THIRD DIVISION

[G.R. No. 154994. June 28, 2005]

JOYCELYN PABLO-GUALBERTO, *petitioner, vs*. CRISANTO RAFAELITO GUALBERTO V, *respondent*.

[G.R. No. 156254. June 28, 2005]

CRISANTO RAFAELITO G. GUALBERTO V, *petitioner, vs.* COURT OF APPEALS; Hon. HELEN B. RICAFORT, Presiding Judge, Regional Trial Court Parañaque City, Branch 260; and JOYCELYN D. PABLO-GUALBERTO, *respondents*.

D E C I S I O N

PANGANIBAN, *J.:*

When love is lost between spouses and the marriage inevitably results in separation, the bitterest tussle is often over the custody of their children. The Court is now tasked to settle the opposing claims of the parents for custody *pendente lite* of their child who is less than seven years of age. There being no sufficient proof of any compelling reason to separate the minor from his mother, custody should remain with her.

The Case

Before us are two consolidated petitions. The *first* is a Petition for Review[1] filed by Joycelyn Pablo-Gualberto under Rule 45 of the Rules of Court, assailing the August 30, 2002 Decision[2] of the Court of Appeals (CA) in CA-GR SP No. 70878. The assailed Decision disposed as follows:

"WHEREFORE, premises considered, the Petition for Certiorari is hereby **GRANTED.** The assailed Order of May 17, 2002 is hereby **SET ASIDE** and **ANNULLED.** The custody of the child is hereby ordered returned to [Crisanto Rafaelito G. Gualberto V].

"The [respondent] court/Judge is hereby directed to consider, hear and resolve [petitioner's] motion to lift the award of custody *pendente lite* of the child to [respondent]."[3]

The second is a Petition for *Certiorari*[4] filed by Crisanto Rafaelito Gualberto V under Rule 65 of the Rules of Court, charging the appellate court with grave abuse of discretion for denying his Motion for Partial Reconsideration of the August 30, 2002 Decision. The denial was contained in the CA's November 27, 2002 Resolution, which we quote:

"We could not find any cogent reason why the [last part of the dispositive portion of our Decision of August 30, 2002] should be deleted, hence, subject motion is hereby DENIED."[5]

The Facts

The CA narrated the antecedents as follows:

"x x x [O]n March 12, 2002, [Crisanto Rafaelito G. Gualberto V] filed before [the Regional Trial Court of Parañaque City] a petition for declaration of nullity of his marriage to x x x Joycelyn D. Pablo Gualberto, with an ancillary prayer for custody pendente lite of their almost 4-year-old son, minor Rafaello (the child, for brevity), whom [Joycelyn] allegedly took away with her from the conjugal home and his school (Infant Toddler's Discovery Center in Parañaque City) when [she] decided to abandon [Crisanto] sometime in early February 2002[.] x x x [O]n April 2, 2002, [RTC Judge Helen B. Ricafort] heard the ancillary prayer of [Crisanto] for custody pendente lite. x x x [B]ecause [Joycelyn] allegedly failed to appear despite notice, [Crisanto], a certain Col. Renato Santos, and Ms. Cherry Batistel, testified before the x x x Judge; x x x documentary evidence [was] also presented[.] x x x [O]n April 3, 2002, x x x [the] Judge awarded custody pendente lite of the child to [Crisanto.] [T]he Order partly read x x x:

'x x x Crisanto Rafaelito Gualberto V testified. He stated that [Joycelyn] took their minor child with her to Caminawit, San Jose, Occidental Mindoro. At that time, the minor was enrolled at B.F. Homes, Parañaque City. Despite effort[s] exerted by him, he has failed to see his child. [Joycelyn] and the child are at present staying with the former's step-father at the latter's [residence] at Caminawit, San Jose, Occidental Mindoro.

'Renato Santos, President of United Security Logistic testified that he was commissioned by [Crisanto] to conduct surveillance on [Joycelyn] and came up with the conclusion that [she] is having lesbian relations with one Noreen Gay Cuidadano in Cebu City.

'The findings of Renato Santos [were] corroborated by Cherry Batistel, a house helper of the spouses who stated that [the mother] does not care for the child as she very often goes out of the house and on one occasion, she saw [Joycelyn] slapping the child.

'Art. 211 of the Family Code provides as follows:

'The father and the mother shall jointly exercise parental authority over the persons of their children. In the case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.'

'The authority of the father and mother over their children is exercised jointly. This recognition, however, does not place her in exactly the same place as the father; her authority is subordinated to that of the father.

'In all controversies regarding the custody of minors, the sole and foremost consideration is the physical,

educational, social and moral welfare of the child, taking into account the respective resources and social and moral situations of the contending parties.

'The Court believes that [Joycelyn] had no reason to take the child with her. Moreover, per Sheriff returns, she is not with him at Caminawit, San Jose, Occidental Mindoro.

'WHEREFORE, pendente lite, the Court hereby awards custody of the minor, Crisanto Rafaello P. Gualberto X to his father, Crisanto Rafaelito G. Gualberto V.'

