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**COMATERNITY: VOLUNTARY RECOGNITION OF A SON TO HOMOPARENTAL
COUPLES
(COMATERNIDAD: RECONOCIMIENTO VOLUNTARIO DE HIJOS DE PAREJAS
HOMOPARENTALES)**

CASE: *Amparo en Revisión 852/2017*

REPORTING JUDGE: Norma Lucía Piña Hernández

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE: May 8, 2019

KEY WORDS: right to identity, right to equality and non-discrimination, right to family protection, best interests of the child, co-maternity, same-sex couples, homoparental families, legal and biological filiation, voluntary recognition, procreational will.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 852/2017*, First Chamber, Norma Lucía Piña Hernández, J., decision of May 8, 2019, Mexico.

The full text of the decision can be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AR%20852-2017.pdf>

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SUMMARY OF THE *AMPARO EN REVISIÓN* 852/2017

BACKGROUND: A homoparental couple on its own behalf and on behalf of a minor filed an *amparo* and the protection of the federal justice system against the approval, promulgation and publication order of Article 384 of the Civil Code of the State of Aguascalientes (CCSA), as well as the application of the cited provision by issuing an official notice in which it was determined that it was not appropriate to register the minor as their child. A district judge heard the claim and denied the *amparo*. The couple then brought a *recurso de revisión*, which was heard by a collegiate court that admitted and registered it; nonetheless, the person representing the affected persons requested the First Chamber of Mexico's Supreme Court of Justice (this Court) to resume its original jurisdiction to hear the case. In response to the request, this Court decided to resume the original jurisdiction to hear the *amparo* in question.

ISSUE PRESENTED TO THE COURT: Whether the figure of voluntary recognition of daughters and sons, as provided for in Article 384 of the CCSA, infringes the right of equality and non-discrimination of homoparental family unions.

HOLDING: The *amparo* was granted on the basis that Article 384 of the CCSA is, essentially, unconstitutional for the following reasons. By limiting the voluntary recognition of a child to a woman and a man, under the presumption of the existence of the genetic link and because it establishes discriminatory treatment that transcends homoparental family unions, as it excludes them from protection. It must therefore be accepted that a woman's biological child may be voluntarily recognized on the birth certificate or in a subsequent special act by another woman with whom she is in a homoparental family union, even if the one who acknowledges obviously has no genetic link to the child. Consequently, the *amparo* was granted to the effect of ordering the de-application of the norm in the legal sphere of those affected and issuing the birth certificate of the minor acknowledging comaternity.

VOTE: The First Chamber unanimously decided this case by five votes from judges Norma Lucía Piña Hernández, Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo, Alfredo Gutiérrez Ortiz Mena and Juan Luis González Alcántara Carrancá.

EXTRACT OF THE *AMPARO EN REVISIÓN* 852/2017

p. 1 Mexico City. First Chamber of Mexico's Supreme Court of Justice (this Court), in session of May 8, 2019, issues the following decision.

BACKGROUND

- p.19 The affected people are two women who have been married since April 28, 2015, a family legal tie that they achieved through a judicial final decision that granted them constitutional protection against the act of the Civil Registry authority that had initially denied the possibility of their marriage.
- p.20 During the processing of that *juicio de amparo indirecto*, the purpose of which was to remove the normative obstacle that prevented them from constituting their marriage; on December 28, 2014, one of those affected gave birth to a child.
- p.20-21 The couple attempted to register the child before marrying, assuming that, given their family status, both should be recognized as her mothers. However, the Director of the Civil Registry denied the registration while the biological mother appeared with the child and submitted all the documents referred to in Article 32 of the Regulations of the Directorate-General of the Civil Registry of the State of Aguascalientes (RDGCR); also, with regard to the recognition of the child by the couple, the authority determined that such recognition was inappropriate in terms of Article 384 of the Civil Code of the State of Aguascalientes (CCSA), which provides that the filiation of children results, in relation to the mother, only from the fact of birth, and with respect of the father, by voluntary recognition or by sentence declaring his paternity.
- p.21-22 The act issued by the civil registry authority to the effect of denying recognition of the child, as well as Article 384 of the CCSA, which served as the basis for sustaining it, were

challenged in the *juicio de amparo indirecto*. The district judge hearing the matter denied the *amparo*.

p.24 The affected persons filed a *recurso de revision* and the Court resumed its original jurisdiction to analyze the constitutionality of Article 384 of the CCSA, on the postulate that the concept of voluntary recognition of a child, in the terms provided for in that law, does infringe the right to equality and non-discrimination of homoparental family unions, particularly of two women, by not recognizing them as a social and family reality, as well as various fundamental rights of the minor to be recognized, to the detriment of her best interest.

