



Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

DAVID H. CARNABUCI,
Petitioner,

G.R. No. 266116

Present:

-versus-

LEONEN, J., Chairperson,
LAZARO-JAVIER,
LOPEZ, M.,
LOPEZ, J., and
KHO, JR., JJ.

HARRYVETTE ROWENA
TAGAÑA-CARNABUCI,
JOSELYN B. ESPIRITU,* and
“JOHN DOES,”
Respondents.

Promulgated:
JUL 22 2024

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DECISION

LOPEZ, J., J.:

This Court resolves a Petition for Review on *Certiorari*¹ filed by David H. Carnabuci (David) assailing the Decision² and the Resolution³ of the Court of Appeals (CA), which affirmed with modification the Decision⁴ of the Regional Trial Court (RTC) denying the Petition for *Habeas Corpus* with Child Custody.⁵

On October 16, 2019, David filed the Petition for *Habeas Corpus* praying that an order be issued directing respondents Harryvette Rowena Tagaña-Carnabuci (Harryvette), Joselyn B. Espiritu (Joselyn), and “John

* Also referred to as “Joselyn B. Catangui” in some parts of the *rollo*.

¹ *Rollo*, pp. 23–62.

² *Id.* at 63–89. The December 12, 2022 Decision in CA-G.R. SP No. 173454 was penned by Associate Justice Rafael Antonio M. Santos and concurred in by Associate Justices Fernanda Lampas Peralta and Lorenza R. Bordios of the Second Division, Court of Appeals, Manila.

³ *Id.* at 90–99. The March 2, 2023 Resolution in CA-G.R. SP No. 173454 was penned by Associate Justice Rafael Antonio M. Santos and concurred in by Associate Justices Fernanda Lampas Peralta and Lorenza R. Bordios of the Second Division, Court of Appeals, Manila.

⁴ *Id.* at 100–126. The February 9, 2022 Decision in SP. Proc. Case No. 19-3221 was penned by Presiding Judge Gay Marie F. Lubigan-Rafael of Branch 73, Regional Trial Court, Antipolo City.

⁵ *Id.* at 129–133.

Does” to produce the bodies of his and Harryvette’s two minor children, Rocco Antonino Carnabuci⁶ (Rocco) and Zahara Brigitte Carnabuci (Zahara). At the time of filing, they were 3 and 2 years old, respectively.⁷

Sometime in 2012, David, an Italian citizen, met Harryvette in La Union, and they began a romantic relationship. Later, they flew to Santa Fe, Bantayan Island in the Province of Cebu, where David resided and ran a restaurant business since 2012.⁸

On January 28, 2013, the pair got married. Eventually, Rocco was born on December 29, 2015, while Zahara was born on February 23, 2017.⁹

Prior to Harryvette’s marriage to David, she also had two other children, Paulyn Nicole Tagaña (Paulyn) and Paul Nicolyn Arellano (Paul), who were then 17 and 15 years old, respectively.¹⁰

Sometime in 2015, David and Harryvette’s marital relations crumbled. Harryvette alleged that David would physically abuse her, leading to their eventual separation.¹¹

To settle disputes regarding their minor children’s support and custody, David and Harryvette executed a Memorandum of Agreement¹² dated December 8, 2017, where David obliged himself to give PHP 2,500,000.00 to Harryvette in exchange for the joint or shared custody of the minor children.¹³ The agreement also stated that David would only provide support for the minor children when they were in his custody, among others. The pertinent provisions are as follows:

3. That the PARTIES have two common children, namely ROCCO ANTONINO CARNABUCI and ZAHARA BRIGITTE CARNABUCI[,] and agree to share in their custody;

3.a. manner of sharing custody of children: equal number of days in a year to both parties; the dates of which, to be agreed by the parties on a case to case basis, depending on the availability of the parties.

4. The SECOND PARTY undertakes to provide support for the parties’ two common children when their children are with the custody of the FIRST PARTY and further specifically undertakes to shoulder the following expenses:

⁶ Also referred to as “Rocco Antonio Carnabuci” in some parts of the *rollo*.

⁷ *Id.* at 65.

⁸ *Id.* at 71.

⁹ *Id.* at 113.

¹⁰ *Id.* at 72.

¹¹ *Id.*

¹² *Id.* at 193–194.

¹³ *Id.* at 72.

4.a. Daily allowance in the amount of Eight Hundred Fifty pesos ([PHP] 850.00) per day for both children which is immediately payable upon the FIRST PARTY taking custody of the children or within reasonable time; For the purpose of this provision, the daily allowance includes but not limited to the expenses for the babysitters or house helpers.

4.b. Half of the Travelling Expenses to/from the taking of the custody of children from the SECOND PARTY[.]¹⁴

In 2018, Harryvette left Cebu and brought their minor children with her to Antipolo City. David claimed that sometime after, Harryvette left for Paris, France to find work and to be with her new partner. A year later, sometime between March and April 2019, Harryvette returned to the Philippines to introduce her new partner to her family and their minor children. After, Harryvette again left for France and turned over the custody of their minor children to David.¹⁵

In July 2019, Harryvette returned to the Philippines. During that time, she and her mother, Joselyn, learned that David went to Thailand for 12 days and left Rocco and Zahara in the care of a couple named Ben and Emily Ilustrisismo (spouses Ilustrisismo) in Bantayan, Cebu without Harryvette's knowledge and consent.¹⁶

On August 9, 2019, Harryvette and Joselyn went to Bantayan Island, Cebu to visit the children and take them to stay in the latter's house in Antipolo City.¹⁷

Harryvette then executed a notarized document dated September 4, 2019, authorizing Joselyn to act as the guardian of her four children upon her return to Paris.¹⁸

On October 7, 2019, David visited Rocco and Zahara in Antipolo City and demanded their custody from Joselyn. However, Joselyn refused his plea and insisted that she had a better right of custody than David pursuant to the authority granted her by Harryvette.¹⁹

The RTC found that the Petition for *Habeas Corpus* filed by David was sufficient in form and substance. It then directed the issuance of summons to Harryvette and Joselyn, which was served through personal

¹⁴ *Id.* at 72–73.

¹⁵ *Id.* at 30.

¹⁶ *Id.* at 73–74.

¹⁷ *Id.* at 74.

¹⁸ *Id.*

¹⁹ *Id.* at 66.

service and received by Joselyn. The RTC also directed Joselyn to appear with Rocco and Zahara on October 29, 2019.²⁰

On even date, the RTC issued an Order²¹ granting Joselyn provisional custody over Rocco and Zahara. However, David was allowed to have unlimited visitation rights under the following conditions:

- a. The petitioner should inform the grandmother as to the date of pick-up and when he should bring back the children to the grandmother.
- b. The petitioner is also allowed to bring the two (2) minor children [to] the city of Antipolo City and within the area of Metro Manila only.²²

Then, on October 30, 2019, the RTC issued a Hold Departure Order directing the Bureau of Immigration and Deportation not to allow the departure of Rocco and Zahara from the Philippines without its permission.²³

In their Answer,²⁴ Harryvette and Joselyn prayed for the dismissal of the Petition arguing that David was incapable of financially providing for the needs of Rocco and Zahara, which was why Harryvette left for work abroad. According to them, David stopped giving the minor children financial support since August 9, 2019.²⁵

Harryvette and Joselyn claimed that David endangered Rocco and Zahara's lives as he did not provide them with a healthy living environment. They claimed that David was unfit to care for the children as he was a habitual drinker, chain smoker, and womanizer.²⁶ David also posted photographs of Rocco drinking from a bottle of beer online, which was accessible to their family and friends, showing that David was irresponsible.²⁷

Next, Joselyn claimed that David would often hire nannies and housekeepers to take care of their minor children while Harryvette was away, but David would let go of them abruptly for unknown reasons. David would also prevent Harryvette from communicating with Rocco and Zahara. Allegedly, she was only able to secretly speak with them through the nannies, whom she provided with separate cell phones.²⁸

²⁰ *Id.* at 67.