"x x x [O]n April 16, 2002, the hearing of [Joycelyn's] motion to lift the award of custody pendente lite of the child to [Crisanto] was set but the former did not allegedly present any evidence to support her motion. However, on May 17, 2002, [the] Judge allegedly issued the assailed Order reversing her Order of April 3, 2002 and this time awarding custody of the child to [Joycelyn]. [T]he entire text of the Order [is] herein reproduced, to wit:

'Submitted is [Crisanto's] Motion to Resolve Prayer for Custody Pendente Lite and [Joycelyn's] Motion to Dismiss and the respective Oppositions thereto.

'[Joycelyn], in her Motion to Dismiss, makes issue of the fact that the person referred to in the caption of the Petition is one JOCELYN Pablo Gualberto and not Joycelyn Pablo Gualberto. [Joycelyn] knows she is the person referred to in the Complaint. As a matter of fact, the body of the Complaint states her name correct[ly]. The law is intended to facilitate and promote the administration of justice, not to hinder or delay it. Litigation should be practicable and convenient. The error in the name of Joycelyn does not involve public policy and has not prejudiced [her].

'This case was filed on March 12, 2002. Several attempts were made to serve summons on [Joycelyn] as shown by the Sheriff's returns. It appears that on the 4th attempt on March 21, 2002, both Ma. Daisy and x x x Ronnie Nolasco, [Joycelyn's mother and stepfather, respectively,] read the contents of the documents presented after which they returned the same.

'The Court believes that on that day, summons was duly served and this Court acquired jurisdiction over [Joycelyn].

'The filing of [Joycelyn's annulment] case on March 26, 2002 was an after thought, perforce the Motion to [D]ismiss should be denied.

'The child subject of this Petition, Crisanto Rafaello P. Gualberto is barely four years old. Under Article 213 of the Family Code, he shall not be separated from his mother unless the Court finds compelling reasons to order otherwise. The Court finds the reason stated by [Crisanto] not [to] be compelling reasons. The father should however be entitled to spend time with the minor. These do not appear compelling reasons to deprive him of the company of his child.

'When [Joycelyn] appeared before this Court, she stated that she has no objection to the father visiting the child even everyday provided it is in Mindoro.

'The Court hereby grants the mother, [Joycelyn], the custody of Crisanto Rafaello P. Gualberto, with [the] right of [Crisanto] to have the child with him every other weekend.

'WHEREFORE:

1. The [M]otion to Dismiss is hereby DENIED;

2. Custody pendente lite is hereby given to the mother Joycelyn Pablo Gualberto with the right of the father, x x x [Crisanto], to have him every other week-end.

3. Parties are admonished not to use any other agencies of the government like the CIDG to interfere in this case and to harass the parties.'"[6]

In a Petition for *Certiorari*[7] before the CA, Crisanto charged the Regional Trial Court (Branch 260) of Parañaque City with grave abuse of discretion for issuing its aforequoted May 17, 2002 Order. He alleged that this Order superseded, without any factual or legal basis, the still valid and subsisting April 3, 2002 Order awarding him custody *pendente lite* of his minor son; and that it violated Section 14 of Article VII of the 1987 Constitution.

Ruling of the Court of Appeals

Partly in Crisanto's favor, the CA ruled that grave abuse of discretion had been committed by the trial court in reversing the latter court's previous Order dated April 3, 2002, by issuing the assailed May 17, 2002 Order. The appellate court explained that the only incident to resolve was Joycelyn's Motion to Dismiss, not the issuance of the earlier Order. According to the CA, the prior Order awarding provisional custody to the father should prevail, not only because it was issued after a hearing, but also because the trial court did not resolve the correct incident in the later Order.

Nonetheless, the CA stressed that the trial court judge was not precluded from considering and resolving Joycelyn's Motion to lift the award of custody *pendente lite* to Crisanto, as that Motion had yet to be properly considered and ruled upon. However, it directed that the child be turned over to him until the issue was resolved.

Hence, these Petitions.[8]

Issues

In GR No. 154994, Petitioner Joycelyn submits these issues for our consideration:

"1. Whether or not the Respondent Court of Appeals, when it awarded the custody of the child to the father, violated Art. 213 of the Family Code, which mandates that 'no child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise.'

"2. Is it Article 213 or Article 211 which applies in this case involving four-year old Rafaello?"[9]

On the other hand, Crisanto raises the following issues:

"A. Did Respondent Court commit grave abuse of discretion amounting to or in excess of jurisdiction when, in its August 30, 2002 Decision, it ordered respondent court/Judge 'to consider, hear and resolve the motion to lift award of custody pendente lite of the child to petitioner and x x x denied the motion for reconsideration thereof in its November 27, 2002 Resolution, considering that: (1) there is no such motion ever, then or now pending, with the court a quo; (2) the November 27, 2002 Resolution is

unconstitutional; and (3) the April 3, 2002 Order of respondent Judge, the validity of which has been upheld in the August 30, 2002 Decision of the respondent Court, has become final and executory; and

"B. Ought not the ancillary remedies [o]f habeas corpus, because the whereabouts, physical and mental condition of the illegally detained Minor Rafaello is now unknown to petitioner and preliminary mandatory injunction with urgent prayer for immediate issuance of preliminary [injunction], petitioner having a clear and settled right to custody of Minor Rafaello which has been violated and still is being continuously violated by [petitioner Joycelyn], be granted by this Honorable Court?"[10]

Being interrelated, the procedural challenges and the substantive issues in the two Petitions will be addressed jointly.

