

Grandparents' Access to Their Grandchildren

A comparative and historical approach
to Turkish and Swiss Civil Codes

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I- The problem

The majority of grandparents in Turkey wish to have personal relations with their grandchildren. This emotional necessity is especially true in case of a divorce or death of one or both of the parents. Sometimes this does not constitute a legal problem as the parent who has the parental power readily accepts the request of the grandparents. However, it is not rare that this request is denied. In such a case, the only solution is to file a lawsuit, and to have the conflict resolved by court.

Some civil codes, like the former Turkish Civil Code, do not handle this problem and the resolution of the legal problem is left to judges; while a number of civil codes, including the new Turkish Civil Code, choose to settle the problem through certain special provisions.

In this article, I intend to examine the alternatives presented by the former and new Turkish Civil Codes. First, the former Turkish Civil Code is analysed. Secondly, the new Turkish Civil Code is studied. In addition, the option presented by the Swiss Civil Code is analysed, as the Turkish Civil Code is essentially based on the

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Swiss Civil Code. Moreover the decision of the Court of Cassation and the Swiss Federal Court's decision are examined as well.

II- Former Situation

According to the former Turkish Civil Code, in case of a divorce or judicial separation, the judge, after hearing the parents, had to give the necessary orders in relation to the exercise of parental power and the personal relations between the parents and children (Article 148, paragraph 1 of the former Turkish Civil Code).

This article did not make reference to the personal relations of the grandparents with their grandchildren and there were no other provisions that dealt with this situation. Accordingly, the problem was essentially a problem of interpretation. The judge had to initially decide whether or not the legislator's silence created "a legal gap" (*praeter legem*). If the judge concluded that the silence of the legislator created a negative resolution of the problem, he would decide that there was not "a legal gap" in the code and refuse the request of the grandparents. On the other hand, if he concluded that this silence did indeed constitute "a legal gap" in the code, that is to say, this silence created a conflict with the structure of the code, he would amend it¹.

Thus, the outcome depended on the interpretation of this silence by the judge. Accordingly, every judge could decide differently. For example, one of the Turkish first instance courts upheld a demand of grandparents and one of the civil chambers of the Turkish Court of Cassation approved it. Nevertheless, after a while, the same civil chamber changed its decision in a similar case. This divergence was finally resolved in favour of grandparents by the Grand General Assembly on the Unification of Judgments².

1 Hasan Erman; Medeni Hukuk Dersleri, Başlangıç Bölümü, 2. Basım, İstanbul, 2007, p: 38; Rona Serozan; Medeni Hukuk, Genel Bölüm, İstanbul, 2004, p: 110; Kemal Oğuzman / Nami Barlas; Medeni Hukuk, Giriş, Kaynaklar, Temel Kavramlar, 14. Bası, İstanbul, 2007, p: 78-79; Jale G. Akipek / Turgut Akıntürk; Türk Medeni Hukuku, Yeni Medeni Kanuna Uyarlanmış Başlangıç Hükümleri, Kişiler Hukuku, Birinci Cilt, Yenilenmiş 4. Bası, İstanbul, 2002, p: 133; Peter Tuor / Bernhard Schnyder / Jörg Schmid / Alexandra Rumo-Jungo; Das schweizerische Zivilgesetzbuch, 12. Auflage, Zürich, 2002, p: 43; Şener Akyol; Medeni Hukuka Giriş; İstanbul, 1995, p: 257; Şener Akyol; Medeni Hukukta Uygulama Örnekleri, Genel İlkeler, Şahıslar, Aile Hukuku, Cilt I, İstanbul, 1984, p: 23.

2 Such decisions are published in the Official Gazette and they have binding effect (Code on Organization of the Court of Cassation article 45). See Tuğrul Ansay / D. Wallace, Jr.; Introduction to Turkish Law, Ankara, 2002, p: 15, 191, n: 62; Baki Kuru; Hukuk Muhakemeleri Usulü, Altıncı Baskı, Cilt V, İstanbul, 2001, p: 4955.

