

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.

**PROHIBITION ON THE DETERMINATION OF THE CUSTODY OF CHILDREN AND ADOLESCENTS DEPENDING ON THE ECONOMIC SITUATION OR HEALTH CONDITION OF THE MOTHER OR FATHER
(PROHIBICIÓN SOBRE LA DETERMINACIÓN DE LA GUARDA Y CUSTODIA DE NIÑAS, NIÑOS Y ADOLESCENTES DEPENDIENDO DE LA SITUACIÓN ECONÓMICA O CONDICIÓN DE SALUD DE LA MADRE O PADRE)**

CASE: *Amparo Directo en Revisión 2618/2013*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

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

DATE OF THE DECISION: October 23, 2013

KEY WORDS: custody, economic situation, health condition, classifications protected by the Constitution.

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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/ADR2618-2013.pdf>

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SUMMARY OF THE *AMPARO DIRECTO EN REVISIÓN* 2618/2013

BACKGROUND: In Ecatepec, State of Mexico, a family court judge decided a case disputing the custody of two girls A and V, as well as the establishment of visitation rights between the children and their father or their mother. With respect to those matters, the family court judge decided to grant the custody of the children to the father and declare visitation rights for the mother. The father and the mother appealed the decision of the family court judge. The civil chamber of Tlalnepantla that heard the appeal decided to grant the custody to the mother and declare visitation rights for the father. The father filed an *amparo* lawsuit against the decision of the civil chamber, arguing that the custody should not be given to the mother since she has psychological problems (depressive neurosis) and the manifestations of the A, who is 12 years old, should have been considered. The Collegiate Circuit Court that heard the *amparo* determined that, according to the best interest of the child, the father should exercise the custody of the children because: (a) from the psychological expert opinions, it was determined that the father is better prepared to have the custody of his daughters; (b) from the manifestations of A, it is seen that the mother does not adequately feed her; (c) the mother is ill and has to remain in bed and, therefore, the appropriate development of the minors is not guaranteed; (d) the mother is not in treatment for her neurosis; (e) the mother suffers from lupus and arthritis, which require special care for their treatment; (f) the social worker's expert opinion shows that the father has better economic and social conditions in comparison to the mother. Therefore, the Collegiate Circuit Court granted the *amparo* to the father for the civil chamber to overturn the challenged decision and issue another one determining that the custody of the children would be granted to the father. The mother requested the review of ruling of the Collegiate Circuit Court, since it discriminated against her based on her health and economic condition. Furthermore, the mother indicated that the opinion of the minors is not the only element that should have been taken into consideration to decide on their custody. Finally, the *recurso de revision* was sent to the Mexico's Supreme Court of Justice (this Court) for its resolution.

ISSUE PRESENTED TO THE COURT: Whether: (I) the custody corresponds to the mother, unless it is shown that harm would be caused to the children; (II) the right to non-discrimination

is undermined when basing the determination of custody of the children on the economic and health situation of the mother; and (III) the best interests of the child is misinterpreted by privileging, in the decision, the opinion of the children or adolescents.

HOLDING: The decision of the Collegiate Circuit Court was overturned (solely for the purpose of the Collegiate Circuit Court issuing a new decision in which the situation of the physical health of the mother is not considered or, if it is, such consideration is based on technical or scientific proof that shows the degree the health of the mother is affected and the manner in which such circumstances make her less appropriate than the father to adequately care for the children) essentially for the following reasons. On the one hand, it was pointed out that custody is not automatically granted to mothers, without first evaluating which situation is more beneficial for the children or adolescents. On the other hand, only if a risk for the development of the children or adolescents is proven can it be claimed that the consideration of the classifications protected by the Constitution (such as the economic situation and health condition of the mother) is intended to protect the best interests of the child.

VOTE: The First Chamber decided this matter by a majority vote of the four justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz and Alfredo Gutiérrez Ortiz Mena. Justice Jorge Mario Pardo Rebolledo voted against.

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=154939>

EXTRACT OF THE *AMPARO DIRECTO EN REVISIÓN* 2618/2013

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 23, 2013, issues the following decision.

