion which may be allotted to him in the division

upon termination of the co-ownership (*Maria Lopez v. Magdalena Gonzaga Vda. De Cuaycong,* 74 Phil. 610).

Also, prior to the liquidation and partition, the interest of an heir in the estate of the deceased person may nevertheless be attached for purposes of execution, even if the estate is in the process of settlement before the courts (*De Borja v. De Borja*, 2 SCRA 1131). This is also allowed under Section 7(e), Rule 57 of the 1997 Rules of Civil Procedure, which provides that one of the properties that can be attached for purposes of execution is the "interest of the party against whom attachment is issued in property belonging to the estate of the decedent, whether as heir, legatee, or devisee by serving the executor or administrator or other personal representative of the decedent with a copy of the writ and notice that said interest is attached." Thus, it has been held:

> "Although the value of the participation of Rafael Vilar in the estate of Florentino Vilar was indeterminable before the final liquidation of the estate, nevertheless, the right of participation in the estate and the lands thereof may be attached and sold (*Gotauco & Co. v. Register of Deeds of Tayabas,* 59 Phil. 756, as cited in *De Borja v. De Borja,* 2 SCRA 1131)."

However, the attachment is subject to the administration of the estate. The administrator retains control over the properties and will still have the power to sell them, if necessary, for the payment of the debts of the deceased (*De Borja v. De Borja,* 2 SCRA 1131).

To reiterate, it is only after liquidation that definable property can be claimed by and adjudged to them from the remainder of their properties after satisfaction of all the obligations which the community property has to pay. Thus, specific and concrete properties cannot be donated by any co-heir prior to liquidation and partition (*Hagosojos v. Court of Appeals,* 155 SCRA 175). Also, in *Anderson vs. Perkins*, 1 SCRA 387, where the special administrator of the deceased spouse sought to sell certain properties allegedly owned by the deceased spouse, the Supreme Court issued an order stopping such sale on the ground, among others, that the widow claims that the properties are either conjugally owned by the deceased and the widow or separately owned by the widow. Pertinently, the Supreme Court said:

> There is, however, a serious obstacle to the proposed sale, namely, the vigorous opposition presented thereto by the appellant, the surviving spouse of the deceased, on the

> ground that she is allegedly entitled to a large portion of the personal properties in question, either because they were conjugal property of herself and the deceased, or because they are her own, exclusive, personal property. Indeed, the records show that up to the time the proposed sale was asked for and judicially approved, no proceedings had as yet been taken, or even started, to segregate the alleged exclusive property of the oppositor-appellant from the mass of the estate supposedly left by the deceased, or to liquidate the conjugal partnership property of the oppositor-appellant and the deceased. Until, therefore, the issue of the ownership of the properties sought to be sold is heard and decided, and the conjugal partnership liquidated, or, at least, an agreement be reached with appellant as to which properties of the conjugal partnership she would not mind being sold to preserve their value, the proposed sale is clearly premature. x x x

CLAIM AGAINST THE ESTATE. Upon the death of any of the spouses, the absolute community of property or the conjugal partnership of gains is dissolved or terminated. No complaint for the collection of indebtedness chargeable to the community or conjugal properties can be brought against the surviving spouse (*Alipio v. Court of Appeals,* 341 SCRA 441; *Ventura v. Militante*, 316 SCRA 226; *Calma v. Tanedo*, 66 Phil. 594) unless such surviving spouse has committed himself or herself to be solidarily liable for the claim against the absolute community or the conjugal partnership property (*Imperial Insurance v. David,* 133 SCRA 317). If the claim is brought against the surviving spouse who did not commit himself or herself to be solidarily liable, and a judgment is rendered directing the surviving spouse to pay the obligation, such judgment is void (*Ventura v. Militante*, *supra*). All debts chargeable against the community or conjugal partnership, which has already been dissolved, must therefore be claimed and paid in the settlement of estate proceedings of the deceased spouse.

> 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. Indeed, the surviving spouse is not even a *de facto* administrator such that conveyances made by him of any property belonging to the partnership (or community property) prior to the liquidation of the mass of conjugal partnership property (or absolute community property) is void (*Alipio v. Court of Appeals*, 341 SCRA 441, additions inside, parenthesis supplied).

MANDATORY COMPLETE SEPARATION OF PROPERTY. The last paragraphs of Article 103 in relation to the absolute community property and of Article 130 in connection with the conjugal partnership of gains are identical. They apply when the first marriage is terminated by death of one of the spouses, and not when the first marriage has been judicially annulled or declared void. They identically provide that if the surviving spouse validly remarries without any liquidation of the properties of the previous marriage, the mandatory regime of complete separation of property shall govern the property relations of the subsequent marriage. These identical provisions are the only exceptions to the general rule that, in the absence of a marriage settlement providing for any other type of regime including the separation of property regime, the absolute community of property regime shall govern the marriage. This is intended to prevent confusion of the properties of the first and second marriages. If, prior to such subsequent marriage, the contracting parties execute a marriage settlement stipulating that the conjugal partnership property regime or the absolute community of property regime shall govern the marriage, such stipulation is not valid as it is against the law. Article 1 of the Family Code clearly provides, among others, that "marriage settlements may fix the property relations during the marriage *within the limits provided by this code."* The last paragraphs of Article 103 and Article 130 constitute two limitations provided by the Family Code in relation to the execution or stipulations in a marriage settlement which must, therefore, be strictly observed.

> **Article 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 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 or among the different communities in proportion to the capital and duration of each. (189a)**

SIMULTANEOUS LIQUIDATION. Article 104 refers to at least two marriages contracted prior to August 3, 1988 and involves a situation where the community properties of each marriage are

to be liquidated simultaneously. Determination of which of the inventoried properties, including their fruits and income, belongs to which community property regime depends upon the proofs presented by the contending claimants in accordance with the rules of evidence.

In case of doubt, the properties inventoried shall be divided between or among the different communities in proportion to the capital and duration of each. There can be five (5) scenarios that are foreseeable in case the situation is doubtful. Let us deal with only two marriages by way of illustration.

The *first scenario* is when the only information known are that the two marriages are equal in duration and the fair market value of the inventoried assets at the time of the liquidation is P15,000 but the assets in each marriage are unknown. In this case, since the duration of each marriage is equal, the P15,000 shall be divided equally by the heirs of each of the marriages. P7,500 for the heirs of the first marriage and the other P7,500 for the second marriage.

The *second scenario* is when the inventoried assets to be divided and the duration of each marriage are known but the actual assets in each particular marriage are unknown. Thus, if the only information are that the first marriage lasted for two (2) years and the second marriage lasted for three (3) years and the fair market value of the inventoried assets is P15,000 at the time of the liquidation, the first marriage will be prorated a share of two-fifths (2/5) of P15,000 which is equal to P6,000 and the second marriage will be prorated a share of three-fifths of P15,000 which is equivalent to P9,000. As a result, P6,000 shall go to the heirs of the first marriage while P9,000 will go to the heirs of the second marriage (See *Dael v. IAC*, 171 SCRA 524).

The *third scenario* is when the durations of each marriage are the same, the assets of the first and second marriage are both known and the assets to be inventoried are also known. In this case, since the durations are equal, they cancel each other and the prorating will be based on the amount of the known assets in each particular marriage. Thus, if the value of the first marriage's asset is P1,000 and that of the second marriage's asset is P2,000, the first marriage will be prorated a share of one-third (1/3) of P15,000 which is equivalent to P5,000 while the second marriage will be prorated a share of two-thirds (2/3) of P15,000 which is equal to P10,000. As a result, the heirs of the first marriage shall get P5,000 while the heirs of the second marriage shall get P10,000.

The *fourth scenario* is when the durations of each marriage are known but different, the assets of each marriage are equal and the amount of the assets to be inventoried at the time of liquidation is ascertained. Considering that the assets of each marriage are equal, they will cancel each other. Hence, the prorating will be based on the different durations *vis-á-vis* the inventoried assets at the time of liquidation. Hence, if each of the marriage has an identical P5,000 worth of assets each but the duration of the first marriage is two (2) years and the second marriage three (3) years, the first marriage will be prorated a share of two-fifths (2/5) of P15,000 which is equal to P6,000 and the second marriage will be prorated a share of three-fifths of P15,000 which is equivalent to P9,000. As a result, P6,000 shall go to the heirs of the first marriage while P9,000 will go to the heirs of the second marriage (See *Dael v. IAC*, 171 SCRA 524). The result is exactly the same as the second scenario.

The *fifth scenario* is when the durations of each marriage are known but different, the amounts of assets in each marriage are known, and also the amount of the assets to be inventoried at the time of liquidation is ascertained. Thus, if the first marriage is for two years and the second marriage is for three years, these respective durations will be related to the assets for each year and then prorated with the amount of the assets to be inventoried. Thus, if the inventoried assets to be liquidated amounts to P15,000 and if the duration of the first marriage is two years and that of the second marriage is three years and their assets are P1,000 and P2,000 respectively, the duration of each marriage shall be multiplied to the assets in that marriage and then prorated with the assets to be liquidated. Hence, the first marriage will be prorated a share of two-eights (2/8) of P15,000 which is equivalent to P3,750 while the second marriage will be prorated a share of six-eights (6/8) of P15,000 which is equivalent to P11,250. The heirs of the first marriage will get P3,750 while the heirs of the second marriage will get P11,250.

Under the present Family Code, it is expressly provided in Article 92(3) that excluded from the absolute community of a subsequent marriage is 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. Hence, the law protects the properties of the previous marriage from the possibility of mixing with the properties of the second marriage whether or not liquidation of the properties of the previous marriage has already been terminated by the time of the celebration of the subsequent marriage. If there are no legitimate descendants of

the previous marriage but there was likewise no liquidation of the properties of the previous marriage, the mandatory property regime in case the termination of the first marriage is by death will govern the property relationship of the subsequent marriage. Mixing up is likewise prevented. If the termination is by nullity or annulment, the property regime in the subsequent marriage is co-ownership because the subsequent marriage is void pursuant to Articles 52 and 53 of the Family Code. Similarly in co-ownership, the property acquired before the marriage will not be included in the co-ownership.

Chapter 4

CONJUGAL PARTNERSHIP OF GAINS

Section 1. *GENERAL PROVISIONS*

Article 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. (n)

The provisions of this Chapter shall also apply to conjugal partnerships of gains already established between the 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)

Article 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)

CONJUGAL PARTNERSHIP OF GAINS. In case the spouses agree upon the regime of conjugal partnership of gains, they shall place in a common fund the fruits of their separate properties and the income from their work or industry. Thus, it has been held that fruits of paraphernal properties, which is the term used under the Civil Code to describe the separate property of the wife, form part of the assets of the conjugal partnership and are therefore subject to the payment of the debts and expenses of the spouses, but not

to the payment of the personal obligation of the husband, unless it be proved that such obligations were productive of some benefit to the family (*Quitos v. Sheriff of Manila,* 64 Phil. 115). When the law likewise refers to those acquired by either or both of the spouses through their efforts or chance, the word "effort" connotes an activity or undertaking which may or may not be rewarded and the word "chance" includes activities like gambling or betting (See Minutes of the 173rd Joint Meeting of the Civil Code and Family Law committees held on February 21, 1987, page 15).

No unilateral declaration by one spouse can change the character of a conjugal property. The conjugal nature of a property is determined by law and not by the will of one of the spouses. The proof of acquisition of the property during the marriage suffices to render the statutory presumption of conjugality to attach (*Go v. Yamane*, G.R. No. 160762, May 3, 2006, 489 SCRA 107).

Upon the dissolution of the marriage, the net gains or benefits obtained shall be divided equally between the spouses unless they have stipulated another proportion in their marriage settlement.

In the event that prior to the effectivity of the Family Code on August 3, 1988, the spouses were already under the conjugal partnership of gains, that property regime shall continue after August 3, 1988 but it shall now be governed by the provisions on the conjugal partnership of gains under the Family Code unless vested rights have already been acquired under the Civil Code or any other law.

Article 107. The rules provided in Articles 88 and 89 shall also apply to conjugal partnership of gains. (n)

WHEN THE CONJUGAL PARTNERSHIP SHALL COMMENCE. Should the spouses agree upon the conjugal partnership of gains, its application shall commence at the precise moment when the marriage ceremony is celebrated. What is considered is the hour and not the date of the marriage.

PROHIBITION ON WAIVER. As in the case of the absolute community regime, no waiver of rights, interests, shares, and effects of the conjugal partnership of gains can be made during the marriage except upon judicial separation of property. The same rationale applies — to avoid undue pressure and influence exerted upon the weaker spouse who may be persuaded or coerced into parting with his or her interests in the conjugal partnership.

Article 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)

SPECIAL TYPE OF PARTNERSHIP. 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 the contract of partnership in all that are not in conflict with what is expressly determined in this Chapter or by the spouses in their marriage settlements. In case of conflict between the Civil Code on the rules on partnership and the provisions of the Family Code on the conjugal partnership of gains, the latter shall prevail (*Homeowners Savings & Loan Bank v. Dailo*, G.R. No. 153802, March 11, 2005, 453 SCRA 283). For instance, just like in a normal partnership governed by Title IX of the Civil Code, any stipulation which excludes the partners from any share of the profits and losses of the partnership is void (Article 1799 of the Civil Code). A partner is a co-owner with his other partner of specific partnership property (Article 1811 of the Civil Code). Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partner from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him or her of its property (Article 1807). Without the consent of the other partner, a partner cannot assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership, confess a judgment, enter into a compromise concerning a partnership claim or liability, submit a partnership claim or liability to arbitration and renounce a claim of the partnership. No act of a partner in contravention of a restriction on authority shall bind the partnership to person having knowledge of the restriction (See Article 1818 of the Civil Code). Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with authority of his co-partner, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act (Article 1822 of the Civil Code).

In *Carandang v. Heirs of Quirino A. De Guzman*, G.R. No. 160347, November 29, 2006, 508 SCRA 469, where the right of one spouse to bring an action was assailed on the ground that the other

spouse should have been made a party in the action, the Supreme Court said:

> Article 108 of the Family Code provides:
>
> > 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.
>
> This provision is practically the same as the Civil Code provision it superseded:
>
> > Art. 147. 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.
>
> In this connection, Article 1811 of the Civil Code provides that "[a] partner is a co-owner with the other partners of specific partnership property." Taken with the presumption of the conjugal nature of the funds used to finance the four checks used to pay for petitioners' stock subscriptions, and with the presumption that the credits themselves are part of conjugal funds, Article 1811 makes Quirino and Milagros de Guzman co-owners of the alleged credit.
>
> Being co-owners of the alleged credit, Quirino and Milagros de Guzman may separately bring an action for the recovery thereof. In the fairly recent cases of *Baloloy v. Hular* and *Adlawan v. Adlawan*, we held that, in a co-ownership, co-owners may bring actions for the recovery of co-owned property without the necessity of joining all the other co-owners as co-plaintiffs because the suit is presumed to have been filed for the benefit of his co-owners. In the latter case and in that of *De Guia v. Court of Appeals*, we also held that Article 487 of the Civil Code, which provides that any of the co-owners may bring an action for ejectment, covers all kinds of action for the recovery of possession.
>
> In sum, in suits to recover properties, all co-owners are real parties in interest. However, pursuant to Article 487 of the Civil Code and relevant jurisprudence, any one of them may bring an action, any kind of action, for the recovery of co-owned properties. Therefore, only one of the co-owners, namely the co-owner who filed the suit for the recovery of the co-owned property, is an indispensable party thereto. The other co-owners are not indispensable parties. They are not even necessary parties, for a complete relief can be accorded in the suit even

without their participation, since the suit is presumed to have been filed for the benefit of all co-owners.

We therefore hold that Milagros de Guzman is not an indispensable party in the action for the recovery of the allegedly loaned money to the spouses Carandang. As such, she need not have been impleaded in said suit, and dismissal of the suit is not warranted by her not being a party thereto.

Section 2. *EXCLUSIVE PROPERTY OF EACH SPOUSE*

Article 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;

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)

PROPERTIES BROUGHT INTO THE MARRIAGE. Under the conjugal partnership regime, all properties brought into the marriage by the contracting parties belong to each of them exclusively. The partnership does not produce the merger of the properties of each spouse (*National Bank v. Quintos*, 46 Phil. 370). Hence, they can exercise all rights of dominion or of ownership over these exclusive properties. The said properties cannot be encumbered, alienated nor disposed of by the other spouse without the consent of the owner-spouse. The nature of the property as separate property shall remain unless the contrary is proved by positive and convincing evidence. Thus, in *Del Mundo v. Court of Appeals*, 97 SCRA 373, the Supreme Court observed and ruled:

> The testimony of Marcela Bernal, which "was wholly corroborated by Simplicio Dantes and Valentina San Andres" x x x, anent the sale of the questioned property to Isidra in 1920 or 1921 when the latter was then single, it having been admitted that Agripino married Isidra only in February 1927, appears to be unrebutted by private respondents. They place

reliance mainly on the deed of sale executed by Simplicio Dantes and his wife in favor of Isidra de la Cruz, when the latter was already married and where in said deed, no mention was made about the sale by the original owners to Isidra. They lose sight of the fact, however, that this deed was executed only for the purpose of recognizing or confirming the verbal sale made by the original owners to Isidra in 1920 or 1921, long before her marriage to Agripino on February 1927. This is the very reason why Agripino had to sign in said deed of sale, declaring that, "the money with which Lot No. 1189-C was purchased from the spouses Simplicio Dantes and Emilia Rivera is her own money, and does not belong to our conjugal property, and therefore, the said Lot No. 1189-C is hers, Isidra's property." The declaration aforequoted is of the highest evidentiary value being one against the declarant's interest. It may well be presumed that Agripino would not have made the said declaration unless he believed the same to be true, prejudicial as it is to his children's interests as his heirs with his first wife. Good faith is always to be presumed and a person always takes ordinary care of his concerns. Against these presumptions, the contrary must be clearly established and proven by sufficient evidence, which is clearly wanting in the instant case. No explanation was given why the aforesaid declaration should not be given due weight. It is significant to note that the same was made on 28 February 1941 or more than six (6) years prior to Agripino's death on 23 December 1947 without his having repudiated the same. Neither did the private respondents, as heirs, question said declaration. Agripino was, therefore, clearly in estoppel to deny his declaration. As such, he can lay no claim nor interest in the questioned property, nor can the private respondents do so, for the person from whom they claim to have succeeded to the property had no title thereto. Estoppel is effective even on successors-in-interest.

Moreover, when the question is exclusively between husband and wife, or between one of them and the heirs of the other, the admission or acknowledgment of one person that the money used to purchase the property came from the other spouse, is evidence against the party making the admission or his heirs. Likewise, where the husband has been a party to an act of purchase of immovable property in the name of his wife, which recited that the purchase was made with the paraphernal property, neither he nor his heirs can be permitted to go behind the deed and contest the wife's title to the property by claiming that it is conjugal. Since the property is the paraphernal property of Isidra, the same having been acquired by her prior to her marriage with Agripino, and having been purchased with

> her exclusive or private funds, any declaration to the contrary made by her, as well as that of her child, cannot prevail nor change the character of the property in question. The extra-judicial partition was evidently an expedient only to facilitate the sale without giving rise to any question as to the legality of the transmission of the property to Isidra and his daughter, as the death of Agripino Alvarez may occasion, for the better protection of the vendee, the petitioner herein. If the property were conjugal, the private respondents would have been made parties to the extra-judicial partition and made signatories thereto.

Also, if the property is asserted as separate property and a title has been issued under the name of the one asserting it and acts have been undertaken clearly indicating that the property is separately owned without prompt opposition from the adverse party who knew of the acts of dominion of those asserting the separate nature of the property, they cannot belatedly claim the conjugal nature of the disputed property. Thus, in a case the Supreme Court stated:

> Pragmacio and Maximo Vitug are now estopped from questioning the title of Donata Montemayor to the said properties. They never raised the conjugal nature of the property nor took issue as to the ownership of their mother, Donata Montemayor, over the same. Indeed, private respondents were among the defendants in said two cases wherein in their answers to the complaint, they asserted that the properties in question are paraphernal properties belonging exclusively to Donata Montemayor and are not conjugal in nature. Thus, they leased the properties from their mother Donata Montemayor for many years knowing her to be the owner. They were in possession of the property for a long time and they knew that the same were mortgaged by their mother to the PNB and thereafter were sold at public auction, but they did not do anything. It is only after 17 years that they remembered to assert their rights. Certainly, they are guilty of laches (*PNB v. Court of Appeals*, 153 SCRA 435).

Also, in the event that the property was purchased by a spouse previous to the marriage and it was only after the marriage that the said property was registered under the name of the owner-spouse but together with the other spouse as co-owner, such property is still the exclusive property of the spouse who bought it by his or her exclusive funds prior to the marriage and the registration after the marriage of the certificate of title under the co-ownership of the spouses to both spouse only creates a trust, thereby necessitating

the restoration to the real owner-spouse of the subject property upon liquidation (*Plata v. Yatco*, 120 Phil. 1515).

Where the title under consideration is a free patent which is granted only to occupants for their continued occupation and cultivation, the Supreme Court held that, had the land been acquired by virtue of the joint efforts of the husband and the wife, the patent should have so indicated. But it is granted to the wife only. It is thus presumed that as the husband is not joined as a co-owner, the land must have been acquired thru the occupation of the wife alone at the time when she was yet unmarried. The land was therefore considered as the wife's exclusive property (*Penanra v. Register of Deeds of Rizal,* 10 SCRA 393).

These exclusive properties brought into the marriage shall be principally used for the payment of personal debts, not redounding to the benefit of the family, contracted by the owner-spouse before the marriage that of fines and indemnities imposed upon him or her, as well as the support of illegitimate children of the owner-spouse. Also, in the event that the assets of the conjugal partnership would be insufficient to pay the obligations of the partnership at the time of the liquidation of the same, the spouses shall be solidarily liable for the unpaid balance with their separate properties in accordance with the provision of paragraph (2) of Article 121.

PROPERTY ACQUIRED BY GRATUITOUS TITLE. Anything received by each spouse from any source by way of an act of liberality of the giver, such as a donation or a gift, shall belong exclusively to the spouse-recipient and will not belong to the conjugal partnership property. These include moderate gifts given by one spouse to another during family occasions. Also, an honorarium may be included as property acquired by gratuitous title as it has been defined as something given not as a matter of obligation but in appreciation for services rendered, a voluntary donation in consideration of services which admit no compensation in money (*Santiago v. Commission on Audit,* G.R. No. 92284, July 12, 1991). Also, in one case it was held that, if the property were acquired by lucrative (or gratuitous) title such as by way of succession, the said property is separate property regardless of whether it was acquired before or after the marriage (*Villanueva v. IAC,* 192 SCRA 21; *Tan v. Court of Appeals*, 83 SCAD 198, 273 SCRA 228).

It must be observed that, in the conjugal partnership property regime, the income and the fruits of the property acquired by gratuitous title shall be considered conjugal. The law does not

include fruits and income of property received by gratuitous title as separate property. This is different from the absolute community of property regime where property acquired during the marriage by gratuitous title by either spouse, and the fruits as well as the income thereof, if any, shall be considered as exclusive property unless it is expressly provided by the donor, testator or grantor that they shall form part of the community property (Article 92[a]).

REDEMPTION, BARTER AND EXCHANGE. In case of redemption, the property shall belong to the spouse who has the right to redeem regardless of whether or not he or she uses personal funds. However, when conjugal funds are used to effect the redemption, the spouse making the redemption through conjugal fund shall be liable to the conjugal partnership for the reimbursement of the amount used to redeem his or her exclusive property (*Santos v. Bartolome*, 44 Phil. 76). The conjugal partnership shall have a lien for the amount paid by it (See *Alvarez v. Espiritu,* 14 SCRA 892). If however there is no right of redemption belonging to either of the spouses, whoever buys or procures something using his or her own funds shall exclusively own what was purchased.

The right of redemption is not the same as the right of a successor in interest in cases of execution of judgment. Thus, in a case where four parcels of land owned by the conjugal property were executed upon and sold to answer for the indemnity due the heirs of a murder victim and thereafter two of the said parcels of land were redeemed by the convict's wife using money given to her by her father and the sheriff having executed in her favor the corresponding deed of repurchase, the Supreme Court held that the two parcels of land so redeemed by the wife cannot anymore be the subject of another execution to satisfy the balance of the indemnity because the wife did not acquire the property on behalf of the husband but she acquired it by right of redemption as successor-in-interest. The property in question has, therefore, become the exclusive property of the wife. At that point, it has ceased to be the property of the judgment debtor. It can no longer therefore be the subject of execution under a judgment exclusively affecting the personal liability of the latter (*Rosete v. Provincial Sheriff of Zambales*, 95 Phil. 560).

It must be important to emphasize also that in the absence of proof that the right of redemption pertained to any of the spouses, the property involved, or the rights arising therefrom, must be presumed, therefore, to form part of the conjugal partnership (*Zulueta v. Pan American World Airways, Inc.,* 49 SCRA 1).

Similarly, property acquired by exchange made by one spouse using his or her exclusive property shall remain the separate property of such spouse. Barter is limited to goods (See Minutes of the 166th Joint Meeting of the Civil Code and Family Law committees held on January 3, 1987, page 16). However, if the separate property of a spouse is used as part of the purchase price of a new property in addition to the conjugal funds spent for the said purchase, the new property shall be considered conjugal. Thus, in *Abella de Diaz v. Erlander S. Galinger, Inc.,* 59 Phil. 326, the Supreme Court held:

> While it may be true that at the time of their marriage, the wife had an automobile, that automobile has long passed out of existence, and the mere fact that each successive car was turned in as part of the purchase price of a new car, would not make every automobile in the future paraphernal, but on the contrary it becomes conjugal and responsible for the debts of the partnership.

Significantly, this provision on the right of redemption, barter and exchange does not have any counterpart provision in the absolute community of property rules, specifically under Article 92.

PROPERTY PURCHASED WITH THE EXCLUSIVE MONEY OF EITHER SPOUSE. Property purchased using the exclusive money of one spouse shall belong to such spouse. However, when property is purchased using the exclusive money of one spouse but the title is taken in the spouses' joint names, the circumstances shall determine whether it shall result in a gift from the spouse whose money was used to effect the purchase, or a trust in favor of such spouse. Conspicuously, Article 109(4) does not have any counterpart provision in Article 92 in relation to the exclusion from the absolute community of property.

Article 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)

ADMINISTRATION OF EXCLUSIVE PROPERTIES. Each spouse shall retain ownership, administration, possession and enjoyment of his or her exclusive properties. Administration shall include entering into contracts regarding the use of the property, engaging in litigation, and the collection of fruits, profits, and income arising from the separate property. The owner-spouse may, during the marriage, transfer the administration of his or her property to the other spouse provided the proper recording in the civil registry is made. Even when there is a transfer of administration, the owner-spouse may still donate, encumber, or otherwise alienate the property. He or she may also transfer administration to a stranger, even without the consent of the other spouse.

Thus, in *Naguit v. Court of Appeals*, 347 SCRA 60, where the exclusive property of the wife was sold upon execution by the sheriff for the satisfaction of a particular court decision finding her husband liable for his personal obligation, the Supreme Court ruled that the wife can file a separate action to annul the sale. In applying the rules on execution of property under the Rules of Court allowing third persons to file a proper action to vindicate their claims if their property was wrongfully sold to satisfy a judgment debt of another person, the Supreme Court ruled that the wife, whose exclusive property was wrongfully levied upon, can be considered a third person and "is deemed a stranger to the action wherein the writ of execution was issued and is therefore justified in bringing an independent action to vindicate her right of ownership over the subject property."

Article 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)

Article 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)

APPLICABILITY. Article 111 is rendered superfluous by Article 234, as amended by Republic Act 6908, which lowers the majority age to eighteen years which is also the age of emancipation and the age when a person acquires the legal capacity to enter

into a contract of marriage. Also, Article 236 of the Family Code provides that 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 law in special cases. Thus, Article 111 should merely state that "either" spouse may mortgage, encumber, alienate, or otherwise dispose of his or her exclusive property.

TERMINATION OF ADMINISTRATION. Considering that an exclusive property does not belong to the conjugal partnership, any spouse who alienates his or her exclusive separate property will terminate the administration of the other spouse over such property and the proceeds of the alienation shall be turned over to the owner-spouse.

Under Article 127, in cases where the spouses are separated in fact, the spouse present shall, upon petition in a summary proceeding, be given 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 in the event that the separate properties of the spouses are solidarily held liable for the obligation of the conjugal partnership property in the absence of sufficient conjugal partnership property to pay off such conjugal debts. The judicial authority given to the present spouse to administer the property constitutes a limitation to Article 112. The owner-spouse, who is a party to the summary proceeding, cannot revoke the judicially approved administration of the present spouse over his or her specific property by the mere expediency of alienating such property. If he or she wants to alienate such property, the owner-spouse must get the consent of the administrator-spouse or, if the latter does not want to give his or her consent, the approval of the court. This restriction is necessary so that the solidary nature attached to the separate properties of the spouse will be better served and effected. Even if the administrator-spouse or the court gives the approval to the sale, the administrator spouse or the court can ask or order, as the case may be, that a portion of the proceeds thereof be earmarked as payment of the owner-spouse's share in the solidary liability.

Article 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, with-

out prejudice to the right of accretion when proper. (150a)

Article 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)

PROPERTY DONATED OR LEFT BY WILL TO SPOUSES. A donor or testator may donate or provide in a will property to the spouses jointly. The donor or testator may likewise designate the respective determinate share of each of the spouses and, in the absence thereof, share and share alike. The property of the donation will then be considered separate property of the spouses.

ACCRETION IN CASE OF DONATION. Accretion is the incorporation or addition of property to another property. As a general rule in a joint donation, one could not accept independently of his co-donee, for there is no right of accretion unless expressly so provided (*Genato v. De Lorenzo*, 23 SCRA 618). One of the exceptions is when the joint donation is in favor of husband and wife. Article 753 of the Civil Code provides:

> Article 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 husband and wife jointly, between whom there shall be a right of accretion, if the contrary has not been provided by the donor.

Thus, if a valid donation has been given to the husband and wife jointly where the donor provided that one-fourth (1/4) of the property will go to the wife and three-fourth (3/4) will go to the husband, each of them shall own such portions given as their respective separate properties. However, if the wife does not accept her part of the donation, accretion will set in favor of the husband. In this case, the one-fourth (1/4) donation that should go to the wife will go to the husband. Hence, the husband will own all of the property donated as his separate property. If however the donor provides in the deed of donation that no right of accretion shall be available to the husband, the latter will only get his original three-fourth (3/4) share in the

donation. If there is no designation of determinate shares, the same rule will apply. However, if the designation is not of determinate shares but of determinate properties like a house or a car, accretion will not apply.

ACCRETION IN CASE OF PROPERTY LEFT BY WILL. In case the property is left by will and for accretion to apply, it shall be necessary that the husband and the wife should be called to the same inheritance, or to the same portion thereof, *pro indiviso* (not divided); and that one of the spouses thus called dies before the testator or renounces the inheritance, or be incapacitated to receive it (see Article 1016 of the Civil Code). The words "one-half each" or "in equal shares" or any other which, though designating an aliquot part, do not identify it by such description as shall make each heir the exclusive owner of determinate property, shall not exclude the right of accretion (Article 1017 of the Civil Code). Such words will not mean that the inheritance is not *pro indiviso*. The spouse to whom the portion goes by right of accretion takes it in the same proportion that he or she inherits (See Article 1019 of the Civil Code). The spouse to whom the inheritance accrues shall succeed to all the rights and obligations which the heir who renounced or could not receive it would have had (Article 1020 of the Civil Code).

Thus, if the husband and the wife were validly given a property in a will which provided that one-fourth (1/4) of the property will go to the wife and three-fourth (3/4) will go to the husband, they shall own their respective shares separately. The designation of this proportionate sharing does not make the properties specific. The inheritance is still *pro indiviso.* However, if the husband dies before the testator, or renounces the inheritance or is incapacitated to receive it, the wife will get the share of the husband by the right of accretion. On the other hand, if the testator gives to the husband and the wife the school buildings which he owns providing that the buildings which are located in Manila shall go to the husband while the building in Cebu shall go to the wife, the right of accretion will not apply because the inheritance is not *pro indiviso.*

PAYMENT USING CONJUGAL FUNDS. If conjugal funds are used to pay the obligations attached to an onerous donation, the donee-spouse shall reimburse the conjugal partnership but the property remains to be his or her exclusive property. This is but proper because the donated property is separate property of the donee-spouse. It must be noted, however, that taxes and expenses for mere preservation made during the marriage upon the separate

property of either spouse shall be chargeable to the conjugal partnership of gains (Article 121[5]).

Article 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)

NATURE OF PENSIONS, ANNUITIES, GRATUITIES. Whether retirement benefits, pensions, and annuities are conjugal or separate will depend upon how it was obtained and the circumstances of the case.

Generally, a gratuity is an act of pure liberality. It is acquired by lucrative title like a donation or a gift. In the case of *Mendoza v. Dizon,* 77 Phil. 533, the Supreme Court held that any amount given by the government because of previous work as provincial auditor is a gratuity and should, therefore, be considered as separate property. However, an annuity is not a gratuity if the recipient thereof is entitled to it as a matter of right. Thus, where a government teacher complied with all the requirements of the law which provides that teachers, principals and supervisors whose positions are not clerical or casual and who, at the time of their retirement, have rendered twenty-five years of government service shall be entitled to a retirement on an annuity, such government teacher is entitled as a matter of right to the said annuity. The annuity, therefore, is not a gratuity (*Heirs of Berganon v. Imperial*, 130 Phil. 101) and is, therefore, conjugal.

Pensions are in the nature of compensation for services previously rendered for which full and adequate compensation was not received at the time of the rendition of the service. It is, in effect, pay withheld to induce long continued and faithful service, and the public benefit accrues in two ways: by encouraging competent employees to remain in the service, and by retiring from the public service those who have become incapacitated from performing the duties as well as they might be performed by younger or more vigorous men. Such pensions generally are not considered donations or gratuities (*Abad Santos v. Auditor General*, 79 Phil. 176). Also, in *Eclar v. Eclar* (40 O.G. 12th Supp No. 18, 86), it was ruled that when there is no liberality on the part of the government, and the award is composed of mere accumulated savings or deductions from money earned during the marriage, this would be a pension and

thus considered conjugal (cited in *Bank of the Philippine Islands v. Posadas*, 56 Phil. 215).

In *Martinez v. Moran*, 11 Tex. Civ. A 509, where a husband took out an endowment life insurance policy on his life payable as directed by will and the premiums thereon were paid by communal funds and, by his will made the proceeds payable to his own estate, it was held that the proceeds were community estate, one-half of which belonged to the wife (cited in *Bank of the Philippine Islands v. Posadas,* 56 Phil. 215). In *In re Stan's Estate*, Myr. Prob (Cal.), 5, where a testator, after marriage took out an insurance policy on which he paid the premiums from his salary, it was held that the insurance money was community property, to one-half of which the wife was entitled as survivor.

In *Bank of the Philippine Islands v. Posadas,* 56 Phil. 215, it was stated that, even if the life insurance taken out by the deceased person is made payable to the deceased estate, the proceeds of the said insurance shall still be considered conjugal property if the life insurance policy is paid out of conjugal funds. However, if the insurance policy were paid partly by conjugal funds and partly by separate funds, the proceeds of the insurance shall be owned by the conjugal partnership and the separate property proportionately in accordance with the amount of contribution. Under the Family Code, for a property to become the separate property of one of the spouses, it must be exclusively paid out from the separate funds of the said spouse (Article 109[4]). Hence, if the situation in the Bank of the Philippine Islands case occurs under the regime of the Family Code, the proceeds shall be considered conjugal with the proper reimbursement to the spouse who paid using his or her separate property.

Likewise, in the case of *Berciles v. GSIS*, 128 SCRA 53, it was held that the retirement premiums totaling P9,700 are conjugal, there being no proof that the premiums were paid from the exclusive funds of the deceased spouse.

It must be pointed out, however, that if a beneficiary is named in the life insurance policy, the proceeds of the same are paid to the said beneficiary. In *Vda. De Consuegra v. GSIS,* 37 SCRA 315, it was held that the GSIS retirement insurance is primarily intended for the benefit of the employee — to provide for his old age, or incapacity, after rendering service in the government for a required number of years. If the employee reaches the age of retirement, he or she gets the retirement benefits even to the exclusion of the beneficiary or

beneficiaries named in his application for retirement insurance. The beneficiary of the retirement insurance can only claim the proceeds of the retirement insurance if the employee dies before retirement. If the employee failed or overlooked to state the beneficiary of his retirement insurance, the retirement benefits will accrue to his estate and will be given to his legal heirs in accordance with law, as in the case of a life insurance if no beneficiary is named in the insurance policy.

Section 3. *CONJUGAL PARTNERSHIP PROPERTY*

Article 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)

WHEN PRESUMPTION IS APPLICABLE. In the case of *Jocson v. Court of Appeals*, 170 SCRA 333, the court held that the party who invokes this presumption must first prove that the property in controversy was acquired during the marriage. In other words, proof of acquisition during the coverture is a condition *sine qua non* for the operation of the presumption in favor of conjugal ownership. The Court cited the decision in the case of *Maramba v. Lozano, et al.,* L-21533, June 29, 1967, 20 SCRA 474, that if "there is no showing as to when the property in question was acquired xxx the fact that the title is in the wife's name alone is determinative." Likewise, it has been held that in an inscription in a Torrens Title stating "Martin Lacerna married to Epifania Magallon," the phrase "married to Epifania Magallon" is merely descriptive of civil status and does not necessarily prove that the land is conjugal (*Magallon v. Mantejo*, 146 SCRA 282; see also *Heirs of Jugalbot v. Court of Appeals*, G.R. No. 170346, March 12, 2007, 518 SCRA 203). Registration of the property is not also proof of acquisition because the property could have been acquired while the owner was single and registered only after the marriage ceremony (*Metropolitan Bank and Trust Company v. Tan,* G.R. No. 163712, November 30, 2006, 509 SCRA 383). For as long as acquisition is proven during the marriage, the presumption will apply even when the manner in which the properties were acquired does not appear (*Tan v. Court of Appeals*, 273 SCRA 229). In *Laperal v. Katigbak*, 10 SCRA 493, the Supreme Court, in justifying that the conjugal presumption has been rebutted, said:

> In the case before Us now for review, the deed to the disputed land is in the name of the wife. At the time of its purchase, the property was already of such substantial value as admittedly, the husband, by himself could not have afforded to buy, considering that his singular source of income then was his P200.00 a month salary from a Manila Bank. As in the *Casiano* case (30 Phil. 135), the defendant herein testified, and was believed by the trial court, that the purchase price was furnished by her mother so she could buy the property for herself. Furthermore, it was established during the trial that it was a practice of defendant's parents to so provide their children with money to purchase realties for themselves.

In case where the property is registered in the names of both spouses, the presumption that it is conjugal arises. However, in such instances, the property may be shown to be really of either spouse, though recorded in the names of both. The underlying reason is the same in all cases, which is the confidential relation between husband and wife. Because of the feelings of trust existing between the spouses, certificates of title are often secured in the name of both, or either, regardless of the true ownership of the property, and regardless of the source of the purchase money. It is thus but fair that on liquidation of the partnership, the trust should be recognized and enforced, so that the real ownership of the property may be established. The principle that a trustee who takes a Torrens title in his name cannot repudiate the trust by relying on the registration is one of the well-known limitations upon the finality of a decree. x x x A trust, deriving its strength from confidence, which runs through with the woof and warf of the social fabric, does not lose that character on the plea that a Torrens certificate of title is conclusive. It is meet and seemly that this should be so, for any rule that permits the violation of a fiduciary duty would be a reproach to any legal system. These observations apply with peculiar force to the relations between husband and wife. In the normal marriage, the spouses trust each other so implicitly that they attach little or no importance to what appears in legal documents, fully and unreservedly believing that no technicality would be availed to claim what in very truth pertains to one or the other. Things would indeed come to a sorry pass if the jurisprudence of this country should harbor any theory which would impair this intimate reliance, this unquestioning loyalty, this befitting faith between husband and wife (*In re Estate of Narciso A. Padilla*, 74 Phil. 377).

For as long as it is proven that the property has been acquired during the marriage, the presumption applies even though the

spouses are living separately (*Wong v. IAC*, 200 SCRA 792). It has likewise been held that evidence must be clear to overcome the presumption. Also, it has been held that:

> the presumption of the conjugal nature of properties subsists in the absence of clear, satisfactory and convincing evidence to overcome said presumption or to prove that the properties are exclusively owned by Romarico. While there is proof that Romarico acquired the properties with money he had borrowed from an officemate, it is unclear where he obtained the money to repay the loan. If he paid it out of his salaries, then the money is part of the conjugal assets and not exclusively his. Proof on this matter is of paramount importance considering that in the determination of the nature of the property acquired by a person during the coverture, the controlling factor is the source of the money utilized in the purchase (*Wong v. IAC,* 200 SCRA 792).

Also, in a case where the husband bought property in installments and thereafter left his family to bigamously marry another woman and where the said husband had the property registered under the name of the said other woman after full payment, it was held that the property is the conjugal partnership of the legitimate first marriage on the strength of the provisions of the New Civil Code and the old Civil Code that "all property of the marriage is presumed to belong to the conjugal partnership, unless it be proved that it pertains exclusively to the husband or the wife" and which presumption had not been convincingly rebutted (*Belcodero v. Court of Appeals*, 45 SCAD 400, 227 SCRA 303).

However, in *Plata v. Yatco*, 12 SCRA 718, it was held that the conveyance of the property of the wife to a third person and its reconveyance to her several months afterwards, does not transform it to conjugal property, in the absence of proof that the money paid in the reconveyance came from conjugal funds.

After proof of acquisition during the marriage has been shown, the presumption of conjugality attaches even if the property is registered in the name of one or both of the spouses (*Villanueva v. Court of Appeals*, G.R. No. 143286, April 14, 2004, 427 SCRA 439). Proofs consisting of tax declaration in the name of one of the spouses obtained during the marriage are not evidence of acquisition, and hence are not sufficient to give rise to the presumption that the property is conjugal (*Pintiano-Anno v. Anno,* G.R. No. 163743, January 27, 2006, 480 SCRA 419).

Article 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)

ACQUISITION BY ONEROUS TITLE FROM COMMON FUND. If that which is acquired by right of redemption or by exchange with other property belonging only to one of the spouses and that which is purchased with exclusive money of the wife or of the husband belong exclusively to such wife or husband, it follows necessarily that that which is acquired with money of the conjugal partnership belongs thereto or forms part thereof (*Zulueta v. Pan American World Airways, Inc.,* 49 SCRA 1). This is true even if the acquisition be for the partnership, or for only one of the spouses.

Damages granted by the courts in favor of any of the spouses arising out of a contract solely financed by the conjugal partnership of gains and consequently unduly breached by a third party belongs to the conjugal partnership of gains. Thus, in *Zulueta v. Pan American World Airways, Inc.*, 49 SCRA 1, the Supreme Court said:

> In the present case, the contract of carriage was concededly entered into, and the damages claimed by the plaintiffs were incurred, during the marriage. Hence, the rights accruing from said contract, including those resulting from breach thereof by the defendant, are presumed to belong to the conjugal partnership of Mr. and Mrs. Zulueta. The fact that such breach of contract was coupled also with quasi-delict constitutes an aggravating circumstance and cannot possibly have the effect of depriving the conjugal partnership of such rights.

Also, damages arising out of the illegal detention of the exclusive property of any of the spouses shall pertain to the conjugal partnership if such detention deprived the partnership of the use and earnings of the same (*Bismorte v. Aldecoa,* 17 Phil. 480).

However, in cases of damages awarded to one of the spouses as a result of physical injuries inflicted by a third party, said damages exclusively belong to the said injured spouse. Thus, in *Lilius v. Manila Railroad Co.*, it was held that the "patrimonial and moral damages" awarded to a young and beautiful woman by reason of a scar in consequence of an injury resulting from an automobile accident — which disfigured her face and fractured her left leg, as well as caused a permanent deformity, are personal to her (*Lilius v. Manila Railroad Co.,* 62 Phil. 56, 64-65, cited in *Zulueta v. Pan American World Airways, Inc.,* 49 SCRA 1).

PROPERTY ACQUIRED THROUGH INDUSTRY, LABOR AND PROFESSION AND THROUGH OCCUPATION. The law also provides that anything obtained from the labor, industry, work and profession of either or both of the spouses is conjugal. It likewise provides that those acquired through occupation such as fishing or hunting are conjugal. During the committee deliberations on the Family Code, the need for separating the two subparagraphs was explained when

> Justice Puno added that in the case of industry or work, one is sure to earn, while in fishing and hunting, there is the element of chance since one can be in the sea or forest for a long time without catching/hunting anything. In other words, the work is not always commensurate with the result (Minutes of the Joint Meeting of the Civil Code Revision and Family Law committees held on December 15, 1984, pages 14 and 18).

FRUITS AND EARNINGS FROM PROPERTIES. Also, fruits of the common property and net fruits of the exclusive property belong to the conjugal partnership. "Net fruits" are referred to because the

fruits of the separate property will be applied first to the expenses of administration of the said separate property and the remaining balance of the said fruits which constitute the net fruits shall be considered conjugal (See Minutes of the 174th Joint Meeting of the Civil Code and Family Law committees held on February 28, 1987, page 13).

HIDDEN TREASURE. 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 is conjugal partnership property. Hidden treasure contemplates artifacts or objects which have undergone transformation from their original raw state, such as earrings, necklace, bracelets and the like. Article 439 of the Civil Code provides that "by treasure is understood, for legal purposes, any hidden and unknown deposit of money, jewelry, or other precious objects, the lawful ownership of which does not appear." Article 519 of the Civil Code, on the other hand, provides that "mining claims and rights and other matters concerning minerals and mineral lands are governed by special laws." Gold nuggets, precious stones in their raw state, oil and the like are therefore not treasures.

LIVESTOCK. Livestock existing upon the dissolution of the partnership in excess of the number of each kind brought to the marriage by either spouse shall be conjugal. With respect to livestock, Justice Puno made a very interesting but relevant comment during the committee deliberations on the Family Code, thus:

> Justice Puno explained that in case there are 40 cows and, as a result of marriage, they become 60 cows, 20 will be the conjugal partnership property. On the assumption that the original stock can no longer be identified, which of the cows will constitute the 20? In reply to his own question, Justice Puno explained that they have to distinguish between the debtor and the creditor, the debtor being the conjugal partnership that will deliver to the original spouses 40 cows. They now apply the general rule that the debtor cannot offer the worst, while the creditor cannot demand the best. Justice Puno asked if they should provide for this. Prof. Baviera opined that they should no longer go into detail that would be taken up in commentaries, which the committee approved (Minutes of the Joint Meeting of the Civil Code Revision and Family Law committees held on December 15, 1984, page 15).

CHANCE. Likewise, those obtained through chance are considered conjugal. Losses from gambling or betting shall be borne

exclusively by the loser-spouse. Article 117(7) implies a situation where the spouse in engaging in such activity has parted with some valuable consideration. Hence, if a spouse is given by a third person a sweepstake ticket without consideration and such sweepstake ticket won P1,000,000.00, such winning shall be considered income and, therefore, shall belong to the conjugal partnership of gains. While income is not defined in the Family Code, the National Internal Revenue Code defines "gross income" of a person as including prize and winnings derived from whatever source (Section 32[a][9] of Republic Act No. 8424 as amended, otherwise known as the National Internal Revenue Code of 1997).

> **Article 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)**

INSTALLMENT PURCHASES. Article 118 contemplates a situation when installment was initiated prior to the marriage and ended during the marriage. When property is bought on installment basis partly by exclusive funds of either or both spouses and partly by conjugal funds, the ownership of the property is determined by the time when the title is vested. If ownership is vested before the marriage, it belongs to the class of properties exempted from the conjugal partnership under paragraph 1 of Article 109 as property brought to the marriage by the spouses. If, however, ownership is vested upon the buyer-spouse after the marriage ceremony, it shall form part of the conjugal partnership. In this instance, the spouse who contracted the purchase shall have the right to be reimbursed by the partnership.

Thus, it has been held that friar lands bought by a woman before her marriage were her paraphernal or separate properties, although some of the installments on their price were paid for with the conjugal funds during their marriage. The conjugal funds would only be entitled to reimbursement for the expense (*Lorenzo v. Nicolas*, 91 Phil. 686). This is so because:

> under the Friar Lands Act No. 1120, the equitable and beneficial title to the land passes to the purchaser the moment the first installment is paid and a certificate of sale is issued. The reservation of the title in favor of the government, which refers to the bare, naked title, is made merely for the protection of its interest so that the lot may not be disposed of by the purchaser before the price is paid in full. But outside of this protection, the government retains no right as an owner (*Alvarez v. Espiritu*, 14 SCRA 892, citing *Director of Lands v. Rizal*, 87 Phil. 806).

The law was properly applied in the case of *Jovellanos v. Court of Appeals*, 210 SCRA 126, where, in a contract to sell or conditional sale of a parcel of land by installment wherein ownership to the said property shall vest only upon the last installment, the Supreme Court held that, since the last installment was made during the valid second marriage by conjugal funds of the said marriage, the property rightfully belongs to the conjugal partnership of the second marriage even though, during the first marriage, the property was paid partly by conjugal funds of the said first marriage and partly by exclusive funds of the husband. The Supreme Court also stated that, in accordance with Article 118, the proper reimbursements should be done.

The law does not provide for a situation where the property was bought during the marriage and the purchase was funded partly by the exclusive money of either or both of the spouses and partly by conjugal funds. Significantly, however, in the case of *Castillo, Jr. v. Pasco,* 11 SCRA 102, where the Supreme Court decided a situation of this nature, it was equitably decided that:

> As the litigated fishpond was purchased partly with paraphernal funds and partly with money of the conjugal partnership, justice requires that the property be held to belong to both patrimonies in common, in proportion to the contributions of each to the total purchase price of P6,000. An undivided one-sixth (1/6) should be deemed paraphernal, and the remaining five-sixths (5/6) held property of the conjugal partnership of spouses Marcelo Castillo and Macaria Pasco (9 Manresa, Com. al Codigo Civil [5th Ed.], p. 549).
>
> *"Puesto que la ley atiende, no a la persona en cuyo nombre o a favor del cual se realiza la compra, sino a la procedencia del dinero, considerando el hecho como una verdadera susticion o conversion del dinero en otros objetos, debemos deducir que cuando una finca, por ejemplo, se compra con dinero del marido y de la mujer, o de la mujer y de la sociedad, pertenece a aquellos*

de quienes procede el precio, y en la proporcion entregada por cada cual. Si pues marido y mujer compran una casa, entregando el primero de su capital propio 10,000 pesetas, y la segunda 5,000, la casa pertenecera a los dos conyuges pro indiviso, en la proporcion de los terceras partes al marido y una tercera a la mujer." (Manresa, *op. cit.*)

The applicability of the above jurisprudence may be questioned right now in view of Article 118. Clearly, the reason for Article 118 is to give life to the state's public policy of, as much as possible, creating a unified ownership of properties between husband and wife during the time of the marriage. This objective is clearly the essential ideal consequence of the permanent union established by marriage between man and woman. While Article 118 contemplates a situation where the property was bought prior to the marriage, the public policy sought to be achieved by the said provision must, with more reason, necessarily be carried into effect also in cases where property was purchased at the time when the parties are already and legally married. Hence, if this is so, properties bought during marriage partly by conjugal funds and partly by exclusive funds of either or both of the spouses, must pertain to the conjugal partnership of gains subject to the same reimbursement scheme under the last sentence of Article 118. This view is supported by Article 109(4) which provides that property purchased with the exclusive money of the wife or of the husband is separate property. Hence, if it is bought partly by conjugal funds and partly by separate funds, it cannot be said to be exclusively bought by the exclusive money of either of the spouses and, therefore, the property so bought should be considered conjugal.

REIMBURSEMENT UPON LIQUIDATION OF PARTNERSHIP. The reason why the reimbursement should be made upon liquidation was discussed during the meeting of the Civil Code and Family Relations committees, thus:

> Justice Caguioa, however, remarked that there can be no absolute sharing until after liquidation. It was clarified that if there is voluntary reimbursement even before an issue arises, it will be held in abeyance since it is only upon liquidation of the partnership that the share of each spouse will be known (Minutes of the 175th Joint Meeting of the Civil Code and Family Law committees held on March 7, 1987, page 2).

Article 119. Whenever an amount or credit payable within a period of time belongs 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)

PAYMENT OF CREDIT IN FAVOR OF SPOUSE. In a situation where one of the spouses has in his favor a credit payable in installments or, in any case, a credit which will be fully paid during the marriage, all payments made on the principal during that marriage shall belong exclusively to the spouse who owns the credit. Interest on the principal falling due during marriage shall belong to the conjugal partnership, as interest is considered a fruit derived from a particular property and is, therefore, included under Article 117(3). During the deliberation of the Civil Code and Family Law committees with respect to Article 119:

> Judge Diy proposed that the above article be eliminated since it is obvious that interests which are civil fruits, are always conjugal anyway. Justice Caguioa, however, opined that the provision should be retained to avoid a question that may arise in case of a credit payable before the marriage, wherein some payments were made during the marriage. There is the question of whether they are payments on the interest or partial payment on the capital. It is, therefore, better to make this matter explicit in the provision. Dean Gupit added that there is also the possibility that the interest may be considered as part of the exclusive property since the payments started before the marriage, and that the provision would show this confusion.
>
> Justice Puno remarked that the general policy now whenever one borrows a certain amount of money is to integrate the interest with the principal and divide the payments into equal installments. He asked if they agreed that in such a case, the installment shall be broken in each part so that, at a given time, they will know the capital and the interest.
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> x x x x x x x x x
>
> After further discussion, Justice Puno clarified that the members are agreed, irrespective of the equity considerations, that the idea in the provision is to consider only the payments during the marriage and to determine the capital and interest in said payments. x x x
>
> Dean Gupit inquired as to how the provision will apply in case the interest is deducted immediately. In reply, Prof.

Baviera remarked that interests are deemed to accrue daily, which Justice Caguioa affirmed.

Justice Puno stated that there are other problems that may arise in connection with the acceleration process, since in case of default in payments just before the marriage, because of the acceleration clause, interests fall due no longer during the marriage but before the marriage.

x x x x x x x x x

After further deliberations, the Committee agreed to go back to the original formulation of the provision and to adopt the phrase "falling due" in place of "accruing" (Minutes of the 175th Joint Meeting of the Civil Code and Family Law committees held on March 7, 1987, pages 4-5).

Article 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 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)

SOURCE OF FUNDS USED FOR IMPROVEMENTS. If the value of the improvement and any resulting increase in value are more than the value of the separate property at the time of improvement, the entire property of one of the spouses shall belong to the conjugal partnership. But ownership shall vest only upon reimbursement to

the owner-spouse which shall be made at the time of the liquidation of the conjugal partnership. Proof, therefore, is needful at the time of the making or construction of the improvements and the source of the funds used therefor, in order to determine the character of the improvements as belonging to the conjugal partnership or to one spouse separately (*Villanueva v. IAC*, 192 SCRA 21).

In *Ferrer v. Ferrer,* G.R. No. 166496, November 29, 2006, 508 SCRA 579, where, prior to the death of the husband, he sold his lot over which an improvement built by conjugal funds was constructed and where the surviving spouse sought reimbursement of half of the amount of the improvement from the new owner on the basis of Article 120 of the Family Code, the Supreme Court rejected the claim for reimbursement by stating that Article 120 does not give a cause of action on the part of the surviving spouse to claim from subsequent buyers of the property of the deceased husband. Article 120 only allows claims from the husband if he is still the owner of the lot upon liquidation.

USUFRUCTUARY. Prior to reimbursement at the time of liquidation, it has been held that:

> the conjugal partnership may use both the land and the improvement, but it does so not as owner but in the exercise of a usufruct. The ownership of the land remains the same until the value of the land is paid, and this payment can only be demanded in the liquidation of the partnership (*Maramba v. Lozano*, 20 SCRA 474, citing *Coingo v. Flores*, 82 Phil. 284; *Paterno v. Bibby Vda. de Padilla*, 74 Phil. 377; *Testate Estate of Narciso Padilla*, G.R. No. L-8748, December 26, 1961).

Hence, prior to liquidation, the owner-spouse still owns her separate property and, therefore, the same cannot be levied upon to satisfy a conjugal debt (*Maramba v. Lozano*, 20 SCRA 474), unless the conjugal funds are insufficient to pay the conjugal debts, in which case the separate property can be held solidarily liable (See last paragraph of Article 121).

Also, in *In Re Padilla,* 74 Phil. 377, the Supreme Court discussed the nature of the usufructuary relationship arising from Article 1404 of the Civil Code which is now Article 120, *to wit:*

> The ownership of the land is retained by the wife until she is paid the value of the lot, as a result of the liquidation of the conjugal partnership. The mere construction of a building from common funds does not automatically convey the ownership

of the wife's land to the conjugal partnership. Such a mode of using the land, namely, by erecting a building thereon, is simply an exercise of the right of usufruct pertaining to the conjugal partnership over the wife's land. As Manresa says, *"las sociedad de gananciales es realmente la usufructuaria de los bienes privativos de cada conyuge."* In consequence of this usufructuary right, the conjugal partnership is not bound to pay any rent during the occupation of the wife's land because if the lot were leased to a third person, instead of being occupied by the new construction from the partnership funds, the rent from the third person would belong to the conjugal partnership. Therefore, before payment of the value of the land is made from common funds, inasmuch as the owner of the land is the wife, all the increase or decrease in its value must be for her benefit or loss. And when may she demand payment? Not until the liquidation of the conjugal partnership because up to that time, it is neither necessary nor appropriate to transfer to the partnership the dominion over the land, which is lawfully held in usufruct by the conjugal partnership during the marriage.

If no reimbursement is made, the ownership of the property shall be retained by the owner-spouse, likewise subject to reimbursement of the cost of the improvement. If the property of the owner-spouse is worth more than the improvement, the entire improvement shall belong to the owner-spouse subject to reimbursement at the time of liquidation in favor of the conjugal partnership.

COMPUTATION. During the 175th meeting of the joint Civil Code and Family Law committees, Justice Puno offered a sample computation of how the second paragraph shall operate, thus:

The building is worth	P 50,000	and
the land is worth	P 100,000	so
the total is	P 150,000	
The value of house and lot as a result of the improvement is	P 180,000	so
that the "plus value" is	P 30,000	
The cost of the building	P 50,000	
plus the "plus value" of	P 30,000	
the total value of the improvement is	P 80,000.	

But since the cost of the land is P100,000, which is still more than the value of the improvement, which is P80,000, it would still be a case of ordinary accession (Minutes of the 175th

Meeting of the Joint Civil Code and Family Law committees held on March 7, 1987, Page 7).

There were preliminary objections to the computation especially the one made by Justice Caguioa. However, after further deliberations the conceptual computation above-described amply fits the application of the second paragraph of Article 120. The above explanatory computation was given when the draft provision still provides that the "ownership of the entire property shall be vested at the time the improvement is made." However, under the final version of the last paragraph of Article 120, "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." In the above case, the owner spouse must reimburse the conjugal partnership at the time of liquidation the amount of P50,000 which is the cost of the improvement.

Section 4. *CHARGES UPON AND OBLIGATIONS OF THE CONJUGAL PARTNERSHIP*

Article 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 profession, 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)

CHARGES AND OBLIGATIONS. Except for the support of illegitimate children and liabilities for fines and pecuniary indemnities arising from crime or quasi-delict which are contained in Item number 9 of Article 94 and which have been incorporated in a separate Article 122 with respect to the conjugal partnership of gains, the liabilities of the conjugal partnership of gains enumerated in Article 121 are the same as those enumerated in Article 94 of the Family Code relative to the liabilities of the absolute community of property. Hence, the explanations are the same.

Liabilities shall only be chargeable to the conjugal partnership if it benefits the same. This rule highlights the underlying concern of the law for the conservation of the conjugal partnership. When making reference to any advantage or benefit to the family, the law interchangeably uses the phrase "redounded to the benefit of," "benefited from," and "for the benefit of." These phrases all mean the same thing. The burden of proof that a debt was contracted for the benefit of the conjugal partnership lies with the creditor. The benefit must be a direct result of the obligation. It cannot simply be a by-product or a spin-off of the obligation or loan itself. Hence, indirect benefits that might accrue to a husband in his signing a surety or guarantee agreement not in favor of the family but in favor of his employer-corporation, such as the possibility of prolonging his employment or of increasing the value of the shares of stock of some

members of the family in the corporation in case of rehabilitation, and enhancing his prestige in the corporation, are not the benefits that can be considered as giving a direct advantage accruing to the family. Hence, the creditors cannot go against the conjugal partnership property of the husband in satisfying the obligation subject of the surety agreement. A contrary view would put in peril the conjugal partnership property by allowing it to be given gratuitously as in cases of donation of conjugal partnership property which is prohibited (*Ayala Investment & Development Corp. v. Court of Appeals*, G.R. No. 118305, February 12, 1998).

Considering that redounding to the benefit of the family must always be proven and cannot be presumed, the burden of proof to show the benefit must always be on the person claiming that the transaction redounded to the benefit of the family. Thus the bare allegation of a creditor that, without doubt, a loan to finance housing units obtained by one of the spouses redounded to the benefit of the family but without adducing evidence to prove such benefit, cannot give rise to any claim on the conjugal assets and does not create any conjugal liability (*Homeowners Savings and Loan Bank v. Dalio,* G.R. No. 153802, March 11, 2005, 453 SCRA 283).

In the case of *Cobb-Perez v. Lantin*, 23 SCRA 637, the Supreme Court said that debts incurred for a commercial enterprise for gain or in the exercise of the industry or profession by which the husband, as administrator of the property contributes to the support of the family, cannot be deemed to be his exclusive and private debts. The conjugal partnership of gains shall be liable for the same (*Cobb-Perez v. Lantin*, 23 SCRA 637; *Abella de Diaz v. Erlanger and Galinger*, 56 Phil. 326; *Javier v. Osmeña*, 34 Phil. 336). Under the Family Code, husband and wife are joint administrators of the conjugal partnership property unless the marriage settlement or the courts, in the proper cases, designates one of the spouses as the administrator.

Also, it has been held that a husband in acting as guarantor or surety for another in an indemnity agreement does not act for the benefit of the conjugal partnership, considering that the benefit is clearly intended for the third party. While the husband by thus signing the indemnity agreement may be said to have added to his reputation or esteem and to have earned the confidence of the business community, such benefit even if hypothetically accepted, is too remote and fanciful to come within the express provision of

Article 161 of the new Civil Code (now Article 121 of the Family Code) (*Luzon Surety Co. v. De Garcia*, 30 SCRA 111).

In the case of *Ayala Investment & Development Corp. v. Court of Appeals*, G.R. No. 118305, February 12, 1998, the Supreme Court tackled with more particularity the question: "What debts and obligations contracted by the husband alone are considered for the benefit of the conjugal partnership which are chargeable to the conjugal partnership? Is a surety agreement or an accommodation contract entered into by the husband in favor of his employer within the contemplation of the said provision?" The Supreme Court said:

> (A) If the husband himself is the principal obligor in the contract, *i.e.*, he directly received the money or services to be used in or for his own business or his own profession, that contract falls within the term "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.
>
> (B) 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 contest of "obligation 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 accomodation agreement, it is "for the benefit of the conjugal partnership." Proof must be presented to establish benefit redounding to the conjugal partnership.

In the same *Ayala case,* the Supreme Court said that the mere signing of a person to act as surety or guarantor of another person does not make him automatically engaged in the profession or business of suretyship or guaranty such that any loss arising from the same should be chargeable to the conjugal partnership. However, if both spouses signed the surety agreement, then the conjugal partnership shall be liable.

OBLIGATION OF HUSBAND AND WIFE. The conjugal partnership property is also liable for all obligations contracted by the husband and wife. If a creditor has a claim against spouses A and B for an indebtedness amounting to P1,000 which the spouses contracted or which, though only one of them contracted, benefited their family, it is the conjugal partnership property of the latter which shall be liable. Thus, in enforcing the claim against A and B, it is not correct for the creditor to consider A and B as jointly liable such that he can collect P500 from the separate property of A and the other P500 from the separate property of B. It is also not correct for the creditor to consider A and B strictly solidarily liable such that he can collect the entire indebtedness of P1,000 from the separate property of either A or B. The creditor must enforce the liability on the conjugal property not on the separate properties of A and B individually. The separate properties of A or B can only be held solidarily liable if the conjugal partnership property is insufficient to pay off the indebtedness.

In the case of *Carandang v. Heirs of Quirino A. De Guzman*, G.R. No. 160347, November 29, 2006, 508 SCRA 469, the Supreme ruled that, in so far as conjugal obligations, are concerned:

> when the spouses are sued for the enforcement of the obligation entered into by them, they are being impleaded in their capacity as representatives of the conjugal partnership and not as independent debtors. Hence, either of them may be sued for the whole amount, similar to that of a solidary liability, although the amount is chargeable against their conjugal partnership property. Thus, in the case cited by the Court of Appeals, *Alipio v. Court of Appeals,* the two sets of defendant-spouses therein were held liable for P25,300.00 each, chargeable to their respective conjugal partnerships.

In *Pelayo v. Perez,* G.R. No. 141323, June 8, 2005, 459 SCRA 475, the Supreme Court held that the signature of a wife as a mere witness and not as a party to a contract nevertheless showed her implied consent to a contract of sale executed by her husband. Moreover, human experience would show that a spouse would surely be aware of the affairs of his or her spouse and that it is a presumption in the law of evidence that, unless rebutted by credible proofs, a person takes ordinary care of his or her concerns.

SOLIDARY OBLIGATION. If the conjugal partnership is insufficient to cover the debts and obligations enumerated in Article

121, the creditors may demand payment from either or any of the spouses with their respective separate properties. He or she who made the payment may claim from his or her spouse only the share which corresponds to each, with the interest for the payment already due. If the payment is made before the debt is due, no interest for the intervening period may be demanded (Article 1217 of the Civil Code).

The separate properties of the husband and the wife may also be solidarily held liable if both of them expressly made themselves liable in a solidary manner in any obligation contracted by them for the benefit of the absolute community of property or conjugal partnership of gains.

INSOLVENCY OF SPOUSES. So long as the conjugal partnership subsists, its property shall not be among the assets to be taken possession of by the assignee for the payment of the insolvent debtor's obligations, except insofar as the latter have redounded to the benefit of the family (Article 2238 of the Civil Code). In an insolvency proceeding filed in the proper court, an assignee is appointed. He or she represents the insolvent and the creditors, whether voluntary or involuntary (*Velayo v. Shell*, 100 Phil. 186). An assignee takes all properties of the insolvent and obtains title thereto. He or she shall as speedily as possible convert the estate, real or personal, into money (Section 39 of Insolvency Law, Act No. 1956) for the purposes of the settlement of the debts of the debtor.

Under the 1950 Civil Code provisions on the conjugal partnership of gains which have been repealed by the Family Code, the husband is the administrator of the conjugal partnership (Article 165 of the Civil Code). Accordingly, the *second sentence of Article 2238 of the Civil Code* dealing with insolvency provides that "if it is the husband who is insolvent, the administration of the conjugal partnership or the absolute community may, by order of the court, be transferred to the wife or to a third person other than the assignee." Obviously, the reason for this is to prevent the husband-administrator from dissipating or transferring the assets of the community property which may be held liable for the insolvent-husband's debts. Under the New Family Code, administration of the conjugal property jointly belongs to the husband and the wife with the decision of the husband prevailing in case of disagreement, but the wife can seek the annulment of the contract if she so desires (Article 124). Hence, the *second sentence of Article 2238* should still

apply under the Family Code especially so when there is in the said law an explicit provision that the husband's decision will prevail in the meantime. If both the husband and the wife maintain their joint administration and one of them becomes insolvent, the right of the insolvent spouse to jointly administer the community property may be legally curtailed by the court, thereby making the other non-insolvent spouse the sole administrator of the conjugal property. The court can likewise appoint a third person, other than the assignee, as administrator.

> **Article 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 indemnities imposed upon them be charged to the partnership.**
>
> **However, the payment of the 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 purposes above-mentioned. (163a)**

DEBTS, FINES, PECUNIARY INDEMNITIES INCURRED BEFORE OR DURING THE MARRIAGE. For as long as debts and obligations redounded to the benefit of the family, such debts and obligations, such as hospital and medical expenses of the spouses, may be charged to the conjugal partnership. The benefit under Article 122 as well as Article 121 of the Family Code:

> need not be quantified into peso or square meters of real property. It is enough that the transaction would result to some discernible advantages or good to the conjugal partnership, directly or indirectly. Thus, the health and well-being of both or

> either of the spouses would undeniably redound to the benefit of the conjugal partnership. The advancement of the interests of the conjugal partnership depends in great measure on the soundness of the body and mind of the partners (*Costuna v. Domondon*, 180 SCRA 333).

For the third paragraph of Article 122 to apply, it must be shown that the obligations under Article 121 have been covered and that the debtor-spouse has insufficient or no exclusive properties to pay the debt or obligation involved. Construing Article 163 of the Civil Code, now Article 122 of the Family Code, the Supreme Court, in *Lacson v. Diaz,* 14 SCRA 183 said:

> As a general rule, therefore, debts contracted by the husband or the wife before the marriage, as well as fine and pecuniary indemnities imposed thereon, are not chargeable to the conjugal partnership. However, such obligations may be enforced against the conjugal assets if the responsibilities enumerated in Article 161 of the New Civil Code have already been covered, and that the obligor has no exclusive property or the same is insufficient. Considering that the enforceability of the personal obligations of the husband and wife, against the conjugal assets, forms the exception to the general rule, it is incumbent upon the one who invokes this provision or the creditor to show that the requisites for its applicability are obtaining.
>
> In the instant case, although it is not controverted that there is due and owing the plaintiffs-appellees a certain sum of money from the appellant-debtor — a personal obligation, yet it has not been established that the latter does not have properties of his own or that the same are not adequate to satisfy appellees' claim. Furthermore, there is no showing that the responsibilities named in Article 161 of the new Civil Code have already been covered in order that the personal obligation of the husband may be made chargeable against the properties of the second marriage.

Significantly, fines and pecuniary indemnities imposed upon either spouses may be charged against the partnership assets even before the liquidation of the partnership (*People v. Lagrimas*, 29 SCRA 153). However, such payment must comply with Article 122 but it should not be applied with rigidity as to negate the claims of the aggrieved creditors. In *People v. Lagrimas*, 29 SCRA 153, the Supreme Court made better clarification or explanation of the applicability of Articles 161 and 163, which are now Articles 121 and 122 of the Family Code, *to wit:*

The applicable Civil Code provision is not lacking in explicitness. Fines and indemnities imposed upon either husband or wife "may be enforced against the partnership assets after the responsibilities enumerated in Article 161 have been covered, if the spouse who is bound should have no exclusive property or if it should be insufficient; x x x." It is quite plain, therefore, that the period during which such liability may be enforced presupposes that the conjugal partnership is still existing. The law speaks of "partnership assets." It contemplates that the responsibilities enumerated in Article 161, chargeable against such assets, must be complied with first. It is thus obvious that the termination of the conjugal partnership is not contemplated as a prerequisite. Whatever doubt may still remain should be erased by the concluding portion of this article which provides "that at the time of the liquidation of the partnership such spouse shall be charged of what has been paid for the purposes above-mentioned."

What other conclusion can there be than that the interpretation placed upon this provision in the challenged order is at war with the plain terms thereof? It cannot elicit our acceptance. Nor is the reason for such a codal provision difficult to discern. It is a fundamental postulate of our law that every person criminally liable for a felony is also civilly liable. The accused, Froilan Lagrimas, was, as noted, found guilty of the crime of murder and sentenced to *reclusion perpetua* as well as to pay the indemnification to satisfy the civil liability incumbent upon him. If the appealed order were to be upheld, he would be in effect exempt therefrom, the heirs of the offended party being made to suffer still further.

It would follow, therefore, that the Civil Code provision, as thus worded, precisely minimizes the possibility that such additional liability of an accused would be rendered nugatory. In doing justice to the heirs of the murdered victim, no injustice is committed against the family of the offender. It is made a condition under this article of the Civil Code that the responsibilities enumerated in Article 161, covering primarily the maintenance of the family and the education of the children of the spouses or the legitimate children of one of them as well as other obligations of preferential character, are first satisfied. It is thus apparent that the legal scheme cannot be susceptible to the charge that for a transgression of the law by either husband or wife, the rest of the family may be made to bear the burdens of an extremely onerous character.

The next question is, how practical effect would be given this particular liability of the conjugal partnership for the payment of fines and indemnities imposed upon either

husband or wife? In the brief for appellants, the heirs of Pelagio Cagro, they seek the opportunity to present evidence as to how the partnership assets could be made to respond, this on the assumption that the property levied upon does not belong exclusively to the convicted spouse.

In *Lacson v. Diaz*, which deals with the satisfaction of the debt contracted by husband or wife before marriage by the conjugal partnership, likewise included in this particular article, it was held: "Considering that the enforceability of the personal obligations of the husband or wife, against the conjugal assets, forms the exception to the general rule, it is incumbent upon the one who invokes this provision or the creditor to show that the requisites for its applicability are obtaining."

Without departing from the principle thus announced, we make this further observation. Considering that the obligations mentioned in Article 161 are peculiarly within the knowledge of the husband or of the wife whose conjugal partnership is made liable, the proof required of the beneficiaries of the indemnity should not be of the most exacting kind, ordinary credibility sufficing. Otherwise, the husband or the wife, as the case may be, representing the conjugal partnership, may find the temptation to magnify its obligation irresistible so as to defeat the right of recovery of the family of the offended party. The result is to be avoided. The lower court should be on the alert, therefore, in the appraisal of whatever evidence may be offered to assure compliance with this codal provision.

DIFFERENCE FROM THE ABSOLUTE COMMUNITY RULE. The conjugal partnership is liable for the personal debts, fines and indemnities of either spouse only after payment of all the liabilities of the conjugal partnership as enumerated under Article 121 are covered and when the separate property of the spouse is insufficient. Under the absolute community regime, such liabilities may be charged against the community only in case the separate property of the spouse is insufficient. The reason for this is that in the absolute community regime, the spouses have fewer, if any at all, exclusive properties with which to meet their personal obligations. Thus, it is no longer required that all the charges upon the absolute community be satisfied before such personal obligations may be paid by the community.

Also in *Spouses Buado v. Court of Appeals*, G.R. No. 145222, April, 24 2009, where a husband opposed the execution of conjugal properties by the sheriff to satisfy damages incurred by his spouse as a result of criminal liability and where the issue was whether or not the husband can be considered a "third party" for purpose of

satisfying the requirement of the Rules of Court that only a third party can file a claim against the execution, the Supreme Court ruled:

> Apart from the remedy of *terceria* available to a third-party claimant or to a stranger to the foreclosure suit against the sheriff or officer effecting the writ by serving on him an affidavit of his title and a copy thereof upon the judgment creditor, a third-party claimant may also resort to an independent separate action, the object of which is the recovery of ownership or possession of the property seized by the sheriff, as well as damages arising from wrongful seizure and detention of the property. If a separate action is the recourse, the third-party claimant must institute in a forum of competent jurisdiction an action, distinct and separate from the action in which the judgment is being enforced, even before or without need of filing a claim in the court that issued the writ.
>
> A third-party claim must be filed a person other than the judgment debtor or his agent. In other words, only a stranger to the case may file a third-party claim.
>
> This leads us to the question: Is the husband, who was not a party to the suit but whose conjugal property is being executed on account of the other spouse being the judgment obligor, considered a "stranger?"
>
> In determining whether the husband is a stranger to the suit, the character of the property must be taken into account. In *Mariano v. Court of Appeals,* which was later adopted in *Spouses Ching v. Court of Appeals*, this Court held that the husband of the judgment debtor cannot be deemed a "stranger" to the case prosecuted and adjudged against his wife for an obligation that has redounded to the benefit of the conjugal partnership. On the other hand, in *Naguit v. Court of Appeals* and *Sy v. Discaya,* the Court stated that a spouse is deemed a stranger to the action wherein the writ of execution was issued and is therefore justified in bringing an independent action to vindicate her right of ownership over his exclusive or paraphernal property.
>
> Pursuant to *Mariano* however, it must further be settled whether the obligation of the judgment debtor redounded to the benefit of the conjugal partnership or not.
>
> Petitioners argue that the obligation of the wife arising from her criminal liability is chargeable to the conjugal partnership. We do not agree.
>
> There is no dispute that contested property is conjugal in nature. Article 122 of the Family Code explicitly provides that

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.

Unlike in the system of absolute community where liabilities incurred by either spouse by reason of a crime or *quasi-delict* is chargeable to the absolute community of property, in the absence or insufficiency of the exclusive property of the debtor-spouse, the same advantage is not accorded in the system of conjugal partnership of gains. The conjugal partnership of gains has no duty to make advance payments for the liability of the debtor-spouse.

Parenthetically, by no stretch of imagination can it be concluded that the civil obligation arising from the crime of slander committed by Erlinda redounded to the benefit of the conjugal partnership.

To reiterate, conjugal property cannot be held liable for the personal obligation contracted by one spouse, unless some advantage or benefit is shown to have accrued to the conjugal partnership.

In *Guadalupe v. Tronco,* this Court held that the car which was claimed by the third party complainant to be conjugal property was being levied upon to enforce "a judgment for support" filed by a third person, the third-party claim of the wife is proper since the obligation which is personal to the husband is chargeable not on the conjugal property but on his separate property.

Hence, the filing of a separate action by respondent is proper and jurisdiction is thus vested on Branch 21. Petitioners failed to show that the Court of Appeals committed G.R.ave abuse of discretion in remanding the case to Branch 21 for further proceedings

PERSONAL OBLIGATIONS OF SPOUSES DURING THE MARRIAGE. Personal obligations of either of the spouses incurred during the marriage which do not redound to the benefit of the family or do not have the consent of the other spouse shall be borne only by the spouse-debtor and his or her separate property (*Francisco v. Gonzales,* G.R. No. 177667, September 17, 2008). Thus, in *BA Finance Corporation v. Court of Appeals,* 161 SCRA 608, the Supreme Court held that where the evidence shows a spouse incurred the obligation for his sole benefit, it should not be charged to the conjugal partnership of gains. The Supreme Court in the said case stated:

> there is no dispute that *A & L Industries* was established during the marriage of Augusto and Lily Yulo and therefore, the same is presumed conjugal and the fact that it was registered in the name of only one of the spouses does not destroy its conjugal nature (See *Mendoza v. Reyes*, 124 SCRA 161, 165). However, for the said property to be held liable, the obligation contracted by the husband must have redounded to the benefit of the conjugal partnership under Article 161 of the Civil Code (now Article 121 of the Family Code). In the present case, the obligation which the petitioner is seeking to enforce against the conjugal property managed by private respondent Lily Yulo was undoubtedly contracted for his own benefit because at the time he incurred the obligation he had already abandoned his family and had left their conjugal home. Worse, he made it appear that he was duly authorized by his wife in behalf of *A & L Industries*, to procure such loan from the petitioner. Clearly, to make *A & L Industries* liable now for the said loan would be unjust and contrary to the express provision of the Civil Code.

Personal obligations for which the debtor-spouse should only be held liable are not given by the law the same advance-reimbursement mechanism provided for under Article 122. In short, the conjugal partnership of gains has no duty to make payment in advance for the liability of the spouse-debtor which shall be reimbursed or paid at the time of liquidation. In so far as debts are concerned, the third paragraph of Article 122 clearly limits the application of this advance-reimbursement mechanism to personal debts not redounding to the benefit of the family contracted by either of the spouses before the marriage and not during the marriage.

COMPUTATION. During the 176th Joint meeting of the Civil Code and Family Law committees, Justice Caguioa gave the following sample computation of the last paragraph of Article 122, *to wit*:

Husband's share	—	P50,000.00
Wife's share	—	50,000.00
Amount advanced by the partnership for personal debt of the husband to be taken from his share	—	10,000.00
Husband's share	—	50,000.00
Less: amount advanced	—	10,000.00
Balance of husband's share	—	P40,000.00

The P10,000.00 will then go to the partnership assets, which shall be divided again between the spouses (Minutes of the 176th Joint Meeting of the Civil Code and Family Law committees held on March 14, 1987, page 15).

During the 177th joint meeting of the same committees, Professor Baviera, another member of the said committee, presented her version of her own computation but Justice Caguioa added that her computation will just result in the same sharing, thus:

Net remainder of conjugal properties	—	P100,000.00
Amount advanced for husband's personal debt	—	P 10,000.00
Basis of sharing	—	P110,000.00
	=	P55,000 share of each spouse
Husband's share	—	P 55,000.00
Less: amount advanced for husband's personal debt	—	P10,000.00
Balance of husband's share		P 45,000.00
Net remainder of conjugal properties	—	P100,000.00
Less: Husband's share		P45,000.00
Wife's share		P 55,000.00

Justice Caguioa explained that his computation resulted in the same figures above since the P10,000 will go to the partnership assets, which shall be divided again between the spouses as follows:

Wife's share	P 50,000.00
Add: 1/2 of P10,000	P 5,000.00
Total	P55,000.00
Husband's share	P40,000.00
Add: 1/2 of P10,000	P 5,000.00
Total	P45,000.00

> Justice Caguioa remarked that his argument at the last meeting is that the result of the computation will not change by considering the amount advanced by the conjugal partnership for personal debts of the husband as partnership assets and that the only difference is the procedure of the computation. Justice Puno added that, as he had stated at the last meeting, this is an accounting process (Minutes of the 177th Joint Meeting of the Civil Code and Family Law committees held on March 21, 1987, page 2).

Under the present Article 129 relative to the liquidation of the conjugal partnership, it must be noted that after the inventory, 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 (Article 129[1] and [2]). This is even prior to the determination of the net remainder (Article 129[7]). Nonetheless, the result will be basically the same as the above and the comment of Justice Caguioa will still be relevant and applicable.

Article 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)

GAME OF CHANCE. The conjugal partnership property must not be put to useless risk precipitated by highly speculative activities of any kind of the spouses. These activities include any game of chance, betting, sweepstakes or any kind of gambling. If, however, a spouse undertakes such activities, his or her winnings shall go to the conjugal partnership property while his or her losses shall not be chargeable to the same. Winnings can be considered as income of the common property and income of the separate property which, therefore, make them part of the conjugal partnership of gains.

Section 5. *ADMINISTRATION OF THE CONJUGAL PARTNERSHIP PROPERTY*

Article 124. The administration and enjoyment of the conjugal partnership shall belong to both spouses jointly. In case of disagreement, the hus-

band's decision shall prevail, subject to recourse to the court by the wife for a 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 the powers of disposition or encumbrance which must have the 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)

Article 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 in distress. (174a)

IDENTITY OF PROVISIONS. Articles 124 and 125 are exactly identical with Articles 96 and 98, respectively, of the Family Code relative to the absolute community of property. Hence, their application is the same. However, it must be importantly emphasized that, if the marriage settlement provides for the conjugal partnership of gains as governing the property relationship within a marriage but the same likewise stipulates that the sharing will not be equal upon liquidation, such unequal sharing will not affect the joint administration of the spouses during the marriage which places the spouses in equal footing, unless otherwise agreed upon also in the marriage settlement (See Minutes of the 173rd Joint Meeting of the Civil Code and Family Law committees held on February 21, 1987, page 13). This is also true with respect to the absolute community of property in cases where a marriage settlement was executed just to define the different sharing of each spouse.

Significantly, it has been previously held that, as conjugal properties belong equally to husband and wife, any alienation made by the husband without the consent of his wife prejudices her in so far as it includes a part or the whole of the wife's half and is, to that extent, invalid (*Baello v. Villanueva*, 54 Phil. 213). However, during the marriage, the interest of each spouse is merely inchoate and cannot be determined in definite and concrete specifications until and after the liquidation of the same (*Madrigal v. Rafferty*, 38 Phil. 414). Accordingly, in cases of disposition of property by the husband over the objection of the wife, the wife is given the right to file a case to nullify or annul, as the case may be, not only such part of the contract as may prejudice her but the entire contract as a whole. Hence, just like the rule in absolute community of property, if the husband, without knowledge and consent of the wife, sells or encumbers conjugal property, such sale is void (*Homeowners Savings & Loan Bank v. Dailo*, G.R. No. 153802, March 11, 2005, 453 SCRA 283; *Bautista v. Silva*, G.R. No. 157434, September 19, 2006, 502 SCRA 334). If the sale was with the knowledge but without the approval of the wife, thereby resulting in a disagreement, such sale is annullable at the instance of the wife who is given five (5) years from the date the contract implementing the decision of the husband to institute the case (*Ravina v. Abrille,* G.R. No. 160708, October 16, 2009).

In case it is an act of administration with the knowledge but without the consent of the wife, the contract is merely rescissible at the instance of the wife and she can question the transaction in court within five (5) years from the implementation of the contract.

In a case where the buyers also knew that the property was conjugal property but they bought it from the husband only without consent of the wife, the Supreme Court said that the sale was totally void. However, the Supreme Court said that, consistent with the doctrine of unjust enrichment, the purchase price had to be returned to the buyers with interest (*Onesiforo v. Alinas*, G.R. No. 158040, April 14, 2008).

In case of incapacity of the other spouse or his or her inability to participate in the administration of the conjugal properties, the same rule in absolute community applies. Relevantly, any alienation or encumbrance by a capacitated spouse of any conjugal property (or absolute community property) without the consent of the incapacitated spouse or without court approval shall be void. If the "contract" is later approved by the court or the incapacitated spouse finally gives his or her consent, there is no retroactive effect

as the contract thereby perfected is an entirely new transaction (See Minutes of the 170th Joint Meeting of the Civil Code and Family Law committees held on January 31, 1987, page 4).

Thus, in *Spouses Antonio v. Court of Appeals*, G.R. No. 125172, June 26, 1998, where a husband, without the consent of his wife who was unable to participate in the administration of the conjugal property in the province because she was in Manila looking for a job, sold one-half of their property in the province to third persons who knew of the objection of the wife to the sale, the Supreme Court ruled that the sale was void *ab initio* pursuant to the second paragraph of Article 124 which pertinently provides that, "in the absence of such authority or consent, the disposition or encumbrance shall be void." The Supreme Court further held that a subsequent but questionable "amicable settlement" entered into by the wife (who contested her signature in the said settlement) with the third persons before the barangay authorities where the wife apparently was made to agree to leave the place could not have validated or ratified an already void and illegal contract which cannot be cured by any subsequent act. Moreover, the court ruled that the alleged "amicable settlement" presented by the third parties in the court where they filed a trespassing case against the wife cannot be considered a "continuing offer" or acceptance contemplated under the last sentence of the second paragraph of Article 124. Pertinently, the Supreme Court said:

> Neither can the "amicable settlement" be considered a continuing offer that was accepted and perfected by the parties, following the last sentence of Article 124. The order of the pertinent events is clear: after the sale, petitioners filed a complaint for trespassing against private respondent, after which the barangay authorities secured an "amicable settlement" and petitioners filed before the MTC a motion for its execution. The settlement, however, does not mention a continuing offer to sell the property or an acceptance of such continuing offer. Its tenor was to the effect that private respondent would vacate the property. By no stretch of imagination can the Court interpret this document as the acceptance mentioned in Article 124.

NATURE OF PROCEEDINGS. Summary procedure pursuant to Title XI (Articles 238 up to 253) of the Family Code shall apply to the first paragraph of Article 124 involving the annulment of the husband's decision in the administration and enjoyment of the conjugal property in case the husband's decision is in conflict with the wife's decision.

However, in *Uy v. Court of Appeals*, G.R. No. 109557, November 29, 2000, where the issue to be decided centers on the nature of the proceedings for the appointment of a sole administrator and the sale of properties in the conjugal partnership property by such administrator under the second paragraph of Article 124, the Supreme Court made the following discussion:

> The issue raised is whether petitioner Gilda L. Jardeleza as the wife of *Ernesto Jardeleza, Sr.* who suffered a stroke, a cerebrovascular accident, rendering him comatose, without motor and mental faculties, and could not manage their conjugal partnership property may assume sole powers of administration of the conjugal property under Article 124 of the Family Code and dispose of a parcel of land with its improvements, worth more than twelve million pesos, with the approval of the court in a summary proceedings, to her co-petitioners, her own daughter and son-in-law, for the amount of eight million pesos.
>
> The Court of Appeals ruled that in the condition of Dr. Ernesto Jardeleza, Sr., the procedural rules on summary proceedings in relation to Article 124 of the Family Code are not applicable. Because Dr. Jardeleza, Sr. was unable to take care of himself and manage the conjugal property due to illness that had rendered him comatose, the proper remedy was the appointment of a judicial guardian of the person or estate or both of such incompetent, under Rule 93, Section 1, 1964 Revised Rules of Court. Indeed, petitioner earlier had filed such a petition for judicial guardianship.
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> x x x x x x x x x
>
> 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 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.

