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**THE BIRTH MOTHER’S ASSENT TO ADOPTION AND THE
LIMITATION OF AUTONOMY OF WOMEN’S WILL IN
SPANISH LAW: A PROPOSAL *DE LEGE FERENDA***

María Victoria Mayor del Hoyo *

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ABSTRACT

Even though in Spanish law the act establishing the adoption is judicial in nature, declarations of will have special relevance in the process, since they are a necessary precondition for the adoption. This work focuses on the assent of the biological mother, who is affected by and has an interest in the adoption process, even if not a party to it herself. In this work, the foundation, configuration, and characteristics of this assent are studied, as well as the form of her declaration of will, and the ability of the mother to offer it. Special attention is paid to the minimum time limit for issuing this declaration. This time limit is based on the European Convention on Adoption and constitutes a legal limitation on women’s autonomy. As an

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alternative to this limitation, we come with a proposal de lege ferenda which ensures a balance between the need for certain precautions and the free exercise of women's decision-making power. This proposal is applicable to all European systems and is consistent with the European Convention, which introduces this limitation on women's autonomy. Finally, a revision of the European Convention is proposed to adapt it to the growing demand for increased autonomy for all persons.

Keywords: Spain, adoption, autonomy of will, European Convention on Adoption, filiation, legal capacity, personal acts, protection of minors, Spanish law

I. INTRODUCTION: ADOPTION AND ITS CONSTITUTIVE ACT

Spanish Law 21/1987, of November 11, amended specific articles of the Civil Code (CC) and the Civil Procedure Law in the area of adoption with the aim of configuring adoption as an instrument of family integration for minors without a family life and to fight against child trafficking.¹ In doing so, the configuration of adoption as a legal transaction between parents and adopters was left behind, replaced by a system that constituted adoption through a judicial resolution with prior administrative control. This system, with some changes, has remained in place until today. The most notable modifications in this regard come from Organic Law 1/1996, of January 15, on the Legal Protection of Minors (OLLPM) and Organic Law 26/2015, of July 28, 2015, on the modification of the System for the Protection of Children and Adolescents.²

In contrast to the system of conventional constitutive act, this is a system of constitution through a public authority,³ specifically, a

1. The legislator understood—as stated in the Preamble to the act—that there was an almost complete lack of control over the actions preceding adoption, something which was “necessary if it is to fulfil its true social purpose of protecting minors deprived of a family life.”

2. Other laws that have amended the Civil Code in this area are: Law 13/2005, Law 54/2007, and Law 15/2015.

3. See the distinction between these two systems made by MIGUEL ÁNGEL PÉREZ ÁLVAREZ, *LA NUEVA ADOPCIÓN 201 et seq.* (Civitas 1989).

judicial authority. Adoption is constituted by judicial resolution as stated in article 176.1 CC. However, this system relies on strong administrative intervention, given that, save for exceptional cases, the public entity has the exclusive authority to initiate the judicial proceeding by presenting the adoption proposal before the judge. In addition, before the judicial proceeding, the public entity is responsible for issuing the declaration of the adopters' suitability and their selection.⁴ Likewise, it has the capacity to create a guardianship for adoption⁵ before the submission of the proposal.⁶ On the other hand, the system does not dispense with the declarations of will of those who are impacted by the adoption and any other subjects involved.⁷

As a rule, the *iter* implemented is as follows: the public entity declares the suitability of the adopters, proceeds to their selection and, when appropriate, creates a guardianship for the purpose of adoption. Subsequently, it presents the adoption proposal to the judge thus initiating the judicial adoption procedure. The judge will gather the pertinent declaration of will and, if necessary, will carry out a hearing. Included in this are all the steps considered necessary to assess whether the adoption is appropriate, taking into account the interests of the adoptee and the suitability of the adopter. Finally, if the judge considers it appropriate, he or she will issue a constitutive resolution.

II. DECLARATIONS OF WILL

The fact that the constitutive act is—as indicated—of a judicial nature does not imply that the will of the persons involved is irrelevant. It is still present, but it has ceased to be constitutive and has instead become a necessary precondition to the constitutive act. The

4. Art. 176.2-176.3 CC.

5. See art. 176 CC: the guardianship for adoption (“guarda con fines de adopción”) is an institution that allows the minor who needs protection to live with their future adopters while the judicial procedure for the constitution of the adoption is processed.

6. *Id.*

7. Art. 177 CC.

adoption is constituted by a resolution of the judge that requires, as a necessary precondition, the issuance of certain declarations of will. If these requirements are not met, the adoption cannot be constituted (doing so regardless would affect its validity). However, the opinions contained in these declarations are not binding on the judge, who is free to decide on the constitution of the adoption.⁸

It seems logical that the will of interested parties should not be excluded. The parent-child relationship that constitutes adoption cannot be imposed. It is not a relationship originated in nature but built by law and based on the will of the persons involved. On the other hand, adoption does not only concern the new parents and the adoptive child, but there are other subjects involved whose rights and legitimate interests must be respected. The fact that their declaration of will is a prerequisite for the constitution of the adoption is fundamental to guarantee this respect. Finally, declarations of will provide the judge with valuable elements for his or her final decision.⁹

There is not a single category of declarations of will. In fact, the law distinguishes three types, even attributing to them different names, according to the degree of involvement of the person in the adoption and the effectiveness given by law: consent, assent, hearing.

In light of article 177 CC, if the person who expresses his or her will is a party to the adoption, this declaration is qualified as consent. Thus, according to the first paragraph of the provision, it is up to the

8. See JOSÉ LUIS LACRUZ BERDEJO ET AL., IV EL NUEVO RÉGIMEN DE LA FAMILIA: ACOGIMIENTO Y ADOCIÓN 86 *et seq.* (Civitas 1989). The authors referred to the manifestations of will as necessary, but not binding, procedural presuppositions. This observation was well received by other authors, such as, for example, PÉREZ, *supra* note 3, at 204. See also JOSÉ JAVIER HUALDE SÁNCHEZ, COMENTARIOS A LAS REFORMAS DEL CÓDIGO CIVIL 185 (Bercovitz Rodríguez-Cano ed., Tecnos 1993); BARTOLOME VARGAS CABRERA, LA PROTECCIÓN DE MENORES EN EL ORDENAMIENTO JURÍDICO 220 (Comares 1994).

