CONFUSION COMPOUNDED:
AN ANALYSIS OF THE EFFECTS OF THE FAMILY CODE ON THE LAW ON SUCCESSION

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PREFATORY STATEMENT

The signing of Executive Order No. 209 by President Corazon C. Aquino on July 6, 1987 ushered in an interesting era in the field of Civil Law. The marriage and family laws embodied in the Civil Code of the Philippines[1] and which have been in force for nearly four decades, were revised and updated purportedly in order to "bring them closer to the Filipino customs, values and ideals and reflect contemporary trends and conditions."[2] The revision was further justified by the "need to implement policies embodied in the new Constitution that strengthen marriage and the family as basic social institutions and ensure equality between men and women."[3] It was the perception of some sectors that there was an extreme urgency which necessitated the immediate enactment of the Family Code as an independent piece of legislation, despite the fact that the Civil Code Revision committee[4], which was charged with revising and updating the Civil Code, barely finished one-fifth of its work. Because of this pressure, the

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1 Republic Act No. 386, as amended.

2 See second recital, Executive Order No. 209 [hereinafter cited as E.O. 289].

3 See third recital, E.O. 209.

4 The Civil Code Revision Committee is chaired by Justice Jose B. L. Reyes, co-chaired by Justice Ricardo C. Puno, with the following members: Justices Irene Cortez, Edgardo Caguioa, Leonor Ines Luciano and Alicia Sempio-Diy, Special Presidential Assistant Flerida Ruth P. Romero, Deans Fortunato Gupit, Jr. and Bartolome S. Carale, Professors Ruben F. Balane, Esteban B. Bautista, and Araceli T. Bayiera and Assistant Secretary Flora C. Eufemio of the Department of Social Welfare and Development.

Family Code came to be. In setting its effectivity, the Family Code provides:

> This Code shall take effect one year after the completion of its publication in a newspaper of general circulation, as certified by the Executive Secretary, Office of the President.[5]

The Code was completely published in the *Manila Chronicle* issue of August 4, 1987, and such publication was duly certified by the then Executive Secretary Joker P. Arroyo. Hence, the Family Code took effect on August 3, 1988, exactly one year after the completion of its publication.[6]

The urgency in enacting the Family Code was best explained by Justice Alicia V. Sempio-Diy, a member of the Civil Code Revision Committee:

> The work of the Civil Code Revision Committee is, however, an on-going process. It is continuing in its work of revising the rest of the 38-year old Civil Code of the Philippines, and its members are meeting every Saturday morning at the U.P. Law Center for that purpose. In answer to those who have been asking why the Committee had to draft a Family Code apart from and independently of the Civil Code, therefore, let them be informed that it was upon the request of the Filipino women in partial realization of their long fight for equality with men before the law, that the Committee submitted it finished version of the law on marriage and family relations to President Aquino as a Family Code, the same later to be integrated and included in the Civil Code after the Committee finishes its work on the revision of the entire Code.[7]

The draft of this Code took seven years and eight months to complete. This period excludes the time spent by the Cabinet Assistance System in evaluating the same and preparing its recommendations to the President. For all the time spent, the Family Code covered no more than a little over eighteen (18%) percent of the provisions of the Civil Code. If the Revision Committee; therefore, were to maintain its present pace of work, it would take more than thirty-eight years from the time work was

[5] Art. 257, E.O. No. 209.

[6] See Art. 13, New Civil Code of the Philippines.

[7] Alicia V. Sempio-Diy, **Handbook on the Family Code of the Philippines**, (Introduction), 1988.

begun, before the entire Civil Code could be updated. The projected revision period excludes the time during which the completely updated code will have to be deliberated upon separately in the two chambers of Congress. By then it cannot be totally discounted that some sectors may feel the need to undertake a new process of revision.

But there is more serious cause for concern. Because of the rather extended period it has taken to complete the Family Code, it is reasonably expected that an even longer period of time may be required to complete the revision process. Depending on such period of time, the composition of the Revision Committee may no longer be the same by the time the work is completed. This could result in a tragedy if the future members of the Revision Committee are to be guided by a legal philosophy different from that presently underlying the Family Code. This is the basic malaise of piecemeal legislation.

In any event, this paper will seek to determine, first, whether or not the Family Code can live up to its avowed objectives of bringing the law closer to Filipino customs, values, and ideals and of strengthening marriage and the family as basic social institutions, and, second, whether or not the Family Code can truly be the catalyst in the realization of the Filipino women's long fight for equality with men before the law. But because of the complexity of the subject matter and the wide variety of legal issues which can be raised, this paper shall be limited to the effect of the Family Code on the hereditary rights of a person which are presently governed by Title IV, Book III of the Civil Code of the Philippines.

I. Declaration of Nullity and Annulment of Marriage

On the one hand, the successional rights of a person, under the present provisions of the Civil Code, depend, to a large extent, on his or her status as a legitimate or illegitimate child. On the other hand, the status of legitimacy or illegitimacy depends upon the validity or invalidity of the marriage between a person's parents. Thus, legal issues pertaining to the existence of successional rights of a person, and the extent thereof, ordinarily involve a scrutiny of the marriage between the person's parents. Hence, a reference to the family law is unavoidable.

Where the marriage between the spouses suffers from a legal defect, the existence as well as the extent of successional rights of children born thereunder, if any, present complicated legal issues. In these instances, the law may deny successional rights, or may provide for modifications thereto, pursuant to specific policy considerations. The effects on the successional rights of children born out of marriages which have been declared void *ab*

initio, or otherwise annulled for some legal reasons, shall be the centerpiece of this paper.

This paper, therefore, begins with the classification of defective marriages as either void or voidable, and proceeds with a brief discussion of each.