STUDY OF THE MERITS

I. Best interest of the child

p.25-26 The prevailing nature of the rights of children and adolescents is a clear mandate of the Federal Constitution. This is recognized in Article 4, which states that all decisions and actions of the State shall ensure and comply with the principle of the best interests of children, fully guaranteeing their rights. This constitutional norm is the basis of the so-called principle of the best interests of the child.

p.28 Thus, for this Court, the principle of best interest grants preferential treatment to children and adolescents, in order to ensure their harmonious and integral development and the full exercise of their rights. However, its material meaning can only be given from the circumstances of each case, even, on many occasions, depending on each particular child or adolescent.

II. Right to identity. The specific case of filiation

p.28-29 The right to identity is inherent to the human being and it is based on human dignity; it is an indispensable right for the person to establish his/her individuality, in a way that personal identity is a right intimately linked to the person in his/her specific individuality

and private life, but it is also a necessary right for the exercise of the individual's relations with the family, society and the State; it has then direct influence in the development of ties in the various areas of a person's life.

On this human right in relation to children, this Court, based on Articles 7 and 8 of the Convention on the Rights of the Child (CRC) and the 4th Constitutional Provision, has emphasized in various precedents that while identity is built through multiple psychological and social factors, as a right, identity in respect of a minor recognizes in its essential core other specific rights, such as having a name, having a birth record, knowing his/her own filial history in its genetic origins where possible, knowing his/her parents and being cared for by them, recognition of legal capacity and nationality, filiation and the rights emanating from that, such as food and inheritance.

p.30 In accordance with the above, in the Contradictory Decisions case 430/2013, the First Chamber of this Court established that the right of identity of a minor is composed of several rights, and among them is to research and know the truth about their origins, which implies the right to request and receive information about their biological origin, in order to be able to exercise their right to biological identity; and that, in terms of Article 7(1) and 8(1) and (2), of the CRC, when the reality of a biological tie is not reflected at the legal level, the State must recognize the right of the minor to achieve the family status that corresponds to their blood relationship, since it is the right of the child to have the filiation that corresponds to him/her and not a mere power of the parents to make it possible, so this Court noted that the trend should be that legal filiation coincides with the biological filiation.

However, in that contradictory decisions case this Court also acknowledged that it is not always possible that such a coincidence of the legal and biological filiation of the person exists, sometimes because of the factual situation in which the person finds him/herself, other times because the legal system makes other interests that it considers legally relevant prevail.

p.31 It was also emphasized that, since the effects of filiation are not exhausted in the knowledge of the biological origin itself, but imply the acquisition of a set of rights of the child in relation to the parents and it constitutes the center of imputation of various rights and obligations, any decision made on the filiation of a minor must take into account the facts surrounding the particular case and always decide according to what is best for the child.

Filiation is a fundamental right and one of the attributes of personality, which is inextricably linked to the name, the marital status of persons, the recognition of their legal capacity, their nationality, etc.; such that the right to filiation is intrinsic to identity.

p.32-33 This Court has been recognizing changes in the traditional conception of filiation, considering that the evolution of society requires legal institutions to adapt to reality, in order for the law to be dynamic and contribute to regulating human relations in a useful way and in line with fundamental rights.

p.33-34 In one of its precedents, this Court reiterated what was said in the Contradictory decisions case 430/2013 of the First Chamber, in the sense that filiation is a right of the child, and not a power of the parents to make it possible; and that, while the trend in the constitution of filiation should ensure that the biological and the legal coincide, when this is not possible, either because of the reality of the situations of fact or because interests that are considered legally more relevant must prevail, the legal filiation may not coincide with the biological one, since what is important is to favor what is in line with the best interests of the child.

p.34 In this regard, this Court has recognized the establishment of legal filiation, without the biological link, to give preeminence to the stability of family relations, privileging a consolidated family status in time.

An example of this is the decision of the *Amparo Directo en Revisión* 6179/2015 of the First Chamber of this Court, in which, in light of the claim of maternity recognition by the

biological mother with respect to her daughter, who since the first days of her birth had been handed over by her in order to "give her up for adoption" to the defendant couple, this Court determined that the social reality of the child should be privileged, since her right of identity was not filled only by the biological tie, since her context also determined her identity, and such a right, in that case, could be better guaranteed by protecting a consolidated family status in time.

