

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.

**ADOPTION OF A CHILD WHOSE DISABLED FATHER HAS HIS PARENTAL AUTHORITY
SUSPENDED DUE TO CIVIL INCAPACITY
(ADOPCIÓN DE UN NIÑO CUYO PADRE CON DISCAPACIDAD TIENE SUSPENDIDA LA
PATRIA POTESTAD POR INCAPACIDAD CIVIL)**

CASE: *Amparo Directo en Revisión 3859/2014*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

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

DATE OF THE DECISION: September 23, 2015

KEY WORDS: paternity rights, principle of maintaining family relations, suspension of parental authority, adoption, best interests of the child, rights of disabled persons, social model, clear and convincing evidence standard, theory of damages.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 3859/2014*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of September 23, 2015, 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-emplematicas/sentencia/2022-01/ADR3859-2014.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo Directo en Revisión 3859/2014*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO EN REVISION* 3859/2014

BACKGROUND: After suffering a car accident, the father of a child was declared in a state of interdiction and for that reason, his parental authority over his son, who remained under the care of his mother, was suspended. Years later, the child's mother married and her now spouse filed for the full adoption of the child. In the adoption procedure, the mother gave her consent, the child expressed his desire to be adopted and the opinion of a psychologist was obtained. The biological father was then notified of the procedure through his guardian. The guardian opposed the adoption and expressed his desire to have visitation rights with the child, who was his grandson. The biological father said he had a child, loved him, and wanted to see him. After the adoption procedure was declared contentious, the guardian of the biological father filed an action for nullity of the adoption, stating that he was not notified of the existence of the procedure until the decision was about to be issued. The now spouse of the mother replied that the guardian did not have to give his consent for the adoption to take place because the parental authority of the biological father was suspended. However, the Family Judge considered that the nullity of the adoption of the child was valid because the biological father had not lost parental authority. This decision was upheld on appeal, so the mother, in representation of her son, and her now spouse filed an *amparo* which was denied. They filed an appeal, which was heard by Mexico's Supreme Court of Justice (this Court).

ISSUE PRESENTED TO THE COURT: Whether the biological father of the child, having suspended parental authority, can contest the adoption requested by the now spouse of the mother; when the presumption in favor of the principle of maintaining family relations can be defeated, in the case of a parent with a disability; and whether, in this case, the adoption of the child should be granted.

HOLDING: This Court reversed the appealed decision essentially for the following reasons. It was determined that the biological father of the child can dispute the adoption of his child, because for the adoption to take place it is necessary for the person who exercises parental authority to grant consent - even in the case of parents with disabilities in a state of interdiction

- and it must be considered that it is exercised by those who have not had it taken away. It was also decided that the presumption in favor of the principle of maintaining family relations may be defeated if the parents have consented to the adoption, or if they object, when it is shown that failure to grant the adoption will result in harm to the child. However, it was established that -in the case of parents with disabilities- it must also be verified that the harm was demonstrated under a clear and convincing standard of evidence, and that the harm does not result from prejudices, stigma or environmental barriers that can be mitigated by alternative measures or reasonable accommodations. In this case, it was concluded that a harmful impact on the rights of the child cannot be clearly and convincingly proven, and therefore it was decided to modify the appealed decision so another decision may be issued in which, among other things, the invalidity of the adoption of the child was confirmed.

VOTE: The First Chamber of Mexico's Supreme Court of Justice decided this case by a majority vote of the three justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea and Alfredo Gutiérrez Ortiz Mena. Justices Jorge Mario Pardo Rebolledo and José Ramón Cossío Díaz (reserved their right to issue a dissenting opinion) voted against.

The vote may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=169650>

EXTRACT OF THE AMPARO DIRECT EN REVISION 3859/2014

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of September 23, 2015, issued the following decision.

BACKGROUND

REG and LCLA were married in Michoacán on August 3, 2001. Two years later, on September 4, 2003, their first child was born, who received the name DEL.

p.1-2 On April 11, 2004, REG was in a car accident.

p.2 Due to the irreversible injuries to his mental function, REG's parents took over his care. LCLA and the child moved into her parents' home.

2 years and 2 months after the accident, on June 7, 2006, LCLA petitioned for a state of interdiction with respect to her then husband. In this interdiction, RES (father of REG) was definitively appointed as guardian. From that moment RES provided his daughter-in-law with the amount of \$1,500.00 pesos per month as support to cover part of the expenses of his minor grandson.

p.2-3 At the end of 2006, REG was interdicted, since it was determined from the medical experts that, as a result of the car accident, he suffered irreversible severe brain injuries. As a result of REG's declaration of interdiction, his parental authority over his son DEL was suspended. That decision failed to establish a visitation regime between the father and the child.

p.3 Subsequently, in August 2007, LCLA filed for divorce, which was decided on January 17, 2008, determining the divorce legally warranted. That decision also did not determine any visitation rights between the child and his father and paternal family.

