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**CHILD’S BEST INTEREST: UPHOLDING
SHARED CUSTODY ARRANGEMENTS OVER
MATERNAL PREFERENCE RULE**

A Thesis Presented to the Faculty of the School of Law University of Cebu Cebu City,
Philippines

In Partial Fulfillment of the Requirements for the Degree of Juris Doctor by

PREACIOUS G. GUMOLON

August 2020



I

UNIVERSITY OF CEBU SCHOOL OF LAW
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DEDICATION

The completion of this thesis is dearly dedicated to my late parents:

Mama LILIAN and Papa LITO

As much I wished to be able to physically share and celebrate this accomplishment with you, Let this be my token of gratitude for everything that you have given me.

ABSTRACT

The "*best interests of the child*" is the standard for awarding child custody, a measure that places paramount importance on the child's physical and psychological well-being. Although the 'best interest of the child' doctrine is meant to be gender-neutral, it appears to be advantageous for women. Over time, the application of the "*maternal preference rule*" or the "*tender years doctrine*" has played a significant role in child custody determinations, placing an infant or young child automatically with their mother unless she was unfit. The application of the rule stems from the perception that "mothers" are primarily responsible for children. The rule eventually disregards emerging constitutional law on gender equality and other constitutional equal protection requirements.

Defining the "*best interest of the child*" in terms of maternal custody forecloses further inquiry into which parent will best protect the child's welfare. The cultural and societal reversal of roles among and between mothers and fathers also ignores the empirical data demonstrating that '*mothering*' is a function independent of the sex of the individual performing it.

This study explains the "*best interests of the child*" standard and the problems caused by the vagueness of applying this standard through the application of the *maternal preference rule*. Further, this paper will critique attempts to simplify the decision-making processes in custody determinations taking into primary consideration the "best interests" of the child through equality capabilities of parents in taking care of their child. Finally, this discusses research findings, which suggest that continued contact with and shared custody of both parents should be the most critical goal in custody awards and is for the "*best interest of the child*."

Keywords: *child custody, best interest of the child, maternal preference rule, tender years doctrine, shared custody, gender equality, gender-neutral*

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CHAPTER I

THE PROBLEM AND ITS SCOPE

INTRODUCTION

The "*best interests of the child*" is the standard for awarding child custody which places paramount importance on the child's physical and psychological well-being.¹ Evolution in legal presumptions helped define this standard. Among these legal presumptions is the "*maternal preference rule*" or the "*tender years doctrine*," which has played a significant role in child custody determinations. The "*maternal preference rule*" places an infant or young child automatically with their mother unless found to be unfit. This rule eventually gave women an unfair advantage. Its application seems to disregard emerging constitutional law on gender equality and other constitutional requirements on equal protection.

This study explores the legal regimes governing "mothering" and its implications in determining the "best interest and welfare." Specifically, this study aims to unsex the concept of "motherhood," to lean toward "parenthood," and to promote the mantra of gender neutrality and equality of opportunity among and between parents for shared custody arrangements.

This chapter begins with an overview of the context, background, and rationale that frames the study. The problem statement, research questions, and thesis statement follow. This chapter includes a discussion on the scope and limitations of this study, the research methodology, the conceptual framework, and the theoretical framework. The chapter concludes with the definitions of the key terminologies used.

Rationale of the Study

Parenting is into "mothering" and "fathering," categories assigned based on biosex presumptions. Religious and social authorities depict sharply sexed parenting roles as distinct, complementary, and essential for a child's well-being. Social and legal default rules force biosex roles on parents, turning them into "mothers" and "fathers." The perception that "mothers" are primarily responsible for children persists.² This perception stems from applying the "*maternal preference rule*," which automatically places an infant or young child with their mother unless found unfit. While the prevailing global standard in child custody proceedings is the "*best interest of the child*," the "*maternal preference rule*" has found a preferential application in awarding child custody.

Socioeconomic conventions reduce parenting to a woman's job without compensation, while men are presumed incapable or uninterested in performing these duties. Mothers are viewed as special and crucial to their children; that mother-child relationship is to be preserved, not diminished. The biological or caregiving role of mothers is seen as worthy of being revered and maintained.³ While this did not necessarily match the social reality of women, it was the prevailing legal, policy, and public view. It is captured in public opinion and many everyday practices.

With the evolution of societal and cultural norms on family structures, there exists a reversal of roles. Mothers have followed careers, bringing home the bacon while the father keeps house, and have also taken up parenting roles. The norm in these modern days is instead that of working parents who manage with domestic workers or family relatives. In an ideal world, people now consider "mothers" and "fathers" as would be "parents" first, a category that includes all forms of caretaking. One could even imagine an androgynous world in which parenting has no sexed subcategories, whether attached to biosex or not. The need to unsex the roles of "mother" and "father" has emerged. Parenting is now elevated from biological branding to chosen classification or roles.⁴

The seismic shift in the discourse of mothers' roles in child-rearing has yet been reflected in applying legal principles. Institutions still support the sexed status quo through their insistence on liberal norms without a more active pursuit of the unsexed idea of child-rearing.⁵

Despite the claim that the "*best interest of the child*" standard is meant to be gender-neutral, it proves to be advantageous towards mothers.⁶ Over time, the standard has been defined and applied with the help of legal presumptions. Through the years, the legal presumption of "*maternal preference rule*" has played a significant role in child custody determinations, placing an infant or young child age seven years old and below automatically with their mother unless found to be unfit.

Defining the "*best interest of the child*" in terms of maternal custody forecloses further inquiry into which parent will best protect the child's welfare. The cultural and societal reversal of roles among and between mothers and fathers also ignores the empirical data demonstrating that '*mothering*' is a function independent of the sex of the individual performing it.

Background of the Study

Child custody law has evolved from the early European concept of absolute paternal power to a presumption that the mother should be granted custody of young children to the current standard, which dictates that the custody award be made in the "*best interests of the child*."⁷

The presumption that the mother should be granted custody of young children is known as the "*maternal preference rule*" or "*tender years doctrine*," which is incorporated under the second paragraph of Article 213⁸ of the Family Code of the Philippines.⁹ The rule provides that a child below seven (7) years of age belongs to the mother. The natural superiority of women and the inferiority of men, as a class, concerning child-rearing functions, provided the solid basis for maternal preference.

While maternal preference is commonly used in cases involving young children, the courts also manifested the application of the said rule to the custody of older children. For example, custody over children born out of wedlock, daughters, and weak, disabled, or unhealthy children, regardless of age, is granted as near-absolute rights of mothers.

It is argued that while the *maternal preference rule* has been articulated in many ways, generally stated, the rule is that the best interest and welfare of the child is served by granting custody to the mother.¹⁰ Mothers are viewed to be more 'nurturing' and, therefore, better parents.

It is noted that the legal assumptions regarding what constitutes *best interests of the child* are products of historical shifts as a reflection of societal and cultural norms, particularly that of motherhood and parenthood.

Over the last decades, the roles and responsibilities of parents within the family structure and social norms and patterns have changed. Fathers have also taken up parenting roles, and mothers have also followed careers. The norm these days is instead that of working. Parenting is becoming more unsexed, and that legal regimes governing parenting should encourage this development to promote fluidity in parenting roles.

Foreign jurisprudence held that mothering is not only a component of a woman's being but is also part of a man's being and that a father, depending on the circumstances, possesses the capacity and capability to exercise custody over a child as well as a mother.¹¹

Further, it is held that the concept of mothering is indicative of a function rather than a persona.

It includes the sensitive attachment, which flows from the attention devoted from day to day to the child's need for love, physical care, nutrition, comfort, peace, security, encouragement, and support.¹²

In the intervening years, the word "mothering" must be reduced and subsumed into "parenting," a gender-neutral concept that explicitly allows others to be considered "as good as," or equivalent to, mothers.¹³ Disentangling parenting from biosex roles shall establish a liberating family for the *best interests of the child*. Moreover, this turn into gender equality of parents in child custody determinations shall benefit the State and the international community itself whose agenda for the promotion of gender equality and neutrality it fulfils.

As the Supreme Court said in *Mississippi University for Women v. Hogan*¹⁴, there should be no "fixed notions concerning the roles and abilities of males and females" embodied in the application of the law. This ideal permeates civil society: either sex should be allowed to perform every role in society. The mantra of sex neutrality and equality of opportunity belies social and legal default rules that entrap us in a sexed existence.¹⁵

The fault line between formal, legal sex neutrality and the dichotomous living of sex identity seems to be expanding.¹⁶ It is a conflict that rages furiously in debates over mothering and parenting, specifically concerning child custody. This study argues that legal regimes governing "mothering" must be unsexed.

Statement of the Problem

This study aims to answer the main legal problem as to whether or not there is a need to abandon the *Maternal Preference Rule*. The mandatory character of the application of the rule seemingly contradicts the idea set under the *Best Interest of the Child* and does not give equal playing field for the fathers.

Objectives of the Study

To shed light on the main problem of this study, the following specific legal questions are addressed:

1. Whether or not the application of the *Maternal Preference Rule* contradicts the principle of *Best Interest of the Child* standard under international and domestic child's rights law and jurisprudence?

2. Whether or not the application of the *Maternal Preference Rule* unfairly discriminates against fathers, under the context of:
 - a) Cardinal principles in the 1987 Constitution (e.g., equal protection clause, etc.); and
 - b) International Law Obligations.
3. Whether or not the *best interest of the child* is best served by granting a shared custody arrangement?

Scope and Limitations

This study focused on examining child custody determinations involving children below seven (7) years of age, whether such custody is an incident of an annulment or separation proceeding or instituted as an independent case. This presupposes that the parent-litigants are either legally married, legally separated, or annulled.

