

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**RIGHT OF MINORS TO PARTICIPATE IN MATTERS AFFECTING THEIR LEGAL SPHERE
(DERECHO DE LAS NIÑAS, NIÑOS Y ADOLESCENTES A PARTICIPAR EN LOS
ASUNTOS QUE AFECTAN SU ESFERA JURÍDICA)**

CASE: *Amparo Directo en Revisión 2479/2012*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

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

DATE OF THE DECISION: October 24, 2012

KEY WORDS: right of minors to participate in cases that may affect their rights, rights to visitation with parents, best interests of the child, due process, right to a hearing, access of minors to justice, progressive autonomy of the child.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, Amparo Directo en Revisión 2479/2012, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of October 12, 2012, Mexico.

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

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/ADR2479-2012.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo Directo en Revisión 2479/2012*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO EN REVISION* 2479/2012

BACKGROUND: SATG and ERGO were married in Harris County, Houston, Texas, USA, and a girl was born from their union. A few years later, a Harris County court: (a) divorced the couple, (b) declared the loss of parental authority of SATG (the father) over his daughter, without visitation rights and (c) granted custody of the child to the mother. SATG initiated an oral proceeding on visitation and temporary possession with respect to his daughter in the state of Nuevo León, Mexico. The family court judge dismissed the case because of the existence of the Harris County court decision. SATG appealed that determination, but the family court chamber that analyzed the appeal upheld the dismissal. SATG then filed an *amparo* lawsuit. The Collegiate Circuit Court granted the *amparo* to SATG in order for the family court chamber to issue a new decision in which it would order the family court judge to decide the matter taking into consideration the right of the girl to be heard if the expert opinions so indicate. Given the decision of the Collegiate Circuit Court, ERGO (the mother) filed a *recurso de revisión*, which was heard by the First Chamber of Mexico's Supreme Court of Justice (this Court). In that request, ERGO essentially stated that the reinstatement was an opportunity for SATG to reframe his case and revisit issues that had already been resolved.

ISSUE PRESENTED TO THE COURT: Whether the interpretation by the Collegiate Circuit Court on the right of minors to participate in matters that may affect their legal sphere was constitutional.

HOLDING: The decision under appeal was upheld for the following reasons. This Court considered that the interpretation by the Collegiate Circuit Court was correct to guarantee the protection of the best interests of the girl. The right of minors to participate in judicial proceedings that may affect their rights was already recognized by the First Chamber of this Court when deciding the *contradicción de tesis* 60/2008-PS. This right is exercised progressively, without establishing any predetermined age that can be applied generally to all minors, but instead analyzing each case. Furthermore, the right of minors to participate in judicial proceedings has a dual purpose, since it achieves the effective exercise of the rights of minors by recognizing them as subjects of the law, while allowing the judge to gather all the elements necessary to forge an opinion regarding a certain matter, which in turn is

fundamental for due protection of the best interests of the child. In addition, this Court indicated the guidelines that must be observed for the participation of minors in judicial proceedings that may affect their legal sphere, regarding the admission, preparation and introduction of evidence, as well as the representation of the minor. Therefore, this Court concluded that the right that is being protected in the *amparo* lawsuit is the right of the girl to participate in the trial so that another right she holds can be reviewed: that of visitation with one of her parents, when it is deemed appropriate. This situation does not imply a new opportunity for the father to reframe his arguments; rather it introduces into the case an element that was never taken into consideration: the best interests of the girl. The reinstatement of the proceeding is an effort to ensure effective protection of the girl's rights.

VOTE: The First Chamber of the Supreme Court decided this case by the unanimous vote of the five justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Guillermo I. Ortiz Mayagoitia and Jorge Mario Pardo Rebolledo.

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=14228>
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EXTRACT OF THE *AMPARO DIRECTO EN REVISION* 2479/2012

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 24, 2012, issued the following decision.