After some time of having a romantic relationship, on July 30, 2010, LCLA and JMTA got married in the City of Morelia, Michoacán.

p.3-4 As a result of this marriage between LCLA and JMTA, on March 20, 2011, JMTA filed an action for full adoption of the minor DEL, stating that he has lived with the child practically from birth, showing him affection and esteem, as if he were his son.

p.4 On March 24, 2011, the Trial Court in Family Matters admitted the full adoption for processing and ordered the personal notification to the Prosecutor's Office and to LCLA, as the person who exercises parental authority over the minor DEL, for her to grant her consent to the adoption. It also ordered the intervention that corresponds to the Technical Adoption Council of the System for Integral Family Development.

This Council, by submission of 19 July 2011, stated that it considered the adoption suitable provided the following was considered: (i) the consent of the grandparents before the judicial authority; (ii) the opinion of the minor; and (iii) the evaluations in social work and psychology be strengthened.

As a result of the above, by hearing of June 30, 2011, the opinion of the minor was elicited in which he expressed his desire that the adoption be carried out.

Faced with the attempted adoption, the paternal grandfather, as guardian of the child's biological father, expressed his opposition by petition presented on November 4, 2011, indicating his interest in maintaining visitation rights with his grandson.

p.5 On November 8, 2011, the Judge declared the proceeding contentious.

p.5-6 On March 20, 2012, RES, paternal grandfather of the child and guardian of the biological father, filed a nullity lawsuit against the adoption that JMTA attempted, noting that he was not informed of the adoption request of his grandson until the decision was about to be issued. He also expressed the desire to maintain visitation rights between his family and the minor.

p.6 On May 17, 2012, JMTA replied to the lawsuit, indicating that the paternal grandfather did not have to give his consent to carry out the adoption, because in the divorce proceeding against REG it was declared that the parental authority over the minor was only exercised by his current wife, LCLA.

p.7 On October 10, 2013, a final decision was issued, in which it was determined that the nullity of the adoption of the minor DEL was legally warranted.

The Judge established that from the content of the interdiction proceeding and the divorce proceeding, it was noted that REG was only suspended in the exercise of parental authority over his minor son, which did not imply the definitive loss of that prerogative.

p.8 JMTA filed an appeal, which was processed before a Civil Court Chamber.

p. 8-9 On January 14, 2014, the Civil Court Chamber upheld the decision of the trial court, considering that, based on the best interests of the child, the rights of persons with disabilities, and in the absence of the consent of the child's biological father, the opposition to the adoption of the child was well founded. This was regardless of the analysis of the suitability of full adoption.

p.9 JMTA and LCLA, on behalf of her minor son DEL, requested the *amparo* and protection of the federal courts. A Collegiate Circuit Court in Civil Matters issued a decision on May 26, 2014, in which it denied the requested *amparo*.

The affected party filed a *recurso de revisión*.

p.9-10 The President of this Court admitted the *recurso de revision*.

STUDY OF THE MERITS

p.22 The decision to be analyzed involves balancing multiple conflicting interests and rights: DEL's best interests and the protection of his rights, the right to paternity, and the right to non-discrimination of persons with disabilities. To resolve this issue, the following topics will be assessed: (I) The paternity rights of persons who have suspended parental authority; (II) the principles governing adoption processes when the parent is a person with a disability; and finally, (III) whether in light of the above, adoption should be granted.

I. Right of opposition of those who have suspended parental authority, in an adoption proceeding.

In this case, DEL's father has not lost parental authority, but it was suspended when he was declared in a state of interdiction. It is therefore necessary to determine whether a

person who has suspended parental authority may oppose the adoption of his minor child by refusing to give his consent.

- p.24 The loss of parental authority constitutes an exceptional measure, intended to defend the interests of the minor in case of any serious breach of the duties inherent to parental authority.
- p.24-25 On the other hand, the case of suspension due to judicially declared disability occurs when it has been proven before a judge, based on expert opinions, that the subject is a person with a disability. It is important to emphasize that even when a person is declared in a state of interdiction for this situation, they do not lose their right to express their will through the decision-making assistance model.
- p.25 The grounds for suspension of parental authority – especially when the father is a person in a state of interdiction – do not result from the serious breach of the parent's duties. The provisional suspension of parental authority is activated for issues unrelated to the parent-child relationship, which are the result of factual situations that prevent the parent from bearing his or her responsibilities.

Thus, it can be concluded that while the loss of parental authority originates from the risk to interests or rights of the minor, the suspension has causes that do not compromise the safety of the child.

