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The controlling case is *Lung Chea Kung Kee & Co. vs. Aldanese and Chua Soco*, 45 Phil. 784, where it was ruled:

"*When Collector of Customs is officially liable.* — Under the provisions of sections 1316 and 1408 of the Administrative Code, the Collector of Customs is officially liable for a misdelivery of merchandise' where it was delivered by a subordinate employee without the surrender of a bill of lading or the exacting of a bond, even though such delivery was made without the knowledge, consent, or approval of the Collector."

Section 1408.is identical to Section 3511 while Section 1316 covers delivery of merchandise without production of a bill of lading.

WHEREFORE, the judgment of the Appellate Court is affirmed. No costs.

SO ORDERED.

Makasiar (Chairman), *Concepcion Jr.*, *Abad Santos*, and *Cuevas*, *JJ.*, concur.

Escolin, *J.*, took no part.

SECOND DIVISION

[G.R. No. 68374. June 18, 1985]

HORACIO LUNA and LIBERTY HIZON-LUNA, *petitioners, vs.* **INTERMEDIATE APPELLATE COURT, HON. ROQUE A. TAMAYO, as Presiding Judge of Regional Trial Court, NCJR, Branch CXXXII, Makati, Metro Manila, MARIA LOURDES SANTOS, and SIXTO SALUMBIDES,** *respondents.*

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SYLLABUS

1. **REMEDIAL LAW; CIVIL PROCEDURE; JUDGMENT; STAY OF EXECUTION OF A FINAL JUDGMENT; JUSTIFICATIONS.**— It is also equally well-known that a stay of execution of a final judgment may be authorized whenever it is necessary to accomplish the ends of justice as when there had been a change in the situation of the parties which makes such execution inequitable, or when it appears that the controversy had never been submitted to the judgment of the court; or when it appears that the writ of execution has been improvidently issued; or that it is defective in substance; or is issued against the wrong party; or that the judgment debt has been paid or otherwise satisfied; or when the writ has been issued without authority.

2. **ID.; ID.; ID.; ID.; MANIFESTATION OF THE CHILD THAT SHE WOULD KILL HERSELF OR RUN WAY FROM HOME IF THE JUDGMENT IN A CUSTODY CASE SHOULD BE ENFORCED IS A CIRCUMSTANCE WHICH MAKE THE EXECUTION OF SUCH JUDGMENT UNFAIR AND UNJUST.**— The manifestation of the child Shirley that she would kill herself or run away from home if she should be taken away from the herein petitioners and forced to live with the private respondents, made during the hearings on the petitioners' motion to set aside the writ of execution and reiterated in her letters to the members of the Court dated September 19, 1984 and January 2, 1985, and during the hearing of the case before this Court, is a circumstance that would make the execution of the judgment rendered in Spec. Proc. No. 9417 of the Court of First Instance of Rizal inequitable, unfair and unjust, if not illegal.

3. **ID.; ID.; ID.; ID.; BEST INTEREST OF THE CHILD CAN OVERRIDE PROCEDURAL RULES ON EXECUTION OF A FINAL JUDGMENT.**— Article 363 of the Civil Code provides that in all questions relating to the care, custody, education and property of the children, the latter's welfare is paramount. This means that the best interest of the minor can override procedural rules and even the rights of parents to the custody of their children. Since, in this case, the very life and existence of the minor is at stake and the child is in an age when she can exercise an intelligent choice, the courts can do

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no less than respect, enforce and give meaning and substance to that choice and uphold her right to live in an atmosphere conducive to her physical, moral and intellectual development. The threat may be proven empty, but Shirley has a right to a wholesome family life that will provide her with love, care and understanding, guidance and counselling, and moral and material security. But, what if the threat is for real?