Albeit, this study is limited to custody cases between and among "mothers" and "fathers", whether as the biological or as the adoptive parent(s). However, the concept of "mother" and "father" are limited to mean based on biosex identification.

The concepts and contexts used and analyzed covered everything relevant and important in defining and expounding the *best interest of the child* standard, and its corresponding legal presumptions, such as, but not limited to the *maternal preference rule* or *tender years doctrine*, *primary caretaker rule*, *psychological parent* and *father's right principle*.

Due to the extensive scope of this study and the limited period allotted to conduct the study, the most relevant information were carefully selected and examined to explain the concepts used herein. The application and implication of important doctrines and rules used by the courts in determining grants in custody cases were thoroughly analyzed to clarify identified issues in this study.

The custody cases analyzed are primarily those decided and promulgated by the Supreme Court of the Philippines. Custody cases of other jurisdiction, with identical or almost similar laws and rules applied in such cases, are also utilized. General international laws concerning custody are also utilized to further explain the existence or non-existence of gender equality in child custody determinations and to verify if shared custody arrangement is for the *best interests of the child*.

Thesis Statement

The *best interest of the child* standard focuses on the needs and rights of children and concentrate on parental responsibilities and obligations rather than parental rights. Consequently, the grant of shared custody arrangement shall best serve the *best interest of the child*, in keeping with equal protection of both parents' responsibilities and obligation to their children.

Significance of the Study

Benefiting from this study are the following:

The Court. This study will aid the judges in evaluating the claims of the parents and in promulgating awards in custody proceedings.

The Lawyers. The discussion and findings in this study will guide the lawyers in determining supporting arguments for their client's cause.

The Parent-Litigants. Primarily affected by the outcome of custody determinations, the discussion in this study will help the parent-litigants understand the reasons for and implications of the resulting court decision.

The Social Worker and/or Counselor. In assessing the capabilities of the parents in fulfilling the needs of the child, the findings of this study will assist them in arriving for the best recommendations to the court.

The Researchers. For researchers interested to study on similar subject, the discussion and findings of this study will help them explain significant topics such as *best interest of the child* standard, child custody, and among others.

RESEARCH METHODOLOGY

Research Design

This study employs a qualitative research descriptive design to analyze the legal implications of doctrines, rules, and presumptions used by courts in child custody determinations. This will explore on the discussion as to whether or not there exist gender discrimination or inequality in determining the custodial parent and as to whether shared custody arrangement would best serve the doctrinal concept of *best interests of the child*.

Research Environment. This research covered all relevant Philippine laws and jurisprudence pertaining to child custody. Consequently, foreign laws and jurisprudence regarding child custody determinations were also utilized, provided that the legal doctrines and presumptions

used in deciding such cases are identical or closely similar to those practiced here in the Philippines.

Research Instruments. This research utilized all relevant Philippine laws and jurisprudence pertaining to child custody. Consequently, foreign laws and jurisprudence regarding child custody determinations were also utilized, provided that the legal doctrines and presumptions used in deciding such cases are identical or closely similar to those practiced here in the Philippines.

Research Procedure. Discussions on inputs were primarily gathered from existing Philippines studies, literatures, and jurisprudence. Foreign sources were also utilized to supplement explanations. Available data are analyzed and contextualized into general theme of topics. A doctrinal approach is used in explaining legal doctrines, rules, and presumptions in relation to its applications in child custody determinations.

INPUT PROCESS OUTPUT

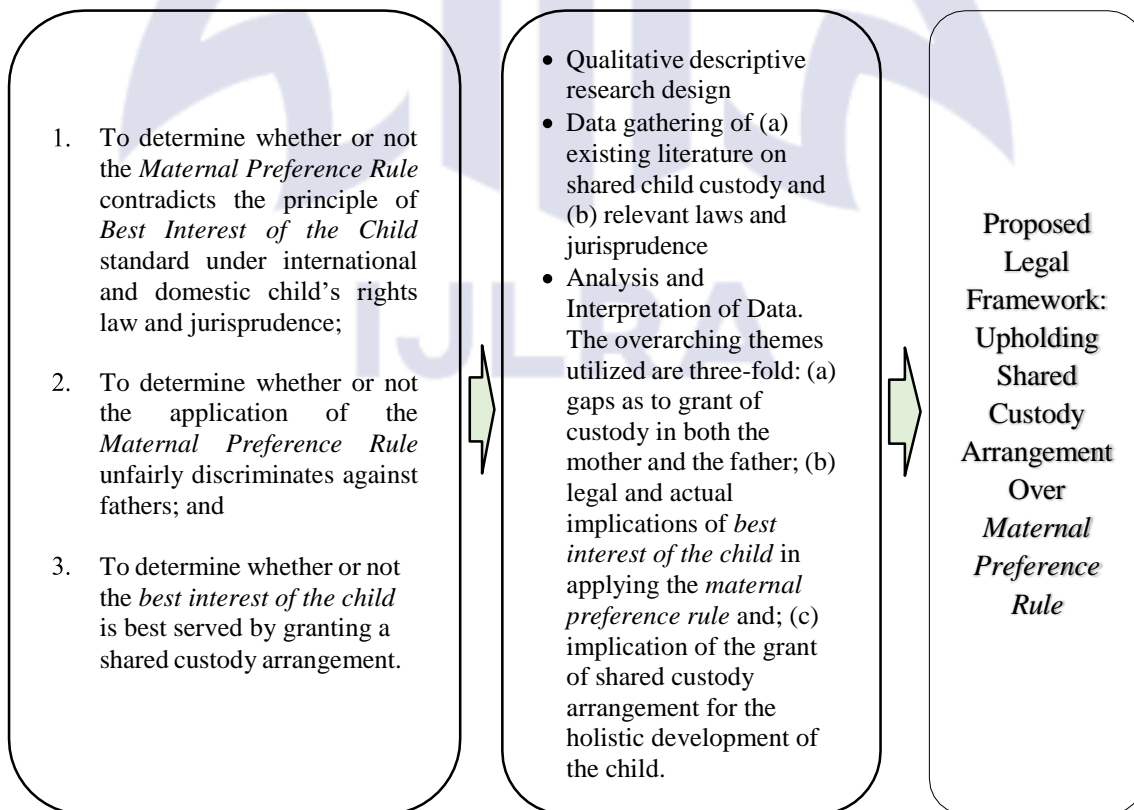


Figure 1. Research Flow Process

Data Gathering. Existing studies and literature as well as the relevant laws and jurisprudence, both in the Philippines and in accordance with International Law are gathered. The data are divided into three common themes: (1) gender gap on custody grants to either mothers, fathers, or both; (2) interpretation of the *best interests of the child* standard in the application of the *maternal preference rule* or the *tender years doctrine*; and (3) grant of shared custody arrangements as serving the *best interests of the child*.

Data Analysis. Relevant legal doctrines, rules, and presumptions are analyzed using a doctrinal approach. The legislative intent of the key provisions are traced in order to better understand how they were applied in child custody determinations. The data are then analyzed based on the three common themes: (1) gender gap on custody grants to either mothers, fathers, or both; (2) interpretation of the *best interests of the child* standard in the application of the *maternal preference rule*; and (3) grant of shared custody arrangements as serving the *best interests of the child*.

THEORETICAL FRAMEWORK

Anchored on the theory of legal realism, this study aims to better understand the connection in theory and practice of the *Best Interest of the Child* vis-à-vis the application of the *Maternal Preference Rule*. The realist theory of law argues that laws should reflect the actual working in the society rather than its traditional given definitions. In the present-day societal set-up, the norm is that of a working mother and the household-participating fathers. Contradicting the traditional notion that only mothers is the primary caretaker of a child, especially those aged seven (7) years and below, the modern society is now recognizing ‘new’ participatory father. This ‘new’ participatory father is not only able to connect emotionally with his children; he is also able to take care of the practicalities of childcare and the day-to-day running of a household.¹⁷ Accordingly, fathers can also provide for the *best interests of the child*.

Further untying the seemingly knotted application of the *Maternal Preference Rule* with determining the *best interests of the child*, this study will review the principle behind the application of the rule. The natural superiority of women and the inferiority of men, as a class, with respect to child-rearing functions, provided the strong basis for the *maternal preference rule*. The mother being the primary caretaker of the children constituted the legal norm that authorities consider as authoritative, such that the *Maternal Preference Rule* attained a mandatory character in its application under Philippine jurisprudence. Deeply tied on legal

positivism, the application of the *Maternal Preference Rule* cemented the idea that the policy of giving the mother the sole custody of children below seven (7) years of age is the most moral, sensible, effective, or reasonable reality.

As yet, the *best interest of the child* standard is concerned primarily with the upbringing of the child holistically, such that the role of fathers in raising a child surely affects the child’s development. As natural law theory suggests, the holistic development of a child is best served with both parents’ participation. Shared custody ensures substantial access for both parents to contribute for the overall well-being of the child.

Figure 2 below illustrates the concurrent analysis of the underlying relevant theories supporting the claim that the grant of shared custody is in the child’s *best interests* over the application of the *Maternal Preference Rule*.