9. See PILAR GUTIÉRREZ SANTIAGO, CONSTITUCIÓN DE LA ADOCIÓN: DECLARACIONES RELEVANTES 96 (Aranzadi 2000). Gutiérrez highlights how the jurisprudence of the *Audiencias Provinciales* refers to the intervention of the various persons as evaluative elements.

adopters and adoptees over the age of twelve to give their consent.¹⁰ Consent must necessarily be given, it can never be waived, and it must be in favor of the adoption.

If the person who expresses his or her will is not a party to the adoption, it is considered either assent or a mere hearing, depending on the degree to which the adoption is affected.

Assent must come from the biological parents of the unemancipated adoptee who have not been deprived of their parental authority, are not involved in a legal case regarding deprivation, or who have not been suspended in accordance with the terms of article 177.2 of the Civil Code. The spouse or partner of the adopter must also give assent. In certain cases, the law allows for this declaration of will to be waived; for example, when those who are to provide it are unable to do so. However, when this declaration of will is mandatory, it must also be in favor of the adoption.

The judge must simply hear from the following persons: (i) the parents who have not been deprived of their parental authority when their assent is not required; (ii) when appropriate, the guardian or the foster family; and (iii) the adoptee under the age of twelve. It is not necessary that the will expressed by these persons is in favor of the adoption, although it is necessary that the hearing exists.

III. RATIONALE FOR THE BIRTH MOTHER'S ASSENT

In this study, we will examine the assent of the biological mother, which is necessary—along with that of the father, if paternity is legally determined—to validly constitute the adoption of the child.

The Civil Code requires this assent in article 177.2. This assent is based not on the legal relationship of filiation¹¹ but on parental

10. The exception to the rule is the case of a child under 12 years of age, who, because of his or her special conditions, even though he or she is a party, is simply heard.

11. Authors agree on this, *see* PÉREZ, *supra* note 3, at 180 *et seq.*; Ignacio Díaz de Lezcano Sevillano, *Consentimiento, asentimiento y ausencia en la nueva Ley de Adopción*, 590 *REVISTA CRÍTICA DE DERECHO INMOBILIARIO* 28 (1989);

authority.¹² This distinction is revealed by the exemption from the requirement when parental authority no longer exists or is affected. In particular, the need for the parent's assent is excluded: (a) when the adoptee is emancipated,¹³ since the adoptee is no longer subject to the parental authority of his or her biological parents; (b) or when the parents have been deprived of their parental authority,¹⁴ are involved in a pending case for deprivation or have been suspended from these rights for two years following a declaration of abandonment.¹⁵ In this sense, the doctrine justifies the need for assent by noting that adoption extinguishes parental authority¹⁶ and, therefore, cannot take place outside of it.¹⁷

Eduardo Hijas Fernández, *Las manifestaciones de voluntad en la constitución de la adopción*, 583 REVISTA GENERAL DE DERECHO 2748 (1993); VARGAS, *supra* note 8, at 232.

12. Parental authority (known as “*patria potestad*”) is regulated by articles 154 *et seq.* CC. Art. 154 states the following:

Non-emancipated children shall be under the parents' parental authority. Parental authority shall be exercised always for the benefit of the children, according to their personality, and respecting their rights and physical and psychological integrity. This authority comprises the following duties and powers: 1. To look after them, to have them in their company, feed them, educate them and provide them with a comprehensive upbringing. 2. To represent them and to manage their property.

13. *See* arts. 314 *et seq.* CC. Emancipation occurs by attaining the age of majority (18 years old). But a minor who has reached the age of 16 can be emancipated by his or her parents or a judge. The emancipated minor is no longer under parental authority and may govern his or her person and property as if he or she were of age, although in order to perform some acts of special importance he or she needs the authorization of his or her parents. The juridical relationship between parent and child does not disappear with emancipation.

14. Deprivation of parental authority is regulated in art. 170 CC: “The father or the mother may be deprived in whole or in part of their authority pursuant to a judgement on grounds of breach of the duties inherent thereto, or rendered in criminal or matrimonial proceedings.”

15. Art. 172 CC states:

If the public entity entrusted with the protection of minors in the respective territory were to become aware that a minor is in a situation of neglect, it shall have *ipso iure* the guardianship of such minor. . . . A situation of neglect shall be deemed to exist *de facto* as a result of the breach or the impossible or inadequate exercise of the protection duties set forth by the laws for the custody of minors, when they should be deprived of the necessary moral or material assistance.

16. Art. 169.3 CC.

17. *See, e.g.*, José Luis Artero Felipe, *El elemento volitivo en la adopción*, 12 ACCIONES E INVESTIGACIONES SOCIALES 65 (2001); BLANCA GESTO ALONSO, *EL PROCEDIMIENTO DE ADOPCIÓN* 67 (Aranzadi 2013).

I believe, however, that the assent of the parents must transcend parental authority and be based on the juridical relationship between parent and child. Adoption does indeed put an end to parental authority, but it only does so because the filiation bond is extinguished. What is essential is not that parental authority ends, but that filiation disappears. Parental authority is merely an institution for the protection of minors that the law links to parenthood. The parental relationship has legal content and a significance in the lives of those who form a part of it that is much more important in intensity and extension than the mere attribution of this temporary function-duty. Through the regulation of filiation, the law attributes legal support to a relationship that is given by nature itself. The legal bond established according to the rules for determining parentage can only be destroyed if it is demonstrated in a judicial proceeding that the paternity or maternity is not authentic. If they are valid, the bond remains. Notwithstanding the above, by regulating adoption, the legal system has provided for the creation of a parent-child relationship not based on biology. Since the constitution of this new bond necessarily entails the disappearance of the original bond, the biological parents, as parties directly involved, must take part: the relationship that the law created to recognize their natural bond will cease to exist. That is the basis of their assent to adoption.

That said, if the parents do not comply with their parental duties and place their child in a situation of need, then the above mentioned does not prevent that priority be given to the child's best interests over that of their parents. This makes it easier for the State to reintegrate the child into another family through adoption, without the need for the assent of the biological parents, thus depriving them of the possibility of deciding on the continuity of the parent-child relationship.

What would exclude the juridical relationship between parent and child as a basis for parental assent to adoption is the possibility that an emancipated child could be adopted without the assent of the parents. This adoption would be a unilateral break of the parent-

child bond without the child having a real need to be protected or without the parents having failed in their duties; and this fact would leave them defenseless. Naturally, precautions should be taken to avoid the prevention of a fair adoption due to a malicious refusal of the parents.