In the case at bar, the trial court did not comply with the procedure under the Revised Rules of Court. Indeed, the trial court did not even observe the requirements of the summary judicial proceedings under the Family Code. Thus, the trial court did not serve notice of the petition to the incapacitated spouse; it did not require him to show cause why the petition should not be granted.

Hence, we agree with the Court of Appeals that absent an opportunity to be heard, the decision rendered by the trial court is void for lack of due process. The doctrine consistently adhered to be this Court is that a denial of due process suffices to cast on the official act taken by whatever branch of the government the impress of nullity. A decision rendered without due process is void *ab initio* and may be attacked directly or collaterally. "A decision is void for lack of due process if, as a result, a party is deprived of the opportunity of being heard." "A void decision may be assailed or impugned at any time either directly or collaterally, by means of separate action, or by resisting such decision in any action or proceeding where it is invoked."

Section 6. *DISSOLUTION OF CONJUGAL PARTNERSHIP REGIME*

Article 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

4) In case of judicial separation of property during the marriage under Articles 134 and 138. (175a)

TERMINATION OF THE CONJUGAL PARTNERSHIP. Article 126 is exactly the same as Article 99. Hence, the explanations under the latter article are likewise applicable to Article 126.

> The community of partnership being as permanent as the state that produces it, there can be no doubt that the same causes influence it as marriage. The first of them is death. Some have believed that the community might continue to exist between the surviving spouse and the heirs of the deceased husband or wife; but, in the opinion of Matienzo, which appears to us to be well-founded, there are reasons for believing otherwise, to wit: (1) When the marriage is dissolved, the cause that brought about the community ceases, for the principles of an ordinary partnership are not applicable to this community, which is governed by special rules. (2) In the absence of the reasons that induced the legislator to establish it, the provisions of law governing the subject should cease to have any effect for the community of property is admissible and proper in so far as it conforms to unity of life, to the mutual affection between husband and wife, and serves as a recompense for the care of preserving and increasing the property; all of which terminates by the death of one of the partners. (3) The partnership having been created by law, it has no object and it is unsafe to extend it on the pretext of tacit consent (Gutierrez, 3d Ed., vol. 1, p. 579; *Nable Jose v. Nable Jose*, 41 Phil. 713).

Under the Family Code, the partnership rules apply in a suppletory manner but, as in the opinion above-quoted, not upon the dissolution of the conjugal partnership of gains. Also,

> Manresa, discussing the status of the community *(socieded)* after dissolution of the conjugal relations, makes the following comment:
>
> "x x x The community terminates when the marriage is dissolved or annulled, or when during the marriage an agreement is entered into to divide the conjugal property. The conjugal partnership exists therefore so long as the spouses are legally united; the important thing is not exactly the bond, the tie formed by the marriage, but the existence in the eyes of the law of the life in common. It is this life in common that creates common necessities and represents common efforts, the result of which should be that both partners should share in the profits. x x x
>
> When, for any cause, the conjugal partnership establishes upon the basis of community property is dissolved, all the provisions x x x based upon the existence of that partnership cease to apply.
>
> Consequently, whatever is acquired by the surviving spouse on the dissolution of the partnership by death or presumption of death, or by either of the spouse on termination of

the partnership for other reasons and when this latter no longer exists, whether the acquisition be made by his or her labor, or industry, or whether by onerous or lucrative title, it forms part of his or her own capital, in which the other consort, or his or her heirs, can claim no share (*Nable Jose v. Nable Jose*, 41 Phil. 713).

Article 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)

EFFECT OF SEPARATION. Article 127 provides for the effect of separation in fact between husband and wife. Article 127 is exactly the same as Article 100. Hence, the explanation made in the latter article is applicable to Article 127. The spouse who unjustifiably leaves the home is not entitled to support.

Also, 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. It must be important to note that, in this case, the guilt of the party in leaving the house is not material. The one who unjustifiably separated from the other spouse may himself or herself avail of this remedy provided by law.

As to item number three (3) of Article 127, it must be important to note that any debt incurred for the support of the family is a liability of the conjugal partnership of gains. Hence, even if one of the spouses left the conjugal home, with or without justifiable reasons,

any debt incurred by any spouse for the benefit of the family shall be chargeable to the community property. Their separation in fact will not justify the non-liability of the community property (*Garcia v. Cruz*, 25 SCRA 225).

Article 128. 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 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)

ABANDONMENT. Article 128 is exactly the same as Article 101. Hence, the explanations made in the latter article are applicable to Article 128. Articles 128 and 101 give an aggrieved spouse, who is the co-owner of the properties, the right to bring an action to protect his or her interest and her right thereto even before the liquidation or dissolution of the conjugal partnership of gains or the absolute community of property (*Enriquez v. Court of Appeals,* 104 SCRA 656).

Section 7. *LIQUIDATION OF THE CONJUGAL PARTNERSHIP ASSETS AND LIABILITIES*

Article 129. Upon the dissolution of the conjugal partnership regime, the following procedure shall apply:

1) An inventory shall be prepared, listing separately all the properties 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 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 interest of said children. (181a, 182a, 183a, 184a, 185a)

LIQUIDATION OF PARTNERSHIP. The conjugal partnership may be liquidated by extrajudicial settlement, ordinary action of partition, or by way of testate or intestate proceedings (*Villocino v. Doyon*, 63 SCRA 460).

INVENTORY. The process of making an inventory is the same as that in the absolute community of property contained in Article 102(1). All properties or assets at the time of the dissolution, whether belonging to the conjugal partnership or separate property of the spouses, must be inventoried. They must all be itemized and usually valued. Under Article 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. Relevantly, it is error to determine the amount to be divided by adding up the profits which had been made on each year of the community's continuance and saying that the result thereof is that amount (*De la Rama v. De la Rama,* 7 Phil. 745). In the appraisal of the properties, it is not the purchase but the market or, in default thereof, the assessed value at the time of the liquidation that must be taken into account (*Prado v. Natividad*, 47 Phil. 775). However, the process of liquidation may take some time. If the proceedings take a long time and the values have suffered some alterations, there is nothing to prevent a new valuation when the last stage is reached, *i.e.*, the actual division or partition comes, so long as *all the properties* are newly appraised in reference to the same period of time. There is no law or doctrine that a prior appraisal is conclusive upon the parties and the courts (*Padilla v. Paterno*, 93 Phil. 884).

CREDITS IN FAVOR OF PARTNERSHIP. Any amount advanced during the marriage by the conjugal partnership in favor of any of the spouses shall be credited to the conjugal partnership as an asset. Thus, the advances made by the conjugal partnership of gains in paying the support of the illegitimate child of either spouse, the personal debts contracted before the marriage which did

not redound to the benefit of the family and the payments of fines and pecuniary indemnities for which the spouse was made liable and which did not redound to the benefit of the family, provided for in Article 122, shall be considered as assets. Also, in cases of property bought by installments under Article 118 where conjugal funds and separate funds were used and where the property was owned separately by either of the spouses, the amount of conjugal funds used for completing the installment purchase shall likewise be considered as an asset owing to the conjugal partnership of gains. This is also true with respect to advances made by the conjugal property involving charges relative to the onerous donations made in favor of a particular spouse (Article 114).

REIMBURSEMENT IN FAVOR OF SPOUSE. If separate funds of any of the spouses are used to buy conjugal property, such amount shall be reimbursed to the spouse. Also, the conjugal partnership shall reimburse the wife for the value of exclusive properties, the ownership of which has been vested by law in the conjugal partnership, as in the case described in Article 120 of the Family Code.

In a case where a building separately owned by the wife was torn down to make way for the construction of new buildings owned by the conjugal partnership property, the value of the torn building should be paid by the conjugal partnership to the separate spouse at the time of liquidation considering that the tearing down of the building benefited the partnership. Thus, in the case of *In re Padilla*, 74 Phil. 377, the Supreme Court said:

> The next question of law is whether the value of the paraphernal buildings which were demolished to make possible the construction of new ones, at the expense of the conjugal partnership, should be reimbursed to the wife. Such tearing down of buildings was done with regard to the Arquiza, Juan Luna and Martin Ocampo properties. Appellant maintains that it is doubtful if these buildings had any value at the time they were destroyed, and that there is no evidence that the conjugal partnership realized any benefit therefrom. However, we are certain these old buildings had some value, though small, and it will be the duty of the commissioners mentioned in the judgment appealed from, to assess that value. We entertain no doubt that the conjugal partnership derived a positive advantage from the demolition, which made it possible to erect new constructions for the partnership. It is but just, therefore, that the value of the old buildings at the time they were torn down should be

> paid to the wife. We dismiss, as without any merit whatever, the appellant's contention that because Article 1404, par. 2 of the Civil Code does not provide for the reimbursement of the value of demolished improvements, the wife should not be indemnified. Suffice it to mention the ancient maxim of the Roman law, *"Jure naturae aequum est, meminem cum alterius detrimento et injuria fieri locupletiorem"* which was restated by the Partidas in these terms: "*Ninguno non deue enriquecerse tortizeramente con dano de otro."* When the statutes are silent or ambiguous, this is one of those fundamental principles which the courts invoke in order to arrive at a solution that would respond to the vehement urge of conscience.

PAYMENT OF DEBTS AND OBLIGATIONS OF PARTNERSHIP. The partnership during its existence may have incurred debts and obligations such as those enumerated in Article 121. They should be paid. It is interesting to note that, under the procedure laid down in Article 129, the reimbursement of the spouses for advances they made in favor of the conjugal partnership or for the value of their separate property which, by law, was vested to the partnership, has to be paid first before paying the other debts and obligations of the conjugal partnership.

In the event that the conjugal partnership is terminated, Article 310 of the Civil Code provides that the construction of a tombstone or mausoleum shall be part of the funeral expenses, and shall be chargeable to the conjugal partnership property, if the deceased is one of the spouses.

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.

DELIVERY OF SEPARATE PROPERTIES. The exclusive properties are owned by either of the spouses. Hence, it is but proper to immediately deliver from the inventory what they respectively own so that they can immediately use the same.

DIVISION OF NET REMAINDER. The interest of the parties is limited to the net remainder which constitutes the profits of the conjugal partnership property. As clearly seen, until a liquidation has been made, it is impossible to say whether or not there will be a net remainder to be divided between the parties (*Nable Jose v. Nable Jose*, 41 Phil. 713). The sharing will be equal unless there is a different proportion or division agreed upon in the marriage settlement, or unless there has been a voluntary waiver of such

share as provided for in the Family Code. The waiver, however, must be valid. If the waiver of rights refers to those made during the subsistence of the conjugal partnership of gains, such waiver is invalid and ineffective as it is prohibited under Article 107 in relation to Article 89. A valid waiver can only occur upon a judicial separation of property or after the marriage has been dissolved or annulled and must be contained in a public instrument, as provided for under the second paragraph of Article 107 in relation to Article 89.

In case of annulment of marriage, the conjugal partnership property 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 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 (Article 50, in relation to Article 43[2]).

It must likewise be recalled that in cases of legal separation and annulment of marriage, the party in bad faith shall forfeit his share in the net profits which 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.

In case the marriage is judicially nullified and when the informal civil relationship is governed by Article 147 and 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 the termination of cohabitation. This rule shall likewise apply in cases of void marriages where the property relationship is governed by Article 148. However, this rule will not apply to a subsequent void marriage as a result of the non-observance of Article 40 in relation to Articles 52 and 53. In this case, the rule that will apply is Article 50 in relation to Article 43(2), which is the forfeiture rule in case of the liquidation of the conjugal partnership of gains.

DELIVERY OF THE PRESUMPTIVE LEGITIME. The presumptive legitime is delivered only after the finality of a judicial decree of annulment on grounds provided in Article 45 or of nullity

of a subsequent void marriage under Article 40. The law clearly provides that such delivery should only be "in accordance with Article 51" which only refers to the termination of marriage either by an annulment or a nullity judgment in the proper cases. Hence, delivery of the presumptive legitime need not be made in cases of legal separation or in case of a void marriage not as a result of the non-observance of Article 40 in relation to Articles 52 and 53. Considering that the delivery of the presumptive legitime shall be provided for in the final judgment, the children or their guardian, or the trustee of their property may ask for the enforcement of the judgment in accordance with the last paragraph of Article 51. The value of the presumptive legitimes of all the 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 (Article 51).

CONJUGAL DWELLING. 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 is no such majority, the court shall decide, taking into consideration the best interests of said children.

Article 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)

IDENTITY OF PROVISIONS. Article 130 relative to the conjugal partnership of gains and Article 103 in connection with the absolute community of property are identical. Hence, the explanations under Article 103 are applicable to Article 130.

In *Estonia v. Court of Appeals*, 266 SCRA 627, the Supreme Court ruled that the statement in a Transfer Certificate of Title describing the owner as married to somebody does not by itself give rise to the presumption of conjugality. Hence, in the absence of proof that the property was acquired during the marriage, the property shall be considered as owned by the person stated in the certificate despite a description that he or she is married to someone. It shall not be considered conjugal. Accordingly, in case of death of the owner, this exclusive property shall be co-owned by the surviving spouse and his or her heirs. Creditors of the surviving spouse can only attach the share or interest of the surviving spouse in the co-ownership and not the whole of the estate of the deceased, because this will greatly prejudice the other heirs.

Article 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 and among the different partnerships in proportion to the capital and duration of each. (189a)

SIMULTANEOUS LIQUIDATION OF CONJUGAL PARTNERSHIP CONSTITUTED PRIOR TO FAMILY CODE. Article 131 has basically the same application as that of Article 104. 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. This has been

squarely applied by the Supreme Court in *Dael v. IAC*, 171 SCRA 524, thus:

> Inevitably, the problem is how to apportion the properties involved between the two conjugal partnerships. On this score, guidance should be sought from the provisions of the Civil Code to the effect that whenever the liquidation of the partnership of two or more marriages contracted by the same person should be carried out at the same time and there is no evidence to show the capital or the conjugal property belonging to each of the partnerships to be liquidated, the total mass of the partnership property shall be divided between the different partnerships in proportion to the duration of each and to the property belonging to the respective spouses.
>
> The first marriage existed for approximately fifteen (15) years (1942 to 1957), while the second marriage lasted for fourteen (14) years (1958 to 1972). Applying the aforestated rule, the first conjugal partnership will be prorated a share of fifteen twenty-ninths (15/29) of the properties included in the inventory submitted on August 30, 1978, while the second conjugal partnership will be fourteen twenty-ninths (14/29) thereof. Not to be included, however, are the real properties listed in the supplementary inventory filed on January 16, 1979, because they definitely belong to the estate of Cesario as the latter's inheritance from his parents, Bartolome Cabutihan and Natividad Dael.

If there are two or more conjugal partnership properties of two marriages which have not yet been liquidated, the subsequent partnership cannot be liquidated without the liquidation of the prior one. Thus, it has been held:

> The situation as regards the children by the first marriage is, however materially different. Indeed, the contract, Exhibit Q, purports to dissolve and, hence, liquidate the conjugal partnership of the petitioners. But, this liquidation should not and cannot be effected without a liquidation of the conjugal partnership between Jose Bermas, Sr. and his first wife, in which the children by first marriage certainly have an interest (*Onas v. Javillo*, 59 Phil. 733). At any rate, said Exhibit Q could adversely affect the rights of said children by the first marriage, for, "in case of doubt, the partnership property shall be divided between the different (conjugal) partnerships in proportion to the duration of each and to the property belonging to the respective spouses," as provided in Article 189 of the aforementioned (Article 1431 of the Spanish Civil Code) [Article

131 of the Family Code]. Hence, it is essential that the said children be personally notified of the instant proceedings, and that, for this purpose, their names and addresses, as well as the addresses of the children of herein petitioners, be furnished (*In re Voluntary Dissolution of the Conjugal Partnership of Jose Bermas, Sr. and Pilar Manuel Bermas,* 14 SCRA 327).

Article 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)

Article 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 the amount received for support which exceeds the fruits or rents pertaining to them. (188a)

ADVANCEMENT. As previously discussed, once a spouse dies, the surviving spouse and the children become co-heirs of the estate left by the deceased. Hence, during liquidation they have a right to get certain amounts from what they technically own to support themselves. The amount which they are allowed to get must at least be equivalent to the fruits or rents arising from the share which they will eventually obtain after liquidation. If what they got exceeded the fruits of their share, the excess shall be taken from the part of the property which has been given to them as their separate property after liquidation. Hence, the advance from the common mass of property made during the liquidation shall be paid first by the fruits of their respective shares. If the fruits are insufficient because their advances exceeded the amount of the fruits, then the excess shall be taken from the particular share delivered to them after liquidation (See *Santos v. Bartolome*, 44 Phil. 76). Thus, the allowances for support to the children and the spouse of the deceased pending liquidation of the estate are subject to collation and deductible from their share of the inheritance in so far as they exceed what they are entitled to as fruits or income (*Lesaca v. Lesaca*, 91 Phil. 135).

It must be observed, however, that only the surviving spouse and the children are entitled to get the allowances for support contemplated in Article 133. Other heirs, such as a grandchild, are

not included (See *Babao v. Villavicencio*, 44 Phil. 921). Also, the fact that the children for example are already of age, gainfully employed or married is of no moment as these factors should not be taken into account in relation to the determination of the rights of the mentioned heirs (children and surviving spouse) under Article 133 (*Santero v. CFI*, 153 SCRA 728).

In one particular case, the Supreme Court held that the expense of the maintenance and support of a widow at the time when the conjugal partnership has not yet been liquidated was property borne by the administrator of the deceased husband, but the expenditure was in the nature of mere advancement and is to be deducted from the share pertaining to the heirs of the widow in so far as it exceeds what they may have been entitled to as fruits or income. However, there must be a showing of the source, or sources, from which the funds used for the maintenance and support of the widow were derived; and if it should appear that any part thereof was derived from the net income of the property of the widow, such amount should not be charged against her share (*Santos v. Bartolome*, 44 Phil. 76).

Chapter 5

SEPARATION OF PROPERTY OF THE SPOUSE AND ADMINISTRATION OF COMMON PROPERTY BY ONE SPOUSE DURING THE MARRIAGE

Article 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)

JUDICIAL SEPARATION OF PROPERTY. If the husband and wife, prior to the marriage, did not execute any written marital agreement providing that the separation of property regime will govern their property relationship, they cannot, after the marriage ceremony, alter their property relationship to a separate property regime without mandatory judicial approval. This is the case whether the separation is by agreement of parties under Article 136 or for sufficient cause under Article 135 of the Family Code. Commenting on the regime of separation of property under the Civil Code, the Supreme Court, in *Garcia v. Manzano*, 103 Phil. 798, stated that:

> consistently with its policy of discouraging a regime of separation as not in harmony with the unity of the family and the mutual help and protection expected of the spouses, the Civil Code requires that separation of property shall not prevail unless expressly stipulated in the marriage settlements before the union is solemnized or by judicial decree during the existence of the marriage.

In most cases, judicial approval of separation of property is sought because the spouses have already separated. In this regard, the Supreme Court said that:

in so approving the regime of separation of property of the spouses and the dissolution of their conjugal partnership, this Court does not thereby accord recognition to nor legalize *de facto* separation of the spouses, which xxx is a "state which is abnormal and fraught with grave dangers to all concerned." We would like to douse the momentary seething emotions of couples who, at the slightest ruffling of domestic tranquility — brought about "by mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion" without more — would be minded to separate from each other (*Lacson v. San Jose-Lacson*, 24 SCRA 837).

Article 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)

CIVIL INTERDICTION. The accessory penalty of civil interdiction deprives the offender during the time of his or her sentence

of the rights of parental authority, or guardianship, either as to the person or property of any ward, of marital authority, of the right to manage his property and of the right to dispose of such property by any act or any conveyance *inter vivos* (Revised Penal Code, Article 34). The final decision of the court rendered against the erring spouse embodying the penalty of civil interdiction is enough for the court to approve a judicial separation of property in this case.

DECLARATION OF ABSENCE. Two years having elapsed without any news about the absentee or since the receipt of the last news, and five years in case the absentee has left a person in charge of the administration of his property, his absence may be declared (Article 384, Civil Code). The spouse present, the heirs instituted in a will who may present an authentic copy of the same, the relatives who may succeed by the law of intestacy, and those who may have over the property of the absentee some right subordinated to the condition of his or her death, may ask for the judicial declaration of absence (Article 385 of the Civil Code). The judicial declaration of absence shall not take effect until six months after its publication in a newspaper of general circulation (Article 386, Civil Code). The final decision of the court declaring the spouse absent is enough for the court to approve a judicial separation of property in this case.

LOSS OF PARENTAL AUTHORITY. Loss of parental authority under Article 135(3) refers to the loss of such authority over the common child, whether legitimate or illegitimate, of the spouse of the petitioner and the petitioner, or over the child, whether legitimate or illegitimate, of the spouse of the petitioner with another person. The law does not distinguish.

It must be observed that one of the liabilities of the absolute community of property or the conjugal partnership of gains is the support of the common children and the legitimate children of either spouse (Articles 94[1] and 121[1]). Subject to reimbursement from the separate property of the liable spouse at the time of the liquidation of the absolute community property or of the conjugal partnership of gains, the liabilities even include the support of the illegitimate children of one of the spouses provided certain conditions are observed (Articles 94[9] and 122). Thus, it can be seen that the exposure of the absolute community of property or the conjugal partnership of gains extends to the support of children who may not even be related to one of the spouses. Indeed, the exposure is predicated on mere filiation. Accordingly, in the event that loss of parental authority has been judicially decreed against a spouse over

a common legitimate or illegitimate child with the other spouse, the latter can seek for the judicial separation of property so that his or her interest in the community property or the partnership assets can be immediately allocated to him or her. Since the relationship of the spouses is already damaged, there is a need to protect his or her interest in the assets by way of partition lest the guilty spouse undertakes an act very prejudicial to the innocent spouse's property rights in the community property or the conjugal partnership.

Also, in the event that loss of parental authority has been judicially decreed against a spouse in connection with his or her legitimate child by a previous marriage, or an illegitimate child with another person, it is but proper to allow the other spouse to immediately ask for a judicial separation of property so that his or her share and interest in the absolute community property or the conjugal partnership property can be immediately allocated to her, thereby removing it from being further exposed to liability in favor of children who are not even related to him or her. But to be able to do so, the petitioning spouse must show a prior judicial declaration of loss of parental authority of the other spouse.

Article 229, the third paragraph of Article 231, and Article 232 of the Family Code enumerate the grounds for the termination of parental authority. To constitute a sufficient cause, a court decision terminating parental authority must be on specific grounds provided by law. Generally, the loss of parental authority should indicate malice, abuse, bad faith or culpable negligence on the part of the spouse of the petitioner. Thus, if a spouse sexually abused his or her child with the petitioner, the latter can ask the court for the termination of parental authority of the abusing parent. He or she can likewise seek the separation of the community property or the partnership property after the court decrees the loss of parental authority. The final decision of the court terminating parental authority is enough for the court to approve a judicial separation of property in this case.

ABANDONMENT AND FAILURE TO COMPLY WITH OBLIGATIONS TO THE FAMILY. The concept of abandonment here and the failure to comply with obligations to the family are the same as that in Article 101. Hence, the explanations under Article 101 are applicable to Article 135(4). A spouse is deemed to have abandoned the other when he or she has left the conjugal dwelling without any intention of returning and with an intent to absolutely forego his or her family duties. 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 (Article 101). Failure to comply with the obligations of the family refers to marital, parental or property relations *(Ibid.)*.

ABUSE OF ADMINISTRATION. The administration of the absolute community properties or the conjugal properties or the community properties may be granted in favor of anyone of the spouses in the marriage settlement entered into prior to the marriage. In case such spouse abuses his or her powers of administration, judicial separation of property may be availed of by the aggrieved spouse to avoid further depletion of his or her interest in the properties. For "abuse" to exist, it is not enough that the spouse granted the power of administration performs an act or acts prejudicial to the other spouse. Nor is it sufficient that he or she commits acts injurious to the community of property or the conjugal partnership property, for these may be the result of mere inefficient or negligent administration. Abuse connotes willful and utter disregard of the interests of the partnership, evidenced by a repetition of deliberate acts and/or omissions prejudicial to the latter (*De la Cruz v. De la Cruz*, 130 Phil. 324). Hence, it has been held that mere refusal or failure of the husband as administrator of the conjugal partnership to inform the wife of the progress of the family business does not constitute abuse of administration (*De la Cruz v. De la Cruz,* 130 Phil. 324).

SEPARATION IN FACT. At the time of the petition, the spouses must have been separated in fact for at least one year and reconciliation is highly improbable.

Article 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)

VOLUNTARY SEPARATION. The spouses may agree on the separation of their absolute community of property regime or their conjugal partnership of gains. Before being effective, such separation must have court approval. Otherwise, it shall be void. The petition to be filed in court need not state any reason for the conversion. The agreement of the parties is enough. But if the reason is stated and the same is against public policy, the court must reject the agreement. The petition for the approval to separate the property may even embody the plan or scheme as to how the properties are to be separated which, if not contrary to law and public policy, shall be granted by the court. The agreement for the division of the community property or the conjugal partnership property must be equal unless a different proportion or division has been agreed upon in the marriage settlement or unless there has been a valid waiver of such share as provided in the Family Code (Article 102[4] and Article 129[7]). A valid waiver may be made upon judicial separation of property.

The agreement for voluntary separation of property takes effect from the time of the judicial order decreeing the separation of the properties and not from the signing of the agreement. Thus, in *Toda, Jr. v. Court of Appeals,* 183 SCRA 713, the Supreme Court ruled and stated thus:

> We are in agreement with the holding of the Court of Appeals that the compromise agreement became effective only on June 9, 1981, the date when it was approved by the trial court, and not on March 30, 1981 when it was signed by the parties. Under Article 190 of the Civil Code [now Article 134 of the Family Code], "in the absence of an express declaration in the marriage settlements, the separation of property between spouses during the marriage shall not take place save in virtue of judicial order." Hence, the separation of property is not effected by the mere execution of the contract or agreement of the parties, but by the decree of the court approving the same. It, therefore, becomes effective only upon judicial approval, without which it is void. Furthermore, Article 192 of the said Code (now Article 137 of the Family Code) explicitly provides that the conjugal partnership is dissolved only upon the issuance of a decree of separation of property.
>
> Consequently, the conjugal partnership of Benigno and Rose Marie should be considered dissolved only on June 9, 1981 when the trial court approved their joint petition for voluntary dissolution of their conjugal partnership. x x x

All creditors of the absolute community or of the conjugal partnership of gains, as well as the personal creditors of the spouses, 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. In case of a waiver of one of the spouses, any creditor 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 the credit (Article 89 and Article 107).

In *De Ugalde v. De Yasi,* G.R. No. 130623, February 29, 2008, 547 SCRA 2008, the Supreme Court ruled that the when the judgment by way of compromise agreement dissolving the conjugal partnership of spouses has become final and executory, the fact that the creditors were not notified will not invalidate such a judgment. According to the Supreme Court, a judgment upon a compromise agreement has all the force and effect of any other judgment, and conclusive only upon parties thereto and their privies, and not binding on third persons who are not parties to it. In the *De Ugalde* case, the Supreme Court was interpreting the provision on notice to creditors in Article 191 of the Civil Code which was essentially adopted by the second paragraph of Article 136.

Article 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)

LIQUIDATION. According to Article 137, the liquidation must be made in conformity with the Family Code. Hence, the processes laid down in Articles 102 and 129 must be observed. However, the delivery of the presumptive legitime provided for in the said provisions need not be complied with, as such delivery specifically applies only in case the marriage is either judicially annulled under Article 45 or declared void for non-observance of Article 40 (*i.e.,* the subsequent void marriage). The division of the community property or the conjugal partnership property must be equal unless a different proportion or division has been agreed upon in the marriage settlement or unless there has been a valid waiver of such

share as provided in the Family Code (Article 102[4] and Article 129[7]). 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.

In *Maquilan v. Maquilan,* G.R. No. 155409, June 8, 2007, 524 SCRA 167, the Supreme Court ruled that a partial voluntary separation of property agreed upon by the parties *via* a compromise agreement duly approved by the court prior to the judicial declaration of nullity of marriage is valid.

Article 138. After dissolution of the absolute community or the conjugal partnership, the provisions on complete separation of property shall apply. (191a)

In case of judicial separation of property, whether voluntary or involuntary, the mere filing of the petition to initiate the proceeding shall not automatically result in the dissolution of the absolute community of property or the conjugal partnership of gains. It is the finality of the decision of the court decreeing the separation which dissolves the same. Therefore, it is only from that time that the complete separation of property applies. Hence, in the same vein, as to properties each of the spouses may have acquired or expenses each of them may have incurred after the finality of the judicial separation decree, the same belong exclusively to either of them independently of the community properties or the conjugal partnership properties.

Article 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)

Article 140. The separation of property shall not prejudice the rights previously acquired by creditors. (194a)

RIGHTS OF CREDITORS. The recording in the civil registry of the petition of the separation of property and the final judgment is to aid present and future creditors in determining whether an asset of a spouse is conjugal or really separate. Likewise, the separation of property shall not prejudice the rights previously acquired by the creditors. In fact, if there has been a waiver on the part of one of the

spouses relative to a property in the regime sought to be liquidated, any creditor 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 the credit (Article 89 and Article 107).

Article 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;

4) When the spouse who has left the conjugal home without a decree of legal separation resumes common life with the other;

5) When the 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)

REVIVAL OF PREVIOUS PROPERTY REGIME. The termination of the causes under Article 135 for which an involuntary separation of property has been decreed by the court constitutes the grounds to be able to revive the previous property regime. This is

clearly set out in Article 141(1) to (6). The parties, however, can file another petition for judicial separation of the properties once there are grounds again to initiate the same even if the ground invoked were the same ground previously used.

Also, in case where the previous property regime was judicially separated on the basis of the voluntary agreement of the parties, the parties can revive the same upon petition in court (Article 142[7]). However, no voluntary separation of property may thereafter be granted. If any one of the spouses gives cause for involuntary separation under Article 135, the proper proceedings for judicial separation invoking any of the grounds in Article 135 can be initiated and a proper decree of separation granted.

JUDICIAL PROCEEDING FOR REVIVAL. To be able to revive the previous property regime, the spouses should file a motion in the same court proceeding where separation was decreed for a decree reviving the property regime that existed between them before the separation of property. The agreement to revive the former property regime 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 separate properties of each spouse; and 3) the names of all their known creditors, their addresses and the amounts owing to each. Copies of the agreement of revival and the motion for its approval shall be furnished to the creditors named therein. After due hearing, the court shall, in its order, take measures to protect the interest of creditors. Such order shall be recorded in the proper registries of property (See Article 67).

Article 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 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)

GUARDIAN. When a spouse is judicially appointed guardian of his or her spouse, he or she may likewise be constituted as the administrator of the estate of the other spouse. This is so because a spouse is already obliged by law to live with and take care of his or her spouse.

ABSENTEE AND CIVIL INTERDICTION. These two grounds are exactly the same as in Article 135(1) and (2). Hence, the explanations in the said article are applicable to Article 142(2) and (3).

FUGITIVE FROM JUSTICE. A fugitive from justice refers to "one who having committed or being accused of a crime in one jurisdiction is absent for any reason from that jurisdiction; specifically, one who flees to avoid punishment" (*Ochida v. Cabarroguis*, 71 SCRA 40).

OTHER PERSONS AS GUARDIAN. 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.

SEPARATION IN FACT. It must be recalled also that under Article 100(3) and Article 127(3), it is provided that the separation in fact between the spouses shall not affect the absolute community property or the conjugal partnership of gains, as the case may be, except that, in the absence of sufficient absolute community property or conjugal partnership of gains, 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.

Chapter 6

REGIME OF SEPARATION OF PROPERTY

Article 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 suppletory. (212a)

SUPPLETORY CHARACTER. In the event the contracting parties want that their property relationship shall be governed by the regime of separation of property, they have to enter into a valid marriage settlement prior to the marriage stipulating such regime. The marriage settlement shall principally govern the regime of separation of property. The Family Code shall only be suppletory in character.

Article 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)

PROPERTIES INCLUDED. The parties may agree on the extent of their separation of property regime. It may involve present or future property or both. It may be total or partial. If it is partial, the property not agreed upon as separate shall pertain to the absolute community.

However, it is not valid for the contracting parties to agree in the marriage settlement that the conjugal partnership of property or the absolute community of property shall govern their marital property relationship only up to a certain time, such as up to the tenth wedding anniversary, and thereafter, the separation of property regime shall commence and govern the marital property

relationship. This is so because the provision on the separation of property regime to commence on the 10th wedding anniversary is tantamount to dissolving the absolute community property or conjugal partnership of gains by virtue of a cause or contingency not specifically provided by law, particularly Articles 99 and 126 of the Family Code.

Article 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)

Article 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 liability of the spouses to creditors for family expenses shall, however, be solidary. (215a)

Chapter 7

PROPERTY REGIME OF UNIONS WITHOUT MARRIAGE

Article 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)

INFORMAL CIVIL RELATIONSHIP. Though there is no technical marital partnership between persons living as husband and wife without being lawfully married or under a void marriage, nevertheless there is between them an informal civil relationship which would entitle the parties to some rights (*Lesaca v. Lesaca*, 91 Phil. 135). The property relationship that is created under Article 147 as well as Article 148 is a special kind of co-ownership. Co-ownership is a form of trust and every co-owner is a trustee for the other (*Mallilin v. Castillo*, G.R. No. 136803, June 16, 2000).

To qualify under Article 147, the man and the woman must: 1) must be capacitated to marry each other; 2) live exclusively with each other as husband and wife; and 3) be without the benefit of marriage or under a void marriage. All these requisites must concur. Absence of any of these requisites will remove the contracting parties from the ambit of Article 147. Thus, a live-in relationship between a man and a woman without the benefit of marriage may fall under Article 147 if all the mentioned requisites are present.

Pertinently, a person with legal capacity to marry 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." Thus, informal civil partnerships where the parties are below 18 years of age or those whose circumstances fall under the incestuous void marriages under Article 37 and under Article 38 enumerating void marriages for reasons of public policy, cannot fall under Article 147. Legal capacity of a person to marry must likewise have reference to Article 39 of the Civil Code stating that family relation limits a person's capacity to act. Thus, an already married person has no legal capacity to remarry without the first marriage having been previously terminated. A second marriage celebrated while the first one is validly subsisting is bigamous.

Consequently, provided there are no other circumstances to make the marriage void under Articles 37, 38, 35(1) and (4) which refer to marriages between persons below eighteen years of age and bigamous or polygamous marriage not falling under Article 41, respectively, the void marriages referred to under Article 147

include void marriages under Articles 36 (*Gonzales v. Gonzales,* G.R. No. 159521, December 16, 2005, 478 SCRA 327), 44, 53 and void marriages where there is absence of consent, authority of the solemnizing officer, a valid marriage license, a marriage ceremony as provided for in Article 4 of the Family Code.

The structure of the property relationship under Article 147 is as follows:

1) Salaries and wages shall be owned by them in equal shares; and

2) Property acquired by either of the parties exclusively by his or her own fund belongs to such party provided that there is proof that he or she acquired it by exclusive funds;

3) Property acquired by both of them through their work or industry shall be governed by the rules on co-ownership. Consequently, either spouse may alienate in favor of the other his or her share in the property;

4) Property acquired *while they live together* shall be presumed to have been obtained by their joint efforts, work or industry and shall be owned by them in equal shares. 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;

5) The fruits of the couple's separate property are not included in the co-ownership (*Valdes v. RTC*, 72 SCAD 967, 260 SCRA 221);

6) Property acquired by any of the parties after separation shall be exclusively owned by the party who acquired it;

7) 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. However, either spouse may alienate in favor of the other his or her share in the property co-owned. But no one can donate or waive any interest in the co-ownership that would constitute an indirect or direct grant of gratuitous advantage to the other which is void pursuant to Article 87;

8) 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.

In *Valdes v. RTC*, 72 SCAD 967, 260 SCRA 221, the Supreme Court stated that, in a void marriage, the property regimes are those provided for in Article 147 or 148 as, the case may be. The liquidation of the co-ownership shall be in accordance with the provisions on co-ownership under the Civil Code which are not in conflict with Article 147 or 148. Articles 50, 51 and 52 in relation to Articles 102 and 129 of the Family Code will not apply in the liquidation and partition. Hence, Articles 102(6) and 129(9) which in effect provide that to whomsoever parent the majority of the children elects to go shall go the conjugal home are not applicable in a marriage judicially declared void. In a void marriage, the conjugal home shall equally be co-owned by the couple and shall be divided equally during liquidation in accordance with the rules on co-ownership.

The *Valdes* ruling likewise stated that paragraphs (2), (3), (4) and (5) of Article 43 relates only, by the explicit terms of Article 50, to voidable marriages under Article 45 and, exceptionally, *to void marriages under Article 40* of the Family Code, namely, the declaration of nullity of *a subsequent marriage* contracted by a spouse of a prior void marriage before the latter is judicially declared void.

Also, in accordance with the *Valdes* ruling and Article 50, if the void marriage involved is the subsequent void marriage that may occur for non-observance of Article 40, the spouse in bad faith shall forfeit only 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 guilty spouse by a previous marriage, or in default of children, the innocent spouse. This is in accordance with Article 43(2) in relation to Article 50. If the void marriage involved is any void marriage other than the subsequent void marriage referred to in Article 40, then the forfeiture shall be in accordance with Article 147 or 148. Under Article 147, the spouse in bad faith shall forfeit not only his or her share in the net profits but *all his or her shares* in the co-ownership 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. Under Article 148, 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 marriage; and 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 Article 147.

> **Article 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)**

PROPERTY REGIME UNDER ARTICLE 148. Article 148 applies to a relationship not within the ambit of Article 147. In short, if any one of the requirements under Article 147 is absent, Article 148 will apply. However, the parties may be deemed to be co-owners of a property acquired during the cohabitation only upon proof that each made an actual contribution to its acquisition. Without proof of actual contribution, a co-ownership under Article 148 cannot arise (*Francisco v. Master Iron Works,* G.R. No. 151967, February 16, 2005, 451 SCRA 494). The fact that the other party administered the property is irrelevant to prove co-ownership (*Tumlos v. Fernandez*, G.R. No. 137650, April 12, 2000). Hence, the relationships contemplated under Article 148 include the following:

> 1. a man and a woman living together as husband and wife, without benefit of marriage, but are not capacitated to marry;

2. an adulterous relationship even if it occurred prior to the effectivity of the Family Code (*Atienza v. De Castro*, G.R. No. 169698, November 20, 2006, 508 SCRA 593).

3. a bigamous or polygamous marriage;

4. incestuous void marriages under Article 37; and

5. void marriages by reason of public policy under Article 38.

The structure of the property regime, which is a limited co-ownership (*Mallilin v. Castillo*, G.R. No. 136803, June 16, 2000) under Article 148, is as follows:

1) The salaries and wages are separately owned by the parties and if any of the spouses is married, his or her salary is the property of the conjugal partnership of gains of such legitimate marriage;

2) Property solely acquired by funds of any of the parties belongs to such party;

3) 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;

4) The respective shares of the parties over properties owned in common are presumed to be equal. However, proofs may be shown to show that their contribution and respective shares are not equal. Without proof of actual contribution by both parties, there can be no presumption of co-ownership and equal sharing (*Villanueva v. Court of Appeals,* G.R. No. 143286, April 14, 2004; *Rivera v. Heirs of Romualdo Villanueva*, G.R. No. 141501, July 21, 2006, 496 SCRA 135).

5) The rule and presumption mentioned above shall apply to joint deposits of money and evidences of credit; and

6) 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 Article 147. The foregoing rules on forfeiture shall likewise apply even if both parties are in bad faith.

In *Manila Surety & Fidelity Co., Inc. v. Teodoro,* 20 SCRA, 463, where the spouses, both Filipinos, procured an absolute divorce

abroad and one of them subsequently contracted another marriage in Hongkong, the Supreme Court held that any liability of the latter spouse who remarried cannot be levied on the fruits of the separate property of his new "spouse" considering that the said fruits were acquired by the said "spouse" prior to the solemnization of the second bigamous marriage and therefore such fruits did not belong to the relationship that resulted from the said bigamous marriage.

In *Juaniza v. Jose*, 89 SCRA 306, where a woman who was living in a bigamous relationship with a married man was sought to be held liable for an accident involving a vehicle driven by the bigamous husband and where the vehicle was registered under the name of the said husband, the Supreme Court ruled that the woman cannot be held liable as a co-owner of the vehicle because the vehicle must be considered the conjugal property of the bigamous husband and his legitimate spouse.

Also, in a case where the husband bought property in installments and thereafter left his family to bigamously marry another woman and where the said husband had the property under the name of the said other woman after full payment, it was held that the property was the conjugal partnership of the legitimate first marriage on the strength of the provisions of the New Civil Code and the old Civil Code that "all property of the marriage is presumed to belong to the conjugal partnership, unless it be proved that it pertains exclusively to the husband or the wife" and which presumption had not been convincingly rebutted and that there was no co-ownership created between the bigamous relationship with respect to the said property (*Belcodero v. Court of Appeals*, 45 SCAD 400, 227 SCRA 303). Under the new Family Code, if the said property were bought through the joint contribution of money, property, or industry by both parties to the bigamous relationship, the share of the bigamous husband shall accrue to the absolute community or conjugal partnership existing in his or her legitimate marriage.

In *Agapay v. Palang,* 85 SCAD 145, 276 SCRA 341, the Supreme Court ruled that, in a bigamous marriage, Article 148 applies especially when it was never shown that one of the spouses actually contributed to the co-ownership. The Supreme Court pertinently said:

> The sale of the riceland on May 17, 1973 was made in favor of Miguel and Erlinda. The provision of law applicable here is Article 148 of the Family Code providing for cases of cohabitation when a man and a woman who are not capacitated to marry

each other live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage. While Miguel and Erlinda contracted marriage on July 15, 1973, said union was patently void because the earlier marriage of Miguel and Carlina was still subsisting and unaffected by the latter's *de facto* separation.

Under Article 148, 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 contributions. 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. If the actual contribution of the party is not proved, there will be no co-ownership and no presumption of equal shares.

In the case at bar, Erlinda tried to establish by her testimony that she is engaged in the business of buy-and-sell and had a sari-sari store but failed to persuade us that she actually contributed money to buy the subject riceland. Worth no-ting is the fact that on the date of conveyance, May 17, 1973, petitioner was only around twenty years of age and Miguel Palang was already sixty-four and a pensioner of the U.S. Government. Considering her youthfulness, it is unrealistic to conclude that in 1973 she contributed P3,750.00 as her share in the purchase price of subject property, there being no proof of the same.

Petitioner now claims that the riceland was bought two months before Miguel and Erlinda actually cohabited. In the nature of an afterthought, said added assertion was intended to exclude their case from the operation of Article 148 of the Family Code. Proof of the precise date when they commenced their adulterous cohabitation not having been adduced, we cannot state definitively that the riceland was purchased even before they started living together. In any case, even assuming that the subject property was bought before cohabitation, the rules of co-ownership would still apply and proof of actual contribution would still be essential.

Since petitioner failed to prove that she contributed money to the purchase price of the riceland in Binalonan, Pangasinan, we find no basis to justify her co-ownership with Miguel over the same. Consequently, the riceland should, as correctly held by the Court of Appeals, revert to the conjugal partnership property of the deceased Miguel and private respondent Carlina Palang.

In *Borromeo v. Descallar,* G.R. No. 159310, February 24, 2009, where title to an immovable property was registered under the name of a Filipina wife considering that her Austrian-husband, who acquired and fully financed the purchase from a realty corporation during the cohabitation, was constitutionally prohibited from owning property in the Philippines, and where it was found out that the Filipina wife was already married to another person prior to her marriage to the Austrian , the Supreme Court affirmed the sale by the Austrian of the property registered under the name of the Filipina wife to a third person by ruling that mere registration of the title under the name of the Filipina spouse does not confer upon her absolute ownership against convincing evidence that the property was financed exclusively by the Austrian. The Supreme Court also stated that:

> Further, the fact that the disputed properties were acquired during the couple's cohabitation also does not help respondent. The rule that co-ownership applies to a man and a woman living exclusively with each other as husband and wife without the benefit of marriage, but are otherwise capacitated to marry each other, does not apply. In the instant case, respondent was still legally married to another when she and Jambrich lived together. In such an adulterous relationship, no co-ownership exists between the parties. It is necessary for each of the partners to prove his or her actual contribution to the acquisition of property in order to be able to lay claim to any portion of it. Presumptions of co-ownership and equal contribution do not apply. Second, we dispose of the issue of registration of the properties in the name of respondent alone. Having found that the true buyer of the disputed house and lots was the Austrian Wilhelm Jambrich, what now is the effect of registration of the properties in the name of respondent?
>
> It is settled that registration is not a mode of acquiring ownership. It is only a means of confirming the fact of its existence with notice to the world at large. Certificates of title are not a source of right. The mere possession of a title does not make one the true owner of the property. Thus, the mere fact that respondent has the titles of the disputed properties in her name does not necessarily, conclusively and absolutely make her the owner. The rule on indefeasibility of title likewise does not apply to respondent. A certificate of title implies that the title is quiet and that it is perfect, absolute and indefeasible. However, there are well-defined exceptions to this rule, as when the transferee is not a holder in good faith and did not acquire the subject properties for a valuable consideration. This is the

situation in the instant case. Respondent did not contribute a single centavo in the acquisition of the properties. She had no income of her own at that time, nor did she have any savings. She and her two sons were then fully supported by Jambrich.

Respondent argued that aliens are prohibited from acquiring private land. This is embodied in Section 7, Article XII of the 1987 Constitution which is basically a reproduction of Section 5, Article XIII of the 1935 Constitution, and Section 14, Article XIV of the 1973 Constitution. The capacity to acquire private land is dependent on the capacity "to acquire or hold lands of the public domain." Private land may be transferred only to individuals or entities "qualified to acquire or hold lands of the public domain." Only Filipino citizens or corporations at least 60% of the capital of which is owned by Filipinos are qualified to acquire or hold lands of the public domain. Thus, as the rule now stands, the fundamental law explicitly prohibits non-Filipinos from acquiring or holding title to private lands, except only by way of legal succession or if the acquisition was made by a former natural-born citizen. Therefore, in the instant case, the transfer of land from Agro-Macro Development Corporation to Jambrich, who is an Austrian, would have been declared invalid if challenged, had not Jambrich conveyed the properties to petitioner who is a Filipino citizen. In *United Church Board for World Ministries v. Sebastian,* the Court reiterated the consistent ruling in a number of cases that if land is invalidly transferred to an alien who subsequently becomes a Filipino citizen or transfers it to a Filipino, the flaw in the original transaction is considered cured and the title of the transferee is rendered valid. Applying *United Church Board for World Ministries*, the trial court ruled in favor of petitioner, *viz.*:

[W]hile the acquisition and the purchase of (*sic*) Wilhelm Jambrich of the properties under litigation [were] void *ab initio* since [they were] contrary to the Constitution of the Philippines, he being a foreigner, yet, the acquisition of these properties by plaintiff who is a Filipino citizen from him, has cured the flaw in the original transaction and the title of the transferee is valid.

The trial court upheld the sale by Jambrich in favor of petitioner and ordered the cancellation of the TCTs in the name of respondent. It declared petitioner as owner in fee simple of the residential house of strong materials and three parcels of land designated as Lot Nos. 1, 3 and 5, and ordered the Register of Deeds of Mandaue City to issue new certificates of title in his name. The trial court likewise ordered respondent to pay petitioner P25,000 as attorney's fees and P10,000 as litigation expenses, as well as the costs of suit.

> We affirm the Regional Trial Court.
>
> The rationale behind the Court's ruling in *United Church Board for World Ministries,* as reiterated in subsequent cases, is this — since the ban on aliens is intended to preserve the nation's land for future generations of Filipinos, that aim is achieved by making lawful the acquisition of real estate by aliens who became Filipino citizens by naturalization or those transfers made by aliens to Filipino citizens. As the property in dispute is already in the hands of a qualified person, a Filipino citizen, there would be no more public policy to be protected. The objective of the constitutional provision to keep our lands in Filipino hands has been achieved.

It is very interesting to note however that in *Nicdao Cariño v. Cariño,* G.R. No. 132529, February 2, 2001, the Supreme Court, while acknowledging that the previous marriage was void for having been solemnized without a marriage license, nevertheless stated that the subsequent marriage of one of the parties is bigamous because the first marriage, though void, was still presumed to be valid. Accordingly, the Supreme Court applied the property regime under Article 148. This particular decision is indeed confusing for, in creating the presumption, there seems to be no more distinction between the voidness of the subsequent marriage under Article 40 and the voidness of the subsequent marriage due to bigamy under Article 41. By the statement of the Supreme Court presuming the validity of the first marriage, though it is indeed void due to lack of marriage license, it obfuscates the difference between Article 40, and Article 41. The question now is this: if the first marriage will always be presumed valid, though it is clearly void, would there still be any difference between Article 40 and bigamy under Article 41? Is it not the law in Article 40 that there is precisely no judicial declaration of nullity of the first marriage? If in such cases all subsequent marriage shall be considered void on the ground of bigamy anyway, what then would be the usefulness of Article 40, especially in the light of the doctrine laid down in the case of *Valdez v. RTC,* 260 SCRA 221, describing the subsequent void marriage in Article 40 as a very exceptional void marriage? It is submitted therefore that, despite the decision of the Supreme Court in the *Nicdao Cariño* case, the basic difference between Articles 40 and 41 must still be maintained. It appears, therefore that the better rule is that pursuant to Article 50, the exceptional subsequent void marriage under Article 40 shall have either a conjugal partnership property or absolute community of property as the case may be and not the co-ownership under Article 148.

The law likewise states that the second paragraph of Article 148 providing for the rules on forfeiture of shares shall likewise apply even if both parties are in bad faith. Thus, if a spouse and his bigamous wife who happens to be a relative by consanguinity within the first civil degree of the former, jointly contribute to their co-ownership while living together, with the husband contributing his salary and the bigamous-cousin-wife likewise contributing her salary, the co-ownership shall be liquidated as follows: the share of the spouse who is obviously in bad faith shall accrue to the absolute community or conjugal partnership of his existing valid marriage while the share of the bigamous-cousin-wife who is also in bad faith shall be forfeited in favor of their common children. In case of default of or waiver of any or all of the common children or their descendants, each vacant share shall belong to the respective surviving descendants and in the absence of descendants, such share shall belong to the innocent party. Since there is no innocent party in this case considering that the spouse is also in bad faith, the share of the bigamous-cousin-wife shall be given to the said bigamous-cousin-wife. In this regard and *for purposes of the share of the bigamous-cousin-wife only* and considering further that both the husband and the bigamous-cousin-wife are in bad faith, they shall be considered as if they are both in good faith and therefore the share of the bigamous-cousin-wife shall go to her.

TITLE V. — THE FAMILY

Chapter 1

THE FAMILY AS AN INSTITUTION

Article 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)

PARAMOUNT IMPORTANCE. The 1987 Philippine Constitution provides that "the State recognizes the sanctity of family life and shall protect and strengthen the family as a basic social institution" (Section 12, Article II). As a matter of fact, to highlight the importance of the family and marriage, the Constitution further provides a separate Article 15 exclusively dealing with the family. Among others, it provides that 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 1, Article 15).

DESTRUCTIVE AGREEMENTS. Family relations are governed by law and no custom, practice or agreement destructive of the family shall be recognized or given effect. Hence, an agreement that, while the marriage is subsisting, the husband can have a concubine or the wife can enter into an adulterous relationship is void. However, such void agreement's only legal significance is to invoke it as an evidence showing "consent" to the sexual infidelity of the husband or the wife in cases of legal separation. In *De Leon v. Court of Appeals*, 186 SCRA 345, where the parties stipulated that "in consideration for a peaceful and amicable termination of relations between the undersigned and her lawful husband," the parties agreed to give some properties to the wife and a monthly support for the children

and for the wife to agree to a judicial separation of property plus the amendment of the divorce proceedings initiated by the wife in the United States to conform to the agreement, the Supreme Court sustained the lower court's ruling that the agreement is contrary to law and Filipino morals and public policy because the consideration of the agreement was the termination of the marriage by the parties which they cannot do on their own and without legal basis.

PARTIES IN COURT CASE. According to Section 4, Rule 3 of the 1997 Rules of Civil Procedure, "husband and wife shall sue or be sued jointly except as provided by law." The word "jointly" simply means that they shall be sued together. It does not refer to the nature of the liability. This is so because when the spouses are sued for the enforcement of an obligation entered into by them or of an obligation which redounded to the benefit of the family, they are being impleaded in their capacity as representatives of the absolute community or the conjugal partnership and not as independent debtors such that the concept of joint or solidary liability, as between them, does not arise (See *Alipio v. Court of Appeals*, 341 SCRA 441). The necessity of being jointly sued is also because generally the spouses are joint administrators of either the absolute community of property or the conjugal partnership of gains.

In *Carandang v. Heirs of Quirino A. De Guzman*, G.R. No. 160347, November 29, 2006, 508 SCRA 469, the Supreme Court allowed only one of the spouses to file a case for recovery of property considering that, in a conjugal partnership of gains, the law of partnership in the Civil Code applies in a suppletory character and considering that, in accordance with the said law, a spouse is a co-owner of partnership property, he or she can therefore undertake anything beneficial to the partnership, including the filing by himself or herself alone of a case for the recovery of partnership property. The other spouse is not an indispensible party to such a case. Neither is the other spouse a necessary party. This rule is also true with respect to the absolute community of property considering that the rule on co-ownership shall apply in a suppletory character in such a property regime.

Significantly, Article 111 of the Family Code provides that a spouse may appear alone in court if what is involved in the litigation is his or her separate and exclusive property.

Also, joint management or administration does not require that the husband and the wife always act together (*Docena v. Lapesura*, G.R. No. 140153, March 28, 2001). Hence, if a debtor of

the conjugal partnership or the absolute community is to be sued, the husband or the wife alone may file the case if the suit relates to any act of administration or management. Each spouse may validly exercise full power of management alone subject to the intervention of the court in proper cases. However, it is always advisable that both husband and wife sue together in pursuing a community or conjugal claim. This is so because they are the representatives of the conjugal partnership or absolute community and they do not act as independent debtors. If one of the spouses, as administrator, files the suit as plaintiff, the defendants in their counterclaim against the conjugal partnership or community property can nevertheless file a motion to include as a necessary party the spouse, who has not been impleaded, on the ground that their counterclaim may be chargeable to the absolute community or conjugal partnership which requires the presence of the other spouse.

Significantly, while as a general rule the verification and certification of non-forum shopping in a petition or a complaint filed in court must be signed by all the petitioners in a case, the signature of the husband or wife alone is substantial compliance with this requirement in cases involving community or conjugal property, even if both of the spouses are petitioners in the case. Each of the spouses may reasonably be presumed to have personal knowledge of the filing or non-filing by the other spouse of any action or claim similar to the petition which the other spouse filed given the notices and legal processes involved in a legal proceeding involving real property (*Docena v. Lapesura*, G.R. No. 140153, March 28, 2001).

Article 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 half-blood. (217a)

Article 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)

APPLICATION. The present Articles 150 and 151 were likewise contained in the Civil Code as Articles 217 and 222, respectively. In *Gayon v. Gayon,* 36 SCRA 104, it was held that the enumeration of the family relations under Article 217 of the Civil Code, now Article 150 of the Family Code, should be construed strictly. Any person not included in the enumeration cannot be considered as within the term "family relations." Hence, in a case involving suits between a husband and his sister-in-law, the court ruled that the requirement of "earnest efforts to seek a compromise" between family members before the commencement of any suit between them as provided under Article 222 of the Civil Code, now Article 151 of the Family Code, need not be observed as the parties are not within the term "family relations" or "family members" under the law (*Gayon v. Gayon*, 36 SCRA 104). Also, collateral relatives who are not brothers and sisters are not included in the term "family relations" (*Mendez v. Eugenia,* 80 SCRA 82). However, a suit filed by a woman against her sister and the latter's husband will not involve earnest efforts to compromise considering the inclusion of the husband who is not within the "family relations" provided by law (*Hontiveros v. RTC*, G.R. No. 125465, June 29, 1999).

The complaint or petition must be verified. If it is unverified, the case should not be dismissed. The court should just merely require the party to have it verified (*Hontiveros v. RTC*, G.R. No. 125465, June 29, 1999).

EARNEST EFFORTS TO COMPROMISE. Before a suit can be filed by a person against another belonging to the same family as provided for under Article 150, earnest efforts must first be made to settle the case amicably. Otherwise, the suit is dismissible. Significantly, failure to exert earnest efforts in these situations is specifically made a ground for a motion to dismiss under Section 1(j), Rule 16 of the Rules of Court of the Philippines. Commenting on the reasons for the inclusion of Article 222 of the Civil Code, now Article 151 of the Family Code, the Civil Code Commission said:

> It is difficult to imagine a sadder and more tragic spectacle than a litigation between members of the 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 strangers (Report of the Code Commission, page 18).

EXCEPTIONS. The duty to engage in earnest efforts to compromise, however, is not required if included in the suit between family members is a stranger not of the same family as the interest of such stranger may differ from the interest of members of the same family.

> It is not always that one who is alien to the family would be willing to suffer the inconvenience of, much less relish, the delay and the complications that wranglings between or among relatives more often than not entail. Besides, it is neither practical nor fair that the determination of the rights of a stranger to the family who just happened to have innocently acquired some kind of interest in any right or property disputed among its members should be made to depend on the way the latter would settle their differences among themselves (*Magbaleta v. Gonong*, 76 SCRA 511).

The rule will not also apply to cases which may not be compromised under the Civil Code. These cases are enumerated in Article 2035 of the Civil Code which provides that no compromise upon the following questions shall be valid: 1) the civil status of persons; 2) the validity of a marriage or of a legal separation; 3) any ground for legal separation; 4) future support; 5) the jurisdiction of courts; and 6) future legitime.

The rule on earnest efforts also does not apply to special proceedings like a petition for the settlement of estate guardianship and custody of children, and *habeas corpus*. The term "suit" provided by law clearly implies only civil actions (*Manalo v. Court of Appeals*, G.R. No. 129242, January 16, 2000).

EXEMPTION FROM CRIMINAL LIABILITY IN CRIMES AGAINST PROPERTY. Article 332 of the Revised Penal Code provides that no criminal, but only civil liability, shall result from the commission of the crime of theft, swindling or malicious mischief committed or caused mutually by the following persons:

> 1. Spouses, ascendants and descendants, or relatives by affinity in the same line;

2. The widowed spouse with respect to the property which belonged to the deceased spouse before the same shall have passed into the possession of another; and

3. Brothers and sisters and brothers-in-law and sisters-in-law, if living together.

The exemption established by Article 332, however, shall not be applicable to strangers participating in the commission of the crime.

RUNNING OF PRESCRIPTIVE PERIODS. Unless otherwise provided by the Family Code and other laws, Article 1109 of the Civil Code provides:

Article 1109. Prescription does not run between husband and wife, even though there be a separation of property agreed upon in the marriage settlements or by judicial decree.

Neither does prescription run between parents and children, during the minority or insanity of the latter, and between guardian and ward during the continuance of the guardianship.

Chapter 2

THE FAMILY HOME

Article 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)

Article 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)

CONSTITUTION. Under the Family Code, a family home is deemed constituted on a house and land from the time it is actually occupied as a family residence (*Arriola v. Arriola,* G.R. No. 177703, January 28, 2008, 542 SCRA 666). The requirement of house and land as constitutive of a family home stresses the element of permanence. Hence, a boat on water cannot be constituted a family home.

If the owners, husband and wife, head of the family or the beneficiaries actually reside in the premises, it can be a family home as contemplated by law. Residing in a family home is a real right (*Taneo v. Court of Appeals*, 304 SCRA 308). The occupancy must be actual and not constructive, something which is merely possible or presumptive (*Patricio v. Dario III*, G.R. No. 170829, November 20, 2006). Hence, one cannot claim that he or she has occupied the premises at the time his or her overseer, maid, houseboy or driver has lived in the said place because occupancy by the one claiming

the house as a family home must be actual and not constructive. Hence, in *Manacop v. Court of Appeals,* 85 SCAD 491, 277 SCRA 57, the Supreme Court, in rejecting the contention of the petitioner that he should be deemed to have occupied his house because he was merely staying temporarily in the United States, the person actually residing therein was his overseer, and his wife stayed in the house whenever she visited the Philippines, ruled that there was no actual occupancy because "that which is actual is something real or actually existing, as opposed to something merely possible."

The creditors should take the necessary precautions to protect their interest before extending credit to the spouses or head of the family owning the home (*Modequillo v. Breva*, 185 SCRA 766).

There is no need to constitute the family home judicially or extrajudicially as required in the Civil Code. All residential houses used as a family home, with or without having been judicially or extrajudicically constituted as such prior to the effectivity of the Family Code, are deemed constituted by operation of law as a family home on August 3, 1988, the date of effectivity of the Family Code (*Modequillo v. Breva*, 185 SCRA 766) provided that the provisions of the Family Code are complied with. Upon automatic constitution on August 3, 1988, the family home shall thereafter be prospectively entitled to all benefits provided under the Family Code. Accordingly, Article 153 cannot be given retroactive effect to shield the homes of debtors from execution of judgment arising from debts which became due and demandable prior to August 3, 1988. Thus, a debtor who, prior to August 3, 1988, never constituted his or her house judicially or extrajudicially as a family home under the Civil Code and whose debt matured prior to August 3, 1988, cannot claim that, on August 3, 1988, his or her house cannot anymore be answerable to satisfy a judgment because it became a family home and therefore exempted from execution. To be able to avail of the benefits of a family home in relation to debts which matured prior to August 3, 1988, it must be shown that the home was constituted either judicially or extrajudicially pursuant to the Civil Code (*Manacop v. Court of Appeals*, 85 SCAD 941, 277 SCRA 57; *Taneo v. Court of Appeals*, 304 SCRA 308).

A family home cannot be constituted by the wife or husband alone. Constitution must be done jointly by both husband and wife. An unmarried head of the family, however, can constitute by himself or herself alone. The occupancy of any of the beneficiaries can likewise constitute a home as a family home. Hence, even if a

married person is legally separated or *de facto* separated, a family home can still be constituted if any of his or her beneficiaries actually occupies the land and the house of such married person with his or her consent and pursuant to the other requirements of the Family Code.

A family home is not affected by the type of property regime of the spouses or by the fact that the marriage has been nullified (*Valdez v. RTC,* 260 SCRA 221).

EXEMPT FROM EXECUTION. The exemption from execution, forced sale or attachment provided by law 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 (*Modequillo v. Breva*, 185 SCRA 766). It is a personal right which can be claimed only by the judgment debtor, and not by the sheriff, and therefore generally must be claimed before the public auction (*Versola v. Court of Appeals*, G.R. No. 164740, July 31, 2006, 497 SCRA 385).

The exemption is not, however, absolute as there are obligations and indebtedness excluded from the exemption which are enumerated in Article 155. Under Article 155, the whole amount obtained from the sale of the family home may be taken by the creditor or obligee.

Also, Article 160 provides that a judgment creditor whose claim is not one among those provided in Article 155 may apply for the family home's execution if he or she has reasonable grounds to believe that the family home is actually worth more than the maximum amount fixed in Article 157. The proceeds of any execution sale shall be applied first to the amount provided in Article 157, and then to the liabilities under the judgment and costs. The excess, if any, shall be delivered to the judgment debtor.

In making the exemption not absolute, the Supreme Court in *People v. Chavez,* 12 SCRA 232, stated that "certainly, the 'humane considerations,' for which the law surrounded the family home with immunities from levy, did not include the intent to enable a debtor to thwart the just claims of its creditors."

In *Josef v. Santos,* G.R. No. 165060, November 27, 2008, where the petitioner immediately claimed exemption from execution of a property which was claimed to be a family home after the respondent filed a motion for execution and where the lower court did not conduct any investigation whether or not indeed the property was

a family home, the Supreme Court voided the writ of execution and stated:

> Being void, the July 16, 2003 Order could not have conferred any right to respondent. Any writ of execution based on it is likewise void. Although we have held in several cases that a claim for exemption from execution of the family home should be set up and proved before the sale of the property at public auction, and failure to do so would estop the party from later claiming the exemption since the right of exemption is a personal privilege granted to the judgment debtor which must be claimed by the judgment debtor himself at the time of the levy or within a reasonable period thereafter, the circumstances of the instant case are different. Petitioner claimed exemption from execution of his family home soon after respondent filed the motion for issuance of a writ of execution, thus giving notice to the trial court and respondent that a property exempt from execution may be in danger of being subjected to levy and sale. Thereupon, the trial court is called to observe the procedure as herein laid out; on the other hand, the respondent should observe the procedure prescribed in Article 160 of the Family Code, that is, to obtain an order for the sale on execution of the petitioner's family home, if so, and apply the proceeds — less the maximum amount allowed by law under Article 157 of the Code which should remain with the petitioner for the rebuilding of his family home — to his judgment credit. Instead, both the trial court and respondent completely ignored petitioner's argument that the properties subject of the writ are exempt from execution.

Article 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)

BENEFICIARIES. Knowing the beneficiaries is important because their actual occupancy of a home may constitute the same as a family home provided their actual occupancy of the house and lot is with the consent either of the husband and/or the wife who own the house and lot or of the unmarried person who is the head of

the family and who likewise owns the house and lot, even if the said owners do not actually reside therein (*Manacop v. Court of Appeals*, 85 SCAD 491, 277 SCRA 57).

To be a beneficiary (other than the husband and the wife or an unmarried person who is the head of a family) of the family home, three requisites must concur: (1) they must be among the relationships enumerated in Article 154 of the Family Code; (2) they live in the Family home; and (3) they are dependent for legal support upon the head of the family. Thus, in *Patricio v. Dario III,* G.R. No. 170829, November 20, 2006, 507 SCRA 438, a grandson was not considered a beneficiary of a family home owned by his grandparent because, while the said grandchild was living in the said family home, he was not dependent for support on the grandparent, who was the head of the family where the said grandchild lived, but was dependent on his father.

Also, the beneficiaries are the people who are most likely to be affected by the constitution of the family home and its disposition. Thus, in case the family home has to be sold by the owner, he or she has to obtain the consent, among others, of a majority of the beneficiaries of legal age (Article 158). Likewise, for 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 (Article 153). The enumeration under Article 154 "may include the in-laws where the family home is constituted jointly by the husband and the wife. But the law definitely excludes maids and overseers" (*Manacop v. Court of Appeals*, 85 SCAD 491, 277 SCRA 57).

Article 155. The family home shall be exempt from execution, forced sale or attachment except:

1) For non-payment 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)

TAXES. Taxes are the lifeblood of the government and their prompt and certain availability is an imperious need (*CIR v. Goodrich*, 22 SCRA 1256). Being the chief source of revenue for the government to keep it running, taxes must be paid immediately and without delay (*CIR v. Yuseco*, 3 SCRA 313).

DEBTS. A court judgment is not necessary to clothe a pre-existing debt under Article 155 with the privileged character of being enforceable against the family home. Hence, in the event a case is filed questioning the propriety or validity of a debt or obligation under Article 155 for which the family home is being executed in accordance with law, such debt or obligation shall be considered to have arisen not from the time the court issues a judgment affirming the existence, propriety or validity of such debt but from the time it actually arose (*People v. Chavez*, 12 SCRA 232).

The term "debt" used in the law, especially under Article 155(2) is not qualified and must therefore be used in its generic sense, *i.e.,* "obligations" in general. It includes money judgment arising from tort (*People v. Chavez*, 12 SCRA 232, citing *Montoya v. Ignacio*, 54 Off. Gaz. 978-979). The whole value of the family home may be used to pay off the obligations under Article 155.

In *Gomez v. Sta. Ines,* G.R. No. 132537, October 14, 2005, 473 SCRA 25, where the debt was incurred before the effectivity of the Family Code on August 3, 1988 and the subject property had not been constituted as a family home under the provisions of the Civil Code, the Supreme Court ruled that , because a home which was not a family home prior to the effectivity of the Family Code became a family home by operation of law upon the effectivity of the Family Code, the debt therefore can be considered as having been incurred before the constitution of the family home and hence can be subject to execution. The Supreme Court also said that the 1989 judgment sustaining the liability of the debtor was not the reckoning date for the existence of the debt. It is the time when the debt was actually incurred that is the reckoning point which in this case was sometime in 1977 such that the action was filed only in 1986.

Article 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 installment where ownership is reserved by the vendor only to guarantee payment of the purchase price may be constituted as a family home. (227a, 228a)

FAMILY HOME. The family home must be constituted at a place where there is a fixed and permanent connection with the persons constituting it. The law provides that it must be a 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. Thus, an apartment unit or a house being merely rented cannot be constituted a family home. Also, a house erected by a person on the property of another is not a family home (*Taneo v. Court of Appeals*, 304 SCRA 308). Nevertheless, property that is the subject of a conditional sale on installment where ownership is reserved by the vendor only to guarantee payment of the purchase price may be constituted as a family home.

Article 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 the 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)

VALUE OF THE FAMILY HOME. It must be observed that the family home is constituted from the time it is actually occupied as a family home (Article 153). Actual occupancy is the operative act of constitution. But the family home at the time of the constitution must be in the amount of three hundred thousand pesos in urban areas and two hundred thousand pesos in rural areas, or such

amount as may hereafter be fixed by law. By present standards, the amounts indicated are low. Be that as it may, the import of the law seems to be that, if at the time of the constitution, the home was more than the value fixed by the law, such home is not a family home; therefore, it is not exempted from execution, forced sale or attachment.

The second paragraph of Article 157 provides that, "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 the evaluation." Thus, in case a house worth P300,000 in an urban area was not legally constituted as a family home prior to the effectivity of the Family Code, it becomes automatically a family home upon the effectivity of the Family Code on August 3, 1988 if the actual value is still in the amount of P300,000 on August 3, 1988. If the house were worth P400,000 prior to the effectivity of the Family Code and if at the time of or after the effectivity of the Family Code, the actual value has already increased to P500,000, it will not be considered a family home because the value of P400,000 at the time of its constitution, not the P500,000 which is the value after the effectivity of the Family Code, shall be the basis of the evaluation considering that the former amount is most favorable for the constitution of a family home. If, however, a Quezon City — house occupied in 1987 was worth P500,000 in the said year, and the value increased to P600,000 at the time of the effectivity of the Family Code in 1988, the said house can never be a family home. But if the value of the same house is worth P300,000 on August 3, 1988, it can be considered a family home considering that P300,000 is the value most favorable for the constitution of a family home.

The code commission in fixing the limits provided for under Article 157 justified such limitations by stating that those who can afford more expensive homes do not need any protection and that the law is intended to protect the middle-class and to discourage them from spending all their money in a family home (See Minutes of the Civil Code and Family Law committees meeting on June 27, 1987). This sweeping justification seems to disregard the fact that there are also a number of middle-class people who would build homes worth more than that provided by law simply because it is their lifetime aspiration to have a decent and comfortable home. In achieving this objective, they will even use most of their savings to build such a house. This is particularly true with respect to Filipinos who toil very hard as construction workers, domestic helpers, and

seamen abroad just to earn money in dollars for their families to be able to have the comforts of life in the Philippines, including the provision of a house which may cost more than P300,000. In this sense, the limitation provided by law is not an incentive for people to spend their money to be able to build a secured home. It appears to be a regressive limitation that tends to inhibit the progressive growth of the middle-class.

It would indeed be better to amend the law by not making the values in Article 157 as determinative of whether or not a home is a family home but only to make such values as reserved amounts which cannot be reached by creditors as in the case provided in Article 160.

INCREASE IN VALUE OF FAMILY HOME. It must, however, be emphasized that the values provided in Article 157 refer only to the value at the time of the constitution made after the effectivity of the Family Code. Hence, if after the constitution, the value of the house increased due to improvements or renovations to an amount more than that fixed by the law at the time of the constitution, such family home will remain a family home.

> **Article 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)**

DISPOSITION OF FAMILY HOME. This is a limitation on the right of disposition of the owners of a property where a family home is situated. The law specifically provides that it cannot be sold, alienated, donated, assigned or encumbered without the written consent of the following: 1) person constituting the same; 2) the latter's spouse; and 3) a majority of the beneficiaries of legal age. Thus, for the family home to be leased, the written consent of all the people mentioned must be obtained considering that a lease is an encumbrance.

> **Article 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)

LIMITATION AFTER DEATH. The security of the family is a concern of the law. Thus, even upon the death of the person who constituted the family home, such family home shall continue as a family home for a period of 10 years or for as long as there is a minor beneficiary. The heirs cannot partition the same unless the court finds compelling reasons therefor. In *Arriola v. Arriola*, G.R. No. 177703, January 28, 2008, 542 SCRA 666, the Supreme Court said that though a house and lot passed to the heirs because of the death of the father, it cannot be immediately partitioned because of Article 159, thus:

> The purpose of Article 159 is to avert the disintegration of the family unit following the death of its head. To this end, it preserves the family home as the physical symbol of family love, security and unity by imposing the following restrictions on its partition: first, that the heirs cannot extra-judicially partition it for a period of 10 years from the death of one or both spouses or of the unmarried head of the family, or for a longer period, if there is still a minor beneficiary residing therein; and second, that the heirs cannot judicially partition it during the aforesaid periods unless the court finds compelling reasons therefor. No compelling reason has been alleged by the parties; nor has the RTC found any compelling reason to order the partition of the family home, either by physical segregation or assignment to any of the heirs or through auction sale as suggested by the parties.
>
> More importantly, Article 159 imposes the proscription against the immediate partition of the family home regardless of its ownership. This signifies that even if the family home has passed by succession to the co-ownership of the heirs, or has been willed to any one of them, this fact alone cannot transform the family home into an ordinary property, much less dispel the protection cast upon it by the law. The rights of the individual co-owner or owner of the family home cannot subjugate the rights granted under Article 159 to the beneficiaries of the family home.
>
> Set against the foregoing rules, the family home — consisting of the subject house and lot on which it stands — cannot be partitioned at this time, even if it has passed to the co-ownership of his heirs, the parties herein. Decedent Fidel died on March 10, 2003. Thus, for 10 years from said date or until

March 10, 2013, or for a longer period, if there is still a minor beneficiary residing therein, the family home he constituted cannot be partitioned, much less when no compelling reason exists for the court to otherwise set aside the restriction and order the partition of the property.

The Court ruled in *Honrado v. Court of Appeals* that a claim for exception from execution or forced sale under Article 153 should be set up and proved to the Sheriff before the sale of the property at public auction. Herein petitioners timely objected to the inclusion of the subject house although for a different reason.

To recapitulate, the evidence of record sustain the CA ruling that the subject house is part of the judgment of co-ownership and partition. The same evidence also establishes that the subject house and the portion of the subject land on which it is standing have been constituted as the family home of decedent Fidel and his heirs. Consequently, its actual and immediate partition cannot be sanctioned until the lapse of a period of 10 years from the death of Fidel Arriola, or until March 10, 2013.

Article 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.

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 costs. The excess, if any, shall be delivered to the judgment debtor. (247a, 248a)

JUDGMENT CREDITOR. Unlike Article 155, there is a need under Article 160 for a court decision before a judgment creditor can avail of the privilege under Article 160 of the Family Code.

Hence, if a creditor has a judgment in his favor directing the debtor to pay P500,000 and the debtor owns a family home in an urban area which has a current actual value of P1,000,000, such judgment creditor can execute on the said family home. Bidders cannot bid in an amount below P300,000. In the event that the family home was sold for P700,000 only, the sheriff had to first give the debtor the amount of P300,000 and thereafter give the balance of P400,000 to the judgment creditor. The idea in having the house immune as to P300,000 is for the judgment debtor to be able to build a new family home. In this way, he or she will not be homeless.

However, the judgment-claim and the judgment creditor making the claim should not be one of those mentioned in Article 155. Hence, if the judgment creditors are laborers and the judgment-amount of P500,000 represents the amount due them for rendering services or furnishing materials for the construction of the family home, the whole amount of P700,000 shall first be applied to their claim. Hence, the amount of P500,000 will be given to them first and thereafter the excess of P200,000 shall be given to the judgment debtor. If the family home was sold for exactly P500,000, then the laborers will get all of the said amount leaving nothing to the judgment debtor.

Article 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)

Article 162. The provisions in this Chapter shall also govern family residences insofar as said provisions are applicable. (n)

APPLICATION OF ARTICLE 162. The extent and legal significance of Article 162 of the Family Code was discussed by the Supreme Court in the case of *Modequillo v. Breva*, 185 SCRA 766, *to wit:*

> The contention of the petitioner that it should be considered a family home from the time it was occupied by petitioner and his family in 1969 is not well-taken. Under Article 162 of the Family Code, it is provided that "the provision of this Chapter

shall also govern existing family residences insofar as said provisions are applicable." It does not mean that Articles 152 and 153 of said Code have a retroactive effect such that all existing family residences are deemed to have been constituted as family homes at the time of the 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. 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. Article 162 does not state that the provisions of Chapter 2, Title V have a retroactive effect.

TITLE VI. — PATERNITY AND FILIATION

Chapter 1

LEGITIMATE CHILDREN

Article 163. The filiation of children may be by nature or by adoption. Natural filiation may be legitimate or illegitimate. (n)

Article 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)

Article 165. Children conceived and born outside a valid marriage are illegitimate, unless otherwise provided in this code. (n)

POLICY OF THE FAMILY CODE. Filiation is a very important subject in family relations such that the status of children can never be compromised (*Baluyut v. Baluyut*, 186 SCRA 506). The policy of the Family Code is to liberalize the rule on the investigation of the paternity of children, especially illegitimate children, without prejudice to the right of the alleged parent to resist the claimed status with his own defenses, including evidence now obtainable through the facilities of modern medicine and technology (See *Mendoza v. Court of Appeals*, 201 SCRA 675).

PATERNITY AND FILIATION. Paternity and filiation refer to the relationship or tie which exists between parents and their children (*Noe v. Velasco*, 61 O.G. 411). Under the New Family Code, there are only two classes of children, namely, legitimate and illegitimate. The five distinctions among various types of illegitimate children under the Civil Code have been eliminated (*Castro v. Court of Appeals*, G.R. Nos. 50974-75, May 31, 1989, 173 SCRA 656; *Gapusan Chua v. Court of Appeals*, 183 SCRA 160). Hence, illegitimate children are not anymore classified as natural children, natural children by legal fiction, acknowledged or recognized natural children, and illegitimate children other than natural such as spurious children and adulterous children. Under the Family Code, all of them are just illegitimate children. Legitimate or illegitimate filiation is fixed by law and cannot be left to the will of the parties or the declaration of any physician or midwife (*Angeles v. Maglaya*, G.R. No. 153798, September 2, 2005, 469 SCRA 363).

The filiation of children may be by nature or by adoption. Natural children are considered legitimate if they are conceived or born during the valid marriage of the parents. The presumption of the legitimacy of a child can only arise upon convincing proof that the parents of the child were legally married and that the child's conception or birth occurred during the subsistence of that marriage (*Angeles v. Maglaya*, G.R. No. 153798, September 2, 2005, 469 SCRA 363).

In *Concepcion v. Court of Appeals,* G.R. No. 123450, August 31, 2005, 468 SCRA 438, where the wife bigamously married another and a child was born in the said bigamous union and where the bigamous marriage was declared null and void, the Supreme Court ruled that the child actually born in the second voided union was in effect born of the wife in the first subsisting marriage and therefore, in the eyes of the law, the father of the child was the first husband of the wife. It was also asserted that the birth certificate of the child stating the name of the second husband as the father created a presumption of fact which should have been rebutted, but this contention was rejected by the Supreme Court by stating that in case of conflict between a presumption of law that a child born inside a valid marriage is legitimate and a presumption of fact arising from the statement of filiation in a birth certificate, the presumption of law will prevail.

Illegitimate children are those conceived and born outside a valid marriage or inside a void marriage. However, there are exceptions. Under Article 54 of the Family Code, children conceived

or born before the judgment of annulment or of absolute nullity of the marriage, where the ground for voiding the same is the psychological incapacity of either of the spouses to perform his or her marital obligations, has become final and executory shall be considered legitimate. Also, under the same Article 54, children born from a subsequent void marriage due to the contracting parties' failure to comply with the mandatory provisions of Articles 52 and 53 of the Family Code shall likewise be considered legitimate. It is clear, therefore, that unless made as an express exception by law, a child born outside a lawful wedlock shall be illegitimate.

ARTIFICIAL INSEMINATION. There are two types of artificial insemination — homologous and heterologous. Homologous insemination is the process by which the wife is artificially impregnated with the semen of her husband. This procedure is referred to as AIH (Artificial Insemination Husband). Heterologous insemination is the artificial insemination of the wife by the semen of a third-party donor (Artificial Insemination Donor). This procedure is referred to as AID and may be "consensual," *i.e.,* with the consent of the husband, or "nonconsensual," *i.e.,* without the consent of the husband (Adoption of Anonymous Surrogate Court, King County, 1973 74 Misc. 2d 99 345 N.Y.S. 2d 430). The medical technique of artificial insemination is a relatively recent origin (about 40 years since it was first performed abroad) and is now being actively undertaken in the Philippines.

STATUS OF AN ARTIFICIALLY INSEMINATED CHILD. The law declares the status of a child, who is a product of artificial insemination, as a legitimate child of the husband and 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 and that the instrument is recorded in the civil registry together with the birth certificate of the child. If the written authorization or ratification contained in the public instrument was obtained through mistake, fraud, violence, intimidation or undue influence, the husband may impugn the legitimacy of the child on these grounds.

While it is true that there are moral and religious objections to artificial insemination, it serves no purpose whatsoever to stigmatize as bastard a child, produced through artificial insemination (especially using the semen of a donor other than the husband) with the full consent of the husband and wife, or to compel the parents to adopt formally in order to confer upon such child the status and

privilege of the rights of a legitimate child. Moreover, since there is consent by the husband, there is no marital infidelity. The child is not born outside a valid marriage but in and during lawful wedlock. In such a case, it has been said that such a child was not "begotten" by a father who is not the husband, considering that in most cases the donor is anonymous; the wife did not have sexual intercourse or commit adultery with him and if there was any "begetting," it was by the doctor who implanted the semen into the wife (Adoption of Anonymous Surrogate Court, King County, 1973 74 Misc. 2d 99 345 N.Y.S. 2d 430).

> x x x A reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behaviour carries with it the legal responsibilities of fatherhood xxx. One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible (*People v. Sorensen*, 68 Cal. 2d 680, 25 ALR 3d 1093).

During the hearing of the Committee on Women and Family Relations of the Senate held on February 3, 1988, Justice Eduardo Caguioa, answering comments from the representative of the Knight of Columbus to the effect that the inclusion of the provision on artificial insemination in the Code gave legality to such process in the Philippines, stated thus:

> JUSTICE CAGUIOA. xxx xxx What is the next objection? Ah, yes, the artificial insemination. As we said, we are already providing for the status of a child born of artificial insemination. There is only one article in the whole Family Code regarding artificial insemination, and that is 221 found in Paternity and Filiation of the Status of Children.
>
> Now, we are not concerned with the legality or illegality of artificial insemination. We are not concerned with the morality or immorality of artificial insemination. But we are concerned of the status of that child born of that fact. You cannot close your eyes to the fact that artificial insemination is here and there are children born of them, born of that method. Now, what will be the status of that child? Shall that child remain in uncertain status? Shall it be made to stay in limbo, not knowing what is his status? So, we provide for the status, regardless of the method by which he was conceived or born.

> For example, in the chapter on Paternity and Filiation, we provide for the status of illegitimate children, adulterous children, bigamous children — all under the term "illegitimate." Now, there is no accusation that we are thereby legalizing or approving of having children outside of marriage. No, Sir. We are merely concerned with the status of the children. Otherwise, they will be left in limbo without status.
>
> So, do not deduce from the status our approval of the act. We are only concerned with the status of the child. Thank you.

However, it must be observed that, even if the requirements laid down in the second paragraph of Article 164, namely: 1) both spouses authorize or ratify such insemination in a written instrument executed and signed by them before the birth of the child; and 2) the instrument is recorded in the civil registry together with the birth certificate of the child, are not followed and the husband does not impugn the legitimacy of the child on grounds provided by law within the prescriptive period, the child shall still be considered legitimate because that child has been conceived or born during the valid marriage of the parents pursuant to the first paragraph of Article 164.

NO CRIMINAL LIABILITY FOR ADULTERY OF WIFE ARTIFICIALLY INSEMINATED WITHOUT CONSENT OF HUSBAND. A wife who, without the consent of the husband, had herself artificially inseminated by the semen of another which led to the siring of a child not of the husband, cannot be held criminally liable for adultery. The crime of adultery has been defined in Article 333 of the Revised Penal Code as committed by any married woman who shall have sexual intercourse with a man not her husband. While it is true that, in the absence of statutory enactment, the gist of the crime of adultery is the danger of introducing illegitimate heirs into the family (Proof of Husband's Impotency or Sterility as rebutting presumption of Legitimacy by James O. Pearson, Jr., J.D. 84 ALR 3d 495), artificial insemination, as previously stated, nevertheless does not involve sexual intercourse which is one of the essential elements in the crime of adultery as defined in the Revised Penal Code. It is a rule in statutory construction that criminal statutes are to be strictly construed; no person should be brought within their terms who is not clearly within them nor should any act be pronounced criminal when it is not made so (*U.S. v. Abad Santos*, 36 Phil. 243; *People v. Yu Huat*, 99 Phil. 728). Moreover, the framers of our Revised Penal Code could not have contemplated artificial insemination as being

within the ambit of the term "sexual intercourse" considering that even by the time the Revised Penal Code was approved by Congress on December 8, 1930 and by the time it took effect on January 1, 1932, the scientific procedure of artificial insemination did not even exist in the Philippines.

Article 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;

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)

Article 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)

APPLICABILITY OF ARTICLES 166 AND 167. Article 166 necessarily presupposes a valid marriage between the husband and the wife. Only the husband and, in proper cases provided in Article 171, the heirs can invoke the grounds under Article 166. No other person can make use of the same. As a consequence of this condition

sine qua non for the application of Article 166, the legitimacy of the child can likewise be questioned on the ground that the marriage between the husband and the wife is void except if the ground for nullity is Article 36 or Article 53 of the Family Code.

In the event that any of the grounds enumerated in Article 166 is proven, the child will neither be legitimate nor illegitimate in so far as the husband is concerned. Simply, the husband and the child will not be related to each other in any manner considering that the husband did not participate in any way as to the child's procreation. In so far as the mother is concerned, the child will be considered illegitimate.

Article 167, on the other hand, makes it impossible for the wife to file an action to impugn the legitimacy of her child because even if the wife knows that the child is by a man other than her husband, the declaration of the wife that the child is illegitimate or the sentencing of the wife as an adulteress has no bearing and can never affect the legitimate status of the child born or conceived inside a valid marriage.

Both Articles 166 and 167 only necessarily apply also to a situation where the child has been delivered by a woman who is the child's natural mother. They do not apply to a situation where the alleged mother did not, in fact, deliver the child herself, or, in short, where the child did not come from her own womb. This is likewise a condition *sine qua non* for Articles 166 and 167 to apply. Thus, in an inheritance case where a person claims to be the son of an alleged woman and of the decedent whose properties are being liquidated, and such person-claimant was not in fact delivered by the alleged mother, she can validly declare that the said person is not in any way related to her as her child and, as the Supreme Court said, "who better than Sy Kao herself would know if Chua Keng Giap was really her son? More than any one else, it was Sy Kao who could say — as indeed she has said these for many years — that Chua Keng Giap was not begotten of her womb" (*Chua Keng Giap v. IAC*, 158 SCRA 18).

Also, in *Benitez-Badua v. Court of Appeals*, G.R. No. 105625, January 24, 1994, 47 SCAD 416, where a person claimed to be the only daughter of the deceased married couple whose estate was under consideration and where the oppositors claimed and presented evidence to show that the alleged "daughter" could not have been that of the deceased because the deceased-spouses were unable to physically procreate and that the certificate of birth stating that she

was the daughter of the deceased couple was in fact false as it was made because the couple desperately desired to treat the "daughter" as their child and they wanted all documents to show this and where the lower court ruled in favor of the said "daughter" relying on Articles 166 and 170 of the Family Code, the Supreme Court, in upholding the Court of Appeals which reversed the ruling of the trial court, observed and ruled:

> 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. The Articles provide: (articles omitted)
>
> 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. x x x 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 v. 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 not applicable 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 aunt. They did 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 acknowledged natural child, nor a child by legal fiction of Esperanza Cabatbat, Violeta is not a legal heir of the deceased.

Also, the Supreme Court, in the leading case of *Macadangdang v. Court of Appeals*, 100 SCRA 73, clearly explained the nature and reasons for the above provisions. Pertinently, the decision reads:

> The child Rolando is presumed to be the legitimate son of respondent and her spouse. This presumption becomes conclusive in the absence of proof that there was physical impossibility of access between the spouses in the first 120 days of the 300 which preceded the birth of the child. x x x x x x.