The Court's Ruling

There is merit in the Petition in GR No. 154994, but not in GR No. 156254.

Preliminary Issue:
The Alleged Prematurity of the Petition in GR No. 154994

Before going into the merits of the present controversy, the Court shall first dispose of a threshold issue. In GR No. 154994, therein Respondent Crisanto contends that the Petition for Review was filed beyond the deadline (October 24, 2002) allowed by the Rules of Court and by this Court. He claims that Registry Bill No. 88 shows that the Petition was sent by speed mail, only on November 4, 2002. Furthermore, he assails the Petition for its prematurity, since his Motion for Partial Reconsideration of the August 30, 2002 CA Decision was still pending before the appellate court. Thus, he argues that the Supreme Court has no jurisdiction over Joycelyn's Petition.

Timeliness of the Petition

The manner of filing and service Joycelyn's Petition by mail is governed by Sections 3 and 7 of Rule 13 of the Rules of Court, which we quote:

"SEC. 3. *Manner of filing*. – The filing of pleadings, appearances, motions, notices, orders, judgments and all other papers shall be made by presenting the original copies thereof, plainly indicated as such personally to the clerk of court or by sending them by registered mail. xxx In the second case, *the date of mailing of motions, pleadings and other papers or payments or deposits, as shown by the post office stamp on the envelope or the registry receipt, shall be considered as the date of their filing, payment, or deposit in court*. The envelope shall be attached to the records of the case.

"x x x x x x x x x

"SEC. 7. *Service by mail*. – Service by registered mail shall be made by depositing the copy in the office, in a sealed envelope, plainly addressed to the party or his counsel at his office, if known,

otherwise at his residence, if known, with postage fully pre-paid, and with instructions to the postmaster to return the mail to the sender after ten (10) days if undelivered. If no registry service is available in the locality of either the sender of the addressee, service may be done by ordinary mail. (Italics supplied)

The records disclose that Joycelyn received the CA's August 30, 2002 Decision on September 9, 2002. On September 17, she filed before this Court a Motion for a 30-day extension of time to file a petition for review on certiorari. This Motion was granted,[11] and the deadline was thus extended until October 24, 2002.

A further perusal of the records reveals that copies of the Petition were sent to this Court and to the parties by registered mail[12] at the Biñan, Laguna Post Office on October 24, 2002. This is the date clearly stamped on the face of the envelope[13] and attested to in the Affidavit of Service[14] accompanying the Petition. Petitioner Joycelyn explained that the filing and the service had been made by registered mail due to the "volume of delivery assignments and the lack of a regular messenger."[15]

The Petition is, therefore, considered to have been filed on October 24, 2002, its mailing date as shown by the post office stamp on the envelope. The last sentence of Section 3 of Rule 13 of the Rules provides that the date of filing may be shown *either* by the post office stamp on the envelope *or* by the registry receipt. Proof of its filing, on the other hand, is shown by the existence of the petition in the record, pursuant to Section 12 of Rule 13.[16]

The postmaster satisfactorily clarifies that Registry Bill No. 88, which shows the date November 2, 2002, merely discloses when the mail matters received by the Biñan Post Office on October 24, 2002, were dispatched or sent to the Central Mail Exchange for distribution to their final destinations.[17] The Registry Bill does not reflect the actual mailing date. Instead, it is the postal Registration Book[18] that shows the list of mail matters that have been registered for mailing on a particular day, along with the names of the senders and the addressees. That book shows that Registry Receipt Nos. 2832-A and 2832-B, pertaining to the mailed matters for the Supreme Court, were issued on October 24, 2002.

Prematurity of the Petition

As to the alleged prematurity of the Petition of Joycelyn, Crisanto points out that his Urgent Motion for Partial Reconsideration[19] was still awaiting resolution by the CA when she filed her Petition before this Court on October 24, 2002. The CA ruled on the Motion only on November 27, 2002.

The records show, however, that the Motion of Crisanto was *mailed* only on September 12, 2002. Thus, on September 17, 2002, when Joycelyn filed her Motion for Extension of Time to file her Petition for Review, she might have still been unaware that he had moved for a partial reconsideration of the August 20, 2002 CA Decision. Nevertheless, upon being notified of the filing of his Motion, she should have manifested that fact to this Court.

With the CA's final denial of Crisanto's Motion for Reconsideration, Joycelyn's lapse may be excused in the interest of resolving the substantive issues raised by the parties.

First Issue:
Grave Abuse of Discretion

In GR No. 156254, Crisanto submits that the CA gravely abused its discretion when it ordered the trial court judge to "consider, hear and resolve the motion to lift the award of custody *pendente lite*" without any proper motion by Joycelyn and after the April 3, 2002 Order of the trial court had become final and executory. The CA is also charged with grave abuse of discretion for denying his Motion for Partial Reconsideration without stating the reasons for the denial, allegedly in contravention of Section 1 of Rule 36 of the Rules of Court.