It should not be forgotten that the relationship between a parent and a child is the strongest to exist. If the law is not indifferent to the more—admittedly—banal or collateral interests of other subjects, such as those of the adopter’s spouse or partner, it should not disregard the interests that derive from this essential bond. These are, in fact, interests that are taken into account by international conventions: the Convention on the Rights of the Child states in article 9 that “States Parties shall ensure that a child shall not be separated from his or her parents against their will” and in article 21, it specifies, concerning adoption, that those persons involved, including the parents, must give their “informed consent.” The European Convention on Adoption¹⁸ also requires the assent of the parents and that the parents are duly informed: “of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin.” And the European Court of Human Rights has stated that adoption without the assent of the mother may be contrary to the right to family life proclaimed by article 8 of the European Convention on Human Rights.¹⁹

IV. CHARACTERISTICS OF THE BIRTH MOTHER’S ASSENT

The assent of the biological mother, just as—when applicable—that of the father, is presented as a necessary but non-binding manifestation of the will of the person who is not a party to the adoptive bond but is affected by it.

18. European Convention on the Adoption of Children, art. 5(1)(a).

19. See *Omrefe c. Espagne*, No. 69339/16, June 23, 2020.

Her favorable will is a condition *sine qua non* for the valid constitution of the adoption. With that manifestation of her will, the birth mother, not a party to the bond but affected by it, does not assume the content of the juridical relationship of the adoption, with the rights and duties that compose it, but authorizes the production of those effects.²⁰ This authorization, is necessary, but—just as with consent—not binding for the judge. The judge is not obligated to grant the adoption, but once the necessary requirements have been met, he or she can decide freely in the best interests of the child.

The mere existence of the biological mother, and in some cases of the legally identified biological father, does not make her assent to the adoption mandatory, but the concurrence of certain circumstances provided by law is necessary. As already mentioned, the adoptee must not be emancipated, and the biological parent must not be deprived of his or her parental authority by a final judgement, nor have legal grounds for such deprivation, nor have his or her parental authority suspended within the period of two years after the notification of the declaration of abandonment without opposition or with opposition dismissed.²¹

However, the Civil Code admits the possibility that, when assent is required due to the circumstances indicated, it can be dispensed with if the mother who is obliged to provide it is unable to do so. Reasons for this may include, for example, that her capacity to act has changed, that she has been declared judicially absent, that her whereabouts are unknown so that it is impossible to summon her, or that if, having been summoned, she does not appear.²²

20. This function of authorization of legal effects has already been referred to by VARGAS *supra* note 8, at 227. See PÉREZ, *supra* note 3, at 191, he observes that assent is not a diminished or attenuated consent but is a qualified consent-authorization for the actions of those who are not subject to the relationship that is to be constituted by judicial decision. See also Miguel Ángel Pérez Álvarez, *Comentario al art. 177 del Código civil*, in *CÓDIGO CIVIL COMENTADO 937* (2d ed., Pedro de Pablo Contreras et al. eds., Civitas 2016).

21. Art. 177.2.2 CC.

22. See art. 177.2 CC; see also art. 38.3, Law 15/2015, of July 2, 2015, Law on Voluntary Jurisdiction Law [hereinafter LVJ].

The basis and importance of the mother's assent have already been pointed out. However, sometimes, situations of impossibility or neglect of duties may arise in connection with the manifestation of this will, which may even block the adoption. In such cases where the judge cannot count on the mother's assent, if he or she believes that adoption is the best option and that it stands a good chance of being a successful one, preventing the judge from establishing the adoption would cause significant damage to the minor, who would be deprived of the protection that this measure of family integration offers him. For this reason, the legislator—balancing these circumstances and the interests of the child and the mother—is inclined to favor the benefit of the child. Thus, the legislator regulates the possibility that, in these cases, the adoption can be validly constituted even without the mandatory assent, sacrificing, if necessary, the possible interest of the mother, who is still a third party in the adoption. In short, it seeks to avoid a situation in which a failure to comply with a presupposition—intended to guarantee the interests of a third party—caused either by impossibility or by the abandonment of obligations of the holder of such interests, might prevent an unprotected minor access to a family-integration measure. It should not be forgotten that adoption is a measure for the protection of minors.

Notwithstanding the foregoing, the law provides for the possibility that a mother who has been unable to give her assent through no fault of her own may, if certain circumstances arise, request the termination of the adoption under the terms of article 180.2 CC.²³

As to the particular or abstract nature of the mother's authorization of effects, article 177.2 *in fine* expressly excludes the possibility that in adoptions requiring a prior proposal from the public body, the assent of the parents may be given to specific adopters. The provision, which had been contained in the Law on Civil Procedure of 1881 in art. 1830 (since 1987), has been relocated to the Civil Code

23. See Antonio Vela Sánchez, *Irrevocabilidad, nulidad y extinción de la adopción*, 70 ANUARIO DE DERECHO CIVIL 1230 *et seq.* (2017) for a work on the extinction of adoption.

by Law 26/2015. In order to avoid irregular actions and child trafficking, the law excludes biological parents from decisions related to the selection of adopters, which is the responsibility of the administration. To admit assent with respect to specific adopters would imply interference in the selection work of the public entity, which would then be seen as subject to the control and approval of the parents. Precisely for this reason, the precept refers to cases in which a previous proposal is required: when there is no proposal from the public body, which is the exception, the adopters are determined by the legally foreseen circumstances and—theoretically—they are not chosen.²⁴ On the other hand, in such cases, in reality, either the prohibition is illogical (when the adopter is the spouse or partner of the parent²⁵) or it is simply not possible or necessary to obtain their assent (when the parents have died and an uncle is going to adopt the orphan,²⁶ when the child is emancipated²⁷ or when a guardian is going to adopt the child already under their care²⁸). In view of the above, it can be said that, in general, the effect authorized by the biological mother, and in some cases the father, is the rupture of

24. Art. 176 CC states that:

[N]o proposal shall be required if the prospective adoptee meets any of the following circumstances:

1. Being an orphan and a relative of the adopter in the third degree by consanguinity or affinity.
2. Being a child of the spouse or person partnered with the adopter in an emotional relationship akin to marriage.
3. Having been in legal foster care for more than a year under a measure of a pre-adoptive foster care, or having been under the adopter's guardianship for the same time.
4. Being of legal age or an emancipated minor.