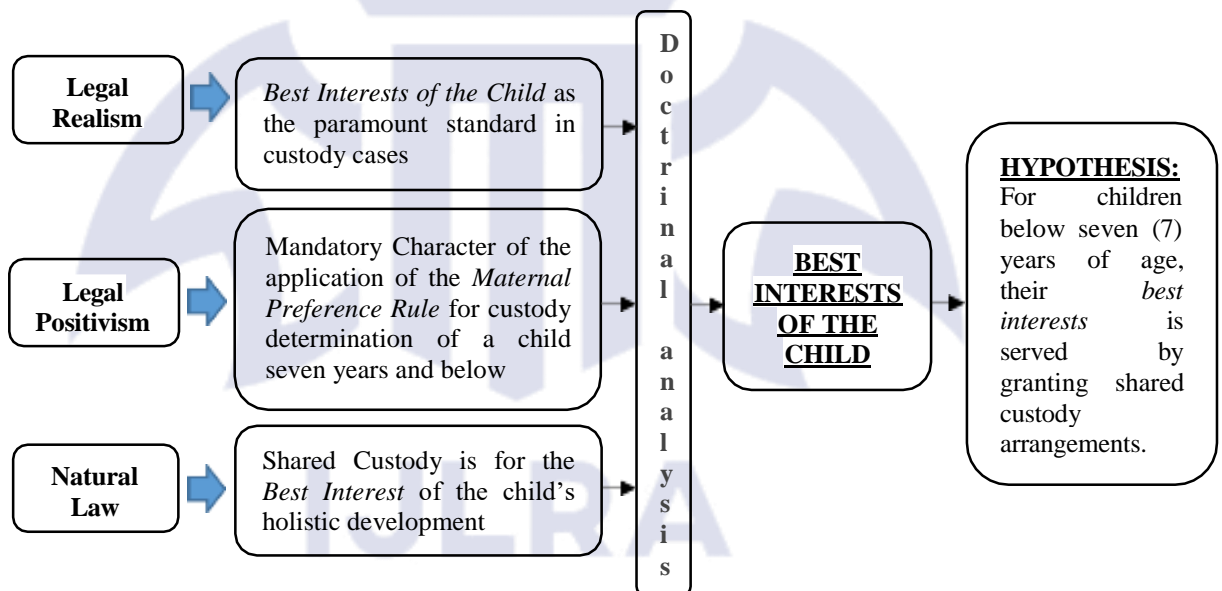


Figure 2. Theoretical Framework

CONCEPTUAL FRAMEWORK

As seen in Figure 3 below, the application of the *maternal preference rule* creates a judicial bias against fathers in child custody battles. Said rule made it mandatory for courts to automatically grant the sole custody of a child below seven years of age to the mother. However, the application of the *best interest of the child* standard should encompass a more in-depth and full investigation of the individual circumstances of each child for his or her holistic development. The holistic development of a child naturally grows from the active

involvement of both mother and father. Placing the child under shared custody arrangement strongly advocate for the *best interests of the child*.

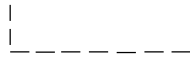


Figure 3. Conceptual Framework

DEFINITION OF TERMS

As used in this paper, the following terms shall have the corresponding meaning and shall be understood as such:

1. **Best Interest of the Child** refers to the standard used by courts for awarding child custody which presumably places paramount importance on the child's physical and psychological well-being.
2. **Biosex** refers to the contracted term for 'biological sex.'
3. **Child/Children** refers specifically to a child/children below seven (7) years of age.
4. **Child Custody** refer to the care, control, and maintenance of a child, which a court may award to one of the parents following a divorce or separation proceedings.
5. **Father** refers to either biological or adoptive father.
6. **Gender Equality** also known as sexual equality or equality of the sexes, is the state of equal ease of access to resources and opportunities regardless of gender, including economic participation and decision-making; and the state of valuing different behaviors, aspirations and needs equally, regardless of gender.
7. **Gender Neutrality** (also known as *gender-neutralism* or the *gender neutrality movement*), is the idea that policies, language, and other social institutions (social structures, gender roles, or gender identity) should avoid distinguishing roles according to people's sex or gender, in order to avoid discrimination arising from the impression that there are social roles for which one gender is more suited than another.
8. **Maternal Preference Rule** refers to a legal presumption in child custody which provides that 'no children below seven (7) years of age shall be separated from the mother.' It is also known as the *Tender Years Doctrine*.
9. **Mother** shall refer to either biological or adoptive mother.
10. **Shared Custody** refers to the order awarding shared legal or shared physical custody or both of a child in such a way as to assure the child of frequent and continuing contact, including physical access, to both parents.
11. **Sole Custody** refers to the order awarding custody of the child to one parent.

CHAPTER 2

REVIEW OF RELATED LITERATURE

This chapter presents the related literature and studies after the thorough and in- depth investigation done by the researcher. The related literature and studies carefully selected herein tackles the core and relevant discussions about the *Maternal Preference Rule* and the *Best Interest of the Child* standard in custody determinations for children seven (7) years and below. Significant comparisons shall then be drawn out as to the application of the aforementioned child custody case rule or doctrine, in the Philippines and under International Law.

Best Interest of the Child vis-à-vis Maternal Preference Rule: The Historical Shifts in Standards and Its Application in Child Custody Determinations

Child custody refers to court orders that award physical possession of a child to a person who may or may not be the child's parent (Michaels, 2016).¹⁸ Undoubtedly, child custody battles are one of the most intense aspects in family litigation. The increasing rate divorce and separation proceedings necessarily implies the resolution of the grant of custody over children. A legal battle for child custody could also be instituted as an independent case.

Historically, child custody cases had shifted in emphasis from the rights of father's to mother's, then that of the child's. Early American custody cases adhered to common law "*paramount right of the father*" to the custody of his children, subject to six major exceptions: (1) children born out of wedlock; (2) young children; (3) weak, disabled or unhealthy children; (4) daughters; (5) older male children who expressed a preference to live with their mothers; and (6) cases where the father was guilty of marital or moral misconduct. However, there was hardly any situation to which a "*paramount right of fathers to custody*" actually applied. Significantly, while the Philippines has been a patriarchal society, we did not have a similar rule or law as such.

In *Commonwealth ex rel. d'Hauteville v. Sears*,¹⁹ it was declared that "in practice, the courts of every state – those that had openly rejected the "*fathers' rights*" doctrine from the beginning, and those that had given it lip service while effectively nullifying it through the application of broad exceptions – decided custody on the basis of the best interests of the child, with a strong presumption that maternal custody was in a child's best interests."

Franklin and Hibbs (1980) viewed the historical shifts in presumption to custody as a reflection

of societal and legal assumptions regarding what constitutes "*best interests of the child*." They argued that the child is singled out by law for special consideration; he is viewed as an incomplete person, unable to safeguard his rights. Law is then society's response to the need for assuring that a child's environment is suitable for his continued growth and development.²⁰

The Best Interests of the Child Standard

It has long been settled that in custody cases,²¹ the paramount consideration should always be the *best interest and welfare of the child*. No less than the Convention on the Rights of the Child,²² an international instrument, provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The Child and Youth Welfare Code,²³ in the same way, unequivocally provides that in all questions regarding the care and custody, among others, of the child, his/her welfare shall be the paramount consideration.

In *Pablo-Gualberto v. Gualberto V*,²⁴ the Court explained and characterized the nature of the principle of *best interest of the child*, stating:

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.²⁵ 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.²⁶ 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.

Maternal Preference Rule

Article 213 of the Family Code of the Philippines²⁷ is the applicable law in child custody battles, particularly in cases of separation of parents. It 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. (Emphasis supplied).

The aforementioned provision became known as the *maternal preference rule*, or otherwise known as the *tender year doctrine*, which places custody of a child below 7 years of age to the mother. In *Pablo-Gualberto v. Gualberto V*,²⁸ the Supreme Court explained that Article 213 takes its bearing from Article 363 of the Civil Code²⁹, 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. **(Emphasis supplied)**

The general rule that children under 7 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.³⁰ 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.³¹ 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. (Emphasis 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 211³² was derived from the first sentence of the afore-quoted Article 17; Article 212,³³ from the second sentence; and Article 213,³⁴ 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.³⁵

The same case³⁶ further discussed the mandatory character of Article 213 of the Family Code, stating:

In *Lacson v. San Jose-Lacson*,³⁷ 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.³⁸ 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."³⁹

In like manner, the word "shall" in Article 213 of the Family Code and Section 6⁴⁰ of Rule 99 of the Rules of Court has been held to connote a mandatory character.⁴¹ 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.⁴² In the present case, the parents are living separately as a matter of fact.

Moreover, the same case⁴³ discussed further that the *maternal preference rule* admits of certain exceptions, thoroughly explaining the exceptions in this manner:

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.⁴⁴

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,⁴⁵ unemployment and immorality,⁴⁶ habitual drunkenness,⁴⁷ drug addiction, maltreatment of the child, insanity and being sick with a communicable disease.⁴⁸

The foregoing case cites immorality on the mother due to alleged lesbian relations as the compelling reason to deprive custody. It has indeed been held that under certain circumstances, the mother's immoral conduct may constitute a compelling reason to deprive the mother of custody to the child.⁴⁹ However, it was emphasized that 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.⁵⁰ 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.⁵¹

To this effect did the Court rule in *Unson III v. Navarro*,⁵² 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 had placed herself might create in [the child's] moral and social outlook."⁵³

In *Espiritu v. CA*,⁵⁴ 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 foregoing jurisprudence, the Court stressed that it is not enough for a petitioner to show merely that the mother is engaged in a homosexual relationship. [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.

Philippine laws and jurisprudence adopt the *maternal preference rule* or *tender years doctrine* as a general rule because traditionally, it is the mother who stays at home and is the primary caretaker of the children. The natural superiority of women and the inferiority of men, as a class, with respect to child-rearing functions, provided the strong basis for the *maternal preference*. Moreover, in foreign jurisdiction, for instance, in the case of *Miner v. Miner*,⁵⁵ the Illinois Supreme Court issued a sweeping generalization that "The mother, from her natural endowments, her position in society, and her constant association with [children], can give them that care, attention and advice so indispensable to their welfare, which a father, if the same children were left to his supervision, would be compelled in a great degree to confide to strangers."