The Order to Hear the Motion to Lift the Award of Custody Pendente Lite Proper

To begin with, grave abuse of discretion is committed when an act is 1) done contrary to the Constitution, the law or jurisprudence;[20] or 2) executed "whimsically or arbitrarily" in a manner "so patent and so gross as to amount to an evasion of a positive duty, or to a virtual refusal to perform the duty enjoined."[21] What constitutes grave abuse of discretion is such capricious and arbitrary exercise of judgment as that which is equivalent, in the eyes of the law, to lack of jurisdiction.[22]

On the basis of these criteria, we hold that the CA did not commit grave abuse of discretion.

First, there can be no question that a court of competent jurisdiction is vested with the authority to resolve even unassigned issues. It can do so when such a step is indispensable or necessary to a just resolution of issues raised in a particular pleading or when the unassigned issues are inextricably linked or germane to those that have been pleaded.[23] This truism applies with more force when the relief granted has been specifically prayed for, as in this case.

Explicit in the Motion to Dismiss[24] filed by Joycelyn before the RTC is her ancillary prayer for the court to lift and set aside its April 3, 2002 Order awarding to Crisanto custody *pendente lite* of their minor son. Indeed, the necessary consequence of granting her Motion to Dismiss would have been the setting aside of the Order awarding Crisanto provisional custody of the child. Besides, even if the Motion to Dismiss was denied -- as indeed it was -- the trial court, in its discretion and if warranted, could still have granted the ancillary prayer as an alternative relief.

Parenthetically, Joycelyn's Motion need not have been verified because of the provisional nature of the April 3, 2002 Order. Under Rule 38[25] of the Rules of Court, verification is required only when relief is sought from a final and executory Order. Accordingly, the court may set aside its own orders even without a proper motion, whenever such action is warranted by the Rules and to prevent a miscarriage of justice.[26]

Denial of the Motion for Reconsideration Proper

Second, the requirement in Section 1 of Rule 36 (for judges to state clearly and distinctly the reasons for their dispositions) refers only to decisions and final orders *on the merits,* not to those resolving incidental matters.[27] The provision reads:

"SECTION 1. Rendition of judgments and final orders. – A *judgment or final order determining the merits of the case* shall be in writing personally and directly prepared by the judge, stating clearly and distinctly the facts and the law on which it is based, signed by him, and filed with the clerk of court." (Italics supplied)

Here, the declaration of the nullity of marriage is the subject of the main case, in which the issue of custody *pendente lite* is an incident. That custody and support of common children may be ruled upon by the court while the action is *pending* is provided in Article 49 of the Family Code, which we quote :

"Art. 49. During the pendency of the action[28] 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. x x x."

Clearly then, the requirement cited by Crisanto is inapplicable. In any event, in its questioned Resolution, the CA clearly stated that it "could not find any cogent reason" to reconsider and set aside the assailed portion of its August 30, 2002 Decision.

The April 3, 2002 Order Not Final and Executory

Third, the award of temporary custody, as the term implies, is provisional and subject to change as circumstances may warrant. In this connection, there is no need for a lengthy discussion of the alleged finality of the April 3, 2002 RTC Order granting Crisanto temporary custody of his son. For that matter, even the award of child custody after a judgment on a marriage annulment is not permanent; it may be reexamined and adjusted if and when the parent who was given custody becomes unfit.[29]

Second Issue:
Custody of a Minor Child

When love is lost between spouses and the marriage inevitably results in separation, the bitterest tussle is often over the custody of their children. The Court is now tasked to settle the opposing claims of the parents for custody *pendente lite* of their child who is less than seven years old.[30] On the one hand, the mother insists that, based on Article 213 of the Family Code, her minor child cannot be separated from her. On the other hand, the father argues that she is "unfit" to take care of their son; hence, for "compelling reasons," he must be awarded

custody of the child.

Article 213 of the Family Code[31] provides:

"ART. 213. In case of separation of the parents, parental authority shall be exercised by the parent designated by the court. The court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit.

No child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise."

This Court has held that when the parents are separated, legally or otherwise, the foregoing provision governs the custody of their child.[32] Article 213 takes its bearing from Article 363 of the Civil Code, which reads:

"Art. 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*."(Italics supplied)

The general rule that children under seven years of age shall not be separated from their mother finds its *raison d'etre* in the basic need of minor children for their mother's loving care.[33] In explaining the rationale for Article 363 of the Civil Code, the Code Commission stressed thus:

"The general rule is recommended in order to avoid a tragedy where a mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age. The exception allowed by the rule has to be for 'compelling reasons' for the good of the child: those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the (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, p. 12)

A similar provision is embodied in Article 8 of the Child and Youth Welfare Code (Presidential Decree No. 603).[34] Article 17 of the same Code is even more explicit in providing for the child's custody under various circumstances, specifically in case the parents are separated. It clearly mandates that "no child under five years of age shall be separated from his mother, unless the court finds compelling reasons to do so." The provision is reproduced in its entirety as follows:

"Art. 17. Joint Parental Authority. – The father and the mother shall exercise jointly just and reasonable parental authority and responsibility over their legitimate or adopted children. In case of disagreement, the father's decision shall prevail unless there is a judicial order to the contrary.