BACKGROUND

- p.1-2 In September 2012, in Ecatepec, State of Mexico, one mother sued the father for: (i) the custody of their daughters A and V; (ii) the payment and securing of alimony for her and their daughters; and (iii) the establishment of a visitation plan between the children and their father. The father answered the lawsuit and requested that: (i) the mother lost parental authority with respect to their daughters; (ii) he be given the provisional custody of their daughters; and (iii) the mother has provisional visitation rights. Later, the father filed for divorce.
- p.2 The family court judge of Ecatepec de Morelos that heard the matter decided: (i) to dissolve the marriage; (ii) to absolve the mother from the loss of parental authority; (iii) to grant the custody of the children to the father; (iv) to declare visitation rights for the mother; (v) to order the father to receive psychological therapy and attend alcoholics anonymous; and (vi) to absolve the father from the payment of alimony to the mother.
- p.2-3 The mother and the father both appealed the judge's decision. The civil chamber that heard the appeal modified the decision and decided to: (i) grant the custody to the mother; (ii) declare visitation rights for the father; (iii) completely restrict the contact of the children with I, the husband of their maternal aunt (who was accused of having sexually abused the girls); (iv) declare alimony for the mother and the girls; and (v) order that the father, the mother and their children undergo psychological therapy.
- p.3-4 The father requested the *amparo* against the civil chamber decision, essentially arguing that the mother's loss of parental authority should be declared since it was demonstrated that I sexually abused the girls due to the mother's abandonment of her duties as a mother. The father also indicated that custody should not be granted to the mother since she had

psychological problems (depressive neurosis) and that the manifestations of A, who is 12 years old, should have been considered.

p.5-9 The Collegiate Circuit Court in civil matters that heard the *amparo* determined that declaring the loss of parental authority was not appropriate. The Collegiate Circuit Court also indicated that, based on the best interests of the child, the father should be the one who exercises custody of the girls since: (a) from the psychological expert opinions it was determined that the father is better prepared to have custody of his daughters; (b) A's manifestations show that the mother does not feed her adequately; (c) the mother is ill and has to remain in bed and, therefore, the minors are not guaranteed proper development; (d) the mother is not in treatment for her neurosis; (e) the mother suffers from lupus and arthritis, which require special care for their treatment; (f) the social worker's expert opinion shows that the father has better economic and social conditions in comparison with the mother. Therefore, the Collegiate Circuit Court granted the *amparo* to the father for the civil chamber to overturn the challenged decision and issue another one determining that the father will have custody of the children.

p.9-11 The mother requested the review of the Collegiate Circuit Court's decision since she considered that the content of article 4 of the Constitution and articles 1, 8, 11, 17, 19 and 24 of the American Convention on Human Rights (ACHR) had not been observed, because she was discriminated against based on her health and economic condition. The mother also pointed out that the opinion of the minors is not the only element that should have been taken into consideration to decide on their custody. Finally, the *recurso de revisión* was sent to the this Court for its decision.

STUDY OF THE MERITS

p.16 The following will be analyzed in this case: (I) whether the custody corresponds to the mother unless it is demonstrated that harm would be caused to the children; (II) whether the right to non-discrimination is violated by basing the determination of custody of the children on the economic and health situation of the mother; and (III) whether the best

interests of the child is misinterpreted by privileging the opinion of the children or adolescents in the decisions.

Preamble. The best interests of the child as guideline for judicial decisions on custody.

This Court has the duty to privilege the best interests of the child in any judicial dispute involving the rights of children or adolescents. This principle constitutes the limit and last point of reference of the institution of custody, as well as of its operativity and effectiveness.

p.17-18 The best interests of the child is expressly established in article 4 of the Constitution. This is also one of the most important guiding principles of the international framework of the rights of children and adolescents. Article 3.1 of the Convention on the Rights of the Child establishes that in any measure taken by State authorities, the best interests of the child must be primary.

p.19 In the *Amparo Directo en Revisión* 69/2012, the First Chamber of this Court indicated that the best interests of the child fulfills various normative dimensions or functions: (i) as an interpretive guideline applicable to the rules and acts that has influence on the rights of children; and (ii) as a guiding legal principle that requires a maximum and comprehensive protection of the rights held by a minor.