MAKASIAR, *J.*, *dissenting:*

SYLLABUS

1. **REMEDIAL LAW; SPECIAL PROCEEDINGS; GUARDIANSHIP AND CUSTODY OF CHILDREN; NATURAL RIGHT OF THE PARENTS INCIDENT TO PARENTHOOD.**— The right of the parents to the custody of their minor children is one of the natural rights incident to parenthood, a right supported by law and sound public policy. The right is an inherent one, which is not created by the state or by the decisions of the courts, but derives from the nature of parental relationship. Since the rights of parents to the custody of their minor children is both a natural and a legal right, the law should not disturb the parent-child relationship except for the strongest reasons, and only upon a clear showing of a parent's gross misconduct or unfitness, or of other extraordinary circumstances affecting the welfare of the child.

2. **ID.; ID.; ID.; ID.; PARENTAL PREFERENCE RULE; EXPLAINED.**— Under the so-called parental preference rule, a natural parent, father or mother, as the case may be, who is of good character and a proper person to have the custody of the child and is reasonably able to provide for such child, ordinarily is entitled to the custody as against all persons. Accordingly, such parents are entitled to the custody of their children as against foster or prospective adoptive parents; and such entitlement applies also as against other relatives of the child, including grandparents, or as against an agency or institution. It has been an established rule that the preference of a child is only one factor to be considered, and it is not controlling, decisive, or determinative. Thus, notwithstanding the preference, the court has a discretion to determine the question of custody, and it is not error for the court to refuse

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to discuss the custody issue with the child. The rights of a parent will not be disregarded in order to gratify the mere wishes of a child where a parent is found to be a proper person to be entrusted with the custody of a child.

DECISION

CONCEPCION, JR., *J.*:

Review on *certiorari* of the decision of the respondent appellate court in case CA-G.R. No. SP-01869, entitled: "*Horacio Luna, et al., petitioners, versus Hon. Roque A. Tamayo, etc., et al., respondents*," which affirmed an order denying a motion to restrain the execution of a final judgment rendered in a *habeas corpus* case.

The records of the case show that the herein private respondent Maria Lourdes Santos is an illegitimate child of the petitioner Horacio Luna who is married to his co-petitioner Liberty Hizon-Luna. Maria Lourdes Santos is married to her corespondent Sixto Salumbides, and are the parents of Shirley Santos Salumbides, also known as Shirley Luna Salumbides, who is the subject of this child custody case.

It appears that two or four months after the birth of the said Shirley Salumbides on April 7, 1975, her parents gave her to the petitioners, a childless couple with considerable means, who thereafter showered her with love and affection and brought her up as their very own. The couple doted upon Shirley who called them "Mama" and "Papa". She calls her natural parents "Mommy" and "Daddy." When Shirley reached the age of four (4) years in 1979, she was enrolled at the Maryknoll College in Quezon City. where she is now in Grade III.

A few months before September, 1980, her "Mama" and "Papa" decided to take Shirley abroad and show her Disneyland and other places of interest in America. Shirley looked forward to this trip and was excited about it. However, when the petitioners asked for the respondents' written consent to the child's application for a U.S. visa, the respondents refused to give it, to the petitioners' surprise and chagrin. Shirley was

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utterly disappointed. As a result, the petitioners had to leave without Shirley whom they left with the private respondents, upon the latter's request. The petitioners, however, left instructions with their chauffeur to take and fetch Shirley from Maryknoll College every school day.

When the petitioners returned on October 29, 1980, they learned that the respondents had transferred Shirley to the St. Scholastica College. The private respondents also refused to return Shirley to them. Neither did the said respondents allow Shirley to visit the petitioners. In view thereof, the petitioners filed a petition for *habeas corpus* with the Court of First Instance of Rizal, Branch XV, against the private respondents to produce the person of Shirley and deliver her to their care and custody. The case was docketed in court as Spec. Proc. No. 9417, and after the filing of an answer and due hearing, a decision was rendered on March 9, 1981, declaring the petitioners entitled to the child's custody and forthwith granted the writ prayed for.