25. *See* art. 176.2.2 CC.

26. *See* art. 176.2.1 CC.

27. *See* art. 176.2.4 CC.

28. *See* art. 176.2.3 CC: The prohibition would make sense only in the case of adoption—without proposal—by the pre-adoptive guardian for more than one year, as there would have been a prior selection by the public entity and there could be interference.

their legal parental bonds and the constitution of new ones,²⁹ with indifference as to who these bonds are formed with.³⁰

Finally, the declaration of the mother's will is of a strictly personal nature, as it will be shown below. This excludes the possibility of representation. Proof of this is that, as has been mentioned, article 177.2 CC establishes that assent can be dispensed with when the person who must give it is unable to do so.³¹

V. FORM OF THE BIRTH MOTHER'S ASSENT

Law 26/2015 has introduced a new paragraph in article 177 CC, which refers jointly to the form of issuance of consents and assents: "they shall be freely granted, with the required legal form and in writing, after information about the consequences thereof has been provided." Since it refers to the "required legal form," it is necessary to refer to the specific provisions of the law in this regard: in particular to article 177.2 of the Civil Code and, especially, articles 35.2 and 37.1 of Law 15/2015, of July 2, 2015, on Voluntary Jurisdiction (LVJ)—which replaces the provisions of the Civil Procedure Law (LCP).³²

29. It should be noted that except in the case of an open adoption, the possibility of the birth parents having knowledge of the specific adopters proposed is, or should be, limited. Art. 39.2 LVJ establishes that the proceedings will be carried out with appropriate reservation, avoiding in particular that the family of origin has knowledge of the adoptive one. So it would not be easy for birth parents to give their assent to the adopters. This possibility was expressly excluded by lawmakers in order to reinforce their policy of combating these irregular practices.

30. See PÉREZ, *supra* note 3, at 184: Pérez Álvarez has observed that what the law prohibits is that the assent of the parents refer to "specific adopters," that is to say, the personalized determination of the adopter, but not the circumstances that must be present in it. He therefore considers that "nothing precludes the possibility for parents to condition their assent to the fact that the adoptive parents meet certain circumstances (morality, livelihood, or concurrence of certain family budgets. . .)." He adds that "if this is admitted, it would appear that what is excluded is subjectively-conditioned assent, but not assent that would have been objectively conditioned." In the same sense, María Angeles Parra Lucán, *Autonomía de la voluntad y derecho de familia*, in 1 AUTONOMÍA DE LA VOLUNTAD EN EL DERECHO PRIVADO: ESTUDIOS EN CONMEMORACIÓN DEL 150 ANIVERSARIO DE LA LEY DEL NOTARIADO 421-422 (Wolters Kluwer 2012).

31. See section VI.

32. Before the LVJ, the matter had been regulated, since 1987, by the Civil Procedure Act of 1881 under arts. 1829.1(c), 1830. The new law has retained the

In view of these precepts, the issuance of the biological mother's assent is not obligatory before the judge, unlike the consent of those who are part of the adoption. The law establishes two different moments for the provision of assent—before or after the opening of a file for a specific adoption and three ways of issuing it: in a public document, before the public entity, or before the judge, which links the different phases or moments:

(i) Issuance of assent before the file is opened: the law allows assent to be given before the adoption file is opened, either before the public body or in a public document, at the choice of the issuer. This prior assent must be stated in the proposal of the public entity, so that the court clerk does not summon the mother and that the judge is aware of the fulfilment of the requirement.³³

The assent thus given has an expiry period of six months from its issuance.³⁴ Although the Voluntary Jurisdiction Law does not expressly say so, it seems that the time at which it must be checked whether the assent has expired is when the adoption proposal is submitted. This was stated in the previous article 1830.2 LCP. This precept also indicated that, once this period had passed, it was necessary for the assent to be renewed before the judge. The new article 37.1 LVJ does not expressly mention the necessary renewal before the judge either, but it can be deduced, without a doubt, from the provision for summoning the subjects in question before the judge.

On the other hand, inasmuch as the law does not establish the irrevocability of the assent thus given, there does not seem to be any inconvenience in the possibility that, so long as a file is not initiated, a retraction of assent may be issued in the same form in which it was given. In such a case, the mother obligated to give her assent must be summoned under the terms of article 37.1 LVJ in order to issue it before the judge, if necessary.

essence of the previous regulation, although with some variation in the wording of the rules entailing certain substantive changes.

33. See arts. 35.2-35.4 LVJ; see also art. 37.2 LVJ.

34. Art. 37.1.2 LVJ.

(ii) Issuance of the assent once the file has been opened: once the file has been opened, the mother who, according to article 177.2 CC, must assent and has not yet done so—either in a public document or before the public entity—or who, having given her assent more than six months ago such that it has expired, will be summoned to do so before the judge.³⁵

In regard to the possibility that, having given assent before the judge, it could be revoked before a decision is made, it is not easily defensible, just as it happens in the case of consent. Just as consent—of adopters and, if applicable, the adopted—is configured by the law as an essential element in the constitution of the adoption, so that it is not possible to imagine an adoption without the favorable will of those who are a party to it, the same is not true of assent, since—as has already been explained—the law has no problem in declaring an adoption without it. It must be also added that a great deal of damage could be caused to the child by desisting at the last minute—after the time and energy invested in the procedure—by a person whose will is not considered essential by the law.³⁶ For all these reasons, revocation is not easily justifiable. Notwithstanding the above, the fact that it does not seem defensible that the mother's repentance automatically prevents the constitution of the adoption does not mean that the judge should disregard it: if he or she is aware of this circumstance, it should be considered in making the final decision.³⁷ It should not be forgotten that the judge in the adoption resolution must decide in accordance with the best interests of the child.³⁸

35. Art. 37.1 LVJ.

36. In this sense, you have to count on it. According to Organic Law 8/2015, of July 22, 2015, art. 2.3(c), the irreversible effect of the passage of time on the development of the child is an element to be taken into account in determining the interest of the child.