While the *maternal preference* was more commonly used in cases involving young children, the rules courts also manifested the application of said rule to the custody of older children. For example, custody over children born out of wedlock, and of daughters, and of weak, disabled or unhealthy children, regardless of age, are granted as near-absolute rights of mothers.

On a similar note, Poole Jr. (1978) argued that while the *maternal preference* rule has been articulated in many ways, generally stated the rule is that the best interest and welfare of the child is served by granting custody to the mother.⁵⁶ Drinan (1962) has a similar view by stating that "In all matters where children are involved, courts have said with tedious regularity that the welfare of the child is the supreme goal to be obtained. No principle is more untiringly recited."⁵⁷

Moreover, Poole Jr. argued that despite its strong judicial acceptance, the *maternal preference rule* recently has been the object of severe criticism [citing Podell, Peck & First (1972)⁵⁸]. One of the strongest criticisms levelled against the rule is that although its premise may have been valid at one time, it is simply no longer supportable in light of the changing roles of married couples [citing Walker (1976)⁵⁹].

Over the years, the roles and responsibilities of father and mother within the family structure, as

well as social norms and patterns, have evolved so much that oftentimes there is a reversal of roles. As mothers have followed careers, they may be the one bringing home the bacon while the father keeps house and have also taken up parenting roles. While that may not be true for some, what is often the case is that women are more visible in the work front these days that it may not be fair to say that the working mother is the primary caretaker. The norm these days is rather that of working parents who manage with the aid of domestic workers or family relatives. Considering the foregoing, the analysis of Poole Jr. (1978) that "applying the *maternal preference rule* under these circumstances deprives the father of his right to custody without serving the ostensible purpose of the rule" would be fitting. Poole Jr. (1978) further states that many writers have agreed that the rule was always based on traditional prejudices than on scientific evidence, proceeding in arguing that if these criticisms are valid, the *maternal preference rule* does not protect the *best interest of the child*.

More fitting to say, Podell, Peck, and First (1972) is correct in stating that "to define the *best interest of the child* in terms of maternal custody not only forecloses further inquiry into a consideration of which parent will best protect the child's welfare, but it also ignores the empirical data demonstrating that 'mothering' is a function independent of the sex of the individual performing it. As a matter of fact, foreign jurisprudence held that mothering is not only a component of a woman's being, but is also part of a man's being, and that a father, depending on the circumstances, possesses the capacity and capability to exercise custody over a child as well as a mother.⁶⁰ Further, it was held that the concept of mothering is indicative of a function rather than a persona. It includes the sensitive attachment which flows from the attention devoted from day to day to the child's need of love, physical care, nutrition, comfort, peace, security, encouragement and support.⁶¹

In the case of *Van Der Linde v Van Der Linde*,⁶² it was held that "A mother, like a father, could be denied custody if a judge determined that she was unfit to be a parent." Interestingly, in the case of *V v V*,⁶³ it was held that: "The old position where the custody of young children was invariably granted to mothers has change. As far as young children are concerned, the pendulum has swung to accommodate the possibility of a father being a suitable custodian parent to young children."

Fairness Doctrine and Legal Equality Doctrine: Gender Discrimination in Child Custody Battles

For years, mothers have received a greater preference in child custody battles, whether it be in the decision of who gets custody. Most of this preference stems from gender roles and stereotypes. Judges are more inclined to award a mother custody over a man since women are viewed to be more nurturing, which is seen as one of the most important parental characteristics.⁶⁴

According to Hoffman and Moon (2000),⁶⁵ Many family court judges use stereotypical gender norms in assessing which parent should be awarded custody, judges continuously voting in favor of the mother, reflecting "the cultural stereotype that mothers are a child's primary parent because they are 'naturally' more capable caregivers than fathers."

There are two paths to equality, and these two paths can be applied to the issue of gender discrimination in child custody disputes. The first path is the legal equality doctrine, which argues that "equality is only possible when the differences between men and women are erased by laws that require men and women to be treated equally" (Ford, 2011, 1). The second path to equality is the fairness doctrine. This path "consciously recognizes the difference between men and women and argues that women will always be disadvantaged if they are not somehow compensated for the social, economic, and political consequences of those differences" (Ford, 2011, 1).

Accordingly, Selfridge (2007),⁶⁶ there are two constitutional issues that are raised when discussing child custody: the first being the fundamental right to raise one's child, and the second is the protection of being treated equally with similarly situated people regardless of gender. He further argued that Statutes that coincide with the fairness doctrine would continue to treat the sexes carefully, thereby not giving any protection and still remaining to have a *maternal preference*. Whereas a statute that coincides with the legal equality doctrine would fully protect the right of being treated as an equal with other similar situated people even if they are of a different gender. Selfridge (2007),⁶⁷ in conclusion suggested that this kind of policy reform is needed in child custody disputes since deciding who gets to continue parenting cannot be based on gender alone.

According to Smith,⁶⁸ to rid courts of this gender discrimination, the legal equality doctrine

must be used, to ensure that, by law, men and women are equal and are not judged by their gender stereotypes. Undoubtedly then, when men and women are seen as equals, the number of custodial mothers and custodial fathers will start to even out since mothers will no longer be viewed as the best or primary caretaker.

Battle for Custody: Shared Custody Arrangement

Most recently two standards, the *primary caretaker* parent and [shared] custody, have emerged to help concretize a child's *best interests* (Emery, 1994)⁶⁹. Shared custody attempts to foster or represent a shared caretaking arrangement between parents. Over the past thirty years, although mothers continue to be recognized as the *primary caretaker* of children in a large majority of cases, states have increasingly recognized shared custody as a feasible arrangement for the children of divorcing families.

Over the past three decades, the election of [shared] custody as an option in divorce settlements has far outdistanced our empirical knowledge about its judiciousness.⁷⁰ As Scott (2014)⁷¹ explains, "only a [shared] custody rule assures that two parents who have fully shared in the care of their child will continue to do so after divorce." Moreover, Scott (2014) argued that a piece of legislation that requires [shared] custody to parents who both are fully capable of raising a child will rid family courts of gender discrimination in child custody disputes since judges will not have to rule based on the gender biased *best interests* standard or the *primary caretaker* standard any more.

CHAPTER 3 RESULTS AND DISCUSSION

In this chapter, the results of the study are presented and discussed with reference to the aim and objectives of this study, which is to determine whether there is a need to abandon the *Maternal Preference Rule*, discovering whether the application of the said rule is consistent with the *Best Interests of the Child* vis-à-vis the grant of shared custody arrangements.

In case of separation of the parents, whether legal or not, disputes always arise on the custody of their minor children. Courts must then determine a weakly defined right: the welfare of the child; and judges are plagued by the same uncertain standard: the *best interest of the child*. What is the welfare of the child and what are the child's best interests as defined by our courts? Is it always for the *best interest of a child* of tender years to be under the mother's custody?

I. UNDERSTANDING *BEST INTERESTS OF THE CHILD* VIS-À-VIS THE APPLICATION OF THE *MATERNAL PREFERENCE RULE*

There is a general agreement that measures to protect and ensure the healthy development of children - whether initiated by parents, caregivers, third parties or the state - must be guided by the *best interests* of those children.⁷²

Best interests of the child is a guiding principle in matters relating to children derived from Article 3(1) of the Convention on the Rights of the Child ('Convention'),⁷³ which states that: *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*

The *best interest* concept is an umbrella provision prescribing the approach to be taken in all actions taken by a government concerning children. Anchored firmly in international human rights law, it has now become an absolute obligation for the *best interests of the child* to be the 'paramount consideration'. The concept is now reflected in the legislation of most countries.

A. *Best Interests of the Child: In Theory and Practice*

Despite clear consensus on the need to uphold the principle of the *best interests of the child*, there is a persistent lack of consensus on how, precisely, those *best interests* are to be decided.⁷⁴

The Convention or other international standards themselves do not offer nor specify a precise definition of *best interests*, or an explicit list of factors relevant to best interests, or any criteria

at all on how and by whom these interests should be determined, or on who should be responsible for making the final decision.

Broadly speaking, the Convention does state that *best interests* refer to a child's "general well-being", which should include the views of the child, the need for a safe environment, family and close relationships, and development and identity needs. As a result, perceptions of what constitutes the best interests of the child have varied widely over the decades, and still do.⁷⁵ Generally, a child's *best interests* are likely to change depending on the situation.

The notion of *best interests* pre-dates the development of internationally accepted human rights. It has invariably been used as the basis for decisions about people deemed incapable of making rational decisions for themselves, as well as for actions intended to help them protect themselves or improve their lives. Persons with disabilities and children have been the main, though by no means the only, groups dealt with in this way.⁷⁶

In relation to children, decisions based on *best interests* could be – and certainly were – unfettered by human rights considerations until the codification of their rights (including their right to be involved in the decisions affecting them) in the Convention of the Rights of the Child (CRC).⁷⁷

Aside from the CRC, the *best interests of the child* standard has been codified in several other international instruments, each with specific application.

The Convention on the Rights of the Child (CRC) was adopted by the General Assembly of the United Nations on November 20, 1989 and has been hailed as a landmark human rights document, marking a "turning point in the international law of children's rights."⁷⁸

With the basic premise that children are born with fundamental freedoms and the inherent rights of all human beings, the Convention has highlighted the principle that the *best interests of the child* shall be the primary consideration in all actions concerning children.⁷⁹

Adopted by the United Nations General Assembly in 1959, the Declaration of the Rights of the Child (DRC)⁸⁰ builds upon rights that had been set forth in a League of Nations Declaration of 1924. The Preamble notes that children need "special safeguards and care, including

appropriate legal protection, before as well as after birth," reiterates the 1924 Declaration's pledge that "mankind owes to the child the best it has to give". One of the key principles in the DRC is that the "paramount consideration" in enacting laws for the purpose of observing children's rights, is the *best interests of the child*.