- p.35 Other cases in which this Court has recognized the legal filiation apart from the existence of a biological tie, giving preeminence to the stability of family relationships, has been in cases where children are born through the use of assisted human reproduction techniques.
- p.35-36 For example, in the resolution of the *Direct Amparo en Revision 2766/2015* the First Chamber of this Court took into account as a relevant element for the justification of the establishment of the legal filiation between the minor and the father, that his procreative will existed, as a bioethical principle of the autonomy of individuals, that is to say that in the case of the use of assisted reproduction techniques in which a parent does not have a genetic participation, the will of the parent for procreation to occur is the determining factor for the establishment of the filiation tie with the child, and for the spouse or common-law spouse who did not provide genetic material to be legally tied to all the legal consequences of a genuine paternal-filial relationship.
- p.37 For this Court, the procreative will forms the backbone of the filial determination when the child is born using one of the assisted reproduction techniques.
- p.39 Hence, the precedents narrated here show that the doctrine of this Court on the establishment of filiation in family relations, although it is based on the principle that legal filiation should coincide with biological filiation, this does not have to be so in all cases, since there are contexts which permit establishing a legal filiation without a biological link if this is consistent with the child's right to identity, with the best interests of the child, and with the family reality in which she lives.

III. Concept of family and its protection. The case of homoparental marriages

p.40 In resolving the *Acción de Inconstitucionalidad 2/2010*, the Plenary of this Court established that Article 4 of the Constitution does not refer to an ideal family model that presupposes a heterosexual marriage and whose purpose necessarily is procreation; the protection of the family that the Constitution orders does not refer exclusively to the nuclear family that has traditionally been linked to marriage: father, mother and biological children.

The Constitution protects the family understood as a social reality, which means that such protection must cover all its forms and manifestations existing in society.

p.42 Furthermore, this Court has established that, like heterosexual couples, same-sex couples have the right to family life, and that this is not only limited to couples' lives, but it can be extended to the procreation and upbringing of children according to the parents' decision. Thus, there are same-sex couples who have family life with children adopted or procreated by one of them, or same-sex couples who use the means derived from scientific advances to procreate.

p.42-43 Therefore, if marriage or any other form of family between persons of the same sex are legal institutions falling under the right of protection of the family enshrined in Article 4 of the Federal Constitution, it must be based on the fact that such couples can access family institutions with all their prerogatives in what is of interest here, with the recognition of their rights to ensure that their family relationship includes, if that is their wish, to have biological children born to one of them, procreated through the use of assisted human reproduction techniques or adopted, and as to this, they must enjoy the same state protection as any other form of family, especially when this necessarily affects the protection of children's rights, such as growing up within a family and accessing all rights arising from filiation with the ancestors, and not being discriminated against or seen at a disadvantage according to the type of family to which they belong and in which they grow up.

IV. Right to equality and non-discrimination of same-sex couples

- p.43-44 Article 1 of the Federal Constitution provides that all persons shall enjoy the human rights recognized in such Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, the exercise of which may not be restricted or suspended, except in those cases and under the conditions established by the Constitution itself. This provision contains a prohibition on "any discrimination motivated by ethnic or national origin, gender, age, disabilities, social status, health condition, religion, opinion, sexual preferences, marital status or any other that violates human dignity and is intended to nullify or impair the rights and freedoms of individuals."
- p.44-45 The principle of equality and non-discrimination permeates the entire legal system; any treatment that is discriminatory with respect to the exercise of any of the rights recognized in the Constitution is inconsistent with the Fundamental Law. However, not every difference in the treatment of a person or group of persons is discriminatory, with distinction and discrimination being legally different; the first constitutes a reasonable and objective difference; while the second constitutes an arbitrary difference that is detrimental to human rights.
- p.45 As has been seen, our Constitution protects all types of families, so for all relevant purposes, homosexual family unions are in a situation equivalent to heterosexual family unions, therefore they must enjoy the prerogatives that usually correspond to heterosexual couples; and in the event that the norm draws a distinction between the two types of families, it will have to be fully and constitutionally justified, discarding the presence of any discriminatory regulatory situation.