²¹ *Id.*

²² *Id.* at 67-68.

²³ *Id.* at 68.

²⁴ *Id.* at 140-146.

²⁵ *Id.* at 144.

²⁶ *Id.* at 143.

²⁷ *Id.* at 144.

²⁸ *Id.* at 142.

In a particular incident, Harryvette returned to the Philippines to visit Rocco and Zahara, but David prevented her from entering the premises by locking the gate of their house. David also threw away all the clothes and necessary items such as feeding bottles that Harryvette gave them. This prompted her to report the matter to the nearest police station. With the help of the Municipal Social Welfare and Development (MSWD), she was able to regain custody of their minor children.²⁹

Harryvette also pointed out that during David's trip to Thailand where he entrusted Rocco and Zahara to spouses Ilustrisimo, David prevented her from speaking with them as he would hire new nannies.³⁰

Lastly, Harryvette and Joselyn argued that David failed to prove his accusations that Harryvette was engaged in an illicit relationship with a new partner and how this should divest her of custody over their minor children.³¹

In his Reply,³² David denied Joselyn's allegations against him. He claimed that Harryvette and Joselyn failed to provide evidence to disqualify him from exercising parental authority or custody over their minor children. David maintained that under Articles 211 and 212 of the Family Code, it is the father who is preferred to take custody of the minor children in the absence of the mother and not the maternal grandmother. Thus, it should be awarded to him owing to Harryvette's absence.³³

As a result of the pre-trial, the RTC issued its December 5, 2019 Order³⁴ directing the MSWD of Antipolo City to submit a case study report on the minor children and all other persons related to them, as well as a report and recommendation within 30 days from notice. The Department of Social Welfare and Development of Bantayan Island, Cebu was likewise directed to make a case study and submit a comprehensive report on David along with its respective recommendation.³⁵

On February 27, 2020, David asked permission to bring Rocco and Zahara with him to Bantayan Island for one month. The RTC granted this upon the condition that the minor children were accompanied by a person trusted by Joselyn for the entire period of their stay on the island.³⁶

²⁹ *Id.*

³⁰ *Id.* at 142.

³¹ *Id.* at 145.

³² *Id.* at 155–159.

³³ *Id.* at 155.

³⁴ *Id.* at 165–169.

³⁵ *Id.* at 168.

³⁶ *Id.* at 102.

David then filed a Manifestation³⁷ where he informed the RTC that he remitted PHP 50,000.00 to Joselyn equivalent to five months of support for the minor children.³⁸

However, due to the COVID-19 pandemic which resulted in a lockdown and nationwide community quarantine, David failed to obtain custody over their minor children.³⁹

When conditions in the country improved, David filed another Motion⁴⁰ to take their minor children into his custody for a period of three months. However, the RTC denied this in an Order⁴¹ due to the ongoing pandemic, reiterating that David may visit them any time.⁴²

After, David filed another Motion⁴³ for the temporary custody of the minor children. This was granted by the RTC in an Order⁴⁴ dated March 15, 2021, where the minor children were permitted to stay with him for three days upon the condition that he furnish the court with the itinerary of their travel and that they were accompanied by a nanny, among others.⁴⁵

Resolving the case on its merits, the RTC issued a Decision,⁴⁶ granting Harryvette not only exclusive parental authority and care over Rocco and Zahara, but also permanent custody of them. The dispositive portion of the RTC Decision states:

WHEREFORE, in light of all the foregoing, the court hereby rules as follows:

- i. The Petition dated October 19, 2019 is hereby **DENIED**.
- ii. Respondent Harryvette Rowena Tagaña-Carnabuci shall have *exclusive parental authority*, care, and *permanent custody* over the minors Rocco Antoni[n]o T. Carnabuci and Zahara Brigitte T. Carn(a)buci.
- iii. In her absence and considering that Harryvette Rowena Tagaña-Carnabuci is currently abroad, the children's maternal grandmother, Joselyn B. [Espiritu], is allowed to exercise immediate custody and parental authority over the children.

³⁷ *Id.* at 170-183.

³⁸ *Id.* at 192.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 100-126.

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- iv. Petitioner is allowed visitation rights over his children under the following conditions:
 - a. The petitioner shall have visitation rights over the children every Saturdays and Sundays.
 - b. The petitioner can also visit the children on special occasions such as but not limited to their birthdays, even if it does not fall on Saturdays or Sundays, as long as it does not prejudice their education.
 - c. Petitioner may have the children in his custody during holidays or for five (5) days when the children are in their school break, upon prior written consent of Harryvette Rowena Tagaña-Carnabuci. Provided, that petitioner may have his children only [in] either the celebration of Christmas day or New Year's day, subject to the election of the respondents.
 - d. The children shall always be accompanied by Joselyn [Espiritu] or any person of her choice.
 - e. The petitioner is not permitted to bring the children outside the Province of Rizal unless with the permission of either Harryvette Rowena Tagaña-Carnabuci or Joselyn B. [Espiritu].
- v. The petitioner is directed to provide a monthly support of Twenty Thousand Pesos (PHP 20,000.00) to the children inclusive of their basic, medical and miscellaneous expenses. The full amount shall be deposited to respondent Joselyn B. [Espiritu]'s bank account on or before the fifth (5th) day of every month starting March 2022. For this purpose, said respondent is directed to give the details of her bank account to the petitioner.
- vi. Respondent Joselyn B. [Espiritu] is directed to account for the monthly support that she will be receiving from the petitioner and to keep all the receipts relative to the children's expenses using the support provided by the petitioner. She shall keep all accounts and documentations in her custody which must be available upon demand.
- vii. Failure on the part of the parties to comply with this Decision of the Court, the court shall act accordingly.
- viii. The Hold Departure Order dated October 30, 2019 shall remain in force until the children reaches seven (7) years old.