Consequently, in the proceedings that directly or indirectly involve rights of minors, the best interests of the child requires the judge to resolve the dispute based on what is best for the child.

p.20 **I. Interpretation of article 4.228 of the Civil Code of the State of Mexico according to the best interest of the child. The custody of children under 10 years of age is not automatically given to the mother.**

p.20-22 In the *Amparo Directo en Revisión* 1573/2011, the First Chamber of this Court indicated how article 4.228 of the Civil Code of the State of Mexico should be construed. The First Chamber of this Court stated that the custody should not automatically be granted, without

further reasoning, to the mother, in spite of the preference established by the legislator. On that occasion it was pointed out that the custody of the children is one of the most important aspects of the judicial decision which imposes the future organization of any family beginning from the situation created by the dissolution of the marriage of the parents.

p.22 The difficulty lies in determining and delineating the content of the best interest of the child or adolescent, since it cannot be established generally and abstractly. The dynamics of family relations are extraordinarily complex and varied and it is those dynamics and the consequences and effects of the family breakup that will determine the most beneficial custodial system for the child or adolescent. The judges must investigate not only the least harm that could be caused to the child or adolescent, but what would be the most beneficial not only in the short term but more importantly in the future.

Even in the case of small children, when the judge decides how to distribute the custody between the parents, the special circumstances of each parent must be evaluated to determine which is the best environment, and not only the least harmful, for the full development of the personality of the child or adolescent.

p.23 The judge must consider the personal, family, material, social and cultural elements that exists in a particular family, seeking what is understood as best for the children, for their full development, their personality, their psychological and physical formation, keeping in mind the individualized elements as guiding criteria, weighing the needs for attention, affection, food, education and school assistance, economic conditions, piece of mind and a balanced climate for their development, the patterns of behavior of their surroundings and their parents, the adequate social and family environment that they can offer them, their affections and relations with them especially if there is a rejection or a special identification, their age and capacity for self-sufficiency, among many other elements that may be present in each specific case.

Therefore, the custody should not be automatically granted to the mother, without first evaluating which situation is more beneficial for the child or adolescent.

II. The evaluation of the health condition and economic situation of the mother

- p.23-24 The methodology used by the Inter-American Court of Human Rights in the Atala Riffo Case will be used to assess whether the mother's right to non-discrimination was violated when her loss of custody of her minor daughters was based on her health condition and economic situation.
- p.24 The Inter-American Court of Human Rights first analyzed: i) whether the judicial decisions were based on the sexual orientation of the mother. With that purpose, a causal link was established between the sexual orientation of the mother and the decisions. Subsequently, this Court evaluated ii) whether those determinations constituted discriminatory treatment. Given that every judicial dispute in which children or adolescents are involved should be governed by the best interests of the child, it must be analyzed whether that principle authorizes the judicial body to confer custody based on the health and economic situation of the mother, and whether the use of those reasons is discriminatory.
- p.25 This Court will analyze (i) the scope of the right to equal treatment and non-discrimination, as well as health and the economic situation as classifications protected by the Constitution and international treaties, (ii) whether the determination of custody was based on the health condition and economic situation of the mother and, (iii) whether the difference in treatment constitutes discrimination. This Court will not weigh or evaluate whether the mother or the father of the children offered a better home for them, since those questions could not be analyzed in this proceeding.

A) Scope of the right to equal treatment and non-discrimination. Health and economic situation as protected classifications

- p.25-26 The principle of equality is established in article 1 of the Constitution through the prohibition of discrimination. Furthermore, this right is recognized in the international legal system in articles 1 and 2 of the Universal Declaration of Human Rights, in articles 2, 3 and 26 of the International Covenant on Civil and Political Rights; and, as to the inter-American system of international conventions, the preamble and article II of the American Declaration of the Rights and Duties of Man and articles 1.1 and 24 of the ACHR are important.

p.27 Discrimination cannot be claimed in every difference in treatment of the State toward the individual, provided the distinction is based on premises of fact substantially different and there is a proportionate and supported connection between those differences and the objectives of the rule, which cannot ignore justice or reason, and cannot pursue arbitrary, capricious or despotic ends or outcomes somehow contrary to the essential unity and dignity of human nature.

In the *Amparo en Revisión* 796/2011, the First Chamber of this Court indicated that the notion of equality derives directly from the unity of the nature of humankind and is inseparable from the dignity of the person. This is incompatible with any situation which, by reason of considering a particular group as superior, treats its members with privilege, or vice versa, considering a group inferior, treats its members with hostility or discriminates against them in the enjoyment of rights recognized for those not considered inferior. However, it was also indicated that not all different legal treatment is discriminatory, because not every distinction in treatment can be considered offensive to human dignity.

p.28-29 Equality constitutes a principle derived from the notion of identical dignity of persons, which prohibits discrimination in the distribution of rights. The assignment of rights will be discriminatory if they are conferred distinguishing situations in an unjustified manner. When the principle of equality materializes in the content or in the application of the law, it is called equality before the law. The Inter-American Court of Human Rights has established that while the general obligation of article 1.1 refers to the duty of the State to respect and guarantee “without discrimination” the rights contained in the ACHR, article 24 protects the right to “equal protection of the law”. In the national system, in the *Amparo en Revisión* 796/2011, the First Chamber of this Court established that while the principles of equality before the law and non-discrimination are closely related, they are not identical but rather complementary.