- p.26 According to the applicable regulations, in order for the adoption process to take place, the person exercising parental authority over the child must grant consent. This Court considers that this provision must be interpreted to mean that a person "exercises" parental authority when they have not been sentenced to its loss. As has been pointed out, the suspension of the parental authority is normally caused by a situation that does not involve risk to the property and rights of the child, so it should not lead to the extreme of nullifying the right of the father to decide on an issue as transcendental as the adoption of his child. Therefore, this Court shares the decision of the Collegiate Circuit Court that REG can contest the adoption of DEL.

II. Principles governing adoption processes when the parent is a person with a disability in a state of interdiction

p.28 According to the principle of keeping the child in the biological family, there is a fundamental interest in ensuring that the child is not separated from his or her parents against their will. This means that a presumption against the termination of the parent-child relationship must be overcome.

In addition to this principle, the right of every person to receive protection from arbitrary or unlawful interference with their family is also recognized.

The above implies that the authorities must at all times preserve and promote the permanence of children in their nuclear family, unless there are decisive reasons for separating them, since the only exception that allows the breaking of the connection between parents and children is subject to the best interests of the child.

p.29 This Court can conclude that there is a presumption in favor of the principle of maintaining family relations, so the facts motivating the adoption of a child must be strictly evaluated in light of the best interests of the child. However, this presumption can be defeated when it is verified that: the parents have consented to the adoption; or if they object, it is shown that failure to grant adoption would harm the rights of the child.

a) Parental consent to grant adoption

p.30 This Court considers that there is a right of parents who have not lost parental authority over their children to participate in adoption proceedings, otherwise their right to receive protection from arbitrary or illegal interference with their family would be affected and the principle of maintaining family relations would be violated.

However, it is important to establish how consent should be assessed when the one who must give it is a person with a disability.

p.31 In accordance with the social model, disability is not the product of the individual's deficiencies, but of the social barriers that limit their ability to participate and interact in the environment in equal circumstances.

A person has the inalienable right to express his or her will, which must be respected and complied with regardless of whether a limitation on his or her legal capacity was declared by a sentence of interdiction.

- p. 32 The judge must promote and respect the free will of persons with disabilities in adoption proceedings. Indeed, when persons who must consent to the adoption suffer a judicially declared disability, the judge cannot forego allowing such persons to express their will. On the contrary, the judge must carefully assess whether they have expressed their intentions in any sense and assume that this manifestation is likely to have legal effects.

Respect for self-determination implies recognizing that certain decisions can only be expressed by the persons themselves, through any means possible. These are decisions that have an impact on the most significant spheres of people's lives, such as their nuclear family.

- p.33 This Court considers that, in the case of persons with judicially declared disabilities, the judge must carefully evaluate whether they have expressed for themselves their will in any sense regarding the adoption.

Based on all of the above, this Court observes that REG not only never gave his consent for the adoption but expressed that he identifies the child as his son, and that he has affection for him and wishes to see him.

In this regard, as the Collegiate Circuit Court concluded, REG must be considered to oppose the adoption, which means he does not give his consent in accordance with article 377 of the Civil Code of Michoacán. Once this person's self-determination is respected, the judge will be able to assess whether the opposition – or absence of consent – can be overcome by a greater good: the integral protection of the child.

- p. 34 However, given the principle of maintaining family relations, in order for the opposition of the father to be overcome, it must be confirmed that if the adoption was not granted, the child would be affected. In the case of parents with disabilities, this impact must be proven "clearly and convincingly".

b) Adoption against the will of the biological parents

It is the consistent case law of this Court that the best interests of the child are the starting point and central axis of proceedings involving the rights of children. Thus, the decision regarding adoption should always seek to ensure the protection of the interests of children. This implies deciding according to what is most beneficial for the child.

p.35 However, the adoption of a child is a momentous decision for both the child and the biological parents, given its definitive nature, so to overcome the interest in preserving family relations a higher standard must be required. This consists in demonstrating that harm will be caused to the child if the adoption is not granted.

p.36 In decisions of this kind that are transcendent and definitive, the principle of maintaining family relations must also be weighed.

Therefore, the adoption of a minor may only be granted against the will of his or her biological parents when it is proven that harm to the child will otherwise be caused.

p.37 As has already been pointed out, the principle of maintaining family relations is reinforced in the specific case in which biological parents are persons with disabilities. In such cases, the State must ensure that the rights of the parents are duly represented in the adoption processes.