A. Void Marriages:

Void marriages are deemed inexistent from the time of celebration. They cannot be ratified, and they do not generally give rise to property relations between the parties, except to the extent that the law recognizes the existence of co-ownership between them.[8] While these marriages are deemed inexistent, however, their nullity should be invoked for the purpose of a subsequent marriage on the basis solely of a final judgment declaring the previous marriage void.[9]

The Code enumerates four specific types of void marriages: (i) those which are void due to the absence of some essential or formal requisites; (ii) those which are void because of psychological incapacity of one of the parties thereto; (iii) those which are void by reason of incest; and (iv) those which are void by reason of public policy.

Marriages which are considered void because of the absence of some essential or formal requisites are enumerated as follows:

1. those contracted by any party below eighteen years of age, even with the consent of parents or guardians;
2. those solemnized by any person not legally authorized to perform marriages, unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so;
3. those solemnized without a license, except those covered by Chapter 2 of the Family Code;
4. those bigamous or polygamous marriages not falling under Article 41 of the Family Code;
5. those contracted through mistake of one contracting party as to the identity of the other; and

[8] Art. 147, E.O. No. 209.

[9] Art. 40, E.O. No. 209, abandoning the established rule that a void marriage requires no judicial declaration of nullity (People v. Mendoza, 95 Phil 843; People v. Aragon, 100 Phil 1033).

6. those subsequent marriages that are void under Article 53 of the Family Code.[10]

Article 36 of the Family Code provides that "[a] marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization."

The third type of void marriages are those considered incestuous. These are marriages between the following persons, whether the relationship be legitimate or illegitimate:

1. marriages between ascendants and descendants of any degree; and
2. marriages between brothers and sisters, whether of the full or half-blood.[11]

Finally, the Code classifies the following marriages as void by reason of public policy:

1. marriages between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree;
2. marriages between step-parents and stepchildren;
3. marriages between parents-in-law and children-in-law;
4. marriages between adopter and the adopted;
5. marriages between the surviving spouse a of the adopter and the adopted;
6. marriages between the surviving spouse of the adopted and the adopter;
7. marriages between the adopted and the legitimate children of the adopter;
8. marriages between the adopted children of the same adopter; and
9. marriages between parties where one, with the intention to marry the other, killed that other person's spouse or his or her own spouse.[12]

Under Article 40 of the Family Code, it is absolutely essential that a void marriage be judicially declared as such, before such nullity could serve

[10] Art. 53, E.O. No. 209.

[11] Art. 37, E.O. No. 209.

[12] Art. 38, E.O. No. 209.

as basis to capacitate a party thereto to contract a subsequent marriage. This new provision requires the filing of a petition in the proper court for the declaration of nullity of a void marriage.

Children born outside of valid marriages are generally classified as illegitimate.[13] Thus, the following children are illegitimate:

1. Children born of couples who are not legally married or born out of common-law relationships;
2. Children born of incestuous, bigamous, or polygamous marriages;
3. Children born out of adulterous relationships;
4. Children born of marriages deemed void by reason of public policy under Article 38 of the Family Code;
5. Children born of couples below 18 years of age, whether or not there was marriage; and
6. Children born of other void marriages under Article 35 of the Family Code, except where the marriage of the parents is void for lack of authority of the solemnizing officer, but either or both parties were in good faith.

It should be noted, however, that children born of marriages which are void due to the psychological incapacity of one of the parents, and those born out of a void second marriage of a widow or widower who has not delivered to his or her children of the first marriage their legitime, shall be considered legitimate.

Article 174 of the Family Code entitles legitimate children to the legitime as well as other successional rights granted to them by the Civil Code. Article 176 of the same Code confers upon illegitimate children successional rights, particularly to the legitime; the illegitimat child is entitled to one-half of the amount of the legitimate child's legitime.

B. VOIDABLE MARRIAGES:

Voidable marriages are defective marriages, but they are considered valid until they are judicially annulled. These marriages may however be ratified by voluntary cohabitation of the parties thereto, and the action to seek their annulment is subject to the statute of limitation. Because they are considered valid marriages prior to judicial annulment, the law recognizes the property relations between the couple prior to such annulment.

An annulment may be judicially granted for any of the following

[13] Art. 165, E.O. No. 209.

causes existing at the time of marriage:

1. The party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one, and the marriage was solemnized without the consent of the parents, guardian, or person having substitute parental authority over the party, in that order, unless after attaining the age of twenty-one, such party freely cohabited with the other and both lived together as husband and wife;
2. Either party was of unsound mind, unless such party after coming to reason, freely cohabited with the other as husband and wife;
3. The consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife;
4. The consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabited with the other as husband and wife;
5. Either party was physically incapable of consummating the marriage with the other, and such incapacity continues and appears to be incurable; or
6. Either party was afflicted with a sexually-transmissible disease found to be serious and appears to be incurable.[14]

[14] Art. 45, E.O. No. 209. As far as fraud is concerned, Art. 46 of the Code limits the availability of annulment to the following specific grounds: (i) non-disclosure of a previous conviction by final judgment of the other party of a crime involving moral turpitude; (ii) concealment by the wife of the fact that at the time of the marriage, she was pregnant by man other than her husband; (iii) concealment of a sexually-transmitted disease, regardless of its nature, existing at the time of the marriage; (iv) concealment of drug addiction, habitual alcoholism, homosexuality or lesbianism existing at the time of marriage.

While the Family Code does not define force, intimidation and undue influence as various forms of vices of consent which may render a marriage voidable, it is believed that the definitions found in the Civil Code are relevant and applicable. Thus, Article 1335 of the Civil Code provides that there is force or violence when in order to wrest consent, serious or irresistible force is employed. There is intimidation when one of the contracting parties is compelled by a reasonable and well-grounded fear of an imminent and grave evil upon his person or property, or upon the person or property of his spouse, descendants or ascendants, to give his consent. And to determine the degree of intimidation, the age, sex, and condition of the person shall be borne. Finally, Article 1337 of the Civil Code provides that there is undue influence when a person takes improper advantage of his power over

(continued...)