B) Health and economic situation as protected classifications

p.29-30 When the assignment of rights is based on one of the classifications protected by article 1 of the Constitution, there is a suspicion that the distinction is discriminatory, and therefore a rigorous and weighty basis is required. In the *Amparo en Revisión* 581/2012,

the First Chamber of this Court stated that a distinction is based on a suspect classification when it uses one of the following criteria: ethnic origin, nationality, gender, age, disability, social condition, health, religion, opinions, sexual preferences, civil status (last paragraph of article 1 of the Constitution) or any other that threatens human dignity and has the purpose of cancelling or undermining people's rights and liberties.

p.30 The use of these classifications must be examined with greater rigor precisely because they bear the weight of the suspicion of being unconstitutional. The laws that use them to make a distinction are presumed to be unconstitutional. The Constitution does not prohibit the use of suspect classifications; what it prohibits is their use without justification. In the *Amparo en Revisión* 581/2012, the First Chamber of this Court pointed out that the strict scrutiny of the distinctions based on suspect classifications guarantees that only those that have a very robust justification will be constitutional.

p.30-31 In the *Atala Riffo* case, the Inter-American Court of Human Rights established that it is not necessary for the entire decision to be based "fundamentally and solely" on the alleged classification to prove that a differentiation in treatment has been used in that decision; it is enough to show that the classification was considered explicitly or implicitly to reach a decision. The court also indicated that the reasons justifying such differentiated treatment must be strictly evaluated to analyze whether the distinction is discriminatory.

p.31 In this case, the measure subject to analysis involves a potential case of discrimination in which it must be determined whether the right of the mother to exercise custody over her minor daughters was unjustifiably denied because of her health and economic condition. As in the *Atala Riffo* case, the measure to evaluate is a judicial decision: the ruling denying the custody of the girls to the affected party.

C) The judicial decision of custody was based on the health and economic condition of the mother

p.31-32 In this first level of analysis, it must be determined if the judicial decision was based on the classifications of health and economic situation of the mother as factors to consider in the determination of the custody of the children. For this it is necessary to analyze the arguments made by the Collegiate Circuit Court, the language used and the context in

which the judicial decision was made, to determine whether there was a causal link between the health and economic situation of the mother and the determination of custody.

- p.32 In the judicial decision in which the custody was conferred to the father of the children, it is clear the Collegiate Circuit Court based its decision on, among other questions, the health and economic condition of the affected party.
- p. 32-34 The Collegiate Circuit Court concluded that the mother is not in the best of health conditions, since she suffers from illnesses that generate an emotional and physical state that is not the most convenient for undertaking the great responsibility of caring for the girls. The Collegiate Circuit Court stated the following reasons: (i) that the mother suffers from the illnesses lupus and arthritis, which require special care for their treatment, (ii) that she suffers from neurosis and does not get therapy that would allow her to control that syndrome, (iii) that such illnesses sometimes make it physically impossible for her to attend to and be vigilant of the needs of the girls and, (iii) that this situation could compromise the physical and emotional integrity of the girls.
- p.34 As to the economic environment in which the mother and the father live, the Collegiate Circuit Court stated that a detailed analysis of the expert testimony of the social worker and the whole social and family environment in which they operate, including their work activities, conditions of the property where they live, family environment (family support networks), etc., shows that the father lives under better economic and social conditions. Therefore, the analysis done and language used in the decision evidence a causal link between (a) the health condition and economic situation and (b) the judicial decision.
- p.34-35 Even though the Collegiate Circuit Court considered other factors that as a group could justify granting the custody to the father of the girls (that the minors live at the domicile of the father, that they were subject to touching by a maternal uncle when the mother left the minors under his care, that the paternal family provides loving support and that the minors stated they felt more comfortable in the paternal domicile), it is impossible to determine the specific weight that each of them were given. In the determination of the custody, all the personal, family, material, social and cultural elements that come together in a family

influence the judicial decision and sometimes it is impossible to disassociate them and establish which of them led to granting the custody to one of the parents. Such factors must be evaluated always seeking to protect the best interests of the child or adolescent.