This 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 (Tolentino, Commentaries and Jurisprudence on the Civil Code, Vol. I, p. 513, citing Bevilaqua, Family, p. 311).

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 (Tolentino, citing Madden, Persons and Domestic Relations, pp. 340-341).

To defeat the presumption of legitimacy, therefore, there must be physical impossibility of access by the husband to the wife during the period of conception. The law expressly refers to physical impossibility. Hence, a circumstance which makes sexual relations improbable cannot defeat the presumption of legitimacy; but it may be proved as a circumstance to corroborate proof of physical impossibility of access (Tolentino, citing Bonet 352; 4 Valverde 408).

Impotence refers to the inability of the male organ to copulate, to perform its proper function (Bouvier's Law Dictionary, p. 514). As defined in the celebrated case of *Menciano v. San Jose* (89 Phil. 63), 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. In respect of the impotency of the husband of the mother of the child, to overcome the presumption of legitimacy based 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 (S.C. — *Tarleton v. Thompson*, 118 S.E. 421, 125 SC 182, cited in 10 C.J.S. 50).

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 (*Estate of Benito Marcelo*, 60 Phil. 442). 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 (1 Manresa 492-55).

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 a sacroiliac injury, he was placed in a plaster cast, and it was inconceivable to have sexual intercourse without the most severe pain (Tolentino, citing *Commissioner v. Kotel*, 256 App. Div. 352, 9 N.Y. Supp. p. 515); or the illness produced temporary or permanent impotence, making copulation impossible (Tolentino, citing Q. Bonet 352).

Thus, in the case of *Andal v. Macaraig* (89 Phil. 165), this court ruled 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. The fact that the wife had illicit intercourse with a man other than her husband during the initial period does not preclude cohabitation between said husband and wife.

Significantly, American courts have made definite pronouncments or rulings on the issues under consideration.

The policy of the law is to confer legitimacy upon children born in wedlock when access of the husband at the time of conception was not impossible (*N.Y. Milone v. Milone*, 290 N.Y.S. 863, 160 Misc. 830) and there is a presumption that a child so born is the child of the husband and is legitimate even though the wife was guilty of infidelity during the possible period of conception (*N.Y. Dietrich v. Dietrich,* 278 N.Y.S. 645, Misc. 714; both cited in 10 C.J.S., pp. 18-20).

So firm was this presumption originally that it cannot be rebutted unless the husband was incapable of procreation or was absent beyond the four seas, that is, absent from the realm, during the whole period of the wife's pregnancy (10 C.J.S., p. 20).

The presumption of legitimacy of children born during wedlock obtains, notwithstanding whether the husband and wife voluntarily separate and live apart, unless the contrary is shown (*Ala. Franks v. State*, 161 So. 549, 26 Ala. App. 430) and this includes children born after the separation (10 C.J.S., pp. 23 and 24).

It must be stressed that x x x x x x the rule that a 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 (*Powell v. State*, 95 N.E., 660).

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 (Manresa, Vol. I, pp. 503-504).

Hence, in general, good morals and public policy require that a mother should not be permitted to assert the illegitimacy of a child born in wedlock in order to obtain some benefit for herself (N.Y. — *Flint v. Pierce*, 136 N.Y.S. 1056, cited in 10 C.J.S. 77).

The law is not willing that the child be declared illegitimate to suit the whims and purposes of either parent, nor merely upon evidence that no actual act of sexual intercourse occurred between husband and wife at or about the time the wife became pregnant. Thus, where the husband denies having an intercourse with his wife, the child was still presumed legitimate (*Lynn v. State*, 47 Ohio App. 158, 191 N.E. 100).

x x x x x x It must be emphasized that adultery on the part of the wife, in itself, cannot destroy the presumption of legitimacy of her child, because it is still possible that the child is that of the husband (Tolentino, citing 1 Vera 170; 4 Borja 23-24).

It has, therefore, been held that the admission of the wife's testimony on the point would be unseemly and scandalous, not only because it reveals immoral conduct on her part, but also because of the effect it may have on the child, who is in no fault, but who nevertheless must be the chief sufferer thereby (7 Am. Jur., Sec. 21, pp. 641-642).

In the case of a child born or conceived in wedlock, evidence of the infidelity or adultery of the wife and mother is not admissible to show illegitimacy, if there is no proof of the husband's impotency or non-access to his wife (Iowa — *Craven v. Selway*, 246 N.W. 821, cited in 10 C.J.S. 36).

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DECLARATION OF LEGITIMACY. The Family Code amended the old provisions of the Civil Code by declaring outright that children conceived or born during marriage are legitimate and that children conceived and born outside a valid marriage are illegitimate, unless otherwise provided in the Code. The Civil Code provided presumptions, whereas, the Family Code provided declarations. Be that as it may, it is already clear that presumptions of legitimacy and paternity exist independently of statute (*Re Ruff's Estate*, 159 Fla. 777, 3250 2d 84 cited in 10 Am. Jur. 851), whether or not such statute states declarations. Hence, in all cases where the husband assails the legitimacy of an issue sired by his wife, all doubts are resolved in favor of legitimacy because of the existence of that universal presumption of legitimacy. The presumption of the legitimacy of children does not only flow out from a declaration contained in the statute but is based on the broad principles of justice and the supposed virtue of the mother (10 Am. Jur. 2d, Bastards 10). To resolve the doubt in favor of the husband would be to determine that the wife had sexual relations at the time of conception with someone other than her husband. This cannot be presumed as the law, quoting Montesquieu, gives "a confidence in the mother as if she were chastity itself." Indeed, the presumption is a branch of that general rule of equity and justice which assumes the innocence of a person until there is proof of actual guilt; and whenever it is not consistent with the facts proved, this presumption is controlling (3 RCL 725). The presumption that the child of a married woman was begotten by her husband is not displaced by proof that the wife had immoral relations with other men; non-access by the husband at the time when the child must have been begotten must have been proved (*Russell v. Russell Eng* [1924] AC 687 [HL]; *Dietrich v. Dietrich,* 154 Misc. 714, 278 N.Y.S. 645; *Re Anonymous Minor Child's Adoption*, 77 N.Y.S. 2d [2]).

REBUTTING PRESUMPTION. Justice Cardozo, in the case of *In re Findlay*, 253 NY 1, 170 NE 471, succinctly stated that while the presumption is a strong one, still, if reason and experience dictates that it should not hold, then the presumption should be disregarded but only upon convincing evidence. Thus:

> "If husband and wife are living together in the conjugal relation, legitimacy will be presumed, though the wife has harbored an adulterer. (Citations omitted). It may even be presumed though the spouses are living apart if there is a fair basis for the belief that at times they may have come together. Whether such a basis exists in any given instance is to be

> determined, however in the light of experience and reason. The presumption does not consecrate as truth the extravagantly improbable, which may be one, for ends juridical, with the indubitably false.
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> x x x x x x x x x
>
> When all ends which the presumption of legitimacy is designed to conserve have been defeated by sordid facts, the courts must deal with the situation in a common sense way.
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> x x x x x x x x x
>
> Viewing the evidence before us in all its cumulative significance, we think it points with overwhelming force to one conclusion and only one. We have no thought to weaken the presumption of legitimacy by allowing its overthrow at the call of rumor or suspicion, or through inferences nicely poised. What we are now holding is in line with the historical development which has shorn the presumption of some follies and vagaries. Follies and vagaries by concession there have been . . . Extravagances hardly less violent there have been at other times in insisting upon the negation of every shadowy possibility. These and nothing more we are pruning from the law.

The Family Code, in Article 166, provides for the exclusive grounds to impugn legitimacy which can be invoked by the husband and, in proper cases, the heirs. The question of legitimacy concerns itself with the infant, and it is in the jealous protection of his rights that the court must require clear and convincing proof of illegitimacy beyond the factual proof of adulterous intercourse (*Gray v. Rose*, 302 N.Y.S. 2d 185).

120-300-DAY PERIOD. Ordinarily and though the actual date of conception cannot be determined, a woman carries a child approximately between 270 and 280 days after its conception. Generally, experience shows that the average longest period of gestation is 300 days. However, it is not improbable that the gestation period may exceed 300 days. Likewise, there can be shorter gestation period.

The law, in effect, states that when a child is born inside a marriage, sexual intercourse or access is presumed to have occurred between the husband and wife within the first 120 days of the 300 days immediately preceding the birth of the child and that any day within the 120-day period is deemed as the possible conception date of a child. The time span between the 120th day and the 300th day

is 180 days or 6 months. Experience shows that a child may be born without any defect whatsoever even if the gestation period is only 6 months.

PHYSICAL INCAPACITY. The presumption of legitimacy is so strong that evidence must be so convincing and persuasive to justify the bastardization of the child. Hence, in a case where it was shown that, while the penis of the man was cut almost leveling it to his stomach and necessitating the insertion of metal sounds for him to urinate and therefore apparently supporting a claim of physical incapability to have sexual intercourse that could sire the subject child, the court still ruled against the bastardization of the subject child because it regarded such evidence as insufficient to impugn the legitimacy of the subject child considering that it was also shown that, despite the cutting of the penis just behind its head, it was still three inches long enough to be able to copulate and also in the light of evidence that he had, in many instances, engaged in sexual intercourse with other women (*Tarleton v. Thompson*, 118 SE 421).

Also, the fact that a husband, who never separated from his wife, has been absolutely stiff in the hips at the time of the conception of the child has been held as not conclusive enough to overturn the presumption of legitimacy of an issue from his wife (*State v. Reed*, 107 W Va. 563, 149 SE 669).

LIVING SEPARATELY. To rebut the presumption of legitimacy, the husband and the wife must have lived separately in such a way that sexual intercourse is not possible. Under the Civil Code which was amended by the Family Code, the term "access" was used instead of sexual intercourse. However, the change is not that significant as the term "access" has been held to mean "sexual intercourse" and not merely presence together of the husband and wife under circumstances which afford opportunity for such intercourse (*Jackson v. Jackson*, 182 Okla. 74, 76 P2d 1062; *Alber v. Alber*, 46 ALR 3d).

Mere remoteness of the wife from the husband is not sufficient proof to disavow paternity. Hence, the bare testimony by the husband that he and his wife were living thirty miles away from each other at about the time of the conception of the child is not enough to show the illegitimacy of the child without any showing that sexual intercourse with the wife was not possible due to the distance (*Skott v. State*, 46 ALR 3d 180; 173 Ark. 625). Also, where the evidences to displace the presumption of legitimacy of a child were the contentions that the spouses lived 170 miles away and

were not cohabiting at the time of the conception of the child, these were held as not satisfactory to show that the husband did not, in fact, have sexual intercourse with the wife, thereby maintaining the presumption (*Melancon v. Sonmer*, 46 ALR 179; 157 So. 2d 577).

However, a child born about 11 years after the mother left her husband in England and came to America with her paramour was proof that the child of the mother was not the legitimate son of the husband (*Re Findlay*, 253 N.Y.L., 170 NE 471). Also, where a child was born in Italy almost six years after the husband left and emigrated to the United States, and he never returned to that country and his wife never left Italy, the court held that no presumption of legitimacy could be indulged in view of such evidence (*Re Bilotta's Estate*, 110 N.T.S. 2d 331; Fernando S. Tinio, Presumption of Legitimacy of Child Born After Annulment, Divorce, or Separation, 46 ALR 3d 187).

SERIOUS ILLNESS. The illness of the husband must be serious and must be such as to absolutely prevent him from engaging in sexual intercourse. Thus, in a case where it was found out that at the time when the particular child was conceived by the mother, the husband was affected by Bright's disease and dropsy of the bowels, scrotum and thighs seriously causing the general excessive accumulation of fluid in the scrotum and in the skin of the penis, so much so that the penis proper could not be seen upon an examination, but that the orifice was visible, and that the general condition of the husband grew steadily worse even at the time when the alleged sexual intercourse with the wife occurred, the court said that this was good evidence showing that the husband could not have begotten the child specially so when there is positive testimony from the doctor who examined the husband that the husband was not physically capable of performing the sexual act in that it was not possible for him to enter a woman so as to bring the semen in the tract in such a manner that the spermatozoa could find their way to the ova (*Goss v. Froman*, 89 Ky. 318, 12 SW 387).

BIOLOGICAL AND SCIENTIFIC REASONS. Paternity can be successfully impugned if, for biological and scientific reasons, the offspring could not have been that of the husband. Thus, it has been held that, by the laws of nature, a white couple cannot produce a black child or mulatto (*Watkins v. Carlton*, 37 Va [10 Leigh] 586). However, it is important to present evidence showing that neither of the spouses had black child or mulatto ancestry because, if either of the spouses had such ancestry, it is very possible that their offspring

could exhibit the color of their forebears, thereby completely sustaining the legitimacy of the child.

STERILITY. Sterility is a relative condition both as to degree and as to time. For sterility to constitute proof of non-paternity on the ground of biological or scientific reasons, the husband must be shown to be completely sterile at the time when the child was conceived. It has been medically shown that, in so far as the sperm count of a man is concerned, 60 million per cubic centimeter is normal and that a count of 10 million cubic centimeter is the minimum to impregnate at a high probability (*Cocharan v. Cocharan*, 2 Wash App 514). However, it is also scientifically proven that it takes only one sperm to successfully fertilize (*Shepherd v. Shepherd*, 236 SW 2d 477). Thus, it has been held that medical evidence to the effect that a husband was "sterile" seven years before the birth of the child and that an examination four years after the birth of the child indicated he was sterile at that time was deemed insufficient to displace the legitimacy of the child (see *Lucas v. William*, 146 A2d 764). Also, in a case where it was shown that, while the husband and the wife cohabited only from January 22, 1947 up to April 15, 1947 and the time of conception was placed sometime in January 28, 1947 considering that the child was born on October 28, 1947 and where two doctors testified that they examined the husband only after April 1947 to have only 50 to 100 sperm which were way below the average of about a million or more sperm per cubic meter which must be present in the semen, the court ruled that such examination of the doctor cannot sustain the claim that the child was not that of the husband considering that, as the doctors themselves admitted, only one sperm was enough to effectively fertilize, and considering further that there was no proof that the husband was completely sterile during his actual cohabitation with the wife which included the approximate date of fertilization (*Shepherd v. Shepherd*, 236 SW 2d 477).

VASECTOMY. The fact that the husband had undergone vasectomy is not enough proof to rebut the presumption of legitimacy of a child sired by his wife. Vasectomy involves the removal of about an inch of the tubes or *vas deferens* which is the passage way of the sperm from the testicle to the urethra and tying the remaining ends. It is possible however that, despite the vasectomy, the sperm can rechannel itself and effect a fertilization. Hence, the fact of vasectomy must be coupled with concrete proof that the husband was entirely sterile and that rechannelization did not occur (*Cocharan v. Cocharan*, 2 Wash App 514).

SCIENTIFIC TESTING. The rationale for providing in the Family Code a ground to disprove paternity on scientific reasons was explained by Justice J.B.L. Reyes, chairman of the Civil Code Revision Committee during the hearing on January 27, 1988 in the Senate Committee on Women and Family Relations, thus:

> JUSTICE REYES: x x x With regard to the advances of science, Madam Chairman, the Family Code, you will notice, at least those who had read it will notice that we have admitted scientific evidence as to the possibility and impossibility of determining the paternity.
>
> The present Civil Code proceeds on the basis that it is not possible to ascertain who the father of a person is, but our inquiries have led to the discovery that of recent date, certain biological tests, especially the Leukocyte test, enable scientists to determine within narrow limits the identity of the father and, therefore, we have admitted that the paternity of a person should be determinable by scientific evidence and not only by presumption.
>
> This present civil code only admits presumption with regard to the father but does not admit any possibility of investigating paternity. The advances of science had permitted that now at present, the identity of the father should be scientifically determined and the experiences of the medical city have shown that this test have satisfied a lot of persons who appealed to it in order to determine the actual paternity and non-paternity of persons in the family to the leukocyte antigen test that provides an analysis of the blood of the parents and of the child to determine whether the suspect person is or is not the father. x x x x x x

There are a number of blood grouping tests, such as the A-B-O test, which are used to determine paternity. However, blood grouping tests involve a limited number of variables and are generally recognized as being accurate only in excluding paternity. Hence, although they cannot indicate with precision that a particular person is the father of the child whose paternity is in issue, in many instances they can establish that an alleged father could not have been the sire (*Story v. Hodges*, 272 ARK 365, 614 SW 2d 506; *Jao v. Court of Appeals,* G.R. No. L-49162, July 28, 1987).

> A blood test could eliminate all possibility that the accused is the father of the 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 make his paternity biologically untenable (*People v. Carutano*, 255 SCRA 403).

The more recent Human Leukocyte Antigen (HLA) Test, referred to by Justice J.B.L. Reyes, has been shown to prove identity between the child and the father with a probability exceeding 98 percent, in addition to proving exclusion in numerous cases in which the A-B-O test would produce inconclusive results.

The HLA test is a tissue typing test which was developed as a means of reducing the incidence of rejection of organ transplants. The test is generally performed on white blood cells, but may be done with other body tissues.

> The HLA test . . . is based on the identification and typing of antigen markers found in white blood cells and other tissues of the body . . . The basic theory is that by identifying the antigen markers of a child and of the mother, the child's antigen genetic markers which could only be inherited from the father can generally be determined, thereby identifying the father to a high degree of certainty. x x x x x x

> The HLA test is based on tissue typing of the white blood cells. This test is far more comprehensive because it involves a larger number of factors such as antigens in the white blood cells. It is widely accepted in scientific communities because in cases involving organ transplants it is used to match the donor and the recipient. Accuracy is essential when dealing with the lives of patients. The HLA test is far more expensive than the standard blood grouping tests x x x. However, the possibility of this respondent being excluded if he has been incorrectly named is somewhat better than 90% (*Crain v. Crain*, 37 ALR 4th 15).

A scientific test that is dependable in determining filiation is the DNA Test (*Herrera v. Alba*, G.R. No. 148220, June 15, 2005, 460 SCRA 197; *Agustin v. Court of Appeals,* G.R. No. 162571, June 15, 2005, 460 SCRA 315). DNA is the abbreviation for deoxyribonucleic acid. DNA "refers to the chain of molecules found in every cell of the body, except in the red blood cells, which transmit hereditary characteristics among individuals. DNA testing is synonymous to DNA typing, DNA fingerprinting, DNA profiling, genetic testing or genetic fingerprinting" (*Tijing v. Court of Appeals*, G.R. No. 125901, March 8, 2001). The Supreme Court has stated that the use of DNA testing is a valid procedure for determining paternity (*Agustin v.*

Court of Appeals, G.R. No. 162571, June 15, 2005; *Estate of Ong v. Diaz,* G.R. No. 171713, December 17, 2007, 140 SCRA 481). Thus, in one case where the DNA test was not used but where the filiation was established through the more traditional means, the Supreme Court said:

> 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 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 the future it would be useful to all concerned in the prompt resolution of parentage and identity issues (*Tijing v. Court of Appeals*, G.R. No. 125901, March 8, 2001).

DNA result that excludes the putative father from paternity is conclusive proof of non-paternity. If the probability of paternity resulting from DNA is 99.9 %, this creates a refutable presumption of paternity. If it is less than 99.9%, it is merely corroborative (*Herrera v. Alba,* G.R. No. 148220, June 15, 2005, 460 SCRA 197).

VITIATED CONSENT IN ARTIFICIAL INSEMINATION. The law provides that in case the children were conceived through artificial insemination and the written authorization or ratification of either parent was obtained through mistake, fraud, violence, intimidation, or undue influence, the legitimacy of the child may be impugned. The mistake, fraud, violence, intimidation, or undue influence can be exerted by not only the spouses against each other but also by third persons on both of the spouses or any one of them. However, the only person who can impugn the legitimacy of the child on this ground, or any ground provided by law for that matter, is the husband as provided in Article 170, or the heirs in special cases as provided in Article 171. The husband or the heirs, as the case may be, can allege that the wife was subjected to these causes (mistake, fraud, violence, intimidation, or undue influence) or the husband was himself subjected to the same or both such husband and his wife were so subjected. However, while the mother may have indeed been subjected to these causes, she cannot file a case to impugn the legitimacy of the child because she is not given legal standing to do

so pursuant to Articles 170 and 171 and also because Article 167 provides that the child shall be considered legitimate although the mother may have declared against its legitimacy or may have been sentenced as an adulteress.

NON-OBSERVANCE OF PROCEDURE RELATIVE TO ARTIFICIAL INSEMINATION. Conspicuously, the law does not provide that the failure to comply with the procedure laid down in the second paragraph of Article 164 shall constitute a ground to impugn the legitimacy of the child. However, if the sperm were the husband's and he voluntarily acceded to the artificial insemination, it is almost impossible why he should even attempt to impugn the child's legitimacy. If he decides to impugn the child later on the ground that the procedure under the second paragraph of Article 164 has not been complied with, the case will necessarily fail because the law does not grant him such ground to make the impugnation, as the grounds in Article 166 are exclusive. Thus, the law intends to bind him on his consent so that a legitimate status can be given to the child for the latter's benefit. The impossibility of impugning the legitimacy of the child on the ground that the procedure laid down in the second paragraph of Article 164 has not been observed implements in full force the declaration in the first paragraph thereof that "children conceived or born during the marriage of the parents are legitimate." The husband in this case must just simply accept the fact that the child is legitimate as he was born inside a valid marriage. Moreover, the child is technically his anyway, as the same was conceived by his sperm in his wife's womb.

In the event that the wife was able to obtain a sperm sample of her husband which the latter contributed in a sperm bank and the said wife had herself artificially inseminated with such sperm without the knowledge or consent of the husband, the husband can impugn the legitimacy of the child brought forth as a result of the artificial insemination under any of the grounds mentioned in Article 166, subparagraph 1(a), (b), (c) and subparagraph 2, contending that it was physically impossible for him to have sexual intercourse with the wife at the time when the child was conceived.

But, in case the husband acceded to the artificial insemination of his wife using the sperm of another man and he fails to comply with the procedure laid down in the second paragraph of Article 164 and he let the prescriptive period for impugning the legitimacy of the child lapsed, the child will be considered the legitimate child of the said husband and the wife by virtue also of the first paragraph

of Article 164 which declares that "children conceived or born during the marriage of the parents are legitimate."

However, if the donor were a man other than the husband and the latter, because he objected to the artificial insemination, did not want to comply with the procedure laid down under Article 164, he can impugn the child's status by invoking any of the grounds under Article 166(1[a, b, c]), and (2). The same course of action can be taken if the husband initially acceded to the artificial insemination but failed or refused to comply with the requirements under Article 164 and later on decided to impugn the child's legitimacy. He should however impugn within the prescriptive period provided in Article 170.

If the husband agreed to the artificial insemination of his wife by the sperm of another man and the spouses observed all the requirements of the law, the husband cannot anymore impugn the legitimacy of the child. He cannot later on invoke the grounds under Article 166(1), (2) and (3) because he precisely knew that the sperm was not his before acceding to the process of artificial insemination, thereby consenting to make the child as his legitimate child in accordance with the law. Moreover, Article 166(2) provides that biological or other scientific reasons cannot be invoked to impugn legitimacy in cases of artificial insemination where the second paragraph of Article 164 has been observed.

> **Article 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;**
>
> **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)**

ACCESS PRESUMED PRIOR TO TERMINATION OF MARRIAGE. Access between the spouses is presumed during the marriage. This presumption holds even immediately before the official termination of marriage. This is so because it is not unlikely that the spouses could have engaged in sexual intercourse just prior to the death of one of them or just before the issuance of a decree of annulment or a declaration of nullity. As pointed out earlier, the law fixes the period of 300 days as the longest gestation period for a child inside the womb of the mother.

ACCESS NOT PRESUMED AFTER TERMINATION OF MARRIAGE. When a marriage is terminated by a decree of annulment or a declaration of nullity by the proper court, the marriage tie is either severed, or declared void from the beginning. The duty of the parties to cohabit, an essential obligation of marriage, disappears. The former spouses are not anymore bound to exercise fidelity toward each other. They are not even obliged to observe mutual love and render mutual help and support. Access cannot anymore be presumed. In fact, the presumption will be that they have abided by or obeyed the decree of annulment or declaration of nullity, as the case may be, and have separated from each other. Otherwise, they will be living against public decency and in an illicit relationship.

It must be important however to observe that, under Article 54, if a child is conceived or born before the finality of a decree of annulment based on Article 45 or a decree of nullity based on Article 36, a child shall be considered legitimate. In short, even after the issuance of the said decrees, if a child were born or conceived prior to the finality of such decree, the said child will be legitimate. Unless appealed, a decision or a decree of the court becomes final after the lapse of fifteen days from receipt of the decision. This rule is on the assumption that the parties whose marriage was nullified or annulled were the ones who had sexual intercourse.

PRESUMPTION OF FILIATION IN CASE OF TWO MARRIAGES. The rules provided for under Article 168 will not apply in case there are convincing proofs of filiation that the father of the child is the previous husband or the subsequent husband, as the case may be. The rules will only apply "in the absence of proof to the contrary." Also, the rules do not give any presumption as to legitimacy or illegitimacy but merely state when the child is considered to have been conceived. The status of the child will depend upon the status of the marriage in which he or she is considered to have been conceived.

Hence, if the mother marries again and a child is born within 180 days from the solemnization of the second marriage and within the 300-day period after the termination of the first marriage and there is no concrete proof as to the father of the child, the child shall be considered to have been conceived of the first marriage. The presumption is in accordance with decency, reason and the supposed virtue of the mother. While the second husband can have his first sexual intercourse with the mother right after the solemnization of the second marriage so as to effect the conception of a child who may be born on the 180th day from the solemnization of the second marriage, the law still recognizes the possibility that the previous husband could have had sexual intercourse with the woman just before separation or termination of marriage. And since the 300-day period is considered the longest period for gestation and the 180-day period as the shortest time for gestation, the law, to avoid confusion as to paternity and in the absence of proof to the contrary, considers the child to have been conceived prior to the second marriage and during the first marriage. Moreover, to indulge in a presumption that the second husband was the father of the child would be in effect to presume that the mother was guilty of acts of wrongdoing, immorality, indecency and indeed even adultery as it would imply the conception of the child even prior to the solemnization of the second marriage. Whether the child is legitimate or illegitimate depends upon the status of the first marriage. If the first marriage is annulled, the child considered to have been conceived during the first marriage shall be legitimate because an annulled marriage is valid up to the time it is terminated. If the first marriage is declared null and void on the ground of Articles 36 and 53, the child shall likewise be legitimate pursuant to Article 54. However, if the first marriage is void *ab initio* on any other ground, the child shall be illegitimate.

A child born after one hundred eighty days following the celebration of the subsequent marriage is considered to have been conceived during such marriage in the absence of proof to the contrary, even though it be born within the three hundred days after the termination of the former marriage. The 180-day period is considered as the shortest gestation period of a woman. The 300-day period is considered the longest gestation period. Hence, the law gives the benefit of the doubt in favor of the child being conceived during the first marriage if the child was born within the period of 180 days after the solemnization of the second marriage and within the 300 days after the termination of the first marriage. The

benefit of the doubt shifts in favor of the child being conceived in the second marriage if the child was born after the 180 days from the solemnization of the second marriage even if the child was born within the 300 days. Thus, if on the 100th day after the termination of the first marriage the woman subsequently remarries, a child born on the 181st day after the solemnization of the second marriage shall be considered as having been conceived during the second marriage even though the child was born within the 300-day period after the termination of the first marriage. The law provides the clause "even though it be born within the 300 days after the termination of the former marriage" because the child could still probably have been conceived during the first marriage had it not for the law considering that it was conceived in the second marriage. If the second marriage is annullable, the child is considered legitimate. If the second marriage is void, the child shall be considered illegitimate except when the ground for nullity is either Article 36 (psychological incapacity) or Article 53 (failure to comply with decree, liquidation and recording requirements) pursuant to Article 54.

PROOF TO THE CONTRARY. If the child is considered conceived during the first marriage, then the husband of the first marriage will be considered to be the father. If the child is considered conceived during the second marriage, then the second husband shall be considered to be the father. Article 168(1) and (2) will apply only in the absence of proof to the contrary. Hence, even if the child is born after the 180th day from the solemnization of the second marriage and within 300 days from the termination of the first marriage, the child will be considered born of the first marriage if there are convincing proof that the child is indeed fathered by the husband of the prior terminated marriage. If there is confusion as to the father of the child because the proofs are not convincing or there is no proof as to who fathered the child, then the child shall be considered conceived of the second marriage applying Article 168(2) and, therefore, fathered by the husband of the subsequent marriage.

Once filiation is proved, the presumption of legitimacy attaches. However, the alleged father can still impugn such legitimacy on the basis of the grounds laid down in Article 166 and within the prescriptive periods provided in Article 170. This is also the import of the phrase "in the absence of proof to the contrary" provided for in Article 168.

Article 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)

NO PRESUMPTION FOR A CHILD BORN AFTER 300 DAYS AFTER TERMINATION OF MARRIAGE. As previously stated, the law considers 300 days as the longest gestation period of a child in the mother's womb. In the absence of any subsequent marriage after the termination of the first marriage, the father of a child born after 300 days from such termination can be anybody. This includes the husband of the previous marriage as it is not improbable that the gestation period may even extend extraordinarily beyond 300 days or that the previously married couple had sexual intercourse after the finality of their decree of annulment or nullity. While there have been cases where the gestation period reached from up to 316 to 330 days (*Ousley v. Ousley*, 261 SW 2d 817), this is not normal and, hence, other convincing proofs of filiation must be shown. Thus, no presumption can attach, thereby necessitating the introduction of evidence by whoever alleges legitimacy or illegitimacy. In *People v. Velasquez,* 120 SCRA 847, where the child, who was allegedly the result of the rape by the accused on the alleged victim, was born ten months and eleven days from the alleged rape, the Supreme Court ruled that such circumstance is not normal and could only prove that there were subsequent acts of sexual intercourse after the first alleged rape which discredited the victim's version that there was no voluntariness in the alleged sexual intercourse, and pertinently stated:

> Another weak link in the theory of the prosecution is the fact that the complainant delivered her child on December 22, 1966. If she was telling the truth that her last intercourse with the appellant was on February 11, 1966, it would mean that the child was born at least ten months and eleven days after conception. While We are not certain as to whether such circumstance is not a medical impossibility, it is undeniably contrary to ordinary and normal experience and, as such, sufficient to cast doubt as to its credibility. Under Our laws, a child born after three hundred days from possible conception is not accorded any presumption either of legitimacy or illegitimacy. Whoever alleged the paternity of the child, whether legitimate or illegitimate, must prove such allegation (Article 261, Civil Code; Section 6, Rule 131, Rules of Court [now Article 169 of the Family Code]). It is accordingly believed that sexual intercourse between the complainant and the appellant did not terminate

on February 11, 1966, as averred by the complainant, but continued for several times thereafter as asserted by appellant (*People v. Velasquez*, 120 SCRA 847).

Article 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.

Article 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)

PARTIES. Impugning the legitimacy of the child is strictly a personal right (*Social Security Sytem v. Aguas*, G.R. No. 165546, February 27, 2006, 483 SCRA 383), and cannot be set up by way of a defense or as a collateral issue (*Rosales v. Castillo Rosales*, 132 SCRA 132). Legitimacy cannot be collaterally attacked or impugned (*Angeles v. Maglaya,* G.R. No. 153798, September 2, 2005, 469 SCRA 363). It can be impugned only in a direct suit precisely filed for the purpose of assailing the legitimacy of the child. Principally, only the

husband can file a direct action to impugn the legitimacy of the child. This is true even if the child were conceived through heterologous artificial insemination by a donor of sperm not the husband. His heirs can substitute him only if he dies before the expiration of the period fixed for bringing the action or after the filing of the same, without him having desisted therefrom, or if the child was born after his death. The law exclusively made the husband, and under special circumstances his heirs, the sole judge of determining whether or not to file a proceeding, or continue such proceeding already filed, to dispute the legitimacy of a child born of the husband's wife, since the husband is the only person who can know that he is not the father of the child. Generally, therefore, where the husband, the sovereign arbiter of his honor, fails to challenge the presumption of legitimacy of a child born to his wife in a direct suit for that purpose, no one can subsequently assert the husband's strictly personal right except the heirs in certain very restricted situations as mentioned previously (see Succession of Salaz, 44 La An 433, 1050 877).

For example, if a wife gives birth to a child of her paramour, the said child is born inside the valid marriage of the wife and the husband. Such child is therefore considered legitimate as to the said husband and wife. Only the husband can impugn the legitimacy of the child if the said husband wants to. In the event the paramour files an action for the custody of the child contending that he is the natural father, the action should be dismissed because only the husband, as a general rule, can claim that the child is illegitimate in a direct action for that purpose and only on the grounds provided by law. To allow the custody case to prosper would mean allowing the paramour to impugn the legitimacy of the child *vis-a-vis* the husband which is not sanctioned by the law.

In *Tison v. Court of Appeals*, 85 SCAD 341, 276 SCRA 582, a niece filed a case for reconveyance of certain properties formerly belonging to her aunt, who had the said niece as one of her heirs. The properties had been conveyed to respondent. To prove her filiation to her aunt, the niece presented evidence showing that she was the legitimate daughter of her father who was the brother of her aunt. The respondent filed a demurrer to evidence, claiming the evidences presented by the niece were not enough to prove her legitimate filiation with her father and, consequently, with her aunt. The Supreme Court ruled that, though the evidences, taken separately and independently of each other were not *per se* sufficient to establish proof of legitimacy or even of pedigree, the niece could

nevertheless avail of the presumption of legitimacy which was never controverted by any sufficient evidence by the respondent. Moreover, the Supreme Court said that the respondent had no legal personality to impugn the legitimacy of the niece as the said respondent was not the "husband" referred to in the law and also the issue of legitimacy cannot be properly controverted in an action for reconveyance. Legitimacy cannot be collaterally attacked but only directly attacked by the husband of the niece's mother (*De Jesus v. Estate of Dizon*, G.R. No. 142877, October 2, 2001).

In *Babiera v. Catotal*, G.R. No. 138493, June 15, 2000, where a legitimate child filed a suit to cancel the birth certificate of her housemaid's child who claimed to be her sister and therefore also the legitimate child of her parents and where it was proven that indeed the housemaid's child was not given birth by the mother of the legitimate child and that the birth certificate of such housemaid's child was forged to make it appear that the said housemaid's child was the child of the parents of the legitimate child, the Supreme Court rejected the contentions of the housemaid's child that the legitimate child cannot anymore impugn her legitimacy on the ground that only the father can do so and that the action had prescribed. Pertinently, the Supreme Court said:

> 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 the 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 the 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 the wife's child. The provision, however, presumes that the child was the undisputed offspring of the mother. The present case alleges and shows that Hermogena did not give birth to the petitioner. In other words, the prayer herein did not declare the

> petitioner is an illegitimate child of Hermogena, but 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.
>
> x x x x x x x x x
>
> Petitioner next contends that the action to contest her status as a child of the late Hermogena Babiera has already prescribed. xxx xxx xxx
>
> 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.*

Impugning the legitimacy of a child cannot be made in an action for partition as this is a collateral attack (*De Jesus v. De Jesus*, G.R. No. 142877, October 2, 2001). However, if one of the issues presented in an action for annulment of an extrajudicial partition concerned the right of a particular person to inherit and the assertion that the alleged heir was not in fact the child of the deceased, a determination of filiation can be made (*Spouses Fidel v. Court of Appeals*, G.R. No. 168263, July 21, 2008).

The heirs, on the other hand, are mere substitutes of the husband, and, therefore, cannot file any action to impugn the legitimacy of the child for as long as the husband is alive. However, the heirs can file such a suit after the death of the husband but also within the prescriptive period set in Article 170. All kinds of heirs, whether testamentary or legal, compulsory or voluntary, are contemplated by law.

The law does not give the mother the standing to file an action to impugn the filiation or legitimacy of her children because maternity is never uncertain (*Eloi v. Made*, 1 Rob. 581). Moreover, for reasons of public decency and morality, a married woman cannot say that she had no intercourse with her husband and that her offspring is spurious (*People ex rel. Gonzales v. Monroe*, 43 Ill. App 2d 1, 192 N.E. 2d 691).

REASON FOR THE LIMITATION OF PARTIES WITH LEGAL STANDING. The reason for preventing disavowal of paternity except within extremely narrow limits is based upon a

desire to protect innocent children against attacks upon paternity (*Russell v. Russell Eng* [1924] AC 687 [HL]; *Taylor v. Taylor*, 295 So. 2d 494). To allow other persons, especially those not belonging to the family wherein the child was born, to bring an action to impugn the legitimacy of such child, would be to invite similar actions, with or without basis, by those whose only purpose is to break up a family to satisfy a jealous or revengeful feeling (*A v. X, Y, and Z, Supreme Court of Wyoming*, 641 P2d 1222 74 L. Ed. 2d 518). The state has an interest in protecting and preserving the integrity of the family unit. It also has an interest in protecting the best interest of the child. Thus, in a case where a certain individual impugned the legitimacy of the child born within the valid marriage of a particular couple, the particular American court said that the said individual is without legal standing in court to make such impugnation as he is not among those granted by law the right to make such impugnation. Pertinently, the court said:

> The statute is a legitimate attempt by the legislature to protect the family unit and the children from external forces. A suit by one outside the marriage, such as in this case, could well destroy a marriage xxx xxx. [Appellant] is concerned that the mother (actually those within the family unit — the child, the mother and the presumed father) can bring a parentage action which would have the same deleterious effect on the marriage as would a suit by an outsider. But the members of the family, not the outsider, are in the best position to judge whether the marriage can stand the trauma or has already failed. xxx xxx (*A v. X, Y, and Z, Supreme Court of Wyoming*, 641 P2d 1222 74 L. Ed. 2d 518).

The court went on to say that the government function or the legislative objective in the said case (a determination that there was no right of action on the part of the said outsider, even if he claims to be the natural father of the child, so that he could not attack the family unit and the legitimacy and well being of the child) far outweighs the private interest of the said outsider claiming to be the natural father of the child. "It appears that the legislature has carefully weighed the various social values and decided that the biological father's rights are subordinate to the collective rights of the child, the mother, the presumed father and the family unit" (*A v. X, Y, and Z, Supreme Court of Wyoming*, 641 P2d 1222 74 L Ed. 2d 518).

In fact, to protect the interest of the family and the child, statutes of this nature limiting the people who could impugn the

legitimacy of a child and providing for a prescriptive period within which to file the action for that purpose, have to be strictly construed, and has been held not only to deprive third persons of the right to dispute the legitimacy of children born in wedlock, but also to prevent a child so born from repudiating his own legitimacy (*Eloi v. Made,* 1 Rob [La] 581 cited in 10 Am. Jur. 2d 858).

PRESCRIPTIVE PERIODS. There are three different prescriptive periods for the husband or, in proper case, the heirs to impugn the legitimacy of a child. They are as follows:

> 1) One (1) year from knowledge of the birth or its recording in the civil register, if the impugner resides in the city or municipality where the birth took place or was recorded;
>
> 2) Two (2) years from knowledge of the birth or its recording in the civil register, if the impugner resides in the Philippines other than in the city or municipality where the birth took place or was recorded; and
>
> 3) Three (3) years, if the impugner resides 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 the birth, whichever is earlier.

Significantly, the prescriptive periods provided by law for the husband or the heirs to impugn the legitimacy of the child are short compared to the other prescriptive periods relative to any other action such as annulment of marriage and legal separation. This is precisely to avoid leaving in dispute for a long period of time the status of the child. Bastardization of a child is a very serious matter which public policy does not encourage. After the lapse of the prescriptive period the status of the child becomes fixed and cannot be questioned anymore (*Angeles v. Maglaya,* G.R. No. 153798, September 2, 2005, 469 SCRA 363; *Tison v. Court of Appeals,* 276 SCRA 582; *De Jesus v. Estate of Decedent Juan Gamboa Dizon*).

It must also be noted that what is important is the knowledge of birth or its recording in the civil register. Hence, if the husband knew of the birth or recording of birth in the civil register, the prescriptive period will start to run from that time and not from the subsequent knowledge that the child is not his child. Thus, if a husband were informed by a woman that a child of which she was pregnant was his child and, because of this information, the man married the woman

who thereafter gave birth to the child in the presence of the husband who, more than one year later, discovered that the child could not be his child, he cannot anymore impugn the legitimacy of the child as the prescriptive period had already lapsed. It started from the knowledge of the child's birth and not from the knowledge that the child was not his. Also, the concealment provided for by the law does not refer to the concealment that the child was not the husband's but the concealment that a child was in fact born or registered in the civil registry as having been delivered by the wife.

Chapter 2

PROOF OF FILIATION

Article 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)

FILIATION ESTABLISHED. It has been observed by the Supreme Court that:

> parentage, lineage and legitimacy cannot be made to depend upon parental physiognomy or bodily marks of similarity. There is scarcely a family among any of the nationalities where there are a number of children, when one or more of them, due to heredity perhaps, do not resemble either of the immediate parents. Lineage cannot depend wholly upon the presence or absence of paternal similarity of physical appearance (*Chun Chong v. Collector of Customs,* 38 Phil. 815; *Chun Yeng v. Collector of Customs*, 28 Phil. 95).

However, the resemblance between the parent and the child can be competent and material evidence to establish parentage if such resemblance is accompanied by other strong evidence, whether

direct or circumstantial, to prove the filiation of the child (*Tijing v. Court of Appeals*, G.R. No. 125901, March 8, 2001). In *Cabatania v. Court of Appeals,* G.R. No. 124814, October 21, 2004, 441 SCRA 96, the Supreme Court said 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."

For as long as the children were conceived or born inside a valid marriage, they are declared by Article 164 of the Family Code as legitimate. If the children were conceived and born outside a valid marriage or inside a void marriage, they are declared by Article 165 as illegitimate unless otherwise provided by law. While Article 172 refers to proof of legitimacy, such proofs can likewise be used to prove illegitimacy as provided in Article 175. When Article 172 of the Family Code therefore provides for the documents establishing the filiation of legitimate children or illegitimate children, it does not in any way derogate the declaration made by law but merely provides for the necessary documentary evidence to prove any claim of legitimate or illegitimate filiation. The legitimate or illegitimate filiation does not arise from the statements and admissions made in the documents mentioned in Article 172(1) and (2) but from the fact that the children were conceived or born inside a valid marriage in case of legitimacy, or from the fact that children were conceived and born outside a valid marriage or in a void marriage, unless otherwise provided by law, in case of illegitimacy. Hence, the documents under Article 172(1) and (2) may pale in legal significance upon a clear showing that the children were born inside a valid marriage in case of legitimate filiation or, unless provided by law, outside a valid marriage or in a void marriage in case of illegitimate filiation.

The probative value of the said documents, however, attains great weight and significance over all other evidence where the children were born three hundred days following the termination of the marriage and no subsequent marriage has been entered into. This is so because in such cases, there is no declaration nor presumption of legitimacy or illegitimacy. According to Art. 169, the legitimacy or illegitimacy shall be proved by whoever alleges such legitimacy or illegitimacy.

RECORD OF BIRTH. A record of birth appearing in the civil register is good proof as it proceeds from an official government source. It is considered a public document and is *prima facie* evidence of the facts therein contained (Article 410 of the Civil Code; *Malicdem v. Republic*, 12 SCRA 313). As *prima facie* evidence, the

statements in the record of birth may be rebutted. Hence, if there are no evidences to disprove the facts contained therein, the presumption will hold and the children, as stated in the birth certificate, shall be considered legitimate (*Mariategui v. Court of Appeals*, 205 SCRA 337). If the certificate of live birth is signed by the parents and more particularly the father, such certificate of live birth and those other modes provided in the first paragraph of Article 172 are self-authenticating and are consummated acts and therefore there is no further need to file any action for acknowledgment (*Montefalcon v. Vasquez,* G.R. No. 165016, June 17, 2008; *Eceta v. Eceta,* G.R. No. 157037, May 20, 2004, 428 SCRA 782; *De Jesus v. De Jesus*, G.R. No. 142877, October 2, 2001).

It has been held that if the alleged father did not sign in the birth certificate, the placing of his name by the mother, or doctor or registrar, is incompetent evidence of paternity of said child (*Reyes v. Court of Appeals*, 135 SCRA 439; *Berciles v. GSIS*, 128 SCRA 53; *Roces v. Local Civil Registrar*, 102 Phil. 1050).

However as between a presumption of fact created by the record of birth and a presumption or declaration of law provided for in Article 164, the latter will prevail (*Concepcion v. Court of Appeals*, 468 SCRA 438).

FINAL JUDGMENT. A final judgment is a judicial decision bearing on the status of the children as legitimate and hence, binding and conclusive. A final judgment is likewise a public document. Hence, final judgment arising from an action to claim legitimacy under Article 173 is proof of filiation. The discussion of the Civil Code and Family Law committees on the meaning of a final judgment is enlightening, thus:

> Justice Reyes asked how the provision will apply in case of a statement in a court of record referring to one as his or her legitimate child. Justice Caguioa opined that it will fall under "any other means allowed by the Rules of Court." On the other hand, Justice Puno said that there would be a distinction between a reportorial statement by the court of what happened and a finding by the court, the former not being a judgment in the accurate sense.
>
> Justice Reyes and Justice Caguioa suggested that, for clarity, subparagraph (2) be modified to read:
>
> (2) Final judgment establishing the filiation.
>
> Justice Puno, however, remarked that it is already clear in the opening sentence which reads: "the filiation of legitimate

> children is established . . .” Justice Reyes commented that this opening sentence may be considered as merely declaratory that any one of those enumerated would establish the filiation. Justice Puno reiterated that a reportorial statement by the court does not establish filiation; if it is only when the court says that it “finds . . .” He, however, raised the question: Supposing the court makes a finding but it is *obiter dictum*, how will the provision apply? Justice Puno himself remarked that personally he believed that this does not establish filiation. Justice Reyes added that when it is *obiter dictum*, it is not part of the judgment with which the other members concurred (Minutes of the Joint Civil Code and Family Law committees held on August 31, 1985, page 3).

A final judgment however based on a compromise agreement where the parties stipulated and agreed on the status of a person is void. Contractually agreeing and establishing the civil status of a person is against the law and public policy. Article 2035(1) of the Civil Code provides that no compromise agreement upon the civil status of persons shall be valid. In *Rivero v. Court of Appeals*, G.R. No. 141273, May 17, 2005 458 SCRA 714, the Supreme Court said that “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 b left to the will or agreement of the parties”.

ADMISSION IN PUBLIC OR PRIVATE HANDWRITTEN DOCUMENT. An admission of legitimate filiation in a public instrument or a private handwritten instrument and signed by the parent concerned is a complete act of recognition without need of court action (*De Jesus v. De Jesus*, G.R. No. 142877, October 2, 2001). If it is a mere instrument, not in the handwriting of the supposed parent or not a public instrument it will not qualify under the law. Thus, it has been held that a child’s written consent to the operation of her alleged father, not being written in the handwriting of the alleged father, is not a proof of filiation (*Reyes v. Court of Appeals,* 135 SCRA 439). Also, a private instrument must be handwritten and signed by the parents such that a secondary student permanent record, or a marriage contract stating that the advice of the alleged father was obtained, not signed by the alleged father, are not adequate proofs of filiation (*Reyes v. Court of Appeals*, 135 SCRA 439).

In *Lim v. Court of Appeals*, 81 SCAD 408, 270 SCRA 1, the Supreme Court ruled that there was no doubt that the petitioner was the father of his illegitimate child because the evidences

convincingly show this. Hence, it was the petitioner who paid the bills for the hospitalization of the mother when she gave birth. He was the one who caused the registration of the name of the child using his surname in the birth certificate. He also wrote handwritten letters to the mother and the child stating his promise "to be a loving and caring husband and father to both of you." When the mother was pregnant of the child, he advised her in a letter to take a lot of rest "especially in the situation you're in now" clearly referring to the mother's pregnancy relative to the child. There were also pictures of the petitioner on various occasions cuddling the child.

OPEN AND CONTINUOUS POSSESSION OF LEGITIMATE STATUS. In the absence of the foregoing evidence, however, the legitimate or illegitimate filiation can be proven by the open and continuous possession of the status of a legitimate child (*Mariategui v. Court of Appeals*, 205 SCRA 337). In *Mendoza v. Court of Appeals,* 201 SCRA 675, the Supreme Court explained what continuous possession means, *to wit:*

> "continuous" 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. The possession of such status means that the father has treated the child as his own, directly and not through others, spontaneously and without concealment though without publicity x x x. There must be a showing of the permanent intention of the supposed father to consider the child as his own, by continuous and clear manifestation of paternal affection and care (*Mendoza v. Court of Appeals*, 201 SCRA 675).

The paternal affection and care must not be attributed to pure charity. As held in the case of *Jison v. Court of Appeals*, G.R. No. 124853, February 24, 1998, "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." A higher standard of proof is needed in proving filiation using continuous possession as proof. Evidence must be clear and convincing (*Constantino v. Mendez*, 209 SCRA 18). In the *Jison* case, the following overt acts and conduct satisfy the requirement:

> [L]ike sending appellant to school, paying for her tuition fees, school uniforms, books, board and lodging at the Colegio 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.

In *Ong v. Court of Appeals*, 82 SCAD 961, 272 SCRA 725, where the alleged father only met the respondent four times to give him money, the Supreme Court rejected the claim of "continuous possession" of the status of a child by the respondent and stated that, for "continuous possession" to exist, the father's conduct toward his son must also be spontaneous and uninterrupted and that the fact that the father met the children four times to give them money is not enough.

In *Angeles v. Maglaya,* G.R. No. 153798, September 2, 2005, 469 SCRA 363, where the birth certificate unsigned by the father, the claimant's student and government records purporting to show that the alleged father was her father and her wedding pictures showing that the alleged father gave her hand in marriage were presented as proofs of filiation, the Supreme Court ruled that such proofs were not enough to prove the relationship of the claimant with her alleged father.

EVIDENCE UNDER THE RULES OF COURT AND SPECIAL LAWS. In the absence also of the evidentiary documents mentioned in the first paragraph of Article 172(1) and (2), the Family Code provides in the second paragraph of Article 172(2) that legitimate filiation (or illegitimate filiation) shall be proved by any other means allowed by the Rules of Court and special laws. Significantly, it has been held that pictures, typewritten letters, and affidavits do not constitute proof of filiation (*Berciles v. Government Service Insurance System*, 128 SCRA 53). The fact alone that a person used the surname of his father, after the latter's death, without his assent or consent, does not constitute a proof of filiation or paternity (*Ferrer v. Inchausti*, 38 Phil. 905).

In earlier cases decided by the Supreme Court, it has been held that canonical records, such as a baptismal record or certificate, do not constitute proof of filiation because:

> such canonical record is simply proof of the only act to which the priest may certify by reason of his personal knowledge, an act

> done by himself or in his presence, like the administration of the sacrament upon a day stated; it is no proof of the declarations in the record with respect to the parentage of the child baptized, or of prior and distinct facts which require separate and concrete evidence (*Berciles v. Government Service Insurance System*, 128 SCRA 53, citing *Adriano v. de Jesus*, 23 Phil. 350).

However, in *Mendoza v. Court of Appeals*, 201 SCRA 675, decided on September 24, 1991, the Supreme Court held that, in view of the fact that filiation may be proved by "any means allowed by the Rules of Court and special laws," this may consist of:

> baptismal certificate, a judicial admission, a family bible in which his name has been entered, common reputation respecting his pedigree, admission by silence, the testimony of witnesses and such other kinds of proof admissible under Rule 130 of the Rules of Court.

Accordingly, for a baptismal certificate to be proof of filiation under the Rules of Court, it must be shown that the father therein participated in the preparation of the same. A birth certificate not signed by the father is not competent proof of paternity. Also, in *Fernandez v. Court of Appeals,* G.R. No. 108366, February 16, 1994, 48 SCAD 333, where the priest who officiated the baptism claimed that he can recognize the father of the child as he was there during the baptism but at the same time testified that he had to be shown by the mother a picture of the father to be able to recognize the father is not concrete testimony to prove filiation. In the case of *Jison v. Court of Appeals*, G.R. No. 124853, February 24, 1998, the rule has been summarized thus:

> 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. 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. In like manner, FRANCISCO's lack of participation in the preparation of the baptismal certificates xxx and school records xxx renders these

documents incompetent to prove paternity, the former being competent merely to prove the administration of baptism on the date so specified. However, despite the inadmissibility of the school records *per se* to prove paternity, they may be admitted as part of MONINA's testimony to corroborate her claim that FRANCISCO spent for her education.

DNA TESTING. Deoxyribonucleic Acid (DNA) testing is also a valid means of determining paternity (*Agustin v. Court of Appeals*, G.R. No. 162571, June 15, 2005). In *Herrera v. Alba*, G.R. No. 148220, June 15, 2005, the Supreme Court expounded on its significance, thus:

DNA Analysis as Evidence

DNA is the fundamental building block of a person's entire genetic make-up. DNA is found in all human cells and is the same in every cell of the same person. Genetic identity is unique. Hence, a person's DNA profile can determine his identity.

DNA analysis is a procedure in which DNA extracted from a biological sample obtained from an individual is examined. The DNA is processed to generate a pattern, or a DNA profile, for the individual from whom the sample is taken. This DNA profile is unique for each person, except for identical twins. We quote relevant portions of the trial court's 3 February 2000 Order with approval:

Everyone is born with a distinct genetic blueprint called **DNA (deoxyribonucleic acid)**. It is exclusive to an individual (except in the rare occurrence of identical twins that share a single, fertilized egg), and DNA is unchanging throughout life. Being a component of every cell in the human body, the DNA of an individual's blood is the very DNA in his or her skin cells, hair follicles, muscles, semen, samples from buccal swabs, saliva, or other body parts.

The chemical structure of DNA has four bases. They are known as **A** (adenine), **G** (guanine), **C** (cystosine) and **T** (thymine). The order in which the four bases appear in an individual's DNA determines his or her physical makeup. And since DNA is a double-stranded molecule, it is composed of two specific paired bases, **A-T** or **T-A** and **G-C** or **C-G**. These are called *"genes."*

Every *gene* has a certain number of the above base pairs distributed in a particular sequence. This gives a person his or her genetic code. Somewhere in the DNA framework, nonetheless,

are sections that differ. They are known as *"polymorphic loci,"* which are the areas analyzed in DNA typing (profiling, tests, fingerprinting, or analysis/DNA fingerprinting/genetic tests or fingerprinting). In other words, DNA typing simply means determining the *"polymorphic loci."*

How is DNA typing performed? From a DNA sample obtained or extracted, a molecular biologist may proceed to analyze it in several ways. There are five (5) techniques to conduct DNA typing. They are: the *RFLP (restriction fragment length polymorphism); "reverse dot blot"* or HLA DQ a/Pm loci which was used in 287 cases that were admitted as evidence by 37 courts in the U.S. as of November 1994; mtDNA process; VNTR (variable number tandem repeats); and the most recent which is known as the PCR-([polymerase] chain reaction) based STR (short tandem repeats) method which, as of 1996, was availed of by most forensic laboratories in the world. PCR is the process of replicating or copying DNA in an evidence sample a million times through repeated cycling of a reaction involving the so-called DNA polymerize enzyme. *STR*, on the other hand, takes measurements in 13 separate places and can match two (2) samples with a reported theoretical error rate of less than one (1) in a trillion.

Just like in fingerprint analysis, in DNA typing, *"matches"* are determined. To illustrate, when DNA or fingerprint tests are done to identify a suspect in a criminal case, the evidence collected from the crime scene is compared with the *"known"* print. If a substantial amount of the identifying features are the same, the DNA or fingerprint is deemed to be a **match**. But then, even if only one feature of the DNA or fingerprint is **different**, it is deemed **not to have come from the suspect.**

As earlier stated, certain regions of human DNA show variations between people. In each of these regions, a person possesses two genetic types called *"allele,"* one inherited from each parent. 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 (Emphasis in the original).

Although the term "DNA testing" was mentioned in the 1995 case of ***People v. Teehankee, Jr.***, it was only in the 2001

case of ***Tijing v. Court of Appeals*** that more than a passing mention was given to DNA analysis. In ***Tijing***, we issued a writ of *habeas corpus* against respondent who abducted petitioners' youngest son. Testimonial and documentary evidence and physical resemblance were used to establish parentage. However, we observed that:

> 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. xxx. For it was said, that courts should apply the results of science when completely 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 [the] future it would be useful to all concerned in the prompt resolution of parentage and identity issues.

Admissibility of DNA Analysis as Evidence

The 2002 case of ***People v. Vallejo*** discussed DNA analysis as evidence. This may be considered a 180 degree turn from the Court's wary attitude towards DNA testing in the 1997 ***Pe Lim*** case, where we stated that "DNA, being a relatively new science, xxx has not yet been accorded official recognition by our courts." In ***Vallejo***, the DNA profile from the vaginal swabs taken from the rape victim matched the accused's DNA profile. We affirmed the accused's conviction of rape with homicide and sentenced him to death. We declared:

> 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 proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the tests.

Vallejo discussed the probative value, not admissibility, of DNA evidence. By 2002, there was no longer any question on the validity of the use of DNA analysis as evidence. The Court moved from the issue of according "official recognition" to DNA analysis as evidence to the issue of observance of procedures in conducting DNA analysis.

In 2004, there were two other cases that had a significant impact on jurisprudence on DNA testing: ***People v. Yatar*** and ***In re: The Writ of Habeas Corpus for Reynaldo de Villa***. In ***Yatar***, a match existed between the DNA profile of the semen found in the victim and the DNA profile of the blood sample given by appellant in open court. The Court, following ***Vallejo's*** footsteps, affirmed the conviction of appellant because the physical evidence, corroborated by circumstantial evidence, showed appellant guilty of rape with homicide. In ***De Villa***, the convict-petitioner presented DNA test results to prove that he is not the father of the child conceived at the time of commission of the rape. The Court ruled that a difference between the DNA profile of the convict-petitioner and the DNA profile of the victim's child does not preclude the convict-petitioner's commission of rape.

In the present case, the various pleadings filed by petitioner and respondent refer to two United States cases to support their respective positions on the admissibility of DNA analysis as evidence: ***Frye v. U.S.*** and ***Daubert v. Merrell Dow Pharmaceuticals***. In ***Frye v. U.S.*** the trial court convicted Frye of murder. Frye appealed his conviction to the Supreme Court of the District of Columbia. During trial, Frye's counsel offered an expert witness to testify on the result of a systolic blood pressure deception test made on defendant. The state Supreme Court affirmed Frye's conviction and ruled that "the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." The ***Frye*** standard of general acceptance states as follows:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

In 1989, ***State v. Schwartz*** modified the ***Frye*** standard. Schwartz was charged with stabbing and murder. Bloodstained articles and blood samples of the accused and the victim were submitted for DNA testing to a government facility and a private facility. The prosecution introduced the private testing facility's

results over Schwartz's objection. One of the issues brought before the state Supreme Court included the admissibility of DNA test results in a criminal proceeding. The state Supreme Court concluded that:

While we agree with the trial court that forensic DNA typing has gained general acceptance in the scientific community, we hold that admissibility of specific test results in a particular case hinges on the laboratory's compliance with appropriate standards and controls, and the availability of their testing data and results.

In 1993, ***Daubert v. Merrell Dow Pharmaceuticals, Inc***. further modified the ***Frye-Schwartz*** standard. ***Daubert*** was a product liability case where both the trial and appellate courts denied the admissibility of an expert's testimony because it failed to meet the ***Frye*** standard of "general acceptance." The United States Supreme Court ruled that in federal trials, the Federal Rules of Evidence have superseded the ***Frye*** standard. Rule 401 defines relevant evidence, while Rule 402 provides the foundation for admissibility of evidence. Thus:

Rule 401. "Relevant evidence" is defined as that which has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 702 of the Federal Rules of Evidence governing expert testimony provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Daubert cautions that departure from the ***Frye*** standard of general acceptance does not mean that the Federal Rules do not place limits on the admissibility of scientific evidence. Rather, the judge must ensure that the testimony's reasoning or method is scientifically valid and is relevant to the issue. Admissibility would depend on factors such as (1) whether the theory or technique can be or has been tested; (2) whether

the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique is generally accepted in the scientific community.

Another product liability case, ***Kumho Tires Co. v. Carmichael,*** further modified the ***Daubert*** standard. This led to the amendment of Rule 702 in 2000 and which now reads as follows:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

We now determine the applicability in this jurisdiction of these American cases. Obviously, neither the ***Frye-Schwartz*** standard nor the ***Daubert-Kumho*** standard is controlling in the Philippines. At best, American jurisprudence merely has a persuasive effect on our decisions. Here, evidence is admissible when it is relevant to the fact in issue and is not otherwise excluded by statute or the Rules of Court. Evidence is relevant when it has such a relation to the fact in issue as to induce belief in its existence or non-existence. Section 49 of Rule 130, which governs the admissibility of expert testimony, provides as follows:

> The opinion of a witness on a matter requiring special knowledge, skill, experience or training which he is shown to possess may be received in evidence.

This Rule does not pose any legal obstacle to the admissibility of DNA analysis as evidence. Indeed, even evidence on collateral matters is allowed "when it tends in any reasonable degree to establish the probability or improbability of the fact in issue."

Indeed, it would have been convenient to merely refer petitioner to our decisions in ***Tijing, Vallejo*** and ***Yatar*** to illustrate that DNA analysis is admissible as evidence. In our jurisdiction, the restrictive tests for admissibility established by ***Frye-Schwartz*** and ***Daubert-Kumho*** go into the weight of the evidence.

Probative Value of DNA Analysis as Evidence

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 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.

Article 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)

ACTION TO CLAIM LEGITIMACY. The right of action for legitimacy devolving upon the child is of a personal character and generally pertains exclusively to him. Only the child may exercise it at any time during his lifetime. As exception, and in three cases only, it may be transmitted to the heirs of the child, to wit: if he or she died during his or her minority, or while insane, or after action had already been instituted. Inasmuch as the right of action accruing to the child to claim his or her legitimacy lasts during his or her whole lifetime, he or she may exercise it either against the presumed parents, or his or her heirs (*Conde v. Abaya*, 13 Phil. 249).

Article 174. Legitimate children shall have the right:

1) To bear the surname 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)

RIGHTS OF THE LEGITIMATE CHILD. The Family Code, like the Civil Code of 1950 and the Spanish Code of 1889, establishes differences in the rights of children according to the circumstances that surround their conception or birth. The greatest and preferential sum of rights is given to the legitimate children (See *Clemena v. Clemena*, 133 Phil. 702).

Thus, a legitimate child has his or her whole lifetime to file an action to claim his or her legitimacy regardless of what type of proofs he or she has as provided for in Article 172, whereas an illegitimate child has his or her lifetime to file an action to claim illegitimacy only if he or she uses the proofs under the first paragraph of Article 172. If such illegitimate child uses the proofs under the second paragraph of Article 172 (continuous possession, Rules of Court), such child could only bring the action within the lifetime of the parent. The right of the legitimate child to file an action to claim his or her legitimacy may be transmitted to his or her heirs as provided for in Article 173, while the right of the illegitimate child to claim his or her status as such is not transmissible to his or her heirs. In the direct line of relationship, the legitimate child is entitled to receive support from any of his or her ascendants and descendants in accordance with the priority set by the law (Articles 195 and 199) but, with respect to the same direct line, an illegitimate child is entitled to receive support only up to his or her grandparents and his or her grandchildren as provided for in Article 195(2) and (3). As to successional rights, the legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child. The legitimate child shall principally bear the surname of the father (Article 364 of the Civil Code) while the illegitimate child shall generally bear the surname of the mother.

Also, an illegitimate child has no right to inherit *ab intestato* from the legitimate children and relatives of his father or mother (Article 992 of the Civil Code) while a legitimate child can so inherit. *For example:* X has a legitimate child Y who, in turn, has two children namely: O who is legitimate and P who is illegitimate. If Y predeceases X and if X later dies, O will inherit from X by right of representation *vis-à-vis* Y who should have inherited had he not died prior to X (Articles 970 to 973 of the Civil Code). However, P, who is an illegitimate child, cannot inherit by right of representation because Article 992 of the Civil Code states that an illegitimate child like P cannot inherit from the legitimate relatives, such as X, of his father Y though X is P's grandfather.

Chapter 3

ILLEGITIMATE CHILDREN

Article 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)

CLAIM OF ILLEGITIMATE CHILDREN. Article 175 contemplates a situation where a child born outside a valid marriage or inside a void marriage, except those provided for in Article 54 of the Family Code, seeks to claim his or her illegitimate status. Thus, if a philandering husband has a concubine, a child of such concubine by the said philandering husband is surely illegitimate. The said illegitimate child may file an action to claim his illegitimate status *vis-à-vis* the said philandering husband. However, if the concubine herself has her own spouse, the said child cannot file an action to claim his illegitimate status against the philandering husband although the latter is in fact his natural father. This is so because the said child was born inside the marriage of the concubine and her own spouse. The law declares that a child conceived or born inside a valid marriage is legitimate. It is up to the concubine's spouse to file a case to impugn the legitimacy of the child. If the said concubine's spouse does not file such a case, then the child shall continue to be the legitimate child of the concubine and her spouse and not the illegitimate child of the concubine and the philandering husband. To allow the child to file the action to claim his illegitimate status *vis-à-vis* the philandering husband would, in effect, allow him to impugn his legitimate status with respect to the concubine and her spouse. This cannot be done. Only the concubine's spouse and his heirs, in

special cases, are given legal standing to file an action to impugn the legitimacy of the child (Articles 170 and 171 of the Family Code). If the concubine's legal spouse is successful in impugning the legitimate status of the child and obtains a court decision that the child is not his, only then can the said child claim his illegitimate status *vis-à-vis* the philandering husband. Also, the said child can do so only in accordance with law using the appropriate proofs of filiation and within the prescriptive period.

PROOFS. The same proofs as provided for in Article 172 for legitimate children may be used by illegitimate children in proving their filiation (*Montefalcon v. Vasquez*, G.R. No. 165016, June 17, 2008). Hence, the explanation under Article 173 is applicable to Article 174. Also, it has been held that a judicial testimony which has not been rebutted and, in fact not disputed by the alleged father, is sufficient to prove paternity (See *Navarro v. Bacalla*, 15 SCRA 114).

The case of *Mendoza v. Court of Appeals*, 201 SCRA 675, is instructive of the applicability of the rules of evidence contained in the Rules of Court in proving paternity. Pertinently, the Supreme Court observed and ruled:

> But although Teopista has failed to show that she was in open and continuous possession of the status of an illegitimate child of Casimiro, we find that she has nevertheless established that status by another method.
>
> What both the trial court and the respondent court did not take into account is that an illegitimate child is allowed to establish his claimed filiation by "any other means allowed by the Rules of Court" x x x according to the Family Code. Such evidence may consist of his baptismal certificate, a judicial admission, a family bible in which his name has been entered, common reputation respecting his pedigree, admission by silence, the testimonies of witnesses, and other kinds of proof admissible under Rule 130 of the Rules of Court.
>
> The trial court conceded that "the defendant's parents, as well as the plaintiff himself, told Gaudencio Mendoza and Isaac Mendoza, that Teopista was the daughter of the defendant." It should have probed this matter in light of Rule 130, Section 39 of the Rules of Court providing:
>
> > Sec. 39. *Act or declaration about pedigree.* — The act or declaration of a person deceased, or unable to testify, in respect to the pedigree of another person related to him by birth or marriage,

> may be received in evidence where it occurred before the controversy, and the relationship between the two persons is shown by evidence other than such act or declaration. The word "pedigree" includes relationship, family genealogy, birth, marriage, death, the dates when and the places where these facts occurred, and the names of the relatives. It embraces also facts of family history intimately connected with pedigree.

The statement of the trial court regarding Teopista's parentage is not entirely accurate. To set the record straight, we will stress that it was only Isaac Mendoza who testified on this question of pedigree, and he did not cite Casimiro's father. His testimony was that he was informed by his father Hipolito, who was Casimiro's brother, and Brigida Mendoza, Casimiro's own mother, that Teopista was Casimiro's illegitimate daughter.

Such acts or declaration may be received in evidence as an exception to the hearsay rule because "it is the best the nature of the case admits and because greater evils are apprehended from the rejection of such proof than from its admission." Nevertheless, precisely because of its nature as hearsay evidence, there are certain safeguards against its abuse. Commenting on this provision, Francisco enumerates the following requisites that have to be complied with before the act or declaration regarding pedigree may be admitted in evidence:

1. The declarant is dead or unable to testify.

2. The pedigree must be in issue.

3. The declarant must be a relative of the person whose pedigree is in issue.

4. The declaration must be made before the controversy.

5. The relationship between the declarant and the person whose pedigree is in question must be shown by evidence other than such declaration.

All the above requisites are present in the case at bar. The persons who made the declarations about the pedigree of Teopista, namely, the mother of Casimiro, Brigida Mendoza, and his brother, Hipolito, were both dead at the time of Isaac's testimony. The declarations referred to the filiation of Teopista and the paternity of Casimiro, were was the very issues involved in the complaint for compulsory recognition. The declarations were made before the complaint was filed by Teopista or before the controversy arose between her and Casimiro. Finally, the

> relationship between the declarants and Casimiro consisting of the extrajudicial partition of the estate of Florencio Mendoza, in which Casimiro was mentioned as one of his heirs.
>
> The said declarations have not been refuted. Casimiro would have done this by deposition if he was too old and weak to testify at the trial of the case.
>
> If we consider the other circumstances narrated under oath by the private respondent and her witnesses, such as the financial doles made by Casimiro to Brigida Toring, the hiring of Teopista's husband to drive the passenger truck of Casimiro, who later sold the vehicle and gave the proceeds of the sale to Teopista and her husband, the permission he gave Lolito Tunacao to build a house on his land after he found that the latter was living on a rented lot, and, no less remarkably, the joint savings account Casimiro opened with Teopista, we can reasonably conclude that Teopista was the illegitimate daughter of Casimiro Mendoza.
>
> We hold that by virtue of the above-discussed declarations, and in view of the other circumstances of this case, Teopista Toring Tunacao has proved that she is entitled to be recognized as such. In so holding, we give effect to the policy of the Civil Code and the Family Code to liberalize the rule on the investigation of the paternity of illegitimate children, without prejudice to his own defenses, including evidence now obtainable through the facilities of modern medicine and technology.

The proof of illegitimate filiation must be clear and convincing. Thus, if the birth of the illegitimate child is way beyond nine months from the approximate time of conception resulting from the alleged sexual intercourse between the parties, this can negate any claim of filiation. In *Constantino v. Mendez*, 209 SCRA 28, the Supreme Court, in ruling that the filiation of an alleged illegitimate child was not sufficiently proven, observed and ruled:

> x x x Amelita's testimony on cross-examination that she had sexual contact with Ivan in Manila in the first or second week of November, 1974 x x x is inconsistent with her response that she could not remember the date of their last sexual intercourse in November 1974 x x x. Sexual contact of Ivan and Amelita in the first or second week of November, 1974 is the crucial point that was not even established on direct examination as she merely testified that she had sexual intercourse with Ivan in the months of September, October and November, 1974.
>
> Michael Constantino is a full-term baby born on August 3, 1975 (Exhibit 6) so that as correctly pointed out by private

> respondent's counsel, citing medical science (Williams, Obstetrics, Tenth Ed., p. 198) to the effect that "the mean duration of actual pregnancy, counting from the day of conception must be close to 267 days," the conception of the child (Michael) must have taken place about 267 days before August 3, 1975. While Amelita testified that she had sexual contact with Ivan in November, 1974, nevertheless said testimony is contradicted by her own evidence (Exh. F), the letter dated February 11, 1975, addressed to Ivan Mendez requesting for a conference, prepared by her own counsel Atty. Roberto Sarenas to whom she must have confided the attendant circumstances of her pregnancy while still fresh in her memory, informing Ivan that Amelita is four months pregnant so that applying the period of the duration of actual pregnancy, the child was conceived on or October 11, 1974.
>
> x x x The burden of proof is on Amelita to establish her affirmative allegations that Ivan is the father of her son. Consequently, in the absence of clear and convincing evidence establishing paternity or filiation, the complaint must be dismissed.

In *Jison v. Court of Appeals,* G.R. No. 124853, February 24, 1998, where private letters and notes were presented to prove filiation under the evidence allowed by the Rules of Court, particularly Section 40, Rule 130 which pertinently provides that "entries in family bibles or other family books or charts, engravings on rings, family portraits and the like may be received as evidence of pedigree," the Supreme Court ruled that such private documents do not fall under the phrase "and the like" of the said rule, thus:

> We hold that the scope of the enumeration contained in the second portion of this provision, in light of the rule of *ejusdem generis*, is limited to objects which are commonly known as "family possessions," or those article[s] which represent, in effect, a family's joint statement of its belief as to the pedigree of a person. These have been described as objects "openly exhibited and well known to the family," or those which, if preserved in a family, may be regarded as giving a family tradition. Other examples of these objects which are regarded as reflective of a family's reputation or tradition regarding pedigree are inscriptions on tombstones, monuments or coffin plates.

In *Verceles v. Posada*, G.R. No. 159785, April 27, 2007, the Supreme Court ruled that the admitted love letters of the petitioner in his own handwriting and using as alias and declaring that

should the respondent become pregnant, he will have no regret and that they should rejoice in the responsibility qualifies as a private handwritten instrument that can establish filiation.

PRESCRIPTIVE PERIOD. If the proofs to be used by the illegitimate child are those under the first paragraph of Article 172, he or she has his or her whole lifetime to bring the action to claim his or her illegitimate status.

However, if the proofs used are those mentioned in the second paragraph of Article 172, the illegitimate child may only bring the action during the lifetime of the alleged parent (*Uyguanco v. Court of Appeals*, G.R. No. 76873, October 26, 1989, 178 SCRA 684).

Thus, in an action for partition brought by an illegitimate child after the death of the alleged father and prior to the effectivity of the Family Code, the issue on his illegitimate status had to be answered collaterally. His ground was his alleged continuous possession of the status of an illegitimate child. When the case reached the Supreme Court, the Family Code already took effect providing that, if an illegitimate child invokes such ground, he could only file a case to claim his illegitimate status at any time prior to the death of the alleged father. The Supreme Court had to dismiss the action for partition as the alleged illegitimate child cannot any more prove his filiation in the said action as he is barred from doing so under the second paragraph of Article 173. The Supreme Court said: "The complaint is indeed a circumvention of Article 172, which allows proof of the illegitimate child's filiation under the second paragraph thereof only during the lifetime of the alleged parent" (*Tayag v. Court of Appeals*, 209 SCRA 664).

However, it must be pointed out that a party must be allowed to adduce the proof of his illegitimacy to be able to know whether he or she falls under the first paragraph of Article 172 or the second paragraph thereof (*Tayag v. Tayag-Gallor*, G.R. No. 174680, March 24, 2008, 549 SCRA 68).

Article 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 doc-

ument 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 Republic Act 9255)

RIGHTS OF AN ILLEGITIMATE CHILD. Even illegitimate children are given substantial rights under the law. The interest of the child is paramount even if such child is the result of an illicit relationship.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as unjust-way of deterring the parent (*Weber v. AETNA*, 406 U.S. 164).

Under Philippine laws, though the illegitimate child is given rights under the law, his or her rights are not equal or the same with that of a legitimate child. The illegitimate child shall generally use the surname of the mother and his or her legitime shall consist of one-half of the legitime of a legitimate child.

PARENTAL AUTHORITY. Article 176 also provides that the illegitimate child shall be under the parental authority of the mother. In *Briones v. Miguel,* G.R. No. 156343, October 18, 2004, 440 SCRA 2004, the father is not given parental authority notwithstanding his recognition that the child is his. It might turn out that the alleged putative father might not be the real natural father and hence, to prevent a person from exercising parental authority over a child who might not be his, the parental authority over an illegitimate child is solely given to the mother. In *David v. Court of Appeals*, 65 SCAD 508, 250 SCRA 82, where a person who lives exclusively with his legitimate family got hold of his illegitimate son from the mother who obviously was not living with the said father, the Supreme Court stated that, pursuant to Article 176, the illegitimate son is under the parental authority of the mother who, as a consequence of

such authority, is entitled to have custody of him. In this particular case, paternity is certain but the father was not cohabiting with the mother.

The *Briones* ruling *(supra)* is quite strict and does not give any chance for an illegitimate father to have parental authority over his illegitimate child. This strict application however disregards the provision in Article 211 of the Family Code. It is submitted however that if the alleged father admits that the child is his and it is shown that it is really conclusively his child and he even acknowledges that the child is his and the said father lives together with the child and the mother of the said child under a void marriage or without the benefit of a marriage, Article 211 of the Family Code will apply, which provides that *"the father and the mother shall jointly exercise parental authority over the person of their common children. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary"* (See *Dempsey v. RTC*, 164 SCRA 384, and explanations under Article 211). Once parental authority is vested, it cannot be waived except in cases of adoption, guardianship and surrender to a children's home or an orphan institution (*Sagala-Eslao v. Court of Appeals*, 78 SCAD 50, 266 SCRA 317). However, parental authority can be terminated in accordance with the legal grounds provided in the Family Code. If therefore, a father lives together with his illegitimate child, whom the said father admits as his, and the said child's mother, parental authority shall be exercised by both the father and the mother.

SURNAME. As to the surname of illegitimate children, the surname of the mother shall be used (*Mossesgeld v. Court of Appeals,* G.R. No. 111455, December 23, 1998; *Republic v. Abadilla*, G.R. No. 133054, January 28, 1999). 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. Nevertheless, the father has the right to institute an action before the regular courts to prove non-filiation during his lifetime.

Chapter 4

LEGITIMATED CHILDREN

Article 177.Children conceived and born outside of wedlock of parents who, at the time of conception of the former, were not disqualified by any impediment to marry each other, or were so disqualified only because either or both of them were below eighteen (18) years of age, may be legitimated. (as amended by Republic Act 9858)

Article 178. Legitimation shall take place by a subsequent valid marriage between parents. The annulment of a voidable marriage shall not affect the legitimation. (270a)

Article 179. Legitimated children shall enjoy the same rights as legitimate children. (272a)

Article 180. The effects of legitimation shall retroact to the time of the child's birth. (273a)

STATUTORY CREATION. Legitimation is purely a statutory creation. Before a child can be legitimated, the requirements of the law must be strictly complied with. However, laws providing for the process of legitimation are remedial in character intended for the benefit and protection of the innocent offspring and, therefore, may be applied retrospectively (Lund's Estate, 162 ALR 606) and must be liberally construed (*Cardenas v. Cardenas,* 12 Ill. App 2d 497, 63 Alr2d 1001; *Ives v. McNicoll*, 59 Ohio St 402). Nevertheless, even a liberal construction does not authorize any enlargement or restriction of plain provisions of the law as written (*Re Jessup*, 81 Cal. 408, 21, p. 976).

REQUIREMENTS. The following are the essential and mandatory requirements that must be present in the process of legitimation:

1. The parents do not suffer any legal impediment or are disqualified to marry because either one or both of them are 18 years of age at the time of the conception of the child by the mother;

2. The child has been conceived and born outside of a valid marriage. This is the rule because, if the child is either conceived or born within a particular valid marriage, the said child is declared by law as legitimate;

3. The parents subsequently enter into a valid marriage. It is this last step which by operation of law will finally legitimate the child. The annulment of a voidable marriage shall not affect the legitimation.

The process of legitimation is made a lot simpler under the Family Code and its amendment. This change in the process definitely favors those who have been conceived and born prior to the effectivity of the Family Code and are qualified under the Family Code but who, under the Civil Code, cannot be legitimated because they failed to meet all of the requirements under the Civil Code. Thus, it has been held that where the essential elements of legitimation existed prior to the passage of the legitimating statute, legitimation is deemed to occur as of the time the statute becomes effective (*Henry v. Jean*, 238 La 314, 115 So2d 363). The effectivity date of the Family Code is August 3, 1988. For example, under the 1950 Civil Code, before a child can be legitimated, such child must also be acknowledged by the father. If *B* gives birth to *X* in 1983 and the father *M* does not want to acknowledge the child as his, the said child cannot be considered legitimated even if *B* and *M* enter into a subsequent valid marriage in 1984. However, on August 3, 1988, such child shall become legitimated because, under the Family Code, there is no more need for acknowledgment of the father as a condition for legitimation. This is clearly for the benefit of the child and in accordance with his or her paramount interest.

However, while a legitimating statute adopted after the birth of an illegitimate child may have the effect of legitimating the child, it will not affect property rights which have already vested (*Muldrow v. Cladwell*, 173 SC 243). Thus, in the example given in the preceding paragraph, if *M* dies in 1985, *X* shall be considered to have been legitimated on August 3, 1988, but as to property rights which have already been transmitted to the legitimate children of *B* and *M* upon the latter's death, *X* will not have a claim anymore as such property rights have already vested in 1985 when *M* died.

Generally, legitimation cannot occur if either or both of the parents, at the time of the conception of the child, are disqualified by any impediment to marry each other. Hence, if a child were conceived and born of parents related within the fourth civil degree of consanguinity (which is a ground to nullify a marriage), whether without marriage or under a void marriage, the said child can never be legitimated.

However, if the legal impediment consists of one or both parties are less than 18 years of age at the time of the conception of the child, legitimation is allowed.

It has been held that adulterous children cannot be legitimated. To do so will destroy the rationale of legitimation and the sanctity of marriage, will be unfair to the legitimate children in terms of successional rights, will be scandalous, especially if the parents marry years after the birth of the child (*Abadilla v. Tabiliran*, 65 SCAD 147, 249 SCRA 447). Children of bigamous marriages cannot be likewise legitimated (*De Santos v. Angeles*, G.R. No. 105619, December 12, 1995, 66 SCAD 510).

EFFECTS OF LEGITIMATION. The effects of legitimation retroact to the child's birth. Also, legitimated children shall enjoy the same rights as legitimate children. Legitimation equalizes children born out of wedlock with legitimate children (*Jameson v. Jameson*, 111 Okla. 82). All the reciprocal responsibilities and duties of parent-child relationship obtain between a father and his legitimated child (*Allison v. Bryan*, 97 P 282). Unlike adoption where the extent of the filial relationship is defined by law, the provisions on legitimation do not do so because, precisely, legitimation puts a legitimated child completely and fully in equal footing with children born in lawful wedlock. Hence, unlike adoption where the relationship created is only that of parent and child, legitimation creates for the legitimated child the total and full extent of the blood-relationship existing within the family to include all descendants, ascendants and collateral relatives.

Article 181. The legitimation of children who died before the celebration of the marriage shall benefit their descendants. (274a)

BENEFIT TO DESCENDANTS. Article 181 also provides that the legitimation of children who died before the celebration of the marriage shall benefit their descendants.

> Goyena says that the reason of the provisions of this article is to give the children what they should have enjoyed during the lifetime of their father or mother. To repair the injury done by their grandfather, through his long silence, upon their father is the object of the law. In this way, the transmission of their property to strangers is prevented. Manresa says that as the death of the child does not break the bonds of paternal love, it is necessary that the means of preserving that affection be preserved (The Civil Code by Vicente G. Sinco and Francisco Capistrano, 1932 edition, page 173, citing also 1 Manresa, C.C., pp. 565-566).

For example, under the law, legitimate ascendants and descendants are obliged to support each other (Article 195[2]). Hence, in the legitimate direct line, a great grandparent is obliged to support his great-grandchild. However, under the law also, in case there is an illegitimate child involved, parents are only obliged to support their illegitimate children and the illegitimate or legitimate children of the latter (Article 195[4]). In short, in the illegitimate direct line, great-grandparents are not obliged to support their great grandchildren. Thus, if Maria has an illegitimate child named Pedro, conceived and born at a time when she and Jose, her boyfriend who was the natural father of Pedro, were capacitated to marry, and Pedro has a legitimate child named Miguel who in turn has a legitimate child by the name of Juan, Maria is not obliged to support Juan because Maria's obligation under the law only extend up to her grandson, Miguel. If after the death of her illegitimate son (Pedro), Maria got validly married to Jose who was the natural father of Pedro, Pedro is thereby legitimated after his death. Hence, he should have enjoyed the rights of a legitimate child while he was still living. Pedro's legitimation after his death benefits his descendants. One of these descendants is Juan. Hence, Maria now is obliged to support Juan in the proper cases specified in the Family Code.

Article 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)

PRESCRIPTIVE PERIOD. Legitimation may be impugned only by those who are prejudiced in their rights, within five years from the date their cause of action accrues. During the deliberations of the Civil Code and Family Law committee on this particular point:

> Justice Caguioa inquired if the word "rights" includes creditors' rights, to which Justice Reyes replied in the negative. Justice Caguioa commented that "rights" may either be commercial or property rights, which is the reason why he is asking if it does not include creditors. Prof. Baviera stated that under the present law, creditors step in only when there is repudiation of inheritance. Dean Gupit opined that the provision refers to basically inheritance rights. Justice Caguioa pointed out that he wanted to exclude creditors. Justice Reyes said that it is up to the creditors to show that the legitimation affected their rights — if the creditors are really prejudiced. He, however, opined that the provision refers to successional rights (Minutes of the Joint Civil Code and Family Law committees held on August 24, 1985, page 6).

Hence, following the sense of the drafters of the Family Code that the term "rights" generally refers to successional rights, the persons who can be prejudiced in their rights by the process of conferring to someone all rights of a legitimate child are the legal heirs of the parents. This is so because, had the child not been legitimated, he or she would have been an illegitimate child and thus, according to law, would only receive half of whatever a legitimate child would get. In being legitimated, the child acquires all rights of a legitimate child and thus, all his successional rights would be the same as a legitimate child. Hence, if the legitimation is irregular, the rights of the compulsory heirs will necessarily be prejudiced. However, the cause of action to impugn the legitimation accrues only upon the death of the parents of the legitimated child because it is only at that time when the successional rights to the legitime will vest. Relevantly, even an adopted child can be a prejudiced heir not only of his or her adopter but also of his or her natural parents in case a child of the said parents is legitimated.

TITLE VII. — ADOPTION

REPUBLIC ACT NUMBERED 8552. The provisions on adoption contained from Articles 183 to 193 of the Family Code have been repealed and replaced by Republic Act Numbered 8552 approved by President Fidel V. Ramos on February 25, 1998. The said law is entitled "AN ACT ESTABLISHING THE RULES AND POLICIES ON THE DOMESTIC ADOPTION OF FILIPINO CHILDREN AND FOR OTHER PURPOSES."

ARTICLE I

GENERAL PROVISIONS

SECTION 1. ***Short Title.*** **— This Act shall be known as the "Domestic Adoption Act of 1998."**

SEC. 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 to Foster Placement and Adoption, Nationally

and Internationally; and the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country 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.

SEC. 3. *Definition of Terms.* — For purposes of this Act, the following terms shall be defined as:

(a) "Child" is a person below eighteen (18) years of age.

(b) "A child legally available for adoption" refers to a child who has been voluntarily or involuntarily committed to the Department or to a duly licensed and accredited child-placing or child-caring agency, freed of the parental authority of his/her biological parent(s) or guardian or adopter(s) in case of rescission of adoption.

(c) "Voluntarily committed child" is one whose parent(s) knowingly and willingly relinquishes parental authority to the Department.

(d) "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.

(e) "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.

(f) "Supervised trial custody" is a period of time within which a social worker oversees the adjustment and emotional readiness of both adopter(s) and adoptee in stabilizing their filial relationship.

(g) "Department" refers to the Department of Social Welfare and Development.

(h) "Child-placing agency" is a duly licensed and accredited agency by the Department to provide comprehensive child welfare services including, but not limited to, receiving applications for

adoption, evaluating the prospective adoptive parents and preparing the adoption home study.

(i) "Child-caring agency" is a duly licensed and accredited agency by the Department that provides twenty-four (24)-hour residential care services for abandoned, orphaned, neglected, or voluntarily committed children.

(j) "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.

STATUTORY CREATION. The right to create the relationship of parent and child between persons who are generally not related by nature exists only by virtue of a statute providing for adoption (2 Am. Jur. 2d, Adoption @1). Hence, adoption is purely a statutory creation. All statutory requirements for adoption must be met, and where a court issues an adoption decree despite the fact that all the said requirements are not met, such decree is a nullity (*In re O'Keefe*, 164 Misc 473 [1937]).

Thus, it has been held that a child by adoption cannot inherit from the parent by adoption unless the act of adoption has been done in strict accord with the statute. Until this is done, no rights are acquired by the child and neither the supposed adopting parents or adopted child could be bound thereby. The burden of proof in establishing adoption is upon the person claiming such relationship. He must prove compliance with the statutes relating to adoption in the jurisdiction where the adoption occurred (*Lazatin v. Campos*, 92 SCRA 263). The law must be strictly complied with in the sense that the mandatory requirements must all be present.