37. See art. 176.1 CC.

38. See art. 176.1 CC and art. 39.1 LVJ.

VI. BIRTH MOTHER'S CAPACITY TO ASSENT

The Civil Code does not contain any special provisions regarding the capacity to give assent to adoption. This may pose problems in cases where the biological mother lacks the general capacity to act because she has not reached the age of majority³⁹ or because an order depriving her of capacity to act has been issued.⁴⁰

In such cases, someone could argue that that the assent to the adoption of the child should be given by the mother's representatives. However, assent is a strictly personal act, which excludes representation. Proof of this is that the law admits that assent is dispensed with when the one who must give it is unable to do so.⁴¹ It should be remembered that strictly personal acts are those that, due to their importance or centrality, can only be performed by the person herself. For these acts, the natural capacity to give valid consent is sufficient, and representation is excluded. Insofar as the mother's assent implies the elimination of the legal mother-child relationship and the consequent modification of her "civil status,"⁴² it falls within the category of a personal act. Because of this, no one can supplant her in this decision. Therefore, her natural capacity should be sufficient to issue her assent.

39. See art. 322 CC.

40. See art. 199 CC. See also art. 322 CC. In Spanish law "A person who is of legal age (18 years old) has capacity for all acts of civil life. . . ." But when the person of legal age does not have the natural capacity to govern himself, he or she may be deprived of the capacity to act in law by means of a judicial decision. Art. 199 CC. states: "No one may be declared incapable save pursuant to a court judgement due to the causes set forth in the law." And art. 200 CC states: "Persistent physical or mental illnesses or deficiencies which prevent a person from governing himself shall be causes for incapacitation." A legally incapacitated person has a guardian who takes care of his or her person and property and who can represent him or her.

41. See art. 177.2 CC.

42. In Spanish law, "civil status" includes personal situations, endowed with a certain stability and permanence, which influence the person's capacity to act or determine the attribution of specific rights or duties, and which the legal system considers fundamental for the organization of society, thereby granting them the same formal regime which basically affects the allocation of certain shares and the peculiarities of their evidence.

Concerning the natural capacity to perform strictly personal acts, the law sometimes establishes a general presumption of aptitude for specific acts when the person reaches a certain age, thus avoiding the need to examine capacity in each specific case. For example, in the case of a will—with the exception of a holographic will—there is a general presumption of natural capacity to create a valid will after the age of fourteen.⁴³ In the case of a marriage, the law indirectly presumes that from the age of sixteen onwards the person has the capacity to consent to the marriage.⁴⁴ When recognizing children, it is also indirectly presumed that the person has the full natural capacity to do so from the age of sixteen onwards, excluding the need for judicial approval.⁴⁵

This does not hold in the specific case of assent to adoption, where the law does not establish a presumption of natural capacity from a specific age. This provision does not seem to impede having the assent of a minor biological mother as a necessary requirement for the valid constitution of the adoption.⁴⁶ This presumption is all the more true if one takes into account the legislator's choice to make mandatory the will of the minor regarding the adoption: it requires the consent of the adoptee older than twelve and allows dual adoption by a minor spouse (when the other spouse has reached the age of twenty-five).⁴⁷ On this matter, the *Tribunal Supremo* (Supreme Court) considered an adoption void on the grounds that the assent given by the minor biological mother corresponded to a fictitious adoption.⁴⁸

43. See arts. 663.1, 688 CC.

44. Compare art. 46 CC with arts. 317, 320 CC.

45. Compare art. 121 CC with arts. 46, 317, 320 CC.

46. Pérez is inclined to consider the mother's assent to be mandatory in cases of minority status: see PÉREZ, *supra* note 3, at 188 n.229; And, in the same vein, see VARGAS, *supra* note 8, at 233: in relation to parents, Vargas Cabrera observes that “the condition of father or mother and sufficient discernment will suffice to give the corresponding declaration of will.”

47. PÉREZ, *supra* note 3.

48. See Judgement of the *Tribunal Supremo* of Jan. 18, 2012.

Since there is no legal presumption of natural capacity to assent to an adoption based on age, it is necessary to evaluate on a case-by-case basis whether the biological mother has such natural capacity. Given that the degree of physical maturity necessary for a woman to be able to procreate requires her to have reached an age at which she will normally have acquired some capacity for discernment, she will usually be in a position to assent, except in situations of too-early motherhood.

If the biological mother is mentally disabled and a declaration of incapacity exists, the declaration will usually delimit her legal capacity to assent. If nothing is specified in the declaration or there is no declaration, she will only lack the capacity to validly assent if that particular circumstance entails a lack of natural capacity to understand the adoption.⁴⁹

In the exceptional case that the mother lacks natural capacity, she will not be able to give valid assent and, given the strictly personal nature of the act, it will also not be possible—as was previously mentioned—for it to be given by proxy. However, this will not paralyze the adoption, since the situation fits the *de facto* case of “impossibility” mentioned in article 177.2 CC, which allows the judge to waive the assent and continue with the adoption regardless. In such cases, however, the mother will simply be heard by the judge.⁵⁰

It should be noted that the strictly personal nature of the mother’s assent to the adoption excludes not only representation but also assistance: she must give it herself and on her own, without the need, if she is a minor or is legally incapacitated, for her decision to be

49. These sources also allude to the lack of discernment when there is no judgement: see MANUEL FELIÚ REY, *COMENTARIOS DE LA LEY DE ADOPCIÓN* 151 (Tecnos 1989); see also VARGAS, *supra* note 8, at 240; Roncesvalles Barber Cárcamo, *La filiación adoptiva*, in 5 *TRATADO DE DERECHO DE FAMILIA* 701 (2d ed., Mariano Yzquierdo Tolsada & Matilde Cuenca Casa eds., Aranzadi 2017); Carmen Callejo Rodríguez, *El asentimiento a la adopción de los padres del adoptando no emancipado*, 9 *LA LEY DERECHO DE FAMILIA: REVISTA JURÍDICA SOBRE FAMILIA Y MENORES* 13 (2016).

50. See art. 177.3.1 CC.

accompanied by the consent of her representatives, as is the case with any act of this nature (will, marriage, recognition of children, etc.).⁵¹ The parents of the minor or incapacitated mother do not even have to be heard by the judge. Although traditionally the Civil Code has relied on expressions of will from other relatives or persons related to the parties to the adoption, Law 21/1987 simplified the lineup in order to speed up and favor the adoption. However, the fact that the hearing is not mandatory does not mean that the judge cannot carry it out, if he or she deems it appropriate: article 39.1 LVJ empowers him or her to “order as many procedural acts as he or she considers appropriate.”