The private respondents appealed to the then Court of Appeals where the case was docketed as CA-G.R. No. SP-12212, and in a decision dated April 7, 1982, the appealed decision was reversed and set aside and another entered, ordering the petitioners, among other things, to turn over Shirley to the private respondents. The herein petitioners filed a motion for the reconsideration of the decision but their motion was denied.

Consequently, the petitioners filed a petition for review of the decision of the appellate court. The case was docketed herein as G.R. No. 60860 and on November 10, 1982, this Court, in a minute resolution, denied the petition for lack of merit.

Upon finality of the judgment, the case was remanded to the court of origin and assigned to Regional Trial Court, NCJR, Branch CXXXII, Makati, Metro Manila, presided over by respondent Judge Roque A. Tamayo who, thereafter, issued an order directing the issuance of a writ of execution to satisfy and enforce the resolution of the Supreme Court which affirmed the decision of the Court of Appeals.

The execution of the judgment was vigorously opposed by the petitioners who filed a motion for the reconsideration of the

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order and to set aside the writ of execution on the ground of supervening events and circumstances, more particularly, the subsequent emotional, psychological and physiological condition of the child Shirley which make the enforcement of the judgment sought to be executed unduly prejudicial, unjust and unfair, and cause irreparable damage to the welfare and interests of the child. By reason thereof, the respondent judge called a conference among the parties and their counsel, and conducted hearings on the petitioners' motion for reconsideration and to set aside the writ of execution. Shirley made manifest during the hearing that she would kill herself or run away from home if she should ever be separated from her Mama and Papa, the petitioners herein, and forced to stay with the respondents. A portion of her testimony is quoted hereunder:

"ATTY. CASTRO:

xxx xxx xxx

Q Would you want to live with your daddy and mommy, referring to Sixto Salumbides and Maria Lourdes Salumbides?

A No, sir.

Q Why not?

A Because they are cruel to me. They always spank me and they do not love me. Whenever I am eating, they are not attending to me. It is up to me whether I like the food or not.

xxx xxx xxx

Q Now, if you will be taken from your papa and mama (Luna spouses) and given to your daddy and mommy (Salumbides spouses), what would you do if you will do anything?

A *I will either kill myself or I will escape.* Even now they said they love me. I don't believe them. I know they are not sincere. They are only saying that to me. And I know those words were not coming from their hearts. If they will get me from my papa and mama, they will be hurt because they know that my papa and mama love me very much."[1]

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[1] *Rollo*, p. 20.

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Dra. Cynthia Dulay Bruce, a child psychologist, affirmed her findings that —

"xxx She (Shirley) has only grown more embittered, cautious, distrusting of her biological parents. She threatens to kill herself or run away if given to her biological parents. She claims she would be very unhappy with her biological parents since they do not understand her needs, are selfish to her, and don't know how to care for her. Presently, she is very difficult to encourage in seeing her biological parents in a different light."[2]

and that —

xxx I reviewed with them (Salumbides spouse) that at the present time, to get Shirley back in this emotionally charged transaction, would hinder Shirley seeing them as truly loving and concerned parents. She would more deeply distrust them if they uproot her from the home of the choice of Mr. and Mrs. Luna. The biological parents wish to do what is also helpful to Shirley. I discussed with both parties the recommendations of placement and follow up."[3]

But, the respondent judge denied the petitioners' motion to set aside the writ of execution. The petitioners filed a motion for the reconsideration of the order and when it was denied, they filed a petition for *certiorari* and prohibition with preliminary injunction and restraining order with the respondent Intermediate Appellate Court, which was docketed therein as CA-G.R. No. SP-01869, to stop altogether the execution of the decision of the Court of Appeals rendered in CA-G.R. No. SP-12212. The petition was duly heard, after which a decision was rendered on May 25, 1984, dismissing the petition. Hence, the present recourse.