SO ORDERED.⁴⁷ (Emphasis supplied)

The RTC ruled that as David and Harryvette have been separated in fact since 2019, and both Rocco and Zahara were under the age of seven, Article 213 of the Family Code is the applicable law. Based on the “tender-age” presumption, if the minor children are below seven years of age, custody over them belongs to the mother, unless the court finds compelling reasons to order otherwise. Hence, it awarded custody to Harryvette.⁴⁸

In arriving at its decision on whom to award custody, the RTC also took into consideration factors such as David’s tendency to frequently drink alcohol, the admission that he indeed committed acts of physical violence to Harryvette, which were reported to the authorities sometime in July 2018, and that he stopped giving financial support to the minor children since August 2019.⁴⁹ It took note of the fact that it was only when David filed his Manifestation that he gave PHP 50,000.00 to Rocco and Zahara after the court reminded him of his obligation. After, he again reneged on his obligation for a year reasoning that he already gave around PHP 3 million to Harryvette.⁵⁰

Next, David failed to adduce evidence to show how Harryvette was unfit to care for their minor children. The RTC disregarded David’s claims of Harryvette being in a relationship with another person and found this insufficient to divest her of custody.⁵¹

However, due to Harryvette’s absence from the country, the RTC allowed Joselyn to exercise immediate custody and parental authority over the minor children.⁵²

In the Parenting Capability Assessment Report by the City Social Welfare and Development (CSWD), they found that Joselyn is more capable of taking care of the minor children and recommended that the children remain with her.⁵³ The RTC also found that Harryvette maintained constant communication with her minor children despite being away by calling and accessing the CCTV of their home in Antipolo City to monitor them from France. Further, Harryvette provided PHP 50,000.00 every month for their daily needs, proving that she was also financially capable of caring for them.⁵⁴

⁴⁷ *Id.* at 126.

⁴⁸ *Id.* at 112–113.

⁴⁹ *Id.* at 117.

⁵⁰ *Id.* at 118.

⁵¹ *Id.* at 115.

⁵² *Id.* at 122.

⁵³ *Id.* at 119.

⁵⁴ *Id.* at 119.

David was also granted visitation rights over the minor children subject to certain conditions and was directed to provide monthly support.⁵⁵

Aggrieved, David filed a Motion for Reconsideration but was denied in a Resolution.⁵⁶ He then appealed to the CA.⁵⁷

In the assailed Decision,⁵⁸ the CA partly granted the appeal and modified the RTC's Decision, particularly that David and Harryvette have joint parental authority over their minor children and that Harryvette had sole custody of them instead of permanent custody:

WHEREFORE, the appeal is **PARTLY GRANTED**. Accordingly, the *Decision* dated 9 February 2022 of the Regional Trial Court, Fourth Judicial Region, Branch 73, Antipolo City in Sp. Proc. No. 19-3321 is **MODIFIED** in part and shall read as follows:

WHEREFORE, in light of the foregoing, the court hereby rules as follows:

- i. The Petition dated October 19, 2019 is hereby **DENIED**.
- ii. Respondent Harryvette Rowena Tagaña-Carnabuci and petitioner David Carnabuci shall have *joint parental authority* over the minors Rocco Antonino T. Carnabuci and Zahara Brigitte T. Carnabuci.
- iii. Respondent Harryvette Rowena Tagaña-Carnabuci shall have *sole custody* over the minors Rocco Antonino T. Carnabuci and Zahara Brigitte T. Carnabuci.
- iv. Considering that Harryvette Rowena Tagaña-Carnabuci is currently abroad, the children's maternal grandmother, Joselyn B. [Espiritu], is allowed to exercise *provisional custody* over the children.
- v. Petitioner is allowed visitation rights over his children under the following conditions:
 - a. The petitioner shall have visitation rights over the children every Saturdays and Sundays.
 - b. The petitioner can also visit the children on special occasions such as but not limited to their birthdays, even if it does not fall on Saturdays or Sundays, as long as it does not prejudice their education.

⁵⁵ *Id.* at 123.

⁵⁶ *Id.* at 127–128.

⁵⁷ *Id.* at 326–327.

⁵⁸ *Id.* at 63–89.

- c. Petitioner may have the children in his custody during holidays or for five (5) days when the children are in their school break, upon prior written consent of Harryvette Rowena Tagaña-Carnabuci. Provided, that petitioner may have his children only either the celebration of Christmas [D]ay or New Year's [D]ay, subject to the election of the respondents.
 - d. The children shall always be accompanied by Joselyn B. [Espiritu] or any person of her choice.
 - e. The petitioner is not permitted to bring the children outside the Province of Rizal unless with the permission of either Harryvette Rowena Tagaña-Carnabuci or Joselyn B. [Espiritu].
- vi. The petitioner is directed to provide a monthly support of Twenty Thousand Pesos ([PHP] 20,000.00) to the children inclusive of their basic, medical and miscellaneous expenses. The full amount shall be deposited to respondent Joselyn B. [Espiritu]'s bank account on or before the fifth (5th) day of every month starting March 2022. For this purpose, said respondent is directed to give the details of her bank account to the petitioner.
- vii. Respondent Joselyn B. [Espiritu] is directed to account for the monthly support that she will be receiving from the petitioner and to keep all the receipts relative to the children's expenses using the support provided by the petitioner. She shall keep all accounts and documentations in her custody which must be available upon demand.
- viii. Failure on the part of the parties to comply with this Decision of the court, the court shall act accordingly.
- ix. The Hold Departure Order dated October 30, 2019 shall remain in force until the children reaches [sic] seven (7) years old[.]

SO ORDERED.⁵⁹ (Emphasis supplied)

First, the CA found that the RTC's grant of sole custody to Harryvette cannot be regarded as "permanent" as custody is not unalterable. It emphasized that if the parent given custody over children suffers a future character change or becomes unfit, the matter of custody can always be reexamined by the courts. Thus, it found the RTC's qualifying of the grant in such manner improper:

⁵⁹ *Id.* at 87-89.

This Court even notes that there is nothing in the record that shows the concrete details or status of respondent-appellee Harryvette's employment in Paris, its duration, or her intention, if there is any, of seeking residency in said country other than respondent-appellee's Joselyn's statement that the former had been working several part-time jobs. To grant respondent-appellee Harryvette "permanent" custody would bar an adjustment along the line should there be a need to reevaluate the best interest of the minor children or should any circumstance change that would render her unfit or that would jeopardize the children's welfare.⁶⁰ (Citation omitted)

Next, the CA upheld the RTC's award of provisional custody to Joselyn based on Article 213 of the Family Code, emphasizing that it is effective only when Harryvette is away. Due to Harryvette being abroad, it would be in the best interest of the minor children to remain with Joselyn who can give full and undivided attention to them as opposed to David who was found by the RTC to be a habitual drinker, smoker, and had exhibited violent tendencies toward Harryvette in the past.⁶¹

It also affirmed the visitation rights granted by the RTC to David. However, it disagreed with the RTC's grant of exclusive parental authority to Harryvette as there was no basis to warrant the suspension or termination of David's rights to exercise this over their children pursuant to Article 228 to 232 of the Family Code.⁶²

Undeterred, David moved for reconsideration.⁶³ Meanwhile, Harryvette and Joselyn filed their Comment to the Motion for Reconsideration with Motion to Allow the Minor Children to Travel with Joselyn to go to France and be with Harryvette.⁶⁴

In the assailed Resolution,⁶⁵ the CA denied David's Motion, finding no compelling reason to justify a modification or reversal of its findings. It also denied Harryvette and Joselyn's Motion due to the standing Hold Departure Order, which remains in force until the children reach 7 years of age:

WHEREFORE, petitioner-appellant's Motion for Reconsideration is **DENIED** for lack of merit. Respondents-appellees' *Motion to Allow Minor Children to Travel with Respondent-Appellee Joselyn Espiritu* incorporated in their Comment to the Motion for Reconsideration is noted without action in accordance with the ruling of the Court.

⁶⁰ *Id.* at 81-82.

⁶¹ *Id.* at 82.

⁶² *Id.* at 85-86.