The 2006 Convention on the Rights of Persons with Disabilities (CRPD) mentions *best interests of the child* as a faithful echo of the CRC. CRPD 7.2 states that "**In all actions concerning children with disabilities, the *best interests of the child* shall be a primary consideration.**" In this case, the best interest manifests a clear importance, but not definitive, consideration in decision-making.

As a member of the United Nations, and signatory of the CRC and other international human rights instruments, the Philippines has the responsibility of adhering to the general principle of *best interests of the child*.

The provisions of the Family Code, the Civil Code of the Philippines as well as court decisions reflect the principle of the *best interest of the child* enunciated by the CRC which was ratified by the Philippines on July 20, 1996.

The Civil Code of the Philippines has scanty, if not very vague laws with regard to questions relating to questions relating to the custody and care of children.⁸¹ In cases of annulled marriages, Article 90⁸² of the Civil Code provides that the court shall award the custody of the children as it may deem best. Article 106,⁸³ one of the effects of legal separation provides that the custody of minor children shall be awarded to the innocent spouse. Otherwise, the court, in the interest of said minors, may appoint a guardian.

According to Section 6, Rule 99 of the Revised Rules of Court, when husband and wife are living separately, and a question as to the care, custody and control of their children arises, it may be resolved by petition before the court or otherwise, as an incident to any other processing. Thereafter, the court, upon hearing testimony, shall award the care, custody and control of such child in accordance with his *best interests*. If the child is ten years of age or over, he shall be permitted to choose the parent he prefers to live with, unless the parent so chosen is unfit to take charge of the child by reason of moral depravity, habitual drunkenness, incapacity or poverty.⁸⁴

Article 8 of the Child and Youth Welfare Code of the Philippines⁸⁵ reads:

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.

Article 363 of the Civil Code of the Philippines simply reiterated the same provision from the Child and Youth Welfare Code of the Philippines, stating:

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** (emphasis supplied).

However, under Article 363, the *best interests of the child* is now qualified by the rule that **no mother shall be separated from her child under seven years of age unless the court finds compelling reasons for such a measure.**⁸⁶

In *Pablo-Gualberto v. Gualberto V*,⁸⁷ the Court explained and characterized the nature of the principle of *best interest of the child*, stating:

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.⁸⁸ 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.⁸⁹ 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.

The overarching consideration in custody cases is the *best interest* of the minor. Even way back, Article 363 of the Civil Code provides that in all questions relating to the care, custody, education and property of the children, the latter's welfare is paramount.⁹⁰

On August 4, 1988, the Family Code came into effect and introduced important changes to the

Civil Code and to the Child and Youth Welfare Code. However, with respect to the laws on custody disputes, nothing much was changed or added thereto, except for the novelty found in Article 213 thereof. This codified into substantive law the child's custodial preference and lowered the age from then to seven.⁹¹

Article 213 of the Family Code states:

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" (Emphasis supplied).

According to Article 213 of the Family Code, the paramount criterion when it comes to child custody is the welfare of the child. This means the court will take into careful consideration the capabilities of both mother and father to raise the child, including their moral, social, and economic situation.

It should also be noted that other procedural rules can be overridden by the *best interests of the child*, especially if the child is at an age where he or she can make intelligent decisions.

As stated in Article 213 of the Family Code, "Every child has 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."

Under present rules, A.M. No. 03-04-04-SC explicitly states that "[i]n awarding custody, the court shall consider the *best interests* of the minor and shall give paramount consideration to the child's material and moral welfare.

The *best interests* of the minor refer to the totality of the circumstances and conditions as are most congenial to the survival, protection, and feelings of security of the minor encouraging to the child's physical, psychological and emotional development. It also means the least detrimental available alternative for safeguarding the growth and development of the minor."⁹²

It has been stated that the welfare of the child is "the polar star" by which the court's discretion must be guided, and to which all other rules, including the parental preference rule, are secondary and, in conflict, the latter must yield.⁹³

In the case of *Masbate vs. Relucio*,⁹⁴ the Court ratiocinated that the child's welfare being the most important consideration, it is not bound by any legal right of a person over the child. In the same case, reiterating its pronouncement in the early case of *Sombong v. CA*, the Court held that:

[I]n passing on the writ in a child custody case, the court deals with a matter of an equitable nature. Not bound by any mere legal right of parent or guardian, the court gives his or her claim to the custody of the child due weight as a claim founded on human nature and considered generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of adults, but on the court's view of the *best interests* of those whose welfare requires that they be in custody of one person or another. Hence, the court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration.

Considering that the child's welfare is an all-important factor in custody cases, the Child and Youth Welfare Code unequivocally provides that in all questions regarding the care and custody, among others, of the child, his welfare shall be the paramount consideration. In the same vein, the Family Code authorizes the courts to, if the welfare of the child so demands, deprive the parents concerned of parental authority over the child or adopt such measures as may be proper under the circumstances.

B. *Raison D'Etre* of Maternal Preference Rule and Its Mandatory Character

Article 213 of the Civil Code provides for the so-called *tender age presumption*, otherwise known as *maternal preference rule*. The particular provision reads that “[n]o **child under seven (7) years of age shall be separated from the mother, only for compelling reasons can the court order otherwise.**” According to jurisprudence, the following instances may constitute “compelling reasons” to wrest away custody from a mother over her child although under 7 years of age: neglect, abandonment, unemployment, immorality, habitual drunkenness, drug addiction, maltreatment of the child, insanity or affliction with a communicable disease.⁹⁵ Prostitution and unfaithfulness to the husband may not be used as grounds to separate a child from the mother. The mother's sexual orientation cannot also be used to separate her from her child, unless there is evidence that this is not conducive to her child's overall development. Moral laxity or the habit of flirting from one another does

not also fall under "compelling reasons."⁹⁶

If a child under 7 years of age expresses his or her desire to stay with the mother or the father, the court is not bound by that preference especially if the chosen parent is deemed unfit by the court.

Due to tender years, the right of choice has been denied to children because they are presumed to lack the capacity to either know the law or make enlightened and mature decisions. Due to this ostensible incapacity, courts tend to overlook the distinct and independent interests that children have in decisions affecting their future.

Under the presumption, before the mother can be denied custody, even for the briefest of periods, the mother's fitness must be properly threshed out. Effectively, under second paragraph of Article 213, the 'tender age presumption' mandates for the regime of sole maternal custody.

While the *maternal preference* was more commonly used in cases involving young children, the rules courts also manifested the application of said rule to the custody of older children. For example, custody over children born out of wedlock, and of daughters, and of weak, disabled or unhealthy children, regardless of age, are granted as near-absolute rights of mothers.

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.⁹⁷ 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, December 10, 1974).⁹⁸ 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. (Emphasis 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 211⁹⁹ was derived from the first sentence of the aforementioned Article 17; Article 212,¹⁰⁰ from the second sentence; and Article 213,¹⁰¹ 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."¹⁰²

The same case¹⁰³ further discussed the mandatory character of Article 213 of the Family Code, stating:

In *Lacson v. San Jose-Lacson*,¹⁰⁴ 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.¹⁰⁵ 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."¹⁰⁶

In like manner, the word "shall" in Article 213 of the Family Code and Section 6¹⁰⁷ of Rule 99 of the Rules of Court has been held to connote a mandatory character.¹⁰⁸ 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.¹⁰⁹

The *maternal preference rule*, in effect, results in a statutory awarding of sole parental custody to the mother mandatory, grounded on sound policy consideration, subject only to a narrow exception.

Arguing against the argument on Article 213's bias favoring the mother, the Court reaffirmed the mandatory character of the provision and the imposition of the regime of sole maternal custody in the case of *Dacasin vs. Dacasin*,¹¹⁰ stating:

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 [shared] 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.

C. *Best Interests of the Child: The Disconnect in Theory and in Practice of Applying the Maternal Preference Rule*

The "*best interests of the child*" standard has the primary focus of what is best for the child. The standard is intended to grant custody to the parent who can provide the child with the best life, and is meant to be applied with gender neutrality.¹¹¹ But mostly, what is considered to be the child's best interests is left up to the personal opinion of the judges. This makes the application of the "*best interests of the child*" standard extremely vague. According to Selfridge (2007), "if the trial court has a generally low opinion of father's child-rearing roles, then the application of the 'best interests' standard is very likely to be biased in the mother's favor". If a family court judge views mothers to be better suited to raise a child than fathers, they are more inclined to rule in favor of the mothers. Many judges can use the inherent vagueness of the "*best*

interests of the child" standard to cover up their gender-biased approach in ruling on child custody cases.

It has been argued that while the *maternal preference rule* has been articulated in many ways, generally stated the rule is that the *best interest and welfare of the child* is served by granting custody to the mother.¹¹²

In *Espiritu vs. Court of Appeals*,¹¹³ the court ruled that in ascertaining the welfare and the *best interest of the child*, courts are mandated by the Family Code to take into account all relevant considerations. If a child is under seven years of age, the law presumes that the mother is the best custodian. The presumption is strong but is not conclusive. It can be overcome by "compelling reasons." If a child is over seven, his choice is paramount but, again, the court is not bound by that choice. In its discretion, the court may find the chosen parent unfit and award custody to the other parent, or even to a third party as it deems fit under the circumstances.

II. TOWARD A GENDER-EQUAL STANDARD OF PARENTHOOD

The *best interest of the child* standard has had its greatest influence in custody cases, initially as a doctrine that allowed courts to recognize the importance of the mothers' role in the child's life and more recently as a way to mediate between mothers' and fathers' competing claims. Even in this context, however, the courts have remained wary of completely open-minded applications of a best interest standard.