The issue is whether or not procedural rules, more particularly the duty of lower courts to enforce a final decision of appellate courts in child custody cases, should prevail over and above the desire and preference of the child, to stay with her grandparents instead of her biological parents and who had

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[2] *Id.*, p. 19.

[3] *Id.*, p. 20.

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signified her intention to kill herself or run away from home if she should be separated from her grandparents and forced to live with her biological parents.

It is a well-known doctrine that when a judgment of a higher court is returned to the lower court, the only function of the latter court is the ministerial one of issuing the order of execution. The lower court cannot vary the mandate of the superior court, or examine it, for any other purpose than execution; nor review it upon any matter decided on appeal or error apparent; nor intermeddle with it further than to settle so much as has been demanded. However, it is also equally well-known that a stay of execution of a final judgment may be authorized whenever it is necessary to accomplish the ends of justice as when there had been a change in the situation of the parties which makes such execution inequitable, or when it appears that the controversy had never been submitted to the judgment of the court; or when it appears that the writ of execution has been improvidently issued; or that it is defective in substance; or is issued against the wrong party; or that the judgment debt has been paid or otherwise satisfied; or when the writ has been issued without authority.

In the instant case, the petitioners claim that the child's manifestation to the trial court that she would kill herself or run away from home if she should be forced to live with the private respondents is a supervening event that would justify the cancellation of the execution of the final decision rendered by the Court of Appeals in CA-G.R. No. SP-12212. The respondents, upon the other hand, maintain that there are no supervening developments and circumstances since these events are not new as the Court of Appeals had taken into account the physiological and emotional consideration of the transfer of custody of Shirley when it reversed the decision of the trial court and gave to the private respondents the custody of the child Shirley; and besides, the wishes and desires of the child is no hindrance to the parents' right to her custody since the right of the parents to the custody of their children is paramount.

We find merit in the petitioner. The manifestation of the child Shirley that she would kill herself or run away from home

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if she should be taken away from the herein petitioners and forced to live with the private respondents, made during the hearings on the petitioners' motion to set aside the writ of execution and reiterated in her letters to the members of the Court dated September 19, 1984[4] and January 2, 1985,[5] and during the hearing of the case before this Court, is a circumstance that would make the execution of the judgment rendered in Spec. Proc. No. 9417 of the Court of First Instance of Rizal inequitable, unfair and unjust, if not illegal. Article 363 of the Civil Code provides that in all questions relating to the care, custody, education and property of the children, the latter's welfare is paramount. This means that the best interest of the minor can override procedural rules and even the rights of parents to the custody of their children. Since, in this case, the very life and existence of the minor is at stake and the child is in an age when she can exercise an intelligent choice, the courts can do no less than respect, enforce and give meaning and substance to that choice and uphold her right to live in an atmosphere conducive to her physical, moral and intellectual development.[6] The threat may be proven empty, but Shirley has a right to a wholesome family life that will provide her with love, care and understanding, guidance and counselling, and moral and material security.[7] But, what if the threat is for real?

Besides, in her letters to the members of the Court, Shirley depicted her biological parents as selfish and cruel and who beat her often; and that they do not love her. And, as pointed out by the child psychologist, Shirley has grown more embittered, cautious and distrusting of her biological parents. To return her to the custody of the private respondents to face the same emotional environment which she is now complaining of would be indeed traumatic and cause irreparable damage to the child. As requested by her, let us not destroy her future.

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[4] *Id.*, p. 54.

[5] *Id.*, p. 75.

[6] Art. 356(4), Civil Code.

[7] Art. 3(2), Child and Youth Welfare Code (PD 603).