⁶³ *Id.* at 393-407.

⁶⁴ *Id.* at 94.

⁶⁵ *Id.* at 90-99.

SO ORDERED.⁶⁶ (Emphasis in the original)

The CA emphasized that Harryvette and Joselyn's Motion should have been addressed to the family court that issued the hold departure order pursuant to A.M. No. 03-04-04-SC, or the Rule on Custody of Minors and Writ of *Habeas Corpus* in relation to Custody of Minors.⁶⁷

Hence, David filed the instant Petition.

In the Petition,⁶⁸ David argues that the CA erred in awarding joint parental authority to both him and Harryvette as well as in granting Harryvette sole custody over their children. Instead, he argues that it should have awarded them joint custody over the children as Article 213 of the Family Code does not explicitly confer to the mother sole parental authority or sole custody. It only mandates that no child under 7 years of age shall be separated from the mother, but it does not strip the father of his right to joint or shared custody of his legitimate minor children and nothing in the provision disallows a father from seeing or visiting his child.⁶⁹

Next, David contends that Harryvette should be considered "absent" within the contemplation of Article 212 of the Family Code for being away from her place of usual residence. He points out that the CA based their ruling on the CSWD's Parenting Capability Assessment Report, but it failed to account for the lack of proof of Harryvette's employment in France, specifically the exact duration of her stay or her intention, if any, or if she is seeking residency there. Joselyn merely provided that Harryvette worked several part-time jobs. She also admitted that Harryvette had not visited their children since 2019.⁷⁰

Meanwhile, David claims to have been granted a permanent immigrant visa by the Bureau of Immigration and continues to run a restaurant, as well as leasing business for a term of 25 years, or until 2035, renewable for another 10 years. He also claims to have income from Italy albeit irregularly. Thus, he is more capable of providing for their children and should be awarded custody over them.⁷¹

Lastly, he disputes the CA's grant to Joselyn to exercise provisional custody over their children. David maintains that parental authority cannot be transferred by virtue of a mere letter executed by Harryvette designating Joselyn to act as a guardian. Further, under Article 214⁷² of the Family

⁶⁶ *Id.* at 98-99.

⁶⁷ *Id.* at 98.

⁶⁸ *Id.* at 23-62.

⁶⁹ *Id.* at 42-45.

⁷⁰ *Id.* at 45-46.

⁷¹ *Id.* at 57.

⁷² FAMILY CODE, art. 214 states:

Code, parental authority may only be substituted in case of the death, absence, or unsuitability of the parent.⁷³

Issues

The questions for this Court to resolve are:

First, whether the CA erred in denying the Petition for *Habeas Corpus* with Child Custody when it granted joint parental authority to petitioner David H. Carnabuci and respondent Harryvette Rowena Tagaña-Carnabuci but only the sole custody over their children to respondent Harryvette Rowena Tagaña-Carnabuci;

Second, whether respondent Harryvette Rowena Tagaña-Carnabuci can be considered absent under Article 212 of the Family Code; and

Finally, whether respondent Joselyn B. Espiritu may exercise provisional authority over the children, as their maternal grandmother, due to Harryvette Rowena Tagaña-Carnabuci's absence.

This Court's Ruling

At the outset, this Court underscores the fundamental policy of the State as embodied in the Constitution in promoting and protecting the welfare of children, in accordance with the principle of the best interest of the child.

As a party to the United Nations Convention on the Rights of the Child, the Philippines bound itself to uphold Articles 3 and 9, that is, in all actions concerning children the best interest of the child shall be of primary consideration and that a child has the right not to be separated from their parents, except in their best interests and by a judicial procedure.

This principle is relevant in cases involving adoption, guardianship, support, personal status, minors in conflict with the law, and the case at bar, child custody.

Here, David's filing of a Petition for *Habeas Corpus* was resorted to for the purpose of obtaining custody over his two minor children.

ARTICLE 214. – In case of death, absence or unsuitability of the parents, substitute parental authority shall be exercised by the surviving grandparent. In case several survive, the one designated by the court, taking into account the same consideration mentioned in the preceding article, shall exercise the authority

⁷³ *Id.* at 52.

This Court clarified the function of *habeas corpus* in custody cases in *Sombong v. Court of Appeals*:⁷⁴

Fundamentally, in order to justify the grant of the writ of *habeas corpus*, the restraint of liberty must be in the nature of an illegal and involuntary deprivation of freedom of action. This is the basic requisite under the first part of Section 1, Rule 102, of the Revised Rules of Court, which provides that “except as otherwise expressly provided by law, the writ of *habeas corpus* shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty.”

In the second part of the same provision, however, *Habeas Corpus* may be resorted to in cases where “the rightful custody of any person is withheld from the person entitled thereto.” Thus, although the Writ of *Habeas Corpus* ought not to be issued if the restraint is voluntary, we have held time and again that the said writ is the proper legal remedy to enable parents to regain the custody of a minor child even if the latter be in the custody of a third person of her own free will.

It may even be said that *in custody cases involving minors, the question of illegal and involuntary restraint of liberty is not the underlying rationale for the availability of the writ as a remedy; rather, the writ of habeas corpus is prosecuted for the purpose of determining the right of custody over a child.*

The controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until he attains majority age. In 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.*⁷⁵ (Emphasis supplied, citation omitted)

A writ of *habeas corpus* as a means of recovering custody is embodied in A.M. No. 03-04-04-SC or the Rule on Custody of Minors and Writ of *Habeas Corpus* in Relation to Custody of Minors.

Aside from the requirements for the issuance of the writ in Section 20⁷⁶ of the same Rule, Section 14 provides an enumeration of factors that

⁷⁴ 322 Phil. 737 (1996) [Per J. Hermosisima, Jr., First Division].

⁷⁵ *Id.* at 749-750.

⁷⁶ A.M. No. 03-04-04-SC – Rule on Custody of Minors and Writ of *Habeas Corpus* in Relation to Custody of Minors. Section 20 provides:

may be considered by the courts in determining whom to award custody over minor children:

SECTION 14. *Factors to consider in determining custody.* – In awarding custody, the court shall consider the best interests of the minor and shall give paramount consideration to his 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 his physical, psychological and emotional development. It also means the least detrimental available alternative for safeguarding the growth and development of the minor.

The court shall also consider the following:

- (a) Any extrajudicial agreement which the parties may have bound themselves to comply with respecting the rights of the minor to maintain direct contact with the non custodial parent on a regular basis, except when there is an existing threat or danger of physical, mental, sexual or emotional violence which endangers the safety and best interests of the minor;
- (b) The desire and ability of one parent to foster an open and loving relationship between the minor and the other parent;
- (c) The health, safety and welfare of the minor;
- (d) Any history of child or spousal abuse by the person seeking custody or who has had any filial relationship with the minor, including anyone courting the parent;
- (e) The nature and frequency of contact with both parents;
- (f) Habitual use of alcohol, dangerous drugs or regulated substances;
- (g) Marital misconduct;

SECTION 20. *Petition for writ of habeas corpus.* – A verified petition for a writ of *habeas corpus* involving custody of minors shall be filed with the Family Court. The writ shall be enforceable within its judicial region to which the Family Court belongs.

However, the petition may be filed with the regular court in the absence of the presiding judge of the Family Court, provided, however, that the regular court shall refer the case to the Family Court as soon as its presiding judge returns to duty.