A voidable marriage may be terminated only upon judicial proceedings properly instituted. Without such proceedings, the marriage continues to be valid. Article 47 of the Family Code prescribes the period within which the action for annulment must be filed, failing which, the marriages, defective as it may be, can no longer be assailed by reason of time-bar.

Children conceived or born before the annulment of a voidable marriage are considered legitimate.[15]

II. Effects of the Declaration of Nullity of Marriage and/or Annulment of Marriage

A marriage declared void *ab initio* or otherwise judicially annulled produces the following legal consequences:

1. The absolute community of property or the conjugal partnership, as the case may be, shall be dissolved and liquidated, but if either spouse contracted said marriage in bad faith, his or her share of the net profit of the community property or conjugal partnership properly shall be forfeited in favor of the common children, if there are none, the children of the guilty spouse by a previous marriage or, in default of children, the innocent spouse;

2. Donations by reason of marriage shall remain valid, except that if the donee contracted the marriage in bad faith, such donations made to said donee are revoked by operation of law;

3. The innocent spouse may revoke the designation of the other spouse who acted in bad faith as beneficiary in any insurance policy, even if such designation be stipulated as irrevocable;

4. The spouse who contracted the subsequent marriage in bad faith shall be disqualified to inherit from the innocent spouse by testate and

[14](...continued)
the will of another, depriving the latter of a reasonable freedom of choice, with the following circumstances duly considered: the confidential, family, spiritual and other relations between the parties, or the fact that the person alleged to have been unduly influenced was suffering from mental weakness, or was ignorant or in financial distress.

[15] Article 54, E.O. No. 209.

intestate succession;[16]

5. If both spouses acted in bad faith, all donations by reason of marriage and testamentary dispositions made by one in favor of the other are revoked by operation of law.[17]

6. The final judgment of declaration of nullity or annulment shall provide for the liquidation, partition and distribution of the properties of the spouses, the custody and support of the common children, and the delivery of their presumptive legitime, unless such matters had been adjudicated in previous judicial proceedings; provided that the creditors of the spouses as well as of the absolute community or the conjugal partnership are notified of the proceedings for liquidation; and provided, finally, that the conjugal dwelling and the lot on which it is situated shall be adjudicated in accordance with the provisions of Articles 102 and 129.[18]

The liquidation and distribution of the community property or the conjugal partnership; the provisions relating to the custody and support of children; the revocation of donations propter nuptias as well as insurance benefits; and the denial of hereditary rights, are logical legal consequences of the declaration of nullity or annulment of marriage. The payment of the legitime to the common children by reason thereof is, however, a legal novelty which, if implemented, can present, serious legal problems, as this paper will attempt to demonstrate. These various legal problems will be discussed at length in order to underscore the impact of this provision of the Family Code on the law on succession.

III. The Payment of Legitime

Article 51 reinforces the provision of Article 50 on the payment of the legitime to the common children. It provides that:

> [I]n the partition, the value of the presumptive legitimes of all common children, computed as of the date of the final judgment of the trial court, shall be delivered in cash, property or sound

[16] Paragraphs (2), (3), (4), and (5) of Article 43, E.O. No. 209, referring to the consequences of the annulment of bigamous voidable marriage defined in Article 41. Article 50 of the same Code provides that these effects shall also apply to marriages which are declared void *ab initio* or annulled by final judgment.

[17] Article 44, E.O. No. 209, referring to a further consequence of the annulment of a bigamous voidable marriage, but which is specifically made by Article 50 applicable to marriages declared void *ab initio* or judicially annulled.

[18] Article 50, E.O. No. 209.

> securities, unless the parties, by mutual agreement judicially approved, had already provided for such matters.
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> The children or their guardian, or the trustee of their property, may ask for the enforcement of the judgment.
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> The delivery of the presumptive legitimes herein prescribed shall in no way prejudice the ultimate successional rights of the children accruing upon the death of either or both of the parent; but the value of the properties already received under decree of annulment or absolute nullity shall be considered as advances on their legitimes.

For the validity and enforceability against third persons of the property dispositions mandated under Article 50, Article 52 provides that (i) the judicial declaration of nullity or the decree of annulment, (ii) the partition and distribution of properties, and (iii) the delivery of the presumptive legitime of the common children shall be recorded in the appropriate civil registries and registries of property. And to further serve as a deterrent to parents who may be tempted to avoid their financial obligations to their children resulting from the decree of annulment or declaration of nullity of their marriage, Article 53 provides as follows:

> Either of the former spouses may marry again after complying with the requirements of the immediately preceding Article; otherwise, the subsequent marriage shall be null and void.

The payment of the legitime to the common children by reason of the declaration of the nullity of the marriage or by reason of the annulment of the marriage of their parents has no antecedent in Philippine legal history. It is a novelty which was evidently motivated by a genuine concern for the welfare of the children who are the victims of the marital break-up. This novelty seeks to guarantee material support and financial security to the children. But while the Revision Committee had unquestionably good intentions in including this provision, they overlooked several, serious, legal problems regarding its implementation. These problems may not have solutions based on existing laws. A survey of these legal problems will demonstrate the magnitude of the problems thus created.

A. The Tax Problems and Implications:

There is no doubt that the payment of the legitime to the children as contemplated by Article 50 will trigger tax consequences. The nature of

the imposable tax, however, is difficult to determine. An examination of possible applicable tax is in order.