However, if the mandatory requirements are present but there are only irregularities, substantial compliance of the mandatory requirements is enough. Thus:

> x x x although, as against the interest of the child, the proceeding must be strictly in accordance with the statute, there is a tendency on the part of the courts, however, where the adoption has been fully consummated, to construe the statute with a reasonable degree of liberality, to the end that the assumed relationship and the intention of the parties be

> upheld, particularly as against strangers to the proceedings collaterally attacking them (2 Corpus Juris Secundum 375-376 as cited in *Santos v. Aranzanso*, 16 SCRA 344).

Likewise, in *Republic v. Court of Appeals* and *Zenaida Bobiles*, 205 SCRA 356, the Supreme Court had occasion to elucidate on this liberal attitude in favor of adoption, thus:

> The first error assigned by petitioner warrants a review of applicable local and foreign jurisprudence. For that purpose, we start with the premise that Article 185 of the Family Code is remedial in nature. Procedural statutes are ordinarily accorded a retrospective construction in the sense that they may be applied to pending actions and proceedings, as well as to future actions. However, they will not be so applied as to defeat procedural steps completed before their enactment.
>
> Procedural matters are governed by the law in force when they arise, and procedural statutes are generally retroactive in that they apply to pending proceedings and are not confined to those begun after their enactment although, with respect to such pending proceedings, they affect only procedural steps taken after their enactment.
>
> The rule that statutory change in matters of procedure will affect pending actions and proceedings, unless the language of the act excludes them from its operation, is not so extensive that it may be used to validate or invalidate proceedings taken before it goes into effect, since procedure must be governed by the law regulating it at the time the questioned procedure arises.
>
> The jurisdictional, as distinguished from the purely procedural, aspect of a case is substantive in nature and is subject to a more stringent rule. A petition cannot be dismissed by reason of failure to comply with a law which was not yet in force and effect at the time. As long as the petition for adoption was sufficient in form and substance in accordance with the law in governance at the time it was filed, the court acquires jurisdiction and retains it until it fully disposes of the case. To repeat, the jurisdiction of the court is determined by the statute in force at the time of the commencement of the action. Such jurisdiction of a court, whether in criminal or civil cases, once it attaches cannot be ousted by subsequent happenings or events, although of a character which would have prevented jurisdiction from attaching in the first instance.
>
> On the second issue, the petitioner argues that, even assuming that the Family Code should not apply retroactively,

the Court of Appeals should have modified the trial court's decision by granting the adoption in favor of private respondent Zenaida C. Bobiles only, her husband not being a petitioner. We do not consider this as a tenable position and, accordingly, reject the same.

Although Dioscoro Bobiles was not named as one of the petitioners in the petition for adoption filed by his wife, his affidavit of consent, attached to the petition as Annex "B" and expressly made an integral part thereof, shows that he himself actually joined his wife in adopting the child. The pertinent parts of his written consent read as follows:

> x x x
>
> 2. That my wife, ZENAIDA O. CORTEZA BOBILES *and I mutually desire to adopt as our child*, a boy named JASON CONDAT, still a minor being six (6) years old, likewise residing at 18-C, Imperial Street, Legaspi City, Albay, also in the Philippines;
>
> 3. That *we are filing* the corresponding Petition for Adoption of said minor child, JASON CONDAT, before the Juvenile and Domestic Relations Court, now the Regional Trial Court in Legaspi City, Albay in the Philippines;
>
> 4. That I, Dioscoro C. Bobiles as the husband and father, am giving my lawful consent to this adoption of said minor, JASON CONDAT;
>
> 5. That further, my wife ZENAIDA O. CORTEZA BOBILES, and I have continuously reared and cared for this minor child, JASON CONDAT since birth;
>
> 6. That as a result thereof, my wife and I have developed a kind of maternal and paternal love for the boy as our very own, exercising therein the care, concern and diligence of a good father toward him;
>
> 7. That I am executing this document, an AFFIDAVIT OF CONSENT for whatever it is worth in the premises as to the matter of adoption of this minor, JASON CONDAT, by my wife ZENAIDA O. CORTEZA BOBILES *and by me, DIOSCORO C. BOBILES,* in any court of justice; (Emphasis supplied.)
>
> x x x

The foregoing declarations, and his subsequent confirmatory testimony in open court, are sufficient to make him a co-petitioner. Under the circumstances then obtaining, and by reason of his foreign residence, he must have yielded to the legal advice that an affidavit of consent on his part sufficed to make him a party to the petition. This is evident from the text of his affidavit. Punctiliousness in language and pedantry in the formal requirements should yield to and be eschewed in the higher considerations of substantial justice. The future of an innocent child must not be compromised by arbitrary insistence of rigid adherence to procedural rules on the form of pleadings.

We see no reason why the following American law should not apply to this case and, for that matter, in our jurisdiction. It is a settled rule therein that adoption statutes, as well as matters of procedure leading up to adoption, should be liberally construed to carry out the beneficient purposes of the adoption institution and to protect the adopted child in the rights and privileges coming to it as a result of the adoption. The modern tendency of the courts is to hold that there need not be more than a substantial compliance with statutory requirements to sustain the validity of the proceeding; to refuse would be to indulge in such a narrow and technical construction of the statute as to defeat its intention and beneficial results or to invalidate proceedings where every material requirement of statute was complied with.

In support of this rule, it is said that it is not the duty of the courts to bring the judicial microscope to bear upon the case in order that every slight defect may be enlarged and magnified so that a reason may be found for declaring invalid an act consummated years before, but rather to approach the case with the inclination to uphold such acts if it is found that there was a substantial compliance with the statute. The technical rules of pleading should not be stringently applied to adoption proceedings, and it is deemed more important that the petition should give facts relating to the child and its parents, which may give information to those interested, than that it should be formally correct as a pleading. Accordingly, it is generally held that a petition will confer jurisdiction if it substantially complies with the adoption statute, alleging all facts necessary to give the court jurisdiction.

In determining whether or not to set aside the decree of adoption, the interest and welfare of the child are of primary and paramount consideration. The welfare of the child is of paramount consideration in proceedings involving its custody and the propriety of its adoption by another, and the courts to which the application for adoption is made is charged with

the duty of protecting the child and its interests and, to bring those interest fully before it, it has authority to make rules to accomplish that end. Ordinarily, the approval of the adoption rests in the sound discretion of the court. This discretion should be exercised in accordance with the best interests of the child, as long as the natural rights of the parents over the child are not disregarded. In the absence of a grave abuse, the exercise of this discretion by the approving official will not be disturbed.

In the case at bar, the rights concomitant to and conferred by the decree of adoption will be for the best interests of the child. His adoption is with the consent of the natural parents. The representative of the Department of Social Welfare and Development unqualifiedly recommended the approval of the petition for adoption and the trial court dispensed with the trial custody for several commendatory reasons, especially since the child had been living with the adopting parents since infancy. Further, the said petition was with the sworn written consent of the children of the adopters.

The trial court and respondent court acted correctly in granting the petition for adoption and we find no reason to disturb the same. As found and aptly stated by respondent court: "Given the facts and circumstances of the case and considered in the light of the foregoing doctrine, We are of the opinion and so hold that the decree of adoption issued by the court *a quo* would go a long way towards promoting the welfare of the child and the enhancement of his opportunities for a useful and happy life."

PHILOSOPHY BEHIND ADOPTION. Adoption used to be for the benefit of the adopter. It was intended to afford persons who have no child of their own, the consolation of having one, by creating by legal fiction, the relation of paternity and filiation where none exists by blood relationship. It was merely looked upon as solely an act of generosity on the part of the adopter (*Hofilena v. Republic*, 34 SCRA 545). The present tendency, however, is geared more toward the promotion of the welfare of the child and the enhancement of his or her opportunities for a useful and happy life (*Daoang v. Municipal Judge of San Nicolas, Ilocos Norte*, 159 SCRA 366, citing *In re Adoption of Resaba*, 95 Phil. 244; *Santos v. Aranzanso*, 123 Phil. 160).

Adoption statutes, being humane and salutary, hold the interest and welfare of the child to be of paramount consideration and are designed to provide homes, parental care and education for unfortunate, needy or orphaned children and give them the protection

of society and family in the person of the adopter as well as to allow childless couples or persons to experience the joys of parenthood and legally give them a child in the person of the adopted for the manifestation of their natural parental instincts. Every reasonable intendment should be sustained to promote and fulfill these noble and compassionate objectives of the law (*Malkinson v. Agrava*, 54 SCRA 66).

ARTICLE II

PRE-ADOPTION SERVICES

SEC. 4. *Counseling Services.* — The Department shall provide the services of licensed social workers to the following:

(a) Biological Parent(s) — Counseling shall be provided to the parent(s) before and after the birth of his/her child. No binding commitment to an adoption plan shall be permitted before the birth of his/her child. A period of six (6) months shall be allowed for the biological parent(s) to reconsider any decision to relinquish his/her child for adoption before the decision becomes irrevocable. Counseling and rehabilitation services shall also be offered to the biological parent(s) after he/she has relinquished his/her child for adoption.

Steps shall be taken by the Department to ensure that no hurried decisions are made and all alternatives for the child's future and the implications of each alternative have been provided.

(b) Prospective Adoptive Parent(s) — Counseling sessions, adoption fora and seminars, among others, shall be provided to prospective adoptive parent(s) to resolve possible adoption issues and to prepare him/her for effective parenting.

(c) Prospective Adoptee — Counseling sessions shall be provided to ensure that he/she understands the nature and effects of adoption and is able to express his/her views on adoption in accordance with his/her age and level of maturity.

COUNSELLING SESSIONS. The law provides that counseling sessions be undertaken for the principal parties to the adoption, namely, the natural parents, adopter and the adoptee. This is to ensure that the parties are well prepared psychologically, emotionally and legally to enter a new phase in their lives with very significant impact not only on themselves but on the society as a whole.

SEC. 5. *Location of Unknown Parent(s).* — It shall be the duty of the Department or the child-placing or child-caring agency which has custody of the child to exert all efforts to locate his/her unknown biological parent(s). If such efforts fail, the child shall be registered as a foundling and subsequently be the subject of legal proceedings where he/she shall be declared abandoned.

SEARCH FOR BIOLOGICAL PARENTS. The natural and biological parents are always given the preference in the custody of their own children. Hence, before adoption can proceed, the law requires that the child's parents, if unknown, must be located and that all reasonable means exhausted to look for them. For example, announcement on radio and television, publication in a newspaper with the photo of the child included, and notices in the locality or residence of the child informing the public of the intended adoption can be made. If such efforts fail, the child shall be registered as a foundling and subsequently be the subject of legal proceedings where he/she shall be declared abandoned.

SEC. 6. *Support Services.* — The Department shall develop a pre-adoption program which shall include, among others, the above-mentioned services.

ADMINISTRATIVE PHASE. The whole adoption process involves two phases. The first phase is the administrative phase which is done by the Department of Social Welfare and Development (DSWD). The Second phase is the judicial phase which is done by the proper family court which will finally issue the decree.

The administrative phase ends when the Department of Social Welfare and Development (DSWD) issues a Certification that a child is legally available for adoption. This process is governed by Republic Act No. 9523 thus:

Republic Act No. 9523

AN ACT REQUIRING CERTIFICATION OF THE DEPARTMENT OF SOCIAL WELFARE AND DEVELOPMENT (DSWD) TO DECLARE A "CHILD LEGALLY AVAILABLE FOR ADOPTION" AS A PREREQUISITE FOR ADOPTION PROCEEDINGS, AMENDING FOR THIS PURPOSE CERTAIN PROVISIONS OF REPUBLIC ACT NO. 8552, OTHERWISE KNOWN AS THE DOMESTIC ADOPTION ACT OF 1998, REPUBLIC ACT NO. 8043, OTHERWISE KNOWN AS THE INTER-COUNTRY ADOPTION ACT OF 1995, PRESIDENTIAL DECREE NO. 603, OTHERWISE KNOWN AS THE CHILD AND YOUTH WELFARE CODE, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. ***Declaration of Policy.*** **—** It is hereby declared the policy of the State that alternative protection and assistance shall be afforded to every child who is abandoned, surrendered, or neglected. In this regard, the State shall extend such assistance in the most expeditious manner in the interest of full emotional and social development of the abandoned, surrendered, or neglected child.

It is hereby recognized that administrative processes under the jurisdiction of the Department of Social Welfare and Development for the declaration of a child legally available for adoption of abandoned, surrendered, or neglected children are the most expeditious proceedings for the best interest and welfare of the child.

Sec. 2. ***Definition of Terms.*** **—** As used in this Act, the following terms shall mean:

(1) Department of Social Welfare and Development (DSWD) is the agency charged to implement the provisions of this Act and shall have the sole authority to issue the certification declaring a child legally available for adoption.

(2) Child refers to a person below eighteen (18) years of age or a person over eighteen (18) years of age but is unable to fully take care of him/herself or protect himself/herself from abuse, neglect, cruelty, exploitation, or discrimination because of physical or mental disability or condition.

(3) Abandoned Child refers to a child who has no proper parental care or guardianship, or whose parent(s) have deserted

him/her for a period of at least three (3) continuous months, which includes a foundling.

(4) Neglected Child refers to a child whose basic needs have been deliberately unattended or inadequately attended within a period of three (3) continuous months. Neglect may occur in two (2) ways:

(a) There is physical neglect when the child is malnourished, ill-clad, and without proper shelter. A child is unattended when left by himself/herself without proper provisions and/or without proper supervision.

(b) There is emotional neglect when the child is maltreated, raped, seduced, exploited, overworked, or made to work under conditions not conducive to good health; or is made to beg in the streets or public places; or when children are in moral danger, or exposed to gambling, prostitution, and other vices.

(5) Child Legally Available for Adoption refers to a child in whose favor a certification was issued by the DSWD that he/she is legally available for adoption after the fact of abandonment or neglect has been proven through the submission of pertinent documents, or one who was voluntarily committed by his/her parent(s) or legal guardian.

(6) Voluntarily Committed Child is one whose parent(s) or legal guardian knowingly and willingly relinquished parental authority to the DSWD or any duly accredited child-placement or child-caring agency or institution.

(7) Child-caring agency or institution refers to a private non-profit or government agency duly accredited by the DSWD that provides twenty-four (24) hour residential care services for abandoned, neglected, or voluntarily committed children.

(8) Child-placing agency or institution refers to a private non-profit institution or government agency duly accredited by the DWSD that receives and processes applicants to become foster or adoptive parents and facilitate placement of children eligible for foster care or adoption.

(9) Petitioner refers to the head or executive director of a licensed or accredited child-caring or child-placing agency or institution managed by the government, local government unit, non-governmental organization, or provincial, city, or municipal Social Welfare Development Officer who has actual custody of the minor and who files a certification to declare such child legally available for adoption, or, if the child is under the

custody of any other individual, the agency or institution does so with the consent of the child's custodian.

(10) Secretary refers to the Secretary of the DSWD or his duly authorized representative.

(11) Conspicuous Place shall refer to a place frequented by the public, where by notice of the petition shall be posted for information of any interested person.

(12) Social Case Study Report (SCSR) shall refer to a written report of the result of an assessment conducted by a licensed social worker as to the social-cultural economic condition, psychosocial background, current functioning and facts of abandonment or neglect of the child. The report shall also state the efforts of social worker to locate the child's biological parents/relatives.

Sec. 3. ***Petition.*** – The petition shall be in the form of an affidavit, subscribed and sworn to before any person authorized by law to administer oaths. It shall contain facts necessary to establish the merits of the petition and shall state the circumstances surrounding the abandonment or neglect of the child.

The petition shall be supported by the following documents:

(1) Social Case Study Report made by the DSWD, local government unit, licensed or accredited child-caring or child-placing agency or institution charged with the custody of the child;

(2) Proof that efforts were made to locate the parent(s) or any known relatives of the child. The following shall be considered sufficient:

(a) Written certification from a local or national radio or television station that the case was aired on three (3) different occasions;

(b) Publication in one (1) newspaper of general circulation;

(c) Police report or barangay certification from the locality where the child was found or a certified copy of a tracing report issued by the Philippine National Red Cross (PNRC), National Headquarters (NHQ), Social Service Division, which states that despite due diligence, the child's parents could not be found; and

(d) Returned registered mail to the last known address of the parent(s) or known relatives, if any.

(3) Birth certificate, if available; and

(4) Recent photograph of the child and photograph of the child upon abandonment or admission to the agency or institution.

Sec. 4. ***Procedure for the Filing of the Petition.*** – The petition shall be filed in the regional office of the DSWD where the child was found or abandoned.

The Regional Director shall examine the petition and its supporting documents, if sufficient in form and substance and shall authorize the posting of the notice of the petition conspicuous place for five (5) consecutive days in the locality where the child was found.

The Regional Director shall act on the same and shall render a recommendation not later than five (5) working days after the completion of its posting. He/she shall transmit a copy of his/her recommendation and records to the Office of the Secretary within forty-eight (48) hours from the date of the recommendation.

Sec. 5. ***Declaration of Availability for Adoption.*** – Upon finding merit in the petition, the Secretary shall issue a certification declaring the child legally available for adoption within seven (7) working days from receipt of the recommendation.

Said certification, by itself shall be the sole basis for the immediate issuance by the local civil registrar of a foundling certificate. Within seven (7) working days, the local civil registrar shall transmit the founding certificate to the National Statistic Office (NSO).

Sec. 6. ***Appeal.*** – The decision of the Secretary shall be appealable to the Court of Appeals within five (5) days from receipt of the decision by the petitioner, otherwise the same shall be final and executory.

Sec. 7. ***Declaration of Availability for Adoption of Involuntarily Committed Child and Voluntarily Committed Child.*** – The certificate declaring a child legally available for adoption in case of an involuntarily committed child under Article 141, paragraph 4(a) and Article 142 of Presidential Decree No. 603 shall be issued by the DSWD within three (3) months following such involuntary commitment.

In case of voluntary commitment as contemplated in Article 154 of Presidential Decree No. 603, the certification declaring the child legally available for adoption shall be issued

by the Secretary within three (3) months following the filing of the Deed of Voluntary Commitment, as signed by the parent(s) with the DSWD.

Upon petition filed with the DSWD, the parent(s) or legal guardian who voluntarily committed a child may recover legal custody and parental authority over him/her from the agency or institution to which such child was voluntarily committed when it is shown to the satisfaction of the DSWD that the parent(s) or legal guardian is in a position to adequately provide for the needs of the child: *Provided*, That, the petition for restoration is filed within (3) months after the signing of the Deed of Voluntary Commitment.

Sec. 8. ***Certification.*** — The certification that a child is legally available for adoption shall be issued by the DSWD in lieu of a judicial order, thus making the entire process administrative in nature.

The certification, shall be, for all intents and purposes, the primary evidence that the child is legally available in a domestic adoption proceeding, as provided in Republic Act No. 8552 and in an inter-country adoption proceeding, as provided in Republic Act No. 8043.

Sec. 9. ***Implementing Rules and Regulations.*** — The DSWD, together with the Council for Welfare of Children, Inter-Country Adoption Board, two (2) representatives from licensed or accredited child-placing and child-caring agencies or institution, National Statistics Office and Office of the Civil Registrar, is hereby tasked to draft the implementing rules and regulations of this Act within sixty (60) days following its complete publication.

Upon effectivity of this Act and pending the completion of the drafting of the implementing rules and regulations, petitions for the issuance of a certification declaring a child legally available for adoption may be filled with the regional office of the DSWD where the child was found or abandoned.

Sec. 10. ***Penalty.*** — The penalty of One hundred thousand pesos (P100,000.00) to Two hundred thousand pesos (P200,000.00) shall be imposed on any person, institution, or agency who shall place a child for adoption without the certification that the child is legally available for adoption issued by the DSWD. Any agency or institution found violating any provision of this Act shall have its license to operate revoked without prejudice to the criminal prosecution of its officers and employees.

Violation of any provision of this Act shall subject the government official or employee concerned to appropriate administrative, civil and/or criminal sanctions, including suspension and/or dismissal from the government service and forfeiture of benefits.

Sec. 11. ***Repealing Clause.*** — Secs. 2(c)(iii), 3(b), (e) and 8(a) of Republic Act No. 8552, Sec. 3(f) of Republic Act No. 8043, Chapter 1 of Title VII, and VIII of Presidential Decree No. 603 and any law, presidential decree, executive order, letter of instruction, administrative order, rule, or regulation contrary to or inconsistent with the provisions of this Act are hereby repealed, modified or amended accordingly.

Sec. 12. ***Separability Clause.*** — If any provision of this Act is held invalid or unconstitutional, the other provisions not affected thereby shall remain valid and subsisting.

Sec. 13. ***Effectivity.*** — This Act shall take effect fifteen (15) days following its complete publication in two (2) newspapers of general circulation or in the *Official Gazette*.

ARTICLE III

ELIGIBILITY

SEC. 7. ***Who May Adopt.*** **— The following may adopt:**

(a) Any Filipino citizen of legal age, in possession of full civil capacity and legal rights, of good moral character, has not been convicted of any crime involving moral turpitude, emotionally and psychologically capable of caring for children, at least sixteen (16) years older than the adoptee, and who is in a position to support and care for his/her children in keeping with the means of the family. The requirement of sixteen (16)-year difference between the age of the adopter and the adoptee may be waived when the adopter is the biological parent of the adoptee, or is the spouse of the adoptee's parent;

(b) Any alien possessing the same qualifications as above stated for Filipino nationals: ***Provided,*** **That his/her country has diplomatic relations with the Republic of the Philippines, that 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, that he/she has been certified by his/her diplomatic or consular office or any appropriate government agency that he/she has the legal capacity to adopt in his/her country, and that his/her government allows the adoptee to enter his/her country as his/her adopted son/daughter: *Provided, further,* That the requirements on residency and 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; or

(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; or

(c) The guardian with respect to the ward after the termination of the guardianship and clearance of his/her financial accountabilities.

Husband and wife shall jointly adopt, except in the following cases:

(i) if one spouse seeks to adopt the legitimate son/daughter of the other; or

(ii) if one spouse seeks to adopt his/her own illegitimate son/daughter: *Provided, however,* That the other spouse has signified his/her consent thereto; or

(iii) if the spouses are legally separated from each other.

In case husband and wife jointly adopt, or one spouse adopts an illegitimate son/daughter of the other, joint parental authority shall be exercised by the spouses.

QUALIFICATIONS. Section 7, Article III specifies the general qualifications of those persons who may adopt. Hence, for as long as the statutory qualifications, exclusions and requirements for adoption are met, relatives by blood or affinity are not excluded from adopting one another (*Santos v. Republic*, 21 SCRA 379). An individual who has already adopted a child or who has legitimate or illegitimate children may still adopt (*Hofilena v. Republic*, 34 SCRA 545). An elder sister can adopt a younger brother (*Tavera v. Cacdac*, 167 SCRA 636) and a stepfather may adopt his step-child (*Malkinson v. Agrava*, 54 SCRA 66). It must be importantly emphasized, however, that as a policy of the state, all measures to maintain the natural parents' authority and custody of their children must be encouraged and implemented. Only when such efforts prove to be insufficient and no appropriate placement or adoption within the child's extended family is available shall adoption by an unrelated person be considered (Section 2, Article I).

CAPACITY FOR ADOPTIVE PARENTHOOD. The law provides for the minimum qualifications for an adopter. It provides, among others that, the adopter must be emotionally and psychologically capable of caring for children. He or she must likewise be financially capable of supporting the child to be adopted. The law provides that he or she must be in a position to support and care for his/her children in keeping with the means of the family. This requirement is important because adoption should not be granted if the prospective parents' own children will be detrimentally affected by the entry of the would-be adopted child in the family.

In evaluating prospective parents, there are other factors to be considered such as, but not limited to, the following: 1) Total personality of the applicants; 2) Emotional maturity; 3) Quality of marital relationship; 4) Feeling about children; 5) Feeling about childlessness and readiness to adopt; and 6) Motivation. These factors have been formulated and used by the Child Welfare League of America, Inc. and which can likewise be utilized in this country.

While adoption aims to approximate natural filiation as much as possible, it is still the best interest of the child or the one to be adopted which is the principal consideration. Public policy, therefore, favors adoption by a family of the same race, religion, and intellectual ability as the child. However, in the case of *In Re Adoption of a Minor,* 54 ALR 2d 905, the court allowed a black man to adopt his wife's illegitimate white child. The court stated that a difference in race or religion may have relevance in adoption proceedings, but

such difference alone cannot be decisive in determining what is best for the welfare of the child and does not permit the court to ignore other relevant considerations. In *Ellis v. McCoy,* 124 N.E. 2d 266 (1955), a Roman Catholic mother was allowed to withdraw consent upon learning that the adoptive parents were Jewish while *In re Adoption of Maxwell,* 176 N.Y.S. 2d 281, the adoption was approved when the adoptive parents agreed to raise the child in the Roman Catholic faith.

CONVICTION NECESSARY. The requirement that an adopter should not have been convicted of any crime involving moral turpitude was lifted and taken from the repealed provisions of the Family Code. During the discussions of the Committees on the Revision of the Civil Code which drafted the original provisions of the Family Code, the question of whether there is really a need for conviction or if commission of a crime would suffice for disqualification was raised. The case of a mother desisting from filing a complaint for the rape of her child because she was paid by the offender was cited by those who considered conviction is unnecessary in certain cases. However, it was opined that since the presumption of innocence should be maintained, conviction is necessary. It was clarified that pardon would not erase the disqualification since the provision refers to the fact of conviction and not to the penalty imposed. The term "moral turpitude" is in connection with one's ability to rear a child so it will not be affected by a pardon.

AGE DIFFERENCE. The present provision, as a general rule, requires an age difference of at least 16 years between the adopter and the adopted. This is a modification of the 15-year difference set under the Child and Youth Welfare Code and an adherence to the age gap provided for in the repealed section on adoption of the Family Code. It was previously set at 15 years for the reason that it was the median age of the old marriageable ages of 14 for females and 16 for males. Fifteen was deemed to be proper to approximate, as much as possible, natural filiation. With this purpose in mind, and since the marriageable age has been raised to 18 years, the Civil Code Committee which drafted the Family Code originally proposed to raise the age difference to 18 years. However, it was pointed out that raising the age difference requirement would result in the disqualification of a lot of prospective adopters. An 18-year difference was argued to be too wide. The trade-off was between trying to approximate natural filiation against that of disqualifying a lot of prospective adopters which was pointed out to be inconsistent

with the principle that adoption be for the benefit of the child. The present age difference of 16 years is a compromise solution to the problem.

ADVANCED AGE OF PROSPECTIVE PARENTS. The age of the prospective parents is an important but not the sole or controlling consideration in determining what is best for the child. Other factors as the health of the petitioners and the kind of home they could provide are often more important (56 ALR 2d 823).

In Re Brown's Adoption, 56 ALR 2d 820, the advanced age of the prospective parents was held to be not enough in itself to disqualify them from adopting, especially as they were in good health and the alternative to granting their petition seems to be placement of the child with a public agency.

ALIENS. Aliens, whether resident or non-resident, can generally adopt for as long as they have all the qualifications possessed by a Filipino national to adopt. This is a departure from the general rule under the repealed provisions on adoption in the Family Code which prohibited aliens to adopt. However, there are added conditions required of aliens, *to wit:*

> a) His/her country has diplomatic relations with the Republic of the Philippines. If the Philippines has previously broken relations with a country but resumes diplomatic relations, this will satisfy the requirement. The requirement of the existence of diplomatic relations is very important so that the Philippines can monitor the progress of a Filipino adoptee in a foreign land in the event the alien adopter brings the Filipino adoptee in his or her own country. This is also for the benefit of the Filipino-adoptee. In case he or she is maltreated, he or she can always go to the Philippine embassy to seek assistance.
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> b) 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. An adoption decree is entered only if such decree has become final and executory.
>
> c) He/she has been certified by his/her diplomatic or consular office or any appropriate government agency that he/she has the legal capacity to adopt in his/her country, and that his/her government allows the adoptee to enter his/her country as his/her adopted son/daughter. The Philippines follows the nationality rule as to family rights and duties, or to status, conditions and legal capacity of persons.

The requirements on residency and certification of the alien's qualification to adopt in his/her country may be waived in case the alien intending to adopt is either of the following:

> (i) a former Filipino citizen who seeks to adopt a relative within the fourth (4th) degree of consanguinity or affinity; or
>
> (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.

It must be observed that the waiver is not automatic but clearly discretionary. Hence, depending on the appreciation of the court or the proper administrative body, the waiver of the requirement of residency and certification may or may not be allowed. The determining point in resolving this issue is the paramount interest of the child. Moreover, considering that they are exceptions, they must be strictly construed. For example, a United States citizen, who has been formerly a Filipina and is presently married to an American, arrives in the Philippines. Within a year, the American husband and his former Filipina spouse file a case to jointly adopt the younger Filipino brother of his spouse. They cannot be granted a waiver of the residency and certification requirements because they do not fall under the exceptions. In the first place, the husband is not a former Filipino citizen but a natural-born citizen of the United States of America. In the second place, the child to be adopted is not the legitimate child of his spouse. In the third place, when the spouses jointly filed the petition to adopt the wife's Filipino brother (who is a relative of the wife within the fourth civil degree of consanguinity), the said wife was no longer a Filipino citizen (See *Republic of the Philippines v. Honorable Rodolfo Toledano, et al.*, G.R. No. 94147, June 8, 1994, 52 SCAD 124). However, if the said spouses really want to adopt, they can avail of the Inter-Country Adoption Law if applicable to their case.

If a Filipino adopts an alien, the adopted alien does not acquire Philippine citizenship because such acquisition of citizenship acquires the character of naturalization which is regulated, not by the Civil Code or the Family Code, but by special laws (*Ching Leng v. Galang*, L-11931, October 27, 1958).

GUARDIANSHIP RELATION. A guardianship is a trust relation of the most sacred character, in which one person called

a "guardian" acts for another, called the "ward," whom the law regards as incapable of managing his or her own affairs (*Snyder v. United States* [DC NC], 134 F Supp 319). By virtue of his or her guardianship, the guardian becomes the authorized agent of the minor to take care of and manage his or her property. But the guardian's power is limited to that of management of the ward's properties. He or she possesses no power to dispose of any part of such property without the court's approval. The purpose of statutes relating to guardianship is to safeguard the rights and interests of minors (*Grayson v. Linton,* 63 Idaho 645). The requirement of a final accounting prior to the termination of the guardianship relation is intended for the protection of the rights of wards and the regulation of the conduct of guardians to make sure that the properties of the former have not been improperly managed by the latter. Section 7(c) of Article III makes the termination of the guardianship and clearance of his or her financial accountabilities as a pre-requisite to the adoption by the guardian of his or her ward, to prevent unscrupulous guardians from escaping liability for their impropriety.

JOINT ADOPTION OF HUSBAND AND WIFE. Under the law, joint adoption of husband and wife, as provided in the repealed portions on adoption in the Family Code, has been maintained. This is a mandatory provision (*In Re: Petition for Adoption of Michelle P. Lim,* G.R. Nos. 168992-93, May 21, 2009). Joint adoption is mandated by the law for the maintenance of harmony within the family. If, as a general rule, husband and wife are allowed to adopt separately, family trouble in the form of resentment toward each other as well as the adopted child may arise.

> The historical evolution of this provision is clear. Presidential Decree 603 (The Child and Youth Welfare Code) provides that husband and wife "may" jointly adopt. Executive Order No. 91 issued on December 17, 1986 amended said provision of P.D. No. 603. It demands that both husband and wife "shall" jointly adopt if one of them is an alien. It was so crafted to protect Filipino children who are put up for adoption. The Family Code reiterated the rule by requiring that husband and wife "must" jointly adopt except in the cases mentioned before. Under the said new law, joint adoption by husband and wife is mandatory. This is in consonance with the concept of joint parental authority over the child, which is the ideal situation. As the child to be adopted is elevated to the level of a legitimate child, it is but natural to require the spouses to adopt jointly. The rule also insures harmony between the spouses (*Republic v. Toledano, et al.*, G.R. No. 94147, June 8, 1994, 52 SCAD 124).

> Also, during the deliberations on the Family Code by the Civil Code and Family Law Committees,
>
> Justice Caguioa suggested that they make it mandatory that husband and wife jointly adopt since if they allow one to adopt only with the written consent of the other, it would go against the concept of joint parental authority (Minutes of the 180th Joint Meeting of the Civil Code and Family Law committees held on April 9, 1987, page 18).

In case of conflict between husband and wife, Article 211 of the Code provides that the father's decision shall prevail unless there is a judicial order to the contrary. The fact that the husband's decision shall prevail in case of disagreement is an intermediate *modus vivendi* before winding up in court (Minutes of the 185th Meeting of the Civil Code and Family Law committees, June 27, 1987, page 5).

SEC. 8. *Who May Be Adopted.* — The following may be adopted:

(a) Any person below eighteen (18) years of age who has been administratively or judicially declared available for adoption;

(b) The legitimate son/daughter of one spouse by the other spouse;

(c) An illegitimate son/daughter by a qualified adopter to improve his/her status to that of legitimacy;

(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;

(e) A child whose adoption has been previously rescinded; or

(f) A child whose biological or adoptive parent(s) has died: *Provided,* That no proceedings shall be initiated within six (6) months from the time of death of said parent(s).

WHO MAY BE ADOPTED. As a general rule, only minors may be adopted. Persons of legal age may be presumed to be able to support themselves unlike minors who need maximum care and

guidance. However, exceptions are provided, namely: when the child to be adopted is the illegitimate child of the adopter, when the child to be adopted is the legitimate child of his or her spouse, and when the child has been consistently treated as a child of the adopter during minority or what the joint Committees on Civil Code and Family Law referred to as *de facto* adoption. *De facto* adoption is made an exception to the minority rule on the assumption that the formal adoption was omitted while the person was still a minor and the reason for the omission could be inaction or postponement. This means that while the child could have been adopted during minority, the adopter failed to do so. If the child could have been adopted during minority, said child could be adopted after reaching legal age. *De facto* adoption must, however, be converted to legal adoption with court approval for all the privileges, rights and duties of the adopter and the adoptee to legally attach.

SEC. 9. *Whose Consent is Necessary to the Adoption.* — After being properly counseled and informed of his/her right to give or withhold his/her approval of the adoption, the written consent of the following to the adoption is hereby required:

(a) The adoptee, if ten (10) years of age or over;

(b) 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;

(c) The legitimate and adopted sons/daughters, ten (10) years of age or over, of the adopter(s) and adoptee, if any;

(d) 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; and

(e) The spouse, if any, of the person adopting or to be adopted.

WRITTEN CONSENT. The State has the duty to foster and nurture a wholesome family unit that constitutes the nucleus of society. Considering that an adoption decree, with certain exceptions, introduces a "stranger" into an existing family unit, the mandatory

written consent required by law is the State's way of assuring itself that all the members of the family have been consulted and are amenable to the introduction of a new member in the home. Of paramount importance among the considerations of the State is the maintenance of harmony within the family and the avoidance of any conflict which may arise as a result of the adoption. By requiring consent, the adopter psychologically and emotionally prepares the members of the family to the idea of adoption instead of forcefully imposing upon them the adoptee, without prior consultation.

In *Tan Suarez v. Republic*, 15 SCRA 543, it was held that the statement subscribed and sworn to before a notary public by the natural parents of the child sought to be adopted, wherein they expressed their conformity to the adoption of their minor child by the petitioner, was correctly admitted as evidence in an adoption proceeding, although no testimonial evidence identifying the signatures on the said statement had been introduced by the petitioner, because such statement was duly authenticated and the other evidence on record strongly indicates that it is what it purports to be. Moreover Section 9, just like the repealed provision of the Family Code and the Civil Code, does not require the court testimony of the person whose consent is needed before the court. What is only needed under court procedures is that the written consent be attached to the petition (See *Cathey v. Republic*, 18 SCRA 86). The adopter himself or herself can just testify that he obtained the consent of those persons whose consent are required and that such written consent has been attached to the petition.

However, in *Santos v. Aranzanso,* 16 SCRA 344, it was held that consent by the parents to the adoption is not an absolute requisite. If the natural parents have abandoned their children, consent by the guardian *ad litem* and the proper government agency suffices. Also, for there to be an abandonment, there must be a total cessation of all parental duties. Hence if the alleged abandoning mother still communicates with the children and gives them support when she can, there is no abandonment. Mere permitting the child to remain for a time undisturbed in the care of others is not such an abandonment. The abandonment must have existed also at the time of the adoption (See also *Landingin v. Republic,* G.R. No. 164948, June 27, 2006, 493 SCRA 415). If the child is illegitimate, the consent can be given by the mother alone because, generally, parental authority is vested on the mother and also because, since paternity is disputable, an alleged "father" might turn out to be not the father and, therefore, without any right at all to give the required

consent. However, if the alleged father has already acknowledged and admitted that the child is his and there is no reason to doubt the same, his consent must likewise be obtained especially if the father cohabits with the mother without benefit of marriage or under a void marriage.

CAN THE NATURAL PARENTS BE ALLOWED TO WITHDRAW THEIR CONSENT TO THE ADOPTION OF THEIR NATURAL CHILD PRIOR TO AN ADOPTION DECREE? No binding commitment by the biological parents to an adoption plan shall be permitted before the birth of the child. A period of six (6) months from the time the biological parents made their decision shall be allowed for the biological parent(s) to reconsider any decision to relinquish his/her/their child for adoption before the decision becomes irrevocable (Section 4[a], Article II). It appears that, under the law, there is statutory estoppel created after six months on the part of the biological parents. The irrevocable nature of the consent as provided by law appears to be harsh. It does not expressly admit of exceptions such as when the prospective adopters suddenly decide not to adopt anymore and, at the same time, the biological parents decide to assume or reassume parental responsibilities, perhaps previously neglected, and therefore decide to withdraw their consent. It would have been better had the law merely created a presumption of the biological parents' incapacity to be parents after the six-month period, thereby shifting to them the burden of proving that the withdrawal of their consent is for the best interest of the child. In case where the adopters decide not to adopt, the courts or the administrative agencies concerned must be given the leeway to again ask the biological parents whether or not they still maintain their decision to relinquish the child to be adopted. In all matters concerning the custody of the child, it must always be a rule that the rights of the would-be custodians, whether the biological parents or the prospective adopters, are merely secondary to the paramount or best interest of the child.

The irrevocability rule therefore should not be construed as to give a limitation to the "child's best interest" rule. This latter rule must be considered as an implicit but real exception to the irrevocability of the decision after the six-month period. For indeed, if, in the event of the adoption decree's revocation, the biological parents' parental authority may be restored (Section 20, Article VI), with more reason should the restoration of parental authority in favor of the biological parents be allowed even after the lapse of the six-month period after the initial decision to relinquish parental

authority if there are indeed compelling, concrete and convincing evidences to show that the restoration will be for the paramount interest of the child.

Cases in various states in the United States can be elucidating. In *Small v. Andrews*, 530 P2d 540, the Court of Appeals of Oregon had occasion to discuss this point, *to wit:*

> Until the Supreme Court's decision in *Williams v. Capparelli,* 180 Or. 41, 175 P.2d 153 (1946), it appears that a natural parent in Oregon was absolutely entitled to withdraw his or her consent to an adoption at any time prior to the entry of a decree.
>
> In Williams, the court said:
>
> ". . . [A] natural parent who has consented to the adoption of a child in compliance with a statute which makes such consent a prerequisite to adoption may effectively withdraw or revoke his consent at any time before the court has made a decree of adoption" (180 Or. at 45, 175 P.2d at 154).
>
> Included in its decision was the additional observation that recent "interesting and persuasive" decisions then "contrary to what we conceive to be the weight of authority . . ." had applied the doctrine of equitable estoppel in denying the right of a parent to withdraw consent. Specific note was made of those matters taken into consideration by courts invoking the doctrine:
>
> ". . . [T]he circumstances under which the consent was given; the length of time elapsing, and the conduct of the parties, between the giving of consent and the attempted withdrawal of consent was made before or after the institution of adoption proceedings; the nature of the natural parent's conduct with respect to the child both before and after consenting to its adoption; and the 'vested rights' of the proposed adoptive parents with respect to the child. In some cases, courts have considered the relative abilities of the adoptive parents and of the natural parents to rear the child in the manner best suited to its normal developments, and other circumstances indicative of what the best interests of the child require . . . Nevertheless, it would seem that courts should not interfere with the natural relationship of parent and child upon the sole ground that the proposed adoptive parents are able to give the child superior advantages over those within the means or social status of the natural parents . . ." (180 Or. at 45-46, 175 P.2d at 155).
>
> Citing Williams as standing rule that "in the absence of an estoppel the natural parent may withdraw his consent to

adoption at any time before the entry of the decree . . .," the court concluded in *Dugger, et al. v. Lauless*, 216 Or. at 188, at 192, 338 P.2d at 660 (1959), that while some authorities continue to characterize the pre-decree right to withdraw consent as one without limitation, "(a)ccording to the better view . . . the right to revoke consent is not absolute . . ." (216 Or. at 198, 338 P2d at 664). Reference to the matters to be considered in determining whether a natural parent ought to be allowed to resume control of a child after the withdrawal of consent which it had noted as relevant (quoted *supra*) in Williams was then followed with the comment:

"In exercising its discretion, the trial court is to be guided by the principle that the child's welfare overrides all other considerations . . . Since the child's welfare is of primary concern, we are of the opinion that the natural parent may, under certain circumstances, be estopped to withdraw consent to the adoption . . ." (216 Or. at 198-199, 338 P.2d at 665).

ARTICLE IV

PROCEDURE

SEC. 10. *Hurried Decisions.* — In all proceedings for adoption, the court shall require proof that the biological parent(s) has been properly counseled to prevent his/her from making hurried decisions caused by strain or anxiety to give up the child, and to sustain that all measures to strengthen the family have been exhausted and that any prolonged stay of the child in his/her own home will be inimical to his/her welfare and interest.

SEC. 11. *Case Study.* — No petition for adoption shall be set for hearing unless a licensed social worker of the Department, 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.

At the time of preparation of the adoptee's case study, the concerned social worker shall confirm 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 concerned social worker to ensure that the adoptee is registered.

The case study on the adoptee shall establish that he/she is legally available for adoption and that the documents to support this fact are valid and authentic. Further, the case study of the adopter(s) shall ascertain his/her genuine intentions and that the adoption is in the best interest of the child.

The Department shall intervene on behalf of the adoptee if it finds, after the conduct of the case studies, that the petition should be denied. The case studies and other relevant documents and records pertaining to the adoptee and the adoption shall be preserved by the Department.

SEC. 12. *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).

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. However, for alien adopter(s), he/she must complete six (6)-month trial custody except for those enumerated in Sec. 7(b), (i), (ii), (iii).

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).

NATURE OF ADOPTION PROCEEDINGS. No person can adopt or may be adopted except through a judicial decree by a competent court. A private adoption agreement between parties is void and does not produce any legal effect (*In re Adoption of Resaba*, 95 Phil. 244). Adoption 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. Only an adoption made through the court, or in accordance with the procedure laid down under Rule 99 of the Rules of Court is valid in this jurisdiction. It is not of natural law at all, but is wholly and entirely artificial. To establish the relation, the statutory requirements must be strictly carried out; otherwise, the adoption is an absolute nullity. The fact of adoption is never presumed but must be affirmatively proved by the person claiming its existence (*Lazatin v. Campos*, 92 SCRA 258).

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 (*Ellis v. Republic*, 7 SCRA 962). Constructive notice to the parties by publication is sufficient (*Santos v. Aranzanso*, 16 SCRA 344).

SEC. 13. *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. The decree shall state the name by which the child is to be known.

NO COLLATERAL ATTACK. Once an adoption decree is issued, it cannot be attacked collaterally (*Sayson v. Court of Appeals*, 205 SCRA 321; *Santos v. Arranzanso*, 116 SCRA 1). This means that

the validity of an adoption decree can only be assailed in a direct proceeding initiated precisely to invalidate the adoption decree.

EFFECTIVITY OF ADOPTION DECREE. The adoption decree shall be effective as of the date the original petition was filed. However, in *Tamargo v. Court of Appeals,* 209 SCRA 518, where a child, subject of an adoption proceeding, shot and killed another while he was still in the actual custody of the natural parents, the Supreme Court rejected the view that, upon the entry of an adoption decree relative to that child, the adopting parents should be held liable for the death caused by the adopted on the ground that the adoption decree should retroact as of the date of the filing of the petition, thereby making the adopting parents in accordance with law liable principally. The Supreme Court in holding that the retroactivity of the decree stated by the law should not apply in this case as it would go against the principle of vicarious liability of parents (which principle is premised upon their children living with them and under their parental authority), observed and ruled:

> 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 liability upon the adopting parents accruing *at a time when the adopting parents had no actual or physical 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 tortuous act that they could not have foreseen and which they could not have prevented (since they were at the time in the United States and had no physical custody over the child Adelberto) would be inconsistent with the philosophical 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 parent."* (Italics 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.

REGISTRATION. In case of adoption, it shall be the duty of the interested parties or petitioners to register the same in the local civil register of the municipality where the decree was issued (Section 10 of the Civil Registry Law, Act No. 3753). It shall be the duty of the clerk of court which issued the decree to ascertain whether the same has been registered, and if this has not been done, to send a copy of said decree to the civil registry of the city or municipality where the court is functioning (Article 409 of the Civil Code). The local civil registry where the original birth certificate of the subject child is recorded or registered must be furnished a copy of the decision by clear implication of Section 13 so that an amended birth certificate may be issued.

MIDDLE NAME OF ADOPTED. In the case of *In the Matter of the Adoption of Stephanie Nathy Astorga,* G.R. No. 148311, March 31, 2005, 454 SCRA 541, the Supreme Court allowed the adopted child to use as her middle name the surname of her biological mother who was not married to the biological father-adopter and who consented to the adoption. This was allowed by the Supreme Court by stating that, although there is no law to this effect, no law also prohibits the same from being done. Moreover, allowing the adopted child to use as her middle name the surname of her biological mother, whose parental authority in this case was, in effect, terminated due to the adoption, is in accordance with the intent of the adoption law to provide the child all the rights of a legitimate child. It is also a custom that a legitimate child uses as his or her middle name, the surname of the mother.

SEC. 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.

CERTIFICATE OF BIRTH. Upon the finality of the adoption decree, the surname of the adopted shall be changed to the surname of the adopter. The original birth certificate of the adoptee shall be canceled and replaced by a new one without any indication or annotation that the same is an amended issue. The reason for this is to preserve the confidentiality of the adoption process.

SEC. 15. *Confidential Nature of Proceedings and Records.* — All hearings in adoption cases shall be confidential and shall not be open to the public. All records, books, and papers relating to the adoption cases in the files of the court, the Department, or any other agency or institution participating in the adoption proceedings shall be kept strictly confidential.

If the court finds that the disclosure of the information to a third person is necessary for purposes connected with or arising out of the adoption and will be for the best interest of the adoptee, the court may merit the necessary information to be released, restricting the purposes for which it may be used.

REASON FOR CONFIDENTIALITY OF RECORDS IN ADOPTION PROCEEDINGS. Confidentiality is perceived to promote the efficacy of the adoption process and to protect the rights and interest of the natural parents, the adopters and the adoptees (*Alma Society, Inc. v. Mellon* [2d Cir. 1979], 601 F. 2d 1225). In the case of *In Re Roger B.*, 84 Ill. 2d 323, 418 N.E. 2d 751, decided by the

Supreme Court of Illinois, the reasons for confidentiality of records were discussed, thus:

> x x x Confidentiality is needed to protect the right to privacy of the natural parent. The natural parents, having determined it is in the best interest of themselves and the child, have placed the child for adoption. This process is done not merely with the expectation of anonymity, but also with the statutory assurance that his or her identity as the child's parent will be shielded from public disclosure. Quite conceivably, the natural parents have established a new family unit with the expectation of confidentiality concerning the adoption that occurred several years earlier. x x x. In application of Maples, the Missouri Supreme Court stated:
>
> "The State at the behest of those concerned undertook through the adoption process to sever the parental relationship, award custody and establish a new relationship of parent and child. Much of the information coming into the court's records during that process is for good reason treated as a confidence, offering a fresh start to the parties so that natural parents making this agonizing decision are assured the parent-child relationship will be completely severed, both legally and socially and may put behind the mistakes and misfortunes precipitating this fateful act. They are assisted in this traumatic experience by the knowledge that the records may be compromised only on order of the court and that neither the child [nor] the adoptive parents may question why they consented to the adoption or the circumstances of the abandonment or neglect. If it were otherwise, the adopted child may re-enter their lives with disastrous results. There must be finality for the natural parents and a new beginning; if there is a right of privacy not to be lightly infringed, it would seem to be theirs" (563 S.W.2d 763).
>
> These interests of natural parents do not cease when the adoptee reaches adulthood. x x x
>
> Confidentiality also must be promoted to protect the right of the adopting parents. The adopting parents have taken into their homes a child whom they will regard as their own and whom they will love, support and raise as an integral part of the family unit. They should be given the opportunity to create a stable family relationship free from unnecessary intrusion. x x x The adoptive parents need and deserve the child's loyalty as they grow older, and particularly in their later years. As stated in Alma Society:
>
> > "The adoptee's attainment of majority is a definite event in the adoptee's life; but it occurs

> independent of either the legally terminated natural family relationship or the legally assumed adoptive one and does not affect termination or continuation of those relationships." (601 F.2d 1225, 1231).

The State's concern of promoting confidentiality to protect the integrity of the adoption process is well expressed by the following excerpt from Klibanoff, Genealogical Information in Adoption: The Adoptees Quest and the Law, 11 Fam. L.Q. 185, 196-197 (1977):

> "The primary interest of the public is to preserve the integrity of the adoptive process, that is, the continued existence of adoption as a humane solution to the serious social problem of children who are or may become unwanted, abused or neglected. In order to maintain it, the public has an interest in assuring that changes in law, policy or practice will not be made which negatively affect the supply of capable adoptive parents or the willingness of biological parents to make decisions which are best for them and for their children. We should not increase the risk of neglect to any child, nor should we force parents to resort to the black market in order to surrender children they can't care for. x x x"

The State certainly must protect the interest of the adoptees, as well as the rights of the natural and adopting parents. When the adoptee is a minor, there is no dispute that the sealed-record provisions serve this end. The child, in his new family environment, is insulated from intrusion from the natural parents. The child is protected from any stigma resulting from illegitimacy, neglect, or abuse. The preclusion of outside interference allows the adopted child to develop a relationship of love and cohesiveness with the new family unit. Prior to adulthood, the adoptee's interest is consistent with that of the adopting and natural parents.

Upon reaching the age of majority, the adoptee often develops a countervailing interest that is in direct conflict with other parties, particularly the natural parents. The adoptee wishes to determine his natural identity, while the privacy interest of the natural parents remains, perhaps stronger than ever. The Section recognizes that the right of privacy is not absolute. It allows the court to evaluate the needs of the adoptee as well as the nature of the relationships and choices made by all parties concerned. The statute, by providing for the release of adoption records only upon issuance of a court order, does not more than allow the court to balance the interest of all the parties and make a determination based on the facts and circumstances of each individual case.

ARTICLE V

EFFECTS OF ADOPTION

SEC. 16. *Parental Authority.* — Except in cases where the biological parent is the spouse of the adopter, 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).

SEVERANCE OF LEGAL TIES. The right to parental authority is purely personal. It cannot be renounced or waived except in those cases provided by law. One of these cases is in adoption (*Santos v. Court of Appeals*, 59 SCAD 672, 242 SCRA 407). Once the adoption decree has become final, the parental authority of the biological parents is effectively cut. All legal ties between the natural parents and the adoptee are terminated. The only exception to the rule is when the biological parent is the spouse of the adopter. The reason for this exception is the general rule that parents have joint parental authority over their common children.

SEC. 17. *Legitimacy.* — The adoptee shall be considered the legitimate son/daughter of the adopter(s) for all intents and purposes and as such is entitled to all the rights and obligations provided by law to legitimate sons/daughters born to them without discrimination of any kind. To this end, the adoptee is entitled to love, guidance, and support in keeping with the means of the family.

EFFECTS OF ADOPTION. The law defines the relation, after adoption, of the child to its natural parents and to its adopting parents, together with their reciprocal rights, duties and privileges (*Betz v. Horr*, 114 ALR 491). Essentially, the legal effect is:

> to make the adopted child the natural child of the adoptive parents, x x x to give the adopted child the same legal relation to the foster parent as a child of his body, x x x and that the adoption divests the natural parents of the relation which they had theretofore sustained toward the infant and such change of relation is in no way affected by the death of the foster parent or parents (*Betz v. Horr*, 114 ALR 491, citation omitted).
>
> A decree of adoption has the effect, among others, of dissolving the authority vested in the natural parent over the

> adopted child except when the adopting parent is the spouse of the natural parent of the adopted, in which case parental authority over the adopted shall be exercised jointly by both spouses. The adopting parents have the right to the care and custody of the adopted child and exercise parental authority and responsibility over him (*Cervantes v. Fajardo*, 169 SCRA 575).

Hence, it is the adopters who must give their consent to the marriage of an adopted child who is between 18 and 21 years of age.

Upon the death of the adoptive parents, there are no rights or duties reestablished in the natural parents (Cases on Domestic Relations by Madden and Compton, page 707, 1940 Footnote 9, citing *Shepherd v. Murphy*, 332 Mo. 1176, 61 S.W. 2d 746). Nor does the child's coming of age or his or her subsequent marriage affect his or her status as an adopted child (*Church v. Lee*, 136 So. 242).

It must also be emphasized that the relation established by the adoption is limited to the adopting parents and does not extend to their other relatives, except as expressly provided by law. The relationship is only one of parent and child. Thus, the adopted child cannot be considered as a relative of the ascendants and collateral relatives 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 (*Santos, Jr. v. Republic,* 21 SCRA 379, citing Tolentino, Civil Code, Vol. 1, 1960 Ed., p. 652, citing 1 Oyuelos 284, Perez, Gonzales and Casta; 4-11 Enneccerus, Kipp & Wolff 177; Munoz, p. 104).

> **SEC. 18. *Succession.* — In legal and intestate succession, the adopter(s) and the adoptee shall have reciprocal rights of succession without distinction from legitimate filiation. However, if the adoptee and his/her biological parent(s) had left a will, the law on testamentary succession shall govern.**

LEGAL OR INTESTATE SUCCESSION. The law provides that in legal and intestate succession, the adopter(s) and the adoptee shall have reciprocal rights of succession without distinction from legitimate filiation. An adopted child is a legal or intestate heir of the adopter. Other legal or intestate heirs are the legitimate,

legitimated and illegitimate children of the said adopter. Ascendants and descendants are likewise legal or intestate heirs. Hence, the adopter is also a legal or intestate heir of the adopted. Legal or intestate heirs are those entitled by law to a legitime. Legitime is that part of the testator's property which he or she cannot dispose of because the law has reserved it for compulsory heirs or legal heirs (Article 886 of the Civil Code).

> Legal or intestate succession takes place:
>
> (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 accretion takes place;
>
> (4) When the heir instituted is incapable of succeeding, except in cases provided in the Civil Code (Article 960 of the Civil Code).

In intestate succession, the adopter and the adoptee are mutually legal or intestate heirs of each other. Thus, if the adopter is survived only by his or her adoptee, the latter gets the whole of the estate of the adopted. This is so because, the adoptee will not only get his or her legitime, which constitutes one-half of the estate (Article 888 of the Civil Code), but also the free portion. The free portion of the estate is that part of the estate which, after determining the legitime of the legal heirs, can be given to anybody. If the adopter is survived only by the adoptee and a legitimate child of the adopter, the collective legitime is one-half of the estate which they will divide equally (Article 980 of the Civil Code). They will likewise divide the free portion equally. Hence, they will divide the whole estate equally (Article 980 of the Civil Code). If the survivors are only the adoptee and an illegitimate child of the adopter, one-half of the estate shall go to the adoptee and one-fourth shall go to the illegitimate child and the balance of one fourth shall be divided between the adoptee and the illegitimate child using the ratio 2:1 in favor of the adoptee because of the rule that an illegitimate child gets half of what a legitimate child gets (See Article 176 of the Family Code).

If it is the adopted who dies and the only survivor is the adopter, the adopter gets one-half of the estate as his or her legitime (Article 889 of the Civil Code) and he or she also gets the other half which is the free portion. In effect, he or she gets the whole estate. The biological parents will not get anything because all legal ties are severed as between them. If the decedent-adoptee has legitimate children of his or her own, only these children will inherit to the exclusion of the adopter. But if the children are illegitimate, the adopter shall get one-half of the estate and the other half goes to the illegitimate children (Article 991 of the Civil Code).

RIGHT OF REPRESENTATION. Under the Civil Code and the Family Code, the adopted or the adoptee does not have the right of representation in the law of succession (*Mariategui v. Court of Appeals*, 204 SCRA 337). This is still true under the Domestic Adoption Law. Representation is a right created by fiction of law, by virtue of which the representative is raised to the place and the degree of the person represented, and acquires the rights which the latter would have if he were living or if he could have inherited (Article 970 of the Civil Code). Thus, in the event that his father dies, a legitimate son has a right of representation to inherit from his grandfather. The son shall inherit what his father would have inherited had the father been alive. It must be importantly emphasized however that *the representative is called to the succession by the law and not by the person represented. The representative does not succeed the person represented but the one whom the person represented would have succeeded* (Article 971 of the Civil Code). Hence, in the example given, the son succeeds, not from his father, but from his grandfather. The son's blood relationship to his grandfather is the reason why the said son is called to succession by law to his grandfather's estate.

In so far as adoption is concerned, it is a rule that successional rights of the adopted and the adopter are purely statutory and therefore limited by statute. Unless provided by the adoption statute, the adopted child does not inherit from the lineal or collateral kindred of the adoptive parents (*In re Harrington's Estate*, 120 ALR 8300; *Shemaker v. Newman*, 89 ALR 1034). The present Domestic Adoption Law only creates the relationship of parent and child. Consistent with this statute-established relationship, Section 18 of the Domestic Adoption Law provides that, in legal and intestate succession, the rights of the adopter(s) and the adoptee refer only to their "reciprocal rights of succession without distinction from legitimate filiation." By using the term "reciprocal," the limitation is clear that the rights only pertain to those existing and

applicable solely between them in their relationship as parent and child. Section 18 of the Domestic Adoption Law does not give the adoptee the right of representation because this does not involve a "reciprocal" right between parent and child. As previously stated, the representative is called to the succession by the law and not by the person represented. The representative does not succeed the person represented but the one whom the person represented would have succeeded (Article 971 of the Civil Code). Hence, in the event the adopter predeceases his or her parent, the adoptee cannot inherit from the adopter's parent because this is not a reciprocal right between the adoptee and the adopter. It is not a situation where the adoptee inherits from the adopter. Rather, it is a situation where the adoptee would have inherited from the parent of the adopter which is not allowed or granted by the law. Moreover, the adopted is not related to the adopter's parent whether by blood or by legal fiction. The right of representation is conferred by statute. It is a mere statutory creation which establishes a legal fiction. There is nothing in the present Domestic Adoption Law which grants by legal fiction to the adoptee the right of representation.

TESTATE SUCCESSION. If the adoptee and his/her biological parent(s) had left a will, the law on testamentary succession shall govern. Testamentary succession refers to a situation where the decedent left a will to govern the disposition of his or her properties after his or her death. A will is an act whereby a person is permitted, with the formalities prescribed by law, to control to a certain degree the disposition of his estate, to take effect after his death (Article 783 of the Civil Code). The adoptee therefore is a compulsory heir of the testator.

Considering that an adopted child shall be considered as a legitimate child, all rights of a legitimate child shall attach to an adopted child regarding inheritance from the adopter. Hence, like a legitimate child, an adopted child, if he or she is the only survivor of the adopter, shall get one-half of the estate of the decedent-adopter as his or her legitime (Article 888 of the Civil Code). If an adoptee concurs or survives with a legitimate child, the adoptee shall be considered as a legitimate child and therefore he or she will share in half of the decedent-adopter's estate which is supposed to go to surviving legitimate children. If an adoptee concurs with an illegitimate child of the adopted, the illegitimate child shall get one-half of what the adoptee gets (Article 176 of the Family Code). If the adoptee and the parents of the adopter are the survivors of the adopter, the adoptee excludes the parents of the adopter in the

inheritance (Article 887 of the Civil Code). On the other hand, if the adoptee dies without leaving any heir other than the adopter, the latter shall be considered his or her compulsory heir and therefore shall be entitled to half of the estate of the adoptee as legitime (Article 888 of the Civil Code).

Preterition is applicable to adopted children *vis-à-vis* the adopter's last will and testament (*Acain v. IAC,* 155 SCRA 100). *Preterition* means the omission of a compulsory heir in the direct line in the testator's will. The effect of preterition is to annul the institution of heirs in a will, but the devises and legacies shall be valid insofar as they are not inofficious (Article 854 of the Civil Code).

Considering that all legal ties are severed between the adoptee and his or her biological parents, the latter shall not inherit anything by way of legitime. However, if there is still a free portion left on the estate of the decedent-adoptee, he or she can give the same to his or her biological parents via a stipulation in a last will and testament. His or her biological parents will become his or her voluntary heirs, legatee or devisee instituted in a will. For example, the net value of the estate of the adoptee is P100,000. He died but was survived by his adopter and his biological parents. The adopter gets P50,000 as his or her legitime. The free portion of the adoptee's estate is also P50,000. In the event that the adoptee left a will stating that he was likewise giving his biological parents P50,000, the said biological parents shall get the said amount because it is exactly the amount of the free portion of the adoptee's estate which he can generally give to anybody. If the adoptee did not make a will, everything will go to the adopter by intestate succession.

ARTICLE VI

RESCISSION OF ADOPTION

SEC. 19. *Grounds for Rescission of Adoption.* — Upon petition of the adoptee, with the assistance of the Department if a minor or if over eighteen (18) years of age but is incapacitated, as guardian/counsel, 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 as-

sault or violence; or (d) abandonment and failure to comply with parental obligations.

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.

RESCISSION. Only the adoptee is given legal standing to rescind an adoption decree. If the adoptee is a minor, he or she shall be assisted by the Department of Social Welfare and Development. If he or she is exactly 18 years of age, the adoptee is already emancipated. Nevertheless, the law still requires that the said 18-year-old adoptee must still be assisted by the Department of Social Welfare. If the adoptee is over 18 years of age but incapacitated, the Department shall act as his or her guardian or counsel. If the adoptee is over 18 years of age and not incapacitated, he or she is qualified to do all acts of civil life and therefore he or she can file an action for rescission without the assistance of the Department of Social Welfare and Development.

Rescission contemplates a situation where the adoption decree is valid up to the time of its termination. A rescinded adoption decree is different from a void decree because the latter contemplates a situation where the judgment is invalid from the beginning. If the adoption decree is void, it can be assailed in a direct proceeding by any interested party such as the biological parent whose consent was not obtained.

MALTREATMENT. Repeated physical and verbal maltreatment by the adopter(s) despite having undergone counseling is a ground for rescission. This ground connotes the incorrigible nature of the adopter's character considering that, having undergone counseling, the adopter still continues to maltreat the adopted in such tormenting and injurious manner. The adopted is entitled to have a wholesome family life. Corollarily, he or she is entitled to be removed from a destructive environment induced or created by the adopter(s).

ATTEMPT ON LIFE. Attempt on the life of the adoptee is a very serious ground. It is criminal. It endangers the life of the adoptee. An adopter who commits an act designed to terminate the life of his or her own adopted child directly contravenes the purpose of

adoption which is to provide the adoptee with a family environment that will ensure a productive life on the part of the adoptee.

SEXUAL ASSAULT OR VIOLENCE. A person who adopts a child and subjects the same to sexual assault or violence does not deserve to continue acting as the adoptive parent. The highly detrimental psychological trauma after such sexual assault or violence can linger for quite a long period of time and may even have an effect on the character and mental well-being of the adopted in his or her adult years. Sexual assault or violence by the adopter on the adopted is a perverse act and the adopted must be immediately removed from an environment that easily subjects him or her to such assault or violence.

ABANDONMENT. Abandonment and failure to comply with parental duties also directly negate the purpose of adoption of providing the adoptee with a wholesome and productive family life. An adopter becomes the parent of the adoptee. If the adopter cannot perform his or her duties and responsibilities as a parent, the adoption decree should be terminated. Abandonment connotes a willful and deliberate act of foregoing all parental duties. Failure to comply with parental duties may be intentional or a result of negligence.

DISINHERITANCE OF ADOPTEE. While an adopter cannot rescind an adoption decree, he or she is given the right to disinherit the adoptee. Disinheritance can be effected only through a will wherein the legal cause therefor shall be specified (Article 916 of the Civil Code). The acts constituting legal causes for disinheriting a descendant enumerated in Article 919 of the Civil Code are the following:

> 1. When a child or descendant has been found guilty of an attempt against the life of the testator, his or her spouse, descendants or ascendants;
>
> 2. When a child or descendant has accused the testator of a crime for which the law prescribes imprisonment for six years or more, if the accusation has been found groundless;
>
> 3. When a child or descendant has been convicted of adultery or concubinage with the spouse of the testator;
>
> 4. When a child or descendant by fraud, violence, intimidation, or undue influence causes the testator to make a will or to change one already made;
>
> 5. A refusal without justifiable cause to support the parent or ascendant who disinherits such child or descendant;

6. Maltreatment of the testator by word or deed, by the child or descendant;

7. When a child or descendant leads a dishonorable or disgraceful life;

8. Conviction of a crime which carries with it the penalty of civil interdiction.

If the adoptee has given rise to a legal cause for disinheritance, a subsequent reconciliation between him and the adopter deprives the adopter of the right to disinherit, and renders ineffectual any disinheritance that may have been made (See Article 922 of the Civil Code).

SEC. 20. *Effects of Rescission.* — If the petition is granted, 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. The reciprocal rights and obligations of the adopter(s) and the adoptee to each other shall be extinguished.

The court shall order the Civil Registrar to cancel the amended certificate of birth of the adoptee and restore his/her original birth certificate.

Succession rights shall revert to its status prior to adoption, but only as of the date of judgment of judicial rescission. Vested rights acquired prior to judicial rescission shall be respected.

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.

ARTICLE VII

VIOLATIONS AND PENALTIES

SEC. 21. *Violations and Penalties.* —

(a) The penalty of imprisonment ranging from six (6) years and one (1) day to twelve (12) years and/or a fine not less than Fifty thousand pesos (P50,000), but not more than Two hundred thou-

sand pesos (P200,000) at the discretion of the court shall be imposed on any person who shall commit any of the following acts:

(i) obtaining consent for an adoption through coercion, undue influence, fraud, improper material inducement, or other similar acts;

(ii) non-compliance with the procedures and safeguards provided by the law for adoption; or

(iii) subjecting or exposing the child to be adopted to danger, abuse, or exploitation.

(b) Any person who shall cause the fictitious registration of the birth of a child under the name(s) of a person(s) who is not his/her biological parent(s) shall be guilty of simulation of birth, and shall be punished by *prision mayor* in its medium period and a fine not exceeding Fifty thousand pesos (P50,000).

Any physician or nurse or hospital personnel who, in violation of his/her oath of office, shall cooperate in the execution of the abovementioned crime shall suffer the penalties herein prescribed and also the penalty of permanent disqualification.

Any person who shall violate established regulations relating to the confidentiality and integrity of records, documents, and communications of adoption applications, cases, and processes shall suffer the penalty of imprisonment ranging from one (1) year and one (1) day to two (2) years, and/or a fine of not less than Five thousand pesos (P5,000) but not more than Ten thousand pesos (P10,000), at the discretion of the court.

A penalty lower by two (2) degrees than that prescribed for the consummated offense under this Article shall be imposed upon principals of the attempt to commit any of the acts herein enumerated.

Acts punishable under this Article, when committed by a syndicate or where it involves two (2) or more children shall be considered as an offense constituting child trafficking and shall merit the penalty of *reclusion perpetua*.

Acts punishable under this Article are deemed committed by a syndicate if carried out by a group of three (3) or more persons conspiring and/or confederating with one another in carrying out any of the unlawful acts defined under this Article. Penalties as are herein provided, shall be in addition to any other penalties which may be imposed for the same acts punishable under other laws, ordinances, executive orders, and proclamations.

When the offender is an alien, he/she shall be deported immediately after service of sentence and perpetually excluded from entry to the country.

Any government official, employee or functionary who shall be found guilty of violating any of the provisions of this Act, or who shall conspire with private individuals shall, in addition to the above-prescribed penalties, be penalized in accordance with existing civil service laws, rules and regulations: *Provided,* That upon the filing of a case, either administrative or criminal said government official, employee, or functionary concerned shall automatically suffer suspension until the resolution of the case.

SEC. 22. *Rectification of Simulated Births.* — A person who has, prior to the effectivity of this Act, simulated the birth of a child shall not be punished for such act: *Provided,* 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: *Provided, further,* 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: *Provided, finally,* That such person complies with the procedure as specified in Article IV of this Act and other requirements as determined by the Department.

NON-LIABILITY FOR SIMULATING BIRTHS. Section 22 of the new law provides the conditions which will not make persons who, prior to the effectivity of the law, simulated or caused the simulation of the birth of the child. The reason for non-liability is the absence of any criminal intent of the simulator. Specifically, the explanatory note of House Bills 6266 and 6132 which eventually became the domestic adoption law states:

> Many parents who have undertaken "simulated births" even those who belatedly recognize the crucial need to legalize their "adoption" are reluctant to take corrective action, because in the process, they would have to disclose the fact that the birth certificate of the child was falsified. As such, they run the risk of being prosecuted for falsifying a public document, an illegal act. To protect themselves and the child, many such parents opt instead to conceal the fact of the "simulated birth" from others, even from the child. They are unable to discuss the "adoption" from the start, in an open and relaxed way. Of course, adoptions seldom remain a secret and, later on, when the child inevitably discovers the fact of his or her "adoption," it becomes a much more difficult issue to handle for the family. To enable the families in this situation to rectify their "simulated births," we have to assure them that they will not be prosecuted for "falsification of public documents," so long as it can be shown that the "simulation of birth" was undertaken in good faith and in the best interest of the child, and provided that they apply for the rectification of their "informal adoptions" within the two-year period from the effectivity of this proposed law [the period is five years in the law which was actually passed]. The bar from prosecution is justified because the decision to adopt was not taken for personal gain or for an illicit or dishonorable purpose; likewise, the application for rectification of the simulated birth is ultimately to protect the rights and interest of the child.

ARTICLE VIII

FINAL PROVISIONS

SEC. 23. *Adoption Resource and Referral Office.* — There shall be established an Adoption Resources and Referral Office under the Department with the following functions: (a) monitor the existence, number, and flow of children legally available for adoption and prospective adopter(s) so as to facilitate their matching; (b) maintain a na-

tionwide information and educational campaign on domestic adoption; (c) keep records of adoption proceedings; (d) generate resources to help child-caring and child-placing agencies and foster homes maintain viability; and (e) do policy research in collaboration with the Inter-country Adoption Board and other concerned agencies. The office shall be manned by adoption experts from the public and private sectors.

SEC. 24. ***Implementing Rules and Regulations.*** **— Within six (6) months from the promulgation of this Act, the Department, with the Council for the Welfare of Children, the Office of the Civil Registry General, the Department of Justice, Office of the Solicitor General, and two (2) private individuals representing child-placing and child-caring agencies shall formulate the necessary guidelines to make the provisions of this Act operative.**

SEC. 25. ***Appropriations.*** **— Such sum as may be necessary for the implementation of the provisions of this Act shall be included in the General Appropriations Act of the year following its enactment into law and thereafter.**

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.**

SEC. 27. ***Separability Clause.*** **— If any provision of this Act is held invalid or unconstitutional, the other provisions not affected thereby shall remain valid and subsisting.**

SEC. 28. ***Effectivity Clause.*** **— This Act shall take effect fifteen (15) days following its complete publication in any newspaper of general circulation or in the *Official Gazette.***

PROCEDURAL RULE ON ADOPTION

[A.M. No. 02-6-02-SC]

A. DOMESTIC ADOPTION

SECTION 1. *Applicability of the Rule.* — This Rule covers the domestic adoption of Filipino children.

SEC. 2. *Objectives.* — (a) The best interests of the child shall be the paramount consideration in all matters relating to his care, custody and adoption, in accordance with Philippine laws, 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 to Foster Placement and Adoption, Nationally and Internationally, and the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption.

(b) The State shall provide alternative protection and assistance through foster care or adoption for every child who is a foundling, neglected, orphaned, or abandoned. To this end, the State shall:

(i) ensure that every child remains under the care and custody of his parents and is provided with love, care, understanding and security for the full and harmonious development of his 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;

(ii) safeguard the biological parents from making hasty decisions in relinquishing their parental authority over their child;

(iii) prevent the child from unnecessary separation from his biological parents;

(iv) conduct public information and educational campaigns to promote a positive environment for adoption;

(v) ensure that government and private sector agencies have the capacity 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;

(vi) encourage domestic adoption so as to preserve the child's identity and culture in his native land, and only when this is not available shall inter-country adoption be considered as a last resort; and

(vii) protect adoptive parents from attempts to disturb their parental authority and custody over their 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 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.

SEC. 3. *Definition of Terms.* — For purposes of this Rule:

(a) "Child" is a person below eighteen (18) years of age at the time of the filing of the petition for adoption.

(b) "A child legally available for adoption" refers to a child who has been voluntarily or involuntarily committed to the Department or to a duly licensed and accredited child-placing or child-caring agency, freed of the parental authority of his biological parents, or in case of rescission of adoption, his guardian or adopter(s).

(c) "Voluntarily committed child" is one whose parents knowingly and willingly relinquish parental authority over him in favor of the Department.

(d) "Involuntarily committed child" is one whose parents, known or unknown, have been permanently and judicially deprived of parental authority over him due to abandonment; substantial, continuous or repeated neglect and abuse; or incompetence to discharge parental responsibilities.

(e) "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."

(f) "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.

(g) "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.

(h) "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.

(i) "Physical neglect" occurs when the child is malnourished, ill-clad and without proper shelter.

(j) "Emotional neglect" exists when a child is raped, seduced, maltreated, exploited, overworked or made to work under conditions not conducive to good health or made to beg in the streets or public places, or placed in moral danger, or exposed to drugs, alcohol, gambling, prostitution and other vices.

(k) "Child-placement agency" refers to an agency duly licensed and accredited by the Department to provide comprehensive child welfare services including, but not limited to, receiving applications for adoption, evaluating the prospective adoptive parents and preparing the adoption home study report.

(l) "Child-caring agency" refers to an agency duly licensed and accredited by the Department that provides 24-hour residential care services for abandoned, orphaned, neglected or voluntarily committed children.

(m) "Department" refers to the Department of Social Welfare and Development.

(n) "Deed of Voluntary Commitment" refers to the written and notarized instrument relinquishing parental authority and committing the child to the care and custody of the Department executed by the child's biological parents or in their absence, mental incapacity or death, by the child's legal guardian, to be witnessed by an authorized representative of the Department after counseling and other services have been made available to encourage the biological parents to keep the child.

(o) "Child Study Report" refers to a study made by the court social worker of the child's legal status, placement history, psychological, social, spiritual, medical, ethno-cultural background and that of his biological family needed in determining the most appropriate placement for him.

(p) "Home Study Report" refers to a study made by the court social worker of the motivation and capacity of the prospective adoptive parents to provide a home that meets the needs of a child.

(q) "Supervised trial custody" refers to the period of time during which a social worker oversees the adjustment and emotional readiness of both adopters and adoptee in stabilizing their filial relationship.

(r) "Licensed Social Worker" refers to one who possesses a degree in bachelor of science in social work as a minimum educational requirement and who has passed the government licensure examination for social workers as required by Republic Act No. 4373.

(s) "Simulation of birth" is the tampering of the civil registry to make it appear in the birth records that a certain child was born to a person who is not his biological mother, thus causing such child to lose his true identity and status.

(t) "Biological Parents" refer to the child's mother and father by nature.

(u) "Pre-Adoption Services" refer to psycho-social services provided by professionally-trained social workers of the Department, the social services units of local governments, private and government health facilities, Family Courts, licensed and accredited child-caring and child-placement agencies and other individuals or entities involved in adoption as authorized by the Department.

(v) "Residence" means a person's actual stay in the Philippines for three (3) continuous years immediately prior to the filing of a petition for adoption and which is maintained until the adoption decree is entered. Temporary absences for professional, business, health, or emergency reasons not exceeding sixty (60) days in one (1) year does not break the continuity requirement.

(w) "Alien" refers to any person, not a Filipino citizen, who enters and remains in the Philippines and is in possession of a valid passport or travel documents and visa.

SEC. 4. *Who may adopt*. — The following may adopt:

(1) Any Filipino citizen of legal age, in possession of full civil capacity and legal rights, of good moral character, has not been convicted of any crime involving moral turpitude; who is emotionally and psychologically capable of caring for children, at least sixteen

(16) years older than the adoptee, and who is in a position to support and care for his children in keeping with the means of the family. The requirement of a 16-year difference between the age of the adopter and adoptee may be waived when the adopter is the biological parent of the adoptee or is the spouse of the adoptee's parent;

(2) Any alien possessing the same qualifications above-stated for Filipino nationals: *Provided*, That his country has diplomatic relations with the Republic of the Philippines, that he has been living in the Philippines for at least three (3) continuous years prior to the filing of the petition for adoption and maintains such residence until the adoption decree is entered, 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 that his government allows the adoptee to enter his country as his adopted child: *Provided*, *further*, That the requirements on residency and certification of the alien's qualification to adopt in his 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; or

(ii) one who seeks to adopt the legitimate child of his Filipino spouse; or

(iii) one who is married to a Filipino citizen and seeks to adopt jointly with his spouse a relative within the fourth (4th) degree of consanguinity or affinity of the Filipino spouse.

(3) The guardian with respect to the ward after the termination of the guardianship and clearance of his financial accountabilities.

Husband and wife shall jointly adopt, except in the following cases:

(i) if one spouse seeks to adopt the legitimate child of one spouse by the other spouse; or

(ii) if one spouse seeks to adopt his own illegitimate child: *Provided*, *however*, That the other spouse has signified his consent thereto; or

(iii) if the spouses are legally separated from each other.

In case husband and wife jointly adopt or one spouse adopts the illegitimate child of the other, joint parental authority shall be exercised by the spouses.

SEC. 5. *Who may be adopted*. — The following may be adopted:

(1) Any person below eighteen (18) years of age who has been voluntarily committed to the Department under Articles 154, 155 and 156 of P.D. No. 603 or judicially declared available for adoption;

(2) The legitimate child of one spouse, by the other spouse;

(3) An illegitimate child, by a qualified adopter to raise the status of the former to that of legitimacy;

(4) A person of legal age regardless of civil status, if, prior to the adoption, said person has been consistently considered and treated by the adopters as their own child since minority;

(5) A child whose adoption has been previously rescinded; or

(6) A child whose biological or adoptive parents have died: *Provided*, That no proceedings shall be initiated within six (6) months from the time of death of said parents;

(7) A child not otherwise disqualified by law or these rules.

SEC. 6. *Venue*. — The petition for adoption shall be filed with the Family Court of the province or city where the prospective adoptive parents reside.

SEC. 7. *Contents of the Petition*. — 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) Sub-paragraph 1(b) above;

(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.

SEC. 8. *Rectification of Simulated Birth*. — In case the petition also seeks rectification of simulated 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 Republic Act No. 8552 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.

SEC. 9. *Adoption of a foundling, an abandoned, dependent or neglected child*. — 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.

SEC. 10. *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.

SEC. 11. *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;

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.

SEC. 12. *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 newspaper 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.

SEC. 13. *Child and Home Study Reports*. — 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.

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.

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 Republic Act No. 8552.

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.

SEC. 14. *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.

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.

SEC. 15. *Supervised Trial Custody*. — Before issuance of the decree of adoption, the court shall give the adopter trial custody of the adoptee for a period of at least six (6) months within which the parties are expected to adjust psychologically and emotionally to each other and establish a bonding relationship. 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. During said period, temporary parental authority shall be vested in the adopter.

The court may, *motu proprio* or upon motion of any party, reduce the period or exempt the parties if it finds that the same shall be for the best interests of the adoptee, stating the reasons therefor.

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.

If the child is below seven (7) years of age and is placed with the prospective adopter through a pre-adoption placement authority issued by the Department, the court shall order that the prospective adopter shall enjoy all the benefits to which the biological parent is entitled from the date the adoptee is placed with him.

The social worker shall submit to the court a report on the result of the trial custody within two weeks after its termination.

SEC. 16. *Decree of Adoption*. — If the supervised trial custody is satisfactory to the parties and the court is convinced from the trial custody report and the evidence adduced that the adoption shall redound to the best interests of the adoptee, a decree of adoption shall be issued which shall take effect as of the date the original petition was filed even if the petitioners die before its issuance.

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 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 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.

SEC. 17. *Book of Adoptions.* — The Clerk of Court shall keep a book of adoptions showing the date of issuance of the decree in each case, compliance by the Civil Registrar with Section 16(B)(3) and all incidents arising after the issuance of the decree.

SEC. 18. *Confidential Nature of Proceedings and Records.* — All hearings in adoption cases, after compliance with the jurisdictional

requirements shall be confidential and shall not be open to the public. All records, books and papers relating to the adoption cases in the files of the court, the Department, or any other agency or institution participating in the adoption proceedings shall be kept strictly confidential.

If the court finds that the disclosure of the information to a third person is necessary for security reasons or for purposes connected with or arising out of the adoption and will be for the best interests of the adoptee, the court may, upon proper motion, order the necessary information to be released, restricting the purposes for which it may be used.

SEC. 19. *Rescission of Adoption of the Adoptee.* — The petition shall be verified and filed by the adoptee who is over eighteen (18) years of age, or with the assistance of the Department, if he is a minor, or if he is over eighteen (18) years of age but is incapacitated, by his guardian or counsel.

The adoption may be rescinded based on any of the following grounds committed by the adopter:

1) repeated physical and verbal maltreatment by the adopter despite having undergone counseling;

2) attempt on the life of the adoptee;

3) sexual assault or violence; or

4) abandonment or failure to comply with parental obligations.

Adoption, being in the best interests of the child, shall not be subject to rescission by the adopter. However, the adopter may disinherit the adoptee for causes provided in Article 919 of the Civil Code.

SEC. 20. *Venue.* — The petition shall be filed with the Family Court of the city or province where the adoptee resides.

SEC. 21. *Time within which to file petition.* — 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.

SEC. 22. *Order to Answer.* — The court shall issue an order requiring the adverse party to answer the petition within fifteen

(15) days from receipt of a copy thereof. The order and copy of the petition shall be served on the adverse party in such manner as the court may direct.

SEC. 23. *Judgment*. — If the court finds that the allegations of the petition are true, it shall render judgment ordering the rescission of adoption, with or without costs, as justice requires.

The court shall order that the parental authority of the biological parent of the adoptee, if known, or the legal custody of the Department shall be restored if the adoptee is still a minor or incapacitated and declare that the reciprocal rights and obligations of the adopter and the adoptee to each other shall be extinguished.

The court shall further declare that successional rights shall revert to its status prior to adoption, as of the date of judgment of judicial rescission. Vested rights acquired prior to judicial rescission shall be respected.

It shall also order the adoptee to use the name stated in his original birth or foundling certificate.

The court shall further order the Civil Registrar where the adoption decree was registered to cancel the new birth certificate of the adoptee and reinstate his original birth or foundling certificate.

SEC. 24. *Service of Judgment*. — A certified true copy of the judgment together with a certificate of finality issued by the Branch Clerk of the Court which rendered the decision in accordance with the preceding Section shall be served by the petitioner upon the Civil Registrar concerned within thirty (30) days from receipt of the certificate of finality. The Civil Registrar shall forthwith enter the rescission decree in the register and submit proof of compliance to the court issuing the decree and the Clerk of Court within thirty (30) days from receipt of the decree. The Clerk of Court shall enter the compliance in accordance with Section 17 hereof.

SEC. 25. *Repeal*. — This supersedes Rule 99 on Adoption and Rule 100 of the Rules of Court.

INTER-COUNTRY ADOPTION

INTER-COUNTRY ADOPTION. Inter-country adoption refers to the socio-legal process of adopting a Filipino child by a foreign national or a Filipino citizen permanently residing abroad where the petition for adoption is filed, the supervised trial custody is

undertaken, and the decree of adoption is issued in the foreign country where the applicant resides, thereby creating a permanent parent-child relationship between the child and the adoptive parents. The law governing inter-country adoption is Republic Act Number 8043 approved by President Fidel V. Ramos on June 7, 1995. On December 26, 1995, the implementing rules and regulations of the said law were approved.

GENERAL PROVISIONS

SECTION 1. *Short Title.* — This Act shall be known as the "Inter-Country Adoption Act of 1995."

SEC. 2. *Declaration of Policy.* — It is hereby declared the policy of the State to provide every neglected and abandoned child with a family that will provide such child with love and care as well as opportunities for growth and development. Towards this end, efforts shall be exerted to place the child with an adoptive family in the Philippines. However, recognizing that inter-country adoption may be considered as allowing aliens, not presently allowed by law to adopt Filipino children if such children cannot be adopted by qualified Filipino citizens or aliens, the State shall take measures to ensure that inter-country adoptions are allowed when the same shall prove beneficial to the child's best interest, and shall serve and protect his/her fundamental rights.

SEC. 3. *Definition of Terms.* — As used in this Act, the term:

a) Inter-country adoption refers to the socio-legal process of adopting a Filipino child by a foreigner or a Filipino citizen permanently residing abroad where the petition is filed, the supervised trial custody is undertaken, and the decree of adoption is issued outside the Philippines.

b) Child means a person below fifteen (15) years of age unless sooner emancipated by law.

c) Department refers to the Department of Social Welfare and Development of the Republic of the Philippines.

d) Secretary refers to the Secretary of the Department of Social Welfare and Development.

e) Authorized and accredited agency refers to the State welfare agency or a licensed adoption agency in the country of the adopting parents which provide comprehensive social services and which is duly recognized by the Department.

f) Legally-free child means a child who has been voluntarily or involuntarily committed to the Department, in accordance with the Child and Youth Welfare Code.

g) Matching refers to the judicious pairing of the adoptive child and the applicant to promote a mutually satisfying parent-child relationship.

h) Board refers to the Inter-Country Adoption Board.

DEFINITIONS. The rules and regulations clarify some definitions under the law and added some more terms to be defined. More accurately, under the rules, "child" refers to a Filipino child below fifteen (15) years of age who can be legally adopted (Section 3[a], Rules and Regulations). The phrase "unless sooner emancipated" provided in the law is not adopted under the rules because the said phrase is clearly erroneous. Under Republic Act Number 6809 which took effect on December 18, 1989, the age of emancipation is 18 years. Hence, quite patently no child can be sooner emancipated if he or she is below fifteen years of age.

In the definition of "inter-country adoption," the rules clarify that the decree of adoption issued outside of the Philippines means that the decree of adoption is one which has been "issued in the foreign country where the applicant resides thereby creating a permanent parent-child relationship between the child and the adoptive parents" (Section 3[b], Rules and Regulations).

Additional terms have been defined under Section 3(f), (g), (h), (i), (j), (k), (l) of the Rules and regulations, *to wit:*

(f) "Chairperson" shall refer to the Chairperson of the Board;

(g) "Committee" shall refer to the Inter-Country Adoption Placement Committee;

(h) "Foreign Adoption Agency" shall refer to the State welfare agency or the licensed and accredited agency in the country of the foreign adoptive parents that provides comprehensive social services and is duly recognized by the Department;

(i) "Child-Caring Agency" shall refer to a welfare agency that provides a twenty-four (24)-hour resident group care service for the physical, mental, social and spiritual well-being of nine (9) or more mentally gifted, abandoned, neglected disabled, or disturbed children, or youth offenders. The term shall include an institution whose primary purpose is education whenever nine (9) or more of its pupils or wards in the ordinary course of events do not return annually to the homes of their parents or guardians for at least two (2) months of summer vacation;

(j) "Child Placing Agency" shall refer to an institution licensed by the Department to assume the care, custody, protection and maintenance of children for purposes of adoption guardianship or foster care;

(k) "Application" shall refer to the application form with a homestudy report for the inter-country adoption of a child, including its supporting documents;

(l) "Applicant" shall refer to a person or married couple who files an application.

ARTICLE II

THE INTER-COUNTRY ADOPTION BOARD

SEC. 4. ***The Inter-Country Adoption Board.*** **— There is hereby created the Inter-country Adoption Board, hereinafter referred to as the Board, to act as the central authority in matters relating to inter-country adoption. It shall act as the policy-making body for purposes of carrying out the provisions of this Act, in consultation and coordination with the Department, the different child-care and placement 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 this 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;

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 involved from the accreditation list of the Board upon a finding of violation of any provision under this Act.

SEC. 5. *Composition of the Board.* — The Board shall be composed of the Secretary of the Department as *ex officio* Chairman, and six (6) other members to be appointed by the President for a nonrenewable term of six (6) years: *Provided*, That there shall be appointed one (1) psychiatrist or psychologist, two (2) lawyers who shall have at least the qualifications of a regional trial court judge, one (1) registered social worker and two (2) representatives from non-governmental organizations engaged in child-caring and placement activities. The members of the Board shall receive a per diem allowance of One thousand five hundred pesos (P1,500) for each meeting attended by them: *Provided, further*, That no compensation shall be paid for more than four (4) meetings a month.