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WHEREFORE, the petition should be, as it is hereby GRANTED and the writ prayed for issued, setting aside the judgment of the respondent Intermediate Appellate Court in CA-G.R. No. SP-01869, and restraining the respondent judge and/or his successors from enforcing the judgment rendered by the Court of Appeals in CA-G.R. No. SP-12212, entitled: "*Horacio Luna and Liberty Hizon-Luna, petitioners-appellees, versus Maria Lourdes Santos and Sixto Salumbides*, respondents-appellants." The decision rendered in Spec. Proc. No. 9417 of the Court of First Instance of Rizal granting the herein petitioners custody of the child Shirley Salumbides should be maintained. Without costs.

SO ORDERED.

Abad Santos, *Escolin*, and *Cuevas*, *JJ.*, concur.

AQUINO, ***J., concurring:***

I concur. A judgment for the custody of the child, like a judgment for support is not final and irrevocable. The welfare of the child is the paramount consideration. It would be for Shirley's welfare to remain in the custody of the petitioners.

MAKASIAR, ***J., dissenting:***

The resolution of the issue on who should have custody over the nine-year old girl has been viewed from a limited approach. The majority opinion has been focused more on the personal assessment of the child rather than on the general and specific laws and jurisprudence that should govern this case. A nine-year old child, brainwashed by the material luxury as well as constant attention showered on her by doting grandparents, cannot possibly appreciate the incomparable love and solicitude her natural parents have for her always, in good or bad times.

The determination, therefore, as to whose custody the child belongs must necessarily and initially involve the question of parental authority. It appears that the law on parental authority has been conveniently sidetracked by petitioners.

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Parental authority, known in Roman law as *patria potestas*, is defined as "the mass of rights and obligations which parents have in relation to the person and property of their children, until their majority age or emancipation, and even after this under certain circumstances" (2 Manresa 8, cited in p. 657, Comments & Jurisprudence on the Civil Code, Tolentino, Vol. I, 1983 ed.).

The following Civil Code provisions thus provide:

"Art. 311. The father and mother jointly exercise parental authority over their legitimate children who are not emancipated. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.

xxx xxx xxx

"Art. 313. Parental authority cannot be renounced or transferred, except in cases of guardianship or adoption approved by the courts, or emancipation by concession" (par. 1).

Significantly, the stern pronouncements of this Court in the case of *Celis vs. Cafuir* (L-3352, June 12, 1950, 86 Phil. 554) are very much in point. This Court thus declared:

"The word 'entrusted' cannot convey the idea of definite and permanent renunciation of the mother's custody of her child.

xxx xxx xxx

"This Court should avert the tragedy in the years to come of having deprived mother and son of the beautiful associations and tender, imperishable memories engendered by the relationship of parent and child. We should not take away from a mother the opportunity of bringing up her own child even at the cost of extreme sacrifice due to poverty and lack of means; so that afterwards, she may be able to look back with pride and a sense of satisfaction and her efforts, however humble, to make her dreams of her little boy come true. We should not forget that the relationship between a foster mother and a child is not natural but artificial. If the child turns out to be a failure or forgetful of what its foster parents had done for him, said parents might yet count and appraise all that they have done and spent for him and with regret consider all of it as a dead loss, and even rue the day they committed the blunder of taking the child into

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their hearts and their home. Not so with a real natural mother who never counts the cost and her sacrifices, ever treasuring memories of her associations with her child, however unpleasant and disappointing. Flesh and blood count.

xxx xxx xxx

"Whether a child should stay permanently with a kindly stranger or with his own mother, is not to be determined alone by considerations of affluence or poverty. Poor youths who had to work their way thru school and college, have, not infrequently, scaled the heights of success, as easily and swiftly as their more favored companions, and done so with more, inner satisfaction, and credit to themselves and their humble parents."

The guardianship or custody which parents exercise over their children is well-entrenched in this jurisdiction. Thus, in the case of *Reyes vs. Alvarez* (8 Phil. 725), this Court declared:

"The guardianship which parents exercise over their children by virtue of the paternal authority granted them by law has for its purpose their physical development, the cultivation of their intelligence, and the development of their intellectual and sensitive faculties. For such purposes they are entitled to control their children and to keep them in their company in order to properly comply with their paternal obligations, but it is also their duty to furnish them with a dwelling or a place where they may live together."