1. The Estate Tax:

Section 87 of the National Internal Revenue Code provides for the levy, assessment, collection and payment, upon the transfer of the net estate of every decedent, whether resident or non-resident, a tax (the "estate tax") which is based on the value of such net estate, computed in accordance with a schedule ranging from exempt to 60%. The estate tax has been defined generally as a tax on the right of the deceased person to transmit his estate to his lawful heirs or beneficiaries. It is, therefore, an excise tax or a tax levied, assessed, and collected for the performance of an act (i.e., the transfer of property from the decedent to his heirs), the enjoyment of a privilege (i.e., the privilege of transferring properties to the heirs), or the engaging in an occupation.[19]

The legitime, as defined in Article 886 of the Civil Code, is that portion of a decedent's estate which he cannot dispose of, because the law has reserved it for certain heirs called compulsory heirs. The legitime therefore passes from the decedent to his or her heirs by hereditary succession, but the transfer of the legitime to the compulsory heirs is premised upon the death of the decedent. Consequently, while a person is still alive, such person's heirs cannot make any claim to the legitime. This principle is enshrined in the Civil Code and remains inviolable because of Article 777 thereof which provides one of the most basic principles of succession:

> "The rights to the succession are transmitted from the moment of the death of the decedent."

The legal scenario resulting from Article 50 of the Family Code, insofar as it mandates the payment of the legitime to the common children, not only contravenes this basic principle of succession, but further results in a tax dilemma. If the transmission of the legitime to the children were to be considered - as it should be considered - a transmission by right of succession to a portion of the estate of their parents, then the estate tax must be levied, assessed and collected for the privilege of transferring certain properties to the heirs. The persons whose properties are to be distributed however are still very much alive, but the estate tax as defined

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[19] *Ibid.*, p. 11.

in Section 87 of the Tax Code is a tax imposed on the net estate of a *deceased* person.

Furthermore, the computation of the net estate and the assessable estate tax will be problematic. Section 88 of the Tax Code defines the gross estate of a deceased person, as inclusive of the value at the time of death of all the real and personal properties of a deceased person wherever situated.[20] Section 89 of the Tax Code allows specific deduction from the gross estate. Section 90 provides for the allowable exemptions. After the gross estate is netted of deductions and exemptions, the amount of estate tax due is computed based on the schedular rate. If the payment of the legitime to the children were to be, considered as it ought to be, that is, as a transfer by right of succession, the computation of the estate tax due cannot be made based on the existing provisions of the Tax Code. This is simply because the gross estate of the parents cannot, during their lifetime, be determined under Section 88. At best, one may have to fix the estate tax liability of the parents based on the present value of their respective estates and thereafter calculate the tax due. However, an attempt to pay the estate tax in this manner will not be consistent with the present provisions of the Tax Code. The Tax Code does not provide for a preliminary determination of the net estate during the lifetime of a person, nor does it allow a creditable payment of estate tax, subject to the filing of a final return based on the valuation of the net estate upon the death of the said person. In sum, the estate tax cannot be levied, assessed, collected nor paid under these circumstances.

2. THE DONOR'S TAX:

An examination of the probable application of the donor's tax is likewise in order. This is a tax imposed on the liberality or generosity of a person. Article 725 of the Civil Code defines a donation as an act of liberality whereby a person disposes gratuitously of a thing or right in favor of another who accepts it. The Tax Code imposes a donor's tax on the privilege of a donor to give, or conversely, a tax on the privilege of the donee to receive.[21] This tax is imposed without reference to the death of the donor, as the gift is made during his or her lifetime.

[20] Offshore properties of non-resident aliens are excluded from the computation of the gross estate.

[21] de Leon, **The Fundamentals of Taxation**, 89.

Section 101 of the Tax Code provides as follows:

> Sec. 101. Imposition of tax. - (a) There shall be levied, assessed, collected and paid upon the transfer by any person, resident or non- resident, of the property by gift, a tax, computed as provided in Section 102.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the **gift is direct or indirect**, and whether the property is real or personal, tangible or intangible." [Emphasis supplied.]

Can the donor's tax be imposed on the payment of legitime contemplated by Article 50, considering that the transmission of property from the parents to the children is without valuable consideration and effected during the lifetime of the parents?

It would seem that the mandatory payment of the legitime to the children under Article 50 of the Family Code cannot be considered a gift within the meaning of the law. Gift-giving is a free and voluntary act. It can never arise from compulsion, nor can it be legislated. Thus, where the parents are required by law to give, by way of presumptive legitime, a portion of their properties to their children as a consequence of the dissolution of marital ties, the resulting transmission of property to the children does not result from the liberality or generosity of the parents. The transmission is made under legal compulsion, subject to such civil penalties as may be provided by the law. In this instance, therefore, liberality or generosity is not and cannot be an issue. Hence, it would seem that the donor's tax cannot apply to this conveyance, as there is in fact neither a donation made, nor an intent to donate on the part of the parents.

3. THE INCOME TAX

If neither the estate tax nor the donor's tax is imposable on the payment of legitime to the children under Article 50 of the Family Code, would the situation give rise to potential income tax liability on the part of the children who receive the same? Can the legitime be considered as income to the children? Revenue Regulations No. 2 defines income as all wealth which flows into the taxpayer other than as a mere return on capital. In the absence of any other applicable tax law, should the legitime be considered as taxable income to the children?

B. The Children's Refusal to Accept:

Article 50 of the Family Code refers solely to the duty of the parents to pay the legitime to the children, But there is no provision is made respecting the possibility that the children may not, for any reason, wish to accept the advance legitime. Article 53, however, nullifies a subsequent marriage contracted by either the former spouses whose marriage was annulled or declared void, unless they comply with the duty to pay the legitime to their common children. Is it therefore possible for the children to legally prevent their parents from contracting subsequent marriages by refusing to accept the legitime? If the children for any reason fail to insist upon or enforce the right conferred upon them by Article 50, and the parents fail to comply with the same, will the provision of Article 53 apply in the event of a subsequent marriage? In the absence of a demand on the part of the children, will the parents incur in delay in the fulfillment of their obligation under Article 50? Does the obligation to pay the presumptive legitime prescribe? If so, within what period? Is the obligation rendered ineffective if the children refuse or fail to enforce the same and the parents do not contract subsequent marriages? These issues are not addressed by the Family Code.