D) Did the determination of custody based on the alleged classifications constitute discriminatory treatment against the mother of the minors?

- p.35 This Court and the Inter-American Court of Human Rights have indicated that the best interests of the child is a legitimate end in itself, and it is also a compelling interest. In addition, when legislative or administrative measures that affect the rights of children or adolescents are involved, the best interests of the child demands from the judicial bodies the application of a much stricter scrutiny in relation to the necessity and proportionality of the measure in question.
- p.36 Thus, it must be determined whether the assessment of the facts stated in the judicial decision is adequate to achieve the end it is intended to protect: the best interests of the child. This scrutiny is made applying an equality test.
- p.36-37 A justified use of the classifications protected by the Constitution (like health, religion, sexual preferences or social condition) will be one that shows, based on technical or scientific evidence, that such circumstances have a negative impact on the wellbeing and development of the child or adolescent. The situation of risk that is alleged must be proven, and not speculative or imaginary. Therefore, speculations, presumptions, stereotypes or generalized considerations on the characteristics of the mother or the father that are classified as protected by the Constitution cannot be admissible.
- p.37 Only if the existence of a risk to the development of the child or adolescent is proven may it be asserted that the consideration of the classifications protected by the Constitution is intended to protect the best interests of the child. Otherwise, the alleged protection would be speculative and without support. If on the contrary such risk is shown, then the best interests of the child must be privileged over the difference in treatment (loss of custody for such circumstances), which, to the extent it was justified, would not be discriminatory.
- p.37-38 Although the Inter-American Court of Human Rights refers to risk and harm indistinctly throughout the Atala Riffo decision, the First Chamber of this Court indicated, in the

Amparo Directo en Revisión 12/2010 and *Amparo Directo en Revisión 1038/2013*, that according to the best interests of the child it is enough for a child or adolescent to be at risk of compromise of their interests and rights, without actual harm being necessary. In these precedents, this Court stated that the principle of best interests requires all State authorities to protect the rights of the child through “reinforced” or “increased” measures, and that the interest of the child or adolescent must be protected with greater intensity.

p.38-39 If risk is understood as simply the possibility that a harm occurs in the future, the possibility of a child or adolescent suffering harm would always be latent. However, if risk is understood in terms of the specialized literature, the increase of the risk usually occurs as a situation in which the occurrence of one event makes the occurrence of another more likely.

p.39 Applying such theory to disputes over custody, it is reiterated that the best interests of the child requires that the judges decide based on what will be more beneficial for the child or adolescent. Under that premise, the situation of risk will occur if the fact that the mother or the father falls under a suspect classification (first event) makes it more likely that the child or adolescent will be better off under the exclusive care of the other parent (second event). It is sufficient that the judge makes it clear that the circumstances that he or she considered, even though they constitute classifications protected by the Constitution, make it more likely that the child or adolescent is better under the exclusive care of the other parent.

p.39-40 The existence of the risk based on one of the conditions protected by article 1 of the Federal Constitution cannot be speculative or imaginary. If the judge finds it appropriate to consider in the disputes over child custody that one of the parents has certain characteristics protected by article 1 of the Constitution, he or she must attest based on technical or scientific evidence that such circumstances make it more likely that the child or adolescent would be better off under the exclusive care of the other parent. Otherwise, the judicial decision based on one of those classifications would be unjustified and therefore would constitute discriminatory treatment. If it is not proven that such circumstance generates a situation of risk in the interests or rights of the children or

adolescents, it cannot be concluded that its consideration in the decision on custody is intended to protect the best interests of the child.