Finally, it should be noted that, in any case (and as a last resort), the decision as to whether the adoption is appropriate is in the hands of the judge,⁵² which means that assent is not exempt from judicial control. In this way, the situation of the minor or the incapacitated mother is not different from that provided for by the law in other strictly personal acts in which, given their transcendence, judicial approval is required. This is what happens, for example, in the case

51. It is surprising that, in the judgement of the *Tribunal Supremo* of Jan. 18, 2012, the Court unexplainably expressed the idea that the assent of the minor mother would have required the concurrence of her parents. This can only be justified by the fact that the assent of the biological mother is based on her exercise of parental authority over her child insofar as art. 157 CC provides that the unemancipated minor shall exercise parental authority with the assistance of his or her parents. In this regard, it should be noted that some authors have understood, along these lines, that assent is contained in the functions of parental authority: see Barber, *supra* note 49, at 706. Without denying that, in most cases, the parents agree to the adoption for the sake of the child and are therefore carrying out an act of protection proper to the exercise of this power, it should not be overlooked that this is not always the case (at least directly): a parent may assent to the adoption simply because, thinking of himself or herself, he or she does not want a parental relationship; and, on the other hand, the relationship with the child is more than parental authority, therefore—as already stated—the basis of assent goes beyond this power and lies in the parental relationship. This precludes the application of art. 157 CC to the assent of the biological mother and excludes the need for parental assistance. On the other hand, this entails—as has been developed in the text—its consideration as a strictly personal act, which can only be carried out by the person himself, personally and solely, eliminating the intervention of the parents or representatives.

52. See art. 176 CC.

of recognition of children by those judged mentally incapable or minors.⁵³

In view of the above, it is desirable to introduce into article 177 CC a specific regulation of the biological mother's capacity to assent to the adoption in order to avoid the court having to infer it by resorting to a systematic interpretation. This is particularly critical because it is not uncommon for the biological mother to be a minor, especially when the adoption takes place immediately after birth. Adding this regulation would prevent doubt and provide legal certainty.

VII. THE SIX-WEEK PERIOD: A LIMITATION ON THE AUTONOMY OF WOMEN'S WILL

Since the 1987 reform, the Civil Code has contained a limitation on the biological mother's ability to give assent, which has recently been intensified. The European Convention on the Adoption of Children, executed in Strasbourg on April 24, 1967, established in article 5.4 a minimum period of six weeks after birth for the mother to give her assent to adoption. Some countries have included this period—or an even longer one—as part of their legislation.⁵⁴ Others dispensed with a minimum period.⁵⁵ Spain did not ratify the Convention and opted—as Pérez Álvarez notes⁵⁶—for an intermediate position between the six-week period set by the Convention and the absence of a time limit, setting instead a minimum period of 30 days from birth. Initially, the period envisaged in the 1987 Law Draft was fifteen days, but an amendment passed, extending it to thirty days.⁵⁷

53. See art. 121 CC.

54. See PÉREZ, *supra* note 3, at 187, n.226; England and Germany are cited as examples.

55. *Id.* at 187. Pérez Álvarez noted that the idea of the time limit was not without controversy: the limit was criticized because the mother's relationship with her child could make adoption difficult.

56. *Id.*

57. See BOCG, Congreso de los Diputados, III legislatura, Serie A: Proyectos de Ley, Mar. 13, 1987 No. 22-4, 25. See also the report of the conference favorable to its acceptance: BOCG, Congreso de los Diputados, III legislatura, Serie A: Proyectos de Ley, June 2, 1987, No. 22-5, 67; and the approval by the

The 2008 European Convention on the Adoption of Children, which replaced the 1967 Convention, establishes in article 5.5 that “[a] mother’s consent to the adoption of her child shall be valid when it is given at such time after the birth of the child, not being less than six weeks, as may be prescribed by law. . . .” It also gives countries the option of not specifying a particular period, instead allowing the mother to give her assent when the competent authority determines that she has recovered from the consequences of childbirth. Since Spain has ratified the European Convention on Adoption, the 2015 reform has been used to adapt the Civil Code to the new international standard, opting, along the lines maintained since 1987, to establish a specific period of time, surely because it is considered to provide more certainty. Thus, Law 26/2015 has modified article 177.2.2 CC and has extended the period during which the mother can assent to the adoption, from thirty days to six weeks from the birth: “The assent of the mother cannot be given until six weeks have elapsed since the birth.”⁵⁸

This means that a woman’s assent is not valid during pregnancy or even after delivery, so long as six weeks have not passed. This was made clear by the *Tribunal Supremo* (Supreme Court) in its well-known September 21, 1999 decision, which was handed down

Commission with full legislative competence: BOCG, Congreso de los Diputados, III legislatura, Serie A: Proyectos de Ley, June 20, 1987, No. 22-6, 90.

58. The number of countries that have ratified the Convention is low. Such countries usually provide for a longer minimum period, but not only for the mother but for the two parents: eight weeks in Germany (§ 1747 BGB: “Die Einwilligung kann erst erteilt werden, wenn das Kind acht Wochen alt ist.”) and Finland (Section 15, Act No. 22/2012, adopted on Jan. 20, 2012: “A parent’s consent to an adoption may not be received until the parent has had the opportunity to consider the matter thoroughly and eight weeks have elapsed from the birth of the child.”); two months in Belgium (art. 348.4 *Code civil*: “La mère et le père ne peuvent consentir à l’adoption que deux mois après la naissance de l’enfant.”) and Norway (Section 10, Act of June 16, 2017, No. 48 relating to adoption: “the parents’ consent may not be given until two months after the birth of the child.”); sixty days in Romania (art. 466 C.Civ.: “Consimțământul la adopție al părinților firești sau, după caz, al tutorelui poate fi dat numai după trecerea unui termen de 60 de zile de la data nașterii copilului.”); three months in Denmark (The Danish Adoption Act, No. 8: “Consent cannot be accepted before three (3) months after the birth of the child, unless special circumstances prevail.”).

under the previous version of the provision. The court considered null and void, in violation of a mandatory rule, the assent to adoption given by a woman in her eighth month of pregnancy in a document explaining that she could not take care of her child because of family, social, emotional and economic circumstances and stating that she had been informed of her rights and the consequences of her assent.⁵⁹