SEC. 6. *Powers and Functions of the Board.* — The Board shall have the following powers and functions:

a) to prescribe rules and regulations as it may deem reasonably necessary to carry out the provisions of this Act, after consultation and upon favorable recommendation of the different agencies concerned with child-caring, placement, and adoption;

b) to set the guidelines for the convening of an Inter-Country Adoption Placement Committee which shall be under the direct supervision of the Board;

c) to set the guidelines for the manner by which selection/matching of prospective adoptive parents and adoptive child can be made;

d) to determine a reasonable schedule of fees and charges to be exacted in connection with the application for adoption;

e) to determine the form and contents of the application for inter-country adoption;

f) to formulate and develop policies, programs and services that will protect the Filipino child from abuse, exploitation, trafficking and other adoptive practice that is harmful, detrimental and prejudicial to the best interest of the child;

g) to institute systems and procedures to prevent improper financial gain in connection with adoption and deter improper practices which are contrary to this Act;

h) to promote the development of adoption services, including post-legal adoption services;

i) to accredit and authorize foreign private adoption agencies which have demonstrated professionalism, competence and have consistently pursued non-profit objectives to engage in the placement of Filipino children in their own country: *Provided,* That such foreign private agencies are duly authorized and accredited by their own government to conduct inter-country adoption: *Provided, however*, That the total number of au-

thorized and accredited foreign private adoption agencies shall not exceed one hundred (100) a year;

j) to take appropriate measures to ensure confidentiality of the records of the child, the natural parents and the adoptive parents at all times;

k) to prepare, review or modify, and thereafter, recommend to the Department of Foreign Affairs, Memoranda of Agreement respecting inter-country adoption consistent with the implementation of this Act and its stated goals, entered into, between and among foreign governments, international organizations and recognized international non-governmental organizations;

l) to assist other concerned agencies and the courts in the implementation of this Act, particularly as regards coordination with foreign persons, agencies and other entities involved in the process of adoption and the physical transfer of the child; and

m) to perform such other functions on matters relating to inter-country adoption as may be determined by the President.

INTER-COUNTRY ADOPTION BOARD. The Rules and Regulations further specify the manner of meeting and voting of the Board as well as the nature of the secretariat, *to wit:*

ARTICLE III

INTER-COUNTRY ADOPTION BOARD

SECTION 4. MEETINGS. — The Board shall meet regularly or upon the call of the Chairperson. In the absence of the Chairperson, the members present who constitute a quorum may choose a presiding officer from among themselves. A majority of all the members of the Board shall constitute a quorum. The Board may hold meetings in executive session.

SECTION 5. VOTING. — The Board shall act as a body. The vote of a majority of the members of the Board constituting a quorum shall be necessary to perform its functions. The Chairperson of the Board shall not vote in a meeting except to break a tie.

ARTICLE IV

SECRETARIAT

SECTION 6. EXECUTIVE DIRECTOR. — The Board shall have a Secretariat headed by an Executive Director who shall be appointed by the Chairperson with the concurrence of a majority of the members of the Board.

SECTION 7. FUNCTIONS OF THE EXECUTIVE DIRECTOR. — The Executive Director shall act as the executive officer of the Secretariat and shall exercise supervision over its personnel. He/she shall also act as the Secretary of the Board.

SECTION 8. QUALIFICATIONS OF THE EXECUTIVE DIRECTOR. — The Executive Director shall have the qualifications of a Director IV, a master's degree in Social Work or its equivalent in a related discipline, and at least five (5) years of supervisory experience, two (2) years of which should be in the area of child care and placement.

SECTION 9. SUPPORT STAFF. — The Secretariat shall have such operating units and personnel as the Board may find necessary for the proper performance of its functions.

SECTION 10. FUNCTIONS OF THE SECRETARIAT. — The functions of the Secretariat shall include the following:

(a) maintain and facilitate communications with the Committee and the different government offices, non-governmental agencies and the general public;

(b) review and process applications, matching proposals, placement, and all documents requiring action by the Board;

(c) review licensing and accreditation applications of agencies for action by the Board;

(d) provide secretariat, records keeping, and other services to the Board and the Committee; and

(e) perform such other duties as the Board may direct.

ARTICLE III

PROCEDURE

SEC. 7. ***Inter-Country Adoption as the Last Resort.*** **— The Board shall ensure that all possibilities for adoption of the child under the Family Code have been exhausted and that inter-country adoption is in the best interest of the child. Towards**

this end, the Board shall set up the guidelines to ensure that steps will be taken to place the child in the Philippines before the child is placed for inter-country adoption: *Provided*, *however*, that the maximum number that may be allowed for foreign adoption shall not exceed six hundred (600) a year for the first five (5) years.

GUIDELINES. The law provides that the Board shall set up the guidelines to ensure that steps will be taken to place the child in the Philippines before the child is placed for inter-country adoption. The guidelines are precisely those provided in the Rules and Regulations. However, from time to time, the Board can modify the rules provided that they are not inconsistent with the law. The matter of the placement of the child depends largely on the placement committee and the licensed local child-caring-placing-agencies and the accredited foreign adoption agencies. The rules have provisions on this point, thus:

ARTICLE V

PLACEMENT COMMITTEE

SECTION 11. COMPOSITION. — The matching of a child to a foreign adoptive family shall be approved by the Board upon the recommendation of a Committee which shall have five (5) members composed of a child psychiatrist or psychologist, a medical doctor or pediatrician, a lawyer, a registered social worker, and a representative of a non-governmental organization engaged in child welfare activities.

The Board shall appoint qualified persons who shall serve in the Committee for a term of two (2) years which may be renewed.

SECTION 12. FUNCTIONS OF THE COMMITTEE. — The Committee shall have the following functions:

(a) carry out an integrated system and network of selection and matching of applicants and children;

(b) recommend to the Board approval of applications and matching proposals; and

(c) perform such other functions and duties as may be prescribed by the Board.

SECTION 13. ALLOWANCES OF COMMITTEE MEMBERS. — A Committee member shall receive an honorarium

of One Thousand Pesos (P1,000.00) for each meeting actually attended: *Provided*, That the total amount of honorarium that a member may receive shall not exceed Four thousand pesos (P4,000.00) a month.

SECTION 14. RULES OF PROCEDURE. — Subject to the approval of the Board, the Committee shall fix its own internal rules and procedures, including the selection of its chairperson.

SECTION 15. MEETINGS. — The Committee shall meet regularly or upon the call of the Board.

ARTICLE VI

LICENSING AND ACCREDITATION

SECTION 16. LOCAL CHILD-CARING AND CHILD-PLACING AGENCIES. — Only local child-caring and-placing agencies licensed and accredited by the Department and with personnel and facilities to undertake a comprehensive child welfare program shall be accredited by the Board to participate in the inter-country adoption program.

SECTION 17. FOREIGN ADOPTION AGENCIES. — No foreign adoption agency shall be allowed to participate in the Philippine inter-country adoption program unless it is granted by the Board an accreditation in its own name. The accreditation from the Board shall be issued upon submission of the following requirements:

(a) A license and/or accreditation or authorization from its government to operate as an adoption agency to carry out inter-country adoption;

(b) Names and qualifications of the members of the board of directors, senior officers and other staff involved in inter-country adoption;

(c) Detailed description of its programs and services, researches and publications;

(d) Audited financial report including sources of funds, adoption fees and charges;

(e) Undertaking under oath that it shall assume responsibility for the selection of qualified applicants; that it shall comply with the Philippine laws on inter-country adoption; that it shall inform the Board of any change in the foregoing information; and it shall comply with post-adoption requirements as specified by the Board; and

(f) Such other requirements which the Board may deem necessary in the best interests of the child.

Authentication of the aforementioned documents shall be made by either the official designated by the Philippine embassy or consulate in the country where the foreign adoption agency operates, or the authorized official of the embassy or consulate in the Philippines of the country where the foreign adoption agency operates.

SECTION 18. LIAISON SERVICES. — Only a non-profit licensed and accredited child-caring or child-placing agency shall be allowed to serve as a representative of a foreign adoption agency and subject to prior approval by the Board based on specific requirements.

The Board shall periodically review the liaison services and may terminate any such services when, after a thorough evaluation, the agency is proven to have violated the requirements under these Rules. The agency concerned shall be given prior notice as provided for in Section 22.

SECTION 19. RENEWAL OF ACCREDITATION. — The Board shall re-accredit previously accredited foreign adoption agencies in order to ensure that all pertinent requirements for proper inter-country adoption are current and valid. The Board shall inspect the facilities of the foreign adoption agency once every four (4) years but may require periodic reports.

SECTION 20. FEES. — No fees or charges of any kind shall be charged in connection with licensing and accreditation under the Act.

ARTICLE VII

SUSPENSION OR REVOCATION OF LICENSE OR ACCREDITATION

SECTION 21. GROUNDS. — The Board shall suspend or revoke the license or accreditation issued to a child-caring or child-placing agency or foreign adoption agency on any of the following grounds:

(a) Imposing or accepting directly or indirectly any consideration, money, goods or services in exchange of an allocation of a child in violation of the Rules;

(b) Misrepresenting or concealing any vital information required under the Rules;

(c) Offering money, goods or services to any member, official or employee, or representative of the Board, to give preference in the adoption process to any applicant;

(d) Advertising or publishing the name or photograph of a child for adoption to influence any person to apply for adoption except special homefinding for hard-to-place children;

(e) Failure to perform any act required under the Rules that results in prejudice to the child or applicant;

(f) Appointing or designating any liaison or agent without prior approval of the Board;

(g) Engaging in matching arrangement or any contact to pre-identify a child in violation of the Rules; or

(h) Any other act in violation of the provisions of the Act, the Rules and other related laws.

SECTION 22. WHO MAY INITIATE ACTION TO SUSPEND OR REVOKE LICENSE OR ACCREDITATION. — The Board, *motu proprio* upon receipt of any information regarding any violation or irregularity, or upon receipt of complaint under oath or request for investigation, may conduct initial inquiries and upon being satisfied that the report, complaint or request for investigation has legal and factual basis, shall require the agency concerned to answer within fifteen (15) working days from receipt of notice, furnishing the agency concerned with copy of the complaint or a brief statement of the report or request.

SECTION 23. PROCEEDINGS FOR SUSPENSION OR REVOCATION. — Upon receipt of the answer or failure to receive an answer within the required period, the Board shall conduct a hearing or investigation and decide according to the evidence. Depending upon the gravity of the violation charged or if the agency shall fail to answer, the Board shall suspend any dealings with the agency concerned during the pendency of the investigation.

SECTION 24. ACTION OF THE BOARD. — Upon termination of the investigation, the Board shall dismiss the charge, or suspend or revoke the license or accreditation of the agency concerned, if the evidence so warrants.

The Board's decision shall be sent to the agency concerned, the Department, the regulatory agency of the state or country where the agency operates, and the Department of Foreign Affairs.

SEC. 8. *Who May Be Adopted.* — Only a legally-free child may be the subject of inter-country adoption. In order that such child may be considered for

placement, the following documents must be submitted to the Board:

a) Child study;

b) Birth certificate/foundling certificate;

c) Deed of voluntary commitment/decree of abandonment/death certificate of parents;

d) Medical evaluation/history;

e) Psychological evaluation, as necessary; and

f) Recent photo of the child.

QUALIFIED CHILDREN. The rules likewise provide, in more particular terms, the qualification of the children who may be adopted. Thus, Section 25, Article VIII of the Rules and Regulations provide:

> Any child who has been voluntarily or involuntarily committed to the Department 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. The prohibition against physical transfer shall not apply to adoption by a relative or children with special medical conditions.

SEC. 9. *Who May Adopt.* — Any alien or a Filipino citizen permanently residing abroad may file an application for inter-country adoption of a Filipino child if he/she:

a) 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 adopter is the parent by nature of the child to be adopted or the spouse of such parent;

b) if married, his/her spouse must jointly file for the adoption;

c) 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/her country;

d) has not been convicted of a crime involving moral turpitude;

e) is eligible to adopt under his/her national law;

f) is in a position to provide the proper care and support and to give the necessary moral values and example to all his children, including the child to be adopted;

g) agrees to uphold the basic rights of the child as embodied under Philippine laws, the U.N. Convention on the Rights of the Child, and to abide by the Rules and Regulations issued to implement the provisions of this Act;

h) comes from a country with whom the Philippines has diplomatic relations and whose government maintains a similarly authorized and accredited agency and that adoption is allowed under his/her national laws; and

i) possesses all the qualifications and none of the disqualifications provided herein and in other applicable Philippine laws.

QUALIFIED ADOPTERS. The rules and regulations essentially reiterate those provided in the law. If a married person is to adopt, the rules likewise clarify that he or she shall file jointly with his or her spouse, if any, who shall have the same qualifications and none of the disqualifications to adopt as prescribed in the rules (Section 6[d], Article VIII, Rules and Regulations).

SEC. 10. *Where to File Application.* — An application to adopt a Filipino child shall be filed either with the Philippine Regional Trial Court having jurisdiction over the child, or with the Board, through an intermediate agency, whether governmental or an authorized and accredited agency, in the country of the prospective adoptive parents, which application shall be in accordance with the

requirements as set forth in the implementing rules and regulations to be promulgated by the Board.

The applications shall be supported by the following documents written and officially translated in English:

a) Birth certificate of applicant(s);

b) Marriage contract, if married, and divorce decree, if applicable;

c) Written consent of their biological or adopted children above ten (10) years of age, in the form of sworn statement;

d) Physical, medical and psychological evaluation by a duly licensed physician and psychologist;

e) Income tax returns or any document showing the financial capability of the applicant(s);

f) Police clearance of applicant(s);

g) Character reference from the local church/minister, the applicant's employer and a member of the immediate community who have known the applicant(s) for at least five (5) years; and

h) Recent postcard-size pictures of the applicant(s) and his immediate family.

The Rules of Court shall apply in case of adoption by judicial proceedings.

APPLICATION AND FILING. The application may be filed either with the regular courts or with the Board. The rules and regulations particularly provide the procedure, thus:

> SECTION 27. *FORM OF APPLICATION.* — An application shall be in the form prescribed by the Board. 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 Act 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 adoption 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.

SECTION 28. *SUPPORTING DOCUMENTS OF APPLICATION.* — The following documents, written and officially translated in English shall accompany the Application:

(a) Family and Home Study reports on the family and home life 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 applicant resides;

(h) Character reference from the local church/minister, 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.

SECTION 29. *FEES, CHARGES AND ASSESSMENTS.* — There shall be a fee of $100 upon filing of the application and $900 upon acceptance of the matching proposal for processing and operational expenses of the inter-country adoption program, and other charges and assessments for child care and placement programs and services. Fees for applicants for special needs children shall be a filing fee of $100 and a processing fee of $400. Such fees, charges and assessments shall be indicated on the application form and communicated to all foreign adoption agencies.

SECTION 30. *WHERE TO FILE APPLICATION.* — The application shall be filed with the Board through a foreign adoption agency in the country where the applicant resides. 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 to be not 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 Act and the Rules. 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 Department.

SECTION 31. *ROSTER OF APPLICANTS.* — The Board shall act on each application and direct the Secretariat to include those approved in the Roster of Applicants within one (1) month from receipt thereof.

SECTION 32. *ENDORSEMENT OF CHILD FOR INTER-COUNTRY ADOPTION.* — A child who has been committed to the Department and who may be available for inter-country adoption shall be endorsed to the Board by the Department. The endorsement shall contain a certification by the Department 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.

SECTION 33. *SUPPORTING DOCUMENTS.* — 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, or 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.

Significantly, Section 30 of the rules quoted above still refers to "Article 184 of the Family Code." This particular article of the Family Code has already been amended by Section 7 of Article 3 of Republic Act No. 8552, known as the Domestic Adoption Act of 1998. Article 184 of the Family Code provided that, as a general rule, aliens cannot adopt except in certain special circumstances. However, under the Domestic Adoption Act of 1998, aliens can now generally adopt provided that they possess the same qualifications required of a Filipino who is qualified to adopt and provided further that they possess the required residency and certification requirements unless they fall under the exceptions provided by law.

SEC. 11. *Family Selection/Matching.* — No child shall be matched to a foreign adoptive family unless it is satisfactorily shown that the child cannot be adopted locally. The clearance, as issued by the Board, with the copy of the minutes of the meetings, shall form part of the records of the child to be adopted. When the Board is ready to transmit the Placement Authority to the authorized and accredited inter-country adoption agency and all the travel documents of the child are ready, the adoptive parents, or any one of them, shall personally fetch the child in the Philippines.

MATCHING. Matching refers to the judicious pairing of the applicant and the child to promote a mutually satisfying parent-child relationship. The rules and regulations provide for the manner of how matching shall be made, thus:

SECTION 34. *MATCHING.* — The matching of the child to an applicant shall be carried out during a matching conference before the Committee participated in by the executive director or social worker of the child caring agency or the social worker of the Department in case of adoption by a relative. The Board shall set the guidelines for the manner by which the matching

process shall be conducted and shall include among others the following:

(a) Matching proposal

(b) Filing of matching proposal

(c) Presentation by the social worker

(d) Deliberations

(e) Committee action (approval, disapproval or deferment)

(f) Motion for reconsideration

SECTION 35. *APPROVAL OF MATCHING.* — The Committee shall endorse the matching proposal to the Board for its approval or other appropriate action. The endorsement shall state the reasons for the Committee's recommendation on the placement.

SECTION 36. *BOARD ACTION ON APPROVED MATCHING.* — The Board shall immediately act on the matching proposal of the Committee. If the same is approved, a notice of matching shall be sent to the concerned foreign adoption agency within five (5) days from date of approval and shall be accompanied by the following documents:

(a) Child Study Report;

(b) Health certificate and medical history of the child;

(c) Recent photographs of the child; and

(d) Itemized pre-adoptive placement costs.

The applicant shall notify the foreign adoption agency in writing of his/her decision on the matching proposal within fifteen (15) calendar days from receipt of said proposal unless the applicant requests for additional information about the child. The matching proposal shall be deemed rejected if the applicant, through the foreign adoption agency, fails to notify the Board of his/her decision within fifteen (15) days from receipt of the notice.

SECTION 37. *NO CONTACT BETWEEN APPLICANT AND CHILD'S PARENTS.* — No matching arrangement except under these 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 Committee has been approved by the Board. 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 Board, is at stake.

SECTION 38. *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 Board 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.

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SECTION 40. *PRE-DEPARTURE PREPARATION OF THE CHILD*. — 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 Department 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.

SECTION 41. *FETCHING OF CHILD BY APPLICANT*. — 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.

The unjustified failure of the applicant to fetch the child within said period shall result in the automatic cancellation of the Placement Authority.

SEC. 12. *Pre-adoptive Placement Costs.* — The applicant(s) shall bear the following costs incidental to the placement of the child:

a) The cost of bringing the child from the Philippines to the residence of the applicant(s) abroad, including all travel expenses within the Philippines and abroad; and

b) The cost of passport, visa, medical examination and psychological evaluation required, and other related expenses.

SEC. 13. *Fees, Charges and Assessments.* — Fees, charges, and assessments collected by the Board in the exercise of its functions shall be used solely to process applications for inter-country adoption and to support the activities of the Board.

PRE-ADOPTIVE PLACEMENT COST. 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 Board may defray the costs subject to reimbursement (Section 39, Rules and Regulations).

SEC. 14. *Supervision of Trial Custody.* — The governmental agency or the authorized and accredited agency in the country of the adoptive parents which filed the application for inter-country adoption shall be responsible for the trial custody and the care of the child. It shall also provide family counseling and other related services. The trial custody shall be for a period of six (6) months from the time of placement. Only after the lapse of the period of trial custody shall a decree of adoption be issued in the said country, copy of which shall be sent to the Board to form part of the records of the child.

During the trial custody, the adopting parent(s) shall submit to the governmental agency or the authorized and accredited agency, which shall in turn transmit a copy to the Board, a progress report of the child's adjustment. The progress report shall be taken into consideration in deciding whether or not to issue the decree of adoption.

The Department of Foreign Affairs shall set-up a system by which Filipino children sent abroad for trial custody are monitored and checked as reported by the authorized and accredited inter-country adoption agency as well as the repatriation to the Philippines of a Filipino child whose adoption has not been approved.

TRIAL CUSTODY AND ADOPTION DECREE. The rules and regulations specify the manner of trial custody, the issuance of an adoption decree and the consequence of the failure to obtain a foreign adoption decree, to wit:

> SECTION 42. *TRANSFER OF CUSTODY OF THE CHILD.* — 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.
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> SECTION 43. *SUPERVISION OF PRE-ADOPTIVE PLACE-MENT.* — 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 Board 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 Board shall furnish the child's home agency a copy of the report.
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> SECTION 44. *EMERGENCY REPORT.* — During the trial custody period, the foreign adoption agency shall notify the Board of any incident that may have resulted in a serious impairment of the relationship between the child and the applicant or of any serious ailment or injury suffered by the child, as soon as possible but not later than seventy-two (72) hours after the incident or the discovery of the ailment or injury.
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> SECTION 45. *TERMINATION OF 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 Board 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.
>
> SECTION 46. *NEW PLACEMENT FOR CHILD.* — In the event of termination of the pre-adoptive relationship, the Board 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 Applicants, the foreign adoption agency may propose a replacement family whose application shall be filed for the consideration of the Board.

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.

SECTION 47. *REPATRIATION OF THE CHILD.* — The child shall be repatriated as a last resort if found by the Board to be in his/her best interests. If the Board 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 inform the Department, the child caring/placing agency concerned and the Department of Foreign Affairs, of the decision to repatriate the child.

SECTION 48. *CONSENT TO ADOPTION.* — 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.

SECTION 49. *FILING OF PETITION FOR ADOPTION.* — 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.

SECTION 50. *DECREE OF ADOPTION.* — 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 Board within one (1) month after its issuance. The copy of the adoption decree shall form part of the records of the Board which shall require the recording of the final judgment in the appropriate local and foreign Civil Register.

SECTION 51. *DISMISSAL OF PETITION FOR ADOPTION.* — In case of dismissal by the foreign tribunal of the petition for adoption filed by the applicant, the procedures under Sections 45, 46, and 47 shall apply.

SECTION 52. *POST-ADOPTION SERVICES.* — The Board shall establish a program of post-adoption services in cooperation with local child-caring and child-placing agencies and foreign adoption agencies.

CONFIDENTIALITY. Just like in domestic adoption, the inter-country adoption law provides for the confidentiality of the records of adoption.

ARTICLE IX

CONFIDENTIALITY

SECTION 53. *RECORDS*. — The application, together with all the records, documents, and communications relating thereto and its processes, shall be confidential. No copy thereof as well as any information relating thereto shall be released without written authority from the Board or the written request of any of the following:

(a) the child/adopted person, with appropriate guidance and counseling, or his/her duly authorized representative, spouse, parent or parents, direct descendants, or guardian or legal institution legally in charge of the adopted person, if a minor;

(b) the court or proper public official whenever necessary in an administrative, judicial or other official proceeding to determine the identity of the parent or parents or of the circumstances surrounding the birth of the child/adopted person; or

(c) the nearest kin, in case of the death of the child/adopted person.

SECTION 54. *PRESERVATION OF INFORMATION*. — The Board shall ensure that information held by them concerning the origin of the child/adopted person, in particular the identity of his/her biological parents, is preserved.

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SECTION 57. *VIOLATION OF CONFIDENTIALITY*. — Any person who shall violate the confidentiality and integrity of records, documents and communications relating to adoption applications, cases and processes, shall suffer the penalty of imprisonment ranging from one (1) year and one (1) day to two (2) years, and/or a fine not less than Five thousand pesos (P5,000.00) but not more than Ten thousand pesos (P10,000.00) at the discretion of the court.

SEC. 15. *Executive Agreements.* — The Department of Foreign Affairs, upon representation of the Board, shall cause the preparation of Executive Agreements with countries of the foreign adoption

agencies to ensure the legitimate concurrence of said countries in upholding the safeguards provided by this Act.

ARTICLE IV

PENALTIES

SEC. 16. *Penalties.* — a) Any person who shall knowingly participate in the conduct or carrying out of an illegal adoption, in violation of the provisions of this Act, shall be punished with a penalty of imprisonment ranging from six (6) years and one (1) day to twelve (12) years and/or a fine of not less than Fifty thousand pesos (P50,000), but not more that Two hundred thousand pesos (P200,000), at the discretion of the court. For purposes of this Act, an adoption is illegal if it is effected in any manner contrary to the provisions of this Act or established State policies, its implementing rules and regulations, executive agreements, and other laws pertaining to adoption. Illegality may be presumed from the following acts:

1) consent for an adoption was acquired through, or attended by coercion, fraud, improper material inducement;

2) there is no authority from the Board to effect adoption;

3) the procedures and safeguards placed under the law for adoption were not complied with; and

4) the child to be adopted is subjected to, or exposed to danger, abuse or exploitation.

b) Any person who shall violate established regulations relating to the confidentiality and integrity of records, documents and communications of adoption applications, cases and processes shall suffer the penalty of imprisonment ranging from one (1) year and one (1) day to two (2) years, and/or a fine of not less than Five thousand pesos (P5,000), but not more than Ten thousand pesos (P10,000), at the discretion of the court.

A penalty lower by two (2) degrees than that prescribed for the consummated felony under this Article shall be imposed upon the principals of the attempt to commit any of the acts herein enumerated.

Acts punishable under this Article, when committed by a syndicate or where it involves two or more children shall be considered as an offense constituting child trafficking and shall merit the penalty of *reclusion perpetua*.

Acts punishable under this Article are deemed committed by a syndicate if carried out by a group of three (3) or more persons conspiring and/or confederating with one another in carrying out any of the unlawful acts defined under this Article. Penalties as are herein provided shall be in addition to any other penalties which may be imposed for the same acts punishable under other laws, ordinances, executive orders, and proclamations.

CRIMINAL ACTS. The acts penalized in the inter-country adoption are considered crimes which are *mala prohibita.* This means that the mere perpetration of the act is enough to be adjudged guilty of committing the crime. There is no more need of showing bad faith or malice. Thus, the rules and regulations provide:

> SECTION 55. *ILLEGAL ADOPTION.* — Any person who shall knowingly participate in the conduct or carrying out of an illegal adoption shall be punished with imprisonment ranging from six (6) years and one (1) day to twelve (12) years and/or fine not less than Fifty Thousand Pesos (P50,000.00), but not more than Two Hundred Thousand Pesos (P200,000.00), at the discretion of the court. For purposes of this Act, an adoption is illegal if it is effected in any manner contrary to the provisions of this Act or established State policies, its implementing rules and regulations, executive agreements, and other laws pertaining to adoption.
>
> SECTION 56. *PRESUMPTION OF ILLEGALITY.* — An adoption shall be presumed illegal if:
>
> (a) the consent for an adoption was acquired through, or attended by coercion, fraud, or improper material inducement;
>
> (b) there is no authority from the Board to effect adoption;

(c) the procedures and safeguards placed under the Act for adoption were not complied with; or

(d) if the child to be adopted is subjected or exposed to danger, abuse and exploitation.

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SECTION 58. *ATTEMPT TO COMMIT OFFENSE.* — A penalty lower by two (2) degrees than that prescribed for the consummated felony described above shall be imposed upon the principals of the attempt to commit any of the acts herein enumerated.

SECTION 59. *CHILD TRAFFICKING.* — Acts punishable under the above provisions shall be considered as an offense constituting child trafficking and shall be punished with *reclusion perpetua* when committed by a syndicate or where it involves two or more children.

An offense is deemed committed by a syndicate if it is carried out by a group of three (3) or more persons conspiring and/or confederating with one another in carrying out any of the unlawful acts.

Penalties herein provided shall be in addition to any other penalties which may be imposed for the same acts punishable under other laws, ordinances, executive orders and proclamations.

SEC. 17. *Public Officers as Offenders.* — Any government official, employee or functionary who shall be found guilty of violating any of the provisions of this Act, or who shall conspire with private individuals shall, in addition to the above-prescribed penalties, be penalized in accordance with existing civil service laws, rules and regulations: *Provided,* That upon the filing of a case, either administrative or criminal, said government official, employee or functionary concerned shall automatically suffer suspension until the resolution of the case.

ARTICLE V

FINAL PROVISIONS

SEC. 18. *Implementing Rules and Regulations.* — The Inter-Country Adoption Board, in coordina-

tion with the Council for the Welfare of Children, the Department of Foreign Affairs, and the Department of Justice, after due consultation with agencies involved in child-care and placement, shall promulgate the necessary rules and regulations to implement the provisions of this Act within six (6) months after its effectivity.

SEC. 19. *Appropriations.* — The amount of Five million pesos (P5,000,000) is hereby appropriated from the proceeds of the Lotto for the initial operations of the Board and subsequently the appropriations of the same shall be included in the General Appropriations Act for the year following its enactment.

SEC. 20. *Separability Clause.* — If any pro-vision, or part hereof, is held invalid or unconstitutional, the remainder of the law or the provision not otherwise affected, shall remain valid and subsisting.

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.

SEC. 22. *Effectivity Clause.* — This Act shall take effect fifteen (15) days after its publication in two (2) newspapers of general circulation.

B. INTER-COUNTRY ADOPTION
(PROCEDURAL RULE A.M. No. 02-6-02 SC)

SEC. 26. *Applicability*. — The following sections apply to inter-country adoption of Filipino children by foreign nationals and Filipino citizens permanently residing abroad.

SEC. 27. *Objectives*. — The State shall:

a) consider inter-country adoption as an alternative means of child care, if the child cannot be placed in a foster or an adoptive family or cannot, in any suitable manner, be cared for in the Philippines;

b) ensure that the child subject of inter-country adoption enjoys the same protection accorded to children in domestic adoption; and

c) take all measures to ensure that the placement arising therefrom does not result in improper financial gain for those involved.

SEC. 28. *Where to File Petition*. — A verified petition to adopt a Filipino child may be filed by a foreign national or Filipino citizen permanently residing abroad with the Family Court having jurisdiction over the place where the child resides or may be found.

It may be filed directly with the Inter-Country Adoption Board.

SEC. 29. *Who may be adopted*. — Only a child legally available for domestic adoption may be the subject of inter-country adoption.

SEC. 30. *Contents of Petition*. — The petitioner must allege:

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 this Rule, in Republic Act No. 8043 and in all other applicable Philippine laws.

SEC. 31. *Annexes*. — The petition for adoption shall contain the following annexes written and officially translated in English:

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.

SEC. 32. *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.

SEC. 33. *Effectivity*. — This Rule shall take effect on August 22, 2002 following its publication in a newspaper of general circulation.

TITLE VIII. — SUPPORT

Article 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 sup-ported 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)

SUPPORT. As a general rule, support includes whatever is necessary to keep a person alive. This is highlighted by the term "indispensable" in Article 194 (Minutes of the Joint Civil Code and Family Law committees held on October 5, 1985, page 7). However, the clause "in keeping with the financial position of the family" determines the amount of support to be given. The said clause therefore eliminates the distinction between natural support and civil support in Article 194 (Minutes of the Joint Civil Code and Family Law Committees held on October 5, 1985, page 17). Natural support has been understood as the basic necessities while civil support refers to anything beyond the basic necessities. In the second paragraph, the word "schooling" refers to formal education while the term "training" refers to non-formal education (Minutes of the Joint Civil Code and Family Law Committees held on October 5, 1985, page 5).

Article 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 full or half-blood. (291a)

MANDATORY NATURE. Support is a mandatory obligation. Article 195 highlights this point when it provides that the persons enumerated therein are "obliged to support each other." Notwithstanding that the Family Code did not incorporate or adopt Article 301 of the Civil Code stating that the right to receive support cannot be renounced nor can it be transmitted to a third person and neither could it be compensated with what the recipient owes the obligor, the very nature of support as a mandatory and essential obligation nevertheless demands that the same cannot be waived, renounced, transmitted or compensated as such obligation is necessary for the existence, survival and well-being of the individual ought to be supported. The Supreme Court has even said that support is the most sacred and important of all obligations imposed by law and it is imposed with overwhelming reality. The others may sometimes fail but this one should never fail unless for a valid cause (*Sumulong v. Cembrano*, 51 Phil. 719). Despite the non-adoption of Article 301 of the Civil Code in the Family Code, the waiver, renunciation, transmission or compensation of the right to receive support cannot still be undertaken as such acts are contrary to law, public policy, morals or good customs pursuant to Article 6 of the Civil Code. Likewise such waiver, renunciation, transmission and compensation are clearly in violation of the mandatory obligation under Article 195 and therefore, if such proscribed acts are undertaken, they shall be void pursuant to Article 5 of the Civil Code. The importance of support is even made more pronounced by Article 2035 of the Civil Code which provides, among others, that no compromise shall be valid upon the question of future support.

Thus, in *De Asis v. Court of Appeals*, 303 SCRA 176, where a mother in a previous support-case manifested that it was useless to claim further support for her son from the defendant who denied paternity and where she agreed to the dismissal of the said case

provided the defendant did not pursue his counterclaim, the Supreme Court held that such manifestation did not bar the mother from filing a subsequent case for support on behalf of the same child against the same defendant because such manifestation and the agreement to dismiss the case on condition that the defendant did not pursue the counterclaim against the mother constitute a form of renunciation as they severed the vinculum that gives the child the right to claim support from the putative parent. Such agreement is likewise in the nature of a compromise which cannot be countenanced as it violates the prohibition against any compromise of the right to future support. The Supreme Court likewise stated that if paternity is at issue in a case, its existence or absence must be judicially established and cannot be left to the will or agreement of the parties.

BETWEEN SPOUSES. As between spouses, the duty to support and the right to be supported presuppose a valid marriage between the parties. It is the fact of a valid marriage that gives rise to the duty of husbands and wives to support each other (*Santos v. Sweeney*, 4 Phil. 79). The right to support between spouses proceeds from the law and is based also on their obligation to mutually help each other, created by the matrimonial bond (*Mendoza v. Parungao*, 49 Phil. 271).

> The mere act of marriage creates an obligation on the part of the husband to support the wife. This obligation is founded not so much on the express or implied terms of the contract of marriage as on the natural and legal duty of the husband; an obligation, the enforcement of which is of such vital concern to the state itself that the law will not permit him to terminate it by his own wrongful acts in driving his wife to seek protection in the parental home. A judgment for separate maintenance is not due and payable either as damages or penalty; nor is it a debt in the strict legal sense of that term, but rather a judgment calling for the performance of a duty made specific by the mandate of the sovereign. This is done from necessity and with a view to preserve the public peace and the purity of the wife; as where the husband makes so base demands upon his wife and indulges in the habit of assaulting her. The *pro tanto* separation resulting from a decree of separate support is not an impeachment of that public policy by which marriage is regarded as so sacred and inviolable in its nature; it is merely a stronger policy overruling a weaker one; and except in so far only as such separation is tolerated as a means of preserving the public peace and morals may be considered, it does not in any respect whatever impair

> the marriage contract or for any purpose place the wife in the situation of a *feme sole.*

In *Dadivas de Villanueva v. Villanueva,* 54 Phil. 93, the Supreme Court allowed separate maintenance to be given to the wife by the husband who was the cause of the separation of the said couple, thus:

> The law is not unreasonable as to require a wife to live in marital relations with a husband whose incurable propensity towards women makes common habitation with him unbearable. Deeply rooted instincts of human nature sanction the separation in such case, and the law is not unreasonable as to require an acquiescence on the part of the injured party which is beyond the capacity of nature. In order to entitle a wife to maintain a separate home and to require separate maintenance from her husband, it is not necessary that the husband should bring a concubine into the marital domicile. Perverse and illicit relations with women outside of the marital establishment are enough. As was said by Justice Moreland in *Goitia v. Campos Rueda*, 35 Phil. 252, 262, a husband cannot, by his own wrongful acts, relieve himself from the duty to support his wife imposed by law; and where a husband by wrongful, illegal and unbearable conduct, drives his wife from the domicile fixed by him, he cannot take advantage of her departure to abrogate the law applicable to the marital relations and repudiate his duties thereunder.

However, it has been held that the adultery of the wife is a valid defense against an action for support (*Quintana v. Lerma*, 24 Phil. 285 as cited in *Sanchez v. Zulueta*, 68 Phil. 110) initiated by the wife claiming support. Also, a spouse who leaves the conjugal home or refuses to live therein, without just cause, shall not have the right to be supported from the conjugal properties or the absolute community of properties, as the case may be (Articles 100 and 127 of the Family Code).

It must be important to note however that in a case for support between husband and wife where the validity of the marriage is in issue, the aggrieved party cannot be given support *pendente lite* [during the pendency of the suit] by the other spouse immediately without due hearing because prior to the rendition of a final judgment declaring the existence or non-existence of the marriage, nothing exist except the allegation of marriage and a denial thereof (*Yangco v. Rohde*, 1 Phil. 404). Pending the proceedings for legal separation

or annulment of the marriage, the spouses shall be supported by the absolute community or the conjugal partnership, as the case may be. In cases of legal separation, Article 198 states that the court may order the guilty spouse to support the innocent one, even after the separation has been decreed. It must be noted that in annulment cases, the marriage is considered valid until annulled while in legal separation cases, the marriage is admitted as valid and the action merely deals with the separation of the spouses from bed and board.

However, once a marriage is annulled, or declared void *ab initio*, the obligation to give support ceases (*Mendoza v. Parungao*, 41 Phil. 271). In legal separation, support likewise ceases unless the court orders the guilty spouse to support the innocent spouse.

BETWEEN ASCENDANTS AND DESCENDANTS. All members of the family in the direct legitimate ascending and descending line are obliged to support each other. The purpose of the provisions on support is to ensure that members of a family do not allow any member of the same family to become a burden to society. If the relationship between the one to be supported and the one to support is in issue, the status of the parties should be established first before support can be made. Thus, in *Francisco v. Zandueta*, 61 Phil. 752, it was held:

> Paraphrasing the language in the decision in the *Yangco case* (1 Phil. 404) it may be said that in the present case the action for support is brought by a minor, through his guardian *ad litem*, who alleges that he is the son of the petitioner; therefore, it is necessary for him to prove his civil status as such son. His alleged civil status being in litigation, it is evident that nothing can be taken for granted upon the point in issue. There is no law or reason which authorizes the granting of support to a person who claims to be a son in the same manner as to a person who establishes by legal proof that he is such a son. In the latter case, the legal evidence raises a presumption of law, while in the former there is no presumption. There is nothing but a mere allegation, a fact in issue, and a simple fact in issue must not be confounded with an established right recognized by a final judgment. The civil status of sonship being denied and this civil status, from which the right of 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. It is also evident that there is a substantial difference between the capacity of a person after the rendition of a final judgment in which that person is declared to be in possession of the status of a son and his capacity prior to

> such time when nothing exists other than his suit or claim to be declared in possession of such suit.

A valid defense to refuse support by a husband to a child claiming support is that such child is the fruit of an adulterous relationship, for in such case, it would not be the child of the person from whom support is being sought and hence, would not be entitled to support (*Sanchez v. Zulueta*, 68 Phil. 110).

BETWEEN PARENTS AND THEIR LEGITIMATE CHILDREN AND THE LEGITIMATE AND ILLEGITIMATE CHILDREN OF THE LATTER. Under the law on support, the parents are obliged to support their children and their grandchildren whether legitimately or illegitimately related to their legitimate children and *vice versa*. This is premised on the principle that as long as one is related by blood to the person who is supposed to give support, there is no reason why the obligation to support him should fall on society and not on his family. However, the persons obliged to support each other are limited from the grandparents to the grandchildren only and *vice versa*.

The Civil Code and Family Law committees explained the inclusion of even an illegitimate child under Article 196, *to wit:*

> The illegitimate children are clearly burdened with the stigma of bastardy and there is no reason why the committee should further inflict punishment or other disabilities on them. The committee is trying to ameliorate as much as possible the stigma. In addition, the sentiment of the present Civil Code of 1950 was best captured in the words: "There are no illegitimate children, there are only illegitimate parents." The committee is therefore implementing this rule. The committee has sufficiently studied the grounds for claim of support and believes that they are sufficient (Minutes of the 186th of the Joint Meeting of the Civil Code and Family Law committees held on July 4, 1987, page 14).

BETWEEN PARENTS AND THEIR ILLEGITIMATE CHILDREN AND THE LEGITIMATE AND ILLEGITIMATE CHILDREN OF THE LATTER. The parents are likewise obliged to support their illegitimate children and their grandchildren whether or not legitimately or illegitimately related to their illegitimate children and *vice versa*. (*Montefalcon v. Vasquez,* G.R. No.165016, June 17, 2008). Again, the persons obliged to support each other are limited from the grandparents to the grandchildren only and *vice versa*.

It has been held that if in a hearing for support *pendente lite*, the status of the child is at issue, the alleged child can get support in the meantime while the case is pending from the alleged parent if his status as such has been proven provisionally. This can only be attained if there is *prima facie* evidence, such as the affidavit of the claimant-child and the testimonies of witnesses, to show the merit of the claim of the child. However, the finding is merely provisional and is subject to the final outcome of the trial on the merits (*Mangulabnan v. IAC*, 185 SCRA 760).

Also, in *Quimiguing v. Icao*, 34 SCRA 132, the Supreme Court held that:

> 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 x x x, 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 x x x.
>
> 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. x x x

BETWEEN LEGITIMATE BROTHERS AND SISTERS, WHETHER FULL OR HALF-BLOOD. The collateral blood relatives obliged to support each other are limited to legitimate brothers and sisters, whether of the full or half-blood. Hence, uncles, aunts, nephews and nieces are not obliged to support each other.

> **Article 196. Brothers and sisters not legitimately related, whether of the full or half-blood, 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 and sister, being of age, is due to a cause imputable to the claimant's fault or negligence. (291a)**

ILLEGITIMATE BROTHERS AND SISTERS. Brothers and sisters, illegitimately related, whether of the full or half-blood, are also entitled to support each other. However, if an illegitimate brother or sister is of age and the need for his or her support is due to his or her fault or negligence, support does not become a demandable right and, therefore, may not be given at all.

> **Article 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)**

SOURCE. Article 197 points out the source from where the support should be taken out. The said article highlights the fact that the support referred to in Article 195 is the support which the people enumerated therein owe personally to each other. Thus, it is from the separate property of the person obliged to give support that support in favor of his or her legitimate ascendants, legitimate or illegitimate descendants, brothers and sisters whether legitimately or illegitimately related shall be obtained.

If the legitimate descendants are the common children of the spouses or the legitimate children of either spouse, the absolute community of property or the conjugal partnership of gains shall be principally charged for their support (Article 94[1] and Article 121[1]). This is different from the personal support owing to them from the father or mother as provided for in Articles 195 and 197.

It must be noted that the law likewise provides that the absolute community of property 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 if there is no separate property of the obligor. Indeed, the law makes a very exacting condition for the community property or the conjugal partnership property to be liable in the meantime, considering the condition

that there must be no separate property available and not merely insufficiency thereof.

However, in so far as the illegitimate children of either of the spouses are concerned, the mere insufficiency of the separate property is enough to make the absolute community property liable in the meantime (Article 94[9]). On the other hand, if the regime is the conjugal partnership of gains, the latter can in the meantime be held liable if the responsibilities enumerated in Article 121 have been covered and there is at least insufficiency of the separate property of the spouse who is called upon to make the support (Article 122).

Article 197 does not indicate where the spouse will get the support of the other spouse. Principally, the absolute community or the conjugal partnership shall be liable for the support of the spouses (Article 94[1] and Article 121[2]). However, support to the spouse is also part of the support of the family such that in the absence of the conjugal partnership property or the absolute community property, support can be taken from the income or fruits of the separate property of the obligor-spouse and, in case of insufficiency or absence of said income or fruits, such obligations shall be satisfied from the obligor-spouse's separate property itself (See Article 70). If however, a particular spouse leaves the home without just cause, he or she shall not be entitled to be supported from the community property or from the conjugal partnership of gains (Article 100[1] and Article 127[1]).

> **Article 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)**

SUPPORT *PENDENTE LITE*. Pending litigation, if there is absolute community property or conjugal partnership property, support for the spouses and the children shall be drawn from the absolute community property or conjugal partnership of gains. However, support under this chapter is principally obtained from the separate property of the spouse from whom support is sought.

Rule 61 of the 1997 Rules of Civil Procedure provides the manner by which support *pendente lite* can be obtained, thus:

> Section 1. *Application.* — At the commencement of the proper action or proceeding, or at any time prior to the judgment or final order, a verified application for support *pendente lite* may be filed by any party stating the grounds for the claim and the financial condition of both parties, and accompanied by affidavits, depositions or other authentic documents in support thereof.
>
> Section 2. *Comment.* — A copy of the application and all supporting documents shall be served upon the adverse party, who shall have five (5) days to comment thereon unless a different period is fixed by the court upon his motion. The comment shall be verified and shall be accompanied by affidavits, depositions, or other authentic documents in support thereof.
>
> Section 3. *Hearing.* — After the comment is filed, or after the expiration of the period for its filing, the application shall be set for hearing not more than three days thereafter. The facts in issue shall be proved in the same manner as is provided for evidence on motion.
>
> Section 4. *Order.* — The court shall determine provisionally the pertinent facts, and shall render such order as justice and equity may require, having due regard to the probable outcome of the case, and such other circumstances as may aid in the proper resolution of the question involved. If the application is granted, the court shall fix the amount of money to be provisionally paid or such other forms of support as should be provided, taking into account the necessities of the applicant or the resources or means of the adverse party and the terms of payment or mode of providing support. If the application is denied, the principal case shall be tried and decided as early as possible.
>
> Section 5. — If the adverse party fails to comply with an order granting support *pendente lite,* the court shall*, motu proprio* or upon motion, issue an order of execution against him or her, without prejudice to his liability for contempt. When the person ordered to give support *pendente lite* refuses or fails to do so, any third person who furnished that support to the applicant may, after due notice and hearing in the same case, obtain a writ of execution to enforce his right of reimbursement against the person ordered to provide such support.
>
> Section 6. *Support in criminal cases.* — In criminal actions where the civil liability includes support for the offspring as a consequence of the crime and the civil aspect thereof has

> not been waived, reserved or instituted prior to its filing, the accused may be ordered to provide support *pendente lite* to the child born to the offended party allegedly because of the crime. The application therefor may be filed successively by the offended party, her parents, grandparents or guardian and the State in the corresponding criminal case during its pendency, in accordance with the procedure established under this Rule.
>
> Section 7. *Restitution.* — When the judgment or final order of the court finds that the person who has been providing support *pendente lite* is not liable therefor, it shall order the recipient thereof to return to the former the amounts already paid with legal interest from the dates of actual payment, without prejudice to the right of the recipient to obtain reimbursement in a separate action from the person legally obliged to give support. Should the recipient fail to reimburse said amounts, the person who provided the same may likewise seek reimbursement thereof in a separate action from the person legally obliged to give such support.

It has been held that adultery of the wife is a defense in an action for support. However, the alleged adultery of the wife must be established by competent evidence. The mere allegation that the wife committed adultery will not bar her from the right to receive support *pendente lite.* Adultery is a good defense and if properly proved and sustained will defeat the action (*Reyes v. Ines-Luciano*, 88 SCRA 803). Also,

> 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 ascertain 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 affidavit may satisfy the court to pass upon the application for support *pendente lite*. It is enough that the facts be established by affidavits or other documentary evidence appearing in the record (*Reyes v. Ines-Luciano*, 88 SCRA 803).

In *Lerma v. Court of Appeals,* 61 SCRA 440, where a spouse, who was convicted of adultery, was the one who filed a case against her husband for legal separation and, during the pendency of the suit, invoked the provision of Article 292 of the Civil Code which is now Article 198 of the Family Code, and where the other spouse contended that such adulterous act of the spouse is a defense to successfully resist from giving support *pendente lite,* the Supreme Court observed and ruled:

It is suggested that while adultery may be a defense in an action for personal support, that is, support of the wife by the husband from his own funds, it is not a defense when the support is to be taken from the conjugal partnership property.

We do not see that the distinction is material in this case. In the first place, Article 292 is not in itself the source of the legal right to receive support. It merely states that the support, not only of the spouses but also of the children, shall be taken from the conjugal property during the pendency of the legal separation proceeding. It does not preclude the loss of such right in certain cases. In the second place, the said article contemplates the pendency of a court action and, inferentially at least, a *prima facie* showing that the action will prosper. For if the action is shown to be groundless, the mere filing thereof will not necessarily set Article 292 in operation. This is also the sense of Section 5 of Rule 61, *supra*, which requires, among other things, when support *pendente lite* is applied for, that the court determine provisionally "the probable outcome of the case." x x x

In a provisional sense at least, within the meaning of Rule 61 (Section 5), the probable failure of the respondent's suit for legal separation can be foreseen since she is not an innocent spouse, having been convicted of adultery by the Court of First Instance. It is true that the judgment of conviction is on appeal in the Court of Appeals, but the same undoubtedly satisfies the standard of provisional showing set by the aforesaid Rule. If legal separation cannot be claimed by the guilty spouse in the first place, the fact that an action for that purpose is filed anyway should not be permitted to be used as a means to obtain support *pendente lite*, which, without such action, would be denied on the strength of the decisions of this Court recognizing adultery as a good defense. Otherwise, as pointed out by the petitioner, all that an erring spouse has to do to circumvent such defense would be to file a suit for legal separation no matter how groundless.

The right to separate support or maintenance, even from the conjugal partnership property, presupposes the existence of a justifiable cause for the spouse claiming such right to live separately. This is implicit in Article 104 of the Civil Code (now Article 61 of the Family Code) which states that after the filing of the petition for legal separation the spouses shall be entitled to live separately from each other. A petition in bad faith, such as that filed by one who is himself or herself guilty of an act which constitutes a ground for legal separation at the instance of the other spouse, cannot be considered as within the intendment of the law granting support.

Article 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)

Article 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, 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)

ORDER OF PRIORITY. The law sets the order of the persons upon whom the liability of giving support devolves. Hence, in the presence of the spouse, the descendants nearest in degree are not obliged to give support. In the same vein, the ascendants nearest in degree shall be obliged to give support only in the absence of or in case of failure or refusal to give support by the descendants in the nearest degree.

In *Mangonon v. Court of Appeals*, G.R. No. 125041, June 30, 2006, 494 SCRA 1, the Supreme Court ordered the grandfather, who was proven to be well-off, to support his grandchildren on the basis of Article 199, considering that their parents were not capable of supporting the children.

Article 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)

Article 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)

PROPORTIONALITY. While the law mandates that those related by marriage and family relationship are generally obliged to support each other, the law is not that unreasonable as to contemplate a situation where the one giving the support shall be compelled to make such support to the detriment of his or her own being and existence. Thus, support must be based on the necessities of the recipient and the resources or means of the person obliged to furnish support. In *Vinluan v. Court of Appeals,* 24 SCRA 787, it was held that where the aggregate annual income of the conjugal properties was only P3,000 and the wife, in her complaint, merely prayed for no more than a monthly allowance of P200, an award to the wife and children for a monthly alimony *(pendente lite)* of P1,000 was clearly excessive.

Also, where it appears that the appellee was earning P365 yearly from his rice mill and P720 from his ten-hectare parcel of land, the yearly produce of which was 120 cavans of palay, valued at P6.00 per cavan and where the lower court, in accordance with the said data concluded that his gross annual income was P1,085 and used this as basis in computing the amount of support due to his illegitimate son, taking into consideration that he was also supporting his wife and three legitimate children, the Supreme Court increased the amount of support from P15.00 granted by the lower court to P25.00 considering that it further appeared from the records that the appellee had another source of income namely, a tailoring shop which earned in 1958 P573.50 in gross receipts and that he owned a house and lot in Kabankalan, Negros Occidental and consequently, did not have to pay rent for his family's expenses. The Supreme Court said that such increase was but proper in accordance with Article 296 of the Civil Code (now Article 201 of the Family Code) which provides that the amount of support shall be in

proportion to the resources or means of the giver and to the needs of the recipient (*Baltazar v. Serfino*, 14 SCRA 820).

PROVISIONAL CHARACTER OF SUPPORT JUDGMENT. It is also because of the changing needs of the recipient and the changing ability of the provider that any judgment for support does not become final (*De Asis v. Court of Appeals*, 303 SCRA 176; *Montefalcon v. Vasquez*, G.R. No. 165016, June 17, 2008). Hence, in *Advincula v. Advincul*a, 10 SCRA 189, it was held:

> The right to support is of such nature that its allowance is essentially provisional; for during the entire period that a needy party is entitled to support, his or her alimony may be modified or altered, in accordance with his increased or decreased needs, and with the means of the giver. It cannot be regarded as subject to final determination.
>
> > "x x x a judgment in a suit by a wife for separate maintenance is not regarded as final, but may be modified at anytime for sufficient reasons upon the application to the court x x x." (Gorayeb v. Hashim, 47 Phil. 87).
> >
> > "The amount of support depends upon the needs of the party entitled as well as on the capacity of the person bound to give support x x x and any sum pre-viously fixed shall be reduced or increased proportionately in accordance with the increased or decreased needs of the party entitled to support and of the means of the giver x x x." (*Gonzales v. Gonzales*, 43 Off. Gaz. 4691).
>
> x x x This being true, it is indisputable that the present action for support can be brought, notwithstanding the fact that the previous case filed against the defendant was dismissed. x x x Once the needs of the plaintiff arise, she has the right to bring the action for support, for it is only then that her cause of action accrues. The right to ask support is demandable from that date in which plaintiff was in need of the same (*Marcelo v. Estacio*, 70 Phil. 215).

Also, in *Samson v. Yatco*, 1 SCRA 1145, it was held that if the petitioners' right of support had already been recognized by the court or the respondent, an order of dismissal of the action for support on some other grounds cannot be with prejudice as this would deprive the petitioners the right to present and future support.

In *Velayo v. Velayo*, 127 Phil. 110, it has been held that judgment for support does not become dormant; the five-year period

for execution (Section 6, Rule 39, Rules of Court) does not apply thereto; rather, the support under the judgment becomes due from time to time as provided and is enforceable by simple motion at any time, except as to installments not recovered within the statute of limitations.

> **Article 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 extrajudicial 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)**

DEMAND. Payment of the amount for support starts only from the time support has been judicially or extra-judicially demanded (*Sy v. Court of Appeals,* G.R. No. 124518, December 27, 2007). In *Jocson v. Empire Insurance Co.*, 103 Phil. 580, the Supreme Court observed:

> Support does include what is necessary for the education and clothing of the person entitled thereto x x x. But support must be demanded and the right to it established before it becomes payable (x x x *Marcelo v. Estacio*, 70 Phil. 215). For the right to support does not arise from the mere fact of relationship, even from the relationship of parents and children, but "from imperative necessity without which it cannot be demanded, and the law presumes that such necessity does not exist unless support is demanded" (Civil Code of the Philippines Annotated, Tolentino, Vol. 1, p. 181, citing Manresa 685). In the present case, it does not appear that support for the minors, be it only for the education and clothing, was ever demanded from their father and the need for it duly established. The need for support as already stated, cannot be presumed, and especially must this be true in the present case where it appears that the minors had means of their own.

In a case where an illegitimate child was born on December 19, 1943 and the extrajudicial demand for support was made only on

June 1959, the Supreme Court held that payment of support should begin only from June 1959 applying Article 298 of the Civil Code (now Article 203 of the Family Code) which provided that the obligation to give support shall be demandable from the time the person who had a right to receive the same needed it for maintenance, but it shall not be paid except from the date it was extrajudicially demanded (*Baltazar v. Serfino*, 14 SCRA 820). Under Article 203 of the Family Code which amended Article 298 of the Civil Code, payment shall be made from the time it was extrajudicially demanded or from the time it was judicially demanded.

Also, in a case filed in the lower court on August 14, 1972 at the time when the plaintiff was seven years of age and where it was proved that the plaintiff was an illegitimate child of the father; that she was born on December 30, 1963; that she was already of school age spending about P400.00 to P500.00 a month for her school expenses alone, while defendant was earning about P10,000.00 a month; that she attained the age of majority on December 30, 1984, the Supreme Court upheld the ruling of the Court of Appeals decreeing that the child, on the basis of Article 203 of the Family Code, is entitled to support in arrears for a period of twelve (12) years, four (4) months and fourteen (14) days which was fixed at P800.00 a month for the first three (3) years; and considering the declining value of the peso as well as her needs as she grows older, at a graduated increase of P1,000.00 a month for the next three (3) years; P1,300 a month for the succeeding three (3) years; and P1,500.00 a month for the last three (3) years, four months and fourteen (14) days until she attained the age of majority (*Ilano v. Court of Appeals*, G.R. No. 104376, February 23, 1994, 48 SCAD 432).

In *Sy v. Court of Appeals*, G.R. No. 124518, December 27, 2007, even if support were not prayed for in a custody suit but it was sought during the hearing of the case without the objection of the other party, a decision on support can be obtained even if the pleadings were not amended to conform to the evidence.

SUPPORT IN ARREARS. In *Mangonon v. Court of Appeals*, G.R. No. 125041, June 30, 2006, 494 SCRA 1, the Supreme Court allowed the payment of support in arrears considering that the children, who should have been given support, must have already finished their schooling by the time the decision was rendered. The amount of support to be paid was computed from the time they entered college until they had finished their respective studies.

Article 204. The person obliged to give support shall have the option to fulfill the obligation either by paying the allowance fixed, or by receiving and maintaining in the family dwelling the person who has a right to receive support. The latter alternative cannot be availed in case there is a moral or legal obstacle thereof. (299a)

OPTION. The right to elect the manner in which this support shall be given is a right conferred by law upon the person whose duty it is to give such support (*Mendoza v. Ibanez*, 4 Phil. 666). However, this right is not absolute as to prevent cases being considered wherein, either because this right would be opposed to the exercise of a preferential right or because of the existence of some justifiable cause morally opposed to the removal of the party enjoying the maintenance, the right of selection must thereby be restricted (*US v. Alvir*, 9 Phil. 576). Thus, it has been held that the wife, who is forced to leave the conjugal abode by her husband, without fault on her part, may maintain an action against the husband for separate maintenance when she has no other remedy, notwithstanding the provision of the law giving the person who is obliged to furnish support the option to satisfy it either by paying a fixed pension or by receiving and maintaining in his home the one having the right to the same (*Goitia v. Campos Rueda*, 35 Phil. 252).

In *Mangonon v. Court of Appeals*, G.R. No. 125041, June 30, 2006, 494 SCRA 1, the Supreme Court rejected the choice of the one giving support, namely the grandfather in accordance with the hierarchy provided in Article 199, to take custody of the grandchildren considering that, while they were in good terms prior to the filing of the suit for support *pendent lite*, the relationship of the grandfather and the grandchildren had already turned sour during the pendency of the suit, especially when accusations were hurled against each other. The Supreme Court said, "particularly difficult for Rica and Rina must be the fact that those who they had considered and claimed as family denied having familial relationship with them."

Article 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)

EXEMPTION FROM ATTACHMENT OR EXECUTION. Anything obtained by way of support necessarily implies provisions made for the survival and well-being of the recipient. To deprive such recipient of these provisions will clearly be prejudicial to his or her very existence. Hence, the law makes it very clear that the right to receive support and the money or property obtained as such support cannot be made to satisfy any judgment against the recipient. It cannot be attached nor be subject to execution.

However, 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 (Article 208 of the Family Code).

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. (2164a)

Article 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)

QUASI-CONTRACT. The resulting relationship between the stranger and the person obliged to give support under Articles 206 and 207 is a quasi-contract. Article 2142 of the Civil Code provides that a quasi-contract is a juridical relation which arises from certain lawful, voluntary and unilateral acts to the end that no one shall be unjustly enriched or benefited at the expense of another. A lawful valid obligation arises out of a quasi-contract (Article 1157[3]) (*Lacson v. Lacson*, G.R. No. 150644, August 28, 2006, 499 SCRA 677). Whoever advances the support shall be entitled to be reimbursed unless the grantor gives it as an act of liberality or without intending to be reimbursed.

However, the requirements under Article 206 for a stranger to be reimbursed must be present. Thus, in a 1926 case, *Ramirez and De Marcaida v. Redfern,* 49 Phil. 849, where a spouse obtained a sum of money on different occasions from her sister and where the sister and her husband sued the husband of the said spouse for reimbursement under Article 1894 of the Civil Code, which is now Article 206 of the Family Code, the Supreme Court observed and ruled:

> The case falls squarely within the provisions of the first paragraph of Article 1894 of the Civil Code. This article provides: "When, without the consent of the person who is bound to give support to a dependent, a stranger supplies it, the latter shall be entitled to recover the same from the former, unless it appears that he gave it out of charity, and without expectation of recovering it." For one to recover under the provisions of Article 1894 of the Civil Code, it must be alleged and proved, *first*, that support has been furnished a dependent of one bound to give support but who fails to do so; *second*, that the support was supplied by a stranger; and *third*, that the support was given without the knowledge of the person charged with the duty. The negative qualification is when the support is given without the expectation of recovering it.
>
> With special reference to the combined facts and law, it may be conceded that Mr. and Mrs. Ramirez did not support Mrs. Redfern with money out of charity. The third requisite of the law is also taken out of consideration since Mr. Redfern is the first to acknowledge that the money was handed to his wife by Mr. and Mrs. Ramirez without his knowledge. We think, however, that there is a failure of proof as to the first essential, and possibly the second essential, of the law.
>
> The first requisite of the law has a legal introduction, but ends as a question of fact. The husband and the wife are mutually bound to support each other. By support is understood all that is necessary for food, shelter, clothing and medical attendance, according to the social standing of the family. Parents are also required to bring up and educate their children. But in this connection, the point of interest is that the wife accepted the assistance from another, when it is not shown that she had ever made any complaint to her husband or any of its agents with regard to her allowance. The testimony of the husband is uncontradicted that he had given his English agent instructions to furnish his wife with any reasonable sum she needed, bearing in mind his financial condition, but she never took advantage of this offer. Mr. Redfern's reason for reducing the allowance,

> he says, was his precarious financial situation in 1921 and 1922. Before one can tender succor to the wife of another with an expectation of recouping himself for the loan, the husband should be given an opportunity to render the needful assistance.
>
> With reference also to the first requirement of the law above-mentioned, it is clear that there is evidence in the record which corroborates the finding of the trial judge that the defendant was amply providing for his wife and children in London. But a wife's fortune and a husband's fortune coincide. For children of proper age to be made to look after themselves is not always a hardship. As to the £600 first advanced to Mrs. Redfern, this was not primarily for support because she retained it for some time before using it.

In the above case, if the situation occurred under the Family Code and it could be proven, however, that the loan given to the wife redounded to the benefit of the family, the conjugal partnership of gains or the absolute community of property may be held liable pursuant to Articles 94 and 121 of the Family Code.

With respect to Article 207, the requisites are the following: 1) there is an urgent need to be supported on the part of the recipient; 2) the person obliged to support unjustly refuses or fails to give the support; and 3) a third person furnishes the support to the needy individual. If all these requisites are present, then the third person shall have a right of reimbursement from the person obliged to give support. Clearly, the phrase "when urgently needed" refers not only to the failure to give support by the person obliged to give support but also it refers to any unjust refusal to give such support (Minutes of the Joint Meeting of the Civil Code and Family Law committees held on November 16, 1985, page 9).

Article 207 particularly applies 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. Thus, if a child in Manila writes his father in Davao that he (the child) needs a certain amount of money to be able to pay his full matriculation fees in school to enable him to get the final examinations and the father refuses to give such support on the ground that he is in Davao and he does not see any reason to go to Manila just to give the money to the said son, a third person can furnish the money to the child. Thereafter, such third person can file a claim against the father for reimbursement.

Article 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)

CONTRACTUAL AND TESTAMENTARY SUPPORT. Legal support is that which is mandated by law to be given and that which is provided in Article 194. However, contractual support is one which is entered into by the parties usually with reciprocal duties and obligations. It is not mandated by law. In case of contractual support and that given by will, the excess in amount beyond that required for legal support shall be subject to levy on attachment or execution. Only contractual support, and not support given in a will, is subject to adjustment whenever modification is necessary due to changes of circumstances manifestly beyond the contemplation of the parties.

The basis of contractual support is an agreement. Hence, if the parents procure an educational policy for their children from an insurance company whereby, for valuable consideration or payment of premium, the said corporation shall undertake to finance all the educational needs of the children up to the time they finish college, this particular educational policy is contractual support and the money placed by the corporation in a trust fund to finance the education of the children cannot be subject to levy or attachment except the amount in excess required for legal support. However, if the policy goes beyond educational support by stating that the children shall be given money every vacation to fund their transportation expenses for any provincial trip in the Philippines, the said money for the provincial trips can be attached in the proper cases, as it is not anymore needed in the children's education.

TITLE IX. — PARENTAL AUTHORITY

Chapter 1

GENERAL PROVISIONS

Article 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)

NATURAL RIGHT. The natural affection between the parents and the offspring has always been recognized as an inherent natural right, for the protection of which, just as much as the protection of the right of the individual to life, liberty and the pursuit of happiness, the government is formed (*State ex rel. Nelson v. Whaley,* 246 Minn. 535). It is cardinal that the custody, care and the nurture of the child reside first in the parents whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder (*H.L. v. Matheson,* 450 US 378, 67 L. Ed. 2d 388).

PARENTAL AUTHORITY. In *Incang v. Court of Appeals*, 296 SCRA 128, the Supreme Court said:

> Parental authority involves a mass of rights and obligation which the law grants for the purpose of the children's physical preservation and development, as well as the cultivation of their intellect and the education of their hearts 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.

Article 210. Parental authority and responsibility may not be renounced or transferred except in the cases authorized by law. (313a)

RENUNCIATION AND TRANSFER OF PARENTAL AUTHORITY. The upbringing of the children is a sacred duty entrusted to the parents. Therefore, it cannot simply be renounced or transferred except in the cases authorized by law. In *Santos v. Court of Appeals*, 58 SCAD 17, 242 SCRA 407, where a father who was not shown to be unfit took away his son from the custody of the grandparents through deceit, false pretensions, and trickery, the Supreme Court ruled that the father has the rightful custody of his child and stated:

> 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. Only in the case of the parent's death, absence, or unsuitability may substitute parental authority be exercised by the surviving parents. In the case at bar, there is no proof that the father cannot support the child at the present time. The fact that he failed to financially support the child for three years is not sufficient reason to strip him of custody. His efforts to get the child and take care of him may be construed as an act to rectify his past misdeeds. Being a soldier and going around the country cannot be enough reason to deprive the father of custody. The father's employment of trickery in spiriting away his son from the maternal grandparents, though unjustifiable, is not a ground to wrest custody from him (*See also Sagala-Eslao v. Court of Appeals,* G.R. No. 116773, January 16, 1997, 78 SCAD 50).

However, parental authority can be terminated for cause in accordance with the legal grounds provided in Articles 228 up to 232 of the Family Code.

> The child has the right to call upon the parent for the discharge of this duty, and public policy for the good of society

> will not permit or allow the parent to divest himself of these obligations in this regard or to abandon them at his mere will or pleasure. An omission to discharge this duty is a public wrong which the state, under its police power, may prevent. Each parent has an equal duty to support and protect the child and cannot stand passively by and refuse to do so when it is reasonably within his power. The duty of care is not necessarily dependent upon custody; thus, a mother who does not have custody of her child may have a duty to give him some personal care and attention, though he is being properly supported and maintained by his father (59 Am. Jur. 97).

Article 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. (172, PD 603)

JOINT PARENTAL AUTHORITY. The parents are equally bound to ensure the wholesome upbringing of the children. This precept is in accordance with the natural order of life. A father and a mother are not expected to have a compartmentalized concern over their children or their parental love be split up to serve different purposes.

Prior to the effectivity of the Family Code when there were still various classes of illegitimate children under the Civil Code, the Supreme Court in *Dempsey v. RTC*, 164 SCRA 384, had occasion to rule that joint parental authority must be exercised by the father and the mother of an acknowledged natural child which was one of the classifications of an illegitimate child under the then effective Civil Code. An acknowledged natural child is an illegitimate child whose father has categorically made an admission that he indeed is the father. In the said *Dempsey v. RTC*, 164 SCRA 384, the Supreme Court even expressly referred to Article 211 of the Family Code, which was then about to take effect, *to wit:*

> The Solicitor General points out that the new Family Code promulgated as Executive Order No. 209, July 17, 1978 erases any distinction between legitimate or adopted children on one

> hand and acknowledged illegitimate children on the other, insofar as joint parental authority is concerned. Article 211 of the Family Code, whose date of effectivity is approaching, merely formalizes into statute the practice on parental authority.

In view of the foregoing observation of the Supreme Court, it is clear that Article 211 on joint parental authority applies to both legitimate and illegitimate children. A comparison of the old laws and the new law fortifies this view. In providing for joint parental authority, Article 211 of the Family Code uses the phrase "common children" which does not distinguish whether the said "common children" are legitimate or illegitimate. This is unlike Article 17 of the Child and Youth Welfare Code, which has been expressly repealed by the Family Code (See Article 254), where joint parental authority referred to legitimate or adopted children only. Also, under Article 311 of the Civil Code, which has been likewise repealed by the Family Code, joint parental authority referred only to common "legitimate children who are not emancipated." The change in the Family Code, therefore, is quite significant and indeed reflects the prevailing sentiment that illegitimate children must likewise be the concern of the State and must be accorded rights and privileges which, though not exactly equaling those of the legitimate child, should at least approximate the same. Relevantly, under Article 211, in case of disagreement between the father and the mother, the father's decision shall prevail, unless there is a judicial order to the contrary.

For Article 211 to apply to illegitimate children, two requisites must concur, namely: 1) the father is certain; *and* 2) the illegitimate children are living with the said father and the mother, who are cohabiting without benefit of marriage or under a void marriage not falling under Articles 36 and 53. This must be the interpretation so that Article 211 can be harmonized with Article 176. It must be noted that Article 176, among others, provides that illegitimate children shall be under the parental authority of the mother. This is based on the general premise that paternity of an illegitimate child is not always certain such that a particular male person should not be made to exercise parental authority with all its legal consequences over an illegitimate child who might turn out not to be his child. Hence, unlike Article 211, it follows that Article 176, providing that illegitimate children shall be under the parental authority of the mother only, applies in two cases, *to wit:* 1) where the paternity of the child is unknown or in doubt, and 2) where, though paternity

is certain, *the father is not living with the mother and the child.* Thus, in *David v. Court of Appeals,* 65 SCAD 508, 250 SCRA, 82 where a married man living with his legitimate family got hold of his illegitimate son from the latter's mother who obviously was not living with the said married man, the Supreme stated that, pursuant to Article 176 of the Family Code, the illegitimate son is under the parental authority of the mother only and therefore entitled to have custody of him.

Unfortunately, in the 2004 case of *Briones v. Miguel*, 440 SCRA 2004, the Supreme Court did not take into consideration Article 211 and ruled that illegitimate children are under the sole parental authority of the mother regardless of the acknowledgment of the father. It is however submitted that harmonization between Article 176 and Article 211 should be the better rule.

Again, it is important to emphasize that once parental authority is vested, it cannot be waived except in cases of adoption, guardianship and surrender to a children's home or an orphan institution (*Sagala-Eslao v. Court of Appeals,* 78 SCAD 50, 266 SCRA 317).

PREFERENTIAL CHOICE OF THE FATHER. The father and the mother exercise joint parental authority over the persons of their common children. In case of conflict between the parents, the decision of the father prevails. It is presumed that the decision of the father is for the children's best interest. This preferential paternal right does not mean that the decision of the mother is not for the children's best interest for it can in fact also be for the children's best interest. However, if both the decision of the father and the mother has merit and to be able to prevent a void that might be detrimental to the children's welfare, the decision of the father, as head of the family, is given preference. The law is designed to provide a mechanism by which the conflicts in the family will be resolved principally by people within the family. Hence, the decision of the mother and the children must defer to the decision of the father.

The binding force of the decision of the father in case of conflict is highlighted by the law itself when it provides that only a court order can alter it. If the mother or the children want to change the decision of the father, they must go to court. The basis for altering the decision of the father must however rest on substantial, important and serious ground for the paramount interest of the children; otherwise the court may unduly supplant the parental

prerogative of the father and ultimately negate the primary duty of the parents in the upbringing of their own children. Hence, the mere fact that the mother does not want to have the children study in a particular school simply because the children do not like the school is not enough reason to supplant the decision of the father in having the children study in the said school. If however the school does not evidently provide good instructions or does not teach the children right moral values and the father continually resists or avoids listening to the reasons of the mother, then the mother can go to court and have the decision changed.

DUTIES OF CHILDREN. Article 211 likewise provides that children shall always observe respect and reverence toward their parents and are obliged to obey them as long as the children are under parental authority. Corollarily, Article 357 of the Civil Code of 1950 still effectively provides that every child shall obey and honor his or her parents or guardian; respect his or her grand-parents, old relatives, and persons holding substitute parental authority; exert his utmost for his or her education and training; and cooperate with the family in all matters that make for the good of the same.

RESPONSIBILITIES OF A CHILD UNDER PRESIDENTIAL DECREE NO. 603. Under the Child and Youth Welfare Code, P.D. No. 603 as amended, the responsibilities of children are enumerated in Article 4 thereof, *to wit:*

> Article 4. *Responsibilities of the Child.* — Every child, regardless of the circumstances of his birth, sex, religion, social status, political antecedents and other factors shall:
>
> (1) Strive to lead an upright and virtuous life in accordance with the tenets of his religion, the teachings of his elders and mentors, and the bidding of a clean conscience;
>
> (2) Love, respect and obey his parents, and cooperate with them in the strengthening of the family;
>
> (3) Extend to his brothers and sisters his love, thoughtfulness, and helpfulness, and endeavor with them to keep the family harmonious and united;
>
> (4) Exert his utmost to develop his potentialities for service, particularly by undergoing a formal education suited to his abilities, in order that he may become an asset to himself and to society;
>
> (5) Respect not only his elders but also the customs and traditions of our people, the memory of our heroes, the

duly constituted authorities, the laws of our country, and the principles and institutions of democracy;

(6) Participate actively in civic affairs and in the promotion of the general welfare, always bearing in mind that it is the youth who will eventually be called upon to discharge the responsibility of leadership in shaping the nation's future;

(7) Help in the observance of individual human rights, the strengthening of freedom everywhere, the fostering of cooperation among nations in the pursuit of their common aspirations for programs and prosperity, and the furtherance of world peace.

Article 212. In case of absence or death of either parent, the parent present shall continue exercising parental authority. The marriage 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. (172, PD 603)

REMARRIAGE OF PARENT. The death of one of the parents will not terminate the parental authority of the surviving parent over their children. Upon remarriage of the surviving parent, the parental authority over the children shall likewise not be affected. The new spouse, by virtue of his or her marrying the surviving parent, does not automatically possess parental authority over the children of the surviving parent unless such new spouse adopts the children. Upon remarriage of the surviving parent, the court may appoint another person to be the guardian of the person or property of the children if it is clearly shown that, by reason of the remarriage, the surviving parent cannot undertake the necessary devotion, care, loyalty and concern toward the children.

Article 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.

SEPARATION. Parental authority shall be given to any of the parents who may be designated by the court in case the parents have separated from each other. Although the court may designate the exercise of parental authority on the part of one parent, this designation does not mean that the parental authority of the other parent is necessarily terminated or suspended. Parental authority shall be terminated only if the court so decrees on the basis of the causes for termination or suspension of such authority provided by law. Thus, in *Cang v. Court of Appeals,* 296 SCRA 128, where, in a legal separation case, the parties agreed that custody of the children shall be awarded to the innocent party, who was the mother, leading the court to issue the legal separation decree with such custody arrangement, and where the mother later decided to have the children adopted without the consent of the father claiming that, since the court designated the exercise of parental authority to her in the legal separation case, there was no need to obtain the consent of the father, the Supreme Court ruled that the consent of the father must still be obtained considering that the legal separation decree did not necessarily terminate the parental authority of the father. The Supreme Court said that, in accordance with Article 213 of the Family Code, only the exercise of parental authority was given to the mother. Hence the mother shall have the right to the children's services and earnings, and the right to direct their activities and make decisions regarding their care and control, education, health and religion. Such delegation however did not excuse the mother from obtaining the needed consent of the father in the adoption of the children considering that he still had in him parental authority over the said children. There was no factual finding in the legal separation case that the father was such an irresponsible person that there were grounds under the law that could deprive him of parental authority.

CUSTODY OF CHILDREN. Parents are never deprived of the custody and care of children except for cause. This is a universal rule of all systems of law, as beneficient to the child as it is just to the parent. Indeed, it might well be said to belong to the realm of natural justice (*Ibanez De Aldecoa v. Hongkong and Shanghai Bank*, 30 Phil. 228).

> 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 (*Sagala-Eslao v. Court of Appeals,* 78 SCAD 50, 266 SCRA 317).

In custody cases, the rights of the parents are not the paramount issue. They have been overridden by the singular interests of the child which the parents in turn have submerged by their own acts, in a ratio directly proportional to their responsibility for the family's division. The child's best interest, which constitutes the "cardinal principle" and the "paramount consideration" (*Querubin v. Querubin,* 87 Phil. 125) in custody cases, is the guiding principle. Hence, in custody cases where the spouses are separated from each other, the courts shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit. In this regard, it has been stated that:

> when the welfare of a helpless child is at stake, it is the bounden duty of courts — which they cannot shirk — to respect, enforce, and give meaning and substance to a child's natural and legal right to live and grow in the proper physical, moral and intellectual environment (*Chua v. Cabangbang*, 27 SCRA 791).

If the child is seven years old and above, his or her choice of a parent with whom he or she will live is significant and the court should take this into consideration. However, such choice is not determinative of the issue of custody because, while the choice may be in favor of one parent, the court may still nevertheless award custody to the other parent or even to a third person if the paramount interest of the child so dictates. However, if the child has made a choice and there is no showing that the selected parent is in any way unfit to have custody of the child, the child should be awarded to such parent (*David v. Court of Appeals,* 65 SCAD 508, 250 SCRA 82).

CUSTODY HEARINGS. The procedure for custody cases is now governed by the Rule on Custody of Minors and Writ of Habeas Corpus in Relation to Custody of Minors (A.M. No. 03-04-04-SC) promulgated by the Supreme Court.

A *habeas corpus* case can be availed of to secure the custody of a child (*Tijing v. Court of Appeals,* G.R. No. 125901, March 8, 2001; *David v. Court of Appeals,* G.R. No. 111180, November 16, 1995, 65 SCAD 508) in case the parents are separated from each other. However, it can be used also by the parents as against third persons.

Thus, the writ of *habeas corpus* is also a proper remedy to enable parents to regain the custody of a minor daughter even though the latter be in the custody of third person of her free will because the parents were compelling her to marry a man against her will (*David v. Court of Appeals,* 65 SCAD 508, 250 SCRA 82).

The question of identity is relevant and material in *habeas corpus* proceedings, subject to the usual presumptions including those as to identity of the person. Thus, in *Tijing v. Court of Appeals,* G.R. No. 125901, March 8, 2001, where the real parent-petitoner filed a *habeas corpus* case against the impostor-parent-private respondent who kidnapped the child from the real parents and caused the issuance of a falsified birth certificate indicating that the child was hers and that of her live-in partner despite the fact that she and her partner were sterile, the Supreme Court ruled that the child belongs to the real parent by making the following observations as to identity:

> A close scrutiny of the records of this case reveals that the evidence presented by Bienvenida is sufficient to establish that John Lopez is actually her missing son, Edgardo Tijing, Jr.
>
> *First,* there is evidence that Angelita could no longer bear children. From her very lips, she admitted that after the birth of her second child, she underwent ligation at the Martinez Hospital in 1970, before she lived with Tomas Lopez without the benefit of marriage in 1974. Assuming that she had that ligation removed in 1978, as she claimed, she offered no evidence she gave birth to a child between 1978 to 1988 or for a period of ten years. The midwife who allegedly delivered the child was not presented in court. No clinical records, log book or discharge order from the clinic were ever submitted.
>
> *Second,* there is strong evidence which directly proves that Tomas Lopez is no longer capable of siring a son. Benjamin Lopez declared in court that his brother, Tomas, was sterile because of the accident (where he bumped his private parts against the edge of a banca causing him excruciating pain and eventual loss of his child-bearing capacity) and that Tomas admitted to him that John Thomas Lopez was only an adopted son. Moreover, Tomas Lopez and his legal wife, Maria Rapatan Lopez, had no children after almost fifteen years together. Though Tomas had lived with private respondent for fourteen years, they also bore no offspring.
>
> *Third,* we find unusual the fact that the birth certificate of John Thomas Lopez was filed by Tomas Lopez instead of the

> midwife and on August 4, 1989, four months after the alleged birth of the child. Under the law, the attending physician or midwife in attendance at birth should cause the registration of such birth. Only in default of the physician or midwife can the parent register the birth of his child. The certificate must be filed with the local civil registrar within thirty days after the birth. Significantly, the birth certificate of the child stated Tomas Lopez and private respondent were legally married on October 31, 1974, in Hagonoy, Bulacan, which is false because even private respondent had admitted she is a "common-law wife." This false entry puts in doubt the other data in said birth certificate.
>
> *Fourth,* the trial court observed several times that when the child and Bienvenida were both in court, the two had strong similarities in their faces, eyes, eyebrows and head shapes. Resemblance between a minor and his alleged parent is competent and material evidence to establish parentage. Needless to stress, the trial court's conclusion should be given high respect, it having had the opportunity to observe the physical appearances of the minor and petitioner concerned.
>
> *Fifth,* Lourdes Vasquez testified that she assisted in Bienvenida's birth to Edgardo Tijing Jr., at her clinic. Unlike private respondent, she presented clinical records consisting of a log book, discharge order and the signatures of petitioners.
>
> All these considered, we are constrained to rule that the subject minor is indeed the son of petitioners. The writ of *habeas corpus* is proper to regain custody of said child (*Tijing v. Court of Appeals,* G.R. No. 125901, March 8, 2001).

Also, in child custody hearings, equity may be invoked for the best interest of the child. Thus, in *Dacasin v. Dacasin,* G.R. No. 168785, February 5, 2010, while the Supreme Court ruled as void a custodial agreement providing that the child below seven years shall be under the joint custody of both separated parents, the Supreme Court, instead of dismissing the custody case for lack of cause of action, remanded the case to the lower court for the determination of the child's custody, thus:

> Instead of ordering the dismissal of petitioner's suit, the logical end to its lack of cause of action, we remand the case for the trial court to settle the question of Stephanie's custody. Stephanie is now nearly 15 years old, thus removing the case outside of the ambit of the mandatory maternal custody regime under Article 213 and bringing it within coverage of the default

> standard on child custody proceedings — the best interest of the child. As the question of custody is already before the trial court and the child's parents, by executing the Agreement, initially showed inclination to share custody, it is in the interest of swift and efficient rendition of justice to allow the parties to take advantage of the court's jurisdiction, submit evidence on the custodial arrangement best serving Stephanie's interest, and let the trial court render judgment. This disposition is consistent with the settled doctrine that in child custody proceedings, equity may be invoked to serve the child's best interest.

PARENTAL PREFERENCE RULE. Under the parental preference rule, the natural parents, who are of good character and who can reasonably provide for the child, are ordinarily entitled to the custody as against all persons. The right of custody accorded to parents spring from the exercise of parental authority (*Santos v. Court of Appeals,* 58 SCAD 17, 242 SCRA 407). Accordingly, such parents are entitled to the custody of their children as against foster or prospective adoptive parents. Such entitlement applies also as against other relatives of the child, including grandparents, or as against an agency or institution (67 C.J.S. 207, 208, cited in Dissenting Opinion of Justice Makasiar in *Luna v. IAC*, 137 SCRA 7; *Vancil v. Belmes,* G.R. No. 132223, July 19, 2001).

In deciding the issue of the custody of the child between a stranger and the parents, it has been said that:

> parents are entitled to the custody of their children. Every court recognizes the deep and enduring affection which parents have for their children and their willingness to make sacrifices and endure hardships in their interests which a stranger would not consider. No court would deprive a parent of his child simply because someone else might give it better care and attention than the means of the parents permit (*Ascroft v. Jensen,* 214 Minn. 193, 195, 7 N.W. 2d 393, 394).
>
> Putting the matter in another way, it is quite correct to say that the welfare of the children is always a matter of paramount concern, but the policy of the state proceeds on the theory that their welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents' right thereto is not infringed or denied. This is the law of the land on this subject. And it never becomes a judicial question as to what is for the welfare and best interests of children until the exceptional case arises where the parents are dead, or where they are unfit to be entrusted [sic] with the custody and rearing

> of their children and have forfeited this right because of breach of parental duty, or when the right has been prejudiced by the discord of the parents themselves. There are enough of the latter sort of cases where the courts are compelled to interfere and take the custody of children from unfit parents, or to decide which of the quarreling parents should have their custody (*In Re Kailer*, 123 Kan. 230, 231, cited *In Re Armentrout*, 58 ALR 3d 1065).

MATERNAL PREFERENCE. It is universally recognized that the mother is the natural custodian of her young. The proper application of the maternal preference rule neither denies nor abridges the equality of rights of the father because, as previously stated, the rights of the parents are not the principal issues in a custody case but rather the best interest of the children (*Cooke v. Cooke,* 70 ALR 3d 255).

The law favors the mother if she is a fit and proper person to have custody of her children so that they may not only receive her attention, care, supervision and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute (*Peavey v. Peavey,* 85 Nev. 571, 460 P2d 110). The preference favoring the mother over the father

> springs from the truth, well known by all men, that no other love is quite so tender, no other solicitude quite so deep, and no other devotion quite so enduring as that of a mother for the child. Generally, the love, solicitude, and devotion of a mother cannot be replaced by another and is worth more to a child of tender years than all other things combined (*Horst v. Mclain*, 466 SW2d 187).

Also, it has been held that the natural inclination to give to the mother the custody of her children of tender years is a recognition that the mother is God's own institution for the rearing and upbringing of the child, and puts a premium on child culture in the hands of an expert (*Hines v. Hines,* 192 Iowa 569).

Maternal preference is also the rule under Article 363 of the Civil Code which is the precursor of the present provision in the Family Code. This rule states that no child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise. In applying this rule, the child must be under seven years of age at the time either parent is given the custody or at the time the decision is rendered (*Espiritu v. Court of*

Appeals, 59 SCAD 631, 242 SCRA 362). This is also known as the tender-age presumption (*Pablo-Gualberto v. Gualberto V*, G.R. No. 154994, June 28, 2005, 461 SCRA 450). The Civil Code Commission in recommending that preference stated:

> 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 as to be for "compelling reason" for the good of the child; those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the (relative) divorce decree will ordinarily be sufficient punishment for her. Moreover, her moral dereliction will not have any effect upon the baby who is as yet unable to understand the situation (Report of the Code Commission, page 12, cited in *Lacson v. San Jose-Lacson*, 24 SCRA 837).

However, the above opinion of the Code Commission must not be construed to supplant the inflexible criterion in deciding issues of the custody of children. This criterion is always the paramount interest of the child. In *Espiritu v. Court of Appeals*, 59 SCAD 631, 242 SCRA 362, despite the choice of the children to go to the father and the determination of an expert psychologist and an expert social worker that the children was better off with the father, the Court of Appeals awarded to the mother, who was convicted of bigamy, the custody of the children who, at the time of the filing of the case in the lower court, were below seven years of age and who saw their mother kissing another man. The Court of Appeals ruled that "children below seven years of age should still be awarded to the mother even if the latter is a prostitute or is unfaithful to her husband. This is on the theory that moral dereliction has no effect on a baby unable to understand such action." At the time the Court of Appeals decided the case, the children were already above seven years of age. The Supreme Court reversed the decision of the Court of Appeals and made a determination that the welfare of the children was better served if they were with their father. The Supreme Court said that:

> the Court of Appeals was unduly swayed by an abstract presumption of law rather by an appreciation of the relevant facts. x x x In all controversies regarding the custody of the minors, the sole and foremost consideration is the physical, educational, social and moral welfare of the child concerned,

> taking into account the respective resources and social and moral situations of the contending parents. x x x. Whether the child is under or over seven years of age, the paramount criterion must always be the child's interest. x x x Once the choice of the child has been made, the burden returns to the court to investigate if the parents thus chosen is unfit to assume parental authority and custodial responsibility.

Adultery of the parent during the child's formative years may likewise be considered in questions involving the custody of children. It has been said that:

> it is not logical to assume that a woman can be a good mother and an adulteress at the same time. The primary duty of any mother is to educate her children in the basic moral principles. One who does not possess these principles can hardly be expected to teach them to others (24 Notre Dame Law 597, 599, case note).