BACKGROUND

p.1-2 SATG and ERGO were married in November 2002 in Houston, Texas, USA and in July 2004 their daughter was born. In January 2007, a Harris County court ordered: (i) the divorce of the two parents; (ii) the loss of parental authority of SATG (father of the girl), without any visitation rights; and (iii) the granting of custody of the girl to ERGO, her mother.

p.2 In 2010, SATG initiated an oral proceeding on visitation and temporary possession of his daughter. The family court judge of the state of Nuevo León considered that SATG had no right to exercise parental authority or any other right over the girl by virtue of the decision of the Harris County court. Consequently, the family court judge ordered the case be dismissed.

p.2-3 SATG then filed an appeal. The family court chamber of the state of Nuevo León that decided the appeal, upheld the dismissal and ordered SATG to pay expenses and costs.

p.3-4 SATG filed an *amparo* lawsuit against that decision, in which he stated that the family court chamber gave full probative value to a foreign decision that removed his parental authority, which in Mexico is inalienable. The Collegiate Circuit Court granted the *amparo* to SATG in order for the family court chamber to issue a new decision in which it will order the family court judge to decide the matter taking into consideration the right of the girl to be heard if the expert opinions so indicate.

p.6-7 ERGO requested the review of the decision of the Collegiate Circuit Court. ERGO argued that the restitution of the girl's human right to be heard in court does not truly contemplate her interest, since the reinstatement of the proceeding gives SATG an opportunity to reframe his case and revisit issues that were already resolved. She also pointed out that SATG's involvement with the girl, as well as her subjection to contact with experts who will supervise the visitation between them, represents an impact on the girl's right to a dignified

life. The Collegiate Circuit Court sent the case file of the *amparo* lawsuit to this Court.

STUDY OF THE MERITS

- p.20 The right under study is the right of minors to participate in matters that may affect their legal sphere.
- p.20-21 Two terms should be clarified. First, the right analyzed is the right of minors to "participate" in judicial proceedings and not just to "be heard". Article 12.1 of the Convention on the Rights of the Child indicates that this right comprises two elements: (i) that children and adolescents be heard; and (ii) that their opinions be taken into account, depending on their age and maturity. The term "participate" is adopted because it is considered more appropriate for describing the content of the right in question.
- p.21 The second clarification is that the right under consideration entails the right of minors to participate in "matters" that may affect their legal sphere. The term "matters" implies the applicability of this right in the different aspects that relate to the access of minors to justice, in addition to other effects regarding decision making in the family and the community. However, in this decision, only participation in judicial proceedings will be analyzed.
- The dispute in this case was originally stated as the attempt of the biological father of the girl to obtain visitation rights with her. Both the family court judge and the family court chamber ruled on the confirmed loss of parental authority of the affected party regarding the girl, as well as on the invalidity of determining any visitation rights between them.
- p.21-22 However, the Collegiate Circuit Court stated that visitation between two people entails the existence of two rights: that of each of them to visit with the other. The Collegiate Circuit Court noted the shortcoming of the family court judge and the family court chamber when only taking into account the right of the father to obtain visitation rights with his daughter and not the right of the daughter to obtain visitation rights with her father.
- p.22-24 The right of minors to participate in judicial proceedings that may affect their rights was already recognized by the First Chamber of this Court when deciding the *contradiccion de tesis* 60/2008-PS. In that case, it was stated that this right is regulated in article 12 of the Convention on the Rights of the Child and implicitly included in article 4 of the Constitution. Article 41, part A of the Law for the Protection of Children's and Adolescents' Rights also

reiterates this right. Therefore, the right of minors to participate in judicial proceedings that may affect their legal sphere is part of the Mexican legal system.

p.25-26 The right under consideration belongs to the due process rights, which include “core” rights that must be observed in all judicial proceedings, and another set of guarantees that are applicable only in processes that involve an exercise of the punitive power of the State. The due process rights that are applicable to any judicial procedure are those identified as the essential procedural formalities, also called “right to a hearing”. In the *Amparo Directo en Revision* 2961/90, the Plenary of this Court indicated that these rights are: (i) the notification of the initiation of the procedure; (ii) the opportunity to introduce and present evidence on which the defense is based; (iii) the opportunity to plead your case; and (iv) the issuance of a decision that resolves the issues in dispute, in which the evidence and pleadings made in court are considered.

p.26-27 The right of minors to participate in proceedings that may affect their legal sphere is of a special nature. This “specialness” comes from the relationship of this right with the principle of equality and with the best interests of the child; its content does not seek to favor minors, but to provide them with additional protection to ensure that the disadvantages inherent in their special condition do not affect their interests in those judicial procedures.

p.27 The right under study constitutes an essential procedural formality in favor of minors, whose protection must always be observed in any type of procedure that may affect their interests. This idea is shared by the Inter-American Court of Human Rights, as can be seen from its advisory opinion on the legal status and human rights of children.