"In case of the absence or death of either parent, the present or surviving parent shall continue to exercise parental authority over such children, unless in case of the surviving parent's remarriage, the court for justifiable reasons, appoints another person as guardian.

"*In case of separation of his parents, no child under five years of age shall be separated from his mother, unless the court finds compelling reasons to do so*." (Italics supplied)

The above mandates reverberate in Articles 211, 212 and 213 of the Family Code. It is unmistakable from the language of these provisions that Article 211[35] was derived from the first sentence of the aforequoted Article 17; Article 212,[36] from the second sentence; and Article 213,[37] save for a few additions, from the third sentence. It should be noted that the Family Code has reverted to the Civil Code provision mandating that a child below *seven* years should not be separated from the mother.[38]

Mandatory Character
of Article 213 of the Family Code

In *Lacson v. San Jose-Lacson*,[39] the Court held that the use of "shall" in Article 363 of the Civil Code and the observations made by the Code Commission underscore the mandatory character of the word.[40] Holding in that case that it was a mistake to deprive the mother of custody of her two children, both then below the age of seven, the Court stressed:

"[Article 363] prohibits in no uncertain terms the separation of a mother and her child below seven years, unless such a separation is grounded upon compelling reasons as determined by a court."[41]

In like manner, the word "shall" in Article 213 of the Family Code and Section 6[42] of Rule 99 of the Rules of Court has been held to connote a mandatory character.[43] Article 213 and Rule 99 similarly contemplate a situation in which the parents of the minor are married to each other, but are separated by virtue of either a decree of legal separation or a de facto separation.[44] In the present case, the parents are living separately as a matter of fact.

The Best Interest of the Child
a Primary Consideration

The Convention on the Rights of the Child provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests of the child* shall be a primary consideration."[45]

The principle of "best interest of the child" pervades Philippine cases involving adoption, guardianship, support, personal status, minors in conflict with the law, and child custody. In these cases, it has long been recognized that in choosing the parent to whom custody is given, the welfare of the minors should always be the paramount consideration.[46] Courts are mandated to take into account all relevant circumstances that would have a bearing on the children's well-being and development. Aside from the material resources and the moral and social situations of each parent, other factors may also be considered to ascertain which one has the capability to attend to the physical, educational, social and moral welfare of the

children.[47] Among these factors are the previous care and devotion shown by each of the parents; their religious background, moral uprightness, home environment and time availability; as well as the children's emotional and educational needs

Tender-Age Presumption

As pointed out earlier, there is express statutory recognition that, as a general rule, a mother is to be preferred in awarding custody of children under the age of seven. The caveat in Article 213 of the Family Code cannot be ignored, except when the court finds cause to order otherwise.[48]

The so-called *"tender-age presumption"* under Article 213 of the Family Code may be overcome only by *compelling* evidence of the mother's unfitness. The mother has been declared unsuitable to have custody of her children in one or more of the following instances: neglect, abandonment, unemployment, immorality, habitual drunkenness, drug addiction, maltreatment of the child, insanity or affliction with a communicable disease.[49]

Here, Crisanto cites immorality due to alleged lesbian relations as the compelling reason to deprive Joycelyn of custody. It has indeed been held that under certain circumstances, the mother's immoral conduct may constitute a compelling reason to deprive her of custody.[50]

But sexual preference or moral laxity *alone* does not prove parental neglect or incompetence. Not even the fact that a mother is a prostitute or has been unfaithful to her husband would render her unfit to have custody of her minor child.[51] To deprive the wife of custody, the husband must clearly establish that her moral lapses have had an adverse effect on the welfare of the child or have distracted the offending spouse from exercising proper parental care.[52]

To this effect did the Court rule in *Unson III v. Navarro,*[53] wherein the mother was openly living with her brother-in-law, the child's uncle. Under that circumstance, the Court deemed it in the nine-year-old child's best interest to free her "from the obviously unwholesome, not to say immoral influence, that the situation in which the mother ha[d] placed herself might create in [the child's] moral and social outlook."[54]

In *Espiritu v. CA*,[55] the Court took into account psychological and case study reports on the child, whose feelings of insecurity and anxiety had been traced to strong conflicts with the mother. To the psychologist the child revealed, among other things, that the latter was disturbed upon seeing "her mother hugging and kissing a 'bad' man who lived in their house and worked for her father." The Court held that the "illicit or immoral activities of the mother had already caused the child emotional disturbances, personality conflicts, and exposure to conflicting moral values x x x."

Based on the above jurisprudence, it is therefore not enough for Crisanto to show merely that Joycelyn was a lesbian. He must also demonstrate that she carried on her purported relationship with a person of the same sex in the presence of their son or under circumstances

not conducive to the child's proper moral development. Such a fact has not been shown here. There is no evidence that the son was exposed to the mother's alleged sexual proclivities or that his proper moral and psychological development suffered as a result.