The petition may also be filed with the appropriate regular courts in places where there are no Family Courts.

The writ issued by the Family Court or the regular court shall be enforceable in the judicial region where they belong.

The petition may likewise be filed with the Supreme Court, Court of Appeals, or with any of its members and, if so granted, the writ shall be enforceable anywhere in the Philippines. The writ may be made returnable to a Family Court or to any regular court within the region where the petitioner resides or where the minor may be found for hearing and decision on the merits.

Upon return of the writ, the court shall decide the issue on custody of minors. The appellate court, or the member thereof, issuing the writ shall be furnished a copy of the decision.

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(h) The most suitable physical, emotional, spiritual, psychological and educational environment for the holistic development and growth of the minor; and

(i) The preference of the minor over seven years of age and of sufficient discernment, unless the parent chosen is unfit.

Applying the foregoing, this Court proceeds to determine whether the CA erred in its ruling.

Custody and parental authority

Under Philippine law, custody arrangements over children can either be sole or joint. In a sole custody arrangement, one parent has the exclusive legal custody of a child whereas in a joint custody arrangement, both parents exercise such right.

In *Santos v. Court of Appeals*,⁷⁷ We said that the right of custody accorded to parents springs from the exercise of their parental authority:

Parental authority or *patria potestas* in Roman Law is the juridical institution whereby parents rightfully assume control and protection of their unemancipated children to the extent required by the latter's needs. *It is a mass of rights and obligations which the law grants to parents for the purpose of the children's physical preservation and development, as well as the cultivation of their intellect and the education of their heart and senses.* As regards parental authority, "there is no power, but a task; no complex of rights, but a sum of duties; no sovereignty but a sacred trust for the welfare of the minor."⁷⁸ (Emphasis supplied, citations omitted)

Further, in the Separate Opinion of Justice A. Reyes, Jr. in *Versoza v. People*,⁷⁹ custody and parental authority were discussed in this wise:

American courts, in interpreting the term "custody," have conceded that the "complex of rights" embraced thereby have "no precise contours." It has been held that parents with custody and control of their children have "the right to make all reasonable decisions for control and proper functioning of the family as a harmonious social unit," including the right to "make decisions regarding care and control, education, health, and religion."

Under contemporary law, parental authority remains a plenary authority whose scope is almost all-encompassing, subject only to the limitations expressly provided for by statute and by the best interests standard. Parents and guardians are vested with this plenary power in view

⁷⁷ 312 Phil. 482 (1995) [Per J. Romero, Third Division].

⁷⁸ *Id.* at 487-488.

⁷⁹ 861 Phil. 230 (2019) [Per Curiam, En Banc].

of their legal responsibility to support, educate, direct, and protect their children or wards.⁸⁰ (Citations omitted)

As a general rule, Article 211 of the Family Code is instructive that it is the father and mother who jointly exercise parental authority:

Article 211. The father and the mother shall jointly exercise parental authority over the persons of their common children. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.

Children shall always observe respect and reverence towards their parents and are obliged to obey them as long as the children are under their parental authority.

Article 220⁸¹ also enumerates the rights and duties of the parents and those exercising parental authority over their children or wards, regardless of their status.

By way of exception, A.M. No. 02-11-12-SC or the Proposed Rule on Provisional Orders provides for instances when courts may award the provisional custody of children to people other than their parents:

SECTION 4. *Child Custody*. – In determining the right party or person to whom the custody of the child of the parties may be awarded pending the petition, the court shall consider the best interests of the child and shall give paramount consideration to the material and moral welfare of the child.

The court may likewise consider the following factors: (a) the agreement of the parties; (b) the desire and ability of each parent to foster an open and loving relationship between the child and the other parent; (c) the child's health, safety, and welfare; (d) any history of child or spousal abuse by the person seeking custody or who has had any filial relationship with the child, including anyone courting the parent; (e) the nature and frequency of contact with both parents; (f) habitual use of alcohol or regulated substances; (g) marital misconduct; (h) the most suitable physical, emotional, spiritual, psychological and educational environment;

⁸⁰ *Id.* at 378–379.

⁸¹ FAMILY CODE, art. 220 states:

ARTICLE 220. – The parents and those exercising parental authority shall have with respect to their unemancipated children or wards the following rights and duties:

- (1) To keep them in their company, to support, educate and instruct them by right precept and good example, and to provide for their upbringing in keeping with their means;
- (2) To give them love and affection, advice and counsel, companionship and understanding;
- (3) To provide them with moral and spiritual guidance, inculcate in them honesty, integrity, self-discipline, self-reliance, industry and thrift, stimulate their interest in civic affairs, and inspire in them compliance with the duties of citizenship;
- (4) To enhance, protect, preserve and maintain their physical and mental health at all times;
- (5) To furnish them with good and wholesome educational materials, supervise their activities, recreation and association with others, protect them from bad company, and prevent them from acquiring habits detrimental to their health, studies and morals; and guardians.



and (i) the preference of the child, if over seven years of age and of sufficient discernment, unless the parent chosen is unfit.

The court may award provisional custody in the following order of preference: (1) to both parents jointly; (2) to either parent taking into account all relevant considerations under the foregoing paragraph, especially the choice of the child over seven years of age, unless the parent chosen is unfit; (3) to the surviving grandparent, or if there are several of them, to the grandparent chosen by the child over seven years of age and of sufficient discernment, unless the grandparent is unfit or disqualified; (4) to the eldest brother or sister over twenty-one years of age, unless he or she is unfit or disqualified; (5) to the child's actual custodian over twenty-one years of age, unless unfit or disqualified; or (6) to any other person deemed by the court suitable to provide proper care and guidance for the child.

The custodian temporarily designated by the court shall give the court and the parents five days notice of any plan to change the residence of the child or take him out of his residence for more than three days provided it does not prejudice the visitation rights of the parents. (Emphasis supplied)

At present, the same law provides that in awarding custody over minor children, courts take into consideration the totality of the circumstances and conditions that are most congenial to the survival, protection, and feelings of security of the minor encouraging his or her physical, psychological, and emotional development. Thus, custody is not strictly hinged upon the physical presence or proximity of a parent to a child. In fact, the Rule on Custody of Minors provides that a petition for custody "may be filed by any person claiming such right."

However, in cases where the parents are separated, it is Article 213 of the Family Code that applies:

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

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

This provision of law embodies the so-called "tender-age presumption" where children who are under 7 years of age shall not be separated from the mother unless the court finds compelling reasons to order otherwise. Notably, the use of the word "shall" connotes its mandatory character.

In the past, the following have been considered justification to deprive a mother of custody and parental authority, such as but not limited to: neglect or abandonment, unemployment, immorality, habitual drunkenness, drug addiction, maltreatment of the child, insanity, and affliction with a communicable disease.⁸²

It remains undisputed that petitioner and respondent Harryvette were married under Philippine law and have been in a *de facto* separation or were separated in-fact since December 2019. Thus, it is Article 213 that applies. As parents of Rocco and Zahara, both parties were properly awarded the right to exercise joint parental authority by the CA.

The CA was correct in modifying the RTC's ruling insofar as it qualified and gave exclusive parental authority to respondent Harryvette. This effectively deprived petitioner of his right to exercise his right without providing basis for the same.