I. Content and scope of the right of minors to participate in judicial proceedings that may affect their legal sphere

p.28 The concept of childhood or being underage protects those persons who require certain measures or special care due to their situation of special vulnerability before the legal system, as a result of their weakness, immaturity or inexperience.

Although minors hold human rights, they actually exercise their rights progressively, as they develop a higher level of autonomy. This has been called the “progressive acquisition of the autonomy of children and adolescents”, who during their early childhood act through other people – ideally, their relatives. Therefore, the right of children to participate in judicial

proceedings that may affect their legal sphere is also exercised progressively, without establishing any predetermined age that can be applied generally to all minors, and instead analyzing each case.

- p.29-30 The right under analysis has a dual purpose, since it achieves the effective exercise of the rights of minors by recognizing them as subjects of the law, while allowing the judge to gather all the elements needed to forge an opinion regarding certain matters, which in turn is fundamental for a proper protection of the best interests of the child.
- p.30 This Court observes that the decision of the Collegiate Circuit Court to consider, *ex officio*, that the advisability of hearing the opinion of the girl, whose rights could be affected, should have been studied in the original trial, was correct.

The Inter-American Court of Human Rights, in the case of Atala Riffo and daughters vs. Chile – which involved a custody procedure – ordered the three girls involved to be given the right to be heard. The First Chamber of this Court has reached the same conclusions in multiple precedents, such as in the *Amparo Directo en Revision 2359/2010*, which explained the obligation of judges to collect *ex officio* the evidence necessary to preserve the best interests of the child, which includes the child's own statement.

- p.31-32 Below are the guidelines that must be observed for the participation of minors in any judicial proceeding that may affect their legal sphere:

1) Admission of evidence. Whether testimony or a statement of the minor has been offered as evidence or their participation is determined *ex officio* by the judge, it is important to consider the following elements regarding the advisability of admitting the evidence:

a) Regardless of their age, it is important to take into consideration the maturity of the minor, which means their ability to understand the matter and its consequences, as well as to form their own judgment or criteria.

Given the above, the evidence should be admitted considering these factors: (i) the differences or variations in maturity of minors must be considered for the evaluation of the evidence; and (ii) the obligation to listen to a minor does not mean accepting their wishes, but their opinion must be analyzed in accordance with the first factor. Likewise, forms of verbal and non-verbal communication should be considered. The maturity of the minor can

be evaluated prior to the introduction of the evidence – by means of an expert opinion – or during the presentation of the evidence itself, as deemed appropriate.

b) Carelessness in the exercise of this right should be avoided, especially when the minors are very young or in cases where the minor has been the victim of certain crimes, such as sexual abuse, violence, or other forms of mistreatment; and

c) It is important to avoid interviewing minors more often than necessary.

p.32-33 2) Preparation of the evidence. Once the advisability of admitting the evidence has been considered, two measures should be adopted prior to the interview:

a) The minor must be informed – in accessible and friendly language – about: (i) the procedure, what it comprises, information on the pleadings and the consequences that may be generated; and (ii) their right to participate; and

b) Once informed, it must be ensured that the minor participates voluntarily: it is an option and not an obligation. The moment of confirmation of this factor occurs immediately before the presentation of the evidence, when the minor is separated from the people who could pressure him or her to participate or refrain from doing so.