Given the importance of assent to adoption, the reason for the rule contained in article 177 CC is to allow the woman to achieve the emotional stability necessary to evaluate the different options with perspective and calm and to decide with full freedom and conscience.⁶⁰ Similarly, the Council of Europe has explained that the objective of article 5.5 of the European Convention on Adoption is “to avoid premature adoptions to which mothers give their consent as a result of pressure exerted before the birth of the child or before their physical health and psychological balance have been restored after the child’s birth.”⁶¹ On the other hand, it cannot be ignored that the prohibition to give consent during pregnancy also has the

59. On this judgement, *see, e.g.*, among others: María Ballesteros de los Ríos, *Reclamación de filiación materna frustrada por la no práctica de una prueba biológica esencial y adopción declarada nula por asentimiento prestado con anterioridad al parto*, 13 DERECHO PRIVADO Y CONSTITUCIÓN 37 *et seq.* (1999); GUTIÉRREZ, *supra* note 9, at 132 *et seq.*

60. The amendment of the 1987 draft law, which led to the extension of the period from 15 to 30 days, was justified on the grounds that the period was too short and that it was appropriate to extend it so that the mother, who had already recovered, was “in full freedom and conscience to gauge the seriousness of the act of assent to the adoption of her child.” *See* BOCG, Congreso de los Diputados, III legislatura, Serie A: Proyectos de Ley, Mar. 13, 1987, No. 22-4, 25. The aforementioned Judgement of the *Tribunal Supremo* of Sept. 21, 1999 explains that “the reasons for this legal caution are explained by the need to ensure that the essential faculties of freedom and conscience are fully present in the biological mother, so that she can carefully and serenely measure the renunciation of the exercise of her motherhood with the child’s release for adoption.” And, more recently, in the Report on the Preliminary Draft of 2015, the General Council of the Judiciary expressed its support for the extension of the deadline to six weeks as it ensures “the greatest possible peace of mind and the freedom of the mother to grant her assent,” *see* Consejo General del Poder Judicial, *Informe del Consejo General del Poder Judicial al Anteproyecto de Ley de Protección a la Infancia* 84 (Sept. 30, 2014).

61. Council of Europe, *Explanatory Report to the European Convention on the Adoption of Children (Revised)* 6, #202 (Strasbourg, Nov. 27, 2008).

objective of fighting against child trafficking and even against practices that may favor surrogacy, which is prohibited by Spanish law.

Given the good intentions of the legislator that can be seen in the inclusion of this caution, this waiting period has been accepted naturally and without further discussion.⁶² However, perhaps it is time for further reflection on this issue, not only at the national level but also at the European level, in light of the new social and legal realities and trends.

In recent years, there has been an increase in the autonomy of the will in all areas, especially in the areas of persons and family.⁶³ This autonomy extends to all persons, including those who have traditionally been protected by depriving them of their capacity to decide because of their special characteristics.⁶⁴ A reform of the Spanish Civil Code is planned to remove the judicial incapacity of persons with disabilities⁶⁵ in order to adapt the internal order to the United Nations Convention on the Rights of Persons with Disabilities (2006). This Convention changes the paradigm and establishes that the autonomy of the will of these persons must be promoted and

62. See, e.g., FELIÚ, *supra* note 49, at 151; VARGAS, *supra* note 8, at 237; GUTIÉRREZ, *supra* note 9, at 131; Artero, *supra* note 17, at 67; GESTO, *supra* note 17, at 70 *et seq.*; Sonia Calaza López, *El nuevo proceso de filiación por adopción*, 36 REVISTA GENERAL DE DERECHO PROCESAL 240 (2015); Cárcamo, *supra* note 49, at 715-716; Callejo, *supra* note 49, at 6-7; Carlos Martínez de Aguirre Aldaz, *La historia interminable: una nueva reforma de la adopción*, in EL NUEVO RÉGIMEN JURÍDICO DEL MENOR: LA REFORMA LEGISLATIVA DE 2015 342 (María Victoria Mayor del Hoyo ed., Aranzadi 2017).

63. On the subject, see Parra, *supra* note 30, at 97 *et seq.*

64. On the new trend in favor of the autonomy of persons with disabilities generated since the 2006 U.N. Convention on the Rights of Persons and Disabilities, see, e.g., MONTSERRAT PEREÑA VICENTE ET AL., LA VOLUNTAD DE LA PERSONA PROTEGIDA: OPORTUNIDADES RIESGOS Y SALVAGUARDAS (Dykinson 2018); SOFIA DE SALAS MURILLO & MARIA VICTORIA MAYOR DEL HOYO, CLAVES PARA LA ADAPTACIÓN DEL ORDENAMIENTO JURÍDICO PRIVADO A LA CONVENCION DE NACIONES UNIDAS EN MATERIA DE DISCAPACIDAD (Tirant lo Blanch 2019).

65. See *Anteproyecto de Ley por la que se reforma la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica* (Jan. 2019).

protected: they must be able to decide for themselves, and they have the right to make mistakes.⁶⁶

This trend that empowers the autonomy of the will clashes with the paternalism that the law still maintains, in matters of adoption, with respect to pregnant women or women who have just become mothers. The Code, finding its justification in the importance of the decision, deprives women in these circumstances of any possibility to decide on the matter, on the assumption that they lack the capacity to do so. This is an irrebuttable presumption, i.e., one which does not admit evidence to the contrary. This presumption, in addition to affecting the free development of the woman's personality, may place her in a complicated situation, extending the suffering and psychological burden that may be involved in having a pending decision regarding her child and going through the issuance of assent. However, this lack of confidence in the decision-making capacity of the pregnant woman has been abandoned by the legislator in other areas: the law itself, in Organic Law 2/2010, of March 3, 2010, on Sexual and Reproductive Health and the Voluntary Interruption of Pregnancy (in which no limitations of this type are introduced), defends the importance of the autonomy of the woman's will in matters of filiation. It maintains that the decision about children "constitutes one of the most intimate and personal matters that people face throughout their lives, which integrates an essential area of individual self-determination" and that "the protection of this area of personal autonomy has a singular significance for women."⁶⁷

It cannot be ignored that, at times, the emotional tension—characteristic of human beings—that surrounds the birth of a child, as well as the pressure of certain personal, economic, and social circumstances, can constitute a handicap in decision-making regarding the relationship of filiation. It is, therefore, understandable that the

66. See U.N. Committee on the Rights of Persons with Disabilities, *General Comment No. 1, Article 12: Equal Recognition Before the Law* (2014), <https://perma.cc/U7TF-QMQ6>.