The use of the word "shall" in Article 363 of the Civil Code (now Article 213 of the Family Code), coupled with the observations made by the Code Commission in respect to the said legal provision, underscores its mandatory character. It prohibits in no uncertain terms the separation of a mother and her child below seven years, unless such separation is grounded upon compelling reasons as determined by a court (*Lacson v. San Jose-Lacson,* 24 SCRA 837). Thus, any agreement by the parties unduly depriving the mother of the custody of her children under seven years of age in the absence of any compelling reason to warrant the same is null and void. *(Ibid.)* In *Dacasin v. Dacasin,* G.R. No. 168785, February 5, 2010, the Supreme Court ruled that a Philippine Court has no authority to enforce a custody-agreement executed in the United States by a Filipina woman divorced and separated from her foreigner-spouse whereby they agreed that, though the child was below seven years of age, they will have joint custody, thus:

> In this jurisdiction, parties to a contract are free to stipulate the terms of agreement subject to the minimum ban on stipulations contrary to law, morals, good customs, public order, or public policy. Otherwise, the contract is denied legal existence, deemed "inexistent and void from the beginning." For lack of relevant stipulation in the Agreement, these and other ancillary Philippine substantive law serve as default parameters to test the validity of the Agreement's joint child custody stipulations.

At the time the parties executed the Agreement on 28 January 2002, two facts are undisputed: (1) Stephanie was under seven years old (having been born on 21 September 1995); and (2) petitioner and respondent were no longer married under the laws of the United States because of the divorce decree. The relevant Philippine law on child custody for spouses separated in fact or in law (under the second paragraph of Article 213 of the Family Code) is also undisputed: "no child under seven years of age shall be separated from the mother x x x." (This statutory awarding of sole parental custody to the mother is mandatory, grounded on sound policy consideration, subject only to a narrow exception not alleged to obtain here. Clearly then, the Agreement's object to establish a post-divorce joint custody regime between respondent and petitioner over their child under seven years old contravenes Philippine law.

The Agreement is not only *void ab initio* for being contrary to law, it has also been repudiated by the mother when she refused to allow joint custody by the father. The Agreement would be valid if the spouses have not divorced or separated because the law provides for joint parental authority when spouses live together. However, upon separation of the spouses, the mother takes sole custody under the law if the child is below seven years old and any agreement to the contrary is void. Thus, the law suspends the joint custody regime for (1) children under seven of (2) separated or divorced spouses. Simply put, for a child within this age bracket (and for commonsensical reasons), the law decides for the separated or divorced parents how best to take care of the child and that is to give custody to the separated mother. Indeed, the separated parents cannot contract away the provision in the Family Code on the maternal custody of children below seven years anymore than they can privately agree that a mother who is unemployed, immoral, habitually drunk, drug addict, insane or afflicted with a communicable disease will have sole custody of a child under seven as these are reasons deemed compelling to **preclude** the application of the exclusive maternal custody regime under the second paragraph of Article 213.

It will not do to argue that the second paragraph of Article 213 of the Family Code applies only to judicial custodial agreements based on its text that "No child under seven years of age shall be separated from the mother, unless **the court** finds compelling reasons to order otherwise." To limit this provision's enforceability to court sanctioned agreements while placing private agreements beyond its reach is to sanction a double standard in custody regulation of children under seven years old of separated parents. This effectively empowers separated

> parents, by the simple expedient of avoiding the courts, to subvert a legislative policy vesting to the separated mother sole custody of her children under seven years of age "to avoid a tragedy where a mother has seen her baby torn away from her." This ignores the legislative basis that "[n]o man can sound the deep sorrows of a mother who is deprived of her child of tender age."
>
> It could very well be that Article 213's bias favoring one separated parent (mother) over the other (father) encourages paternal neglect, presumes incapacity for joint parental custody, robs the parents of custodial options, or hijacks decision-making between the separated parents. However, these are objections which question the law's wisdom not its validity or uniform enforceability. The forum to air and remedy these grievances is the legislature, not this Court. At any rate, the rule's seeming harshness or undesirability is tempered by ancillary agreements the separated parents may wish to enter such as granting the father visitation and other privileges. These arrangements are not inconsistent with the regime of sole maternal custody under the second paragraph of Article 213 which merely grants to the mother **final** authority on the care and custody of the minor under seven years of age, in case of disagreements.
>
> Further, the imposed custodial regime under the second paragraph of Article 213 is limited in duration, lasting only until the child's seventh year. From the eighth year until the child's emancipation, the law gives the separated parents freedom, subject to the usual contractual limitations, to agree on custody regimes they see fit to adopt. Lastly, even supposing that petitioner and respondent are not barred from entering into the Agreement for the joint custody of Stephanie, respondent repudiated the Agreement by asserting sole custody over Stephanie. Respondent's act effectively brought the parties back to ambit of the default custodial regime in the second paragraph of Article 213 of the Family Code vesting on respondent sole custody of Stephanie.

EXCEPTION TO MATERNAL PREFERENCE. Maternal preference is not an absolute rule. It is intended to serve only the function as a "tie-breaker" in those rare instances when parental qualities are so equally balanced between litigants that resort to the preference is necessary. Article 213 likewise specifically provides that, if the courts determine that there are compelling reasons existing to deprive the mother of the custody of the child, then an order depriving the mother of custody may be validly issued (*Pablo-Gualberto v. Gualberto V,* G.R. No. 154994, June 28, 2005, 461 SCRA 450). What

constitutes "compelling reason" must be clearly shown by positive and clear evidence of the unfitness of the mother and its determination is left to the sound judgment of the courts (*Medina v. Makabali,* 27 SCRA 502; *Cervantes v. Fajardo,* 169 SCRA 575). Thus:

> A state statute which provided that, other things being equal, a mother is to be given preference in the matter of the custody of her children of tender years was construed to require that the mother may not be deprived of custody absent a showing of her positive, and not merely comparative, unfitness as a parent, in *Earnst v. Earnst* (1966, Okla.) 418 P2d 351, the court reversing a judgment changing the custody of a 5-year-old child from her mother to her father. It is not sufficient to establish the unfitness of a mother for the custody and control of her minor child, the court observed, to show that she has some fault of character, or bad habits; rather, it must be shown that her condition in life, or her character and habits are such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, cannot be reasonably expected at the mother's hand. And applying this standard in the present case, the court concluded that testimony by several of the mother's relatives to the effect that she slept too late in the morning after being out late at night, left the child in the care of the grandmother in many occasions, failed to properly bathe and dress the child, and otherwise neglected the child, lacked the clarity and decisiveness necessary to be convincing, and revealed at best ill feeling and a long lived controversy between the mother and her relatives. None of the relatives, the court added, testified that the mother was an unfit parent, but merely said that she was neglectful, without any explanation of the term (Modern Status of Maternal Preference or Presumption in Child Custody Cases by Thomas R. Trenkner, J.D. 70 ALR 3d 262).

In *David v. Court of Appeals*, 65 SCAD 508, 250 SCRA 82, where it was shown that the father was well-off compared to the mother but the latter can nevertheless decently support her children, the Supreme Court still awarded the children to the mother by stating:

> Nor is the fact that private respondent is well-off a reason for depriving petitioner of the custody of her children, especially that she has been able to rear and support them on her own since they were born. Petitioner is a market vendor earning from P2,000 to P3,000 when the RTC decision was rendered. She augments her income by working as secretary at the Computer System Specialist, Inc. earning a monthly income of P4,500.00. She has an arrangement with her employer so that she can

> personally attend to her children. She works up to 8:00 o'clock in the evening to make up for time lost during the day. That she receives help from her parents and sister for the support of the three children is not a point against her. Cooperation, compassion, love and concern for every member of the family are characteristics of the close family ties that bind the Filipino family and have make it what it is.
>
> 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.

Also, in *Pablo-Gualberto v. Gualberto V,* G.R. No. 154994, June 28, 2005, 461 SCRA 450, the Supreme Court said that the mere fact that the mother is a lesbian is not enough justification to remove the child from her custody.

In *Castelo v. Estacio*, CA-G.R. No. SP-31466 dated May 31, 1994, where a mother filed a *habeas corpus* case to get custody of her two children below seven years of age from the father and where it was positively and convincingly shown that the mother of the two children below seven years of age can hardly attend to the said children as she was selling jewelry at an average of more than 13 hours a day; that she desired to have the children adopted by her aunt in exchange for monetary consideration leading the court to state that such was a misplaced sense of moral values for a mother; that she used prohibited drugs which made her violent whenever she was under the influence of the same that she lived in a house with only one room without partition and toilet facilities and which practically was surrounded by stagnant water infested by mosquitoes, whereas, the father who had custody of the child lived in a well-furnished surrounding with the paternal grandparents and who was shown to have taken care of the children very well, and that, when she took the children with her, the children almost always ended up getting sick without the said mother having them checked by a doctor and, in fact, she even waited for the father to fetch them so that the father had to be the one who took them to the doctor, the Court of Appeals ruled that the situation and behavior of the mother clearly showed compelling reasons to grant the children to the father even though they were below seven years of age.

The child's best interest is the cardinal principle in determining the right between parents as to custody, and any presumption of

maternal preference is to be resorted to only in the rare situation in which all other considerations are equal, with the parental qualities of litigants so equally balanced that a resort to the presumption is necessary (*Cooke v. Cooke,* 70 ALR 3d 255). Thus:

> Observing that while, as a general rule, courts will indulge the presumption that the interests of young children are best served when they are in the custody of their mother, the controlling consideration is always the welfare of the children, the court in *Monacelli v. Monacelli* (1972, Dist Col App 296 A2d 445), affirmed a judgment continuing the custody of three minor children in their father rather than their mother. The children's mother, the court observed, resided in her parent's home without gainful employment and made no plans to move to any environment better suited to the healthy development of the children. Moreover, the court pointed out that notwithstanding protracted psychiatric care, the mother, in the opinion of the trial court, exhibited attitudes which were deemed to have deleterious effects upon the children (Modern Status of Maternal Preference or Presumption in Child Custody Cases by Thomas R. Trenkner, J.D. 70 ALR 3d 262).

CUSTODY GRANTED TO OTHERS. Custody may even be awarded to persons who are strangers to the family if such award would best serve the paramount interest of the child (*Balatbat v. Balatbat,* 98 Phil. 998). Thus, it has been held that:

> the absence of any kinship between the child and the Cabangbang's alone cannot serve to bar the lower court from awarding her custody to them. Indeed, the law provides that in certain cases the custody of a child may be awarded even to strangers, as against either the father and the mother or against both. Thus, in proceedings involving a child whose parents are separated — either legally or *de facto* — and where it appears that both parents are improper persons to whom to entrust the care, custody and control of the child, "the court may either designate the paternal or maternal grandparents of the child, or his oldest brother or sister, or some reputable and discreet persons to take charge of such child, or commit it to any suitable asylum, children's home, or benevolent society" (*Chua v. Cabangbang,* 27 SCRA 291, citing Section 6, Rule 99 of the Rules of Court).

NO FINALITY OF CUSTODY JUDGMENT. It must be pointed out however that decisions of the courts, even the Supreme Court,

on the custody of minor children are always open to adjustments as the circumstances relevant to the matter may demand in the light of the inflexible criterion, namely, the paramount interest of the children (*Unson III v. Navarro,* 101 SCRA 189; *Pablo-Gualberto v. Gualberto V,* G.R. No. 154994, June 28, 2005, 461 SCRA 450). Thus, in *Luna v. Intermediate Appellate Court*, 137 SCRA 7, where the custody of the child was awarded to the grandparents by the lower court but which award was later reversed by the Court of Appeals which made judgment in favor of the natural parents and which Court of Appeals decision was affirmed by the Supreme Court and consequently became final and executory, a writ of execution to deliver the child to the natural parents by the lower court to which the case was remanded for execution was set aside by the Supreme Court when, after the decision of the Supreme Court, the child manifested that she would kill herself if she were delivered to her natural parents instead of letting her stay with her grandparents. The Supreme Court even ruled in its subsequent decision that the decision of the lower court, which it previously in effect reversed when it affirmed the decision of the Court of Appeals awarding the child to the natural parents, should be maintained.

Also in *Viesca v. Gilinsky,* 526 SCRA 533, G.R. No. 171698, July 4, 2007, the Supreme Court explained what a court can do in relation to an equivocal compromise agreement that resultantly caused disagreement between the parties. The Supreme Court ruled:

> The question thus becomes:can the trial court modify, by motion of one of the parties, a Compromise Judgment? We hold in the negative.
>
> To reiterate, a compromise judgment has the force of *res judicata* between the parties and should not be disturbed except for vices of consent or forgery which private respondent does not allege in this case.
>
> More importantly and as correctly pointed out by petitioner, it is settled that neither the courts nor quasi-judicial bodies can impose upon the parties a judgment different from their compromise agreement or against the very terms and conditions of their agreementwithout contravening the universally established principle that a contract is the law between the parties. The courts can only approve the agreement of parties.They can not make a contract for them.
>
> Nevertheless, we cannot totally blame the trial court for having granted respondents Very Urgent Motion to Enforce

and Enjoy Visitorial Rights.Perhaps, in its desire to finally put to rest the bothersome issue concerning Clause II(b) of the Compromise Judgment and to prevent future disagreements between the parties, the trial court saw the wisdom, as this Court does, in providing the specifics in the said indefinite portion of the Compromise Judgment. As we previously held in the case of *Hernandez v. Colayco*

> This is not the first unfortunate instance that a compromise judgment of a trial court has given rise to subsequent prolonged controversy, only because the trial judge failed to exercise the required degree of care in seeing to it that neither ambiguity nor incompleteness of details should characterize the agreement, much less the judgment rendered on the basis thereof.The expressed desire of the parties to end their judicial travails by submitting to a compromise deserves the utmost attention from the court, and no effort should be spared in helping them arrive at a definite and unequivocal termination of their problems and differences.It is high time that the matter-of-fact treatment usually accorded by trial courts to motions to approve compromises were abandoned in favor of the more positive activist attitude the situation demands.In acting in such a situation, the judge should bear in mind that the objective is to end the disagreement between the parties, not to begin a new one.**Thus, if the parties and their counsel are unable to do it, the judge is expected to assist them in attaining precision and accuracy of language that would more or less make it certain that any disputes as to the matters being settled would not recur, much less give rise to a new controversy.** (Emphasis supplied.)

Resultantly, a remand of this case is necessary to allow the parties themselves to resolve the matter regarding the implementation of Clause II(b) of the Compromise Judgment.In this regard, the rule on immutability for purposes of execution does not attach to a judgment that is materially equivocal or which suffers from either patent or latent ambiguity. To obviate further discord between them and to preclude their recourse to the trial court every time one of them perceives a violation committed by the other of Clause II(b) of the Compromise Judgment, we direct the trial court to be on guard and ensure that the parties would lay out in concrete, specific details the

terms of their agreement as to this specific matter as well of the appointment of Louis Maxwells accompanying guardian.

Article 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)

SUBSTITUTE PARENTAL AUTHORITY OF GRANDPARENTS. In the absence or incapacity of the parents, the grandparents are the most natural, suitable and logical persons to exercise parental authority. Hence, grandparents have the legal preference in the matter of substitute parental authority.

It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceed anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the legislature nor the court is blind to human truths which grandparents and grandchildren have always known (*Mimkon v. Ford,* 66 N.J. 426, 332 A. 2d 199 [1975]).

Article 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)

REASON FOR THE FILIAL PRIVILEGE. The reason for the privilege is to foster family unity and tranquility. Absence of this article does violence to the most sacred feelings of the family. No descendant shall be compelled, in a criminal case, to testify against his parents and grandparents.

The privilege is solely addressed to the descendant-witness. He or she may or may not testify against his or her parents or grandparents in a criminal case. If the descendant does not want to do so, he or she cannot be compelled to do so. However, there is an exception to the rule and this is when the testimony is indispensable in a crime against the descendant or by one parent against the other. This exception is based on the recognition that once a crime is committed against the descendant or by one parent against the other, the sanctity and tranquility of the family as well as of the marriage has already been destroyed. Thus, the very reason for the filial privilege has already been ravaged (*Merritt v. State,* 93 ALR 3d 1005).

MARITAL PRIVILEGE. Corollary to the filial privilege under Article 215 of the Family Code is the marital privilege provided for under Section 24(a) of Rule 130 of the Rules of Court, which pertinently provides that:

> the husband or the wife, during or after the marriage, can not be examined without the consent of the other as to any communication received in confidence by one from the other during the marriage, except in a civil case by one against the other, or in a criminal case for a crime committed by one against the other or the latter's direct descendants or ascendants.

The reason for this marital privilege is the belief that the husband and wife are considered as but one person, and because of this unity, when one is excluded on the ground of interest, the other is also excluded; and the courts are reluctant to sanction any rule tending to promote domestic dissension (*Merritt v. State,* 93 ALR 3d 1005).

The rule, however, admits of exceptions. The spouses can testify against each other in a civil case by one against the other, or in a criminal case for a crime committed by one against the other. The reason for the exception was aptly stated in *People v. Francisco*, 78 Phil. 694, thus:

> Like the rule itself, the exceptions are backed by sound reasons which, in excepted cases, outweigh those in support of the general rule. For instance, where the marital and domestic relations are so strained that there is no more harmony to be preserved nor peace and tranquility which may be disturbed, the reason based upon such harmony and tranquility fails. In such a case identity of interest disappears and the consequent

> danger of perjury based on that identity is non-existent. Likewise, in such a situation, the security and confidence of private life which the law aims at protecting will be nothing but ideals which, through their absence, merely leave a void in the unhappy life (*People v. Francisco,* 78 Phil. 694).

The phrase "in a criminal case for a crime against the other" has been construed in *Ordono v. Daguigan*, 62 SCRA 270, as to include a case for rape filed by the daughter against the father. Thus, the mother can validly testify against the father in a criminal case for rape initiated by the daughter. In essence, the Supreme Court said that because of the special and close bond between mother and daughter, a crime of rape against the daughter is a "crime committed by him against the wife."

In *Alvarez v. Ramirez,* G.R. No. 143439, October 14, 2005, 473 SCRA 72, where a wife testified against the husband in an arson case where the husband set fire to the house of his wife's sister knowing that his wife was inside the house, the Supreme Court ruled that the marital privilege will not anymore apply considering that it was obvious that there was nothing anymore to preserve in the marriage of the wife and her husband. The husband's act "eradicates all the major aspects of marital life such as trust, confidence, respect and love by which virtues the conjugal relationship survives and flourishes" and that the preservation of the marriage between the said husband and the wife "is no longer an interest the State aims to protect."

Chapter 2

SUBSTITUTE AND SPECIAL PARENTAL AUTHORITY

Article 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 Article 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)

SUBSTITUTE PARENTAL AUTHORITY. Persons exercising substitute parental authority have a very important role to undertake. They shall have all the rights of the parents enumerated in Article 220. The person exercising substitute parental authority shall have the same authority over the person of the child as the parents (Article 233). They shall be civilly liable for the injuries and damages caused by the acts or omissions of the unemancipated children living in their company and under their parental authority (See Article 221). Thus, it can very well happen that a person who is not even related to an unemancipated child and who has not adopted the same but who has actual custody of the said child, may be liable for all the injuries and damages which the said child had caused another person but, at the same time and in spite of his or

her taking care of the child, will not inherit from the said child upon the latter's death because he or she is not an heir at all.

It must be importantly emphasized that the order established in Article 216 is not mandatory. Always, the paramount interest of the child must be the basis of custody and care. Hence, if it is shown that the brothers and sisters are more qualified than the grandparents, then substitute parental authority should be granted to such brothers and sisters. However, the order must, as much as possible, be observed especially when all of those enumerated are equally fit to take care of the children.

Article 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)

UNFORTUNATE CHILDREN. A *foundling* is a newborn child abandoned by its parents who are unknown (Bouvier's Law Dictionary, 3rd Revision, page 1293). An *abandoned child* is one who has no proper parental care or guardianship, or whose parents or guardians have deserted him for a period of a least six continuous months (Article 141[2], PD 603). A *neglected child* is one whose basic needs have been deliberately unattended or inadequately attended. Neglect may occur in two ways:

> a) There is 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;
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> 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 or other vices (Article 141[3], PD 603).

An *abused child* can come within the second kind of a neglected child as stated above. A *dependent child* is one who is without a parent, guardian or custodian; or one whose parent, guardian or other custodian for good cause desires to be relieved of his care

and custody; and is dependent upon the public for support (Article 141[1], PD 603).

CHILD WELFARE AGENCY. No private person, natural or juridical, shall establish, temporarily or permanently, any child welfare agency without first securing a license from the Department of Social Welfare. Such license shall not be transferable and shall be used only by the person or institution to which it was issued at the place stated therein. No license shall be granted unless the purpose or function of the agency is clearly defined and stated in writing. Such definition shall include the geographical area to be served, the children to be accepted for care and the services to be provided (Article 118, PD 603). The protection and best interests of the child or children therein shall be the first and basic consideration in the granting, suspension or revocation of the license (Article 119, PD 603).

TRANSFER OF PARENTAL AUTHORITY. Parental authority over these children shall be entrusted in a summary proceeding to heads of children's homes, orphanages and similar institutions duly accredited by the proper government agency. The judicial summary proceeding shall be in accordance with Article 253. The transfer of legal or parental authority over the child can be done in two ways, namely, involuntary and voluntary.

In the first case, namely, involuntary, the Department of Social Welfare 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 to the proper court for involuntary commitment of said child to the care of any duly licensed child-placement agency (Article 142, PD 603). After due hearing, when a child shall have been committed to the Department of Social Welfare or any duly licensed child-placement agency or individual pursuant to an order of the court, his parents or guardians shall thereafter exercise no authority over him except upon such conditions as the court may impose (Article 151, PD 603). The Department of Social Welfare or any duly licensed child-placement agency or individual receiving a child pursuant to an order of the court shall be the legal guardian and entitled to his legal custody and control, be responsible for his support as defined by law, and when proper, shall have authority to give consent to his placement, guardianship and/or adoption (Article 152, PD 603).

The second case is when the commitment is voluntary. 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. However, no child shall be committed unless he is surrendered in writing by his parents or guardians to the care and custody of the Department of Social Welfare or duly licensed child-placement agency. In case of 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 Department of Social Welfare, 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 (Article 155, PD 603). When any child shall have been so committed and such child shall have been accepted by the Department of Social Welfare 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. 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 (Article 156, PD 603).

Article 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)

Article 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)

LIABILITY OF PERSONS POSSESSING SPECIAL PARENTAL AUTHORITY. Persons and entities given by law special parental authority are the school, its administrators and teachers, or the individual, entity or institution engaged in child care. Special parental authority can be exercised only over minors while under their supervision, instruction or custody. The authority and supervision also attach to all authorized activities whether inside or outside the school, entity or institution.

They are civilly liable for acts and omissions of the unemancipated minor. However, the liabilities shall not apply if it is proved that they exercised the proper diligence required under the particular circumstances.

The teacher must be the teacher-in-charge. He or she is the one designated by the dean, principal or other administrative superior to exercise supervision over the pupils in the specific classes or sections to which he or she is assigned and thus is the one immediately involved in the students' discipline as he or she has direct control and influence over them. Hence, a mere physics teacher who is not the teacher-in-charge of the class shall not be liable (*Amadora v. Court of Appeals,* 160 SCRA 315).

Under the present Articles 218 and 219, the persons with special parental authority are in *loco parentis* only with respect to unemancipated persons and their liability will attach only in such case. Significantly, under Article 234 of the Family Code as amended by Republic Act 6809, the majority age is 18 years and hence, today, when you speak of minors, it necessarily connotes that they are not emancipated. Under the present law, there is no distinction as to whether the school is academic or non-academic (arts and trades), and the liability also extends to the administrators of the school.

The liability attaches while the minor child is under their supervision, instruction and custody and also to all authorized activities whether inside or outside the premises of the school, entity or institution. Being in the custody of the school means

> the protective and supervisory custody that the school and its head and teachers exercise over the pupils and students for as long as they are in attendance in the school, including recess time (*Palisoc v. Brillantes,* 41 SCRA 548, cited in *Amadora v. Court of Appeals,* 160 SCRA 322 and in *Salvosa v. Intermediate Appellate Court,* 166 SCRA 274).

In *Amadora v. Court of Appeals*, 160 SCRA 274, the extent of the term "custody" in Article 2180 of the Civil Code, which is also applicable under the Family Code, was further explained. Thus,

> As long as it can be shown that the student is in the school premises in pursuance of a legitimate student objective, in the exercise of a legitimate student right, and even in the enjoyment of a legitimate student privilege, the responsibility of the school authorities over the student continues. Indeed, even if the student should be doing nothing more than relaxing in the campus in the company of his classmates and friends and enjoying the ambience and atmosphere of the school, he is still within the custody and subject to the discipline of the school authorities under the provisions of Article 2180.

LIABILITY OF PARENTS OR PERSONS EXERCISING SUBSTITUTE PARENTAL AUTHORITY. Under Article 219, parents, judicial guardians or the persons exercising parental authority over the minor shall be subsidiarily liable. The liability is subsidiary because, while in school or in an institution engaged in child care, the said persons do not have the direct custody of their children. They shall be liable only if the persons with special parental authority cannot satisfy their liability.

DEFENSE OF PERSONS WITH SPECIAL PARENTAL AUTHORITY. As previously stated, the liability under Article 219 will not apply if it is proved that they exercised the proper diligence required under the particular circumstances. Thus, in *Ylarde v. Aquino*, 163 SCRA 697, it was held:

> the contention that private respondent Aquino exercised the utmost diligence of a very cautious person is certainly without cogent basis. A reasonably prudent person would have foreseen that bringing children to an excavation site, and more so, leaving them there all by themselves, may result in an accident. An ordinarily careful human being would not assume that a simple warning "not to touch the stone" is sufficient to cast away all the serious danger that a huge concrete block adjacent to an excavation would present to the children. Moreover, a teacher

> who stands in *loco parentis* to his pupils would have made sure that the children are protected from all harm in his company.

In regard to the concept of due diligence, the statement by the Court in *Amadora v. Court of Appeals*, 160 SCRA 274, is still relevant, *to wit:*

> The Court is not unmindful of the apprehensions expressed by Justice Makalintal in his Dissenting Opinion in *Palisoc* that the school may be unduly exposed to liability under this article in view of the increasing activism among the students that is likely to cause violence and resulting injuries in the school premises. That is a valid fear, to be sure. x x x Moreover, the defense of due diligence is available to it in case it is sought to be held answerable as principal for acts or omission of its head or the teachers in its employ.
>
> The school can show that it exercised proper measure in selecting the head or its teachers and the appropriate supervision over them in the custody and instruction of pupils pursuant to its rules and regulations for the maintenance of discipline among them. In almost all cases now, in fact these measures are effected through the assistance of an adequate security force to help the teacher physically enforce those rules upon the students. This should bolster the claim of the school that it has taken adequate steps to prevent any injury that may be committed by the students.
>
> *A fortiori*, the teacher himself may invoke this defense as it would otherwise be unfair to hold him directly answerable for the damage caused by his students as long as they are in the school premises and presumably under his influence. In this respect, the Court is disposed not to expect from the teacher the same measure of responsibility imposed on the parent, for their influence over the child is not equal in degree. Obviously, the parent can expect more obedience from the child because the latter's dependence on him is greater than on the teacher. It need not be stressed that such dependence includes the child's support and sustenance, whereas submission to the teacher's influence, besides being co-terminous with the period of custody, is usually enforced only because of the students' desire to pass the course. The parent can instill more lasting discipline on the child than the teacher and so should be held to a greater accountability than the teacher for the tort committed by the child.

QUASI DELICT. Article 2180 of the Civil Code provides that "teachers or heads of establishments of arts and trades shall

be liable for damages caused by their pupils and students or apprentices so long as they remain in their custody." Liability shall attach only upon a clear showing of negligence or laxness in the enforcement of discipline. This article applies if the students, pupils or apprentices are not anymore minor children. A teacher, who must be a teacher-in-charge, will be liable for damages committed by his or her students or pupils in an academic institution of learning. Heads of establishments of arts and trades, which are non-academic institution but technical or vocational ones, shall be liable for damages caused by their apprentices. These heads must likewise have direct control and influence over their apprentices. While the school itself cannot be held liable under Article 2180, it can nevertheless be held liable under the principle of *respondeat superior* considering that it is the employer of the liable teacher or the head. In any event, the school, the teacher of an academic institution, and the head of establishment of arts and trades (non-academic) may exculpate themselves from liability upon showing that they had taken the necessary precautions to prevent the injury complained of (*Amadora v. Court of Appeals,* 160 SCRA 315).

Chapter 3

EFFECT OF PARENTAL AUTHORITY UPON THE PERSONS OF THE CHILDREN

Article 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)

PARENTAL RIGHTS AND DUTIES. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions. More important historically, it has recognized that natural bonds of affection lead parents to act in the best interest of the child (*Parham v. J.R.,* 442 US 584, 61 L. Ed 2d 101).

> Unemancipated minor children, due to the incomplete development of their mind and intellectual faculties, and to their lack of experience in the world, need the counsel, care, and guidance of their progenitors in order to prevent the impulse of passion, excited by worldly illusions which their undeveloped intellectual faculties are not strong enough to overcome, from leading them to serious consequences (*Salvana and Saliendra v. Gaela,* 55 Phil. 680).
>
> The parents are recognized as natural guardians of the child. However, it is said that the natural rights of a father (and, for that matter, of the mother) are recognized in law not as guardian, but as father (as mother), and that such rights are greater than those which any guardian can have. The relationship between the parents and their minor children naturally gives rise to various rights and obligations affecting the welfare of, and the parents' control over, the child. Some of these are recognized in law. Others have only a moral sanction. Parental duties, it is said, are not always legal duties, and the law cannot inquire in every case how fathers (and mothers) have fulfilled their duties. The rights and obligations of parenthood are not limited of course, to natural parents, but, at least for most purposes, apply with equal force to adopting parents, except as modified by the adoption statutes (59 Am. Jur. 91).

Relevantly, the Civil Code of 1950 provides in Article 358 thereof which was not repealed by the Family Code that:

> every parent and every person holding substitute parental authority shall see to it that the rights of the child are respected and his duties complied with, and shall particularly, by precept and example, imbue the child with high-mindedness, love for

country, veneration for the national heroes, fidelity to democracy as a way of life, and attachment to the ideal of permanent world peace.

DUTIES OF PARENTS UNDER PRESIDENTIAL DECREE NO. 603. Article 46 of the Child and Youth Welfare Code (P.D. 603 as amended) also provides that parents shall have the following duties toward their children: 1) to give them affection, companionship and understanding; 2) to extend to them the benefits of moral guidance, self-discipline and religious instruction; 3) to supervise their activities, including recreation; 4) to inculcate in them the value of industry, thrift and self-reliance; 5) to stimulate their interest in civic affairs, teach them the duties of citizenship, and develop their commitment to their country; 6) to advise them properly on any matter affecting their development and well-being; 7) to always set a good example; 8) to provide them with the adequate support as defined in the law particularly the Family Code; and 9) to administer their property, if any, according to their best interest subject to the provisions of the Family Code particularly Article 225.

Whenever proper, parents shall allow the child to participate in the discussion of family affairs, especially in matters that particularly concern him. In cases involving his discipline, the child shall be given a chance to present his side (Article 47). If by reason of his studies or for other causes, a child does not live with his parents, the latter shall communicate with him regularly and visit him as often as possible. The parents shall see to it that the child lives in a safe and wholesome place and under responsible adult care and supervision (Article 49). Parents shall endeavor to discover the child's talents or aptitudes, if any, and to encourage and develop them. If the child is gifted, his parents shall report this fact to the National Center for Gifted Children or to other agencies concerned so that official assistance or recognition may be extended to him (Article 50). The reading habit should be cultivated in the home. Parents shall, whenever possible, provide the child with good and wholesome reading material, taking into consideration his age and emotional development. They shall guard against the introduction in the home of pornographic and other unwholesome publications (Article 51). Parents shall encourage the child to associate with other children of his own age with whom he can develop common interests of useful and salutary nature. It shall be their duty to know the child's friends and their activities and to prevent him from falling into bad company. The child should not be allowed to stay out late at night to the detriment of his health, studies or morals (Article 52).

Parents shall give the child every opportunity to form or join social, cultural, educational, recreational, civic or religious organizations or movements and other useful community activities (Article 53). When a party gathering is held, the parents or a responsible person should be present to supervise the same (Article 54). Also, parents shall take special care to prevent the child from becoming addicted to intoxicating drinks, narcotic smoking, gambling and other vices or harmful practices (Article 55 of PD 603).

REPRESENTATIVE OF THE CHILDREN. Article 220, subparagraph 8 of the Family Code provides that the parents shall also have the duty to represent the unemancipated children in all matters affecting their interest. Thus, it has been held in *Wenceslao v. Calimon*, 46 Phil. 906, that the offer to redeem a particular property made by the father on behalf of his children is valid, as he is their natural guardian and represents them in and out of court and that such an offer is not an act of administration but of representation of his children. Also, in a case where it was the mother, who filed for and on behalf of her child a petition for change of name, the Supreme Court held that such a petition was not dismissible because the mother, with respect to her unemancipated child, had the duty to represent him in all actions which redound to his benefit (*Tse v. Republic,* 20 SCRA 1261).

Likewise, in a petition for *habeas corpus* filed by the uncle of a minor which did not succeed in the lower court and which was consequently elevated to the Supreme Court, the Supreme Court had to dismiss the case on the ground, among others, that the parents of the minor filed a motion to withdraw the appeal which should take precedence over the objection of the uncle. Pertinently, the Supreme Court observed and ruled, *to wit:*

> The petition was filed by Claudio Ubaldo, Saturnina's uncle. During the pendency of this appeal the parents of Saturnina filed a motion to withdraw the appeal; and such withdrawal must take precedence over the objections of Claudio Ubaldo, in view of Article 311 of the Civil Code which provides that "the father and mother jointly exercise parental authority over their legitimate children who are not emancipated." Article 316 makes it their duty to represent their children in all actions which may redound to their benefit (*Ubaldo v. Salazar,* 101 Phil. 1249).

Pertinently, the cited Article 311 of the Civil Code is now Article 211 of the Family Code which provides that "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." Also, the cited Article 316 of the Civil Code is now Article 220, subparagraph 8 of the Family Code which provides that the parents shall also have the duty to represent the unemancipated children in all matters affecting their interest.

DISCIPLINARY ACTIONS. Under the second paragraph of Article 211 of the Family Code, children shall always observe respect and reverence toward their parents and are obliged to obey them as long as the children are under their parental authority. Under Article 220(7) and (8), parents have the right to demand from the children respect and obedience and to impose discipline on them as may be required under the circumstances. They may inflict a reasonable measure of corporal punishment (See Minutes of the 135th meeting of the Joint Civil Code and Family Law committees held on March 22, 1986, pages 15-16).

If a child uselessly spends the parents' hard-earned money given to him or her so that he or she can study, can the parents as a disciplinary action withhold from the said child educational support for the meantime until he or she learns a lesson? Can the child, despite his or her wrong and seemingly incorrigible behavior, file an action in court to compel the parents to provide him or her with support on the ground that parents are obliged to support their children, whether legitimate or illegitimate, under Article 195 of the Family Code? There has been as yet no case decided by the Supreme Court on this matter. However, American decisions on these issues may be helpful in answering these queries. Thus, in *Roe v. Doe,* 29 NY 2d 188, 272 N.E. 2d 567, 324 NY S.2d 71 (1971), where a minor, in full possession of her faculties, was dutifully supported by her parents with respect to her educational financial concerns, including her dormitory fees but, contrary to the father's prior instructions and without his knowledge, took up residence with a female classmate in an off-campus apartment, experimented with prohibited drugs without however being addicted to the same, and later, upon returning to the city where her father lived, voluntarily, without cause, abandoned the parent's home against the will of the parent and for the purpose of avoiding parental control, and finally thereafter, files an action to compel her father to support her, it was held that her actions in disregarding the parental authority of the parent forfeited her rights to demand support, with the court observing thus:

It has always been, and remains a matter of fundamental policy within this State, that a father of a minor child is chargeable with the discipline and support of that child x x x; and none would dispute that the obligation cannot be avoided merely because a young enough child is at odds with her parents or has disobeyed their instructions: delinquent behavior itself, even if unexplained or persistent, does not generally carry with it the termination of the duty of a parent to support.

On the other hand, while the duty to support is a continuing one, the child's right to support and the parent's right to custody and services are reciprocal: the father in return for maintenance and support may establish and impose reasonable regulations for his child x x x. Accordingly, though the question is novel in this State, it has been held, in circumstances such as here, that where by no fault on the parents' part, a child "voluntarily abandons the parent's home for the purpose of seeking its fortune in the world or to avoid parental discipline and restraint, that child forfeits the claim to support." To hold otherwise would be to allow, at least in the case before us, a minor of unemployable age to deliberately flout the legitimate mandates of her father while requiring that the latter support her in her decision to place herself beyond his effective control.

We do not have before us the case of a father who casts his helpless daughter upon the world, forcing her to fend for herself; nor has the father been arbitrary in his requests that the daughter heed his demands. The obligations of parenthood, under natural and civil law, require of the child "submission to reasonable restraint, and demands habits of propriety, obedience, and conformity to domestic discipline." x x x True, a minor, rather than submit to what her father considers to be proper discipline, may be induced to abandon the latter's home; but in so doing, however impatient of parental authority, she cannot enlist the aid of the court in frustrating that authority, reasonably exercised, by requiring that her father accede to her demands and underwrite her chosen lifestyle or as here, run the risk of incarceration.

Nor can we say that the father was unreasonable or capricious in his request that the daughter take up residence in the college dormitory or return to New York. In view of her past derelictions, and, to use the Appellate Division's words, "the temptations that abound outside" x x x, we can only conclude that it was reasonable for her father to decide that it was in her own best interests that she do so. And the fact that the father doggedly persisted in his demands despite similar evils which may have lurked within the campus residence, or psychiatric advice that the daughter live off campus, cannot be said to

> amount to a showing of misconduct, neglect or abuse which would justify the Family Court's action. The father has the right, in the absence of caprice, misconduct or neglect, to require that the daughter conform to his reasonable demands. Should she disagree, and at her age that is surely her prerogative, she may elect not to comply; but in so doing, she subjects herself to her father's lawful wrath. Where, as here, she abandons her home, she forfeits her right to support.

RIGHTS OF THE CHILDREN. With respect to the duties of the parents, they must likewise know that there are certain rights of the children which they are duty-bound to accord. Thus, Article 356 of the Civil Code of 1950 still effectively provides that every child:

(1) is entitled to parental care;

(2) shall receive at least elementary education;

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

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

Commenting on Article 356 of the Civil Code, the Supreme Court observed that "it is clear that the above-quoted legal provision grants to every child rights which are not and should not be dependent solely on the wishes, much less the whims and caprices, of his parents. His welfare should not be subject to the parents' say-so or mutual agreement alone" (*Lacson v. San Jose-Lacson*, 24 SCRA 837).

Under Presidential Decree Number 603, otherwise known as the Child and Youth Welfare Code, the rights of the child are likewise enumerated in Article 3 thereof, thus:

> Article 3. *Rights of the Child.* — All children shall be entitled to the rights herein set forth without distinction as to legitimacy or illegitimacy, sex, social status, religion, political antecedents and other factors.
>
> (1) Every child is endowed with the dignity and worth of a human being from the moment of his conception, as generally accepted in medical parlance, and has, therefore the rights to be born well.
>
> (2) Every child has a right to a wholesome family life that will provide him with love, care and understanding, guidance and counseling, and moral and material security.

The dependent or abandoned child shall be provided with the nearest substitute for a home.

(3) Every child has the right to a well-rounded development of his personality to the end that he may become a happy, useful and active member of society.

The gifted child shall be given opportunity and encouragement to develop his special talents.

The emotionally disturbed or socially maladjusted child shall be treated with sympathy and understanding, and shall be entitled to treatment and competent care.

The physically or mentally handicapped child shall be given the treatment, education and care required by his particular condition.

(4) Every child has the right to a balanced diet, adequate clothing, sufficient shelter, proper medical attention, and all the basic physical requirements of a healthy and vigorous life.

(5) Every child has the right to be brought up in an atmosphere of morality and rectitude for the enrichment and the strengthening of his character.

(6) Every child has the right to an education commensurate with his abilities and to the development of his skills for the improvement of his capacity for service to himself and to his fellowmen.

(7) Every child has the right to full opportunities for safe and wholesome recreation and activities, individual as well as social, for the wholesome use of his leisure hours.

(8) Every child has the right to protection against exploitation, improper influences, hazards, and other conditions and circumstances prejudicial to his physical, mental, emotional, social and moral development.

(9) Every child has the right to live in a community and a society that can offer him an environment free from pernicious influences and conducive to the promotion of his health and the cultivation of his desirable traits and attributes.

(10) Every child has the right to care, assistance, and protection of the State, particularly when his parents or guardians fail or are unable to provide him with his fundamental needs for growth, development and improvement.

(11) Every child has the right to an efficient and honest government that will deepen his faith in democracy and inspire

him with the morality of the constituted authorities both in their public and private lives.

(12) Every child has the right to grow up as a free individual, in an atmosphere of peace, understanding, tolerance, and universal brotherhood, and with the determination to contribute his share in the building of a better world.

Article 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)

PRIMARY LIABILITY OF PARENTS. The parents are principally and primarily liable for acts or omissions of their unemancipated children resulting in injuries to others (*Libi v. Intermediate Appellate Court,* 214 SCRA 16). However, for liability on the part of the parents to attach, the unemancipated child must be living in their company *and* under their parental authority. In explaining the philosophy of parental liability under Article 280 of the Civil Code which has been modified by Article 221 of the Family Code and which rationale is applicable under the latter law, the Supreme Court, in *Tamargo v. Court of Appeals*, 209 SCRA 518, stated, thus:

> This principle of parental liability is a species of what is frequently designated as vicarious liability, or the doctrine of "imputed negligence" under the 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. Thus, parental liability is made a natural and logical consequence of the duties and responsibilities of parents — their parental authority — which includes the instructing, controlling and disciplining of the child. The basis for the doctrine of vicarious liability was explained by the Court in *Cangco v. Manila Railroad Co.* (38 Phil. 768), in the following terms:
>
> > With respect to extra-contractual obligation arising from negligence, whether of act or omission, it is competent for the legislature to elect — and our Legislature has so elected — to limit such liability to cases in which the person upon whom such an obligation is imposed is morally culpable or, on

> the contrary, for reasons of public policy, to extend that liability, without regard to the lack of moral culpability, so as to include *responsibility for the negligence of those persons whose acts or omissions are imputable*, by legal fiction, *to others who are in a position to exercise an absolute or limited control over them*. The legislature which adopted our Civil Code has elected to limit extra-contractual liability — with certain well-defined exceptions — *to cases in which moral culpability can be directly imputed to the persons to be charged.* This moral responsibility may consist in having failed to exercise due care in one's own acts, or *in having failed to exercise due care* in the selection and control of one's agents or servants, or in the control of persons who, by reasons *of their status, occupy a position of dependency with respect to the person made liable for their conduct.*
>
> The civil liability imposed upon parents for the torts of their minor children living with them, may be seen to be based upon the parental authority vested by the Civil Code upon such parents. The civil law assumes that when an unemancipated child living with its parents commits a tortiuous act, the parents were negligent in the performance of their legal and natural duty closely to supervise the child who is in their custody and control. Parental liability is, in other words, anchored upon parental authority coupled with presumed parental dereliction in the discharge of the duties accompanying such authority. The parental dereliction is, of course, only presumed and the presumption can be overturned under Article 2180 of the Civil Code by proof that the parents had exercised all the diligence of a good father of a family to prevent the damage.

Thus, in a case where a minor child was the subject of an adoption proceeding but he was still in the custody of the natural parents and under their parental authority when the said minor child shot another person and where the adopting parents were sought to be held liable, the Supreme Court ruled that Article 35 of P.D. No. 603 (now Section 13 of R.A. No. 8552), which provides that the adoption decree shall be effective as of the date of the filing of the petition, cannot apply in issues of vicarious liability of parents which can only attach if, at the time of the incident, the child were under their custody and parental authority. Hence, the natural parents should still be held liable and not the adopting parents notwithstanding the provision of the law that the adoption decree

has a retroactive effect that goes back to the filing of the petition for adoption (*Tamargo v. Court of Appeals,* 209 SCRA 518).

DILIGENCE OF A GOOD FATHER OF A FAMILY. To be able to remove themselves from liability under Article 221, the parents must show that they exercised the diligence of a good father of a family. In *Libi v. Intermediate Appellate Court,* 214 SCRA 17, where the father appeared to have negligently left his gun in a safety deposit box and where it was also proved that the minor son knew of the location of the gun; that strong circumstantial evidence pointed to the son as having taken the gun to kill his former girlfriend against whom he had a grudge for breaking the relationship with him and that later he killed himself, the Supreme Court affirmed the ruling of the Court of Appeals that the parents of the minor son were vicariously liable for the death of the former girlfriend and stated that no sufficient evidence were presented to show that they exercised the diligence of a good father of a family, *to wit:*

> Petitioners' defense that they had exercised the due diligence of a good father of a family, hence, they should not be civilly liable for the crime committed by their minor son, is not borne out by the evidence on record either.
>
> Petitioner Amelita Yap Libi, mother of Wendell, testified that her husband, Cresencio Libi, owns a gun which he kept in a safety deposit box inside a drawer in their bedroom. Each of these petitioners holds a key to the safety deposit box and Amelita's key is always in her bag, all of which facts were known to Wendell. They have never seen their son Wendell taking or using the gun. She admitted, however, that on that fateful night the gun was no longer in the safety deposit box. We, accordingly, cannot but entertain serious doubts that petitioner spouses had really been exercising the diligence of a good father of a family by safely locking the fatal gun away. Wendell could not have gotten hold thereof unless one of the keys to the safety deposit box was negligently left lying around or he had free access to the bag of his mother where the other key was.
>
> The diligence of a good father of a family required by law in a parent and child relationship consists, to a large extent, of the instruction and supervision of the child. Petitioners were gravely remiss in their duties as parents in not diligently supervising the activities of their son, despite his minority and immaturity, so much so that it was only at the time of Wendell's death that they allegedly discovered that he was a CANU agent and that Cresencio's gun was missing from the safety deposit box. Both parents were sadly wanting in their duty and

> responsibility in monitoring and knowing the activities of their children who, for all they know, may be engaged in dangerous work such as being drug informers, or even drug users. Neither was a plausible explanation given for the photograph of Wendell, with a handwritten dedication to Julie Ann at the back thereof, holding upright what clearly appears as a revolver and on who or why he was in possession of that firearm.

Article 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 require. (317)

GUARDIAN. A guardianship is a trust relation of the most sacred character, in which one person, called a "guardian," acts for another, called the "ward," whom the law regards as incapable of managing his own affairs (39 Am. Jur. 9). Guardians *ad litem* are considered officers of the court in a limited sense, and the office of such guardian is to represent the interest or the incompetent or the minor (*Rivero v. Court of Appeals,* G.R. No. 141273, May 17, 2005, 458 SCRA 714). It has been held that:

> It has been said that in no relation, except that of parent and child or husband and wife, are the elements of confidence on one side and active good faith on the other more essential than in the relation of guardian and ward. The ward is frequently a minor and often so young as to be entirely dependent on his guardian. The guardian is sometimes the ward's father or mother and, if not, sustains a quasi-parental relation. The government itself is, in a sense, the supreme guardian, whom the individual guardian represents in its solicitude for the welfare of the wards. Guardianship, therefore, has been said to be a trust of the highest and most sacred character. The law looks on the guardian as a trustee, and as such, he cannot be allowed by law to have any inducement to neglect his ward's interest (39 Am. Jur. 159).

SELECTION. Appointment of a guardian *ad litem* is addressed to the sound discretion of the court and designed to assist the court in the determination of the best interest of the child (*Rivero v. Court of Appeals*, G.R. No. 141273, May 17, 2005, 458 SCRA 714). In selecting a guardian for a minor, an appointment which probably will keep together the family, or those remaining, will, as a general rule, be preferred to one which will bring about their separation (39 Am. Jur. 30). A parent's right to guardianship may be forfeited or abandoned, however, and any rights which the parents may have are subordinate to the established rule that the welfare and best

interests of the child are the primary considerations (39 Am. Jur. 30).

> In determining the selection of a guardian the court may consider the financial situation, the business acumen, the physical condition, the morals, character, and conduct, and the present and past history of a prospective appointee, as well as the probability of his being able to exercise the powers and duties of guardian for the full period during which guardianship will be necessary (39 Am. Jur. 35).

A court cannot appoint a guardian who is not personally subject to its jurisdiction (*Vancil v. Belmes,* G.R. No. 132223, June 19, 2001).

RULE ON GUARDIANSHIP OF MINORS

(A.M. No. 03-02-05-SC)

Section 1. *Applicability of the Rule.* — This Rule shall apply to petitions for guardianship over the person or property, or both, of a minor.

The father and the mother shall jointly exercise legal guardianship over the person and property of their unemancipated common child without the necessity of a court appointment. In such case, this Rule shall be suppletory to the provisions of the Family Code on Guardianship.

Sec. 2. *Who may petition for appointment of guardian.* — On grounds authorized by law, any relative or other person on behalf of a minor, or the minor himself if fourteen years of age or over, may petition the Family Court for the appointment of a general guardian over the person or property, or both, of such minor. The petition may also be filed by the Secretary of Social Welfare and Development and by the Secretary of Health in the case of an insane minor who needs to be hospitalized.

Sec. 3. *Where to file petition.* — A petition for guardianship over the person or property, or both, of a minor may be filed in the Family Court of the province or city where the minor actually resides. If he resides in a foreign country, the petition shall be filed with the Family Court of the province or city where his property or any part thereof is situated.

Sec. 4. *Grounds of petition.* — The grounds for the appointment of a guardian over the person or property, or both, of a minor are the following:

(a) death, continued absence, or incapacity of his parents;

(b) suspension, deprivation or termination of parental authority;

(c) remarriage of his surviving parent, if the latter is found unsuitable to exercise parental authority; or

(d) when the best interests of the minor so require.

Sec. 5. *Qualifications of guardians.* — In appointing a guardian, the court shall consider the guardian's:

(a) moral character;

(b) physical, mental and psychological condition;

(c) financial status;

(d) relationship of trust with the minor;

(e) availability to exercise the powers and duties of a guardian for the full period of the guardianship;

(f) lack of conflict of interest with the minor; and

(g) ability to manage the property of the minor.

Sec. 6. *Who may be appointed guardian of the person or property, or both, of a minor.* — In default of parents or a court-appointed guardian, the court may appoint a guardian of the person or property, or both, of a minor, observing as far as, practicable, the following order of preference:

(a) the surviving grandparent and in case several grandparents survive, the court shall select any of them taking into account all relevant considerations;

(b) the oldest brother or sister of the minor over twenty-one years of age, unless unfit or disqualified;

(c) the actual custodian of the minor over twenty-one years of age, unless unfit or disqualified; and

(d) any other person, who in the sound discretion of the court, would serve the best interests of the minor.

Sec. 7. *Contents of petition.* — A petition for the appointment of a general guardian must allege the following:

(a) The jurisdictional facts;

(b) The name, age and residence of the prospective ward;

(c) The ground rendering the appointment necessary or convenient;

(d) The death of the parents of the minor or the termination, deprivation or suspension of their parental authority;

(e) The remarriage of the minor's surviving parent;

(f) The names, ages, and residences of relatives within the 4th civil degree of the minor, and of persons having him in their care and custody;

(g) The probable value, character and location of the property of the minor; and

(h) The name, age and residence of the person for whom letters of guardianship are prayed.

The petition shall be verified and accompanied by a certification against forum shopping. However, no defect in the petition or verification shall render void the issuance of letters of guardianship.

Sec. 8. *Time and notice of hearing*. — When a petition for the appointment of a general guardian is filed, the court shall fix a time and place for its hearing, and shall cause reasonable notice to be given to the persons mentioned in the petition, including the minor if he is fourteen years of age or over, and may direct other general or special notice to be given.

Sec. 9. *Case study report*. — The court shall order a social worker to conduct a case study of the minor and all the prospective guardians and submit his report and recommendation to the court for its guidance before the scheduled hearing. The social worker may intervene on behalf of the minor if he finds that the petition for guardianship should be denied.

Sec. 10. *Opposition to petition*. — Any interested person may contest the petition by filing a written opposition based on such grounds as the majority of the minor or the unsuitability of the person for whom letters are prayed, and pray that the petition be denied, or that letters of guardianship issue to himself, or to any suitable person named in the opposition.

Sec. 11. *Hearing and order for letters to issue*. — At the hearing of the petition, it must be shown that the requirement of notice has been complied with. The prospective ward shall be presented to the court. The court shall hear the evidence of the parties in support of

their respective allegations. If warranted, the court shall appoint a suitable guardian of the person or property, or both, of the minor.

At the discretion of the court, the hearing on guardianship may be closed to the public and the records of the case shall not be released without its approval.

Sec. 12. *When and how a guardian of the property for non-resident minor is appointed; notice.* — When the minor resides outside the Philippines but has property in the Philippines, any relative or friend of such minor, or any one interested in his property, in expectancy or otherwise, may petition the Family Court for the appointment of a guardian over the property.

Notice of hearing of the petition shall be given to the minor by publication or any other means as the court may deem proper. The court may dispense with the presence of the non-resident minor.

If after hearing the court is satisfied that such non-resident is a minor and a guardian is necessary or convenient, it may appoint a guardian over his property.

Sec. 13. *Service of final and executory judgment or order.* — The final and executory judgment or order shall be served upon the Local Civil Registrar of the municipality or city where the minor resides and the Register of Deeds of the place where his property or part thereof is situated shall annotate the same in the corresponding title, and report to the court his compliance within fifteen days from receipt of the order.

Sec. 14. *Bond of guardian; amount; conditions.* — Before he enters upon the execution of his trust, or letters of guardianship issue, an appointed guardian may be required to post a bond in such sum as the court shall determine and conditioned as follows:

(a) To make and return to the court, within three months after the issuance of his letters of guardianship, a true and complete inventory of all the property, real and personal, of his ward which shall come to his possession or knowledge or to the possession or knowledge of any other person in his behalf;

(b) To faithfully execute the duties of his trust, to manage and dispose of the property according to this rule for the best interests of the ward, and to provide for his proper care, custody and education;

(c) To render a true and just account of all the property of the ward in his hands, and of all proceeds or interest derived therefrom,

and of the management and disposition of the same, at the time designated by this rule and such other times as the court directs; and at the expiration of his trust, to settle his accounts with the court and deliver and pay over all the property, effects, and monies remaining in his hands, or due from him on such settlement, to the person lawfully entitled thereto; and

(d) To perform all orders of the court and such other duties as may be required by law.

Sec. 15. *Where to file the bond; action thereon*. — The bond posted by a guardian shall be filed in the Family Court and, in case of breach of any of its condition, the guardian may be prosecuted in the same proceeding for the benefit of the ward or of any other person legally interested in the property.

Whenever necessary, the court may require the guardian to post a new bond and may discharge from further liability the sureties on the old bond after due notice to interested persons, if no inquiry may result therefrom to those interested in the property.

Sec. 16. *Bond of parents as guardians of property of minor*. — If the market value of the property or the annual income of the child exceeds P50,000.00, the parent concerned shall furnish a bond in such amount as the court may determine, but in no case less than ten *per centum* of the value of such 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 Family Court of the place where the child resides or, if the child resides in a foreign country, in the Family 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 of a general guardian shall be heard and resolved.

Sec. 17. *General duties of guardian*. — A guardian shall have the care and custody of the person of his ward and the management of his property, or only the management of his property. The guardian of the property of a nonresident minor shall have the management of all his property within the Philippines.

A guardian shall perform the following duties:

(a) To pay the just debts of the ward out of the personal property and the income of the real property of the ward, if the same

is sufficient; otherwise, out of the real property of the ward upon obtaining an order for its sale or encumbrance;

(b) To settle all accounts of his ward, and demand, sue for, receive all debts due him, or may, with the approval of the court, compound for the same and give discharges to the debtor on receiving a fair and just dividend of the property and effects; and to appear for and represent the ward in all actions and special proceedings, unless another person is appointed for that purpose;

(c) To manage the property of the ward frugally and without waste, and apply the income and profits thereon, insofar as may be necessary, to the comfortable and suitable maintenance of the ward; and if such income and profits be insufficient for that purpose, to sell or encumber the real or personal property, upon being authorized by the court to do so;

(d) To consent to a partition of real or personal property owned by the ward jointly or in common with others upon authority granted by the court after hearing, notice to relatives of the ward, and a careful investigation as to the necessity and propriety of the proposed action;

(e) To submit to the court a verified inventory of the property of his ward within three months after his appointment, and annually thereafter, the rendition of which may be required upon the application of an interested person;

(f) To report to the court any property of the ward not included in the inventory which is discovered, or succeeded to, or acquired by the ward within three months after such discovery, succession, or acquisition; and

(g) To render to the court for its approval an accounting of the property one year from his appointment, and every year thereafter or as often as may be required.

Sec. 18. *Power and duty of the court.* — The court may:

(a) Request the assistance of one of more commissioners in the appraisal of the property of the ward reported in the initial and subsequent inventories;

(b) Authorize reimbursement to the guardian, other than a parent, of reasonable expenses incurred in the execution of his trust, and allow payment of compensation for his services as the court may deem, just, not exceeding ten *per centum* of the net income of the

ward, if any; otherwise, in such amount the court determines to be a reasonable compensation for his services; and

(c) Upon complaint of the guardian or ward, or of any person having actual or prospective interest in the property of the ward, require any person suspected of having embezzled, concealed, or disposed of any money, goods or interest, or a written instrument belonging to the ward or his property to appear for examination concerning any thereof and issue such orders as would secure the property against such embezzlement, concealment or conveyance.

Sec. 19. *Petition to sell or encumber property*. — When the income of the property under guardianship is insufficient to maintain and educate the ward, or when it is for his benefit that his personal or real property or any part thereof be sold, mortgaged or otherwise encumbered, and the proceeds invested in safe and productive security, or in the improvement or security of other real property, the guardian may file a verified petition setting forth such facts, and praying that an order issue authorizing the sale or encumbrance of the property.

Sec. 20. *Order to show cause*. — If the sale or encumbrance is necessary or would be beneficial to the ward, the court shall order his next of kin and all person/s interested in the property to appear at a reasonable time and place therein specified and show cause why the petition should not be granted.

Sec. 21. *Hearing on return or order; costs*. — At the time and place designated in the order to show cause, the court shall hear the allegations and evidence of the petitioner and next of kin, and other persons interested, together with their witnesses, and grant or deny the petition as the best interests of the ward may require.

Sec. 22. *Contents of order for sale or encumbrance and its duration; bond*. — If, after full examination, it is necessary, or would be beneficial to the ward, to sell or encumber the property, or some portion of it, the court shall order such sale or encumbrance the proceeds of which shall be expended for the maintenance or the education of the ward, or invested as the circumstances may require. The order shall specify the grounds for the sale or encumbrance and may direct that the property ordered sold be disposed of at public sale, subject to such conditions as to the time and manner of payment, and security where a part of the payment is deferred. The original bond of the guardian shall stand as security for the proper appropriation of the proceeds of the sale or encumbrance, but the court may, if deemed expedient, require an additional bond

as a condition for the sale or encumbrance. The authority to sell or encumber shall not extend beyond one year, unless renewed by the court.

Sec. 23. *Court may order investment of proceeds and direct management of property.* — The court may authorize and require the guardian to invest the proceeds of sales or encumbrances, and any other money of his ward in his hands, in real or personal property, for the best interests of the ward, and may make such other orders for the management, investment, and disposition of the property and effects, as circumstances may warrant.

Sec. 24. *Grounds for removal or resignation of guardian.* — When a guardian becomes insane or otherwise incapable of discharging his trust or is found thereafter to be unsuitable, or has wasted or mismanaged the property of the ward, or has failed to render an account or make a return for thirty days after it is due, the court may, upon reasonable notice to the guardian, remove him as such and require him to surrender the property of the ward to the person found to be lawfully entitled thereto.

The court may allow the guardian to resign for justifiable causes.

Upon the removal or resignation of the guardian, the court shall appoint a new one.

No motion for removal or resignation shall be granted unless the guardian has submitted the proper accounting of the property of the ward and the court has approved the same.

Sec. 25. *Ground for termination of guardianship*. — The court *motu proprio* or upon verified motion of any person allowed to file a petition for guardianship may terminate the guardianship on the ground that the ward has come of age or has died. The guardian shall notify the court of such fact within ten days of its occurrence.

Sec. 26. *Service of final and executory judgment or order.* — The final and executory judgment or order shall be served upon the Local Civil Registrar of the municipality or city where the minor resides and the Register of Deeds of the province or city where his property or any part thereof is situated. Both the Local Civil Registrar and the Register of Deeds shall enter the final and executory judgment or order in the appropriate book in their offices.

Sec. 27. *Effect of the rule.* — This Rule amends Rules 92 to 97 inclusive of the Rules of Court on guardianship of minors.

Guardianship of incompetents who are not minors shall continue to be under the jurisdiction of the regular courts and governed by the Rules of Court.

Sec. 28. *Effectivity*. — This Rule shall take effect on May 1, 2003, following its publication in a newspaper of general circulation not later than April 15, 2003.

Article 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)

Article 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. (319a)

AID FROM THE COURT. The parents have the principal duty of undertaking measures to discipline their children. Even the State recognizes this norm unless of course, the parents treat the children inhumanly or beyond what is absolutely necessary. If the children remain incorrigible, the parents are given the right to seek the aid of

the court to impose other more drastic disciplinary measures for the child's improvement and which the court may provide as warranted under the premises. However, just like in any court action, the child is entitled to counsel so that if the child counters that it is in fact his or her parents who have been seriously mistreating him or her and this fact is proven, parental authority of the parents may even be suspended or terminated.

One of the measures imposable on the child is 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 or her support. Upon proper petition or at its own instance, the court may terminate the commitment of the child whenever just and proper.

REPUBLIC ACT NO. 8972

AN ACT PROVIDING FOR BENEFITS AND PRIVILEGES TO SOLO PARENTS AND THEIR CHILDREN, APPROPRIATING FUNDS THEREFOR AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the Philippines Congress assembled:

Section 1. *Title.* — This Act shall be known as the "Solo Parents' Welfare Act of 2000."

Section 2. *Declaration of Policy.* — It is the policy of the State to promote the family as the foundation of the nation, strengthen its solidarity and ensure its total development. Towards this end, it shall develop a comprehensive program of services for solo parents and their children to be carried out by the Department of Social Welfare and Development (DSWD), the Department of Health (DOH), the Department of Education, Culture and Sports (DECS), the Department of the Interior and Local Government (DILG), the Commission on Higher Education (CHED), the Technical Education and Skills Development Authority (TESDA), the National Housing Authority (NHA), the Department of Labor and Employment (DOLE) and other related government and non-government agencies.

Section 3. *Definition of Terms.* — Whenever used in this Act, the following terms shall mean as follows:

(a) "Solo parent" — any individual who falls under any of the following categories:

(1) A woman who gives birth as a result of rape and other crimes against chastity even without a final conviction of the offender: *Provided,* That the mother keeps and raises the child;

(2) Parent left solo or alone with the responsibility of parenthood due to death of spouse;

(3) Parent left solo or alone with the responsibility of parenthood while the spouse is detained or is serving sentence for a criminal conviction for at least one (1) year;

(4) Parent left solo or alone with the responsibility of parenthood due to physical and/or mental incapacity of spouse as certified by a public medical practitioner;

(5) Parent left solo or alone with the responsibility of parenthood due to legal separation or de facto separation from spouse for at least one (1) year, as long as he/she is entrusted with the custody of the children;

(6) Parent left solo or alone with the responsibility of parenthood due to declaration of nullity or annulment of marriage as decreed by a court or by a church as long as he/she is entrusted with the custody of the children;

(7) Parent left solo or alone with the responsibility of parenthood due to abandonment of spouse for at least one (1) year;

(8) Unmarried mother/father who has preferred to keep and rear her/his child/children instead of having others care for them or give them up to a welfare institution;

(9) Any other person who solely provides parental care and support to a child or children;

(10) Any family member who assumes the responsibility of head of family as a result of the death, abandonment, disappearance or prolonged absence of the parents or solo parent.

A change in the status or circumstance of the parent claiming benefits under this Act, such that he/she is no longer left alone with the responsibility of parenthood, shall terminate his/her eligibility for these benefits.

(b) "Children" — refer to those living with and dependent upon the solo parent for support who are unmarried, unemployed and not more than eighteen (18) years of age, or even over eighteen (18) years but are incapable of self-support because of mental and/or physical defect/disability.

(c) "Parental responsibility"— with respect to their minor children shall refer to the rights and duties of the parents as defined in Article 220 of Executive Order No. 209, as amended, otherwise known as the "Family Code of the Philippines."

(d) "Parental leave" — shall mean leave benefits granted to a solo parent to enable him/her to perform parental duties and responsibilities where physical presence is required.

(e) "Flexible work schedule" — is the right granted to a solo parent employee to vary his/her arrival and departure time without affecting the core work hours as defined by the employer.

Section 4. *Criteria for Support.* — Any solo parent whose income in the place of domicile falls below the poverty threshold as set by the National Economic and Development Authority (NEDA) and subject to the assessment of the DSWD worker in the area shall be eligible for assistance: *Provided, however,* That any solo parent whose income is above the poverty threshold shall enjoy the benefits mentioned in Sections 6, 7 and 8 of this Act.

Section 5. *Comprehensive Package of Social Development and Welfare Services.* — A comprehensive package of social development and welfare services for solo parents and their families will be developed by the DSWD, DOH, DECS, CHED, TESDA, DOLE, NHA and DILG, in coordination with local government units and a nongovernmental organization with proven track record in providing services for solo parents.

The DSWD shall coordinate with concerned agencies the implementation of the comprehensive package of social development and welfare services for solo parents and their families. The package will initially include:

(a) Livelihood development services which include trainings on livelihood skills, basic business management, value orientation and the provision of seed capital or job placement.

(b) Counseling services which include individual, peer group or family counseling. This will focus on the resolution of personal relationship and role conflicts.

(c) Parent effectiveness services which include the provision and expansion of knowledge and skills of the solo parent on early childhood development, behavior management, health care, rights and duties of parents and children.

(d) Critical incidence stress debriefing which includes preventive stress management strategy designed to assist solo parents in coping with crisis situations and cases of abuse.

(e) Special projects for individuals in need of protection which include temporary shelter, counseling, legal assistance, medical care, self-concept or ego-building, crisis management and spiritual enrichment.

Section 6. *Flexible Work Schedule.* — The employer shall provide for a flexible working schedule for solo parents: *Provided,* That the same shall not affect individual and company productivity: *Provided, further,* That any employer may request exemption from the above requirements from the DOLE on certain meritorious grounds.

Section 7. *Work Discrimination.* — No employer shall discriminate against any solo parent employee with respect to terms and conditions of employment on account of his/her status.

Section 8. *Parental Leave.* — In addition to leave privileges under existing laws, parental leave of not more than seven (7) working days every year shall be granted to any solo parent employee who has rendered service of at least one (1) year.

Section 9. *Educational Benefits.* — The DECS, CHED and TESDA shall provide the following benefits and privileges:

(1) Scholarship programs for qualified solo parents and their children in institutions of basic, tertiary and technical/skills education; and

(2) Non-formal education programs appropriate for solo parents and their children.

The DECS, CHED and TESDA shall promulgate rules and regulations for the proper implementation of this program.

Section 10. *Housing Benefits.* — Solo parents shall be given allocation in housing projects and shall be provided with liberal terms of payment on said government low-cost housing projects in accordance with housing law provisions prioritizing applicants below the poverty line as declared by the NEDA.

Section 11. *Medical Assistance.* — The DOH shall develop a comprehensive health care program for solo parents and their children. The program shall be implemented by the DOH through their retained hospitals and medical centers and the local government units (LGUs) through their provincial/district/city/ municipal hospitals and rural health units (RHUs).

Section 12. *Additional Powers and Functions of the DSWD.* — The DSWD shall perform the following additional powers and functions relative to the welfare of solo parents and their families:

(a) Conduct research necessary to: (1) develop a new body of knowledge on solo parents; (2) define executive and legislative measures needed to promote and protect the interest of solo parents and their children; and (3) assess the effectiveness of programs designed for disadvantaged solo parents and their children;

(b) Coordinate the activities of various governmental and nongovernmental organizations engaged in promoting and protecting the interests of solo parents and their children; and

(c) Monitor the implementation of the provisions of this Act and suggest mechanisms by which such provisions are effectively implemented.

Section 13. *Implementing Rules and Regulations.* — An interagency committee headed by the DSWD, in coordination with the DOH, DECS, CHED, TESDA, DOLE, NHA, and DILG is hereby established which shall formulate, within ninety (90) days upon the effectivity of this Act, the implementing rules and regulations in consultation with the local government units, nongovernment organizations and people's organizations.

Section 14. *Appropriations.* — The amount necessary to carry out the provisions of this Act shall be included in the budget of concerned government agencies in the General Appropriations Act of the year following its enactment into law and thereafter.

Section 15. *Repealing Clause.* — All laws, decrees, executive orders, administrative orders or parts thereof inconsistent with the provisions of this Act are hereby repealed, amended or modified accordingly.

Section 16. *Separability Clause.* — If any provision of this Act is held invalid or unconstitutional, other provisions not affected thereby shall continue to be in full force and effect.

Section 17. *Effectivity Clause.* — This Act shall take effect fifteen (15) days following its complete publication in the Official Gazette or in at least two (2) newspaper of general circulation.

Approved.

(Sgd.) JOSEPH EJERCITO ESTRADA
President of the Philippines

Chapter 4

EFFECT OF PARENTAL AUTHORITY UPON THE PROPERTY OF THE CHILDREN

Article 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 P50,000.00, the parent concerned shall be required to furnish a 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)

LEGAL GUARDIAN. There is no more need for a judicial court order appointing the parents as guardians. It is clear from Article 225 that regardless of the value of the unemancipated common child's property, the father and mother *ipso jure* become the legal guardian of the child's property (*Pineda v. Court of Appeals,* 45 SCAD 30, 226 SCRA 754). Parents are presumed to act only for the best interest of the children and are capacitated to reasonably undertake activities for the children's benefit. Moreover, the natural confidence which the children have with respect to their parents cannot be equaled by any other person. In case of disagreement, the affairs of the children should not be uselessly placed in a hiatus. Hence, the father's decision prevails without prejudice to the mother's right to go to court to question such decision.

PROHIBITION. There are two cases where a parent cannot be the administrator of the property of his or her children. These prohibitions are provided in the law of succession contained in the Civil Code. The *first one* is in Article 923 of the Civil Code which provides that

> Children and descendants of the person disinherited shall take his or her place and shall preserve the rights of compulsory heirs with respect to the legitime, but the disinherited parent shall not have the usufruct or administration of the property which constitutes the legitime.

For example: A has a legitimate son *B* who, in turn, has a legitimate son *C. A* executed a will where he validly disinherited *B* and bequeathed all his properties to *C.* At the time of the death of *A*, his net estate is P100,000. Considering that *C* is the only heir who can inherit, he will inherit all of the P100,000. According to Article 888 of the Civil Code, the legitime of *C* shall be one-half of the estate of the deceased. Hence *C's* legitime is P50,000. The other P50,000 shall be the free portion. Considering that *A* bequeathed all his property to *C, C* will inherit P50,000 as his legitime in his capacity as a compulsory heir and the other P50,000 in his capacity as an instituted voluntary heir in *A's* will. According to Article 923 of the Civil Code, *B* cannot administer the P50,000 constituting the legitime. However, *B* can administer the other P50,000 constituting *C's* inheritance as a voluntary heir.

The *second one* is in Article 1035 of the Civil Code which similarly provides the following:

> If the person excluded from the inheritance by reason of incapacity should be a child or descendant of the decedent and

> should have children or descendants, the latter shall acquire his right to the legitime.
>
> The person so excluded shall not enjoy the usufruct and administration of the property thus inherited by his children.

For example: A has a legitimate son *B* who, in turn, has legitimate children *C* and *D*. *B* groundlessly accused *A* of murder which accusation made *B* incapacitated to succeed due to unworthiness as provided for in Article 1032(3) of the Civil Code. At the time of the death of *A*, his net estate is P100,000. Considering that *C* and *D* are the only heirs who can inherit, they will inherit all of the P100,000. Since there is no last will and testament, they shall divide the P100,000 equally as their inheritance in accordance with Article 979 of the Civil Code. P50,000 will go to *C* and the other P50,000 will go to *D*. According to the second paragraph of Article 1035, *B* will not enjoy the usufruct and administration of the said amounts respectively inherited by *C* and *D*.

BOND. If the value of the property or income of the child exceeds P50,000, the parents are required to furnish a 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 (*See Pineda v. Court of Appeals,* 45 SCAD 30, 226 SCRA 754). The reason for the P50,000 bench mark drafted by the committee which studied the Family Code is as follows:

> The committee considers P50,000 as the amount when the property is valuable enough to require a bond on the basis of the current valuation, considering the possible abuse by the parents and the expensiveness of the bond (Minutes of the 186th Joint Meeting of the Civil Code and Family Law committees held on July 4, 1987, page 10).

Also, the law "speaks of the market value of the property or the annual income of the child, which means, therefore, the aggregate of the child's property or annual income; if this exceeds P50,000.00 a bond is required" (*Pineda v. Court of Appeals,* 45 SCAD 30, 226 SCRA 754). In a case where the claims of the three minors were worth P50,000.00 each over the death of their father and where it was contended that, in releasing the said amounts, the insurance company did not violate Section 180 of the Insurance Code requiring the posting of bond on the part of the parent with respect to a claim of a child-beneficiary in cases where the interest of the minor in

the particular claim did not exceed twenty thousand pesos, because Article 180 of the Insurance Code was already repealed by Article 225 of the Family Code which provides that a bond is required only if the property or income of the unemancipated children amounts to over P50,000.00, the Supreme Court, in *Pineda v. Court of Appeals,* 45 SCAD 30, 226 SCRA 754, ruled against the insurance company by observing that, for Article 225 of the Family Code to apply, there must be "evidence that the share of each of the minors in the proceeds of the group policy in question is the minor's only property. Without such evidence, it would not be safe to conclude that, indeed, that is his only property."

It is usually held that the giving of such a bond, the "qualification" of the guardian as it is called, is a condition precedent to the vesting of his authority. Any act done without or before the giving of the bond is a nullity (39 Am. Jur. 46). Where the natural guardian is empowered to take possession of and administer on the assets of his ward upon giving bond, the giving of the required bond is a prerequisite to this right to exercise such power (39 Am. Jur. 46-47).

BOND AND DUTIES OF A GUARDIAN. The purpose of the bond is to guarantee the performance of the obligations prescribed for general guardians.

In *Jocson v. Empire Insurance Co.,* 103 Phil. 580, where the bond of the guardian-father was sought to be forfeited on the ground that, although he had court approval to use some of the money, which the children inherited from their mother, for the children's clothing and education, such expenditure was illegal because support cannot be taken from the property of the children but from the guardian-father's own property considering that, according to the law, parents were obliged to support their children, the Supreme Court held that, since support was dependent also on the need of the recipient and that, for payment thereof, demand was a necessary requisite and considering that there was no demand, the use of the children's money by the guardian-father to buy them clothes and pay their education, which was made with court approval, was valid and therefore the bond cannot be forfeited. "Furthermore," the Supreme Court said, "the claim for support should be enforced in a separate action and not in these guardianship proceedings."

ALIENATION AND ENCUMBRANCE. Also, it has been held that the parent's authority over the estate of the ward as a legal-guardian would not extend to acts of encumbrance or disposition,

as distinguished from acts of management or administration. The distinction between one and the other kind of power is too basic in our law to be ignored (*Nario v. Philippine American Life Ins. Co.,* 20 SCRA 434). Thus, in a case where the mother did not seek court approval of the sale of properties of her minor children, the Supreme Court declared the sale as void with the following observations:

> Although the mother was said to be the minor children's guardian — an allegation on which there is not the slightest evidence — it does not appear that she was authorized to enter into these transaction or that the sale was approved by the competent court. Without the court's authority or approval, the sale was ineffective as to the minor children even if she were the minor's judicial guardian. A guardian has no authority to sell real estate of his ward, merely by reason of his general powers, and in the absence of any special authority to sell conferred by will, statute, or order of the court (28 C.J., 1133). A sale of the ward's realty by the guardian without authority from the court is void (*Lafarga v. Lafarga*, 22 Phil. 357; *Ledesma Hermanos v. Castro*, 55 Phil. 136; *Drysdales Succ.,* 130 La., 167, 57 S. 789; *Loving v. Craft,* Tx. Civ. A. 228 S.W. 390; *Palmer v. Abraham*, 55 Wash., 352; 104, p. 648).

Likewise, an abdicative waiver of rights by a guardian is an act of disposition. It cannot bind his ward, being null and void as to the ward unless duly authorized by the proper court. Thus, a parent-guardian cannot waive the rights of his or her children over property inherited from the father (*See Ledesma Hermanos v. Castro,* 55 Phil. 136, 142; *Reyes v. Barretto-Datu,* 19 SCRA 85). A parent has no power to compromise their children's claims, for a compromise has always been deemed equivalent to an alienation, and is an act of strict ownership that goes beyond mere administration (*Visaya, et al. v. Suiguitan, et al.,* G.R. No. L-8300, November 18, 1955; *Lindain v. Court of Appeals*, 212 SCRA 725). The court's approval is necessary in compromises entered into by guardians, parents, absentee's representatives and administrators or executors of decedent's estates (Article 2032 of the Civil Code).

SUMMARY PROCEEDING. Parents are required to immediately take care of the affairs of the unemancipated children. The day-to-day management should not be derailed by long court proceedings. Hence, the judicial proceeding with respect to the approval of the bond is summary in nature. This is also because the law itself has already constituted the parents as the legal guardian; hence, it is presumed that they will only act to preserve the interest

of the children and that the bond they filed with the court is in such amount as will be enough to protect the child. However, the courts still have the discretion to determine what is the reasonable amount but in no case should the amount of the bond be less than ten percent (10%) of the value of the property or annual income of the child.

All other incidents and issues shall be decided in an expeditious and inexpensive manner without regard to technical rules in the same proceeding where the bond was approved. The phrase "all incidents and issues" may include the alienation, disposition, mortgaging or otherwise encumbering of the property beyond P50,000. During the deliberations of the Civil Code and Family law committees, Justice Caguioa in referring to this matter of "all incidents and issues" in the fourth paragraph of Article 225 which, in the original draft was Article 237, clarified that the obligation to obtain authority on the part of the general guardian to sell or mortgage is limited to real properties which exceeds the value of P50,000; however, for purpose of this article, it includes personal properties since they are referring to the second paragraph of the proposed Article 237 (Minutes of the Joint Civil Code and Family Law committees held on March 1, 1986, page 6).

GUARDIANSHIP PROCEEDING. If the guardian are the parents, the rules on guardianship are merely suppletory but if the child is under substitute parental authority, or the guardian is a stranger, or a parent has remarried, the ordinary rules on guardianship shall apply. Persons other than the parents cannot be expected to have the same sense of devotion and loyalty to the child not their own and, therefore, more protection and safeguards are needed. Thus, in a case where the dispute deals with the issue of which person, namely, the mother or the child's uncle, should take hold or manage the proceeds of an insurance policy given to the child by the deceased father, the Supreme Court observed that:

> it is not an unreasonable assumption that between a mother and an uncle, the former is likely to lavish more care on and pay greater attention to her. This is all the more likely considering that the child is with the mother. There are no circumstances then that did militate against what conforms to the natural order of things, even if the language of the law were not as clear. It is not to be lost sight of either that the judiciary pursuant to its role as an agency of the State as *parens patriae,* with an even greater stress on family unity under the present Constitution, did weigh in the balance the opposing claims and did come to

the conclusion that the welfare of the child called for the mother to be entrusted with such responsibility (*Cabanas v. Pilapil,* 58 SCRA 94).

Article 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)

OWNERSHIP OF CHILD'S PROPERTY. The child himself owns the property acquired by him or her through his or her work or industry and shall be primarily used for his own welfare, support and education. However, being a part of a family which the state seeks to strengthen, if the child's property is more than sufficient to maintain the said child, the said properties may be used to defray the collective daily needs of the family. It must likewise be emphasized that a child is obliged to support his or her parents in accordance with Article 195 of the Family Code and from his or her separate property can be taken the support to be given to the parents if the same needs it and if the child can afford it.

Article 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)

ALLOWANCE OF UNEMANCIPATED CHILD. Parents who have engaged their unemancipated children to take care of their properties shall only be entitled to the net fruits of the properties so managed. This is so because the unemancipated child shall first

be given a monthly reasonable allowance taken from the gross proceeds of the property for the said month. Also, all other expenses of the administration and management of the property shall be taken from the proceeds. The balance left shall be considered the net proceeds which will go to the parents. The exception to this is when the parent-owner just decides to grant the entire proceeds to the child.

Significantly, the term "allowance" is used by the law instead of "compensatio." During one of the meetings of the Civil Code and Family Law committees which drafted the Family Code,

> Justice Reyes commented that "compensation" refers to an employer-employee relationship. He explained that the idea in the term "allowance" is that it is a family relation (Minutes of the Joint Meeting of the Civil Code and Family Laws committees held on February 19, 1986, pages 16-17).

The law provides that the proceeds thus given in whole or in part shall not be charged to the child's legitime. Justice Puno explains that the words "in whole" refer to the "entire proceeds" while the words "in part" refer to the "allowance" (Minutes of the Joint Meeting of the Civil Code and Family Laws committees held on February 19, 1986, page 17).

Chapter 5

SUSPENSION OR TERMINATION OF PARENTAL AUTHORITY

Article 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)

DEATH OF PARENT OR CHILD. Article 42 of the Civil Code provides that civil personality is extinguished by death. It likewise provides that the effect of death upon the rights and obligations of the deceased is determined by law, by contract and by will. Article 228 of the Family Code provides the effect of death of the parents or of the children relative to parental authority. Expressly, such death terminates parental authority.

Article 20 of Presidential Decree No. 603, as amended, otherwise known as the Child and Youth Welfare Code, provides that the court upon the death of the parents and in the cases mentioned in Articles 328 to 332 of the Civil Code can appoint a guardian for the person and property of the child, on petition of any relative or friend of the family or the Department of Social Welfare. Articles 328 to 332 refer to the termination or suspension of parental authority which, in turn, have already been repealed by Chapter 5, Title IX of the Family Code dealing with the same subject matter on termination and suspension of parental authority.

EMANCIPATION. A child is emancipated upon reaching the age of majority which is 18 years. Emancipation terminates parental authority over the person and property of the child and he or she is thereby qualified to do all acts of civil life save for exceptions established by existing laws in special cases.

EFFECT OF ARTICLE 228. The law provides that in the cases provided in Article 228, parental authority is terminated permanently. This article contemplates a situation where clearly, as Justice Caguioa said during the Civil Code and Family Law meetings, "the events happen with no fault on the part of the parents" (Minutes of the 135th Meeting of the Civil Code and Family Law committees held on March 22, 1986, page 9). For obvious reasons, parental authority cannot be revived in the cases provided in Article 228.

Article 229. Unless subsequently revived by a final judgment, parental authority also terminates:

1) Upon adoption of the child;

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)

EFFECT OF ARTICLE 229. The grounds referred to in Article 229 likewise terminate parental authority. However, such termination is not permanent, as parental authority can be revived by court order unlike in Article 228 and Article 232. The revival is allowed because, as Justice Caguioa said during the Civil Law and Family Code meetings, the grounds enumerated in Article 229 generally "are events without the fault of the parents or with the fault of the parents but without malice" (Minutes of the 135th Meeting of the Civil Code and Family Law committees held on March 22, 1986, page 9).

JUDICIAL TERMINATION OF PARENTAL AUTHORITY. Termination of parental authority is such a drastic step that it can only be allowed on the basis of the legal grounds provided by law. Thus, in *Salvana and Saliendra v. Gaela*, 55 Phil. 680, decided by the Supreme Court at a time when minors, in certain cases, were allowed to legally marry provided consent of the parents was obtained and where one of the issues involved was whether or not parents can

be deprived of their parental authority over their unemancipated child because they interfered with "the personal liberty of their own daughter by inducing her to make a cruel sacrifice, namely, to marry a man she does not care for, and against her will," the Supreme Court observed and ruled:

> Neither the act of compelling their unemancipated minor daughter to marry against her will, nor the act of refusing to give their consent to her marriage, is included in the causes established by the laws we have cited for depriving parents of *patria potestas* and the custody of their unemancipated minor children.
>
> Although in the majority of cases when parents oblige their unemancipated minor children to marry against their will they have at heart the welfare of those children, we disapprove of such a practice, for while in time and through fond and tender treatment, affection may follow and with it the happiness of the family, above all, should there be children, since marriage should be based upon mutual love and sympathy, there are not a few cases where marriages not precluded by such sentiments have been unfortunate; and when the means employed by parents to make their unemancipated minor children marry against their will is such as bring about moral or physical sufferings, the intervention of the courts to deprive such parents of *patria potestas* and the custody of said children will be justified.
>
> In the present case, however, it does not appear that the parents of the minor Felicisima Salvana insist upon her marrying against her will, nor do we believe that they will insist upon it on account of her present physiological condition; the cruelty having ceased thereby, which would otherwise have justified depriving them of parental authority, and if they now desire to keep her in their company, notwithstanding such condition, it is because they love her.
>
> It may be that by marrying the man by whom she is now pregnant, she would be happier than by living with her own parents, but since the law does not authorize the deprivation of parental authority on the ground that parents refuse to consent to the marriage of the unemancipated minor children, it would be a direct violation of that law, depriving said parents of their parental authority.

ADOPTION. Except in cases where the biological parent is the spouse of the adopter, 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) upon the finality of a judicial adoption decree

(Section 16, Article 5, Republic Act No. 8552). The adoptee shall be considered the legitimate son/daughter of the adopter(s) for all intents and purposes and as such is entitled in all the rights and obligations provided by law to legitimate sons/daughters born to them without discrimination of any kind. To this end, the adoptee shall be entitled to love, guidance and support in keeping with the means of the family (Section 17, Article 5, Republic Act No. 8552).

In case the adoption decree is rescinded, such 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. Upon rescission, the parental authority of the adoptee's biological parent(s), if known, or the legal custody of the Department of Social Welfare and Development if the adoptee is still a minor or incapacitated shall be restored (Section 20, Article 6, Republic Act Number 8552).

GUARDIANSHIP. A guardian appointed by the court shall generally have the care and custody of the person of his or her ward and the management of his or her estate (Section 1, Rule 96 of the Rules of Court of the Philippines).

JUDICIAL DECLARATION OF ABANDONMENT. Abandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. It means neglect or refusal to perform the natural and legal obligations of care and support which parents owe to their children.

This particular ground refers to a judicial decision arising from a case precisely filed for the declaration of abandonment. This is the meaning of the phrase "a case filed for the purpose" stated in Article 229(3). The deliberation of the Civil Code and Family Law committees leading to this ground is as follows:

> Justice Puno raised a clarificatory question: In the judicial declaration of abandonment of the child, was the suit filed precisely and primarily for the purpose of declaring the abandonment or can it be a pronouncement as an incident in another case? Justice Luciano replied that the suit was filed for the purpose. Justice Puno suggested that, since it is clear that the petition was precisely for declaration of abandonment, they say so in the provision. Dean Gupit suggested that the phrase "in a petition filed for the purpose" be added at the end of subparagraph (3). Justice Caguioa remarked that the proper term is "proceeding" and not "petition." Justice Puno

> proposed the term "instituted" to go with "proceeding" instead of "filed," while Prof. Bautista suggested the term "instituted." The Committee, however preferred to use "filed." Dean Gupit proposed the word "case" instead of "proceeding," which the Committee approved.
>
> Thus, subparagraph (3) shall read:
>
> (3) Upon judicial declaration of abandonment of the child in a case filed for the purpose (Minutes of the Civil Code and Family Law committees meeting held on March 15, 1986).

DIVESTMENT BY FINAL COURT JUDGMENT. The court may divest the parents of their parental authority over their children if the welfare of the children demands. However, the court must proceed with utmost caution in proceeding with a case involving the severance of parental authority. A decree of termination must be issued only upon clear, convincing and positive proofs. As stated by the United States Supreme Court in *Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640:

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to the "companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection" (Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 1212, 31 L.Ed. 551). Here, the State has sought not simply to infringe upon that interest but to end it. If the state prevails, it will have worked a unique kind of deprivation (Cf. May v. Anderson, 345 U.S. 528, 533, 73 S. Ct. 840, 843, 97 L. ed. 1221; Armstrong v. Mazo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. ed. 2d 62). A parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore a commanding one.

In *Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct. 1388, again the United States Supreme Court had occasion to stress on the parent's interest in court cases that deal with termination of parental authority, *to wit:*

> Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. In anything, persons faced with forced dissolution of parental rights have a more critical need for procedural protection than those resisting state intervention

into ongoing family affairs. When the State moves to destroy weakened family bonds, it must provide the parents with fundamentally fair procedure.