p.33 3) Presentation of evidence. The statement or testimony of the minor must be taken in the form of an interview or conversation and not an interrogation or unilateral examination; this process must meet the following requirements:

a) Content: prior to the interview it is advisable for the judge – or the person authorized to carry out the process – to meet with a childhood specialist – psychiatrist or psychologist – to clarify the terms of what is to be discussed with the minor, so it is easier for him or her to understand and follow the conversation;

b) Place: the interview should take place, as far as possible, in a place that does not represent an environment hostile to the interests of the minor, where he or she can feel respected and safe to freely express his or her opinions.

p. 33-34 c) Persons involved: in addition to the judge or official making the decision and the minor, two more people should be present during the proceedings: (i) the childhood specialist who has met with the judge – psychiatrist or psychologist –; and (ii) a person the minor trusts, who exercises his or her natural representation, as long as this does not represent a conflict

of interest, which may be an interim guardian or an adult involved in the affairs of the minor, such as another family member who is not involved in the conflict, or a teacher, social worker or caregiver. The latter person should participate if the minor requests it or it is considered better to achieve his or her best interest.

p.34 d) Recording of the process: as far as possible, the statement or testimony of the minor must be recorded in its entirety, either through the transcription of the entire process or with the use of the technology available to the court that allows the recording of audio. This will allow the interview to be fully assessed by higher and *amparo* courts that may eventually hear the matter, while avoiding subjecting the minor to new interviews when they are not necessary.

4) Representation of the minor. The minors must be directly involved in the interviews, but this does not mean that they cannot have any representation during the trial. The representation will fall on those who are legally called to exercise it, unless this situation generates a conflict of interest – as often happens in custody matters – in which case the need to appoint an interim guardian must be analyzed.

p. 34-35 5) Confidentiality. Although the final decision will be adopted by the judge, the minors must be consulted about the confidentiality of their statements, to avoid generating any conflict that may imply an impact on their mental health or, in general, their well-being.

p.35 Each of these measures must always take into account the best interests of the child, so no determination should be made that implies any harm to the minors, beyond the normal effects that are inherent in their participation in a judicial procedure. Likewise, all decisions taken in relation to the evidence and its assessment must be expressed clearly and exhaustively by the judge or court, so that they can be subject to analysis and control by higher courts and *amparo* judges. This will make it possible to verify that the best interests of the child have been followed during the procedure and detect any deficiencies.

Judicial processes related to adoption, custody and visitation with children, especially during their early childhood, must be handled with exceptional diligence and speed by the authorities, through the consideration of all the elements of evidence that may be necessary.

p.35-36 Therefore, this Court considered that the conclusions of the Collegiate Circuit Court were correct and, indeed, constitute the best way to protect the best interests of the girl. Thus, the mother's argument that the decision of the Collegiate Circuit Court entails an opportunity for the father to reframe the dispute and revisit the issues that were resolved is unfounded. The right that is being protected in the *amparo* lawsuit is the right of the girl to participate in the trial so her right to visit with one of her parents is reviewed. This situation does not imply a new opportunity for the father to reframe his arguments; instead, it introduces an element that was never taken into consideration: the best interests of the girl. The reinstatement of the proceeding for the purpose of protecting the rights of the girl is not an affront to her best interests but rather a clear effort to effectively protect her rights.

p.37 This Court is very aware that participation in a judicial proceeding will necessarily have an impact on a minor; however, this impact is nuanced because: 1) the Collegiate Circuit Court assessed the matter that gave rise to the *amparo* lawsuit and concluded that the participation of the girl in the process does not constitute an excessive practice of the right in question; and, 2) the guidelines indicated by the Collegiate Circuit Court for the involvement of the girl in the process are intended to mitigate the impact that such participation may have, in order to effectively and comprehensively protect her best interests.

Therefore, the participation of the girl in the original trial, with due compliance with the measures established by this Court, is the appropriate measure to protect the best interests of the girl. It should be remembered that these measures include the assessment of the desire of the minor to participate in the trial.

p.37-38 In the event that it is determined that the visitation of the girl with her biological father is in her best interest, said visitation must also comply with certain standards aimed at safeguarding her psychological and emotional integrity.

DECISION

p.38 Since the contraventions alleged by the mother are unfounded, it is appropriate to uphold the decision of the Collegiate Circuit Court and, therefore, to grant the *amparo* to the father.