Moreover, it is worthy to note that the trial court judge, Helen Bautista-Ricafort, ruled in her May 17, 2002 Order that she had found the "reason stated by [Crisanto] not to be compelling"[56] as to suffice as a ground for separating the child from his mother. The judge made this conclusion after personally observing the two of them, both in the courtroom and in her chambers on April 16, 2002, and after a chance to talk to the boy and to observe him firsthand. This assessment, based on her unique opportunity to witness the child's behavior in the presence of each parent, should carry more weight than a mere reliance on the records. All told, no compelling reason has been adduced to wrench the child from the mother's custody.

No Grant of Habeas Corpus and Preliminary Injunction

As we have ruled that Joycelyn has the right to keep her minor son in her custody, the writ of habeas corpus and the preliminary mandatory injunction prayed for by Crisanto have no leg to stand on. A writ of habeas corpus may be issued only when the "rightful custody of any person is withheld from the person entitled thereto,"[57] a situation that does not apply here.

On the other hand, the ancillary remedy of preliminary mandatory injunction cannot be granted, because Crisanto's right to custody has not been proven to be "clear and unmistakable."[58] Unlike an ordinary preliminary injunction, the writ of preliminary mandatory injunction is more cautiously regarded, since the latter requires the performance of a particular act that tends to go beyond the maintenance of the status quo.[59] Besides, such an injunction would serve no purpose, now that the case has been decided on its merits.[60]

WHEREFORE, the Petition in GR No. 154994 is *GRANTED*. The assailed Decision of the Court of Appeals is hereby *REVERSED* and the May 17, 2002 Regional Trial Court Order *REINSTATED.* The Petition in GR No. 156254 is *DISMISSED*. Costs against Petitioner Crisanto Rafaelito Gualberto V.

SO ORDERED.

Sandoval-Gutierrez, Corona, Carpio-Morales, and *Garcia, JJ.,* concur.

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[1] GR No. 154994 *rollo*, pp. 9-78.

[2] *Id*., pp. 80-86. Twelfth Division. Penned by Justice Edgardo F. Sundiam and concurred in by Justices Portia Aliño-Hormachuelos (Division chair) and Elvi John S. Asuncion (member).

[3] Assailed CA Decision, p. 7; GR No. 154994; *rollo*, p. 86.

[4] GR No. 156254 *rollo*, pp. 3-32.

[5] Assailed CA Resolution, p. 1; GR No. 156254; *rollo*, p. 34.

[6] CA Decision, pp. 1-4; GR No. 154994; rollo, pp. 80-83. Citations omitted.

[7] GR No. 154994 *rollo*, pp. 88-118; GR No. 156254; *rollo*, pp. 73-103.

[8] The two cases were consolidated on October 13, 2004. They were deemed submitted for decision on June 14, 2004, upon the Court's receipt of Joycelyn Gualberto's Memorandum in GR No. 156254, signed by Atty. German A. Gineta. Crisanto Gualberto V's Memorandum, signed by Atty. Reynaldo B. Aralar, was filed on June 4, 2004.

In GR No. 154994, Joycelyn's Memorandum, also signed by Atty. Gineta, was received by the Court on May 8, 2003. Crisanto's Memorandum and Reply Memorandum, also signed by Atty. Aralar, were filed on May 5, 2003 and May 16, 2003, respectively.

[9] Joycelyn Gualberto's Memorandum, p. 7; GR No. 154994 *rollo*, p. 320.

[10] Crisanto Gualberto's Memorandum, pp. 11-12; GR No. 156254; *rollo*, p. 371-372.

[11] SC Resolution dated October 7, 2002; *rollo*, p. 7.

[12] Under Registry Receipt Nos. 2832-A and 2832-B for the Supreme Court, 2831 for the CA, 2830 for the Office of the Solicitor General, 2829 for the RTC Judge, and 2828 for private respondent's counsel; per Certification dated December 3, 2002, issued by the Biñan postmaster (GR No. 154994; *rollo*, p. 277) and Certified True Copy of the Registration Book (id., pp. 279-280). These documents are attached as Annexes "1" and "3" to Joycelyn's Motion to Allow and Admit Comment/Opposition [Re: (Crisanto's) Motion to Dismiss] and Manifestation before this Court.

[13] GR No. 154994; *rollo*, p. 242.

[14] *Id*., p. 78. The Affidavit was executed by one Michael John M. Armuete.

[15] *Ibid*. §11 of Rule 13 provides that a resort to modes of service other than personal service "must be accompanied by a written explanation why the service or filing was not done personally"; and that "[v]iolation thereof may be cause to consider the paper as not filed."

[16] §12 of Rule 13 of the Rules of Court provides:

"SEC. 12. Proof of filing. – The filing of a pleading or paper shall be proved by its existence in the record of the case. If it is not in the record, but is claimed to have been filed personally, the filing shall be proved by the written or stamped acknowledgment of its filing by the clerk of court on a copy of the same*; if filed by registered mail, by the registry receipt and by the affidavit of the person who did the mailing, containing a full statement of the date and place of depositing the mail in the post office in a sealed envelope addressed to the court*, with postage fully prepaid, and with instructions to the postmaster to return the mail to the sender after ten (10) days if not delivered." (Italics supplied)

[17] Letter of Biñan Postmaster Jose M. Espineli dated December 4, 2002; GR No. 154994; *rollo*, p. 281.