1- Resolution of the Turkish Courts of Cassation

As mentioned above, the Grand General Assembly on the Unification of Judgments of the Court of Cassation accepted that grandparents were allowed to have access to their grandchildren. The facts at issue in this judgment were as follows:

a- The first decision of the second civil chamber:

The plaintiffs' son got married to the defendant, but afterwards they divorced and the parental power was given to the mother. After a while, their son died and they wanted to maintain their personal relations with their grandchildren, but the defendant (their former daughter-in-law) refused this request. They therefore had to file a lawsuit. The Civil Court of First Instance accepted this demand. However, the defendant asked the Court of Cassation to reconsider the decision. The second Civil Chamber of the Court of Cassation approved the inferior court's decision. The Civil Chamber considered it legal and natural to give grandparents the right of carrying on personal relations with their grandchildren³.

b- The second decision of the second civil chamber:

Twelve years after this decision, the second Civil Chamber of the Court of Cassation changed its judgment and in its petition, dated 10.3.1959, asked the Grand General Assembly on the Unification of Judgments to resolve this conflict definitely. In this petition, the second Civil Chamber of the Court of Cassation noted that:

- The silence of the legislator on the grandparents' personal relations with their grandchildren was not merely an oversight,
- The parental power belongs only to the mother or the father,
- The parental power cannot be taken from them except on justifiable grounds,
- The legislator, adopting this silence, did not want to give the grandparents the right of having personal relations with their grandchildren,
- The right of having personal relations is only conferred by article 148 of the (former) Turkish Civil Code, in case of a divorce or a separation, to the mother or the father who does not have the parental power,

3 Dated 11.12.1947, 6501/6134.

- If all grandparents have personal relations with their grandchildren, this can be harmful to the children.

To sum up, grandparents cannot have personal relations with their grandchildren⁴.

c- The definitive resolution of this conflict

As cited above this divergence was finally resolved in favour of grandparents by the Grand General Assembly on the Unification of Judgments⁵. According to this decision:

- It is obvious that grandparents' personal relations do not result from their parental power. The parental power belongs only to the mother and the father,
- If grandparents have personal relations with their grandchildren, it does not mean that the parental power is taken from the mother or the father,
- It does not constitute an attack on their parental power,
- It cannot be absolutely accepted that the personal relations of all grandparents are necessarily harmful to their grandchildren,
- On the contrary, the existence of personal relations between grandparents and grandchildren can have a positive effect on children.
- On the other hand, the judge can impose limitations on these relations. If the grandparents' behaviour becomes harmful to the child, the judge can change his/her decision.
- If the parent who has parental power refuses the grandparents' requests without any just motives, it can be harmful to the child, as the grandparents who do not have any personal relations with their grandchildren can make a will or an agreement of inheritance and may not leave their properties, within the limits of reserved proportion, to their grandchildren.

4 However, in this decision, the second Civil Chamber accepted that the judge, taking into consideration article 272 of the (former) Turkish Civil Code, can give the right of having personal relations to the grandparents as a preventive measure. Said article stated that: "*Where the parents do not fulfil their duties, the judge must take the appropriate measures for the protection of the child.*"

5 Dated 18.11.1959, 12 / 29, Official Gazette 16.04.1960, p: 10482.

- Children who cannot have any personal relations with their grandparents and are deprived of their love and care may suffer emotionally.
- The parent, who has parental power, taking the future material or immaterial (psychological) benefits of their children into consideration, has to allow the establishment of personal relations between the grandparents and grandchildren.

In conclusion, Grand General Assembly on the Unification of Judgments took the view that grandparents can have personal relations with their grandchildren although their mothers or fathers may not want it⁶.

2- Resolution of the Swiss Federal Court

The problem was the same in Switzerland. However, the Swiss Federal Court did not accept the view that a legal gap existed in the Swiss Civil Code⁷. The summary of the conflict was this: a grandfather and grandmother, whose daughter had died, wanted to go on holiday with their daughter's child twice a year and visit him/her twice a month in the afternoons. The Swiss Federal Court accepted that:

- There is not a "legal gap" in terms of the right of visitation of the grandparents. They do not have such a right.
- There is only a liability of support between them and they can be heirs to each other.
- If the legislator accepted the grandparents' visitation right, it would be harmful to the children especially in case of a divorce or a separation as, for example in case of divorce, every grandparent and the party who does not have the

6 About this decision see: Turgut Akıntürk; *Aile Hukuku, Gözden Geçirilip Genişletilmiş 4. Bası*, Ankara, 1996, p: 276; Selahattin Sulhi Tekinay; *Türk Aile Hukuku, Yedinci Baskı*, İstanbul, 1990, p: 509; Feyzi Necmeddin Feyzioğlu / Cumhuriyet Özakman / Enis Sarıal; *Aile Hukuku, 3. Bası*, İstanbul, 1986, p: 385-386; Bülent Köprülü / Selim Kaneti; *Aile Hukuku, 2. Bası*, İstanbul, 1989, p: 199-200; Kemal Oğuzman / Mustafa Dural; *Aile Hukuku, İstanbul*, 1998, p: 142.

