

Some Reflections on Transactions Requiring Spousal Consent

(Turkish Civil Code art. 194 and art. 223/p.2 and
Turkish Code of Obligations Project art. 589)

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I- Introduction

In Turkey, that the conjugal home generally belongs to or is rented by the husband is a common fact. The former Turkish Civil Code did not handle the spouses' transactions pertaining to the conjugal home. Thus, husbands could perform legal transactions related to conjugal home without any limitations and this situation could work to the disadvantage of women.

On the other hand, according to the former Turkish Civil Code, the legal matrimonial property system mandated separation of estates unless a different arrangement had been agreed upon. In addition, pursuant to this legal system, where a property is co-owned by both spouses, each could dispose his or her share without the other spouse's consent. Consequently, this situation could be harmful to the conjugal union.

Our legal system allows each spouse to enter into any legal transaction with a third party provided the law makes no exception. The suretyship of each spouse is valid since neither Turkish Civil Code nor Turkish Code of Obligations has an exception on the issue. Thus, this can harm the conjugal union as well.

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As the Turkish legislature observed these problems, new Turkish Civil Code adopted Article 194 and 223/p.2 to address the issues mentioned above. Moreover, the legislature adopted a special disposition for the suretyship of each spouse in the Turkish Code of Obligations project.

This article first analyzes the amendments originating from the new Turkish Civil Code and secondly the potential dispositions of the Turkish Code of Obligations project.

II- Amendments of the new Turkish Civil Code

Article 193 of the Turkish Civil Code provides:

“Each spouse can enter into any legal transaction with the other spouse or with a third party unless a disposition to the contrary exists in the law.”

In the presence of this article it is obvious that each spouse can enter into any legal transaction with a third party unless the contrary is stated in the law.

The Turkish Civil Code contains two special provisions for the spouses' legal transactions with a third party: Article 194 related to conjugal home, and Article 223 related to properties co-owned by the spouses in the system of participation in acquisitions.

1- Legal Transactions on Conjugal Home

According to the Article 194 of the Turkish Civil Code,

“A spouse can not terminate a lease contract related to the conjugal home, transfer the conjugal home or restrict the rights on the conjugal home unless the express consent of the other spouse exists.

A spouse who can not secure the consent or a spouse who is denied consent without a just cause can appeal to the judge.

The spouse who is not the owner of the conjugal home can ask an annotation be noted in the big book.

Before proceeding, conjugal home should be defined. The conjugal home is the center of life of spouses with their children (if there are any), and as a general rule the conjugal home is unique¹.

¹ See Şükran Şıpka; Aile Konutu ile İlgili İşlemlerde Diğer Eşin Rızası, 2. Bası, İstanbul, 2004, pp: 82.

Article 194 restricts the right of disposal of the spouse who owns the conjugal home². Under Article 194, the spouse who owns the conjugal home can not sell, donate or transfer it and can not create a mortgage, a usufruct or other similar servitudes without express consent of the other spouse.

At this point the annotation that can be noted in the big book according to the 3 rd paragraph of Article 194 should be analyzed. It is not clear whether this annotation is creative or explanatory. According to some writers this annotation is explanatory in nature. Even if there is no annotation in the big book the house which is the center of the spouses' life is still the conjugal home³.

Moreover, if the conjugal home is leased by one of the spouses he or she can not terminate the lease contract without the other spouse's consent.

The spouse whose consent is required may not consent without a just cause or it may not be possible to have this consent. In that case, the spouse who needs the consent can appeal to the judge and if the judge finds that the spouse withheld consent without just cause, the verdict would replace this lack of consent.

2- Legal Transactions on Co-owned Properties

Co-ownership is generally regulated by Articles 688 -700 of the Turkish Civil Code. According to Article 688 / paragraph 3:

“In respect of his share each co-owner has the rights and is under the obligations of an owner; he can alienate or pledge it and it can be seized by his creditors for debt.”