But apart from merely wanting to legally prevent their parents from contracting valid, subsequent marraiges, as illustrated above, children could have more legally substantial reasons for refusing to accept their legitime; there may, for example, be a genuine, legal dispute regarding the valuation of the estate of their parents, or there may be a dispute relating to the completeness of the inventory of the properties submitted by their parents. Thus, it is possible that, despite a court decree declaring the nullity of a marriage or annulling the same and making adequate provision for the payment of the legitime to the children, the actual distribution of the legitime may be deferred by a protracted litigation regarding its amount. In the meantime, the parents, are held hostage by Article 53 which effectively prohibits them from contracting a second valid marriage until the issues on the legitime are finally resolved. Was it the intention of the framers of the law to make life miserable for both the parents and the children?

The creditors of the spouses, or of the community property, or conjugal partnership, may also considerably delay the payment of the legitime as contemplated by Article 50. Creditors must first be paid before any distribution of hereditary shares can be made.[22] If in the meantime the creditors claims are disputed and protracted proceedings ensue, the former

[22] Article 908, Civil Code.

spouses are barred from contracting subsequent valid marriages. While the inconvenience caused to a guilty spouse is understandable, the inconvenience may extend to the innocent spouse who should not otherwise be prejudiced. If only Article 50 did not require the payment of legitime to the children, and if only Article 53 did not provide for the nullity of subsequent marriages contracted prior to the payment of said legitimes, then these unnecessary difficulties and embarrassments could be avoided.

C. Problems With Respect To Restitution:

The payment of the legitime under Article 50 is not a final payment of hereditary rights under the law. Article 51 emphasizes this point:

> The delivery of the presumptive legitimes herein prescribed shall in no way prejudice the ultimate successional rights of the children accruing upon the death of either or both of the parents; but the value of the properties already received under the decree of annulment or absolute nullity shall be considered as advances on their legitime.

It is most unfortunate that the provision merely considered the possibility that the fortune of the parents may improve subsequent to the dissolution of the marriage. The law conveniently ignored the other distinct possibility that the parents may lose their fortunes. The result of this oversight is the failure of the Family Code to make provisions for the eventuality that restitution of all or a portion of the presumptive legitime may in the future be required. If this contingency had been taken into account and the concomitant possible legal complications arising therefrom duly considered, then perhaps the framers of the law would have entertained second thoughts about the propriety of requiring the payment of the presumptive legitime in Article 50 of the Family Code. A survey of different legal scenarios will prove the gross inadequacy of the new law.

1. The marriage of A and B was annulled. At the time of annulment, the respective shares of A and B in the net community of property was ₱ 1,000,000.00 each. They have two legitimate children C and D. Under Article 50 of the Family Code, C and D shall each receive their presumptive legitimes from A and B as follows:

Owing from A:

To C ,by way of legitime	-	250,000.00
To D by way of legitime	-	250,000.00

Total	-	500,000.00

Owing from B:

To C by way of legitime	-	250,000.00
To D by way of legitime	-	250,000.00
Total		500,000.00[23]

Having paid the legitime, A married X; B married Y. A and X begot two legitimate children, E and F. B and Y begot two legitimate children, G and H. Upon the death of A, his net estate amounted to ₱ 2,000,000.00, net of expenses and taxes. The children of the second marriage received no advances of their legitime. Thus, the estate for distribution shall be as follows:

Funds from the second marriage	-	2,000,000.00
Add: collationable advances to C and D[24]	-	500,000.00
Total	-	2,500,000.00

A is survived by C and D, legitimate children of the first marriage, E and F legitimate children of the second marriage, and X, surviving spouse. Assuming that A died intestate, the estate shall be distributed equally among the four legitimate children of the first and second marriage, and the surviving spouse as follows:[25]

To C	250,000.00
To D	250,000.00
To E	500,000.00
To F	500,000.00
To X	500,000.00
Total	2,000,000.00

[23] *See* Article 888, Civil Code.

[24] *See* Article 1061, Civil Code.

[25] *See* Articles 892 and 996, Civil Code.

It should be noted that C and D received on ₱ 250,000.00 each because they have already received an advance of their legitime in the amount of ₱ 250,000.00 upon the annulment of the marriage of A and B. Therefore, if the advance legitime of C and D were to be added to the additional amount of ₱ 250,000.00 each which they will now receive, then C and D would have received an amount equal to ₱ 500,000.00 which was likewise each received by E, F and X.

Consider, however, the situation where upon the demise of A the net cash balance of his estate amounted to only ₱ 100,000.00. His estate shall be computed as follows:

Funds from the second marriage	-	100,000.00
Add: Collationable Advances to C and D	-	500,000.00
Total	-	600,000.00

Assuming that A died intestate, his estate shall be divided equally among his four legitimate children of the first and second marriage, and X, the surviving spouse. Thus, C, D, E, F and X shall equally divide among themselves a theoretical estate of ₱ 600,000.00 or ₱ 120,000.00 each in the following manner:

Heir	Actual Legitime	Free Portion	Total
C	75,000.00	45,000.00	120,000.00
D	75,000.00	45,000.00	120,000.00
E	75,000.00	45,000.00	120,000.00
F	75,000.00	45,000.00	120,000.00
X	75,000.00	45,000.00	120,000.00
Total	375,000.00	225,000.00	600,000.00

Note, however, that C and D received advances of the legitime from A in the amount of ₱250,000.00 each. These advances are now in excess of the legitime by ₱175,000.00 each. Therefore, C and D must reimburse to the estate the excess drawing on the legitime. This is so because: first, there was absolutely no intention on the part of A to give to C and D an advance share of the free disposal, and second, the advance was made pursuant to Article 50 of the Family Code which requires the payment of the presumptive legitime only. Thus, an adjustment of the distributive shares is

proper in order to achieve equalization of the intestate shares. The adjustment should be based upon a theoretical net hereditary estate of ₱600,000.00, after collating the advances of C and D in the amount of ₱500,000.00 in the aggregate.