7 Recueil officiel des arrêts du Tribunal fédéral, 54 II 4 or Journal des tribunaux 1928 I 194. About this decision see Maurice Marthaler; *Essai sur le droit aux relations personnelles plus communément appelé droit de visite*, Neuchâtel, p: 32-36; Akyol, *Medeni Hukukta Uygulama Örnekleri*, p: 40; Aytekin Ataay; *Büyükanne ve Büyükbabalarla Torunlar Arasındaki Şahsi Münasebetler*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Cilt XXIII, Sayı 3-4, p: 380.

parental power, that is to say five different people, would visit the child.

- On the other hand, the plaintiffs did not claim that the party who had the parental power had abused his/her right. If an abuse of a right had taken place, this behaviour would have been towards the child. In such a case, the grandparents could only have claimed that the mother or the father did not fulfil their duties towards their child, and the guardianship authorities could have taken necessary measures.

In short, the Swiss Federal Court took the view that grandparents do not have visitation rights with regards to their grandchildren.

III- The New Situation

As observed above, the second Civil Chamber of the Court of Cassation initially accepted that grandparents are entitled to have personal relations with their grandchildren; however this right was refused subsequently. This conflict was resolved in favour of grandparents by the Grand General Assembly of the Court of Cassation on the Unification of Judgments and it was decided that grandparents may have personal relations with their grandchildren. The Swiss Federal Court, on the other hand, decided that grandparents do not have the right to visit their grandchildren.

The legislators who observed the situation felt the need to create new provisions. First, the Swiss legislator created a special article pertaining to this problem, then the Turkish legislator followed.

Initially the Swiss legislature accepted that the Code's silence caused a problem and consequently created a new provision to resolve it⁸. According to the article 274a of the Swiss Civil Code:

“Where there exist extraordinary circumstances, the right of personal contact can also be given to other persons, in particular to relatives, provided this is for the well-being of the child.

The limitations of the right of personal contact which are valid for the parents apply accordingly.”

Subsequently the Turkish legislator followed the Swiss one. The article 325 of the Turkish Civil Code was adopted in line with article 274a of the Swiss Civil Code.

⁸ Recueil officiel 1977 237 264 ; Feuille fédéral 1974 II 1.

Both Turkish and Swiss legislators accepted that grandparents could have personal relations with their grandchildren. Additionally, other persons can have this right. However, both relatives and other persons can enjoy this right only under extraordinary circumstances: that is to say, in case of a divorce, a separation or death of one or both of the parents etc. In addition, this right can be given provided that it is for the well being of the child.

As observed, in the new situation the resolution of the problem is easier and clearer. Accordingly, the judge only applies the terms of the provision without having to search for an applicable provision in the customary law or create a new provision⁹.

IV- Conclusion

It is submitted that article 274a is a substantial improvement for the Swiss civil law practice since the Swiss Federal Court did not previously accept the right of personal contact of grandparents due to the silence of the legislature. However, the article 325 of the new Turkish Civil Code has a less profound impact on Turkish civil law practice as the Grand General Assembly of the Court of Cassation on the Unification of Judgments had already accepted in 1959 that grandparents are entitled to have personal relations with their grandchildren¹⁰. Moreover, the decision of the General Assembly had a binding effect upon the first instance and cassation courts.

On the other hand, giving the right to have personal relations to other persons apart from relatives is a real improvement for both Codes. However, it is submitted that the demand of the other persons must be evaluated more carefully than the relatives' demands.

9 According to the second paragraph of the first article of the former Turkish Civil Code: *"Where no provision is applicable, the judge shall decide according to the existing customary law and in default thereof, according to the rules which he would lay down if he had himself to act as legislator."*

10 Turgut Akıntürk; *Türk Medeni Hukuku, Yeni Medeni Kanuna Uyarlanmış Aile Hukuku*, İkinci Cilt, Yenilenmiş 10. Bası, İstanbul, 2006, p: 326; Compare it with Bilge Öztan; *Aile Hukuku*, 4. Bası, Ankara, 2004, p: 473.