JUDICIAL DECLARATION OF ABSENCE OR INCAPACITY. Parental authority cannot be expected from an absentee or one who is incapacitated. The paramount consideration is the best interest of the child. Hence, once a judicial declaration of absence or incapacity has been decreed by the court and has become effective, this is a valid ground for terminating parental authority. A separate case can be filed using the judicial declaration of absence or incapacity to terminate parental authority.

Article 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)

CIVIL INTERDICTION. Civil interdiction is an accessory penalty imposed on an accused found guilty of certain crimes. It involves the deprivation of the offender during the time of his or her sentence of the rights of parental authority, or guardianship, either as to the person or property of any ward, of marital authority, of the right to manage his property and of the right to dispose of such property by any act or conveyance *inter vivos* (Revised Penal Code, Article 34). During the Civil Code and Family Law Committee hearings and considering that civil interdiction is an accessory penalty, Justice Caguioa observed that there is really no judicial declaration of civil interdiction and this ground is distinct because "there is automatic revival of parental authority" (Minutes of the Civil Code and Family Law Committee meetings held on March 15, 1986, page 11) once the sentence is served or upon pardon or amnesty of the offender. Hence, Justice Puno recommended the separate article regarding the ground of civil interdiction to bring in the context "that civil interdiction results in termination of parental authority, which can be revived without need of a court order" (Minutes of the Civil Code and Family Law Committee meetings held on March 15, 1986, page 11).

Article 231. 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.

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)

COURT PROCEEDING. The suspension or deprivation under Article 231 can be judicially decreed in a case specifically filed for that purpose or in a related case. The phrase "in a related case" in the first paragraph of Article 231, as clarified during the Civil Code and Family Law committee deliberations, can be an "off-shoot of an incident or a collateral pronouncement in another case" (Minutes of the 135th Meeting of the Civil Code and Family Law committees held on March 22, 1986, pages 5-6). It may be "an independent or collateral proceeding" *(Ibid.)*. Thus, under Article 223 of the Family Code, if a parent files a case or petition in court for the same to impose disciplinary measures over the child, the said court in the same proceeding and irrespective of the merits of the petitioner, and when it finds that the petitioner was the one at fault and not the child may order the deprivation or suspension of parental authority when the circumstances so warrant or adopt such measures as it may deem just and proper.

EXCESSIVE HARSHNESS OR CRUELTY. While parents have the duty to discipline their children which authorizes them to inflict some form of corporal punishment, the same should not be excessive. Parents likewise should not treat the children with cruelty whether or not they have any ostensible reason to do so. For instance, severely beating a child to allegedly teach him or her a lesson is no excuse for terminating parental authority. In the case of "In the Interest of J.Z., a child, *William H. Blore v. John Z. and Susan Z.,*" 53 ALR 3d 592, 190 NW 2d 27, where the circumstantial evidence was so strong and convincing that the only conclusion that can be derived from the same was that the father had by force inserted a toy telephone into the mouth of the child nearly causing his death, that the father forced very hot liquid into the child's mouth causing serious burns to his throat, that the child had previously received numerous bruises and five fractured ribs as a result of rough treatment by his father, that the mother had acquiesced in this treatment, and that this treatment by the parents was likely to continue and would cause the child serious physical, mental, moral and emotional harm, the Supreme Court of Dakota upheld the ruling of the lower court terminating the parental rights of the parents over the child.

Also, in *Hutchinson v. Hutchinson,* 124 Cal. 677, 57 P 674, where the father who was unable to control his children, frequently struck them with such things as his closed fists, a teacup, a frying pan, a strap, a cane, an iron hammer, a poker, and a cat-o'-nine tart, the court ruled that termination of parental rights of the father and the appointment of a guardian were proper under the circumstances.

CORRUPTING ORDERS, COUNSEL OR EXAMPLE. It is the duty of the parents to provide the children with moral and spiritual guidance, inculcate in them honesty, integrity and self-discipline and stimulate them in their interest in civil affairs. Hence, if the parents themselves are the ones who teach the children how to steal, rob, lie, hurt people and other negative traits, suspension or, in case of grave acts, termination of parental authority is but proper considering that by their actions they show their unfitness to provide the children with the upbringing that is due them under the law. These parents cannot be expected to be good examples to the children.

COMPELS THE CHILD TO BEG. It is the duty of the parents to inculcate in the children self-reliance through lawful activities. If a parent teaches a child to beg, he or she thereby destroys the very

potential of the child to be a productive citizen of the country. Such parents likewise cannot be expected to uplift the sense of worthiness of the child. The paramount interest of the child in this case demands the suspension or, in grave cases, termination of parental authority of a truly unworthy parent.

ACTS OF LASCIVIOUSNESS. For a parent to make the child the object of his or her prurient behavior can cause great emotional, psychological and physical harm to the victim-child. A parent subjecting his or her children to acts of lasciviousness manifests a perverse, morally depraved and highly repugnant attitude destructive of the well-being of the children and the family as well.

CULPABLE NEGLIGENCE. The grounds enumerated in Article 231 are deemed to include cases which have resulted from culpable negligence of the parent or the person exercising parental authority. For example, if a stepfather forces his stepson to beg and the mother acts indifferently or does not care about such act of the stepfather, she can be considered culpably negligent, warranting the suspension of parental authority.

SUSPENSION, DEPRIVATION, REVIVAL. The grounds under Article 231 are grounds to suspend parental authority. However, Article 231 also provides that, if the ground under the said article exists and 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.

Like Article 229, 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.

Article 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)

SEXUAL ABUSE. For a parent to sexually abuse his or her child or allow the said child to be subjected to sexual abuse is clearly a serious act of moral depravity and corruption. Such parent cannot be expected to rear his or her children in a healthy, wholesome

and upright way and can even give rise to serious traumatic and psychological problems on the part of the children.

Thus, it has been held that where a 10-year-old girl was sexually molested by her adoptive father and the natural mother was aware of her husband's behavior and failed to take steps to prevent the abuse and where it was shown that, though the mother indicated that she was separating from her abusive husband and though she actually separated from him but returned less than one month after with the abused child to live again with the adoptive father, a court order terminating the parental rights of the mother was justified (*Re Van Vlack,* 81 Cal App 2d 838, 185 P2d 346).

Also, in the case of *Re Armentrout,* 58 ALR 3d 1065, where the evidence clearly showed that two minor children were sexually molested by their stepfather who was consequently convicted of statutory rape as to one of the minor children, but the mother consistently refused to believe the stepfather's guilt despite the conviction and categorically manifested that she wanted to continue the marriage with the molesting stepfather and would bring the same back into the home when and if he were released regardless of the consequences, a court order permanently severing parental rights of the mother was considered proper as "she fails, neglects and/or refuses to appreciate the potential jeopardy into which the little girls would be placed and the attending apprehension and probable ultimate harm on them." The court said that, obviously, the mother gave more importance to her relationship with the molesting stepfather than to the welfare of the children, especially the one subjected to statutory rape and that, among others, this showed her unfitness as she was willing to risk further injury on the children. While her belief that the molesting stepfather was innocent can be understood as coming from a loyal wife, nevertheless, the molesting stepfather was criminally convicted of statutory rape which was reached after proof beyond reasonable doubt was presented in court. Although the mother insinuated that the child, who was the victim of the statutory rape, was only mixed-up when she testified against the molesting stepfather, her insistence that the molesting stepfather was innocent marks the child as either being confused or a liar, and should the mother welcome the stepfather into the home again, the child's life will become highly intolerable as she will be more confused and exposed to the same abhorrent sexual behavior of the stepfather. The court further stated that when the welfare of the child so demands, the rights of its parents must yield to the

paramount right of their offspring to receive proper parental care, guidance and control.

EFFECT OF ARTICLE 232. To highlight the gravity of sexual abuse as ground for termination of parental authority, the members of the Civil Code and Family Law committees made a separate article for that purpose and categorically provided that, if such perverse ground occurs, the parents shall be permanently deprived of their parental authority. Hence, unlike in Articles 229, 230 and 231, parental authority cannot be revived if the parents or the persons exercising parental authority are found to have subjected the child or allowed him or her to be subjected to sexual abuse pursuant to Article 232. Hence, if a father subjects his daughter to sexual abuse, he can be permanently deprived of his parental authority over the said abused daughter. If the father reforms for the better and there are indications that he might not do the same abusive act again, his parental authority cannot be revived even if the reformation of the father is authentic. It is a permanent deprivation. Parental authority cannot be restored. Termination is forever. This is such a drastic but justified consequence such that, in case a perverse and sexually abusive parent genuinely seeks the restoration of his or her parental authority on the claim that he or she has truly changed for the better, the benefit of the doubt shall be against him or her. His or her parental authority will not be restored.

GROUNDS FOR TERMINATING PARENTAL AUTHORITY UNDER THE REVISED PENAL CODE. Article 278 of the Revised Penal Code provides, among others, that it is unlawful for any ascendant, guardian, teacher or person entrusted in any capacity with the care of a child under sixteen years of age to deliver, either gratuitously or in consideration of any price, compensation or promise, such child to any habitual vagrant or beggar, or to any person who, being an acrobat, gymnast, rope-walker, diver, wild animal tamer or circus manager or engaged in a similar calling who employs said children in exhibitions. In case it is the parents who entrust such child, he or she may be deprived, temporarily or perpetually, in the discretion of the court, of their parental authority and they shall be punished by the penalty of *prision correccional* in its minimum and medium periods and a fine not exceeding P500.

Article 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 and exercising special parental authority, inflict corporal punishment upon the child. (n)

CORPORAL PUNISHMENT. Corporal punishment is the infliction of physical disciplinary measures to a student. This is absolutely prohibited under the Family Code. Also, Section 75 of the Manual of Regulations of Private Schools provides that:

> Section 1. *Imposition of Disciplinary Action.* — School officials and academic personnel shall have the right to impose appropriate and reasonable disciplinary measures in case of minor offenses or infractions of good school discipline. However, no cruel or physically harmful punishment shall be imposed or applied against any pupil or student.

While a teacher may be administratively or civilly liable in the event that he or she inflicts corporal punishment to a student, it has been held that where there was no criminal intent on the part of the teacher who angrily and repeatedly whipped a student resulting in slight physical injuries to the said student and where the purpose of the teacher was to discipline a student, the said teacher cannot be held feloniously liable for the criminal offense of slight physical injuries (*Bagajo v. Marave,* 86 SCRA 389).

RIGHT OF PARENTS TO INFLICT CORPORAL PUNISHMENT. It must be noted that only persons exercising special parental authority cannot inflict corporal punishment. Parents and persons exercising substitute parental authority can inflict corporal punishment (See Minutes of the 135th meeting of the Joint Civil Code and Family Law committees held on March 22, 1986, pages 15-16). This is also pursuant to Article 220(8) which provides that the parents have the right and the duty "to impose discipline on them as may be required under the circumstances." However, those allowed to inflict corporal punishment must do it in a reasonable manner and not treat the child with excessive harshness or cruelty, which may be a ground under Article 231 to suspend parental authority or even lead to the deprivation of the same if the cruel acts are indeed very serious.

CRIMINAL LIABILITY OF PARENTS. Aside from the termination of parental authority for an erring or abusive parent, the state has provided laws which make it a crime for parents to seriously mistreat the children. Thus, criminal liability shall attach to

any parent, guardian or the head of the institution or foster home who commits any of the following acts:

1) conceals or abandons the child with intent to make such child lose his civil status;

2) abandons the child under such circumstances as to deprive him of the love, care and protection he needs;

3) sells or abandons the child to another person for valuable consideration;

4) neglects the child by not giving him the education which the family's station in life and financial conditions permit;

5) fails or refuses, without justifiable grounds, to enroll the child;

6) causes, abates or permits the truancy of the child from the school where he is enrolled. "Truancy" as here used means absence without cause for more than twenty days, not necessarily consecutive;

7) improperly exploits the child by using him, directly or indirectly, such as for purposes of begging and other acts which are inimical to his interest and welfare;

8) inflicts cruel and unusual punishment upon the child or deliberately subjects him to indignation and other excessive chastisement that embarrass or humiliate him;

9) causes or encourages the child to lead an immoral or dissolute life;

10) permits the child to possess, handle or carry a deadly weapon, regardless of its ownership;

11) allows or requires the child to drive without license or with license which the parent knows to have been illegally procured. If the motor vehicle driven by the child belongs to the parents, it shall be presumed that he permitted or ordered the child to drive (Article 59, PD 603).

The above acts shall be punishable with imprisonment from two or six months or a fine not exceeding five hundred pesos, or both, at the discretion of the Court, unless a higher penalty is provided for in the Revised Penal Code or special laws, without prejudice to actions for involuntary commitment of the child under Title VIII of PD 603 (Article 60, PD 603).

LEGISLATION FOR THE PROTECTION OF CHILDREN. On June 17, 1992, President Corazon Aquino approved Republic

Act Number 7610, otherwise known as the "Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act." The text is as follows:

REPUBLIC ACT NO. 7610

AN ACT PROVIDING FOR STRONGER DETERRENCE AND SPECIAL PROTECTION AGAINST CHILD ABUSE, EXPLOITATION AND DISCRIMINATION, PROVIDING PENALTIES FOR ITS VIOLATION, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

ARTICLE I

Title, Policy, Principles and Definition of Terms

SECTION 1. *Title.* — This Act shall be known as the *"Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act."*

SECTION 2. *Declaration of State Policy and Principles.* — It is hereby declared to be the policy of the State to provide special protection to children from all forms of abuse, neglect, cruelty, exploitation and discrimination, and other conditions prejudicial to their development; provide sanctions for their commission and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation and discrimination. The State shall intervene on behalf of the child when the parent, guardian, teacher or person having care or custody of the child fails or is unable to protect the child against abuse, exploitation and discrimination or when such acts against the child are committed by the said parent, guardian, teacher or person having care and custody of the same.

It shall be the policy of the State to protect and rehabilitate children gravely threatened or endangered by circumstances which affect or will affect their survival and normal development and over which they have no control.

The best interests of children shall be the paramount consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, and legislative bodies, consistent with the principles of First Call for Children as

enunciated in the United Nations Convention on the Rights of the Child. Every effort shall be exerted to promote the welfare of children and enhance their opportunities for a useful and happy life.

SECTION 3. *Definition of Terms.* —

(a) "Children" refers to persons below eighteen (18) years of age or those but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition;

(b) "Child Abuse" refers to the maltreatment, whether habitual or not, of the child which includes any of the following:

(1) Psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment;

(2) Any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a human being;

(3) Unreasonable deprivation of his basic needs for survival, such as food and shelter; or

(4) Failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth and development or in his permanent incapacity or death.

(c) "Circumstances which gravely threaten or endanger the survival and normal development of children" include, but are not limited to, the following:

(1) Being in a community where there is armed conflict or being affected by armed conflict-related activities;

(2) Working under conditions hazardous to life, safety and morals which unduly interfere with their normal development;

(3) Living in or fending for themselves in the streets of urban or rural areas without the care of parents or a guardian or any adult supervision needed for their welfare;

(4) Being a member of an indigenous cultural community and/or living under the conditions of extreme poverty or in an area which is underdeveloped and/or lacks or has inadequate access to basic services needed for a good quality of life;

(5) Being a victim of a man-made or natural disaster or calamity; or

(6) Circumstances analogous to those above-stated which endanger the life, safety or normal development of children.

(d) "Comprehensive program against child abuse, exploitation and discrimination" refers to the coordinated program of services and facilities to protect children against:

(1) Child prostitution and other sexual abuse;

(2) Child trafficking;

(3) Obscene publication and indecent shows;

(4) Other acts of abuse; and

(5) Circumstances which threaten or endanger the survival and normal development of children.

ARTICLE II

Program on Child Abuse, Exploitation and Discrimination

SECTION 4. *Formulation of the Program.* — There shall be a comprehensive program to be formulated by the Department of Justice and the Department of Social Welfare and Development in coordination with other government agencies and private sector concerned, within one (1) year from the effectivity of this Act, to protect children against child prostitution and other sexual abuse; child prostitution; child trafficking; obscene publications and indecent shows; other acts of abuse; and circumstances which endanger child survival and normal development.

ARTICLE III

Child Prostitution and Other Sexual Abuse

SECTION 5. *Child Prostitution and Other Sexual Abuse.* — Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

The penalty of *reclusion temporal* in its medium period to *reclusion perpetua* shall be imposed upon the following:

(a) Those who engage in or promote, facilitate or induce child prostitution which include, but are not limited to, the following:

1. Acting as a procurer of a child prostitute;

2. Inducing a person to be a client of a child prostitute by means of written or oral advertisements or other similar means;

3. Taking advantage of influence or relationship to procure a child as a prostitute;

4. Threatening or using violence towards a child to engage him as a prostitute; or

5. Giving monetary consideration, goods or other pecuniary benefit to a child with the intent to engage such child in prostitution.

(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse: *Provided,* That when the victim is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: *Provided*, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be *reclusion temporal* in its medium period; and

(c) Those who derive profit or advantage therefrom, whether as manager or owner of the establishment where the prostitution takes place or of the sauna, disco, bar, resort, place of entertainment or establishment serving as a cover or which engages in prostitution in addition to the activity for which the license has been issued to said establishment.

SECTION 6. *Attempt to Commit Child Prostitution.* — There is an attempt to commit child prostitution under Section 5, paragraph (a) hereof when any person who, not being a relative of a child, is found alone with the said child inside the room or cubicle of a house, an inn, hotel, motel, pension house, apartelle or other similar establishments, vessel, vehicle or any other hidden or secluded area under circumstances which would lead a reasonable person to believe that the child is about to be exploited in prostitution and other sexual abuse.

There is also an attempt to commit child prostitution, under paragraph (b) of Section 5 hereof when any person is receiving services from a child in a sauna parlor or bath, massage clinic, health club and other similar establishments. A penalty lower by two (2) degrees than that prescribed for the consummated felony under Section 5 hereof shall be imposed upon the principals of the attempt to commit the crime of child

prostitution under this Act, or, in the proper case, under the Revised Penal Code.

ARTICLE IV

Child Trafficking

SECTION 7. *Child Trafficking.* — Any person who shall engage in trading and dealing with children including, but not limited to, the act of buying and selling of a child for money, or for any other consideration, or barter, shall suffer the penalty of *reclusion temporal* to *reclusion perpetua.* The penalty shall be imposed in its maximum period when the victim is under twelve (12) years of age.

SECTION 8. *Attempt to Commit Child Trafficking.* — There is an attempt to commit child trafficking under Section 7 of this Act:

(a) When a child travels alone to a foreign country without valid reason therefor and without clearance issued by the Department of Social Welfare and Development or written permit or justification from the child's parents or legal guardian;

(b) When a pregnant mother executes an affidavit of consent for adoption for a consideration;

(c) When a person, agency, establishment or child-caring institution recruits women or couples to bear children for the purpose of child trafficking;

(d) When a doctor, hospital or clinic official or employee, nurse, midwife, local civil registrar or any other person simulates birth for the purpose of child trafficking; or

(e) When a person engages in the act of finding children among low-income families, hospitals, clinics, nurseries, day-care centers, or other child-caring institutions who can be offered for the purpose of child trafficking.

A penalty lower by two (2) degrees than that prescribed for the consummated felony under Section 7 hereof shall be imposed upon the principals of the attempt to commit child trafficking under this Act.

ARTICLE V

Obscene Publications and Indecent Shows

SECTION 9. *Obscene Publications and Indecent Shows.* — Any person who shall hire, employ, use, persuade, induce or

coerce a child to perform in obscene exhibitions and indecent shows, whether live or in video, pose, or model in obscene publications or pornographic materials or to sell or distribute the said materials shall suffer the penalty of *prision mayor* in its medium period.

If the child used as a performer, subject or seller/distributor is below twelve (12) years of age, the penalty shall be imposed in its maximum period.

Any ascendant, guardian, or person entrusted in any capacity with the care of child who shall cause and/or allow such child to be employed or to participate in an obscene play, scene, act, movie or show or in any other acts covered by this section shall suffer the penalty of *prision mayor* in its medium period.

ARTICLE VI

Other Acts of Abuse

SECTION 10. *Other Acts of Neglect, Abuse, Cruelty or Exploitation and Other Conditions Prejudicial to the Child's Development.* —

(a) Any person who shall commit any other acts of child abuse, cruelty or exploitation or be responsible for other conditions prejudicial to the child's development including those covered by Article 59 of Presidential Decree No 603, as amended, but not covered by the Revised Penal Code, as amended, shall suffer the penalty of *prision mayor* in its minimum period.

(b) Any person who shall keep or have in his company a minor, twelve (12) years or under or who is ten (10) years or more his junior in any public or private place, hotel, motel, beer joint, discotheque, cabaret, pension house, sauna or massage parlor, beach and/or other tourist resort or similar places shall suffer the penalty of *prision mayor* in its maximum period and a fine of not less than Fifty Thousand Pesos (P50,000.00): *Provided,* That this provision shall not apply to any person who is related within the fourth degree of consanguinity or affinity or any bond recognized by law, local custom and tradition, or acts in the performance of a social, moral or legal duty.

(c) Any person who shall induce, deliver or offer a minor to any one prohibited by this Act to keep or have in his company a minor as provided in the preceding paragraph shall suffer the penalty of *prision mayor* in its medium period and a fine of not less than Forty Thousand Pesos (P40,000.00): *Provided, however,* That should the perpetrator be an ascendant, step-parent or guardian of the minor, the penalty to be imposed shall

be *prision mayor* in its maximum period, a fine of not less than Fifty Thousand Pesos (P50,000.00), and the loss of parental authority over the minor.

(d) Any person, owner, manager or one entrusted with the operation of any public or private place of accommodation, whether for occupancy, food, drink, or otherwise, including residential places, who allows any person to take along with him to such place or places any minor herein described shall be imposed a penalty of *prision mayor* in its medium period and a fine of not less than Fifty Thousand Pesos (P50,000.00), and the loss of the license to operate such a place or establishment.

(e) Any person who shall use, coerce, force or intimidate a street-child or any other child to:

(1) Beg or use begging as a means of living;

(2) Act as conduit or middleman in drug trafficking or pushing; or

(3) Conduct any illegal activities, shall suffer the penalty of *prision correccional* in its medium period to *reclusion perpetua.*

For purposes of this Act, the penalty for the commission of acts punishable under Articles 248, 249, 262, paragraph 2, and 263, paragraph 1 of Act No. 3815, as amended, the Revised Penal Code, for the crimes of murder, homicide, other intentional mutilation, and serious physical injuries, respectively, shall be *reclusion perpetua* when the victim is under twelve (12) years of age. The penalty for the commission of acts punishable under Articles 337, 339, 340 and 341 of Act No. 3815, as amended, the Revised Penal Code, for the crimes of qualified seduction, acts of lasciviousness with the consent of the offended party, corruption of minors, and white slave trade, respectively, shall be one (1) degree higher than that imposed by law when the victim is under twelve (12) years of age.

The victim of the acts committed under this section shall be entrusted to the care of the Department of Social Welfare and Development.

ARTICLE VII

Sanctions for Establishments or Enterprises

SECTION 11. *Sanctions for Establishments or Enterprises which Promote, Facilitate or Conduct Activities Constituting Child Prostitution and Other Sexual Abuse, Child Trafficking, Obscene Publications and Indecent Shows, and Other Acts of*

Abuse. — All establishments and enterprises which promote or facilitate child prostitution and other sexual abuse, child trafficking, obscene publications and indecent shows, and other acts of abuse shall be immediately closed and their authority or license to operate canceled, without prejudice to the owner or manager thereof being prosecuted under this Act and/or the Revised Penal Code, as amended, or special laws. A sign with the words "off limits" shall be conspicuously displayed outside the establishments or enterprises by the Department of Social Welfare and Development for such period which shall not be less than one (1) year, as the Department may determine. The unauthorized removal of such sign shall be punishable by *prision correccional.*

An establishment shall be deemed to promote or facilitate child prostitution and other sexual abuse, child trafficking, obscene publications and indecent shows, and other acts of abuse if the acts constituting the same occur in the premises of said establishment under this Act or in violation of the Revised Penal Code, as amended. An enterprise such as a sauna, travel agency, or recruitment agency which: promotes the aforementioned acts as part of a tour for foreign tourists; exhibits children in a lewd or indecent show; provides child masseurs for adults of the same or opposite sex and said services include any lascivious conduct with the customers; or solicits children for activities constituting the aforementioned acts shall be deemed to have committed the acts penalized herein.

ARTICLE VIII

Working Children

SECTION 12. *Employment of Children.* — Children below fifteen (15) years of age may be employed: *Provided*, That, the following minimum requirements are present:

(a) The employer shall secure for a work permit from the Department of Labor and Employment;

(b) The employer shall ensure the protection, health, safety, and morals of the child;

(c) The employer shall institute measures to prevent exploitation or discrimination taking into account the system and level of remuneration, and the duration and arrangement of working time; and

(d) The employer shall formulate and implement continuous program for training and skill acquisition of the child.

The Department of Labor and Employment shall promulgate rules and regulations necessary for the effective implementation of this section.

SECTION 13. *Non-formal Education for Working Children.* — The Department of Education, Culture and Sports shall promulgate a course design under its non-formal education program aimed at promoting the intellectual, moral and vocational efficiency of working children who have not undergone or finished elementary or secondary education. Such course design shall integrate the learning process deemed most effective under given circumstances.

SECTION 14. *Prohibition on the Employment of Children in Certain Advertisements.* — No person shall employ child models in all commercials or advertisements promoting alcoholic beverages, intoxicating drinks, tobacco and its by-products, and violence.

SECTION 15. *Duty of Employer.* — Every employer shall comply with the duties provided for in Articles 108 and 109 of Presidential Decree No. 603.

SECTION 16. *Penalties.* — Any person who shall violate any provision of this Article shall suffer the penalty of a fine of not less than One Thousand Pesos (P1,000.00) but not more than Ten Thousand Pesos (P10,000.00) or imprisonment of not less than three (3) months but not more than three (3) years, or both, at the discretion of the court; *Provided*, That in case of repeated violations of the provisions of this Article, the offender's license to operate shall be revoked.

ARTICLE IX

Children of Indigenous Cultural Communities

SECTION 17. *Survival, Protection and Development.* — In addition to the rights guaranteed to children under this Act and other existing laws, children of indigenous cultural communities shall be entitled to protection, survival and development consistent with the customs and traditions of their respective communities.

SECTION 18. *System of and Access to Education.* — The Department of Education, Culture and Sports shall develop and institute an alternative system of education for children of indigenous cultural communities which is culture-specific and relevant to the needs and the existing situation in their communities. The Department of Education, Culture and Sports shall also accredit and support non-formal but functional

indigenous educational programs conducted by non-governmental organizations in said communities.

SECTION 19. *Health and Nutrition.* — The delivery of basic social services in health and nutrition to children of indigenous cultural communities shall be given priority by all government agencies concerned. Hospitals and other health institutions shall ensure that children of indigenous cultural communities are given equal attention. In the provision of health and nutrition services to children of indigenous cultural communities, indigenous health practices shall be respected and recognized.

SECTION 20. *Discrimination.* — Children of indigenous cultural communities shall not be subjected to any and all forms of discrimination.

Any person who discriminates against children of indigenous cultural communities shall suffer a penalty of *arresto mayor* in its maximum period and a fine of not less than Five Thousand Pesos (P5,000.00) nor more than Ten Thousand Pesos (P10,000.00).

SECTION 21. *Participation.* — Indigenous cultural communities, through their duly-designated or appointed representatives, shall be involved in planning, decision-making, implementation, and evaluation of all government programs affecting children of indigenous cultural communities. Indigenous institutions shall also be recognized and respected.

ARTICLE X

Children in Situations of Armed Conflict

SECTION 22. *Children as Zones of Peace.* — Children are hereby declared as Zones of Peace. It shall be the responsibility of the State and all other sectors concerned to resolve armed conflicts in order to promote the goal of children as zones of peace. To attain this objective, the following policies shall be observed:

(a) Children shall not be the object of attack and shall be entitled to special respect. They shall be protected from any form of threat, assault, torture or other cruel, inhumane or degrading treatment;

(b) Children shall not be recruited to become members of the Armed Forces of the Philippines or its civilian units or other armed groups, nor be allowed to take part in the fighting, or used as guides, couriers, or spies;

(c) Delivery of basic social services such as education, primary health and emergency relief services shall be kept unhampered;

(d) The safety and protection of those who provide services including those involved in fact-finding missions from both government and non-government institutions shall be ensured. They shall not be subjected to undue harassment in the performance of their work;

(e) Public infrastructure such as schools, hospitals and rural health units shall not be utilized for military purposes such as command posts, barracks, detachments, and supply depots; and

(f) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated due to armed conflict.

SECTION 23. *Evacuation of Children During Armed Conflict.* — Children shall be given priority during evacuation as a result of armed conflict. Existing community organizations shall be tapped to look after the safety and well-being of children during evacuation operations. Measures shall be taken to ensure that children evacuated are accompanied by persons responsible for their safety and well-being.

SECTION 24. *Family Life and Temporary Shelter.* — Whenever possible, members of the same family shall be housed in the same premises and given separate accommodation from other evacuees and provided with facilities to lead a normal family life. In places of temporary shelter, expectant and nursing mothers and children shall be given additional food in proportion to their physiological needs. Whenever feasible, children shall be given opportunities for physical exercises, sports and outdoor games.

SECTION 25. *Rights of Children Arrested for Reasons Related to Armed Conflict.* — Any child who has been arrested for reasons related to armed conflict, either as combatant, courier, guide or spy is entitled to the following rights:

(a) Separate detention from adults except where families are accommodated as family units;

(b) Immediate free legal assistance;

(c) Immediate notice of such arrest to the parents or guardian of the child; and

(d) Release of the child on recognizance within twenty-four (24) hours to the custody of the Department of Social Welfare and Development or any responsible member of the community as determined by the court.

If after hearing the evidence in the proper proceeding the court should find that the aforesaid child has committed the acts charged against him, the court shall determine the imposable penalty, including any civil liability chargeable against him. However, instead of pronouncing judgment of conviction, the court shall suspend all further proceedings and shall commit such child to the custody or care of the Department of Social Welfare and Development or to any training institution operated by the Government, or duly-licensed agencies or any other responsible person until he has had reached eighteen (18) years of age, or for a shorter period as the court may deem proper, after considering the reports and recommendations of the Department of Social Welfare and Development or the agency or responsible individual under whose care he has been committed.

The aforesaid child shall be subject to visitation and supervision by a representative of the Department of Social Welfare and Development or any duly-licensed agency or such other officer as the court may designate subject to such conditions as it may prescribe.

The aforesaid child whose sentence is suspended can appeal from the order of the court in the same manner as appeals in criminal cases.

SECTION 26. *Monitoring and Reporting of Children in Situations of Armed Conflict.* — The chairman of the barangay affected by the armed conflict shall submit the names of children residing in said barangay to the municipal social welfare and development officer within twenty-four (24) hours from the occurrence of the armed conflict.

ARTICLE XI

Remedial Procedures

SECTION 27. *Who May File a Complaint.* — Complaints on cases of unlawful acts committed against children as enumerated herein may be filed by the following:

(a) Offended party;

(b) Parents or guardians;

(c) Ascendant or collateral relative within the third degree of consanguinity;

(d) Officer, social worker or representative of a licensed child-caring institution;

(e) Officer or social worker of the Department of Social Welfare and Development;

(f) Barangay chairman; or

(g) At least three (3) concerned, responsible citizens where the violation occurred.

SECTION 28. *Protective Custody of the Child.* — The offended party shall be immediately placed under the protective custody of the Department of Social Welfare and Development pursuant to Executive Order No. 56, series of 1986. In the regular performance of this function, the officer of the Department of Social Welfare and Development shall be free from any administrative, civil or criminal liability. Custody proceedings shall be in accordance with the provisions of Presidential Decree No. 603.

SECTION 29. *Confidentiality.* — At the instance of the offended party, his name may be withheld from the public until the court acquires jurisdiction over the case.

It shall be unlawful for any editor, publisher, and reporter or columnist in case of printed materials, announcer or producer in case of television and radio broadcasting, producer and director of the film in case of the movie industry, to cause undue and sensationalized publicity of any case of violation of this Act which results in the moral degradation and suffering of the offended party.

SECTION 30. *Special Court Proceedings.* — Cases involving violations of this Act shall be heard in the chambers of the judge of the Regional Trial Court duly designated as Juvenile and Domestic Relations Court.

Any provision of existing law to the contrary notwithstanding and with the exception of *habeas corpus*, election cases, and cases involving detention prisoners and persons covered by Republic Act No. 4908, all courts shall give preference to the hearing or disposition of cases involving violations of this Act.

ARTICLE XII

Common Penal Provisions

SECTION 31. *Common Penal Provisions.* —

(a) The penalty provided under this Act shall be imposed in its maximum period if the offender has been previously convicted under this Act;

(b) When the offender is a corporation, partnership or association, the officer or employee thereof who is responsible

for the violation of this Act shall suffer the penalty imposed in its maximum period;

(c) The penalty provided herein shall be imposed in its maximum period when the perpetrator is an ascendant, parent, guardian, stepparent or collateral relative within the second degree of consanguinity or affinity, or a manager or owner of an establishment which has no license to operate or its license has expired or has been revoked;

(d) When the offender is a foreigner, he shall be deported immediately after service of sentence and forever barred from entry to the country;

(e) The penalty provided for in this Act shall be imposed in its maximum period if the offender is a public officer or employee: *Provided, however,* That if the penalty imposed is *reclusion perpetua* or *reclusion temporal*, then the penalty of perpetual or temporary absolute disqualification shall also be imposed: *Provided, finally,* That if the penalty imposed is *prision correccional* or *arresto mayor*, the penalty of suspension shall also be imposed; and

(f) A fine to be determined by the court shall be imposed and administered as a cash fund by the Department of Social Welfare and Development and disbursed for the rehabilitation of each child victim, or any immediate member of his family if the latter is the perpetrator of the offense.

ARTICLE XIII

Final Provisions

SECTION 32. *Rules and Regulations.* — Unless otherwise provided in this Act, the Department of Justice, in coordination with the Department of Social Welfare and Development, shall promulgate rules and regulations for the effective implementation of this Act.

Such rules and regulations shall take effect upon their publication in two (2) national newspapers of general circulation.

SECTION 33. *Appropriations.* — The amount necessary to carry out the provisions of this Act is hereby authorized to be appropriated in the General Appropriations Act of the year following its enactment into law and thereafter.

SECTION 34. *Separability Clause.* — If any provision of this Act is declared invalid or unconstitutional, the remaining provisions not affected thereby shall continue in full force and effect.

SECTION 35. *Repealing Clause.* — All laws, decrees, or rules inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SECTION 36. *Effectivity Clause.* — This Act shall take effect upon completion of its publication in at least two (2) national newspapers of general circulation.

Approved: June 17, 1992.

(Sgd.) CORAZON C. AQUINO
President of the Philippines

SPECIAL RULES ON CHILDREN WITNESSES. The Supreme Court has promulgated special rules for witnesses who are children especially those who are abused.

RULES ON EXAMINATION OF A CHILD WITNESS

SECTION 1. *Applicability of the Rule.* — Unless otherwise provided, this Rule shall govern the examination of child witnesses who are victims of crime, accused of a crime, and witnesses to crime. It shall apply in all criminal proceedings and non-criminal proceedings involving child witnesses.

SEC. 2. *Objectives.* — The objectives of this Rule are to create and maintain an environment that will allow children to give reliable and complete evidence, minimize trauma to children, encourage children to testify in legal proceedings, and facilitate the ascertainment of truth.

SEC. 3. *Construction of the Rule.* — This Rule shall be liberally construed to uphold the best interests of the child and to promote maximum accommodation of child witnesses without prejudice to the constitutional rights of the accused.

SEC. 4. *Definitions.* —

(a) A "child witness" is any person who at the time of giving testimony is below the age of eighteen (18) years. In child abuse cases, a child includes one over eighteen (18) years but is found by the court as unable to fully take care of himself or protect himself from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition.

(b) "Child abuse" means physical, psychological, or sexual abuse, and criminal neglect as defined in Republic Act No. 7610 and other related laws.

(c) "Facilitator" means a person appointed by the court to pose questions to a child.

(d) "Record regarding a child" or "record" means any photograph, videotape, audiotape, film, handwriting, typewriting, printing, electronic recording, computer data or printout, or other memorialization, including any court document, pleading, or any copy or reproduction of any of the foregoing, that contains the name, description, address, school, or any other personal identifying information about a child or his family and that is produced or maintained by a public agency, private agency, or individual.

(e) A "guardian *ad litem*" is a person appointed by the court where the case is pending for a child who is a victim of, accused of, or a witness to a crime to protect the best interests of the said child.

(f) A "support person" is a person chosen by the child to accompany him to testify at or attend a judicial proceeding or deposition to provide emotional support for him.

(g) "Best interests of the child" means the totality of the circumstances and conditions as are most congenial to the survival, protection, and feelings of security of the child and most encouraging to his physical, psychological, and emotional development. It also means the least detrimental available alternative for safeguarding the growth and development of the child.

(h) "Developmental level" refers to the specific growth phase in which most individuals are expected to behave and function in relation to the advancement of their physical, socio-emotional, cognitive, and moral abilities.

(i) "In-depth investigative interview" or "disclosure interview" is an inquiry or proceeding conducted by duly trained members of a multidisciplinary team or representatives of law enforcement or child protective services for the purpose of determining whether child abuse has been committed.

SEC. 5. *Guardian ad litem.* —

(a) The court may appoint a guardian *ad litem* for a child who is a victim of, accused of, or a witness to a crime to promote the best interests of the child. In making the appointment, the court shall consider the background of the guardian *ad litem* and his familiarity with the judicial process, social service programs, and child development, giving preference to the parents of the child, if qualified. The guardian *ad litem* may be a member of the Philippine Bar. A person who is a witness

in any proceeding involving the child cannot be appointed as a guardian *ad litem*.

(b) The guardian *ad litem*:

(1) Shall attend all interviews, depositions, hearings, and trial proceedings in which a child participates;

(2) Shall make recommendations to the court concerning the welfare of the child;

(3) Shall have access to all reports, evaluations, and records necessary to effectively advocate for the child, except privileged communications;

(4) Shall marshal and coordinate the delivery of resources and special services to the child;

(5) Shall explain, in language understandable to the child, all legal proceedings, including police investigations, in which the child is involved;

(6) Shall assist the child and his family in coping with the emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved;

(7) May remain with the child while the child waits to testify;

(8) May interview witnesses; and

(9) May request additional examinations by medical or mental health professionals if there is a compelling need therefor.

(c) The guardian *ad litem* shall be notified of all proceedings but shall not participate in the trial. However, he may file motions pursuant to Sections 9, 10, 25, 26, 27 and 31(c). If the guardian *ad litem* is a lawyer, he may object during trial that questions asked of the child are not appropriate to his developmental level.

(d) The guardian *ad litem* may communicate concerns regarding the child to the court through an officer of the court designated for that purpose.

(e) The guardian *ad litem* shall not testify in any proceeding concerning any information, statement, or opinion received from the child in the course of serving as a guardian *ad litem*, unless the court finds it necessary to promote the best interests of the child.

(f) The guardian *ad litem* shall be presumed to have acted in good faith in compliance with his duties described in sub-section (b).

SEC. 6. *Competency.* — Every child is presumed qualified to be a witness. However, the court shall conduct a competency examination of a child, *motu proprio* or on motion of a party, when it finds that substantial doubt exists regarding the ability of the child to perceive, remember, communicate, distinguish truth from falsehood, or appreciate the duty to tell the truth in court.

(a) *Proof of necessity.* — A party seeking a competency examination must present proof of necessity for competency examination. The age of the child by itself is not sufficient basis for a competency examination.

(b) *Burden of proof.* — To rebut the presumption of competence enjoyed by a child, the burden of proof lies on the party challenging his competence.

(c) *Persons allowed at competency examination.* — Only the following are allowed to attend a competency examination:

(1) The judge and necessary court personnel;

(2) The counsel for the parties;

(3) The guardian *ad litem*;

(4) One or more support persons for the child; and

(5) The defendant, unless the court determines that competence can be fully evaluated in his absence.

(d) *Conduct of examination.* — Examination of a child as to his competence shall be conducted only by the judge. Counsel for the parties, however, can submit questions to the judge that he may, in his discretion, ask the child.

(e) *Developmentally appropriate questions.* — The questions asked at the competency examination shall be appropriate to the age and developmental level of the child; shall not be related to the issues at trial; and shall focus on the ability of the child to remember, communicate, distinguish between truth and falsehood, and appreciate the duty to testify truthfully.

(f) *Continuing duty to assess competence.* — The court has the duty of continuously assessing the competence of the child throughout his testimony.

SEC. 7. *Oath or affirmation.* — Before testifying, a child shall take an oath or affirmation to tell the truth.

SEC. 8. *Examination of a child witness.* — The examination of a child witness presented in a hearing or any proceeding shall be done in open court. Unless the witness is incapacitated to

speak, or the question calls for a different mode of answer, the answers of the witness shall be given orally.

The party who presents a child witness or the guardian *ad litem* of such child witness may, however, move the court to allow him to testify in the manner provided in this Rule.

SEC. 9. *Interpreter for child.* —

(a) When a child does not understand the English or Filipino language or is unable to communicate in said languages due to his developmental level, fear, shyness, disability, or other similar reason, an interpreter whom the child can understand and who understands the child may be appointed by the court, *motu proprio* or upon motion, to interpret for the child.

(b) If a witness or member of the family of the child is the only person who can serve as an interpreter for the child, he shall not be disqualified and may serve as the interpreter of the child. The interpreter, however, who is also a witness, shall testify ahead of the child.

(c) An interpreter shall take an oath or affirmation to make a true and accurate interpretation.

SEC. 10. *Facilitator to pose questions to child.* —

(a) The court may, *motu proprio* or upon motion, appoint a facilitator if it determines that the child is unable to understand or respond to questions asked. The facilitator may be a child psychologist, psychiatrist, social worker, guidance counselor, teacher, religious leader, parent, or relative.

(b) If the court appoints a facilitator, the respective counsels for the parties shall pose questions to the child only through the facilitator. The questions shall either be in the words used by counsel or, if the child is not likely to understand the same, in words that are comprehensible to the child and which convey the meaning intended by counsel.

(c) The facilitator shall take an oath or affirmation to pose questions to the child according to the meaning intended by counsel.

SEC. 11. *Support persons.* —

(a) A child testifying at a judicial proceeding or making a deposition shall have the right to be accompanied by one or two persons of his own choosing to provide him emotional support.

(1) Both support persons shall remain within the view of the child during his testimony.

(2) One of the support persons may accompany the child to the witness stand, provided the support person does not completely obscure the child from the view of the opposing party, judge, or hearing officer.

(3) The court may allow the support person to hold the hand of the child or take other appropriate steps to provide emotional support to the child in the course of the proceedings.

(4) The court shall instruct the support persons not to prompt, sway, or influence the child during his testimony.

(b) If the support person chosen by the child is also a witness, the court may disapprove the choice if it is sufficiently established that the attendance of the support person during the testimony of the child would pose a substantial risk of influencing or affecting the content of the testimony of the child.

(c) If the support person who is also a witness is allowed by the court, his testimony shall be presented ahead of the testimony of the child.

SEC. 12. *Waiting area for child witnesses.* — The courts are encouraged to provide a waiting area for children that is separate from waiting areas used by other persons. The waiting area for children should be furnished so as to make a child comfortable.

SEC. 13. *Courtroom environment.* — To create a more comfortable environment for the child, the court may, in its discretion, direct and supervise the location, movement and deportment of all persons in the courtroom including the parties, their counsel, child, witnesses, support persons, guardian *ad litem*, facilitator, and court personnel. The child may be allowed to testify from a place other than the witness chair. The witness chair or other place from which the child testifies may be turned to facilitate his testimony but the opposing party and his counsel must have a frontal or profile view of the child during the testimony of the child. The witness chair or other place from which the child testifies may also be rearranged to allow the child to see the opposing party and his counsel if he chooses to look at them, without turning his body or leaving the witness stand. The judge need not wear his judicial robe.

Nothing in this section or any other provision of law, except official in-court identification provisions, shall be construed to require a child to look at the accused.

Accommodations for the child under this section need not be supported by a finding of trauma to the child.

SEC. 14. *Testimony during appropriate hours.* — The court may order that the testimony of the child should be taken during a time of day when the child is well-rested.

SEC. 15. *Recess during testimony.* —

The child may be allowed reasonable periods of relief while undergoing direct, cross, re-direct, and re-cross examinations as often as necessary depending on his developmental level.

SEC. 16. *Testimonial aids.* — The court shall permit a child to use dolls, anatomically-correct dolls, puppets, drawings, mannequins, or any other appropriate demonstrative device to assist him in his testimony.

SEC. 17. *Emotional security item.* — While testifying, a child shall be allowed to have an item of his own choosing such as a blanket, toy, or doll.

SEC. 18. *Approaching the witness.* — The court may prohibit a counsel from approaching a child if it appears that the child is fearful of or intimidated by the counsel.

SEC. 19. *Mode of questioning.* — The court shall exercise control over the questioning of children so as to: (1) facilitate the ascertainment of the truth, (2) ensure that questions are stated in a form appropriate to the developmental level of the child, (3) protect children from harassment or undue embarrassment, and (4) avoid waste of time.

The court may allow the child witnesses to testify in a narrative form.

SEC. 20. *Leading questions.* — The court may allow leading questions in all stages of examination of a child if the same will further the interests of justice.

SEC. 21. *Objections to questions.* — Objections to questions should be couched in a manner so as not to mislead, confuse, frighten, or intimidate the child.

SEC. 22. *Corroboration.* — Corroboration shall not be required of a testimony of a child. His testimony, if credible by itself, shall be sufficient to support a finding of fact, conclusion, or judgment subject to the standard of proof required in criminal and non-criminal cases.

SEC. 23. *Excluding the public.* — When a child testifies, the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made to protect the right to privacy of the child or if the court determines on the

record that requiring the child to testify in open court would cause psychological harm to him, hinder the ascertainment of truth, or result in his inability to effectively communicate due to embarrassment, fear, or timidity. In making its order, the court shall consider the developmental level of the child, the nature of the crime, the nature of his testimony regarding the crime, his relationship to the accused and to persons attending the trial, his desires, and the interests of his parents or legal guardian. The court may, *motu proprio,* exclude the public from the courtroom if the evidence to be produced during trial is of such character as to be offensive to decency or public morals. The court may also, on motion of the accused, exclude the public from trial, except court personnel and the counsel of the parties.

SEC. 24. *Persons prohibited from entering and leaving courtroom*. — The court may order that persons attending the trial shall not enter or leave the courtroom during the testimony of the child.

SEC. 25. *Live-link television testimony in criminal cases where the child is a victim or a witness.* —

(a) The prosecutor, counsel or the guardian *ad litem* may apply for an order that the testimony of the child be taken in a room outside the courtroom and be televised to the courtroom by live-link television.

Before the guardian *ad litem* applies for an order under this section, he shall consult the prosecutor or counsel and shall defer to the judgment of the prosecutor or counsel regarding the necessity of applying for an order. In case the guardian *ad litem* is convinced that the decision of the prosecutor or counsel not to apply will cause the child serious emotional trauma, he himself may apply for the order.

The person seeking such an order shall apply at least five (5) days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(b) The court may *motu proprio* hear and determine, with notice to the parties, the need for taking the testimony of the child through live-link television.

(c) The judge may question the child in chambers, or in some comfortable place other than the courtroom, in the presence of the support person, guardian *ad litem,* prosecutor, and counsel for the parties. The questions of the judge shall not be related to the issue at trial but to the feelings of the child about testifying in the courtroom.

(d) The judge may exclude any person, including the accused, whose presence or conduct causes fear to the child.

(e) The court shall issue an order granting or denying the use of live-link television and stating the reasons therefor. It shall consider the following factors:

(1) The age and level of development of the child;

(2) His physical and mental health, including any mental or physical disability;

(3) Any physical, emotional, or psychological injury experienced by him;

(4) The nature of the alleged abuse;

(5) Any threats against the child;

(6) His relationship with the accused or adverse party;

(7) His reaction to any prior encounters with the accused in court or elsewhere;

(8) His reaction prior to trial when the topic of testifying was discussed with him by parents or professionals;

(9) Specific symptoms of stress exhibited by the child in the days prior to testifying;

(10) Testimony of expert or lay witnesses;

(11) The custodial situation of the child and the attitude of the members of his family regarding the events about which he will testify; and

(12) Other relevant factors, such as court atmosphere and formalities of court procedure.

(f) The court may order that the testimony of the child be taken by live-link television if there is a substantial likelihood that the child would suffer trauma from testifying in the presence of the accused, his counsel or the prosecutor as the case may be. The trauma must be of a kind which would impair the completeness or truthfulness of the testimony of the child.

(g) If the court orders the taking of testimony by live-link television:

(1) The child shall testify in a room separate from the courtroom in the presence of the guardian *ad litem*, one or both of his support persons; the facilitator and interpreter, if any; a court officer appointed by the court; persons necessary to operate the closed-circuit television equipment; and other persons whose presence are determined by the court to be necessary to the welfare and well-being of the child;

(2) The judge, prosecutor, accused, and counsel for the parties shall be in the courtroom. The testimony of the child shall be transmitted by live-link television into the courtroom for viewing and hearing by the judge, prosecutor, counsel for the parties, accused, victim, and the public unless excluded.

(3) If it is necessary for the child to identify the accused at trial, the court may allow the child to enter the courtroom for the limited purpose of identifying the accused, or the court may allow the child to identify the accused by observing the image of the latter on a television monitor.

(4) The court may set other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the best interests of the child.

(h) The testimony of the child shall be preserved on videotape, digital disc, or other similar devices which shall be made part of the court record and shall be subject to a protective order as provided in section 31(b).

SEC. 26. *Screens, one-way mirrors, and other devices to shield child from accused.* —

(a) The prosecutor or the guardian *ad litem* may apply for an order that the chair of the child or that a screen or other device be placed in the courtroom in such a manner that the child cannot see the accused while testifying. Before the guardian *ad litem* applies for an order under this section, he shall consult with the prosecutor or counsel subject to the second and third paragraphs of section 25(a) of this Rule. The court shall issue an order stating the reasons and describing the approved courtroom arrangement.

(b) If the court grants an application to shield the child from the accused while testifying in the courtroom, the courtroom shall be arranged to enable the accused to view the child.

SEC. 27. *Videotaped deposition.* —

(a) The prosecutor, counsel, or guardian *ad litem* may apply for an order that a deposition be taken of the testimony of the child and that it be recorded and preserved on videotape. Before the guardian *ad litem* applies for an order under this section, he shall consult with the prosecutor or counsel subject to the second and third paragraphs of section 25(a).

(b) If the court finds that the child will not be able to testify in open court at trial, it shall issue an order that the deposition of the child be taken and preserved by videotape.

(c) The judge shall preside at the videotaped deposition of a child. Objections to deposition testimony or evidence, or parts thereof, and the grounds for the objection shall be stated and shall be ruled upon at the time of the taking of the deposition. The other persons who may be permitted to be present at the proceeding are:

(1) The prosecutor;

(2) The defense counsel;

(3) The guardian *ad litem*;

(4) The accused, subject to sub-section (e);

(5) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child;

(6) One or both of his support persons, the facilitator and interpreter, if any;

(7) The court stenographer; and

(8) Persons necessary to operate the videotape equipment.

(d) The rights of the accused during trial, especially the right to counsel and to confront and cross-examine the child, shall not be violated during the deposition.

(e) If the order of the court is based on evidence that the child is unable to testify in the physical presence of the accused, the court may direct the latter to be excluded from the room in which the deposition is conducted. In case of exclusion of the accused, the court shall order that the testimony of the child be taken by live-link television in accordance with Section 25 of this Rule. If the accused is excluded from the deposition, it is not necessary that the child be able to view an image of the accused.

(f) The videotaped deposition shall be preserved and stenographically recorded. The videotape and the stenographic notes shall be transmitted to the clerk of the court where the case is pending for safekeeping and shall be made a part of the record.

(g) The court may set other conditions on the taking of the deposition that it finds just and appropriate, taking into consideration the best interests of the child, the constitutional rights of the accused, and other relevant factors.

(h) The videotaped deposition and stenographic notes shall be subject to a protective order as provided in section 31(b).

(i) If, at the time of trial, the court finds that the child is unable to testify for a reason stated in section 25(f) of this Rule, or is unavailable for any reason described in section 4(c), Rule 23 of the 1997 Rules of Civil Procedure, the court may admit into evidence the videotaped deposition of the child in lieu of his testimony at the trial. The court shall issue an order stating the reasons therefor.

(j) After the original videotaping but before or during trial, any party may file any motion for additional videotaping on the ground of newly discovered evidence. The court may order an additional videotaped deposition to receive the newly discovered evidence.

SEC. 28. *Hearsay exception in child abuse cases.* — A statement made by a child describing any act or attempted act of child abuse, not otherwise admissible under the hearsay rule, maybe admitted in evidence in any criminal or non-criminal proceeding subject to the following rules:

(a) Before such hearsay statement may be admitted, its proponent shall make known to the adverse party the intention to offer such statement and its particulars to provide him a fair opportunity to object. If the child is available, the court shall, upon motion of the adverse party, require the child to be present at the presentation of the hearsay statement for cross-examination by the adverse party. When the child is unavailable, the fact of such circumstance must be proved by the proponent.

(b) In ruling on the admissibility of such hearsay statement, the court shall consider the time, content and circumstances thereof which provide sufficient *indicia* of reliability. It shall consider the following factors:

(1) Whether there is a motive to lie;

(2) The general character of the declarant child;

(3) Whether more than one person heard the statement;

(4) Whether the statement was spontaneous;

(5) The timing of the statement and the relationship between the declarant child and witness;

(6) Cross-examination could not show the lack of knowledge of the declarant child;

(7) The possibility of faulty recollection of the declarant child is remote; and

(8) The circumstances surrounding the statement are such that there is no reason to suppose the declarant child misrepresented the involvement of the accused.

(c) The child witness shall be considered unavailable under the following situations:

(1) Is deceased, suffers from physical infirmity, lack of memory, mental illness, or will be exposed to severe psychological injury; or

(2) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

(d) When the child witness is unavailable, his hearsay testimony shall be admitted only if corroborated by other admissible evidence.

SEC. 29. *Admissibility of videotaped and audio-taped in-depth investigative or disclosure interviews in child abuse cases.* — The court may admit videotape and audiotape in-depth investigative or disclosure interviews as evidence, under the following conditions:

(a) The child witness is unable to testify in court on grounds and under conditions established under section 28(c).

(b) The interview of the child was conducted by duly trained members of a multidisciplinary team or representatives of law enforcement or child protective services in situations where child abuse is suspected so as to determine whether child abuse occurred.

(c) The party offering the videotape or audiotape must prove that:

(1) the videotape or audiotape discloses the identity of all individuals present and at all times includes their images and voices;

(2) the statement was not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the statement of the child and not the product of improper suggestion;

(3) the videotape and audiotape machine or device was capable of recording testimony;

(4) the person operating the device was competent to operate it;

(5) the videotape or audiotape is authentic and correct; and

(6) it has been duly preserved.

The individual conducting the interview of the child shall be available at trial for examination by any party. Before the videotape or audiotape is offered in evidence, all parties shall be afforded an opportunity to view or listen to it and shall be furnished a copy of a written transcript of the proceedings.

The fact that an investigative interview is not videotaped or audio-taped as required by this section shall not by itself constitute a basis to exclude from evidence out-of-court statements or testimony of the child. It may, however, be considered in determining the reliability of the statements of the child describing abuse.

SEC. 30. *Sexual abuse shield rule.* —

(a) *Inadmissible evidence.* — The following evidence is not admissible in any criminal proceeding involving alleged child sexual abuse:

(1) Evidence offered to prove that the alleged victim engaged in other sexual behavior; and

(2) Evidence offered to prove the sexual predisposition of the alleged victim.

(b) *Exception.* — Evidence of specific instances of sexual behavior by the alleged victim to prove that a person other than the accused was the source of semen, injury, or other physical evidence shall be admissible.

A party intending to offer such evidence must:

(1) File a written motion at least fifteen (15) days before trial, specifically describing the evidence and stating the purpose for which it is offered, unless the court, for good cause, requires a different time for filing or permits filing during trial; and

(2) Serve the motion on all parties and the guardian *ad litem* at least three (3) days before the hearing of the motion.

Before admitting such evidence, the court must conduct a hearing in chambers and afford the child, his guardian *ad litem,* the parties, and their counsel a right to attend and be heard. The motion and the record of the hearing must be sealed and remain under seal and protected by a protective order set forth in Section 31(b). The child shall not be required to testify at the hearing in chambers except with his consent.

SEC. 31. *Protection of privacy and safety.* —

(a) *Confidentiality of records.* — Any record regarding a child shall be confidential and kept under seal. Except upon written request and order of the court, a record shall only be released to the following:

(1) Members of the court staff for administrative use;

(2) The prosecuting attorney;

(3) Defense counsel;

(4) The guardian *ad litem*;

(5) Agents of investigating law enforcement agencies; and

(6) Other persons as determined by the court.

(b) *Protective order.* — Any videotape or audiotape of a child that is part of the court record shall be under a protective order that provides as follows:

(1) Tapes may be viewed only by parties, their counsel, their expert witness, and the guardian *ad litem*.

(2) No tape, or any portion thereof, shall be divulged by any person mentioned in sub-section (a) to any other person, except as necessary for the trial.

(3) No person shall be granted access to the tape, its transcription or any part thereof unless he signs a written affirmation that he has received and read a copy of the protective order; that he submits to the jurisdiction of the court with respect to the protective order; and that in case of violation thereof, he will be subject to the contempt power of the court.

(4) Each of the tape cassettes and transcripts thereof made available to the parties, their counsel, and respective agents shall bear the following cautionary notice:

> "This object or document and the contents thereof are subject to a protective order issued by the court in *(case title), (case number).* They shall not be examined, inspected, read, viewed, or copied by any person, or disclosed to any person, except as provided in the protective order. No additional copies of the tape or any of its portion shall be made, given, sold, or shown to any person without prior court order. Any person violating such protective order is subject to the contempt power of the court and other penalties prescribed by law."

(5) No tape shall be given, loaned, sold, or shown to any person except as ordered by the court.

(6) Within thirty (30) days from receipt, all copies of the tape and any transcripts thereof shall be returned to the clerk of court for safekeeping unless the period is extended by the court on motion of a party.

(7) This protective order shall remain in full force and effect until further order of the court.

(c) *Additional protective orders.* — The court may, *motu proprio* or on motion of any party, the child, his parents, legal guardian, or the guardian *ad litem,* issue additional orders to protect the privacy of the child.

(d) *Publication of identity contemptuous.* — Whoever publishes or causes to be published in any format the name, address, telephone number, school, or other identifying information of a child who is or is alleged to be a victim or accused of a crime or a witness thereof, or an immediate family of the child shall be liable to the contempt power of the court.

(e) *Physical safety of child; exclusion of evidence.* — A child has a right at any court proceeding not to testify regarding personal identifying information, including his name, address, telephone number, school, and other information that could endanger his physical safety or his family. The court may, however, require the child to testify regarding personal identifying information in the interest of justice.

(f) *Destruction of videotapes and audiotapes.* — Any videotape or audiotape of a child produced under the provisions of this Rule or otherwise made part of the court record shall be destroyed after five (5) years have elapsed from the date of entry of judgment.

(g) *Records of youthful offender.* — Where a youthful offender has been charged before any city or provincial prosecutor or before any municipal judge and the charges have been ordered dropped, all the records of the case shall be considered as privileged and may not be disclosed directly or indirectly to anyone for any purpose whatsoever.

Where a youthful offender has been charged and the court acquits him, or dismisses the case or commits him to an institution and subsequently releases him pursuant to Chapter 3 of P.D. No. 603, all the records of his case shall also be considered as privileged and may not be disclosed directly or indirectly to anyone except to determine if a defendant may have his sentence suspended under Article 192 of P.D. No. 603

or if he may be granted probation under the provisions of P.D. No. 968 or to enforce his civil liability, if said liability has been imposed in the criminal action. The youthful offender concerned shall not be held under any provision of law to be guilty of perjury or of concealment or misrepresentation by reason of his failure to acknowledge the case or recite any fact related thereto in response to any inquiry made to him for any purpose.

"Records" within the meaning of this sub-section shall include those which may be in the files of the National Bureau of Investigation and with any police department or government agency which may have been involved in the case. (Art. 200, P.D. No. 603)

SEC. 32. *Applicability of ordinary rules.* — The provisions of the Rules of Court on deposition, conditional examination of witnesses, and evidence shall be applied in a suppletory character.

SEC. 33. *Effectivity.* — This Rule shall take effect on December 15, 2000 following its publication in two (2) newspapers of general circulation.

TITLE X. — EMANCIPATION AND AGE OF MAJORITY

Article 234. Emancipation takes place by the attainment of majority. Unless otherwise provided, majority commences at the age of eighteen years. ***(As amended by Republic Act No. 6809)***

Article 235. ***REPEALED BY REPUBLIC ACT NO. 6809.***

Article 236. Emancipation for any cases 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. No. 6809)***

Article 237. ***REPEALED BY REPUBLIC ACT NO. 6809.***

EMANCIPATION. Emancipation is attained upon reaching eighteen years of age. Marriage is not anymore a ground for emancipation because a person who decides to get married is necessarily at least eighteen years of age. If the contracting party is below eighteen years of age at the time of marriage ceremony, such a marriage is void by express provision of Article 35(1) of the Family Code. In short, an unemancipated child cannot enter into a valid contract of marriage.

Thus, Article 399 of the Civil Code imposing a limitation on a person emancipated by marriage with respect to borrowing of money and encumbering his property is completely deleted by the present law. Also, he may now sue or be sued without the assistance of the father, mother or guardian.

PARENTAL CONSENT. According to the second paragraph of Article 236, contracting marriage shall require parental consent until the age of twenty-one. This provision, however, does not make parental consent an essential requirement nor a formal requirement of marriage in the sense that its absence will render the marriage void. The requirement of parental consent in case of marriage is a recognition of Filipino culture and tradition. This can be seen from the Senate discussion, to wit:

> *Senator Saguisag.* Isang bagay na po lamang ang gusto kong linawin. Tungkol po ito sa parental consent na tinalakay natin at pinag-usapan din ng magkaroon tayo ng break. Ang panganay ko pong lalaki ay labing-anim na taong gulang. Ipagpalagay po natin na sa loob ng dalawang taon ay giniyagis siya ng kamunduhan at isang araw ay bigla na lamang nag-uwi sa amin ng isang dalagita. At sa pakiwari ay nagbunga po iyong kanilang "pagtatampisaw sa batis ng kaligayahan." Wala pong trabaho ang anak kong lalaki at dahil dito ay hihingi ng tulong sa akin, "Papa, pahingi po ng baon." Papayag po ba tayo na hindi alisin ang karapatan ng magulang na magkaroon ng parental consent under Article 14 of the Family Code? Alam po natin na ang isang 18-year-old ay nag-aaral pa. Iyon po ba ay hindi maaapektohan ng panukalang batas na ito?
>
> *Senator Lina.* Sa akin pong ibinigay na paliwanag kanina, iyon po ang gabay na, sa palagay ko, maaaring ilihis sa pangkalahatang panuntunan pagdating ng 18. The capacity to act is already full, meaning a person can enter into any agreement with legal effect. Sa palagay ko, batay sa ating kultura at tradisyon, magandang panatilihin iyong pagmamahal ng magulang sa anak kahit na ito ay 18, basta hindi lalampas ng 21. Na iyong nasa 18 to 21 years of age ay kailangan pa rin ang consent ng parents. Maaari po akong sumabay sa ganoong interpretasyon. Sapagkat malinaw na malinaw na sa kulturang Pilipino, ang sentimyento ng mga magulang ay makapagbigay din ng aral at pangangalaga sa kanilang mga anak kahit na ito ay lumampas na ng 18, basta hindi naman lalampas ng 21. Samakatwid, iyong probisyon ng Family Code requiring parental consent for those who are 18 and below 21, I think, should be retained (Senate Records, June 6, 1989, page 69).

It was Senator Paterno who made the proposal that the paragraph "THE CONTRACTING OF MARRIAGE SHALL REQUIRE THE PARENTAL CONSENT UNTIL THE AGE OF 21" be inserted in the law (*Ibid.*, 78, 79). Hence, the insertion of the said paragraph became known as the Paterno Amendment during the Senate discussion.

The absence of parental consent, however, will render the marriage annullable under Article 45 of the Family Code.

TORT LIABILITY OF PARENTS AND GUARDIANS. The phrase "save the exceptions established by existing laws in special cases" contained in Article 236 was intended, among others, to take care of the parents' tort liability even if the child is emancipated but below 21 years of age. This can be seen from the explanation of Senator Lina during the Senate discussions precisely dealing with the significance of the insertion of the said phrase in Article 236 which recommendation was approved without objection, thus:

> *Senator Lina.* Mr. President, we are still on the Committee Amendments. On page 1, line 21, the proposed amendment is to delete the period and substitute it with a comma (,) and after the comma (,) include the phrase "SAVE THE EXCEPTIONS ESTABLISHED BY EXISTING LAWS IN SPECIAL CASES." This will take care of the situation where in Tort under Article 2180 of the New Civil Code, whereby even if an eighteen-year-old is guilty of committing a tort, the parents will still be liable for whatever damage that may have been caused as a consequence of the act of the eighteen-year-old, Mr. President. Of course, the parents can put up the defense of being a good father of a family; meaning to say, that he has to prove that he took care of his children properly and all that, and that exception is reasonable. And to cover all the exceptions, it is proposed that the phrase "SAVE THE EXCEPTIONS ESTABLISHED BY EXISTING LAWS IN SPECIAL CASES" be incorporated under Article 236.
>
> *The President.* Is there any objection? (silence) Hearing none, the same is approved (Senate Records, June 6, 1988, pages 77-78).

To further highlight the tort liability of the parents for acts or omissions committed by their children who are at least 18 and above but below 21 years of age, Senator Saguisag proposed the inclusion of the last paragraph of Article 236 which was known as the Saguisag Amendment and which was consequently approved. Pertinent portions of the Senate discussions are as follows:

Senator Saguisag. Mr. President, the second and third paragraphs of Article 2180 of the Civil Code, if I am the victim of a tort committed by a 19- or 20-year old, I can go after the parents or guardians, as the case may be. And it seems to me that is something which we should retain. As I said, If I got run over by a 19-year-old, my chances of recovering against someone who may still be in school and would be a long way from getting employed would be a little problematic. So, I was hoping also to save that as an exception. In other words, I have no objection to the general formulation of Senator Guingona, but I would hope that he would be open to accommodating that special concern. The language I have in mind is something like as follows: "NOTHING IN THIS ACT SHALL BE CONSTRUED TO DEROGATE FROM THE DUTY OR RESPONSIBILITY OF PARENTS AND GUARDIANS MENTIONED IN THE SECOND AND THIRD PARAGRAPHS OF ARTICLE 2180 OF THE CIVIL CODE."

x x x x x x x x x

Senator Saguisag. If my proposed amendment has been properly recorded, maybe, it can logically follow the Paterno Amendment because it is a second exception.

Senator Lina. Yes, Mr. President, we accept the amendment. That will be after the Paterno Amendment, Mr. President.

The President. Is there any objection? (Silence). Hearing none, the same is approved. x x x (*Ibid*., pages 80-81).

Pursuant to the third paragraph of Article 286, even if the person is above eighteen but below twenty-one years of age, the liabilities of the parents under the second and third paragraphs of Article 2180 of the Civil Code shall not be derogated. The second and third paragraphs of Article 2180 provides that:

"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.

"Guardians are liable for damages caused by the minors or incapacitated persons who are under their authority and live in their company."

SOURCE OF CONFUSION. The third paragraph of Article 236 is a cause for confusion. Prior to Republic Act 6809, the second and third paragraphs of Article 2180 have already been effectively superseded by Article 221 of the Family Code which provides:

> 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.

It must be pointed out that Article 2180(2) and (3) of the Civil Code which had been superseded by Article 221 of the Family Code is at least consistent in one area, namely: parents shall only be liable for acts or omissions of their unemancipated or minor children or ward. Article 221 of the Family Code is clearly intended to take the place of Article 2180(2) and (3) of the Civil Code and even to modify the latter to the extent that the primacy of the father being held liable first and then, in case of his death or incapacity, the mother, has been repealed.

By August 3, 1988 when the Family Code took effect, parents are not civilly liable for acts or omissions committed by emancipated children not because of Article 2180(2) and (3) of the Civil Code but because of Article 221 of the Family Code. In effect, therefore, when the legislature referred to the *"second and third paragraphs of Article 2180 of the Civil Code"* in the last paragraph of Article 236 by way of amendment contained in Republic Act No. 6809 which took effect on December 18, 1989, it was referring to certain provisions which have already been previously rendered ineffective by Article 221 of the Family Code.

Even the prefatory phrase *"nothing in this Code shall be construed to derogate . . ."* appears to be of no help to this confusion because by the time Republic Act 6809 took effect containing all these amendments, the liability of parents with respect to unemancipated children and, by clear implication, their non-liability as to emancipated children, *e.g.,* those 18 years of age and above, have been already effectively governed by Article 221 of the Family Code and not by the *"second and third paragraphs of Article 2180 of the Civil Code."*

Accordingly, if Article 234 as amended by Republic Act 6809 provides that the age of emancipation is eighteen (18) years, then the term "unemancipated children" in Article 221 must, therefore, necessarily be construed as children below 18 years of age at the time Republic Act No. 6809 took effect on December 18, 1989.

Even the phrase *"save the exceptions established by existing laws in special cases"* in Article 236 to qualify the full capacity of

an emancipated minor to act is not likewise of any help at all if it were intended to take care of the tort liability of parents for acts of their emancipated children between 18 years old and 21 years old. This is so because, as previously stated, even when Republic Act 6809 was being deliberated in Congress, the liability of parents for unemancipated children was already governed by Article 221 of the Family Code which superseded Article 2180(2) and (3) which latter article, therefore, cannot qualify as within the ambit of "existing laws in special cases."

It is quite interesting also why there was even no reference to Article 221 of the Family Code when the Senate was deliberating on this last paragraph of Article 236, as amended by Republic Act 6809.

ELCANO V. HILL RULING. The doctrine laid down in the case of *Elcano v. Hill*, 77 SCRA 98, is instructive. In that case, the Supreme Court ruled that even if the minor (which was then a person below 21 years of age), living in the company of the father, was emancipated by marriage, the father of the said minor can nevertheless be held liable under Article 2180(2) for damages for crimes committed by the minor. The decision was anchored on the opinion that while the minor was emancipated by marriage, he was nevertheless under the authority of the father, not merely because he was living with the father, but because the law at that time, namely, Article 399 of the Civil Code, clearly and expressly provided that the minor, though emancipated by marriage which thereby terminated parental authority, nevertheless *cannot sue or be sued without the assistance of the father*. This implied, according to the Supreme Court, that the father had the duty to see to it that the said minor did not give any cause for judicial litigation. It is clear, therefore, that in the *Elcano* case, Article 2180(2) could not have applied had it not been for the presence of Article 399 which expressly provided conditions qualifying the termination of parental authority of the parents over a minor emancipated by marriage. These conditions were the following: (1) such minor, though emancipated, cannot sue and be sued in court without the assistance of his father, mother or guardian; and (2) such minor, though emancipated, cannot borrow money or alienate or encumber real property without the consent of his father, or mother, or guardian.

Under the present provision of the Family Code, an emancipated person can sue and be sued alone. He or she can borrow money or alienate or encumber property. The assistance or consent of the father, mother or guardian is not anymore required. He or she is

qualified and responsible for all acts of civil life, save the exceptions established by existing laws in special cases. There is absolutely no counterpart provision in the Family Code of Article 399 of the Civil Code qualifying the effects of emancipation. In fact, even when Article 234 was not yet amended by Republic Act Number 6809 thereby allowing emancipation by marriage, there was also no counterpart provision in the Family Code of Article 399 of the Civil Code. The intention is clear, therefore, that an emancipated person under the Family Code has no limitations as to his capacity to sue or be sued. Since Article 399 of the Civil Code was never adopted in the Family Code, whether amended or not amended by Republic Act 6809, the mandatory implication of the said article referred to in *Elcano v. Hill,* 77 SCRA 98, namely, that "such emancipation does not carry with it freedom to enter into transactions or do any act that can give rise to judicial litigation" does not hold true or is not applicable in the Family Code. Consequently, the very basis for the decision in the *Elcano* case is not anymore existing in the New Family Code.

The liability of parents under Article 2180(2) attaches only in case where the "minor" children live in their company. A minor under the Civil Code was considered to be a person below 21 years of age. Following the *Elcano ruling*, even if the minor becomes emancipated, the parents can still be liable under Article 2180(2) because Article 399 of the Civil Code provides that such minor, though emancipated, cannot sue or be sued without the assistance of the parents. Under the present Family Code, there is no provision similar to Article 399. The link therefore for liability on the part of the parents to attach even if the children are emancipated is not anymore present. In this regard, when Article 236 of the Family Code provides that:

> 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,

there appears to be no basis for referring to the "duty or responsibility of parents and guardians and wards below twenty-one years of age" because the only basis for the said parents to be liable, at least under the Civil Code, is to relate or link Article 2180(2) of the Civil Code to its Article 399 which has been totally repealed by the Family Code. It appears that the "duty or responsibility of parents and guardians" referred to in the last paragraph of Article 236 of the new Family

Code as amended by Republic Act 6809 is, to say the least, without any legal basis.

APPLICABILITY OF THE LAST PARAGRAPH OF ARTICLE 236. Be that as it may, it appears that the idea of the last paragraph of Article 236 is to hold parents and guardians responsible for the acts or omissions of their children or ward (18 and above but under the age of 21). However, with respect to parents, the father and, in case of his death or incapacity, the mother, are responsible for the damages caused by the children between 18 and 21 who live in their company. In case of guardians, they are liable for damages if the said persons are under their authority and live in their company, whether the liability of the parents under the last paragraph of Article 236 is not specified. However, following the *Elcano ruling* stating that the liability of parents for the acts or omissions of their emancipated children living in their custody is subsidiary, then the same subsidiary liability should apply under the last paragraph of Article 236.

TITLE XI. — SUMMARY JUDICIAL PROCEEDINGS IN THE FAMILY LAW

Chapter 1

SCOPE OF APPLICATION

Article 238. Until modified by the Supreme Court, the procedural rules provided for 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. (n)

Chapter 2

SEPARATION IN FACT BETWEEN HUSBAND AND WIFE

Article 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)

JUDICIAL APPROVAL. If the property regime is the absolute community of property or the conjugal partnership of gains, the spouses are co-owners or partners of the community property or partnership property. A spouse cannot alienate, dispose or encumber

community or conjugal property without the consent of the other spouse. In case they are separated in fact or one spouse abandons the other, this will not generally affect the absolute community of property or the conjugal partnership of gains. Hence, if any of the spouses desires to enter into any transaction, like the sale of co-owned properties, he or she can go to court for approval of the sale if he or she cannot obtain the consent of the other spouse.

The petition should be verified, which means that it should be under oath stating that the petitioner has caused the preparation and the filing of the petition, that he or she has read the contents of the petition and that he or she knows that the contents are true of his or her own knowledge and belief. An unverified petition cannot be given consideration by the court.

The approval of the court shall protect the transacting spouse and third persons who are directly affected by the transaction.

Article 240. Claims for damages by either spouse, except costs of the proceedings, may be litigated only in a separate action. (n)

DAMAGES. A claim for damages usually entails a lengthy process. Because time is of the essence of the court case contemplated by the law in these cases, the law provides that damages, except costs of the proceedings, may be litigated only in a separate action.

Article 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)

PROPER COURT. Republic Act Number 8369, otherwise known as the Family Courts Act of 1997, established the family courts which are exclusively tasked to take cognizance of family cases such as custody of children, annulment or nullity of cases, adoption and termination of parental authority. Specifically, the law provides that summary judicial proceedings brought under the Family Code shall be heard in the proper family court with jurisdiction to try the case (Section 5[j] of R.A. No. 8369).

Article 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)

DUE PROCESS. Once the petition is filed, due process requires that the other party, called the respondent, shall be given the chance to comment on the petition and to show cause why the petition should not be granted. The respondent likewise may nevertheless manifest his or her agreement in which case the suit shall become moot and academic.

Article 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)

PRELIMINARY CONFERENCE. The preliminary conference is aimed at having the parties settle amicably their differences on the transaction involved so that the judicial proceedings can be further shortened. During the initial conference, the parties will not be assisted by counsel. The judge will conduct the proceedings personally. Lawyers are not allowed to be present so that the proceedings will not become unduly adversarial which can lead to a protracted case. Since the issue pertains to very personal family decisions, it is better to let the parties decide the issues by themselves. However, if the judge finds out that the issues are complicated and that any of the spouses does not really have a complete understanding of the transaction and its consequences, lawyers may be allowed to assist the parties in the next hearings.

Article 244. In case of non-appearance of the spouse whose consent is sought, the court shall inquire into the reasons for his or her failure to appear, and shall require such appearance, if possible. (n)

NON-APPEARANCE. Due process requires that the other party must be heard. Hence, the court shall inquire into the reasons

for the failure of the spouse whose consent is sought to appear in court.

Article 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)

EX-PARTE PROCEEDING. In case the non-consenting spouse does not appear despite efforts from the court requiring him or her to attend, the case will proceed *ex parte* or even without the presence of the non-consenting party. Judgment will be rendered on the basis of the facts and evidence presented. The judge may grant or deny the petition. In all cases, the judge shall endeavor to protect the interest of the non-appearing spouse.

Article 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)

SUMMARY PROCEEDING. The case shall be summary and the manner by which it will proceed shall depend on the appreciation of the situation by the judge. The judge can decide it on mere affidavits or he or she may require testimonies from the parties. He or she may even decide what sort of testimony he or she wants to know and also what sort of witnesses should be presented.

Article 247. The judgment of the court shall be immediately final and executory. (n)

FINALITY. Usually, a decision becomes final and executory after the lapse of 15 days from the time the parties receive a copy of the decision. Since time is of the essence, the decision of the court shall be immediately final and executory in cases under this Title. However, the aggrieved party can still file a case with the higher court to annul the decision on the basis that he or she was not really given due process. However, without an injunction from the higher

court, the decision can be executed even if it is pending in the said higher court.

Article 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)

ADMINISTRATION OF PROPERTY. Article 248 refers to paragraph 3 of both Articles 100 and 127 which essentially provides that the separation in fact between husband and wife shall not affect either the absolute community of property or the conjugal partnership of gains except that, among others, in the absence of sufficient community or conjugal 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.

Chapter 3

INCIDENTS INVOLVING PARENTAL AUTHORITY

Article 249. Petitions filed under Articles 223, 225 and 235 of this Code involving parental authority shall be verified. (n)

VERIFIED PETITIONS. Petitions under Articles 223 and 225 must be verified. Article 223 deals with a case seeking a court order providing for disciplinary measures over the child. Article 225 deals with a case for the approval of the bond required of parents who exercise parental authority over the property of their children. Article 235 on emancipation has already been repealed by Republic Act No. 6809.

Article 250. Such petitions shall be filed in the proper court of the place where the child resides. (n)

VENUE. The venue of the case shall be the court of the place where the child resides. This is for the benefit and convenience of the child.

Article 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)

NOTIFICATION. The court must undertake everything possible for the benefit of the child and must issue decisions having the paramount interest of the child as the inflexible criterion. Hence, it is the duty of the court to notify people who have parental authority over the children to appear in court so that the court can itself probe these people on the real necessity for the filing of the case. For instance, in an action seeking the disciplinary measures to be imposed on the child, it may turn out that the problem does not lie with the child but with the parent who is grossly abusive. In such a case, the court may even terminate or suspend the parental authority of the abusing parent.

Article 252. The rules in Chapter 2 hereof shall also govern summary proceedings under this Chapter insofar as they are applicable. (n)

PROCEEDINGS. As much as practicable and insofar as they are applicable, the proceedings in the court cases referred to in Articles 223 and 225 shall likewise be summary in nature. This is for the benefit of the child. For instance, corrective measures which can be imposed on an incorrigible child must be done at the earliest possible time so that, in case of commitment of the child, the same can be quickly implemented with the end in view of returning the child to his or her parents as soon as possible. Also, in case of court approval of the bond required of a parent administering the property of his or her child, the proceeding must be summary in order that this legal measure for the further protection of the child can be immediately undertaken by the parent.

Chapter 4

OTHER MATTERS SUBJECT TO SUMMARY PROCEEDINGS

Article 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.

OTHER CASES. Summary proceedings shall also be the procedure under Article 41 which deals with the judicial declaration of a spouse as presumptively dead, under Article 51 which deals with an action of a child for the delivery of his or her presumptive legitime, under Article 69 which deals with the judicial determination of the family domicile in case of disagreement of the spouses, under Article 73 which deals with the court adjudication of the validity of a spouse's objection to the profession of the other spouse, and under Article 217 which deals with the court order entrusting foundlings, abandoned, neglected or abused children and other children similarly situated to heads of children's homes, orphanages and similar institutions duly accredited by the proper government agency.

Summary procedure likewise applies to Articles 96 and 124 involving the annulment of the husband's decision in the administration and enjoyment of the community or conjugal property in case the husband's decision is in conflict with the wife's decision. However, the appointment of one of the spouses as the sole administrator under the second paragraphs of Articles 96 and 124 shall be in a summary proceeding under Article 253 of the Family Code only if it involves a situation where the other spouse is absent or separated in fact or has abandoned the other or the consent is withheld. If the subject spouse "is an incompetent" who is in a comatose or semi-comatose condition, a victim of stroke, cerebrovascular accident, without motor and mental faculties, and with diagnosis of brain stem infarct, the proper remedy is a judicial guardianship proceeding under Rule 93 of the 1964 Revised Rules of Court and not a summary proceeding under the Family Code (*Uy v. Court of Appeals*, G.R. No. 109557, November 29, 2000). In any event, should the administering spouse desire to sell real property as such administrator of the community or conjugal property, he or she must observe the procedure for the sale of the ward's estate required of judicial guardians under Rule 95 of the 1964 Revised Rules of Court, not the summary judicial proceedings under the Family Code. This is so because, as the administrator spouse, he or she must perform the duties of a guardian (*Uy v. Court of Appeals*, G.R. No. 109557, November 29, 2000).

TITLE XII. — FINAL PROVISIONS

Article 254. Titles III, IV, V, VI, VII, VIII, IX, XI and XV of Book I 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. (n)

REPEALING PROVISION. The Family Code is intended to be the principal law that shall govern family relations. Hence, Article 254 expressly repealed Titles III, IV, V, VI, VII, VIII, IX, XI and XV of Book 1 of the Civil Code of the Philippines, as amended. These Titles in Book 1 refer to Marriage, Legal Separation, Rights and Obligations Between Husband and Wife, Property Relations Between Husband and Wife, The Family, Paternity and Filiation, Support, Parental Authority, and Emancipation and Age of Majority. With respect to Presidential Decree 603, only Articles 17, 18, 19, 27, 28, 29, 30, 31, 39, 40, 41, and 42 are expressly repealed.

Aside from an express repeal of particular provisions of the Civil Code and of Presidential Decree No. 603, Article 254 likewise provides for an implied repeal of all laws, decrees, executive orders, proclamations, rules and regulations, or parts thereof, inconsistent with the Family Code. However, for this implied repeal to operate, there must be a substantial irreconcilable conflict in connection with the provisions found in existing and prior acts with those of the Family Code (See *Iloilo Palay v. Feliciano,* 13 SCRA 377). Thus, though Title XIII of the Civil Code in connection with the use of surnames is not one of those expressly repealed by Article 254 of the Family Code, some provisions therein have been clearly impliedly repealed by the Family Code.

Article 255. If any provision of this Code is held invalid, all the other provisions not affected thereby shall remain valid. (n)

SEPARABILITY. The provisions of the Family Code are separable in the sense that the invalidity of one provision will not necessarily invalidate the whole law. However, the invalidity of a particular provision necessarily invalidates those other provisions which are affected by the said invalidity.

The separable nature of the provisions likewise makes it possible for certain laws to be passed affecting a part of a particular provision but retaining the validity of the rest of the said provision. Thus, the passing of Republic Act No. 6809 making the attainment of 18 years of age as the sole way by which a person can be emancipated has modified if not totally rendered useless or repealed certain provisions of the Family Code. For example, in Article 14 of the Family Code relative to the need for obtaining parental consent, the reference to contracting parties "not having been emancipated by a previous marriage" should now be disregarded and considered as not written precisely because when one gets married after the effectivity of Republic Act 6809, he or she is necessarily emancipated. Nobody can be emancipated by marriage. Also, Article 78 which provides that "a minor who according to law may contract marriage" has become a useless article after the passing of Republic Act 6809 which provides that a person emancipated is one who reaches the age of 18 years and, upon reaching the said age, he or she is now qualified to do all acts of civil life save the exceptions established by existing laws in special cases. Considering that the marrying age is likewise 18 years of age, there is no more person who can be considered as "a minor who according to law may contract marriage." In the same vein, the reference to a "spouse of age" in Article 111 has become superfluous because, after the effectivity of Republic Act 6809, a spouse is always, without exception, of age.

Article 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. (n)

RETROACTIVE EFFECT. The Family Code specifically provides that the provisions of the same shall have retrospective application. Thus, in *Jovellanos v. Court of Appeals,* 210 SCRA 126, where a husband, during his first marriage in 1955, entered into a

contract to sell or a conditional sale in installment over a specific property but where title to the property would only fully vest upon payment of the last installment and whereupon the said husband paid partly by conjugal funds of the first marriage and partly by his separate exclusive funds, but where the last installment was made in 1975 during the valid second marriage (entered into in 1967) using conjugal funds of the second valid marriage, it was held that the property is part of the conjugal partnership of the second marriage by virtue of Article 118 of the Family Code which took effect on August 3, 1988 providing that in a purchase of property by installment partly made by conjugal funds and partly made by exclusive funds, the property shall be considered conjugal if title vested during the marriage. The Supreme Court said that the deceased husband had no vested rights at the time of the execution of the contract to sell in 1955 because the vested right to the property only attached in 1975 when the last installment was paid during the second marriage. Hence, in so far as the said heirs are concerned, their father could not have owned the property and there can be no vested rights that will be affected by the application of Article 118 of the Family Code, which should, therefore, be given retroactive effect in its application. The Supreme Court therefore likewise ordered that reimbursement be made to the estate of the father also by virtue of Article 118 of the Family Code which provides that "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."

In *Atienza v. Brillantes,* 60 SCAD 119, 243 SCRA 32, where a judge entered into a void marriage in 1965 because of the absence of a marriage license and subsequently entered into another marriage in 1991 without obtaining a judicial declaration of nullity of the first marriage, the Supreme Court, invoking Article 256 of the Family Code providing that the said law shall have retroactive effect in so far as it does not prejudice vested rights, rejected the contention of the judge that Article 40 of the Family Code requiring a previous judicial declaration of nullity of marriage is not applicable to him. According to the Supreme Court, Article 40 of the Family Code is applicable to remarriages involving a previously void marriage, whether or not the first marriage was celebrated before or after August 3, 1988, the date of the effectivity of the Family Code.

VESTED RIGHTS. The retrospectivity of the Family Code does not apply if vested rights are involved. A vested right is an immediate fixed right of present and future payment. It is to be distinguished

from a right that is expectant or contingent. It is a right which is fixed, unalterable, absolute, complete and unconditional to the exercise of which no obstacle exists, and which is perfect in itself and not dependent upon a contingency. Thus, for a property right to be vested, there must be a transition from the potential or contingent to the actual, and the proprietary interest must have attached to a thing; it must have fixed or established and is no longer open to doubt (*Jovellanos v. Court of Appeals,* 210 SCRA 126).

In *Republic v. Court of Appeals,* 205 SCRA 356, it was held that where a petition for adoption was filed prior to the effectivity of the Family Code by only one of the spouses pursuant to the relevant provisions of the Child and Youth Welfare Code (PD 603) but the decree of adoption was granted after the effectivity of the Family Code on August 3, 1988 where it amended PD 603 by requiring that in cases of adoption the husband and wife must jointly adopt, the Supreme Court held that the adoption decree cannot be nullified by the failure of the other spouse to join the petition in accordance with the Family Code and stated:

> Article 256 of the Family Code provides for retroactive effect of appropriate relevant provisions thereof, subject to the qualification that such retrospective application will not prejudice nor impair vested or acquired rights in accordance with the Civil Code or other laws.
>
> A vested right is one whose existence, effectivity and extent does not depend upon events foreign to the will of the holder. The term expresses the concept of present fixed interest which in right reason and natural justice should be protected against arbitrary State action, or an innately just and imperative right which an enlightened free society, sensitive to inherent and irrefragable individual rights, cannot deny. Vested rights include not only legal or equitable title to enforcement of a demand but also an exemption from new obligations created after the right has vested.
>
> Under the Child and Youth Welfare Code, private respondent had the right to file a petition for adoption by herself, without joining her husband therein. When Mrs. Bobiles filed her petition, she was exercising her explicit and unconditional right under said law. Upon her filing thereof, the right to file such petition alone and to have the same proceed to final adjudication, in accordance with the law in force at the time, was already vested and cannot be prejudiced or impaired by the enactment of a new law.