A. *Fairness Doctrine and Legal Equality Doctrine: Removing Gender Discrimination in Child Custody Battles*

For years, mothers have received a greater preference in child custody battles, whether it be in the decision of who gets custody. Most of this preference stems from gender roles and stereotypes. Judges are more inclined to award a mother custody over a man since women are viewed to be more nurturing, which is seen as one of the most important parental characteristics.¹¹⁴

Many family court judges use stereotypical gender norms in assessing which parent should be awarded custody, judges continuously voting in favor of the mother, reflecting "the cultural stereotype that mothers are a child's primary parent because they are 'naturally' more capable caregivers than fathers."¹¹⁵

There are two constitutional issues that are raised when discussing child custody: the first being the fundamental right to raise one's child, and the second is the protection of being treated equally with similarly situated people regardless of gender. There is a further argument that statutes that coincide with the fairness doctrine would continue to treat the sexes carefully, thereby not giving any protection and still remaining to have a *maternal preference*. Whereas a statute that coincides with the legal equality doctrine would fully protect the right of being treated as an equal with other similar situated people even if they are of a different gender. In conclusion suggested that this kind of policy reform is needed in child custody disputes since deciding who gets to continue parenting cannot be based on gender alone.¹¹⁶

To rid courts of this gender discrimination, the legal equality doctrine must be used, to ensure that, by law, men and women are equal and are not judged by their gender stereotypes. Undoubtedly then, when men and women are seen as equals, the number of custodial mothers and custodial fathers will start to even out since mothers will no longer be viewed as the best or primary caretaker.¹¹⁷

B. Equal Parenting in the Name of Children's Rights

The fault line between formal, legal sex neutrality and the dichotomous living of sex identity seems to be expanding.¹¹⁸ It is a conflict that rages furiously in debates over mothering and parenting, specifically concerning child custody.

Parents have confronted a far more sexed area. Parenting has been divided into "mothering" and "fathering," categories assigned based on biosex presumptions. It was argued that it is of "...the states' interest in encouraging children to be "raised by both a mother and a father, each performing distinct sex- based roles. Some religious and social authorities depict sharply sexed parenting roles as distinct, complementary, and essential for a child's well-being. Beyond the realms of academic theory and religion, social and legal default rules force biosex roles on parents, turning them into "mothers" and "fathers." The perception that "mothers" are primarily responsible for children persists.¹¹⁹ The view is that this division is best for children, because mothers and fathers bring different abilities to the parenting enterprise. Mothers, as argued, "tend to be more emotion focused, while fathers, in turn, are more playful and a little more task-oriented."

It has been perceived that only a mother knows how to be a "parent" (who knows how to parent in the most challenging situations - that a father is not the primary parent - a mother.

In an ideal world, people now considered "mothers" and "fathers" would be "parents" first, a category that includes all forms of caretaking. Within most homes, parents share responsibilities and flip roles. The mothering role has been played out with some fluidity.

The outside world needs to unbox the "father" and "mother" category as much as it invests women with the power of motherhood. Then, one could even imagine an androgynous world in which parenting has no sexed subcategories, whether attached to biosex or not. Unsexing the roles of "mother" and "father", elevating them from biodeterminist brandings to chosen classification or roles.¹²⁰ As the Supreme Court said in *Mississippi University for Women v. Hogan*¹²¹, there should be no "fixed notions concerning the roles and abilities of males and females" embodied in the application of the law. This ideal permeates civil society: either sex should be allowed to perform every role in society.¹²²

In this sense, unsexed parenting would not mandate the elimination of sex or gender roles—as long as those roles do not presume biosex or fixed gender bases. When a woman parent performs a "fatherly" role, it may be masculine, but it reflects unsexed parenting. A person does not need to "lose" all references to her biosex as long as biosex does not by itself define her parental role. A woman can have a child with her own ovaries, carry the child in her womb, and then nurture the child with her breast milk, but it does not make her more of a mother than someone who has done none of those things but nurtures the child in other ways.

In essence, parenting need to be counter-stereotype. "Mothering" should be unsexed as the primary parental relationship. "Fathering," correspondingly, should be unsexed from its breadwinner status. Liberated from biosex roles, a parent could define herself/himself as "parent," "mother," or "father" with some fluidity. "Mothering" and "fathering" may take on new meanings as they become untethered from biosex. They may then be joined by other sex-neutral terms, terms with more appeal than "primary parent" and "secondary parent."

To define the *best interest of the child* in terms of maternal custody not only forecloses further inquiry into a consideration of which parent will best protect the child's welfare, but it also ignores the empirical data demonstrating that 'mothering' is a function independent of the sex of the individual performing it.

Foreign jurisprudence¹²³ held that mothering is not only a component of a woman's being, but

is also part of a man's being, and that a father, depending on the circumstances, possesses the capacity and capability to exercise custody over a child as well as a mother.

Further, it was held that the concept of mothering is indicative of a function rather than a persona. It includes the sensitive attachment which flows from the attention devoted from day to day to the child's need of love, physical care, nutrition, comfort, peace, security, encouragement and support.¹²⁴

In reality, to the extent the traditional definitions of "mother" and "father" mean anything, many of us flip and shift among those roles. In fact, the past few decades have seen the spread of sex-neutral laws regarding adoption, alimony, child custody, parental leave, and spousal benefits. Law no longer assumes motherhood for women and traditional family roles need not have an assigned gender.

Parenting includes "mothering" and "fathering," as well as childcare that may be labeled neither, either, or both. The knot of sex and parenting should be unwound entirely, apart from the biological realities of pregnancy and lactation. In the actual act of parenting, biology plays no critical role. Unsexed mothering is relational, not biological, and it is an act, not a fixed identity. While biological elements may undoubtedly further that relationship, one need not engage in these functions to mother a child.

III. FOR THE CHILD'S *BEST INTEREST*: SHARED CUSTODY OF PARENTS

Over the past decades, the election of [shared] custody as an option in child custody determinations has far outdistanced empirical knowledge about its judiciousness.¹²⁵ It explains that "only a [shared] custody rule assures that two parents who have fully shared in the care of their child will continue to do so after divorce," and argued that a piece of legislation that requires [shared] custody to parents who both are fully capable of raising a child will rid family courts of gender discrimination in child custody disputes since judges will not have to rule based on the gender biased *best interests* standard or the primary caretaker standard any more.¹²⁶

Shared custody is when the family court awards some type of shared custody to both parents. Shared custody can come in two forms. Parents can have shared legal custody and/or shared physical custody. When parents have both forms of shared custody, this is usually referred to

as *joint* custody. This means that the parents essentially split both legal and physical custody of the child. When awarding shared custody, the court is attempting to assure that the child will have continuing and hopefully frequent access to both parents, paving way to the holistic development of the child. As such, the *best interests of the child* is being served.

A. Primacy of Parenthood Over Motherhood

The right of custody accorded to parents spring from the exercise of parental authority. According to *Santos vs. CA*,¹²⁷ parental authority or *patria potestas* in Roman Law is the juridical institution whereby parents rightfully assume control and protection of their unemancipated children to the extent required by the latter's needs. The Court in *Reyes vs. Alvarez*¹²⁸ also states that custody is a mass of rights and obligations which the law grants to parents for the purpose of the children's physical preservation and development, as well as the cultivation of their intellect and the education of their heart and senses.

Based on Articles 222-224 of the Family Code, the right of parental authority (to which the right of custody over a child attaches) is purely personal; therefore, 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. The Supreme Court in *Celis v. Cafuir*¹²⁹ states that when a parent entrusts the custody of a minor to another, such as a friend or godfather, even in a document, what is given is merely temporary custody and it does not constitute a renunciation of parental authority. Even if a definite renunciation is manifest, the law still disallows the same. The father and mother, being the natural guardians of unemancipated children, are duty-bound and entitled to keep them in their custody and company.

Under Article 8, Presidential Decree No. 603 or the *Child and Youth Welfare Code*, the child's welfare is always the paramount consideration in all questions concerning his care and custody. The law vests on the father and mother joint [shared] parental authority over the persons of their common children. In case of absence or death of either parent, the parent present shall continue exercising parental authority. Only in case of the parents' death, absence or unsuitability may substitute parental authority be exercised by the surviving grandparent.

Custody embraces the sum of parental rights with respect to the rearing of a child, including his care. It includes the right to direct his activities and make decisions regarding his care, control, education, health and religion. It also includes the right to the child's services and

earnings within the limitations provided by law.

The legal custody of the parents refer to the right to make major decisions affecting the *best interests* of a minor child. These major decisions could include, but are not limited to, morality, residence, healthcare, religion, and education.

Consequently, physical custody is the actual physical possession and control of the child. When someone is referred to as the "custodial parent," this usually refers to physical custody. This means that the child lives with the parent for majority of the time. The other parent may still have visitation on a regularly basis. Usually the other parent will be referred to as the "non-custodial parent." Even though a parent may be referred to as a "non-custodial parent," that does not mean that the parent does not have legal custody over the child. A parent could not have physical custody, but still have shared legal custody.

The child could live with the other parent, but the "non-custodial parent," may retain legal custody with the rights to weigh in on decision-making for the child. While the child does not live with the "non-custodial parent," that parent can still have the right to say where the child can live, such as moving out-of-state. Essentially, even if a parent does not have the child in their possession at the time, they still may possess the rights, also known as legal custody, to state what the child can and cannot do when the child is in someone else's possession and control.

B. *The Win-Win Solution: Shared Victory for Parents*

When parents go separate ways, whose responsibility should care for children be?' The answer I begin with is, 'Not simply women's responsibility.'" It is the parents' responsibility - both the mother and father.