This Court has long recognized that "the right attached to parental authority is a purely personal one, and it is extinguished upon the death of the parent exercising it" (*Abiera vs. Orin*, 8 Phil. 193).

Custody embraces the sum of parental rights with respect to the rearing of a child, including his care. It includes the right to the child's services and earnings, and the right to direct his activities and make decisions regarding his care and control, education, health, and religion (p. 107, 59 Am. Jur. 2d.).

The right of the parents to the custody of their minor children is one of the natural rights incident to parenthood, a right supported by law and sound public policy. The right is an inherent one, which is not created by the state or by the decisions of the

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courts, but derives from the nature of parental relationship. Since the rights of parents to the custody of their minor children is both a natural and a legal right, the law should not disturb the parent-child relationship except for the strongest reasons, and only upon a clear showing of a parent's gross misconduct or unfitness, or of other extraordinary circumstances affecting the welfare of the child (pp. 107 & 108, 59 Am. Jur. 2d.).

"Article 363 orders that 'No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure.' One of the cruelest acts in the world is to separate a mother from her baby. This was often done in case of adultery by the mother, and the court ordered that the custody of the child should be given to the father, but the new article provides other wise because the mother's maternal love — than which there is nothing greater in this life — should be respected. Besides, she could not exert a bad influence on a baby. And lastly, perhaps the presence of her child will often redeem her" (p. 199, The Father of the First Brown Race Civil Code, Rivera, 1978 Ed.).

As long as the parents are living and they have not lost their parental authority, *patria potestas* is limited to them. Other ascendants have no authority over the children, even if the parents of the latter are minors (2 Manresa 13, cited in p. 661, Comments and Jurisprudence on the Civil Code, Tolentino, Vol. I, 1983 Ed.).

Parental authority is inalienable and every abdication of this authority by the parents is void (Planiol and Ripert 324, p. 664, *Ibid.*).

Whatever agreement or arrangement there was between petitioners and respondents when the child Shirley was given to the former, the same has not been validated nor legalized by the mere fact that the said girl had stayed with the petitioners for a number of years, in view of the explicit provision of Article 313 mandating that parental authority cannot be renounced or transferred, except in cases of guardianship or adoption approved by the courts, or emancipation by concession.

Thus, the mother in case of separation, cannot by agreement vest the custody of a child in the maternal grandmother as against

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the father (*Mason vs. Williams*, 165 Ky. 331, 176 S.W. 1171, cited in p. 662, Comments and Jurisprudence on the Civil Code, Tolentino, Vol. 1, 1983 Ed.).

Some United States courts have consistently ruled that since children cannot be bought and sold, and since the parent is subject to obligations which he cannot throw off by any act of his own, agreements by which the parents, or one of them, transfer custody of a child to a third person, with the provision or informal understanding that custody will not be reclaimed, are not generally considered legally binding contracts, unless they amount to statutory indentures of apprenticeship, or are supported by other express statutory provisions. This is especially true in the case of a parent who, having been compelled by poverty or unfavorable circumstances to surrender the custody of his child, wishes to reclaim it when circumstances are improved (p. 117, 59 Am. Jur. 2d.).

For this Court to award custody over Shirley to petitioners primarily on the basis of her reaction and choice would run counter to existing law and jurisprudence as already aforestated.