It is clear that even for the sole purpose of paying the legitime of the compulsory heirs, the net cash balance of ₱100,000.00 is grossly insufficient. Clearly C and D must make the necessary reimbursements. For the simplification of the adjustments, the computation shall be limited to the intestate shares of E, F and X, since it has been established that C and D received an amount far in excess of their respective intestate shares. Thus, based on the theoretical net hereditary estate of ₱600,000.00, E, F, and X should receive the following sums:

	Share in the		Total
Heir	Legitime	Free Portion	Intestate Share
E	75,000.00	45,000.00	120,000.00
F	75,000.00	45,000.00	120,000.00
X	75,000.00	45,000.00	120,000.00
Total			360,000.00

(C and D each retaining ₱120,000.00 or a total of ₱240,000.00 for a combined aggregate intestate shares of ₱600,000.00)

The total intestate shares of E, F and X in the amount of ₱360,000.00 shall be paid as follows:

From the cash balance of the estate	-	100,000.00
Reimbursement from C and D	-	260,000.00
Total	-	360,000.00

In the meantime, the combined advances of C and D in the amount of ₱500,000.00 must be reduced by a total amount of ₱260,000.00, or the equivalent of ₱130,000.00 each. Hence:

	Advance	Reduction	Balance
C	250,000.00	130,000.00	120,000.00
D	250,000.00	130,000.00	120,000.00
Total	500,000.00	260,000.00	240,000.00

What would happen if C and D had spent the entire advance, such that at the time of A's death, neither would be in a position to make the necessary restitution? As nobody can be imprisoned for non-payment of a civil obligation, E, F, and X are without any other effective remedy, and that under the circumstances, they will simply divide the cash balance of ₱100,000.00 equally among themselves. It can now be asked whether or not it would have been better if A had not been compelled to give C and D their presumptive legitime in advance. If A during his lifetime had lost his fortune which resulted in a significant diminution of the legitime, none of the heirs would feel defrauded. The situation presented above involves the inability of certain heirs to receive full successional rights, because some other heirs had spent it for them. Does Article 50, really therefore, bring the law "closer to Filipino customs, values and ideals"?

2. On the same set of facts, C and D received ₱250,000.00 each from B. Assume that D was subsequently convicted by final judgment of an attempt on the life of B, by reason of which D has become incapacitated to succeed from B because of unworthiness.[26] In the meantime, Article 50 of the Family Code had in the meantime entitled D to receive ₱250,000.00 from B. Under the circumstances, at what time should D return the money which he received from B? On the one hand, one may argue that D should reimburse the advance legitime immediately upon the finality of the judgment of conviction, because it is precisely at that moment, that D is renedered incapacitated to inherit from B. On the other hand, one may also argue that the effects of D's incapacity cannot be recognized for as long as B is alive, since the succession to B's estate shall not open until then.[27] Furthermore, the effects of such incapacity can be obliterated during B's lifetime by means of a written condonation.[28] It would seem equally arguable, therefore, that a demand for restitution made upon the finality of the judgment of conviction is, at the very least, premature because B can still change his mind and eventually forgive D in a written instrument. It should be noted that the Family Code is silent on this point.

Assume that B is not inclined to forgive D and that the probability of condonation is extremely remote. Meanwhile, D had spent practically all of the ₱250,000.00 advance legitime and thus cannot make the restitution. Assume further that at the time of B's death, the cash balance of his estate

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[26] Article 1032 (2), Civil Code.

[27] Article 777, Civil Code.

[28] Article 1033, Civil Code.

was a measly sum of ₱100,000.00 Let us examine the partition.

Funds from the second marriage	-	100,000.00
Add: Collationable advances to C and D	-	500,000.00
Total	-	600,000.00

The partition should exclude D who has become incapacitated to succeed. Thus, assuming B died intestate, the estate should be divided equally among C, G, H and Y. Please note that the full payment of the legitime is conditioned upon the following: (i) D's ability to restitute the amount of ₱250,000.00 which he received in the past, and (ii) C's ability to return the amount representing the excess drawing on his legitime. Hence:

Heir	Actual Legitime	Free Portion	Total
C	100,000.00	50,000.00	150,000.00
G	100,000.00	50,000.00	150,000.00
H	100,000.00	50,000.00	150,000.00
Y	100,000.00	50,000.00	150,000.00
Total	400,000.00	200,000.00	600,000.00

To fund the foregoing distribution of intestate shares, particularly the shares of G, H and Y, the following amounts must be immediately available:[29]

i. Funds from the second marriage	-	100,000.00
ii. Reimbursement of D's advance	-	250,000.00
iii. Partial Reimbursement from C	-	100,000.00
Total	-	450,000.00

Thus, if neither C nor D can effect the required restitutions, then G,

[29] It should be noted that the total intestate share of C is ₱150,000.00. He previously received an advance of ₱250,000.00 which exceeded his intestate share by ₱100,000.00. Clearly, C will not participate in the distribution of the cash balance of ₱100,000.00, but must instead return the excess amount which he had received, together with D who must return his entire advance legitime.

H and Y will merely divide ₱100,000.00 cash balance among themselves. The scenario clearly demonstrates that the mandatory payment of advance legitime under Article 50 of the Family Code can result in a gross injustice. In addition, the scenario further demonstrates the manner in which the provisions of the Civil Code on incapacity to succeed can be frustrated.