2 See Kemal Oğuzman / Özer Seliçi / Saibe Oktay-Özdemir; Eşya Hukuku, İstanbul, 2006, p: 184; Mustafa Alper Gümüş; Türk Medeni Kanununun Getirdiği Yeni Şerhler, Ankara, 2003; Compare, Ahmet Kılıçoğlu; Türk Medeni Kanununda Diğer Eşin Rızasına Bağlı Hukuksal İşlemler ve Yasal Alım Hakkı, Ankara, 2002, p: 5.

3 Even if there is no annotation in the big book this restriction of right of disposal exists. In such a case, even if the spouse who is the owner of conjugal home sells and transfers it to a third party, the third party can not own the conjugal home. This registration would be wrongful. However, according to article 1023 of the Turkish Civil Code: *“Where any person has acquired the ownership or other real right by «bona fide» relying on entry in the register, his rights are protected.”* The legislature provides the spouse who is not the owner of the conjugal home with the right of asking annotation. By this, third persons can not claim that they do not have cognizance of the real nature of the immovable that it is the conjugal home. Briefly, the spouse who is not the owner of the conjugal home can have stronger protection by having this annotation noted in the big book (See Oğuzman / Seliçi / Oktay-Özdemir, p: 214-215; Gümüş, p: 135).

It is obvious that each co-owner can alienate or pledge (mortgage) his or her share⁴. Nevertheless Article 223 / paragraph 2 creates an exception for spouses in the matrimonial property system of participation in acquisitions. This article provides:

“A spouse can not dispose of his or her share on the co-owned property without the other spouse’s consent, unless a different arrangement has been agreed upon.”

As can be observed, the legislature adopting this disposition makes an exception and thus a spouse can not alienate or pledge (mortgage) his or her share on the co-owned property without the consent of the other spouse⁵. I maintain that this disposition restricts as well the right of disposal on his or her share on the co-owned property in the matrimonial property system of participation in acquisitions. Consequently, with this disposition the legislature wishes to protect conjugal union.

At this point it must be stated that this article is different from Article 201 of the Swiss Civil Code. According to this article:

“Where a property is co-owned by both spouses, neither of the spouses can dispose of his or share without the other spouse’s consent, unless a different arrangement has been agreed upon.”

This article uses the statement *“where a property is co-owned by both spouses ...”* so it can be concluded that for instance where a husband has a co-owned property not with his spouse but with a third party, he can dispose of his share without the consent of his spouse. However, the Turkish Civil Code uses the statement *“A spouse can not dispose of his or her share on the co-owned property...”* so it can be concluded that, for instance where a husband has a co-owned property with a third party, not his spouse, he can not dispose of his share without the consent of his spouse.

I maintain that the statement preferred by the Turkish legislature is more comprehensive but not appropriate.

III- Amendments of Turkish Code of Obligations Project

As stated above our legal system allows each spouse to enter into any legal transaction with a third party provided the law makes

⁴ Oğuzman / Seliçi / Oktay-Özdemir, p: 252.

⁵ Where the spouses have a co-owned property with a third party, a spouse can not alienate, donate or pledge his or share without the other spouse’s consent either. However, where the third party wishes to dispose of his share, the spouses’ consent is not required (Kılıçoğlu, pp: 24-25).

no exception. The suretyship of each spouse is valid since neither Turkish Civil Code nor Turkish Code of Obligations has an exception on the issue.

However, the Turkish Code of Obligations Project contains a new article about this issue. According to Article 589:

“Unless the spouses are separated by judicial decision or the right of living a separate life exists, either spouse can be a surety only with the written consent of the other spouse; this consent must be given in advance or at the latest concurrently of the formation of the contract.

Where a suretyship, pertaining to the company, is given by the owner of a company registered in the commercial register; the partner of a collective company⁶, the partner with an unlimited liability of a commandit company⁷; the manager or the member of the board of directors of a corporation, the manager of a commandit company with shares⁸ or managing partner of a limited company, the consent of the other spouse is not necessary.