Even in best circumstances, separation in-law or in-fact is a stressful process for all parties. It is especially true for the children placed in the center of custody disputes. While a variety of custodial arrangements exists, selecting a workable schedule acceptable to both parents and promoting the child's *best interests* remains a complicated task, particularly when two "fit" or competent parents are involved.

Two standards have recently emerged to help concretize a child's *best interests* – the primary

caretaker parent and [shared] custody.¹³⁰ Shared custody attempts to foster or represent a shared caretaking arrangement between parents. Over the past thirty years, although mothers continue to be recognized as the primary caretaker of children in a large majority of cases, states have increasingly recognized shared custody as a feasible arrangement for the children of divorcing families.

In shared legal custody, both parents have equal rights and responsibilities regarding issues such as the child's education, medical care, and religious upbringing. Neither parent's rights are superior. Both parents are entitled to have an opinion as to the child's religious upbringing, where the child will attend school, what extracurricular activities that child will partake in, where the child will live, and possibly whether the child will be exposed to unrelated, opposite gender adults when visiting the other parent.

Proponents of shared custody argue that it brings gender and emotional equality to the decision making process. In particular, studies have established that children benefit from continued relationships with each parent post-separation. Access to both parents is believed to foster an arrangement most closely resembling an intact nuclear family. Because neither parent has a superior legal claim over the child, mental health professionals believe it is less likely that one parent will take advantage of the other and more likely that they will consider each other equals. The premise of equality behind shared custody is also meant to eliminate feelings of second class parental status often felt by non-custodial parents in sole-custody arrangements.

CHAPTER 4

FINDINGS, CONCLUSION AND RECOMMENDATIONS

This chapter presents the summary of the research work undertaken, the conclusions drawn and the recommendations made as an outgrowth of this study.

Summary of Findings

The salient findings of this study are as follows:

1. The application of the *Maternal Preference Rule* or the *Tender Age Presumption* is mandatory in character and provides for a custodial regime of sole custody in favor of the mother. As a legal presumption, it is one of the factors considered by judges in determining in fulfilling the child's *best interests*. While most often, courts and judges deemed it in application that *the best interest of the child 7 years and below* is best served by granting custody to the mother, the application of the *Maternal Preference Rule* is not conclusive. The father can be granted custody of a child 7 years and below if he can successfully prove that "compelling reasons" exists as to deprive the mother of the sole custody.
2. Under international and domestic standards, the *Best Interest of the Child* is meant for a gender-neutral application. As a matter of right, a legal principle, and a rule of procedure, the judicial application of the standard is mostly left to the discretion of the judges. Many family court judges use stereotypical gender norms in assessing which parent should be awarded custody. Judges have continuously voted in favor of the mother, reflecting the cultural stereotype that mothers are a child's primary parent because they are 'naturally' more capable caregivers than fathers.
3. The *Best Interest of the Child* primarily advocates for the holistic development of a child. As the ages 7 years and below is considered as formative years, the active role and involvement of both parents is crucial to the development of the child. Consequently, access to both parents under a shared custody arrangement will foster for an arrangement most closely resembling an intact nuclear family, which cultivates for the holistic development of the child.

Conclusion

Our laws concerning custody and access focus on what is best for the child, not what either parent wants or needs. These laws do not favor mothers over fathers nor fathers over mothers, even in cases involving children as young as 7 years and below. The law doesn't favor keeping

sons with their fathers or daughters with their mothers.

To be awarded custody of their children, fathers are required to show that the mother is unfit, thereby prompting an ugly custody dispute. It would be better to reduce this effect by opening up to the idea that a father can be just as effective as managing conservator as a mother. There should be no reason to deny the father the same parental status as the mother.

Parents would be expected to provide nurturing, support, structure, and discipline to their children. Each parent, regardless of biosex, should be able to choose a parenting role, whether gendered or not. It follows that parents, and the law, might then cease conceptualizing childcare as an endeavor that requires adherence to one or the other role. Thus, men can mother, father, or parent; women can mother, father, or parent. A same-sex couple might take on gender roles that are both "father" and "mother" at the same time. Courts and legislatures would move beyond the mother-father presumption to establish family governance for diverse parental family formations. Having escaped from the male/female dyad, family law regimes might even permit adults who have strong bonds with children, but are not primary "parents," to attain some legal status in recognition of their childcare role.

Courts are required to arrange custody and access so that the child has as much contact with both parents as is consistent with the child's *best interests*. Courts will generally find that it is in the child's *best interests* to have both parents involved in their life and that both parents have a role to play regarding issues such as discipline, schooling, cultural, religious or spiritual guidance, health matters and activities. They will consider each parent's ability to allow, encourage and facilitate contact with the other parent, unless it would be harmful to the child.

Recommendations

As a result, this paper recommends the following:

1. Repeal the *Maternal Preference Rule* under Article 213 of the Family Code and Section 6 of Rule 99 of the Rules of Court.

Removing the *Maternal Preference Rule* allows courts to engage in full, fair and comprehensive examinations of the *best interests of the child*, without burdening the father or the non-custodial parent with proving the unfitness of the mother.

Following the removal thereof, the burden of proof must be equalized on both parents – mother and father – in proving to be a better custodian, that which should favor for the child's *best*

interest.

2. Adopting the guidelines set by the *In re Wesley*¹³¹ court for granting shared custody in accordance with the *best interest of the child* standard.

In conjunction to the pursuit to being granted shared custody with the child, there must be guidelines to be considered in determining whether shared custody is appropriate in a case-to-case basis. In the case of *In re Wesley*, a definite guideline was formulated to determine the appropriateness of a shared custody arrangement so as to serve for the *best interest of the child*. Significantly, the guidelines has been adopted by most jurisdiction around the world and interpreted as a practical guideline in determining what would be for the child's *best interest*. The Court has formulated the following four guidelines must be consider in determining whether shared custody is appropriate:

- a. First, both parents must be fit. This means both parents must be sane and capable of making rational child-rearing decisions. Each parent must be willing and able to love and care for the child.
- b. Second, both parents must want to continue active involvement in the child's life. This is not to say that both parties must seek shared physical custody. Instead, a shared arrangement will be implemented so long as evidence exists demonstrating each parent's ability to place the child's interest before his or her own.
- c. Third, the child must have established relationships with each parent. This element is considered from the child's perspective. The child must see both parents as sources of security and love.
- d. The final and perhaps most important criterion considered is the degree of cooperation that exists between the parents. This, however, does not mean parents must have an amicable relationship. Successful shared physical custodial schedules only require parents to separate personal conflicts from their parental roles and spare their children whatever resentment and ill will they may harbor. Ideally, this would be the case regardless of the type of arrangement in place.

3. Application of *Best Interests of the Child* Standard in Custody Determinations Involving Same-Sex Parents

For purposes of future researches, the *Best Interest of the Child* Standard can be used to argue that a custody can be granted to same-sex couples. Primarily meant to be gender-neutral the

application of the *Best Interest of the Child* standard can be used to foster argument on the necessity of placing children under same-sex parents.

4. Advocate Extrajudicial Custody Settlement with Shared Custody Arrangements

While this paper has limited its scope in the application of the *Best Interest of the Child* standard in child custody determinations under judicial proceedings, future researches may use the discussions in this paper to extend the application of the standard in extrajudicial custody settlement. Much so that it can be argued that shared custody arrangement is best formulated and easily executed if devised by both parents rather than the courts.

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⁴ *Id.*

⁵ Rosenblum, *supra*.

⁶ Smith, A. *Gender Discrimination in Child Custody Battles*.

⁷ Charlow, *supra* note 1.

⁸ Second paragraph of Article 213, Family Code of the Philippines 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. (Emphasis supplied).

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- ¹⁵ Rosenblum, *supra*.
- ¹⁶ *Id.*
- ¹⁷ Hamad (2014), as cited by Åström, B. (2018). *Post-Feminist Fatherhood and the Marginalization of the Mother in Cormac McCarthy's The Road, Women: A Cultural Review*, 29:1, 112- 128, DOI: 10.1080/09574042.2018.1425539
- ¹⁸ Michaels, W. (2016). *Child Custody and the Father Right Principle*. 10.1002/9781118663219.wbegss260. ¹⁹ 279 (Phila., Pa. Ct. of General Sessions 1840) (concluding, on the basis of a review of early American custody cases, that "[t]he common law of the United States is in favour of the mother's custody").
- ²⁰ Franklin, R., & Hibbs, "B". (1980). *Child Custody in Transition*. Journal of Marital and Family Therapy, 6.3.
- ²¹ *Santos Sr. v. CA*, G.R. No. 113054, March 16, 1995, 242 SCRA 407; *Cervantes v. Fajardo*, G.R. No. 79955, January 27, 1989; *Unson III v. Navarro*, G.R. No. L-52242, November 17, 1980, 101 SCRA 182; *Medina v. Makabali*, G.R. No. L-26953, March 28, 1969, 27 SCRA 502; *Pelayo v. Lavin Aedo*, 40 Phil. 501; *Lozano v. Martinez*, 36 Phil 976 citing Sec. 771 of the Code of Civil Procedure then in force.
- ²² Article 3, number 1, Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on November 20, 1989
- ²³ Presidential Decree No. 603, as amended, Article 8.
- ²⁴ *Id.*
- ²⁵ *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*, G.R. No. 118870, March 29, 1996; *Espiritu v. CA*, G.R. No. 115640, March 15, 1995; *Medina v. Makabali*, *supra*, March 28, 1969, 27 SCRA 502; *Slade Perkins v. Perkins*, 57 Phil. 217, 219, September 12, 1932.
- ²⁶ *Bondagiy v. Bondagiy*, G.R. No. 140817, December 7, 2001; *David v. CA*, 320 Phil. 138, November 16, 1995; *Espiritu v. CA*; *supra*; *Unson v. Navarro*, *supra*; *Cervantes v. Fajardo*, *supra*.
- ²⁷ Executive Order No. 209, July 6, 1987.
- ²⁸ G.R. No. 154994, June 28, 2005.
- ²⁹ Republic Act No. 386, June 18, 1949.
- ³⁰ *Espiritu v. CA*, *supra*.
- ³¹ Article 8 of Presidential Decree 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."
- ³² 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."
- ³³ 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."
- ³⁴ 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."
- ³⁵ Sempio-Diy, Handbook on the Family Code of the Philippines (1988), pp. 296-297.
- ³⁶ Pablo-Gualberto v. Gualberto V, *supra*.
- ³⁷ 133 Phil. 884, 894, August 30, 1968.
- ³⁸ 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."
- ³⁹ P. 895, per Castro, J.
- ⁴⁰ "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."