[18] *Supra*.

[19] GR No. 156254; *rollo*, pp. 44-51.

[20] Republic *v*. COCOFED, 423 Phil. 735, 774, December 14, 2001.

[21] Baylon *v*. Office of the Ombudsman, 423 Phil. 705, 720, December 14, 2001; Benito *v*. Comelec, 349 SCRA 705, 713-714, January 19, 2001; Defensor-Santiago *v*. Guingona Jr., 359 Phil. 276, 304, November 18, 1998; and Philippine Airlines, Inc. *v*. Confesor, 231 SCRA 41, 53, March 10, 1994.

[22] Vda. de Bacaling *v*. Laguna, 54 SCRA 243, 251, December 18, 1973.

[23] Ludo & Luym Corp. *v.* CA, 351 SCRA 35, 40, February 1, 2001; Logronio *v*. Talaseo, 370 Phil. 907, 910 & 917, August 6, 1999 (citing Hernandez *v*. Andal, 78 Phil. 196, 209-210, March 29, 1947); Sesbreño *v*. Central Board of Assessment Appeals, 337 Phil. 89, 100, March 24, 1997.

[24] GR No. 154994 *rollo*, pp. 232-236. Among others, Joycelyn prayed that "the Order of this Honorable Court dated April 3, 2002, awarding custody of minor Crisanto Rafaello P. Gualberto X to [the father] be lifted and set aside and [a] new one issued maintaining the status quo."

[25] §§1 and 3 of Rule 38 of the Rules of Court pertinently provides:

> "SEC. 1. Petition for relief from judgment, order, or other proceedings. – When *a judgment or final order is entered, or any other proceeding is thereafter taken* against a party in any court through fraud, accident, mistake, or excusable negligence, he may file a petition in such court and in the same case praying that the judgment, order or proceedings be set aside."
>
> "SEC. 3. Time for filing petition; contents and verification. – *A petition provided for in either of the preceding sections of this Rule must be verified*, filed within sixty (60) days after the petitioner learns of the judgment, final order, or other proceeding to be set aside and not more than six (6) months after such judgment or final order was entered, or such proceeding was taken; x x x." (Italics supplied)

[26] Manongdo *v*. Vda. de Albano, 95 SCRA 88, 98, January 22, 1980.

[27] Borromeo *v*. CA, 186 SCRA 1, 6, June 1, 1990; Mendoza *v.* CFI, 51 SCRA 369, 375, June 27, 1973; Bacolod Murcia Milling Co., Inc. *v.* Henare, 107 Phil. 560, 570, March 30, 1960.

[28] The action here refers to the annulment of marriage under Article 45 of the Family Code.

[29] Unson III *v*. Navarro, 101 SCRA 183, 189, November 17, 1980 (cited in Espiritu *v*. CA, 312 Phil. 431, 440, March 15, 1995).

[30] Crisanto Rafaello X was born on September 11, 1998. Exhibit "C," Certificate of Birth, Records of GR 154994, p.11.

[31] Executive Order No. 209.

[32] Perez *v*. CA, 325 Phil. 1014, 1021, March 29, 1996.

[33] Espiritu *v*. CA, *supra*, p. 366.

[34] Article 8 of PD No. 603:

> "Art. 8. Child's welfare paramount. – In all questions regarding the care, custody, education and property of the child, his welfare shall be the paramount consideration."

[35] Article 211 of the Family Code:

> "Art. 211. The father and the mother shall jointly exercise parental authority over the persons of their common children. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.
>
> "Children shall always observe respect and reverence towards their parents and are obliged to obey them as long as the children are under parental authority."

[36] Article 212 of the Family Code:

> "Art. 212. In case of absence or death of either parent, the parent present shall continue exercising parental authority. The remarriage of the surviving parent shall not affect the parental authority over the children, unless the court appoints another person to be the guardian of the person or property of the

children."

[37] The Article is worded as follows:

"Art. 213. In case of separation of the parents, parental authority shall be exercised by the parent designated by the court. The Court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit.

"No child under seven years of age shall be separated from the mother unless the court finds compelling reasons to order otherwise."

[38] *See* Sempio-Diy, *Handboook on the Family Code of the Philippines* (1988), pp. 296-297.

[39] 133 Phil. 884, 894, August 30, 1968.

[40] The Court in this case emphasized that under ordinary parlance and in its ordinary signification, the term "shall" is a word of command; one that is generally imperative or mandatory; and that which "operates to impose a duty which may be enforced, particularly if public policy is in favor of its meaning or when public interest is involved. x x x."

[41] P. 895, per Castro, *J*.