A nine-year old girl, although already at the age of discernment, is not capable of knowing or defining varied feelings like love, anger or cruelty when such a girl has been exposed to two contrasting conditions, the first for more than eight years and the second, for barely four months. The child grew up amidst affluent surroundings — the grandparents being well-off. The *lolo* and *lola* as most *lolos* and *lolas* are, doted over Shirley. In fact, she attended Maryknoll College, a school for the elite, and rode in a chauffeur-driven car. She grew up amidst a luxurious atmosphere. Perhaps, in their own way of loving their granddaughter, they showered her with all material needs and pampered her. Thus, the child had not been made to experience disappointments, much less hardships. Life with her *lolo* and *lola* meant having what she wanted. In the process, Shirley moved about in a limited world, created by her Mama (*Lola*) and Papa (*Lolo*) — a world felt and seen through rose-colored lenses, The child addresses her natural parents as "Daddy" and "Mommy".

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Then all of a sudden, the scenario is changed and the girl finds herself in a very contrasting situation. Having been used to the life style offered by her grandparents and having thus absorbed a set of values different from the average and ordinary, she now finds life with her natural parents harsh and unbearable. With the luxurious life she had with petitioners at the back of her mind, she would naturally look at things in the respondents' home differently and partially.

Four months is too insufficient a time for a nine-year old girl to comprehend and accept a home atmosphere strikingly distinct from one where she had lived for more than eight years. Four months is a very short time for the child to be able to understand, to absorb and to appreciate two vastly different home conditions. Whatever set of values the second home has to offer, the same cannot settle in a child for only four months' exposure. To Shirley, therefore, any attempted discipline imposed by her natural parents means cruelty and lack of affection for her. Where before she could choose the food she wanted, now she has to take whatever food is available within the limited means of her parents. She cannot realize that in a middle-class family, the choice of food is restricted by the amount appropriated therefor. The gauge is what and how much food could benefit all the members of the household and not just one member. Choice for particular needs becomes secondary to what the family budget can afford for the entire family. This explains why Shirley had a dislike for the conditions existing in respondents' house which did not cater to her tastes.

In her answers to the questions which are quite leading, one can clearly sense that Shirley, who was used to having all the lavish care and attention from petitioners, reacted negatively to her natural parents whose ways are so different from the former. It would take some more time and exposure for Shirley to be able to really say that respondents do not love and care for her. She would have been given more time in respondents' home to allow whatever values such place can offer to settle in her mind. It was unfair for petitioners to push Shirley into a choice — a decision which a nine-year old girl could not have made intelligently without undue pressure and played-up emotionalism.

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It must be noted with concern that Article 312 of the Civil Code clearly defines the specific and limited role of grandparents when it states that "grandparents shall be consulted by all members of the family on all important family questions." This has been interpreted to mean that as long as the parents are living, grandparents and other ascendants have no authority over the children, even when the parents are minors. Grandparents, therefore, cannot question the form of instruction or education chosen by the parents for the children. The grandparents can only advise and counsel the children. But if the parents are dead or are absent, then the grandparents shall exercise parental authority over the children (Article 354, p. 663, Comments and Jurisprudence on the Civil Code, Tolentino, 1983 Ed.).

Evidently, the present petition for custody of petitioners runs counter to the parental preference rule. Under the so-called parental preference rule, a natural parent, father or mother, as the case may be, who is of good character and a proper person to have the custody of the child and is reasonably able to provide for such child, ordinarily is entitled to the custody as against all persons. Accordingly, such parents are entitled to the custody of their children as against foster or prospective adoptive parents; and such entitlement applies also as against other relatives of the child, including grandparents, or as against an agency or institution (pp. 207 & 208, Vol. 67A C.J.S.).

It has been an established rule that the preference of a child is only one factor to be considered, and it is not controlling, decisive, or determinative. Thus, notwithstanding the preference, the court has a discretion to determine the question of custody, and it is not error for the court to refuse to discuss the custody issue with the child. The rights of a parent will not be disregarded in order to gratify the mere wishes of a child where a parent is found to be a proper person to be entrusted with the custody of a child (pp. 231-232, Vol. 67A C.J.S.).

In view of the foregoing, and considering that herein respondents have not been shown to be unfit or unsuitable or financially incapable of keeping and caring for Shirley, the latter's custody should be awarded to said respondents.