We maintain that the separation of the parents of their marital union does not automatically and simultaneously divest them of their right to exercise personal authority over their children.

Further, Article 210 of the Family Code states that parental authority and responsibility may not be renounced or transferred except in the cases authorized by law.⁸³ In some instances, this Court allowed for a waiver in cases of adoption, guardianship, and surrender to a children's home,⁸⁴ none of which are applicable in this case.

This case does not also fall under the instance when sole parental authority is awarded to the mother in cases of nonmarital children,⁸⁵ as Rocco and Zahara were born during the parties' marriage.

Hence, David should be allowed to continue to exercise his rights. Considering this, We affirm the visitation rights granted to him, subject to the limitations provided by the RTC and the CA.

As to the issue of custody, the second paragraph of Article 213 is seemingly limited in duration, lasting only until the child's seventh year. Hence, from a child's eighth year until their emancipation, the law gives separated parents the freedom to agree on custody regimes they see fit to adopt, subject to limitations.

⁸² *Briones v. Miguel*, 483 Phil. 483, 493 (2004) [Per J. Panganiban, Third Division]. (Citations omitted)

⁸³ FAMILY CODE, art. 210.

⁸⁴ *See Santos v. Court of Appeals*, 312 Phil. 482, 483 (1995) [Per J. Romero, Third Division].

⁸⁵ G. R. No. 208912 & G.R. No. 209018, *Aquino v. Aquino*, December 7, 2021 [J. Leonen, *En Banc*].

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Indeed, in accordance with the principle of the “best interest of the child,” the award of the custody of minor children to a parent is not an unalterable matter and is subject to a continuing assessment of their fitness and capabilities.

As opined by Justice Abad in his separate opinion in *Dacasin v. Dacasin*,⁸⁶ he stated that:

A joint custody agreement can of course never be regarded as permanent and unbending. *The situations of the mother or the father and even of the child can change and render performance of such agreement no longer in the latter’s best interest.*⁸⁷ (Emphasis supplied)

Otherwise said, a judgment involving the custody of a minor child cannot be accorded the force and effect of *res judicata*.

Indeed, when the Petition for *Habeas Corpus* was filed, Rocco and Zahara were 2 and 3 years old. At present, Rocco and Zahara are now 8 years old and 7 years old.

However, we still affirm the award of sole custody over the minor children to respondent Harryvette.

Respondent Harryvette has not been remiss in exercising her right to parental authority and custody over Rocco and Zahara despite being overseas. As emphasized by the CA in awarding sole custody to her:

With respect to petitioner-appellant’s argument that respondent-appellee Harryvette is “absent,” this Court finds from the evidence presented that while respondent-appellee Harryvette is in fact working abroad, she continues to exercise parental authority over her minor children[,] Rocco and Zahara. With the help of technology, respondent-appellee Harryvette is able to freely and constantly communicate with her children and see them every day before she goes to work through a CCTV with built-in microphone and speaker as reported in the Parenting Capability Assessment Report dated 31 May 2021 submitted by the social worker of Antipolo City upon order of the family court. In the same report, it was also stated that respondent-appellee Harryvette has been sending money every month to support her children’s daily expenses. While the situation may not be ideal, the minor children Rocco and Zahara are still able to receive the attention, care, support, and supervision of their mother in their current setting and home environment, as the law intended, with the assistance of respondent-appellee Joselyn. On the other hand, petitioner-appellant failed to establish that respondent-appellee Harryvette’s stay in Paris is permanent. In fact, petitioner-appellant himself stated that respondent-appellee Harryvette had returned to the

⁸⁶ 625 Phil. 494 (2010) [Per J. Carpio, Second Division].

⁸⁷ *Id.* at 513.

country three (3) times since July 2018. In other words, these circumstances taken together show that while respondent-appellee Harryvette may not be physically present, she cannot be considered “absent” within the contemplation of Article 212 of the Family Code as petitioner-appellant argues, as she still essentially exercises parental authority over said minor children.⁸⁸

Petitioner contends that despite being awarded sole custody of their minor children, respondent Harryvette should be considered “absent” from the country due to her work abroad based on Article 212 of the Family Code:

Article 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. (Emphasis supplied)

According to petitioner, respondent Harryvette is unable to fulfill her duty to their minor children, and for that, he should be the one to exercise both parental authority and custody over them as he is present in the country and can exercise custody.

We disagree. Respondent Harryvette cannot be considered “absent” in contemplation of Article 212 of the Family Code.

As found by the RTC and the CA, respondent Harryvette returned to the Philippines to visit their children three times since 2018, which contravenes David’s claim that her absence is permanent. Further, it was found that respondent Harryvette makes a continuous effort to communicate with their children and watches them through the CCTV system installed in Joselyn’s home despite being away for work. She was also able to financially support them, providing around PHP 50,000.00 to PHP 60,000.00 for their daily needs.

Petitioner also failed to prove that respondent Harryvette is unfit as a mother to divest her custody over their minor children.

Although the situation at hand is peculiar, in the sense that the parent who was awarded custody cannot physically exercise custody over the minor children, it is by no means a novel one.

⁸⁸ Roilo, pp. 79-80

In *Espiritu v. Court of Appeals*,⁸⁹ this Court granted the award of custody over minor children to the petitioner, their father, who was temporarily assigned abroad for work:

Respondent court's finding that the father could not very well perform the role of a sole parent and substitute mother because his job is in the United States while the children will be left behind with their aunt in the Philippines is misplaced. The assignment of Reynaldo in Pittsburgh is or was a temporary one. He was sent there to oversee the purchase of a steel mill component and various equipment needed by the National Steel Corporation in the Philippines. Once the purchases are completed, there is nothing to keep him there anymore. In fact, in a letter dated January 30, 1995, Reynaldo informs this Court of the completion of his assignment abroad and of his permanent return to the Philippines[.]

The law is more than satisfied by the judgment of the trial court. The children are now both over seven years old. Their choice of the parent with whom they prefer to stay is clear from the record. From all indications, Reynaldo is a fit person, thus meeting the two requirements found in the first paragraph of Article 213 of the Family Code[.]⁹⁰

In *Espiritu*, the couple was initially based in the United States. Respondent, the minor children's mother, worked there as a nurse. When the parties separated, petitioner brought their minor children to the Philippines. However, due to his work in the United States, petitioner left their minor children in the custody of his sister, their aunt. This led respondent to file a petition for *habeas corpus* to gain custody over their minor children and have them transferred from the Philippines back to the United States. Ultimately, however, this Court did not award custody to the mother owing to the principle of the best interest of the child as the minor children grew accustomed to the care of their father through their aunt. Again, it does not follow that the parent who is in close proximity with the minor child is the most suitable to be entrusted to their care.

More, as We emphasized in *Espiritu*, the petitioner's employment abroad was limited by a contract and was temporary. Hence, his being physically apart from his minor children did not affect his right to their custody.

As applied here, the mere fact that a parent is an overseas Filipino worker does not deprive them of their right to exercise parental authority or sole custody.

Respondent Harryvette is still able to exercise sole custody through the grant of provisional custody to respondent Joselyn. This springs from respondent Harryvette's right under Article 213 of the Family Code as their

⁸⁹ 312 Phil. 431 (1995) [Per J. Melo, Third Division].