In *Tayag v. Court of Appeals*, 209 SCRA 665, it was held that where an action for recognition of an illegitimate child was filed prior to the effectivity of the Family Code, the governing prescriptive period was the one provided for in Article 285 of the Civil Code and not Article 175 of the Family Code. Pertinently, the Supreme Court observed and ruled:

> Article 256 of the Family Code states that "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. It becomes essential, therefore, to determine whether the right of the minor child to file an action for recognition is a vested right or not.
>
> Under the circumstances obtaining in the case at bar, we hold that the right of action of the minor child has been vested by filing the complaint in court under the regime of the Civil Code and prior to the effectivity of the Family Code. We herein adopt our ruling in the recent case of *Republic of the Philippines v. Court of Appeals, et al.*, where we held that the fact of filing the petition already vested in the petitioner her right to file it and to have the same proceed to final adjudication in accordance with the law in force at the time, and such right can no longer be prejudiced or impaired by the enactment of a new law.
>
> Even assuming *ex gratia argumenti* that the provision in question is procedural in nature, the rule that a statutory change in matters of procedure may affect pending actions and proceedings, unless the language of the act excludes them from its operation, is not so pervasive that it may be used to validate or invalidate proceedings taken before it goes into effect, since procedure must be governed by the law regulating it at the time the question of procedure arises especially where vested rights may be prejudiced. Accordingly, Article 175 of the Family Code finds no proper application to the instant case since it will ineluctably affect adversely a right of private respondent and, consequently, of the minor child she represents, both of which have been vested with the filing of the complaint in court. x x x (See also *Aruego v. Court of Appeals,* 69 SCAD 423, 254 SCRA 711).

In the same vein, in *Marquino v. IAC*, G.R. No. 72078, June 27, 1994, 52 SCAD 414, where an action for recognition was filed prior to the effectivity of the Family Code, it was held that:

> Article 173 of the Family Code cannot be given retroactive effect so as to apply to the case at bench because it will prejudice

> the vested rights of petitioners transmitted to them at the time of the death of their father, Eutiquio Marquino. "Vested right" is property which has become fixed and established and is no longer in doubt or controversy. It expresses the concept of present fixed interest, which in right reason and natural justice should be protected against arbitrary state action (*Marquino v. IAC,* G.R. No. 72078, June 27, 1994, 52 SCAD 414).

In *Ty v. Court of Appeals,* G.R. No. 127406, November 27, 2000, the petitioner was married to the respondent on April 4, 1979 just before the previous marriage of her husband was judicially declared null and void by a court. Article 40 of the Family Code mandating that there must first be a judicial declaration of nullity of the first marriage for purposes of remarriage was invoked by petitioner to nullify her marriage with the respondent. The Supreme Court refused to apply Article 40 to the subsequent marriage of the petitioner because, on the day of her marriage, the judicial doctrine then prevailing was that there was no need of a judicial declaration of nullity of a void marriage. The Supreme Court said that to apply Article 40 will definitely impair the vested rights of the petitioner and her children with the respondent. In this case the Supreme Court historically summarized the changing rules relative to the need to judicially declare a marriage void. Thus, in *People v. Mendoza* (95 Phil. 845) decided on September 28, 1954 and *People v. Aragon* (100 Phil. 1033) decided on February 28, 1957, the Supreme Court ruled that there was no need for a judicial declaration of nullity of a void marriage. Then, in *Gomez v. Lipana* (33 SCRA 614) decided on June 30, 1970 and *Conseguera v. Conseguera* (37 SCRA 315) decided on January 30, 1971, the Supreme Court changed the rule and pronounced that there was a need for a judicial declaration of nullity of a void marriage. Thereafter, in *Odayat v. Amante* (77 SCRA 338) decided on June 2, 1977 and in *Tolentino v. Paras* (122 SCRA 525) decided on May 30, 1983, the Supreme Court reverted to the rule that there was no need for a judicial declaration for nullity of a void marriage. Subsequently, in *Wiegel v. Sempio Diy* (143 SCRA 499) decided later on August 19, 1986, the Supreme Court returned to the rule that there was a need for a judicial declaration of nullity of a void marriage. Then in a later case, *Yap v. Court of Appeals* (145 SCRA 229), decided on October 28, 1986, the Supreme Court again reverted to the rule that there was no need for a judicial declaration of nullity of a void marriage. Finally, on August 3, 1988, the Family Code took effect which provides in Article 40 thereof that "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"; thus, by statute, the rule now is that there is a need for a judicial declaration of nullity of a void marriage only for purposes of remarriage. The petitioner was married at a time when the prevailing doctrine was the one laid down in the case of *Odayat and Tolentino* stating that there was a need for a judicial declaration of nullity of a void marriage.

> **Article 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.**
>
> **Publication shall likewise be made in the *Official Gazette*. (n)**

EFFECTIVITY. The publication of the Family Code of the Philippines in the Manila Chronicle, a newspaper of general circulation, was completed on August 4, 1987. Hence, the said code took effect on August 3, 1988 (Memorandum Circular No. 85 dated November 7, 1988 of the Office of the President of the Philippines; *Mondequillo v. Breva,* 185 SCRA 766).

FAMILY COURT

REPUBLIC ACT NO. 8369

AN ACT ESTABLISHING FAMILY COURTS, GRANTING THEM EXCLUSIVE ORIGINAL JURISDICTION OVER CHILD AND FAMILY CASES, AMENDING BATAS PAMBANSA BILANG 129, AS AMENDED, OTHERWISE KNOWN AS THE JANUARY REORGANIZATION ACT OF 1980, APPROPRIATING FUNDS THEREOF AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. ***Title.*** **— This Act shall be known as the** ***"Family Courts Act of 1997."***

SECTION 2. ***Statement of National Policies.*** **— The State shall protect the rights and promote the welfare of children in keeping with the mandate of the Constitution and the precepts of the United Nations Convention on the Rights of the Child. The State shall provide a system of adjudication for youthful offenders which takes into account their peculiar circumstances.**

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. The courts shall preserve the solidarity of the family, provide procedures for the reconciliation of spouses and the amicable settlement of family controversy.

SECTION 3. ***Establishment of Family Courts.*** **— There shall be established a Family Court in every province and city in the country. In case where the city is the capital of the province, the Family Court**

shall be established in the municipality which has the highest population.

SECTION 4. *Qualification and Training of Family Court Judges.* — Section 15 of Batas Pambansa Blg. 129, as amended, is hereby further amended to read as follows:

> **"SECTION 15. (a) *Qualification.* — No person shall be appointed Regional Trial Judge or Presiding Judge of the Family Court unless he is a natural-born citizen of the Philippines, at least thirty-five (35) years of age, and, for at least ten (10) years, has been engaged in the practice of law in the Philippines or has held a public office in the Philippines requiring admission to the practice of law as an indispensable requisite.**
>
> **(b) *Training of Family Court Judges.* — The Presiding Judge, as well as the court personnel of the Family Courts, shall undergo training and must have the experience and demonstrated ability in dealing with child and family cases.**
>
> **The Supreme Court shall provide a continuing education program on child and family laws, procedure and other related disciplines to judges and personnel of such courts."**

SECTION 5. *Jurisdiction of family Courts.* — The Family Courts shall have exclusive original jurisdiction to hear and decide the following cases:

a) Criminal cases where one or more of the accused is below eighteen (18) years of age but not less than nine (9) years of age or where one or more of the victims is a minor at the time of the commission of the offense: *Provided*, That if the minor is found guilty, the court shall promulgate sentence and ascertain any civil liability which the accused may have incurred. The sentence, however, shall be

suspended without need of application pursuant to Presidential Decree No. 603, otherwise known as the "Child and Youth Welfare Code";

b) Petitions for guardianship, custody of children, *habeas corpus* in relation to the latter;

c) Petitions for adoption of children and the revocation thereof;

d) Complaints for annulment of marriage, declaration of nullity of marriage and those relating to marital status and property relations of husband and wife or those living together under different status and agreements, and petitions for dissolution of conjugal partnership of gains;

e) Petitions for support and/or acknowledgment;

f) Summary judicial proceedings brought under the provisions of Executive Order No. 209, otherwise known as the *"Family Code of the Philippines"*;

g) Petitions for declaration of status of children as abandoned, dependent or neglected children, petitions for voluntary or involuntary commitment of children; the suspension, termination, or restoration of parental authority and other cases cognizable under Presidential Decree No. 603, Executive Order No. 56 (Series of 1986), and other related laws;

h) Petitions for the constitution of the family home;

i) Cases against minors cognizable under the Dangerous Drugs Act, as amended;

j) Violations of Republic Act No. 7610, otherwise known as the *"Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act,"* as amended by Republic Act No. 7658; and

k) Cases of domestic violence against:

1) *Women* — which are acts of gender-based violence that result, or are likely to re-

sult in physical, sexual or psychological harm or suffering to women; and other forms of physical abuse such as battering or threats and coercion which violate a woman's personhood, integrity and freedom of movement; and

2) *Children* — which include the commission of all forms of abuse, neglect, cruelty, exploitation, violence, and discrimination and all other conditions prejudicial to their development.

If an act constitutes a criminal offense, the accused or batterer shall be subject to criminal proceedings and the corresponding penalties.

If any question involving any of the above matters should arise as an incident in any case pending in the regular courts, said incident shall be determined in that court.

CONCURRENT JURISDICTION. The Supreme Court, Court of Appeals and the Family Court have concurrent jurisdiction to take cognizance of *habeas corpus* cases involving minors (*Madrinan v. Madrinan,* G.R. No. 159374, July 12, 2007, 527 SCRA 487).

SECTION 6. *Use of Income.* — All Family Courts shall be allowed the use of ten percent (10%) of their income derived from filing and other court fees under Rule 141 of the Rules of Court for research and other operating expenses including capital outlay: *Provided,* That this benefit shall likewise be enjoyed by all courts of justice.

The Supreme Court shall promulgate the necessary guidelines to effectively implement the provisions of this section.

SECTION 7. *Special Provisional Remedies.* — In cases of violence among immediate family members living in the same domicile or household, the Family Court may issue a restraining order against the accused or defendant upon a verified application by the complainant or the victim for relief from abuse.

The court may order the temporary custody of children in all civil actions for their custody. The court may also order support *pendente lite,* including deduction from the salary and use of conjugal home and other properties in all civil actions for support.

SECTION 8. *Supervision of Youth Detention Homes.* — The judge of the Family Court shall have direct control and supervision of the youth detention home which the local government unit shall establish to separate the youth offenders from adult criminals: *Provided, however,* That alternatives to detention and institutional care shall be made available to the accused including counseling, recognizance, bail, community continuum, or diversions from the justice system: *Provided, further,* That the human rights of the accused are fully respected in a manner appropriate to their well-being.

SECTION 9. *Social Services and Counseling Division.* — Under the guidance of the Department of Social Welfare and Development (DSWD), a Social Services and Counseling Division (SSCD) shall be established in each judicial region as the Supreme Court shall deem necessary based on the number of juvenile and family cases existing in such jurisdiction. It shall provide appropriate social services to all juvenile and family cases filed with the court and recommend the proper social action. It shall also develop programs, formulate uniform policies and procedures, and provide technical supervision and monitoring of all SSCD in coordination with the judge.

SECTION 10. *Social Services and Counseling Division Staff.* — The SSCD shall have a staff composed of qualified social workers and other personnel with academic preparation in behavioral sciences to carry out the duties of conducting intake assessment, social case studies, casework and counseling, and other social services that may be needed in connection with cases filed with the court:

Provided, however, **That in adoption cases and in petitions for declaration of abandonment, the case studies may be prepared by social workers of duly licensed child caring or child placement agencies, or the DSWD. When warranted, the division shall recommend that the court avail itself of consultative services of psychiatrists, psychologists, and other qualified specialists presently employed in other departments of the government in connection with its cases.**

The position of Social Work Adviser shall be created under the Office of the Court Administrator, who shall monitor and supervise the SSCD of the Regional Trial Court.

SECTION 11. ***Alternative Social Services.*** **— In accordance with Section 17 of this Act, in areas where no Family Court has been established or no Regional Trial Court was designated by the Supreme Court due to the limited number of cases, the DSWD shall designate and assign qualified, trained, and DSWD accredited social workers of the local government units to handle juvenile and family cases filed in the designated Regional Trial Court of the place.**

SECTION 12. ***Privacy and Confidentiality of Proceedings.*** **— All hearings and conciliation of the child and family cases shall be treated in a manner consistent with the promotion of the child's and the family's dignity and worth, and shall respect their privacy at all stages of the proceedings. Records of the cases shall be dealt with utmost confidentiality and the identity of parties shall not be divulged unless necessary and with authority of the judge.**

SECTION 13. ***Special Rules of Procedure.*** **— The Supreme Court shall promulgate special rules of procedure for the transfer of cases to the new courts during the transition period and for the disposition of family cases with the best interests of the child and the protection of the family as primary consideration taking into account the United Nations Convention on the Rights of the Child.**

SECTION 14. ***Appeals.*** **— Decisions and orders of the court shall be appealed in the same manner and subject to the same conditions as appeals from the ordinary Regional Trial Courts.**

SECTION 15. ***Appropriations.*** **— The amount necessary to carry out the provisions of this Act shall be included in the General Appropriations Act of the year following its enactment into law and thereafter.**

SECTION 16. ***Implementing Rules and Regulations.*** **— The Supreme Court, in coordination with the DSWD, shall formulate the necessary rules and regulations for the effective implementation of the social aspects of this Act.**

SECTION 17. ***Transitory Provisions.*** **— Pending the establishment of such Family Courts, the Supreme Court shall designate from among the branches of the Regional Trial Court at least one Family Court in each of the cities of Manila, Quezon, Pasay, Caloocan, Makati, Pasig, Mandaluyong, Muntinlupa, Laoag, Baguio, Santiago, Dagupan, Olongapo, Cabanatuan, San Jose, Angeles, Cavite, Batangas, Lucena, Naga, Iriga, Legazpi, Roxas, Iloilo, Bacolod, Dumaguete, Tacloban, Cebu, Mandaue, Tagbilaran, Surigao, Butuan, Cagayan de Oro, Davao, General Santos, Oroquieta, Ozamis, Dipolog, Zamboanga, Pagadian, Iligan and in such other places as the Supreme Court may deem necessary.**

Additional cases other than those provided in Section 5 may be assigned to the Family Courts when their dockets permit: ***Provided,*** **That such additional cases shall not be heard on the same day family cases are heard.**

In areas where there are no Family Courts, the cases referred to in Section 5 of this Act shall be adjudicated by the Regional Trial Court.

SECTION 18. ***Separability Clause.*** **— In case any provision of this Act is declared unconstitutional, the other provisions shall remain in effect.**

SECTION 19. ***Repealing Clause.*** **— All other laws, decrees, executive orders, rules or regulations inconsistent herewith are hereby repealed, amended, or modified accordingly.**

SECTION 20. ***Effectivity.*** **— This Act shall take effect fifteen (15) days after its publication in at least two (2) national newspapers of general circulation.**

Approved:

(SGD.) JOSE DE VENECIA, JR.
Speaker of the House of Representatives

(SGD.) ERNESTO M. MACEDA
President of the Senate

This Act which is a consolidation of Senate Bill No. 1205 and House Bill No. 9292 was finally passed by the Senate and the House of Representatives on October 13, 1997 and October 9, 1997, respectively.

(SGD.) ROBERTO P. NAZARENO
Secretary General House of Representatives

(SGD.) LORENZO E. LEYNES, JR.
Secretary of the Senate

Approved: October 28, 1997

(SGD.) FIDEL V. RAMOS
President of the Philippines

CIVIL CODE OF THE PHILIPPINES

TITLE X. — FUNERALS

Article 305. The duty and the right to make arrangements for the funeral of a relative shall be in accordance with the order established for support, under Article 294. In case of descendants of the same degree, or of brothers and sisters, the oldest shall be preferred. In case of ascendants, the paternal shall have a better right.

ARRANGEMENTS. Those who are duty-bound to make arrangements shall be in accordance with the order established for support. This order is now governed by Article 199 of the Family Code which repealed Article 294 of the Civil Code and which provides that such duty shall devolve first on the spouse; in his or her absence or incapacity, the descendants in the nearest degree; in the absence or incapacity of the latter, the ascendants in the nearest degree; and finally, in the absence of all of the said persons, the brothers and sisters. Article 305 also provides that in case of descendants of the same degree, or of brothers and sisters, the oldest shall be preferred. In case of ascendants, the paternal shall have a better right.

Article 306. Every funeral shall be in keeping with the social position of the deceased.

Article 307. The funeral shall be in accordance with the expressed wishes of the deceased. In the absence of such expression, his religious beliefs or affiliation shall determine the funeral rites. In case of doubt, the form of the funeral shall be decided upon by the person obliged to make arrangements for the same, after consulting the other members of the family.

KINDS OF FUNERAL. The wishes of the deceased shall be mainly followed because this is part of the respect that should be accorded to the dead. In the absence of such expression, his or her religious beliefs or affiliation shall determine the funeral rites because religious beliefs cater to the spiritual and, more often than not, the deceased's concept of death is greatly influenced by his or her religious background. In case of doubt, the form of the funeral shall be decided upon by the person obliged to make arrangements for the same, after consulting the other members of the family. The reason for this is that the law presumes that these people are the ones who know the deceased very well and they are in a position to know the kind of respect which the deceased might have desired in his or her funeral had he or she expressed his or her wish before he or she died.

However, in all cases, the law mandates that every funeral shall be in keeping with the social position of the deceased. The kind of funeral is the last manifestation of the kind of life which the deceased has attained and the law sees to it that those who will be in charge of the funeral arrangements will accord the right type of respect due to the deceased.

Article 308. No human remains shall be retained, interred, disposed of or exhumed without the consent of the persons mentioned in Articles 294 and 305.

Article 309. Any person who allows disrespect to the dead, or wrongfully interferes with a funeral shall be liable to the family of the deceased for damages, material and moral.

RESPECT FOR THE DEAD. Philippine culture and tradition give reverence to the dead. Thus, any undertaking that would, in a way, "disturb" the dead must be with the consent of those who will be greatly affected. Also, damages can be sought against those who allow disrespect to the dead, or wrongfully interfere with a funeral.

Article 310. The construction of a tombstone or mausoleum shall be deemed a part of the funeral expenses, and shall be chargeable to the conjugal partnership property, if the deceased is one of the spouses.

LIABILITY OF CONJUGAL PARTNERSHIP. If the deceased is married, the law clearly provides that the tombstone or mausoleum shall be deemed a part of the funeral expenses and shall be chargeable to the conjugal partnership property.

TITLE XII. — CARE AND EDUCATION OF CHILDREN

Article 356. Every child:

(1) Is entitled to parental care;

(2) Shall receive at least elementary education;

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

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

Article 357. Every child shall:

(1) Obey and honor his parents or guardian;

(2) Respect his grandparents, old relatives, and persons holding substitute parental authority;

(3) Exert his utmost for his education and training;

(4) Cooperate with the family in all matters that make for the good of the same.

Article 358. Every parent and every person holding substitute parental authority shall see to it that the rights of the child are respected and his duties complied with, and shall particularly, by precept and example, imbue the child with high-mindedness, love of country, veneration for the national heroes, fidelity to democracy as a way of life, and attachment to the ideal of permanent world peace.

Article 359. The government promotes the full growth of the faculties of every child. For this purpose, the government will establish, whenever possible:

(1) Schools in every barrio, municipality and city where optional religious instruction shall be taught as part of the curriculum at the option of the parent or guardian;

(2) Puericulture and similar centers;

(3) Councils for the Protection of Children; and

(4) Juvenile courts.

Article 360. The Council for the Protection of Children shall look after the welfare of children in the municipality. It shall, among other functions:

(1) Foster the education of every child in the municipality;

(2) Encourage the cultivation of the duties of parents;

(3) Protect and assist abandoned or mistreated children, and orphans;

(4) Take steps to prevent juvenile delinquency;

(5) Adopt measures for the health of children;

(6) Promote the opening and maintenance of playgrounds;

(7) Coordinate the activities of organizations devoted to the welfare of children, and secure their cooperation.

Article 361. Juvenile courts will be established, as far as practicable, in every chartered city or large municipality.

Article 362. Whenever a child is found delinquent by any court, the father, mother, or guardian may in a proper case be judicially admonished.

Article 363. In all questions on the care, custody, education and property of children, the latter's welfare shall be paramount. No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure.

TITLE XIII. — USE OF SURNAMES

SURNAME AND MIDDLE NAME. The legal importance of a surname is highlighted by the fact that there are so many cases decided by the Supreme Court concerning surnames.

A person's name is the designation by which he is known and called in the community in which he lives and is best known. It is defined as the word or combination of words by which a person is distinguished from other individuals and, also, as the label or appellation which he bears for the convenience of the world at large addressing him, or in speaking of or dealing with him. It is both of personal as well as public interest that every person must have a name. The name of an individual has two parts: (1) the given or proper name and (2) the surname or family name. The given or proper name is that which is given to the individual at birth or at baptism, to distinguish him from other individuals. The surname or family name is that which identifies the family to which he belongs and is continued from parent to child. The given name may be freely selected by the parents for the child, but the surname to which the child is entitled is fixed by law (*In the matter of the adoption of Stephanie Nathy Astorga Garcia,* G.R. No. 148311, March 31, 2005, 454 SCRA 541).

A name is said to have the following characteristics: (1) It is absolute, intended to protect the individual from being confused with others. (2) It is obligatory in certain respects, for nobody can be without a name. (3) It is fixed, unchangeable, or immutable, at least at the start, and maybe changed only for good cause and by judicial proceedings. (4) It is outside the commerce of man, and therefore inalienable and intransmissible by act *inter vivos* or *mortis causes.* (5) It is imprescriptible (*In Re: Petition for Change of Name and/or Correction of Entry in the Civil Registry of Julian Lin Carulasan Wang,* G.R. No. 159966, March 30, 2005, 454 SCRA 155).

Middle names have a practical and legal significance in that they serve to identify the maternal lineage or filiation of a person as well as further distinguish him or her from others who

may have the same given name and surname as he or she has. A middle name cannot just be dropped without compelling or justifiable reasons. It cannot be dropped merely because it is an inconvenience to the person using it (*In Re: Petition for Change of Name and/or Correction of Entry in the Civil Registry of Julian Lin Carulasan Wang,* G.R. No. 159966, March 30, 2005, 454 SCRA 155).

Article 364. Legitimate and legitimated children shall principally use the surname of the father.

LEGITIMATE AND LEGITIMATED CHILDREN. Article 174 of the Family Code provides, among others, that legitimate children shall have the right to bear the surname of the father and the mother. Article 179 of the Family Code provides that legitimated children shall enjoy the same rights as legitimate children and therefore, they shall likewise have the right to bear the surname of the father and the mother.

In *Alfon v. Republic,* G.R. No. L-51201, May 29,1980, 97 SCRA 858, the Supreme Court ruled that the worked "principally" used in Article 364 is not equivalent to "exclusively" so that there is no legal obstacle if a legitimate or legitimated child should choose to use the surname of the mother to which it is equally entitled. In the said *Alfon* case, the Supreme Court also found as justified the use of the use of the mother's surname considering that the child has been using it already in various records and hence changing the child's surname in her birth certificate from that of her father to her mother was justified to avoid confusion.

Article 365. An adopted child shall bear the surname of the adopter.

ADOPTED CHILD. Section 17, Article 5 of Republic Act 8552, otherwise known as the Domestic Adoption Act of 1998, provides that the adoptee shall be considered the legitimate son/daughter of the adopter(s) for all intents and purposes and as such is entitled to all the rights and obligations provided by law to legitimate sons/daughters without discrimination of any kind and, to this end, the adoptee is entitled to love, guidance and support in keeping with the means of the family. One of the rights of the adopted is, therefore, the right to use the surname of the adopter.

Article 366. A natural child acknowledged by both parents shall principally use the surname of the father. If recognized by only one of the parents, a natural child shall employ the surname of the recognizing parent.

Article 367. Natural children by legal fiction shall principally employ the surname of the father.

Article 368. Illegitimate children referred to in Article 287 shall bear the surname of the mother.

ILLEGITIMATE CHILDREN. Under the new Family Code, there are only two classes of children, namely, legitimate and illegitimate. The five distinctions among various types of illegitimate children under the Civil Code have been eliminated (*Gapusan Chua v. Court of Appeals,* 183 SCRA 160). Article 176 of the Family Code provides that

> 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 Republic Act No. 9255).

Article 369. Children conceived before the decree annulling a voidable marriage shall principally use the surname of the father.

CONCEPTION INSIDE AN ANNULLABLE MARRIAGE. Legitimate children are those conceived or born inside a valid marriage. An annullable marriage is valid until annulled or terminated. Hence, a child conceived inside a marriage prior to its annulment is legitimate.

Article 370. A married woman may use:

(1) Her maiden first name and surname and add her husband's surname, or

(2) Her maiden first name and her husband's surname, or

(3) Her husband's full name, but prefexing a word indicating that she is his wife, such as "Mrs."

MARRIED WOMAN. Article 370 is directory and permissive in character because when a woman gets married, she does not change her name but only her civil status. Moreover this is consistent with the rule that surname indicates descent (*Remo v. Honorable Secretary of Foreign Affairs*, G.R. No. 169202, March 5, 2010; *Yasin v. Honorable Judge Shari'a District Court*, 311 Phil 696, 707). A married woman can maintain her name and surname or follow any of the names in Article 370. Thus, a validly married woman has actually four alternatives in the use of a name. Thus, Corazon Cojuangco married to Benigno Aquino, Jr. may use either Corazon Cojuangco, Corazon Cojuangco-Aquino, Corazon Aquino or Mrs. Benigno Aquino, Jr.

In *Remo v. Honorable Secretary of Foreign Affairs*, G.R. No. 169202, March 5, 2010, the Supreme Court ruled that, for purposes of surnames used in the passport, a married woman who opted to use the surname of her husband in her passport must continue to use it in case of renewal. She cannot revert to using her maiden surname because, pursuant to Republic Act No. 8239, the law regulating the issuance of passport, a married woman who used the surname of her husband in initially obtaining a passport can change her surname to her maiden surname in subsequent renewals only if the marriage were annulled or nullified or the woman obtained a valid divorce abroad. The Supreme Court likewise stated that Republic Act No. 8239 is a more specific law than the Civil Code on surnames and therefore the former should prevail. It is submitted that the decision of the Supreme Court in the *Remo* case should have been the other way around. The woman should have been allowed to use her maiden surname. This decision should not have been decided from the perspective of mere statutory construction but it should have been determined from a rights-based perspective which is more fundamental. Article 370 of the Civil Code deals with a fundamental right to the use of a surname by a woman. Republic Act No. 8239 merely deals with a procedural rule that does not go into the intrinsic significance of the importance of a surname. While it may be true that a passport is the property of the State, this is not enough reason to deprive its citizen of a fundamental right which the State must also protect.

Article 371. 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, unless:

(1) The court decrees otherwise, or

(2) She or the former husband is married again to another person.

ANNULMENT. In the event that the marriage is annulled, there are certain rules to be followed in so far as the wife is concerned. Thus, if Maria Clara-De la Cruz's marriage to Juan De la Cruz is annulled and if the said wife is the guilty party, she should resume using Maria Clara. If she is the innocent spouse, she may use Maria Clara or Maria Clara-De la Cruz depending upon her choice unless the court decrees otherwise or unless she marries Sam America in which case she will follow the rule under Article 370 in connection with her being married to Sam America.

Article 372. When legal separation has been granted, the wife shall continue using her name and surname employed before the legal separation.

LEGAL SEPARATION. In legal separation the bond of marriage is not severed. The husband and the wife are only separated from "bed and board." Hence, the wife may use her name and surname employed before the legal separation (See *Laperal v. Republic*, 6 SCRA 357).

Article 373. A widow may use the deceased husband's surname as though he were still living, in accordance with Article 370.

WIDOW. A widow is a person whose husband is dead. She can use the surname of the husband as if he were still living in accordance with Article 370.

Article 374. In case of identity of names and surnames, the younger person shall be obliged to use such additional name or surname as will avoid confusion.

IDENTITY OF NAMES. So that confusion can be prevented, the law provides that additional names or surnames shall be used by younger people. Thus, if parents would want to name their son after his godfather who is not related to them, the said son must use an additional name or surname. Hence, if the name of the godfather is Juan de la Cruz, the godson must use an additional name such as Juan Pedro de la Cruz.

Article 375. In case of identity of names and surnames between ascendants and descendants, the word "Junior" can be used only by a son. Grandsons and other direct male descendants shall either:

(1) Add a middle name or the mother's surname, or

(2) Add the Roman numerals II, III, and so on.

IDENTITY OF NAMES BETWEEN ASCENDANTS AND DESCENDANTS. According to the law, only the son can use the word "junior" in case of identity of names between ascendants and descendants. Hence, the son of Juan de la Cruz who has the same name shall use Juan de la Cruz, Junior. Any other direct descendant other than a son could either add a middle name or the mother's surname, or add the Roman numerals II, III, and so on. Hence, if Juan de la Cruz, Junior, who is married to Julieta Santos, has a son with the same name, such son shall use Juan Ricardo de la Cruz, or Juan Santos-de la Cruz, or Juan de la Cruz III. If Juan de la Cruz names his son after his father, Roberto de la Cruz, such son shall be named Roberto de la Cruz II.

Article 376. No person can change his name or surname without judicial authority.

REPUBLIC ACT NUMBERED 9048. Article 366 and also Article 412 of the Civil Code have been amended by Republic Act Number 9048, otherwise known as "An Act Authorizing the City or Municipal Civil Registrar or the Consul General to Correct a Clerical or Typographical Error in an Entry and/or Change of First Name or Nickname in the Civil Register Without Need of Judicial Order. Amending for this Purpose Articles 376 and 412 of the Civil Code of the Philippines." The Act is a consolidation of House Bill No.

9797 and Senate Bill No. 2159. It was finally passed by the House of Representatives on February 7, 2001 and by the Senate on February 8, 2001. It was signed by President Gloria Macapagal-Arroyo on March 22, 2001. The complete text of the law is as follows:

> Section 1. *Authority to Correct Clerical or Typographical Error and Change of First Name or Nickname.* — No entry in a civil register shall be changed or corrected without a judicial order, except for clerical or typographical errors and change of first name or nickname which can be corrected or changed by the concerned city or municipal civil registrar or consul general in accordance with the provisions of this Act and its implementing rules and regulations.
>
> Sec. 2. *Definitions of Terms.* — As used in this Act, the following terms shall mean:
>
> (1) *"City or municipal civil registrar"* refers to the head of the local civil registry office of the city or municipality, as the case may be, who is appointed as such by the city or municipal mayor in accordance with the provisions of existing laws.
>
> (2) *"Petitioner"* refers to a natural person filing the petition and who has direct and personal interest in the correction of a clerical or typographical error in an entry or change of first name or nickname in the civil register.
>
> (3) *"Clerical or typographical error"* refers to a mistake committed in the performance of clerical work in writing, copying, transcribing or typing an entry in the civil register that is harmless and innocuous, such as misspelled name or misspelled place of birth or the like, which is visible to the eyes or obvious to the understanding, and can be corrected or changed only by reference to other existing record or records: *Provided, however,* That no correction must involve the change of nationality, age, status or sex of the petitioner.
>
> (4) *"Civil register"* refers to the various registry books and related certificates and documents kept in the archives of the local civil registry offices, Philippine Consulates and of the Office of the Civil Registrar General.
>
> (5) *"Civil registrar general"* refers to the administrator of the National Statistics Office which is the agency mandated to carry out and administer the provision of laws on civil registration.
>
> (6) *"First name"* refers to a name or a nickname given to a person which may consist of one or more names in addition to the middle and last names.

Sec. 3. *Who may File the Petition and Where.* — Any person having direct and personal interest in the correction of a clerical or typographical error in an entry and/or change of first name or nickname in the civil register may file, in person, a verified petition with the local civil registry office of the city or municipality where the record being sought to be corrected or changed is kept.

In case the petitioner has already migrated to another place in the country and it would not be practical for such party, in terms of transportation expenses, time and effort to appear in person before the local civil registrar keeping the documents to be corrected or changed, the petition may be filed, in person, with the local civil registrar of the place where the interested party is presently residing or domiciled. The two (2) local civil registrars concerned will then communicate to facilitate the processing of the petition.

Citizens of the Philippines who are presently residing or domiciled in foreign countries may file their petition, in person, with the nearest Philippine Consulates.

The petitions filed with the city or municipal civil registrar or the consul general shall be processed in accordance with this Act and its implementing rules and regulations.

All petitions for the correction of clerical or typographical errors and/or change of first names or nicknames may be availed for only once.

Sec. 4. *Grounds for Change of First Name or Nickname.* — The petition for change of first name or nickname may be allowed in any of the following cases:

(1) The petitioner finds the first name or nickname to be ridiculous, tainted with dishonor or extremely difficult to write or pronounce;

(2) The new first name or nickname has been habitually and continuously used by the petitioner and he has been publicly known by the first names or nicknames in the community; or

(3) The change will avoid confusion.

Sec. 5. *Form and Contents of the Petition.* — The petition shall be in the form of an affidavit, subscribed and sworn to before any person authorized by law to administer oaths. The affidavit shall set forth facts necessary to establish the merits of the petition and shall show affirmatively that the petitioner is competent to testify to the matters stated. The petitioner shall state the particular erroneous entry or entries which are sought to be corrected and/or the change sought to be made.

The petition shall be supported with the following documents:

(1) A certified true machine copy of the certificate or of the page of the registry book containing the entry or entries sought to be corrected or changed;

(2) At least two (2) public or private documents showing the correct entry or entries upon which the correction or change shall be based; and

(3) other documents which the petitioner or the city or municipal civil registrar, or the consul general may consider relevant and necessary for the approval of the petition.

In case of change of first name or nickname, the petition shall likewise be supported with the documents mentioned in the immediately preceding paragraph. In addition, the petition shall be published at least once a week for two (2) consecutive weeks in a newspaper of general circulation. Furthermore, the petitioner shall submit a certification from the appropriate law enforcement agencies that he has no pending case or no criminal record.

The petition and its supporting papers shall be filed in three (3) copies to be distributed as follows: *first* copy to the concerned city or municipal civil registrar, or the consul general; *second* copy to the Office of the Civil Registrar General; and the *third* copy to the petitioner.

Sec. 6. *Duties of the City of Municipal Civil Registrar or the Consul General.* — The city or municipal civil registrar or the consul general to whom the petition is presented shall examine the petition and its supporting documents. He shall post the petition in a conspicuous place provided for the purpose for ten (10) consecutive days after he finds the petition and its supporting documents sufficient in form and substance.

The city or municipal civil registrar or the consul general shall act on the petition and shall render a decision not later than five (5) working days after the completion of the posting and/or publication requirement. He shall transmit a copy of his decision together with the records of the proceedings to the Office of the Civil Registrar General within five (5) working days from the date of the decision.

Sec. 7. *Duties and Powers of the Civil Registrar General.* — The civil registrar general shall, within ten (10) working days from receipt of the decision granting a petition, exercise the power to impugn such decision by way of an objection based on the following grounds:

(1) The error is not clerical or typographical;

(2) The correction of an entry or entries in the civil register is substantial or controversial as it affects the civil status of a person; or

(3) The basis used in changing the first name or nickname of a person does not fall under Section 4.

The civil registrar general shall immediately notify the city or municipal civil registrar or the consul general of the action taken on the decision. Upon receipt of the notice thereof, the city or municipal civil registrar or the consul general shall notify the petitioner of such action.

The petitioner may seek reconsideration with the civil registrar general or file the appropriate petition with the proper court.

If the civil registrar general fails to exercise his power to impugn the decision of the city or municipal registrar or of the consul general within the period prescribed herein, such decision shall become final and executory.

Where the petition is denied by the city or municipal civil registrar or the consul general, the petitioner may either appeal the decision to the civil registrar general or file the appropriate petition with the proper court.

Sec. 8. *Payment of Fees.* — The city or municipal civil registrar or the consul general shall be authorized to collect reasonable fees as a condition for accepting the petition. An indigent petitioner shall be exempt from the payment of the said fee.

Sec. 9. *Penalty Clause.* — A person who violates any of the provisions of this Act shall, upon conviction, be penalized by imprisonment of not less than six (6) years but not more than twelve (12) years, or a fine of not less than Ten thousand pesos (P10,000.00) but not more than One hundred thousand pesos (P100,000.00), or both, at the discretion of the court.

In addition, if the offender is a government official or employee, he shall suffer the penalties provided under civil service laws, rules and regulations.

Sec. 10. *Implementing Rules and Regulations.* — The civil registrar general shall, in consultation with the Department of Justice, the Department of Foreign Affairs, the Office of the Supreme Court Administrator, the University of the Philippines Law Center and the Philippine Association of Civil Registrars, issue the necessary rules and regulations for the effective

implementation of this Act not later than three (3) months from the effectivity of this law.

Sec. 11. *Retroactivity Clause.* — This Act shall have retroactive effect insofar as it does not prejudice or impair vested or acquired rights in accordance with the Civil Code and other laws.

Sec. 12. *Separability Clause.* — If any portion or provision of this Act is declared void or unconstitutional, the remaining portions or provisions thereof shall not be affected by such declaration.

Sec. 13. *Repealing Clause.* — All laws, decrees, orders, rules and regulations, other issuances, or parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

Sec. 14. *Effectivitiy Clause.* — This Act shall take effect fifteen (15) days after its complete publication in at least two (2) national newspapers of general circulation.

CHANGE OF NAME AND SURNAME. A change of name is a privilege and not a matter of right, so that before a person can be authorized to change his or her name given either in his or her certificate or civil registry, he or she must show proper or reasonable cause or any compelling reason which may justify such change (*Yu Chi Han v. Republic,* 15 SCRA 454; *Ng Yao Siong v. Republic,* 16 SCRA 483). A change of name or nickname can be effected through the office of the local civil registrar reviewable by the office of the Civil Registrar General and finally the courts.

A change of surname is however, a matter of judicial discretion which must be exercised in the light of the reasons adduced and the consequences that will likely follow (*Yu v. Republic,* 17 SCRA 253). A person should not be allowed to use a surname which otherwise he is not permitted to employ under the law (*Manuel v. Republic,* 1 SCRA 836).

REASONS FOR CHANGE OF NAME. The purpose of the law in allowing a change of name or surname is to give a person an opportunity to improve his or her personality and to promote his or her best interest (*Calderon v. Republic,* 19 SCRA 721). But to justify a change of name, there must exist a proper and reasonable cause or compelling reason. The reasons for change of name or nickname are all provided in Section 4 of R.A. 9048. The following have been held to constitute proper and reasonable causes or compelling reasons

for change of surname: (1) a ridiculous name, a name tainted with dishonor, or a name extremely difficult to write or pronounce; (2) a change of civil status; and (3) a need to avoid confusion (*Republic v. Tañada,* 42 SCRA 419). Also, it has been held that, in the absence of prejudice to the State or any individual, a sincere desire to adopt a Filipino name to erase signs of a former alien nationality which unduly hamper social and business life, is a proper and reasonable cause for a change of surname (*Uy v. Republic*, 15 SCRA 457).

In *Silverio v. Republic*, G.R. No. 174689 October 19, 2007, 537 SCRA 373, the Supreme Court ruled that , a male person who had a surgical sexual reassignment where she became biologically a woman cannot use that ground as reason to change his name from "Rommel" to "Mely" as a person's sex is immutable from birth. However, in *Republic v. Cagandahan*, G.R. No. 166676, September 12, 2008, 565 SCRA 72, a change of name from "Jennifer" to "Jeff" was allowed even without surgical sexual reassignment in a case where the person was found out to have Congenital Adrenal Hyperplasia (CAH) which was a rare biological situation where the person had the sex organs of a male and a female and where the person finally considered his sex as a male considering that he had no menstruation and no breast as a woman and was wanting in woman-hormones. The Supreme Court said:

> Respondent here has simply let nature take its course and has not taken unnatural steps to arrest or interfere with what he was born with. And accordingly, he has already ordered his life to that of a male. Respondent could have undergone treatment and taken steps, like taking lifelong medication, to force his body into the categorical mold of a female but he did not. He chose not to do so. Nature has instead taken its due course in respondent's development to reveal more fully his male characteristics.
>
> In the absence of a law on the matter, the Court will not dictate on respondent concerning a matter so innately private as one's sexuality and lifestyle preferences, much less on whether or not to undergo medical treatment to reverse the male tendency due to CAH. The Court will not consider respondent as having erred in not choosing to undergo treatment in order to become or remain as a female. Neither will the Court force respondent to undergo treatment and to take medication in order to fit the mold of a female, as society commonly currently knows this gender of the human species. Respondent is the one who has to live with his intersex anatomy. To him belongs the human right to the pursuit of happiness and of health. Thus, to him

> should belong the primordial choice of what courses of action to take along the path of his sexual development and maturation. In the absence of evidence that respondent is an "incompetent" in the absence of evidence to show that classifying respondent as a male will harm other members of society who are equally entitled to protection under the law, the Court affirms as valid and justified the respondent's position and his personal judgment of being a male.

In a case where a divorced woman subsequently remarried and desired to have her child's surname changed to the surname of her second husband who had always treated the child with love and affection, the Supreme Court rejected the plea for change of name and observed:

> Anent the first issue, the government sustains a negative stand for the reason that our laws do not authorize a legitimate child to use the surname of a person who is not his father, for, as a matter of fact, Article 364 of the Civil Code specifically provides that legitimate children shall principally use the surname of their father. Mention is also made of Article 369 of the same Code which provides that in case of annulment of voidable marriage the children conceived before the annulment shall principally use the surname of the father, and considering by analogy the effect of a decree of divorce, it is concluded that the children who are conceived before such a decree should also be understood as carrying the surname of the real father, which, in this case, is Velarde.
>
> We find tenable this observation of government's counsel. Indeed, if a child born out of a lawful wedlock be allowed to bear the surname of the second husband of the mother, should the first husband die or be separated by a decree of divorce, there may result a confusion as to his real paternity. In the long run, the change may redound to the prejudice of the child in the community.
>
> While the purpose which may have animated petitioner is plausible and may run along the feeling of cordiality and spiritual relationship that pervades among the members of the Moore family, our hand is deferred by a legal barrier which we cannot at present overlook or brush aside.
>
> Another factor to be reckoned with is the fact that the child concerned is still a minor who for the present cannot fathom what would be his feeling when he comes to a mature age. Any way, if the time comes, he may decide the matter for himself and take such action as our law may permit. For the present

> we deem the action taken by petitioner premature (*Moore v. Republic,* 8 SCRA 282).

However, in a subsequent case, the Supreme Court allowed the change of surname of an illegitimate child as it would appear that it was for the best interest of the child. The Supreme Court, in *Calderon v. Republic*, 19 SCRA 721, observed and ruled, *to wit:*

> The lower court found that petitioner Gertrudes Josefina was born on March 17, 1956, an illegitimate child of Manuel del Pradeo and Corazon Adolfo as a result of their bigamous marriage which was annulled on July 18, 1957, after a judgment of conviction of said Manuel del Prado on the complaint for bigamy on December 5, 1956; that subsequently, on December 26, 1957, Corazon Adolfo, mother of the petitioner, got married to Romeo C. Calderon; that the petitioner is living with her mother and her foster father; and that Romeo C. Calderon declared in open court his consent to the petitioner's adopting his surname, especially so because he is the one supporting her. The lower court says: "In the opinion of the Court the reasons adduced by the petitioner are valid and will redound to the best interests of said minor who after all is not at fault to have come to this world as an illegitimate child."
>
> We agree with the court *a quo*. A petition to change the name of an infant, as in this case, should be granted only where to do so is clearly for the best interest of the child. When the mother of the petitioner filed the instant petition, she had in mind what she believed was for the best interest of her child, considering that her husband Romeo C. Calderon is the one supporting the child and that he is agreeable to the child's using his surname. The mother had considered the generous attitude of her husband as an opportunity for her to promote the personality and enhance the dignity, of her daughter by eliminating what constitutes a stigma of illegitimacy which her child would continue to bear if her surname is that of her legitimate father.
>
> The Solicitor General, in his brief, avers that the evident purpose of petitioner in seeking a change of her surname is to conceal her status as an illegitimate child and that any attempt to conceal illegitimacy cannot be motivated by good faith and an honest purpose. The Solicitor General further alleges that to authorize the change of the name of the petitioner would be to sanction a misrepresentation because the petitioner wants to appear as if she is the daughter of Romeo C. Calderon. We cannot agree with the view of the Solicitor General. The Solicitor

> General seems to support the idea that since the petitioner has the misfortune of being born illegitimate she must bear that stigma of illegitimacy as long as she lives. That idea should not be countenanced. Justice dictates that every person be allowed to avail of any opportunity to improve his social standing as long as in so doing he does not cause prejudice or injury to the interests of the State or of other people.
>
> The Solicitor General also contends that the status of the petitioner is that of a natural child by legal fiction and under Article 367 of the Civil Code, she shall principally enjoy the surname of the father. We agree with the lower court when it said that "While it is true that the Code provides that a natural child by legal fiction as the petitioner herein shall principally enjoy the surname of the father, yet, this does not mean that such child is prohibited by law from taking another surname with the latter's consent and for justifiable reasons." If under the law a legitimate child may secure a change of name through judicial proceedings, upon a showing of a "proper and reasonable cause," we do not see any reason why a natural child cannot do the same. The purpose of the law in allowing a change of name, as contemplated by the provisions of Rule 103 of the Rules of Court, is to give a person an opportunity to improve his personality and to promote his best interests. We are satisfied that the facts and circumstances as borne out by the record amply justify the change of surname of the petitioner as ordered by the lower court. We have held that the matter whether to grant or deny a petition for a change of name is left to the sound discretion of the court, and in the present case we believe that the court *a quo* had exercised its discretion in a judicious way when it granted the petition.

EFFECT OF CHANGE OF NAME. A change of name does not alter family relations, rights or duties, legal capacity, civil status or citizenship (*Calderon v. Republic,* 19 SCRA 721).

> What is altered is only the name, which is that word or combination of words by which a person is distinguished from others and which he bears as a label or appellation for the convenience of the world at large in addressing him, or in speaking of or dealing with him (*In re Petition for Change of Name of Joselito Yu, Juan S. Barrera v. Republic of the Philippines*, L-20874, May 25, 1966).

NATURE OF PROCEEDINGS. The procedure for change of *name* is provided for in Section 3 up to 7 of R.A. No. 9048. However, a petition for change of *surname* is a judicial proceeding *in rem* (*Tan*

v. Republic, 4 SCRA 1128). The judicial proceeding for change of surname is governed by Rule 103 of the Rules of Court, *to wit:*

> Section 1. *Venue.* — A person desiring to change his name shall present the petition to the Court of First Instance [now Regional Trial Court] of the province in which he resides, or, in the City of Manila, to the Juvenile and Domestic Relations Court (now Regional Trial Court).
>
> Section 2. *Contents of petition.* — A petition for change of name shall be signed and verified by the person desiring his name changed, or some other person on his behalf, and shall set forth:
>
> (a) That the petitioner has been a *bona fide* resident of the province where the petition is filed for at least three (3) years prior to the date of such filing;
>
> (b) The cause for which the change of the petitioner's name is sought;
>
> (c) The name asked for.
>
> Section 3. *Order for hearing.* — If the petition filed is sufficient in form and substance, the court, by an order reciting the purpose of the petition, shall fix a date and place for the hearing thereof, and shall direct that a copy of the order be published before the hearing at least once a week for three (3) successive weeks in some newspaper of general circulation published in the province, as the court shall deem best. The date set for the hearing shall not be within (30) days prior to an election nor within four (4) months after the last publication of the notice.
>
> Section 4. *Hearing.* — Any interested person may appear at the hearing and oppose the petition. The Solicitor General or the proper provincial or city fiscal shall appear on behalf of the Government of the Philippines.
>
> Section 5. *Judgment.* — Upon satisfactory proof in open court on the date fixed in the order that such order has been published as directed and that the allegations of the petition are true, the court shall, if proper and reasonable cause appears for changing the name of the petitioner, adjudge that such name be changed in accordance with the prayer of the petition.
>
> Section 6. *Service of judgment.* — Judgments or orders rendered in connection with this rule shall be furnished the civil registrar of the municipality or city where the court issuing the same is situated, who shall forthwith enter the same in the civil register.

Although Rule 103 refers to change of "name," it should refer to surname in view of the fact that change of name is now governed by Republic Act No. 9048.

It has been importantly held that publication of the petition for change of name is essential for the court to acquire jurisdiction (*Ng Yao v. Republic,* 16 SCRA 483). Publication is notice to the whole world that the proceeding has for its object "to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established" (*Rendora v. Republic,* 35 SCRA 483).

Article 377. Usurpation of a name and surname may be the subject of an action for damages and other relief.

Article 378. The unauthorized or unlawful use of another person's surname gives a right of action to the latter.

USURPATION OF NAME. In *Tolentino v. Court of Appeals,* 162 SCRA 66, where the current wife filed an action to prevent the former wife of her husband to use the surname of the said husband, the Supreme Court ruled that there was no usurpation and pertinently stated:

> There is no usurpation of the petitioner's name and surname in this case so that the mere use of the surname Tolentino by the private respondent cannot be said to have injured the petitioner's rights. "The usurpation of name implies some injury to the interests of the owner of the name. It consists in the possibility of confusion of identity x x x between the owner and the usurper. It exists when a person designates himself by another name x x x. The following are the elements of usurpation of a name: 1) there is an actual use of another's name by the defendant; 2) the use is unauthorized; and 3) the use of another's name is to designate personality or identify a person (Tolentino, *supra*, p. 685). None of these elements exists in the case at bar and neither is there a claim by the petitioner that the private respondent impersonated her. In fact, it is of public knowledge that Constancia Tolentino is the legal wife of Arturo Tolentino so that all invitations for Senator and Mrs. Arturo Tolentino are sent to Constancia. Consuelo never represented herself after the divorce as Mrs. Arturo Tolentino but simply Mrs. Consuelo David-Tolentino. The private respondent has legitimate children who have every right to use the surname Tolentino. She could not possibly be compelled to use the prefix

"Miss" or use the name Mrs. David, different from the surnames of her children. The records do not show that she has legally remarried.

In *Silva, et al. v. Peralta* (110 Phil. 57), cited by the petitioner, it was not the mere use of the surname that was enjoined but the defendant's representation that she was the wife of Saturnino Silva. There was, therefore, a usurpation of the wife's status which is absent in the case at bar.

We rule that the use of the surname Tolentino does not impinge on the rights of the petitioner.

Considering the circumstances of this petition, the age of the respondent who may be seriously prejudiced at this stage of her life, having to resort to further legal procedures in reconstituting documents and altering legal transactions where she used the surname Tolentino, and the effects on the private respondent, who while still not remarried, will have to use a surname different from the surnames of her own children, we find it just and equitable to leave things as they are, there being no actual legal injury to the petitioner save a deep hurt to her feelings which is not a basis for injunctive relief.

Article 379. The employment of pen names or stage names is permitted, provided it is done in good faith and there is no injury to third persons. Pen names and stage names cannot be usurped.

Article 380. Except as provided in the preceding article, no person shall use different names and surnames.

PEN NAMES OR STAGE NAMES. A person may use a name other than his name. This name is called pen name or stage name. Journalists and artists usually use pen names and stage names. However, for them to be able to do so, it must be done in good faith and without injury to third persons. Indeed, people using pen names and stage names can have a vested right on such names because the law also provides that it cannot be usurped.

TITLE XIV. — ABSENCE

Chapter 1

PROVISIONAL MEASURES IN CASE OF ABSENCE

Article 381. When a person disappears from his domicile, his whereabouts being unknown, and without leaving an agent to administer his property, the judge, at the instance of an interested party, a relative, or a friend, may appoint a person to represent him in all that may be necessary.

This same rule shall be observed when under similar circumstances the power conferred by the absentee has expired. (181a)

Article 382. The appointment referred to in the preceding article having been made, the judge shall take the necessary measures to safeguard the rights and interests of the absentee and shall specify the powers, obligations and remuneration of his representative, regulating them, according to the circumstances, by the rules concerning guardians. (182)

Article 383. In the appointment of a representative, the spouse present shall be preferred when there is no legal separation.

If the absentee left no spouse, or if the spouse present is a minor, any competent person may be appointed by the court. (183a)

COURT APPOINTMENT. It is necessary that the appointment of a representative of an absentee be made by way of a court order (*Ablang v. Fernandez,* 25 Phil. 33), and it must be noted that a

spouse must likewise file an application for appointment with the courts with respect to the properties of his or her very own absent spouse. If there is no legal separation, the spouse present shall be preferred.

The phrase "or if the spouse present is a minor" in the second paragraph of Article 383 has already been repealed by Republic Act No. 6809 which lowered the age of emancipation to 18 years of age. Thus, a person who marries must necessarily be at least 18 years of age for the marriage to be valid.

Chapter 2

DECLARATION OF ABSENCE

Article 384. Two years having elapsed without any news about the absentee or since the receipt of the last news, and five years in case the absentee has left a person in charge of the administration of his property, his absence may be declared. (184)

Article 385. The following may ask for the declaration of absence:

(1) The spouse present;

(2) The heirs instituted in a will, who may present an authentic copy of the same;

(3) The relatives who may succeed by the law of intestacy;

(4) Those who may have over the property of the absentee some right subordinated to the condition of his death. (185)

Article 386. The judicial declaration of absence shall not take effect until six months after its publication in a newspaper of general circulation. (186a)

JUDICIAL DECLARATION OF ABSENCE. A judicial declaration of absence is necessary for interested persons to be able to protect their rights, interests and benefits in connection with the person who has disappeared. It is also necessary to protect the interest of the absentee.

SPOUSE. For a spouse, a judicial declaration of absence can be a sufficient cause for an involuntary judicial separation of property between spouses under Article 135 of the Family Code and, therefore, a basis for the termination of the absolute community property or

the conjugal partnership of gains pursuant to Articles 99, 126, 134 to 138 of the Family Code; a ground for the transfer of all classes of exclusive properties of a spouse to his or her other spouse under Article 142 of the Family Code; and a basis that can be used for the termination of parental authority under Article 229 of the Family Code.

TESTAMENTARY HEIRS. If a person executes a will and he institutes another person as the one who will succeed him or her in his or her property, such person can seek for the judicial declaration of absence of the testator.

INTESTATE HEIRS. The intestate heirs are those specified in Section 2, Subsections 1 to 6, Chapter 3 of Title IV, Book III of the Civil Code relative to the rules of successions. Hence, as a general rule and in proper cases provided in the said Title IV of the Civil Code, the legitimate and illegitimate relatives of the deceased, the spouse, and the collateral relatives are the intestate heirs.

INTERESTED PARTY. The law also provides that those who may have over the property of the absentee some right subordinated to the condition of the absentee's death may seek the judicial declaration of absence. For example, during the time when the person was still present he or she executed a valid contract with another person providing that, if he dies in 1993, the said person shall have the right to repurchase his former house which was sold to the absentee when the latter was still present, such interested person can seek the judicial declaration of absence of the absentee as his right of repurchase is subordinated to the death of the absentee. In this regard, Article 42 of the Civil Code also provides that the effect of death upon the rights and obligations of the deceased person is determined, among others, by contract.

EFFECTIVITY OF JUDICIAL DECLARATION. The law provides that the judicial declaration of absence shall not take effect until six months after its publication in a newspaper of general circulation. However, the absence of the absentee shall be counted not from the effectivity of the judicial decree but from the date on which the last news of the absentee was received (*Jones v. Hortiguela,* 64 Phil. 179).

Chapter 3

ADMINISTRATION OF THE PROPERTY OF THE ABSENTEE

Article 387. An administrator of the absentee's property shall be appointed in accordance with Article 383. (187a)

Article 388. The wife who is appointed as an administratrix of the husband's property cannot alienate or encumber the husband's property, or that of the conjugal partnership, without judicial authority. (188a)

PROHIBITION ON ALIENATION. While Article 388 refers only to the wife, a husband likewise is prohibited from alienating the properties of the wife without her consent. Under the Family Code, the rights of the spouses as to their respective exclusive properties are respected. Hence, any of the spouses cannot alienate the properties of the other spouse without the consent of the latter. In fact, Article 111 of the Family Code provides that a spouse 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. Article 112 of the Family Code provides that 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.

Article 389. The administration shall cease in any of the following cases:

(1) When the absentee appears personally or by means of an agent;

(2) When the death of the absentee is proved and his testate or intestate heirs appear;

(3) When a third person appears, showing by a proper document that he has acquired the absentee's property by purchase or other title.

In these cases, the administrator shall cease in the performance of his office, and the property shall be at the disposal of those who may have a right thereto. (190)

APPEARANCE OF ABSENTEE. The purpose of appointing an administrator is to protect the properties of the owner during his or her absence. If the owner appears, the very reason for the administrator's appointment ceases. The owner must be allowed to take care of his or her own property. This is true also if a duly appointed agent of the owner appears. By the contract of agency, a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter (Article 1868 of the Civil Code).

DEATH. Upon the death of a person, the executor mentioned in his or her will shall usually be appointed as the administrator of his or her estate in accordance with the said decedent's wishes which must be pursuant to law. If he or she dies without a will, intestate proceedings will be instituted where a new administrator of his or her estate shall be appointed.

SUPERIOR INTEREST. The administrator must always act within his or her mandate and authority. An administrator has no right to administer property which does not belong to the owner. Hence, if somebody presents any valid or authentic document showing that the property being administered really belongs to somebody else, the administration over such property shall and must necessarily cease.

Chapter 4

PRESUMPTION OF DEATH

Article 390. After an absence of seven years, it being unknown whether or not the absentee still lives, he shall be presumed dead for all purposes, except for those of succession.

The absentee shall not be presumed dead for the purpose of opening his succession till after an absence of ten years. If he disappeared after the age of seventy-five years, an absence of five years shall be sufficient in order that his succession may be opened. (n)

Article 391. The following shall be presumed dead for all purposes, including the division of the estate among the heirs:

(1) A person on board a vessel lost during a sea voyage, or an aeroplane which is missing, who has not been heard of for four years since the loss of the vessel or aeroplane;

(2) A person in the armed forces who has taken part in war, and has been missing for four years;

(3) A person who has been in danger of death under other circumstances and his existence has not been known for four years.

Article 392. If the absentee appears, or without appearing his existence is proved, he shall recover his property in the condition in which it may be found, and the price of any property that may have been alienated or the property acquired therewith; but he cannot claim either fruits or rents. (194)

ABSENCE. The word "absence" in the rule that a presumption of death is raised by the "absence" of a person from his domicile when unheard of for seven years, means that a person is not at the place of his domicile and his actual residence is unknown, and it is for this reason that his existence is doubtful, and that, after seven years of such absence, his death is presumed. But removal alone is not enough (*Gorham v. Settegast,* 98 SW 655). Indeed, disappearance from his domicile and from knowledge of those with whom he could naturally communicate is necessary (*Maley v. Pennsylvania R. Co.,* 101 A. 911, 258 Pa. 73).

PRESUMPTION OF DEATH. Article 390 creates the presumption of death. Except for purposes of remarriage under Article 41 of the Family Code, there is no need for filing a case to declare that one is presumptively dead. As held in the case of *In re Szatraw*, 81 Phil. 461:

> This presumption may arise and be invoked and made in a case, either in an action or in a special proceeding, which is tried or heard by, and submitted for decision to, a competent court. Neither is there a prayer for the final determination of his right or status or for the ascertainment of a particular fact (*Hagan v. Wislizenus,* 42 Phil. 880), for the petition does not pray for a declaration that the petitioner's husband is dead, but merely asks for a declaration that he be presumed dead because he had been unheard from in seven years. If there is any pretense at securing a declaration that the petitioner's husband is dead, such a pretension cannot be granted because it is unauthorized. The petition is for a declaration that the petitioner's husband is presumptively dead. But this declaration, even if judicially made, would not improve the petitioner's situation, because such a presumption is already established by law. A judicial pronouncement to that effect, even if final and executory, would still be a *prima facie* presumption only. It is still disputable. It is for that reason that it cannot be the subject of a judicial pronouncement or declaration, if it is the only question or matter involved in a case, or upon which a competent court has to pass. The latter must decide finally the controversy between the parties, or determine finally the right or status of a party or establish finally a particular fact, out of which certain rights and obligations arise or may arise; and one such controversy is decided by a final judgment, or such right or status determined, or such particular fact established, by a final decree, then the judgment on the subject of controversy, or the decree upon the right or status of a party or upon the existence of a particular

> fact becomes *res judicata*, subject to no collateral attack, except in a few rare instances especially provided by law. It is therefore clear that a judicial declaration that a person is presumptively dead, because he had been unheard from in seven years, being a presumption *juris tantum* only, subject to contrary proof, cannot reach the stage of finality or become final. Proof of actual death of a person presumed dead because he had been unheard from in seven years, would have to be made in another proceeding to have such particular fact determined. If a judicial decree declaring a person presumptively dead because he had not been heard from in seven years cannot become final and executory even after the lapse of the reglementary period within which an appeal may be taken, for such presumption is still disputable and remains subject to contrary proof, then a petition for such a declaration is useless, unnecessary, superfluous and of no benefit to the petitioner. The Court should not waste its valuable time and be made to perform a superfluous and meaningless act.

PERIOD. For purposes of remarriage under Article 41 of the Family Code, four consecutive years is enough for a person to be judicially declared presumptively dead. For other purposes, there is no need of a judicial declaration but the required period for one to be presumed dead is seven years except for the opening succession. In the latter case, an absence of 10 years is mandated by law except when the person disappeared after the age of seventy-five years in which case an absence of five years is enough. In these cases, the person shall be presumed dead at the end of the seven-year period.

However, if the disappearance occurred under dangerous circumstances as specified in Article 391, the period is shortened to four years for all purposes including the division of the estate among the heirs but excluding the situation under Article 41 of the Family Code with respect to the present spouse wanting to remarry, in which case a judicial declaration of presumptive death is needed and the period is shortened to two years.

MISSING PERSON. Article 391 describes situations where a person has been missing under dangerous circumstances. In this regard, it has been held that Article 391 cannot apply to a person who accidentally fell into the sea while on board a vessel and consequently drowned. This is so because "the vessel was not lost during a sea voyage" in such a particular case (*Caltex v. Villanueva,* 2 SCRA 897). In the same vein, therefore, if a person cannot be found in a wreckage of an airplane which crashed, Article 391 will not

apply because the airplane is not missing. In case of Article 391(2), the person subject of inquiry must have "taken part in the war." Relevantly, in case Article 391 is applicable in a particular situation, it shall be presumed that the person died at the time when he was last heard of and not at the end of the period.

Chapter 5

EFFECT OF ABSENCE UPON THE CONTINGENT RIGHTS OF THE ABSENTEE

Article 393. Whoever claims a right pertaining to a person whose existence is not recognized must prove that he was living at the time his existence was necessary in order to acquire said right. (195)

PROOF OF EXISTENCE. If a person is known to be dead and there is a controversy as to the validity of a transaction or contract allegedly entered into by him, the person claiming the validity of the transaction, contract or obligation must prove that, at the time it was entered into, the person who entered the contract or incurred the obligation was alive. Also, if some right exists in favor of a deceased and such right is sought to be enforced, the individual seeking to enforce such right must prove that the right vested in favor of the deceased while the latter was still living. Hence, if *A* validly made a donation of a house to *X* to be given on January 5, 1990 and likewise promised to give another donation of a specific car also to *X* in the event that *X* would still be alive by January 2, 1991 and if, after December 25, 1990, *X* was nowhere to be found the heirs of *X* can claim that the car already belongs to *X* after January 2, 1991 by proving that *X* was alive on January 2, 1991.

Article 394. Without prejudice to the provisions of the preceding article, upon the opening of a succession to which an absentee is called, his share shall accrue to his co-heirs, unless he has heirs, assigns, or a representative. They shall all, as the case may be, make an inventory of the property. (196a)

ACCRETION. The disposition of the inheritance of an absentee shall benefit either his or her co-heirs or his or her own heirs, assigns or representatives. *For example, A* and *B* are brothers. They are the only heirs of their father. *A* has been judicially declared an absentee. Thereafter, their father died without a last will and testament leaving a net estate valued at P100,000. If *A* were not an absentee, he will inherit P50,000 while *B* will likewise inherit P50,000. Considering, however, that *A* is an absentee, his P50,000 shall accrue to *B* who will therefore inherit the whole estate. However, if *A* has children who are therefore his heirs, the said children shall inherit the P50,000 which was supposed to go to *A*. The children will inherit by their right of representation.

Article 395. The provisions of the preceding article are understood to be without prejudice to the action or petition for inheritance or other rights which are vested in the absentee, his representatives or successors in interest. This right shall not be extinguished save by lapse of time fixed for prescription. In the record that is made in the Registry of the real estate which accrues to the co-heirs, the circumstance of its being subject to the provisions of this article shall be stated. (197)

CLAIM. In the event that the property supposed to be inherited by the absentee accrues to the co-heirs, the title or record of the said property in the proper registry of property shall have an annotation stating that, within the prescriptive period provided by law, the property can be subject to the claim of any person having an interest in the said property especially the absentee, or his or her representative or successors. If the said absentee reappears, he or she has the right to file a petition to be able to get his or her rightful inheritance from the said co-heirs. This right to claim the inheritance by the absentee is also given to the absentee's representatives or successors. However, the absentee, his or her representatives or successors must file the petition within the prescriptive period provided by law.

Article 396. Those who may have entered upon the inheritance shall appropriate the fruits received in good faith so long as the absentee does not appear, or while his representatives or successors do not bring the proper actions. (198)

APPROPRIATION OF FRUITS. Anyone who obtains the inheritance of the absentee in accordance with law can make use or appropriate the fruits of the inheritance as long as they are in good faith. However, if the absentee appears or his or her representatives or successors already filed a claim in court, those who may have entered upon the inheritance cannot anymore make such appropriation.

TITLE XVI. — CIVIL REGISTRY

Article 407. Acts, events and judicial decrees concerning the civil status of persons shall be recorded in the civil register. (325a)

DUTIES OF THE LOCAL CIVIL REGISTRAR. The Local Civil Registrar in each city or municipality shall: (a) file registerable certificates and documents presented to them for entry; (b) compile the same monthly and prepare and send any information required of them by the Civil Registrar General; (c) issue certified transcripts or copies of any certificate or document registered, upon payment of the proper fees; (d) order the binding, properly classified, of all certificates or documents registered during the year; (e) send to the Civil Registrar-General during the first ten days of each month, a copy of the entries made during the preceding month, for filing; (f) index the same to facilitate search and identification in case any information is required; and (g) administer oaths, free of charge, for civil register purposes (Section 12 of the Civil Registry Law, Act No. 3753).

Article 408. The following shall be entered in the civil register:

(1) Births; (2) marriages; (3) deaths; (4) legal separations; (5) annulment of marriages; (6) judgments declaring marriages void from the beginning; (7) legitimations; (8) adoptions; (9) acknowledgments of natural children; (10) naturalization; (11) loss; or (12) recovery of citizenship; (13) civil interdiction; (14) judicial determination of filiation; (15) voluntary emancipation of a minor; and (16) changes of name. (326a)

Article 409. In cases of legal separation, adoption, naturalization and other judicial orders mentioned in the preceding article, it shall be the duty

of the clerk of court which issued the decree to ascertain whether the same has been registered, and if this has not been done, to send a copy of said decree to the civil registry of the city or municipality where the court is functioning.

Article 410. The books making up the civil register and all documents relating thereto shall be considered public documents and shall be *prima facie* evidence of the facts therein contained.

PUBLIC DOCUMENTS. The books making up the civil register and all documents relating thereto shall be considered public document (Article 409 of the Civil Code, Section 13 of Act No. 3753), They shall be open to the public during office hours and shall be kept in a suitable safe which shall be furnished to the local civil registrar at the expense of the general fund of the municipality concerned. The local civil registrar shall not under any circumstances permit any document entrusted to his care to be removed from his office, except by order of a court, in which case the proper receipt shall be taken. The local civil registrar may issue certified copies of any document filed, upon payment of the proper fees required under the law (Section 13 of the Civil Registry Law, Act No. 3753).

Unlike the filing of documents in the Registry of Deeds where the law expressly provides that such filing is constructive notice to all of the documents filed therein (Section 52 of P.D. 1529), the Civil Register Law does not provide for constructive notice to all persons of any document filed in the Office of the Local Civil Registrar or Office of the Civil Registrar General (See Section 13 of Civil Register Law Act No. 3753).

Thus, birth records, including a birth certificate, are strictly confidential and the contents therein cannot be revealed except when obtained by those interested therein, namely: 1) the person himself, or any person authorized by him or her; 2) his or her spouse, his or her parent or parents, his or her direct descendants, or the guardian or institution legally in charge of him or her if he or she is a minor; 3) the court or proper public official whenever absolutely necessary in administrative, judicial or other official proceedings to determine the identity of the child's parents or other circumstances surrounding his birth; and 4) in case of the person's death, the nearest of kin (Article 7 of Presidential Decree No. 603 as amended, otherwise known as The Child and Youth Welfare Code).

PRIMA FACIE EVIDENCE. By *prima facie* evidence is meant such proofs which, if remaining unrebutted or uncontradicted, is sufficient to maintain the fact such evidence seeks to substantiate. It creates a presumption of fact. (*Malicden v. Republic,* 12 SCRA 313):

> In case of conflict between a presumption of fact and a presumption of law, the latter will prevail. Thus, even if the record of birth states the name of a person as the father but the child was born inside the valid marriage of the mother with another man, the latter will be considered as the father because of the presumption of law that a child born inside a valid marriage is legitimate as to the spouses of that marriage (*Concepcion v. Court of Appeals*, 468 SCRA 438).

Also, in *Babiera v. Catotal,* G.R. No. 138493, June 15, 2000, where a legitimate child filed a suit to cancel the birth certificate of her housemaid's child who claimed to be her sister and therefore also the legitimate child of her parents and where it was proven that the birth certificate of such housemaid's child was forged to make it appear that the said housemaid's child was the child of the parents of the legitimate child, the Supreme Court rejected the contention of the housemaid's child that the birth certificate must be considered authentic considering that it enjoys the presumption of regularity in its issuance. Pertinently, the Supreme Court said:

> Lastly, petitioner argues that the evidence presented, especially Hermogena's testimony that petitioner was not her real child, cannot overcome the presumption of regularity in the issuance of the Birth Certificate.
>
> While it is true than an official document such as petitioner's Birth Certificate enjoys the presumption of regularity, the specific facts attendant to the case at bar, as well as the totality of evidence presented during trial, sufficiently negate such presumption. *First,* there were already irregularities regarding the Birth Certificate itself. It was not signed by the local civil registrar. More important, the Court of Appeals observed that the mother's signature therein was different from her signatures in other documents presented during trial.
>
> *Second*, the circumstances surrounding the birth of petitioner show that Hermogena is not the former's real mother. For one, there is no evidence of Hermogena's pregnancy, such as medical records and doctor's prescriptions, other than the Birth Certificate itself. In fact, no witness was presented to attest to

the pregnancy of Hermogena during that time. Moreover, at the time of her supposed birth, Hermogena was already 54 years old. Even if it were possible for her to have given birth at such late age, it was highly suspicious that she did so in her own home, when her advanced age necessitated proper medical care normally available only in a hospital.

The most significant piece of evidence, however, is the deposition of Hermogena Babiera, which states that she did not give birth to petitioner, and that the latter was neither hers nor her husband Eugenio's.

Article 411. Every civil registrar shall be civilly responsible for any unauthorized alteration made in any civil register, to any person suffering damage thereby. However, the civil registrar may exempt himself from such liability if he proves that he has taken every reasonable precaution to prevent the unlawful alteration.

Article 412. No entry in a civil register shall be changed or corrected, without judicial order.

REPUBLIC ACT NUMBERED 9048. Article 412 has been amended by Republic Act 9048. The complete text of the said act is set out in the discussion under Article 376. Nevertheless, Republic Act Number 9048, among others, also deals with corrections in the civil registry which involve merely typographical or clerical errors just like the concept in Article 412.

ADMINISTRATIVE OR JUDICIAL PROCEEDING. Except for clerical or typographical errors or change in the name or nickname of a person, a change in the entries in the civil register must always pass through a judicial proceeding. Typographical and/or clerical errors can be corrected administratively through the office of the local civil registrar by filing the necessary verified petition by any person having direct and personal interest in the correction (Section 3 of R.A. No. 9043). However, the resolution of the Office of the Local Civil Registrar can be reviewed by the Office of the Civil Registrar General and finally by the courts (Section 7 of R.A. No. 9048). The proceeding may either be summary or adversarial. A clerical error has been defined as one made "in copying or writing" (*Yu v. Republic*, 21 SCRA 1018).

"Clerical or typographical error" refers to a mistake committed in the performance of clerical work in writing,

> copying, transcribing, or typing an entry in the civil registrar that is harmless and innocuous, such as misspelled name or misspelled place of birth or the like, which is visible to the eyes or obvious to the understanding and can be corrected or changed by reference to other existing record or records; *Provided, however,* That no correction must involve the change of nationality, age, status or sex of the petitioner (Section 2[3] of R.A. No. 9043).

Examples of these errors are clearly misspelled name and occupation of parents (*Alisoso v. Lastimoso*, 14 SCRA 210). Thus, the change of "Sincio" to "Sencio," which merely involves the substitution of the first vowel "i" in the first name into the vowel "e," merely amounts to the righting of a clerical error (*Yu v. Republic*, 21 SCRA 1018).

The proceeding must be judicial and should be adversarial if the changes involve substantial or controversial matters such as those which involve a person's civil status, nationality or citizenship, and filiation of the offsprings of parents (*Chug Siu v. Local Civil Registrar,* 20 SCRA 877; *Ty Kong Tin v. Republic*, 50 O.G. 1077, cited in *David v. Republic,* 15 SCRA 439). These substantial and controversial matters should be threshed out in an appropriate court proceeding instituted for the purpose wherein the State and all parties who may be affected by the entries are notified or represented to the end that the case may be decided with due process of law and on the basis of the facts proven (*Chug Siu* case, 20 SCRA 877; See also *Ansaldo v. Republic,* 54 O.G. 5886).

With respect to a change which will, in effect, alter the status of a person, for example from legitimate to illegitimate filiation, the general rule, as previously stated, is that such change cannot be effectuated under Article 412 of the Civil Code.

RULE 108 OF THE RULES OF COURT. Rule 108 of the Rules of Court provides for the procedural rules for the cancellation or correction of entries in the civil registry. The procedure is as follows:

> "Section 1. *Who may file petition.* — Any person interested in any act, event, order or decree concerning the civil status of persons which has been recorded in the civil register, may file a verified petition for the cancellation or correction of any entry relating thereto, with the Court of First Instance of the province where the corresponding civil registry is located.
>
> Section 2. *Entries subject to cancellation or correction.* — Upon good and valid grounds, the following entries in the civil

register may be cancelled or corrected (same as Article 408 of the Civil Code).

Section 3. *Parties.* — When cancellation or correction of an entry in the civil register is sought, the civil registrar and all persons who have or claim any interest which would be affected thereby shall be made parties to the proceeding.

Section 4. *Notice and publication.* — Upon the filing of the petition, the court shall, by an order, fix the time and place for the hearing of the same, and cause reasonable notice thereof to be given to the persons named in the petition. The court shall also cause the order to be published once a week for three (3) consecutive weeks in a newspaper of general circulation in the province.

Section 5. *Opposition.* — The civil registrar and any person having or claiming any interest under the entry whose cancellation or correction is sought may, within fifteen (15) days from notice of the petition, or from the last date of publication of such notice, file his opposition thereto.

Section 6. *Expediting proceedings.* — The court in which the proceeding is brought may make orders expediting the proceedings, and may also grant preliminary injunction for the preservation of the rights of the parties pending such proceedings.

Section 7. *Order.* — After hearing, the court may either dismiss the petition or issue an order granting the cancellation or correction prayed for. In either case, a certified copy of the judgment shall be served upon the civil registrar concerned who shall annotate the same in his record.

Before, it has been pronounced that Rule 108 deals with the summary judicial proceeding referred to in Article 412 of the Civil Code in connection with the changes of clerical and innocuous errors. However, in *Republic v. Valencia*, 141 SCRA 462, it was held that if all the procedural requirements under Rule 108 have been followed,

> a petition for correction and/or cancellation of entries in the record of birth even if filed and conducted under Rule 108 of the Revised Rules of Court can no longer be described as "summary." There can be no doubt that when an opposition to the petition is filed either by the Civil Registrar or any person having or claiming any interest in the entries sought to be cancelled and/or corrected and the opposition is actively prosecuted, the proceedings thereon become adversary proceedings (*Republic v. Valencia,* 141 SCRA 462).

Thus, in the said case of *Republic v. Valencia,* 141 SCRA 462, where the changes sought in the entries in a record of birth are the following: 1) from "Chinese" to "Filipino"; and 2) from "Legitimate to Illegitimate," the Supreme Court ruled that, while the case was filed under Article 412 of the Civil Code which deals with only clerical and innocuous errors which may be corrected by way of a summary proceeding in court and while the fact that the changes sought are not mere clerical errors but substantial ones which cannot be corrected under Article 412, the changes can be allowed if all the requirements under Rule 108 are fulfilled because in such case the proceedings turned into an adversarial one which is the appropriate judicial proceedings with respect to substantial changes in the entries. The Supreme Court likewise stated:

> *Provided*, the trial court has conducted proceedings where all relevant facts have been fully and properly developed, where opposing counsel have been given opportunity to demolish the opposite party's case, and where the evidence has been thoroughly weighed and considered, the suit or proceeding is "appropriate."
>
> x x x x x x x x x
>
> In the instant case, a petition for cancellation and/or correction of entries of birth of Bernardo Go and Jessica Go in the Civil Registry of the City of Cebu was filed by respondent Leonor Valencia on January 27, 1970, and pursuant to the order of the trial court dated February 4, 1970, the said petition was published once a week for three (3) consecutive weeks in the Cebu Advocate, a newspaper of general circulation in the City of Cebu. Notice thereof was duly served on the Solicitor General, the Local Civil Registrar and Go Eng. The order likewise set the case for hearing and directed the local civil registrar and the other respondents or any person claiming any interest under the entries whose corrections were sought, to file their opposition to the said petition. An opposition to the petition was consequently filed by the Republic on February 26, 1970. Thereafter, a full-blown trial followed, with respondent Leonor Valencia testifying and presenting her documentary evidence in support of her petition. The Republic on the other hand cross-examined respondent Leonor Valencia.
>
> We are of the opinion that the petition filed by the respondent in the lower court by way of a special proceeding for cancellation and/or correction of entries in the civil register with the requisite notice and publication and the recorded proceedings that actually took place thereafter could very well be regarded as that proper suit or appropriate action.

Article 413. All other matters pertaining to the registration of civil status shall be governed by special laws.

Act Numbered 3753, otherwise known as the Civil Registry Law, provides for the registration of documents evidencing the acquisition or termination of a particular civil status such as legitimation, adoption, change of name, marriage, termination of such marriage and others. They have been discussed in this book in the appropriate chapters dealing with the relevant subjects.

AD MAIOREM DEI GLORIAM

This book is dedicated to my MOTHER, Florencia.

PREFACE TO THE FIFTH EDITION

In a field of law that is as active as persons and family law, it is important to be abreast with current legal developments that bear upon the individual and society. New values, ideas and paradigms have made their way not only in our lives but also in our laws and jurisprudence. They significantly impact on the manner we experience family life. For instance, issues on sexual orientation, gender reassignment, divorce, abortion, personality disorders and even the definition of a man and a woman have made their way to the hallowed chambers of the Supreme Court for discussion and determination. Indeed, events are not only in constant flux but they are interestingly filled with legal possibilities and innovations. In the same breadth however, there are enduring principles affecting family rights, duties and conditions that are never-changing. The paramount interest of the child, for example, has continued to be the inflexible criterion in determining issues involving children.

It is in this light that I decided it was time, after six years, to review and revise my previous 2004 edition and come up with this new one. For this, I am very much grateful to my wife, Professor Amparita Sta. Maria who teaches Persons and Family Relations, Human Rights and Gender and the Law at the Ateneo de Manila School of Law, for contributing her ideas and offering a gendered perspective on various provisions of the law, as well as helping me convey and articulate ideas using gender-sensitive language. Law professors, students, practitioners and even magistrates who have used my textbook as reference will undoubtedly observe in this new edition a quality-change that greatly "genderizes" it in a very enlightening way. For instance, reference to outmoded authorities stating that homosexuality or lesbianism is a "sickness" has been deleted. A particular decision of the Supreme Court disallowing the reversion of a married woman to use her maiden name based on procedural grounds has been critiqued as it was not founded on a rights-based perspective which is more fundamental than recourse to mere rules on statutory construction. Even previous reference to a "he" in the previous book has been changed to a "he or she."

Significant amendments to the Family Code and other related laws are incorporated and explained in this new edition. Relevant recent cases, including those where former editions of this book had been cited as authority by the Supreme Court, are likewise discussed or referred to. I believe that I have come up with a much improved and strengthened edition and hope that law students, law professors, legal practitioners and magistrates will find this book useful.

MELENCIO STA. MARIA, JR.

April 22, 2010
Quezon City

FOREWORD

To the Fourth Edition

Professor Melencio S. Sta. Maria, Jr. has been teaching Persons and Family Relations Law at the Ateneo de Manila School of Law since the time the Family Code of the Philippines took effect. Truly, he has followed the growth of the said law and all other laws related to it in a most scholarly fashion. From a 280-paged book on the subject released in 1991, it has quadrupled in size as clearly evidenced by this new edition. The comprehensiveness of this book is of the highest standard and its reliability as a principal source of research is of the best quality.

This is a valuable edition which should be read by all law students, members of the academe, law practitioners and members of the judiciary.

I congratulate Professor Melencio Sta. Maria, Jr. for finally releasing this fourth edition.

(Sgd.) FR. JOAQUIN G. BERNAS, S.J.
Dean

PREFACE
To the Fourth Edition

This fourth edition is my project as a recipient of the 2001 Sasakawa Young Leaders Fellowship Fund. For this grant, I wish to express my deepest gratitude to the Ateneo de Manila University.

I also wish to thank Fr. Joaquin Bernas of the Society of Jesus, Dean of the Ateneo de Manila School of Law, for his kind foreword and also for his full support of my professorship at the same Jesuit institution, my alma mater.

I wish to acknowledge the following for the assistance they extended to me:

1) Vergenee Marree A. Abrenica (Ateneo Law Class of 2003), my ever-ready student-assistant at the Ateneo de Manila School of Law, for helping me encode some of the new cases used in this book;

2) Atty. Ernie C. Salao and Christopher A. Pasuquin of Rex Book Store for their patience in seeing to it that this edition comes out on time.

Last but not the least, I wish to thank my wife, Atty. Amparita Sta. Maria, the Thesis Director of the Juris Doctor (JD) Program of the Ateneo de Manila University School of Law and also a law professor in "Person and Family Relations" at the same institution, for her valuable insights and suggestions.

MELENCIO S. STA. MARIA, JR.

July 9, 2003
Quezon City

PREFACE

Third Edition

Since the release of the second edition of this book, there have been many important and leading judicial decisions in family law promulgated by the Supreme Court. Likewise, significant legislations on family relations were enacted by Congress and approved by the President. This third edition incorporates all these important developments.

I wish to thank the Ateneo De Manila University for awarding to me the 1998 Ateneo Law Alumni Foundation Professorial Chair in Civil Law. This third edition is my project for the professorial chair.

MELENCIO S. STA. MARIA, JR.

February 23, 1999
Quezon City, Metro Manila

PREFACE

Second Edition

The first edition of this book released in 1991 was entitled "Family Relations Law." This second edition has been retitled "Persons and Family Relations Law." In addition to the Family Code, it now includes an annotation of the important provisions in the Preliminary Title, Book I Title I, Title II, Title XII, Title XIII, Title XIV and Title XVI of the Civil Code of 1950. The significant provisions of the Child and Youth Welfare Code (P.D. 603, as amended), the Revised Penal Code, the Rules of Court, the Marriage Act of 1929 (particularly its penalty provisions), Republic Act No. 6955 prohibiting the establishment of a marriage brokering business, and our naturalization laws are likewise referred to in this work.

This book has the same style and format as the first edition. It has additional references to and citations of significant old and new cases (both local and foreign), the report of the Code Commission which drafted the 1950 Civil Code, the deliberations in the various joint meetings of the Civil Code and Family Law committees which drafted the Family Code, the discussions in the 1988 congressional hearings (particularly in the Senate Committee on Women and Family Relations) on the Family Code, and the legislative debates and interpellations in the Senate relative to the amendment on certain provisions of the Family Code dealing with emancipation.

I wish to extend my gratitude to the Ateneo De Manila University for awarding me the 1994 Ateneo Law Alumni Foundation Professorial Chair in Civil Law. The monetary grant, though limited, gave me the means to finance the expenses necessary to come up with this edition. This work is truly the fruit of this professorial chair.

I also wish to thank my wife, Atty. Amparita S. Sta. Maria who is the Litigation Director of the Ateneo Human Rights Center, a Lecturer of Law in Legal Research and in Thesis Writing, the Thesis Director of the Juris Doctor (JD) Program and the Legal Aid

Director of the Ateneo De Manila School of Law. Despite her own busy schedule, she was still able to spend some time assisting me in my research and giving me some of her invaluable insights on certain points contained in this second edition. Likewise, I gratefully appreciate the Ateneo Human Rights Center for permitting me to use its facilities in the drafting of this book during the times when my own computer system was out of order.

Again, to all law students, law practitioners, members of the judiciary and my colleagues in the academe, I hope that this work can assist and guide all of you in your continuous study of our laws on persons and family relations.

MELENCIO S. STA. MARIA, JR.

February 4, 1995
Quezon City, Metro Manila

PREFACE

First Edition

The Family Code of the Philippines is a very important statute. All of us should be aware of its contents as the said law specifies our rights, duties, obligations and remedies in all matters affecting and governing the immediate communities we are in, namely, our very own respective families. The law is designed to solidify the family as a truly effective base from where the strength of our nation can be anchored.

In explaining the important provisions of the Family Code, clarifications made during the congressional hearings on the Family Code by the members of the commission which drafted the same have been taken into consideration. Also, jurisprudence laid down in various decisions of the Supreme Court of the Philippines interpreting provisions in the Civil Code which are not amended or repealed by the Family Code, have been cited and, in appropriate instances, quoted. If novel questions arise from the implementation of a particularly new or modified provision, a discussion of the problem is made and a position is thereafter taken in the light of the basic public policy considerations sought to be implemented by the law as a whole.

Decisions of various superior courts of the United States and the Federal Supreme Court of the United States construing statutory provisions in their respective jurisdictions similar to those contained in our Family Code, or, at least, enunciating certain basic and universal precepts in marital and family relations are also availed of. Indeed, while our own local decisions are very rich in family and marital jurisprudence, even our own Supreme Court, in appropriate cases, has made use of foreign decisions to support and explain its decisions relative to family and marital legal controversies elevated before it for adjudication.

To all law students, I hope that this work can help you in your study of our law on family relations.

MELENCIO S. STA. MARIA, JR.

29 July 1991
Makati, Metro Manila

FOREWORD

First Edition

This book on Family relations, prepared by one of my better and talented students in the Ateneo Law School, now a practicing lawyer and lecturer in the same school, is the latest work on the Family Code of the Philippines. It is notable for its clear-cut explanation of the provisions and its searching exposition of the meaning, extent and background of the new provisions of the said code. The author has buttressed his conclusions with quotations from the explanations made by members of the Civil Code Revision Committee which drafted the Family Code, during the Senate hearings on the Code. He has likewise illustrated the meaning, for example of Article 36 on psychological incapacity, with actual cases decided by various Catholic Matrimonial Tribunals which are of persuasive authority, considering that Article 36 was taken from the Canon Law. More importantly, he has advanced reasoned opinions on the legality of modern day phenomena such as gay marriages and marriages of persons who have undergone sex change. Also discussed is whether adultery is committed by a wife who consents to be artificially inseminated with the semen not of her husband but that of a donor.

There is no doubt then that this latest book on the Family Code of the Philippines will be of tremendous help to students of law, practitioners, and even to the members of the judiciary. The author is to be congratulated for preparing and publishing such a helpful book.

San Juan, Metro Manila
August 19, 1991

JUSTICE EDUARDO P. CAGUIOA

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