⁴¹ Perez v. CA, *supra*.

⁴² Briones v. Miguel, G.R. No. 156343, October 18, 2004.

⁴³ Pablo-Gualberto v. Gualberto V, *supra*.

⁴⁴ Briones v. Miguel, *supra*.

⁴⁵ Medina v. Makabali, *supra*.

⁴⁶ Cervantes v. Fajardo, *supra*.

⁴⁷ Tolentino (1990). *Commentaries and Jurisprudence on the Civil Code of the Philippines*.

⁴⁸ A. Sempio-Diy, *supra*; J. Vitug, *Compendium of Civil Law and Jurisprudence* (Revised ed., 1993) citing Sy v. Funa, CA G.R. No. 122117.

⁴⁹ Espiritu v. CA, *supra*; Cervantes v. Fajardo, *supra*; Unson III v. Navarro, *supra*; Cortes v. Castillo, 41 Phil. 466, March 18, 1921.

⁵⁰ Sempio-Diy, *supra*.

⁵¹ 70 ALR 3d 262, Ch. I, §2[b].

⁵² *Id.*

⁵³ P. 189, per Barredo, J.

⁵⁴ *Supra*.

⁵⁵ 11 Ill. 43, 50 (1849).

⁵⁶ Poole Jr., S. N. (1978). *Maternal Preference and the Double Burden: Best Interest of Whom?* 38 La. L. Rev.

⁵⁷ Drinan (1962). *The Rights of Children in Modern American Family Law*. 2 J. FAM. L. 101, 103.

⁵⁸ Podell, Peck and First. (1972). *Custody – To Which Parent?* 56 MARQ. L. REV. 51, 52. (As cited by Poole Jr, *supra*).

⁵⁹ Walker (1976). *Measuring the Child's Best Interest – A Study of Incomplete Considerations*. 44 DEN. L.L. 132, 139 (As cited by Poole Jr; *supra*).

⁶⁰ *Van Pletzen v Van Pletzen*, 1998 (4) SA 95 (O).

⁶¹ 1996 (3) SA 509 (O).

⁶² American Bar Association, *Guide to Marriage, Divorce, & Families* 172 (2006) (observing that “[b]y the mid-1800’s, most states had come to exhibit a strong preference for the mothers in issues of custody.”) Since the maternal preference was the guide star for custody decisions throughout most of the twentieth century, it will be explored in more depth when this blog makes it into the twentieth century.

⁶³ 1998 (4) SA 169 (C).

⁶⁴ Aubrey Smith. *Gender Discrimination in Child Custody Battles*.

⁶⁵ As cited by Smith, *supra*; Hoffman, C. D., and Moon, M. (2000) *Mothers' and Fathers' Gender-Role Characteristics: The Assignment of Post-divorce Child Care and Custody*. *Sex Roles*, 42: 917-924.

⁶⁶ As cited by Smith, *supra*; Selfridge, A. (2007). *Equal Protection and Gender Preference in Divorce Contests over Custody*. *Journal of Contemporary Legal Issues* (Spring), 16(1): 165-176. ⁶⁷ *Id.*

⁶⁸ Smith, *supra*.

⁶⁹ As cited by Marsha Kline Pruett, *Joint Custody: A Judicious Choice for Families – But How, When, and Why?*

⁷⁰ Pruett, *supra*.

⁷¹ As cited by Smith, *supra*; Scott, E. S., and Emery, R. E. (2014). *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*. *Law and Cotemporary Problems*, 77(1): 69108.

⁷² Cantwell, Nigel (2014). *The Best Interests of the Child in Intercountry Adoption*. Innocenti Insight, Florence: UNICEF Office of Research. Retrieved from <https://www.unicef-irc.org/research/the-best-interests-principle-in-intercountry-adoption>.

⁷³ *Convention on the Rights of the Child*, General Assembly Resolution 44/25, annex, 44. U.N. GAOR Supp. (no. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990.

⁷⁴ Cantwell, Nigel (2014). *The Best Interests of the Child in Intercountry Adoption*. Innocenti Insight, Florence: UNICEF Office of Research. Retrieved from <https://www.unicef-irc.org/research/the-best-interests-principle-in>

intercountry-adoption.

⁷⁵ Cantwell, *supra*.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Saulle, M.R. (1994). *The Rights of the Child: International Instruments XVI*, as cited by Candelaria, S. and Rayco, R. *The Philippines and the Convention on the Rights of the Child: Evaluating Compliance with Respect to the International Standards for Procedural Rules Involving Children*.

⁷⁹ CRC, *supra*, Article 3.

⁸⁰ *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

⁸¹ Santos, L. *A Child's Voice and Choice in Custody Disputes: A Search for a Standard*, 39 Ateneo L.J. 50 (1994).

⁸² Article 90 of the Civil Code of the Philippines provides,

“When a marriage is annulled, the court shall award the custody of the children as it may deem best, and make provision for their education and support. Attorney's fees and expenses incurred in the litigation shall be charged to the conjugal partnership property, unless the action fails.”

⁸³ Art. 106 provides,

The decree of legal separation shall have the following effects:

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

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

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

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

⁸⁴ Santos, *Id.*

⁸⁵ *Child and Youth Welfare Code of the Philippines*, Presidential Decree No. 603

⁸⁶ Santos, *supra*.

⁸⁷ Pablo-Gualberto v. Gualberto V, *supra*.

⁸⁸ *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*.; *Espiritu v. CA*, *supra*; *Medina v. Makabali*, *supra*; *Slade Perkins v. Perkins*, *supra*.

⁸⁹ *Bondagiy v. Bondagiy*, *supra*; *David v. CA*, *supra*; *Espiritu v. CA*, *supra*; *Unson v. Navarro*, *supra*; *Cervantes v. Fajardo*, *supra*.

⁹⁰ *Luna v. Intermediate Appellate Court*, 221 Phil.400, 408 (1985).

⁹¹ Santos, *supra*.

⁹² See Section 14 of A.M. No. 03-04-04-SC.

⁹³ 59 Am. Jur. 2d 164.

⁹⁴ *Masbate vs. Relucio*, 875 SCRA 25 (2018).

⁹⁵ *Cervantes vs. Fajardo*, *supra*; *Medina vs. Macabali*, *supra*.

⁹⁶ *Masbate vs. Relucio*, *supra*.

⁹⁷ *Espiritu v. CA*, 312 Phil. 431, 440.

⁹⁸ Article 8 of Presidential Decree No. 603:

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¹⁰² Sempio-Diy, A. (1988). *Handbook on the Family Code of the Philippines*, pp. 296-297.

¹⁰³ Pablo-Gualberto v. Gualberto V, *supra*.

¹⁰⁴ 133 Phil. 884, 894, August 30, 1968.

¹⁰⁵ 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."

¹⁰⁶ P. 895, per Castro, *J*.

¹⁰⁷ "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."

¹⁰⁸ Perez v. CA, *supra*.

¹⁰⁹ Briones v. Miguel, *supra*.

¹¹⁰ Dacasin v. Dacasin, *supra*.

¹¹¹ Smith, A. *Gender Discrimination in Child Custody Battles*.

¹¹² Poole Jr., S. N. (1978). *Maternal Preference and the Double Burden: Best Interest of Whom?* 38 La. L. Rev.

¹¹³ Espiritu vs. Court of Appeals, *supra*.

¹¹⁴ Smith, A., *supra*.

¹¹⁵ As cited by Smith, *supra*; Hoffman, C. D., and Moon, M. (2000) *Mothers' and Fathers' Gender-Role Characteristics: The Assignment of Post-divorce Child Care and Custody*. *Sex Roles*, 42: 917-924.

¹¹⁶ *Id*.

¹¹⁷ Smith, *supra*.

¹¹⁸ *Id*.

¹¹⁹ Rosenblum, D., *supra*.

¹²⁰ *Id*.

¹²¹ 458 U.S. 718 (1982).

¹²² Rosenblum, *supra*.

¹²³ *Van Pletzen v Van Pletzen*, *supra*.

¹²⁴ 1996 (3) SA 509 (O).

¹²⁵ Pruett, *supra*.

¹²⁶ As cited by Smith, *supra*; Scott, E. S., and Emery, R. E. (2014). *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*. *Law and Cotemporary Problems*, 77(1): 69108.

¹²⁷ Santos vs. Court of Appeals, *supra*.

¹²⁸ *Reyes vs. Alvarez*, 8 Phil. 732

¹²⁹ *Celis vs. Cafuir*, 86 Phil. 555

¹³⁰ As cited by Marsha Kline Pruett, *Joint Custody: A Judicious Choice for Families – But How, When, and Why?*

¹³¹ *In re Wesley J.K.*, 299 Pa. Super. 504 (1982)