⁹⁰ *Id.* at 447.

mother and thus, is effective only while she is away. Considering that the courts found Harryvette entitled to exercise sole custody over the minor children, she can ask Joselyn to look after them in the exercise of such right.

Between respondent Joselyn and petitioner, it is Joselyn who can better give her full and undivided attention to the minor children and provide them with an environment most conducive to their development. This is as opposed to the latter who was deemed unfit, being a habitual drinker and smoker, and who has previously exhibited violent tendencies. Such findings of fact by the RTC, as affirmed by the CA, are binding and conclusive upon this Court.

In addition, the two minor children have grown accustomed to their way of living with respondent Joselyn and their two older half-siblings. As the CA ratiocinated:

In the Parenting Capability Assessment Report dated May 31, 2021, the City Social Welfare and Development (CSWD)[.]

[I]t was indicated that Joselyn is retired] and devotes all her time to teach Rocco and Zahara. She is hands-on with regard to the needs of the children [as] their nanny is there merely to provide her assistance. In turn, Rocco and Zahara reciprocates the love they received [from] Joselyn; they would always approach her when times get difficult, find her own when she leaves[,] and be at [peace] with her presence.

Attention and time are crucial in Rocc[o] and Zahara's formative years and the court could not emphasize the indispensable of role models [sic] like Joselyn. Under her care, Rocco is currently enrolled as a nursery student, gaining excellent grades[,] and various awards for his participation in school.

....

In addition . . . , Rocco and Zahara have been living with Joselyn and their [two] older half-siblings, Paulyn and Paul in Antipolo City.⁹¹

All told, We find no reason to deviate from the findings of the RTC and the CA and modify the award to provisional custody of the minor children to respondent Joselyn.

Finally, this Court notes the parties' fervent efforts in seeking custody over their children throughout the course of trial. Still, We deem it

⁹¹ *Rollo*, pp 82-83.

imperative for their best interest that they remain in the sole custody of respondent Harryvette and the provisional custody of respondent Joselyn.

However, all is not lost for petitioner. As the dire situation brought about by COVID-19 in the country has improved, petitioner is neither constrained nor deprived from continuing to exercise his visitation rights to nurture his bonds with his children.

ACCORDINGLY, the Petition is **DENIED**. The December 12, 2022 Decision and March 2, 2023 Resolution of the Court of Appeals in CA-G.R. SP No. 173454 are **AFFIRMED**.

- i. Respondent Harryvette Rowena Tagaña-Carnabuci and petitioner David Carnabuci shall have joint parental authority over the minors Rocco Antonino T. Carnabuci and Zahara Brigitte T. Carnabuci.
- ii. Respondent Harryvette Rowena Tagaña-Carnabuci shall have sole custody over the minors Rocco Antonino T. Carnabuci and Zahara Brigitte T. Carnabuci.
- iii. Considering that respondent Harryvette Rowena Tagaña-Carnabuci is currently abroad, the children's maternal grandmother, respondent, Joselyn B. Espiritu, is allowed to exercise provisional custody over the children.
- iv. Petitioner David Carnabuci is allowed visitation rights over his children under the following conditions:
 - a. Petitioner David Carnabuci shall have visitation rights over the children every Saturdays and Sundays.
 - b. Petitioner David Carnabuci can also visit the children on special occasions such as but not limited to their birthdays, even if it does not fall on Saturdays or Sundays, as long as it does not prejudice their education.
 - c. Petitioner David Carnabuci may have the children in his custody during holidays or for five days when the children are in their school break, upon prior written consent of respondent Harryvette Rowena Tagaña-Carnabuci. Provided, that petitioner David Carnabuci may have his children only in either the celebration of Christmas Day or

New Year's Day, subject to the election of the respondents.

- d. The children shall always be accompanied by respondent Joselyn B. Espiritu or any person of her choice.
- v. Petitioner David Carnabuci is not permitted to bring the children outside the Province of Rizal unless with the permission of either respondent Harryvette Rowena Tagaña-Carnabuci or respondent Joselyn B. Espiritu.
- vi. Petitioner David Carnabuci is directed to pay in full the accumulated monthly support of PHP 20,000.00 owed to the children beginning from March 2022 up to receipt of this Decision. He is also directed to continue paying the amount of PHP 20,000.00 to the children every month hereafter. This is inclusive of the children's basic, medical, and miscellaneous expenses. The full amount shall be deposited to respondent Joselyn B. Espiritu's bank account on or before the fifth day of every month. For this purpose, said respondent is directed to give the details of her bank account to the petitioner.
- vii. Respondent Joselyn B. Espiritu is directed to account for the monthly support that she will be receiving from petitioner David Carnabuci and to keep all the receipts relative to the children's expenses using the support provided by petitioner David Carnabuci. She shall keep all accounts and documentations in her custody which must be available upon demand.

SO ORDERED.


JOSEP M. LOPEZ
Associate Justice

WE CONCUR:

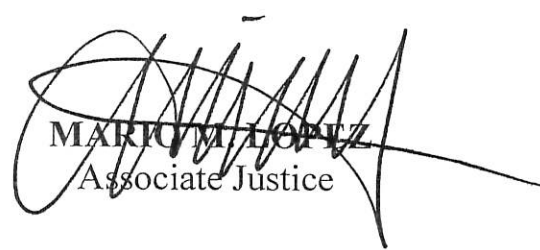
See separate concurring opinion


MARVIC M.V.F. LEONEN
Senior Associate Justice

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AMY C. LAZARO-JAVIER
Associate Justice



MARIUM LOPEZ
Associate Justice



ANTONIO T. KHO, JR.
Associate Justice

ATTESTATION

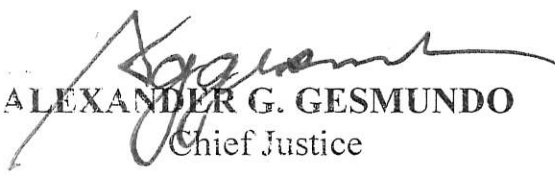
I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



MARVIC M.V.F. LEONEN
Senior Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



ALEXANDER G. GESMUNDO
Chief Justice

SECOND DIVISION

G.R. No. 266116 – DAVID H. CARNABUCI, Petitioner, v. HARRYVETTE ROWENA TAGAÑA-CARNABUCI, JOSELYN B. ESPIRITU, and “JOHN DOES,” Respondents.

Promulgated:

JUL 22 2024

X-----X

SEPARATE CONCURRING OPINION

LEONEN, J.:

I concur in the *ponencia* but express my reservation in the use of the term “sole” custody in the dispositive portion.

In affirming the Court of Appeals’ Decision and Resolution, the *ponencia* adopts the language of the appellate court of awarding “sole” custody only to Harryvette Rowena Tagaña-Carbanuci (respondent mother). In my opinion, however, using the term “primary” custody is more accurate and reflective of the custody arrangement.

Child custody arrangements are a complex set of issues that require a careful resolution by the courts. Various factors must be studied to arrive at a fair outcome, but the paramount consideration of them all is the best interest of the child. Thus, these resulting arrangements on who takes custody of minor children are made on a case-to-case basis; there is no blanket arrangement that can be said to work best for all circumstances.

In the same sense that the *ponencia* articulates the principle that judgments on the custody of minors are not unalterable,¹ speaking in absolutes should be avoided as they fail to reflect true and realistic arrangements.