For the subsequent modifications that do not cause the amount of the liability to increase or an ordinary suretyship to transform into a joint and several suretyship or a substantial diminution of the security interests in favor of the surety, the consent of the other spouse is not necessary.

The first paragraph of this article regulates the main principle according to which either spouse can be a surety only with the written consent of the other spouse. However, spouses can live separately for two reasons. One of them is judicial separation: According to the Turkish Civil Code spouses can demand separation or divorce. Where only judicial separation is asked for, the judge can not grant a divorce. The judge must grant a judicial separation if the conditions are met. Where the suit is for a divorce, the judge may only grant judicial separation if a reconciliation between spouses

6 This type of company is more or less similar to the Partnership (sometimes called *General Partnership*) in English and American legal systems (Bülent Sözer, *Legal Environment of Business A Hand - Book on The Turkish and International Business Law*, İstanbul, 2001, p: 162, n: 33). For the term *General Partnership* see Tuğrul Ansay; *Introduction to Turkish Business Law*, Ankara, 2002, p: 85.

7 This type resembles Limited Partnership in the English and American Laws (Sözer, p: 164, n: 35). For the term *Limited Partnership* see Ansay, p: 88.

8 See Turkish Commercial Code article 475-484.

seems probable. In these cases the judge can grant a judicial separation⁹.

The second possibility for a separate life can be based on Article 197 of the Turkish Civil Code. According to this article a spouse is entitled to the right for a separate life so long as his or her personality, economic security or the welfare of the family is seriously imperiled by a continuance of life in common¹⁰.

In these cases spouses may live and organize their lives separately and accordingly can sign a suretyship contract independently.

In the second paragraph the legislature regulates the other possibilities in which the consent of the other spouse is not required. When the article is analyzed it can be concluded that the persons who can sign a suretyship contract without their spouses' consent have a secondary legal (*de jure*) liability for the debts of the company or that business practice (*de facto*) demands them to have this kind of liability. For instance the partner of a collective company has secondary liability for the debts of the collective company¹¹; to obtain a loan contract, the banks demand, almost without exception, that the manager or the members of the board of directors of a corporation become jointly and severally surety.

When the third paragraph of this article is analyzed, it can be said that in the cases where the liability of the spouses who previously signed a suretyship contract is not increased the consent of the other spouse is not necessary.

IV- Conclusion

According to Article 193 of the Turkish Civil Code each spouse can enter into any legal transaction with a third party unless the contrary is stated in the law. The Turkish Civil Code contains two special provisions for the spouses' legal transactions with a third party: one of them is Article 194 related to conjugal home, and the second one is Article 223 related to properties co-owned by the spouses in the system of participation in acquisitions.

According to Article 194 of the new Turkish Civil Code the spouse who owns the conjugal home does not have full right of

9 See Turgut Akıntürk; Türk Medeni Hukuku, Yeni Medeni Kanuna Uyarlanmış Aile Hukuku, 2. Cilt, Yenilenmiş 9. Bası, İstanbul 2004, pp: 266-267.

10 See Akıntürk, p: 128.

11 Reha Poroy / Ünal Tekinalp / Ersin Çamoğlu; Ortaklıklar ve Kooperatif Hukuku, Güncelleştirilmiş 9. Bası, İstanbul, 2003, p: 177, no: 283.

disposal over it. This article restricts the right of disposal of the spouse who owns the conjugal home.

According to Article 223/paragraph 2 of the new Turkish Civil Code pertaining the matrimonial property system of participation in acquisitions, a spouse can not dispose of his or her share on the co-owned property without the other spouse's consent, unless a different arrangement has been agreed upon.

These articles intent to protect the conjugal home and sustain the economic integrity of the family.

The legislature implements this intention by adopting a new disposition in the Turkish Code of Obligations Project. Article 589 regulates that either spouse can be a surety only with the written consent of the other spouse with the stated exceptions .

Consequently, with these dispositions the legislature wishes to protect conjugal union and welfare.