67. See Organic Law 2/2010, of March 3, 2010, on Sexual and Reproductive Health and the Voluntary Interruption of Pregnancy, Section I of the Preamble.

legal system should adopt some caution that takes this reality into account for the benefit of all parties.

However, the legislator must find a balance between this caution and the exercise of the decision-making power. It must also take into account all those involved. It is true that in the tension that surrounds birth there is an important physical component that (obviously) only affects women and that can even be complicated by conditions such as postpartum depression.⁶⁸ However, this tension does not have an exclusively physical origin, but rather has another psychological component that derives naturally from the arrival of a child into the world and is present in both parents. Therefore, even if it is not what is usually done, when filiation is determined with regard to the father, (for example, because of the existence of marriage⁶⁹) these considerations should also be taken into account with regard to him.

In order to ensure this integrative balance, the law could allow parents to give their assent to adoption at any time during pregnancy and at any time after birth, but with the possibility of freely revoking it within a period of time, which could be, for example, during the two or three months immediately following birth.⁷⁰ The determination of the period of revocability should take into account the child's

68. On the subject, see DANIELA WADIA JARUFE CONTRERAS, TRATAMIENTO LEGAL DE LAS FILIACIONES NO BIOLÓGICAS EN EL ORDENAMIENTO JURÍDICO ESPAÑOL: ADOPCIÓN VERSUS TÉCNICAS DE REPRODUCCIÓN HUMANA ASISTIDA 241-242 (Dykinson 2013).

69. See art. 116 CC.

70. This possibility is not alien to the legislator, who already raised it in the drafting of the 1987 Act. Thus, the first Draft Law, of Mar. 10, 1986, proposed the following wording of art. 176.3 CC: "The *irrevocable* assent of the mother of the adoptee shall not be accepted until fifteen days have elapsed since the birth" (emphasis added). In favor of it, see PÉREZ, *supra* note 3, at 187, n.228. In some previous work I already defended the prior provision of a revocable assent: see Maria Victoria Mayor del Hoyo, *Más allá del acogimiento de menores: incapacitados, tercera edad y nasciturus*, 734 REVISTA CRÍTICA DE DERECHO INMOBILIARIO 3235-3236 (2012); MARIA VICTORIA MAYOR DEL HOYO, LA ADOPCIÓN EN EL DERECHO COMÚN ESPAÑOL 243 *et seq.* (Tirant lo Blanch 2019). In the same vein, see Parra, *supra* note 30, at 422. also spoke in favor of a system similar to this one, setting the deadline for revocation within two months after childbirth: see JARUFE, *supra* note 68, at 241 (previously, in the defense of his doctoral dissertation, he already advocated this possibility).

interest in not prolonging uncertainty in order to avoid the irreversible effect of the passage of time on his or her development.⁷¹

In particular, a system could be set up to provide assent in the form of a public document that can be registered *ex officio* by the notary in a registry created *ad hoc*. Once the assent has been issued in these terms, the parents could, at any moment before the deadline set by law, change their mind in a new notarized document. Once this period of time has elapsed without exercise of the power of revocation, the assent given would automatically become firm and no new manifestation of will—not even a confirmation of the previous one—would be necessary. With that firmness, the manifestation of will would acquire—by virtue of the law—the juridical condition of valid assent to adopt, that is assent *ad adoptionem*, and would open the door to the possible constitution of the adoption. Moreover, this assent would not expire. The public body and the judge would only need to consult the assent kept in the registry.

This is my proposal *de lege ferenda*: this proposal would allow respect for the autonomy of the will of women who would not be deprived of their capacity to decide because they are in a state of gestation or have recently given birth, favoring the free development of their personality and facilitating things at a difficult time for them, in a manner that is coherent with the rest of the order and the new social reality.

At the same time, it would allow the introduction of a prudent caution that, given the complexity of the situation, could be of help, both by offering calm to those making the decision and by facilitating, if necessary, conformation with the perspective of the will. It could even be said that this option allows for greater perspective, given that the proposed system would allow the extension of the term given to consider the decision.

71. See Organic Law 8/2015, of July 22, 2015, art. 2.3 c).

The proposal would not be detrimental to the child since the limit to the power of revocation would be determined by the child's interest.

The proposal would also enable birth parents to be placed on an equal footing with respect to each other, by adapting the system once again to the new social sensibilities.

The proposal would solve the problem, already denounced by the Special Committee of the Senate that studied the adoption,⁷² that sometimes causes the disappearance of the mother when she leaves the hospital, before the deadline for her to give her assent to the adoption has passed.

The system would in no way constitute an adoption of the *nasciturus*, insofar as the adoption could only be constituted from the moment the assent became final. And, moreover, the current adoption procedure is designed, as already stated, to firmly prevent any irregular practice related to child trafficking or other actions prohibited by law. It should be remembered, on the one hand, that it is the responsibility of the public entity to declare the suitability and selection of the adopters and that, except in the case of assessed cases, for an adoption file to be opened it must be proposed by the public entity. And, on the other hand, the adoption is constituted by judicial resolution with the guarantees that this implies.

Finally, from a teleological point of view, the system would not conflict with the European Convention on Adoption, given that the mother's assent would only be understood to have been given, in the strict or technical sense, once the previously expressed wish had become firm because the two or three months following the birth, fixed by law, had elapsed without revocation. Only at that time, and not before (as it is subject to revocation), would the will be said to acquire the legal status of assent and be valid. In any case, it would be desirable that in future revisions of the European Convention on

72. See *Informe de la Comisión Especial de Estudio de la problemática de la adopción nacional y otros temas afines*, BOCG, Senado, IX legislatura, Series I, Nov. 17, 2010, No. 545, at 9, 17, 20, 49, 53.

Adoption, the content of article 5.5 be reconsidered, in order to adapt it to the new realities and to avoid inappropriate limitations on the woman's capacity to decide.

Until this revision of the European Convention on Adoption is done, the proposal may be extrapolated, with the appropriate adaptations, to the other European legal systems mentioned above that have ratified the Convention and that, following the provisions of the Convention, limit the autonomy of the will of women by setting a minimum time limit for giving assent to adoption.