Thus, we can distinguish two presumptions, one generic and one reinforced in the case of parents with disabilities. In the first case, it must be proven that if the adoption is not granted, the child could suffer harm. In the second, when the parents are especially protected because they are people with disabilities, it must also be verified (a) that the impact was demonstrated under a clear and convincing standard of evidence, (b) that such harm does not result from prejudices or stigmatizations, or (c), from environmental barriers that can be mitigated by alternative measures or reasonable accommodations.

p.41 If the decision is based on the possible impact on the property and rights of children because one of their parents is a member of one of the so-called suspect classes, -as in the present case, in which the disability status of the father is weighed- such harm must be

real; i.e., based on technical or scientific evidence, not on prejudices or generalized considerations.

On the other hand, in addition to proving the impact on the minor under the standard described above, it must also be proven that this situation does not result from social barriers that can be remedied through alternative measures.

p.42 Based on the social model, if the situation of disability results in limitations to undertaking their obligations as a parent, it must be shown that these are not the product of contextual barriers; i.e., they do not arise because of functional diversities *per se*, but because of their interaction with certain social barriers. If the limitations are social, the judge should try to find alternatives that allow the person with disabilities to have full social participation.

This correction of social barriers has been called reasonable accommodation, as it is referred to in article 2 of the Convention on the Rights of Persons with Disabilities.

p.42-43 Given this scenario, this Court considered that, in adoption and parental authority proceedings, the judge must evaluate whether there are alternative measures through which the person with a disability can fulfill the duties derived from paternity.

III. Analysis of this case

p.43 In order to determine whether the adoption requested in this case should be granted, it is essential to determine whether it was clearly and convincingly proven that failure to grant the adoption would create a situation prejudicial to DEL. In the event that there is indeed an impact, it must be evaluated whether this situation was corroborated with technical or scientific evidence so that it is not the result of prejudice or stigmatization. Finally, it must be established that the harm is not the result of a failure to apply reasonable accommodations that has prevented the father from undertaking his family obligations; i.e., that there are no other alternative measures to guarantee the protection of the child.

p.46 From the evidentiary material on file, this Court cannot consider that an impact on the rights of DEL has been clearly and convincingly proven. We will address each of the possible impacts and indicate why they were not proven under this standard.

- p.46-47 With regard to the right to be financially supported, an impact and not just a situation of risk must be proven, and therefore the mere possibility that in the future the mother of the child will not be able to cover the child's expenses is insufficient to consider that the rights of the child have been affected now. On the contrary, socio-economic studies show that the child enjoys an adequate standard of living.
- p.47 Regarding the psychological impacts on DEL, it is noted that, although the child is in a situation of stress, there is no technical evidence that determines that this is the result of the continuation of his filial relationship with REG. On the contrary, the psychological expert analyses show that the anguish the child is experiencing is the result of the pressure of his environment and the adoption process itself. The psychological opinions also indicate unmet psycho-affective needs and the desirability of the child visiting with his biological father.
- p.47-48 Regarding the alleged violation of the identity of the minor, this Court has determined that filiation should not always correspond to biological truth; this dissociation must be the result of an analysis under the standard described above, which was not satisfied in this case.
- p.48 In addition, a person's identity is also shaped by the understanding of their family reality, however complex it may be. The reality of DEL is that he has a father who, due to circumstances beyond his control, has not been able to undertake his obligations, who also opposes his adoption and states that he wants to visit with him. On the other hand, DEL has grown up with his mother and JMTA, who have taken care of him.
- p.48-49 Although the father has not taken care of the economic and affective needs of DEL, neither his guardians nor the State have sought alternatives so that REG can be close to his son. It was never verified that DEL's father did not have assets with which he could take care of the child's maintenance. In addition, support should be sought from the extended family so that the person with a disability can exercise his rights and obligations as a father. Thus, it is possible that REG's guardians can facilitate visitation and the beginning of an affective relationship between father and son.

p.49 Finally, with regard to the right of the minor to be heard, it is the consistent case law of this Court that this right does not imply that the desire of the minor should be privileged. It is noted from the documents before the Court that DEL had the opportunity to express his wishes during this proceeding. Thus, despite the fact that he states that he wants to be adopted by JMTA, it is indicated that his opinion has to be evaluated along with all the evidence. And, it does not follow from the evidence that the child will suffer harm if the adoption is not granted; therefore its granting would not be according to his best interests.

DECISION

49-50 In the circumstances described above, considering the best interests of the child and the social model on the rights of persons with disabilities, this Court modifies the decision under appeal in order for the Civil Court Chamber to reverse the challenged decision and issue another one that, taking up the arguments of this decision: 1) confirms the invalidity of the adoption of the minor; 2) establishes visitation rights between the minor and his father; 3) determines whether REG has assets with which he can fulfill his parental obligations; and 4) orders psychological therapy so that the minor can understand and manage his family reality.