V. Analysis of the legal concept of child recognition, particularly what occurs voluntarily before the Civil Registry Officer on a birth certificate

- p.46.51 The CCSA regulates filiation in the First Book (On individuals), Seventh Title (On Parenthood and Filiation), this divided into five Chapters. Of the first four chapters, the

design of the legislation under analysis makes evident differences between the rules aimed at establishing the filiation of children born within a marriage, and those born outside of it. But above all, such legislation realizes the predominance of the biological and anthropological roles of gender in the conception of filiation.

p.51-52 Therefore, it is restated, the filiation as to the woman-mother, is reduced to proof of childbirth and filiation with respect to the male-father, subject to the legal presumption of paternity in case the birth has occurred within a marriage; and voluntary recognition or declaration of paternity by court sentence when the birth happens without marriage between the parents, under the logic that procreation presumes the intervention of two people of different sexes.

p.52-53 However, the fact that those filiation rules are based on the basic premise that the physical and physiological constitution of human beings, for procreation, requires the participation of male and female sex cells and, to that extent, are operative for establishing filiation with respect to children born in contexts of heterosexual couples married or not, with the purpose of favoring concordance of legal filiation with genetic ties, which is the common scenario. This does not preclude that such filiation rules, and in particular the one challenged here, can be examined in a broader and more inclusive optic, in the light of the constitutional and conventional parameter previously referred to, which postulates the right of equality and the principle of non-discrimination in the recognition of the rights of same-sex couples that make up family unions, to procreation and family protection on equal terms as those for heterosexual couples, but above all, in the light of the rights of children born in these homoparental family contexts. Hence, this Court deems the district judge's determination incorrect.

p.53 The examination of regularity of Article 384 of the CCSA hereby challenged is possible under the approach put forward by those concerned, because under that provision, as has been seen, the biological child of a woman who is not married, can only be voluntarily recognized by a male.

p.54 But another woman could not make that voluntary recognition of the biological child of a woman, in order to establish a filiation tie with her, even if both formed a homoparental family union in which the child will live, since the norm expressly establishes that possibility of voluntary recognition with respect to the "father", referring to a male, and implicitly, assuming that the man who makes the recognition is the one who has the biological tie with the child, as her progenitor.

p.55 Therefore, the legal possibility of establishing filiation between the child of a woman and another woman with which the biological mother forms a homoparental family union, even matrimonial, is excluded from the CCSA, since that legislation, in addition to only conceiving the existence of heterosexual family unions, and not between persons of the same sex, in the case of legal filiation, the existing rules only allow it to be established in respect to a child, by a man and a woman who are presumed to be the biological parents, without contemplating or tacitly excluding other possibilities.

a) The norm, from the perspective of the rights of the same-sex couple

p.60 It is appropriate to reiterate the postulate sustained in the *Acción de Inconstitucionalidad 2/2010* by the Plenary of this Court, that Article 4 of the Federal Constitution enshrines the protection of the development and organization of the family as a social reality; therefore, such protection includes all kinds of family unions, including homoparental unions, that is, those made up of couples of same-sex persons.

p.60-61 Similarly, on the basis that, in accordance with Article 4 of the Constitution, both men and women, without distinction, have the right to form a family and to decide freely, responsibly and in an informed manner, on the number and spacing of their children, that is, they have the right to procreation and to raise children, it is worth reiterating in particular what this Court said in its court precedent, that homosexual couples have the right to access family life and, if it is their wish, that includes procreation and/or parenting, whether adoptive,

naturally procreated by one of them or through the use of human assisted reproduction techniques.

- p.61 At present, it is recognized that homoparental family models consisting of two women exercise the so-called comaternity, i.e. double maternal filiation, a concept obviously derived from the cultural changes of society, that have transformed their reality and particularly the traditional conception of family, which, as has been pointed out, has gone through various types of family unions; evolutions that, in accordance with the current constitutional order, cannot be ignored, denied or deprived of rights under differentiation criteria that address gender or sexual preference of the people who make up family unions, because all, whatever their configuration, are subject to protection.
- p.62-63 Comaternity, as an emerging family model in which a couple of women care for one or more minors, like any other parenting exercise, must be recognized, as there are no elements that show that it may be harmful in the upbringing of minors.
- p.63 In this regard, it must be accepted that the norm labelled as unconstitutional, in so far as it limits the voluntary recognition of a child, to be made by a woman-mother and a man-father, under the presumption of the existence of the genetic tie, does establish a differentiation of treatment that transcends the homoparental family unions of women, which implicitly leads to the rejection arising from the special sexual orientation of those who constitute them, as they are same-sex persons; because such provision, in constraining itself to providing only for the recognition of a child in respect to persons of different genders, takes into account only the possibility of biological procreation with each other, which is not possible between two persons of the same sex who form a family union, and this entails a difference in treatment that is discriminatory, since the norm only supposes strictly heterosexual couples, but same-sex couples will not be able to access its application.
- p.64 Therefore, the rule is exclusionary and does not guarantee the protection of the fundamental rights of persons forming homoparental family unions to procreation,

parenting and family life, while it tacitly denies child recognition and the establishment of legal filiation by not considering different possibilities for the procreation to operate, since it reduces its scope to the presumption of a biological tie; which leads to an undermining of their rights to equality and non-discrimination, compared to heterosexual couples.