[42] "SEC. 6. *Proceedings as to child whose parents are separated. Appeal.* – When husband and wife are divorced or living separately and apart from each other, and the question as to the care, custody, and control of a child or children of their marriage is brought before a Court of First Instance by petition or as an incidence to any other proceeding, the court, upon hearing the testimony as may be pertinent, shall award the care, custody, and control of each such child as will be for its best interest, permitting the child to choose which parent it prefers to live with if it be over ten years of age, unless the parent so chosen be unfit to take charge of the child by reason of moral depravity, habitual drunkenness, incapacity, or poverty. If, upon such hearing, it appears that both parents are improper persons to have the care, custody, and control of the child, the court may either designate the paternal or maternal grandparents of the child, or his oldest brother or sister, or some reputable and discreet person to take charge of such child, or commit it to any suitable asylum, children's home, or benevolent society. The court may in conformity with the provisions of the Civil Code order either or both parents to support or help support said child, irrespective of who may be its custodian, and may make any order that is just and reasonable permitting the parent who is deprived of its care and custody to visit the child or have temporary custody thereof. Either parent may appeal from an order made in accordance with the provisions of this section. No child under seven years of age shall be separated from its mother, unless the court finds there are compelling reasons therefor."

[43] Perez *v*. CA, *supra*, p. 1022.

[44] Briones *v*. Miguel, GR No. 156343, October 18, 2004, p. 13.

[45] §1 of Article 31 of the Convention on the Rights of the Child (CRC).

[46] Tonog *v*. CA, 427 Phil. 1, 7, February 7, 2002; Artadi-Bondagiy *v*. Bondagiy, 423 Phil. 127, 136, 138, December 7, 2001; Perez v. CA, supra, p. 1024; Espiritu *v*. CA, *supra*, p. 437; Medina *v*. Makabali, 137 Phil. 329, 331, March 28, 1969; Slade Perkins *v*. Perkins, 57 Phil. 217, 219, September 12, 1932.

[47] Bondagiy *v*. Bondagiy, *supra*; David *v*. CA, 320 Phil. 138, November 16, 1995; Espiritu *v*. CA; *supra*; Unson *v*. Navarro, *supra*; Cervantes *v*. Fajardo, 169 SCRA 575, January 27, 1989.

[48] Briones *v*. Miguel, *supra*, p. 12.

[49] See among others, Briones *v*. Miguel, *supra*; Tonog *v*. CA, *supra*; Cervantes *v*. Fajardo, *supra*; Medina *v*. Makabali, *supra*. See also Tolentino, Civil Code, (1990), p. 609; Sempio-Diy, *supra*, p. 297.

[50] Espiritu *v*. CA, *supra*; Cervantes *v*. Fajardo, *supra*; Unson III *v*. Navarro, *supra*; Cortes *v*. Castillo, 41 Phil. 466, March 18, 1921.

[51] Sempio-Diy, *supra*, p. 297.

[52] 70 ALR 3d 262, Ch. I, §2[b].

[53] *Supra*.

[54] P. 189, per Barredo, *J*.

[55] *Supra*, p. 440, per Melo, *J*.

[56] Order dated May 17, 2002, p. 2; GR No. 154994; *rollo*, p. 120.

[57] §1 of Rule 102 of the Rules of Court, which provides as follows:

> "Sec. 1. *To what habeas corpus extends*. – Except as otherwise expressly provided by law, the writ of *habeas corpus* shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or *by which the rightful custody of any person is withheld from the person entitled thereto*."(Italics supplied)

[58] As held in Pelejo *v*. Court of Appeals, 117 SCRA 665, 668, October 18, 1982, the issuance of a writ of preliminary mandatory injunction is justified only when the following are shown: 1) the complainant has a clear legal right; 2) that right has been violated and the invasion is material and substantial; and 3) there is an urgent and permanent necessity for the writ to prevent serious damage. See also Spouses Crystal *v*. Cebu International School, 356 SCTA 296, 305, April 4, 2001; Heirs of Asuncion *v*. Gervacio Jr., 363 Phil. 666, 674, March 9, 1999; Suico Industrial Corporation *v*. CA, 361 Phil. 160, 169-170, January 20, 1999 (citing Arcega *v*. CA, 341 Phil. 166, 171, July 7, 1997).

[59] Spouses Crystal *v*. Cebu International School, *ibid*.; Prosperity Credit Resources, Inc. *v*. CA, 361 Phil. 30, 37, January 15, 1999 (citing Manila Electric Railroad and Light Company v. Del Rosario, 22 Phil. 433, 437, March 29, 1912 and Bautista *v*. Barcelona, 100 Phil. 1078, 1081, March 29, 1957).

[60] Under Section 1 of Rule 58 of the Rules of Court, preliminary injunction is defined as "an order granted at any stage of an action or proceeding *prior to the judgment or final order,* requiring a party or a court, agency or a person to refrain from a particular act or acts. It may also require the performance of a particular act or acts, in which case it shall be known as a preliminary mandatory injunction." (Emphasis supplied.) See Miriam College Foundation Inc. *v*. CA, 348 SCRA 265, 277, December 15, 2000; Spouses Lopez *v*. CA, 379 Phil. 743, 749-750, January 20, 2000; Paramount Insurance Corporation *v*. CA, 369 Phil. 641, 648, July 19, 1999.