3. It may be argued that the foregoing situation may likewise arise under the present provisions of the Civil Code. A gratuitous conveyance of property through a donation *inter vivos* to a compulsory heir generally constitutes an advance of the legitime.[30] As such, the commission by the said compulsory heir of an act of unworthiness or an act which may justify a valid disinheritance may also result in the same frustration of the law. Thus, a father who may have given a substantial donation to his son may later on seek to recover what has been given by reason of the son's commission of an act of ingratitude.[31] The father has three alternate ways of seeking retribution. First, during his lifetime, he may seek a revocation of the donation. Second, he may execute a will expressly disinheriting the son. Third, he may rely on Article 1032 which incapacitates an unworthy son from inheriting. The last two remedies do not seek to recover what has been given but will effectively bar the son from further successional rights. In the first case, the intent to recover what has been given may be frustrated if prior to the revocation of the donation, the son had in the meantime spent the property, or is otherwise not financially capable to restitute.

The argument may be correct, but the situation arising under the Civil Code is completely different from that which may arise under Article 50 of the Family Code. To begin with, there is no provision in the Civil Code which imposes a legal duty on the part of a person to give in advance to any of his or her compulsory heirs the whole or a portion of the legitime, since succession opens only from the moment of the death of the decedent.[32] Pursuant to the Civil Code, an advance of the legitime occurs only if, in the proper case,[33] a person gives a donation to either an ascendant or descendant.[34] Thus, where there is no gratuitous transfer of

[30] Article 1061, Civil Code.

[31] Article 765, Civil Code.

[32] Article 777, Civil Code.

[33] *See* Article 887, Civil Code.

[34] The spouse should be excluded by reason of the provisions of Article 87 of the Family Code which prohibits donations between the spouses during the

(continued...)

property made in favor of a compulsory heir, no advance of the legitime is recognizable under the law.

On the one hand, when a donor gives a donation to a compulsory heir, he or she does so on his or her own free will without any compulsion. Consequently, a donor who decides to give a gift to such heir, whether it be his or her intention to give an advance of the legitime or to charge the gift to the free disposal of his or her estate, gives such donation freely and intelligently, with full knowledge that the donee may later on prove to be ungrateful or unworthy. Thus, it is apparent that a donor takes a calculated risk each time he or she gives a donation to his or her heirs. If the heir proves to be ungrateful or unworthy and is eventually unable to restitute, the non-recovery is clearly imputable to the fault of the donor. The frustration of the legal remedies available to the donor cannot be imputed to the inadequacy of the law.

On the other hand, the payment of the presumptive legitime under Article 50 of the Family Code is an obligation mandated by the law. It cannot, therefore, be characterized as a transfer of property by reason of liberality, and it is not in the nature of a donation. Consequently, if the heir who benefitted from this statutory provision eventually proves to be ungrateful or unworthy, such improvident payment of the presumptive legitime cannot and should not be imputed to the bad judgment of the parents. Since the delivery of the presumptive legitime is a requirement of some law, it would seem reasonable to expect that the very same law should provide for adequate remedies in the event that the recipients prove themselves to be ungrateful or unworthy of the favor. In this respect, the Family Code is an utter failure.

D. Effects of Predecease:

A compulsory heir who dies before the testator, a person incapacitated to succeed, and one who renounces the inheritance, shall transmit no right to his own heirs, except in cases expressly provided for in the Civil Code.[35] In order to inherit, it is therefore important that the heir should survive the decedent, possess the capacity to succeed, and accept the bequest. These are fundamental principles of succession.

Article 50 of the Family Code requires the payment of the

[34](...continued)
marriage.

[35] Article 856, Civil Code.

presumptive legitime under the circumstances mentioned therein. The provision, however, does not take into account the possibility that the child may predecease the parents. To illustrate the point, assume that upon the annulment of the marriage between A and B, C was paid his presumptive legitime of ₱250,000.00 by B. C married Z and had a child I. Assume further that C predeceased B and that C left no other property except the ₱250,000.00 which he received from B. Who would be entitled to the ₱250,000.00 if the same were claimed by: (i) B by reason of the fact that C did not and cannot inherit from B; and (ii) Z and I, as surviving spouse and legitimate child of C, by reason of being the sole compulsory heirs of C?

By virtue of his death prior to B, C failed to inherit from the former. Therefore, theoretically, C was never entitled to the presumptive legitime of ₱250,000.00 If C was not entitled to the legitime, should not the same be returned to B? It may be true that the child I may eventually be entitled to inherit from B through the right of representation. But such inchoate right is exercisable by I only when B finally dies. It would seem, therefore, that the ₱250,000.00 should revert to B.

If it were to be assumed that the ₱250,000.00 could not be returned to B because C had spent the same in his lifetime, a legal problem would arise. It would appear that a person (C) collected and spent his presumptive legitime pursuant to the law when in fact he was not entitled to it. His inability to return the same to the proper party results in a deprivation or diminution of the successional rights of some other lawful heirs. The resulting situation is certainly anomalous.

On the basis of such an anomalous situation, would such sum be considered as an advance of the inchoate successional right of I (by representation) from B? The Family Code is obviously silent on this point. If so, should I account for the same in the determination of his rights upon the death of B? The complication can be compounded further if at the time of B's death, the final legitime of each legitimate child was an amount less than ₱250,000.00. In which event, should I be responsible to make the restitution which C could not effect? Again, the Family Code is silent on this vital issue.

After considering all the foregoing, one wonders whether the Revision Committee, in its genuine concern for the welfare of the children, deliberately conferred the benefits of Article 50 without due regard to the resulting problems which the Family Code cannot presently solve.