b) The norm, from the perspective of the rights of minor children, born in homoparental contexts

- p.68 In this regard, it should be reiterated that the right to identity of persons, and with greater emphasis on minors, is extremely important for the configuration of their individuality and legal capacity, which are decisive in the development of their personal and social life, as well as in their relations with the State. And among the rights included in the identity, is the essential one related to the establishment of their legal filiation, since it will allow them to access the full exercise of another set of personal and economic rights.
- p.68-69 Similarly, while this Court has been upholding the doctrine that the right of minors to identity includes among its prerogatives the right to have their legal filiation match their biological origins, and therefore, the trend would be to incline to make the principle of biological truth prevail; this is not an unrestricted rule, because when the above is not possible because of the situations of fact in which the child finds herself or because more relevant interests such as the stability of family relationships or privileging consolidated family status in time must prevail, it is valid that the legal filiation be determined without the biological tie, because the identity of minors depends on multiple factors and not only on the knowledge and/or prevalence of biological relationships.
- p.69 On that basis, it is true that in comaternity, necessarily one of the women who make up the couple does not have a biological tie with her partner's child, given the physiological impossibility of procreating with each other, which means that in the procreation of the child, apart from the sexual preference of the woman progenitor, a third party intervened, either as an anonymous donor of the male sex gamete through the use of an assisted human reproduction technique or through sexual intercourse.

p.70 In the second case, that is, where the child is procreated in a sexual relationship, the existence of a third person cannot be denied and he will be entitled to the establishment of legal filiation with the child by voluntary recognition of paternity before the Civil Registry Officer; nor is the right of the minor, where appropriate, to paternity investigation and to require that the existence of legal filiation in accordance with his biological origins be declared, in doubt.

However, in this Court's view, the foregoing should not inhibit or exclude the possibility that the child of a woman born out of sexual intercourse with a male may be voluntarily recognized by another woman in her birth registration or by special act, when that child is born and grows up in a context of homoparental family union; because in such a case, there are factors that must be weighed based on her best interests privileging her family stability.

p.71 Thus, this Court considers that if the minor is born of a mother with homosexual orientation, from a natural sexual relationship with a third party, the manifestation of the will of the mother's partner must suffice in recognizing her and exercising comaternity, in order to consider that there is a willingness to assume parental duties materially and legally, with all that entails.

p.73 In conclusion, while it is true that Article 384 of the CCSA is intended to protect the fundamental right of persons, and particularly of a minor person, to his/her identity, enshrined in Article 4 of the Constitution, it is also true that such norm limits the establishment of legal filiation only to the existence of a biological tie between the recognized person and the one who recognizes him/her, without considering other possibilities, such as the one relating to privileging family stability and immediate access to the prerogatives of legal filiation with those who assume parental duties with her; therefore it excludes from its protection minors born in contexts of homoparental family unions and that makes it unconstitutional because it is contrary to the best interest of the child.

DECISION

p.74-75 In view of the foregoing, it is concluded that provision 384 of the CCSA, seen from the perspective of the rights of minors born within homoparental family unions of two women, and from the point of view of the rights of same-sex persons who make up that type of family, is unconstitutional, because it limits the scope of protection for the purposes of the establishment of legal filiation to the criteria of prevalence of a different gender of those who seek to voluntarily recognize a child and the principle of biological truth, since this ignores the reality of those persons, whose rights to form family unions must be protected on equal terms as any other form of family.

p.75.76 It must therefore be accepted that a woman's biological child may be voluntarily recognized on her birth certificate or in a subsequent special act, by another woman with whom she is in a homoparental family union, even if obviously the one who makes the acknowledgement does not have a genetic tie with the child. Therefore, it is ordered to return the court record to the collegiate tribunal that heard the matter, so that, on the basis of the considerations set out herein, it proceeds to the analysis of the act challenged, to the effect that it orders the de-application of the norm in the legal sphere of those affected and orders the issuance of the birth certificate of the minor recognizing the comaternity.