Here, the use of the term “sole” custody implies that the award is absolute and exclusive to respondent mother. By nomenclature, it eliminates David H. Carnabuci (petitioner father) from having any form of custody over their children. However, the dispositive portion acknowledges that petitioner father can have custody over their children, although under very limited circumstances:

¹ *Ponencia*, p. 20.

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ACCORDINGLY, the Petition is **DENIED**. The December 12, 2022 Decision and March 2, 2023 Resolution of the Court of Appeals in CA-G.R. SP No. 173454 are **AFFIRMED**.

- i. Respondent Harryvette Rowena Tagaña-Carnabuci and petitioner David Carnabuci shall have joint parental authority over the minors Rocco Antonino T. Carnabuci and Zahara Brigitte T. Carnabuci.
- ii. Respondent Harryvette Rowena Tagaña-Carnabuci shall have sole custody over the minors Rocco Antonino T. Carnabuci and Zahara Brigitte T. Carnabuci.
- iii. Considering that respondent Harryvette Rowena Tagaña-Carnabuci is currently abroad, the children's maternal grandmother, respondent Joselyn B. Espiritu, is allowed to exercise provisional custody over the children.
- iv. Petitioner David Carnabuci is allowed visitation rights over his children under the following conditions:
 - a. Petitioner David Carnabuci shall have visitation rights over the children every Saturdays and Sundays.
 - b. Petitioner David Carnabuci can also visit the children on special occasions such as but not limited to their birthdays, even if it does not fall on Saturdays or Sundays, as long as it does not prejudice their education.
 - c. *Petitioner may have the children in his custody during holidays or for five days when the children are in their school break, upon prior written consent of Harryvette Rowena Tagaña-Carnabuci. Provided, that petitioner may have his children only in either the celebration of Christmas Day or New Year's Day, subject to the election of the respondents.*
 - d. The children shall always be accompanied by respondent Joselyn B. Espiritu or any person of her choice.
- v. Petitioner David Carnabuci is not permitted to bring the children outside the Province of Rizal unless with the permission of either respondent Harryvette Rowena Tagaña-Carnabuci or respondent Joselyn B. Espiritu.
- vi. Petitioner is directed to pay in full the accumulated monthly support of PHP 20,000.00 owed to the children beginning from March 2022 up to receipt of this Decision. He is also directed to continue paying the amount of PHP 20,000.00 to the children every month hereafter. This is inclusive of the children's basic, medical, and miscellaneous expenses. The full amount shall be deposited to respondent Joselyn B. Espiritu's bank account on or before the fifth day of every month. For this purpose, said respondent is directed to give the details of her bank account to the petitioner.
- vii. Respondent Joselyn B. Espiritu is directed to account for the monthly support that she will be receiving from petitioner David Carnabuci and to keep all the receipts relative to the children's

expenses using the support provided by petitioner David Carnabuci. She shall keep all accounts and documentations in her custody which must be available upon demand.

SO ORDERED.² (Emphasis supplied)

Paragraph (iv) (c) of the dispositive portion acknowledges that petitioner father may have custody over their children during holidays or for five days during school breaks, subject to certain restrictions. This seemingly contradicts the award of “sole” custody to respondent mother.

Custody, after all, springs from a parent’s exercise of parental authority, which petitioner father did not lose here. In *Santos v. Court of Appeals*,³ which is also cited in the *ponencia*, this Court said that in parental authority, “there is no power, but a task; no complex of rights, but a sum of duties; no sovereignty but a sacred trust for the welfare of the minor.”⁴ This highlights the concept that when a parent takes custody over their children, the child’s best interest is still the principal consideration.

As regards the parent, custody is better described as a set of obligations to further the child’s “physical preservation and development, as well as the cultivation of their intellect and the education of their heart and senses.”⁵ Declaring the exclusion of petitioner father from having any form of custody, even in the limited instances when he has with him the minor children, would seem to remove or diminish his obligations to his children.

Instead, using the term “primary” instead of “sole” when qualifying the term clarifies the difference between the custody exercised by respondent mother, as opposed to the limited custody petitioner father has over their children. It also dispels any doubt as to who has the superior claim to the children’s custody, and who has the subordinate claim. At the same time, it preserves the concept that custody over children is a set of duties that neither parent can escape.

In any case, neither the law nor the rules use the term “sole” custody when awarding it to a parent or a qualified person. The Family Code provides:

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

² *Ponencia*, pp. 24–25.

³ 312 Phil. 484 (1995) [Per J. Romero, Third Division].

⁴ *Id.* at 487–488.

⁵ *Id.* at 487.

No child under seven years of age shall be separated from the mother unless the court finds compelling reasons to order otherwise.⁶

The Rule on Custody of Minors and Writ of Habeas Corpus in Relation to Custody of Minors⁷ provides:

SECTION 13. *Provisional order awarding custody.* — After an answer has been filed or after expiration of the period to file it, the court may issue a provisional order awarding custody of the minor. As far as practicable, the following order of preference shall be observed in the award of custody:

- (a) Both parents jointly;
- (b) Either parent, taking into account all relevant considerations, especially the choice of the minor over seven years of age and of sufficient discernment, unless the parent chosen is unfit;
- (c) The grandparent, or if there are several grandparents, the grandparent chosen by the minor over seven years of age and of sufficient discernment, unless the grandparent chosen is unfit or disqualified;
- (d) The eldest brother or sister over twenty-one years of age, unless he or she is unfit or disqualified;
- (e) The actual custodian of the minor over twenty-one years of age, unless the former is unfit or disqualified; or
- (f) Any other person or institution the court may deem suitable to provide proper care and guidance for the minor.

SECTION 18. *Judgment.* — After trial, the court shall render judgment awarding the custody of the minor to the proper party considering the best interests of the minor.

If it appears that both parties are unfit to have the care and custody of the minor, the court may designate either the paternal or maternal grandparent of the minor, or his oldest brother or sister, or any reputable person to take charge of such minor, or commit him to any suitable home for children.

In its judgment, the court may order either or both parents to give an amount necessary for the support, maintenance and education of the minor, irrespective of who may be its custodian. In determining the amount of support, the court may consider the following factors: (1) the financial resources of the custodial and non-custodial parent and those of the minor; (2) the physical and emotional health, special needs, and aptitude of the minor; (3) the standard of living the minor has been accustomed to; and (4) the non-monetary contributions that the parents would make toward the care and well-being of the minor.

The court may also issue any order that is just and reasonable permitting the parent who is deprived of the care and custody of the minor to visit or have temporary custody.⁸

⁶ FAMILY CODE, art. 213.

⁷ A.M. No. 03-04-04-SC (2003).

⁸ A.M. No. 03-04-04-SC (2003), secs. 13, 18.

The award of sole custody, while not disallowed, should be carefully used to only cover instances where the best interest of the child would warrant it. The complete deprivation of custody from a parent entails their exclusion from the child's life.

This is contrary to the finding in this case. Respondent mother, and provisionally, the children's maternal grandmother, were only declared as the main custodians of the minor children, with petitioner father having limited visitation rights and temporary custodial rights. Therefore, it is my opinion that this be reflected by using the term "primary" custody instead of "sole" custody.

ACCORDINGLY, I vote to **DENY** the Petition.



MARVIC M.V.F. LEONEN
Senior Associate Justice