IV. LEGAL SEPARATION

The Family Code, in Article 55, expanded the grounds for legal separation to include 10 circumstances, ranging from coercing a spouse to change political affiliation to the ground of sexual perversion. In Article 63 of the same Code, the effects of legal separation include, among others, the following:

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

These provisions affected the law on hereditary succession, which to date recognizes only two grounds for legal separation; i.e., (i) adultery on the part of the wife and concubinage on the part of the husband, and (ii) an attempt by one spouse on the life of another.[36] Accordingly, the present law on succession makes provisions only for the aforesaid grounds. In Article 921 (4), a spouse may be disinherited if he or she has given cause for legal separation. The causes for legal separation are those mentioned in Article 97 of the Civil Code. Then again in Article 1032 of the Civil Code, the following are included as grounds for incapacity to succeed by reason of unworthiness:

> "xxx xxx xxx
> (2) Any person who has been convicted of an attempt against the life of the testator, his or her spouse, descendants, or ascendants;
> xxx xxx xxx
> (5) Any person convicted of adultery or concubinage with the spouse of the testator.
> xxx xxx xxx"

In sum, Article 921, insofar as it enumerates the grounds for disinheriting a spouse, is deemed modified by the provision of Article 55 of the Family Code. It is not clear, however, whether the provision of Article 55 of the Family Code impliedly amended the provision of Article 1032 of the Civil Code.

Under the Family Code, the offending spouse is disqualified by Article 63 from inheriting from the innocent spouse only in two respects: i.e., (i) by intestate succession, and (ii) by testamentary succession, based on

[36] Article 97, Civil Code.

the will of the innocent spouse in existence at the time legal separation was granted. Clearly, Article 63 will permit the guilty spouse to inherit from the innocent spouse only if the latter, after the issuance of the decree of legal separation, makes a will and therein provide for the guilty spouse.

Article 1032 of the Civil Code should nevertheless be taken into account. Under the Article 97 of the said Code, legal separation can be obtained on two grounds. These grounds, though not referred to in Article 1032 as grounds of legal separation, were nevertheless included as grounds for considering a person incapacitated by reason of unworthiness. If the Family Code expanded the grounds for legal separation, should such amendment be deemed to include the implied amendment of Article 1032 for the purpose of also considering the additional grounds for legal separation as grounds for unworthiness of a spouse? It would seem that a spouse who has given cause for legal separation by reason of attempted parricide or marital infidelity is no less unworthy to succeed from the innocent spouse, as one who gave cause for legal separation by reason of repeated physical violence or marital abandonment. And yet Article 1032 was not considered in formulating the new grounds for legal separation. Was it the intention of the Revision Committee to make such distinction among the various grounds for legal separation?

Then there is Article 1033 which obliterates the effects of the incapacity of a guilty spouse to inherit from the innocent spouse by reason of unworthiness. A spouse, therefore, who was convicted of an attempt on the life of the offended spouse or who committed adultery or concubinage, as the case may be, regains his or her capacity to succeed, if the offended spouse executes a written deed of condonation. But a spouse who committed repeated physical violence upon the person of the innocent spouse does not, under Article 1033 of the Civil Code, regain such capacity to succeed despite a written deed of condonation executed by the offended spouse. The question is thus: why the distinction? It would seem that reasonable foresight and anticipation in the drafting of the Family Code could have addressed this issue, particularly in the light of the desire of its framers to enact the said code separately and independently of the Civil Code.

V. CONCLUSION

The recitals of Executive Order No. 209 may now be cited:

> WHEREAS, almost four decades have passed since the adoption of the Civil Code of the Philippines;
>
> WHEREAS, experience under said Code as well as pervasive

changes and developments have necessitated revision of its provisions on marriage and family relations to bring them closer to Filipino Customs, values and ideals and reflect contemporary trends and conditions;

WHEREAS, there is need to implement policies embodied in the new Constitution that strengthen marriage and the family as basic social institutions and ensure equality between men and women;

In the light of these premises, one must ask some soul-searching questions. Were the provisions of the Civil Code on marriage and the family, on the one hand, so outdated that they can no longer be tolerated? Were these provisions too old to be effective? Can they no longer address the basic family needs of the Filipino? Was an immediate abrogation of the system indeed necessary?

On the other hand, did the Family Code achieve its avowed objectives? Did it properly respond to present needs? Did it resolve the nagging issues on marriage and family laws, or were the amendments merely cosmetic improvements which in the end created more problems than it had hoped to resolve?

As a whole, it would seem that the Family Code was an honest and creditable attempt at updating an old law. It contains new provisions which undoubtedly bring the law closer not only to Filipino values, but closer even to reality. But it also created a fairly good number of potential legal problems. Perhaps this is because of the basic imperfection of human laws. And the Family Code is no exception to the rule. All things considered the Family Code's good features certainly outweigh the bad ones. What seems to be the fundamental problem is not the Family Code itself, but its hasty implementation. Evidently, the new provisions have not been tested for consistency with the remaining portions of the Civil Code.

In the end, the nagging issue really is the propriety of amending portions of a codification, and implementing the amendments even before a thorough examination of their effects on the rest of the code could be determined. The problems arising from the new provisions of the Family Code could have been avoided, if only the Filipino women had patiently waited just a little longer for the completion of the revision efforts. After all, the women were adequately represented in the Civil Code Revision Committee, as six of its thirteen members are women. As a group, the women commissioners could very effectively exert influence in speeding up the completion of the task.

Impatience has led to the necessity of enacting remedial measures to cure the deficiencies of the Family Code. Unless such measures are promptly

cure the deficiencies of the Family Code. Unless such measures are promptly taken, strange issues may be filed in court and no solutions may be in place. The Filipino women for whose benefit the law was specially passed, may be the very victims of the unnecessary haste in the implementation of the new law. Everyone would certainly be pleased to see the Filipino women finally realize full equality with men before the law. But let not haste in the quest for equality with men lead into confusion, rather than equality before the law.