- p.41 As the Inter-American Court of Human Rights indicated in the *Atala Riffo* case, a determination based on unfounded and stereotypical presumptions about the parental capacity and appropriateness to guarantee and promote the wellbeing and development of the child is not adequate for guaranteeing the legitimate purpose of protecting the best interests of the child.
- p.41-42 The consideration of the health of the mother may be divided into two aspects, physical health and mental health. With respect to physical health, the Collegiate Circuit Court indicated that the mother suffers from lupus and arthritis, illnesses that need special care for their treatment, and therefore it is convenient that the girls remain in the care of their father. The risk noted by the judge was not based on technical or scientific evidence from which it could be asserted that the mother is less ideal than the father for caring for the girls. While the decision of the Collegiate Circuit Court sought the best interest of the children, the degree in which the health of the mother was affected and the way that circumstance made her less ideal than the father for caring for their daughters was not proven based on technical or scientific evidence, and therefore such decision constitutes discriminatory treatment against the mother.
- p.43 With respect to the mental health of the mother, the Collegiate Circuit Court evaluated various expert witness opinions based on which it was determined that while the mother can socialize with the minors, she is not in the best conditions to be responsible for them. It was justified through scientific evidence that her mental health condition could compromise the integrity and proper development of her daughters. The measure undoubtedly was intended to protect the best interests of the child, and since the risk that situation would cause to the rights and interests of the girls is proven, it is clear that it was adequate.
- p.43-44 The evaluation of the social condition of the mother is also justified and, therefore, is not discriminatory. The considerations of the Collegiate Circuit Court were based on evidence. It considered the expert opinion of the social worker to know the economic and social

environment in which the girls, the father and the mother lived. When the Collegiate Circuit Court referred to the economic environment, it did not do so to privilege the father who is in a better economic situation; rather it studied the social environment in which each of the parents lived. Thus, it evaluates the conditions of the properties, the professional activities, the networks of family assistance, among other factors. The Collegiate Circuit Court used technical evidence to argue it would be more beneficial for the girls to stay under the care of their father. Therefore, the best interest of the child was privileged.

III. The opinion of the child or adolescent

- p.44-45 In the *Contradicción de Tesis* 60/2008-PS, the First Chamber of this Court recognized the right of children and adolescents to participate in the judicial proceedings that could affect their rights. That right is expressly regulated in article 12 of the Convention on the Rights of the Child and implicitly recognized in article 4 of the Constitution. Furthermore, article 41, part A, of the Law for the Protection of the Rights of Children and Adolescents reiterates the right already recognized in the international treaty. Therefore, the right of children and adolescents to participate in the judicial proceedings that could affect their legal sphere is part of Mexican law.
- p.45 In the *Amparo Directo en Revisión* 2479/ 2012, the First Chamber of this Court indicated that the participation of children and adolescents in judicial procedures has a double purpose. By recognizing them as subjects of law, the effective exercise of their rights is achieved and, at the same time, the court can collect the elements it needs to construct its opinion with respect to a matter, which is fundamental for the proper protection of the best interests of the child.
- p.46 Children and adolescents have a right to have their opinions heard in the proceedings where their rights are involved. This does not mean that the proceedings for custody must privilege the wishes of the child or adolescent, but rather that their opinion must be considered with the sum of factors that the judge must evaluate to determine what is best for the child or adolescent. In this case, the court did not base its decision solely on the opinion of the girls; rather it considered their assertions and evaluated them with various circumstances that it considered relevant to determine where the best interest of the child

lay. Thus, it decided that the best interest of the girls was to stay under the care of their father.

Therefore, the interpretation by the Collegiate Circuit Court of article 4.228 of the Civil Code for the State of Mexico and the weight it gave to the opinion of the children in the determination of custody was correct. According to the best interest of the child, the judge must decide based on what is best for the child or adolescent, and therefore their custody, even if they are under 10 years of age, does not automatically correspond to the mother and the children and adolescents have the right to be heard in the disputes that involve their rights.

p.46-47 This Court concluded that while the decision of the Collegiate Circuit Court intended to protect the best interest of the girls, it did not prove that the consideration of the physical health of the mother was appropriate for that purpose, given that the situation of risk such condition caused for the children was not based on technical or scientific evidence, and therefore that decision constituted discriminatory treatment against the mother. In contrast, the evaluation of the classifications of mental health and economic situation were based on expert opinions and other material evidence, and therefore their consideration was justified and was intended to protect the best interests of the child.

p.47 It is reiterated that the above does not mean that the final decision of the Collegiate Circuit Court conferring the custody of the girls to the father must be overturned. It is possible that the analysis of the other factors, evaluated altogether, would lead to the same decision as the judicial body reached - that the girls should remain under the care of the father.

DECISION

p.46-47 The decision of the Collegiate Circuit Court is overturned, only for the Collegiate Circuit Court to issue a new decision in which it does not consider the physical health of the mother or, if it does, it does so based on technical or scientific evidence that shows the degree in which the health of the mother is affected and the manner in which such circumstances make her less ideal than the father to adequately care for the girls.